The Knight-Errant?

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The knight, as an embodiment of valour, strength and mystery, has been the subject of enchantment for generations of fables. As an idea, it has always been associated as a maverick, whether it is the medieval knight wandering in search of adventures or the classic one step sideward and two steps forward movement in chess. The law, despite its obsession with conformity and consistency, has often thrown open its own version of the knight, through judges and judicial activism, with their own notions of dissidence, vigilantism and social reform. There have been various legends associated with dissenting judgments, shaping the history of the Supreme Court, some even gaining legitimacy subsequently, through larger benches affirming previous minority opinions[1].

The judicial resurrection of dissents is critical and makes it necessary to examine the four opinions of Chandrachud J., three of which are minority. The said opinions, understandably, have gained considerable traction within certain quarters, who were perhaps the target audience for the same. Considering the fact that he would, in the future, become one of the longest serving Chief Justices of modern times, the four opinions—the dissent in the *Puttaswamy II*[2] case, the limited minority opinion in the *Sabrimala Temple*[3] case [now referred to a larger bench], the dissent in the *Urban Naxal*[4] case and the judgment in the *BK Pavitra* case[5], require closer consideration.

The AADHAR DISSENT: The step sideward

After the eloquent majority judgment in the Puttaswamy I, importing the concept of *legitimate state interest*, the dissent in Puttaswamy II, comes as a slight surprise. The dissent is not based merely on a disagreement on the conclusions or the applicability of the doctrine of judicial review, rather it is grounded in a fundamental mistrust of the use of biometrics for public purposes. Ignoring how biometrics have, across numerous technological interactions, revolutionised the previously document/password based identification systems, the dissent, after conducting a scientific enquiry via a judicial opinion, concludes that biometrics cannot be foolproof.[6] This symptomatically leads to a negative finding under the proportionality test, as even if the object of the legislation constitutes a *legitimate state interest*, it would lead to exclusions of critical benefits to the marginalised populace. The possibility of these exclusions and the failure of the State to demonstrate the project as a proportional means to achieve state interests of minimisation of pilferage and targeted delivery of benefits, tips the balance of proportionality. The second leg of disagreement stems from misgivings about storing and management of Aadhaar data and the possibility of interlinking of separate data silos. This leads to negative conclusions on surveillance, profiling and privacy and administers a finding of unconstitutionality on presumptive

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apprehensions of interlinking of unidentifiable data patterns. Lastly, the opinion has a brief overlap with the majority judgment, albeit with differing conclusions on the money bill aspect. The dissent tears in to the characterisation of Aadhaar Act as a money bill, subjects it to substantive judicial review and renders the process and the resulting Act, unconstitutional.

This dissent is the step sideward and not backward, as it is a brilliant read on the academic front. In theory, the dissent fails to reason the applicability of the test of proportionality or the veiled '*least intrusive means*' to the doctrine to *legitimate state interests* and makes a fatal, fundamentally wrong presumption of Aadhaar data, solely in possession of the State, becoming a *bridge across discreet data silos*. Such factual assumptions, in absence of the Petitioner's empirically establishing the same, cannot be made by the Court sitting under writ jurisdiction. Further, it is often inadvisable to enter scientific questions[7]. It is based on individualistic idealism, almost with a pre-supposition of unfairness of State action and conduct, something unique within the constitutional sphere. It ignores how the dialogue between *technology and power* is not unprecedented and the relationship between the individual and State will continue to change drastically, from one age to another[8]. The said transformation is an undeniable facet of the continuous process of sophistication of the modern State, as with more means come more responsibility.

The Sabrimala Enthusiasm : The first step backward

The opinion in the Sabrimala judgment, prior to the recent reference of the 'question of law' to seven judges[9], forms a part of the three concurring opinions in the judgment. However, certain parts of the opinion form a part of the minority as the same is not resonated in the other two opinions of Misra, J. and Nariman, J. It is first necessary to discuss the majority opinion, considering the reference in the review does not provide elaborate reasons for disagreement rather, probably as a matter of *judicial maturity*, simply refers it to a larger bench to decide on questions concerning judicial policy in such matters. Gogoi J., speaking for the majority in the reference order, had previously given hints towards a different judicial approach in the *Adi Saiva*[10] case. In the *Adi Saiva* case, Court read down an amendment which provided that *archakas* could be appointed in a Temple from any caste, class or creed. The Court held that the exposition of the *Agamas* (the rules with regard to rituals followed in worship), excludes even other Brahmins from the sanctum sanctorum and from the performance of duties of poojas. Therefore, the Court implied that the exposition in Agamas does not discriminate on any constitutionally recognisable ground of caste, class, race or religion; rather it differentiates on the basis of the denominational doctrine and traditional lineage. The reference of the question of law and policy in Sabrimala review was therefore in line with the mature and tempered judicial policy in such matters. While the reference may decide the questions framed one way or the other, it is necessary to examine the judgement in *Indian Young Lawyers Association and Ors. v. State of Kerala and Ors.*(hereinafter referred to as the "original judgment)".

The majority opinion in the Sabrimala judgment, is an exercise laced with a sequence of errors, geometrically progressing in gravity. The first conclusion—that the devotees of Sabrimala do not constitute a *separate denomination*—may, on the limited precedent on the subject seem justifiable, but omitting the opportunity to developing upon the precedent, the *sequitur* is undeniably dangerous. The majority seems to presume that the group rights under Article 26 for administration/ management of religious premises is limited to *separate denominations*. There is no doubt as to why the majority in the subsequent reference order refers this exact question of whether the *"essential religious practices of a religious denomination, or even a section thereof are afforded constitutional protection under Article 26"* to seven judges. The denial of this recognition in the previous judgment, apart from ignoring the use of the phrase *sections thereof* under Article 26, fuels apprehensions of larger doctrinal problems of constitutionally approved discrimination amongst different categories of faiths in the Indian context.

