LEGAL RIGHTS AND CONSTITUTIONAL WRONGS

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"The more I think about the past, the more sceptical I find myself about predictions of the future."[1]

ABSTRACT

Courts change constitutions. Re-interpretation of the constitution has become such a common and revered exercise of judicial power, that the legal traditions which justify this, often path-breaking, process have received less attention than its substantive outcomes. Whilst judicial review is perceived to be a principled function, certain decisions are found to be more acceptable, even more popular amongst academia and the citizens, than others. I seek to analyse this context-specific tendency to prefer certain ideals and outcomes to others, by providing examples of the outcome-centric polyvocality that is apparent not just in judicial decisions, but also the societal response to them.

I will analyse the Indian Constitution and the Supreme Court's views regarding the 'horizontal' application in the form of constitutional guarantees of primary education, and then apply the same in terms of linguistic-identity based employment guarantees, to exhibit established precedents in Indian constitutional law which invite different responses depending on the desired social outcome, despite the same individual interest and constitutional provision at stake. I will then consider, on the one hand, 'Transformative Constitutionalism' - an idea which seeks to pre-dispose courts to achieve transformative ends, and on the other hand, Herbert Wechler's views on constitutional interpretation which encumber the courts to the ends of legal process - to decide based on "neutral principles", regardless of the preferred

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[1] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law", *Harvard Law Review*, Vol. 73, No. 1, November 1959, pp. 1-35.

outcome. I will argue that existing rights should serve as neutral principles to constitutionally limit an activist judiciary, facing or making populist choices.

Based on my analysis of how utilitarian concerns and judicial self-perception affect substantive outcomes, which may not be in consonance with the constitution, I will conclude by analysing the polyvocality of established jurisprudence of the Supreme Court to show the theoretical and practical unsustainability of such consequentialism.

INTRODUCTION

In *The Endurance of National Constitutions*,[2] the seminal project of comparative constitutional law which claims that the average life-expectancy of national constitutions is 19 years, the authors analyse what makes constitutions endure over time, their single conclusion being – change.[3] Their analysis holds the longevity of a constitutional text to be based on two pillars, the first being 'constitutional design', and the other being the national and international political circumstances that the Constitution endures, termed 'environment factors'.[4] A constitution's design is not only the language and purport of its provisions, but also the interpretations that courts attach to them over time.[5] Therefore, constitutional change is not only brought about by traditional amendment procedures, but it is inherent in the process of interpretation, and the consequences of it.[6] Constitutions can be changed through both, the formal amendment process - 'textual change', as well as interpretative changes that update the understanding of the text - 'contextual change'.[7]

(a) The Polyvocality of Decisions and Discussions

[2] Tom Ginsburg, *et al.*, *The Endurance of National Constitutions*, Cambridge University Press, New York, 2010.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 6 ("Constitutions also evolve through ongoing interpretation, such as by high courts engaging in constitutional review…").
[6] *See* David A. Strauss, "The Irrelevance of Constitutional Amendments", *Harvard Law Review*, Vol. 114, No. 1457, 2001, pp. 1459.
[7] Shruti Rajagopalan, "Constitutional Change – A Public Policy Analysis", *The Oxford Handbook of Indian Constitutional Law*, Oxford University Press, 2016, pp. 133.

Constitutional interpretation, which often causes legal change, holds two values dearly – 'certainty', and 'finality'.[8] Yet, there is an uncertainty of opinions and reactions that judicial decisions are subjected to, as may be seen in the widespread acceptance of the Supreme Court's views in *K.S.Puttaswamy* (2017),[9] which unanimously held privacy to be a pervasive fundamental right guaranteed by, but not limited to, Art.21 of the Constitution, while similar popularity was not enjoyed by the nationalist-decision in *Shyam Narayan Chouksey* (2016),[10] in which, relying solely on the Fundamental Duties chapter, the Supreme Court ordered all cinema halls across the country to play the national anthem, and those present to stand up in respect.[11] While *Shreya Singhal* (2015),[12] in which the Supreme Court held §66A of the Information Technology Act unconstitutional for violating the freedom of speech was widely celebrated, a critical yet divided, response was received by the *NJAC* (2015)[13] decision, which declared that the executive may interfere with the autonomy of the judiciary through the National Judicial Appointments Commission – even the possibility of which violates the "basic structure" of the Constitution.[14]

Far from holding the validity of judicial discourse hostage to the consequent public or academic opinion, the argument here is to simply highlight that the seemingly principled exercise of judicial review may invite diverse reactions, despite all consequent judgments holding the same level of legitimacy and 'finality',[15] whether popular or unpopular. A distinction may also be noticed

[8] Upendra Baxi, "The Travails of Stare Decisis in India", *Legal Change: Essays in Honour Of Julius Stone*, Butterworths, 1983, pp. 38.
[9] *Justice K.S. Puttaswamy* v. *Union of India*, W.P. (Civil) No. 494/2012; Suhrith Parthasarathy, "The Constitution, refreshed", THE HINDU, August 26, 2017; Lawrence Liang, "A Right for the Future", THE HINDU, August 29, 2017.
[10] *Shyam Narayan Chouksey* v. *Union of India*, W.P. (Civil) No. 855/2016.
[11] Anuj Bhuwania, "Making of a Legislative Court", THE HINDU, December 03, 2016.
[12] *Shreya Singhal* v. *Union of India*, W.P. (Criminal) No.167/2012; Anjana Pradhan, "SC has upheld liberty of thought, expression", THE HINDU, March 25, 2015; Suhrith Parthasarathy, "The judgment that silenced Section 66A", THE HINDU, March 26, 2015.
[13] *Supreme Court Advocates-on-Record Association* v. *Union of India*, W.P. (Civil) No. 13/2015.
[14] Gopal Subramanium, "A new beginning by the Supreme Court", THE HINDU, October 16, 2015; *cf.* Suhrith Parthasarathy, "An Anti-Constitutional Judgment", THE HINDU, October 30, 2015.
[15] *See* Hyde, "The Concept of Legitimation in the Sociology of Law", *Wisconsin Law Review*, No. 379, 1983.

between the examples cited – with *Shreya Singhal* and *Puttaswamy* being exponents of "expansive interpretation"[16] of the Constitution, whereas the less popular *Chouksey* decision exhibits "purposive interpretation"[17] gone awry - which explains the difference of reactions based on the respective outcomes, the individual rights in issue, and the societal interests at stake. The unsustainability of consequence-oriented decisions is exemplified by the fact that eventually, the nationalist-decision in *Chouksey* had to be overturned.[18] Ultimately, judges are said to operate within a framework of internal and external constraints.[19] If this is true, is there a 'correct outcome' when the basis of individual rights in two different issues is the same, yet the societal interests at stake differ? Is there a need for such 'correctness', at all?

(b) The Constitutionality of Populism

To decipher this dissonance between the principled façade of judicial review and its consequence-oriented reality, in Part I, I will analyse the political use of reservations in India, and certain new tendencies that it has adopted through the instrument of horizontal-application of Constitutional guarantees.[20] I will then exhibit the unprincipled discourse of the Indian judiciary regarding 'horizontal application', and by comparison, analyse the 'activist' tendencies of other courts along with their probable cause.[21] For clarity, throughout this paper I will adopt Ronald Dworkin's definition of 'principle'[22] and will hold

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[16] *See* Ronald Dworkin, "Law as Interpretation", *Texas Law Review*, Vol. 60, No. 529, 1982, pp. 531.

[17] Evan Bell, "Judicial perspectives on Statutory Interpretation", *Commonwealth Law Bulletin*, Vol. 39, No. 2, 2013, pp. 245-281.

[18] Krishnadas Rajagopal, "SC modifies order, says playing of national anthem in cinema halls is not mandatory", THE HINDU, January 09, 2018.

[19] Walter Murphy, *Elements of Judicial Strategy*, University of Chicago Press, 1964, pp. 33.

[20] Sudhir Krishnaswami, "Horizontal Application of Fundamental Rights and State Action in India", *Human Rights, Justice and Constitutional Empowerment*, Oxford University Press, 2010, pp. 53.

[21] For clarity on the ubiquitous word 'activist' in the Indian context, *see* Prof. Upendra Baxi, "The Avatars of Indian Judicial Activism: Explorations in The Geographies Of [In]justice", *Fifty Years of The Supreme Court*, Oxford University Press, 2002, pp. 165. ("In contrast, an activist judge regards herself as holding judicial power in fiduciary capacity for civil and democratic rights of all peoples, especially the disadvantaged, dispossessed, and the deprived.").

[22] Ronald Dworkin, "The Model of Rules", *Chicago Law Review*, Vol. 35, No. 14, 1967, pp. 22-29. ("A 'policy' sets out a goal to be reached, generally an improvement in some economic,

certain judicial decisions to be "unprincipled" in their consequence-orientated disposition. My aim is to highlight the fundamental concerns that appear necessary for courts to consider while dealing with prospects of activism over individual rights, and populism at the cost of them.

