

THE COURTS OF REASON: IN SEARCH OF THE ULTIMATE JUSTIFICATION

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ABSTRACT

The Supreme Court has deliberately kept the judiciary out of the ambit of 'State' under Article 12 but the functional justification it provides for such a move does not correspond to how the common man perceives its role in the state machinery. It does not provide an ultimate understanding as to why such a position is taken. It is in this search that we turn to higher norms. The moment we leave the womb of the Court's reasoning, the sceptic raises his head and asks what then, in turn, justifies this higher norm. This leads us to the problem of infinite regress which offers no way out. It is in this position that we turn to the understanding of legitimacy and justification in an attempt to make sense of the state machinery. Disillusioned by the absence of a primordial norm, we turn towards the art of persuasion and the implications flowing from it. Lastly, we delve into state structure and judiciary's role to understand the deeper interests that the Court is trying to protect.

Keywords: *Article 12, Infinite Regress, Basic Norm, Legitimacy, Judiciary*

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I. INTRODUCTION

Since the Constitution's inception, Indian legal jurisprudence has greatly advanced, expanding fundamental rights and clarifying state responsibilities. Yet, one question has always lacked a final and convincing reasoning from the Court. It is the question of inclusion of the judiciary in the definition of 'State' under Article 12 of the Constitution. While the Court has held in a series of judgements that the judiciary acting in its judicial capacity is not part of the 'State', the reasoning provided for the same seems elusive. After all, the state manifests itself through the three organs, of which the judiciary is one. Thus, there must exist some exigency so imperative that the Apex Court has almost consistently kept the judiciary out of the ambit of Article 12. This has led to a narrative arguing for its inclusion in the definition of 'State'.

H.M. Seervai, who is a proponent of this narrative, proposes that the Courts do make law under Article 13 and if they are not considered a part of the 'State', they can violate fundamental rights.⁸⁹ He states that "*many provisions in Part III are, at least in part, directed at judicial bodies*".⁹⁰ Giving the example of the writ of Certiorari, he asserts that since it can only be exercised against judicial or quasi-judicial bodies, if Court orders were to fall outside the ambit of fundamental rights, such a writ would be meaningless.⁹¹ Drawing an analogy between Article 14 of the Indian Constitution and the Fourteenth Amendment of the United States of

⁸⁹ H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 393 (4th ed. 2006).

⁹⁰ *Id.* at 394.

⁹¹ *Id.*

America's ("USA") Constitution, Seervai states that since judicial actions are part of 'State action' in America, the same position should be followed in India.⁹²

On the international front, the International Arbitral Tribunal has made the Indian Republic responsible for the 'inaction' of its Courts.⁹³ Even our courts in various judgements have conclusively held that the judiciary while exercising "administrative functions" is a part of the 'State'.⁹⁴ The Supreme Court has gone a step ahead and even declared that while realizing the Directive Principles of State Policy in Part IV of the Constitution, the judiciary comes under the purview of 'State'.⁹⁵ It is imperative to note that Article 36, which is the introductory article to Part IV, provides that 'State' shall have the same meaning as Part III. Thus, there seems to be no rationale behind such an inclusion in Part IV and exclusion in Part III.

In this paper, we shall propose that if the judiciary is made a part of the 'State', it will be possible to challenge the decisions of the highest court repeatedly, ad infinitum. Thus, the state machinery will become dysfunctional. It is the finality given by the courts in their judgments, as we shall propose, that is the core reason for the stable structure of the modern state and democracy. The paper shall be divided into four parts. In the first part, we shall briefly discuss the Court's reasoning within the constitutional

⁹² *Id.* at 393.

⁹³ *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award of Nov. 30, 2011, Final Award, at 41, 139, <https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>.

⁹⁴ *Riju Prasad Sarma v. State of Assam*, (2015) 9 SCC 461, 498; *National Federation of the Blind Maharashtra v. High Court of Judicature of Bombay*, (2018) 5 Mah LJ 903, 916.

⁹⁵ *State of Kerala v. NM Thomas*, (1976) 2 SCC 310, 343.

realm in the search for the ultimate postulate. In the second part, we shall delve deeper into the very foundations of state structure and try to find out the ‘basic norm’ that seems to be the latent force behind the Court’s reasoning. In the third part, it shall further be proposed that since the basic norm is self-validating, the essence of judicial decision is based on persuasion. We shall discuss the implication of such an understanding and then move towards the fourth part of the paper in which we briefly consider the reasons for democratic state structure, i.e., for the courts to exist the way they do.

II. DETERMINATION OF SELF: THE COURT’S OWN STAND

The initial jurisprudence on the issue evolved in *Budhan Choudhry v State of Bihar*,⁹⁶ wherein a constitutional bench of seven judges, taking reference from Frankfurter, J in *Snowden v Hughes*,⁹⁷ held that the action of the judiciary is ‘State action’ under Article 12 when it violates Article 14. However, they restricted it to cases of intentional and purposeful discrimination. Later, in what is still perhaps the most authoritative judgement on this point, a nine-judge bench in *Naresh Mirajkar*⁹⁸ (“**Mirajkar**”) held that while giving judicial decisions, the judiciary will not be a part of the ‘State’. In this judgement, the foundation for the sceptic’s argument for judicial action being part of ‘State action’ was laid by the dissent of Hidayatullah, J. He pointed towards Article 13(2) to conclude that since the courts make rules if they were not brought under the

⁹⁶ *Budhan Choudhry v. State of Bihar*, (1955) 1 SCR 1045, ¶ 9.

