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TAKING THE CONSTITUTION AWAY FROM THE SUPREME COURT OF INDIA

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Abstract In very few countries worldwide, is constitutionalism confined to the apex court's courtrooms, the way it is in India. This facet of Indian political life has been taken so much for granted that rarely have people stopped to examine whether it is even desirable. This article will argue that on a closer examination, the Supreme Court is an inefficient forum to realise the Constitution's promises and more so in today's political climate. On the contrary, India's Supreme Court centric constitutionalism raises more challenges than it resolves. This article will suggest that there is an urgent need to usher in a revolution of constitutionalism outside the Supreme Court, wherein the battles regarding the Constitution are predominantly fought outside the Supreme Court rather than within. While such arguments have been made in the Anglo-American context, seldom have scholars advocated for constitutionalism outside the courts in global south countries like India, where courts are considered vital for constitutional sustenance. In departing from this trend, this article will demonstrate how although the Supreme Court might still have a crucial role to play, 'Taking The Constitution Away From the Supreme Court' is indispensable.

I. PROLOGUE

A distinctive trait of Indian public life is the crucial space the Supreme Court of India[1] ('Supreme Court') occupies. Starting with *C. Golak Nath* v.

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1 The discussion surrounding the Supreme Court in this article is limited to its role as a constitutional court and not as a court of appeals for civil and criminal matters (even though at times some overlaps might exist).

State of Punjab[2] in the late 1960s, the Supreme Court has been at the vanguard of nearly all political, social, and economic controversies in India.[3] With the upswing of human rights litigation since the 1980s, the Supreme Court has cultivated tremendous public support.[4]

In India, the Supreme Court is considered a 'beacon of hope' and has regularly been asked to step in for inept governments. Relaxing the traditional rules of procedure by allowing public-spirited individuals and organisations to bring cases on behalf of the public[5] and accepting letters as petitions[6] added to its allure. The Supreme Court has witnessed acclaim beyond India's borders as well, where scholars have considered it to be a prototype for constitutional courts.[7]

Though recent decisions have raised some doubts regarding the Supreme Court's efficacy, its seat as the custodian of the Indian Constitution remains unmoved.[8] With India's Constitution facing attacks from every corner in the past few years,[9] recourse to the Supreme Court has been the prime modus operandi of those involved in protecting the same. Even during the COVID-19 pandemic, it was the institution whose assistance was sought to tackle the difficulties that surfaced.[10] Considering Supreme Court's role in India, it would not be inaccurate to state that the Supreme Court largely shapes India's Constitution and its scope and meaning. Only in a handful of other democracies do apex courts occupy such a position.[11]

India's Supreme Court Centric Constitutionalism ('SCCC') has been taken so much for granted that rarely have people stopped to ask whether it is even

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2 *See*, the text body accompanying footnotes 37-38.

3 *See generally*, Lavanya Rajamani and Arghya Sengupta, 'The Supreme Court' in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds), *The Oxford Companion to Politics in India* (OUP 2010) 80-97.

4 Sudhir Krishnaswamy and Siddharth Swaminathan, 'Public Trust in the Indian Judiciary' in Sudhir Krishnaswamy, Gerald Rosenberg and Shishir Bail (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (CUP 2019) 123-145.

5 *See*, *SP Gupta* v. *Union of India* 1981 Supp SCC 87.

6 *See*, *Sunil Batra (II)* v. *Delhi Administration* (1980) 3 SCC 488 : AIR 1980 SC 1579.

7 *See*, David Landau, 'A Dynamic Theory of Judicial Role' (2014) 55 Boston College Law Review 1500.

8 Pratap Bhanu Mehta, 'PB Mehta Writes: SC was Never Perfect, but the Signs are that it is Slipping into Judicial Barbarism' *The Indian Express* (18 November 2020).

9 *See*, Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India' (2020) 14(1) Law & Ethics of Human Rights 49, 49-95; *See also*, Rahul Mukherji 'Covid vs. Democracy: India's Illiberal Remedy' (2020) 31(4) Journal of Democracy 91, 91–105.

10 Mihir Desai, 'COVID-19 and The Indian Supreme Court' *Bloomberg Quint*, (28 May 2020) <https://www.bloombergquint.com/coronavirus-outbreak/covid-19-and-the-indian-supreme-court> accessed on 24 September 2020.

11 Peter Quint, 'The Most Extraordinarily Powerful Court of Law the World has Ever Known? Judicial Review in the United States and Germany' (2006) 65 Maryland Law Review 152, 168.

desirable. On a careful examination, SCCC raises more problems than it resolves.[12] SCCC is an inept system to attain the promises of the Constitution. Without the power of the purse or sword, the Supreme Court has its limits and cannot solve every problem or right every wrong. It is infeasible for the Supreme Court to be the counter-majoritarian institution that it is expected to be and aggressively confront the government at every turn.[13] Doing so would just put the Supreme Court in harm's way and threaten its independence.[14]

In fact, the Supreme Court has often shied away when there were immediate threats to Indian democracy and arguably even contributed to its erosion.[15] The Supreme Court also has institutional constraints that make it arduous to achieve reforms through it.[16] Despite the common perception of the Supreme Court, its role in the realisation of rights and the protection of the Indian Constitution is questionable at best.[17] Barring a few decisions where there was not much opposition from the government, its famed decisions have hardly altered the ground realities on their own.[18] The graver problems with SCCC express themselves in subtler ways. SCCC has distorted the political process, resulted in burdens on the average Indian, and led to popular estrangement from the Constitution.[19]

Consequently, this article will contend how all concerned players should gradually ensure 'Taking the Constitution Away from the Supreme Court.' 'Taking the Constitution Away from the Supreme Court' would entail ushering in a revolution of constitutionalism outside the courts where debates regarding the Indian Constitution's interpretation and enforcement are predominately decided outside the Supreme Court's courtrooms and often with the active involvement of nearly 1.4 billion Indians. This would certainly not be an easy change to the status quo and would require some serious investment in formal organisations (including but limited to civil society organisations).

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12 *See generally*, part II.

13 *See*, the text body accompanying footnotes 26-35.

14 ibid.

15 *See*, *ADM Jabalpur* v. *Shivkant Shukla* (1976) 2 SCC 521 (holding that during the proclamation of emergency the writ of *habeas corpus* is suspended) ('ADM Jabalpur'); *See also*, AP Shah, 'The Only Institution Capable of Stopping the Death of Democracy is Aiding it' (*The Wire*, 18 September 2020) <https://thewire.in/law/supreme-court-rights-uapa-bjp-nda-master-of-roster> accessed 24 September 2020.

16 *See*, the text body accompanying footnotes 46-72.

17 *See*, Krishnaswamy (n 4) 345-357; *See also*, Pratap Bhanu Mehta 'India's Judiciary: The Promise of Uncertainty', in Pratap Bhanu Mehta and Devesh Kapur (eds), *Public Institutions in India: Performance and Design* (OUP 2007) 158-167.

18 For example, *see*, Vinay Sitapati, *After Judgment Day: Under What Conditions are Court Decisions Implemented?* (Princeton University 2017) 240-256; *See also*, Rosalind Dixon and Rishad Chowdhury, 'A Case for Qualified Hope?' in Krishnaswamy (n 4) 243-258.

19 *See*, the text body accompanying footnotes 74-84.

A clarification is worth offering upfront. Unlike scholars in the Anglo-American context, like Mark Tushnet, Jeremy Waldron, and Larry Kramer,[20] this article does not call for stripping the Supreme Court of judicial supremacy or adopting a weak form of judicial review framework.[21] Neither does it demand not making use of the Supreme Court at all. As will be discussed later in this article, the Supreme Court can still play an integral role irrespective of its shortcomings.[22] Even otherwise, as a practical matter, a global south country like India cannot successfully operate without judicial supremacy or in a weak form of the judicial review framework.[23] What this article will suggest is not making the Supreme Court the prime venue for deciding every constitutional question.[24] Our expectations about what the Supreme Court can do to fulfil the promises of the Constitution, need to be toned down.

The rest of the article will proceed as follows: Part II of this article will highlight the challenges of SCCC and describe how these challenges have reared their heads repeatedly in India. Part III of this article will illustrate how, in addition to the challenges of SCCC discussed in Part II, SCCC is not a viable strategy today because of the political climate India finds itself in. Part IV of this article will suggest 'Taking the Constitution Away from the Supreme Court' and describe what that could look like in India. Part v. of this article will provide the concluding remarks.

II. THE CHALLENGES OF SUPREME COURT CENTRIC CONSTITUTIONALISM

Courts' decision-making abilities have restrictions. Counter to what legalists and activists would prefer, courts cannot and do not decide cases merely according to the law and without paying attention to the socio-political environment in which they operate.[25] As institutions dependent on the government for their functioning, the boundaries of a court's decision-making are determined by what Lee Epstein, Jack Knight, and Olga Shvetsova term as the

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[20] *See*, Mark Tushnet, *Taking the Constitution Away from the Courts* (PUP 1999) ('Tushnet'); *See also*, Jeremy Waldron, *Law and Disagreement* (OUP 1999); *See also*, Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (OUP 2004).

[21] This is a framework that either does not allow courts to declare laws unconstitutional or allows the Government to reject and 'override' constitutional rulings of the judiciary by simple majority. *See*, Walter Sinott-Armstrong, 'Weak and Strong Judicial Review' (2003) 22 Law & Philosophy 381.

[22] *See*, Amal Sethi, 'Towards a Pluralistic Conception of Judicial Role' (2021) 91(1) University of Missouri-Kansas City Law Review <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3545792> accessed on 24 September 2020.

[23] David Landau, 'Political Institutions and Judicial Role in Comparative Constitution Law' (2010) 51(2) Harvard International Law Journal 320, 323-335.

[24] *See generally*, part IV.

[25] *See*, Tom Clark, *The Limits of Judicial Independence* (CUP 2010).