In Part II, engaging in a jurisprudential exposition to understand how the self-perception of the judiciary in India affects judicial choices, I will analyse the dispositive notions of 'transformative constitutionalism'[23] which seeks to predispose judges to make activist-spirited decisions aimed at ideals of societal transformation. I will attempt to distinguish transformative constitutionalism's dispositive ideas with a narrower view – 'aspirational constitutionalism', and how the latter is better suited for judicial consideration when dealing with constitutional matters. In Part III, with a view towards conceptualizing disciplinary constraints in the interpretive process drawing from ideas in the 'legal process school', I will specifically analyse Herbert Wechsler's views, who holds that constitutional matters must be judged by "neutral principles" - standards that transcend the case at hand, regardless of the expected or preferred outcome.[24] Drawing from Herbert Wechsler and Ronald Dworkin, I will elaborate upon how constitutional rights function as limitations which must be observed by courts to ensure that adjudication and the interpretive discourse retain essential 'justice-qualities'[25]

In Part IV, to test my thesis and discover constitutional limitations through it, I will rely on Hohfeld's synthesis of 'jural-correlatives',[26] to exhibit the 'duty' that constitutional rights encumber the State with, and how horizontal application of constitutional guarantees may at times alter this equation in a way which may not be constitutionally valid. Far from altogether dismissing

political, or social feature of the community. A 'principle' is a standard to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.")

[23] KE Klare, "Legal Culture and Transformative Constitutionalism", *South African Journal on Human Rights*, Vol. 14, No. 146, 1998, pp. 147.

[24] Wechsler, *supra* note 1, at 15.

[25] Upendra Baxi, *The Future of Human Rights*, Oxford University Press, 2002, pp. 184. ("These may relate to the substance of rights, or to the justness of procedures adopted for articulation of human rights values, or, further, to the appropriate just responses that may result in case of infringement or violation.")

[26] *See* Wesley N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", Yale Law Journal, Vol. 26, No. 8, 1916, pp. 710-726.

horizontal application as an instrument of legal reform, the analysis will serve to highlight the need for courts to remain alive to legal-consistency requirements,[27] and how "neutral principles" can function as a disciplinary constraint to ensure critical engagement with constitutional concerns.

I. THE CONSTITUTIONAL FRAMEWORK AND NEW DIMENSIONS

As a legal system grows, the remedies that it affords substantially proliferate, a development to which courts contribute, but in which the legislature has an even larger hand.[28] In India, the Constitution empowers both, the Central and State governments to engage in affirmative efforts.[29] It creates three beneficiaries of reservation policies: Scheduled Castes, Scheduled Tribes, and the Other Backward Classes.[30] The Constitution empowers the Union Executive to categorise castes and tribes as SC[31] or ST.[32] The OBCs, unlike the SCs and STs, are not a distinct social group as they do not possess historically recognized social identities.[33] The categorization of the OBCs is based on under-representation in higher education and employment,[34] whom the Government of India estimates to constitute 52 per cent of the Indian population.[35] Politically, reservations aimed at alleviation have the potential of creating group-interests, a potent tool for populist promises, distinct from the initial goals of societal transformation.[36] The political extravagance in promising reservations necessitates a judicial analysis of the reservation-

[27] For a discussion on the 'consistency principle', *see* Norman E. Bowie, "Taking Rights Seriously by Ronald Dworkin" *Catholic University Law Review*, Vol. 26, No. 908, 1977, pp. 914.
[28] "Developments in the Law – Remedies Against the United States and Its officials", *Harvard Law Review*, Vol. 70, No. 827, 1957.
[29] INDIA CONST. art. 12, read with arts. 15(4) and 16(4).
[30] Vinay Sitapati, "Reservations", *The Oxford Handbook of Indian Constitutional Law*, Oxford University Press, New Delhi, 2016, pp. 722.
[31] INDIA CONST. art. 341.
[32] INDIA CONST. art. 342.
[33] Udai Raj Rai, *Fundamental Rights and Their Enforcement*, PHI Learning, New Delhi, 2011, pp. 442.
[34] Sitapati, *supra* note 30, at 722.
[35] Government of India, *Report of the Backward Classes Commission*, known as the 'Mandal Commission Report' 13 (1980).
[36] Granville Austin, *The Indian Constitution: Cornerstone Of A Nation*, Oxford University Press, 1966, pp. 119.

framework in India, and the limitations inherent within it.[37]

(a) Horizontal Application in India

Public employment has been one of the preferred means of social mobility in India, considering the constitutional protections for government employees, the relative job stability, and the initial macro-economic aversion to private industries.[38] The enabling provision for reservations in public employment is Art.16(4)[39] for all three categories, and Art.15(4)[40] of the Constitution was added later for educational opportunities. Both provisions are contained in the justiciable Fundamental Rights chapter of the Constitution (Part III), and are textually limited to guarantees concerning the "State".[41] The existing affirmative action programs applying exclusively to State institutions are "designed under the shadow of the equality-guarantee under the Constitution."[42] Prof. Stephen Gardbaum describes horizontal application of rights in terms of whom the Constitution binds – "Rights with vertical effect apply only against the government, whereas horizontal rights also apply against private actors".[43]

Post the economic-liberalization of the 1990s, with the consequent contraction of public-sector employment giving way to private industries, a new whim that has caught the attention of Indian politics is the avenue of 'horizontal' application of constitutional guarantees. Political parties in India have called for reservations in private employment,[44] despite no constitutional provision allowing it, expressly.[45] In December 2016, one such measure was proposed in the state of Karnataka, where the incumbent government of the

[37] *See* M.P. Singh, "Are Articles 16(4) or 15(4) Fundamental Rights?", *SCC Journal*, Vol. 3, No. 31, 1994.
[38] Sitapati, *supra* note 30, at 728.
[39] INDIA CONST. art. 16(4).
[40] INDIA CONST. art. 15(4).
[41] MP Jain, *Indian Constitutional Law*, Lexis-Nexis Publications, 2011, pp. 1301.
[42] Krishnaswami, *supra* note 20, at 52.
[43] Stephen Gardbaum, "Horizontal Effect", *The Oxford Handbook of Indian Constitutional Law*, Oxford University Press, New Delhi, 2016, pp. 600.
[44] Surinder Jodhka, "Caste and Politics", *The Oxford Companion to Politics in India*, Oxford University Press, 2010, pp. 431.
[45] Sitapati, *supra* note 30, at 731. ("But there is currently no constitutional provision that allows for it, no Supreme Court judgment on the subject, and no government Bill pending").

time was contemplating 100 per cent reservation for 'Kannadigas' in all private-sector industries in the state (hereinafter, the 'Kannada-reservation').[46] I will proceed with this instance as one amongst the many examples of horizontal-application of constitutional rights[47] sought and promised in contemporary politics. Regarding such attempts, it has been expressed that, "[I]n comparative law, we find examples such as policies that tend to recognize only one language and to suppress any manifestation of the others, even in private, by trying to justify this option on economic, religious or political grounds—such as to preserve internal cohesion or encourage nation-building—and by reference to the values of inclusion and the promotion of equality."[48] Such attempts create a legal quagmire because private-enterprise is itself entitled to constitutional guarantees,[49] exhibiting the classic double-edged nature of the rights discourse.[50] While the political willingness to facilitate redistribution of opportunities through horizontal application can be understood, the court's perceived role as a justice-dispensing institution is put to test, especially when faced with contending individual rights, and the constitutionality of newly created collective-investitures.

(b) The Judicial Response to Horizontal Application

The Supreme Court has been largely supportive of horizontal-application in education, as seen in various failed challenges[51] regarding the ambit of the Right to Education Act ('RTE') in its application to private educational

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[46] The draft amendments to the Karnataka Industrial Employment (Standing orders) Rules, 1961; "Bill on 100% quota for Kannadigas in group 'C' and 'D' jobs with Law Dept.", THE HINDU, January 03, 2017.

[47] "Maharashtra Assembly approves 16% quota for Marathas", THE HINDU, November 29, 2018; Sonam Saigal, "Bombay HC begins hearing on petitions against Maharashtra's decision to increase quota", THE HINDU, February 07, 2019; Vikas Vasudeva, "Haryana Assembly passes jaat-quota Bill", THE HINDU, March 29, 2016.

[48] Bipin Adhikari & Carlos Viver Pi-Sunyer, "Linguistic and Cultural Rights", *Routledge Handbook of Constitutional Law*, Routledge Publications, 2013, pp. 1309.

[49] INDIA CONST. art. 19(1)(g).

[50] David Kennedy & W. Fisher, eds., *The Canon of American Legal Thought*, PU Press, 2006, pp. 334.

