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Volume XIV **March 2020**

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PRINCIPAL'S PAGE AND ACKNOWLEDGEMENT

It gives me immense pleasure to present the 14th issue of ILS Law Review. It contains the conference proceedings of the **Professor S.P. Sathe 14th Public Memorial Lecture, delivered by Shri Jasti Chelameswar, Retired Justice, Supreme Court of India and 14th International Conference on Contemporary Trends in Comparative Public Law** under the ***"14thREMEMBERING S. P SATHE" event of 2020.*** **We also intend to share the video recordings of the Conference on You Tube within due course of time.**

This volume would not have been a reality without the perspiration and toil of a very dedicated team of sub-editors Ms. Swatee Yogessh and Ms. Rajalaxmi Joshi. They ensured that every article is properly screened right from plagiarism check to taking care of citations and formatting and coordinating the peer review process. On every front, they made valuable contributions. I place on record appreciation to Ms. Divya Mittal for her assistance in the editorial and review process. I would also like to place on record special appreciation to the team of student researchers Varad Kolhe and Nihar Chitre for rendering the assistance during the compilation of the articles. I am also immensely grateful to Ms. Vaijayanti Joshi, Director-Academic and Administration, ILS Law College and Hon. Secretary, Indian Law Society, to be the part of the review process of the papers along with me. Finally let me thank and congratulate all the authors without whose contributions this volume could not have been published. I also thank our librarian Mr. Madhukar Togam and all other staff members of the College for providing all the necessary assistance in preparation of this volume. Thanks are also due to our Shree J Printers.

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Associate Professor,
Additional Charge, Principal,
ILS Law College, Pune

EDITORIAL

The scholarship of Professor S.P. Sathe is unparalleled in many ways. Firstly, he is a scholar of unmatched depth and yet has been able to express himself and speak to his mind in a language which is conversant with and comfortable to public at large. This is testified by his numerous writings and publications, including articles published in daily newspapers – Marathi and English. Through these articles, he was able to interact with the public at large on almost every complexity of the Constitution of India in particular and Public Law in general. Secondly, unlike many other scholars who generally like to engage with law in silo, Professor Sathe had the extra-ordinary proficiency and iconoclasm to look at law both as an independent domain as well as in terms of its intersection with other social sciences. Thirdly, he openly advocated for preferring simple and accessible language to convey his complex thoughts over legal jargons and the same had its impact resulting in recognition to his scholarship worldwide with varied audiences. So far as legal theory is concerned, he held the profound belief that law cannot be imposed as a supra structure from the above, i.e. top down conception. Rather he advocated the bottom up conception of law which is attained upon deliberative and democratic interaction. Whether Indian Constitution is a top down instrument, or it is evolved by following bottom up process, has been a question with which even Prof. Sathe appears to have grappled with, both implicitly and explicitly. Reading in between the lines of his scholarship, I can vouchsafe that he did not regard Indian Constitutional Law as a permanent or a focused instrument with static meaning. In one of his profound essays, he had this to say :[1]

> "A positivist interpretation is vulnerable to changes in the text. An interpretation based on the structure or spirit of the Constitution cannot be as easily dislodged. Therefore, while the *Golaknath* case's majority's interpretation was effectively nullified by the twenty-fourth amendment, no way could be found of circumventing the interpretation adopted by the majority in the *Kesavanand* case. Although this was also based on the words in art 368 that 'the Constitution shall stand amended', it was invulnerable to nullification by a subsequent

[1] See S.P. Sathe, India : From Positivism to Structuralism in Jeffrey Goldsworthy (ed.) *Interpreting Constitutions*, pp.246

> constitutional amendment, because the words 'the Constitution' were construed as referring no merely to a document called the Constitution, but to a basic structure of checks and balances intended to sustain certain enduring values essential to a liberal, constitutional democracy."

He further observed :[2]

> "The positivist, black letter law tradition held that judges should be completely insulated from politics, and that courts should not be concerned with policy. Structuralist interpretation requires courts to deal with politics more openly. Indian judges now have a substantial involvement in matters of social policy, as they have acknowledged in a number of cases. An example is judicial review of the President's power to dismiss state governments under article 356."

Comparative public law / constitutional law now has become a very topical domain of law to engage with and significant contributions have been made by different scholars around the world. Nevertheless, the question remains whether the canvass of comparative public law is representative of the scholarship around the world. Does the comparative public law take cognizance of developments outside Europe and America or is it still Euro-American centric. Many third world scholars Prof. Upendra Baxi, Prof. Yash Ghai etc. are of the categorical opinion that even now as the world enters into third millennium, the hegemony of Euro-American centrism on public law persists, and they have continuously contested and problematized about the assumptions of Euro-American scholars about public law.

In fact, there are certain emerging scholars like Prof. M.P. Singh, Late Dr. Shirish Deshpande, Prof. Upendra Baxi, Prof. Kumar Singham, Prof. Arun Thiruvengadam[3], who now take a position that third world constitutionalism has to be taken earnestly and in fact it has given a southern turn to the comparative public law domain. They argue that southern constitutionalism has made original contribution in the evolution of and in

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2 Id at pp.261

3 See generally William Twining (ed), *Human Rights, Southern Voices: Francis Deng, Abdullahi An-Na'im, YashGhai and UpendraBaxi* (CUP 2009); Daniel Bonilla Maldonado (ed), *Constitutionalism of The Global South: The Activist Tribunals of India, South Africa, and Colombia* (OUP 2013); Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2017) 65 (3) American Journal of Comparative Law 527

refining the shape of the comparative public law. It is not possible in this short editorial to take an in-depth survey of the aforementioned scholarship. However, suffice it to allude to the observations of the noted scholars Philipp Dann, Michael Riegner, and Maxim Bönnemannin their recently published treatise[4]where they have tried to map the contribution of the southern constitutionalism on overall domain of comparative public law. It is worthwhile to quote in full the first para of the introduction to this book.