'tolerance interval' of the government.[26] Simply put, the government will endure an independent court only when they see some benefit in having one or when the backlash of curtailing courts is too extreme.[27]

When courts decide profusely against the interests of the government and the public is not behind the court or, worse, is against it, there is not much in the government's way to prevent them from curbing courts and compromising their independence.[28] As a result, to ensure that they do not put strain on their 'reservoir of goodwill'[29] and fall outside the government's 'tolerance interval,' courts over protracted periods (1) limit their decisions against the government to ensure that the latter does not see a net negative in maintaining an independent court (2) decide as many cases as possible in favour of the government to make it see a value in maintaining an independent court (3) largely stay in line with majoritarian preferences to avoid public backslash (4) issue multiple low-stakes human rights and other popular judgements to cultivate public support.[30]

Further, in order to confirm that their overall decision-making does not significantly impact their position within the government's 'tolerance interval', Samuel Issacharoff and Rosalind Dixon show how courts make use of deferral strategies and avoidance cannons such as obiters, prospective overruling, justiciability requirements, the political question doctrine, unconstitutional but not void holdings, weak enforcement strategies, etc.[31] These tools are utilised by courts so that, in order to maintain their position within the

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[26] Lee Epstein, Jack Knight, and Olga Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35(1) Law & Society Review 117, 117-136.

[27] In countries where the executive and legislature are controlled by different parties, this equation becomes a little more complicated as competing interests often clash. However, considering India has a parliamentary system with a fused executive and legislature, the judicial independence equation can be simplified to this account. *See*, Georg Vanberg, 'Establishing and Maintaining Judicial Independence' in Keith Whittington and Daniel Kelemen (eds), *The Oxford Handbook of Law and Politics* (OUP 2008) 103-105; *See also*, Keith Whittington, 'Legislative Sanctions and The Strategic Environment of Judicial Review' (2003) 1 International Journal of Constitutional Law 446.

[28] ibid.

[29] *See*, Diana Kapiszewski and others, 'Of Judicial Ships and Winds of Change' in Diana Kapiszewski and others (eds), *Consequential Courts: Judicial Roles in Global Perspective* (CUP 2013) 493, (explaining how elected branches deference to judicial authority is not contingent on the immediate outputs of the case at hand but rather the support elected branches and the people have on it in the long run – also called its 'reservoir of goodwill'. A court without a reservoir of goodwill, they suggest, may be limited in their ability to defy the preferences of the majority or the elected branches. A court can build its reservoir of goodwill by deciding in favour of majorities, popular minorities, or the elected branches over time. Conversely it can take away from its reservoir of goodwill by doing the contrary).

[30] *See*, Sethi (n 22) 18-22; *See also*, Jack Knight and Lee Epstein, *The Choices Justices Make* (Sage Publications 1998); *See also* Epstein (n 28); *See also*, Vanberg (n 29).

[31] *See*, Samuel Issacharoff and Rosalind Dixon, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) 16(1) Wisconsin Law Review 683, 683-731.

government's 'tolerance interval', they are not forced to compromise on principle and render judgments that go contrary to a polity's law.[32] Doing so could have consequences for the rule of law, which courts would want to avoid at all costs.[33] These are not contentious assertions regarding the operation of courts. Decades of social science scholarship backs this model of judicial behaviour, and there is unanimous consensus that these are the considerations that guide the function of courts that have managed to maintain their independence.[34]

India's Supreme Court is undoubtedly no exception to this. The Supreme Court's jurisprudential history is laden with the usage of deferral strategies and avoidance cannons. Additionally, it has seldom[35] gone brazenly counter-majoritarian or in great opposition to the government's key policy initiatives. In the previously mentioned *Golak Nath* v. *State of Punjab*, the Supreme Court laid down critical law and held that the government could not curtail fundamental rights.[36] Yet, in the same case, the Supreme Court did not halt the government's attempt to limit fundamental rights, and the petitioner did not get any relief as the court made use of the tool of prospective overruling and did not make its reasoning applicable to the case at hand.[37] The story was repeated in other cases considered to have changed the landscape of Indian Constitutionalism like *Kesavananda Bharati* v. *State of Kerala*,[38] *Minerva Mills Ltd* v. *Union of India*,[39] and *Maneka Gandhi* v. *Union of India*,[40] where the Supreme Court established ground-breaking jurisprudence through avoidance cannons and deferral strategies but left the petitioners wanting. All these cases expanded the Supreme Court's powers and clarified the scope of the Constitution in the abstract.

A common thread with many resonant human rights decisions is the 'rights without serious remedies' scenario, wherein the Supreme Court declared rights not stipulated in the written Constitution but simultaneously, did not offer any

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[32] *See*, Alexander Bickel, 'The Supreme Court, 1960 Term-Foreword: The Passive Virtues' (1961) 75 Harvard Law Review 40.

[33] Cf Gerald Gunther, 'The Subtle Vices of the "Passive Virtues"- A Comment on Principle and Expediency in Judicial Review' (1964) 64(1) Columbia Law Review 1, 1-25.

[34] *See*, Georg Vanberg, 'Constitutional Courts in Comparative Perspective: A Theoretical Assessment' (2015) 18 Annual Review of Political Science 167, 167-185.

[35] Two notable decisions in stark opposition to key policies of the Government are *Madhav Rao Jivaji Rao Scindia* v. *Union of India* (1971) 1 SCC 85 (declaring a presidential order abolishing privy purses to be unconstitutional) and *Rustom Cavasjee Cooper* v. *Union of India* (1970) 1 SCC 248 : (1970) 3 SCR 530 (holding unconstitutional the governments much touted Banking Companies Acquisition and Transfer of Undertaking Act).

[36] AIR 1967 SC 1643 : (1967) 2 SCR 762.

[37] ibid.

[38] (1973) 4 SCC 225 (holding that the parliament cannot alter the basic structure of the Constitution).

[39] (1980) 3 SCC 625 (holding that the parliament cannot alter its power to amend the Constitution).

[40] (1978) 1 SCC 248 (holding that the right to life under the Constitution has a substantive component as well).

substantial remedies.[41] The Supreme Court has, through such 'noise around zero' decisions, coupled with several low-stakes public interest decisions where it did not force the government to undertake action it was not ready to perform,[42] ensured that there is a high level of confidence in the Supreme Court.[43] However, in some of the most decisive moments in history when fundamental freedoms were put under enormous strain, such as during the emergency of the 1970s, the Supreme Court found its hands tied.[44]

This is not a criticism of the Supreme Court's historical performance. The Supreme Court was compelled to engage in such decision-making to navigate turbulent tides. It is a praiseworthy achievement that the Supreme Court managed to preserve its independence and render judgments that were not wholly meaningless and had some tangible impact (even if relatively small). Nevertheless, the institutional limitations of the Supreme Court should not be overlooked. The Supreme Court can and does play a vital role in a country such as India, but it has a limited 'tolerance interval'. This limitation makes the Supreme Court an insufficient venue to fight battles, especially when they are severely misaligned with government interests or majoritarian preferences.

Limits to decision-making abilities are just one small facet of the challenges with SCCC. SCCC is plagued by the Supreme Court's several institutional capacity deficits as well. To start with, the Supreme Court is dependent on the government to enforce its decisions. If there is an indifference or

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41 For example, *see*, *Olga Tellis* v. *Bombay Municipal Corporation* (1985) 3 SCC 545 (declaring right to shelter and livelihood to be a fundamental right); *See also*, *KS Puttaswamy* v. *Union of India* (2017) 10 SCC 1 (declaring right to privacy to be a fundamental right) ('*KS Puttaswamy*'); *See also*, *Mohini Jain* v. *State of Karnataka* (1992) 3 SCC 666 (declaring right to education to be a fundamental right); *See also*, *Consumer Education & Research Centre* v. *Union of India* (1995) 3 SCC 42 (declaring right to health and medical care to be a fundamental right); *See also*, *Union of India* v. *Association for Democratic Reforms* (2002) 5 SCC 294 (declaring right to information to be a fundamental right); *See also*, *Anuradha Bhasin* v. *Union of India* (2020) 3 SCC 637 (declaring internet access to be essential to Freedom of Speech and Freedom of Trade); *Subash Kumar* v. *State of Bihar* (1991) 1 SCC 598 (declaring the right to enjoyment of pollution free air and water as a fundamental right).

42 For example, *see*, *Bandhua Mukti Morcha* v. *Union of India* (1997) 10 SCC 549 (issuing directions for the welfare of bonded labourers); *See also*, *Rudul Sah* v. *State of Bihar* (1983) 4 SCC 141 (providing compensation for illegal detention); *See also*, *Paschim Banga Khet Samity* v. *State of West Bengal* (1996) 4 SCC 37 (providing compensation for loss suffered due to inadequate medical facilities); *See also*, *Nilabati Behara* v. *State of Orissa* (1993) 2 SCC 746 (providing compensation for death suffered due to custodial torture); *See also*, *Vineet Narain* v. *Union of India* (1998) 1 SCC 226 (issuing directions for the reform of the Central Bureau of Investigation); *See also*, *MC Mehta* v. *Union of India* (1992) 3 SCC 256 (monitoring the construction of sewage treatment plants).

43 Cf Rohit De, *A People's Constitution: The Everyday Life of Law in the Indian Republic* (PUP 2018) (De describes a positive account of the Supreme Court's jurisprudence. Yet a closer look at the cases he covers illustrates a perfect fit with this standard model of judicial behaviour. All those cases were low-stakes and/or not significantly at odds with governmental or majoritarian preferences).