[51] *Pramati Educational & Cultural Trust v. Union of India & Ors.*, (2014) 8 SCC 1; *Society for Un-aided Private Schools of Rajasthan v. Union of India*, AIR (2012) SC 3445; *Ashoka Kumar Thakur v. Union of India*, (2008) 4 SCR 1.

institutions.[52] The provision in question was §12(1)(c) of the RTE, which provides that all schools will reserve a minimum 25 per cent of seats for certain beneficiaries.[53] The challenge in these cases was with respect to the 'autonomy' of private institutions, the source of which was claimed to be Art.19(1)(g),[54] the same provision which will find application to the case of private enterprises if a challenge to the above-mentioned Kannada-reservation is posed by the industry.[55]

Regarding education, the judiciary has traditionally taken a sympathetic view for the betterment of society, especially considering the interest at stake being the right to education.[56] The Supreme Court's approach to the question of the fundamental rights of private educational institutions has been explained in *Unni Krishnan*,[57] holding that "Trade or business normally connotes an activity carried on with a profit motive. Education has never been commerce in this country."[58] The decision to deny the protection of Art.19(1)(g), based on whether the claimant is a profit-making entity or not, characterizes the early approach of the Supreme Court. Thereby, the Court clarified that the limited protection of Art.19(1)(g) is based on the nature of activity engaged in, and its ultimate profit motive.[59]

Another strand in the approach of the Supreme Court becomes visible in later challenges to the RTE, with the Court favouring the legislation for its limited interference in the administration of the claimant institutions. In *Society for Unaided Private Schools* (2012),[60] Kapadia J. writing for the majority held that

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[52] Constitution 86th Amendment Act, 2002 and the Constitution 93rd Amendment Act, 2005 added the enabling provisions.
[53] Right to Education Act, 2009, §12(1)(c).
[54] *T.M.A. Pai Foundation v. The State of Karnataka*, (2002) 8 SCC 481. ['Pai Foundation']
[55] "Trade bodies apprehensive about quota in Karnataka", THE HINDU, December 23, 2016.
[56] Shylashri Shankar, "The Embedded Negotiators", *Constitutionalism of the Global South*, Cambridge University Publications, 2013, pp. 99.
[57] *Unni Krishnan v. State of Andhra Pradesh And Ors.*, 1993 SCR (1) 594.
[58] *Id.* at ¶197.
[59] Unni Krishnan was an extension of the principle laid in *Sodan Singh* v. *New Delhi Municipal Committee*, AIR 1989 SC 1988. ("Trade in its wider sense includes any bargain or sale, any occupation or business carried on for subsistence or profit, it is an act of buying and selling of goods and services").
[60] *Society for Unaided Private Schools of Rajasthan* v. *Union of India*, AIR 2012 SC 3445.

the seat-reservation provision under §12(1)(c) of the RTE is a 'reasonable restriction' under Art.19(6) on the rights of private educational institutions under Art.19(1)(g), and is therefore constitutional.[61] Finally, in *Pramati* (2014),[62] the controversy regarding constitutionality of the RTE and the extension of educational rights to the private domain was effectively putting to rest.

What needs to be noticed is that traditionally, fundamental rights were commonly divided into two fixed and inflexible categories: (i) *liberty rights*, which are negative rights, rest on state-abstention, and (ii) *social rights*, which are positive, enabling rights and are costly.[63] However, with the rise of the welfare state, liberty and social rights cannot realistically be compartmentalized anymore, because they are deeply interconnected and mutually dependent – requiring reciprocal enlightenment through engagement.[64] Holding itself to be the "sentinel on the qui vive",[65] the higher judiciary in India can be characterised as fulfilling this engagement – by crafting judgments that avoid conflict with the political wings while preserving for the court a pro-citizen reputation.[66] However, to what extent might notions of judicial self-perception[67] be accepted to dominate legal discourse in relation to context-specific inquiries, and how does this methodical polyvocality affect the justice-qualities of its outcomes?[68] Are there other circumstantial factors that lead courts to render unprincipled solutions

[61] *Id.* at 32, ¶12.
[62] *Pramati Educational & Cultural Trust* v. *Union of India*, (2014) 8 SCC 1.
[63] Catarina Botelho, "Aspirational Constitutionalism, Social Rights Prolixity and Judicial Activism: Trilogy or Trinity", *Comparative Constitutional Law and Administrative Law Quarterly*, Vol. 3, No. 4, 2017, pp. 70.
[64] *Id.*
[65] The earliest reference to the phrase – "sentinel on the *qui vive*" that I could find was in State of Madras v. V.G. Row, AIR 1952 SC 196. The latest reference this phrase is in *Navtej Singh Johar* v. *Union of India*, W. P. (Crl.) No. 76 of 2016, at ¶98.
[66] Shylashri Shankar, "Descriptive Overview of The Indian Constitution and The Supreme Court of India", *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India And South Africa*, Pretoria University Law Press, 2013, pp. 107).
[67] *See* David W. Kennedy, *A Critique of Adjudication: Fin de Siecle*, *Cardozo Law Review*, Vol. 22, 2001, pp. 991.
[68] Chintan Chandrachud, "Measuring Constitutional Case Salience in the Indian Supreme Court", *Journal of Indian Law and Society*, Vol. 6, No. 42, 2016, pp. 73., explains the problem of polyvocality in the context of the large docket of the Indian Supreme Court, which "has presented a problem for scholars: examining constitution benches no longer provides an adequate account of salient constitutional cases."

pursuant to their 'creative function'?

(c) The Problem and Cause of Spirited Decisions – A Comparison

Judicial behaviour has been theorized in various ways. Some theories have emphasized the values and ideological preferences of judges, whereas others have stressed the role of institutional factors as the main determinants of judicial decision-making.[69] Since the Indian experiment with horizontal application is relatively nascent, Canadian experience may exemplify a distinctly unprincipled, result-oriented approach, and its causes. Prof. Mark Tushnet analyses two such Canadian cases,[70] the first being a labour-relations issue in *Dolphin Delivery*,[71] in which an employer locked out workers associated with a labour-union, and the union challenged it as a violation of the freedom of expression guaranteed by the Canadian Charter. The Canadian Supreme Court held that the Charter did not apply to private litigation, which is divorced completely from any connection with the Government.[72] The underlying principle was that "…the Charter, like most written Constitutions, was set up to regulate the relationship between the individual and the Government."[73]

However, in relation to workplace-discrimination based on sexual orientation which was not covered by a provincial human-rights legislation, the Canadian judiciary's approach has been characteristically different. For instance, in *Vriend*,[74] the plaintiff who was dismissed as a teacher because of his sexual orientation, sued the provincial government because the Alberta human rights legislation did not include sexual-orientation as a 'protected-category' in terms of discrimination, and sought a declaration that such statutory non-inclusion constitutes a violation of the Charter right to equality.

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[69] For an in-depth account of the various theories of judicial behavior, *see* Arthur Dyevre, "Unifying the field of Comparative Judicial Politics: Towards a General Theory of Judicial Behavior", *European Political Science Review*, Vol. 2, No. 2, 2010, pp. 297.

[70] Mark Tushnet, "State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations", Chicago Journal of International Law, Vol. 3, No. 2, 2002, pp. 435-441.

[71] *Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573.

[72] *Id.* at 599.

[73] *Id.* at 598.

[74] *Vriend v. Alberta*, (1998) 1 SCR 493, 553.

Applying the *Dolphin-Delivery* principle of the limited application of the Charter in the private domain, such inclusion would clearly impinge the employer-college's rights of property and contract.[75] However, the Supreme Court held that the Charter had been violated by the legislative omission,[76] thereby extending the Canadian Charter to private-employment.

According to Prof. Tushnet, such actions of courts may be attributed to the nature of the rights and the interests at stake. He claims that "[I]f market transactions resulted in outcomes where people did not have 'enough' according to prevailing social norms, those outcomes certainly could be changed by legislation, and sometimes had to be changed pursuant to judicial command."[77] The judicial approach varies with the context, the common question being: "[W]hat must the legal system make available to people who cannot acquire them through market transactions?"[78] Wherefore, Prof. Tushnet claims that the "state action/horizontal effect doctrine is the vehicle whereby background rules of property, contract, and tort are made subject to constitutional norms dealing with the level and distribution."[79]

Prof. Tushnet's analysis holds that an alteration of the background legal rules is necessary to facilitate redistributive efforts.[80] Thus, reverting to the Kannada-reservation, it may be argued that such a regulation also constitutes an alteration of background legal rules by seeking to create new collective-rights to preferential employment based on language. This may even be politically and circumstantially justified because, as pointed out by Morris Cohen[81] and the early American Legal Realists, "the ability to exclude in the hands of the property-owners, essentially allows them to exercise a much greater power than a mere proprietary interest, giving them a disparate controlling stake in society."[82] The very real concern that the private enterprise

[75] Tushnet, *supra* note 70, at 437.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 443.
[79] *Id.*
[80] *Id.* at 445.
[81] *See* Morris Cohen, "Property and Sovereignty", *Cornell Law Review*, Vol. 13, No. 8, 1927.
[82] *Id.*

seeks efficiency, and not redistribution, may provide positive reasons for courts to facilitate government actions of the kind.[83]

Appearing to follow this view, the Supreme Court of India in *Shivashakti Sugars* (2017)[84] has held it to be the "bounden duty of the Court"[85] to consider the economic impact of its decisions as an interpretive concern, because "India is on the road of economic growth."[86] However, as will be discussed in part III(a) of this paper, cases like *Chouksey* and *Kaushal,* which are merely the more polarising ones in a sea of polyvocality, lead to questions about whether the Indian judiciary is to limited to these economic-redistributive concerns, or does it exemplify Duncan Kennedy's view - that judges are political actors, strategising how best to write their liberal or conservative ideological projects into law?[87]

Since, besides self-perception, activist-courts decide based on desired outcomes and utilitarian concerns, the question then is whether in a pursuit of policy goals, must courts be committed to the popular agenda? If so, when a conflict between policies on the one hand and entrenched rights on the other occurs, must 'fidelity to the law' be disregarded as "formalist" and "obstructive", and 'activism' be necessarily hailed as "transformative"?