⁹⁷ *Snowden v. Hughes*, 321 U.S. 1, 15 (1944).

⁹⁸ *Naresh Shridhar Mirajkar v. State of Maharashtra*, (1966) 3 SCR 744, ¶ 15.

definition of ‘State’, they could undermine fundamental rights.⁹⁹ While *Mirajkar* took reference from *Ujjam Bai*,¹⁰⁰ the same stand has been taken by courts in *Rupa Hurra*¹⁰¹ and later in *Riju Prasad*.¹⁰²

It is interesting to note that there also exist judgements that take the contrary view. Mathew, J. developing on J. Hidayatullah’s dissent in *Mirajkar*, held in *Kesavananda Bharati*¹⁰³ and *N.M. Thomas*¹⁰⁴ that the definition of ‘State’ for Part III and Part IV is the same. In *Shivdev Singh*,¹⁰⁵ the Court held that a writ petition could be invoked before the High Court to review an order passed against a person in instances where the person has not been allowed to be heard. Ganguly, J. in *Harjinder Singh*, while holding that the definition of ‘State’ under Article 12 includes the judiciary,¹⁰⁶ said that “...if the judges fail to discharge their duty in making an effort to make the ‘preambular’ promise a reality, they fail to uphold and abide by the Constitution which is their oath of office.”¹⁰⁷ Again in *Ramdeo Chauhan*,¹⁰⁸ Ganguly, J. stated that “instances of this Court’s judgement violating the human rights of the citizens may be extremely rare but it cannot be said that such a situation can never happen.”

Curiously, if we look at the reasoning provided by the Court in *Riju Prasad*, the Court has held that if such a position is taken, the Court would

⁹⁹ *Id.* at 100.

¹⁰⁰ *Shrimati Ujjam Bai v. State of UP*, (1963) 1 SCR 778, ¶ 23.

¹⁰¹ *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388, 400.

¹⁰² *Riju Prasad Sarma v State of Assam*, (2015) 9 SCC 461, 498.

¹⁰³ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, 876.

¹⁰⁴ *State of Kerala v. NM Thomas*, (1976) 2 SCC 310, 343.

¹⁰⁵ *Shivdev Singh v. State of Punjab*, AIR 1963 SC 1909, ¶ 10.

¹⁰⁶ *Harjinder Singh v. Punjab State Warehousing Corporation*, (2010) 3 SCC 192, 212.

¹⁰⁷ *Id.* at 210.

¹⁰⁸ *Ram Deo Chauhan v. Bani Kanta Das*, (2010) 14 SCC 209, 224.

lose its impartiality and demands will be made on the Court to act as the ‘State’ and deliver all the remedies in a dispute where the legislature or the executive is not a party.¹⁰⁹ The reasoning seems flawed because the Court relates its inclusion in the definition of ‘State’ to mean that it undertakes the obligations of the other organs while granting relief to private parties. For instance, when a case of violation of fundamental rights comes against Hindustan Aeronautics Limited (a state entity), the judiciary being a part of the ‘State’ will not be in a position to be a neutral adjudicator. In *A.R. Antulay*, the Court took the view that to prevent “gross miscarriage of justice” and “abuse of its process”, the courts may reconsider their decision in the exercise of its inherent power.¹¹⁰ But it is worth noting that the Apex Court restricted the scope of *Antulay* stating that it was based on peculiar circumstances.¹¹¹

As it stands, *Naresh Mirajkar*, being a decision of a nine-judge bench, is still the law of the land, albeit with Justice Hidayatullah’s dissent. Though limited in its scope, the dissent became the basis for contrary viewpoints taken by subsequent benches. The problem with *Harjinder Singh* is not just that of bench strength, but also the fact that the decision makes no mention of the majority judgement in *Naresh Mirajkar* and relied solely on its dissent. If we look at the judgements as a whole, the rationales supplied do not seem to tackle the problem head-on. They try to justify the present arrangement by reference to undesirable consequences that would

¹⁰⁹ *Supra* note 14.

¹¹⁰ AR *Antulay v. RS Nayak*, (1988) 2 SCC 602, 657.

¹¹¹ *Khoday Distilleries Ltd. v. Registrar General*, Supreme Court of India, (1996) 3 SCC 114, 116; *Krishna Swami v. Union of India*, (1992) 4 SCC 605, 620.

arise if the ‘State’ were to include the judiciary. If we go a step further, what the court is trying to say is that the judiciary cannot come under the definition of ‘State’ because if it were so, a judicial action would be prone to be challenged again and again by whichever party’s fundamental rights are violated, i.e., no final resolution will be found. It is so because the hypothetical petitioner would propose that if the state entities can violate their fundamental rights, the same can be done by the judiciary - even the highest court.