44 *ADM Jabalpur* (n 15).

opposition from the government, there is not much the Supreme Court can do to compel the government to comply with its orders.[45] Two of the most widely applauded decisions of the Supreme Court in *Vishaka* v. *State of Rajasthan*[46] *and D.K. Basu* v. *State of W.B.*,[47] did not see any enforcement by the government, mainly out of indifference. When the promise of *Vishaka* finally materialised almost two decades later in the form of The Sexual Harassment of Women at Workplace Act, it was because of the pressure on the government to take immediate action in the wake of a heinous rape incident in the capital city. Likewise, in the *Narmada Bachao Andolan* v. *Union of India*[48] case, the Supreme Court had ordered individuals displaced by the Narmada Dam's construction to be provided with cultivable land and quality housing. As Vinay Sitapati has demonstrated via significant empirical research, due to the lack of state capacity and the indifference to overcome the same on the government's part, of the 43,201 families displaced by the construction of the Dam in Madhya Pradesh, only nine families received the Supreme Court mandated reparation.[49]

The complexities in the face of opposition from the government are much higher. Dance bars occupied a pivotal role in the cultural life of Mumbai. In an instance of moral policing, the government had banned these bars in 2005. Despite Supreme Court decisions in 2013[50] and 2019[51] declaring various aspects of the ban to be unconstitutional, these dance bars never reopened because of the government's opposition to the Supreme Court's orders.[52] Many of these bars have either shut down, leading to job losses or now operate as orchestra bars.[53] Similarly, in the monumental *Mohd. Ahmed Khan* v. *Shah Bano Begum*[54] case, where the Supreme Court held that Muslim women are entitled to maintenance post-divorce, not only did the government refuse to implement the decision, but they also passed and enforced legislation overruling the judgement.[55] Even during the 1960s-70s, when the Supreme Court invalidated several land reform laws, the government kept overruling the court's decisions

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45 Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press 1991) 4.

46 (1997) 6 SCC 241 (laying down guidelines for sexual harassment in the workplace in India which had the force of law till the parliament came up with a legislation).

47 (1997) 1 SCC 416 (laying down guidelines for preventing custodial violence which had the force of law till the parliament came up with a legislation).

48 (2000) 10 SCC 664.

49 Sitapati (n 18) 241-242.

50 *State of Maharashtra* v. *Indian Hotel & Restaurant Association* (2013) 8 SCC 519.

51 *Indian Hotel & Restaurant Association* v. *State of Maharashtra* (2019) 3 SCC 429.

52 Mohua Das, Mateen Hafeez, and Chittaranjan Thembekar, 'The Story of Mumbai's Money-Spinning Dance Bars' *The Economic Times* (18 January 2019).

53 ibid.

54 (1985) 2 SCC 556.

55 Vrinda Narain, *Reclaiming the Nation: Muslim Women and the Law in India* (University of Toronto Press 2008) 123-124.

by passing constitutional amendments.[56] This trend finally continued till the Supreme Court relented and embraced the government's policy preferences.[57]

Even if the Supreme Court can get its decisions enforced by the government, which might have their own agendas to enforce them, there are still reasons why SCCC faces challenges. The Supreme Court is a highly elitist institution that is unable to account for even a fraction of the different voices and stakeholders in polycentric debates. When vital matters of public life are decided in the Supreme Court rather than deliberative forums, the bulk of the citizenry is deprived of the opportunity to shape important questions.[58] This ends up favouring those actors with specific knowledge, better access to, and influence upon the legal system, at the expense of much of the populace who rarely have a voice in matters.[59]

This deficiency has persisted even when the Supreme Court has tried to remedy its capacity defects by seeking the assistance of *amicus curiaes*, civil society organisations, and instituting expert/policy-evaluation/fact-finding/monitoring committees to aid their decision making. As Anuj Bhuwania, in one of the most comprehensive empirical studies of the Supreme Court, showed, many of the major Public Interest Litigations ('PILs') where the Supreme Court tried to remedy its capacity defects, were still unable to account for all sides in polycentric debates and often did not hear those individuals most impacted by the decisions.[60]

In the cases covered by Bhuwania's study, the outcomes of the PILs did not benefit the 'public' but instead were geared to improve the quality of life for the elite middle and upper class of India.[61] On the contrary, the outcomes of those PILs led to unwarranted and unsubstantiated financial burdens on the everyday Indian.[62] For example, Bhuwania showed how PILs became a tool to carry out slum demolitions all over Delhi, leading to the displacement of over three million people without providing any alternative housing sites to the slum residents.[63] According to the Supreme Court, providing alternative sites of housing was self-defeating and "it has only created a mafia of property

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[56] Manoj Mate, 'Public Interest Litigation and the Transformation of the Supreme Court of India', in Kapiszewski (n 29) 265-270.

[57] ibid.

[58] Ran Hirschl, 'Resituating the Judicialization of Politics: *Bush* v. *Gore* as a Global Trend' (2002) 15 Canadian Journal of Law & Jurisprudence 191, 214.

[59] ibid; *See also*, Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (CUP 2017); *See also*, David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 Harvard International Law Journal 189, 209; Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (2011) 89 Texas Law Review 1643, 1660– 61.

[60] Bhuwania (n 59) 120.

[61] ibid 50-111.

[62] Bhuwania (n 59) 55-56, 60-61, 80.

[63] Bhuwania (n 59) 88.

developers and builders who have utilised this policy to encourage squatting on public land, get alternative sites and purchase them to make further illegal constructions". In several of these cases, the Supreme Court did not give any legal reasoning and made statements such as "if action was not taken immediately…the slum dwellers would soon invade the court premises itself and squat there."[64]

A considerable part of India's SCCC has been using the forum of the Supreme Court to try and get socio-economic policies pushed. The Supreme Court at several junctures has been asked to adjudicate on public policy questions customarily reserved for the exclusive domain of the government, such as healthcare, environment, education, food security, housing, etc.[65] Worth discussing is a significant capacity concern that underscores this trend as well. Courts like the Supreme Court are generally poor policymakers.[66] They lack the ability to study situations and ground recommendations empirically.[67] They are also unable to carry out investigations regarding the realities of a particular situation on their own.[68] More often than not, their intervention into policy questions opens a pandora's box of predicaments and ends up making a mess of things.

In no recent case was this more evident than the one dealing with migrant rights during the COVID-19 pandemic. Curiously, even in this case, the Supreme Court heard every voice except that of the migrant workers.[69] According to a governmental ordinance, all employers were directed to pay full wages to their employees during the COVID-19 pandemic induced lockdown.[70] In the wake of this ordinance, a petition was filed in the Supreme Court by a trade union challenging this ordinance's constitutionality.[71] The Supreme Court put a stay on this ordinance.[72] With no guaranteed pay and no end to the pandemic in view, several million migrant workers left for their hometowns, often travelling thousands of kilometres on foot. This resulted in a full-blown crisis.

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64 ibid 7.

65 *See generally*, Rajamani and Sengupta (n 3) 80-97.

66 *See*, Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353, 394–95; *See also*, Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' 2007 19(3) Journal of Environmental Law 293.

67 Christopher Elmendorf, 'Advisory Counterparts to Constitutional Courts' (2007) 56 Duke Law Journal 953, 997.

68 Rosenberg (n 45) 4.

69 Anuj Bhuwania, 'The Curious Absence of Law in Migrant Workers' Cases' (*Article* 14, 16 June 2020) <https://www.article-14.com/post/the-curious-absence-of-law-in-india-s-migrant-workers-cases> accessed 24 September (Bhuwania: Article 14) 2020.

70 Government of India: Ministry of Home Affairs 2020, Order No 40-3/2020-DM-I (1).

71 *Hand Tools Manufacturers Association* v. *Union of India* (2020) Writ Petition (Civil) Diary No(s) 11193 of 2020 (Pending) (SC).

72 ibid.

Later, when the crisis showed no sign of subsiding, the Supreme Court passed a *suo motu* order, where it asked the government to take urgent steps to resolve the crisis[73] – which the government, from its end was already doing, in whatever questionable manner, it deemed fit. The Supreme Court does not deserve all the blame for the migrant crisis; inadequate and uncoordinated governmental policies were primarily responsible for the same. Nonetheless, its initial intervention into the issue did nothing to alleviate the crisis and arguably contributed to its exacerbation.

In addition to limits on decision-making abilities and capacity concerns, SCCC is plagued by a few minor complications that do not bode well for constitutional governance.[74] The first of these is judicial overhang.[75] This is the phenomenon in which, considering that courts are the primary forum to decide constitutional questions, legislatures stop taking the Constitution and their law-making functions seriously. in the belief that the court will decide major constitutional questions.[76] Such situations often see governments avoiding political responsibility for making tough decisions.[77] It also witnesses governments shifting the blame for controversial decisions on the courts or using courts to forward contentious policy agendas that are not easy to advance through open legislative and electoral politics.[78]

The BJP government has frequently been doing the same, as can be observed in examples dealing with two of the BJP government's most prominent election promises, i.e., Constructing the Ram Temple and Banning the Islamic Practice of Triple Talaq. With both these issues, the BJP government could have pursued their agendas by legislation but avoided the political costs associated with democratic decision-making as the Supreme Court was willing to adjudicate these matters. Curiously, in many cases which involve such vital issues, government lawyers frequently make arguments grounded in

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[73] *In re Problems and Miseries of Migrant Labourers* 2021 SCC OnLine SC 454.

[74] These complications are in addition to the commonly argued anti-democratic nature of judicial review which thwarts the voice of peoples elected representatives (*See*, Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (YUP 1986) 16-17). However, scholars' have contended that due to the dysfunctional nature of electoral politics, this concern does not have the same sting in global south democracies like India (*See*, Kim Lane Scheppele, 'Democracy by Judiciary: Or Why Courts Can Be More Democratic than Parliaments' in Adam Czarnota, Martin Krygier, and Wojciech Sadurski, *Rethinking the Rule of Law After Communism* (CEU Press 2005) 25-60; *See also*, Landau (n 6) 1503. Nonetheless, the anti-democratic nature of judicial review has been bought up even in the Indian context as well (*See*, Pratap Bhanu Mehta, 'The Rise of Judicial Sovereignty' in Sumit Ganguly, Larry Diamond, and Marc Plattner (eds), *The State of India's Democracy* (JHU Press 2007) 117).

