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Exploring the relationship between Legal Dogma and Constitutional Identity

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Constitutions set the basic normative framework for any country. They freeze certain nuances of governance so that the society can move on with its goals without having to consistently bother about the basis of cohesion and functioning. At the same time, they also ensure that the general language of drafting aids each generation to engage in debates about the meanings of adopted values, and modes of carrying them out into execution. While procedures of the amendment have been incorporated in the constitution to suit such needs, interpretation of the constitution by the judicial organ also provides an opportunity for engaging with changing values. In this article, the role of the judiciary as a vehicle of constitutional dynamism has been explored especially in the light of the idea of legal dogma. The court indulges in meaning-making and defines and re-defines the constitutional provisions. This process often makes use of doctrines and theories which are formulated on the basis of reasoning, and any empirical assessment thereof would be difficult to assess their place and utility in a legal system. This paper takes three doctrines from the Indian experience with Constitution and explores the relationship between legal dogma and constitutional identity.

Keywords: *legal dogma, constitutional identity, amendments, basic structure doctrine, constitutional dynamism.*

INTRODUCTION

A constitution, as the name suggests, performs the task of constituting a State. Most constitutions grant a distinct identity to the people of a nation – as citizens – and also recognise and protect the basic rights of the people. Apart from the aforementioned tasks, they also create and empower government institutions, structures, and processes. The normative role of the Constitution has consequences in the political, social, economic, cultural, and all other domains in the life of the State. The compromises made in the making of a constitutional text are not reached with ease, and it has been noted that most well-functioning constitutions have been made during times of transformation or socio-political revolution (which Bruce Ackerman terms as constitutional moments). Hence, constitutions are intended to endure for ages to come.[1] The desire for constitutions to endure has been incorporated both in the constitutional texts and also in the manner the judiciary interacts with constitutions. In the first instance, procedures for amendments have been added to constitutions, while on the other hand, the judiciary indulges in continuous interpretation and construction of the provisions of the constitution. One of the essential factors that help constitutional longevity is their ability to adapt to the changing needs of society.[2]A constitution that is unable to adapt to the changing needs might fall out of acceptance and suffers the probability of being discarded by the people. Both amendments and judicial pronouncements serve as mechanisms of flexibility, and sites of contestations revolving around desirable changes in the text and interpretation of the constitution. While the connection between constitutional endurance and flexibility has been established something needs to be said about an idea implicit in endurance – constitutional identity. The endurance of the constitution ensures that the constitution lasts. This, as has already been said, is done by making changes either in the text or in the manner of interpretation of the constitution. It must be remembered, however, that the aim is to be able to make changes in the constitution, and not to change the constitution itself. A constitution wishes to last for a long period of time, not to be replaced every few years. Hence, all efforts at maintaining constitutional continuity also address the need to maintain constitutional identity.

[1] *McCullough v Maryland* [1819] 4 Wheat [17 U.S.] 316
[2] Zachary Elkins et. al., *The Endurance of National Constitutions* (Cambridge University Press 2009)

This is expressly visible in the German Basic Law of 1949 which provides for its amendment, but also includes an eternity clause mentioning values that even an amendment cannot take away.

Hence, there are certain features that are understood as so basic and essential to the constitution that removing them would deny the constitution its very nature – its identity. Thus, the mechanisms of flexibility have to be such that is able to make changes in the constitution without changing the constitution itself. They, therefore, are trying to balance two seemingly contradictory values of constitutional stability and constitutional dynamism. Further, it may be noticed that the tools of amendments and interpretation empower the present generation to adjust the constitution to the needs of the day, releasing them from the 'dead hand of the past'. However, the past is not irrelevant or unimportant. The lessons of history about the importance of rights, democratic institutions, tolerance and fraternity, rule of law, independence of judiciary, etc. are mostly recognised as values to be retained, and the present generation cannot alter and replace these basic values.