This problem of infinite appeal or ‘infinite regress’ would lead the state machinery to an impasse.¹¹² So, it is essentially the finality that is accorded to the judgements of the Apex Court that is most important for the smooth functioning of the state. But what gives finality to a decision of the Apex Court when there are mechanisms of review, revision and even curative petitions, which is an instrument made by the Court itself?¹¹³ As we shall see with evidence courts have, in many instances, themselves been the reason for the violation of fundamental rights. But then there must be some justification because the judgement of the courts does get obeyed. If the Constitution does not explicitly supply the reason for such adherence, is the answer then to be found in the source of the Constitution, i.e., “We the people” in the Preamble? But then it indicates that the constitutional machinery and judiciary in its part are the function of nothing more than the habitual obedience of the masses.¹¹⁴ Such a functional understanding

¹¹² Krishnaprasad KV, *Judicial Accountability and Fundamental Rights-II*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (Jan. 10, 2014), <https://indconlawphil.wordpress.com/tag/judiciary-as-state/>.

¹¹³ Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388, 416.

¹¹⁴ John Dewey, *Austin’s Theory of Sovereignty*, 9 Pol. Sci. Q. 31, 34 (1894).

can lead one to think that the mechanism in force might be arbitrary. This conclusion suffers from the same vice of scepticism as the analysis of the rationales provided by the Court. When one is looking for a higher norm to justify a given norm, one finds himself in perpetual agony because every such norm, then in turn, requires a justification from a higher norm. It is in our search for deeper reasoning that we turn to the differences between justification and legitimacy vis-à-vis a jurisprudential understanding of the 'basic norm'.

III. THE SEARCH FOR A BASIC NORM: UNMOVER-MOVER PARADOX

Our problem with the constitutional design, in which after exhausting the remedies provided within its framework, one is bound to accept the reasoning and decision provided by the Apex Court as ultimately true, is that it does not satisfy the sceptic inside us. In other words, it leaves scope for one to doubt that if the courts can be wrong in one place, why can they not be wrong in another? Aristotle, in his 'Unmover-Mover' theory, proposes that although all things are moved by something, the chain of causation must end at some place, i.e., there must be a prime 'unmover-mover' that has initiated the movement in the universe.¹¹⁵ With this theory in mind, let us try to understand the problem in the hierarchical arrangement of norms. If one considers a system of rules, such as the finality of judicial decisions, one is bound to ask what makes this rule valid. The answer lies in the fact that a superior norm or authority validates the given norm.

¹¹⁵ HJ Easterling, *The Unmover Mover in Early Aristotle*, 21 *Phronesis* 252, 255 (1976).

For example, the Supreme Court Rules are validated by the existence of a Supreme Court which is in turn validated by Article 124(1) of the Constitution, which may in turn be said to be validated by the proclamation of “We the People” in the Preamble. “*But to ‘close’ the system, to prevent it being infinitely regressive, a highest or supreme norm or authority is required.*”¹¹⁶ Kelsen develops upon this idea by arguing that two contrary postulates arise.¹¹⁷ One states that there must be an initial self-validating norm and the other that no norm is valid without reference to a prior valid norm. He concludes that the search for a basic norm exposes the contradiction of legal reasoning.¹¹⁸ Thus, it is his position that anybody who uses legal reasoning accepts, explicitly or implicitly, the existence and legal validity of the grundnorm, i.e., a founding constitution that supplies a set of rules that are in turn used to test the legal validity of lower level norms.¹¹⁹ A similar position has been taken by Benedict de Spinoza while deliberating on the ultimate rationality of the order of nature.¹²⁰

Kelsen and Hart are essentially arriving at the same point via two different routes. Kelsen asserts that the law’s validity is based on our assumption and the conduct that follows, relying on a self-validating basic norm. On the other hand, Hart’s “rule of recognition” suggests that the chain of validation ends where we choose to stop pursuing it.¹²¹ In other

¹¹⁶ MM Goldsmith, *Hobbes’s ‘Mortall God’: Is there a fallacy in Hobbes’s theory of Sovereignty*, 1 *His. Pol. Thought* 33, 38 (1980).

¹¹⁷ Lloyd L. Weinreb, *Law as Order*, 91 *Harv. L. Rev.* 909, 933 (1978).

¹¹⁸ *Id.*

¹¹⁹ NW Barber, *Sovereignty Re-Examined: The Courts, Parliament, and Statutes*, 20 *Oxford J. of Legal Stud.* 131, 134 (2000).

¹²⁰ ALLISON, BENEDICT DE SPINOZA: AN INTRODUCTION 60-1 (2nd ed., 1987).

¹²¹ Lloyd L. Weinreb, *Law as Order*, 91 *Harv. L. Rev.* 909, 934 (1978).

words, we accept a system as functional, and this acceptance cancels any further search for ultimate validity without fully answering it.¹²²

Then if the basic norm has to be self-sufficient (and the sceptic is not satisfied), is it mere habitual obedience that gives validity to the judgements of the court? To quote Robert Jackson, J. who while reflecting on the position of the USA Supreme Court said “*We are not final because we are infallible, but we are infallible only because we are final.*”¹²³ Now consider this in reference to the following decisions of the Indian courts where the courts have themselves been the reason for the violation of the rights of the people.

In *Attorney General v Lachma Devi*, the High Court sentenced the accused to death by public hanging. On appeal, the Supreme Court called it a blatant violation of the rights of dignity assured to every human being.¹²⁴ In *M.S. Ahlawat*, the accused was held guilty of the offence of fabricating false records.¹²⁵ The conviction was based on an investigation and the sentence was without any trial. Later, on appeal, the Court observed that the decision was given without following due procedure and led to a catastrophe in the convict’s life and career.¹²⁶ The Court went on to say that “...to perpetuate an error is no virtue, but to correct it is a compulsion of judicial conscience.”¹²⁷ Accordingly, the sentence was set aside. In *Supreme Court Bar Association v Union of India*, a writ petition under Article 32 was

¹²² *Id* at 935.