II. TRANSFORMATIVE CONSTITUTIONALISM IN TEXT AND CONTEXT

Most modern Constitutions are designed to facilitate societal aspirations. One such view which informs South African constitutional law is 'transformative constitutionalism', described as "a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a

[83] Stephen Gardbaum, "The Structure and Scope of Constitutional Rights", *Comparative Constitutional Law*, Edward Elgar Publishing, 2012, pp. 392. ("Secondly, at least in the contemporary context, constitutional rights and values may be threatened at least as much by extremely powerful private actors and institutions as by governmental ones, and the vertical approach automatically privileges the autonomy and privacy of such citizen-threateners over those of their victims.")
[84] *Shivashakti Sugars Ltd. v. Shree Renuka Sugar Ltd.*, [2017] 7 SCC 729.
[85] *Id.* at ¶37.
[86] *Id.*
[87] *See* Duncan Kennedy, *A Critique of Adjudication*, Harvard University Press, 1997.

country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."[88] Most post-colonial Constitutions contain similar projects.[89] Upon delving into the historical and political circumstances that necessitate transformative goals, a common line of experience emerges amongst countries that adopt such conceptions.[90] Prof. Upendra Baxi holds that, "[T]ransformation remains an epochal conception, marking a series of breaks with old forms of state, society, and culture (social formations) and inaugurating a new order of things."[91] To that extent, activist-decisions may appear to be justified in such constitutional setups, regardless of principle-concerns. However, henceforth, I will argue for the need for courts to examine the true context in which transformative abilities were vested, and why judges must continue to observe fidelity to the rights, regardless of the right in context - whether *individual* or *collective*.[92]

(a) Transformative Constitutionalism

Dennis M. Davis and Karl Klare, exponents of this view, in *Transformative Constitutionalism and the Common and Customary Law* (2010)[93] hold that legal reasoning consists of "the rhetorical strategies and argumentative techniques deployed to produce the appearance of the legal necessity of an outcome."[94] They justify the dipositive ends[95] of transformative constitutionalism by holding that legal texts, interpretations as well as outcomes "are not infinitely plastic",[96] and suggest that South African judges

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[88] Klare, *supra* note 23, at 150.
[89] Oscar Vieira, *et al.*, "Introduction", *Transformative Constitutionalism: Comparing the Apex Courts Of Brazil, India And South Africa*, Pretoria University Law Press, 2013, pp. 3.; *See* Colm O'Cinneide and Manfred Stelzer, "Horizontal effect/state action", *Routledge Handbook Of Constitutional Law*, pp. 534. ("The willingness of courts in these jurisdictions to give direct horizontal effect to rights appears to be based in part on the expectation common to many post-colonial states that courts should play a leading role in transforming society.")
[90] *Id.*, Vieira at 23.
[91] Upendra Baxi, "Preliminary Notes on Transformative Constitutionalism" *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India And South Africa,* Pretoria University Law Press, 2013, pp. 23.
[92] Mark Tushnet, "The Critique of Rights", *SMU Law Review*, Vol. 47, No. 23, 1994, pp. 24.
[93] Davis & Klare, "Transformative Constitutionalism and the Common and Customary Law", *South African Journal on Human Rights*, Vol. 26, 2010, pp. 436.
[94] *Id.*
[95] *Id.*
[96] *Id.*

should become conversant with the 'anti-formalist' ideas and techniques derived from American Legal Realists.[97] As scholars of the Critical Legal Studies school ('CLS'),[98] they treat 'indeterminacy' of the law as central to the functioning of law and legal rules,[99] and idea that I shall refer to as the 'indeterminacy-thesis'. As Prof. Ken Kress expresses, "critical legal scholars, building on the work of legal realists, have developed an extensive array of arguments concluding that law is radically indeterminate, incoherent, and contradictory. Law is indeterminate to the extent that legal questions lack single right answers. In adjudication, law is indeterminate to the extent that authoritative legal materials and methods permit multiple outcomes to lawsuits."[100]

According to Prof. Theunis Roux, transformative constitutionalism holds that, "a particular interpretive method, one typically associated with the methodology and political commitments of the Critical Legal Studies movement in the United States, is required in order to realise the full transformative potential of the Constitution."[101] The expected disposition of a judge in a transformative-constitutional setup is to make "a judgment that must rely on considerations and intuitions external to the legal concept itself."[102] By using the example of a lawyer's hypothetical expectation of what the law is, and what the predictable outcome should therefore be,[103] the qualification that exponents of this view make is that legal outcomes are a circumstantial "compromise".[104] This is specifically the reason why I take the example of transformative constitutionalism - because it justifies activism based on notions of self-perception drawing from the past, and rather

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97 *Id.* at 435.
98 *See* WB le Roux & Karin Van Marle, "Critical Legal Studies" in C. Roederer & D. Moellendorf (eds.) *Jurisprudence*, Juta Publications, 2004, pp. 246-247.
99 Duncan Kennedy, "Form and Substance in Private Law Adjudication", *Harvard Law Review*, Vol. 89, 1979, pp. 1979, Joseph Singer, "The Player and The Cards: Nihilism and Legal Theory", Yale Law Journal, Vol. 94, No. 1, 1984, pp. 12-13, who claims that "liberal legal theory requires substantial determinacy to satisfy the requirements of the rule of law."
100 Ken Kress, "Legal Indeterminacy", *Californial Law Review*, Vol. 77, No. 283, 1989, pp. 284.
101 Theunis Roux, "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?", *Stellenbosch Law Review*, Vol. 20, No. 259, 2009, pp. 258-285.
102 Davis & Klare, *supra* note 93, at 439.
103 *Id.* at 436.
104 *Id.* at 437.

necessitates a consequence-oriented disposition on the part of judges.

Transformative constitutionalism uses the indeterminacy-thesis solely as instrumental to the political agenda, which is the expected disposition of the judges as well.[105] Transformative-constitutionalists believe that the 'indeterminacy' of legal reasoning "does not mean that it is merely a façade or that its conventions provide no guide to or constraint upon decisions makers."[106] However, it is curious that Davis and Klare make such restraint contingent upon the prevalent 'legal culture', holding that "a legal tradition may exercise a highly constraining force upon judges in democratic societies in which fidelity to the law is a powerful norm."[107] Klare describes 'legal culture' as the "professional sensibilities, habits of mind, and intellectual reflexes" of judges, lawyers and legal academics",[108] and idea that resonates with notions of self-perception.[109] He claims that "all participants within a legal culture are to some extent influenced and constrained by it to produce ideas and out-comes that are or might be different from the ideas and outcomes that would arise were they participants in a different or a more plural or conflictual legal culture."[110]

The question is whether reliance on 'legal culture' *i.e.*, the traditional self-perception of the actors within a legal system as a judicial constraint ensures against a transformative agenda descending into a populist one, the simplest indication of which can be the judicial legitimization of rights-transgressions due to the thrust of transformative ideals, which this view actively disposes a judge towards. Significantly, transformative constitutionalism, while open to "traditional accounts of the rule of law, thereby reaching amongst other disciplines - philosophy, political theory and

[105] Kress, *supra* note 100, at 284; *See* Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", *Chicago Law Review*, Vol. 54, No. 462, 1987, pp. 491-95.
[106] Davis & Klare, *supra* note 93, at 440.
[107] *Id.* at 441.
[108] *Id.* at 466.
[109] Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India", *Third World Legal Studies*, Vol. 4, 1985, pp. 107. ("The Court is augmenting its support base and moral authority in the nation at a time when other institutions of governance are facing a legitimation crisis. In the process, like all political institutions, the Court promises more than it can deliver and is severely exposed to the dynamics of disenchantment.")
[110] Klare, *supra* note 23, at 151.

sociology",[111] must also account for existing and past political realities – critically, and not just notionally. Prof. Karin van Marle conceives of the notion of transformative constitutionalism as a 'critical' one, "a project that entails thought/thinking."[112] Marle seeks "to distinguish roughly between two strands in engagements with transformative constitutionalism - an 'instrumental/functionalist' approach and a 'critical' approach."[113]

(b) The Transformative - Aspirational Distinction

The fundamental paradox that transformative constitutionalism poses is that, despite relying on American Legal Realism[114] and its 'indeterminacy-thesis', it overlooks the views of the progenitors of this school, who against the formalist order, sought to dispel notions of the law being a self-contained discipline.[115] Prof. Marle expresses concern that, "Klare's notion of transformative constitutionalism will not be possible, because since legal rules function as 'exclusionary reasons' and political considerations, balancing and reflexivity will not be possible within the limits of the law."[116] She explains further, that "[W]hile playing with both hands, a scholar experiencing this paradox would say to the constitutional court that they haven't lived up to Karl Klare's challenge, while knowing that they never really can."[117] Against transformative constitutionalism's instrumental conceptions in seeking to actively reorient the judiciary's perception of its role,[118] viewing such aspirations critically - as described by Prof. Marle to be "a notion that urges an engagement with complexity"[119] - appears better suited to the judicial function to strike a balance between contending interests, either pre-existing, or ones that are sought to be created in a society aspiring towards 'transformation'.