"Comparative constitutional law is not what it used to be. As a field of study, it has globalized geographically, diversified methodologically, and pluralized epistemologically. Constitutional orders in Asia, Africa, and Latin America have expanded the Euro-American horizon of the discipline. Critical comparatists and social scientists have provided new methodological tools to study constitutional orders across the North–South divide. 'Southern voices' are more present in constitutional conversations, and the 'Global South' is increasingly invoked in comparative debates."[5]

They lament that while the global south represents 'most of the world' in terms of population and constitutions, it remains conspicuously absent from global constitutional debates, teaching materials, publications, and conferences. It is interesting that despite wealth of scholarship depicting and narrating the ideas of southern constitutionalism, we have yet to see anything equivalent to 'Third World Approaches to International Law' in the domain of Comparative Law. Can it not be argued that evolution of socio-economic rights or invocation of doctrines like constitutional morality and transformative constitutionalism are nothing but the approaches to the third world comparative public law? In this connection, again reference may be made to the work of Prof. Philip Dann*etal* :

They present three-fold argument for articulation of southern turn to global constitutional law.

Firstly, they observe,

'Global South' has already become a term used productively in neighbouring disciplines and legal scholarship, even though in very different and sometimes under-theorized ways. From this follows the question of how

4 The Global South and Comparative Constitutional Law, OUP 2020

5 Id at pp.1

we could make sense of the notion in comparative constitutional law. Secondly, the 'Global South' is a useful concept to capture and understand a distinctive constitutional experience. This experience is shaped by the *distinctive context* that emerges from the history of colonialism and the peripheral position of the South in the geopolitical system, placing Southern constitutionalism in a dialectical relationship with its Northern counterpart.[6] According to them – Three *distinctive themes* –"characterize Southern constitutionalism: constitutionalism as an experience of socio-economic transformation; constitutionalism as a site of struggle about political organization; and constitutionalism as denial of, and access to, justice."[7]

Highlighting the south-north entanglement, they present their third argument –

"taking the Global South seriously has implications for comparative constitutional scholarship as a whole. The Southern turn implies an approach to *doing* comparative law that improves our understanding of constitutional law in both North and South. Thinking about and with the 'Global South' denotes a specific epistemic, methodological, and institutional sensibility that reinforces the ongoing move towards more epistemic reflexivity, methodological pluralism, and institutional diversification in comparative constitutional scholarship generally. In that sense, the Southern turn is a double turn: after the pivot to the South, it turns back to the North and to the world as a whole."[8]

In fact, to be non-cognizant to the aforementioned turn is to advocate and perpetuate the epistemicide by overlooking anything but Euro-American and by exaggerating everything but southern and third world constitutionalism.

Be it, late Chief Justice of India Justice Y.V. Chandrachud, late Justice P.N. Bhagwati or be it the son of Kerala late Justice K.K. Mathew, all of them have cautioned against over indulgence with American exceptionalism. All of them have repeatedly advocated for evolution of new tools of jurisprudence to deal with post-colonial situation of our country. It is therefore not surprising to see the robust response of the Supreme Court to

[6]Id no. pp.2
[7]*Ibid*
[8]*Ibid*

the phenomenon of government lawlessness, misuse of / abuse of amending power by the Parliament, broadening of *locus standi* for enforcement of fundamental rights by poor and marginalized, etc. (list of issues can be multiplied).

We had almost a replica of Justice Cardozo, Lord Denning in Justice H.R. Khanna, who in his fearless tone could show the mirror of rule of law to the then iron lady of India Mrs. Indira Gandhi through his powerful dissent.[9] In other words in bits and pieces, and through episodes both scholars and judges in India are continuously enduring the new canons of jurisprudence to engage with post-colonial scenario. However, the need of the hour is to have a continuous and cohesive strategy. To my mind, southern turn to constitutionalism is one such canon with which illuminating scholars and jurists like Justice D.Y. Chandrachud, Prof. Upendra Baxi, Prof. Pratap Bhanu Mehta are now increasingly engaging to contest and problematize the anglo-saxon constitutionalism. When Justice D.Y. Chandrachud very memorably observed during one of his eloquent speeches, delivered during the valedictory session of **It can be done! : International Summit on legal professionals with disabilities** organized by ILS Law College,[10] that we have to combat the disabilities in our minds to enable the world. What he was professing other than deviance from the conventionalist ableism and embracing of enabling environment! In fact, by characterizing the law to be multi-sourced and by increasingly questioning the statist focus on law, the third world scholars are making rich contribution in the development of southern constitutionalism. Having thus briefly embarked upon the problemitization of common law approach to constitutionalism and having advocated for indulgence in southern constitutionalism, let me now briefly deal with the themes of the articles appearing in this volume.

The Volume is divided into two parts; first part is the transcript of the Professor S.P. Sathe 14th Public Memorial Lecture, delivered by Shri Jasti Chelameswar, Retired Justice, Supreme Court of India; and the second part is the articles. The title of Justice Chelameswar's lecture is 'Fundamental Principles of the Constitution in light of R (Miller) v. The Prime Minister and Cherry v. Advocate General Scotland (Miller II). He divided the lecture in

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9 ADM Jabalpur vs Shivkant Shukla (1976) 2 SCC 521

10 Video of the is available at https://youtu.be/rApG6MQiWhI (last visited 28 Dec. 2020)

five parts. The first part is a brief introductory remark about the College and Professor S.P. Sathe. In the second part, Hon'ble Justice Chelameswar briefly delves into the law laid down by the UK Supreme Court in R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland. In the third part, Hon'ble Justice Chelameswar draws valuable insight from this momentous pronouncement of UK Supreme Court for Indian Public Law. He stresses that without adherence to fundamental constitutionals, no democracy can survive. He emphasizes how states like India and US being entrenched with written constitution, have carved out explicit limitations on the exercise of powers by all the authorities and every organ of the state, and judiciary has also drawn limitations on these authorities and organs of the state invoking the 'doctrine of necessary implication'. He also highlights the fact that in UK, in absence of a written constitution and in the light of prevalence of doctrine of Parliamentary Supremacy, it is not easy to pinpoint the fundamental constitutionals. Nevertheless, drawing from the history, he argues that be it prerogative powers of crown or constitutional conventions, every constitutional fundamental has evolved itself in UK. He rules out the argument based on article 372 of the Indian Constitution that in India too, unwritten prerogative powers of the executive can be justified, as the said article preserves the existing law, and pre-constitutional law to the extent of its compatibility with the Constitution of India. According to him, the article has its typical context, and cannot be invoked for expansion of powers of any authority under the Constitution beyond its text, and even though we might observe certain conventions. The same are in conformity with the Constitution.

