FOURTH EDITION OF THE COURTS AND THE CONSTITUTION CONFERENCE

2022 IN REVIEW

11-12 March, 2023

NALSAR HYDERABAD | LAW AND OTHER THINGS | Azim Premji University

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THE COURTS AND THE CONSTITUTION

ABOUT

The Courts and the Constitution Conference envisages furthering engagement and scholarship on public law by undertaking review of the major constitutional law developments in and outside Courts, taking place in India. The Conference aims to broadly reflect on the past, present, and future of Indian constitutionalism. It is an attempt to bring together diverse voices from the bench, bar, academia, and journalism to deliberate on the landmark legal developments which are bound to have a long-term impact on governance and the rights of the citizenry.

This Conference is being organised by the Editorial Team of the 'Law and Other Things' Blog in collaboration with its institutional sponsors, the Centre for Constitutional Law, Policy & Good Governance, NALSAR University of Law and the School for Policy and Governance, Azim Premji University. The event will take place at the campus of NALSAR University of Law, Hyderabad.

THE COURTS AND THE CONSTITUTION, 2023

SCHEDULE

MARCH 11, 2023 (SATURDAY)

- Inaugural Session

- Session I - Media Ethics and Viewpoint Pluralism

- Session II - Populism and South Asian Constitutionalism

- Session III - Affirmative Actions: Changing Conception of Equality

MARCH 12, 2023 (SUNDAY)

- Session IV - Developments in Gender Rights Jurisprudence

- Session V -Liberty and Special Legislations

- Session VI - Shamnad Basheer Memorial Roundtable – Technology & Human Rights

- Closing Remarks

MEDIA ETHICS AND VIEWPOINT PLURALISM

SESSION - 1

This panel aims to engage with the pervasive problem of the concentration of media ownership and its impact on the content that reaches readers, viewers, and listeners. Several nations, such as *Bolivia, Ecuador and Chile*, have formally recognized media pluralism as an essential requirement for a healthy, functioning democracy. Many democratic countries in the world are facing renewed dangers due to new forms of populism and demagoguery, where elected leaders and political parties often enter into reciprocal arrangements with businesses that own media outlets, thereby shaping the content and ideological orientation of what is presented before large audiences.

The content of public discourse and electoral outcomes are inherently connected. This was amply illustrated in the case of the *Facebook-Cambridge Analytica scandal* a few years ago, where private voter information was used to magnify the reach of electoral candidates, thereby casting serious doubts on the very foundations of voter preferences. With respect to recent developments in India, the takeover of NDTV by the Adani Group becomes a visible trigger for such apprehensions. The evident polarization and lack of moderation in news-content can be clearly linked to the patterns of financial control in the print, broadcast and digital media sectors. So much so that even public institutions such as the Telecom Regulatory Authority of India (TRAI) and the Law Commission of India (LCI) have discussed this issue through *consultation papers*, albeit without proceeding towards concrete regulatory measures.

This panel is envisioned as one that examines the developments in the Indian context while acknowledging lessons from other jurisdictions. Even if the ownership structures of media organisations are carefully scrutinized, can there be legal oversight and restraints placed over who buys shares in these businesses? What are the possible justifications for such regulation? What is the conceptual basis for restraining economic freedoms in order to protect viewpoint pluralism? If one adopts a more abstract view, these questions exhibit how interventions in the field of corporate law can have a significant impact on press freedoms and the interests of news-consumers, a theme which has traditionally been studied through the lens of public law.