¹²³ *Brown v. Allen*, 344 U.S. 443, 540 (1953).

¹²⁴ *Attorney General of India v. Lachma Devi*, 1989 SCC (Cri) 413, ¶ 1.

¹²⁵ §. 193, The Indian Penal Code, No. 45 of 1860.

¹²⁶ *MS Ahlawat v. State of Haryana*, (2000) 1 SCC 278, 284.

¹²⁷ *Id.* at 278,284.

filed against the decision of the Supreme Court in which the Apex Court had suspended the licence of an advocate barring him from practice for three years.¹²⁸ It was observed by the Court that it had no jurisdiction to do so while exercising powers under Articles 129 read with 142.¹²⁹ In 2016 the Supreme Court convicted the accused based on a confession contrary to the provisions of law.¹³⁰ The Court went on to say that “Frantic cries of injustice founded on perceived erroneous application of law or appreciation of facts will certainly not be enough to extend the frontiers of this jurisdiction.”¹³¹

Now, in this background, let us consider a person who insists that for him the Constitution is the highest norm. This person will not be able to reconcile the behaviour of the courts in such decisions to the fact that the highest norm (i.e., for him, the constitution) from which these decisions draw legitimacy can allow the courts to do wrong. On the other hand, we have a sceptic who (unlike this person) keeps searching for a higher norm to justify a lower norm. The situation is such that if he keeps searching, he will not find an ultimate answer and on the contrary, if he insists that he knows, then he will be wrong. It then becomes imperative for us to understand what ‘legitimacy’ means and contrast it with ‘justification’ that the courts give while adjudicating disputes.

IV. LEGITIMACY IS THE ULTIMATE JUSTIFICATION: THE ART OF PERSUASION & ITS IMPLICATIONS

¹²⁸ Vinay Chandra Mishra, Re, (1995) 2 SCC 584.

¹²⁹ Supreme Court Bar Association v. Union of India, (1998) 4 SCC 409, 444.

¹³⁰ Ashiq Hussain Faktoo v. Union of India, (2016) 9 SCC 739, 742.

¹³¹ *Id* at 745.

Before entering into the real differences between legitimacy and justification, it becomes necessary to know the traditional understanding of the terms. It is usually said that a norm cannot be justified unless it is legitimate.¹³² In this direction, many theories of legitimacy have been propounded. Once a preferred theory is chosen, it is then used to justify the norm. The problem with such an approach is that it takes hold of a legal argument (a theory) and elevates it to a position from which a given lower norm can be provided legitimacy.¹³³ There can also be a case where a person tries to justify a given norm (such as judicial review) because it produces effects that are worth having¹³⁴ or a person can seek justification by deciphering the intention of the framers of the Constitution.¹³⁵ Such arguments suffer from the same vice of infinite regress as already discussed above.

A way out of this problem is to accept the fact, as Putnam rightly points out, that our perception of the truth is based on our practice¹³⁶ and since the normative justification lies only within such practice, we should not try to locate the justification for a practice of law outside the practice itself.¹³⁷ Phillip Bobbit contends that “*all attempts to find a normative foundation outside the conventions of legal arguments confuse legitimacy with justification. Neither*

¹³² Dennis Patterson, *Review: Conscience and the Constitution*, 93 Colum. L. Rev. 270, 272 (1993).

¹³³ *Id.*

¹³⁴ SHYAM DIVAN, PUBLIC INTEREST LITIGATION 662 (Pratap Bhanu Mehta et al. eds., 2016).

¹³⁵ Dennis Patterson, *Review: Conscience and the Constitution*, 93 Colum. L. Rev. 270, 272 (1993).

¹³⁶ *Id.* at 270, 288.

¹³⁷ *Id.* at 270, 292.

the constitution, the conventions of legal arguments, nor judicial review requires legitimation.”¹³⁸ He provides a unique approach to finding justification in constitutional law by employing six tools, which he calls modalities.¹³⁹

Bobbit says that a norm can be justified by the use of a ‘Historical’ argument which relies on the intention of the framers of the Constitution; a ‘Textual’ argument which looks at the literal meaning of the Constitution alone; a ‘Structural’ argument which derives from the relationships between the various bodies under the Constitution; a ‘Doctrinal’ argument which applies rules made by precedent; an ‘Ethical’ argument deriving from moral commitments reflected in the Constitution; and lastly, a ‘Prudential’ argument which seeks to balance gains and losses of a particular rule. The unconventional approach that he takes sees the truth of law not as a theory but as a practice where the modalities are the ‘tools of the trade’.¹⁴⁰ He concludes that “there is nothing more to constitutional law (or any other body of doctrine) than the use of six modalities of argument.”¹⁴¹

From this lens, a judicial decision is “justified” to the extent it is given according to law and a decision is said to be ‘according to law’ when it employs one or more of the six modalities. A judicial decision is “*legitimate to the extent that its argumentative character remains within modalities.*”¹⁴² To try to understand this, one can consider the Supreme Court decisions such as *Kharak Singh*¹⁴³ and *KS Puttaswamy*¹⁴⁴ relating to the right to privacy, ✓

¹³⁸ *Id* at 270, 272.