In the fourth part, stressing on fundamental constitutional principles, he laments against the erosion of these principles in India, and to demonstrate his claim, he sites two concrete examples – (a) creation of new Andhra High Court; and (b) creation of legislative councils in bifurcated states of Andhra Pradesh and Telangana. He argues that in creation of Andhra High Court, fundamental constitutional principle of determination of date of appointment has been violated. He concludes that sections 30 and 31 of the Andhra Pradesh Reorganization Act, 2014 are in violation of the Constitution, in the context of creation of high courts in both the states, i.e. Andhra Pradesh and Telangana. In respect of legislative councils in bifurcated states, his view is that the same is in violation of procedure laid down in articles 168 and 169.

In the concluding part of his lecture which may be characterized as constitutional theory, Justice Chelameswar argues that without observance of the fundamental norms of constitution and procedure laid down therein, celebration of Republic Day or Constitution Day is merely tokenism. In fact, he expresses his disappointment about newspapers and electronic media which, in his view, does not go far enough to safeguard constitutional norms and therefore he told the audience in his lecture that he has stopped reading newspaper and watching news. In his view, the constitutionalism in India has been evolved at a very high price of sacrifices by numerous freedom fighters and he specifically alludes to Jallianwala massacre. He argues that each authority owes itself to the Constitution and therefore is duty-bound to adhere scrupulously to its role and subject itself to accountability in light of principles of checks and balances and separation of powers. He advises the young students while concluding his talk, to avoid abstractions and engage with live controversies of Indian Public Law to nurture endurance of the Constitution of India.

In the second part of this volume, we directly deal with the global southern constitutionalism as we represent the global south. We have articles covering wide range of topics and divided the articles in eight different themes viz.

1. Critical Jurisprudence
2. Basic Structure Constitutionalism
3. Comparative Constitutionalism and Theory
4. Disability Rights, Judicial Activism and Feminist Constitutionalism
5. Sexuality Rights
6. Rights Constitutionalism
7. Fundamental Rights and Rule of law
8. Constitutional Morality

However, the themes cannot be and are not hermetically sealed and there is bound to be some overlap.

1. Critical Jurisprudence

In my article, I (Dr.Sanjay Jain) have problematized the monist, statist and ableist conception of law by advancing arguments based on disability

legal studies, and advocated evolution of disability inclusive theory, a theory which would not locate the differences in body and rather focus on social barriers. Rajlaxmi Joshi in her thought provoking piece, has extended the arguments advanced by me by using disableism as a looking glass to critique ableist legal regime of India. In support of her arguments, she has drawn from various Indian laws and has also exposed the ableist stance of judiciary. Mr. Rahul Bajaj in his piece advocates a case for deepening the alliance of intersectionality and disability. How disability operates in intersection with other forms of discrimination and oppression is his inquiry. Mr. Arvind Narain has taken forward the same approach i.e. questioning the monistic and verticalist notion of law, but from the perspective of Gandhian and Ambedkarite ideologies.

2. Basic Structure Constitutionalism

As a matter of fact, doctrine of basic structure is an addition by the global south in the vocabulary of western comparative public law. The notion of basic structure being originated in India,[11] though some jurists also trace it in Pakistani jurisprudence[12], has been engaged with by two prominent scholars and jurists Mr. Arvind Datar and Mr. Shrihari Aney (designated senior counsels) former supporting the doctrine and the latter exposing its weaknesses and making a strong case for having a relook at it.

3. Comparative Constitutionalism and Theory

Maithili Sane draws on the work of Prof. Fred Riggs to make a case for India being a prismatic society. By prismatic, she means a society governed by diverse factors like caste, gender, religion, region etc. and argues that courts cannot be unmindful of the same. Against this backdrop, she reviews the e-courts public policy in India. Mr. Mustafa Mubarak Pathan engages with a social menace of mob lynching and argues that mobocracy is proving a fatal threat to the sustenance of values of rule of law and democracy in India. He also takes a bird's-eye view of laws in other major jurisdictions combatting this degrading practice. Mr. Ronak Chhabria engages with yet

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[11] Supreme Court judges of India were motivated to adopt the notion of basic structure from the writings of German Professor Dietrich Conrad. See generally, A.G Noorani, Behind the 'basic structure' doctrine, https://frontline.thehindu.com/other/article30159673.ece(last visited 29 Dec. 2020).

[12] See the opinion of Mudholkar J. in Sajjan Singh v. State of Punjab, AIR 1965 Supreme Court 845 :: 1965 (1) SCR 933 cited at para 59

another controversial issue i.e. Recusal by judges. Should judges recuse from a particular case and if at all they should, in what circumstances? What connection recusal has with bias? All these questions are grappled with by Mr. Chhabria both from perspective of India and through the lens of international law. In a typical comparativist tradition, Mr. Vindhya Gupta and Ms. Sanya Agrawal delve into comparative analysis of citizenship and immigration laws in India, U.S.A., and Germany. Ms. Supriya Pathak following the same thread, goes into the analysis of cooperative federalism in India, U.S.A. and Australia. She introduces the fancy term 'The Marble Cake Federalism' and argues that it is synonymous to cooperative federalism.