POPULISM AND SOUTH ASIAN CONSTITUTIONALISM

SESSION - 2

The tensions between populism and liberal constitutionalism have been prominently discussed in the *recent scholarship* in comparative constitutional law. This panel seeks to examine how populist impulses have played out within South Asian constitutionalism in the recent past. We can begin by thinking about examples in the Indian context, such as the Supreme Court decision that upheld the EWS reservation, the continuing delay in hearing the *challenges* to the CAA, and similar delay in addressing the *challenges* to the Electoral Bonds scheme, among others. Going beyond the immediate Indian context, it is vital to engage with developments in neighboring South Asian countries. For instance, Sri Lanka witnessed a dramatic transfer of power in 2022 that followed a sustained period of economic hardship, thereby demonstrating how popular mobilization can proceed far beyond the interests of elected leaders. Pakistan also underwent a change in the composition of the government, which followed a backdrop of direct judicial interventions against the previous incumbents. These developments compel us to return to some of the foundational questions about the legitimacy of elected governments and the ideas of representation that they seek to embody.

This panel will address the following questions in more detail: How can populism be defined, understood and located within the frameworks of a modern constitutional order? How do we engage

with the preference for 'constitutional workarounds' that have favoured populist measures across jurisdictions?

Can constitutional texts and institutional practices build more effective safeguards against such workarounds? Is it possible to arrive at a more robust definition of constitutionalism, in order to more accurately address this problem?

AFFIRMATIVE ACTION: CHANGING CONCEPTIONS OF EQUALITY

SESSION - 3

The Supreme Court in *Janhit Abhiyan v. Union of India* upheld the 103rd Constitutional Amendment providing 10% reservations to the EWS category and questioned the viability of identity-based reservations altogether in its majority judgment. The idea that reservations can be provided exclusively to the general category, leaving out the Scheduled Castes (SC), Scheduled Tribes (ST), and Other Backward Classes (OBC), solely on the basis of individual economic status, aligns with the initial objections based on a 'colour-blind individual-centric' conception of equality, that was invoked in early Supreme Court decisions such as *Champakam Dorairajan*. It makes us question whether the Judiciary will continue to recognise patterns of group-subordination, while shaping India's equality jurisprudence for the future. Some critical voices have asserted that such a shift away from ideas of historical justice for subordinated communities creates a slippery slope that may lead to the undoing of affirmative action policies in general.

Secondly, the Haryana Government's *recent 75% domicile reservations* in the private sector have omitted the need and priority of the phrase 'Social and Educational Backwardness' for determining the beneficiaries of reservation policies. The selective application of the 50% ceiling by policymakers, to different forms of reservations also raises questions about consistency in their enforcement.

Do residence-based reservations fit within the constitutional vision of equality, or do they signify a shift away from the centrality of identity-based reservations based on reparative justice?

Thirdly, we can examine the failure of affirmative action policies to consider the ground reality of groups such as Dalit Christians and Dalit Muslims for the last 75 years, who have been at the receiving end of both religious and socio-economic backwardness. The petition in *Centre for Public Interest Litigation and Anr. v. Union of India*, calling for providing Scheduled Castes (SC) status to Dalit Christians and Dalit Muslims, has been *met with a denial* of intersectional perpetration of caste-based prejudices. This, however, is inconsistent with the findings of *prominent government reports*. The Judgment delivered by the Madras High Court in *U. Akbar Ali v. State of Tamil Nadu*, denying reservation benefits to religious converts, is yet another blow to the long-term pursuit of shaping intersectional reservations. Is this another example of how the present discussions about equality are changing, perhaps back towards a formalist reading of the anti-discrimination provisions? Do the recent trends in policy-making and judicial decisions indicate an increasing tendency to roll back the equality conception that accounted for the sites of historically sustained discrimination to the colour-blind idea that does not acknowledge or tolerate any classes among citizens?

DEVELOPMENTS IN GENDER RIGHTS JURISPRUDENCE

SESSION - 4

This session aims to unpack the various verdicts given by the Courts in the year 2022, that either strengthen or limit the exercise of their constitutional rights by women and other gender minorities. The panel shall focus on the theoretical underpinnings of the developing gender rights jurisprudence, the implications of these decisions on other gender rights cases currently being heard by the Courts, and the role of this judicial exercise in influencing the larger public opinion at the ground level.