The said apprehensions are based on a rather simple premise; if *essentiality* of a practice within a belief system is the determinative factor in defining the extent of constitutional freedom accorded to that particular religion/denomination, the degree of such religious freedom would be different for every religion/denomination, depending upon how wide is the scope of such *essentiality* within the said religion/denomination. This will invariably result in an arbitrary approach, wherein the degree of constitutional freedom varies as per the nature of a particular religion/ denomination and how strict it is in terms of defining its practices and requiring its adherent to practice them. Therefore, the *de facto* situation would be where some religions/denominations may have wide ranging '*essential practices*' arising from rigid prescriptive scriptures/manuscripts as opposed to another religion/denomination which may have little to none '*essential practices*'. The *traditionalists*, in this context argue that owing to the limited aspects which Indic faiths would consider *essential* to their survival, the protection guaranteed under Article 25 and Article 26 to them, in light of the essentiality doctrine, would undeniably be lesser than other faiths. It is argued that Indic faiths with the lack of sophisticated religious establishments, the complexity and diverse mosaic of temples in India, the lack of a streamlined path towards religious affirmation, the organic and unique history of every small sub-cultural unit within the omnibus idea of Hinduism, are points which separate it from the monotheistic, well organised, book based, inherently exclusionist ideas of Abrahamic faiths. The said differentiations may often be marketed as rational strengths, but on account of the essentiality doctrine, have turned out to be constitutional weaknesses. The extent of constitutional freedom becomes a product of these essentiality imbalances, resulting in rewarding the unyielding and punishing the malleable. Surprisingly, the said position seems to have been affirmed in the minority opinion of J. Rohinton in review petitions, that original judgment "*cannot be used to undermine the religious rights of others, including, in particular, religious minorities*" on the basis of a skewed interpretation of Article 25(2)(b),Article 29 and Article 30.[11]

Keeping the above said apprehension aside,

the Court has mysteriously ignored the fact that the essentiality doctrine is intended to interpret the constitutionally viable extent of State intrusions in religious matters. The same cannot be extended to justify the Court's intrusions in *public interest litigations*. Further, even if the Sabrimala and its devotees are not considered to be a *separate denomination*, the denial by the majority judgment to even discuss purported rights of the religious establishment under Article 26, points towards a serious omission. The majority opinion proves that while the essentiality doctrine is *de jure* uniformly applicable, the application of the said doctrine, manifests itself in a *de facto* arbitrary situation.

The minority part in the third concurring opinion, takes these inconsistencies in Misra, CJ.'s and Nariman, J.'s opinions, to another tangent altogether. After a similar analysis mentioned above, the opinion nonchalantly imports Article 17, the provision which bans "untouchability," to the Sabrimala debate. It makes sweeping conclusions on the subject of 'caste based exclusions' and the alleged "*hierarchical order of purity and pollution enforced by social compulsion*" without any submissions or factual or judicial analysis to that effect. The opinion places reliance on *Devaru* case[12] ignoring that the same concerned a state legislation which was enacted to reform and eradicate the systematic caste based exclusion across temples specifically under Article 25(2)(b) and cannot stand at the same footing as Sabrimala case. Article 17, if at all applicable in the said context, would be limited to cases of complete exclusion as was in the *Devaru* case and in the case of Sabrimala. The opinion presumes a *purity and pollution* based exclusion at Sabrimala in order to import the 'untouchability' under Article 17. The reliance on the opinion of Gogoi, J. in the *Adi Saiva* case is surprising, as although he held that Article 17 of the Constitution strikes at caste-based practices built on *superstitions and beliefs that have no rationale or logic*, but in the same paragraph, in the context of appointment of a certain sub-caste of brahmins as *Acharaks*, he carefully points out that not every exclusion would be hit by Article 17. The stark difference in approach is further accentuated as in the same paragraph, Gogoi, J. provided a more nuanced and intuitive understanding of what actually constitutes a *denomination*, held that the "offer" of the State to appoint Shaivite as Archakas in Shiva temples and Vaishnavas in Vaishnavite temples is *too naïve an understanding of a denomination* and a "denomination" is actually a far more *sharply identified subgroup*. The reliance on the *Adi Saiva* case is surprising and almost purposefully incomplete.

The next leg of minority opinion is, in part, dealing with the phrase "*laws in force*" in Article 13 and the judgement of *Narasu Appa Mali*[13]. This is relevant because the interpretation of the said article/provision defines the contours of judicial review by the Court as only *laws* falling under Article 13 would be subject to judicial review. In 1951, the Bombay High Court, in a two part judgment, by majority held that *personal laws* are not included in the expression "*laws in force*". In the second part, a split Division Bench, on an issue which can be termed as *obiter*, interpreted the phrase '*custom or usage*' under Article 13. Chagla, J. held that 'custom or usage' would be included in the definition of 'laws in force' whereas

Gajendragadkar, J. held otherwise. This interpretation is provided without controlling the meaning with its suffix - '*having the force of law*'. A harmonious construction would completely alter the understanding and the interpretation of the said phrase. Interestingly, while dealing with the issue of Triple Talaq in Shayara Bano case, Nariman, J. had held that the review of Narasu case is unnecessary as the practice of Triple Talaq was indirectly codified by the Muslim Personal Law (Shariat) Application Act, 1937 and hence, it was a '*custom or practice*' which is '*having the force of law*'. The minority opinion in Sabrimala, in an expansionist interpretation of Article 13, states that irrespective of the source from which a practice claims legitimacy, the Court's power of judicial review cannot be detracted considering the *constitutional vision of equal citizenship*. This zeal, if applied in the manner contemplated, mandates the Court to enter spheres which have remained untouched even by legislations or any writ of the State. The State, with all its "might" in terms of the tangible wherewithal and direct democratic writ, often shies away from entering religious spheres, especially the regulation of religious customs in holy places. Previously, the approach of the Court, through the essentiality doctrine, permitted state interventions in regulation of religious place through *ex-officio* appointments, but this approach would permit adventurist judicial intervention over and above what is contemplated even by the State.