4. Disability Rights, Judicial Activism and Feminist Constitutionalism

Prof. Domenico Amirante in his interesting paper looks at the southern turn to the constitutionalism in the light of epistemology of the south in general and the view of Prof. Sathe on judicial activism in particular. This epistemological study is very apt to illustrate the conversions of north and south constitutionalism. Ms. Gauri Pillai, in her article, is interested in exploring and reconfiguring the constitutional foundations of the reproductive rights in India. She prefers the route of articles 14 and 15 over article 21. She wants to explore the social foundation of these rights in the aforementioned articles. Prof. Vini Singh looks at the public law adjudication in Canada and India through the looking glass of feminism and makes a case for evolution of feminist constitutionalism.

5. Feminism and Sexuality Rights

Aishwarya Peshwe, in her essay, critiques the rights of sexual minority through the prism of transformative constitutionalism. She challenges the notion of heterosexuality by developing the broad conception of sexuality. Dr. Tejaswini Malegaonkar also deals with the same area by critiquing the institutional and structural discrimination against LGBTQ community. Ms. Siddhi Nigam in her crisp article engages with POCSO and goes into the social digression of sexual abuse of children. For the same, she employees socio-economic lens.

6. Rights Constitutionalism

Mr. Ashok Pandey, in his article, deals with right to privacy and going into the issue of data protection, makes a case for balancing of the same with

the principle of transparency. Ms. Madhura Sawant, in her paper, employees sociological approach to comprehend the notion of discrimination. Her approach is inter-disciplinary i.e. blend of sociology and law. Ms. Manasi Joglekar and Mr. Aniruddh Awalgaonkar go into the merits and demerits of recently enacted citizenship amendment act. Mr. Nihar Chitre deals with yet another controversial issue of the campaign finance in the light of recently introduced electoral bonds in India. Mr. Varad Kolhe makes a significant contribution in addressing virtually unattended area of an electoral law, contestation of elections by same candidate from multiple constituencies. He rightly questions whether the same is any longer feasible. The paper of Ms. Rashmi Raghavan and Ms. Neha Sagam is very interesting. They venture into the discussion of rethinking equality in the context of freedom of religion.

7. Fundamental Rights and Rule of law

Mr. Avirup Mandal and Mr. Vishwajeet Deshmukh in their paper critically analyse the asymmetrical citizenship regime in India and the exceptionalism in context of Assam. The concern voiced by them regarding working of foreign tribunal in Assam is thought provoking. Mr. Aayush Mishra deals with yet another evolving topic in the context of fundamental rights and good administration. He delve's into the doctrine of legitimate expectation. Mr. Deepak Kumar examines the prospect of application of fundamental rights in private sphere i.e. horizontal enforcement of fundamental rights. The notion of whistle blower is a newly introduced reform to curb the governmental lawlessness. Mr. Rajveer Gurudatta and Ms. Harshita Kakar go into the judicial response in protecting whistle blowers. Ms. Yamini Sharma and Ms. Janhavi Deokar take up yet another interesting topic, Right to Information and examine its contours in the context of Freedom of Information Act, 2005.

8. Constitutional Morality

Is there a relationship between constitutional morality and public morality and whether the invocation of the latter in an indiscriminate manner results in mob justice - is the theme of the paper of Mr. Aditya Rawat and Mr. Divyanshu Chaudhary. Ms. Varsha Deshpande then goes onto expand the same and examines its nuances in the context of deliberative democracy.

Professor S.P. Sathe 14th Public Memorial Lecture, 2020 by Shri Jasti Chelameswar, Retired Justice, Supreme Court of India.

It gives us immense pleasure to publish the 'Professor S.P. Sathe 14th Public Memorial Lecture, 2020 delivered by Shri Jasti Chelameswar, Retired Justice, Supreme Court of India, on 6th March, 2020. In order to give structure of an article to his lecture, we have edited the transcript of his lecture. Full version of his lecture has been made available on YouTube channel of the Centre for Public Law, ILS Law College. The title of Justice Chelameswar's lecture is 'Fundamental Principles of the Constitution in light of R (Miller) v. The Prime Minister and Cherry v. Advocate General Scotland (Miller II). He divided the lecture in five parts. The first part is a brief introductory remark about the College and Professor S.P. Sathe. In the second part, Hon'ble Justice Chelameswar briefly delves into the law laid down by the UK Supreme Court in R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland.[1] In the third part, Hon'ble Justice Chelameswar draws valuable insight from this momentous pronouncement of UK Supreme Court for Indian Public Law. He stresses that without adherence to fundamental constitutionals, no democracy can survive. He emphasizes how states like India and US being entrenched with written constitution, have carved out explicit limitations on the exercise of powers by all the authorities and every organ of the state, and judiciary has also drawn limitations on these authorities and organs of the state invoking the 'doctrine of necessary implication'. He also highlights the fact that in UK, in absence of a written constitution and in the light of prevalence of doctrine of Parliamentary Supremacy, it is not easy to pinpoint the fundamental constitutionals. Nevertheless, drawing from the history, he argues that be it prerogative powers of crown or constitutional conventions, every constitutional fundamental has evolved itself in UK. He rules out the argument based on article 372 of the Indian Constitution that in India too, unwritten prerogative powers of the executive can be justified, as the said article preserves the existing law, and pre-constitutional law to the extent of its compatibility with the Constitution of India. According to him, the article has its typical context,

1 ([2019] UKSC 41)

and cannot be invoked for expansion of powers of any authority under the Constitution beyond its text, and even though we might observe certain conventions. The same are in conformity with the Constitution.

In the fourth part, stressing on fundamental constitutional principles, he laments against the erosion of these principles in India, and to demonstrate his claim, he sites two concrete examples – (a) creation of new Andhra High Court; and (b) creation of legislative councils in bifurcated states of Andhra Pradesh and Telangana. He argues that in creation of Andhra High Court, fundamental constitutional principle of determination of date of appointment has been violated. He concludes that sections 30 and 31 of the Andhra Pradesh Reorganization Act, 2014 are in violation of the Constitution, in the context of creation of high courts in both the states, i.e. Andhra Pradesh and Telangana. In respect of legislative councils in bifurcated states, his view is that the same is in violation of procedure laid down in articles 168 and 169.