Both judicial pronouncements and amendments have been the subject of rigorous study in the field of constitutional changes. This paper aims to concentrate on changes in the reading of the constitutional text, especially in the light of judicial pronouncements. The paper does not cover the entire domain of judicial indulgence in the creative reading of the constitution. Rather, it seeks to assess the role of legal dogma in ensuring the endurance of the constitution. Before the study is closely undertaken, we are required to disclose the meaning of legal dogma. The pronouncements by Courts may not always be directly based on textual interpretation. It may also employ facts[3] and develop norms or standards where the constitution does not explicitly provide for "*crises of human affairs*".The facts and norms provide an explanation of fundamental values, problems, and solutions to them by means of rational exercise, and are not embedded in concrete empirical findings.[4] Therefore, the title borrows the term legal

[3] David L. Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* (Oxford University Press 2008) 167-173
[4] *Ibid*

dogma[5] to describe them. The term 'dogma' shall not be understood to derive any derogative meaning. It is a representation of the nature of norms developed by the Courts – satiating human reason on one hand but not necessarily based on any empirical findings. As Raul Nartis puts it,

"*It (Legal Dogmatics) is the intrinsic system of legal order that has evolved over different stages of development, is non-compendious and often controversially transcribed*."

Constitutional identity, which is marked by continuity and change, has been understood as inclusive of dynamism.[6]As legal dogma aids the court in adopting constitutions to changing needs, it may be said to be upholding constitutional identity. However, there have been concerns that dogma might get petrified and opposed to change itself.[7] Therefore, it is presumed that the theoretical proposition may not be true in all cases. For this study, a few illustrations of legal dogma have been examined to test their role in maintaining constitutional identity. Emphasis has been given to the rationale behind the dogma, and its effect on constitutional identity.

LEGAL DOGMA AND CONSTITUTIONAL IDENTITY: AN ASSESSMENT

The relationship between legal dogma and constitutional identity has been explored here with the help of three prime dogmas from constitutional law: the doctrine of implied limitations on Parliament's power to amend the constitution, the doctrine of implied fundamental rights, and the doctrine of non-arbitrariness. All three of them have played an essential role in the realisation of the goals set forth by the constitution. They form a reasonable subject of our study because they provide the best sites for contestations both in the courtroom and in the socio-political site of contestations.

- ***The doctrine of the Basic Structure of the Constitution***

[5] Raul Nartis, 'Principles of Law and Legal Dogmatics as methods used by Constitutional Courts' (*Juridica International*) <https://www.juridicainternational.eu/article_full.php?uri=2007_XII_15_principles-of-law-and-legal-dogmatics-as-methods-used-by-constitutional-courts> accessed 21 May 2022
[6] Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 323-326
[7] Raul Nartis (n 5)

Article 368[8] of the Indian Constitution, as originally drafted, only provided for 'Procedure for Amendment of the Constitution". It stated no limitations regarding the extent to which the Parliament could make amendments to the contents of our Constitution. With no substantive limitations being specifically provided, an inference could be drawn that no limitations are imagined against the power of amendment. If this interpretation is taken, then any amendment made by following the procedures mentioned in Article 368 would be capable of making any and all sorts of changes to the text of the Constitution. It did not take much time for this question to reach the Supreme Court. The Court had to consider the question of the constitutionality of the Constitution (First Amendment) Act, 1951, which purported to insert Articles 31A and 31C[9] in the Constitution, in the case of *Shankari Prasad. Union of India*.[10]

Apart from the alleged ground of Provisional Parliament being incompetent to exercise the power of amendment, the petitioner also attempted to get fundamental rights recognised as a substantive limitation to the power of amendment. It was argued that amendments are laws within the meaning of Article 13(2)[11], and as no 'law' can be made by the Parliament that "takes away or abridges the rights conferred" by Part IIIof the Constitution, the First Amendment Act is unconstitutional in so far as it purports to do so by the incorporation of Articles 31A and 31C in the text of the constitution. The court appreciated the plausibility of the argument but decline to accept it. The court distinguished between ordinary law (made in the exercise of legislative power) and constitutional law (made in the exercise of constituent power).