Further, the use of the terms '*customs or practice*' in the text of Article 13 indeed creates a muddle, but constitutional interpretation has to take within the enforceable realities. If this interpretation is extrapolated to its extreme, then perhaps a writ petition questioning the practice and 4 AM timing of *bhasm-aarti* at a Shiv Temple on grounds of rationality, equality and arbitrariness would be maintainable. It may even be the case that *transformative constitutional morality* may render the practice unconstitutional. Nariman, J., perhaps preempting the anomalies of expanding the powers of judicial review over uncodified and unprotected customs and practices, has deftly skirted the issue after ignoring it altogether in Shayara Bano case[14] (Triple Talaq judgment). However, it is relevant to point out that the Supreme Court has, through various judgments, taken conflicting stands on the issue, which were altogether ignored during the submissions made by the counsel and the minority opinion in question. The pre-occupation with *Narasu* is hence uncalled for.

The last part of the opinion, which progressively deteriorates in reasoning, casts a serious shadow over the essential practices doctrine. The said doctrine has been questioned by scholars on both sides of the ideological divide—one being the *expansionists*, advocating for interventionist approach and the other being the *traditionalists*, advocating for a wider domain of exercise of religious freedoms. The minority opinion relies only upon opinions of various scholars falling under the first category and conducts a rather incongruent exercise in comparing the *group rights* and *individual rights*. The opinion boldly claims that the rights under the Constitution are only meant for *self-realisation of the individual*. The said position, apart from being etymologically inconsistent, has no basis in constitutional

jurisprudence. The fundamental rights under Article 15(4), Article 16(4), Article 17, Article 24, Article 26, Article 29 and Article 30 are all group rights and often there have been clashes between the said group rights and individual rights, wherein the Court has either harmoniously construed the conflicting fundamental rights, as in the cases concerning affirmative action, or applied the principle of proportionality, as in the Aadhaar judgment. The apprehension that elevating group integrity may cause blocking individual access to important public goods, is irrelevant as the said question is involved in almost every case of clash of fundamental rights, and therefore, the perceivable conflict between individual freedoms and religious denominational rights is not a special case of *blocking individual access to public goods*. In order to subtly delineate and diminish group denominations rights under the Constitution, the opinion in effect holds that some rights under Part III are more *fundamental* than others and the holy trinity of Articles 14, 19 and 21 apply intermittingly.

To suggest future course, the opinion relies upon an article by Jaclyn Neo which, while expanding upon the problems with the essential practices doctrine, suggest a two-stage test in adjudicating issues percolating to religious freedom. As per the scholar, in the first stage, the courts should accept a group's self definition on the issue and at the second stage, the courts should apply a balancing, compelling reason inquiry, or proportionality analysis to determine whether the religious freedom claim is outweighed by competing state or public interest. This test, if applied, opens the entire gamut of religious freedoms to be easily outweighed by vague and discretionary standards. This overshadowing has been expressly avoided in the constitutional provisions and falls foul of basic constitutional interpretation. Further, relying on a rather cryptic opinion of another scholar, the opinion exalts that the religious freedoms ought to be governed by an obscure *anti-exclusion principle*, which has no basis in constitutional text, theory or precedent. As stated above, while the anxieties of the scholar of *impairing the dignity* or *hampering of access to basic goods*, may be a relevant factor in defining the scope of religious freedoms in some context, the same cannot outweigh denominational rights under Article 26. The standard propounded by these scholars virtually leads to religious denominations/institutions coming under the definition of "State" under Article 12.

The freedoms mentioned under Article 25 and 26, can be curtailed only under the grounds mentioned in the text of the said articles, thereby marking specific portions of religious domain which remain outside the purview of State interference and obviously, the Court's purview in 'public interest'. Religious freedoms, by their very nature, cannot be subjected to a rationality review or the obscure *anti-exclusions test* in absence of any legislation or compelling circumstances. In effect, a lackadaisical interpretive approach, faithlessness in core constitutional text, importing prosaic foreign concepts and heavy reliance on specious opinions of scholars, has led to unjust conclusions. Religion and law have had an acrimonious history, and it was advisable that in Sabrimala, the colloquial opium of the masses remained untouched by the long arms of the law. No doubt, the above said

factors percolated the minds of the majority in the reference to seven judges with a specific mandate to settle issues concerning the laying down of a uniform "judicial policy" regarding such issues.

The Urban Naxal dissent : The next step backward

The arrests of five 'writers' and 'activists' took place recently in connection with their links/ membership with Maoists organisations and the Communist Party of India (Maoist), which had been previously banned by the Central Government in 2009 by way of a notification under the Unlawful Activities Prevention Act. The Communist Party of India (Maoist), as per the manifesto, has an agenda which actively works towards the violent overthrow of the Democratic Republic of India in order to establish a communist state. As per the Government, the Communist Party of India (Maoist), has a detailed and sophisticated approach for achieving the aforesaid aim. The manifesto, which was extensively read by the State Government during the hearing, states that the organisation divides the nature and type of its activities in '*struggle areas*' and in '*urban areas*'. The activities in struggle areas are violent and seek to destabilise and eradicate the writ of the Indian State, whereas the work in urban areas seeks to create a subterfuge, to disguise the activities of the party in struggle areas as local peaceful activism. As per the submissions, the Communist Party of India (Maoist) has created a mechanism, wherein by working under-cover (in the present case as activists/teachers), the workers in urban areas clandestinely aid the movement in the struggle areas through perceivably independent civil society organisations, termed as '*front organisations*'. The sum and substance of the allegation on the arrested persons was that, during the investigation carried out by the Police in the FIR registered regarding the Bhima-Koregaon violence, it had emerged that the five arrested persons were members of the Communist Party of India (Maoist) and had previously aided the party in the mechanisms as enunciated above.