¹³⁹ *Id* at 270, 294.

¹⁴⁰ *Id.*

¹⁴¹ *Id* at 270, 295.

¹⁴² *Id.*

¹⁴³ *Kharak Singh v. State of UP*, (1964) 1 SCR 332.

¹⁴⁴ *KS Puttaswamy v. Union of India*, (2017) 10 SCC 1.

*Revathi*¹⁴⁵ and *Joseph Shine*¹⁴⁶ relating to the law of adultery, *Suresh Kumar Kaushal*¹⁴⁷ and *Navtej Singh Johar*¹⁴⁸ relating to homosexuality. Recently in *Kaushal Kishor v State of UP*¹⁴⁹ the court used a ‘prudential’ argument to declare that fundamental rights could even be enforced against private persons. Interestingly, in the same case, J. B.V. Nagarathna’s dissent uses a ‘historical’ argument to assert that the majority position would make the traditional definition of State under Article 12 redundant. If one looks at the rationales provided by the Court in these cases, one can easily employ one or more of the modalities to understand the decisions.

But what happens when modal conflicts arise, i.e., when two modal arguments seem to carry equal weight in the mind of the judge? While Fallon considers this as the most important problem in constitutional law,¹⁵⁰ Bobbit considers it a distinct virtue providing the space for moral reflection “*just as garden walls can create a space for a garden*”.¹⁵¹ He believes that recourse to conscience is the way to resolve such a conflict.¹⁵² However, since the realm of conscience is private, implying that no public access is available, one cannot rely boldly on this last aspect.¹⁵³ Prof. Dennis

¹⁴⁵ *V Revathi v. Union of India*, (1988) 2 SCC 72.

¹⁴⁶ *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

¹⁴⁷ *Suresh Kumar Kaushal v. Naz Foundation*, (2014) 1 SCC 1.

¹⁴⁸ *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791.

¹⁴⁹ *Kaushal Kishor v. State of UP*, (2023) 4 SCC 1.

¹⁵⁰ Richard Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189, 1191 (1987).

¹⁵¹ Dennis Patterson, *Review: Conscience and the Constitution*, 93 Colum. L. Rev. 270, 302 (1993).

¹⁵² *Id* at 303.

¹⁵³ *Id*.

Patterson while reviewing Bobbit's work says that ultimately it is persuasion and not conscience that drives choice.¹⁵⁴

Talking about the importance of persuasion, Charles Taylor says that when we try to convince someone of the adequacy of our interpretation, we try to explain to him how it makes sense of the 'original nonsense or partial sense'.¹⁵⁵ Taylor emphasizes that if the person does not follow the various resources that we employ to emphasize the final point, there seems to be no way to convince such a person or justify writing.¹⁵⁶ If this is true, there are paramount implications that need to be understood. If it is the art of persuasion that ultimately provides the needed justification for a judgement, the Supreme Court must ensure that the rationales they provide are persuasive enough. If doubts are cast over the judgement of the Court or the credibility and sanctity of the judges, the state machinery faces a serious threat. This is because the state machinery heavily depends on the finality given by the court's judgement. It is so because "*legitimacy is not something a system of law can achieve writ large. The legitimacy of a legal system is an accretion; it develops over time and is maintained only by adherence to a legal form of justification.*"¹⁵⁷

It has to be understood that if the courts compromise on the modalities and if the decisions appear arbitrary to the common man, then over time it is the legitimacy of the system as a whole that is undermined.

¹⁵⁴ *Id.* at 305.

¹⁵⁵ Charles Taylor, *Interpretation and the Sciences of Man*, in 2 PHILOSOPHY AND THE HUMAN SCIENCES 15, 17 (1985).

¹⁵⁶ *Id.*

¹⁵⁷ Dennis Patterson, *Review: Conscience and the Constitution*, 93 Colum. L. Rev. 270, 296 (1993).

The judiciary “*is the last resort for common man... common man has faith in the judiciary*”.¹⁵⁸ For most people, there is little distinction between the Court’s actions as an administrative body and its role as a neutral judge. They view the judiciary as a crucial part of the state’s machinery, without focusing on the nuances of its different roles. In this background, let us have a look at the recent instances that seem to indicate that doubts have indeed been cast on the judiciary and that there is a growing disillusionment regarding its legitimacy. It must be kept in mind that this is not an attempt to discredit the judiciary as an institution but it has become necessary to bring to light this growing trend of defiance to the judicial foundation.

The allegation of sexual harassment on a former Chief Justice of India,¹⁵⁹ the chastisement of the Apex Court in a first of its kind press-conference by its judges raising concerns about the working of the institution,¹⁶⁰ the alleged irregularities by another former Chief Justice of India,¹⁶¹ the denial of bail on medical grounds to an activist,¹⁶² the contempt proceedings initiated against a senior-advocate based on a social media

¹⁵⁸ *Faith Of Common Man In Judiciary Has Eroded Considerably; Should Find Out Where We’ve Gone Wrong: Justice AS Oka*, LIVE LAW (Jan. 18, 2024), <https://www.livelaw.in/top-stories/faith-of-common-man-in-judiciary-has-eroded-considerably-should-find-out-where-weve-gone-wrong-justice-as-oka-247013>.

¹⁵⁹ *CJI Sexual Harassment Case: A Timeline*, LIVE LAW (May 6, 2019), <https://www.livelaw.in/top-stories/cji-sexual-harassment-case-timeline-144830>.