On September 29, 2022, the Supreme Court in *X v. The Principal Secretary* held that an unmarried woman had the right to terminate her pregnancy within the 20-24 week timeline provided under Section 3(2)(b) of the amended Medical Termination of Pregnancy Act. The Court, employing queer-affirmative language, clarified that the scope of the judgment extended to all persons including, and also other than, cis-gendered women, who may require access to safe medical termination of their pregnancies. Additionally, the Supreme Court reiterated the standard of interpretation to be used in case of beneficial legislation by observing that they must be interpreted in favour of the beneficiaries, in this case gender minorities, when it is possible to take two views of a legal provision.

2022 also saw the Delhi High Court dealing with the legality of marital rape, a private manifestation of the admittedly public institution of marriage, in *RIT Foundation v. Union of India*. Two elements conspicuous in Justice Shankar's judgment were a refusal to allow any invasion in a married couple's private space, and an anachronistic reliance on the argument of marriage as a sacrament. This, however, was in stark contrast to the feminist position that had been advocated earlier by the Supreme Court in *Joseph Shine v. Union of India*, that marriage—whether it be a sacrament or contract—does not result in ceding of the autonomy of one spouse to another. The judgment also raised larger questions regarding the role of the public-private divide in gender rights cases. Similarly, in the much discussed *Aishat Shifa v. State of Karnataka*, a case that dealt primarily with the right to decisional autonomy for Muslim Women, a two-judge bench of the Supreme Court delivered a split-verdict. While Justice Dhulia characterised the issue as one of personal choices, which according to him could not be restricted by educational institutions, Justice Gupta emphasized the role of uniforms in fostering a sense of equality, thus dismissing the petitions that were filed against the measures to restrict the wearing of the Hijab.

In another significant decision, the Supreme Court in *Deepika Singh v. Central Administrative Tribunal* noted that, "Familial relationships may take the form of domestic, unmarried partnerships, or queer relationship". It held that such atypical manifestations of the family unit are equally deserving not only of protection under law, but also of the benefits available under social welfare legislations. This observation is especially relevant in light of the Supreme Court currently hearing a *slew of petitions* seeking the recognition of same-sex marriages. Also before the Supreme Court is a *challenge* to the constitutionality of polygamy, Nikah Halala, and other similar practices validated under Section 2 of the *Shariat Act*.

LIBERTY UNDER SPECIAL LEGISLATIONS

SESSION - 5

Special legislation have been enacted in respect of certain categories of offences to enable the Executive and the Courts to tailor their responses to these offences accordingly. In economic and terror-related special legislations, the question of liberty and due process deserves serious attention, so as to examine the validity of the special laws in the constitutional scheme. The question of how bail is granted or denied, has become a representative subject that requires careful analysis of how personal liberty is construed and curtailed through these legislations.

The Supreme Court delivered its verdict in *Vijay Madanlal Chodhary v. Union of India* upholding the wide investigative powers of the Directorate of Enforcement (ED) and the restrictive bail conditions under the *Prevention of Money Laundering Act, 2002 (PMLA)*. Since the Act's implementation, there are 5422 cases that have been registered till March 2022, and out of these, convictions have taken place in only *23 cases*. The twin-conditions test for granting bail as provided under *Section 45* of the PMLA, and the provision for allowing the ED to compel the accused to make self-incriminating statements, are two central concerns when we examine the working of *Section 50* of PMLA. Here, the Court has upheld the twin-conditions test that was earlier struck down in *Nikesh Tarachand Shah v. Union of India*, and provided for an extremely high threshold for granting of bail, thereby impacting the liberty of the accused. There are two primary concerns that arise from this judgment:

firstly, the shifting procedural fairness requirements concerning the rights of the accused; and *secondly*, the evolving jurisprudence of the appellate courts while interpreting executive powers. Can the State provide for different standards of due process in investigation and bail, while overlooking core constitutional protections? Are the courts moving towards allowing a higher degree of executive discretion while interpreting special criminal laws?