Following the arrests, there were widespread, somewhat bizarre reports in various media establishments of an '*emergency like situation,'* alleging that the State had indiscriminately arrested innocent people, who do not share the ideology of the government in power. As the said reports gained traction and the role of law enforcement agencies was under public scrutiny, the state police held a press conference, prima facie, detailing the allegations against the arrested persons. The detailing may not have been appropriate considering the pendency of the investigation, but necessarily quelled public apprehensions and provided a reasonable rejoinder in interest of law enforcement.

Before the matter had reached the Supreme Court, three out of the five arrested persons had already approached their respective jurisdictional High Courts seeking reliefs in the nature of bail. It must be noted that it is necessary as per any writ courts' registry rules that while filing a writ petition, a necessary declaration has to be made to the effect that the petitioner has not approached any other forum seeking similar reliefs. In order to overreach the same, the surrogate petition was filed by 'eminent persons' seeking reliefs in the nature of bail, quashing and a special investigation team under

the supervision of the Supreme Court for the five arrested persons. The petition was purportedly in 'public interest' and made hyperbolic allegations of 'muzzling of dissent,' 'erosion of democracy,' etc.

As per the prevailing law, a public interest litigation in a criminal matter, at the behest of strangers, is simply not maintainable.[15] Despite taking a preliminary objection as to the maintainability, during the hearing the State placed on record the entire case-diary and the documentation therewith under a sealed cover for the perusal of the Court. The majority opinion, upon perusal of the material, opined that it was not a case of arrest because of *mere dissenting views* or on account of opposing political ideologies, but particularly concerned the *link* of the arrested persons with the members of the banned organisation and its activities. This finding, on facts and on the basic understanding of the prevailing law under UAPA, marked the major point of difference between the opinions. It must be noted that as per the statutory regime of the UAPA, membership of the banned organisations itself is a punishable offence.[16] While there have been some academic criticisms of the said provisions, the Petitioner had not questioned the vires of the said provisions. A debate regarding the interpretation of the said provisions is pending after the *Raneef* and *Arup Bhuyan* judgements, which held that *mere membership* cannot attract criminal liability and the standard that is to be applied would be '*active membership*'[17]. At the instance of the Union of India, the said judgment has been referred to a larger bench for arguments on lowering the threshold[18]. Nevertheless, the State sought to establish a case of 'active membership' against the five arrested persons and not of *mere membership*.

The dissenting opinion, in order to overcome the vice of non-maintainability, facetiously relied upon a subsequent affidavit filed by the arrested persons, 'supporting' the petition, without realising the obvious bar of entertaining two simultaneous writ remedies at two separate forums. In addition, the affidavit can't cure the original defect of lack of locus standi. In eagerness to thwart State action which allegedly sought to muzzle dissent and persecute persons for being defenders of human rights, the dissenting opinion expands the limited jurisdiction under Article 32, especially concerning prayers for a SIT. The opinion takes the press briefing as the only basis of lack of fairness on part of the investigating agency, and concludes that a SIT, monitored by the Supreme Court, is necessary. The press briefing was made the basis of sweeping comments on conduct of investigating agency sans any reference to the veracity of the actual investigation carried out and material gathered therefrom; the dissent concludes that the press briefing attempts at '*manipulating public opinion*' resulting in a media trial and thereby Maharashtra Police cannot be trusted to carry out an independent investigation.

While discussing the contents of the sealed cover, the dissenting opinion notes, '*general allegations against the philosophy of a banned organisation, its policies and the modalities followed in the execution of its unlawful activities constitute one thing*' but '*linking this to specific activities of named individuals is a distinct matter*'. This is the genesis of the error and in a veiled manner, shows the misinterpretation

of the law. The Unlawful Activities Prevention Act does not require '*specific activities of named individuals*' or a '*direct link*' to a particular criminal incident to attract criminality. If that was the case, the Act would not be required at all as the aforesaid would still be punishable under the Indian Penal Code. The Unlawful Activities Prevention Act criminalises *active membership* of banned organisations and doesn't require a group of persons to actually conspire to assassinate the Prime Minister and take steps thereupon. It criminalises the *active membership* of the said group of persons of an organisation that has an aim of assassination of the Prime Minister. The correctness of the said statute may be a matter of general public debate or even a matter for a constitutional challenge, but since the said Act was not under challenge in the Urban Naxal case, there was no occasion to apply any other standard while adjudging the nature or the sufficiency of allegations contained in the sealed cover. Perceivably, the standard applied in the dissenting opinion is of '*imminent lawless action*' or "*clear and present danger,*" a doctrine that has evolved in the United States and has no applicability to the Indian statutory or constitutional context and have been specifically rejected by constitution benches of the Supreme Court[19].