Article 13(2), according to the court, disciplines only the ordinary law and not constitutional law (of which amendments are a part). Thus, with no indications of limitations on the power of amendment in the text of the constitution, the court rejected to recognise fundamental rights as a substantive test for amendments. An attempt was again made in *Sajjan Singh* v *State of Rajasthan*,[12] to have a substantive review of the Parliament's power to amend the Constitution

[8] Constitution of India, 1950, art.368
[9] Constitution of India, 1951, art.31A and art.31C
[10] *Shankari Prasad v Union of India* (1951), AIR 458
[11] Constitution of India, 1950, art.13(2)
[12] *Sajjan Singh v State of Rajasthan* (1965), AIR 845

by challenging the constitutionality of the Constitution (Seventeenth Amendment) Act, 1964. Here, again, the petitioners wished to protect rights promised by Part III of the Constitution from the amendment. The court, again, rejected the argument citing reasons akin to *Shankari Prasad*:

"*…having regard to the fact that a specific, unqualified and unambiguous power to amend the Constitution is conferred on Parliament, it would be unreasonable to hold that the word "law" in Article 13(2) takes in Constitution Amendment Acts passed under Article 368. If the Constitution-makers had intended that any future amendment of the provisions in regard to fundamental rights should be subject to Article 13(2), they would have taken the precaution of making a clear provision on that behalf. Besides, it seems to us very unlikely that while conferring the power on Parliament to amend the Constitution it was the intention of the Constitution-makers to exclude from that comprehensive power fundamental rights altogether*." (Part 28 of *Sajjan Singh*)

However, two judges of the Bench registered their discomfort (without giving a dissenting opinion) with accepting the absolute nature of the power of amendment. JusticeHidayatullah brought to light the language of permanency used in Part III to showcase its sanctity. He was in favour of taking a comprehensive reading of the scheme of the Constitution, rather than reading the various provisions as purely disjunctive to each other. He gave the example of the guarantee of fundamental rights promised by Article 32[13] to substantiate his view:

"*Article 32 does not erect a shield against private conduct but against state conduct including the legislatures (See Article 12[14]). Can the legislature take away this shield? Perhaps by adopting a literal construction of Article 368[15] one can say that. But I am not inclined to play a grammarian's role. As at present advised I can only say that the power to make amendments ought not ordinarily to be a means of escape from absolute constitutional restrictions*."

Justice Mudholkar, too, did not agree with the absolute nature of the power of amendment. He, too, used the example of Article 32 to point out the anomaly caused by the unlimited

[13] Constitution of India, 1950, art.32
[14] Constitution of India, 1950, art.12
[15] Constitution of India, 1950, art.368

power of amendment. He pointed out that the rights promised by Part III are 'fundamental', and of those rights, one – under Article 32 – "*the right to move the Supreme Court for the enforcement of rights conferred by Part III*", has been explicitly guaranteed by the Constitution. It would be strange if a constitutional guarantee could be done away with by an amendment passed by the Parliament. Also, the written nature of the Constitution along with the separation of powers, federal structure, and guarantee of rights was understood to constitute the identity of the Constitution. This identity could also be gauged with the help of the Preamble. Once the identity of the Constitution is established, the further argument made was that such identity ought to be given permanency:

"*Can it not be said that these are indicia of the intention of the Constituent Assembly to give permanency to the basic features of the Constitution? It is also a matter of consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368?*"

The idea of the Indian Constitution has a permanent, protected and uncompromisable identity, therefore, finds its first utterances in the *Sajjan Singh* itself. The same argument was forwarded even in the Golak Nath judgment. Justice Subba Rao appreciated the force of the argument, but he did not deem it fit to address the argument in the matter.

The argument that the Indian Constitution has an inviolable identity, and that the same cannot be abrogated even by way of an amendment under Article 368 was finally accepted by the Supreme Court in the case of *KesavanandaBharati*. The court expounded the doctrine of a basic structure that finally placed substantive limitations on the amending power. The doctrine of basic structure limits the power of the legislature to amend the Constitution. It holds that the "*amending power is conceived to preserve constitutional continuity by making timely adaptations of detail… It is neither the power to destroy the constitution nor to create a new one.*"[16]The limitation,

[16] Conrad Joseph et. al., '*Zwischen Den Traditionen: Probleme Des Verfassungrechts Und Der Rechtskultur in Indien Und Pakistan* (Autrement 1999)

found within the German Basic Law of 1949[17], is not provided expressly in the Indian Constitution.