The question of bail can be scrutinized through the lens of anti-terror laws such as the UAPA to understand its impact, in parallel with economic offences. With a *mere 3% conviction rate* in 4690 arrests made between 2018-2020 under the UAPA, and high prospects of bail-deniability, anti-terror laws have functioned as effective mechanisms of curtailing individual liberty, with courts showing considerable deference to the Executive. On one hand, the rejection of the bail application by *Umar Khalid* in the Delhi High Court, is yet another example of the restrictive effects of Section 43D(5) of the UAPA. However, on the other hand, the bail provided by the Supreme Court to *Varavara Rao* and *Anand Teltumbde* do partially address the judiciary's duty to act as the first line of defence against curtailments on liberty. With extremely low thresholds of bail-denial leading to an *increase in arrests* and vague definitions provided in the UAPA, anti-terror legislations have been allegedly used to quell the voices of dissent. The emphasis on the mere perusal of a chargesheet for instituting a prima facie case in *NIA v. Zahoor Ahmed Shah Watali*, succumbs to excessive executive discretion and the consequent denial of the liberty of citizens. Do these doctrinal developments, such as the revival of the twin-conditions test, and the visible effects of Section 43D(5), point towards an increasing tendency of showing higher deference to the Executive and a consequential serious curtailment of liberty? Does liberty under special legislations now imply bail being the rule and bail, the exception?

SHAMNAD BASHEER MEMORIAL ROUNDTABLE – TECHNOLOGY AND HUMAN RIGHTS

SESSION -6

Predictive policing is the use of algorithms to analyse large data sets in order to forecast and prevent future criminal activity. For the purpose of identifying patterns in criminal behaviour, massive amounts of data are entered into complicated algorithms. Prejudice is given a scientific sheen when it is applied via predictive police algorithms and facial recognition technology (FRT), making it less unacceptable. Historical crime data is used for the development of predictive policing algorithms, but this data does not necessarily indicate who is more likely to commit crime and instead, more accurately reflects who is more likely to be policed. Across the world, people of colour and members of religious minorities are disproportionately targeted by law enforcement, even when there is substantial proof demonstrating their innocence. In the case of *Ankush Maruti Shinde v. State of Maharashtra*, for example, the Supreme Court overturned the convictions of six individuals who were members of a minority group. Here, the police had immediately presumed that they were responsible for the crime because they were members of the historically marginalised *Pardhi* community.

Reports suggest that similar discrimination is presently taking place with *Delhi's CMAPS* system of predictive policing. The algorithm has been flagged for supporting the inherent biases held by police officers. This results in a biased feedback loop, in which the police are more likely to concentrate their attention on neighbourhoods in which

members of minority groups (such as those of a given caste or religion) make up a majority of the population.

The findings of the census in India are undoubtedly data-heavy when one considers the country's massive population as well as its diverse cultural and economic landscape. The Census itself raises questions with regard to data privacy and macroscopic discrimination. In addition, the collection of sensitive data in India is governed by a *very small number* of regulations. The inadequacy of the *Digital Personal Data Protection Bill, 2022*, and all previous legislation pose difficult questions for the data-processing endeavors of the government.

In this context, we can also look at the concerns related to the proposals for the conduct of a Socio-Economic Caste Census (SECC). As various Dalit-Bahujan writers and activists have *pointed out*, the right to privacy is weaponized by those in power to subjugate marginalized groups. The weak data protection regime in India is at present unable to eradicate the possibility that a caste census or predictive policing would be constitutionally tortuous or violative of the due process requisites of the Constitution. This is of course at odds with the argument that an SECC would provide more robust data to streamline the delivery of public services and welfare schemes. In other words, the central concerns raised in Aadhaar litigation may re-appear as the data-aggregation efforts are scaled up and become more influential in our daily lives.

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