Reservation in promotions approval : The deliberate ignorance

The provisions for equality in the Constitution, comprising of Article 15(1), 15(2), 16(1), 16(2) and Article 14 prohibit discrimination of grounds of religion, race, sex, caste or place of birth, equality of opportunity and non-arbitrariness respectively. Together, these provisions have been referred to as the '*equality code*' of the Constitution. Article 14 providing for equality of opportunity/protection and right against arbitrariness serves as the genus, while examining the critical issues concerning affirmative action. Arbitrariness, as a concept, has had its own journey in judicial precedents. At first, the *Royappa* case[20], which was followed in the famous *Maneka Gandhi* case[21], provides that equality is antithetic to arbitrariness, with them being 'sworn enemies' of each other. Arbitrariness has been compared to the 'whim and caprice of an absolute monarch' and as a 'golden thread which runs through the whole of the fabric of the Constitution'[22]. The most recent exposition on the arbitrariness doctrine, that being of '*manifest arbitrariness*', came to be coined in the *Sharyara Bano* case[23], further extends the scope of judicial review and entrusts the Court with a crucial constitutional obligation. The said position also solidified the contested doctrine of 'substantive due process', an American import, which was referred to as '*substantive judicial review*' in Puttaswamy I case.

The relationship between these affirmative action provisions and the non-arbitrariness/equality texts itself has a colourful history. At first, in *M.R. Balaji case*[24], the Court states that purely caste-based policy of reservations would be ultra-vires the Constitution with Article 16(4) being an '*exception'* to Article 16(1). Subsequently, in the *N.M. Thomas case*[25], a Court which was manned by judges with substantially different ideologies than at the time of the *Balaji* case, justified 'caste' as the basis for affirmative action and in an abstract theoretical, rendered reservations as a facet of

equality itself. This was followed in *Indra Sawhney*[26], which expressly held that the affirmative action provisions are a '*reinstatement of equality*'. The *Indra Sawhney* case also sought to rationalise the overall quota scheme by reading in quantitative limitation[27] and qualitative exclusion[28].

In the public service domain, affirmative action exists pervasively at the entry level, and has ceased to be a bone of contention or litigation. However, reservations in matter of promotions, over and above the reservation at the higher educational and entry level, is a matter of judicial concern. Pertinently, the *Indra Sawhney* case unequivocally held that affirmative action in promotions of government employees, would be ultra vires the Constitution. The said issue has been a bone of contention between the Parliament and the Judiciary ever since and the Parliament has consistently sought to erode the core text of constitutional equality through successive constitutional amendments[29]. First, the constitution was amended to expressly provide an enabling power to provide for reservation in promotions. Through the 90s, the Courts made meagre attempt in balancing the fragments of equality and developed service law doctrines of the '*pigeon hole rule*' and '*catch up principle*' to balance the effect of the amendment[30]. The '*pigeon hole rule*' provides that even if reservations exist in promotions, the promotions would be regulated by a running account roster.[31] The said rules, though developed judicially, helped contain the fall over effects of reservations in promotions.

In order to nullify the balancing effect of the *catch up* rule, in complete disregard to constitutional propriety (a la constitutional morality), the Parliament enacted the 77th, 81st, 82nd, and 85th amendments, to reservation in promotions *with consequential seniority*. The provisions for 'consequential seniority' (along with pre-existing reservation in promotions) meant that once a reserved category person, technically junior in rank and profile, is promoted over the unreserved candidate, he/she becomes senior to the general category employee for all times to come. The said amendments came to be challenged and tested at anvil of the basic structure doctrine in the *M. Nagaraj* case[32], which upheld the amendments but imposed restrictions on enabling power of the State under Article 16(4A) and 16(4B). The Court stated that a fresh objective exercise of collecting '*quantifiable data*' justifying reservation in promotions in terms of parameters of efficiency, backwardness and inadequacy of representation in particular class or classes of posts, is necessary to extend reservation in promotions with consequential seniority. These perquisites were the chains attached to the enabling power providing that the "*opinion of the State*" would have to be formed on objective, identifiable and quantifiable factors. The *M. Nagaraj* case uses the word 'compelling' in the context of the data numerous times, heightening the requirement for the quality, the relevance and the applicability of the data. Post the *M. Nagaraj* case, the Supreme Court held the statutes providing for reservation in promotions in Uttar Pradesh, Rajasthan, Tamil Nadu and Karnataka to be ultra vires with statutes from Madhya Pradesh, Bihar and Tripura (the "Jarnail bench"), pending a final decision.

The judgment in M. Nagaraj was referred to

a five judge bench in the Jarnail Singh case to examine its correctness on two counts: first, whether the controlling factor of the requirement of quantifiable data to establish backwardness of Scheduled Castes and Scheduled Tribes as a precursor to the exercise of power to provide for reservations in promotions is correct law; and second, whether the concept of 'creamy layer' can be made applicable to the Scheduled Castes and Scheduled Tribes.

The bench in Jarnail, speaking through Rohinton J.[33], answered the question by placing heavy reliance on a prophetic passage in the *N. M. Thomas* case where J. Iyer states that he has three major apprehensions with reservations in general. The first was the danger of the benefits being snatched away by the creamy layer amongst the backward classes excluding the weaker sections. Second, the claim to self-identification as backward will be overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness though substantially lightened, would wish to wear the weaker section label as a means to compete with people in the general category. Third, the ignoring of the larger solution, which could come only from improvement of social environment, added educational facilities and cross-fertilisation of castes. The judgment in *Jarnail* refers to the broader object of amelioration of backward classes and clarifies that this cannot be achieved "*if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were.*" This, in essence, becomes the rationale to exclude the creamy layer within the Scheduled Castes and Scheduled Tribes from the benefit of reservation in promotions. Therefore, the Court in the *Jarnail* case, affirmed the validity of the application of the qualitative exclusion by way of creamy layer standard to reservations in promotions. This changed a long standing but erroneous constitutional 'belief' of inapplicability of 'creamy layer' concept to SC/STs and being limited to 'other backward classes'. This conclusion was also clearly grounded in the constitutional obligation of substantive judicial review and manifest arbitrariness.

