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EDITORIAL NOTE

The *Socio-Legal Review* was one of the few academic publications in the country devoted exclusively to socio-legal discussion at its inception in 2005. Since then, the *Review* has not only published leading pieces in this space, but has also helped carve out the contours of socio-legal discussion in India. Seventeen years later, we have had to contend with the nature of the space we occupy in a changed landscape of socio-legal writing. An encouraging spurt of publications sharing our mandate in recent years has provided us with the opportunity to re-evaluate the advantages that we can bring as a student-run interdisciplinary journal. At the same time, the Covid-19 pandemic forever changed the way in which we think of socio-legal issues. The pandemic prompted the realisation of the ways in which all problems with a legal interface even those traditionally not thought of as so are social.

Grappling with this insight, we attempted to experiment with an expanded understanding of our 'socio-legal' mandate in Volume 18. Acknowledging the important role that disciplines outside of the law play in understanding legal institutions and outcomes, Volume 18(1) utilises methods from adjacent areas of study to provide insights where traditional legal analysis ends. In doing so, the discussion in this issue breaks in both form and substance from wider writing on these topics as well as our own previous volumes. We hope the articles in this issue demonstrate the critical need for an interdisciplinary approach to address legal problems, and for socio-legal writing to adapt to meet this need.

Continuing our series of *Notes from the Field*, the first article in this issue is *Living by Religion, Playing by Law: Early Glimpses of the Ban on Triple Talaq* by Dr. Kalindi Kokal. *Notes from the Field* are inter-disciplinary pieces highlighting the complexities in the impact and implementation of the law, with an aim to inform legal discussion with observations from the ground-up. To this end, Dr. Kokal makes an invaluable addition to the literature on triple talaq by documenting the implementation, negotiations, and navigation of the Muslim Women's Act 2019 over a period of 16 months in three police stations in central Mumbai. Her ethnographic research is relevant, timely, and important in understanding the complex relationship between the law and the State, and its effect on interpersonal relationships.

The four other pieces in this issue are full-length research articles. Ms. Maansi Verma in *Agenda Control in the Indian Parliament and the Impact on its Oversight Function – Analysis and Evidence*, presents empirical evidence to show how the legislature's institutional ability to hold the executive accountable through debate and discussion has been compromised. This piece not only

fills a gap in existing literature through its study of granular data on the functioning of Parliament, but also contributes to larger theorisation on the separation of powers and democratic backsliding through analysis of Parliamentary rules and procedure.

The third article in this issue is *Majesty and Dignity of Courts: Changes in Court Dynamics with the Onset of the Covid-19 Pandemic in India* by Dr. Rahela Khorakiwala. This piece explores how the concept of the majesty and dignity of the courts, which usually relies on visual aspects such as the architecture, dress code, and traditions within the courtroom, has changed during the Covid-19 pandemic. The second piece in this issue to use ethnography, Dr. Khorakiwala asks readers to interrogate the narratives of authority and different forms of control exercised by the courts.

The last two pieces in this issue look closely at trends in religious discrimination. Dr. Rowena Robinson in *'Private Acts' and Structural Inequality: Law and Housing Discrimination*, focusses on housing discrimination experienced by Muslims in urban areas from a sociological perspective. She argues that segregation produces and is a product of economic inequality and targeted social exclusion, and calls for the legal community's active involvement through demosprudence. In the final piece of Volume 18(1), Dr. Seema Kazi explores the intersection of religious discrimination and gender politics seen during the abrogation of Article 370 of the Constitution. Dr. Kazi, in *Women, Gender Politics, and Resistance in Kashmir*, explores the misogyny in the nationalist subtext that justified the revocation and the parallels between the State's claims over Kashmiri territory and Kashmiri women. By using local Kashmiri reportage, Dr. Kazi captures Kashmiri women's voices, their resistance, political resolve, and struggle for justice in the midst of ethno-political dominance.

In addition to rethinking the mandate and style of the *Review*, we have also worked towards putting in place formal editorial and publication policies, to be finalised over the coming months. We are grateful to Professor (Dr.) Arun Thiruvengadam and Ms. Nishtha V for going over these aspects and the general direction of the journal with us at length over multiple discussions through the year. We would like to thank the Editorial Board 2021-22 and the observers to the Socio-Legal Review for their efforts, as well as our peer reviewers and our Vice-Chancellor Professor (Dr.) Sudhir Krishnaswamy for their continued support and guidance. We hope you not only find this issue useful, but also enjoy reading the pieces as much as we did. We look forward to your feedback and welcome responses to this issue on the *Forum* as well as in upcoming issues of the *Review*.

Srobona Ghosh Dastidar and Jwalika Balaji,
Chief Editor and Deputy Chief Editor,
Socio-Legal Review,
New Delhi/Bangalore, October 2022.

LIVING BY RELIGION, PLAYING BY LAW: EARLY GLIMPSES OF THE BAN ON TRIPLE TALAQ

—Kalindi Kokal*

The Supreme Court of India declared triple talaq, a type of Islamic divorce, as unconstitutional in 2017. Following that, in 2019, the Parliament enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019, which criminalised the pronouncement of triple talaq. Triple talaq as a form of divorce continues to hold legitimacy under the uncodified religious law that Muslims in India abide by in their everyday life. What, then, is the impact of the criminalisation of this practice at the level of the community? What does intervention by the criminal justice system mean for justice in inter-personal disputes that are primarily of civil nature? The paper explores how disputes involving the question of triple talaq unfold in police stations, which are the first State institutions that take cognisance of the offence, to examine the value of criminal deterrence for offences related to domestic disputes.

I. INTRODUCTION

In August 2017, the Supreme Court of India declared the pronouncement of triple talaq, a form of divorce under the Muslim personal law, as unconstitutional. The judgement in the case of *Shayara Bano v Union of India*[1] was

* Postdoctoral Fellow, Centre for Policy Studies, IIT Bombay. This paper would not have been complete without the critical insights of several friends and colleagues, specifically Prof Werner Menski, Prof Lynette Chua, Prof Srimati Basu, Prof Parthasarathy, Prof Pratiksha Baxi, and Prof Anindita Chakrabarti. I remain ever so grateful to the police officers and

followed by a legislation titled the Muslim Women (Protection of Rights on Marriage) Act 2019 ('Muslim Women's Act 2019') that was passed amidst escalated emotions, both celebratory and furious. The declaration of triple talaq as unconstitutional held promise of gender justice reform.[2] On the other hand, the criminalisation of the practice under the Muslim Women's Act 2019 fell right in the terrain where gender reform activists and the Hindu nationalist government become uncomfortable bedfellows in the current political environment in India.[3] Through an examination of the actual implementation of the Muslim Women's Act 2019 in three police stations in Mumbai, this paper explores what this new law means for gender justice reform, the interplay between religious laws and State law at the level of interpersonal relations, and the impact of this new law on the changing nature of State–society relations.

The present paper draws on sixteen months of fieldwork carried out in three police stations in central Mumbai located in the Khadakwadi, Neeve, and Chavan Nagar regions.[4] Fieldwork was carried out through several hours of participant observation combined with in-depth qualitative interviews. The interviews were in part extended informal conversations and in part semi-formal interviews conducted with a questionnaire. I sat at the station house where complainants first arrived. On a routine day, I shadowed individual police officers during day and night duties as well as patrolling, and observed senior

police constables who allowed me a window into their lifescapes within and outside the police station, and to the Centre for Policy Studies at IIT Bombay for providing the required intellectual and financial support that made the study this paper is based on possible.

1 (2017) 9 SCC 1.

2 Popular narratives about the judgement indicate the passing of this judgement to be a milestone victory for the Indian women's movement. However, a closer reading of the arguments during the hearing reveals that there was indeed a debate among women's groups about the actual value of such an intervention. One prominent voice was that of grassroots activist and lawyer Flavia Agnes, who voiced her dissent about the nature of such judicial intervention. She argued for the already existing gender-justice legislations (such as the Protection of Women from Domestic Violence Act 2005) and provisions in criminal law (like s 498A of the Indian Penal Code 1860) to be evoked to remedy the issues the petitioners had highlighted. Another point raised by activists dissenting against the judgement was the Court circumventing the discussion about putting in place a plan for the economic welfare of women who were victims of violence. See S Naskar, 'Aim should be Uniformity of Rights, Not a Uniform Law: Flavia Agnes on a UCC' (*The Wire*, 19 October 2016) <https://thewire.in/politics/interview-flavia-agnes-says-the-aim-should-be-the-uniformity-of-rights-rather-than-the-ucc> accessed 20 September 2019.

3 The Indian women's movement underwent a significant change with regard to their stand vis-à-vis the Uniform Civil Code (UCC), which was at the crux of advocacy that envisaged gender reform through the abolition of personal law systems in India. Mid-1980's onwards, women's groups began to prefer small-scale reforms within communities. This shift was preferred largely because of the communalisation of the issue of personal law reform and the UCC. See Tanja Herklotz, 'Law, Religion and Gender Equality: Literature on the Indian Personal Law System from a Women's Rights Perspective' (2017) 1 Indian Law Review 250, 262.

4 The names of all respondents and police stations have been anonymised to maintain confidentiality.

police officers in their meeting hours with the public. The semi-formal interviews were a continuation of the informal conversations, meant to gather more focused responses to certain situations that had been jointly witnessed at the police station concerned. Police stations are often the first point of contact in India between individuals and State laws. Therefore, they remain crucial indicators of what people expect in terms of justice for a particular grievance or conflict. In other research, I have examined how the arrival of a family dispute in the public sphere is an indicator of the dispute having reached a stage of "crisis for the individual/s involved".[5] In people's imagination, the police station is also popularly regarded as a 'public' space in the context of family matters, which are perceived to concern the private part of people's lives. Being located at the police station, I analyse the case studies presented in this paper from the state of such 'crisis', one element of which is the pronouncement of triple talaq.[6]

The areas within the jurisdiction of the police stations where participant observation was carried out were inhabited largely by low-income and middle-income groups, mostly comprising daily wage labourers, hawkers, auto-rickshaw and cab drivers, fruit and vegetable vendors, small shop owners, and small-scale business owners. In Neeve and Khadakwadi, the majority of the population belonged to the Muslim community; and in Chavan Nagar, Muslims comprised approximately 50% of the population. In all the jurisdictions, the remaining population comprised Hindus that belonged to Scheduled Caste and Scheduled Tribe communities. Mumbai witnesses a large amount of migration. With the exception of the Chavan Nagar police station, the other police stations were visited by people who identified themselves as belonging to a village or town outside of Mumbai, even though they may have been the second or third generation brought up in Mumbai. Therefore, the language of communication between the police and disputing parties was mostly Hindi, sometimes Marathi, and occasionally English. The police officers and constables in all three police stations spoke Marathi among themselves. I have translated and transcribed all interviews conducted and conversations observed into English. I selected the case studies described in this paper from among those that I observed, based on their capacity to bring forth the nuances of interactions between the police and the people in the specific context of the Muslim Women's Act 2019. They are in no way meant to generalise the experiences of Muslim women, which the author appreciates are diverse.

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[5] Kalindi Kokal, *State Law, Dispute Processing and Legal Pluralism: Unspoken Dialogues from Rural India* (Routledge 2020).

[6] Triple talaq, although a matter of divorce which is ordinarily a subject of civil litigation, has been specifically brought within the jurisdiction of the police through a criminalising law, which is discussed in the following sections of this paper.

II. DEBATING THE CONSTITUTIONALITY OF TRIPLE TALAQ

The *talaq-e-biddat,* also known as *teen* talaq or triple talaq,[7] is one form of Islamic divorce that is practised within the Muslim community in India. For it to come into force, this form of talaq requires the husband to pronounce the word 'talaq' (divorce) three times at once, after which the divorce immediately becomes effective and irrevocable.[8] Given its instantaneous and unilateral nature, the exact process for such a pronouncement to be final and irrevocable has undergone much examination in India at the hands of Indian courts, women's groups, and Islamic scholars.[9] Triple talaq is recognised by the Indian state as well, by virtue of a personal law system that allows citizens of India to be governed by their religious and customary laws in matters of marriage, divorce, maintenance, and guardianship.[10] In 2017, a series of six petitions by Muslim women who had been divorced by way of the triple talaq were heard simultaneously by a full bench of the Supreme Court of India, and converged into a single judgement. This judgement held that this form of divorce was inconsistent with the fundamental rights guaranteed under the Indian Constitution and was thus unconstitutional.[11] All five judges agreed that the practice required revisiting. However, in light of the values that the Indian Constitution upholds, they were divided (in a ratio of 3:2) about whether the practice should be abolished or modified by way of a judicial decree, or whether such abolition or modification should be brought about at the legislature's initiative. What resulted was that the Supreme Court declared the practice as unconstitutional and in the operational part of the judgement, added that a legislation concretising its ratio should follow.

This judgement was not unprecedented.[12] The Supreme Court's judgement in *Shamim Ara v State of U.P.* had explained that triple talaq would be valid so long as it was for a reasonable cause and was preceded by an attempt at reconciliation. However, the judgement in *Shayara Bano v Union of India* remained

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7 This paper will use the term 'triple talaq' in the remaining part.

8 For a brief description of the different types of divorces under Islamic law, see Sohaira Z Siddiqui 'Triple Divorce and the Political Context of Islamic Law in India' (2021) 2 Journal of Islamic Law 5.

9 See Tanja Herklotz, 'Shayara Bano versus Union of India and Others. The Indian Supreme Court's Ban of Triple Talaq and the Debate around Muslim Personal Law and Gender Justice' (2017) 50 Verfassung und Recht in Übersee/Law and Politics in Africa, Asia, and Latin America 300, 305.

10 Muslims are governed in India by their personal law, part of which is codified in State laws such as Muslim Personal Law (Shariat) Application Act 1937, the Dissolution of Muslim Marriages Act 1939, the Muslim Women (Protection of Rights on Divorce) Act 1986 and Muslim Women's (Protection on Marriage) Act 2019. For the larger part, however, Muslim personal law remains uncodified.

11 *Shayara Bano v Union of India*, (2017) 9 SCC 1.

12 Siddiqui (n 8) 17–21.

celebrated for its clarity. Indian courts had already ruled on the inefficacy of the practice of triple talaq. Even the All India Muslim Personal Law Board ('the AIMPLB') had expressed its dissent against the perpetuation of the practice at the community level.[13] Despite these developments, Siddiqui observes that the legislature had remained "conspicuously silent", given the delicate balance it would have to strike between upholding fundamental rights on the one hand and the rights of individuals to be governed by their personal laws on the other hand. Notwithstanding whether and to what extent the judgement succeeded in creating this balance, it deserves to be applauded for laying to rest the longstanding debate on the validity of the triple talaq practice vis-à-vis State law, by unequivocally stating the unconstitutionality of the practice.[14]

In the context of the issues that were raised in these petitions and the manner in which the discussions around them panned out, they would fit within the understanding of 'strategic litigation' in social movement studies. In India, they formed the category of Public Interest Litigation ('PIL'). As a form of litigation, PILs are popular because of the procedural flexibility they offer. PIL procedures do not call for the strict enforcement of the rule of locus standi, i.e., that only a directly affected party may file a suit in the court. Additionally, the formalities involved in the filing process and the stages of hearing are also eased. This is primarily to avoid delay in decision-making due to the 'public' nature of the consequences that the decisions in these cases are likely have.[15]

Given the accessibility it enables,[16] this type of litigation is often used by activists and public-spirited citizens to test the boundaries to which they can stretch the enforcement of rights through the medium of State courts. For instance, when strategic litigation is unsuccessful, it is an indication to activists, lawyers, and others pursuing the litigated agenda to adopt other mechanisms to achieve their intended objective (probably less confrontational ones). However, the success of strategic litigation actually lies in the awareness it creates about the issues being debated, which is evident from the case studies

[13] I mention the AIMPLB here because of the crucial role it has played in amendments and resistance to amendments in the context of Muslim personal law. The self-declaratory role of the AIMPLB as a representative institution of the Muslim community in India has been contested by different Muslim sects and Muslim women's rights groups. However, in popular political rhetoric, opinions of the AIMPLB continue to hold significance.

[14] Siddiqui (n 8) 21.

[15] Anindita Chakrabarti, 'Religious Freedom, Legal Activism, and Muslim Personal Law in Contemporary India: A Sociological Exploration of Secularism' in Olga Breskaya, Roger Finke, and Giuseppe Giordan (eds), *Religious Freedom: Social-Scientific Approaches* vol 12 (Brill 2021); Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press 2016).

[16] Procedural formalities often deter people from litigating in courts. They are perceived to create hurdles that involve excessive expenditure of time and money. Here, I refer to accessibility. The absence of lengthy filing and hearing procedures were meant to make courts and "justice" more accessible. See Marc Galanter and Jayanth K Krishnan, 'Bread for the Poor: Access to Justice and the Rights of the Needy in India' (2004) 55 Hastings Law Journal 789.

that are later discussed in this paper. While knowledge about the exact consequences of the pronouncement of a triple talaq may have been fuzzy, it was popular knowledge that triple talaq was invalid in the eyes of the State. Cases in the form of PILs that debated the legitimacy of *dar-ul-qazas*, the constitutionality of Section 377 of the Indian Penal Code, 1860 ('IPC'), or the status of the right to privacy as a fundamental right, witnessed how public opinion came to the front in scores on these issues through op-eds in newspapers, news channel debates, and hashtag trends on social media.[17] Similarly, by drawing public attention to the threads of arguments weaving into the main subject, the PIL testing the constitutionality of the practice of triple talaq threw light on the sustainability of, and popular support for, campaigns within the broader societal and social dynamics. These included the campaigns on gender equality and the uniform civil code.[18]

A closer reading of the judgement reveals that the intent of the petitions and the judgement that followed was twofold: *firstly*, to restructure the unequal power relations between men and women that were reinforced by this practice, in alignment with the right to equality;[19] and *secondly*, in line with the Indian state's welfare function, to curb the destitution that results from the instantaneous nature of this divorce practice. Following the judgement, the Muslim Women's Act 2019 was brought into force to give life to the decision of the Supreme Court. As Mandal notes from his reading of the Parliamentary debates, the government then in power felt that it was insufficient to just declare that the practice lacked legal validity: the backing of a sanction was

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[17] Flavia Agnes, 'Darul Qaza Row: A Storm in a Teacup' (*The Asian Age,* 1 August 2018) <http://www.asianage.com/opinion/oped/010818/darul-qaza-row-a-storm-in-a-teacup.html> accessed 16 August 2018; Ajay Kumar, 'Section 377: What Two Recent SC Judgments Tell Us about Court's Altered View on Sexuality and Privacy in India' (*Firstpost*, 10 January 2018) <https://www.firstpost.com/india/section-377-what-two-recent-sc-judgments-tell-us-about-courts-altered-view-on-sexuality-and-privacy-in-india-4295821.html> accessed 5 September 2018; Faizan Mustafa, 'Sharia Courts in Fact' (*The Indian Express*, 10 August 2018) <https://indianexpress.com/article/opinion/columns/sharia-courts-muslims-triple-talaq-aimplb-uniform-civil-code-in-fact-5299750/> accessed 16 August 2018.

[18] Ratna Kapur, 'Triple Talaq Verdict: Wherein Lies the Much Hailed Victory?' (*The Wire*, 28 August 2017) <https://thewire.in/gender/triple-talaq-verdict-wherein-lies-the-much-hailed-victory> accessed 16 September 2019; Sherin BS, 'Feminism at a Crossroad: Triple Talaq Judgement and the Question of Gender' (*Outlook India*, 26 August 2017) <https://www.outlookindia.com/website/story/feminism-at-a-crossroad-triple-talaq-judgment-and-the-question-of-gender-justice/300801> accessed 29 June 2020; Jyoti Punwani, 'In the End, We'll Get a Good Law: Senior Advocate Bader Sayeed' (*The Hindu*, 3 February 2018) <http://www.thehindu.com/society/in-the-end-well-get-a-good-law-senior-advocate-bader-sayeed/article22644167.ece> accessed 5 February 2018.

[19] Justice Nariman wrote in his judgement that: "… this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India." *Shayara Bano* (n 11) [57].

further required. A criminal law that penalised the very pronouncement of the triple talaq was deemed to be an ideal deterrent for husbands.[20]

This action of the Hindu nationalist government evoked a lot of criticism. It was perceived to be politically motivated,[21] framing the question of arbitrary divorce as a religious problem, "leading to further homogenisation of Muslims and reification of Muslim misogyny."[22] There was opposition to the bill on several grounds, including questioning the veracity of the deterrence thesis, the singling out of Muslim men, and the treatment of Muslim women as more vulnerable than others.[23] Such opposition remained unsuccessful, and the bill was eventually passed in both Houses of Parliament, bringing into force the Muslim Women's Act 2019.[24]

In light of the discussions stirred by the enactment of this Act, the next part of this paper examines how the practice of triple talaq developed within the everyday life of the Muslim community in its interaction with the State after the law came into force.

III. THE LIFE OF TRIPLE TALAQ ON DOCUMENTS

The validity of the triple talaq pronouncement through a written document received by the wife – letters, WhatsApp messages, and legal notices – has

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20 S Mandal, '"Taking a Gun to Kill the Mosquito": Gender Justice, Deterrence and Protection in the Legislative Debate on Criminalising Triple Talaq' (2018) 2 The JMC Review 83, 91.

21 Danish Raza, 'Indian Parliament Bans Instant Divorce for Muslims' (*The Atlantic*, 4 August 2019) <https://www.theatlantic.com/international/archive/2019/08/india-triple-talaq/595414/> accessed 28 March 2022; Faizan Mustafa, 'Why Criminalising Triple Talaq is Unnecessary Overkill' (*The Wire*, 15 December 2017) <https://thewire.in/gender/why-criminalising-triple-talaq-is-unnecessary-overkill> accessed 28 March 2022; Flavia Agnes, 'The Politics behind Criminalising Triple Talaq' (2018) 53 Economic and Political Weekly 12, 14.

22 Chakrabarti (n 15) 52-53.

23 Mandal (n 20) 92-93.

24 ibid 86. Along with legal implications, the enactment of the Muslim Women's Act 2019 held political significance as well, the title of the Act being the most prominent indicator of this. The Muslim Women (Protection of Rights on Marriage) Act 2019 is a mirror image of the Muslim Women (Protection of Rights on Divorce) Act 1986, mentioned before, with the word 'divorce' being replaced by 'marriage'. The 1986 Act was passed by the Congress Government following the Supreme Court's judgement in *Mohd Ahmed Khan v Shah Bano Begum,* AIR 1985 SC 945. This enactment was criticised for its supposed denial of applicability of the maintenance law under s 125 of the Code of Criminal Procedure to Muslim women. It was the context of what was popularly understood as the Congress government's submission to the politics of conservative Muslim groups that the Modi government promoted an enactment whose title was worded in a manner "...to contrast the illusory protection of Muslim women's rights 'on divorce' by the 1986 Act, with its own supposedly more radical protection offered to them 'on marriage.'"

been long debated.[25] The issue reached a consensus in *Shamim Ara* v *State of U.P.*,[26] when the judges observed in the obiter dicta that a triple talaq would be valid and final only when it was pronounced for a reasonable cause, and was preceded by an attempt by the couple to reconcile their differences.

My ethnographic work at the police stations in Mumbai revealed that the pronouncement of triple talaq had evolved to combine State and religious law. It developed into a practice where Muslim husbands (seriously) intending to divorce their wives used a document titled as a deed of divorce to pronounce triple talaq. However, this was considered to be a valid pronouncement in the community only if the wife also signed the same document, as explained to me by one Muslim lady. Such documents looked like any other contract deed, duly notarised and executed on a stamp paper, with pictures and signatures of the couple and their witnesses. I could not get any clear answer from the members of the community or the police about whether this practice of documenting the pronouncement - attested by the parties in the presence of a notary and 2 witnesses–had gained traction after the Supreme Court judgement or had existed from before. However, what was evident was the treatment of such a document, which seemed to have been impacted significantly after the judgement and the passing of the Muslim Women's Act 2019.

In the case of Rizwan and Saba, according to Saba's narrative to Assistant Police Inspector ('API') Tawade, Rizwan had been compelling Saba to sign the deed of divorce so that he could marry his girlfriend - Ayesha – whom he was currently living with.[27] The deed was drafted to read that the divorce was by mutual consent,

> …where the party of the first part (read: husband) herein grants the customary divorce pronounce(d) three times Talaq Talaq Talaq to the wife herein and the wife accepts the said Talaq in front of witnesses freely and voluntarily and without any force, coercion, or undue influence from anybody.[28]

Showing the document to the API, Saba said, "I am not divorced from him. But he has a new girlfriend, so he keeps pressurising me to give talaq. But

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[25] 'Talaq Delivered through Skype, WhatsApp and Others Means Valid: AIMPLB' (*India Today TV*, 3 November 2015) <https://www.indiatvnews.com/news/india/talaq-delivered-through-skype-whatsapp-sms-valid-55711.html> accessed 15 October 2021; HT Correspondent, 'Man Sends "Talaq" Notice by Registered Post, Kerala Court Nullifies the Divorce' *Hindustan Times* (18 May 2017) <https://www.hindustantimes.com/india-news/kerala-malappuram-court-nullifies-talaq-sent-by-post/story-SLxY2aA6PTp8zyVKOpOThK.html> accessed 15 October 2021.

[26] *Shamim Ara v State of U.P.*, (2002) 7 SCC 518, AIR 2002 SC 3551.

[27] Participant observation at Neeve Police Station (2 February 2020).

[28] Copy of deed on record with the author.

what will I do? I have two children from him." At the time of visiting the police station, Saba was living with her natal family. She had left her matrimonial home because of increasing instances of physical and mental violence caused by Rizwan, which, as she narrated, had a deteriorating impact on her health. "Ever since I discovered I have a heart problem I went to live with my father and brother. I cannot bear the beating that happens on a daily basis anymore (*Woh roz roz ka marna peetna sehen nahi hota hai*)," said Saba, who had been married to Rizwan for eight years at the time. Saba's understanding of this divorce deed and the pronouncement of triple talaq in it was that it was not valid unless she consented to the divorce, which would be confirmed only with her signature on the deed. The API supported her perspective and said, "whether or not to give talaq is entirely your prerogative," thus tilting the power balance – customarily in favour of the husband – in favour of Saba, the wife.[29]

However, in the background, paperwork to build a case against Rizwan had already begun on the basis of this divorce deed produced by Saba. Rizwan was listed as a habitual offender in the register of Neeve police station. The police had attempted to arrest him previously in other cases. However, given his political connections, they had been unable to keep him in actual custody. The police discussed that a matrimonial dispute was the perfect opportunity to do so.[30] The offence of pronouncing triple talaq was non-bailable, which meant that Rizwan could be held in police custody for at least twenty-four hours before being produced before the court. "This is enough time for us to interrogate him about the other offences he has been involved in," said a Police Sub-Inspector working in the detection team of the police station. The 'domestic' nature of the offence, under the pretext of which Rizwan would be arrested, would shield the system from political interference, as such matters were considered one's 'private affairs'. Given the recentness of the enactment of this legislation, the police hoped that bail would not come easily even from the court.

Saba visited the police station a few more times after this day with different complaints against Rizwan, who was allegedly threatening her brother and

[29] Rizwan's girlfriend Ayesha's parents had also visited the police station earlier that week to lodge a complaint against Rizwan for 'abducting' their daughter. Before registering such a complaint formally, the police informally asked Ayesha to visit the police station. Such practices are commonly undertaken by the police in order to test the veracity of the complainant's narrative. When Ayesha had been called to the police station in this context, she said that she was living with Rizwan of her own will and that she did not intend to marry him until he was divorced from his first wife. The pressure on Saba to accept the triple talaq was possibly a result of this situation, since polygamy within the Muslim community is otherwise recognised as a matrimonial arrangement by the Indian State.

[30] The police did not register the complaint for abduction as was being pursued by Ayesha's parents because Ayesha and Rizwan were two adults in a consensual relationship and therefore, according to the police, a case for abduction would not hold ground in court.

father to compel her into signing the divorce deed. However, she only sought an 'NC' each time. An 'NC' is the short form for a non-cognisable complaint, which meant that the sections applied against Rizwan would not allow the police to arrest him without a warrant from the court.[31] The officer at the station house changed on a daily basis in this police station, and all of the officers knew that Rizwan was 'wanted' in connection with what they perceived as graver offences.[32] Hence, Saba was eventually convinced into filing a complaint against Rizwan for pronouncing triple talaq, which is a cognisable offence. This meant that a First Information Report ('FIR') was lodged against him, which gave the police powers to make an immediate arrest.

However, in another case from the same police station, that of Yusuf and Shabana, procedures panned out differently with respect to the document that recorded the pronouncement of the triple talaq. In Shabana's narrative, Yusuf had already divorced her through a divorce deed that she had signed. This divorce deed was in Urdu, and it contained the pronouncement of triple talaq in the language of the document. It was executed by an Imam and notarised with a seal of the court. "My signatures were taken on a blank sheet of paper," said Shabana, when I asked her if she understood the terms of the document.[33] According to the narrative of her neighbour, who accompanied Shabana, this document had been preceded by an oral pronouncement of the talaq a few days before, after which Shabana had been living with her mother.

Shabana came to the police station twice. The first time, she had come to complain that her husband had suddenly divorced her, and she had brought along the divorce deed as proof. The Police Sub-Inspector ('PSI') on duty at the station house had summoned her husband to the police station and had

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[31] To this end, however, the complainant has to approach the court with the NC document and acquire a warrant for his arrest. Most NCs however never reach the court, except as annexures to a civil case against the same person. The procurement of an NC document, however, seems to provide some mental relief to complainants.

[32] During my time spent at the police stations, police officers explained the varying ranks that there were "serious" and "trivial or useless (*faltu*)" offences. Serious offences mostly comprised murder, rape, thefts of large amounts or gold and theft rackets, large monetary frauds, and offences carried out using technology. While the former list could be expanded, most police officers shared the opinion that family disputes were inevitably trivial because they could never be "solved", especially by the police who perceived themselves as outsiders to the situation. I also felt that it was the commonness of these disputes that made them seem unimportant, especially to the male police officers who were more interested in busying themselves with "more important" matters. These "more important" matters commanded investigation and interrogation – perceived to evoke more masculine attributes, unlike family disputes that often-required counselling skills – perceived popularly as a feminine talent – on part of the intervener. In this case study, Rizwan had been charged before as an abettor in cases of communal violence and grievous hurt arising from property disputes. For more on masculinity and policing, see Beatrice Jauregui, *Provisional Authority* (University of Chicago Press 2016).

[33] Participant observation and informal conversation with Shabana at Neeve Police Station (25 February 2020).

found that neither of them understood the document. He had later pointed out in a discussion with other police officers that the couple could not even read the Urdu document. Narrating the incidence of the event, emphasising the irony (of the offence, if there was one) with a short laugh, PSI Kolhe discussed with his colleagues:

> The document contains the triple talaq pronouncement. But the husband said he was willing to live with the wife so long as she agreed to his terms and conditions. They had some petty differences between them. Currently I have mediated the situation between them and sent them back home (*tyana samjavun ghari pathavla*), asking them to give the relationship a second chance. But what is the meaning of this document now? Is this pronouncement an offence under the new Act? Both the husband and wife are illiterate (*angutha chāp*) and cannot even read the document, let alone understand it.[34]

Kolhe revealed that his sympathies were with Yusuf, and that if Shabana insisted on lodging an FIR, he would apply Section 498A of the IPC and not the Muslim Women's Act 2019.[35] "My gut feeling is that this woman is using the document to corner Yusuf, because she knows that triple talaq is now an offence. She has been taught" (by someone), he remarked during the discussion. Some of the other officers in the discussion also felt that if the parties did not understand the document they had signed, the terms of such a document did not make for a cognisable offence.

I met Shabana when she came to the police station the second time, on the very next day after the discussion with Kolhe. This time the officer on duty at the station house was API Desai, who was taking a lunch break when Shabana

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[34] Participant observation at Neeve Police Station (24 February 2020).

[35] This was because Kolhe was not compelled to arrest Yusuf. Section 498A of the IPC relates to cruelty against a woman by her husband and/or her in-laws. Its penal provisions are similar to the offence of pronouncement of triple talaq, in that, it is cognizable, non-bailable, and punishable with imprisonment of up to three years and a fine. In the city of Mumbai, however, there is an informal protocol amongst police officers to thoroughly enquire into the genuineness of a complaint under Section 498A before actually filing the FIR. Documents such as the statements of the complainant and witnesses are collected as part of this protocol and a rough file is created which needs to be approved by the senior inspector of the police station followed by the Assistant Commissioner of Police (ACP), and at times even the Deputy Commissioner of Police (DCP), to ensure the veracity of this complaint as well as the possibility of its success in court (as a conviction). This procedure can take anywhere between one to two months. The police can avoid arresting the individual for this period, as there is no "actual" complaint registered as an FIR. Even once the offence is registered, the police stated that they avoided arresting the accused under Section 498A in line with the Supreme Court's verdict in *Arnesh Kumar v State of Bihar*, (2014) 8 SCC 273, which deters the arrest of an accused – unless absolutely necessary – for crimes punishable with upto 7 years of imprisonment.

arrived at the station house with her mother and her neighbour. Within the system of police hierarchy in India, an API is senior by several years of experience to a PSI. She told the probationary officer filling in for API Desai that her husband had divorced her, and that he had kept their child with him. She was seeking police intervention to get back her child's custody.

From the conversations among Shabana, her mother, and the neighbour, I learnt that Shabana's mother was more interested in Shabana returning to her matrimonial home if she wanted to keep the child. Shabana's neighbour emphasised how the pronouncement of triple talaq was now a criminal offence, and that Shabana could use this to compel her husband to give her some compensation for having abandoned her so suddenly. However, Shabana's focus remained on recovering the custody of the child. She said she was not keen to cohabit with Yusuf because he placed too many restrictions on her.

As per the informal policy, the probationary officer called Yusuf to the police station. By the time Yusuf arrived, API Desai was back at the station house, and had already been briefed about Shabana's grievance. On seeing Yusuf, Desai roughed him up with some abusive language and asked him why he was troubling his wife. He quickly realised that the differences between Yusuf and Shabana were not easily reconcilable, and so used the information of the talaq to make the next statement: "You are divorced already. You don't want to live together anyway. So, stay apart." This indicated that the API did not intend to delve into the issue of the pronouncement of the triple talaq. By virtue of his statement, it seemed as though he accepted it as it was. Turning to the issue of the child, which was Shabana's primary grievance on that day, Desai told Yusuf that he would have to gain custody of the child from the court. The child was barely a few months old, and under law would have to remain with the mother. Yusuf was unwilling to give the child to Shabana. He spoke agitatedly and gesticulated emphatically to explain how Shabana could not look after the child properly. "You take videos of how she is looking after the child and present that as evidence (in court)," advised Desai. The dispute concluded with Desai strictly telling Yusuf to return the child's custody to Shabana until he had a court order.

The unfolding of the cases of Rizwan and Saba, and Shabana and Yusuf, reveals that while the documentation of the pronouncement of triple talaq makes for concrete evidence of the occurrence of this offence under the Muslim Women's Act 2019, its interpretation remains within the discretion of the police officer who examines it. The police in India have long been criticised for using their discretion to decide whether or not an act should be categorised as a cognisable offence, particularly in the case of women

complainants.[36] The handling of triple talaq pronouncements by the police in Neeve police station was no different. In the case of Rizwan and Saba, Saba was unaware that the pronouncement of triple talaq constituted a criminal offence. She was aggrieved with her matrimonial situation and wanted it to be tackled by the police in some way. Registering an FIR for the pronouncement of triple talaq on the document that Saba produced at the police station also worked to meet the end Saba was trying to achieve. But more importantly, the Muslim Women's Act 2019 was swiftly enforced because the police needed a pretext to arrest Rizwan, whom they had been looking to gain custody of in his connection with other offences, unconnected to Saba. Therefore, the motivation to take cognisance of the triple talaq pronouncement was not so much Saba's matrimonial grievance, as had been envisaged by the Court and legislature – it was to overcome systemic hurdles that the police had been facing in getting police custody of Rizwan as an offender in other contexts.[37]

Contrastingly, there was no such urgency or motivation for the police in the case of Shabana and Yusuf. Like Saba, Shabana also did not persist in pursuing a case against Yusuf for the pronouncement of triple talaq. Her matrimonial grievance was specifically related to recovering custody of her child from Yusuf. In this case as well, the pronouncement of triple talaq was documented in the divorce deed. Nevertheless, the police chose to overlook this pronouncement as an offence under the Muslim Women's Act 2019. In fact, it was Shabana's neighbour who kept bringing the fact of pronouncement to the fore of the discussion with the police and among themselves. This reinforces the high level of awareness that was created as a result of the litigation that brought triple talaq into the spotlight.[38] However, the police had debated the legitimacy of the triple talaq. In the first instance (during the discussion with PSI Kolhe), on the basis of whether the couple understood the contents of the divorce deed when they concluded that the pronouncement was invalid, and in the second instance, on the basis of the circumstances of the dispute before them, when API Desai proceeded on the ground that the triple talaq had resulted in the fact of a divorce.

Such treatment of documents confirms early conjectures of scholars about the possible impacts of the Muslim Women's Act 2019 – that it has become an

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[36] Mandal (n 20) 12.

[37] ibid 13. The rhetoric of gender justice and empowerment underscored the discussions in the legislature during the passing of the Bill. "The government's advocacy of criminal law centred on the image of Muslim women as helpless victims of triple talaq... Criminal law … was therefore as much an instrument of protection directed at Muslim women, as an instrument of deterrence directed at their husbands."

[38] Chakrabarti (n 15).

additional armour for the police, specifically against Muslim men,[39] providing no novel relief to Muslim women in distressing matrimonial situations.[40]

IV. VICTIMS OR VICTORS? WOMEN'S NAVIGATION OF TRIPLE TALAQ PRONOUNCEMENTS

The Court and legislators obviously knew that banning triple talaq would not bring its pronouncement as a form of divorce within the Muslim community in India to a halt. The criminalisation of the pronouncement was meant to deter the use of this form of divorce under Muslim personal law, given its unilateral and instantaneous nature,[41] giving women dissatisfied with the separation a legal mechanism to counter balance the situation they found themselves in. In the cases I saw during my ethnographic work at the police stations, I noticed that the Muslim Women's Act 2019 was used not so much to dismiss the validity of the pronouncement – that continues to remain legitimate according to Islamic legal order – and restore matrimonial cohabitation, but rather in the aftermath of the pronouncement. Therefore, the legitimacy and finality of the pronouncement, which the State sought to revoke, remained. However women were observed to use the criminalisation of this pronouncement brought about by this Act to negotiate the terms of such a divorce.