¹⁶⁰ *Nothing Changed After Judges Press Conference: Former CJI Justice Lodha*, LIVE LAW (Jan. 16, 2019), <https://www.livelaw.in/top-stories/nothing-changed-judges-press-conference-former-cji-justice-lodha-142177>.

¹⁶¹ *Will The Real CJI Dipak Misra Stand Up? How Will History Judge Him?*, LIVE LAW (Oct. 1, 2018), <https://www.livelaw.in/will-the-real-cji-dipak-misra-stand-up/>.

¹⁶² *Father Stan Swamy, Undertrial In Bhima Koregoan Case, Passes Away Ahead Of His Bail Hearing In Bombay High Court*, LIVE LAW (July 5, 2021), <https://www.livelaw.in/top-stories/father-stan-swamy-passes-away-ahead-of-his-bail-hearing-in-bombay-high-court-176893>.

post¹⁶³ indicate that the courts are indeed not infallible. The list of such instances is not small enough to be ignored as mere aberrations. In the recent case of *Aparna Bhat v State of M.P.*,¹⁶⁴ the high court's imposition of a bail condition requiring the victim to tie a *rakhi* on the hands of the accused flagrantly flouted established legal principles. In another case, the Bombay High Court's ruling which said that a 'skin-to-skin' contact would be necessary to comprise sexual assault under The Protection of Children from Sexual Offences Act, 2012 ("POCSO").¹⁶⁵ and the negative reverberations it caused which led to the stay on the judgement by the Supreme Court is a case on point.¹⁶⁶ The recent nomination of a former Chief Justice of India in the Rajya Sabha¹⁶⁷ indicates a precarious trend. When reason steps down into the struggle of will, it starts to lose its legitimacy.

The common man's perception of such instances carries more weight than the statesman would like to think. What is being pointed out is not a separate instance of fallibility but a question on the perception of

¹⁶³ *Prashant Bhushan Contempt Case - Time Line, Petitions, Pleadings, Arguments, Orders*, LIVE LAW (Aug. 31, 2020), <https://www.livelaw.in/top-stories/prashant-bhushan-contempt-case-time-line-petitions-pleadings-argumentsorders-162179?infinetiscroll=1>.

¹⁶⁴ *Aparna Bhat v. State of MP*, (2016) 16 SCC 179.

¹⁶⁵ *Shareem Khan, Pressing Breasts Without Disrobing Not "Sexual Assault" As Per POCSO Act But Offence Under Sec 354 IPC : Bombay High Court*, LIVE LAW (Jan. 24, 2021), <https://www.livelaw.in/top-stories/pressing-breasts-without-disrobing-not-sexual-assault-pocso-bombay-high-court-168845>.

¹⁶⁶ *Supreme Court Stays Bombay HC Judgment Which Held 'Skin To Skin' Contact Necessary For 'Sexual Assault' Under POCSO Act*, LIVE LAW (Jan. 27, 2021), <https://www.livelaw.in/top-stories/supreme-court-stays-bombay-high-courts-skin-to-skin-judgment-in-pocso-case-168971>.

¹⁶⁷ *Plea In Supreme Court Challenges Ex-CJI Ranjan Gogoi's Rajay Sabha Membership*, LIVE LAW (Aug. 29, 2021), <https://www.livelaw.in/top-stories/supreme-court-challenges-ex-cji-ranjan-gogoi-s-rajya-sabha-membership-180504>.

legitimacy that the people accord to the courts. In the next part of the paper, we shall propose that a surface understanding of the mechanism of the state is not all that there is to the three organs. It is not only a system of checks and balances that exists between them but a deeper representation of the different parts of the common will of the people.

V. AND LATER EVE WAS CREATED FROM ADAM’S RIB: THE JUDICIARY OF REASON

The criticisms dealt with above are not all that there is to the legitimacy of the courts. Every time the Court has upheld rights and expanded the scope of liberty, it has gained a token of legitimacy in the eyes of the people. For instance, when the Court expanded Lesbian, Gay, Bisexual & Transgender (“**LGBT**”) rights,¹⁶⁸ enforced women’s rights by criminalizing triple talaq,¹⁶⁹ allowed women to enter the Sabarimala temple,¹⁷⁰ decriminalized adultery,¹⁷¹ or recognized privacy as a fundamental right,¹⁷² it has gained legitimacy by being championed as the protector of the rights of the citizens. Recently, in *X v Principal Secretary*¹⁷³ the Supreme Court granted single and unmarried women the right to abortion. In another notable judgement, the Supreme Court affirmed that a woman’s entitlement to statutory maternity leave remains inviolable, irrespective of any prior utilization of childcare leave for non-biological children.¹⁷⁴ Even during the Coronavirus pandemic, when an

¹⁶⁸ Navtej, *Supra* note 60.

¹⁶⁹ Shayara Bano v. Union of India, (2017) 9 SCC 1.

¹⁷⁰ Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1.

¹⁷¹ Joseph Shine v. Union of India, (2019) 3 SCC 39.

¹⁷² *Supra* note 56.

¹⁷³ *X v. Principal Secretary, Health and Family Welfare Department*, (2023) 9 SCC 433.