After the verdict of the constitution bench in *Jarnail*, it became clear that any enactment, which failed to carve out the qualitative exception before extending reservations in promotions with consequential seniority, would fall foul of Article 14 and Article 16. In *Pavitra I*[34], the Supreme Court had already declared the Karnataka 2002 Act providing for consequential seniority along with reservations in promotions as unconstitutional on the ground of absence of any quantifiable data which is mandatory as per the *M. Nagaraj* case. Post *Pavitra I*, the Karnataka Government, 'revived' the exact same provisions on the basis of the Ratna Prabha Committee Report. The said report, like most statistical exercises, was geared towards painting a pre-determined picture by brushing away inconvenient facts. The revival of provisions, already declared unconstitutional in *Pavitra I*, was challenged in *Pavitra II*[35]. The questions to Pavitra II were clear:

Whether the data takes away the basis of Pavitra I ? and

Whether the failure to incorporate qualitative exclusion results was in breach of Article 14 and Article 16?

The Court, in answering these questions, abdicated its basic constitutional obligation of substantive judicial review and betrayed the trust reposed in it by *M. Nagaraj* and *Jarnail*.

In reviewing the Ratna Prabha Committee Report, the Court failed to analyse the data, test it as per the requirements set in the precedents and to apply its own doctrine of substantive judicial review in a complete abdication of the constitutional obligation. This resulted in validating the revived provisions without the requisite constitutional basis. In order to evade its constitutional obligation, *Pavitra II* relies on *Indra Sawhney*[36] and *Barium Chemicals* case[37], to hold that the opinion of the government on the 'inadequacy of representation' of the SCs and STs in the public services, is a matter which forms a part of the 'subjective satisfaction' of the State. On this basis, the Court held that the only question that could be analysed would be whether the report considered material which was irrelevant or extraneous or had drawn a conclusion which no reasonable body of persons could have adopted. While the said proposition has some basis in classic administrative law making, the same would not be applicable in the sphere of reservation in promotions wherein the requirement of the robust data was read in by way of basic structure test. It may be noted that the sanctity of the data, and its heightened standard is clear from constant reference to a 'compelling need' highlighted in *M. Nagaraj*. The requirement of data, as a precondition to exercise of the enabling power, was meant to be a measure to curtail excessiveness and to make sure that the exercise of such power is as per the de-facto situation. The data being cadre specific marked the measure of its qualitative-ness and specificity. The Court in *Pavitra II*, failed to judicially review the data against the binding precedent in *M Nagaraj* and *Jarnail* which held that that "*quantifiable data shall be collected by the State, on the parameters as stipulated in Nagaraj (supra) on the inadequacy of representation, which can be tested by the Courts*".

This abdication of judicial responsibility, if analysed in juxtaposition of the data presented before the Court, paints a disconcerting picture. First, the data collected by the state government was limited and sampled. The sampling enabled the State to deliberately not collect data from all government department and specifically ignore the departments where there was a high reserved category representation. The Court, by allowing the sampling of data rather than a complete analysis, allowed the States to cherry-pick the data and shadow other purportedly inconvenient parts.

Second, the data was collected on the hypothetical standard of 'vacancies' as per 'total sanctioned posts' and not on the basis of the de facto position. The data was collected on the basis of grades (A, B, C and D) and not on the basis of cadre in various promotional posts in contravention of M. *Nagaraj* and the *UPPCL* case[38]. This judging of 'inadequacy in representation' on the basis of vacancies from total sanctioned posts rather than cadre resulted in a grave anomaly. It must be noted that vacancies calculated from 'total sanctioned posts' would never depict the genuine situation in the service as total sanctioned posts are rarely ever filled up in any government department which have large backlogs for both, unreserved and reserved category. To illustrate,

suppose there are 100 sanctioned posts in a department, and 30 are occupied by unreserved candidates and 15 are occupied by reserved candidates and 55 remain 'vacant'. The reservation is 30 percent, which implies that 30 posts must be manned by reserved category employees. From the sanctioned posts standpoint, there would be an 'inadequacy' of 15 vacancies for reserved category. Whereas when the same is compared to the de facto situation, it would be clear that the reserved category representation is more than adequate with 15 out of the 45 posts (1/3rd posts) being actually occupied by reserved category candidates. Due to its failure to see through the said methodology, the Court, in effect, validated a dishonest data collection exercise.

Third, *Pavitra II* defines standard of 'adequacy' on the basis of the proportion of reserved category persons to the total population of the State. Even if one studies the etymology of the words adequate/adequacy on one hand and proportion/proportional on the other, it would be clear that under no circumstance can 'adequacy' be ever equated with 'proportionality' in population. The standard for "adequacy" is to be adjudged at a level lower to proportion of the population by comparing the actual representation with the 'adequate representation'. The Constitution mandates of adequacy of representation and not a pro-rata distribution of State service amongst caste groups in a State. In equating 'adequacy' with 'proportion of population,' *Pavitra II* ignored perhaps six decades of precedents from the *Rangachari* case[39] to the *Jarnail* case. Further, the Court failed to indicate any marker as to the requirement of compelling nature of inadequacy, and merely based it on a 'subjective satisfaction' of vague notions. The Court in *Pavitra II*, by ignoring the mandate of substantive judicial review, has allowed the States with boundless leeway to fabricate convenient data and trample upon the equality code. The methodology adopted by the Court, results in deceitfully masking factual position resulting in manifest injustice and perpetuating inequality.

Apart from the above mentioned abdication of constitutional obligation, the Court in Pavitra II has made certain elementary doctrinal errors. First, the Court renders the judgment on the presupposition of treating reservation in promotions as a fundamental right. The judgment notes that it is "*considering the validity of a law which was enacted by the State legislature for enforcing the substantive right to equality for the SCs and STs*". This perhaps is the genesis of the error. Reservations, cannot, in any manner whatsoever, be regarded as a substantive right to equality. There may indeed be certain theoretical discussions in precedents wherein reservations were read to be part of warped definition of equality, but the affirmative action provisions have consistently been held as 'enabling provisions' which permit the State to exercise the power as and when required. Affirmative action cannot be claimed as a matter of right or mandamus and is actually dependent upon the discretion of the State which is subject to rigorous judicial review.