Ayesha, a young Muslim woman of twenty-two years, approached the Khadakwadi police station with an application (*arzi*) against her husband, Shahid. While admitting the application for further enquiry into the register of the police station, the lady PSI Tigve asked Ayesha what the cause of her application was.[42] She mentioned that Shahid had divorced her by way of triple talaq a year ago, and all attempts at reconciliation by families, religious heads, and well-wishers had failed. She finally decided to lodge a police complaint for the harassment she had faced in her matrimonial home.

On learning that Ayesha *had* been open to reconciliation talks, in the hope that a more structured intervention for reconciliation may help, Tigve advised Ayesha to first visit the Special Cell for Women and Child Support ('Special Cell')[43] located in the premises of the police station. This Special Cell is

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[39] Agnes (n 21) 14.

[40] Zubair Abbasi, 'Criminalization of Triple Ṭalāq in India: A Dilemma for Religiously Divorced but Legally Married Muslim Women' (*Islamic Law Blog*, 8 August 2019) <https://islamiclaw.blog/2019/08/08/commentary-criminalization-of-triple-%e1%b9%adalaq-in-india-a-dilemma-for-religiously-divorced-but-legally-married-muslim-women/> accessed 20 October 2021.

[41] Mandal (n 20) 91.

[42] The observation of this case study spanned a few weeks between 25 August 2021 – when Ayesha visited Khadakwadi police station for the first time – and 29 September 2021.

[43] The Special Cell for Women and Child Support has been set up under a joint programme between the Tata Institute for Social Sciences and the Department of Women and Child

managed by two women who have a degree in social work and/or counselling practices. One of the functions they fulfilled was to intervene in matrimonial and family disputes, to explore whether the grievances and dispute concerned could be settled by way of mediation instead of a police complaint. On the same day, in the Special Cell, Ayesha narrated that she had been living with her parents for over a year because her husband had pronounced triple talaq and suddenly asked her to leave the matrimonial home. She explained that differences had arisen between her and her husband because he wanted her to cut off all relations with her parents. "I had made an application at the police station even then. At the time my husband's family said that we could talk this out (*sulah karenge*). They just kept beating around the bush and no settlement talks ever occurred," narrated Ayesha.[44] The Special Cell workers explained to Ayesha that they would, if Ayesha was willing, conduct a formal procedure for individual and joint meetings between Ayesha and Shahid. Ayesha conversed confidently, treating the circumstances she found herself in a matter-of-fact way. This was different from the distraught state that most women who approached the Special Cell for the first time appeared in. The Special Cell workers were keen to verify Ayesha's motivation for their intervention, and therefore asked Ayesha if she would be willing to return to her matrimonial home if the mediation resulted in such an understanding. "He has not taken my calls in one month, why will he take me back home now?" asked Ayesha rhetorically. As in her conversation with the PSI Tigve, so also in her discussion with the Special Cell workers, Ayesha was primarily interested to know whether this procedure would result in a "case".[45] When she could not get a clear answer from the Special Cell, she made photocopies of her application, submitting one to the Special Cell and another to the police station, putting the process in motion in both forums.

In the week that followed, the Special Cell managed to call Shahid for an individual meeting, in line with their procedure. The context to Ayesha's complaint, as had been speculated by both the Special Cell workers and PSI Tigve, had many threads. Ayesha's brother was married to Shahid's sister. The couple had not gotten along, and this had resulted in their separation, with Shahid's sister returning to her parent's home, i.e., Ayesha's matrimonial home. All attempts at settling differences between Ayesha's brother and Shahid's sister had failed. Shahid's sister had ultimately filed a case under Section 498A of the IPC against Ayesha's brother, because he refused to give her a divorce

Development, Government of Maharashtra. It aims to eliminate violence against women ('VAW') by adopting a multifaceted response to the complex issue of VAW. These cells are strategically located in police stations, thus linking police systems with women's organisations and building a coordinated response to the needs of violated women.

44 Participant observation at Special Cell meeting (25 August 2021).

45 I observed that for the majority appearing at the police station, the popular understanding of "case" meant an active intervention by police personnel at the least, and a court appearance in its graver form.

(*talaq nahi diya)* as per Muslim personal law. Soon thereafter, problems arose between Shahid and Ayesha, because Shahid wanted Ayesha to suspend her relations with her parents until his sister's matrimonial dispute broke ground. In this context, a few weeks later, in another visit to the Special Cell, Shahid narrated: "I told her to wait until her brother either gave a divorce to my sister so that she could be remarried, or the court case reached its reasonable end."[46] Ayesha had eventually returned to her parent's home on the ground that the arguments between Shahid and her had led to him pronouncing triple talaq. This fact was denied by Shahid on both occasions when he visited the Special Cell. "We used to argue every day because she would not listen. (*Roz roz ladai hoti thi*)," he told the Special Cell workers when they asked him about the triple talaq pronouncement. In one conversation about the talaq, he carefully explained how in order to be valid, triple talaq had to be pronounced in the presence of two witnesses, and anything else did not actually amount to a talaq. According to him, Ayesha's complaint against him was closely interwoven with the processing of her brother's matrimonial dispute. While Shahid denied having pronounced the triple talaq, like Ayesha, he was also not keen on reconciliation. A joint meeting between Ayesha and Shahid was nevertheless planned by the Special Cell.

In the same week, Ayesha once again visited the police station with her parents. I was present at the station house at the time they visited. They informed PSI Kothe, who was on duty at the time, that Ayesha's case was simultaneously being processed in the Special Cell. When Kothe asked Ayesha for an update on the proceedings in the Special Cell, Ayesha's father said: "There is no hope of her going back. He has given her a divorce. And in our community, he has left our daughter. (*Usne talaq de diya hai. To humare main ise chodd diya hai,*). Now we want to file an FIR. Our daughter has suffered a lot. (*Bahut julm hua hai humare beti pe*)."[47] Ayesha sat quietly, while her mother confirmed her father's narrative and said: "Initially, she used to say nothing to us about her life in her matrimonial home. She used to only cry when we asked her anything. But then when she came to live with us, she started telling us everything slowly."[48] On determining that Ayesha and her family were keen to lodge an FIR, Kothe – to whom Ayesha's application had been allotted – said he would call Ayesha and her family members in the next days for a statement.

Later, I learnt from the Special Cell that Ayesha had called them to cancel the joint meeting soon after her conversation with PSI Kothe. The Special Cell workers were convinced by Ayesha's narrative that she had been given the triple talaq, although Shahid denied it. However, they acknowledged that both Shahid and Ayesha accepted the legitimacy and finality of the triple talaq as

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[46] Participant observation at Special Cell (27 September 2021).
[47] Participant observation at Khadakwadi police station (30 August 2021).
[48] ibid.

per their religious legal order, even though under State law this was now invalid. A Special Cell worker said:

> This community is very strict (*kattar*) about the meanings and interpretations of their customary practices. In his head he (Shahid) knows that he has already given triple talaq and therefore he feels that even if he wants to, he may not be able to live together again with Ayesha, as Muslim personal law denies that right.

Accepting the religious legitimacy of such a pronouncement probably also aligned with the animosity that had arisen between Ayesha and Shahid due to the string of litigation between their families. In light of Ayesha's reluctance to pursue a process with the Special Cell, and the limited cooperation to this end from Shahid, her case was closed in the Special Cell.

Meanwhile, since his meeting with Ayesha and her family, Kothe had already begun to record the statements of Ayesha and her family members. Informal policy at the level of the police station requires the police to record the statement of the husband and the wife in matrimonial disputes. Accordingly, Shahid had narrated to PSI Kothe, as he had in the Special Cell, the connection of Ayesha's case against him with the case of his sister against Ayesha's brother. Here, in Kothe's perspective, Ayesha's complaint was "technical". As per police practice, husbands accused of pronouncing triple talaq were also charged under Section 498A of the IPC. The FIR against Shahid was no different. Ironically, Ayesha's case against Shahid was being developed with a charge under Section 498A of the IPC for pronouncing the triple talaq; whereas Ayesha's brother in his case was being charged under the same section of the IPC, but because he was refusing to pronounce the talaq!

Ayesha's case is a reminder of the fact that pronouncements (as well as non-pronouncement) of triple talaq are preceded by a history of violence and complex interpersonal dynamics.[49] Bracketing triple talaq as a criminal offence, to be dealt with through penal consequences, provides neither a simplistic nor a straightforward solution, given the web of complexities such a pronouncement is often tied into. Her case also evidences the practical difficulties that consequently arise for the police in investigating and collecting evidence for establishing such an oral pronouncement. This causes the police to adopt practices such as the application of Section 498A of the IPC, which nullify certain reconciliatory aspects of the legislation. While Section 498A of the IPC bears the same punishment as Section 3 of the Muslim Women's Act 2019, only the latter is compoundable. This means that the woman can stop

[49] Agnes (n 21).

legal proceedings under the Act in the instance she decides to settle the matter with her husband. Theoretically, the facts of Ayesha's case made for an offence under Sections 498A of the IPC *and/or* Section 3 of the Muslim Women's Act 2019. However, given the procedural requirements of investigating facts and collecting evidence, the police – per practice – applied several sections in every FIR. This increased their scope of investigation, and simultaneously transferred decision-making about which sections the accused should finally be charged with, to the courts. However, in Ayesha's case, the joint application of both these sections nullified the possibility of her stopping proceedings and reconciling with her husband at her own will. This is because when provisions with differing consequences regarding bail and compounding are jointly applied, the discretion on these matters – which is very crucial to the dispute – is automatically transferred to the police and the State.[50]

Triple talaq was declared unconstitutional because it violated certain fundamental rights. The formal (and popular) reading of Muslim personal law indicates that the majority of methods for divorce under Muslim personal law are unilateral in nature and vest the power of "giving divorce" in the husband. What set triple talaq apart from the other forms of divorce was the fact that it was instantaneous and irrevocable after the third pronouncement of "talaq", to be pronounced in immediate succession after the first two. In their judgement, the judges deciding this issue highlighted that this created scope for arbitrary and unfair decisions by a husband. This caused the practice of triple talaq to impose a disproportionate burden on women in matrimony, by leaving them at the mercy of their husband's will in the most unfortunate circumstances.

However, as the empirical data in this paper indicates, the use of this legislation by both the State and Muslim women, is shaping it to take on a life of its own. To what extent then was the court successful in – what critiques of the judgement call – "saving Muslim women" from the apparently arbitrary actions of their husbands? Does sending a husband to prison necessarily translate into the wife's well-being, as is envisaged by the promulgation of the Muslim Women's Act 2019? Does it not undo several years of work by the women's movement, that resulted in compelling the courts to consider civil remedies as an option for domestic disputes, including domestic violence?[51] The Supreme Court's judgement was heavily criticised as a lost opportunity to articulate jurisprudence on gender justice.[52] In declaring triple talaq invalid only on the grounds of its arbitrary nature, the judges obviously adopted a very narrow

[50] Fieldwork notes from various discussions with police inspector at Khadakwadi police station (1 July 2021 to 30 September 2021).

[51] Here, I am referring to the history of the Protection of Women from Domestic Violence Act 2005. For more details see A Suneetha and Vasudha Nagaraj, 'A Difficult Match: Women's Actions and Legal Institutions in the Face of Domestic Violence' (2006) 41 Economic and Political Weekly 4355.

[52] Herklotz (n 9).

approach in evaluating the practice and its consequences.[53] Leaning towards the preservation of marriages, the judgement framed women within a very protectionist discourse.[54] A perspective on the agency of women in navigating and using the law (as is evident from cases like that of Ayesha) as the agency of individual agents of the State (such as that of the police officers in Saba or Shabana's case) has been completely overlooked not only in the judgement, but also in the framing of the Muslim Women's Act 2019.

V. EMPOWERING WHOM?

The Muslim community has long been navigating State law in a manner such that they can continue to follow their personal law without seeming to have violated State law.[55] Despite the recognition of personal laws in India, there is no clarity on the relationship between personal laws and State sovereignty, and whether the State can amend personal laws.[56] The judgement on triple talaq was an opportunity for the Supreme Court to begin jurisprudential discourse on this relationship between personal laws and the Constitution. However, as Sen points out, the judges avoided this more complex exercise, and limited their opinion to the relationship between triple talaq and Muslim personal law.[57]

Given this continued fuzziness, therefore, the practices of personal law oscillate between the two extremes of absolute non-interference by the State[58] and legislative amendments pertaining to often uncodified personal laws.[59] Such precarity results in hybrid forms of practice that use bureaucratic practices (borrowed from the architecture of the State)[60] to validate customary

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[53] Jhuma Sen, 'The Gender Question' (*Frontline*, 15 September 2017) <https://frontline.thehindu.com/the-nation/the-gender-question/article9834658.ece> accessed 12 October 2021.

[54] Kapur (n 18).

[55] Gopika Solanki, *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in India* (Cambridge University Press 2011); Sylvia Vatuk, 'Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law' (2008) 42 Modern Asian Studies 489; S Ghosh and Anindita Chakrabarti, 'Religion-Based "Personal" Law, Legal Pluralism and Secularity: A Field View of Adjudication under Muslim Personal Law in India' (2021) 10 Oxford Journal of Law and Religion 254.

[56] Rochana Bajpai, *Debating Difference: Group Rights and Liberal Democracy in India* (Oxford University Press 2011); Gilles Tarabout, 'Ruling on Rituals: Courts of Law and Religious Practices in Contemporary Hinduism' (2018) 17 South Asia Multidisciplinary Academic Journal <http://journals.openedition.org/samaj/4451> accessed 20 January 2020.

[57] Suneetha and Nagaraj (n 51).

[58] See *Vishwa Lochan Madan v Union of India*, (2014) 7 SCC 707; *Shakti Vahini v Union of India*, (2018) 7 SCC 192.

[59] See *Indian Young Lawyers Association v State of Kerala*, (2018) SCC OnLine SC 1690.

[60] Akhil Gupta, *Red Tape: Bureaucracy, Structural Violence, and Poverty in India* (Duke University Press 2012); Nayanika Mathur, *Paper Tiger: Law, Bureaucracy and the Developmental State in Himalayan India* (Cambridge University Press 2015).

practices and grant them some form of legitimacy for their comprehension by State law and its institutions. The documentation and notarisation of divorce in a divorce deed (*talaqnama*) that records the pronouncement of triple talaq is a conspicuous sign of this trend, lending customarily oral practice a new meaning that has further evolved in light of the Muslim Women's Act 2019.

In Rizwan and Saba's case, the police decided to act on the written pronouncement because they had compelling reasons requiring the custody of Rizwan that were not related to Saba's dire matrimonial situation. Saba's opposition to the divorce lent strength to the case, thus giving a drive to the efforts of the police to investigate. Contrastingly, Shabana did not contest the pronouncement of talaq by Yusuf. While she would be as vulnerable as Saba after the divorce, her acceptance of the divorce and 'commonness' of her case resulted in the issue of triple talaq not becoming a point of discussion for the police officer at all. In fact, API Desai treated Shabana's situation in a 'post-divorce' context, cursorily treating the pronouncement as legitimate and final.

As this legislation unfolds at the levels of community and interpersonal relationships, these case studies remain examples of how the implementation of State law is accompanied by unforeseen consequences that empower (and disempower) individuals of the State and society in myriad ways. The paper describes and analyses how the enforcement machinery makes a choice regarding the implementation of the Muslim Women's Act 2019 in light of several factors, including the biographies of the parties, the strength of their motivation to pursue a complaint, and the uniqueness of the facts of the case. This confirms conjectures about the law being a political dialogue; but in this case, legitimising discrimination by the carceral State against a specific religious minority. The legislation has also equipped Muslim women with a strategic tool to negotiate matrimonial disputes, much like what Section 498A of the IPC is already being criticised to have provided.[61] My fieldwork revealed how the State has put into play a variety of informal practices to control litigation under Section 498A,[62] popularly perceived as being used to obtain a better (financial or emotional) bargain. Will the Muslim Women's Act 2019 meet a similar fate?

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[61] Express News Service, 'Sec 498A Being Used to Settle Personal Scores against Husband, His Kin: SC' (*The Indian Express*, 9 February 2022) <https://indianexpress.com/article/india/sec-498a-being-used-to-settle-personal-scores-against-husband-his-kin-sc-7763471/> accessed 5 April 2022; Kanchan Chaudhari, 'Section 498-A Being Misused to Implicate Husband's Entire Family: Bombay High Court' (*Hindustan Times*, 21 October 2020) <https://www.hindustantimes.com/mumbai-news/section-498-a-being-misused-to-implicate-husband-s-entire-family-bombay-high-court/story-SJAdXS3OuXtXiq0Qx2IVDO.html> accessed 5 April 2022.

[62] Kapur (n 18); Sherin (n 18); Punwani (n 18).

VI. CONCLUSION

Gender justice as a value grounded in constitutional morality and broader public interest was the justification of the Court and the legislators for their interventionist approach and to literally "…grasp the levers of religious authority and to reformulate the religious tradition from within, as it were".[63] However, this paper asks the question as to how the Muslim Women's Act 2019 assures any outcome for gender justice that is different from those guaranteed under existing laws, such as the Protection of Women from Domestic Violence Act 2005 or Section 498A of the IPC. The data laid out in this paper point towards trends in the implementation and use of this law that may cause it to end up with the same checklist of criticisms that are levelled against other pro-women laws in the country.

In order to understand the significance of this legislation, then, we are compelled to review its motivations. Among these, the role of political leanings and ideologies holding force at the time the legislature that passed this bill cannot be overlooked. Therefore, a second question that this paper also probes into is to what extent a law with significant consequences for a particular community in society, in this case the Muslim community, actually unfolds to coincide with the political aspirations that drove it.[64] The legislation clearly equips the State with enhanced discretion vis-a-vis Muslim men in circumstances that are not unique to Muslim families alone. Interestingly, however, the exercise of this discretion may not necessarily be the consequence of an individual officer's political leanings, as could be simply assumed. Based on my fieldwork in the city of Mumbai, I argue that it is in view of systemic issues that the possibility of an increase in the unwarranted persecution of Muslim men through the use of this legislation cannot be ruled out. These issues include the imbalanced representation (in terms of religion and gender) within implementational agencies such as the police,[65] procedural protocols for law and order that tend to be discriminatory on the lines of caste and religion in "communally sensitive" areas of a city, and every police station's informal policies regarding investigation methods,[66] informant networks, and so forth. There is very little

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[63] Marc Galanter, 'Hinduism, Secularism, and the Indian Judiciary' (1971) 21 Philosophy East and West 467, 480.

[64] Mandal (n 20).

[65] For instance, within the police in Mumbai, office holders – at all ranks – are predominantly male and Hindu. See also Bhatnagar, 'Muslims Representation in Police Low, Number of Prisoners Relatively High' (*The Wire*, 10 May 2018) <https://thewire.in/government/muslims-representation-in-police-low-number-of-prisoners-relatively-high> accessed 5 April 2022; Jauregui, 'Police and Legal Patronage in Northern India' in Anastasia Piliavsky (ed), *Patronage as Politics in South Asia* (Cambridge University Press 2014).

[66] Given the history of communal riots that Mumbai has witnessed over the years, the Mumbai police regularly update a list of communally sensitive areas in the city. These areas are determined, amongst other factors, on the basis of the number of riots that have taken place there in the past as well as its recent population and any changing developments that could lead to

evidence to suggest that imprisonment, or the length of imprisonment, is effective in deterring crime.[67] Moreover, the unfolding of the Muslim Women's Act 2019 at the level of interpersonal relationships pushes us to review the type of intervention that disputes under personal laws require. Given their complex intertwining with kinship networks, social values such as *izzat* and the multiple axes of their governance, it needs to be asked how suited they are to conflict resolution through adversarial mechanisms. Such methods, as the 'wise old men and women'[68] caution, mostly empower agents[69] other than those the State law purports to protect, and often to their detriment.

a riot-like situation. See also 'Guidelines on Communal Harmony' (Ministry of Home Affairs) <https://www.mha.gov.in/sites/default/files/ComHor141008.pdf> accessed 6 April 2022.

67 Ray Paternoster, 'How Much Do We Really Know About Criminal Deterrence?' (2010) 100 The Journal of Criminal Law & Criminology 765, 818.

68 Here, I am referring to the research on non-State mechanisms of conflict resolution at the community level. Community-based forums are popularly perceived to be led by the elders – wise and old – of the community. However, as empirical evidence shows, this is not always the case.

69 This hesitation to approach State forums (that are mostly adversarial) is also connected to the large investment of time and money that the procedural and representational formalities of these forums command. See Kokal (n 5); Aditya Malik, *Tales of Justice and Rituals of Divine Embodiment: Oral Narratives from the Central Himalayas* (Oxford University Press 2016); Solanki (n 55); Marc Galanter, *Law and Society in Modern India* (Oxford University Press 1989); Erin Moore, *Conflict and Compromise: Justice in an Indian Village* (University Press of America 1985) for more details.

AGENDA CONTROL IN THE INDIAN PARLIAMENT AND THE IMPACT ON ITS OVERSIGHT FUNCTION – ANALYSIS AND EVIDENCE

—Maansi Verma*

Separation of powers is understood as the diffusion of powers among different branches of the government, with each branch acting as a check on the other. This principle is considered an anti-thesis to totalitarianism, preventing the absolute concentration of power and thus protecting liberty. The Cabinet-style parliamentary form of government, with its genesis in Britain, fused together the executive with the legislature. This resulted in powerful executives and weakened legislatures with limited oversight capabilities. As institutions evolved over time, internal rules and procedures also evolved both as constraints and enablers of executive dominance, by distributing the powers of agenda control. Agenda control, understood as the power to decide what gets on the agenda, is a contested notion between the executive and the legislature. While there have been studies exploring agenda control in the context of the United States Congress and parliaments in several European countries, a similar study in the context of the Indian Parliament is yet to emerge. This paper attempts to examine the rules and procedures of the Indian Parliament to determine who controls the agenda, and what impact this control has on the oversight function of Parliament. For this purpose, the paper will limit itself to procedures pertaining to convening and proroguing a session, deciding the time and agenda for legislative discourse, and controlling deliberations on financial matters. The paper

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ends by making some recommendations on the reform of these rules and procedures, so as to ensure a greater sharing of the power of agenda control between the executive and the legislature in India.

I. INTRODUCTION

On September 14, 2020, the first day of the Monsoon Session of Parliament, a motion came up for vote in the Lok Sabha.[1] The motion, moved by the Minister of Parliamentary Affairs, proposed that owing to the pandemic, there was a need to maintain distancing and to keep the presence of government officials and others within Parliament precincts to a minimum. Thus, it was proposed that Starred Questions[2] and Private Member Business be suspended for the session. The government had earlier proposed that no Question Hour be conducted during the Monsoon Session. The Speaker of the Lok Sabha, resorting to his residuary powers,[3] had directed that no time be allotted for Question Hour.[4] Later, Unstarred Questions[5] were permitted as the government faced backlash from Members of Parliament ('MPs'), mostly belonging to the opposition.[6]

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1 Lok Sabha Debate 14 September 2020, motion by Shri Prahlad Joshi <http://loksabhadocs.nic.in/debatestextmk/17/IV/14.09.2020(a).pdf> accessed 20 July 2022.

2 Starred Questions are orally answered on the floor of the House during Question Hour, the dedicated hour for answering questions in both Houses of Parliament. It is the first hour of sitting in the Lok Sabha and the second hour of sitting in the Rajya Sabha.

3 *Rules of Procedures and Conduct of Business in Lok Sabha* (16th edn) r 389 (Lok Sabha Rules of Procedure). This rule provides that all matters, not specifically provided for in the Rules, shall be regulated in such manner as the Speaker directs.

4 Lok Sabha Debate 14 September 2020, announcement (ii) by the Speaker <http://loksabhadocs.nic.in/debatestextmk/17/IV/14.09.2020(a).pdf> accessed 20 July 2022.

5 Unstarred Questions are responded to in writing. They are not discussed during Question Hour. So, even if Question Hour doesn't happen due to sudden suspension, written responses will still be made available to MPs.

6 Moushumi Das Gupta, 'Modi govt climbs down on Question Hour, will allow "unstarred questions" in monsoon session' (*The Print*, 2 September 2020) <https://theprint.in/india/governance/modi-govt-climbs-down-on-question-hour-will-allow-unstarred-questions-in-monsoon-session/494523/> accessed 20 July 2022.

Several MPs of the opposition spoke against the motion, arguing that parliamentary questions are instruments to seek accountability from the government. Manish Tewari, Lok Sabha MP from Anandpur Sahib, asserted that while the Speaker has the power to pass such directions under Rule 32 of the Rules of Procedure and Conduct of Business in Lok Sabha, such direction can be issued only if the House unanimously agrees on a motion.[7] His argument, which was summarily dismissed by the Speaker, was that the House must pass the motion first before the Speaker may suspend Question Hour, and not the other way round. This is because MPs are required to submit notices of questions in advance.[8] With the Speaker suspending Question Hour without seeking the approval of the House, MPs were not allowed to submit their notices, making the motion moved later a mere formality. Even if the motion had failed, Question Hour would practically still not have been held as MPs were prevented from submitting their notices in advance.

Asaduddin Owaisi, Lok Sabha MP from Hyderabad, asserted that the motion was "weakening the theory of separation of powers, which is part of the basic structure of our Constitution."[9] He further implored the Speaker not to "allow the executive to encroach on the territory of the legislature."[10] He also demanded a division,[11] which was denied by the Speaker.

The motion was ultimately passed by voice vote. The Minister of Parliamentary Affairs asserted that the leaders of all major parties were consulted before the decision was taken, a claim that a leader of the largest opposition party refuted. Nevertheless, in effect, the executive unilaterally suspended the privilege of the legislature to question the former on the floor of the Parliament. This debate is a striking example of how the legislature and executive contest each other to decide how the time of parliament is to be apportioned. It further exemplifies how the government exerts greater agenda control powers through the office of the Speaker, emaciating the oversight function of parliament.

The Indian Parliament is a legislative institution of representative accountability and oversight. The Constitution envisages three fundamental functions

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7 MN Kaul and SL Shakdher, *Practice and Procedure of Parliament* (7th edn, Lok Sabha Secretariat 2016) 500.

8 As per Lok Sabha Rules of Procedure (n 3) r 33 and *Rules of Procedure and Conduct of Business in the Council of States* (9th edn) r 39 (Rajya Sabha Rules of Procedure), fifteen days' notice is required to be given for questions.

9 Lok Sabha Debate 14 September 2020, speech by Shri Asaduddin Owaisi <http://loksabhadocs.nic.in/debatestextmk/17/IV/14.09.2020(a).pdf> accessed 20 July 2022.

10 ibid.

11 Any Member of Parliament can demand division challenging the decision of the Speaker/Chairman regarding a voice vote. Division or recorded vote may be conducted by operating the automatic vote recorder or through division slips.

for Parliament: executive accountability, law-making, and financial oversight. The Constitution provides for all those subject-matters on which Parliament is competent to make laws[12] and the procedure for law making.[13] It ensures executive accountability by making the Council of Ministers collectively responsible to the House of People,[14] and it provides for procedures in financial matters,[15] empowering the House of People to assent, refuse to assent, or modify any demand for grants for expenditure to be incurred from the Consolidated Fund of India.[16] However, owing to the near-complete agenda control powers of the executive, the Indian Parliament is prevented from effectively discharging these functions. This paper examines three broad yet fundamental procedures in detail, with evidence on how the executive's agenda control through these procedures impedes Parliament's oversight function. These procedures are related to the convening and prorogation of parliamentary sessions, decisions on legislative agenda, time, and discourse, and the exercise of a check on the executive's budget. These three procedures respectively correspond to the three fundamental functions of Parliament identified above, and therefore, are the focus of the present study.

The central argument in this paper is that the rules and procedures of the Indian Parliament facilitate agenda control by the executive, thereby negating Parliament's oversight function. However, this executive control through rules and procedures is an extension of the structural defects inherent in the Cabinet system of our parliamentary set-up. The Cabinet system, an innovation of the British parliamentary form of government, fuses the executive and legislature in one body. This has the impact of diluting the institutional separation of powers, and weakening the functional separation which is required to ensure an effective check by the legislature on the executive. Thus, in exploring the central argument, this paper will first examine the impact that rules and procedures of Parliament have, and ought to have, on the executive in context of the functional separation of powers between the organs. The paper will then undertake a theoretical deliberation on the concept of agenda control, and lay down the principles which will be applied in this paper. Finally, it will critically analyse three broad, fundamental rules and procedures of the Indian Parliament, and study their impact on its oversight function through evidence. The paper will conclude by recommending some procedural reforms which enable greater sharing of the power of agenda control between the legislature and the executive.

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[12] Constitution of India 1950, art 246 read with sch 7.
[13] Constitution of India 1950, arts 107 – 111.
[14] Constitution of India 1950, art 75(3).
[15] Constitution of India 1950, arts 112 – 117.
[16] Constitution of India 1950, art 113(2).

The paper also suffers from some limitations. So far, the concept of agenda control hasn't been analytically explored in the context of the Indian Parliament. Therefore, the paper refers to literature on agenda control in Western democracies and juxtaposes the same with data and evidence from the Indian Parliament. However, given that the Indian Parliament is designed, elected, and functions differently from parliaments in Western democracies, the paper does not undertake a comparative analysis. Instead, it proposes a framework to study agenda control as it applies to the unique Indian context. The paper also does not claim that the proposed framework is the only or the best framework possible - it merely initiates a proposition that can be further studied through different dimensions.

Another limitation of this paper is the lack of a standard format of the data and evidence relied on for supporting and corroborating the arguments advanced. The paper uses a variety of evidence: descriptive examples such as the one discussed in the introduction, historical data over different periods of time and recent data from a specific time period, particularly the last decade. The reason for such a mixed evidence approach is that the available data on the functioning of Parliament does not easily lend itself to a study on agenda control. For instance, though data is available to show that the number of days that the Indian Parliament is in session in a year has progressively reduced, the paper views this from the perspective of the systematic exertion of greater agenda control by the government and reinforces this conclusion by providing examples from recent years. Therefore, both data and examples which indicate elements of agenda control are used to advance the arguments in this paper.

The third limitation of this paper is that it does not dwell in great detail on the question of politics, i.e., that political actors are bound by different considerations than their constitutionally prescribed roles and responsibilities, though this issue is referred to wherever warranted. For example, some studies on Parliament, which are also referred to in this paper, emphasise the fusion of party and the State as one of the reasons for weak legislatures and executive overreach. This aspect is tangentially explored in this paper as well. The paper confines itself largely to a study of how the structure, rules, and procedures of the Indian Parliament enable greater agenda control by the government. However, in limiting its scope in this manner, the paper does not negate other reasons and causes, including political reasons, which weaken parliaments. Since the problem of agenda control is multi-dimensional – structural, political, and perhaps even sociological and ideological - solutions also need to be multi-dimensional. This paper focuses only on the structural causes and recommends structural solutions, but it is open to future studies to explore other dimensions as well.

II. SEPARATION OF POWERS IN THE PARLIAMENTARY FORM OF GOVERNMENT AND THE IMPACT OF RULES AND PROCEDURES

The development of the principle of separation of powers in British jurisprudence was premised on the idea of limiting the government's power to protect individual liberty. MJC Vile, in his authoritative text titled *Constitutionalism and the Separation of Powers*, argues that the emergence of three separate branches of government in Britain was a response to the understanding that the "diffusion of authority in different centres of decision-making is the antithesis of totalitarianism and absolutism."[17] This institutional arrangement of three branches of government has been immortalised in the works of Montesquieu, who observed that if there is a concentration of the legislative and executive powers in the same person or same body, "there can be no liberty."[18]

However, Vile argues that what became prevalent in Britain was not a 'pure theory' of separation of powers.[19] A 'pure theory' posits that for the maintenance of political liberty, the government must be divided into three branches – the executive, the legislature, and the judiciary, with each branch performing a separate function – the executive, the legislative, and the judicial. Further, the persons who perform these functions must be kept separate and distinct, and no branch should encroach upon the functions of the other branches.[20] It was presumed that if this separation was achieved, each branch would be a check on the other.

Instead, the central theme in British jurisprudence was 'harmony'. Checks were sought to be applied in a manner so as to achieve a balance between the government (here, the executive) and parliament (legislature),[21] through the Cabinet system. This came to be considered the 'efficient secret' of the English Constitution. By default or design, it led to the 'nearly complete fusion of the executive and legislative powers',[22] arguably failing the Montesquieuian test. The underlying idea of the Cabinet system was that it is not practically possible to separate the functioning of the different branches of government without affecting the efficiency of administration, and some 'cooperation and

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17 MJC Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Indianapolis, Liberty Fund 1998) 16.

18 Charles de Secondat, baron de Montesquieu, 'The Spirit of the Laws', *Great Books of the Western World* (1952) 38 as quoted in Edward Hirsch Levi, 'Some Aspects of Separation of Powers' (1976) 76 Columbia Law Review 371, 373.

19 Vile (n 17) 59.

20 ibid 14.

21 ibid 234.

22 Walter Bagehot, *The English Constitution* (Paul Smith ed, Cambridge University Press 2001) 8.

coordination' between different branches is required for the state to function in a cohesive manner.[23]

The Cabinet-style parliamentary system also came to be adopted in India. It enabled some MPs, usually of the same party that is in majority in parliament or with the same political views as the party, to perform the duties of the executive. This form of government had its share of supporters and critics in the Constituent Assembly, and intense debates preceded it being enshrined in the Constitution. It was after two years of deliberation that in November 1948, Dr. BR Ambedkar, the Chairperson of the Constitution Drafting Committee, tabled the draft Constitution for consideration, proposing the parliamentary form of government for India.[24] Dr. Ambedkar differentiated the parliamentary system from the presidential form prevalent in the United States of America, and evaluated the two systems on two choices– stable executive or responsible executive. These were, in his view, mutually exclusive.

According to Dr. Ambedkar, the system in the United States of America and the Swiss system are more stable since the executive is not dependent for its existence on a majority in legislature and thus, cannot be dismissed by the legislature. However, he argued that the British Parliamentary system was more responsible even though less stable, as the executive must resign if it loses the confidence of the majority in the legislature. He also argued that in the presidential system, the responsibility of the executive is assessed periodically through elections while in the parliamentary system, it is assessed both periodically through elections and daily through questions, resolutions, debates, no confidence motions, etc. So, he averred, the draft Constitution preferred a responsible executive over a stable executive, and recommended a parliamentary form of government.

A debate that happened in the Constituent Assembly on the tendency of executive dominance in parliamentary forms of government is instructive. A member moved an official amendment to include the separation of powers as a principle in the Constitution.[25] The amendment was supported and criticised in equal measure.[26] The member moving the amendment argued that a complete

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[23] Eoin Carolan, *The New Separation of Powers, A Theory for the Modern State* (Oxford Scholarship Online 2010) 19.

[24] Constituent Assembly of India Debates (Proceedings) 4 November 1948, vol 7 <https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25> accessed 20 July 2022.

[25] Prof. KT Shah moved the amendment, "There shall be complete separation of powers as between the principal organs of the State, viz, the Legislative, the Executive and the Judicial." See Constituent Assembly of India Debates (Proceedings) 10 December 1948, vol 7 <http://loksabhaph.nic.in/Debates/cadebatefiles/C10121948.html>.

[26] ibid. For those opposing the Parliamentary form of government, see the arguments made by Kazi Syed Karimuddin and Prof. Shibban Lal Saksena, who also said that though it was too late to now consider the Presidential system but through the discussion the House got an

separation between the executive and the legislature is essential for safeguarding individual liberty, civil liberties, and the rule of law. Others argued that the legislature cannot remain independent and becomes submissive to the executive. Concerns of the opposition being neglected and crushed were also expressed.

Nevertheless, the parliamentary form of government came to be adopted in the hope of creating a responsible executive. In that regard, it is pertinent to note the importance ascribed in Dr. Ambedkar's speech to routine procedures of parliament (like questions, debates, and motions) in extracting accountability from the executive and making it responsible to the legislature. In operationalizing parliament's oversight on the executive, these procedures and the rules governing them are crucial, as they provide for the 'daily and periodic assessment' of ministerial responsibility.[27]

The Global Parliamentary Report 2017 ('GPR') produced by the Inter-Parliamentary Union and the United Nations Development Programme, which is based on data from one hundred and three parliaments and surveys of parliamentarians from one hundred and twenty eight parliaments, notes that parliaments are able to conduct effective oversight when they have the mandate to make it happen, as derived from either the Constitution or laws and rules of procedure.[28] The GPR further highlights that oversight-seeking instruments such as questions and committees create a mindset among governments that they may be required to justify their actions, which will not go uncontested. In the absence of such instruments, there could be inefficient policies and lack of transparency.[29]

The rules and procedures enable parliaments to exercise oversight over the executive because procedures act as constraints on the executive. It has been argued that though a majority government has the power to determine policy outcomes, it must act through parliament and conduct itself according to the rules of procedure.[30] These procedures may be amended to suit the government, such as the gradual expansion of the powers of the Speaker and strengthening of the control of the government on all matters in the context of

'opportunity to express its doubt as to whether we have done wisely in accepting the present system.' For those supporting the Parliamentary form of government, see the arguments made by K. Hanumanthaiya and K. Santhanam.

27 Kaul and Shakdher (n 7) 11.

28 Global Parliamentary Report 2017–Parliamentary Oversight: Parliament's Power to Hold Government to Account (Inter-Parliamentary Union and United Nations Development Programme 2017) <https://www.ipu.org/resources/publications/reports/2017-10/global-parliamentary-report-2017-parliamentary-oversight-parliaments-power-hold-government-account> accessed 20 July 2022 (Global Parliamentary Report).

29 ibid 16.

30 P Norton, 'Playing by the Rules: The Constraining Hand of Parliamentary Procedure' (2001) 7(3) Journal of Legislative Studies 13, 17.

the British Parliament. However, the need for modification indicates "that what previously existed was a constraint on the government."[31] It is thus contended that rules and procedures can counter, to some extent, the inherent potential in parliamentary systems for executive dominance.