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Introduction: It is a great honor to be with you this evening for more than one reason. Having regard to a fact that this is almost a hundred-year-old institution which produced legal gems like Justice Gajendragadkar, Justice Y.V Chandrachud just to mention two, and not to mention many other great scholars and legal luminaries produced by this institution.

In fact, when I met Prof. Jain and enquired whether the records of the college are digitalised, he said yes. Then I requested him to find out the record of my maternal uncle who was a student of this college. My father also was a student at this College, but he could not the complete his course as he went to Hyderabad and completed the course there. This is a 1950's story. That way I have some connection with this institution. Apart from that to be called upon to deliver a lecture in the name of one of the distinguished scholars of this country, Prof. Sathe, itself is an honor. For these reasons, I am immensely happy, and I feel intimidated also this evening. But last few years as a rule as far as possible barring circumstances beyond my control, I have never declined an invitation to address a gathering of youngsters. The reason is and I am convinced that if the change is to take place in this country for better, it is only possible through the next generation. I think our generation has messed up with the system and when I make this statement, I make it with a sense of responsibility. It is not a statement by which I wish to become popular. It makes no difference to me if I am popular or unpopular. There is a certain amount of sadness in my heart. Whenever I have an opportunity to address a gathering of students particularly and young lawyers, I express in the same vein. I don't need to speak to one crore a day lawyers but rather with them who are at the threshold of the profession, who have dreams, who have ideas, who have a future and they certainly have the power collectively in their hands to mould their future and the future of this country.

Miller II Case: The topic suggested to me today by the College is very topical and recent - the Brexit judgment[2] : its implications and substance. My dear students, all of you who have completed your constitutional law paper by now, and those who have not yet, must be aware of the fact, that unlike India and United States, Britain doesn't have a single document titled as constitution. A few enactments, actually number of enactments, certain conventions, certain practices, cumulatively constitute the British Constitution. In the evolution of the British judicial system, for that matter the British Constitutional System, judiciary has never enjoyed the authority to pronounce upon the constitutional validity, the validity of a law made by the Parliament. When the Parliament makes a law, it is the last word in that country. It is only the interpretation of such a law which is the responsibility of the judiciary.

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[2] R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland ([2019] UKSC 41)

On the other hand, countries like India, USA and other democratic countries having written constitution, right from the days of John Marshall and Marbury vs. Madison[3], have developed a system by which, the legality of a law made by the legislature can be tested on the principles of the written constitutions of those countries. It being the responsibility, obligation and authority or jurisdiction of the Supreme Court and the constitutional courts, the statutory courts do not have that power in India. Though some form of a judicial review of the legislative action is also available in these countries, where, democratic countries are governed by the written constitution.

In this background, Brexit judgment or Miller II judgment as it is known popularly appears perhaps to the academic world to be an 'adventurous judgment', pardon for not being able to use a better expression. Now, what exactly is this judgment ? I will briefly narrate the facts. I will not go into the nitty-gritty of the case. Britain has been the member of the European Union since long time, probably almost for 50 years. For whatever reasons in the recent past, and particularly since the last decade, there have been demands from various quarters in Britain against the continuance of membership of the European Union by Britain being detrimental to its interest. Therefore, Britain should severits connection with the European Union; and for a long political process and years of campaigning pro and against this position took place. A referendum took place on 23rdJune 2016. On a lighter note, that date has a great significance for India and for me also.If you people recollect, the war of Plassey also commenced on 23rd June 1757. So far as personal reference is concerned, I was born on 23rd June 1953.

The referendum took place and the British people by majority expressed their desire to exit from European Union. After this decision, it was necessary to decide the modalities and this was easier said than done. There was an old treaty under which, certain procedure ought to be followed, and if any state party desires to exit from the obligations of this treaty, then the Union as well as the state party may have to determine on what terms to exit, or should be relieved of the obligations. All has to be reduced into an agreement so on and so forth, and in the context of Britain, all this was subject to Parliamentary supervision. There are laws which deal with these matters. You are law students, you can read it to understand. Now, it became

[3] Marbury v. Madison, 5 U.S. 1 Cranch 137 . 1803.

a little difficult to get the approval of the Parliament for creating the appropriate legal framework for Brexit. If Britain did nothing for the period of two years or for the extended period from the relevant date, the exit of Britain would be an automatic affair, a situation which perhaps the British government was not willing to get into. They wanted some negotiated agreement or settlement. If the Parliament is not willing, then how to get out of the requirement of Parliamentary approval was the real question for the government. In the process, the monarch was advised to prorogue the Parliament so that the Parliament cannot debate the issue anymore. When the Parliament is prorogued, thenit cannot debate any issue, but under the law, the government would continue to function. However, prorogation does not amount to dissolution of the Parliament. It suspends the parliamentary session for unspecified duration. So this was the advice given to the Crown, which was challenged. Innumerable questions were posed, considered and argued in R. (Miller) v. The Prime Minister and Cherry v. Advocate General for Scotland[4], apart from the Crown's amenability to the jurisdiction of the courts. Eventually the UK Supreme Court found that the advice tendered by the Prime Minister to the Crown to prorogue the Parliament is legally untenable, because, certain advice would be inconsistent with the Constitution of Britain i.e. the Parliament, which according to the British law, is a sovereign body, and has constitutional obligation to superintend and hold accountable the executive process in the country which was violated. Since, the advice itself was illegal, therefore the Court issued a declaration that the order or prorogation issued by the Prime Minister, an outcome of advice was also null and void, as if it was never passed.

Relevance of Miller for Indian Public Law :

The point is both in the USA and India, we have a written Constitution for a period of almost 250 and 70 years respectively. Great part of these years, there were innumerable judgments which held that every action of the Executive, every action of the state i.e. Executive, Legislative and Judiciary. Every branch of the state has limitations, the authority of every branch which are enshrined in the constitution or implied by it. None of these bodies have

[4] R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland ([2019] UKSC 41)

absolute authority even within the fields assigned to them. They take it with certain limitations inherent in the constitution.