Second, *Pavitra II* confuses the concept of efficiency with diversity of representation and inclusiveness. In a first, the otherwise insulated concept of 'efficiency' fell prey to the liberal enthusiasm of reading in expansive concepts of

diversity and inclusiveness in all forms. This reinterpretation has little theoretical or legal basis as diversity and equal representation cannot be conflated with 'efficiency'. It may be noted that the benchmark for adjudging persons, across sectors, can be of qualitative or quantitative nature or a mix of both. In fact, the over-dependence on 'qualitative benchmarks' in judging merit in society, as sought to be propounded in *Pavithra II*, often leads to perpetuation of class/caste and hinders social mobility. It can be argued that it was the over-dependence on "qualitative benchmarks" which perpetuated the "caste system" or that still perpetuates the nepotism in the judicial system. The subjectivity and discretion enables intangible and unquantifiable factors which perpetuate nepotism/discrimination in various forms. It is the modernisation of systems that has helped us move from a majorly qualitative to majorly quantitative mechanism of adjudging merit, which has been a catalyst for social mobility across fields. Therefore, efficiency and quantitatively definable merit go hand in hand and any detachment in the name of inclusiveness of "substantive equality" is actually a step backward.

Third, *Pavitra II* grafts a highly contentious and obscure idea of 'merit' on to the Constitution and its equality code. The Court, relying heavily on the Amartya Sen's post-modern rambling about a Utopian society, states: "*merit must not be limited to narrow and inflexible criteria such as one's rank in a standardised exam, but rather must flow from the actions a society seeks to reward, including the promotion of equality in society and diversity in public administration*." Through this, the judgment seeks to re-define merit and efficiency, superimposing abstract social science principles grounded in staunch post-modernist/communist philosophy. Admittedly, there is nothing wrong in citing Prof. Amartya Sen's ideas on "merit," howsoever detached from reality they may be, but it is only fair for the Supreme Court to stay ideologically neutral in such matters. The Court cannot rely solely on a scholar on one side of a stark ideological divide and completely ignore the views on the other side. The judgments coloured by such staunch ideological bias, often result in bad precedents.

Lastly, on the issue of 'creamy layer,' *Pavitra II* seeks to overreach the constitution bench judgment in *Jarnail*, without any basis or analysis whatsoever. The rule of precedent and the importance of adherence to judgments of larger benches require no elucidation. In *Jarnail*, the Constitution bench had unanimously opined that the failure to exclude the 'creamy layer' from the benefit of reservation in promotions with consequential seniority would render such enactment as bad in law. In *Pavitra II*, most surprisingly, despite the opinion in *Jarnail* being fresh in the minds of everyone, the Court held: "*the concept of creamy layer has no relevance to the grant of consequential seniority*". It may be noted that 'consequential seniority' has no meaning without the context of reservations in promotions and the qualitative exclusion is a necessary requirement for any reservation in promotion enactment to be Article 14 and Article 16 compliant. The blatant overreach of the ratio of *Jarnail* by stating that the *Pavitra II* is limited to consequential seniority is nothing but insincere.

In essence, *Pavitra II* marks an astonishing

departure from the precedent on the subject and seems to be written in complete forgetfulness of Article 14, Article 15 and Article 16(1), along with an atypical affinity to the exceptionality of Article 16(4)/(4A)/(4B). A 'judgment' is defined as the act or process of forming an opinion or making a decision after careful thought. A judgment cannot be a pre-determined conclusion which is sought to be justified thereafter by a meandering simulated analysis.

Conclusions

The four opinions, and the findings therein, clearly shows a distinct departure from precedent in the constitutional approach and statutory interpretation. They also express a conveniently inconsistent judicial approach wherein incursions by the State in the "right to privacy" qua the object of judicious distribution of State largesse and incursions in the "right to free speech" qua the maintenance of public order and security of the State, are quashed as disproportionate whereas judicial incursions in the denominational "right to manage religious institutions" qua women's rights and State incursions in the "right to quality" qua reservations to depressed classes is upheld as proportional. Some fundamental rights, clearly seem to be *more equal* than others.

The said four opinions are not merely differences; they are statements of intent and expressions of a jurisprudential legacy. Having seen the era of *constitutional morality* unfold, it will be interesting to see the future, when the author of today's minority opinions would wield the power of the master of the roster. To contextualise the same, one must remember that the most avid dissenter in the history of the Supreme Court, never dissented as the Chief Justice.[40] The Knight-errant shapes his path on the edge of a thin line of morality, separating the right from the wrong, utilising activism as a means of dispensing a greater notion of justice. The caveat on this path remains, as a small slip towards vigilantism, turns the *Knight-errant* into just an errant Knight.