However, the GPR report also notes that "governments jealously guard their control" over the allocation of time in parliament. It further acknowledges that the opposition must have the opportunity to "question, challenge and seek amendment to the government programme."[32] Therefore, even as procedures exist to constrain the executive and to empower legislatures to seek oversight, procedures also exist to empower executives to command control over the time of the legislature. This aspect of agenda control through procedures, to be discussed in detail in the next section, may provide the executive with superseding powers even over the procedures through which the legislature is to keep a check on the executive. Thus, the political contestation of power between the executive and the legislature also plays out through the design and application of the rules and procedures of parliament. This, in turn, impacts the ability of these two pillars of democracy to check each other.

III. AGENDA CONTROL THROUGH PROCEDURES – CONCEPTS AND IMPLICATIONS

For the purposes of this paper, agenda control is understood as control over the apportionment of the time of the legislature, which is to decide what the legislature's time will be spent on. This is premised on the understanding that time is a finite resource that needs to be governed carefully. An elected government has a limited duration to deliver on its policy mandate, which it must undertake through the legislature. The legislature, which also comprises of the opposition, has the same limited duration to extract accountability and present alternative policy proposals. As such, the contestation between the executive and the legislature results in both claiming the right to control how the legislature's time is spent. This is because the ability to gain or prevent access to the plenary time of the legislature is "the central source of power in democratic legislatures."[33]

In the everyday workings of parliament, agenda control manifests in controlling when, and for how long, the legislature convenes for its session, how much time is allocated every day for which business, and the power to curtail

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[31] ibid.

[32] Global Parliamentary Report (n 28).

[33] Gary W Cox and Matthew D McCubbins, 'Managing Plenary Time: The U.S. Congress in Comparative Perspective' in Eric Schickler and Frances E Lee (eds), *The Oxford Handbook of the American Congress* (Oxford: Oxford University Press 2011) 451–472.

and limit debate and deliberation. Since some policy decisions such as the annual budget are very time-sensitive, agenda control is considered a necessary evil, a compromise based on the acknowledgement of the "right of the majority to govern and the right of the minorities to be heard."[34] Since it is a compromise, it demands a principled approach from both the executive and the legislature to maintain this delicate balance.

Given the rule of the majority in parliamentary forms of government, it is easier for the executive to dishonour the compromise and command near-complete agenda control by exploiting procedural frameworks. For instance, for the suspension of Question Hour in the Monsoon Session of 2020, the executive resorted to the residuary powers of the Speaker before seeking the approval of the House for the same, thus reducing the latter to a mere formality. As will be explained in greater detail later, this session was convened as the country was in the grip of the pandemic, with the government pushed into a corner on its mishandling of the pandemic and its announcement of a strict nation-wide lockdown without proper preparation to deal with its outcome. The session was short in duration, and was primarily convened to seek the approval of the House on a large number of government Bills. By doing away with Question Hour and replacing it with the government's agenda, the executive managed to exact control on the time of the legislature and evade accountability.

In a study based on some procedures applicable to the Congress of the United States of America, it was shown through experimental models that "procedures matter when the cost of transacting agreements to get around them are high."[35] It was argued that parliamentary procedures affect outcomes, and that they are observed till the expected outcome is desirable and the transaction costs of negotiating and enforcing agreements to evade the procedures are low.[36] In the above example, observing Question Hour could have had a less than desirable outcome for the executive as it would have had to face probing questions from the legislature. Hence, it was done away with.

In parliamentary forms of government, the executive's power to control the plenary timetable to set the agenda of every day is considered an important aspect of agenda-setting. A study of parliamentary procedures in select European countries indicates "governments effectively controlling the flow of parliamentary business" in most countries, with some notable exceptions where the legislature itself is able to determine the agenda.[37] In such countries,

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[34] Herbert Döring, 'Parliamentary Agenda Control and Legislative Outcomes in Western Europe' (2001) 26(1) Legislative Studies Quarterly 145, 147.

[35] Kenneth A Shepsle and Barry R Weingast, 'When Do Rules of Procedure Matter?' (1984) 46(1) The Journal of Politics 206, 214.

[36] ibid 219.

[37] Michael Laver and Kenneth A Shepsle (eds), *Cabinet Ministers and Parliamentary Government* (Cambridge University Press 1994) 295.

legislatures find it almost impossible to get anything on the agenda, including a vote of no-confidence, the most stringent censure and check that the legislature can exercise on the executive.[38] In the context of the legislature demanding time to censure the government, the Rajya Sabha website notes that, "The apparent absurdity that the opposition asks for Parliamentary time to be set aside by the Government in order that the opposition may censure the Government, is not an absurdity at all."[39] This is in acknowledgement of the fact that government alone cannot lay claim on the time of the legislature: the opposition also can, and must.

In another study of parliamentary procedures in Western European democracies by Döring, it has been shown that 'executive dominance' is a matter of agenda control.[40] This study analyses Parliamentary procedures across several indicators, some of which have been referred to for this paper as well. The study begins by looking at who controls the plenary agenda, which requires setting 'the order of the day', each day.[41] Ranking eighteen Western European countries from higher to lower governmental control over the plenary agenda, it identifies seven variations. These range from the government alone determining the plenary agenda, to consensual agreements of party groups with the right of the majority to overturn the proposal, to the legislature itself determining the agenda.[42] Interestingly, the study shows that countries in which the executive exercises more control over the plenary agenda are also the countries where the executive is able to exert greater control on the functioning of legislative committees and curtail debate before the final vote on a Bill.[43]

Thus, the power of the government to control the agenda is derived, and to some extent circumscribed, by rules and procedures. In the next section of the paper, the procedures to determine the convening of a session, and deciding

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[38] For instance, in 2018 in India, the opposition's motion for vote of no-confidence was consistently rejected by the Speaker of Lok Sabha citing chaos and disorder in the House for several days, providing the government with an opportunity to push the Budget and Finance Bill in the House without any debate.

[39] Rajya Sabha Secretariat, *Practice and Procedure* (2005) <https://cms.rajyasabha.nic.in/UploadedFiles/Procedure/PracticeAndProcedure/English/25/INTRODUCTION1.pdf> accessed 28 July 2022.

[40] Herbert Döring (ed), *Parliaments and Majority Rule in Western Europe* (Campus Verlag St. Martin Press 1995) <https://www.mzes.uni-mannheim.de/d7/en/publications/book/parliaments-and-majority-rule-in-western-europe> accessed 20 July 2022.

[41] ibid 224.

[42] ibid 225.

[43] ibid 245. Some of the countries in this study have a semi-presidential system like in France, and a non-parliamentary system like Switzerland. Thus, it has been argued that the indicators used in this study are applicable to other forms of government as well. See George Tsebelis, 'Agenda Setting and Executive Dominance in Politics' in Steffen Ganghof, Christoph Hönnige and Christian Stecker (eds), *Parlamente, Agendasetzung und Vetospieler* (VS Verlag für Sozialwissenschaften 2009) 17.

the plenary agenda for debates on Bills and financial proposals of the government will be analysed.

IV. WEAKENING OF PARLIAMENTARY OVERSIGHT DUE TO THE EXECUTIVE'S AGENDA CONTROL - ANALYSIS AND EVIDENCE

Subject to the provisions of the Constitution, each House of Parliament may design its own rules and procedures to regulate its working.[44] Other than the Constitution and the rules and procedures adopted for a House, directions issued by presiding officers from time to time and conventions also govern the functioning of each House. In the subsequent paragraphs, a detailed analysis of three procedures will be undertaken to show how these have enabled an executive takeover of the agenda and prevented Parliament from providing an effective check on the executive. It is important to note that the procedures discussed here are not recent developments, as the discussion will show. In fact, most have regulated the Indian Parliament's working since its inception. As such, despite many innovations over the years in other rules, these procedures have withstood the test of time. Considering that these procedures enable tight executive control over the legislature, it is perhaps understandable that incentives for reform may not exist. However, what also becomes evident from the discussion is that over the years, procedures providing a balance by countering the executive's dominance with the rights of the legislature have also evolved - it is their increased manipulation in the last decade which raises concern.

For instance, in the 1990s, Department Related Standing Committees ('DRSCs') were established in both Houses of Parliament to enable the legislature to exercise oversight over the executive. Envisioned as mini-parliaments, these DRSCs were designed to enable a more focused, deeper, and largely apolitical study of legislative proposals before they were taken up for discussion in Parliament. Even though it is not mandatory to send a Bill to a DRSC, a healthy convention had developed which faced serious assault in the last decade. Research indicates that as opposed to 71% of all Bills being referred to a DRSC for study between 2009-2014, only 27% of Bills were sent to a DRSC after the regime changed in 2014. In the most recent term of the current government, since 2019, only 12% of Bills have been referred to DRSCs for study.[45]

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[44] Constitution of India 1950, art 118.

[45] MR Madhavan, 'Dormant Parliament, Fading Business' (*The Hindu*, 27 March 2021) <https://www.thehindu.com/opinion/lead/dormant-parliament-fading-business/article34173052.ece> accessed 20 July 2022.

Thus, this paper particularly focuses on data and analysis from the last decade, when the procedures or their manipulation have enabled, instead of checking, a rather aggressive form of 'executive aggrandisement.'[46] While acknowledging the structural weaknesses of parliamentary systems to check the executive, the capitulation of the legislature before the executive since the change of regime in 2014 has been spectacular: indicated, for instance, by India's free fall on the Varieties of Democracy Index.[47] Therefore, studying and measuring agenda control in parliament becomes a useful metric in determining the health of a democracy. Greater agenda control of the executive over the time of the legislature can be seen as both an indicator and an outcome of democratic backsliding in general. To that end, this paper also attempts to fill a critical gap in scholarship on the functioning of Indian democracy, which has not systematically and explicitly studied agenda control in the Indian Parliament so far. Finally, in the past decade, there has been a specific focus on the functioning of Parliament in the shadow of the pandemic, when the force of the executive's agenda control through procedures was possibly felt harder than usual, and required legislatures to rise to the challenge to provide effective oversight.[48]

A. The legislature can only be convened by the executive

In the Constituent Assembly, a point was raised to empower the presiding officers of the two Houses to summon a session of Parliament, instead of the President.[49] Dr. Ambedkar rejected the proposal, arguing that the President summons Parliament only when the executive government has business to place before the Houses. This was a candid admission that Parliament essentially convenes to discuss the executive's business, providing a normative justification for the executive controlling the agenda of Parliament. Thus, as per the Constitution, the President, on the aid and advice of the Council of Ministers headed by the Prime Minister, can summon the Houses of Parliament to meet at a time deemed fit.[50]

In practice, it is the Cabinet Committee of Parliamentary Affairs, headed by the Defence Minister of India at the time of writing, which considers and gives its recommendations on proposals to summon or prorogue the Houses

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[46] Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandisement and Party-State Fusion in India' (2020) 14(1) Law & Ethics of Human Rights 49.

[47] ibid.

[48] This comparative study shows how executive dominance in response to the pandemic rose in many democracies, prompting some parliaments to evolve innovative ways to continue effective oversight. See Erin Griglio, 'Parliamentary Oversight under the Covid-19 Emergency: Striving Against Executive Dominance' (2020) 8(1-2) Theory and Practice of Legislation 1.

[49] Constituent Assembly of India Debates (Proceedings) 18 May 1949, vol 8 <http://loksabhaph.nic.in/Debates/Result_Nw_15.aspx?dbsl=580>.

[50] Constitution of India 1950, arts 74 and 85.

of Parliament.[51] As expected, the Committee presently comprises of only Ministers.[52] Once the Cabinet approves the dates for summoning a parliamentary session, the same is submitted to the Speaker, who then directs the Secretary-General to obtain the order of the President.[53] It is interesting to note that on at least two occasions in the past, in 1955 and in 1958, proposals were made to obtain and notify the order of the President to summon Parliament under orders of the Ministry of Parliamentary Affairs, instead of those of the Speaker. However, such proposals were ultimately rejected as it was argued that the Speaker should communicate with the President so as to not leave the entire discretion of summoning the Lok Sabha to the government.[54]

However, the fact remains that the executive alone takes the decision on whether or when to convene a session of Parliament. As mentioned earlier, these sessions are convened only when the government wishes to place before the House business it wants to be transacted. This is the most fundamental manner in which the executive has taken control of the legislature, which has no power to convene itself and to decide its business. This is exacerbated by the absence of a fixed calendar of Parliamentary sittings, making the government's discretion absolute. In 2020, this resulted in the Indian Parliament sitting in session for thirty-three days only, a historic low.[55] The pandemic simply became a reason to aggravate a growing trend – from an average of one-hundred and twenty days in a year in the initial years of its functioning, to just seventy in the 1990s.[56] The 16th Lok Sabha (2014-19) sat for only three-hundred and thirty-one days, much lesser than the average sitting days of full-time Lok Sabhas at four-hundred-and-sixty-eight days.[57] The lesser the number of days that Parliament remains in session, the weaker is its ability to seek governmental accountability.

Other than the executive's control of the legislature, this trend of decreasing number of days for which Parliament is in session is a manifestation of the rise of political parties' influence, weakening checks and balances. In 2017,

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51 Ministry of Parliamentary Affairs, *Handbook of Ministry of Parliamentary Affairs* (2019) <https://mpa.gov.in/sites/default/files/Handbook-2019.pdf> accessed 20 July 2022.

52 Press Information Bureau, Reconstitution of Cabinet Committees-2019 - revised (2019) <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1573622> accessed 20 July 2022.

53 Kaul and Shakdher (n 7) 191.

54 ibid 192.

55 Anuja and Gyan Verma, 'Parliament may See Historically Low Number of Sittings this Year' (*Livemint*, 25 November 2020) <https://www.livemint.com/news/india/parliament-likely-to-have-historically-lowest-sittings-in-a-year-owing-to-covid-11606278740033.html> accessed 20 July 2022.

56 Trina Roy, 'If Parliament Doesn't Have the Power to Convene Itself, How Effective Can It Really be?' (*The Wire,* 22 November 2017) <https://thewire.in/government/parliament-doesnt-power-convene-effective-can-really> accessed 20 July 2022.

57 Kusum Malik, Sanat Kanwar, Manish Kanadje, Vital Stats – Functioning of the 16th Lok Sabha (2014-2019) (PRS Legislative Research, 13 February 2019) <https://prsindia.org/files/parliament/vital_stats/PRS%2016th%20LS%20Vital%20Stats.pdf> accessed 28 July 2022.

through a question in Parliament, the government was asked to explain the delay in holding the Winter Session, reportedly due to Assembly elections in Gujarat.[58] The government simply stated that precedents from previous governments exist for rescheduling the Winter Session of Parliament due to elections, and that the "time and duration of each session is decided by the government keeping in view exigencies of legislative business."[59] As political pursuits of a party in a state assembly election assume greater significance over the executive's accountability to Parliament, Parliament's effectiveness is dented.

In 2020, the Budget Session of Parliament was cut short and a day later, a lockdown was imposed across the nation through an executive fiat without taking Parliament into confidence. As the country grappled with many challenges, calls grew from MPs to convene the Monsoon Session as soon as possible. However, the government instead cited precedents for holding off on the session.[60] The unbridled executive power to single-handedly decide whether and when to convene a session of parliament enables the executive to avoid facing parliament and prevents debates on various issues if the executive is "uncomfortable in defending its actions".[61]

Perhaps this explains why the government hesitated to respond with procedural reforms to hold sessions virtually last year when it faced severe backlash for mishandling the migrant workers' crisis, even as the pandemic-induced lockdown led many countries to bring such procedural reforms. For instance, within a few weeks of the onset of the pandemic, hybrid sittings of parliaments (with some MPs joining virtually) were organised in the United Kingdom and Canada. The Bureau of European Parliament temporarily amended its rules, Chile amended its Constitution to permit MPs to deliberate and vote virtually, and closer home, the Maldives permitted MPs to join virtually using Microsoft Teams video conferencing technology.[62]

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[58] 'Winter Session of Parliament likely to be delayed due to elections in Gujarat and Himachal Pradesh' (*Firstpost*, 9 November 2017) <https://www.firstpost.com/politics/winter-session-of-parliament-likely-to-be-delayed-due-to-elections-in-gujarat-and-himachal-pradesh-4200885.html> accessed 20 July 2022.

[59] Rajya Sabha Debate 9 March 2019, unstarred question no. 1719 by Shri Husain Dalwai <https://pqars.nic.in/annex/245/Au1719.pdf> accessed 20 July 2022.

[60] CL Manoj, 'Many precedents of Session beginning in August, September: Joshi' (*Economic Times*, 2 July 2020) <https://economictimes.indiatimes.com/news/politics-and-nation/many-precedents-of-session-beginning-in-august-september-joshi/articleshow/76757791.cms?-from=mdr> accessed 20 July 2022.

[61] MR Madhavan, 'Parliament' in Devesh Kapur, Pratap Bhanu Mehta, and Milan Vaishnav (eds), *Rethinking Public Institutions in India* (OUP 2017) 75.

[62] Maansi Verma, 'Parliaments in the Time of Pandemic' (2020) 55(24) *Economic and Political Weekly* 14 <https://www.epw.in/journal/2020/24/commentary/parliaments-time-pandemic.html#:~:text=On%2023%20March%202020%2C%20the,of%20the%20Covid%2D19%20pandemic> accessed 20 July 2022.

In India, the request from some Parliament Committees to be allowed to meet virtually and deliberate on important matters of public concern was denied.[63] It was this hesitancy to bring procedural reforms which led India to a race to the bottom in a comparative study on whether and how different countries showed legislative leadership during Covid-19.[64] The parameters considered in this cross-country study included the number of sittings of the legislature, how effectively the legislature exercised oversight over the functioning of governments during the pandemic as compared to its effectiveness in doing so prior to the pandemic, and the constraints created by the pandemic. The study found that India did not display any legislative leadership.

Finally, much like the power to summon, the power to adjourn and prorogue a session also vests entirely in the executive. At the time of writing, seven, consecutive Parliament sessions since the beginning of 2020 had been adjourned ahead of the scheduled dates.[65] Since a session is convened primarily for the executive's business, a session can be adjourned or extended as per the calculations of the executive, without taking the legislature into confidence. This is the position even though it results in lost opportunities for MPs to question the executive and present private member Bills, resolutions, etc.[66] The presiding officers adjourn proceedings of their respective Houses sine die (for an indefinite period of time, which in parliamentary terms refers to adjourning the House at the end of one session till the next session is convened) without taking any formal consensus from MPs on the same.[67] The President prorogues the Houses thereafter.[68]

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[63] ibid.

[64] Rebecca Gordon and Nick Cheeseman, 'Legislative Leadership in the Time of Covid-19' (WFD 2021) <https://www.wfd.org/sites/default/files/2022-02/Covid-19-legislative-leadership-V5.pdf>.

[65] The Budget Session of 2020 was scheduled to go on till April 3, 2020, but was adjourned sine die on March 23, 2020 and prorogued by the President on March 29, 2020. The Monsoon Session of Parliament which was supposed to go on till October 1, 2020, was adjourned sine die on September 23, 2020 and was prorogued on September 30, 2020. The Budget Session of 2021 was supposed to go on till April 8, 2021, but was adjourned sine die on March 25, 2021 and prorogued on March 29, 2021. The Monsoon Session of Parliament was supposed to go on till August 13, 2021, but was adjourned sine die on August 11, 2021 and prorogued on August 31, 2021. The Winter Session of Parliament was scheduled to end on December 23, 2021, but was adjourned sine die on December 22, 2021 and was prorogued on December 24, 2021. The Budget Session of 2022 was scheduled to go on till April 8, 2022, but was adjourned sine die on April 7, 2022 and was prorogued on April 8, 2022.

[66] For instance, the first session of the current Lok Sabha was scheduled to go on till July 26, 2019 but was extended on July 25, 2019 without taking any consensus from MPs, which some opposition MPs objected to. See Lok Sabha Debate 26 July 2019, Shri Adhir Ranjan Choudhury's speech <http://loksabhadocs.nic.in/debatestextmk/17/I/26.07.2019r.pdf> accessed 20 July 2022.

[67] Lok Sabha Rules of Procedure (n 3) r 15 and Rajya Sabha Rules of Procedure (n 8) r 257.

[68] Constitution of India 1950, art 85(2).

However, on the advice of the Council of Ministers, the President may prorogue a sitting of the House even when it hasn't been adjourned sine die. This happened in 2016 when the Budget Session of Parliament was in its recess, but was prorogued midway as the executive urgently needed to bring an ordinance, which can only happen when both Houses of Parliament are not in session.[69] The exclusive power to control the procedures to summon, extend, adjourn, and prorogue Parliament's sessions has resulted in the loss of agency for the legislature in the workings of Parliament. It is interesting to note that in the British Parliament, MPs approve recesses in the sessions and in 2019, when the Queen prorogued a session with some weeks still to go, it was struck down by the United Kingdom Supreme Court as it prevented "Parliament from carrying out its constitutional role."[70]

B. Legislative agenda, time, and discourse are dictated by the executive

Once the executive decides to convene a session of parliament, the next exercise of executive discretion is in deciding the legislative agenda for a session, usually announced in advance but not always so. The tentative legislative agenda for the Budget Session of Parliament in 2021 was announced on the very day on which the session started, even though the summons for the session had been issued two weeks prior.[71] The legislative agenda needs to be announced sufficiently in advance to enable MPs to prepare for 'nuanced debate' on the proposed laws and policies.[72] However, executive influence doesn't end with deciding the legislative agenda- it also extends to whether and when any item on the agenda (legislative or otherwise) may be taken up.

A Business Advisory Committee ('BAC'), chaired by the Presiding Officer of the House and comprising of the leaders of the major parties, exists in both Houses. It decides when any government Bill or any other business may be taken up.[73] Though the BAC has an all-party setup, the government has a

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[69] Manish Chhiber and Liz Matthew, 'Uttarakhand Crisis: Parliament Session to be Prorogued, AG Mukul Rohatgi in Nainital' (*Indian Express*, 30 March 2016) <https://indianexpress.com/article/india/india-news-india/uttarakhand-crisis-presidents-rule-harish-rawat-floor-test-bjp/> accessed 20 July 2022.

[70] 'Johnson's Suspension of Parliament Unlawful, Supreme Court Rules' (*The Guardian*, 24 September 2019) <https://www.theguardian.com/law/2019/sep/24/boris-johnsons-suspension-of-parliament-unlawful-supreme-court-rules-prorogue> accessed 20 July 2022.

[71] The Budget Session of Parliament started on January 29, 2021 and the legislative agenda was announced the same day. The summons for the session was issued on January 14,2021.

[72] Chakshu Roy, 'This Monsoon Session is an Urgent Reminder of Long Overdue Reforms of India's Parliamentary Calendar' (*Scroll*, 17 July 2017) <https://scroll.in/article/844068/this-monsoon-session-is-an-urgent-reminder-of-long-overdue-reforms-of-indias-parliamentary-calendar> accessed 20 July 2022.

[73] For functions of BAC, see Lok Sabha Rules of Procedure (n 3) r 288 and Rajya Sabha Rules of Procedure (n 8) r 33. As per these rules, the BAC can only allocate time for items referred

greater presence and thus almost a 'veto' in deciding which business gets taken up when and in what form.[74] But even if a decision is reached in the BAC, it doesn't mean that the government will stick to it. In fact, several examples exist of the government coming up with surprises, some of which will be explored below.

As per the decision of the BAC, the agenda for each day is prepared by the Secretariat of the respective Houses and presented in the form of a List of Business ('LoB'), deviation from which is not ordinarily permitted.[75] However, there is another list called the Supplementary List of Business ('SLoB'). No explicit rules cover the SLoB, but it can be understood as a list through which the government includes in the LoB some urgent and pressing matters. In reality, it is a procedural innovation specifically designed to aid the executive in avoiding prior notice. The author's research shows that in the seventeen-day long Monsoon Session of 2021, as many as eleven SLoBs were brought, and six of these were to list Bills for introduction or passing. As per the rules, not only is a copy of the Bill circulated in advance before its introduction, but also some stipulated time is provided to MPs to read the Bill after its introduction and before it is taken up for discussion.[76] By springing legislation upon MPs in this manner, they are deprived of the opportunity to properly study and apply their minds to the legislation.

Research on Western European democracies indicates that executives with higher agenda control on average produce more conflictual or controversial Bills. This is because the transaction costs of law production are reduced, and the special prerogatives granted to the government incentivise it to tackle controversial Bills.[77] The experience from the Indian Parliament doesn't seem any different. For instance, on December 28, 2017, after weeks of speculation in the media, the government suddenly circulated an SLoB in the Lok Sabha for the introduction as well as the passage of the Muslim Women (Protection of Rights on Marriage) Bill, 2017.[78]

This happened again in a more extreme form on August 5, 2019. After intense troop buildup and a complete communication blockade in Jammu and

to it by the Presiding Officer, in consultation with the Leader of the House or Council, giving an upper hand to the government in closely managing the agenda of each day of sitting of Parliament.

74 Madhavan (n 61) 78.

75 Lok Sabha Rules of Procedure (n 3) r 31; Rajya Sabha Rules of Procedure (n 8) r 29.

76 Lok Sabha Rules of Procedure (n 3) r 64, read with Directions by the Speaker under the Rules of Procedure and Conduct of Business in Lok Sabha, direction 19B <http://loksabhaph.nic.in/direction/direction.pdf>; Lok Sabha Rules of Procedure (n 3) r 74(a).

77 Döring (n 34) 157.

78 'Second Supplementary List of Business dated December 28, 2017' (Lok Sabha Secretary General, 2018) <http://loksabhadocs.nic.in/lobmk/16/XIII/SSLOB28.12.2017.pdf> accessed 28 July 2022.

Kashmir, and in a bid to "catch the opposition unawares", the government pushed through the Rajya Sabha a law to reorganise the state of Jammu and Kashmir in complete disregard of rules, procedures, and settled conventions.[79] On December 20, 2021, the Election Laws (Amendment) Bill, 2021, pertaining to electoral reforms including the linkage of the Aadhaar card with the Voter Identity Card, was similarly suddenly listed for passage after being introduced that morning amid intense protests.[80] It is imperative to note that this practice to introduce surprise legislation pits one procedure against another, i.e., procedures which provide for executive supremacy are pitted against procedures which seek to temper this by providing for checks in the form of prior circulation. However, the executive's influence ultimately holds sway.

The executive's hold on the legislative as well as non-legislative agenda of the House is almost complete, leaving little room for individual legislators, the opposition, or minority parties to influence the agenda of Parliament. Along with the legislative agenda, the government's business comprising statements by Ministers, tabling of reports, moving different types of motions, etc., takes up almost three-fourth of the time of the House on any given day.[81] Only the rest of the time is available for mechanisms through which MPs can question the government on its policies, have non-legislative debates, or apprise the government of urgent policy matters or issues from their constituency for redressal. For Private Members' Business, through which MPs can propose legislation or resolutions for the consideration of the House, only two and a half hours on one day of the week are allocated, which is just 8.3% of Parliament's weekly sitting time.[82]

While it may be understandable that legislative business takes up a major portion of the legislature's time, that is no guarantee of proper scrutiny or informed deliberation. For instance, between 2009 and 2014, one-fourth of all Bills passed were passed in less than thirty minutes.[83] More recently, during the ten-day short Monsoon Session of 2020, 59% of the time of both Houses was spent on legislative business.[84] This was almost double the average time spent by the Lok Sabha on legislative business between 2014 and 2019.[85] However, fifteen Bills cleared by Parliament in that session, accounting for more than half of the total Bills cleared, were voted on by the Rajya Sabha in

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[79] Maansi Verma, 'Diminishing the Role of Parliament: The Case of the Jammu and Kashmir Reorganisation Bill' (2019) 54(45) EPW.

[80] 'Special List of Business: Bill for reference to Joint Committee' (Lok Sabha, 20 December 2021) <http://loksabhadocs.nic.in/lobmk/17/VII/SLOB20.12.2021.pdf> accessed 20 July 2022.

[81] Kaul and Shakdher (n 7) 483.

[82] Lok Sabha Rules of Procedure (n 3) r 26 and Rajya Sabha Rules of Procedure (n 8) r 24.

[83] Madhavan (n 61) 76.

[84] Manish Kanadje, 'Vital Stats - Parliament functioning in Monsoon Session 2020' (*PRS Legislative Research*, 23 September 2020) <https://prsindia.org/files/parliament/session_track/2020/vital_stats/PRS_17LS_Monsoon_2020_Vital_Stats.pdf> accessed 28 July 2022.

[85] Malik, Kanwar and Kanadje (n 57).

a matter of just two days, with just eight hours of debate in total.[86] Further, the author's research shows that in the Monsoon Session of 2021, the Lok Sabha cleared eighteen Bills with less than fifteen minutes of discussion each, and the Rajya Sabha cleared twelve Bills with less than thirty minutes of discussion each.

It must be remembered that the Monsoon Session of 2020 was convened when the Constitutional outer limit of six months' duration between two sessions was about to be breached.[87] The session was convened for only eighteen days, for which the government proposed a very ambitious legislative agenda of thirty-three Bills for consideration and passing in the Lok Sabha, and thirty-eight Bills in the Rajya Sabha, including eleven Ordinances that the government had promulgated in the inter-session period.[88] The eighteen-day Monsoon Session eventually ended in ten days, having cleared twenty-seven Bills, with just five of those having been studied by a Parliament Committee. The government managed to get many legislations approved in a short span of time, and hence, the session was declared productive.[89] Subsequently, the Winter Session was cancelled altogether, again citing the pandemic as a reason, with the opposition alleging that the government was avoiding responding to the demands of the protesting farmer organisations.[90] By delaying a session, convening a short session, designing the latter in a manner which maximises the government's business completion, and not providing enough opportunity to legislators to properly scrutinise Bills, the executive manages to manipulate the 'time' of the legislature to the former's advantage.[91]

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[86] Rajya Sabha Debate 22 September 2020 DC-GS/1A/9.00 <http://164.100.47.7/newdebate/252/22092020/Fullday.pdf> and 23 September 2020 NBR-ASC/1A/9.00 <http://164.100.47.7/newdebate/252/23092020/Fullday.pdf> accessed 20 July 2022.

[87] The Budget Session of Parliament last year was cut short on March 23, 2020. The Monsoon Session was convened on September 14, 2020. As per the Constitution of India 1950, art 85(1), six months shall not intervene between the last sitting of one session of Parliament and first sitting of the next session.

[88] Lok Sabha Bulletin-II 10 September 2020 <http://loksabhadocs.nic.in/bull2mk/2020/10.9.2020.pdf> accessed 20 July 2022; Rajya Sabha Bulletin 10 September 2020 <http://164.100.47.5/newsite/bulletin2/Bull_No.aspx?number=60123> accessed 20 July 2022.

[89] Lok Sabha Debates 23 September 2020 <http://loksabhadocs.nic.in/debatestextmk/17/IV/23.09.2020f.pdf> accessed 20 July 2022; Rajya Sabha Debates 23 September 2020 <http://164.100.47.5/Official_Debate_Nhindi/Floor/252/F23.09.2020.pdf> accessed 20 July 2022.

[90] 'Government Cancelled Parliament Winter Session to Avoid Questions on its Failures: CPI(M)' (*The Hindu*, 20 December 2020) <https://www.thehindu.com/news/national/government-cancelled-parliament-winter-session-to-avoid-questions-on-its-failures-cpim/article33378052.ece> accessed 20 July 2022.

[91] Maansi Verma and Malavika Prasad, 'Parliament Logjam Part 11: Time, the Unseen Yet Powerful Factor of Politics, is Key to Con' (*Firstpost*, 4 June 2018) <https://www.firstpost.com/india/parliament-logjam-part-11-time-the-unseen-yet-powerful-factor-of-politics-holds-key-to-controlling-legislative-discourse-4494933.html> accessed 20 July 2022.

Time is manipulated when routine parliamentary procedures designed to enable gradual and studied deliberations on laws and policies are seen as obstructing the executive's agenda, especially in a year of crisis. It does not come as a surprise then, that regular observers of the Indian Parliament believe that the procedural norms of Parliament began eroding in the 1970s due to, and in the aftermath of, the imposition of the Emergency.[92] The pandemic last year accelerated the redundancy of parliamentary procedures and proper legislative scrutiny and oversight.

Since the government exercises rigid control on the business taken up in the House, the opposition may not get sufficient opportunities to set the agenda or push for discussions on issues inconvenient for the government. It has been argued that enough political incentives do not exist for opposition parties in parliament to seek everyday accountability; instead, they focus more on controversial scams and scandals.[93] This then results in the opposition resorting to protests and disruptions in the House which, as some MPs have argued, can be a 'legitimate tactic' in the face of an unyielding executive.[94] However, this creates a vicious circle where disruptions are used as an excuse by the executive to push for the government agenda, sacrificing other work. The current government has blamed the previous government for passing as many as eighteen Bills amidst ruckus between 2006 and 2014, even as it continues to do the same.[95] In just one Monsoon Session of 2021, as many as nineteen Bills were cleared amidst ruckus and protests by the opposition. In this context, the Rajya Sabha website notes that while the opposition has no right to obstruct a session, "in the sense of making barren or unproductive", the government must also respect the rights of the opposition as "evidence of the soundness of its parliamentary faith."[96]

C. The legislature's oversight on the executive's budget, weakened

The Lok Sabha has the power to approve or disapprove demands for grants by the executive from the Consolidated Fund of India, or in other words, the budget of the government for its proposed expenditure.[97] This power is perhaps

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92 Devesh Kapur and Pratap Bhanu Mehta, The Indian Parliament as an Institution of Accountability (UN Research Institute for Social Development, 2006) <https://www.unrisd.org/80256B3C005BCCF9/%28httpAuxPages%29/8E6FC72D6B546696C1257123002FCCEB/$file/KapMeht.pdf> accessed 20 July 2022.

93 ibid 10.

94 Arun Jaitley, 'Defending the Indefensible' (*The Hindu*, 28 August 2012) <https://www.thehindu.com/opinion/lead/defending-the-indefensible/article3828649.ece> accessed 20 July 2022.

95 'UPA Passed 18 Bills Amid Ruckus, Modi 2.0 on Same Track' (*Economic Times*, 7 March 2020) <https://economictimes.indiatimes.com/news/politics-and-nation/upa-passed-18-Bills-amid-ruckus-modi-2-0-on-same-track/articleshow/74519650.cms?from=mdr> accessed 20 July 2022.

96 Rajya Sabha Secretariat (n 39).

97 Constitution of India 1950, art 113.

one of the most stringent checks of the legislature on the executive, as the government's inability to get its budget approved by parliament is automatically considered a vote of no-confidence.[98] The procedure for the passage of the Budget is as follows – the Finance Minister presents the Budget in the Lok Sabha.[99] This is immediately followed by the introduction of the Finance Bill to give effect to the financial proposals of the government for the upcoming financial year.[100] The demands for grants for different ministries are tabled in the Lok Sabha,[101] a general discussion on the Budget takes place,[102] the demands for grants are referred to standing committees for detailed scrutiny, while the session adjourns for a recess.[103] The session then reconvenes, and some demands for grants are taken up for discussion and vote.[104] On the last day allotted for voting on the demands for grants, the remaining demands for grants are put to vote together in a process which is called the 'guillotine'.[105] After the vote on all demands for grants, the Appropriation Bill (to appropriate funds out of Consolidated Fund of India) is voted upon.[106] Finally, the Finance Bill is voted upon.[107]

Of the three parliamentary sessions conventionally held in a calendar year, the Budget Session alone is focused on discussions related to, and the passage of, the Budget of the government. Despite that, on average, in the last fifteen years, the Lok Sabha spent only 33% of its time during the Budget Session discussing the Budget.[108] The number of days to be devoted to the discussion of the Budget is proposed by Minister of Parliamentary Affairs and approved by the BAC.[109] Thus, in effect, the time spent by the Lok Sabha to discuss the Budget is decided by the government, thus providing it with complete discretion in this regard. In the Budget Session of 2021, the government had allocated sixteen of the thirty-three days of the session to discussions on the Budget, but the Lok Sabha ended up spending only 38% of its time debating the Budget.[110] In this time, the Lok Sabha managed to discuss only 24% of the Budget in detail before voting, which means that 76% of the Budget

98 Kapur and Mehta (n 92) 4.
99 Lok Sabha Rules of Procedure (n 3) r 204.
100 Kaul and Shakdher (n 7) 786.
101 Lok Sabha Rules of Procedure (n 3) r 206.
102 ibid r 207.
103 ibid r 331-E(1)(a).
104 ibid r 208(1).
105 ibid r 208(2).
106 Constitution of India 1950, art 114, read with Lok Sabha Rules of Procedure (n 3) r 218.
107 Lok Sabha Rules of Procedure (n 3) r 219.
108 'Parliament functioning in Budget Session 2020' (*PRS Legislative Research*) <https://prsindia.org/parliamenttrack/vital-stats/parliament-functioning-in-budget-session-2020> accessed 28 July 2022.
109 Kaul and Shadkher (n 7) 789.
110 Manish Kanadje, 'Vital Stats– Parliament functioning in Budget Session 2021' (*PRS Legislative Research*, 25 March 2021) <https://prsindia.org/files/parliament/session_track/2021/vital_stats/Budget_2021_Vital_Stats.pdf> accessed 28 July 2022.

was passed without discussion, through guillotine.[111] Data suggests that in the last eighteen years, on average, 83% of the Budget has been passed without discussion.[112]

This is an example of the government's discretion, as it alone can decide when detailed discussions need to end and when the voting process needs to start. The Budget Session of 2018 saw the entire Budget of the government pushed for passage within an hour and amidst chaos, without any discussion, i.e., 100% guillotine. This happened as the days allotted for discussion and voting on the Budget saw disruptions related to the opposition's demand for a no-confidence motion.[113] In the past, 100% guillotine has also happened in 1999-2000, 2004-05 and 2013-14.[114] In 2018, the Finance Bill was also passed within eighteen minutes, without any discussion.[115] In 2020, the Finance Bill was passed within an hour without any discussion, as the government curtailed the Budget Session ahead of schedule, a day before imposing a nationwide lockdown.[116]

The Finance Bill is supposed to contain the taxation proposals of the government for one year only, but it is not uncommon for governments to slip in non-financial proposals. This militates against the convention of not making permanent changes through an annual finance Bill.[117] This prevents the oversight of the Rajya Sabha on matters which are not financial in nature, since the Finance Bill is a Money Bill for which the Rajya Sabha's approval is not needed. In 2017, the Finance Bill contained controversial non-financial provisions for restructuring tribunals, allowing anonymous political donations through electoral bonds, making Aadhaar mandatory for applying for a Permanent Account Number, etc.[118]

Demands for grants for different Ministries are studied by Standing Committees when Parliament is in recess during the Budget Session, but that may not always happen. For example, in 2011, senior MPs were busy with state assembly elections and hence no Committee scrutinised the grants.[119]

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111 ibid.