¹⁷⁴ Deepika Singh v. Central Administrative Tribunal, 2022 SCC OnLine SC 1088.

unprecedented situation had arisen in the country, the Court took a highly proactive approach by forming a Task-Force for oxygen allocation.¹⁷⁵ It also criticized the government on the procurement of vaccines¹⁷⁶ and ordered the government to provide ‘ex-gratia assistance’ to the victims.¹⁷⁷

Before we discuss why the judiciary must exist in the definition and structure of the modern state, it should be made clear that judges make new laws when they decide important cases.¹⁷⁸ When the Court reads into an expansive interpretation of Article 21, it is essentially declaring new law developing upon the existing jurisprudence. The Apex Court in *Delhi Transport Corporation* case has taken the same view when it declared that “*we must do away with the ‘childish fiction’ that law is not made by the judiciary.*”¹⁷⁹

When the judiciary recognised and expanded the rights of homosexuals¹⁸⁰ or when it declared the right to privacy as a fundamental right,¹⁸¹ what the court is essentially doing is giving a progressive interpretation to the Constitution and expanding the horizon of inclusion of the rights of a variety of people who earlier felt alienated. This act of

¹⁷⁵ Krishnadas Rajagopal, *Supreme Court forms National Task Force for transparent oxygen allocation*, THE HINDU (May 8, 2021), <https://www.thehindu.com/news/national/supreme-court-sets-up-national-task-force-for-transparent-oxygen-allocation/article34515284.ece>.

¹⁷⁶ *Centre Will Procure Vaccines For States; Free Vaccination For 18-44 Years, Says PM Modi*, LIVE LAW (Jun. 7, 2021), <https://www.livelaw.in/top-stories/centre-to-procure-vaccines-for-states-free-vaccines-for-18-44-years-says-pm-modi-175355>.

¹⁷⁷ *COVID Victims Entitled to Ex-Gratia Compensation; Supreme Court Directs NDMA To Frame Guidelines Within 6 Weeks*, LIVE LAW (Jun. 30, 2021), <https://www.livelaw.in/top-stories/covid-victims-entitled-to-ex-gratia-supreme-court-directs-ndma-to-frame-guidelines-within-6-weeks-176545>.

¹⁷⁸ RONALD DWORIN, LAW’S EMPIRE 6 (1986); *State of Kerala v. NM Thomas*, (1976) 2 SCC 310, 343.

¹⁷⁹ *Delhi Transport Corporation v. DTC Mazdoor Congress*, 1991 Supp. (1) SCC 600, 683.

¹⁸⁰ *Supra* note 60.

¹⁸¹ *Supra* note 56.

inclusion of subaltern groups into the constitutional narrative is intrinsically the role of the legislature. Now, let us take into account the objection forward by Alexander Bickel who states that in instances where the Court nullifies a legislative enactment or an executive action, it essentially goes against the popular will of the time.¹⁸² Thus, it exercises control against the wishes of the people. One is bound to ask that if the state machinery works for the people, how then can the judiciary go against the mandate of the masses?

To understand the seemingly contradictory methods of operation of the organs of the modern-day state, we need to briefly understand how such a mechanism of the state has evolved. Consider this perspective: In the era of monarchies, an imaginary king held unchecked authority to act as he desired. He was the judge, the jury and the executioner himself. In such a situation, there was nothing to stop the will from moving in any direction it pleased. If the king was a good man, he would develop and enforce minority rights and women's rights, and provide benefits to the downtrodden, evolving the state into a welfare society. But if the king were an arbitrary and regressive man (as men in power generally are), he would not care two straws for the groups mentioned above. It would not make a difference if this king was not one person but a group of individuals sharing absolute power. Such a system based on the whims and fancies of those in power is by its very nature unstable and is more prone to revolutions, upheavals, disobedience and eventually anarchy. So, as the state machinery

¹⁸² ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-7 (1962).

evolved, courts such as the King's Court, Privy Council and Nyaya Panchayat came into existence. What was manifesting through these bodies was the reason and wisdom of the ages. Gradually, it came to be understood that unless the will of Adam was disciplined by the reason of Eve, the state would keep falling back into anarchy.

If we look at the modern state today, we observe that the will has come to be restricted by the presence of higher norms that are unalterable.¹⁸³ This is so because majority rule in itself guarantees nothing.¹⁸⁴ Unless there is a basic structure that cannot be changed even by a majority vote, there is no saying that the majority cannot declare that a nation be changed from a republic to a monarchy. Only if there exist some fixed constitutional norms limiting the will of the people, can the state machinery be relied upon to maintain relations of right.¹⁸⁵

However, there are two problems with this. First, when a supreme non-amendable norm like the Constitution is imposed, who is there to guarantee that you might not be subject to arbitrariness under it? If one appoints an expert overseer to ensure a justified political order, what is there to ensure that this authority will act rationally? Second, an 'a priori' constitution is not equipped to deal with the changing reality that can only be conceived by experience. This means that there will be a need for a dynamic interpretation of the constitutional values. This is one of the most important roles of the courts in a modern state. So, what the courts represent as the guardian of the constitution is a reasoned approach based

¹⁸³ Richard Winfield, *The Reason for Democracy*, 5 *His. Pol. Thought*, 543, 549 (1984).

¹⁸⁴ *Id* at 543, 558.

¹⁸⁵ *Id* at 543,549.

on modalities to move the wheel of the state forward. But this is not all that there is to the interaction of the state organs.