If you remember at least by now, recollect famous case of Kesavanand Bharti[5], series of judgments from 1950 to 1973 revolved around the question of the authority of the Parliament to amend the Constitution. All the cases like Kameshwar Singh[6], Sankari Prasad[7], Sajjan Singh[8], Golaknath[9] and ultimately Kesavanand Bharti[10], the Supreme Court declared that though the Parliament has power to amend the constitution sitting as constituent assembly, the authority has limitations by necessary implications within the scheme and text of the constitution, that the authority can never be exercised to destroy the basic structure of the constitution. Subject to that limitation, Parliament has the power to amend it. Amending body is highest body within our constitutional scheme, and for that matter, in the constitutional schemes of most of the states, and if this body is under limitations, then by necessary implication, all other bodies either created by constitution or any other statutes, are subject to limitations. This is a principle which is not very difficult for us to understand and explain in this country. But in the case Britain, the situation is slightly different. There is no written document called constitution. There are conventions, there are prerogatives, prerogatives are known for British Common Law for centuries. Depending upon the nature of prerogative claimed or what was the life span of those prerogatives is a different matter, some may be of more ancient character than other. But that kind of a situation does not obtain in India, it is now controlled by the text of the constitution. Unless the constitution itself makes a reference, for example, if you remember the powers, privileges and immunities of the legislature are not yet codified, although the text of the constitution says that the legislative bodies can make a law dealing with them. Until such a law is made, the powers, privileges and immunities of the legislative bodies should remain same as those of British Parliament. Barring specific cases like these, there are no prerogatives recognized in this country. There was doubt at some point

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5 Kesavananda Bharati v. State Of Kerala And Anr, AIR 1973 SC 1461.

6 Kameshwar Singh v. State of Bihar, 1959 AIR 1303

7 Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar, [1952] S.C.R. 89

8 Sajjan Singh v. State Of Rajasthan, 1965 AIR 845, 1965 SCR (1) 933

9 I.C. Golak Nath v. State of Punjab, AIR 1967 SC 1643

10 Kesavananda Bharati v. State Of Kerala And Anr, AIR 1973 SC 1461.

of time whether prerogatives of the British Crown survived because of the declaration under article 372 that all laws in force immediately before the commencement of the constitution in the territory of India, would be taken to include common law and prerogative. Let us not go into these details. Broadly, this question of law did not arise in this country. In a country like Britain, where prerogatives are given, court accepts their existence. In this judgment (Miller II), the court accepts the existence of prerogatives. But then whether the power was within the permissible limits of the prerogatives or was exercised for a valid reason or was not was the matter of examination. Now in this context, what are the implications of this judgment, let us say for us, as we are worried about our country, what happens to the constitution of this country? My own understanding of the situation is theoretically we do not lack the constitutional authority for examining any action of any organ of the state or branch of the state. That power is repeatedly asserted and reasserted by the Supreme Court since 1950 onwards. But the problem is how effectively this power has been exercised by judiciary of this country, and how regularly we talk about it in the court rooms. I never believe in talking in abstracts, it does not serve any great purpose. Speaking from abstracts and quoting from landmarks of lords, I am not very fond of it, it is my limitation or my failing. I am like this, I cant help it. I will take few concrete examples. If the amending body being the highest constitutional body is under limitation, then necessarily all other bodies and authorities either created by constitution or otherwise are also subject to the limitations.

It is not unusual for the constitutional courts to exercise power of judicial review and hold the Parliamentary action to be unconstitutional. However, in case of Britain, amidst, un unwritten constitution and weak form of judicial review, Miller II decision is bound to create huge controversy.

Any serious student of law must necessarily follow the political developments, not only current political developments and history, but also political philosophy. These are all interrelated subjects. Each one of the same influences and manages human societies.

Now all of us who have had a glance at the constitution know that India i.e. Bharat, is a union of states and territories. Now the states which have members of the Union for good or bad reason in this country have only transient existence. Last 70 years we have seen the geographical territories of the different states going through the process of reorganization and variations

for good or bad reasons. These are value judgments. Let us not go into it whether a particular reorganization is good or bad. But you take the facts. This exercise went on for some time; and is still going on in this country. There have been always demands for separate states here and there.

One of the states which came into existence in 1955, by virtue of The States Reorganization Act, 1956, the state to which I belong. The erstwhile state of Andhra Pradesh underwent reorganization in 2014. There was a larger state of Andhra Pradesh earlier which was divided into two states Andhra Pradesh and Telangana. It being a political decision, I have nothing to say about it here.

Now point is even if such a decision is to be taken, how consistent it is with the principle laid down in the constitution and all the incidental matters therein is the question, and how did we deal with this, we in the sense, the Indian legal syste? Since we are talking about Brexit and the heroic role played by British Judiciary, I remember when this judgment was delivered, somebody sent me a Whatsapp message. It was a little cynical. Well if we speak outside the precincts of academic institution, there is a risk of being called in contempt also. Whatsapp message said something like I don't exactly remember the words, the British Judiciary has gone rogue. They should have learnt from the Indian Judiciary to understand the implications.

Now point is, the original state of Andhra Pradesh got bifurcated into two. Two or three aspects need to be examined for this event in the context of the propositions of Brexit case. Firstly, whether the notification by which new Andhra Pradesh High Court was created is intra-vires the constitution. By not appointing an exact date for the creation of the new Andhra Pradesh High Court or by not delegating the power on the competent authority to do so, whether Parliament exercised its legislative power under entry 78, list 1, schedule 1 in accordance with the provisions of the constitution. Secondly, should the existing judges have taken fresh oath as the judges of new Andhra Pradesh High Court? Lastly, whether the Legislative Councils were created in Andhra Pradesh and Telangana by following the constitutional provisions are some of the questions which can be examined, and I intend to examine them in the context of the principles enunciated by the Brexit case. I will deal with the creation of Legislative Council later. First, let me shed light on process of creation of High Courts adopted in 2014 Act.