References:

1 *Justice H.R. Khanna in Additional District Magistrate V. Shivkant Shukla (1976) 2 SCC 521; Justice Fazal Ali in A. K. Gopalan Vs. State Of Madras, (1950) AIR 27; J. Subba Rao in Kharak Singh Vs. State of Uttar Pradesh & Ors, (1963) AIR 1295; Justice John Marshall Harlan and Justice Oliver Wendell Holmes in Lochner v. New York, 198 U.S. 45 (1905); J. Brandies in Olmstead v. United States, 277 U.S. 438 (1928) – are some case wherein a famous dissent has later become the law of the land.*

2 *K.S. Puttaswamy (Aadhar-5J.) v. Union of India, (2019) 1 SCC 1*

3 *Indian Young Lawyers Association and Others.v. State of Kerala and Others, 2018 SCC OnLine SC 1690*

4 *Romila Thapar v. Union of India, (2018) 10 SCC 753*

5 *B.K. Pavitra v. Union of India, 2019 SCC OnLine SC 694*

6 *K.S. Puttaswamy (Aadhar-5J.) v. Union of India, (2019) 1 SCC 1, Para 1194-1198*

7 *See Academy of Nutrition Improvement v. Union of India, (2011) 8 SCC 274; State of Kerala v. Joseph Antony, (1994) 1 SCC 301; Union of India v. S.L. Dutta, (1991) 1 SCC 505; State of M.P. v. Narmada Bachao Andolan, (2011) 7 SCC 639; Pooja Pal v. Union of India, (2016) 3 SCC 135*

8 *Michael Thad Allen and Gabrielle Hecht , Technologies of Power. Essays in honor of Thomas Parke Hughes and Agatha Chipley Hughes. Cambridge, ma and London: MIT Press*

9 *Kantaru Rajeevaru v. Indian Young Lawyers Association Thr. Its General Secretary and Others, 2019 SCC OnLine SC 1461*

10 *Adi Saiva Sivachariyargal Nala Sangam vs. Government of Tamil Nadu and Another, (2016) 2 SCC 725*

11 *See Paragraphs 20 and 28 of opinion of Rohinton J.*

12 *Sri Venkataramana Devaruand Ors. v. The State of Mysore Ors. 1958 AIR 255.*

13 *The State of Bombay v. Narasu Appa Mali, [AIR 1952 Bom 84]*

14 *(2017) 9 SCC 1*

15 *See Rajiv Ranjan Singh 'Lalan' (VIII) v. Union of India, (2006) 6 SCC 613; Simranjit Singh Mann v. Union of India, (1992) 4 SCC 653; Ashok Kumar Pandey v. State of W.B., (2004) 3 SCC 349*

16 *See Section 10 of the Unlawful Activities (Prevention) Act, 1967*

17 *See State of Kerala v. Raneef, (2011) 1 SCC 784; Arup Bhuyan v. State of Assam, (2011) 3 SCC 377*

18 *Arup Bhuyan v. State of Assam, (2015) 12 SCC 702*

19 *See Babulal Parate v. State of Maharashtra, (1961) 3 SCR 423; Madhu Limaye v. Sub-Divisional Magistrate, (1970) 3 SCC 746; Supdt., Central Prison v. Dr Ram Manohar Lohia, (1960) 2 SCR 821; followed in Ramlila Maidan Incident, In re, (2012) 5 SCC 1*

20 *E.P. Royappa v. State of T.N., (1974) 4 SCC 3*

21 *Maneka Gandhi v. Union of India, (1978) 1 SCC 248*

22 *Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722*

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

24 *M. R. Balaji And Others vs State Of Mysore, 1963 AIR 649*

25 *State Of Kerala & Anr vs N. M. Thomas & Ors, 1976 AIR 490*

26 *Indra Swahney v. Union of India & Ors., AIR1993SC477 (constitutional bench of nine judges)*

27 *Ceiling limit of 50% on the overall quota scheme including the proportion of the SC/STs. For more See I.R. Coelho (Dead) by LRS. Vs. State of T.N., 2007 (2) SCC 1*

28 *Members of an OBC who are denied benefit because their family income is above a defined maximum (about $10,000)*

29 *Rajeev Dhavan, Reservation bill for the SC/ST fails the test, The Mail Online India, 17 September 2012.*

30 *See the R K Sabharwal Vs St of Punjab AIR 1995 SC 1371, Union of India Vs Varpal Singh AIR 1996 SC 448, Ajitsingh Januja & Ors Vs State of Punjab AIR 1996 SC 1189, Ajitsingh Januja & Ors Vs State of Punjab & Ors AIR 1999 SC 3471*

31 *For example : if 16% of the posts are reserved then in a lot of 100 posts, posts falling at serial numbers 1,7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 91 would be reserved. When the total number of posts in a cadre are filled by the operation of the said roster, the running account ceases and when there is a vacancy, the same would be filled from amongst the category to which the post belonged in the roster. For example, if points 51 and 91 retire, then these slots are to be filled from amongst the reserved category. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the*

general category. The 'catch up' rule means that if a senior candidate of general category is promoted after SC/ST candidates, he would regain his seniority in promotion over the juniors promoted ahead of him under the reserved vacancies. For example, a general category candidate was in service from 1990 and the reserved category candidate joined the service in 1995 and was promoted from position X to Y, above the general candidate, by virtue of reservation. If the general category candidate is promoted to Y position while the reserved candidate is also at Y position, the general category candidate would regain seniority over such reserved candidate by virtue of the erstwhile seniority.

32 *M. Nagaraj v. Union of India,(2006) 8 SCC 212*

33 *Jarnail Singh v. Lachhmi Narain Gupta, (2018) 10 SCC 396*

34 *B K Pavitra v. Union of India, Civil Appeal No. 2368 Of 2011*

35 *Ibid – Note 5*

36 *Indra Sawhney v. Union of India, (1992) Suppl. 3 SCC 21*

37 *Barium Chemicals Ltd. Vs. Company Law Board; AIR 1967 SC 295*

38 *Uttar Pradesh Power Corporation V. Rajesh Kumar And Ors. (2012) 7 SCC 1*

39 *The General Manager, Southern Railway Vs. Rangachari, 1962 (2) SCR 586*

40 *The most avid dissenter is J. Subba Rao – 48 dissents in 9 years at the Supreme Court. Gadbois, 'Indian Judicial Behaviour', Pg 166.*

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