There are many proactive orders passed by the courts which are not implemented at the ground level. A much-celebrated judgement banning the over-the-counter sale of acid¹⁸⁶ has still not been enforced in many parts of the country even after six years of ban. Even after the Court struck down S. 66A of Information Technology Act, 2000,¹⁸⁷ cases were still being registered and investigated under this section.¹⁸⁸ Similarly, the guidelines for arrest and detention framed by the Court way back in 1997¹⁸⁹ are still disobeyed. In the same year, the Court laid down significant guidelines ensuring the safety of women in workplaces.¹⁹⁰ However, the guidelines have not been implemented at the ground level.¹⁹¹ Is it because the will of the day does not recognise such issues? As the state evolves, issues that are once considered fringe come to the centre of the table. For example, the United Kingdom has banned fast food commercials on TV during the day.¹⁹² Such an issue will not be the focus of parliamentary debate in a more primitive state. Even in our own country, the issue of air pollution gains a

¹⁸⁶ *Laxmi v. Union of India*, (2014) 4 SCC 431.

¹⁸⁷ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1.

¹⁸⁸ *No Person Should Be Prosecuted Under Section 66A IT Act: Supreme Court Issues Directions To Enforce Shreya Singhal Judgment*, LIVE LAW (Oct. 12, 2022), <https://www.livelaw.in/top-stories/no-person-should-be-prosecuted-under-section-66a-it-act-supreme-court-issues-directions-to-enforce-shreya-singhal-judgment-211452>.

¹⁸⁹ *DK Basu v. State of West Bengal*, (1997) 1 SCC 416.

¹⁹⁰ *Vishakha v. State of Rajasthan*, (1997) 6 SCC 241.

¹⁹¹ *Medha Kotwal Lele v. Union of India*, (2013) 1 SCC 297.

¹⁹² Justin Parkinson, *Anti-obesity drive: Junk food TV adverts to be banned before 9pm*, BRITISH BROADCASTING CORPORATION (Jun. 24, 2021), <https://www.bbc.com/news/uk-politics-57593599>.

lot of traction in New Delhi¹⁹³ but it does not even become a fringe issue in state elections in Bihar. Thus, while a National Green Tribunal order requiring the cleaning of Yamuna will be strongly implemented in New Delhi,¹⁹⁴ a similar order would not gain much attention from the executive in Bihar.¹⁹⁵ Nevertheless, such orders passed by the courts of reason, even though not fully implemented, at least show the common man a way ahead. In other words, the courts discipline the popular will and guide it based on constitutional principles towards the ‘Shangri-La’ of a welfare state.

So, while the judiciary can be seen in many instances carrying the beacon of ideals of the welfare state forward, there seems to be, at the same time, an executive and legislative apathy regarding such values. Thus, there is a constant push and pull between the reason and the will manifesting in the judiciary and the other organs of the state which keeps the wheel of the state moving.

VI. CONCLUSION

Our search for a higher norm starts from the point where we find that the rationales given by the Court are elusive. One thing is certain to the common man, the judiciary is indeed a part of the state, he looks up to the highest court with deep faith in his eyes that justice will not be denied

¹⁹³ Shreyas Sardesai, *Capital worry: Pollution*, THE INDIAN EXPRESS (Dec. 10, 2019), <https://indianexpress.com/article/cities/delhi/capital-worry-pollution-delhi-assembly-elections-aam-aadmi-party-6158923/>.

¹⁹⁴ Press Trust of India, *National Green Tribunal forms monitoring committee to clean Yamuna*, THE INDIAN EXPRESS (July 26, 2018), <https://indianexpress.com/article/india/ngt-monitoring-committee-yamuna-cleaning-5277535/>.

¹⁹⁵ *Patna HC Tasks SPCB & Advisory Committee To Implement ‘Action Plan of Air Pollution Control’*, LIVELAW (Feb. 8, 2020), <https://www.livelaw.in/environment/air-pollution-patna-hc-tasks-spcb-advisory-committee-to-implement-action-plan-of-air-pollution-control-read-order-152474>.

to him there. But once we realise that the courts are indeed not infallible, a natural inclination to find a higher justification arises in us. We ask, what gives finality to the decisions of the highest court? What is the ultimate reasoning or the 'basic norm' that can quench our thirst for a deeper understanding of the state structure? On this journey, we find ourselves in a state of perpetual agony because, for every norm that justifies a given norm, a still higher norm exists. This never-ending problem of infinite regress leaves one perplexed as to whether any final answer exists at all.

It has been proposed in this paper that an ultimate and conclusive understanding to this problem may not exist. In other words, it is only the practice of law and nothing more that justifies a legal norm. To answer the sceptic's question of what justifies judicial review, the answer turns out to be nothing, of course. Since law is a part of society, the only way to justify a legal proposition is to use what Bobbit calls modalities, i.e., arguments based on societal reasons. With this idea in the background, we come to realise the importance of persuasion in legal reasoning. There are important implications of this. Since the legitimacy that the common man accords to the court is distinct from their reasoning in any given decision and since this legitimacy is based on a long-term perception, it becomes vital that the courts maintain their sanctity as guardians of the Constitution and the freedom of the common will.

Since the evolution of the state has bestowed reason in the judiciary and will in the legislature and the executive, it is imperative that the judiciary disciplines the other organs and guides the popular will based on constitutional principles like a lighthouse guiding a ship in the sea.