[75] Tushnet (n 20) 57–65.

[76] ibid.

[77] *See*, James Bradley Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 Harvard Law Review 129, 156.

[78] Keith Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in US History* (Princeton University Press 2007) 139.

'separation of powers' as to why the Supreme Court should not decide these cases.[79] However, in both the cases described above, this was not the case, alluding to the fact that the BJP government would rather have the Supreme Court make the determinations.

Apart from judicial overhang, countries in which apex courts strongly shape constitutionalism see a serious distrust for the government.[80] As they have done in India, courts frequently use the rhetoric of representing the people's interests and being more democratic than the government to justify their interventions.[81] This could cause people to doubt the elected officials, which has the potential to fracture the political process in ways from which it is not easy to recover. People might lose interest in civic life, believing that the political process is beyond redemption and might not feel incentivised to engage in political activities. This is precisely one of the reasons why 'Taking the Constitution Away from the Supreme Court' does not have a similar allure in India as it has in some other developed countries. The citizenry cannot envision anything good coming via the government and feel that the Supreme Court is their only resort. The most common objection, I expect to this article's suggestion of 'Taking the Constitution Away from the Supreme Court', is precisely this. As this article will later cover at length, this is an inflated concern and one that should surely not deter people from 'Taking the Constitution Away from the Supreme Court'.

Akin to the issue mentioned above, SCCC can also lead to popular estrangement from the Constitution. When constitutional decision-making becomes the prerogative of a few unelected elites sitting in the capital city, the average individual seeing no realistic probability of influencing the course of constitutional decision-making, does not try or, worse, ceases to care about the Constitution.[82] Citizens often start treating the Constitution no longer as a set of defining norms but rather as a remote set of "rules and regulations made by

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[79] *See example*, *State of West Bengal* v. *Committee for Protection of Democratic Rights* (2010) 3 SCC 571; *See also*, 'Disabled Person Needs To Pay 5% Tax To Walk': Plea In SC Against GST On Disability Equipments' (*Live Law*, 26 October 2020) <https://www.livelaw.in/top-stories/disabled-person-needs-to-pay-5-tax-to-walk-plea-in-sc-against-gst-on-disability-equipments-165006> accessed 24 September 2020; *See also*, Arpan Chaturvedi, 'Migrant Crisis: Solicitor General Says A Few High Courts Are Running Parallel Governments' (*Bloomberg Quint*) (29 May 2020) <https://www.bloombergquint.com/law-and-policy/migrant-crisis-solicitor-general-says-a-few-high-courts-are-running-parallel-governments> accessed 24 September 2020.

[80] *See*, Scheppele (n 74) 49; *See also*, Julio Faundez, 'Democratization Through Law: Perspectives from Latin America' (2005) 12 Democratization 749, 758; *See also*, Elena Martínez Barahona, 'Judges as Invited Actors in the Political Arena: The Cases of Costa Rica and Guatemala' (2010) 3 Mexican Law Review 3, 3, 5–6.

[81] *See*, Nick Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 Washington University Global Studies Law Review 1, 8–17; *See also*, Landau (n 6).

[82] Joan Larsen, 'Constitutionalism Without Courts? Taking the Constitution Away from The Courts' (2000) 94 North Western University Law Review 983, 985.

an elite group of lawyers and judges", which ultimately leads to estrangement from the Constitution.[83]

While there are, to my knowledge, no empirical studies illustrating this phenomenon in India, the popular estrangement from the Constitution is evident in India in a manner similar to those in the comparative context. A major sign of this is that discourse outside the legal fraternity is very rarely framed in terms of constitutional rights but is rather done as an appeal to emotions, beliefs, and needs. The everyday politician or the common Indian very rarely speaks in constitutional terms. Policies and demands are not marketed as Articles 14, 15, 16, 19, or 21 rights. In comparison, in a country such as the United States of America, where there is a relatively higher constitutional culture, key debates such as those relating to religion, gun rights, or government powers are frequently framed in constitutional terms.

This part highlighted the manifold complications with SCCC. There is a possibility that all these challenges that were raised with SCCC might still not convince concerned actors to rethink their SCCC. They might still believe that the Supreme Court is a forum where they will be heard and would prefer to fight their battles in the Supreme Court. They might also consider that politics is highly dysfunctional, and hence the Supreme Court might be a better forum to decide several questions. In turn, in the next part, this article will demonstrate that even if the concerns with SCCC are overstated, given the current political climate, the Supreme Court is not a viable venue to safeguard the soul of India's Constitution.

III. THE SUPREME COURT TODAY

During periods of electoral uncertainty, courts generally have a wider tolerance interval[84] to operate. This is because there is not enough public support behind incumbents to conduct court curbing measures without facing a backlash.[85] Coalition members and opposition parties who have a considerable influence in such scenarios might also not support such measures.[86] Additionally, governing parties may themselves be willing to tolerate an independent court if they expect that the court will protect their own interests if they find themselves in the opposition.[87] This also explains how the Supreme Court managed to be activist without having to toe the government's line in the decade's post the 1980s, when the Indian National Congress ('INC') was no longer the only game in town.

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83 ibid 985.

84 *See*, the text body accompanying footnote 26-35.

85 Epstein (n 26).

86 *See*, Stephen Gardbaum, 'What Makes for More or Less Powerful Constitutional Courts?' (2018) 29(1) Duke Law Review 1, 24-30.

87 Vanberg (n 27) 175-177.

Since 2014, India is rapidly descending again towards a dominant party state. The Bharatiya Janata Party ('BJP') led coalition controls over 60% of the parliament with a marginal near-future probability of losing its dominance at the centre. In such a backdrop, the Supreme Court has a very small 'tolerance interval' to work with. India's electoral condition has certainly resulted in the BJP government being able to easily engage in court curbing actions without any sizeable political or electoral backlash.[88]

In India, judicial appointments are in the hands of a committee of Senior Judges of the Supreme Court called the 'collegium', who send their nominations for judicial appointments to the Ministry of Law and Justice ('MoLJ'). The MoLJ does a background check of the nominated judges and then resends the nominations with its findings back to the collegium, along with its additional recommendations for judges. The collegium then considers these findings and recommendations and gives its final nomination to the MoLJ, on whom these nominations are binding. Post final approval from the MoLJ, the President of India officially appoints judges.

During the early days of the BJP government's first term, the MoLJ had stalled approving the nomination of Senior Advocate Gopal Subramaniam's appointment to the Supreme Court in what was perceived as a retaliation to his involvement in a case which concerned senior BJP leader Amit Shah.[89] In another instance, the MoLJ delayed the Supreme Court of Justice Kurian Joseph's elevation, who, as a High court Judge, had issued decisions against the BJP's interests.[90] Only after much outcry did the MoLJ confirm his appointment after a delay of eight months, resulting in Justice Kurian Joseph losing his seniority in a court where seniority holds sway.[91]

The MoLJ had, during this same period, continued approving judges nominated along with Justice Kurian Joseph.[92] In fact, when judges sympathetic to the government were nominated, the MoLJ cleared their appointments

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88 This includes trying to pass the National Judicial Appointment Committee Act which would institute a committee to appoint judges. The Supreme Court pushed back and had held this law unconstitutional. However, and the government resorted to indirect ways to curb the judiciary. *See*, Madan Lokur, 'Collegium's Actions Show that the NJAC which was Struck Down Four Years Ago is Back, with a Vengeance' *The Indian Express* (16 October 2019).

89 'Centre declines to clear Gopal Subramanium as SC Judge' *Deccan Herald* (19 June 2014).

90 Shishir Tripathi, 'Centre's Decision to End Impasse Over Justice KM Joseph's Elevation May Help Resolve Judiciary-Executive Deadlock' (*Firstpost*, 3 August 2018) <https://www.firstpost.com/india/centres-decision-to-end-impasse-over-justice-km-josephs-elevation-may-help-resolve-judiciary-executive-deadlock-4888481.html> accessed 24 September 2020.

91 ibid.

92 'Indu Malhotra Takes Oath as SC Judge Amid Controversy Over Centre's Blocking of KM Joseph' (*Scroll*, 21 April 2018) <https://scroll.in/latest/877080/indu-malhotra-takes-oath-as-supreme-court-judge-amid-controversy-over-centres-blocking-of-km-joseph> accessed 24 September 2020.

within two days.[93] These are not isolated incidents and have been witnessed at all levels of judicial appointments.[94] Furthermore, while the BJP government has interfered with judges' appointments not aligned with their interests, it rewarded sympathetic Chief Justices, who in India command significant control over judicial appointments,the court's docket and composition of its benches, with political posts immediately after they retired from the Supreme Court.[95]

A causative outcome of the government's interference in appointments is that the Supreme Court today comprises of several judges who ardently support the BJP agenda.[96] This changing dynamic has resulted in the polyvocal[97] Supreme Court not shying away on occasions from siding with the BJP government's nationalist agenda and imbuing it with a veneer of judicial legitimacy.[98] In the past, the Supreme Court generally avoided adjudicating exceedingly sensitive topics that could affect the delicate balance of secularism in India. This is not the case anymore.

The obvious contender to lead this charge against the Supreme Court has been its decision on the construction of the Ram Temple in Ayodhya. A hotly contested issue over the past couple of decades and one of the main electoral promises of the BJP government was the construction of a Ram Temple on the site of the demolished Babri Mosque. No political resolution of this issue had been possible, and the Supreme Court had refused to adjudicate on it up until now. The Supreme Court overruled the Allahabad High Court decision, which had provided for a distribution of land between the Hindu and Muslim parties to construct their respective place of worships.[99] It instead allowed for a sole Hindu temple on the site of the demolished mosque.[100]

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93 Shah (n 15).