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111 *Id.*
112 Karin van Marle, "Transformative Constitutionalism as/and Critique", *Stellenbosch Law Review*, Vol. 20, No. 286, 2009, pp. 300.
113 *Id.* at 294.
114 Michael Steven Green, "Legal Realism as Theory of Law", *William & Mary Law Review*, Vol. 46, 2005, pp. 1915. ("Professor Kalman's description presents two facets of legal realism - (1) the acceptance of abstract concepts, and (2) instrumentalism or functionalism.")
115 *See* Felix Cohen, "Transcendental Nonsense and the Functional Approach", *Columbia Law Review*, Vol. 35, No. 6, 1935.
116 Marle, *supra* note 112, at 293.
117 Karin van Marle, "Revisiting the Politics of Constitutional Interpretation", *TSA Review*, 2003, pp. 555-556.
118 Marle, *supra* note 112, at 294.
119 *Id.* at 300.

In seeking to avoid the dispositive notions of transformative constitutionalism, reference may also be made to Prof. Kim Lane Scheppele's use of the phrase 'aspirational constitutionalism' in a comparative constitutional law perspective – described as "a process of constitutional building (a process that includes both drafting and interpretation by multiple actors) in which constitutional decision-makers understand what they are doing in terms of the goals that they want to achieve and aspirations that they want to live up to."[120] How 'aspirational constitutionalism' fundamentally differs from 'transformative constitutionalism' is in terms of the due regard it gives to rights and constitutional design,[121] and its non-reliance on the indeterminacy-thesis. In recognizing this essential difference, judges can avoid mixing utilitarian concerns and self-perception with the constitutional aspirations, and whenever they do, clarity on this distinction will facilitate objective criticism.

(c) Textual Basis of the Transformative Agenda

While South African constitutionalism has been described with the metaphor of "crossing the bridge",[122] to highlight the historical and socio-political contexts before constitutional functionaries, I rely again upon the Indian Constitution. According to Prof. Baxi, in India, "transformation is characterized chiefly by judicial populism."[123]Prof. MP Singh holds that the

[120] Kim Lane Scheppele, "Aspirational and Aversive Constitutionalism: The case for studying cross-constitutional influence through negative models", *International Journal of Constitutional Law*, Vol. 1, No. 2, 2003, pp. 299.
[121] *Id.* at 300. Prof. Scheppele introduces another term – 'aversive constitutionalism' which "calls attention to the *negative models* that are prominent in the constitution builder's mind. ("Constitution builders may have only the vaguest sense of where they are going and how they should get there; more often, they have a clearer sense of what it is that they want to avoid."); Ran Hirschl, "The Strategic Foundations of Constitutions", *Social And Political Foundations Of Constitutions*, Cambridge University Press, 2013, pp. 158-159. ("Fear is a main driving force of constitutionalisation… constitutions are viewed (and justified) as self-binding precautions that responsible right-holders who are well aware of their weaknesses have taken against their own imperfections.")
[122] Baxi, Preliminary Notes, *supra* note 91, at 21.
[123] Upendra Baxi, *The Indian Supreme Court And Politics*, Eastern Book Co., 1980, pp. 121-248.

transformative goals of the Constitution are found in the Preamble."[124] He further describes the 'rubric of equality' in the Indian Constitution which subsumes the affirmative action provisions.[125] As to the promises of the Directive Principles in Part IV, the judicial approach has been inconsistent,[126] but has achieved tangible results. Procedurally too, the unrivalled space that Public Interest Litigation now occupies in Indian judicial discourse initially arose in response to "an apathetic executive with no real possibility of near-term improvement."[127]

The latest foray into the understanding of transformative constitutionalism in India has been seen in *Navtej Johar v. Union of India*[128] (2018), wherein it was observed that, "the purpose of having a Constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism. While the 'design' factors are clearly present in the constitutional text, the socio-political complexities to which the Indian Constitution caters are latent. "The map of India – its communities, the majority and minorities, institutional arrangements – look different" when a different identifier is used, be it religion, economic and social status (as in the case of OBCs) or language.[129] Such is the case of the Kannada-reservation which seeks to provide a 'horizontal' preferential employment guarantee to the speakers of 'Kannada', in a country where provinces were carved on linguistic basis.[130]

Collective rights, despite popular support, have controversial features. As expressed by Bipin Adhikari, "[P]roblems often arise in determining whether these measures are to protect and promote real rights or not, and, if so, what kind of rights are concerned since, in the sphere of language rights,

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[124] *Supra* note 37.
[125] *Ibid.*
[126] Gautam Bhatia, "Directive Principles of State Policy", *The Oxford Handbook of Indian Constitutional Law*, Oxford University Press, New Delhi, 2016, pp. 644.
[127] Shyam Divan, "Public Interest Litigation", *The Oxford Handbook of Indian Constitutional Law*, Oxford University Press, New Delhi, 2016, pp. 663.
[128] *Navtej Singh Johar v. Union of India*, W. P. (Crl.) No. 76 of 2016. ['Johar']
[129] Gurpreet Mahajan, "Keeping the Faith: Legitimizing Democracy through Judicial Practices in India" *Constitutionalism of The Global South*, Cambridge University Press, 2013, pp. 211.
[130] Prabhananda Rai, "Reorganisation of States: The Approach and Arrangements", *Economic and Political Weekly*, Vol. 7, No. 42, 1955.

both collective and individual rights are important."[131] Even without a detailed analysis of the complexities that exist before the courts in India, it hardly appears to be plausible that constitutional rights catering to such diversity should lend themselves to be trampled upon for temporary political convenience, on the pretext of socio-political and economic alleviation. Though every such attempt certainly cannot be attributed to legally untenable 'populism' *per se*, can self-perceived notions and professional sensibilities that constitute 'legal culture' be relied upon as sufficient constraints on courts committed to 'transformation'? To counter such uncertainty, rights and background legal rules, though 'indeterminate'[132] and not set in stone against progressive intent, may find value as indicators of the 'justice-quality' of judicial actions.

III. RIGHTS AS INDICATORS OF 'JUSTICE-QUALITY'

Judgments about the 'justice-quality' of transformation remain complex and contradictory because various change-agents and change-constituencies may espouse diverse interest-based understanding of what justice may mean.[133] Contrary to the indeterminacy-thesis, reference must now be made to the 'Legal Process School' which is marked by its insistence that despite the indeterminacy of some legal materials, adjudication can be rational insofar as those materials—whether case law, statutes, or the Constitution—are applied in a principled manner and interpreted by reference to their purpose.[134] According to Herbert Wechsler, a legal process scholar, when "the language of the Constitution, of history and precedent do not combine to make an answer clear" to novel issues, the matter must be judged by "neutral principles" - standards that transcend the case at hand, regardless of the expected or preferred outcome.[135]An evaluation of a court's reasons should not be based on the interest it serves, but on the method of the decision –

[131] Adhikari, *supra* note 48, at 1306.
[132] Davis & Klare, *supra* note 93, at 437.
[133] Baxi, Preliminary Notes, *supra* note 91, at 23.
[134] Charles L. Barzun, "The Forgotten Foundations of Hart and Sacks", *Virginia Law Review*, Vol. 99, No. 1, 2013, pp. 9.
[135] Wechsler, *supra* note 1, at 17; *cf.* Hart, "Positivism and the Separation of Law and Morals", *Harvard Law Review*, Vol. 71, No. 593, 1958, pp. 606-07. (According to Hart, the penumbra of uncertainty derives from the vagueness and open texture of the language of enactments.)

including the types of reasons provided.[136] In favor of 'reasoned elaboration' of the basis of decisions, he also meant to restrict the types of reasons which can be a part of this elaboration. Louis Henkin has called Wechsler's views an "inevitable reaction, long overdue"[137] to the more radical versions of legal realism, since he redeemed the use of "principles" from the Realist-assault.[138]

(a) The Generality of Neutral-Principles

Wechsler's focus is on the appropriate standards to be used to interpret the Constitution. For Wechsler, the principles that support a decision must be "adequately general, as well as neutral."[139] An examination of the words – 'neutral', and 'principle' – will clarify what qualifies as a 'principle' in Wechler's terms, and when a principle qualifies as 'neutral'. If an opinion is so limited to the facts that the reasoning gives little or no guidance as to how related situations would be treated, then the opinion fails Wechsler's criterion of generality. "A principled decision… is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[140]