112 ibid.

113 Kusum Malik, Roshni Sinha and Gayatri Mann, 'Vital Stats– Parliament Functioning in Budget Session 2018' (*PRS Legislative Research*, 6 April 2018) <https://prsindia.org/files/parliament/session_track/2018/vital_stats/Vital%20Stats%20-%20Budget%20Session%202018.pdf> accessed 2 August 2022.

114 Kaul and Shakdher (n 7) 796.

115 Malik, Sinha and Mann (n 113).

116 Verma (n 62).

117 Kaul and Shakdher (n 7) 812.

118 Mandira Kala, 'How Finance Bill Amendments Affect Tribunals' (*Indian Express*, 27 March 2017) <https://indianexpress.com/article/explained/budget-2017-finance-Bill-amendments-tribunals-arun-jaitley-4586925/> accessed 20 July 2022.

119 Madhavan (n 61) 90.

However, what weakens legislative scrutiny is that the Standing Committees are getting lesser and lesser time to study the demands for grants in detail. Since the Budget Session is designed with a recess in between, during which the Standing Committees study the demands for grants, curtailing the period of recess directly impacts the level of scrutiny of the Budget. A manifestation of the complete discretion of the government to design a session has been that from a forty-day recess in 2016, the recess came down to only twenty days in 2021.[120]

During the recess, the Standing Committees are required to take evidence from Ministry officials regarding the performance of various schemes for which funds are sought, and even consult other stakeholders and prepare a detailed report with recommendations. These reports are then tabled once the Lok Sabha reconvenes, and are referred to by MPs when demands for grants are taken up for voting in the House. A smaller recess prevents timely and proper scrutiny by the Committees. In the Budget Session of 2021, the Standing Committee on Food, Consumer Affairs and Public Distribution, expenditure on which constitutes 7.4% of the total government Budget expenditure, submitted its report after the Budget had already been cleared, thus defeating the purpose of undertaking the exercise.[121]

It is interesting to note that the Constitution empowers Parliament to enact a law to regulate the procedure for the timely completion of financial business.[122] So far, no law has been enacted and hence, the exercise of passing the Budget is governed by rules and procedures which provide the executive with an upper hand. The rules empower the Speaker to exercise "all such powers as are necessary" for the timely completion of financial business.[123] This, in effect, empowers the government to control the legislature's oversight on the Budget through the office of the Speaker, as the passing of the Budget and Finance Bill without any discussion cannot happen without the permission of the Speaker. The Speaker is also the constitutional authority to certify a Bill as a Money Bill, thus legitimising the government's attempt to bypass the Rajya Sabha by including non-financial proposals in the Finance Bill.[124] In fact, research shows that the executive is increasingly resorting to the Money Bill route: between May 2004 and September 2018, the number of Money Bills passed was 21% more than that of ordinary Bills.[125]

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[120] Data collected from the scheduled dates of Budget Sessions since 2016.

[121] Suyash Tiwart, 'Explained: Parliamentary Scrutiny of Union Budget 2021-22' (*CBNC TV18*, 25 March 2021) <https://www.cnbctv18.com/politics/explained-parliamentary-scrutiny-of-union-budget-2021-22-8723451.htm/amp?__twitter_impression=true> accessed 20 July 2022.

[122] Constitution of India 1950, art 119.

[123] Lok Sabha Rules of Procedure (n 3), r 221.

[124] Constitution of India 1950, art 110(3).

[125] Devyani Chhetri, 'As Justice Chandrachud Calls Aadhaar Law "Unconstitutional", Government Increases Use of Controversial Short Cut' (*Bloomberg Quint*, 3 October 2018)

With respect to the Budget, it is argued that voters gain if there is a kind of check and balance system which provides the executive with "agenda setting power over the size of the Budget" and the legislature with the "agenda setting power over the composition."[126] This results in splitting the Budget process into two stages between two bodies, but ultimately requiring both to agree. The Constitution does provide for a similar process, empowering the House of the People to alter a demand for grant by reducing its size. However, by virtue of its complete control over the Budget procedure, the executive's control on the size as well as the composition of the Budget is total.

V. CONCLUSION & RECOMMENDATIONS

In the Constituent Assembly, a critical debate took place discussing how Parliament at that time, and the legislatures in some provinces, worked for very few days in a year. This prompted some members to demand continuous sessions, and to reduce the time period between one session and next.[127] In response, Dr. Ambedkar observed that the earlier practice may have been for the "executive to shun the legislature", but he expressed confidence that no "executive would hereafter be capable of showing this kind of callous conduct towards the legislature." This may have happened had a system vulnerable to executive dominance been subject to checks and balances by suitable procedures. However, when the procedures enable executive supremacy, the structural tendency inherent in the system gets aggravated, as is evident from the analysis above.

Sole executive discretion in convening a session has progressively brought down the number of days Parliament sits in a year and has dented its oversight. The executive's tight control on the time and agenda of legislative discourse has resulted in diminishing legislative scrutiny and check by Parliament. Further, executive dominance in Budget-related matters has resulted in an increasingly high proportion of the Budget being passed without sufficient review and discussion. Even as the opposition must acknowledge the government's right to govern, the government must also work within procedural constraints as the same provide legitimacy to its actions. In the absence of procedures or the observance of procedures which provide adequate and meaningful opportunities for the legislature to perform its responsibility of oversight, harmony and cooperation between the executive and the legislature for effective administration cannot be achieved.

<https://www.bloombergquint.com/law-and-policy/as-justice-chandrachud-calls-aadhaar-law-unconstitutional-government-increases-use-of-controversial-short-cut> accessed 20 July 2022.

[126] Torsten Parsson and others, 'Separation of Powers and Political Accountability' (1997) 112(4) The Quarterly Journal of Economics 1163, 1166.

[127] Constituent Assembly of India Debates (n 49).

Given the current state of things, what can be done? Before proposing potential reforms, it is important to rule out some reforms as well. This paper has argued that the parliamentary form of government tends to be disposed towards executive dominance, and the procedural workings of the institution reinforce that tendency. However, the examples shared within this paper have also shown that some parliamentary governments have provided the legislature with greater agenda control powers in their internal procedures, indicating the possibility of a more balanced sharing of power between the executive and the legislature within the current system. Therefore, this paper has not attempted to study or propose a pivot to a presidential form of government.

It is interesting to mention here that a study of the policymaking power of opposition players in fifty legislative chambers across variables such as the power of the initiation of Bills, agenda setting, committee procedures, etc., finds that the regime type (parliamentary or presidential) does not influence the policy-making power of opposition players.[128] Power-sharing between the executive and the legislature, between the government and the opposition, and between the majority and the minority varies across different types of governments. Thus, this paper only proposes reforms within the procedural workings of the parliamentary form of government in India. The paper also proposes reforms keeping in mind that in a parliamentary set up in which governments are formed by the majority, minority members and opposition members are legitimate stakeholders and must occupy their legitimate space. Therefore, reforms are proposed which strike a balance between the government's right to govern and the opposition's right to question, seek accountability, propose alternatives, and create narratives.

The table below suggests some potential reforms to overcome executive dominance.

Rule of procedure	**What causes executive dominance presently**	**How can agenda control powers be shared between the legislature and the executive?**
Procedure to convene and adjourn a session of parliament	Executive's unilateral power to decide when and for how long a session has to be convened.	A multi-party committee of parliament should decide its own calendar in advance.[129]

[128] Simone Wegmann, 'Policy-making Power of Opposition Players: A Comparative Institutional Perspective' (2020) The Journal of Legislative Studies 1, 18.

[129] Parliaments like that of the United Kingdom, Canada, Australia, South Africa and some European countries follow this procedure. *See* Vatsal Khullar, 'Role of Parliament in Holding the Government Accountable' (*PRS India*, 22 November 2017) <https://prsindia.org/theprs-blog/role-of-parliament-in-holding-the-government-accountable> accessed 20 July 2022.

Rule of procedure	**What causes executive dominance presently**	**How can agenda control powers be shared between the legislature and the executive?**
Setting agenda for each day of the session	The Government unilaterally decides the agenda and the BAC allots time for it, but government has more presence and almost a 'veto' in the BAC.	The National Commission to Review the Working of the Constitution had recommended- "In order to ensure better scrutiny of administration and accountability to Parliament, Parliamentary time in the two Houses may be suitably divided between the government and the opposition."[130] Opposition days, a common practice in several democracies, will help achieve that. A Private Member Bill in Parliament had also been proposed for the convening of a special session for which the agenda would not be decided by the government but by other political parties.[131] This would also provide a systematic framework for realizing opposition rights.
Procedure regarding financial business	Executive's sole prerogative on how many days to allot for discussion on Budget, when to guillotine.	Having a multi-party Committee set the calendar in advance, which can help design better, longer Budget sessions; providing more time to the Standing Committees to study budgets, and more time for Parliament to debate budgetary proposals.

However, it must be noted that any procedural reform will require initiative by the government, and if not by the government, by the opposition, even though the government may remain unresponsive. During the pandemic, when Parliament Committees were unable to meet physically, some opposition MPs had requested for virtual Committees to be permitted. To this, the Speaker of Lok Sabha said that rules regarding the same need to be discussed by the Rules Committee of Lok Sabha, and if any change is then proposed, it will have to be approved by the House.[132] However, the Rules Committee of Lok

[130] The Hindu Centre, Summary of Recommendations: Report of the National Committee to Review the Working of the Constitution (The Hindu Centre, 2002) <https://legalaffairs.gov.in/sites/default/files/chapter%2011.pdf > accessed 20 July 2022.

[131] The Parliament (Enhancement of Productivity) Bill 2017 <http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/parliament-24317-E.pdf> accessed 20 July 2022.

[132] Liz Mathew, 'Not My Call; No Consensus Among Parties on Virtual House Panel Meetings, Says Speaker' (*Indian Express*, 19 June 2021) <https://indianexpress.com/article/india/

Sabha, chaired by the Speaker himself, hasn't met since its constitution in October 2019.[133] It has been argued that for a government, the price of change in rules is big: it needs to expend time and intellectual resources to change rules, and there may be a future price as well, as any change made today may be at its disadvantage tomorrow if it is voted out.[134] It is thus incumbent on the opposition and civil society to demand procedural reforms which can strengthen the legislature's check on the executive.

virtual-house-panel-meetings-lok-sabha-speaker-om-birla-7365603/> accessed 20 July 2022.

[133] Lok Sabha, Other Parliamentary Standing Committees (Lok Sabha) <http://loksabhaph.nic.in/Committee/CommitteeInformation.aspx?comm_code=40&tab=2> accessed 26 January 2022.

[134] Norton (n 30) 27.

THE MAJESTY AND DIGNITY OF COURTS: CHANGES IN COURT DYNAMICS WITH THE ONSET OF THE COVID-19 PANDEMIC IN INDIA

—Dr. Rahela Khorakiwala*

The procedures and practices of courts were brought to a sudden halt with the onset of the Covid-19 pandemic. This led to the promulgation of virtual courts where previously known traditions of the courts changed in many ways. The dress code was watered down and the understanding of the majesty and dignity of courts had to be re-established. This paper documents the seismic changes that occurred in virtual courts and how the courts had to keep redefining what contempt meant in the context of virtual courts. It is argued that majesty and theatrics affect the dispensation of justice, so when it is slightly 'lowered' – as was during the pandemic – the seriousness of the justice process is also scrutinised. The question remains as to whether timing, manner, and presentation are still relevant in times of Covid-19. The paper begins with a theoretical explanation of the majesty and dignity of courts in the pre-pandemic era. The next two sections illustrate the theatre of the court, pre-Covid-19 and during Covid-19. The following section is an ethnographic account of the redefining of majesty and dignity in virtual courts. The conclusion discusses the effect of the pandemic on the re-imagining of the spatial dynamics of courts in India.

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I. INTRODUCTION

Existing ideas of courts, their spatial dynamics, the strict adherence to the dress code, and the ban on any form of photography and visualisation of courts are intrinsically linked to the majesty and dignity of courts. These processes have often limited the physical access to justice.[1] These procedures and practices were brought to a sudden halt with the onset of the Covid-19 pandemic. Almost overnight, the court systems were forced to adapt to digital platforms to remain accessible, even if in a very limited form. During my fieldwork (pre-pandemic), there was a lot of resistance to the live telecasting of court proceedings and/or video recordings.[2] However, with no other option during the pandemic, judges started conducting what they were permitted to define as urgent hearings through video conferencing. The dress code and dignity of the court remained in focus at this time too. As the pandemic continued and brought wave after wave, the judicial system had to continuously expand the scope of virtual courts. During this time, the courts witnessed various seismic changes to their procedures, processes, and authority.

In this paper, I focus on the changes in courts that affected their existing understanding of majesty and dignity, and how courts had to keep redefining what contempt meant for virtual courts. Instances of this were seen in the way courts dealt with lawyers appearing from cars to lawyers appearing in vests and smoking hookahs on screen during live court proceedings. While in the Bombay High Court some judges appeared in white shirts without the band and gown, arguing lawyers were also not in full dress code.[3] On the other hand, in the western state of Rajasthan, a lawyer appeared wearing a vest during a video conference before the High Court. The judge was displeased by the lawyer's appearance and adjourned the matter.[4] At this point, the judge requested the Bar Association to urge all lawyers to appear in uniform even through video conferences. In the Bombay High Court, fuelled by some audio disruptions, a circular was issued cautioning that, "Though virtual,

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1 Linda Mulcahy, 'Architects of Justice: The Politics of Courtroom Design' (2007) 16 (3) Social and Legal Studies 383; Rahela Khorakiwala, *From the Colonial to the Contemporary: Images, Iconography, Memories and Performances of Law in India's High Courts* (Oxford Hart Publishers 2019).

2 Khorakiwala (n 1).

3 Observation based on an open-source video conference hearing held.

4 'COVID-19: Advocate Appears in his Vest on Video Conference before Rajasthan HC; Bar Association Asked to Inform All to Appear in Uniform' (*Bar and Bench*, 10 April 2020) <https://www.barandbench.com/news/litigation/advocate-appears-in-his-baniyan-on-video-conference-before-raj-hc-bar-association-asked-to-inform-all-to-appear-in-uniform> accessed 1 July 2021.

this is nonetheless a court hearing, and therefore appropriate court conduct is required."[5]

Mithi Mukherjee indicates that independence did not mark a break from the colonial past that India had inherited; in fact, the Indian state continued to evolve under the "shadows of empire".[6] This is applicable within the judicial system that the British introduced in 1862 and continued through the establishment of the colonial courts, beginning with the Calcutta High Court in 1872.[7] Certain colonial practices are more pronounced in the erstwhile colonial High Courts of India when compared to post-colonial courts.[8] The notions of majesty and dignity that have been carried forward continue to reshape themselves in the post-colonial context. The most recent adaptation has been through the perpetuation of these ideas in virtual courts. Majesty and dignity have been redefined but continue to play a significant role in the administration of justice during the pandemic.

What then does this mean for the future of courts and their 'majesty' and 'dignity'? In such times should the courts still seek to implement traditional practices of a strict dress code? While the idea of any video device in court had not yet been warmed up to, it has now become a reality to deal with the current crisis. Are the courts adapting or will they go back to traditional court procedures once normalcy returns? In such unprecedented times, merely accessing the courts has become important and therefore a lawyer not wearing the band and gown in the Bombay High Court was not considered to be puncturing the majesty of the court. However, the wearing of the vest was unacceptable to another judge. Where then is the line drawn? It can be argued that the majesty and theatrics affect the dispensation of justice, so when it is slightly lowered– as is the case in the current pandemic – the seriousness of the justice process is also scrutinised. The question remains as to whether timing, manner, and presentation are still relevant in times of Covid-19.

As news keeps trickling in on the various challenges the court faces, and how it reacts to the same, I argue how a life-changing event might have a long-lasting effect on the way courts render access to justice.

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5 'Video Conferencing Blues Amid COVID-19 Lockdown: Raj HC Defers Bail Pleas Finding it not Feasible to Hear "So Many Counsel Simultaneously"' (*Bar and Bench,* 15 April 2020) <https://www.barandbench.com/news/litigation/video-conferencing-blues-amid-covid-19-lockdown-raj-hc-defers-bail-pleas-finding-it-not-feasible-to-hear-so-many-counsel-simultaneously> accessed 1 July 2021.

6 Mithi Mukherjee, *India in the Shadows of Empire: A Legal and Political History (1774 – 1950)* (Oxford University Press 2019).

7 The Calcutta High Court was established by statute in 1862, but the court building began construction in 1864 and was completed in 1872.

8 Khorakiwala (n 1).

The paper begins with a theoretical explanation of the majesty and dignity of courts in the pre-pandemic era. This section highlights how courts are designed, and the inherent contradictions of inequality that are built into court structures. The following two sections describe the theatre of the court, at first in pre-Covid-19 times, followed by a description of the same theatre of the court during Covid-19. These two sections detail daily court proceedings and rituals, and contrast how this has changed from a physical court setting to a virtual court setting. This leads to the next section, which is an ethnographic account of the redefining of majesty and dignity in virtual courts. The paper ends with the conclusion that discusses the effect of the Covid-19 pandemic on the re-imagining of the spatial dynamics of courts.

II. THE THEATRE OF THE COURT: A THEORETICAL UNDERSTANDING OF THE MAJESTY AND DIGNITY OF COURTS

In my recently published book,[9] I argue that certain colonial practices continue to be followed in contemporary times in the erstwhile colonial courts of India, leading to issues of access to justice. My research, based on my ethnographic fieldwork, navigates through the High Courts located in the cities of Kolkata, Mumbai, and Chennai. I make my observations through various registers, some of which include, but are not limited to, the architecture of these court spaces, the spatial ritualisation followed in these courts, the prescribed dress code for court proceedings and the ban on imaging through photography, video recording, live telecasting and sketching of court proceedings. I examine these aspects through the visual culture of courts and the judicial iconography that is displayed through these practices. The importance given to the maintenance of the majesty and dignity of the court was of great relevance. In this context, contempt of court has been directly linked to the lowering of the authority and majesty of the court. On contempt, the Supreme Court of India has held, "This jurisdiction may also be exercised when the act complained of *adversely affects the majesty of law or dignity of the Courts*. The purpose of contempt jurisdiction is to uphold the majesty and dignity of the Courts of law."[10]

A recurrent emotion when entering large court structures is that there is a sense of awe towards the space, the process, and the people.[11] As Peter Goodrich argues, the 'visual metaphor' is important in the scheme of justice wherein justice is something that must be visible, which captures the "symbolic

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[9] Khorakiwala (n 1).

[10] *Prodip Kumar Biswas v Subrata Das*, (2004) 4 SCC 573.

[11] I observed this during my ethnographic fieldwork in the first three colonial High Courts of India as documented in my book. *See* Khorakiwala (n 1).

presence of law as a façade."[12] As Goodrich explains, a day in court can be a very frustrating experience in terms of the confusion, ambiguity, and panic that the process creates and, "…if justice is seen to be done it is so seen by outsiders to the process."[13]

Goodrich argues this on different registers when he describes the didactic nature of courts, along with the language used, acoustic difficulties faced by people in court, and the imposition of a dress code without meaning. The important attributes of justice that contribute to the symbolic façade of law include the study of the architecture of courts and courtrooms, use of the internal space in courtrooms, seating arrangements for the different court actors, the dress worn by the participants of the court process, and the props used in the process of justice, that is, the mace, the black gown and white band. The common thread amongst these attributes is the images of justice they create for the law within the space of a court structure. Reading the literature on iconographical and iconological symbolism allows the courts to be understood in terms of the influence that the surroundings have on them.[14] In round tables on law and semiotics, Goodrich recognised and denotes categorically that,

> Discursive restrictions upon forms of address, time and tone of speech, narrative content and forms of reference combine to create a powerfully oriented genre of legal paraphrase in which *symbolic recognition of the authority of the court* is the overriding message conveyed or, more properly, announced by the law (*emphasis added*).[15]

Here, the idea of the 'symbolic recognition' of the authority of the court is important. The symbols that generate the authority may range from the architecture of the court to the dress and seating arrangements used in the court process. They all talk directly to the maintenance of the majesty and dignity of the courts.

In terms of the architecture of court buildings itself, certain specific aspects are seen across court structures. Courts are usually built above the ground level, to create an imposing effect on the people that walk the streets along the courts. Windows in court buildings are generally tall and narrow, and in

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[12] Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (Weidenfeld and Nicolson 1990) 188.

[13] ibid.

[14] *See* Erwin Panofsky, 'Iconography and Iconology: An Introduction to the Study of Renaissance Art' in Erwin Panofsky (ed), *Meaning in the Visual Arts* (University of Chicago Press 1982) 26-54; Roberta Kevelson, 'Introduction to the First Round Table on Law and Semiotics' in Roberta Kevelson (ed), *Law and Semiotics* (Plenum Press 1987) 1-24.

[15] Peter Goodrich, 'Modalities of Annunciation: An Introduction to Courtroom Speech' in Roberta Kevelson (ed), *Law and Semiotics* (Plenum Press 1988) 143.

most cases, inaccessible.[16] Although the entrance to a court will be inviting, in all likelihood entry will be limited to the members of the judiciary who are at the top of the legal hierarchy. With the elevated entrance, access only becomes more restrictive and imposing. Goodrich summarises, in one sentence, the feeling of a person thus walking to the court, that, "the threshold to the court building will be marked and physical access to the seats of justice will involve both a visual and conceptual ascension from the quotidian street to the ritualized space."[17]

The visual field of law is also manifested in terms of the image that exists both of a court and inside the court and a courtroom.[18] Linda Mulcahy elaborates on the concept of images of justice when she states that the courtroom space can be looked at as a relationship with our ideals of justice. She argues that the judicial space is not 'neutral' and "understanding the factors which determine the internal design of the courtroom are crucial to a broader and more nuanced understanding of state-sanctioned adjudication."[19] In her description of the courtroom space, jury boxes, witness boxes, barricades, and additional spaces provided to different court actors contribute to the legitimacy that court proceedings derive. This legitimacy is not restricted only to the actual process of a trial but is influenced by all these allocations of place in a courtroom. It is then relevant to question if there is any direct relationship between the space provided in a witness box or the distance placed between a judge and an arguing lawyer.

Mulcahy's emphasis is on the 'spatial dynamics' that influence the confidence the public has in the court system.[20] She debates that the way a courtroom is designed influences the kind of judgment delivered.[21] Therefore, a judgment delivered in a particular court space would differ from one that does not have the key ingredients of a visual nature that specifically upholds the majesty and dignity of the court. In pursuance of this, Mulcahy argues that "the shape of a courtroom, the configuration of walls and barriers, the height of partitions within it, the positioning of tables, and even the choice of

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16 ibid.

17 ibid 149.

18 Katherine Fischer-Taylor, *In the Theater of Criminal Justice: The Palais de Justice in Second Empire Paris* (Princeton 1993); Peter Goodrich 'The Foolosophy of Justice and the Enigma of Law' (2012) 24 Yale Journal of Law and the Humanities 141; Piyel Haldar, 'The Function of the Ornament in Quintilian, Alberti, and Court Architecture' in Costas Douzinas and Lynda Nead (eds), *Law and the Image: The Authority of the Art and the Aesthetics of Law* (Chicago Press 1999); Martin Jay, 'Must Justice be Blind: The Challenges of Images to the Law' in Martin Jay (ed), *Refractions of Violence* (Routledge 2003) 87-102; Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge 2011); Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale 2011).

19 Mulcahy (n 18).

20 Mulcahy (n 1).

21 ibid.

materials are crucial to a broader and more nuanced understanding of judge-craft."[22] This contrasts with the idea that the courtroom space is neutral. The courtroom space is a contested space, and several factors influence the production of justice in its precincts. The presence of a particular visual adaptation of the court space certainly influences the relationship between the process of and access to adjudication. Katherine Fischer-Tayloris states that in legal systems, performance is all that matters and therefore the courtroom is like a stage where space, vision, and acoustics are all critical to the relationship formed with the given space – thus making these aspects important parts of the judicial iconography of courts.[23]

In the construction of a courtroom, an elevated platform is a symbol of hierarchy; a partition between court actors signals inequality and a form of undefined segregation, and a symbol of the state behind the judges signifies the authority of the state and/or government through which the judge acts.[24] Therefore, though courts are public structures, it is often felt that a court space is most restrictive to this very public.

Mulcahy suggests, "courts are supposed to be daunting places in which participants are encouraged to reflect on the gravity of law and legal proceedings" and therefore the building structure furthers this idea.[25] Courts across the world have been implementing certain basic criteria in court buildings that are seen as specific legitimising tools, giving the court the majesty and dignity it seeks daily. The most important aspect of this is how the public who attend court perceive the space.[26] Mulcahy documents how courts in the United Kingdom were built in favour of judges and lawyers and how they categorically kept the public out.[27] She also writes about the changing nature of the role of each of these players, and as their importance grew, how their space increased in courts, creating less and less space for the public. There was often a "tendency to see both litigants and the public as irritants in the trial"[28] and therefore courts were built as being large and inviting but in practice were often exclusive and condescending.[29] This is seen in courts in India where the main entrances are large and inviting, but inaccessible when approached.[30]

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22 ibid.
23 Fischer-Taylor (n 18).
24 Mulcahy (n 1).
25 Mulcahy (n 1) 387.
26 Mulcahy (n 1).
27 ibid.
28 In a similar vein, some lawyers in the Calcutta High Court believed that to ease the space problem in the High Court, litigants and the public should be denied entry into the court. *See* Khorakiwala (n 1).
29 Mulcahy (n 1) 393.
30 The main entrance of the Bombay High Court and Madras High Court is reserved for Judges. Lawyers, litigants and the public enter from the back. *See* Khorakiwala (n 1).

Another aspect seen across courts is the relation of height with hierarchy and authority. Height elevates the judiciary to a point where they can survey the court process and all the people in that specific court space. The idea of the Panopticon plays out here, where surveillance can be controlled through an aerial hierarchical view.[31] The hierarchy and panoptical setting allow the judge to visually control the court and thereby all persons' parts in the court process. In this format, the law can maintain control over its image of supremacy amongst the public. While on one hand, the judges – the top of the hierarchy – are provided with panoptical surveillance, on the other hand, the viewing positions of the public are starkly different. Mulcahy notes that while there is often a clear view of the judge, there is a limited view of the proceedings of the court.[32]

This differentiation within a courtroom space is not limited to being present inside the courtroom only but extends to spaces outside the courtroom, around the court building, and within the court structure itself. These observations focus on the power dynamics within a court based on the physical aspect of a court structure. This is important to understand as it is able to control not only who can hear in a court, but also what specifically can be heard in that court. This has the effect of changing the relationship that the person shares with the judiciary and the legal system, and in particular, the way they can access justice.[33]

III. THE THEATRE OF THE COURT: PRE-COVID-19

A large part of physically going into courts was about maintaining the majesty and dignity of these court spaces. These two terms are used extensively by the Supreme Court of India and various High Courts across the country when they link the concept of contempt of courts to affecting the majesty and dignity of the courts. The Contempt of Courts Act 1971 talks about contempt in terms of anything that lowers the authority of the court. The Act does not directly use the words majesty or dignity.[34]

Through various judgements, the Supreme Court and High Courts have made references to acts of contempt as those that adversely affect, "…the majesty of law or dignity of the Courts…".[35] *Aswini Kumar Ghose v Arabinda Bose* mentions the 'dignity and prestige of this court'.[36] *EM Sankaran Namboodiripad v T. Narayanan Nambiar* mentions the 'dignity of the court'

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[31] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York 1975).
[32] Mulcahy (n 1).
[33] ibid.
[34] Contempt of Courts Act 1971.
[35] *Prodip Kumar Biswas v Subrata Das*, (2004) 4 SCC 573.
[36] AIR 1953 SC 75.

and 'majesty of the law'.[37] *DC Saxena v CJI* brought these two concepts together and stated that "all acts which bring the court into disrepute or disrespect, or which offend its dignity or its majesty or challenge its authority" will fall under the ambit of contempt of court.[38] The act of holding one in contempt, therefore, has at its very core the upholding of the majesty and dignity of the court.

Before the Covid-19 pandemic, a regular day in court involved the mandatory wearing of the black gown and white band, entering the courtroom, bowing before the judge who is seated on a higher pedestal, maintaining court decorum which ranged from not carrying plastic bags in courtrooms (due to the noise created by them) to not being able to read newspapers or sit cross-legged on a courtroom bench.[39] Judges also follow their prescribed dress code and are accompanied by a *chopdar*[40] who walks in before the judge, moves their chair for them to sit, and whose presence is a reminder that the judge is about to arrive or about to leave the court. It is also the cue for all present in court to rise and then bow once the judge enters and leaves. Some of these practices are mandated under various rules and legislations and some of them are practiced as customary tradition. The strict adherence to the dress code is mandated under The Bar Council of India Rules, 1975,[41] and the practices of bowing before judges and judges sitting at a pedestal higher than everyone else in court are part of the customary practices of the court.[42]

Importantly, courts are public spaces, in that there are no restrictions as to who can enter the court and sit in on proceedings in a courtroom.[43] Every person entering the court, including the lawyers, is subject to a search procedure at the entrance of the court after which they are permitted to be present in any courtroom or part of the court. Restrictions are placed on in-camera trials where, based on judicial discretion, certain matters are heard behind closed doors, and no public is permitted.[44] The Supreme Court of India also has entry restrictions based on security issues where every person entering court

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37 (1970) 2 SCC 325, (1971) 1 SCR 697.

38 *D.C. Saxena v Chief Justice of India*, (1996) 5 SCC 216, AIR 1996 SC 2481 [33]; There are several cases in the Supreme Court and the High Courts where the courts have held that contempt involves upholding the majesty and dignity of the courts. For example, *see Surya Prakash Khatri v Madhu Trehan*, 2001 SCC OnLine Del 590, (2001) 59 DRJ 298; *MV Jayarajan, In re* 2011 SCC OnLine Ker 4069.

39 Based on my experiences and observations during my fieldwork in the Calcutta, Bombay and Madras High Courts.

40 A *chopdar* is the person who walks with the Judge to and from courtroom and announces the arrival of the Judge in the courtroom.

41 Advocates Act 1961, s 49.

42 These observations are based on my ethnographic research work as detailed in Khorakiwala (n 1).

43 Code of Civil Procedure 1908, s 153-B; Code of Criminal Procedure 1973, s 327.

44 Code of Civil Procedure 1908, order XXXII-A rule 2; Code of Criminal Procedure 1973, s 327(2).

requires a pass. While the pass is not that simple to secure, in principle anyone can avail of it and therefore enter and access the Supreme Court as well.

With the onset of the Covid-19 pandemic, these procedures and practices were completely disrupted. As India began imposing a nation-wide lockdown, in the initial days, courts were completely closed.[45] As time passed, courts slowly started opening for what they defined as urgent hearings. However, when courts opened, they were virtual and no longer physical.

IV. THE THEATRE OF THE COURT: DURING COVID-19

With the onset of lockdowns and the spread of the coronavirus across India, courts were forced to adapt to the changing times. Due to the very nature of the Covid-19 pandemic – the issue of containing the spread of a highly communicable disease, courts, along with several other institutions, had to make themselves available and at the same time, follow Covid-19 protocols. The resolution was to go virtual.

In the initial phase, the process was new for everyone involved and the courts, along with court staff, lawyers, and litigants, were all adjusting to the changing nature of access to courts and dissemination of court orders and judgments. Courts were accessible through online forums where a link to a video conferencing service was provided to the concerned persons. Courts heard very limited matters, and the entire process was digital. Papers were e-filed, and the hearing happened through virtual means. Each court adapted to these methods in its own organic way. The rules and practices on how to access these courts and what qualified as appropriate behaviour changed regularly.

Links to attend court hearings were available to lawyers who had cases listed before the court, and this came with restrictions on the number of people who could attend, largely because online platforms had bandwidth issues if too many people logged in at one time.[46] In some cases, restrictions included the number of lawyers representing one party to the dispute who could attend court, and the number of litigants per case who could log in. In some courts, lawyers and litigants were permitted entry into court in a staggered manner,

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[45] Abhinav Garg, 'Coronavirus Lockdown: Delhi High Court, Six Lower Courts Closed till April 4' (*Times of India*, 24 March 2020) <https://timesofindia.indiatimes.com/city/delhi/hc-six-lower-courts-closed-till-april-4/articleshow/74783526.cms> accessed 1 July 2021.

[46] Aishwarya Iyer, 'Password Leak Disturbs Andhra Pradesh HC Virtual Hearing in SEC Case; HC to hold open-court hearing following social distancing norms' (*Bar and Bench*, 30 April 2020) <https://www.barandbench.com/news/litigation/andhra-pradesh-hc-to-conduct-physical-hearing-on-may-4-asks-advocates-to-not-share-video-conference-details-with-unrelated-persons> accessed 1 July 2021.

based on their serial number and the case number being heard in court.[47] The links, while in theory were not private links to attend court, still made the courts inaccessible to anyone else who wanted to enter court, observe proceedings, or generally follow court cases.[48] Accessibility in terms of space within a courtroom was an issue before the pandemic as well, where physical courtrooms could only accommodate a limited number of people. This inaccessibility continued in virtual form, triggered by different constraints.

While accessing the court became harder, there was confusion as to the dress code to be worn in a virtual court setting. Once courts went virtual, the question quickly arose if the same strict adherence to the dress code was required. Many argued that a virtual court was exactly like a regular court and therefore all practices and procedures followed should be the same.[49] However, a few days into virtual proceedings, several notifications were released stating that the black gown was not required for virtual court proceedings.[50] The notification from the Supreme Court was issued following remarks by the then Chief Justice of India who stated that there is a risk that the black gowns can further spread the coronavirus infection.[51] Following the Supreme Court's notification, several other courts and the Bar Council of India issued similar directions and lawyers were not expected to wear the black gown or the white band while attending virtual court proceedings.[52]

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[47] This is based on my observations of a certain virtual court proceedings that I was able to attend.

[48] A handful of High courts have made their virtual links public. *See* Meera Emmanuel, 'Open Justice in Trying Times: Kerala High Court Conducts Virtual Hearings Accessible to Public Amid Coronavirus Lockdown' (*Bar and Bench*, 2 April 2020) <https://www.barandbench.com/news/litigation/open-justice-in-trying-times-kerala-high-court-conducts-virtual-hearings-accessible-to-public-amid-coronavirus-lockdown> accessed 1 July 2021.

[49] Mehal Jain, 'Taking Screenshot Of Virtual Hearing Equivalent To Clicking Photo Of Actual Courtroom Proceeding: Calcutta HC Initiates Contempt Against Advocate [READ UPDATE-Contempt Proceedings Dropped]' (*Livelaw*, 26th August 2020) <https://www.livelaw.in/top-stories/taking-screenshot-of-virtual-hearing-actual-courtroom-proceeding-calcutta-hc-initiates-contempt-against-advocate-161990> accessed 2 July 2021; 'Allahabad High Court Asks Advocates to Stick to Formal Dress Code for Virtual Hearings' (*India Legal*, 3 July 2021) <https://www.indialegallive.com/constitutional-law-news/courts-news/allahabad-high-court-asks-advocates-to-stick-to-formal-dress-code-for-virtual-hearings/> accessed 3 July 2021.

[50] Part VI of the Bar Council of India Rules, 1975 states that, "…Wearing of the Advocates' gown shall be optional except when appearing in the Supreme Court or in High Courts…" Therefore, the context of this argument is restricted to the practices before the Supreme Court and various High Courts.

[51] PTI, 'Judges, Lawyers Shouldn't Wear Coat and Gown as it's Easier to Catch Covid-19: CJI Bobde' (*The Print*, 13 May 2020) <https://theprint.in/india/judges-lawyers-shouldnt-wear-coat-gown-as-its-easier-to-catch-covid-19-cji-bobde/420862/> accessed 1 July 2021.

[52] Supreme Court of India, (Circular F. No. 06/Judl./2020, 13 May 2020) <https://main.sci.gov.in/pdf/cir/13052020_115216.pdf>; PTI, 'Lawyers Need not Wear Coats, Gowns During Virtual Hearings: HC' (*Economic Times*, 21 May 2020) <https://economictimes.indiatimes.com/news/politics-and-nation/lawyers-need-not-wear-coats-gowns-during-virtual-hearings-hc/articleshow/75867819.cms?from=mdr> accessed 1 July 2021; Sanya Talwar, '[COVID-19] "No Coats, Gowns/Robes Required To Be Worn By Lawyers Across India Till Further Orders": BCI [Read Circular]' (*Livelaw*, 14 May 2020) <https://www.livelaw.in/top-stories/

While the dress code was debated and discussed, other aspects and practices of the court were not deliberated over as much. Certain practices that were treated as inherent to the process of rendering justice, such as judges seated at an elevated position, the *chopdar* always being available for the judge, bowing while entering and exiting the court, were not discussed in the context of a virtual court setting. Therefore, lawyers and litigants would log into the various video conferencing applications that were provided, where the judge was already seated at their desk. The hearing would start per the serial number on the list of cases. Lawyers would turn on their cameras when their serial number was called out. Therefore, traditional, and sometimes colonial, practices that were inherent in some courts gave way to practical aspects of adapting to virtual courts during a pandemic.[53] In some instances, conditioned by habit, certain lawyers would appear in virtual court proceedings standing, with the lectern in front of them. This would give them the sense of being physically in court, which allowed for them to present their case using methods they are familiar with.

The spatial dynamics also changed in virtual courts. In the physical courtroom, judges along with their staff were accorded with maximum space, followed by lawyers, the litigants, and then the public. In the virtual setting, the spatial dynamics changed. On video conferencing applications, everyone has equal screen space. In that limited sense, everyone is accorded the same amount of space. Virtual courts have been shaped by technical design choices, which include using features that can mute participants and switch on or off their videos, having the option to virtually raise your hand to speak, and the platforms having a limit on the number of attendees at one time.