94 *See example*, 'Centre Has Its Way, Supreme Court Collegium Reassigns Justice Akil Kureshi' (*The Wire*, 21 September 2019) <https://thewire.in/law/supreme-court-now-recommends-justice-kureshi-to-tripura-high-court> accessed 24 September 2020.

95 Nilanjan Mukhopadhyay 'Modi Government Perfects Congress "Game" by Sending Gogoi to RS' (*The Quint*, 17 March 2020) <https://www.thequint.com/voices/opinion/justice-ranjan-gogoi-rajya-sabha-judiciary-bjp-modi-government> accessed 24 September 2020.

96 Cf Maneesh Chhibber, 'Supreme Court Judges Gushing Over Modi is a Problem for the Judiciary and Democracy' (*The Print*, 26 February 2020) <https://theprint.in/opinion/supreme-court-judges-gushing-over-modi-is-a-problem-for-judiciary-and-democracy/370935/> accessed 24 September 2020.

97 The Indian Supreme Court is a polyvocal court and does not decide in one voice. Yet there have been allegations by sitting judges of the Court itself, that with the Court now having several judges sympathetic to the BJP government, the Chief Justices who controls the composition of benches of this polyvocal court, have constituted benches in ways to influence the outcomes of decisions. *See example*, India Supreme Court Judges: Democracy is in Danger (*BBC*, 12 January 2018) <https://www.bbc.com/news/world-asia-india-42660391> accessed 24 September 2020.

98 Prannv Dhawan and Parth Maniktala, 'The Ayodhya Ruling and The Rule of Law' (*Rights Review*, 11 December 2019) <https://blogs.cuit.columbia.edu/rightsviews/2019/12/11/the-ayodhya-ruling-and-the-rule-of-law/> accessed 24 September 2020.

99 *Mohammed Siddiq* v. *Mahant Suresh Das* 2019 SCC OnLine SC 1483.

100 ibid.

A different story but with a comparable outcome was witnessed in the Sabarimala Temple controversy. In 2018, the Supreme Court had ruled that the Sabarimala Temple in Kerala cannot bar the entry of women to the temple.[101] The BJP-led centre sided with temple authorities and mounted a massive political campaign against the Supreme Court judgement.[102] Soon after, the Supreme Court had a change of mind and referred certain questions pertaining to the judgement to a larger bench.[103] It consequently held that pending referral, the original judgement was not the 'final word'.[104] Besides, the Supreme Court even refused to issue an interim order on a petition to provide security for women entering the Sabrimala temple.[105] It is to be seen when this larger bench eventually decides the matter, if at all. For the time being, the net results of these developments mean that what was supposed to be a final decision of the Supreme Court has been rendered meaningless.

The process of not taking up a case or leaving a case on its docket to prevent giving a decision has been part of a broader strategy of the Supreme Court of not deciding against the government in times where the court has a very low 'tolerance interval'. This tactic has been given the term' judicial evasion' by Gautam Bhatia, a prominent commentator on Indian Constitutional Law.[106] The Supreme Court has utilised it in several contentious cases involving key BJP policies, such as during the demonetisation saga, the trifurcation of the state of Jammu and Kashmir, and the passing of the Citizenship Amendment Act ('CAA'). In all these cases, the Supreme Court gave the government the upper hand by not adjudicating the issues.

These judicial evasions have also resulted in instances of the Supreme Court turning a blind eye to the curtailment of constitutional rights in the country. In the wake of the trifurcation of the state of Jammu and Kashmir in August 2019, the government put several opposition leaders in Jammu and Kashmir such as Omar Abdullah, Mehbooba Mufti, and Shah Faesal under preventive detention as well as blocked internet services in the state. With the preventive detentions, the leaders were initially detained without any charges under the

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[101] *Indian Young Lawyers Association* (v.) *State of Kerala* (2019) 11 SCC 1.

[102] Rohini Swamy, 'As Sabarimala Issue Fizzles Out, BJP Has Gained Virtually Nothing in Kerala' (*The Print*, 17 October 2019) <https://theprint.in/politics/as-sabarimala-issue-fizzles-out-bjp-gained-virtually-nothing-kerala/306881/> accessed 24 September 2020.

[103] *Kantaru Rajeevaru* v. *Indian Young Lawyers Association* (2020) 2 SCC 1.

[104] 'Sabarimala Verdict not the "Final Word", Larger Bench Will Review It, Says SC On Activist's Plea' (*Scroll*, 5 December 2019) <https://scroll.in/latest/945890/sabarimala-verdict-not-the-final-word-larger-bench-will-review-it-says-sc-on-activists-plea> accessed 24 September 2020.

[105] Japnam Bindra 'SC Refuses to Pass Order on Plea for Protection for Women Entering Sabrimala Temple' *The Mint* (13 December 2019).

[106] Gautam Bhatia, Judicial Evasion and the Status Quo: On SC Judgments' *The Hindu* (10 January 2019).

Criminal Procedure Code.[107] Just before the expiry of the maximum permitted six months period under the Code, the leader's detentions were extended under a separate Act.[108] Despite the *habeas corpus* petitions filed in the Supreme Court, the court delayed adjudicating upon the petitions till as late as March 2020, when Abdullah was finally released. The other leaders continue to be detained at the time of writing of this article, and the Supreme Court has stayed silent.[109]

The same can be seen with the government blocking internet services in the state of Jammu and Kashmir. The Supreme Court allowed the internet blockage to go on, and only in January 2020, in *Anuradha Bhasin* v. *Union of India*, adjudicated upon the matter. In this case, while it held that suspension of communication services should comply with standards of necessity and proportionality, it did not rule upon the merits of the matter.[110] Instead, it handed over the deciding of the legality of the blockade to a governmental review committee headed by the executive.[111] The state of Jammu and Kashmir still faces internet restrictions of varying orders, and in further challenges to the internet blockage, the Supreme Court has refused to alter the status quo.[112] Even in May 2020, it dodged adjudication on the legality of the internet blockage by stating that threats of terrorism in the state give rise to special circumstances that might warrant actions on the grounds of national security.[113]

The passing of the CAA was followed by widespread protests all over the country.[114] These protests were handled violently by the government and were accompanied by the arrests of individuals involved in these protests.[115] Like in other instances, the Supreme Court has evaded adjudicating upon petitions with respect to the protestors.[116] When state high courts gave judgements favouring protestors, on appeal, the Supreme Court has kept these cases hanging, thereby rendering the finality of the high court judgements in doubt.[117] The

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[107] 'Omar, Mehbooba Booked Under PSA on Last Day of Their Detention' *The Times of India* (6 February 2020).

[108] ibid.

[109] Apoorva Mandhani, 'Rejected, Infructuous, Pending — Status of Pleas in SC, HC Against Detention of J&K Leaders' (*The Print*, 2 August 2020) <https://theprint.in/judiciary/rejected-infructuous-pending-status-of-pleas-in-sc-hc-against-detention-of-jk-leaders/473069/> accessed 24 September 2020.

[110] *Anuradha Bhasin* (n 41).

[111] ibid.

[112] *Foundation for Media Professionals* v. *Union Territory of J&K* (2020) 5 SCC 746.

[113] ibid.

[114] Anjali Mody, 'India Awakens to Fight for its Soul' *The New York Times* (20 December 2019).

[115] Sameer Yasir and Kai Schultz, 'India Rounds Up Critics Under Shadow of Virus Crisis, Activists Say' *The New York Times* (19 July 2020).

[116] Sruthisagar Yamunan, 'Supreme Court to Tiz Hazari: How the Judiciary Responded to CAA Protests and Police Action' (*Scroll*, 24 December 2019) <https://scroll.in/article/947770/supreme-court-to-tiz-hazari-how-the-judiciary-responded-to-caa-protests-and-police-action> accessed 24 September 2020.

[117] Shah (n 15).

most prominent of these cases was perhaps from the State of Uttar Pradesh. In Uttar Pradesh, the protestors' photographs were put on hoardings by the government, and they were subsequently targeted.[118] The Allahabad High Court had directed that these hoardings be pulled down within 24 hours, calling it an "unwarranted interference in the privacy of people."[119] The Uttar Pradesh government appealed to the Supreme Court, who subscribed to the High Court's reasoning, but still directed the case for reference to a larger bench stating that the case pertained to "issues which need further consideration by a bench of sufficient strength."[120] Beyond overlooking the cases dealing with protestors, recently the Supreme Court in *Amit Sahni* v. *Commr of Police*, stated that protests can only take place in government-designated areas and that protestors do have right to occupy public places for protests as that could inconvenience others.[121]

This trend of the Supreme Court not guarding constitutional rights has been observed across the board. The Supreme Court denied bail, contrary to the accepted rules regarding issuing bails, to an analyst who posted a satirical tweet about a Hindu Temple.[122] During the hearings, the Chief Justice sarcastically commented that the best place for the accused would be in jail.[123] The Supreme Court has also denied bail to several activists who were convicted of Maoist conspiracies and instigating the Bhima Koregoan riots based on extremely insubstantial evidence and have allowed them to be imprisoned for over two years without a conviction.[124] It even refused to allow one of the imprisoned activists temporary release to seek treatment for COVID-19.[125] During the last few years, most free speech decisions have been those that forward the BJP agenda or are ones that it had no objection to.[126]

The Supreme Court's most jarring decision-making came in ways that did not receive as much scrutiny as they deserve. The case that perhaps might have the most severe concerns for India is the one concerning electoral bonds. Electoral bonds were special promissory instruments issued by the central government, which allowed individuals and corporations to make donations to

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118 'Supreme Court Refers UP's Appeal on Hoardings of Anti-CAA Protesters to Larger Bench' (*The Wire*, 12 March 2020) <https://thewire.in/law/supreme-court-up-caa-hoardings-larger-bench> accessed 24 September 2020.

119 ibid.

120 Supreme Court Refers UP's Appeal (n 118).

121 (2020) 10 SCC 439.