Illegalities around creation of High Court for New State of Andhra Pradesh post bifurcation: The existing state of Andhra Pradesh (as it existed from 1956 to 2014) was bifurcated by an Act of Parliament titled the Andhra Pradesh Reorganisation Act, 2014. It created two new states of Telangana and Andhra Pradesh. The said Act contains various provisions required for the creation of the two new states.

Since it is the mandate of Article 214 of the Constitution that there shall be a High Court for each state, Sections 30 and 31 of the Reorganisation Act declare that a separate High Court for the state of Andhra Pradesh is required to be "constituted" and the High Court of Judicature at Hyderabad "shall become" the High Court for the state of Telangana. However, the High Court of Judicature at Hyderabad is nothing but the erstwhile High Court for the then state of Andhra Pradesh whose territorial jurisdiction was the sum of the two new states. But the High Court of Telangana now has territorial jurisdiction over a part of the territory over which it had earlier exercised full jurisdiction.

The Reorganisation Act is silent with regard to the date on which a separate High Court for the state of Andhra Pradesh is to be "constituted". It is also silent about the process by which a separate High Court is to be constituted. Right from 1861 with the enactment of The Indian High Courts Act, whenever any High Court was created either by Britishers or in independent India, invariably there was a mention of date of appointment as well as articulation about overall process of its creation. To further illustrate the point, we may refer to Section 28 of the Andhra State Act, 1953. It provided that either from the first day of January 1956 or from some other earlier date to be determined by the President by a notification, there shall be a separate High Court for the state of Andhra Pradesh. Section 28(3) declared that the principal seat of the High Court shall be at such place as the Governor of Andhra may decide. Similar provisions are to be found in the States Reorganisation Act, 1956, Bihar Reorganisation Act, MP Reorganisation Act and Bombay Reorganisation Act by which Jharkhand, Chhattisgarh and Gujarat were constituted.

In each of the above mentioned enactments, provisions were made indicating the procedure for fixing the date on which the newly constituted High Court is to come into existence, where its seat is to be located and directing the competent authority to determine these issues. The basic

authority of law for the constitution of a new High Court is unequivocally provided by Parliament. Unfortunately, we do not find such statutory provision in the 2014 Act with respect to the date on which the new High Court shall come into existence. Nor is the power to determine such a date delegated to any other authority, be it the President of India or someone else.

However, a new High Court for the state of Andhra Pradesh is purported to have been constituted by a notification published in the Gazette of India on 26 December 2018 signed by the President of India. The notification refers to a judgment of the Supreme Court in the case of Union of India v. B Dhanapal SLP 29890/2018 and states that by virtue of the said judgment, the competent authority could issue a notification bifurcating the High Court of Judicature of Hyderabad into the High Court of Telangana and the High Court of Andhra Pradesh, respectively.

The question is who is the competent authority? Under the hallowed doctrine of the rule of law, competence for performing any public act in a country governed by a constitution flows either from the Constitution itself or by any law validly enacted under the Constitution. I have already mentioned that the Reorganisation Act of 2014 is absolutely silent with respect to the authority who is competent to determine the date. Yet the rulers of the country and the state believe it could be done by a notification issued in the name of the President.

Fresh Oath to same High Court Judges: The most hilarious part of the episode is that those judges who continued at the High Court of Telangana, which is nothing but the original High Court of Andhra Pradesh, now with a truncated territorial jurisdiction, were also administered fresh oaths. No fresh warrants of appointments were issued—in my opinion, rightly. But at the same time, no fresh oath is required either on a proper analysis of the scheme of the Constitution or on the strength of precedent. When the Andhra High Court was created in 1953, carving out the territorial jurisdiction from the parent Madras High Court, those judges remaining at Madras did not take any fresh oath. Same is the case with judges of Bombay, Patna and Madhya Pradesh High Courts when the new High Courts of Gujarat, Jharkhand and Chhattisgarh were created. Examples could be multiplied. However, the judges remaining at the High Court of the judicature at Hyderabad, now called the Telangana High Court, were administered fresh

oaths. At both the events in Andhra Pradesh and Telangana, some sitting and former judges of the Supreme Court graced the occasion.[11]

Maybe there was some convention which I didn't know. Its not that everybody should know everything, at least not me. So I called, I can mention the name no harm, Mr. Iqbal Chagla whose father was the Chief Justice of the state for almost 14 years plus I think. I asked him Mr. Iqbal Chagla, do you remember, by any chance, when the Gujrat state was bifurcated and a new High Court was constituted, did the judges of the Bombay High Court take a fresh oath again those who remained in Bombay High Court ? He almost gave me a mouthful. What happened to you ? Why should they take fresh oath again ? they are already the judges of the Bombay High Court. But The judges of new Andhra Pradesh High Court were administered an oath, a grand ceremony was organized, once gain they were asked to take oath. A couple of the sitting judges of the Supreme Court, a couple of retired judges of the Supreme Court everybody was present on the occasion. The question is, whether this is a conduct consistent with the constitutional document of the country?

Post Bifurcation Creation of Legislative Councils: Legislative Council as I mentioned, if you look at Article 168,for every state there shall be legislature which shall consist of a governor (there were amendments to this provision from time to time in the Constitution). In the states of Andhra Pradesh, Bihar, Madhya Pradesh, Maharashtra, Karnataka, Tamilnadu, Telangana and Uttar Pradesh there shall be two houses, and in other states one house. Now where there are two houses of the legislature of the state one shall be known as Legislative Council other as Legislative Assembly and where there is only one house it shall be knows as a Legislative Assembly. Article 169 is more important. Notwithstanding Article 168, Parliament may by law provide for the abolition of a legislative council of a state having such a council, or for the creation of such a council, for a state having no such council;(kindly note following words) if the Legislative Assembly of the State passes a resolution to that effect by a majority of the total membership of the Assembly and by a majority of not less than two thirds of the members