In some instances, there is a semblance of a democratic structure creeping in, with equal screen size and less emphasis on the dress code, but the lack of access through bandwidth issues, lack of technical affordability and availability make online courts less accessible than their physical counterparts. Adaptation and change were seen, whether planned or unplanned, in the functioning of the entire judicial system due to the changes brought on by the Covid-19 pandemic. With the earlier architectural structuring no longer available during virtual hearings, the courts are seen to fall back on other forms of performance

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covid-19-no-coats-gownsrobes-required-to-be-worn-by-lawyers-across-india-till-further-orders-bci-read-circular-156751> accessed 1July 2021; Circular by Telangana High Court, (ROC. No.394/SO/2020, 20 May 2020) <http://www.manupatrafast.in/covid_19/Telangana/Court/Notice%20regarding%20the%20dress%20code%20of%20the%20advocates.pdf >; Pritam Pal Singh, 'Delhi HC Exempts Advocates from Wearing Gowns, Coats During Virtual Hearings' (*Indian Express*, 25 May 2020) <https://indianexpress.com/article/cities/delhi/delhi-hc-exempts-advocates-from-wearing-gowns-coats-during-virtual-hearings-6426660/> accessed 1 July 2021.

[53] This observation is made in relation to the Bombay High Court, which is one of the first three colonial High Courts of India. Colonial practices and traditions in the Bombay High Court are more pronounced when compared to the post-colonial courts of India.

to maintain their majesty and dignity. Therefore, whether this made the courts more or less accessible is contentious.

V. MAJESTY AND DIGNITY IN VIRTUAL COURTS

As noted earlier, courts have linked contempt to the majesty and dignity of courts. While most written judgments and orders on contempt relate to contempt in terms of not following the orders of a court, contempt in terms of the majesty and dignity of courts is not documented in the same way. Most of this contempt is witnessed while sitting through court procedures and observing judges' remarks on what they deem as contemptuous behaviour. The definition of contempt under the Act is open-ended and thus gives the freedom to each judge to decide what classifies as contempt in their courtroom.[54] Therefore, different acts amount to contempt depending on the dynamics of a particular courtroom. From my ethnographic work, I have seen people being warned of contempt for mobile phones ringing in court, to acts of reading a newspaper while seated inside the courtroom, to sitting with legs crossed one over the other. Certain judges make it clear, with notices posted on their courtroom door stating that the use of plastic bags is not permitted (due to the noise they make). In some courtrooms, I have witnessed minute scrutiny of the lawyers' dress code, where people check if the colour of the shirt is pure white or not, if the black gown is falling off the shoulder, or the way the white band is sitting around the neck without a collared shirt (in the case of women).[55] These observations are based on the prescribed dress code per the Bar Council of India Rules, 1975.[56]

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[54] Contempt of Courts Act 1971, s 2(c):

"criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which— (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

[55] These observations are based on my ethnographic work as documented in my book. *See* Khorakiwala (n 1).

[56] Form of Dresses or Robes to be Worn by Advocates (Rules under s 49(I) (gg) of the Advocates Act 1961):

Advocates appearing in the Supreme Court, High Courts, Subordinate Courts, Tribunals or Authorities shall wear the following as part of their dress, which shall be sober and dignified.

1. Advocates
   (a) A black buttoned up coat, chapkan, achkan, black sherwani and white bands with Advocates' Gowns.
   (b) A black open breast coat. white shirt, white collar, stiff or soft, and white bands with Advocates' Gowns.

In either case wear long trousers (white, black striped or grey), Dhoti excluding jeans.

Provided further that in courts other than the Supreme Court, High Courts, District Courts, Sessions Courts or City Civil Courts, a black tie may be worn instead of bands.

II. Lady Advocates

With the courts going virtual, the form, nature, and relationship with the majesty and dignity of the court have changed. While courts have relaxed the rules related to the dress code and the traditional procedures of court, this has manifested itself in different ways, with different courts experiencing a varied nature of what would otherwise be held as contempt in the physical court setting.

The Rajasthan High Court bore witness to a lawyer wearing a *banyan* (vest) while appearing before it. The lawyer was appearing in a bail matter and logged into the virtual court hearing wearing only a vest. Justice Sharma of the Rajasthan High Court adjourned the matter on this ground. After this, Justice Sharma asked the High Court Bar Association to remind all lawyers to appear in proper attire before the court.[57] Another instance involved a senior lawyer smoking a hookah during court proceedings. This was seen in the Rajasthan High Court, wherein the lawyer was holding up case papers to cover his face, but at one point it became visible that he was smoking a hookah while the virtual court proceedings were ongoing. In this case, the judge remarked in a lighter vein saying, "Not at this age" and the virtual court proceedings continued.[58]

The Odisha High Court imposed fines on a lawyer for not wearing the white band around his neck. The court stated that having a dress code like the ones lawyers have to adhere to conveys the solemn and dignified nature of the legal profession. As per the court, "Being an Advocate, he is expected to appear before the Court in a dignified manner with proper dress, even if it is a virtual mode".[59] Therefore, the requirements of the dress code were seen to dif-

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(a) Black full sleeve jacket or blouse, white collar stiff or soft, with white bands and Advocates' Gowns. White blouse, with or without collar, with white bands and with a black open breast coat. Or

(b) Sarees or long skirts (white or black or any mellow or subdued colour without any print or design) or flare (white, black or black stripped or grey) or Punjabi dress Churidar Kurta or Salwar-Kurta with or without dupatta (white or black) or traditional dress with black coat and bands…

[57] 'COVID-19: Advocate Appears in his Vest on Video Conference before Rajasthan HC; Bar Association Asked to Inform All to Appear in Uniform' (*Bar and Bench,* 10 April 2020) <https://www.barandbench.com/news/litigation/advocate-appears-in-his-baniyan-on-video-conference-before-raj-hc-bar-association-asked-to-inform-all-to-appear-in-uniform> accessed 1 July 2021.

[58] 'Senior Advocate Smokes Hookah During Virtual Hearing of Rajasthan HC, Video Goes Viral' (*India Today*, 13 August 2020) <https://www.indiatoday.in/india/story/senior-advocate-hookah-virtual-hearing-rajasthan-hc-viral-dhawan-1710734-2020-08-13> accessed 3 February 2022.

[59] Debabrata Mohanty, 'Orissa HC Lawyer Fined Rs 500 for not Wearing Neck Band During Hearing' (*Hindustan Times*, 21 February 2021) <https://www.hindustantimes.com/india-news/orissa-hc-lawyer-fined-rs-500-for-not-wearing-neck-band-during-hearing-101613901326721.html> accessed 1 July 2021.

fer between high courts, even following the Supreme Court notification on the same.[60]

Another instance that went viral on social media involved the Bollywood actress Juhi Chawla. Chawla had filed a suit before the Delhi High Court. On the day of her hearing, and upon receiving the video conference link, Chawla updated the same to her Instagram profile. This made the link to the virtual hearing public. While arguments were ongoing, one person who had entered the virtual proceedings, with his camera off, started singing songs from films of the Bollywood actress. The singing continued for a while before the judge asked the Delhi Cyber Crime Cell to track the person down through their Internet Protocol Address (IP Address) and hold them in contempt. Chawla herself was seated in a car while logging in for the court proceedings.[61]

News articles have covered several such incidents across courts. A lawyer before the Supreme Court was found chewing *gutka* (tobacco) and spitting it while appearing in a case,[62] the Odisha High Court witnessed lawyers appearing before them in moving cars, from their gardens and some eating while arguing before the Bench.[63] All these instances were found objectionable by the court. The Gujarat High Court fined a lawyer Rs. 10,000 when he was found smoking and sitting in a car while appearing before the court. The judge took this opportunity to remind everyone that such conduct was unbecoming of a lawyer and that it was required of a lawyer to maintain minimum decorum so that the 'majesty and dignity of courts' is maintained.[64] In the Karnataka High Court, on seeing a lawyer appear from their vehicle, the judge was compelled to state that even in video conferencing all participants were required to maintain minimum decorum.[65] The Debt Recovery Tribunal in Ahmedabad

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60 Supreme Court of India (n 52).

61 'Man Sings Songs from Juhi Chawla's Movies During Hearing on 5G Rollout, Court Orders Contempt Charge' (*The Print*, 2 June 2021) <https://scroll.in/latest/996491/man-sings-songs-from-juhi-chawlas-movies-during-hearing-on-5g-rollout-court-orders-contempt-charge> accessed 1 July 2021.

62 Dhananjay Mahapatra, 'In E-courts, Lawyers in Vests, with Hookas' (*Times of India*, 14 August 2020) <https://timesofindia.indiatimes.com/india/in-e-courts-lawyers-in-vests-with-hookahs/articleshow/77535824.cms> accessed 1 July 2021.

63 'No Decorum: Orissa HC Irked by Lawyers Eating during Virtual Hearings, Arguing from Moving Cars' (*News 18*, 5 September 2020) <https://www.news18.com/news/india/orissa-high-court-irked-by-lawyers-appearing-for-virtual-hearings-while-eating-from-moving-cars-gardens-2852389.html> accessed 1 July 2021.

64 Satish Jha, 'Gujarat: Lawyer Fined Rs 10,000 for Smoking During Virtual Court Hearing' (*Deccan Herald*, 24 September 2020) <https://www.deccanherald.com/national/west/gujarat-lawyer-fined-rs-10000-for-smoking-during-virtual-court-hearing-892537.html> accessed 1 July 2021.

65 Mustafa Plumber, 'Advocates do not Address Court on VC Hearing By Sitting in Car Maintain Court Decorum: Karnataka HC' (*Livelaw*, 16 October 2020) <https://www.livelaw.in/news-updates/advocates-do-not-address-court-on-vc-hearing-by-sitting-in-car-maintain-court-decorum-karnataka-hc-164560> accessed 1 July 2021.

took this further by fining a lawyer Rs. 10,000 for addressing it from his car.[66] In this case, the matter was adjourned for an hour and the lawyer was asked to appear before the court with a more suitable physical background.[67] There are multiple instances of lawyers attracting the ire of the court for appearing while seated in their cars. Cases have been seen in the Madras High Court, Orissa High Court, and the Delhi High Court.[68] In the Allahabad High Court, when a lawyer appeared from his car, the judges declined to hear the lawyer and proceeded to direct the Registrar of the court to frame a set of rules for lawyers while they address court.[69] The judges further added that lawyers were requested to strictly adhere to these rules.

In some cases, the choice of a casual dress code was not always expected to be known to the court. A senior lawyer appearing before the Supreme Court was seen wearing only boxers and a formal shirt when the smart device he was using fell by mistake.[70] In another case, a lawyer who appeared before the Allahabad High Court wearing a casual t-shirt, lounging on a bed, along with a woman by his side (who had a face pack on), showed no remorse even after being admonished by the High Court. Pursuant to this, the Court asked the Bar Association to be careful about matters related to court decorum and to treat virtual proceedings just like an extended courtroom.[71]

I bring these instances together in one frame to see the changing relationship between judges and lawyers in the space of the court. As traced earlier, before the onset of Covid-19 and the restrictions it came with, courts were spaces where decorum was of utmost importance. In certain courts, these

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[66] I refer to the example of the Debt Recovery Tribunal for illustrative purposes. In terms of judicial hierarchy, the Tribunal is not at par with a High Court.

[67] TNN, 'Ahmedabad: Debt Recovery Tribunal fines lawyer Rs 10,000 for Addressing it from Car' (*Times of India*, 4 November 2020) <https://timesofindia.indiatimes.com/city/ahmedabad/drt-fines-lawyer-rs-10k-for-addressing-it-from-car/articleshow/79027471.cms> accessed 1 July 2021.

[68] Sparsh Upadhyay, 'Representing Case Sitting in Stationed Car In 'A Casual Manner' Amounts to Disrespecting Court Proceedings: Madras High Court' (*Livelaw,* 5 February 2021) <https://www.livelaw.in/news-updates/representing-case-sitting-in-stationed-car-in-a-casual-manner-amounts-to-disrespecting-court-proceedings-madras-high-court-169410#:~:text=To%20this%2C%20the%20Court%20said,High%20Court%20Video%20Conferencing%20Rules.%22> accessed 1 July 2021.

[69] Areeb Ahmed, 'It is Shocking that Counsel Wants to Address the Court While Sitting in a Car: Allahabad High Court Directs Framing of Dos and Don'ts for Lawyers' (*Bar and Bench*, 5 July 2021) <https://www.barandbench.com/news/litigation/advocate-appears-from-car-allahabad-high-court-framing-dos-and-donts-for-lawyers> accessed 3 February 2022.

[70] Aneesha Mathur, 'Virtual Hearing Gaffe: Lawyer Caught Attending Court Proceedings in Shorts as Tablet Falls' (*India Today*, 15 June 2021) <https://www.indiatoday.in/law/story/virtual-hearing-gaffe-lawyer-caught-attending-court-proceedings-in-shorts-as-tablet-falls-1815267-2021-06-15> accessed 1 July 2021.

[71] Sparsh Upadhyay, 'VC Hearing Appearance: "Advocate Lounging On Bed, Lady With Face Pack On Unacceptable": Allahabad HC Asks Bar Not To Be "Casual"' (*Livelaw*, 2 July 2021) <https://www.livelaw.in/news-updates/vc-hearing-appearance-advocate-lounging-bed-lady-fac-pack-on-unacceptable-allahabad-high-court-bar-casual-176694> accessed 2 July 2021.

traditions have been followed from colonial times, through the independence movement, and carried forward in post-colonial times also. In this context, the Covid-19 pandemic can be termed a life-changing event. With this pandemic, courts went virtual. The same lawyers who would otherwise be subject to strict scrutiny had now lowered their guard. None of the instances as noted above would have been acceptable in a physical court setting, and that is something all who enter court are aware of. However, with the change of format, even with several reiterations from the court that the virtual court is equal to a regular court proceeding, there is a change in the way the court is approached. These notions were strongly embedded in court culture and as time progresses, and physical hearings commence again, the court will have to re-assess the promulgation of these practices.

VI. CONCLUSION: COVID-19 AND THE RE-IMAGINING OF RITUAL SPACES

Physical courts, before Covid-19, focussed strongly on the adherence to this theatre of the court as described earlier. With the onset of the pandemic, and the switch to virtual courts, these rules, both written and customary, became blurry. Different courts tackled the issues they faced differently. When lawyers appeared in vests, the dress code became important. When lawyers appeared from vehicles, the dignity of the court became paramount again. When the Supreme Court watered down the provisions of wearing the black gown, that practice trickled down across the High Courts, but there was a difference in approach in some jurisdictions. There was a ban on photography, ambiguity on sketching, and no permission for live streaming of court procedures pre-Covid-19. With the courts going virtual, recording devices, while not officially permitted, can be used and accessed, along with photography of the court – by taking a screenshot of a video conferencing proceeding. Such a situation occurred in the Calcutta High Court. A lawyer took a screenshot of the virtual court proceedings which he later posted on LinkedIn. The High Court initiated a *suo moto* contempt action against the lawyer for this. This was dropped after the lawyer tendered an unconditional apology, along with accepting that his actions were incorrect and that he did not want to lower the dignity or the majesty of the court.[72]

The rules vary not only from court to court but even from courtroom to courtroom, based on the judge, the court staff, and the dynamics of that space. There is no uniform rule that controls these changing aspects across the courts. It can be argued that the courts do not expect this to be a permanent arrangement and therefore all instances at present are treated as they occur.

[72] Jain (n 49).

The question remains – can these processes be made permanent? Courts have worked with the idea of letting go of the black gown – will they be able to let it go once physical courts resume permanently? Lower courts in the judicial hierarchy and certain high courts during the summer months are exempt from the requirement of the black gown.[73] Is it possible that the pandemic has made a shift and change in these colonial traditions to the extent that they can be altered when courts begin physically again? While it is true that there has been a change in the way certain practices are performed, these practices have not yet completely disappeared. They still exist. Only the form has changed, but the underlying purpose of maintaining the majesty and dignity of the courts remains.

Court proceedings, though limited in access, were held successfully over video conferencing facilities without the *chopdar* walking along with the judge, without everyone bowing before the court, and without the judges sitting on an elevated pedestal. The judicial process continued, in a limited manner, and the dress code, ban on photo or recording devices became secondary to accessing the courts and hearing matters. What then does that tell us about the requirements of these processes and procedures? Is not the majesty and dignity of the court upheld when the court provides access through the roughest of times?

While one form of access was provided by making courts virtual, a whole other aspect of accessing courts was taken away. Access to virtual courts presupposes the existence of high-speed internet connections, devices that can manage the technology of virtual court platforms, and the continuous uninterrupted supply of electricity. Before Covid-19, courts were open spaces where any person could enter and follow any court proceedings. Virtual platforms did not have this option as the number of people who could log in onto one link was limited, there were technical issues, and the link was not publicly available to all. Therefore, when looked at through this lens, court spaces became less accessible.

However, another aspect became more open and democratic. That is, the dropping of the ritual wearing of the black gown, and the change in the spatial hierarchy of the court. In the physical court, space is restricted, and judges sit elevated on a pedestal. In the virtual court, the screen size of all participants is

[73] Bar Council of India Rules 1975 under s 49 (I)(gg) of the Advocates Act 1961:

IV. Except in Supreme Court and High Courts during summer wearing of black coat is not mandatory.

In the change brought about in the Dress Rules, there appears to be some confusion in so far as the Sub-Courts are concerned. For removal of any doubt, it is clarified that so far as the courts other than Supreme Court and High Court are concerned during summer while wearing black coat is not mandatory, the advocates may appear in white shirt with black, white striped or gray pant with black tie or band and collar.

equal – judges, lawyers, and litigants. In this sense, the court democratises its space in the virtual.

As discussed, the Covid-19 pandemic has changed certain things permanently. With this change, courts can also consider letting go of certain practices that work to hamper access to justice rather than make the process easier. While virtual courts have its issues of access in terms of technology and usability across sections of society, the aspect of the strict adherence to colonial traditions, the origins of some of which are unknown, can be reconsidered. Before Covid-19, there was a strong emphasis on the majesty and dignity of courts, and the notion of contempt was a crucial part of this. With the onset of Covid-19, the entire notion of this space has changed, and there has been a change in the understanding of what is now cyberspace. In this environment, it is difficult to sustain the idea of majesty and dignity. The core notions of it have changed. Courts are always focussed on securing their authority and controlling their image, but during Covid-19 there has been a loss of control over this decorum, where each court and courtroom dispensed rules that suited the personal choices of the judicial officers. With the eventual shift back to physical courts, it is to be seen whether the changes necessitated by the pandemic are more superficial than first considered. The pandemic provided new ways for courts to police its space and image, trends of which were seen when courts partially re-opened between the different Covid-19 waves.[74]

For an institution to gain relevance and for its processes to be upheld with sanctity over time, there must be a recurrence and repetition of certain procedures and actions. Judith Butler defines this as the 'theory of performativity' which allows institutions to perform their duties over time with stability.[75] This stability was shaken by Covid-19 and the performativity of the court was destabilised. The challenge thus of virtual courts goes beyond holding on to and maintaining the majesty and dignity of these ritualised spaces. It talks to the growing sense of powerlessness in court processes and how contempt is invoked as a tool to protect the judiciary and the courts, so that they can control their own narrative. In re-imagining the daily rituals of court procedures and the spatial dynamics that come with it, the court will also redefine what majesty and dignity means in the face of a pandemic. The direction taken by the courts at this time will create a guide for physical courts when they function alongside the learnings gained from virtual courts.

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[74] There have been anecdotal accounts of judges asking lawyers to remove their masks as they cannot be heard and the insistence of getting people not located in the city to physically appear in the court even with the available option of video conferencing.

[75] Sarah Salih, 'On Judith Butler and Performativity' in Karen Lovass and others (eds), *Sexualities and Communication in Everyday Life: A Reader* (Sage Publications 2016).

‘PRIVATE ACTS’ AND STRUCTURAL INEQUALITY: LAW AND HOUSING DISCRIMINATION

—Rowena Robinson*

This paper focuses on law and housing discrimination within the context of a sociological understanding of the cumulative disadvantageous effects of what are legally considered ‘private acts’. It therefore brings a distinct perspective to the examination of vertical versus horizontal rights. The paper particularly focuses on housing discrimination against Muslims in urban areas against the background of marginalisation, conflict, and violence. It seeks to think about housing segregation as both producing discrimination, targeted violence, economic inequality, and social exclusion as well as itself being a product of these factors. Public policy in the form of equal opportunities legislation has been the chosen instrument for tackling similar racial and ethnic discrimination in several countries worldwide. This paper argues that public activism could be significant in embedding values socially and making durable the legislation arising there from. At the same time, it calls on the notion of demosprudence to contend that in the context of deep-rooted structured inequalities, as the history of the US civil rights movement also shows, a primary judicial step triggered by the mechanism of social action litigation may be necessary.

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I. HORIZONTAL RIGHTS AND HOUSING DISCRIMINATION

To what extent do the rights to equality and liberty, for instance, of Part III of the Indian Constitution, apply to acts of private individuals and entities who are not part of the definition of State? This is the idea of the horizontal application of rights, as distinct from their vertical application to the relationship between citizens, on the one hand, and the State on the other. Making an argument that the Indian Supreme Court has effectively reinforced the 'separateness of private law', Gardbaum[1] states that there is no general principle that fundamental rights and Constitutional values must permeate private acts. He further argues that the classic case in the matter, relating to housing discrimination – *Zoroastrian Cooperative Housing Society v District Registrar* ('*ZCHS*')[2] – appears to rebuff the relevance of the parallel US case of *Shelley v Kraemer* for thinking about the constitutionality of the Court's role in enforcing restrictive covenants.

This paper examines the issue of the horizontal application of Part III of the Constitution to private acts of housing from a sociological perspective, and with specific reference to housing discrimination in India, particularly taking up the case of Muslims.[3] Housing discrimination, in effect, leads to segregation. In India and elsewhere, the most severe and persistent problems of housing discrimination and segregation arise when a *dominant* community excludes, or has excluded, historically marginalised groups, such as African-Americans, Jews, Muslims, or Dalit-Bahujan castes, who have been largely confined to ghettos. Ghettoisation has produced, or itself been the product of, tense and bitter conflicts as well as civil strife between the segregated groups or communities. The ghetto is certainly not merely an 'undesigned' adaptation

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1 Stephen Gardbaum, 'Horizontal Effect' in M Khosla, S Chaudhry, and PB Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 613.

2 *Zoroastrian Cooperative Housing Society Ltd v District Registrar, Cooperative Societies (Urban)*, (2005) 5 SCC 632 ("*ZCHS*").

3 At the same time, the findings of the paper also apply to Dalits and other marginalised groups. Social and spatial segregation has always been a critical dimension of rural social organisation for Dalits. Recalling the sociological understanding of ghettos, Ambedkar himself wrote that Hindus do not only suspend intercourse with Dalits temporally. 'It is a case of territorial segregation…Every Hindu village has a ghetto. The Hindus live in the village and the Untouchables in the ghetto.' BR Ambedkar, *The Untouchables: Who Were They and Why They Became Untouchables* (Amrit Books 1948) 21–22). This spatial segregation is not confined to villages but emerges even in urban areas, and it is more likely that Muslims end up sharing city space with Dalit-Bahujan communities than others. Sriti Ganguly, 'Socio-Spatial Stigma and Segregation' (2018) 53(50) Economic and Political Weekly 50–57. Though the remedies may overlap, constitutional provisions and the burdens of history distinguish the position of Scheduled Castes from religious minorities and they may require separate analytical understanding. This paper looks particularly at Muslims as a significant and disparaged minority confined spatially due to residential segregation.

and a 'natural area' of the city,[4] which develops straightforwardly as a product of simple inward migration. Following recent scholarship,[5] the ghetto is treated here as a spatial-organisational instrument of economic constraint, social exclusion, and ethnic stigmatisation.

A reading of literature on ghettoisation leads to the argument that three other aspects should be recognised, and they are critical to the thinking of this paper.[6] *First*, while ghettoisation or the process of ghettoising necessarily implicates segregated housing, all forms of segregation are manifestly not ghettos. A rule-of-thumb approach might be to understand that the ghetto is an involuntary spatial confinement, a location from which a marginalised minority cannot get *out*. On the other hand, many upmarket residential localities and gated communities (as well as the Zoroastrian Cooperative Housing Society referred to above) are voluntary sites of exclusion, where those who do not belong cannot get *in*. *Second*, while poverty is often a reality for those in the ghetto, the ghetto is not identified principally by poverty, but by social exclusion and stigma.[7] Thus, working as well as middle-class and high-income residential localities will constitute ghettos if they are segregated and spatially confined on lines such as race, ethnicity, or religion. *Third*, the literature has argued that ghettoisation leads to 'institutional encasement'. This term has been used in the sense that ghettos develop their own social arrangements to ensure basic needs and a sense of cultural consciousness, identity, and belonging. This is because of threats and disparagement from outside, and due to isolation and a consequent lack of political influence. However, what is additionally pointed out here is that the idea of 'institutional encasement' may be extended to encompass the policing and hyper-surveillance that typically mark such ghettos. The increased ghettoising of Muslims in the wake of violence more easily permits the maintenance of such institutional encasement and inequitable procedures for containing violence by the State. A high concentration of Muslims is almost synonymous with heavy policing and the constant presence of police *chowkies* on the borders of these areas. This is, of course, compounded by the fact that most Muslims live in congested, low-income

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4 Louis Wirth, *The Ghetto* (University of Chicago Press 1956) ix.

5 Liyi Xie, 'Exploring the Concept of Ghetto' (2016) 5(2) Social Sciences 32–36; Loïc Wacquant, 'What is a Ghetto? Constructing a Sociological Concept' (2004) <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.572.465&rep=rep1&type=pdf> accessed 29 September 2021.

6 See, for instance, Wirth (n 4); Xie (n 5); Wacquant (n 5); Ambedkar (n 3).

7 Urban studies identify the ghetto as emerging out of serious constraint, the enclave as an intentional form of segregation and the citadel, where an upper class within a segregated minority might separate itself off. Here, while agreeing with Galonnier below that these categories, which developed in the American and European contexts, may be applicable to Muslims in urban India, I also use the terms ghettoisation and segregation more generally when speaking of all of these: Peter Marcuse, 'The Enclave, the Citadel and the Ghetto: What Has Changed in the Post-Fordist U.S. City' (1997) 33 Urban Affairs Review 228; Juliette Galonnier, 'The Enclave, the Citadel and the Ghetto. See The Threefold Segregation of Upper-Class Muslims in India' (2014) 39 International Journal of Urban and Regional Research 92.

areas, where crime, petty thefts, smuggling, and prostitution may also thrive. The obtrusive policing only feeds popular perceptions and official definitions of particular areas as 'trouble spots', 'communally sensitive', 'disturbed', or 'volatile'.

From this perspective, the paper sets the jurisprudential interpretation of housing agreements as 'private acts', with the tacit understanding that these are pacts entered into by individuals or entities freely and for their own advantage and therefore, adequately covered by contract law against what such an understanding obscures: the historical and aggregate burdens of unfairness or discrimination that might render such contracts unjust and oppressive, especially and disproportionately on one side. What this juxtaposition clearly exposes is that restrictive covenants in housing create or compound disadvantages not only between individuals but also between social groups. Further, their effects radiate throughout society and reinforce structures of inequality. Indeed, as the paper shows, discrimination may occur through a range of mechanisms apart from restrictive covenants. We are sharply recalled to Ambedkar's words to the Constituent Assembly on November 25, 1949, wherein he portended the implications of deep social inequalities and illiberalism for political democracy:

> On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognising the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up.[8]

As it proceeds, the paper moves beyond understandings of housing discrimination couched in terms of attitudinal bias or a strong sense of separateness.[9]

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[8] 'Constituent Assembly of India Debates (Proceedings) Volume XI: November 25, 1949' (Constitution of India) Dr BR Ambedkar [11.165.325] <https://www.Constitutionofindia.net/Constitution_assembly_debates/volume/11/1949-11-25> accessed 7 April 2022.

[9] See, for instance, 'Interview with Tarunabh Khaitan: Ending Discrimination: "It is not just about majority and minority but also about attitudes"' (*Scroll*, 26 March 2017) <https://scroll.in/article/832386/ending-discrimination-it-is-not-just-about-majority-and-minority-but-also-about-attitudes> accessed 13 September 2021 (Interview with Tarunabh Khaitan); Gautam Bhatia, 'No Flats To Let For Muslims?' (*Outlook*, 4 February 2022) <https://www.

The following section shows that discrimination and ghettoisation have a long history, and are linked to patterns of collective conflict and violence. Drawing on recent scholarship, the next segment brings out the significant relationship (beginning to be acknowledged in India) between ghettoisation and access to critical social goods, such as health, education, and the like. What emerges is that the problem of iniquitousness in this regard goes very deep and needs proportionate legal and policy address. The paper then turns to the current jurisprudential understanding framed by the Supreme Court's *ZCHS* judgment, which, as is argued, does not suffice. At the same time, it is shown that legislation has, to date, failed to take off the ground. Finally, the paper steers a course between appealing to the courts in each case of discrimination on the one hand and the espousal of political solutions on the other, by drawing on the notion of demosprudence. Going beyond the original instance of the oral dissent of judges, demosprudence is seen as the work of activists, scholars, and lawyers meticulously initiating social action litigation. Such work could in turn call forth appropriate judicial response, and perhaps pave the way for policy change in due course.

II. COLLECTIVE VIOLENCE AND THE PROCESS OF GHETTOISATION

Histories going back to time before independence have marked Muslims in India as the 'Other'. Muslims have been portrayed as somehow bearing the burden of responsibility for the Partition, and of being heir to a violent tradition of Islam on the subcontinent, associated with a long trail of temple destruction and 'forced' conversions.[10] Ritual and embodied markers of Muslim identity such as circumcision, the skull cap, or *burqa* are ridiculed and stigmatised, in the sense in which Goffman speaks of 'undesired differentness' which turns 'normals' away.[11] In communal attacks, mobs descending on Muslim-dominated areas have been known to shout slogans such as "*Kamar pe lungi muhn men pan, bhago landiya Pakistan*" (You who wear *lungis* and chew betel

outlookindia.com/website/story/no-flats-to-let-for-muslims/289983> accessed 13 September 2021.

[10] The efforts of a large body of scholarship, including Richard Eaton, *The Rise of Islam and the Bengal Frontier 1204-1760* (OUP 1997); Carl Ernst, *Eternal Garden: Mysticism, History and Politics at a South Asian Sufi Center* (SUNY 1992); ZH Zaidi, 'Conversion to Islam in South Asia: Problems in Analysis' (1989) 6(1) American Journal of Islamic and Society 93; Stephen Dale, 'Trade, Conversion and the Growth of the Islamic Community in Kerala' in Rowena Robinson and Sathianathan Clarke (eds), *Religious Conversion in India: Modes, Motivations and Meanings* (OUP 2003), to contest and thoroughly complicate this entrenched and highly simplistic popular view appears to have had little success, at least with right-wing majoritarian thinking.

[11] Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin 1973).

leaves, you circumcised ones leave for Pakistan),[12] "*Landiya ko pakdo*" (catch the circumcised), "*kaat do uski*" (cut it off), and the like. Even today, Muslims continue to be considered as strong opponents of Hindus, and a 'fifth column' in the Indian nation. Their patriotism is constantly called into doubt and they often bear the stigma of being viewed as obscurantist, with their men seen as a threat to the honour of Hindu women. Spatial segregation allows the Hindus, particularly of upper and middle classes, to create 'pure areas' from which Muslims are excluded.

In India, spatial separation and ghettoising mark urban areas across the country and have contributed to tension and communal conflict over the decades, especially between Hindus and Muslims.[13] In turn, successive incidents of violence have led to the displacement of families and greater and more marked segregation.[14] Collective violence has had severe impact on minorities in terms of lives and property lost, and it is particularly Muslims who have been targeted in violent social crimes.[15] States in northern and western India, such as Uttar Pradesh, Gujarat, Bihar, and Maharashtra, have seen recurrent Hindu-Muslim conflict since independence. On the other hand, some states in eastern and southern India, such as Orissa or Kerala, remained relatively peaceful. However, it is generally agreed[16] that the curve of communal violence took an upward turn from the late 1970s onwards. More areas of the country began to see violence in the 1980s, including those which were earlier unaffected. Further, each spell of collective violence was marked by greater organisation and planning.

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[12] AA Engineer, *Communalism in India: A Historical and Empirical Study* (Vikas Publishing House 1995) 162.

[13] See, for instance, Rowena Robinson, *Tremors of Violence: Muslim Survivors of Ethnic Strife in Western India* (Sage 2005). The intermeshing of partition history with subsequent tensions and displacements of urban Indian Muslims has been specifically examined, for instance, in the context of Delhi. See Vazira Fazila-Yacoobali Zamindar, *The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories* (Columbia University Press 2007).

[14] Veena Das (ed), *Mirrors of Violence: Communities, Riots and Survivors in South Asia* (OUP 1990); Shail Mayaram, *Resisting Regimes: Myth, Memory and the Shaping of a Muslim Identity* (OUP 1997); Robinson (n 13).

[15] See 'A Narrowing Space: Violence and Discrimination against India's Religious Minorities' (Center for Study of Society and Secularism, and Minority Rights Group International 2017) <https://minorityrights.org/wp-content/uploads/2017/06/MRG_Rep_India_Jun17-2.pdf> accessed 26 September 2021. In 1984, after the assassination of Indira Gandhi, Sikhs were targeted.

[16] NL Gupta (ed), *Communal Riots in India* (Gyan Publishing House 2000); AM Basu, 'The Demographics of Religious Fundamentalism' in K Basu and S Subrahmanyam (ed), *Unravelling the Nation: Sectarian Conflict and India's Secular Identity* (Penguin 1996) 129–156; PR Rajgopal, *Communal Violence in India* (Uppal Publishing House 1987); Stanley Tambiah, *Leveling Crowds: Ethnonationalist Conflicts and Collective Violence in South Asia* (Vistaar Publications 1997); Ashutosh Varshney, *Ethnic Conflict and Civic Life: Hindus and Muslims in India* (Yale University Press 2002).

It has been argued that in the 1980s and 1990s, Hindu-Muslim hostility and communal violence grew against the backdrop of the Babri Masjid-Ramjanambhoomi issue. In this period, attacks on Muslims increased in ferocity and scale of execution.[17] The *rath yatras* to 'free' the birthplace of Ram left a bloody trail of communal violence in their wake. The worst riots suspiciously began to take on the dimensions of a pogrom. In Mumbai, after the demolition of the Babri Masjid, there were several attacks by Muslims on Hindu temples and shrines in the city. Apart from other sporadic incidents of violence, in early January 1993, 6 Hindus were killed in a slum in Jogeshwari. This became the justification for violence wreaked on Muslims throughout Mumbai in the days that followed. In 2002, on February 27, more than fifty persons aboard a train at Godhra in Gujarat – most, if not all, Hindus - were burnt to death. Suspicion fell on some Muslims in Godhra for their involvement in the crime. The horrendous felony was used to legitimise the killing, rape, and looting of thousands of Muslims across a large part of the state. Over the last decade or so, mob lynching and cow vigilante attacks, as well as assaults over 'love jihad', have occurred throughout the country.[18] The move to extend the National Register of Citizens ('NRC') across all states, in combination with the Citizenship Amendment Act, threatens to render a large number of Muslims in the country stateless.[19] The global vilification of Muslims fuelled by terrorist activity, often attributed to militant outfits in Southwest Asia, has only reinforced stereotypes about the community, even within the country.[20] Thus, recent times have seen the growing vulnerability and insecurity of Muslims, which is also manifested in their increasing residential displacement and ghettoisation.

In the North Indian plains, it is common to hear a man going to the toilet, that impure *sandas* (privy) often located outside or behind the home, refer to his visit as "going to Pakistan". As seen, in communal discourses the Indian Muslim *is* a Pakistani, a scorned being who should "go to Pakistan". It is often

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[17] See Gupta (n 16); Rowena Robinson, 'Betwixt Kin and Community: Muslim Women and the Family in the Wake of Ethnic Strife in Western India' (2008) 4 Asian Population Studies 177, 180–181; Robinson (n 13).

[18] 'Love jihad' is a term used by those claiming that there is a 'conspiracy' to lure Hindu girls and convert them to Islam through marriage. 'Madhya Pradesh: Minor Bashed up on Suspicion of "Love Jihad"' (*The New Indian Express*, 4 September 2021) <https://www.newindianexpress.com/nation/2021/sep/04/madhya-pradesh-minor-bashed-up-on-suspicion-of-love-jihad-2354349.html> accessed 1 October 2021.

[19] See Nayanima Basu, 'CAA, NRC Could Render Huge Numbers of Indian Muslims Stateless, Says Ashutosh Varshney' (*The Print*, 5 March 2020) <https://theprint.in/india/caa-nrc-could-render-huge-numbers-of-indian-muslims-stateless-says-ashutosh-varshney/376008/> accessed 29 September 2021.

[20] Certainly, Muslims are not a homogeneous or cohesive community. Nevertheless, they are constructed as a monolithic community in political and communal discourses (the reference to the 'Muslim vote', for example), and are increasingly obliged to see themselves as one when it comes to struggles against discrimination, state-sanctioned or otherwise, or the compulsions of pursuing a common safety in the face of violence.

easy to pinpoint Hindu and Muslim areas in cities. Indeed, as the social geography of Indian cities manifests, the Muslim in fact *lives* in Pakistan, *many* Pakistans, *mini* Pakistans. This understanding of ghettoisation takes into consideration the 'mental maps' through which residents interpret the history of their city, perceive city spaces, and imagine the city's future trajectory and their own experiences, security, and place within it.[21] As I have argued elsewhere, every city in India that has seen major conflict between Hindus and Muslims has acquired a history of spaces that mimics international borders: boundaries, innocuous or otherwise, designate 'India' (Hindu-dominated areas) from 'Pakistan' (Muslim-dominated areas).[22] These boundaries are reinforced during times of violence; most violence is in what people designate as 'border' areas, places where Hindus and Muslims "*takkar pe aate hain*", (come into conflict). This pattern is itself a product of the segregation of residential spaces. Communal segregation of spaces by no means averts violence but simply relocates it. Moreover, each bout of violence can yield a further uprooting and reorganisation of the boundary lines. This can have deeply problematic implications.