122 'No Relief from SC for Analyst Who Joked About Konark Temple' (*The Wire*, 4 October 2018) <https://thewire.in/law/sc-bail-plea-analyst-konark-temple> accessed 24 September 2020.

123 ibid.

124 Shah (n 15).

125 ibid.

126 Apurva Vishwanath, '10 Free Speech Cases this Year: In Most, No Relief from Supreme Court — Except when Centre did not Object' *The Indian Express* (22 August 2020).

political parties anonymously.[127] There is a fear that these bonds will lead to the influx of black money and allow corporations to make political donations without disclosing them.[128] Despite the law being passed in 2017, the Supreme Court heard a petition in March 2019, when most of the electoral bonds had already been procured. It has not issued a verdict on its legality to this date.[129]

Apart from the case of the electoral bonds, another case whose impact might be felt far beyond the case at hand was *K.S. Puttaswamy* v. *Union of India*, which concerned the Aadhar Act or the identity authentication bill. In this case, the Supreme Court allowed the BJP government to pass a legislation that concerned identity authentication as a Money Bill.[130] Money Bills related to the spending and receiving of money by the Union government are not required to go through the Upper House of the Parliament. Since the BJP government, at the start of its first term, did not have a majority in the Upper House, it passed the Aadhar Act as a Money Bill. The Supreme Court had held that the government could do so because a single section of the Act provided for the use of the Aadhar Number for availing benefits, subsidies, and services, which incurred expenses on the Consolidated Fund of India.[131] Thus, this judgment essentially allowed the government to pass an act which it could not have done if the normal legislative process mandated by the Constitution prevailed. Decisions such as this have tremendous potential of removing 'veto points' from the political system, resulting in abuse and the concentration of power.[132]

Admittedly, an overview of the Supreme Court today would be disingenuous without mentioning some of its positive decisions. Since the start of the BJP rule, the Supreme Court has struck down Section 377 of the Indian Penal Code, which criminalised homosexuality,[133] Section 497 of the Indian Penal Code, which criminalised adultery,[134] and Section 66A of the Information and Technology Act, which gave arbitrary powers to the authorities to police online speech.[135] Although otherwise a destabilising decision in many ways, the Supreme Court in *K.S. Puttaswamy* v. *Union of India* declared that despite no textual mention, 'the right to privacy' was protected under the Constitution.[136]

Additionally, in the previously described *Anuradha Bhasin* v. *Union of India*, the Supreme Court had decreed that 'internet access' is essential to both

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[127] Ashish Aryan, 'Explained: What are Electoral Bonds and Why is there a Controversy?' *Business Standard* (19 November 2019).
[128] ibid.
[129] Aryan, i.e., (n 127).
[130] *Puttaswamy* (n 41).
[131] ibid.
[132] Cf George Tsebelis, *Veto Players How Political Institutions Work* (PUP 2002).
[133] *Navtej Singh Johar* v. *Union of India* (2018) 10 SCC 1.
[134] *Joseph Shine* v. *Union of India* (2019) 3 SCC 39 : AIR 2018 SC 4898.
[135] *Shreya Singhal* v. *Union of India* (2015) 5 SCC 1 : AIR 2015 SC 1523.
[136] *Puttaswamy* (n 41).

the Freedom of Speech and the Freedom of Trade under the Constitution.[137] The Supreme Court's midnight intervention in the Karnataka Assembly Case is also noteworthy. In this case, the Supreme Court stalled the Karnataka Governor's decision to invite the BJP-led coalition to form the government, despite the coalition not having the requisite majority and ordered a floor test immediately so that horse-trading could not be carried out.[138] This decision ultimately led to the Janata Dal United and INC coalition forming a government. The Supreme Court had comparably intervened in the Arunachal Pradesh Assembly crisis and overruled the decision of the Governor declaring President's rule in the state.[139] Akin to the Karnataka instance, the Supreme Court verdict led to an INC government in the state.

The Supreme Court's positive decisions highlight one crucial thing, i.e., though the government's 'tolerance interval' is small and the Supreme Court is not ready to go against the BJP government (and in some cases actively support it), it is ready to (1) declare rights to be protected by the Constitution without giving remedies in individual cases (2) decide significant albeit low stake matters which do not have significant opposition from the government (3) insist on adhering to democratic procedures at the state level. It is imperative to understand this 'tolerance interval' to be able to help guide how the operation of constitutionalism should be rethought in India.

IV. TAKING THE CONSTITUTION AWAY FROM THE SUPREME COURT

Even if the numerous challenges with SCCC were not enough, with the Supreme Court, visibly not protecting the Constitution and its promises, there was never a more pressing need in India for 'Taking the Constitution Away from the Supreme Court'. 'Taking the Constitution Away from the Supreme Court' would require the battles for the guarantees of the Indian Constitution to be predominantly fought outside the Supreme Court rather than within it. This is not an easy endeavour and would entail a lot from the numerous players in the system.

To start with, every concerned actor who helped usher in India's SCCC would now instead have to prioritise building efficient organisations[140] (including but not limited to civil society organisations)[141] and strengthening

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[137] *Anuradha Bhasin* (n 41).

[138] *G Parmeshwara* v. *Union of India* (2018) 16 SCC 46.

[139] *Nabam Rebia* v. *Speaker, Arunachal Pradesh Legislative Assembly* (2017) 13 SCC 326.

[140] By organisation, this article refers to the plain dictionary meaning of the word, i.e., "an organised body of people with a particular purpose"; See, Organisation, Oxford English Dictionary (OUP 2020).

[141] This is because it is not only civil society and non-profit organisations that can help realise the promise of constitutions. Organisations such as religious groups, community groups,

existing ones. In the 1800s, Alexis de Tocqueville wrote about how organisations were central to the American republic's initial success.[142] A recent cross-country empirical analysis by Adam Chilton and Mila Versteeg substantiated Tocqueville's observations in the comparative context and showed how the promise of Constitutions is realised when dedicated organisations fight for rights and freedoms.[143]

Constitutions can promise a lot, but without organisations to push for their attainment, these promises are reduced to mere words on paper. Only when a polity has efficient organisations does it see improved governance, democracy, and fundamental freedoms.[144] As Charles Epp has highlighted, this is true even if a country has independent courts that can give favourable constitutional decisions.[145] In India, there is no shortage of organisations (particularly civil society organisations),[146] but most of these organisations are functionally weak and require work to be done on them.[147]

The *raison d'etre* why the starting point for 'Taking the Constitution Away from the Supreme Court' is developing and strengthening organisational machinery, is because as Adam Chilton and Mila Versteeg contend - organisations help overcome problems of coordination and collective action.[148] The coordination problem can manifest in two ways. *Firstly*, when citizens are unsure about what the government owes to them in a constitutional regime or what transgressions by the government are impermissible per the Constitution. *Secondly*, when citizens are unsure and divided about what strategies they need to pursue to actualise the promises of the Constitution.

In the 21st century, governments frame anti-democratic actions under the guise of law or justify them as essential for the greater good or to protect some

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indigenous groups, trade unions, industrial associations, political parties, interest groups, etc., could also be instrumental in enforcing the promises of the Constitution especially when it comes to forwarding their own individual constitutional rights.

142 Alexis de Tocqueville, *Democracy in America* (first published 1840, 2nd edn, University of Chicago Press 2002) 114.

143 Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter* (OUP 2020) 25-58 (while Chilton and Versteeg's global study is about the effectiveness of constitutional rights – the one factor that they show matters to the realisation of rights is the presence of dedicated organisations).

144 *See*, Larry Diamond, 'Rethinking civil society: toward democratic consolidation' (1994) 5 Journal of Democracy 4, 4-18; *See also*, Emile Durkheim, *Professional Ethics and Civic Morals* (Routledge 1992) 96; *See also*, Ernest Gellner, *Conditions of Liberty: Civil Society and its Rivals* (Penguin Books 1994) 5.

145 *See*, Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998) 3.

146 *See*, Rob Jenkins, 'Non-Governmental Organizations in Jayal and Mehta' (n 61) 424-440.

147 *See*, Pratap Bhanu Mehta, 'A New Bully Pulpit' *The Indian Express* (4 October 2014); *See also*, PKB Nayar, 'Civil Society, State and Democracy: Lessons for India' (2001) 50(2) Sociological Bulletin 192, 216.

148 *See*, Chilton and Versteeg (n 143) 30-34.

other right.[149] They also derelict their duties using propaganda to divert attention from problems or diminishing their magnitude.[150] They employ courts to give their actions the facade of judicial legitimacy.[151] These strategies are way too familiar in present-day India. In such situations, citizens might doubt the constitutional permissibility of acts of commission or omissions by the government. When coordination problems exist, it becomes extremely easy for the government to dismiss complaints and criticism regarding its policies and actions.

Dedicated organisations can help overcome the coordination challenge by persuading citizens that specific actions are constitutionally impermissible irrespective of what the government or the courts are saying.[152] In other cases, they could persuade the populace that the Constitution would demand a particular behaviour on the government's part. In a global south country with a weak constitutional culture such as India, organisations can also assist in framing issues in ways that can capture the collective imagination of the populace, as opposed to a handful of elites.[153]

Beyond the coordination problem, many instances of compelling governments to adhere to or implement the constitution are only effective when a critical mass of citizens is applying pressure on the government.[154] This is the gist of the collective action problem.[155] Small movements are rarely able to make governments change their ways.[156] Governments can easily suppress small movements and even label them as 'extremists' or, in Indian terms, as 'anti-nationals'.[157] The large crowds' making noise forces the government to rethink their moves or pressure them to undertake actions since the costs of suppressing them are incredibly high.

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149 Ozan Varol, 'Stealth Authoritarianism' (2015) 100 Iowa Law Review 1673, 1685.

150 Jason Stanley, *How Fascism Works: The Politics of Us and Them* (Penguin Random House 2018) 51-74.

151 *See*, David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 UC Davis Law Review 1313.