The Indian Supreme Court used the doctrine to puta limitation on the power of the Parliament to amend the Constitution on the same rationale as provided above.[18]No exhaustive definition of the basic structure was given by the Court. The list of features that have been included in the contents of the basic structure is comprised of 'principles' incorporated in the Constitution, and not only Articles in themselves. Similarly, only essential 'principles' were incorporated in Art 79(3) of German Basic Law. Though principles have been criticised for being vague, they help in keeping the constitution open for change in form. Therefore, though secularism has been held to be a part of the basic structure of the constitution[19], Articles specifically dealing with it may also be amended to the extent that the spirit of secularism is retained. This helps the essential constitution principles to change their form if any better model of enforcement is found in the future. Therefore, the doctrine not only provides for a certain amount of rigidity by putting limitations on the amendment power but also leaves space for flexibility.[20]

However, the doctrine suffers from its own deficits in India. The basic features of the constitution have been left undefined, and it is left for the court to decide whether the basic structure is violated on a case-to-case basis.[21]This has often been criticised for leaving it to the will of the court to determine the content of the basic structure. It is argued that the court has, through the basic structure doctrine, granted itself the power to identify constitutional principles and apply them post-fact to government action. This can, arguably, mar the expectation of the perspectivity of laws. On the other hand, it may be argued that the case-to-case definition of content serves the purpose of maintaining the constitution as a living document. It is difficult to define exhaustively all the components of the basic structure of our constitution. Further, it also ensures that the constitution, which is a living document, is not frozen in time even with respect to its identity. Many features of its identity, then, can be

[17] German Basic Law, 1949, art.79(3)
[18] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225
[19] *S.R. Bommai v Union of India* (1994) 3 SCC 1
[20] Mahendra Pal Singh, *V.N. Shukla's Constitution of India* (21st edition, Eastern Book Company 2017) 1101
[21] Kesavananda Bharati (n 18)

explored by the Constitution from time to time. Thus, the present form of the basic structure doctrine does not merely promise its identity to the Constitution, rather it also grants it the ability to explore and identify its nuances over a period of time. The doctrine, which helps the constitution to maintain its essential characteristics while remaining flexible, is a prime example of a legal dogma enabling constitutional identity.

- ***The doctrine of Implied Fundamental Rights***

Almost every constitution provides a Bill of Rights that ought to be protected by the State. However, it is difficult to provide an exhaustive enumeration of rights as the nature of human interest keeps changing with time and the degree of progress of society. In this regard, the doctrine of implied rights has been developed, which carves out new rights within the existing corpus of rights. In India, such an exercise has been largely done (if not solely)by expanding the meaning of life and personal liberty under Article 21 of the Indian Constitution.

The idea of implied fundamental rights keeps the Bill of Rights open for substantive expansion by judicial reading. This doctrine is met with a demanding question at the outset: Why is such a doctrine required if constitutions already have prescribed processes for change in the text of the Constitution? Thus, one may argue that any expansion of the guaranteed rights may be done through an amendment, and any attempt to extend the reach of the existing rights by the judiciary is an act of institutional overreach. We may answer such a question in two ways. One, the reading and interpretation of the constitutional text by the judiciary is a task of meaning-making. In this process, the judiciary may define or redefine the terminologies used in the light of the changing demands of the times. Let us take the task of defining 'life' under Article 21 for our purposes. It is clear that the Article promises the right to all persons.

The constitution is not merely promising their bare existence to people as biological beings. The Constitution is a socio-political text, promising a socio-political right to a socio-political being. A meaningful guarantee of the right to life to a human being ought to be a guarantee of human life. We would further be required to answer questions like: what does it mean to be a human; what distinguishes humans from other animals; what are the requirements of humans