Research shows that many Muslims have been forced to migrate – within the same city to other places, sometimes to other states– as a direct result of communal violence.[23] For instance, in Mumbai, greater concentration of Muslims is found in the 'older' parts of the city, such as Dongri, Nagpada, or Mohammad Ali Road. In the years after 1993, Muslims moved to 'safe' areas; Hindus did so to a much lesser extent. Muslims moved into areas where there were already fair numbers of their own, and this movement has taken at least 3 directions.[24] Some areas in Central Mumbai have seen greater concentration, such as Nagpada, Madanpura, Bhendi Bazar or Mohammad Ali Road as well as parts of Wadala, such as Kidwai Nagar, or Byculla. Moving further outwards, Jogeshwari (West) saw considerable in-movement of Muslims, as also Kurla and Govandi. Millat Nagar, a large complex of apartments off Lokhandwala in Andheri (West) is a sanctuary for middle-class Muslims. Finally, Mira Road, a distant suburb in north-west Mumbai, and Mumbra, one in north-east Mumbai, have become noticeable areas of Muslim concentration. In Jogeshwari, it has been shown that Muslims have systematically, over the decades, been pushed into a small settlement area at the peak of a hill. They are surrounded by Hindu settlements all around and have almost no access routes out of their pocket except through these Hindu areas. In the 1970s, Muslims and Hindus were interspersed throughout the area, though there were

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[21] Raphael Susewind, 'Muslims in Indian Cities: Degrees of Segregation and the Elusive Ghetto' (2017) 49 Environment and Planning A: Economy and Space 1286.

[22] Robinson (n 13) 42-73.

[23] Robinson (n 13) 181.

[24] Alongside such moves, Muslims may also sometimes send children away from the city to live with relatives in the village or elsewhere to protect them against future conflicts and to distribute the costs of rebuilding life after violence. See ibid 185.

larger and smaller religion-based pockets here and there. Each bout of violence, however, led to further concentration of Muslims. As Muslims moved inward from the boundary line, the boundary itself shifted further towards the interior, thereby reducing considerably the space available for habitation.[25] Today Muslims are largely ghettoised in Prem Nagar which is East Jogeshwari's 'Pakistan', and the road that divides it from the Hindu area is, ironically enough, Gandhi Market road. Prior to 1973, Jogeshwari (East) comprised one political ward. At that time, facilities came to the entire ward, and serious political attempts were made to unite communities. In 1973, the area was bifurcated into two wards, one of them comprising mainly Muslims. By 1992, the number of wards had increased, but again Jogeshwari's Muslim pocket comprised a separate ward. Thus, the construction of ward boundaries legitimised the segregation and political isolation of Muslims.[26]

In Baroda too, Muslim *mohallas* may be readily identified.[27] While a few areas such as Fatehgunj continue to struggle to retain their pluralistic identity, long years of conflict have ensured that ethnic demarcations in the city have sharpened. The 2002 violence was inclined towards 'purifying' particular neighbourhoods by driving the few Muslims out. Certain areas, such as Pratap Nagar, Raopura, Mandvi, or Tandalja, the last located suitably far from the city's centre, became the recourse for displaced Muslims. In Ahmedabad, Rajagopal shows how decades of violence and vulnerability has led to the eastern side of the city being dominated by Muslims, while the western section has become almost entirely Hindu.[28] Areas which became the refuge of Muslims following the violence of 2002 include Juhapura, the Muslim society in elite Navrangpura, Shahpur, Khanpur and Jamalpur, and even old city wards such as Kalupur and Dariapur. Paldi, which saw a lot of violence, has been increasingly deserted in favour of areas such as Juhapura. Parts of the city, west of the river Sabarmati, including Vastrapur, Drive In Road, Gurukul, or Satellite areas have largely closed to Muslims, regardless of class.[29]

Other cities show similar patterns. A study using administrative data of over 3000 Indian cities and 100,000 neighbourhoods has shown that residential segregation of Muslims does not limit itself to older cities but is also a characteristic of younger ones.[30] Moreover, residential segregation is manifest not only

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[25] Miloon Kothari and Nasreen Contractor, *Planned Segregation: Riots, Evictions and Dispossession in Jogeshwari East* (YUVA 1996).

[26] ibid; Jyoti Punwani, 'Without Any Stakes in the Riot' (*The Independent*) (6 January 1991) 5.

[27] Robinson (n 13) 49.

[28] Arvind Rajagopal, 'Special Political Zone: Urban Planning, Spatial Segregation and the Infrastructure of Violence in Ahmedabad' (2010) 1 South Asian History and Culture 529.

[29] Robinson (n 13) 48.

[30] Adukia and others, 'Residential Segregation in Urban India' (*Center for Effective Global Action*, 2019) <https://cega.berkeley.edu/wp-content/uploads/2020/03/Tan_PacDev2020.pdf> accessed 1 October 2021.

in slums or low-income housing, but also middle and high-end properties.[31] Data from all 5,481 urban wards in Karnataka show that there is segregation *of* urban wards as well as *within* urban wards. Intra-ward segregation is a crucial driver of ghettoisation of spatially marginalised groups such as Muslims in urban India. Further, there is no correlation of the degree of residential segregation with levels of urbanisation. Rather, high levels of segregation exist across urban settlements, from the semi-urban to the global metropolis.[32] Additionally, several writers have recorded that Muslim tenants face the humiliation of being rejected by house owners across different cities in India. Such tenants are steered towards Muslim ghettos by agents and brokers, and made to feel unwelcome outside the ghettos. Mixing is limited to the workplace, markets, or other such public areas where it is unavoidable.[33] It is suggested that the rapid pace of urbanisation has, on the whole, thwarted systematic government intervention with regard to access to housing. It has allowed 'dysfunctional land markets', rather than state regulation, to control access to urban land.[34] However, it is also pointed out that processes of global capitalism[35] and political and bureaucratic measures to "clean up" cities, remove encroachments,

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[31] Soutik Biswas, 'Why Segregated Housing is Thriving in India' *BBC News* (10 December 2014) <https://www.bbc.com/news/world-asia-india-30204806> accessed 23 September 2021.

[32] Naveen Bharathi and others, 'Village in the City: Residential Segregation in Urbanising India' (2019) IIM Bangalore Research Paper No. 588 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3377270> accessed 22 July 2022.

[33] Mohsin Bhat, 'Bigotry At Home: How Delhi, Mumbai Keep Muslim Tenants Out — Article 14' (*article 14*, 2021) <https://www.article-14.com/post/bigotry-at-home-how-delhi-mumbai-keep-muslim-tenants-out> accessed 26 September 2021; Aishwarya Dharni, 'Muslim? Ghar Nahin Milega: Shocking Stories Of Discrimination While House Hunting In India' (*India Times*, 2020) <https://www.indiatimes.com/lifestyle/muslim-ghar-nahin-milega-shocking-stories-of-discrimination-while-house-hunting-in-india-504788.html> accessed 26 September 2021; Rina Chandran, 'No Muslims, No Single Women: Housing Bias Turning Indian Cities into Ghettos' (*Reuters*) (23 January 2017) <https://www.reuters.com/article/us-india-cities-ghettos-idUSKBN15726C> accessed 26 September 2021; Mohsin Bhat and Asaf Ali Lone, 'Cities Divided: How Exclusion Of Muslims Sharpens Inequality' (*India Housing Report*, 2 March 2021) <https://indiahousingreport.in/outputs/opinion/cities-divided-how-exclusion-of-muslims-sharpens-inequality/> accessed 26 September 2021; Jasan Miklian and Niranjan Sahoo, 'PRIO Policy Brief No. 3' (2016) <http://file.prio.no/publication_files/prio/Milkian,%20Sahoo%20-%20Supporting%20a%20More%20Inclusive%20and%20Responsive%20Urban%20India, %20PRIO%20Policy%20Brief%203-2016.pdf> accessed 21 September 2021. It has also been noted that communal propaganda through pamphleteering in recent decades asks Hindus 'to save our country by boycotting Muslims economically and socially' (Janyala Sreenivas, 'Communal Harmony Is Drama: VHP Pamphlet' *Indian Express* (12 April 2002) 1-2) and to keep away from business establishments that are run by Hindu and Muslim partners so that the latter cannot benefit from their profits and the Hindus will learn a lesson and break away from the Muslim partners (Rajeev Khanna, 'Hate Tracts Being Distributed in Gujarat Towns' (*The Asian Age*) (26 April 2002) 9). Muslims are seen as undesirable even in municipal parks or *maidans* (Robinson (n 13) 56-57) and in recent years, there have also been warnings issued to minorities to stay away from festival celebrations in which they customarily participated. See 'Hardline Indian Hindu Group Aim to Exclude Muslims from Festival' (*Reuters*) (25 September 2014) <https://www.reuters.com/article/uk-india-religion-idUKKCN0HK1J620140925> accessed 27 September 2021.

[34] Adukia and others (n 30) 6.

[35] Ghazala Jamil, *Accumulation by Segregation: Muslim Localities in Delhi* (OUP 2017).

or resettle 'unauthorised' residents have led to large-scale evictions of Muslims.[36] In sum, it appears that residential segregation of Muslims in Indian cities builds upon capitalist accumulation as well as practices of discrimination by builders, developers, housing societies, estate agents, and brokers, apart from government and State action. It further implicates a high degree of rental discrimination.[37] Ghettoisation emerges not only as a product of past collective violence but also in anticipation of future violence. It may have serious consequences for outcomes and opportunities such as with regard to health, education or employment, as the following section proceeds to examine.

III. DEPRIVATION, DISCRIMINATION AND RESIDENTIAL SEGREGATION[38]

More Indians than ever before live in urban areas (over 30%). This means that the attributes of urban neighbourhoods are increasingly significant for determining people's opportunities and overall socio-economic development.[39] Further, more than 40% Muslims, in comparison to 29% Hindus, are residents of towns and cities, and the rate of increase of the urban population of Muslims is also more than Hindus. This may be related in part to security-related concerns of Muslims.[40] Indeed, India has one of the world's largest populations of Muslims.[41] In combination, these facts bring home the significance, for Indian society as a whole, of the material and social circumstances of Muslims in our cities. At the same time, it is only very recent research that has begun to connect ghettoisation in Indian cities with social and economic disadvantage for historically stigmatised and excluded groups.

Indian Muslims have a historical experience of discrimination, and they are one of India's most deprived communities. The literacy rate among Muslims is far below the national average, and this gap is greater in urban areas and for women. Further, significant disparities emerge between the educational status

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[36] Yasir Hameed, 'Not in My Neighboourhood' (*Contested Cities*, 2016) <http://contested-cities.net/wp-content/uploads/sites/8/2016/07/WPCC-163014-HameedYasir-NotMyNeighborhood.pdf> accessed 22 July 2022.

[37] ibid.

[38] The data in this section largely relies on the Government of India report titled Sachar Committee, 'Social, Economic and Educational Status of the Muslim Community in India' (2006) <https://www.minorityaffairs.gov.in/sites/default/files/sachar_comm.pdf> accessed 25 September 2021. When other sources are relied on, these have been cited separately.

[39] Adukia and others (n 30) 1.

[40] Subodh Varma, 'More Religious Minorities Live in Urban Areas than Rural' *The Times of India* (26 August 2015) <https://timesofindia.indiatimes.com/india/more-religious-minorities-live-in-urban-areas-than-rural/articleshow/48680765.cms> accessed 26 September 2021.

[41] See, for instance, 'Muslim Population by Country 2022' <https://worldpopulationreview.com/country-rankings/muslim-population-by-country> accessed 1 November 2022.

of Muslims and that of other socio-religious categories (except SCs and STs).[42] Both Mean Years of Schooling ('MYS') and attendance levels of Muslims are low in absolute numbers, as well as in comparison with other socio-religious groups. However, Muslim enrolment rates have shown an increase. While Muslims had the lowest enrolment rate of all socio-religious groups in 1999-2000, the rate improved significantly in five years. While still lower than the average enrolment rate, it was slightly higher than that of OBCs. It is a falsehood that Muslims prefer to send their children to *madrasas*, where they acquire religious and other education. Across the country, only 3% of all Muslim children of school-going age are enrolled in *madrasas*. Many children may attend *maktabs* for religious education, but this is in addition to regular schooling and not a substitute for it. While the number of those with Urdu as their mother tongue requires delivery of education through this medium in different states, Muslims are not opposed to mainstream schooling and have shown increasing inclination towards English education for their children.

At the same time, there is significant Muslim disadvantage in higher education. This may be related to several factors including their poor economic status and generally low education levels. It may also be due to the lack of employment opportunities as the unemployment rate among Muslim graduates is seen to be the highest among socio-religious communities, both poor and not poor. Muslims do not see education as necessarily translating into formal employment. This is because *firstly*, they have a low presence in formal employment and, *secondly*, they perceive that they will be discriminated against in recruitment for salaried jobs. The low perceived returns from education contribute to the non-retention of Muslims in the education system. The disparity in graduation attainment levels between Muslims and all other groups has been widening since the 1970s. In the initial stages of planning, Muslims had a higher graduate attainment rate than SCs and STs, but subsequently, the latter overtook them. The probability of Muslims and SCs and STs completing graduation is lower than for all other socio-religious groups, especially in urban areas and for men. However, the pool of those eligible for higher education has been increasing faster for SCs and STs than for Muslims. This must be related partly to affirmative action, and the higher perceived returns from education for the former groups. Hence, being Muslim reduces the chances of obtaining education at secondary, and then at higher levels.

Worker population ratios are lower for Muslims, and more so for Muslim women, than for any other socio-religious community. Additionally, there is a very high concentration of Muslims in self-employment activities. Their engagement in despised occupations such as butchering further marginalises

[42] In accordance with available data, the Sachar Committee (n 38) identifies socio-religious categories as Hindus, Muslims, other minorities, SCs and STs.

and stigmatises certain Muslims groups.[43] The concentration of Muslim workers in casual labour, daily wage work, and self-employment – street vending, small trades, and enterprises – ensures perhaps that the community is far more exposed to the disruptions and damage caused by urban conflict and violence, lockdowns, curfews, and the like. They are very poorly represented in regular, salaried employment. Only about 27% of Muslim workers in urban areas are engaged in regular work, while the share of such workers among SCs and STs, OBCs, and Hindu upper castes is 40%, 36%, and 49% respectively. The participation of Muslims in formal sector employment is far less than the national average. Further, they tend to be more insecure and vulnerable in terms of conditions of work. This is not only because of their sizable presence in informal sector employment but also because their job conditions (length of contract, social security benefits, and the like) even as regular workers are poorer than those for other socio-religious groups. Muslim men are over-represented in street vending (more than 12% against the national average of <8%), and women tend to work from home to a much larger degree (70%) than the average (51%).[44] Traditional barriers to women's mobility, as well as childcare and other household responsibilities, may be partly responsible for keeping Muslim women within the limits of their homes and close to the neighbourhood. However, Muslims are also confined to certain parts of cities within ghettos, and urban conflict and the threat of violence result in the further huddling of Muslims in community-dominated localities. Women especially harbour a great sense of fear of going beyond the boundaries of these neighbourhoods, within which they feel their security, and that of their children, is better assured.[45]

The immense precarity of Muslim participation in the economy and the low level of their asset accumulation in general further intensify their vulnerability to physical and economic displacements and disruptions caused by communal strife. Research shows that Muslims are far more likely than most other Indians to live in poorer cities, and cities with a higher Muslim share in the population have significantly lower per capita consumption levels. While both Muslim and SC/ST neighbourhoods have lower consumption levels than neighbourhoods in the same city that have fewer marginalised groups, cities with greater Muslim concentration overall have worse access to schools and to public hospitals and doctors. Generally, segregated cities have worse educational outcomes for Muslims.[46] Muslims have poor access to bank credit, and

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[43] See Zarin Ahmad's interesting study of the Qureshi butchers of Delhi: Zarin Ahmad, *Delhi's Meatscapes: Muslim Butchers in a Transforming Mega-City* (OUP 2018).

[44] This is an overall picture, though some differences emerge across states and regions with Muslims in the south and to an extent in the west doing better on a range of indicators than those in the north, central and east of the country. See, for instance, Hasan and Menon, *Unequal Citizens: A Study of Muslim Women in India* (OUP 2004).

[45] Fear, discrimination, and segregation together make for the insecurity of urban Muslims, and women are particularly disadvantaged. See Robinson (n 13); Nida Kirmani, *Questioning the 'Muslim Woman': Identity and Insecurity in an Urban Indian Locality* (Routledge 2013).

[46] Adukia and others (n 30).

the average size of credit is meagre and low compared to other socio-religious groups. Banks use the practice of negative geographical zones within which credit and other financial services are not easily provided. This unacknowledged practice of 'redlining'[47] has serious implications for Muslims because such 'negative' zones usually include poorer neighbourhoods where Muslims form a majority of the population.[48] Such financial exclusion has far-reaching consequences for an economically vulnerable and educationally deprived community.

Urban spaces occupied by Muslims are also typically characterised by decay and a notable lack of civic services. Muslim-concentration areas are marked by poorly tarred and badly maintained roads, and poor sewage and garbage collection systems. While Muslims share in this deprivation with Dalits and the mass of the urban poor, they are the worst off in terms of conditions of living and access to various kinds of resources in comparison with other religious communities.[49] Moreover, such conditions continue to feed the popular images of Muslims as 'dirty', 'unhygienic', and even expendable. Muslims clearly lack political influence and are unable to make demands on collective resources that merit attention.

Overall, the data indicates the residential segregation of Muslims throughout urban India, both with regard to rented and owned properties. Further, they show targeted violence as a mechanism and outcome of the dislocation and confinement of Muslims to restricted areas of the city, and distinct bias in public service provisioning regarding education, physical infrastructure, and health facilities in such Muslim-concentration areas.[50] Discrimination with respect to financial services, credit, and banking also marks these urban zones. In other words, wealth and poverty, opportunity and disadvantage are spatially concentrated across urban India. These distinctions overlap with each other as well

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[47] Redlining is a term used particularly in the US to designate systematic discriminatory practices that put financial or other services out of reach for residents of certain neighbourhoods, typically based on race or ethnicity.

[48] Saumya Roy and Gargi Banerjee, 'Loan Approvals Depend on Borrowers' Address' (*Live Mint*) (8 April 2008) <https://www.livemint.com/Money/f0Rtetble3Chhd5PoAZ2KJ/Loan-approvals-depend-on-borrowers8217-address.html> accessed 21 September 2021. Dupont's study of Mayur Vihar-Trilokpuri in East Delhi also shows that Muslims are largely in poorer settlements. While they represent 11% of the zone's population, their proportion reaches 43% in squatter settlements, becomes marginal in Delhi Development Authority flats, and almost nil in co-operative housing societies. See Veronqiue Dupont, 'Socio-Spatial Differentiation and Residential Segregation in Delhi: A Question of Scale?' (2004) 35 Geoforum 157.

[49] Azra Razzack and Anil Gumber, *Differentials in Human Development: A Case for Empowerment of Muslims in India* (NCAER 2002); Abusaleh Shariff, 'Relative Economic and Social Deprivation in India' (International Development Research Centre, Oxford University 2000).

[50] See also Niranjan Sahoo, 'A Tale of Three Cities: India's Exclusionary Urbanisation' (2016) ORF Brief No 156 <https://www.orfonline.org/wp-content/uploads/2016/09/ORF_IssueBrief_156.pdf> accessed 22 July 2022.

as the divide between Hindus (particularly upper castes) and Muslims. Thus, ghettoisation effectively has corresponding and cumulative consequences on the social and economic aspirations and life-chances of Muslims. It plays a role in pushing down levels of achievement, fixing Muslim expectations at a low level, and sustaining a subdued or defensive cultural profile.

Racial and ethnic residential segregation is an aspect of many countries across the world. Scholars have pointed out that what needs examination is which minority or minorities are segregated, for what reasons, and who impelled them into a segregated situation.[51] Then again, racially determined spatial segregation has been particularly manifest in the United States, a country deeply divided by a history of Black oppression. Studies have shown that disadvantaged minorities such as African-Americans do worse off in segregated areas when it comes to schooling and employment, and are likely to have higher rates of single parenthood.[52] The sociological interest in, and importance of residential segregation by race in the United States overlapped with the expanding civil rights movement. However, the stage for grassroots initiatives in the struggle for civil rights may have been set in part by some earlier events. Among these was an executive move: Truman's 1948 order ending discrimination in the military. The other, notably, was judicial, and this was the landmark US Supreme Court judgment in the *Shelley v Kraemer* case on racial discrimination in housing, which came out in the same year. The judgement asserted that judicial enforcement of racially restrictive housing covenants violated the Equal Protection Clause of the Fourteenth Amendment of the US Constitution.[53]

The analysis of the preceding sections has uncovered the systematic and pervasive character of urban residential discrimination faced by Muslims in India. It has further pointed out the associations of such discrimination with violence and insecurity, and its implications on education, health, employment, and overall social and economic outcomes of the community. Hence, a

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[51] HJ Gans, 'Involuntary Segregation and the Ghetto: Disconnecting Process and Place' (2008) 7 City and Community 353; Xie (n 5).

[52] David Cutler and Edward Glaeser, 'Are Ghettos Good or Bad?' (1995) NBER Working Paper 5163 <https://www.nber.org/papers/w5163> accessed 22 July 2022.

[53] 92 L Ed 1161: 334 US 1 (1948). The Kraemers filed against an African-American couple (the Shelleys), trying to prevent them from purchasing property in a residential neighborhood where Whites had a private agreement to not sell property to non-Whites. Arguing that the State cannot enforce private contracts when these violate the basic protections of the Constitution and asserting that State action included actions by legislative bodies as well as courts and judicial officials, the US Supreme Court struck down the Supreme Court of Missouri's decision to enforce the restrictive covenant. See '*Shelley v Kraemer*' (Jrank) <https://law.jrank.org/pages/24793/Shelley-v-Kraemer-Significance.html> accessed 2 October 2021. The Court looked at restrictive covenants as 'private agreements to exclude persons of designated race or color from the use or occupancy of real estate for residential purposes.'

sociological grasp of this issue moves it beyond analysis in terms of 'attitudinal',[54] transactional or service-provision bias, or even apartness or segregation, however 'virulent'.[55] The analysis points towards a fuller understanding of urban residential discrimination as a form of deep, structural inequality that lies embedded in social institutions and processes throughout society, which is continuously reproduced through inequitable practices and is not only the expression or the outcome of discrimination but constitutes a mechanism to *produce* or enhance cumulative and crosscutting economic, social, and political disadvantage. The next section of the paper turns to the law on exclusionary housing covenants in terms of the jurisprudential understanding of these as private acts. Such covenants, while implicating horizontal discrimination, have not been considered as violative of Constitutionally-guaranteed fundamental rights.

IV. HOUSING DISCRIMINATION IN THE LAW

Indian jurisprudence continues to treat private acts, including exclusionary housing covenants, as effectively shielded from the provisions of Part III of the Constitution. This is no doubt not idiosyncratic, but a legacy of a liberal understanding inherent in the discourse of rights itself. This understanding historically grew out of an anxiety to limit the power of the State to curtail individual freedoms, especially but not only economic freedoms in emerging bourgeois democracies. It predicated itself on a sharp public-private divide that located not only the domain of the familial but also that of the market outside the writ of the State and constitutional rights.[56] In contrast, the Indian Constitution has articulated particular rights in an affirmative language, rather than only negatively as restrictions on State action.[57] While this could be the basis for reading discriminatory actions by non-state actors as also violating

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[54] Interview with Tarunabh Khaitan (n 9).

[55] Bhatia (n 9).

[56] These are the historical outcomes of the bloodless and bloody revolutions in England and France, countries struggling against monarchical and feudal regimes, as well as the US. They perhaps explain something of the negative language in which such rights have been framed (in the US, for instance, 'Congress shall make no law…').

[57] Martha Nussbaum argues that in contrast to the phraseology of the US Constitution that essentially sees fundamental entitlements as prohibitions against State intervention, the Indian Constitution 'typically specifies rights affirmatively'. According to her: "Thus, for example: 'All citizens shall have the right to freedom of speech and expression; to assemble peaceably and without arms; to form associations or unions; ….etc.' (Art 19). These locutions have usually been understood to imply that *impediments supplied by non-state actors may also be deemed violative of Constitutional rights*" (Martha Nussbaum, 'Poverty and Human Functioning: Capabilities as Fundamental Entitlements' in DB Grusky and R Kanbur (eds), *Poverty and Inequality* (Stanford University Press 2006) 54, emphasis added). In contrast to this view, as Gardbaum has shown (Stephen Gardbaum, 'Horizontal Effect' in M Khosla, S Chaudhry, and PB Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016)), Indian jurisprudence in the context of Article 13 has generally restricted fundamental right application to State action.

constitutional rights, critical Supreme Court judgments have largely held back from such an interpretation.

Indeed, the paradigmatic case in this regard is *ZCHS*. In this case, a Parsi cooperative housing society, registered under Bombay Cooperative Societies Act, excluded non-Parsis from becoming members of the society in accordance with its bye-law 7 read with 21. When a member wanted to sell a plot to a non-Parsi builders' association, the tribunal and Gujarat High Court found the bye-laws to be invalid, as they restricted the right to alienate property.[58] On the other hand, ZHCS argued on the basis of Article 19(1)(c) (Right to form associations) and Article 29 (Right of minorities to preserve their culture). It also pointed out that the restriction did not violate the parent enactment. The State argued that this kind of restrictive covenant was invalid because it violated public policy, as drawn from various non-discrimination provisions of the Constitution. In its judgment, the Supreme Court called on the freedom of association in Article 19(1)(c) and the freedom of contract to uphold the restrictive covenant. Effectively viewing statutory policy as public policy, it argued that in this context public policy was defined by the 'four corners' of the enactment under which a member of a cooperative society gets their rights and which governs the society's bye-laws. The members are therefore not entitled to question their constitutionality.[59]

The Court asserted that while it is a constitutional goal to do away with discrimination based on religion or sex, this must be achieved "by legislative intervention and not by the Court coining a theory that whatever is not consistent with…Part III or Part IV [of the Constitution] could be declared to be opposed to public policy". It held that no related amendment had been brought to the cooperative societies enactments in the various states and they did not prohibit such a restriction. Hence, the Court could not direct societies to go against their bye-laws based on its own criteria.[60] In making this argument, the Court effectively denied the American Supreme Court's reasoning in *Shelley v Kraemer*. It ended up enforcing a discriminatory private housing covenant, rather incongruously, by calling on the safeguard of freedom of association.[61] The judgment in this case may be defensible on the grounds of protecting the culture and identity of the Parsi minority under Article 29. However, it is not a good test case for the broader issues under discussion here because the kinds of residential segregation and ghettoisation described above operate, more often than not, as efficient mechanisms for the exclusion of stigmatised and

58 1999 SCC OnLine Guj 183, AIR 2000 Guj 9.
59 ZCHS (n 2) [13].
60 ibid [32].
61 Gautam Bhatia, 'Horizontal Discrimination, Article 15(2) and the Possibility of a Constitutional Civil Rights Act' (*Academia*, 2014) <https://www.academia.edu/9736139/Article_15_2_and_a_Constitutional_Civil_Rights_Act> accessed 22 September 2021.

marginalised groups.[62] Cooperative societies may employ their bye-laws to perpetuate exclusionary practices against marginalised groups in housing markets, thereby ensuring that the collective rights of the cooperative society effectively outweigh individual rights.[63]

At the same time, as mentioned earlier, courts in other countries have also held back from generally applying fundamental rights horizontally against private actors. This has been seen in cases claiming discrimination in private housing covenants. In such cases, courts in various jurisdictions have not directly held such contracts as constitutionally invalid, but have sought alternative remedies to handle them. In the US, as the case of *Shelley v Kraemer* manifested, the Court refused to enforce a discriminatory private covenant, without holding it illegal per se. Such weak indirect protection is given in the UK as well.[64] In Canada, statute law is subject to the Charter of Fundamental Rights and Freedoms when it comes up in private litigation, but not common law. However, courts are expected to take the Charter's values into consideration while scrutinising and developing the common law.[65] Indeed, Canadian courts have voided discriminatory housing contracts on the ground of violating public policy such as in *Re Drummond Wren* of the Ontario High Court.[66] In this case, Judge McKay argued: "It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity." The judgment further stated that:

> …nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this province, or in this country, than the sanction of a method of

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[62] See Gardbaum (n 1); Interview with Tarunabh Khaitan (n 9); Gautam Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach' (2016) 11(1) Asian Journal of Comparative Law 87. Bhatia is one of the few legal scholars who has written consistently on housing discrimination and has helped my own grasp of the legal implications of *ZCHS* and related judgments. In India, the right to property is not a fundamental right. In a comparative perspective, it has been noted that the right to property may clash with other economic, social, cultural, and even civil and political rights. It was not therefore included in the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966) 993 United Nations Treaty Series 3 (ICESCR) (1976). In order to minimise such conflicts, for instance with the right to equality before the law, the right to property is commonly hedged by public interest constraints in most jurisdictions. It is within this context that anti-discrimination provisions with regard to property and its disposal must be placed. See, for instance, Curtis Doebbler, *Introduction to International Human Rights Law* (CD Publishing 2006) 141- 142.

[63] Professor Rahul Sapkal (personal communication, 10 November 2021).

[64] Gavin Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: a Bang or a Whimper?' (1999) 62 Modern Law Review 824, 833-34.

[65] Canadian Charter of Rights and Freedoms 1982, s 32(1).

[66] *Re Drummond Wren* 1945 OR 778 Ont HC <https://www.canlii.org/en/on/onsc/doc/1945/1945canlii80/1945canlii80.html> accessed 5 October 2021.

> land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or, conversely, would exclude particular groups from particular business or residential areas.

Among newer constitutional jurisdictions, South Africa is distinct as constitutional values such as equality and non-discrimination have been directly applied to individuals and non-State entities, such as in the 2010 case of *Curators Ad Litem to Certain Potential Beneficiaries of Emma Smith Educational Fund v University of KwaZulu-Natal*.[67] In this case, the Court invalidated a racially restrictive testament by calling upon these constitutional values and argued that they can be invoked against both State-sanctioned discrimination and private acts.

For the most part, however, countries have used the policy route to pass equal opportunities legislations combating such forms of discrimination, including in the area of housing. This is, for instance, the case in the US, the UK, France, and Germany.[68] In India, while the UPA government dabbled with the idea of setting up an Equal Opportunity Commission, it soon unobtrusively dropped it. The *Anti-Discrimination and Equality Bill* was introduced in the Lok Sabha in 2017 as a private bill, but it lapsed with the dissolution of the House. In 2021, MP Shashi Tharoor, who had introduced the Bill in Parliament, submitted a version of it to Kerala's law minister and the leader of the opposition. He urged the State Government to enact an anti-discrimination law. He recommended that the Bill go through a process of pre-legislative consultation in order to foster participation and consensus around the issue. On the other hand, Gujarat passed *The Gujarat Prohibition of Transfer of Immovable Property and Provision for Protection of Tenants from Eviction from Premises in Disturbed Areas Act 1991* which was later amended in 2020. Under this Act, the state can declare an area to be 'disturbed', following which transfer of property in the area requires the permission of the Collector. This enactment was ostensibly promulgated to prevent distress sales of property due to fear in the wake of collective conflict and violence. However, it has been employed to push Muslims out of 'mixed' areas, and propel them into greater ghettoisation.[69] In 2021, the Gujarat High Court, pending a full hearing on the matter,

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[67] (2010) 6 SA 518 (SCA).

[68] The US Fair Housing Act 1968; the UK Equality Act 2010 and other related codes. French law prohibits discrimination on a range of criteria in the access to goods and services including housing and there is also an enforceable right to housing under the DALO Act 2007; Germany General Equal Treatment Act 2006.

[69] Under the Gujarat Prohibition of Transfer of Immovable Property and Provision for Protection of Tenants from Eviction from Premises in Disturbed Areas Act 1991, the State Government can declare an area as 'disturbed' if, in its opinion, there has been intense rioting or mob violence for a substantial period, if polarisation or improper clustering of persons belonging to one community has taken place or is likely to take place, disturbing the demographic equilibrium of persons of different communities residing in that area. The 2020 amendments

stopped the government from declaring any locality as a 'disturbed area'. It stated that such declarations could lead to the improper clustering of persons from one community.[70]

Indecisive political attempts, combined with Gujarat's divergent move that effectively legitimises segregation, complicate our understanding of legislative efforts to counter housing discrimination in India. The judicial approach has been conservative in this context and has overall limited the application of Part III of the Constitution to private acts. Although, for instance, the Supreme Court has selectively applied the 'right to health' under Article 21 horizontally against private employers in the context of occupational health hazards.[71] It also held in the *Vishaka* case that sexual harassment violated the fundamental rights of women under Articles 14, 15(1), 19(1)(g), and 21.[72] However, rather than directly seeing these rights as infringed by private actors, it laid upon the State the constitutional duty to protect individuals from sexual harassment in the workplace through effective legislation. Until the passage of law, the Court saw itself as filling the gap with the *Vishaka* guidelines as an arm of the State for the purposes of Article 12.[73]

At the same time, Article 15(2) of the Indian Constitution explicitly prohibits discrimination by private individuals on the grounds of religion, race, caste, sex or place of birth in terms of access to shops, public restaurants, hotels, and places of public entertainment.[74] The understanding of 'shops' in this Article, as it emerges from Constituent Assembly debates, and in particular Ambedkar's response to specific questions on the November 29, 1948, releases it unambiguously from any fixed notion as a physical structure permitting entry. It defines 'shop' generically as including "anybody who offers his services". According to Ambedkar, 'shops' in Article 15(2) "is used in the larger sense of requiring the services if the terms of service are agreed to."[75]

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increased the scope of the term 'transfer' and penalties for violation of the Disturbed Areas Act 1991 and gave the Collector even more powers in ascertaining the likelihood of polarisation or improper clustering in an area. See Parimal Dabhi, 'Explained: What has Changed in Gujarat's Disturbed Areas Act' *Indian Express* (19 October 2020) <https://indianexpress.com/article/explained/gujarats-disturbed-areas-act-amendments-6723215/> accessed 17 October 2021.

70 See 'Housing Segregation: Gujarat HC Bars State Govt from Declaring Localities "Disturbed Areas"' (*The Wire*, 21 January 2021) <https://thewire.in/law/improper-clustering-gujarat-hc-bars-state-govt-from-declaring-localities-disturbed-areas> accessed 18 October 2021.

71 *Consumer Education & Research Centre v Union of India,* (1995) 3 SCC 42.

72 *Vishaka v State of Rajasthan,* (1997) 6 SCC 241.

73 Gardbaum (n 57).

74 Constitution of India 1950, art 15(2)(b) prohibits such discrimination in the use of wells, tanks, bathing *ghats*, roads, and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

75 'Constituent Assembly of India Debates (Proceedings) Volume VII: November 29, 1948' (Constitution of India) Dr BR Ambedkar [7.62.129] <https://www.Constitutionofindia.net/Constitution_assembly_debates/volume/7/1948-11-29> accessed 10 October 2021.

This interpretation was called upon by the Supreme Court in 2011 in *Indian Medical Assn. v Union of India*.[76] The Army College of Medical Sciences (Delhi Cantonment) wanted to reserve all its seats for wards or children of Army personnel (current and former) and their widows. Quoting Ambedkar, the Court included educational institutions within the meaning of the term 'shops'. It thereby ensured fundamental rights protection to anyone discriminated against by such service providers on the grounds prohibited in Article 15(2).[77] It has been argued that therein lies a constitutional response to horizontal discrimination. The Article, as in this judgment, could be used by courts and judges to directly render void exclusionary private covenants, such as that upheld in *ZCHS*.[78]

V. A CASE FOR DEMOSPRUDENCE

It is tempting to conclude that courts already have an appropriate instrument Article, 15(2), to apply in order to enforce fundamental rights horizontally, such as in cases of housing discrimination.[79] Further, the Delhi High Court's verdict in *Delhi Dayalbagh House Building Society v Registrar, Cooperative Societies*, and its consequent ratification by the Supreme Court could be read as now limiting the wider applicability of *ZCHS*.[80] At the same time, apart from necessitating an approach to the courts for redress in each case,[81] the sociological analysis in this paper has shown that housing discrimination both includes and goes beyond restrictive covenants and cannot be viewed as an isolated element of disadvantage. It is a part of profound

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[76] (2011) 7 SCC 179.

[77] Article 15(2) is the basis for the Protection of Civil Rights Act 1955.

[78] Bhatia (n 62).

[79] Gautam Bhatia, 'Exclusionary Covenants and the Constitution' (*IndConLawPhil*, 14 January 2014) <https://indconlawphil.wordpress.com/2014/01/14/exclusionary-covenants-and-the-Constitution-iv-article-152-ima-v-uoi-and-the-Constitutional-case-against-raciallyreligiously-restrictive-covenants/> accessed 12 October 2021.

[80] (2019) 4 SCC 429. In this case, membership to a housing society was sought to be limited to those belonging to the Radha Soami sect. The society was governed by the Delhi Cooperative Societies Act 2003 (with amendments in 2006 and further rules in 2007). Unlike the Gujarat Cooperative Societies Act 1961 relevant to the *ZCHS* case, the Delhi Cooperative Societies Act specifies the cooperative principles. The first principle is voluntary and open membership without discrimination on the basis of gender, social inequality, racial, political ideologies, or religious consideration. Thus, Dayalbagh could not frame by-laws in contravention of these principles, as the object of the society was housing and not religious activity. The Court reasoned [27] that the *ZCHS* judgment does not apply as appropriate legislation is in place in Delhi to cover the Dayalbagh case. Moreover, it went on to say that the petitioner society was not required to change its fundamental character; this was not a minority community but only a sect of the mainstream Hindu religion. In this sense, the *ZCHS* judgment is not seen as generally applicable because it is limited to the State's Cooperative Society Act under which that society was constituted and also to the specific characteristic of that society, i.e., as composed of a minority community.

[81] Interview with Tarunabh Khaitan (n 9).

structures and processes of inequality, and it further produces negative social and economic effects for those subject to segregation. Ghettoisation does not emerge out of accidental urban growth but is actively manufactured and maintained by the institutional and individual practices of a diverse range of economic and social actors and entities. Further, segregation on community lines cannot contain strife and violence. It merely shifts conflict elsewhere, and may over time even aggravate it because those who live in ghettoised neighbourhoods do not learn about different cultures and end up demonising other communities.[82] The overlapping as well as crosscutting stratifications of class, community, education, health, and employment outcomes that the data reveals underline the fact that segregation is multifaceted and can have overall negative implications for society as a whole.