152 Chilton and Versteeg (n 143) 35.

153 Verta Taylor and Nella Van Dyke, 'Get up, Stand Up: Tactical Repertoires of Social Movements' in David A Snow, Sarah Soule, and Hanspeter Kriesi (eds), *The Blackwell Companion to Social Movements* (Blackwell 2004) 262-293 (showing how the framing of issues matter in the success of movements).

154 *See*, Erica Chenoweth and Maria Stephan, 'Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict' (2011) 33(1) International Security 8; *See also*, William Gamson, *The Strategy of Social Protest* (Doorsey Press 1975); *See also*, Frances Fox Piven and Richard Cloward, *Poor People's Movements: Why they Succeed, How they Fail* (Vintage Books 1979); *See also*, David Dellinger, *More Power Than We Know: The People's Movement Toward Democracy* (Anchor Press 1975).

155 Chilton and Versteeg (n 143) 8.

156 Chenoweth and Stephan (n 154) 39-42.

157 ibid.

Nevertheless, getting people to mobilise and act collectively is not easy. Citizens participation is influenced by their beliefs about the involvement of others', and they will turn out if they can be assured that they will not be alone.[158] This is where organisations can come into the picture and ensure large crowds by assuring citizens that others will join them.[159] To do this, certain organisations can even draw upon their member bases.

Because of coordination and collective action problems, SCCC appeared as an attractive tool in India. PIL was an uncomplicated route for a few dedicated individuals to take it upon themselves to try and achieve change. This did not require any considerable machinery, coordination, or collective action. Yet, as was demonstrated in the previous parts, SCCC was not an optimal mechanism to effectuate the constitution. Likewise, the chances of attaining progressive outcomes at the present-day Supreme Court are so scant that SCCC might frequently result in unwanted decisions. This could push the fight for a particular issue a few years behind due to the legitimacy that comes with judicial sanctification.

Building efficient organisations and strengthening existing ones is just one step in 'Taking the Constitution Away from the Supreme Court'. There is still the question of the strategies that would be needed to be undertaken by organisations. As organisations in India work towards 'Taking the Constitution Away from the Supreme Court', one of the most important tactics they will have to adopt is interacting ardently and building connections with different government levels.

At the end of the day, it is the government that must enforce or abide by the Constitution. When the government is mooting proposals, organisations with ties to the government can indicate to the government how their initiatives are not in compliance with the Constitution.[160] This provides the government with the knowledge that there might be repercussions for its actions and allows it to change track.[161] Adam Chilton and Mila Versteeg found this to be a far more effective strategy than litigation to ensure that the government does not violate the Constitution.[162] Petitioning the government could also facilitate them taking immediate action and passing certain laws needed in a country and required by the Constitution.

Organisations in India should not be wary about the latter, thinking that the government is beyond redemption. Even in non-democratic regimes,

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[158] *See*, Davide Cantoni and others, 'Protests as Strategic Games: Experimental Evidence from Hong Kong's Anti-Authoritarian Movement' (2019) 134(2) Quarterly Journal of Economics 1021.

[159] Chilton and Versteeg (n 143) 35.

[160] ibid 40.

[161] Chilton and Versteeg (n 143) 40.

[162] Chilton and Versteeg (n 143) 40.

organisations have found success in convincing the government to enforce the Constitution.[163] In India itself, it resulted from tireless engagement with the government by a handful of grassroots organisations that legislations such as the Right to Education Act and the Right to Information Act were passed.[164]

At times engaging directly with the government might not be enough. As was mentioned earlier, some of the most efficient tools for convincing the government to comply with the Constitution require collective action. Erica Chenoweth and Maria Stephan have shown how civil resistance in boycotts, strikes, protests, and organised non-cooperation between 1990-2006 achieved 53% success across the globe in challenging entrenched power exacting political concessions.[165] It does not require any empirical exploration to know that this number is undoubtedly greater than what SCCC has achieved in India. Tools of civil resistance also become very vital in the shaky footing which India finds itself in.[166] Organised civil resistance helped African countries like Senegal and Burkina Faso ensure that their dictators do not hold power indefinitely, which has been a recurring problem in the African continent.[167]

India's own history should give a lot to be optimistic about. Unlike some countries, India does not have the challenge of getting the populace to come out on the streets. After all, India had obtained freedom because of a massive civil resistance movement. Even post-Independence, there have been several instances of large-scale civil resistance movements and in particular, those bearing fruits. In modern times, two of the biggest mobilisations in the wake of the Delhi Rape in 2012 and the India Against Corruption Movement in 2011-2012 led to the passage of legislations like the Sexual Harassment at the Workplace Act, The Criminal Law (Amendment) Act, and the Lokpal Act. The recent 2020 farmer protests organised by different agrarian unions[168] is another example that shows not only how Indians are ready to mobilise to fight for their rights but also the role organisations can play in 'Taking the Constitution

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[163] *See example*, Qianfan Zhang, 'A Constitution Without Constitutionalism? The Paths of Constitutional Development in China' (2010) 8 International Journal Of Constitutional Law 950, 960– 68.

[164] *See*, Esha Sen Madhavan, *Revisiting the Making of India's Right to Information Act: The Continuing Relevance of a Consultative and Collaborative Process of Law-Making* (Harvard Berkman Centre 2016) 1; *See also*, Ravi S.K., 'Right to Education at Cross-Roads in India' (*Action Aid*, 12 January 2017) <https://www.actionaidindia.org/right-to-education-at-cross-roads-in-india/> accessed 24 September 2020.

[165] Chenoweth and Stephan (n 154) 8.

[166] Cf Kurt Schock, *Unarmed Insurrections: People Power Movements in Nondemocracies* (University of Minnesota Press 2005).

[167] Janette Yarwood, 'The Struggle Over Terms Limits in Africa: The Power of Protest' (2016) 27(3) Journal of Democracy 51, 51-60.

[168] Varinder Bhatia, 'Explained: Who are the Punjab, Haryana Farmers Protesting at Delhi's Borders?' *The Indian Express* (10 December 2020).

Away from the Court' and how the government finds it hard to ignore pressure imposed by numbers.[169]

Sceptics might point to the lack of success of the early 2020 anti-CAA protests and the corresponding crackdown by the BJP government as the problem with civil resistance movements. However, if anything, these protests are to be looked at as a silver lining. The anti-CAA protests were disorganised, spontaneous and lacked support from structured civil society. Despite these hurdles, these protests were able to garner tremendous numbers.[170] It was also perhaps the first time the Constitution managed to catch the public imagination in India, with protest sites seeing collective readings of the Preamble to the Constitution.[171] The BJP government could clamp down on these protests because they suffered from a coordination problem and lack of organisation. An interruption by the unanticipated COVID-19 pandemic also turned out to be a blessing in disguise for the government as many protests were cancelled, and others saw reduced crowds because of the pandemic induced lockdown.[172] Lack of coordination and collective action is precisely why the BJP government has been able to imprison activists and censure them. If movements have the organisation and numbers, it becomes impossible for the government to suppress them.[173]

When it comes to mobilising the citizenry, a valuable instrument in the activist toolbox is social media. In the 21st century, social media has turned out to be a potent instrument to gain support. Social media was integral to ensuring that people initially get involved in causes.[174] Important movements like the Arab Spring, #Metoo, and Black Lives Matter all initially used social media to gain support and mobilise citizens. A word of caution is mandated here. Like SCCC, organisations need to be circumspect about being over-reliant on social media and should not get carried away because its use makes things easier. Movements solely restricted to social media face coordination hurdles and lack the requisite strategic decision-making and planning

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169 Tribune News Service, 'Modi Government is Scared, says Farmers' Alliance Samyukt Kisan Morcha' *The Tribune* (25 November 2020).

170 Mody (n 114).

171 Ganeshdatta Podar, 'The Importance of Spontaneous Protest in India' (*Center For Advanced Study of India at University of Pennsylvania*, 12 October 2020) <https://casi.sas.upenn.edu/iit/ganeshdattapoddar> accessed 12 October 2020.

172 *See*, 'Covid-19 Outbreak: Anti-CAA 'Mumbai Bagh' Protest Put on Hold' *The Economic Times* (23 March 2020); *See also*, ANI, ' Coronavirus Outbreak: Number Of Protesters Dwindles At Shaheen Bagh After Government's Decision To Lockdown Delhi' (*Firstpost*, 24 March 2020) <https://www.firstpost.com/health/coronavirus-outbreak-number-of-protesters-dwindles-at-shaheen-bagh-after-governments-decision-to-lockdown-delhi-8177971.html> accessed 24 September 2020.

173 Chenoweth and Stephan (n 154) 42.

174 Carla Soares and Luiz Joia, 'The Influence of Social Media on Social Movements: An Exploratory Conceptual Model' (2015) 7th International Conference on Electronic Participation 27, 27-38.

capabilities.[175] Such movements can also be limited in their reach and might have trouble penetrating all levels of society, especially in a society like India, where socio-economic realities restrict internet access.[176] Because of these weaknesses, movements restricted to social media can fail to have the requisite impact, and organisations must rely on it with caution.

Apart from the aforesaid, there are several other tools available to organisations. Organisations can attempt to work with the political opposition to turn voters against an incumbent who is diluting the constitution.[177] After all, it is in the interest of organisations to facilitate the rotation of power. Democracy in the post-world war era is understood as a form of government that permits the rotation of power.[178] For democracy to thrive, it requires incumbents to lose elections from time to time.[179] When re-election is guaranteed, ruling parties do not see any incentives to respond to public opinions, let alone respond to opposition voices.[180]

In times like today, when the opposition is severely broken in India, organisations could help opposition parties sustain. Knowing that rotation of power is imperative for their interests, organisations could help opposition parties understand what they would need to do to garner different groups' support.[181] When convinced that opposition parties would support their causes, organisations with vast grassroots networks could help opposition parties attain the much-needed support essential for them to win against the BJP government.[182] The BJP's growth with the aid of grassroots organisations like the Vishwa Hindu Parishad and the Rashtriya Swayamsevak Sangh is strong evidence of how organisations can help opposition parties even within dominant party systems.