Wechsler's theme is the applicability of, and the judicial willingness to apply, standards across a range of cases – in situations that would affect different interests, or affect interests differently.[141] Against outcome-centric polyvocality which is convenient and short-sighted, Wechsler's demand of neutrality is that a value and its measure can be determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable - regardless of the interest, person, or group that may assert the claim. "When there is conflict among values having constitutional protection, calling for their ordering or their accommodation, I argue that the principle of resolution must be neutral in a comparable sense - both in the definition of

136 Kennedy and Fisher, *supra* note 50, at 319.
137 Louis Henkin, "Some Reflections on Current Constitutional Controversy", *University of Pennsylvania Law Review*, Vol. 109, No. 637, 1961, pp. 654.
138 Kent Greenawalt, "The Enduring Significance of Neutral Principles", *Columbia Law Review*, Vol. 78, No. 5, 1978, pp. 982.
139 *Id.* at 987.
140 Baxi, Politics, *supra* note 134, at 27.
141 Kennedy & Fisher, *supra* note 50, at 319.

the individual competing values and in the approach that it entails to value-competition."[142]

For Wechsler, essentially different from courts, political actors often employ arguments in favour of specific results that they would be unwilling to give similar weight to in other situations to which the arguments apply, because "principles are largely 'instrumental' as they are employed in politics."[143] In criticizing the grounds of a decision, Wechsler suggests that the reasons offered are such that neither the judges, nor their critics, would be willing to apply broadly.[144] Applying his ideas to the celebrated decision of *Brown* v. *Board of Education*,[145] in which the US Supreme Court declared public-schools segregated on racial differences to be unconstitutional, Wechsler argued that the Court's emphasis on the principle of "discrimination" was insufficiently neutral, because "the separate-but-equal formula was not overruled 'in-form', but was held to have no place in public education…"[146] This observation is important in terms of the outcome-centric adjudication that courts engage in, carving out specific exceptions based on the facts and interests engaged in the matter at hand, which may or may not be applicable in other cases, despite the same constitutional right in context. Thereby, the outcome in *Brown* was 'insufficiently neutral' according to Wechsler because it was made with the limited aim of desegregation in public-education, and was later not applied "to other public facilities, such as public transportation, parks, golf courses, bath houses, and beaches."[147] Subsequently, in part IV(c) of this paper, I will exhibit a similar flaw in Indian education-guarantee cases.

Disagreements arise over how attainable Wechsler's 'neutrality' is, and whether it should give way to the social ends of judicial decisions. As criticism, it has been expressed that "Wechsler writes as if competent courts should be able to consistently formulate such principles, and as if their presence is a minimal condition of an acceptable decision in a case that calls for an

[142] Wechsler, *supra* note 1, at 19.
[143] Greenawalt, *supra* note 149, at 985.
[144] *Id.*
[145] *Brown v. Board of Education*, 347 U.S. 483 (1954).
[146] Kennedy & Fisher, *supra* note 50, at 345.
[147] Wechsler, *supra* note 1, at 22.

opinion."[148] However, in his analysis of *Brown*, it is apparent that he "insisted not so much that the governing principle should be neutral, but that it should also be neutrally applied."[149] Wechsler did not criticize the quality of the outcome in *Brown*, nor the nobility of desegregation, but merely questioned quality of the precedent that *Brown* set in its subsequent non-compliance, and highlighted the unsustainability of such consequence-specific decisions.

Wechsler does not mean to revive mechanical jurisprudence,[150] and has never regarded 'neutral principles' as a comprehensive guide to a 'correct' decision. It is, in his view, merely a "negative requirement," a "minimal criterion."[151] The virtue or demerit of a judgment turns entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees.[152] The discipline of neutral principles therefore as a method of reasoned decision-making can bind courts to be disinterested, and congruent in outcomes.

"Neutral principles" are standards which judges should always be conscious to, and to which, in the absence of very strong countervailing reasons, they should always aspire. The example of *Suresh Kaushal* (2013)[153] and *NALSA* (2014)[154] may be taken. While in *Kaushal*, the Court could not fathom the "anxiety to protect the so-called rights of LGBT persons",[155] a year later in *NALSA*, the Court was moved to recognize transgender-individuals as the 'third-gender', "so far deprived of their legitimate natural and constitutional rights."[156] In qualitative terms, the Court in *Kaushal* ruled that since the

[148] Henkin, *supra* note 148, at 657. *See* Barzun, *supra* note 145, at 12 ("In their common valorization of 'process' values (for example, the Court's legitimacy as an institution) over 'substantive' ones (for example, racial justice), Hart, Sacks, Wechsler, and others were seen to have failed to understand or appreciate the Court's more aggressive role in trying to achieve progress towards social justice. Instead, their theory was perceived to be based on little more than 'empty-proceduralism.'")
[149] HP Monaghan, "A Legal Giant is Dead", *Columbia Law Review*, Vol. 100, No.6, 2000, pp. 1370-1373.
[150] Greenawalt, *supra* note 149, at 991.
[151] Herbert Wechsler, "The Nature of Judicial Reasoning", *Law And Philosophy*, 1964, pp. 290-299.
[152] Baxi, Politics, *supra* note 134, at 27.
[153] *Suresh Kaushal v. NAZ Foundation*, (2014) 1 SCC 1.
[154] *Id.* at ¶52.
[155] *NALSA v. Union of India*, WP (Civil) No. 604/2013].
[156] *Id.* at ¶126.

Parliament had the opportunity to do so and did not take any action despite the *Naz* decision of the Delhi High Court or the Law Commission's recommendation,[157] it had to respect the legislature's intention.

Considering that the true and limited purport of Wechsler's views is to exert disciplinary constraints on judicial construction,[158] it will be noticed that the approach in *Kaushal* – of deference to legislative intent, was in stark contrast to controversial judgment in the *2-G case*,[159] in which the Court cancelled the allotment of telecom licenses and mandated that allotment of all natural resources be done only by auction, thereby expressly going against the erstwhile policy of the Government, and *Abhay Singh*,[160] in which the Court limited the use of red-lights in cars to those holding constitutional posts, expressly directing the legislature to amend the Motor Vehicle Rules, 1989. As to the question whether, figuratively speaking, there is "method to the madness", it must be noted that each of these views was authored by the same former judge of the Supreme Court, and rendered on the same day.[161]

Must justice concern itself with the vicissitudes of the judge's individuality, or be structured in a way that lends itself to logic and justification? The present permits itself to review the past, and one may see Nariman J.'s judgment in *Navtej Johar*[162] clearly rationalizes that, "[W]here, however, a pre-constitution law is made by either a foreign legislature or body, none of these parameters obtain. It is therefore clear that no such presumption attaches to a pre-constitutional statute like the Indian Penal Code."[163]

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[157] Kaushal, *supra* note 164, at ¶18.1, referring to 172nd Report of the Law Commission of India which contained recommendations for deleting Section 377 Indian Penal Code.
[158] Greenawalt, *supra* note 149, at 994.
[159] *Center for Public Interest Litigation v. Union of India*, AIR 2013 SC 3725.
[160] *Abhay Singh v. State of UP*, 2013 (15) SCALE 26.
[161] *Editorial,* 6 INDIAN J. CONST. L. iii (2013).
[162] *Navtej Singh Johar v. Union of India,* W. P. (Crl.) No. 76 of 2016.
[163] *Id.* at ¶90. For a well-founded exposition on the presumption of constitutionality and pre-constitutional legislations, *see* Gautam Bhatia, "Civilization has been brutal: Navtej Johar, Section 377, and the Supreme Court's Moment of Atonement", *Indian Constitutional Law and Philosophy*, 2018.

(b) 'Hard Cases' and Recourse to Principle

The question remains as to why a reversion to 'rights' as indicators of the 'justice-quality' of judicial discourse is appropriate. In this context, there is surprising resonance between the kind of cases Wechsler focuses on,[164] and Ronald Dworkin's *Hard Cases*.[165] Dworkin defines 'hard cases' as instances that "raise issues so novel that they cannot be decided even by stretching or reinterpreting existing rules."[166] In contrast to the method of CLS, Dworkin's method is premised on the view that claims about the political morality informing a Constitution and its interpretation are often presented as claims about the objective correctness of a particular interpretation.[167] Dworkin is a critic of the activist dispositions which commit courts to a positive agenda,[168] holds utilitarianism as an insufficient theory of justification, and views policy arguments as inappropriate in judicial decision-making.[169] In his particular focus on 'rights', Dworkin argues that "[I]ndividual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals to have or to do, or not a sufficient justification for imposing some loss or injury upon them."[170]

Dworkin's hypothetical judge in *Hard Cases*, 'Hercules', is "[A] judge who is insulated from the demands of the political-majority whose interest the right would trump..."[171] When facing hard cases, Hercules relies upon pre-existing rights and principles.[172] What makes Dworkin's theory of adjudication particularly suited to Wechsler's "neutral principles" is the middle path that both seek to provide against formalist conceptions of law from obstructing