Considering the complexities of disadvantage underlying 'private acts' of housing and other forms of systemic and systematic horizontal discrimination, the comprehensive legislative track followed in other countries seems an appropriate mechanism of prevention. It may appear that the policy route, through the crafting of a well-designed 'statutory scheme' built on local accountability, would be the best way to tackle this problem in India as well.[83] However, there has been political ambivalence over equal opportunity legislation in India. Contradictory moves, such as by Gujarat, instead appear to authorise housing segregation. Moreover, the entrenched historical burden of suspicion and stigma borne by Muslims since partition is not easily erased. Further, the rising sway of majoritarian politics, with electoral successes increasingly linked to deepening lines of religious hostility and violence,[84] may well preclude housing discrimination of this kind from being readily placed on the legislative agenda anytime soon.

Therefore, it appears apposite to return to the idea of demosprudence. This notion seeks to capture the potential of certain legal practices to spark or target social movements, and thereby to become the facilitators of policy change.[85] Demosprudence may be understood as the collective action of proponents of justice on behalf of disadvantaged groups working with legal professionals to influence social change, by pushing for constitutional interpretations that

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[82] 'Naveen Bharathi: Fractal Urbanisation and Residential Segregation in Liberalising India' (*Mittal South Asia Institute*, 14 November 2019), <https://mittalsouthasiainstitute.harvard.edu/2019/11/naveen-bharathi-fractal-urbanization-and-residential-segregation-in-liberalizing-india/> accessed 1 October 2021.

[83] Interview with Tarunabh Khaitan (n 9).

[84] See, for instance, Pradeep Chhibber and Harsh Shah, 'Electoral Wins or Religious Peace?' *The Hindu* (2015) <https://www.thehindu.com/opinion/op-ed/electoral-wins-or-religious-peace/article7220396.ece> accessed 24 September 2021.

[85] Lani Guinier and Gerald Torres, 'Changing the Wind: Notes toward a Demosprudence of Law and Social Movements' (Cornell Law Faculty Publications 2014) 1212 <https://scholarship.law.cornell.edu/facpub/1212> accessed 12 October 2021.

enhance democracy.[86] Recollecting the significance of *Shelley v Kraemer* (and later *Brown v Board of Education*)[87] in catalysing civil rights struggles in the United States with its deep-rooted racial divide, it is argued that the dislodgement of equally ingrained and historically-determined social divisions as spoken of in this paper may require a judicial nudge. It is true that the Supreme Court has so far held to a narrow understanding of the application of constitutional law to exclusionary housing covenants, and in general to the domain of private acts. At the same time, the Indian judiciary practised demosprudence much before Guinier first spoke of the term in restricted association with judicial 'oral dissents'.[88] The space created by the Supreme Court for such 'dialogic' adjudicative co-governance[89] is expansive and includes the labour of a range of legal and social actors in facilitating democratic change. Thus, rather than await decisions in specific appeal matters, the paper has pointed to social science and legal scholarship now available in this regard. This scholarship may be marshalled and honed, if one might so put it, as a 'juridical trigger'. Just as in the *Vishaka* case, women's groups came forward to forge a plea to the Supreme Court against workplace sexual harassment in the name of the fundamental rights of women, what is asserted here is the possibility (and the necessity) for appropriately crafted social action litigation to emerge.[90] Such litigation would call forth a fuller Supreme Court interpretation of Article 15(2) and its relationship to Article 21,[91] and uphold constitutional morality against diverse forms of horizontal discrimination.

Where societal prejudices are strong[92] and political will is wavering, a judicial pronouncement or set of guidelines could fill the gap in the existing legislation.[93] It could also stir a wider conversation in civil spaces of activism and in the media on the costs of conflict and segregation.[94] It would provide "a powerful pedagogical opportunity to open up space for deliberation and engagement" among a range of 'non-judicial actors' including members of

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86 This understanding relies on ibid.

87 1954 SCC OnLine US SC 44, 98 L Ed 873, 347 US 483 (1954).

88 This is argued by Upendra Baxi, 'Law, Politics, and Constitutional Hegemony: The Supreme Court, Jurisprudence and Demosprudence' in S Chaudhry, M Khosla and PB Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 94-109.

89 ibid.

90 ibid. I follow Baxi in using the term social action litigation.

91 For an argument framed in the context of Article 21, see 'Discrimination in Housing' (*Frontline*) (8 July 2016) <https://frontline.thehindu.com/the-nation/discrimination-in-housing/article8745 826.ece> accessed 11 October 2021.

92 For instance, Bhat (n 33); Bhat and Lone (n 33); Dharni (n 33).

93 In the US, following *Shelley v Kraemer* and the civil rights movements, policy was enacted in 1968 with regard to fair housing.

94 For instance, see Gupta (n 16); AR Desai, 'Caste and Communal Violence in Post-Partition Indian Union' in AA Engineer (ed), *Communal riots in post-Independence India* (Sangam Books) 10-32.

think tanks,[95] politicians, and leaders of all kinds as well as ordinary people. It would further enable the commencement of the labour of persuasion required for introducing and stabilising policy change. In doing so, demosprudence would take seriously Ambedkar's understanding that structural inequalities threaten individual rights and political freedoms, and impart meaning to his social and economic democracy. It could also lay the groundwork for that third elusive constitutional promise – fraternity – an idea which, I have argued in detail elsewhere,[96] is particularly pertinent in the context of residential segregation. Indeed, for Ambedkar, democratic citizenship on the ground is fraternity. That, in turn, is nothing other or less than dwelling together, or neighbourliness in its fullest sense as a "mode of associated living, of conjoint communicated experience"[97] and shared interactions in the 'vital processes' of everyday life.[98]

VI. CONCLUSION

In conclusion, the paper has employed a sociological lens to critically query the interpretation of housing agreements as 'private acts' not subject to fundamental rights application in Indian jurisprudence. This notion perceives such acts as freely entered into by persons for their own benefit. However, the paper has uncovered that with regard to the renting and owning of urban property, Muslims are at the receiving end of structural and pervasive patterns of discrimination and inequality, which disadvantage them not only as individuals but also as a despised and stigmatised group. Moreover, as the paper documented, recent research has begun to show the negative effects of housing discrimination on a range of social outcomes including consumption levels, education, health, and the like. This clearly has serious implications for a community that is already economically precarious and socially and politically vulnerable, and calls for legal or legislative redress. While points of view have ranged on either side of these options,[99] it has been argued here, recollecting the US civil rights experience, that political and legislative action may require

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[95] Guinier quoted in Brian Ray, 'Demosprudence in Comparative Perspective' (2011) 47 Stanford Journal of International Law 111.

[96] Rowena Robinson, 'In Search of Fraternity: Constitutional Law and the Context of Housing Discrimination in India' (2015) 50(26-27) Economic and Political Weekly 54.

[97] BR Ambedkar, 'Annihilation of Caste' in Vasant Moon (ed and compiled), *Dr. Babasaheb Ambedkar Writings and Speeches, Volume 1* (Government of Maharashtra 1979) 57 <http://www.mea.gov.in/Images/attach/amb/Volume_01.pdf> accessed 17 December 2017. In this, he is influenced by and is quoting John Dewey. See John Dewey, *Democracy and Education* (Macmillan 1916) 93.

[98] BR Ambedkar, 'Philosophy of Hinduism' in Vasant Moon (ed and compiled), *Dr. Babasaheb Ambedkar Writings and Speeches, Volume* 3 (Government of Maharashtra 1987) 44 <http://www.mea.gov.in/Images/attach/amb/Volume_03.pdf> accessed 3 January 2018.

[99] As the paper has shown, Interview with Tarunabh Khaitan (n 9) argues for specific public policy legislation while Bhatia (n 79 and n 62) suggests that judges can rest on Article 15(2) of the Constitution to adjudicate discrimination cases.

a judicial nudge. Thus, the paper has called on the notion of demosprudence. The paper has contended that effectively honed social action litigation spurred by scholars and legal and social activists may elicit a Supreme Court reconsideration of *ZCHS*, and a clearer judicial pronouncement upholding fundamental rights against various forms of horizontal discrimination. This could in turn perhaps trigger public policy legislation and enable wider democratic change.

WOMEN, GENDER POLITICS, AND RESISTANCE IN KASHMIR

—Seema Kazi*

This article focuses on Kashmiri women and the gender politics underpinning the August 5, 2019 revocation of Article 370 in Kashmir. Reclaiming Kashmiri women's property rights was among the justifications cited by the state for revoking Kashmir's autonomy. Paradoxically, however, most analyses centered on its political implications. Kashmiri women's opinions regarding the revocation, the state's use of the women's rights argument to justify the same, or Kashmiri women's rights and experiences in the wake of the revocation were seldom the subjects of discussion or analysis. Beginning with a brief overview of Kashmiri women's role in the Kashmiri struggle, I juxtapose the State's claim as defender of Kashmiri women's property rights against the legal and factual position of women's property rights in Kashmir prior to the revocation, demonstrating the contradiction between the two. I subsequently foreground the gendered, misogynist sub-text of nationalist rhetoric unleashed in the wake of the revocation. The convergence between hyper-nationalist, masculinist claims to Kashmir's territory on the one hand, and to Kashmiri women's bodies on the other, is highlighted. This particular dimension, I maintain, symbolises the gendered edge of the Indian State's policy of colonial and ethnic domination in Kashmir. In the final section, I use local Kashmiri reportage on Kashmiri women's views, subjective experience, and collective resistance to contest (a) constructs of the apolitical, victimised, agency-less Kashmiri Muslim woman, and (b) state claims to Kashmiri, especially Kashmiri women's endorsement of the revocation. Kashmiri women's resistance, I conclude, is part of a Kashmiri struggle underpinned by the universal principles of justice and liberty; it symbolises the need for a just and peaceful resolution to Kashmir's tragedy.

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I. INTRODUCTION

The end of Jammu and Kashmir's ('Kashmir') limited autonomy on August 5, 2019 reconfigured Kashmir's relationship with the Indian state.[1] Over previous decades, a majority of constitutional provisions under Article 370 of the Indian Constitution ('Article 370') affirming Kashmir's autonomy were rescinded without Kashmiri consent.[2] A key provision of Article 35A[3] forbidding non-Kashmiris from outside the state from permanently settling, buying land, holding local government jobs, and securing education scholarships had, however, remained. With its revocation, Kashmiris stood dispossessed of the last remaining remnant of Kashmiri sovereignty, namely, Kashmiri rights over Kashmiri land, and the statehood and residency rights flowing from the latter. The withdrawal of constitutional protections[4] over Kashmiri land, residence rights, identity, and ways of life signalled a policy of aggressive colonisation.[5] From its status as disputed territory with a contested accession[6] to a period of extraordinary military occupation backed by impunity, the annexation marked

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1 Under the Constitution of India 1950, art 370, in addition to its own flag and constitution, Indian jurisdiction in Kashmir was limited to defence, foreign affairs, and communication. By 2019, however, as many as 290 out of 395 Articles of the Indian Constitution were applied to Kashmir. Virtually nothing remained of Article 370. The only remaining protection was art 35A related to Kashmiri rights over land, employment, and government scholarships. See Abdul G Noorani, 'What Article 35A Implies' (*Frontline*, 29 March 2019) <https://frontline.thehindu.com/cover-story/article26506833.ece> accessed 23 May 2020.

2 Kashmir was the only Princely State to negotiate the terms of its temporary accession within the Indian Union. According to a Government of India white paper on Jammu and Kashmir, "in accepting the accession, the Government of India made it clear that they would regard it as 'purely provisional' [emphasis original] until such time as the will of the people of the State could be ascertained." The paper reiterated that "the question of the State's accession should be settled by a reference to the people." See Government of India White Paper on Kashmir, quoted by Abdul G Noorani, *The Kashmir Dispute 1947-2012* (vol 1, Tulika Books 2013) 23-24.

3 Noorani (n 1).

4 Abdul G Noorani, 'Article 370: Genesis and Wreckage' (*Kashmir Ink*, 29 April 2016) <http://gdcganderbal.edu.in/Files/a8029a93-30ad-4933-a19a-59136f648471/Link/ARTICLE_370__GENESIS_AND_WRECKAGE_-_Copy_88fea090-5882-42cd-8557-7aaf79477718.pdf> accessed 23 May 2020.

5 Aditi Saraf, 'The Lie of the Land: Why Losing Territorial Sovereignty Poses and Existential Threat to Kashmiris' (*The Caravan*, 1 October 2019) <https://caravanmagazine.in/commentary/losing-territorial-sovereignty-poses-existential-threat-to-kashmiris> accessed 23 May 2020.

6 Josef Korbel, 'The Kashmir Dispute and the United Nations' (1949) 3(2) International Organization 278.

a third phase characterised by a full-blown settler colonial project in Kashmir.[7] The August 5, 2019 revocation split the state into the two separate Union Territories of 'Jammu and Kashmir' and 'Ladakh', each under direct control of the Central Government. The bifurcation replaced an older, overarching, historically shaped Kashmiri identity with a new balkanised version,[8] with constituent groups and regions caught in competitive rather than in cooperative mode.[9]

The revocation also served to blunt a more than seven-decade-long Kashmiri Muslim resistance against occupation and repression in the Kashmir Valley by pitting it against majoritarian Hindu nationalist sentiment in Jammu. Likewise, the new Union Territory of Ladakh drew Ladakhi Muslims into an equation of political inequality and dominance with regard to Ladakh's Buddhist majority, inclined towards New Delhi. In effect, the breakup of the state of Jammu and Kashmir polarised and politicised relations between ethnicities and regions in ways that subverted the integrity of a distinctive regional Kashmiri identity shaped through history. Kashmir's traditional red flag with its three white stripes symbolising the three component regions of Kashmir, Jammu, and Ladakh, was replaced with the Indian flag at the state secretariat building.[10] The division of Kashmir on ethnic lines served to erode the region's Muslim majority character and weaken Kashmiri Muslim political power within each of the two new constituent territories.

In the wake of August 5, 2019, in addition to an already existing troop presence estimated at between five lakh - seven lakh security personnel,[11] the

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7 Goldie Osuri, 'Imperialism, Colonialism and Sovereignty in the Post (Colony): India and Kashmir' (2017) 38(11) Third World Quarterly 2428.

8 Fayaz Bukhari and Zeba Siddiqui, 'India Moves to Divide Jammu and Kashmir Despite Protests, Attacks' (*Reuters*, 30 October 2019) <https://www.reuters.com/article/us-india-kashmir-idUSKBN1X90JB> accessed 19 April 2020.

9 The erstwhile State of Jammu and Kashmir comprising the Kashmir Valley, Jammu, and Ladakh had a Muslim majority character. The Valley is overwhelmingly Muslim (68%) with a Hindu minority (28%); Hindus are the predominant group in the Jammu region (62%) albeit with a 33% Muslim minority; Ladakh is home to a Buddhist majority (51%) with a Muslim minority (44%). Overall, the State of Jammu and Kashmir comprised 68.3% Muslims. See Census Organization of India, 'Jammu and Kashmir Religion Census 2011' (Census 2011) <https://www.census2011.co.in/data/religion/state/1-jammu-and-kashmir.html> cited in Bilal Ahmad Khan, 'Demography of Jammu and Kashmir in Historical Perspective' (2018) 7(3) Asian Review of Social Sciences 143.

10 "Under article 370, Kashmir was permitted to have its own flag, which was red in colour with three equidistant white vertical strips and a white plough. The flag was adopted by Kashmir's Constituent Assembly on June 7, 1952. The three stripes represented the state's three regions of Jammu, Kashmir and Ladakh … The flag was removed from the Civil Secretariat three weeks after the Centre revoked article 370." Press Trust of India, 'Jammu and Kashmir State flag Removed from Civil Secretariat' (*Economic Times*, 25 August 2019) <https://economictimes.indiatimes.com/news/politics-and-nation/jammu-and-kashmir-state-flag-removed-from-civil-secretariat/articleshow/70829513.cms> accessed 23 May 2020.

11 Office of the United Nations High Commissioner for Human Rights, 'Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from

central government dispatched an additional thirty-eight thousand troops to Kashmir.[12] A formidable security presence paralleled a crippling lockdown,[13] an internet and telecommunication blackout,[14] a ban on public gatherings,[15] a curfew,[16] and extraordinary levels of repression[17] against the local population.

Historically, Kashmir has been subject to political control by New Delhi.[18] Kashmir's 1987 Assembly election proved to be a watershed moment in this regard. A local umbrella opposition conglomerate, the Muslim United Front ('MUF'), emerged as the principal political challenger to the incumbent National Conference ('NC'). The defeat of the MUF in an election, the results of which were widely believed to be rigged, generated widespread resentment.[19] Many MUF candidates were arrested; some who won were declared defeated. Popular anger at the subversion of democracy in Kashmir generated a militant-led movement for azadi, independence.[20]

June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan' (United Nations 2018).

12 Kamaljit Kaur Sandhu, 'Another 28,000 Troops Rushed to Kashmir Valley week after 10,000 were Deployed' (*India Today*, 2 August 2019) <https://www.indiatoday.in/india/story/28-000-more-troops-deployed-in-kashmir-valley-1576280-2019-08-02> accessed 10 May 2020.

13 Jeffrey Gentleman, 'In Kashmir Growing Anger and Misery' (*New York Times*, 30 September 2019) <https://www.nytimes.com/2019/09/30/world/asia/Kashmir-lockdown-photos.html> accessed 10 May 2020.

14 Mayank Bhardwaj, 'India Isolates Kashmir by Shutting down Communications as Big Change Announced' (*Reuters*, 5 August 2019) <https://www.reuters.com/article/us-india-kashmir-blackout-idUSKCN1UV1R7> accessed 7 May 2020.

15 Rebecca Ratcliffe, 'Kashmir Leaders Placed under Arrest Amid Security Crackdown' (*The Guardian*, 5 August 2019) <https://www.theguardian.com/world/2019/aug/05/kashmir-leaders-placed-under-arrest-amid-security-crackdown>accessed 10 May 2020.

16 Surabhi Tandon and Adil Bhat, 'Kashmir Residents Struggle under Curfew' (*France 24*, 14 August 2019) <https://www.france24.com/en/20190814-kashmir-exclusive-india-pakistan-tensions-curfew-struggle-report-muslim-modi> accessed 3 May 2020.

17 People's Union for Civil Liberties, 'Imprisoned Resistance: 5th August and its Aftermath' (*PUCL* 2019) 40-63 <http://www.pucl.org/reports/imprisoned-resistance-5th-august-and-its-aftermath> accessed 20 January 2022; 'About 4,000 People Arrested in Kashmir since 5 August: Govt Sources to AFP' *The Hindu* (18 August 2019) <https://www.thehindu.com/news/national/about-4000-people-arrested-in-kashmir-since-august-5-govt-sources-to-afp/article61582905.ece> accessed 7 December 2019.

18 Hilal Bhatt recalls that, "Even prior to the ill-fated elections in 1987, there had been a widespread belief among the people of Kashmir that they had never been given a fair chance to choose their own representatives: since the first such elections, in 1951, the ruling parties had always been those backed by New Delhi." See Hilal Bhatt, 'Fayazabad' in Tariq Ali and others (eds), *Kashmir: The Case for Freedom* (Verso 2011) 79.

19 Farrukh Faheem, 'Interrogating the Ordinary: Everyday Politics and the Struggle for Azadi in Kashmir' in Haley Duschinski and others (eds), *Resisting Occupation in Kashmir* (University of Pennsylvania Press 2018); Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* (Vistaar Publications 2003) 49-51; Chitralekha Zutshi, *Kashmir: History, Politics, Representation* (Oxford University Press 2019).

20 The Jammu and Kashmir Liberation Front ('JKLF') dominated the movement for azadi (freedom) during 1990-1993. The JKLF's idea of a united Kashmir independent of both India and Pakistan had little traction in India or Pakistan. Pakistan weakened the JKLF by supporting a range of pro-Pakistan militant factions, most primarily the Hizbul Mujahideen (HM) and

Many Kashmiri women joined Kashmiri men in supporting the movement for independence. During the initial phase of the movement in the early 1990s, women helped militant rebels morally, economically, and emotionally.[21] Because Kashmir's movement was anchored in Kashmiri society, the Indian state's counter-offensive was not restricted to armed militants – it included the rebellion's social base, i.e., Kashmiri men and women. Kashmiri homes and bodies thus transformed into targets and sites of violence in an all-encompassing counter-offensive to contain the rebellion. For precisely this reason, women's identification and support for Kashmir's political struggle was inextricable from struggles of everyday survival and resistance in a conflict "where the binaries of home and outside do not hold and where the home is not an indicator of safety."[22]

A range of literature highlights Kashmir as a complex, multi–layered terrain where the conventional combatant–non–combatant, civil-military boundaries are blurred.[23] As the counter-offensive to contain the rebellion morphed into random and indiscriminate targeting of Kashmiri bodies by state forces, the methods and instruments of repression were gendered and sexualised.[24] Kashmir transformed into a space where the practices of repression intruded into social and cultural interstices and private spaces.[25]

Anthropological studies demonstrate that conflict in Kashmir is as much about violence and the abuse of power inflicted on Kashmiri bodies as it is

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its ideology of Kashmir banega Pakistan (Kashmir will join Pakistan). In 1994, the JKLF declared an indefinite ceasefire and continuation of the struggle through peaceful means. See Bose (n 19) 126-134. The JKLF was banned by the Indian state in March 2019 under the Unlawful Activities (Prevention) Act, 1967.

21 Mushtaq ul Haq Sikandar, 'Women in Conflict: Surviving and Struggling in Kashmir' (2012) 47(9) Economic and Political Weekly 21.

22 Nitasha Kaul and Ather Zia (eds), *Can You Hear Kashmiri Women Speak?: Narratives of Resistance and Resilience* (Women Unlimited 2020) xi.

23 Cabeiri deBergh Robinson, *Body of Victim, Body of Warrior: Refugee Families and the Making of Kashmiri Jihadists* (Berkeley University of California Press 2013); Haley Duschinski and others (eds), *Resisting Occupation in Kashmir* (University of Pennsylvania Press 2013); Essar Batool and others, *Do You Remember Kunan Poshpora?* (Zubaan Books 2016); Suvir Kaul, *Of Gardens and Graves: Essays on Kashmir, Poetry, Politics* (Three Essays Collective 2015).

24 Office of the United Nations High Commissioner for Human Rights (n 11); Essar Batool, 'Dimensions of Sexual Violence and Patriarchy in a Militarized State' (2018) 53(47) Economic and Political Weekly 60; Kaul and Zia (n 22); Samreen Mushtaq, 'Militarisation, Misogyny and Gendered Violence in Kashmir' (*London School of Economics and Political Science — Engenderings*, 9 September 2019) <https://blogs.lse.ac.uk/gender/2019/09/09/militarisation-kashmir/> accessed 7 March 2022; Aliya Anjum, 'Moving from Impunity to Accountability: Women's Bodies, Identity, and Conflict-related Sexual Violence in Kashmir' (2018) 53(47) Economic and Political Weekly 47.

25 Fahad Shah (ed), *Of Occupation and Resistance: Writings from Kashmir* (Tranquebar Press 2013); Ather Zia and Javaid Iqbal Bhat (eds), *A Desolation Called Peace* (Harper Collins 2019); Saiba Varma, *The Occupied Clinic: Militarism and Care in Kashmir* (Yoda Press 2021).

about exercising political and territorial dominance. The field of conflict in Kashmir is thus multi-layered and complex: it is not an exclusively male space, nor is it a straightforward contest between state forces and Kashmiri militants, or between state forces and Pakistan-based militants. Critical gender scholarship on Kashmir illuminates the multiple instrumentalities of gender, especially the gendered field of conflict in Kashmir and the exploitation of gender difference and cultural codes of gender for political ends by state personnel.[26]

Further, the term 'Kashmiri women' within the dominant discourse shaped by mainstream media is generally reductive and permeated with negative stereotypes of Kashmiri women, and by extension, of Kashmiri Muslim society. In mainland India, Kashmiri resistance against occupation and repression is viewed as an outcome of a Pakistan-backed Kashmiri Islamist patriarchy. Within this particular construct, Kashmiri women, as Kaul and Zia note, "are often presented as passive victims of their men and of the overarching political violence."[27] Such representations of Kashmiri women shaped through public ignorance and hostility mask the historicity, complexity and continuity of women's resistance against the gendered, interlocking systems of militarisation and political violence.[28] Against the latter, Kashmiri women witness and struggle to survive amidst a conflict characterised by, among others, democratic subversion, civilian killings, massacres, disappearances, curfews, blindings, the destruction of Kashmir's civil society, ethnic fragmentation and polarisation, a mental health crisis, and migration.[29]

By 2010, the Kashmiri struggle transformed into peaceful civic opposition against status quo. Kashmiri women joined civic mobilisations against occupation, militarisation, and repression as women and as Kashmiris. In 2017, for instance, female students joined other students to protest the creation of a security checkpoint at Pulwama's Degree College. "Young women pelted stones at the police, kicked armoured vehicles, or got into altercations with the armed forces."[30] Over the decades, many young Kashmiri women chose to wear a headscarf — a cultural choice that dovetailed into dominant representations of Kashmiri women as victims of a Kashmiri Muslim patriarchy. Mainstream media represented images of protesting young Kashmiri women with headscarves and covered faces as a sign of an Islamist radicalisation of women.[31]

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[26] Anjum (n 24); Batool (n 24).

[27] Nitasha Kaul and Ather Zia, 'Knowing in Our Own Ways' (2018) 53(47) (Economic and Political Weekly) 33.

[28] Mir Fatima Kanth, 'Women in Resistance: Narratives of Kashmiri Women's Protests' (2018) 53(47) Economic and Political Weekly 42.

[29] Office of the United Nations High Commissioner for Human Rights, 'Update on the Situation of Human Rights in Indian-Administered and Pakistan-Administered Kashmir from May 2018 to April 2019' (United Nations 2019) <https://www.ohchr.org/sites/default/files/Documents/Countries/IN/KashmirUpdateReport_8July2019.pdf> accessed 10 July 2022.

[30] Kanth (n 28).

[31] ibid.

Such (mis)characterisations served to mask Kashmiri women's subjectivity as self-aware political actors with culturally anchored practices of resistance. As Inshah Malik asserts, "Kashmiri women's refashioning of self and notions of struggle for political freedom are drawn on elements from within their own culture."[32]

Moreover, relatively little attention was paid to Kashmiri women's resistance in post-August 2019 Kashmir, even though gender equality was among the stated aims for the revocation of Kashmir's autonomy. The gender justice argument advanced by the Indian state received uncritical support across mainland India. It reinforced the nationalist convergence between Kashmir as threatened territory and Kashmiri women as threatened victims of a Kashmiri Muslim patriarchy — both needing to be secured and saved by the Indian state and by Indian men respectively. Effaced completely were Kashmiri "women's agential roles in resisting the everyday militarisation of their lives … participation in protest marches … to speak for themselves and challenge the militaristic state through their everyday negotiations."[33]

This article addresses three relatively unexamined gender domains related to Article 370, its revocation, and the political aftermath. The first relates to the gender politics around Article 370. Since 2018, calls for abrogating Article 370 became more strident. The gender justice argument was employed by the government and its nationalist allies to advance the argument that the legal and constitutional protections over Kashmiri land discriminated against the residence and property rights of those Kashmiri women who married non-Kashmiri men. This article contests the legal validity of the gender justice argument with reference to the revocation of Article 370.

The second argument focuses on the convergence between hyper-masculine assertions of power over Kashmiri land and over Kashmiri female bodies through misogynist sloganeering and the objectification of Kashmiri women. The gendered subtext of the message of masculinist dominance over Kashmiri land and bodies conveyed through the August 5, 2019 abrogation is examined and analysed. The confluence between hyper-masculine Hindu nationalist entitlement to Kashmiri women's bodies on the one hand, and Kashmir's annexed territory on the other, is fore grounded.

The third argument relates to the contradiction between the Indian state's claims to gender justice through the revocation of Article 370 in mainland India, and the notable absence of the views of Kashmiri women themselves on the revocation. Many Kashmiri women protested the annexation, yet little

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[32] Inshah Malik, 'Imaginations of Self and Struggle: Women in Kashmiri Armed Resistance' (2015) 50(49) Economic and Political Weekly 60, 66.

[33] Mushtaq (n 24).

attention was paid to the very constituency on whose behalf the revocation was executed.[34] Blending critical scholarship on Kashmiri women's resistance through the decades with local Kashmiri reportage of women's protests against the August 5, 2019 revocation, this section reclaims and reaffirms Kashmiri women as critical, self-aware political actors contesting the revocation of Kashmir's autonomy undertaken in their name. The conclusion sums up the salience of Kashmiri women's resistance and underscores its political significance.

A. Women in Kashmir

The extraordinary violence, social chaos, human rights abuse, and the destruction of Kashmir's social capital in the wake of the 1989–1990 rebellion arrested the modest albeit significant achievements of Kashmiri women. Gender norms and roles were dislodged, extended, broken, instrumentalised and subverted as the conflict's dynamics seeped into the personal, social, cultural, and economic capillaries of Kashmir's society. Women transformed into protestors, prisoners, widows, writers, rape survivors, civic activists, mobilisers, *mukhbirs* (informers), prostitutes, and a whole host of other roles shaped by a military occupation.[35]

Dominant narratives tend to view Kashmiri women as perennial victims of an Islamist and/or militarist patriarchy lacking socio-political understanding or subjectivity. Post-colonial feminist scholars underscore the critical importance of self, agency, and subjectivity towards understanding women in Muslim societies.[36] This point has much salience with regard to representations of Kashmiri women as apolitical, agency-less victims of conflict, proxies of Islamist jihadis, or at best, adherents of a male/militant-led Kashmiri nationalism. Such narratives mask and camouflage a context wherein the cultural dimensions of patriarchy in Kashmir are rendered redundant against the everyday violence, brutality, and dehumanisation inflicted by occupation, repression, and dispossession.

Additionally, some of the early feminist scholarship on Kashmir placed Kashmiri women within the larger universalist canvas of armed conflict, highlighting women as both victims and survivors.[37] Missing in these accounts

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[34] People's Union for Civil Liberties (n 17).

[35] Sikandar (n 21) 22-23.

[36] Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton University Press 2005); Lila Abu-Lughod, 'Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others' (2002) 104(3) American Anthropologist 783.

[37] Urvashi Butalia, *Speaking Peace - Women's Voices from Kashmir* (Bloomsbury Academic 2002); Rita Manchanda, *Women, War and Peace in South Asia: Beyond Victimhood to Agency* (SAGE Publications 2001).

were Kashmiri women's local subjectivities shaped by a political understanding of survival amidst daily violence and repression, women's resistance against the status-quo, and women-led public struggles for accountability and justice.[38] In effect, as Inshah Malik maintains, "… an assessment of Kashmiri women's agency ... is a complex notion constituted by various identities and performed both as acts of self-formation and in constitutive struggles against oppressive subjection. Kashmiri women's lives are … scripted by constraints of gender and political occupation."[39]

Notwithstanding a formidable security presence and continuing violence for over seven decades, Kashmiri women have protested the militarisation, occupation, and repression in Kashmir. The post-2010 civic mobilisations against the status quo witnessed notable participation by women. In 2017, for instance, young women from prominent Srinagar colleges came out collectively for pro-freedom protests; Srinagar schoolgirls thronged the streets and pelted Indian soldiers and armoured vehicles with stones, undeterred by tear gas.[40] In the same year, after security forces fired tear-gas shells and pellets against students of Pulwama Degree College, female students across various districts in Kashmir organised protests and marches as a mark of solidarity with students of Pulwama – they chanted pro-freedom slogans and demanded the right to self-determination.[41]

Further, as a result of the state's counter-offensive, the killing or enforced disappearance of male kin pushed Kashmiri women to assume responsibility as earners and caregivers. Because many rebels were working-class, such killings and disappearances pushed a large number of underprivileged women into economic roles as breadwinners. In the absence of male kin, the rise of working-class female-headed households in a traditional society added to women's vulnerabilities. Working-class widows led a harsh life as female breadwinners with scant economic resources, a disabled and unsympathetic governance machinery, and an omnipresent fear of predatory violence by security forces.[42] Many widows lead an invisible existence in suffering, struggle, and neglect.[43]

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38 Kaul and Zia (n 22); Ather Zia, *Resisting Disappearance: Military Occupation and Women's Activism in Kashmir* (Zubaan Books 2020).

39 Inshah Malik, *Muslim Women, Agency and Resistance Politics: The Case of Kashmir* (Palgrave Macmillan 2019) 9.

40 Inshah Malik, 'Gendered Politics of Funerary Processions: Contesting Indian Sovereignty in Kashmir' (2018) 53(47) Economic and Political Weekly 63, 65.

41 Kanth (n 28) 43.

42 'Half Widow, Half Wife? Responding to Gendered Violence in Kashmir' (Association of Parents of Disappeared Persons 2011) <https://kafilabackup.files.wordpress.com/2011/07/half-widow-half-wife-apdp-report.pdf> accessed 18 May 2022.

43 Soudiya Qutub, 'Women Victims of Armed Conflict: Half-widows in Jammu and Kashmir' (2021) 61(2) Sociological Bulletin Indian Sociological Society 255.

Furthermore, Kashmiri women were subject to high levels of gender-based violence in Kashmir's extraordinarily militarised conflict. Independent reports testify to the extraordinary levels of sexual abuse by state personnel in Kashmir.[44] Special security legislation such as the Armed Forces (Special Powers) Act 1958, allowing impunity for the perpetrators of crimes against women, leaves survivors without any legal remedy for justice against gender-based violence by state actors.

In effect, the gendered edge of the Indian state's counter-offensive in Kashmir is coded with a message of political domination, wherein the sexual subjugation of Kashmiri women is both an abuse of public authority and a means to re-inscribe the larger equation of power and dominance over individuals, families, communities, and over Kashmiri society at large. Against this overarching context, Kashmiri women are raped not only because they are women; they are also raped because they belong to an 'other' (Kashmiri) ethnic group.[45] The gendered, sexualised edge of India's counter-offensive in Kashmir acquired a sharper ethno-nationalist edge in the wake of the August 5, 2019 revocation of Kashmir's autonomy.

II. GENDER POLITICS AND ARTICLE 370

In 1927, Kashmir's ruling monarch Maharaja Hari Singh granted Kashmiris exclusive rights over Kashmiri land, property, and jobs. His intent was to protect the interests of natives and prevent non-natives dominating the administration or from buying or selling Kashmiri land.[46]

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[44] Asia Watch and Physicians for Human Rights, 'Rape in Kashmir: A Crime of War' (Human Rights Watch 1993); Medicins Sans Frontieres, 'Kashmir: Violence and Health' (Medicines Sans Frontieres 2006) <https://www.msf.org/sites/default/files/2018-08/kashmir-violence-and-mental-health.pdf> accessed 22 September 2021; Batool and others (n 23); Office of the United Nations High Commissioner (n 11) 28.

[45] Surabhi Chopra, 'Dealing with Dangerous Women: Sexual Assault under Cover of National Security Laws in India' (2016) 34(2) Boston University International Law Journal 319.

[46] Through the 1927 and 1932 notifications by Kashmir's Maharaja, Jammu and Kashmir State subjects were vested with exclusive rights to land ownership, immovable property, scholarships, and government jobs in the three regions of Jammu and Kashmir. The protections under the Notifications of 1927 and 1932 were integrated within the Jammu and Kashmir Constitution of 1939 and subsequently within the Jammu and Kashmir Constitution of 1956. The objective of both was to address concerns brought to the notice of the Maharaja regarding the influx of outsiders and their likely appropriation of the property and employment rights of Kashmiris. See MJ Aslam, 'How State Subject Laws of Erstwhile State of JK came into Being: Have Kashmiri Hindus Forgotten it?' (*Countercurrents*, 26 May 2020) <https://countercurrents.org/2020/05/how-state-subject-laws-of-erstwhile-state-of-jk-came-into-being-have-kashmiri-hindus-forgotten-it/> accessed 13 January 2022. "At the beginning of the 20th Century 'a new problem confronted the people' - the outsider occupying posts in the administration. In 1912 a definition of the 'State Subject' was formulated for the first time. The cry of 'down with the outsider' was raised mostly by the Hindus. Muslims were excluded from State jobs by the Dogra ruler and were too poor to own lands." See Noorani (n 1).

The continuity of this order by way of Article 35A[47] was a core condition for Kashmir's accession[48] to India.

In order to comprehend the instrumentality of the women's rights argument with regard to the revocation, it is useful to situate the latter with reference to Article 35A. The provisions of Article 35A applied to all Kashmiri residents. During the 1960s however, Kashmir's revenue ministry began issuing residence certificates for women till marriage; the ministry also refused to renew the residency status of those Kashmiri women who married non-residents.[49] This particular gender-specific interpretation[50] of Article 35A, whereby female permanent residents lost their rights upon marriage to a person outside

[47] "Article 35A is embedded in Kashmir's history and psyche…The Maharaja's order of June 27, 1932, imposed a ban on 'foreign nationals' in respect of citizenship and purchase of immoveable property." See Noorani (n 1). "They [Kashmiris] are afraid that people from India or elsewhere, rich people and others, might come and buy up property there, and thereby gradually all kinds of vested interests would grow up in property in Kashmir on behalf of people from outside. So far as we were concerned, we thought that this was only the existing law there, and the existing law prevails under Article 370 of the Constitution, which I have just read. We thought it was a perfectly justifiable feeling on their part, and that acquisition of property in Kashmir State should be protected on behalf of the people there." It was agreed therefore that: "The State Legislature shall have power to define and regulate the rights and privileges of the permanent residents of the State, more especially in regard to the acquisition of immovable property, appointments to service and like matters." Art 35A is based on a solemn pact between the Union and the State in 1952. It cannot be altered unilaterally. See Jawaharlal Nehru quoted by AG Noorani in Noorani (n 1).

[48] For many Kashmiris, the 1947 accession was temporary. This claim is based on Prime Minister Nehru's repeated assurances to Kashmiris and to the United Nations that the Kashmiri people were the sole, legitimate arbiters of their political destiny. "We have declared that the fate of Kashmir is ultimately to be decided by the people. That pledge we have given not only to the people of Kashmir to the world. We will not and cannot back out of it." Jawaharlal Nehru quoted by Arundhati Roy in Arundhati Roy, 'Seditious Nehru' in Ali (n 18) 126.