to lead a meaningful life; are these requirements static or are they capable of change with socio-political and economic advancements? Answering such questions will take us away from the pure text, and demands us to have rigorous and comprehensive assessments of our arguments about the law. Hence, the task of meaning-making pushes us (and the courts) to consider the relevant surrounding attributes of any right. This often leads to an extension of meaning, which is not an overreach by the judiciary, but an outcome of it performing its task judiciously. We may also respond to the argument against the doctrine of implied fundamental rights with the help of Jeremy Waldron's argument in his articl*e Core of the Case Against Judicial Review*.[22]In this essay, Waldron argues that if democratic institutions are not dysfunctional, and the problem is mere that the members of the democratic institutions disagree about rights, then the judicial review is not the appropriate avenue for deciding those disagreements. However, it shall be noted that Waldron has not attempted to establish judicial review as inappropriate for all cases. Judicial Review is, according to him, a useful avenue for decision-making when democratic institutions are not functioning properly. In the life of a nation, the institutions of government are not always capable of performing their role. Therefore, extremely strict restrictions on changing the meaning of the constitutional text would be a menace to society if the Parliament, for any reason, is unable to decide about rights. Further, any meaning decided by the Courts is not fixed in stone; rather, in India, we have noted how the judicial and the legislative organs have been in a constant conversation through their judgments and legislation, respectively. The basis for implied fundamental rights in India was explained by the Supreme Court in *Unni Krishnan J.P. v State of Andhra Pradesh*.[23] The Court observed: "*A question may be asked as to why it did not positively confer a fundamental right to life or personal liberty like Art 19. The reason is, that great concepts like liberty and life were left to gather meaning from experience. They relate to the whole domain of social and economic fact… Political, social, and economic changes entail the recognition of new rights and the law in its eternal youth grows to meet the demands of the society*."[24] This gives the Courts the power to recognise and enforce new rights within the existing framework of rights. The doctrine is also

[22] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 (6) Yale Law Journal 1346-1406
[23] *Unni Krishnan J.P. v State of Andhra Pradesh* (1993) 1 SCC 645
[24] *Ibid*

utilised in Australia where the Constitution[25] contains no Bill of Rights. Any prospect of inclusion of a Bill of Rights has also been criticised on the ground of excellent functioning of democratic structures,[26] and due to fear of intrusion of the judiciary.[27]The 'implied rights' doctrine has in fact been used to express concerns against the incorporation of a Bill of Rights: "*They could, I repeat, use a text which lays down explicitly proclaimed individual rights (usually in vague, amorphous but emotively attractive terms) to get their own way against the elected branches of government much more easily than they could ever use the 'implied rights' vehicle.*"[28]

The difference in reception of the same doctrine in the two countries seems to arise out of the difference in the locus of their trust. While the Indian population trusts the judiciary more with their rights,[29] the Australian population seems to be leaning towards their political representatives. However, in India, the doctrine has helped in the recognition of the rights of many stakeholders. It has served as the torch bearer for the right to education, equal pay for equal work, a clean environment, dignified life, privacy, etc. Thus, having aided the constitution to meet the needs of a progressing society, it has helped the continuity of the constitution, and therefore, constitutional identity.

- ***Equality is antithetical to arbitrariness***

Art. 14[30] of the Indian Constitution provides the right to equality to every person; not only citizens. The principle of equality under the Article is that "*equals must be treated equally while unequal must be treated differently*."[31]For many years the Supreme Court had been showing "*fanatical reverence*"[32] to the doctrine of reasonable classification.[33]Reasonable classification became an interpretive fact, which did not require any evidence for its proof at that time.

[25] Commonwealth of Australia Constitution Act, 1901
[26] James Allan, 'Paying for the Comfort of Dogma' (2003) 25 Sydney L. Rev. 63, 64
[27] *Ibid,* 68
[28] *Ibid*
[29] See A. S. Anand, 'The Indian Judiciary in the 21st Century' (1999) 26 (3) India International Centre Quarterly 61-78
[30] Constitution of India, 1950, art.14
[31] Mahendra Pal Singh (n 20) 50
[32] V. K. Sircar, 'The Old and New Doctrines of Equality: A Critical Study of nexus Tests and Doctrine of Non-Arbitrariness' (1991) 3 SCC (Jour) 1
[33] *State of West Bengal v Anwar Ali Sarkar* (1952), AIR 75

However, the lack of any empirical basis soon proved that the doctrine was not fit for all circumstances. It was found that the test was inadequate to meet the situations where wide discretion was given to the authority to pick and choose persons for giving differential treatment.[34]

Later, a new approach to Art 14 was developed in *E. P. Royappa v State of Tamil Nadu*[35] by Justice Bhagwati. He observed: "*Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetical to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch*."