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[164] Wechsler, *supra* note 1, at 17 ("…when the language of the Constitution, of history and precedent do not combine to make an answer clear…").
[165] Ronald Dworkin, "Hard Cases", *Harvard Law Review*, Vol. 88, No. 6, 1975, pp.1057-1109].
[166] *Id.* at 1058; Essentially similar to what H.L.A. Hart in "Positivism and the Separation of Law and Morals"*, Harvard Law Review*, Vol. 71, No. 593, 1958, pp. 606-07., calls the "penumbra of uncertainty".
[167] Theunis Roux, *supra* note 101, at 259.
[168] Kennedy & Fisher, *supra* note 50, at 544.
[169] Bowie, *supra* note 27, at 914.
[170] *Id.* at 910.
[171] *Id.*
[172] Hard Cases, *supra* note 176, at 1083.

the transformative agenda.[173] To facilitate Hercules' task, Prof. Dworkin distinguished between 'principles' and 'policy',[174] and held that in deciding 'hard cases', judges should respect rights, and reason from principles rather than policy.[175] Giving rights due importance, Dworkin describes that "an argument of principle fixes on some interest presented by a proponent of the right it describes, an interest alleged to be of such a character as to make irrelevant, fine discriminations of any argument of policy that might oppose it."[176]

A 'committed judiciary' would be committing a grave error in granting extreme deference to the legislature to change background legal rules[177] at whim. As Prof. Baxi cautions, "[I]f human rights are treated as no more than policy statements, these remain poor guides to state action."[178] Whether a judge seeks to emulate Dworkin's Hercules to the bone is a matter of choice,[179] which Dworkin's theory of adjudication affords to the adjudicator. His relevance to judicial activism is in his emphasis on why rights are 'trumps' and must remain so.[180]

IV. CONSTITUTIONAL RIGHTS AND HOHFELDIAN CLARITY

It is incumbent upon me to test my thesis – that the perception of the judicial role must remain critical, principle-centric, and must not become result-oriented. As noted in the beginning, constitutions subsist based on

[173] Kennedy & Fisher, *supra* note 50, at 554.
[174] *See* Dworkin, "The Model of Rules", Vol. 35, No. 14, *University of Chicago Law Review*, 1967, pp. 22-29. ("A 'policy' sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community. A 'principle' is a standard to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.").
[175] Kennedy & Fisher, *supra* note 50, at 555.
[176] Hard Cases, *supra* note 176, at 1062.
[177] Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State", *Political Science Quarterly*, Vol. 38, 1923. ("Background legal rules,' that is, common law rules of property, tort, and contract").
[178] Baxi - Preliminary Notes, *supra* note 91, at 46.
[179] Hard Cases, *supra* note 176, at 1058 ("Judges must sometimes make new law, either covertly or explicitly").
[180] Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, 1978.

'environment' or political factors, and inherently possess a 'design'.[181] To require a court to mechanically commit to transformative goals may suit transient socio-political conditions and interests, but may not correspond with the protections which are meant to be entrenched in the Constitution. For clarity, it would be prudent to scrutinize any attempt at creating group-rights under the lens of Hohfeld'sjural-relations, to recognize constitutional limits of such an exercise, and thereby its constitutional propriety. An example from the Indian Constitution may explain the individual-collective conflict.

(a) The Myth and Reality of Reservation Provisions

Arts.15(4) and 16(4), which provide for reservations, are incidentally found in Part III of the Indian Constitution, the fundamental rights. It is easy to assume that all provisions in this part are right-conferring, justiciable and therefore individually enforceable by a court against the 'State'. However, Prof. MP Singh explains that, "some of the provisions of Part III are just definitional; others provide for the effect of the fundamental rights on the existing and future laws. Still others provide for the enforcement and implementation of the fundamental rights while some others provide exceptions to the fundamental rights."[182] There being considerable variance in the legal effect of Part III provisions, the question is whether state-inaction in providing certain kinds of reservations is culpable, as a matter of right, to be challenged in court, or, whether reservation-provisions are merely enabling, to facilitate affirmative action.

Prof. Singh holds that, "the words 'Nothing in this Article shall prevent the State from making any provision' in Arts.16(4) and 15(4) clearly establish that these clauses constitute authorising provisions, and nothing more."[183] The Supreme Court appears to agree, and in *Indra Sawhney*,[184] the *locus classicus* on reservations, the judges unanimously held that "Arts.16(4) and 15(4) are couched in enabling language, and represent an empowerment of the

[181] *See* Endurance, *supra* note 2.
[182] MP Singh, *supra* note 37.
[183] Paramanand Singh, "Fundamental Right to Reservation: A Rejoinder", SCC Journal, Vol. 3, No. 6, 1995.
[184] *Indra Sawhney & Others v. Union of India*, AIR 1993 SC 477.

State to pursue the goals of substantive or genuine equality."[185] The position that to grant reservation is not an individual right, and therefore it is not a State-duty despite reservation provisions existing in Part III of the Constitution, is further bolstered by recent exposition of the Supreme Court in *Suresh Gautam* (2016),[186] holding that the "State is not bound to make reservation for SCs/STs in matters of promotion."[187] Therefore, does a right to horizontal-reservation in the private domain exist?

(b) Locating Rights, Duties and Hohfeldian-Privilege

Considering that reservation provisions are merely enabling, and since courts tend to treat like-cases differently depending upon self-perception and utilitarian concerns, when faced with propositions that seek to justify horizontal application, the need for principled limitations gets exacerbated. The question now is whether attempts at horizontal-reservation in the private domain would create 'rights', or 'privileges', since the consequent jural position in relation to either is different. To answer this, I rely on Hohfeld's taxonomy,[188] which remains a powerful corrective to errors in contemporary legal thought.[189] Hohfeld described four kinds of entitlements - *rights, privileges, powers, and immunities*, and four correlative disablements - *duty, no right, liability, and disability*.[190] He explains that in the existence of an enforceable 'duty' to respect a legally protected interest, the interest-holder has a correlative 'right' to the duty of non-interference by the state, and/or *in rem*.[191] However, a 'privilege' may only be created in the absence of a 'duty', when a situation of 'no-right' exists.[192]

Textually, because the ability to undertake affirmative action exists within the limited domain of the State,[193] there is no right to claim reservations

185 Paramanand, *supra* note 194, at 178.
186 *Suresh Gautam v. State of Uttar Pradesh*, W.P. (Civil) No. 690/2015.
187 *Id.*
188 Hohfeld, *supra* note 26.
189 Pierre Schlag, "How To Do Things With Hohfeld", *Law and Contemporary Problems*, Vol. 78, No. 185, 2015, pp. 187.
190 *Id.* at 188.
191 Hohfeld, *supra* note 26, at 716.
192 Kennedy & Fisher, *supra* note 50, at 49.
193 Sitapati, *supra* note 30.

in the private domain.[194] To the contrary, the private domain possesses Art.19(1)(g) rights,[195] incidentally in the nature of entrenched fundamental rights, which imposes a limited duty of non-interference upon the State. Wherefore, the horizontal extension of any constitutional benefit or protection can only be an exercise in creating a 'privilege', as against a 'right'. However, since the jural pre-requisite for a 'privilege' to exist is a situation of 'no-right', which does not exist in relation to reservations in the private domain because the private domain possesses Part III protections, future legal challenges engaging such questions must be tested on the constitutional limitations imposed through rights to ensure fidelity to the Constitution.

In this explanation, I hold reservation in the private domain to be a 'privilege', because there is no right to claim such reservation.[196] The right which exists in fact, is the individual right under Art.19(1)(g) which horizontal-application may violate, unless deemed "reasonable". I claim that a situation of 'no-right', necessary for a 'privilege' to exist, does not exist in terms of reservation in the private domain, because even the "reconsideration of the traditional distinction between the 'public' and the 'private' domain" which characterizes horizontal-application,[197] requires such application to be an extension of the pre-existing constitutional rights.[198] To the contrary, since in Hohfeldian terms the private domain constitutes right-holders, the 'duty' of non-interference upon the State is bolstered by Art.13 of the Constitution.[199] The doctrinal flaw in stretching reservation-provisions to the private domain thus becomes apparent. Even though there exist enabling provisions to facilitate the cause, it is doubtful whether an attempt to alter the background rules for redistribution of employment opportunities in violation of express constitutional rights should sustain, unless constitutionally justified. What are such justifications?

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194 *Id.* at 731. ("But there is currently no constitutional provision that allows for it, no Supreme Court judgment on the subject, and no government Bill pending").
195 TMA Pai Foundation, *supra* note 54.
196 Parmanand, *supra* note 194.
197 Krishnaswami, *supra* note 20, at 48.
198 *See* Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism", *The American Journal of Comparative Law*, Vol. 49, No. 707, 2001, pp. 719.
199 INDIA CONST. art. 13.