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[175] *See*, Zeynep Tufekci, *Twitter and Tear Gas: The Power and Fragility of Networked Protest* (YUP 2017).

[176] *See*, Hyesun Hwang and Kee-Ok Kim, 'Social Media as A Tool for Social Movements: The Effect of Social Media Use and Social Capital on Intention to Participate in Social Movements' (2015) 39 International Journal of Consumer Studies 478, 478-488.

[177] Chilton and Versteeg (n 143) 41.

[178] Steven Levitsky and Lucan Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War* (CUP 2010) 5-6.

[179] Adam Przeworski and others, *Democracy and Development: Political Institutions and Well-Being in the World, 1950–1990* (CUP 2000) 18-27.

[180] Hermann Giliomee and Charles Simkins, 'The Dominant Party Regimes of South Africa, Mexico, Taiwan and Malaysia: A Comparative Assessment' in Hermann Giliomee and Charles Simkins (eds), *The Awkward Embrace: One-Party Domination and Democracy* (Taylor & Francis 1999) 1-46.

[181] Hanspeter Kriesi, 'Party Systems, Electoral Systems, and Social Movements' in Donatella Della Porta and Mario Diani (eds), *The Oxford Handbook of Social Movements* (OUP 2015) 676.

[182] Swen Hutter, Hanspeter Kriesi, and Jasmine Lorenzini, 'Social Movements in Interaction with Political Parties' in David Snow and others, *The Wiley Blackwell Companion to Social Movements* (Wiley & Sons 2019) 328.

Lastly, although SCCC is not desirable as the primary tactic, the Supreme Court still has a role to play depending on the 'tolerance interval' in a given time and space. The Supreme Court could facilitate solving coordination problems and give conformity to specific issues as being unconstitutional or required by the constitution.[183] As was seen earlier, the Supreme Court has been ready to do this, even in today's challenging political environment. Moreover, when it comes to collective action, the Supreme Court can also be beneficial. Supreme Court decisions can help translate mere claims to constitutional rights.[184] With a constitutional right to mobilise around, it becomes easy for organisations to get citizens to rally for a particular cause.[185] In other instances, such as in the cases concerning the street vendors in metropolitan areas, organisations strategically approached the Supreme Court to enable them to buy time while addressing the coordination and collective action problems.[186]

Besides, it is not always that the Supreme Court is the incorrect forum to attain a specific goal. It might be possible that Supreme Court litigation could help attain certain goals. For example, some issues (particularly when they are not misaligned with governmental or majoritarian preferences) might need comparatively lesser post-litigation activism and lobbying to come into effect. A favourable decision could go a long way in forwarding those issues. The Supreme Court's decisions in the cases decriminalising adultery and homosexuality are possible examples of the same. While the underlying causes with respect to these issues need way more than merely getting laws struck off the books, the Supreme Court could still be a viable option for organisations to pursue to initially get the respective laws repealed.

Nevertheless, organisations need to realise that approaching the Supreme Court prematurely and without a minimal level of support can, occasionally, hurt their cause. Only a couple of years before the Supreme Court in Navtej Singh *Johar* v. *Union of India* decriminalised homosexuality, it had upheld the constitutional validity of Section 377 of the Indian Penal Code.[187] It took the LGBTQ+ movement a couple of years to garner support for their cause from several political parties as well as from within the ruling BJP government[188]

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[183] Daniel Sutter, 'Enforcing Constitutional Constraints' (1997) 8 Constitutional Political Economy 139–50; *See also*, Georg Vanberg, 'Substance Versus Procedure: Constitutional Enforcement and Constitutional Choice' (2011) 80 Journal of Economic Behaviour & Organization 309–18; *See also*, Sonia Mittal and Barry Weingast, Constitutional Stability and the Deferential Court' (2010) 13(2) Journal of Constitutional Law 337-352.

[184] Michael McCann, 'Litigation and Legal Mobilization', in Whittington and Kelemen (n 27) 523, 529– 30.

[185] ibid.

[186] Karthik Rao-Cavale, 'The Art of Buying Time Street Vendor Politics and Legal Mobilization in Metropolitan India' in Krishnaswamy (n 4) 151-183.

[187] *Suresh Kumar Koushal* v. *NAZ Foundation* (2014) 1 SCC 1.

[188] Jyoti Malhotra, 'How Arun Jaitley Persuaded Narendra Modi to Soften his Stand on Homosexuality in India' (*The Print*, 13 July 2018) <https://theprint.in/opinion/modi-monitor/

before they could re-approach the Supreme Court and attain a favourable outcome.

Likewise, organisations on achieving satisfactory decisions should not think that the issue is settled and cease labouring further.[189]. Organisations need to remember that even if there are independent courts that can give favourable decisions, they still have much work to do to ensure the implementation of the decisions.[190] This applies even in instances when organisations have succeeded in having the government pass favourable legislation. The successful implementation of legislations will often require the continual application of pressure on the government.

V. EPILOGUE

In suggesting 'Taking the Constitution Away from the Supreme Court,' this article might have raised more questions than it potentially answers. How long should the project of 'Taking the Constitution Away from the Supreme Court' be? How should the Supreme Court see its own role in a post-SCCC world? What is the role of high courts in this new regime? How can the populace be convinced that certain actions are constitutionally impermeable in a country with a weak constitutional culture like India? How can the constitutional culture be improved in India? Which issues in India need the most prioritisation? What are the best strategies to adopt for which issue? How much does the 'Constitution' as a document matter in a post-SCCC world? How to tackle actors who would resist an alteration to SCCC? Would the Supreme Court need redesigning to better accommodate a post-SCCC world?

Further, considering the important part organisations must play in this proposed regime, the shortcomings of organisations is an unavoidable conversation to be had.[191] In the SCCC regime, the flaws of organisations got concealed because the Supreme Court occupied such a prominent place. Additionally, approaching the Supreme Court did not require full-fledged organisations, and often a handful of lawyers or activists were enough. Organisations in India are also middle class dominated and often do not involve themselves in the problems of the average Indian.[192]

On the other hand, many organisations are governed by narrow ethnic, regional, communal, and linguistic considerations, which also affect their

narendra-modi-can-pat-himself-on-the-back-for-taking-the-middle-path-on-section-377/82620/> accessed 24 September 2020.

189 Landau (n 6) 1546-47.

190 *See*, Epp (n 145) 3-5.

191 Cf Venkat Pulla, Neelmani Jaysawal and Sudeshna Saha, 'Challenges and Dilemmas of Civil Society Movements in India' (2019) 13 Asian Social Work & Policy Review 169.

192 John Hariss, 'Antinomies of Empowerment: Observations on Civil Society, Politics and Urban Governance in India' (2007) 42(26) Economic and Political Weekly 2716, 2716-2724.

effectiveness.[193] Organisations in a global south society with as many problems as India also jump from issue to issue and infrequently take things over the finish line.[194] Even when organisations manage small gains, they consider issues as won and move on without pursuing them to the enforcement stage. These limited outrage cycles make sustained advocacy extremely difficult.[195] The eventual success of 'Taking the Constitution Away from the Supreme Court' would depend on organisations keeping aside their own narrow agendas. It would also require them to engage in effective and sustained dialogues with not only the government but also with each other as well as stakeholders, such as the opposition and the public.[196]

Nonetheless, in the choice between SCCC and 'Taking the Constitution Away from the Supreme Court,' there are few rational reasons to stick with the former. Many problems with the organisational system in India are amplified on a far larger scale with SCCC. It is simply not prudent that the Supreme Court is the sole battleground for the Constitution. Moreover, with the full-frontal assaults that the BJP government is launching on the Indian Constitution, coupled with the Supreme Court's present decision-making, new tactics are necessary sooner than later. A few lawyers and activists litigating in the Supreme Court is a losing strategy.[197] Additionally, the longer SCCC is persisted with, it will only delay realising the Constitution's entire range of promises.[198]

Actors who were instrumental in India's SCCC must show faith in the Indian populace's ability to rise. They would also have to have faith in their own capacity to get the Indian population to join the fight for preserving the Indian Constitution's soul. Although realising India's transformative Constitution is a long-term vision that might require work and time, present threats to the Indian Constitution can and should be addressed outside the Supreme Court's courtrooms. If it were possible in countries with grimmer ground realities than India, it is surely possible here.[199] Perhaps until the organisational machinery can be fully nurtured, the extant organisational system would need to 'step up their game' and give its 300%.

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193 Nayar (n 147) 192, 198.

194 Nitin Pai, 'Bihar Encephalitis to Lynching's to #MeToo – Why Indians Don't Take Issues to the Finish Line' (*The Print*, 25 June 2019) <https://theprint.in/opinion/bihar-encephalitis-to-lynchings-to-metoo-why-indians-dont-take-issues-to-the-finish-line/253942/> accessed 12 October 2020.

195 ibid.

196 Pulla (n 191) 171.

197 *See example*, Pratap Bhanu Mehta, 'The Morning After CAB: It Will Be a Mistake to Rely just on Supreme Court' (*The Print*, 12 December 2019) <https://indianexpress.com/article/opinion/columns/the-morning-after-citizenship-amendment-bill-6162497/> accessed 12 October 2020.

198 Siri Gloppen, 'Legal Enforcement of Social Rights: Enabling Conditions and Impact Assessment' (2009) 2 Erasmus Law Review 465, 473.

199 Yarwood (n 167) 51-60.

For the time being, this article will conclude with the hope that the future of India's Constitution is not left in the sole hands of the Supreme Court. The experiment with SCCC, if not a failed one, has not been the most successful one either. The fight to achieve the ultimate promises of the Indian Constitution is a long one and one that would need far more to be done outside the Supreme Court than within it.