Article 14 currently functions in the expanded structure which incorporates both the constitutional facts. Where the reasonable classification test is inapplicable, the arbitrariness test can be applied. Recently, Justice Nariman, in *ShayaraBano* v *Union of India,*[36]applied the doctrine of arbitrariness to do away with the practice of instantaneous triple talaq, as it gives arbitrary power to the Muslim husband to divorce his wife at his whims and fancy. In *Independent Thought* v *Union of India,*[37] the Supreme Court used both the doctrines together to read down Explanation 2 to S. 375 Indian Penal Code, 1860.[38]

WOMEN, EQUALITY, AND THE ROLE OF DOGMA

The Constitutional vision of equality based on reasonable classification and non-arbitrariness has for long been marred by the practices of the Indian Courts. The stereotypes created and used by the Court over a period of time have ruled the rape law adjudication in our country. The stereotypes, derived from irrational beliefs, have enforced a sort of unreasonable classification among the rape victims – between those women who fit the stereotype,[39] and

[34] V. K. Sircar (n 32)
[35] *E. P. Royappa v State of Tamil Nadu* (1974) 4 SCC 3
[36] *ShayaraBano v Union of India* (2017) 9 SCC 1
[37] *Independent Thought v Union of India* (2017) SCC OnLine 1222
[38] Indian Penal Code, 1860, s 375
[39] Bharwada Bhoginbai Hirjibai v State of Gujarat (1983) 3 SCC 217

those who don't. The survivors who do not suit the ideal image of a rape victim are less probable to get justice from the court.[40]The strength of stereotypes is visible due to their application even after the Criminal Law Reforms of 2013. The definition of consent incorporated in Explanation 2 to Section 375 of IPC was ignored to create a deferential standard of consent for "conservative persons" and "intellectually proficient persons who have had physical contact in the past".[41] Such unreasonable classifications are being created and enforced by the Courts on the basis of non-empirical and untested facts. This practice has been running in violation of Constitutional principles of equality and non-discrimination.

CONCLUSION

A legal dogma lacks empirical and textual support, and therefore rests, for its validity, on the rationale that supports it. The doctrine of basic structure and implied fundamental rights derive their strength from the strength of the reasons behind them. The notion that a few special features constitute the essence of a constitution, without which the constitution could not be recognised is a strong construct made by the court in India. It is also in line with the idea that certain values according to which the constitution was framed cannot be departed from. Similarly, the notion that the extent of rights expands with the changing demands of human life is an extension of the established nature of life being ever dynamic. With this, the scope of people's interests also increases, which further invites the question of their protection through new rights. Providing reasons may not always be enough. *Faigman* emphasises the importance of providing real reasons behind constructs created by the court. According to him, not doing this may result in substantial costs.[42]Also, the dogma of stereotypes usually enforced in rape laws shows the disaster that courts can cause by accepting presumptions about female behaviour to be facts and enforcing the same leading to abridgement of their fundamental rights. The difference in approach between India and Australia towards the doctrine of implied fundamental rights also shows that the acceptability of a dogma largely depends on the political realities of the countries. Thus, legal dogma does not, by itself,

[40] Corey Rayburn, 'To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials' (2006) 15 Colum. J. Gender & L. 437, 484

[41] *Mahmood Farooqui v State (NCT of Delhi)* (2017) SCC OnLine Del 6378

[42] David L. Faigman (n 3) 9- 13

promote constitutional identity. It has to be rationalised properly in coherence with the general scheme of the constitution, and if it is in the form of fact, especially reviewable fact, efforts must be made to base it on empirical data as far as possible. A well-formulated legal dogma can save the nation from the despotic rule[43], and dogma based on mere presumptions could snatch the rights of many at one go.

[43] Arvind P. Datar, 'The case that saved Indian democracy' (*The Hindu*, 24 April 2013) <https://www.thehindu.com/opinion/op-ed/the-case-that-saved-indian-democracy/article62107496.ece> accessed 24 May 2022