[49] Ather Zia, 'Erasing Kashmir's Autonomous Status' (*AlJazeera*, 14 August 2017) <https://www.aljazeera.com/opinions/2017/8/14/erasing-kashmirs-autonomous-status> accessed 8 January 2022.

[50] In 1965, the Jammu and Kashmir High Court had "ruled that women take on the domicile and nationality of their husband, thus depriving women of their rights." See Riyaz Wani, 'Do Women Enjoy Equal Rights in Kashmir?' (*Tehelka*, 5 December 2013) <http://www.tehelka.com/2013/12/do-women-enjoy-equal-rights-in-jk/> accessed 8 January 2022. The landmark Susheela Sawhney judgment in 2002 referred to the 1965 ruling. It recalled the controversy "regarding the loss of status of a female permanent resident on her marriage with a non-permanent resident in *Parkash* v *Shahni*, 1964 SCC OnLine J&K 34: AIR 1965 J&K 83, by a Division Bench of the Jammu and Kashmir High Court." Ms Sahni, a permanent resident of the State, married a refugee to the State in 1947. Drawing upon the British Nationality and Status of Aliens Act 1914, the Division Bench in 1965 held that "a married woman acquires the 'domicile' of her husband if she had not the same domicile before marriage." However, because of changes in British laws with regard to the 'domicile' of married women, the 2002 ruling held that the domicile of a married woman is to be ascertained in the same way as the domicile of an independent person is ascertained. Accordingly, in its written order, the 2002 judgment overruled the 1965 ruling. For the full judgment, see *State of J&K v Susheela Sawhney*, 2003 SCC OnLine J&K 34: AIR 2003 J&K 83.

the state was, correctly, held to be discriminatory.[51] The controversy was put to rest by a Jammu and Kashmir High Court ruling in 2002 that rejected the executive order which sought to disqualify women of permanent resident status if they married non-residents, on the ground that this constituted a violation of the fundamental right of gender equality applicable to the state under Article 370.[52] This ruling thus affirmed in law the rights of all Kashmiri female residents in the event of their marriage to a non-Kashmiri.[53]

Notwithstanding the 2002 ruling, the question of Kashmir's special status continued to be permeated with insinuations of gender discrimination in the mainstream media[54] and across influential sections of Indian civil society.[55] The gender justice argument was also invoked by India's higher judiciary in the run-up to the revocation,[56] reinforcing mainland public opinion and

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[51] Such a practice was indeed discriminatory for women who moved out of the state and married non-state men. See Arshie Qureshi, 'Using Women to Justify the Removal of Article 370: The State is Posturing as Patriarch' (*The Citizen*, 24 October 2019) <https://www.thecitizen.in/index.php/en/newsdetail/index/7/17763/using-women-to-justify-the-removal-of-article-370> accessed 22 December 2021.

[52] *State of J&K v Susheela Sawhney*, 2003 SCC OnLine J&K 34, AIR 2003 JK 83.

[53] ibid. The judgment held that "a daughter of a permanent resident marrying a non-permanent resident will not lose the status of permanent resident of the State of Jammu and Kashmir," thereby clarifying female permanent residents' right to inherit property.

[54] See, for instance, Ishkaran Singh Bhandari, 'The Case against Article 370' (*The Pioneer*, 21 August 2018) <https://www.dailypioneer.com/2018/columnists/the-case-against-article-370.html> accessed 22 December 2021.

[55] In 2014, an NGO 'We the Citizens' petitioned India's Supreme Court to revoke art 35A on the ground of gender discrimination. Disregarding the 2002 Jammu and Kashmir High Court judgment upholding the right and status of a Kashmiri woman upon her marriage to a non-Kashmiri, in accordance with the Constitutional right to equality, the petition invoked the gender discrimination argument with reference to Constitutional art 6 (Right to Equality): "The petitioners challenge art 35A on the grounds that it results in the unfair treatment of women. They claim that art 6 of the Constitution of Jammu and Kashmir discriminates against women and violates the right to equality. A female descendant of a permanent resident of the State loses her status of permanent residency on marrying a non-permanent resident of the State. However, the same disqualification does not apply to a man who has married a non-resident of the State." See We the *Citizens* v *Union of India*, Case No. WP (C) 722/2014 in the Supreme Court of India. Several individual petitioners petitioned the Supreme Court on similar grounds. See Aanchal Bansal and Nidhi Sharma, 'Petitioners who Challenged Article 35A Happy Over Changes in Property Rights' (*Economic Times*, 8 August 2019) <https://economictimes.indiatimes.com/news/politics-and-nation/petitioners-who-challenged-article-35a-happy-over-changes-in-property-rights/articleshow/70581443.cms> accessed 22 December 2021.

[56] During a Supreme Court hearing on a petition challenging art 35A, the Additional Solicitor General Tushar Mehta commented that "It can't be denied that there is an aspect of gender discrimination in it (35A)." In response, Ishaq Qadri, former Advocate General of the Government of Jammu and Kashmir stated that "This issue was settled by a full bench of Jammu and Kashmir High Court in the case titled *State of J&K* v *Susheela Sawhney*, 2002 SCC OnLine J&K 34 by striking down the proviso of the state subject (permanent residency) law according to which women marrying outsiders would lose their permanent resident status." See 'J&K women marrying non-natives don't lose residency rights' (*The Business Standard*, 22 January 2019) <https://www.

strengthening the case for revocation.[57] By 2019, the charge of gender discrimination was among the principal legal reasons advanced by the government for the revocation of Kashmir's autonomy. Justifying the revocation in a public speech, the Indian prime minister said, "Due to Article 370, the women of the Jammu and Kashmir were deprived of their rights. Now they will enjoy the same rights as those of men."[58]

Notwithstanding the historical and legal factual position with regard to women's property rights in Kashmir, the gender justice argument portrayed the Indian state as the eternal paternal protector of the putatively oppressed Kashmiri women. "The banner of saving Kashmiri women was [thus] advanced to maximum effect by the Indian government …"[59] The narrative of 'gender equality' for Kashmiri women in mainland India obscured Kashmiri jurisprudence upholding the principle of gender equality. That the gender justice argument had no basis in Kashmiri law was ignored in order to justify a hyper-masculine, mainland nationalist narrative of Kashmiri women as passive victims of Kashmiri men[60] and by extension, of a peripheral, regressive Kashmiri Muslim ethnic minority which mandated integration and assimilation within a putatively progressive mainland. Colonial cultural tropes and hyper masculine nationalist posturing converged. "Narratives of progressive Hindus versus backward Muslims who need to be enlightened" and "the violence of militarization in Kashmir …[is] perceived as the expected natural behaviour of a strong masculinist state."[61]

For Kashmiri Muslim women, the irony of political, bodily, and ethnic domination under the pretext of women's empowerment was a particularly painful one. As Kashmiri women's rights, society and culture transformed into alibis for justifying the revocation, its outcome was no less injurious than physical violence. Kay Warren notes that "conceptions of violence that privilege harm and fail to question the ways in which cultural and political practices mediate

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business-standard.com/article/pti-stories/j-k-women-marrying-non-natives-don-t-lose-residency-rights-expert-119012201079_1.html> accessed 22 December 2021.

57 Dilution of Article 35A could potentially change the demography of the Valley, especially since the provision was enacted to protect the culture and the distinct character of the region. Apurva Viswanath, 'As heat in JK builds up, Pending in Supreme Court: 7 Petitions against Article 35A' (*Indian Express*, 29 July 2018) <https://indianexpress.com/article/india/centre-sends-more-forces-to-kashmir-triggers-speculation-on-fate-of-article-35a-5859202/> accessed 1 December 2021.

58 'Article 370 Deprived Women of their Rights … Top quotes from PM Modi's address to the nation' (*Outlook*, 8 August 2019) <https://www.outlookindia.com/website/story/india-news-top-8-quotes-from-prime-ministers-address-to-nation/335840> accessed 22 December 2021.

59 Kaul and Zia (n 22) viii.

60 ibid.

61 Nitasha Kaul, 'India's Obsession with Kashmir: Democracy, Gender, (Anti-)Nationalism' (2018) 119 Feminist Review 126, 137.

the experience of violence" are limited.[62] Notwithstanding the enduring significance of the nature, scale and implications of physical and bodily harm inflicted by institutional violence, it is nevertheless important to foreground how cultural and political practices influence and shape the experience of violence.[63] In this respect, the gender justice argument advanced by the Indian state to justify Kashmir's political and territorial subordination exemplifies how cultural meaning and narrative underpin and augment the execution and practice of institutional violence. Instrumental use of Kashmiri women's rights and by extension, Kashmir's culture and society by the state served to facilitate and justify the institutional violence that followed.

Further, anthropologists Scheper-Hughes and Bourgois assert the significance of social and cultural dimensions of violence which give violence its power and meaning.[64] The concept of violence as a continuum between everyday practices of violence and explicit acts of state violence and repression[65] is especially useful in tracing the continuity between Kashmir's over seven-decade-old territorial occupation, the history of egregious state violence and repression, the militarisation of everyday life in Kashmir, and the cultural trope of the victimised ethnic-minority Kashmiri Muslim woman rescued by the revocation of Article 370.[66]

The gender-justice argument further functioned as an alibi to advance and entrench an unstated albeit manifest intent of domination of a different (Kashmiri Muslim) ethnicity through the revocation of Article 370. The term 'ethnic domination' here connotes the exercise of power by a dominant majority, independent of institutional constraints, whereby:

> the state behaves more as an agent of the dominant/majority ethnic community … to serve its ethnic interests while minority/weaker groups face a threat from those institutions on which they rely for protections, equity and justice…bodies of popular representation (parliament) and adjudication (judiciary) … function like a mere rubber-stamp of the dominant/majority … community.[67]

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62 Kay B Warren, *The Violence Within*: *Cultural and Political Opposition in Divided Nations* (Westview Press 2013) 3.

63 ibid.

64 Nancy Scheper-Hughes and Philippe Bourgois, *Violence in War and Peace: An Anthology* (Blackwell 2004) 1.

65 ibid 20-21.

66 Kaul and Zia (n 22).

67 P Sahadevan, 'Managing Internal Conflicts in India, Nepal, Sri Lanka and Myanmar' in VR Raghavan (ed), *Policy Choices in Internal Conflicts: Governing Systems and Outcomes* (Vij Books 2013) 82.

In the new nationalist narrative, Kashmir was a conquered territory with a people who had been shown their rightful place in a new Hindu India, where 'different' religious and/or ethnic minorities had to either assimilate or be 'othered'.[68] Dibyesh Anand notes that the August 5, 2019 move stemmed from a sense of unconcealed joy at "the humiliation of Kashmir's Muslims for daring to be different". "Ab Hindu Rashtra banega" (We will now build a Hindu nation), the ordinary vegetable vendor in Ranchi [said] to me with sadistic glee: "Now the Muslims will become Hindu out of fear or they will go to Pakistan or they will face… He let the sentence trail off, an unspoken threat."[69]

III. LAND, WOMEN AND ETHNO-POLITICS IN KASHMIR

Prior to August 2019, there existed an across-the-board acquiescence within the Indian polity for Kashmir's territorial occupation, repression, the disabling of civilian institutions, the targeting of Kashmiri bodies, and impunity for crimes by state personnel. Since 2018, however, the gender-justice argument advanced by the state to justify the revocation functioned as an instrument to inscribe majoritarian ethnic dominance over Kashmiri land and bodies. Ethnic stereotypes of Kashmir as an 'other' misogynist Muslim patriarchy peopled by hard-line Islamist/terrorist Kashmiri men from whom Kashmiri Muslim women and Kashmir's territory needed to be rescued, were widely circulated. Noting the intersection between ethnicity and the revocation of Article 370, Kashmiri anthropologist Ather Zia asserts, "In this context, Kashmir's autonomous status was framed as creating a shield for an oppressive patriarchal structure which perpetrated gender injustice as exemplified by the women who married non-Kashmiris".[70]

The objectification and misogynist fetishization of Kashmiri Muslim women in the aftermath of the removal of Kashmir's autonomy scaled higher levels

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[68] "Hindutva was inimical to all of India's minority religions to the extent that it sought either to assimilate them into the Hindu fold or explicitly othered them as foreign to India." Medha Menon, 'The Revocation of Kashmir's Autonomy: High Risk Hindutva Politics at Play' (German Institute of Global and Area Studies Focus Asia 2019). <https://www.giga-hamburg.de/en/publications/giga-focus/the-revocation-of-kashmir-s-autonomy-high-risk-hindutva-politics-at-play> accessed 28 September 2021.

[69] Dibyesh Anand, 'Kashmir is a Dress Rehearsal for Hindu Nationalist Fantasies' (*Foreign Policy*, 8 August 2019) <https://foreignpolicy.com/2019/08/08/kashmir-is-a-dress-rehearsal-for-hindu-nationalist-fantasies/> accessed on 22 December 2021.

[70] Ather Zia, 'The Specter of Gender Discrimination in the Removal of Kashmir's Autonomy' (Association for Political and Legal Anthropology, 1 September 2020) <https://politicalandlegalanthro.org/2020/09/01/the-specter-of-gender-discrimination-in-the-removal-of-kashmirs-autonomy> accessed 3 March 2022.

post-August 5, 2019.[71] The appropriation of Kashmir's territory through the revocation became inextricable from mainland Indian hyper-masculine entitlement to Kashmiri women's bodies. Many Hindu nationalist men celebrated the idea of their entitlement to Kashmiri Muslim women and to Kashmiri land in the wake of the revocation. While Kashmiris across the Valley and beyond were cut off from each other due to a blanket communications blackout in the region, news reports and social media messages were flooded with misogynist messages across mainland India targeting Kashmiri women. Social media was inundated with celebratory messages among "Hindu men asserting 'victory' by claiming they can now 'get girls' from Kashmir."[72] Describing the misogynist fetishization of Kashmiri women's bodies after the revocation, a Kashmiri woman wrote, "The way women of Kashmir are exoticised and objectified on a daily basis in India, the way their bodies are portrayed as vulnerable and used to create fear and intimidation, has heightened the sense of being preyed upon."[73]

A Kashmiri scholar noted the misogyny equating Kashmiri women with property in the wake of the revocation of Kashmir's autonomy: "You don't need to spend money on buying land in Kashmir when you can simply marry a Kashmiri girl and ask [for] land in dowry", she noted. "If this bill is for the rights of Kashmiri women," she went on to ask, "why are people abusing and insulting Kashmiri girls on social media?"[74]

The gendered subtext of the revocation, as Hana Fatima wrote, "is clear: Kashmiri women are no longer an unattainable marital conquest for civilian Indian men. Military personnel or not, Kashmir is within reach."[75] Thus, the Chief Minister of Haryana, a BJP-ruled north Indian state declared, "Nowadays people are saying the path to Kashmir has been cleared. Now we

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[71] Samreen Mushtaq, 'The Violent Misogyny that Partners India's Stripping of Kashmir's Autonomy' (*TRT World*, 9 August 2019) <https://www.trtworld.com/opinion/the-violent-misogyny-that-partners-india-s-stripping-of-kashmiri-autonomy-28889> accessed 3 May 2020.

[72] Piyasree Dasgupta, '"Get a Wife from Kashmir": Article 370 News has Sparked a Horrible Wave of Misogyny' (*Huffington Post*, 6 August 2020) <https://www.huffingtonpost.in/entry/article-370-kashmir-women-tiktok_in_5d494898e4b0d291ed064107> accessed 7 May 2020.

[73] Adnan Bhat, 'Kashmiri Women are the Biggest Victims of this Inhuman Siege' (*Al Jazeera*, 21 August 2019) <https://www.aljazeera.com/indepth/features/women-biggest-victims-inhumane-siege-190820122327902.html> accessed 30 April 2020.

[74] Iram Rizvi, 'Robbed of "Special Status", Kashmiris Feel Insecure, Humiliated, and Reduced to a Bounty of War' (*People's Review*, 15 August 2019) <https://peoplesreview.in/opinion/2019/08/robbed-of-special-status-kashmiris-feel-insecure-humiliated-and-reduced-to-a-bounty-of-war/> accessed 20 March 2022.

[75] Hana Fatima, 'Women's Bodies as Battlegrounds: Social Media Discourse and the Weaponization of Rape in Kashmir' (*The American Bazar*, 24 February 2020) <https://www.americanbazaaronline.com/2020/02/24/womens-bodies-weaponization-of-rape-in-kashmir-440299/> accessed 20 March 2022.

will bring girls from Kashmir."[76] Likewise, Vikram Saini, a legislator from the Hindu nationalist BJP said, "his party workers were excited over the scrapping of Article 370 as it would now enable them to marry 'gori' (fair) Kashmiri girls … He said bachelors in BJP were now welcome to go to Kashmir, buy plots of land and get married. Now anyone can get married to a Kashmiri girl without any issue … Now Kashmiris have attained freedom."[77] Nivedita Menon, a feminist academic, observed that these were "proclamations of conquest and plunder [that] reveal the real intention behind the abrogation of 370."[78] In effect, the convergence between Kashmiri land and Kashmiri women mirrored an Indian colonialism rooted in fantasy and desire for women and landscape.[79]

For Kashmiri women in Kashmir, the confluence between Kashmir's occupation, annexation, and cultural stereotyping was disturbing. Adding to women's bodily insecurity in post-revocation Kashmir was a gendered, sexualised edge of ethno-political dominance. In his testimony to the Associated Press five weeks after the revocation, Abdul Ghani Dar, aged sixty, narrated how soldiers raided his home in the hamlet of Marhang, south Kashmir, seven times since early August, adding that he sends his daughter to another location before they arrive. "They say they have come to check on my son but I know they are looking for my daughter," Dar said, his eyes welling with tears.[80] Residents of three other villages said soldiers had threatened to take girls away from their families for marriage. "They are marauding our homes and hearths like a victorious army. They are now behaving as if they have a right over our lives, property, and honour."[81]

In another testimony, a woman of Kupwara in north Kashmir told a visiting civil society group after the August 5, 2019 move that the army barged into her home. Upon protesting the intrusion, she was threatened. "Do you know what happened in Konan Poshpora (sites of mass rapes by the army in 1991)? We will do the same with you all."[82]

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[76] Manohar Lal Khattar, quoted in 'Haryana CM Manohar Lal Khattar Triggers Row Over Article 370 Assertion' (*Times of India*, 10 August 2019) <https://timesofindia.indiatimes.com/city/gurgaon/now-we-can-bring-girls-from-kashmir-says-haryana-cm-ml-khattar/articleshow/70617564.cms> accessed 20 March 2022.

[77] 'BJP Bachelors Can Now Marry White-Skinned Kashmiri Women, Says MLA After Article 370 Move' (*News18 India*, 7 August 2019) <https://www.news18.com/news/india/bjp-bachelors-can-now-marry-white-skinned-kashmiri-women-mlas-shocker-on-article-370-2262103.html> accessed 20 March 2022.

[78] Bhat (n 73).

[79] Kaul and Zia (n 22).

[80] Aijaz Hussain, 'Kashmiris Allege Night Terror by Indian Troops in Crackdown' (*Associated Press*, 14 September 2019) <https://apnews.com/52b06a124a5a4469984793d3c208733d> accessed 15 September 2019.

[81] ibid.

[82] Ameen Furquan, 'Kashmir Reports: What Rights Teams have Found' (*The Telegraph*, 19 October 2019) <https://www.telegraphindia.com/india/kashmir-reports-what-rights-teams-have-found/cid/1712774> accessed 23 October 2019.

Both reports illuminate the gendered edge of ethno-political practice in Kashmir in the aftermath of the annexation of Kashmir's territory, where threats to Kashmiri women's bodily and sexual integrity by state forces were integral to nationalist assertions of majoritarian power and dominance over Kashmiri land and bodies. In other words, the misogynist entitlement to Kashmiri women's bodies by mainland Indian men enabled by the revocation was inseparable from an overarching continuum of ethno-political domination intent on Kashmiri subordination through sexual humiliation.

IV. KASHMIRI WOMEN'S RESISTANCE

For over seven decades, against daunting and formidable odds, Kashmiri women survived and resisted occupation, repression, annexation, violence, loss, dispossession, sorrow, and despair.[83] Women in Kashmir survive "the everyday tribulations of militarization … and its multi-faceted gender-based violent manifestations,"[84] yet Kashmiri women are usually absent in dominant narratives on Kashmir, centred on territory, militancy, and national security. Representations of Kashmiri women as agency-less victims of Kashmir's patriarchal society, Kashmiri militants, and militarised violence are routine.[85] Contrary to such representations, however, Kashmiri women's resistance against militarisation, occupation and dispossession, and their pioneering civic struggles for accountability and justice are integral to Kashmir's struggle for liberty and justice.[86] As Samreen Mushtaq, a Kashmiri scholar, writes:

> It is important to recognize women's agential roles in resisting the everyday militarization of their lives. For instance, many women across Kashmir have been actively involved with the Association of Parents of Disappeared Persons, an anti-disappearance collective comprising kin of enforced disappeared men and boys. As they assemble on the 10th of every month in the summer capital city of Srinagar, they visibilise and re-member/remember the bodies of their disappeared kin. Their collective mourning and memorialisation thus become deeply political acts of resistance as they demand accountability and freedom … [Further], Kashmiri women through their writings, resistance poetry and

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[83] Zia (n 38); Malik (n 40) 64; Sikandar (n 21) 21-24; Mona Bhan and Parvaiz Bukhari, 'Inside Kashmir – A Heroic Fight for Justice' (*Sapiens*, 25 May 2017) <https://www.sapiens.org/culture/kashmir-justice/> accessed 28 February 2022.

[84] Samreen Mushtaq, 'Home as the Frontier: Gendered Constructs of Militarised Violence in Kashmir' (2018) 53(47) Economic and Political Weekly 54; Kaul and Zia (n 22).

[85] Adil Bhat, 'Oppressed by Religion, Kashmiri Women are Forgetting how to Sing' (*The Wire*, 20 January 2017) <https://thewire.in/culture/kashmir-women-zaira-wasim> accessed 8 February 2022.

[86] Zia (n 38).

> participation in protest marches have come out to speak for themselves and challenge the militaristic state through their everyday negotiations.[87]

In addition to women's political activism focused on using memory as a means to demand accountability from the state for the disappeared, Kashmiri women were integral to the post-2010 popular civic upsurges against a spate of civilian killings by security forces.[88] During the 2016 mass civic uprising, for instance, hundreds of women across Kashmir, especially from rural areas, participated in protests for which several women were killed, blinded, and harassed as part of collective punishment for joining Kashmiri men in public protest.[89]

Further, away from the public domain, Kashmiri women's resistance encompasses myriad social and cultural spaces wherein women's words and bodies craft and forge alternate critical intersectional solidarities. Uzma Falak notes that, "Women's embodied practices, everyday memory projects, and intimate worlds shape and are shaped by…vyestoan, a critical and affective female alliance and friendship, a companionship of resistance."[90]

There is, however, little public interest or sympathy for the views of Kashmiri women in mainland India where the revocation of Article 370 found resounding acceptance. There is a silence around Kashmiri women's views or opinion regarding the revocation. Neither the Indian state nor India's polity, nor indeed mainland Indian society, expressed much interest in the views of Kashmiri women themselves regarding the move. With the exception of a report by a women's delegation on violence against women and children in the aftermath of the August 5, 2019 move[91] and a few reports on the human rights situation in the Kashmir Valley by civil society groups,[92] there was a studied silence among mainland women and feminists regarding Kashmir's

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87 Mushtaq (n 24).

88 Parvaiz Bukhari, 'Summers of Unrest Challenging India' in Sanjay Kak (ed), *Until My Freedom Has Come: The New Intifada in Kashmir* (Penguin 2010); Parvaiz Bukhari, 'Kashmir 2010: The Year of Killing Youth' (*The Nation*, 22 September 2010) <https://www.thenation.com/article/archive/kashmir-2010-year-killing-youth/> accessed 7 March 2022; Aaliya Anjum and Saiba Varma, 'Curfewed in Kashmir: Voices from the Valley' (2011) 45(35) Economic and Political Weekly 10; Hafsa Kanjwal, Durdana Bhat and Masrat Zahra, '"Protest" Photography in Kashmir' (2018) 46(3) Women's Studies Quarterly Fall/Winter 85.

89 Essar Batool, 'Women's Resistance in Kashmir' (*AWID*, 22 February 2017) <https://www.awid.org/news-and-analysis/womens-resistance-kashmir> accessed 19 October 2021.

90 Uzma Falak, 'The Intimate World of Vyestoan: Affective Female Alliances and Companionships of Resistance in Kashmir' (2018) 53(47) Economic and Political Weekly 76.

91 'Women's Voice: A Fact-Finding Report on Kashmir 17-21 September 2019' (*Kashmir Action*, 2019) <https://www.kashmiraction.org/womens-voice-fact-finding-report-on-kashmir> accessed 19 October 2021.

92 People's Union for Civil Liberties (n 17); Jean Dreze and others, 'Kashmir Caged' (*Kafila*, 14 August 2019) <https://kafila.online/2019/08/14/kashmir-caged-a-report-from-the-ground/> accessed 19 October 2021.

militarisation, occupation and annexation. The limited civil society discourse in mainland India focused on the post-August 5 human rights violations in Kashmir. Women's silence in the mainland served to legitimise the revocation and the project of ethno-dominance in Kashmir. It is part of a continuing mainland unease and reluctance to address unresolved political and moral questions regarding Kashmir's status, its occupation, and the stated reasons for the revocation. As Ather Zia notes, "… gender discrimination which the government of India had propped up as a reason for the removal of autonomy seemed even more a ruse, deployed in propagating the Indian religious ethno-nationalist project."[93]

In contrast to mainland India, however, local civic resistance in Kashmir emerged and attempted to sustain itself. One pocket of resistance was Soura, north Srinagar, where large numbers of women joined men to protest the revocation. Protests in Soura contested the government's narrative that Kashmiris were happy with the abrogation of Article 370:

> We protest because our rights have been taken away … The Government (of India) claims that these laws (Article 370 and Section 35a) led to injustice to Kashmiri women. Real injustice is when our children, husbands and brothers are taken away (by security forces)."[94]

Some twenty thousand to twenty-two thousand people of the Soura community including women spent their nights maintaining a vigil and preventing security forces from breaching their barricades.[95] Kashmiri writer Nawal Ali Watali reported on women's resistance in Soura:

> There was not a degree of fear in the eyes of women, regardless of their age. After the protest, which was entirely peaceful, the police fired pellets from a distance injuring four people. This infuriated women and they picked up stones. Before they could have hurled them at the police, they got to know that some of the neighbourhood boys were detained. They put down the stones and gave the police a chase instead

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93 Zia (n 70).

94 Aditya Menon, 'Protests in Kashmir: How Srinagar's Soura Became the Hub of Anger' (*The Quint*, 14 September 2020) <https://www.thequint.com/news/india/kashmir-protests-srinagar-soura-article-370-media-army-crpf> accessed 7 May 2020. See also 'We Won't give an Inch: India Faces Defiance in Kashmir's Gaza' (*TRT World*, 22 August 2019) <https://www.trtworld.com/asia/we-won-t-give-an-inch-india-faces-defiance-in-kashmir-s-gaza-29190> accessed 5 May 2020.

95 Azaan Javaid, 'Why Some in Western Media Call this Srinagar Neighborhood Kashmir's Gaza' (*The Print*, 29 August 2019) <https://theprint.in/india/why-some-in-western-media-call-this-srinagar-neighbourhood-kashmirs-gaza/283258/> accessed 18 May 2020.

> … Back in the neighbourhood, Amina Jan treated pellet victims. She is a community paramedic. Other women assisted her with water, bandages, and other medical instruments.[96]

The Soura protests were witness and testimony to an unacknowledged women's resistance in Kashmir. They reaffirm Kashmiri women as self-aware political actors, possessing political judgment and exercising political agency to defend their land, homes, dignity, and honour. Nawal Ali Watali and Ufaq Fatima's report on women's resistance in Soura rendered Kashmiri women's courage, resistance and forbearance against formidable odds visible; it also contested dominant tropes of the apolitical veiled Kashmiri woman "as a body sans capacities to think and reflect on her political condition."[97] Women in Soura affirmed Kashmiri women as critical political actors raising their voice and bodies to protest the revocation.

The story of Kashmiri women's resistance is, however, inextricable from the story of Kashmir's struggle for liberty and justice. If anything, Kashmiri women's resistance in post-revocation Kashmir symbolises the history, continuity, and enduring legitimacy of a Kashmiri struggle for justice and liberty, vividly captured by journalist Smita Gupta more than three decades ago:

> But it is at Nowshera that we get a ringside view of what to all appearances is a liberation movement. Young men, old men, women, teenagers, march in an unending stream through the streets in complete defiance of the prohibitory orders that are in force. They are coming from Ganderbal and Kangan, 25 kilometres from Srinagar and their destination is Lal Chowk in the heart of the city [of Srinagar] ... Women peeping out of the homes that overlook the street softly echo the slogans being shouted. It is the most incredible sight.[98]

This history and memory of resistance is testament to women's grit and courage in a conflict characterised by the politicisation of women's private spaces and of women's bodies, a struggle wherein Kashmiri women consistently craft and affirm a collective vision of moral and political justice. This

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[96] Nawal Ali Watali and Ufaq Fatima, 'Women Overlooked in Kashmir's Resistance Against India's Iron-fisted Policy' (*TRT World*, 9 October 2019) <https://www.trtworld.com/perspectives/women-overlooked-in-kashmir-s-resistance-against-india-s-iron-fisted-policy-30463> accessed 22 May 2020.

[97] Malik (n 40) 64.

[98] Smita Gupta, 'Storm Over Srinagar' *The Independent* (Mumbai, 17 February 1990); Seema Kazi, *Between Democracy & Nation: Gender and Militarization in Kashmir* (Women Unlimited 2009) 88.

struggle, as Kashmiri writer Uzma Falak maintains, is a part of a 'historical continuum' of Kashmiri women's lives.[99]

Kashmiri women understand well that the real purpose of the revocation was to erase Kashmir's identity by ending Kashmiri sovereignty over Kashmiri land.[100] Kashmiri women also know that Kashmir's struggle for justice is not limited to re-instating Article 370 without ending militarisation, occupation, and repression in Kashmir. In the words of a woman from Soura, "Our fight is bigger than Article 370. The abrogation of the article stripped us off our identity; however, our battle is older than this. We are fighting for Kashmir's liberation and until that is achieved, we will keep fighting, even if it takes several months or years."[101]

V. CONCLUSION

Kashmiri women's resistance contests nationalist, misogynist tropes of the passive, repressed Kashmiri Muslim woman integral to mainland Indian nationalist narratives underpinning the revocation of Article 370.[102] Women's resistance in Kashmir further contradicts and challenges state claims to popular acquiescence for the revocation by Kashmiris.[103] It affirms Kashmiri women as political actors in their own right, with a clear political understanding of the implications of the revocation for all Kashmiris, especially for Kashmiri women themselves. Further, women's resistance, of which Soura is an example, is testament to Kashmiri women's political resolve and endorsement for a Kashmiri struggle for justice, shaped and sustained through history, collective memory, and a strong sense of a shared destiny other than what the Indian state has ordained for Kashmiri women and men.[104]

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[99] Falak (n 90) 76.

[100] In response to the question regarding integrating Kashmir with India, jurist AG Noorani pointed out, "It is already there. What they mean by integration is just to remove its identity." See Akshay Deshmane, 'Kashmir: Scrapping Article 370 "Unconstitutional", "Deceitful" Says Legal Expert A.G. Noorani' (*Huffington Post*, 5 August 2019) <https://www.huffpost.com/archive/in/entry/kashmir-article-370-scrapping-constitutional-expert-reacts-noorani_in_5d47e58de4b0aca341206135> accessed 22 May 2020.

[101] Nawal Ali Watali and Ufaq Fatima, 'Women Overlooked in Kashmir's Resistance against India's Iron-fisted Policy' (*TRT World*, 9 October 2019) <https://www.trtworld.com/perspectives/women-overlooked-in-kashmir-s-resistance-against-india-s-iron-fisted-policy-30463> accessed 22 May 2020.

[102] Kaul and Zia (n 22) ix.

[103] See for instance Manish Shukla, 'Majority of Kashmiri People are Happy Article 370 has Gone: NSA Ajit Doval' (*DNA News*, 8 September 2019) <https://www.dnaindia.com/india/report-majority-of-kashmiri-people-are-happy-article-370-has-gone-nsa-ajit-doval-2788218> accessed 22 May 2020.

[104] Gurharpal Singh makes this point with reference to India's peripheral ethnic minority regions. See Gurharpal Singh, 'Reassessing Conventional Wisdom: Ethnicity, Ethnic Conflict and India as an Ethnic Democracy' in Sanjib Baruah (ed), *Ethnonationalism in India* (Oxford 2010).

Finally, women's resistance in Kashmir raises moral questions regarding India's methods to extinguish Kashmiri resistance, identity, and aspiration. Women's resistance in Kashmir affirms Kashmir as a struggle about people and justice. A repressive, militarist response may contain, but cannot erase a people's imagination crafted through history, memory, and collectivity. Most importantly, perhaps, Kashmiri women's resistance foregrounds the compelling need for a just, people-centric resolution to the conflict in Kashmir through peaceful, democratic means.

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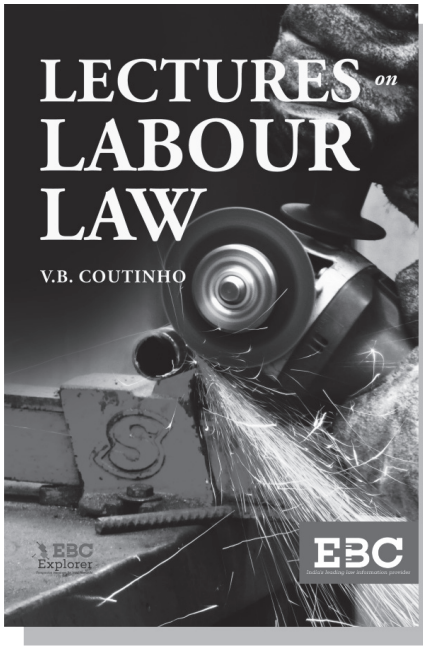

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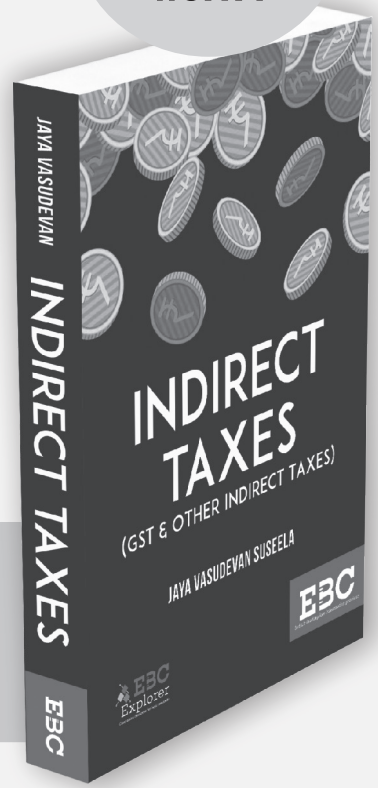

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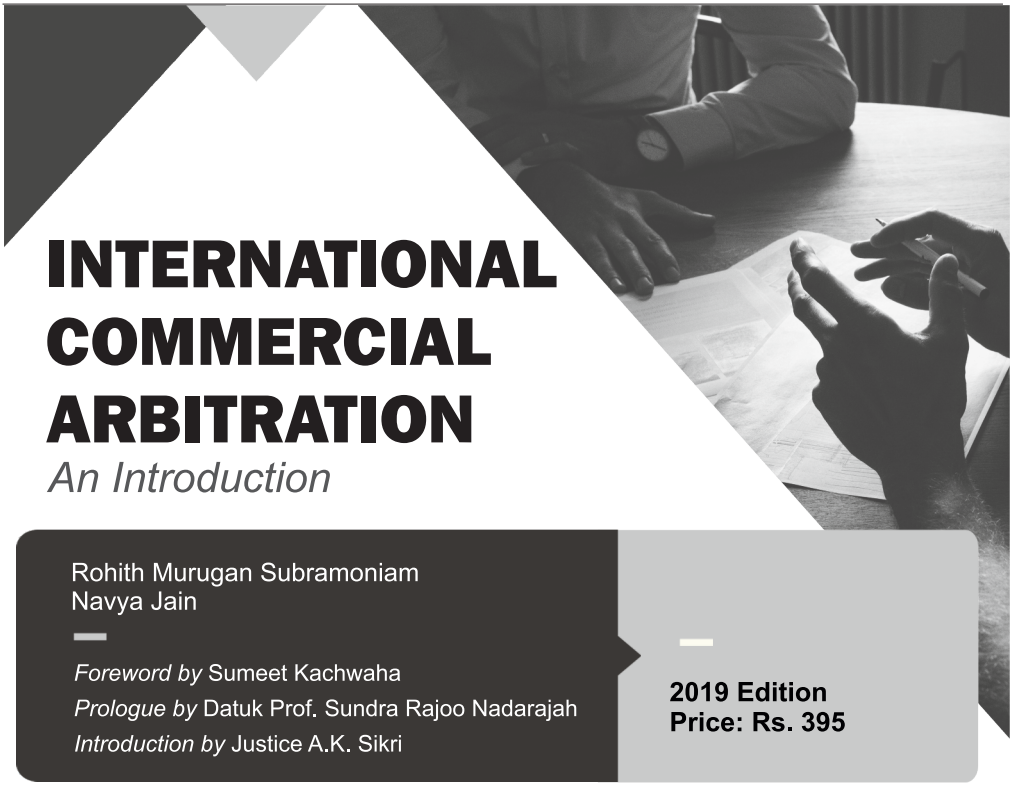

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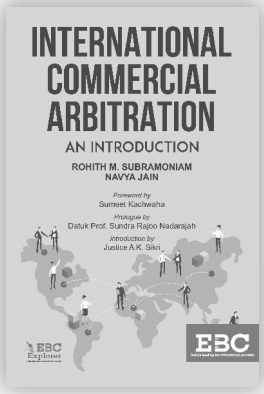

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