(c) Active Activist-Anomalies

A person gives a neutral reason, in Wechsler's sense, if he states such a basis for a decision that he would be willing to follow in other situations to which it applies.[200] Reverting to the trajectory of the Indian Supreme Court, as discussed earlier, in *Society for Unaided Private Educational Institutions*,[201] the Supreme Court considered whether seat-reservation in the RTE is a "reasonable restriction" within the meaning of Art.19(6) of the Constitution, and held it to be so. Whereas in the earlier case of *Unni Krishnan* (1993),[202] which marks the beginning of the judicial pursuit of an education-guarantee in India, the Court found it fit to deny to private institutions the protection of Art.19(1)(g), holding the activity to inherently lack profit-motive - necessary for the provision's protection. Regardless of the outcome, the reason for this shift in the Supreme Court's jurisprudence - from profit-motive to 'reasonableness' - may be attributed to the stage of the educational guarantee jurisprudence.[203]

A remarkable change of the standard for Art.19(1)(g)'s protection can be seen post the enactment of the 86th Amendment to the Constitution (2002), which incorporated the guarantee of universal primary education in Art.21A. The constitutional position was not so before the enactment of the 86th Amendment, and thereby, in *TMA Pai* (2002),[204] the Court deflected from *Unni Krishnan's* profit-motive standard, and in pursuit of its policy goals, it was able to hold that, "[T]he establishment and running of an educational institution…must necessarily be regarded as an 'occupation', even if there is no element of profit-generation. It is difficult to comprehended that education, *per se*, will not fall under any of the four expressions in Art.19(1)(g)."[205] This approach has been maintained in *Inamdar* (2004)[206] and *Ashoka Thakur* (2008), and upon granting Art.19(1)(g) protection regardless of profit-motive, the Court has now adopted the reasonableness analysis in

[200] Greenawalt, *supra* note 149, at 985.
[201] Society, Rajasthan, *supra* note 60.
[202] Unni Krishnan, *supra* note 57.
[203] Shankar, *supra* note 56, at 99.
[204] Pai Foundation, *supra* note 54.
[205] *Id.* at ¶25.
[206] *Inamdar v. State of Maharashtra*, (2004) 8 SCC 139.

relation to Art.19(6).[207]

Apart from the shifting sands of judicial opinion on the same provision and in the same context, what is significant here is the lasting effect that the Court's flip-flops have had on Art.19(1)(g)-jurisprudence. A clear example may be found in *Mohanraj* (2016),[208] a case regarding the suspension of MLAs in Tamil Nadu. The petitioner-MLAs contended that the right to occupy the office of an MLA fell under Article 19(1)(g) within the term 'occupation'. Examining the meaning of 'occupation' in Art.19(1)(g) while relying expressly on *Pai*, Chelameswar J. held that "…all the activities contemplated under Art.19(1)(g) are essentially activities which enable a citizen to generate economic benefits." As has been emphasized, this runs contrary to the ratio in *Pai* and the subsequent cases.[209] Even though it may be argued that Art.19-rights must be read along with their respective "reasonable restrictions" clauses, which essentially makes every such analysis a contextual inquiry,[210] the education-specific consequentialism of the Supreme Court in relation to Art.19(1)(g) is being applied erratically, which fails Wechsler's test of neutrality and has had unintended consequences.

What will happen if the same conception is applied in a challenge to the Kannada-reservation is preceded by confusion as to which standard will apply. On a conjectural note, the most obvious challenge to the Kannada-reservation may be regarding the quantum of reservation – at 100 per cent, which was capped at 50 per cent by the Supreme Court in *Indra Sawhney* (1992),[211] and was modified by the test of backwardness created in *Nagaraj*.[212] The legitimacy of *Nagaraj's* test has in turn been questioned upon the presumption of backwardness recognized in *Sawhney*, when it was held that the

[207] Society, Rajasthan, *supra* note 60, at ¶12.
[208] *Alagaapuram Mohanraj v. Tamil Nadu Legislative Assembly*, W.P. (Civil) No. 455/2015.
[209] TejasPopat, "The Supreme Court on Parliamentary Privileges and Fundamental Freedoms – II", *Indian Constitutional Law And Philosophy*, 2016.
[210] JAIN, *supra* note 41, at 1073 ("There is no definite test to adjudge the reasonableness of a restriction. Each case is to be judged on its own merits, and no abstract standards, or general pattern of reasonableness is applicable uniformly to all cases.").
[211] Sawhney, *supra* note 195.
[212] *M. Nagaraj v. Union of India*, (2006) 8 SCC 212. *See* Shruti Rajagopalan, "Constitutional Change – A Public Choice Analysis", *The Oxford Handbook of Indian Constitutional Law*, Oxford University Press, 2016, pp. 141.

'creamy layer' concept does not apply to the SCs and STs. Therein lies the lasting utility of Wechsler's views.

CONCLUSION

As Lawrence Tribe declared, "I do not regard the rulings of the Supreme Court as synonymous with constitutional truth."[213] Even though to theorise about judicial conduct was never the aim of this paper, to analyse the romantic association with judicial self-perception became one of my aims along the way. In his recent comment on Dr. Anuj Bhuwania's book, *Courting the People*,[214] Prof. Upendra Baxi holds that Bhuwania's critique of PILs dismisses "any talk of 'good PILs' and 'bad PILs', or 'abuses of PIL'."[215] Though I do not take the birth of PILs to solely be associated with the judiciary's self-perception, the instrument is a manifestation of it. For Prof. Baxi, there exists a distinction between "the 'instrumental' (pejoratively as deploying something for an individual ends), as opposed to being 'teleological' (acting in pursuit of a social goal)."[216] It is precisely the dubiety of such consequentialist ideas that has led to many *post-facto* realizations for the judiciary, one example of which is the spirited onslaught on, and the subsequent volley of concessions to the fate of diesel-taxis in Delhi,[217] the timid realizations leading to *Chouksey's* overturning,[218] and the judicial atonement in *Navtej Johar*.[219]

I began this discourse by asking whether "there is a need for 'correctness', at all?" This correctness should be gleaned not just from the decision, but also the interpretive considerations and the process involved in arriving at the

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213 Laurence H. Tribe, *American Constitutional Law*, The Foundation Press, 1978. Tribe further expresses, "Courts that held slaves to be non-persons, separate to be equal, and pregnancy to be non sex-related can hardly be deemed either final or infallible".

214 *See* Anuj Bhuwania, *Courting the People*, Cambridge University Press, 2017.

215 Upendra Baxi, "Some Thoughts on Dr. Anuj Bhuwania's Courting the People", *NLUD Student Law Journal*, Vol. 4, No. 8, 2017.

216 *Id.*

217 Krishnadas Rajagopal, "SC converts ban on diesel cabs to gradual phase-out", THE HINDU, May 10, 2016.

218 Krishnadas Rajagopal, "SC modifies order, says playing of national anthem in cinema halls is not mandatory", THE HINDU, January 09, 2018.

219 Indu Malhotra J., *supra* note 139, at ¶20 ("History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries."); Chandrachud J., *supra* note 139, at ¶2 ("Civilization has been brutal.")

decision. Legal indeterminacy and interpretive openness "on a minor scale is not very problematic, whereas on a large scale it is crippling."[220] If like litigation, adjudication is also primarily to be a consequentialist discourse, the supporters of such a trajectory must also survey the legal consequences of interest-centric decisions. As can be seen, judges base decisions on individual and institutional self-perception, constantly reworking the "distinction between the legal and political sovereign in ways that legitimize judicial action, as an articulator of the popular sovereign."[221] However, in this quest, fidelity to rights must not be reduced to a perception of obstructive-formalism.

The idealism of this paper must not be construed as simply an appeal to strict textualism, or the interstices of procedure. The ideas expressed, through examples and references relied upon, do consider the political reality of India, where faith is reposed, and duly so, in the judiciary against the opacity of politics. Yet, taking 'rights' as indicators of justice-quality stems not from a formalist understanding of the Constitution, but is rather aimed at highlighting a critical and intellectual in-between, which Tribe describes as "an essential compromise between constitutional order and chaos",[222] that may get obscured by an idealistic self-perception of the quixotic judiciary and its chaotic choices. Rights, when taken seriously and proliferated with restraint, will ensure critical engagement with aspirational ideals. It is in such cases that Dworkin's theoretical sophistication may help a judge to decide whether to consider, and how much importance to attach to, right-claims, ensuring that attempts at transformation is not just legitimate, but 'just'.

Besides the uncanny similarity between Wechsler's analysis of *Brown* and the education-rights cases relevant to this paper, a quest for neutral principles can be limitlessly fruitful. Not fundamentally set against activist-necessities, for Wechsler, the merit of a judgment lies in the reasons that support it, and the future maintenance of any value-choice made. The struggle for courts is to distinguish positive reasons after a critical analysis, from

[220] Mathew Kramer, *Objectivity And The Rule Of Law*, Cambridge University Press, 2007, pp. 210.
[221] Baxi, *supra* note 21, at 163.
[222] Tribe, *id.* at 225.

dispositive notions based on self-perception.[223] While in the academic and public sphere, diverse narratives must be encouraged; in the judicial sphere, neutral principles will help in avoiding unsustainable outcomes. If judges hold themselves to the discipline of neutral principles, their constitutional propriety is more likely to render considered decisions, and those decisions are more likely to be perceived as just.[224]

[223] Maneka Guruswami, "Access to Justice in India: The Jurisprudence (and Self Perception) of the Supreme Court", *Constitutionalism of The Global South*, Cambridge University Press, 2013, pp. 329.
[224] Greenawalt, *supra* note 149, at 994.