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[11] See , Justice J Chelameswar, Bifurcation of Hyderabad HC flawed, published on 26th January 2019, Indian Express, also see New Andhra High Court violates rules: Justice Chelameshwar, written by Sreenivas Janyala, published on 27 January 2019, Indian Express

of the Assembly present and voting. Now the legislative assembly of the state passes a resolution. Now what did the Parliament do in case of the reorganization of Andhra Pradesh? If you take the history of Andhra Pradesh legislative council if you take the history of whole Andhra Pradesh state, now the divided bifurcated Andhra Pradesh. It was in 2 territories. What is today called Andhra Pradesh was part of British India and part of the erstwhile Madras province of the British India. And what is called today Telangana was not part of British India, it was part of the Nizam's territories, which became the part B state initially in 1950 when the constitution was brought into existence. Some of the old states, the present Telangana, few districts from present Maharashtra, district from present Karnataka all of them constituted the Nizam's territories. When the erstwhile State of Hyderabad merged into the Union of India. And eventually when the State Reorganization Act came to be passed in 1956, the Parliament thought people of these two territories, since they speak one language, they should be in fact in same state. There was a huge agitation, demand and so many things. Telugu People are wonderful people, they can agitate for anything today and denounce it tomorrow. As new state was created initially that part of territory which was part of whole Madras province was constituted into separate state in 1953 called the Andhra State not the Andhra Pradesh mind you. Andhra state. When Andhra state was constituted all these questions arose. The Andhra State Act 1953 by which the Andhra state was brought into existence contained provisions for establishment of the high court and date everything was specified there. You are not worried about it. It did not provide for the legislative council for whatever reasons we will not speculate now, fact remains legislative council was not there.

Then in a couple of Years the Parliament enacted the States Reorganization Act, by which a lot of changes took place in this country. For example, the state in which we are sitting right now, Maharashtra. It was a part of the Bombay Province, comprising much larger territories than what you have today. Including some parts of Gujrat. Then the question arose when the new states were created, the newly constituted states, some of them did not have a legislative council. Some of them wanted to have the legislative council. Resolutions were passed by the legislative assemblies of the newly constituted states. The matter went to the Parliament. In 1957 there was a law made by the Parliament, called the Legislative Councils Act.

Incidentally, when the bill was being debated in the Parliament, a question arose, whether the resolution passed by the erstwhile state, which stood bifurcated or trifurcated, would be a valid resolution either for the creation of new legislative councils or for abolition of existing legislative councils. If you can get hold of it, these are all are published material (Parliamentary Debates). A.K Sen, and for the information for the younger generation, he was a giant of lawyers in the 1950s. He was the law minister of Union of India at that point of time when the Legislative Councils Act was passed. When the objection was sought to be made regarding the constitution of the legislative council for the Gujrat State. On the ground that erstwhile old Bombay State assembly did not want this legislative council. A. K. Sen made a specific statement in the Parliament saying that the state is no more in existence and that state's life has come to an end, it is a new state. The assembly can be dissolved when the state remains intact but that resolution is of no significance. Presently a new resolution is passed which is more relevant and which is relevant in the context of new demand for the council. When the law minister makes a statement on the floor of the Parliament, obviously it represents the view of the Government of India.

In 2014 when the state of Andhra Pradesh was bifurcated, the erstwhile state of Andhra Pradesh, don't get confused, there is also the state of Andhra Pradesh today. The larger state of Andhra Pradesh was bifurcated, the Parliament simply bifurcated the legislative council into two pieces.

There is a Solomonic story, when two women go before the king Solomon for claiming to be the real, natural mothers of the child, I hope you have heard the story. He played a trick on them. Solomon says chop the child into two pieces and give them two parts. Then the real mother says no please don't do this let the child survive somewhere. It doesn't matter if it's not with me. This is exactly what the Parliament did. It simply chopped the Legislative Council, and assigned people on some consideration, some seats to Andhra Pradesh some seats to Telangana state. These are two striking features of the Act. My understanding of the law is that, both these things are constitutionally impermissible things. At least in so far as the creation of the High Court without specifying a date by the law or by some authority which is duly invested with the power to specify the date by virtue of delegation of authority by the Parliament. The constitution of the High Court itself would be illegal according to me. I went on record and wrote an article. Nobody

bothered in this country. Neither those who are responsible for the making of the law nor those who are responsible for the interpretation of the making of the law. There were very imminent personalities including the Chief Justice of India of the day, went in and participated in the event (Oath Ceremony). I am not questioning going and participating but is it not worth looking at.

Chelameswarian Constitutionalism: If we have a written constitution and we have settled practices for 100 years. I mentioned to you, the 1861 Charter, the date is always fixed by the lawmaker be it Queen Victoria or the Parliament. There is a departure. Now this act was challenged before the Supreme Court for whatever grounds, I never dealt with this matter. I belong to that state so obviously I might have some vested interest in decision of the matter. To the best of my knowledge this matter is never decided. I came to know from newspaper reports, that on two three occasions the matter was listed and the Supreme Court said it is premature. And eventually when the new state came into existence and when the presidential assent was given, according to the newspaper reports it became in fructuous. Issues were never considered by anybody. What is the great harm if the existence legislative council is divided into two pieces?

Let's not talk about Constitutionalism, Constitutional Studies, Prof. Sathe, ILS, 100 year old institution. Nothing here is irreparable. For example, the lacuna in not notifying the date in a classical system, may be it happens by the both sides. Nobody bothered or in hurry when they drafted it, the draftsman didn't take care of it. It could simply be constitutionally rectified by making a retrospective amendment, authorizing the President to determine the date. That would have cured the defect. Even that is not there. Nobody applied mind or nobody cared for it. Yet we celebrate the constitutional day we talk about a lot of things such as rule of law I don't know what more you must have heard a lot more because since last two years I am spared of this problem because I live in a small village. I don't even buy newspaper now a days. Of course I check my mobile just to find the headlines where is the war and somebody died. But beyond that I stopped looking at these things. Because I realized there is no point in looking at these things because nobody bothers about it. And the point is my dear children this attitude of not bothering about the constitutional arrangement. It is a not a document, it is not an administrative manual written for the some office or secretariat! I

mentioned in one of my judgments, in the privacy judgment. [12] Don't look at it as administrative manual please see it as document written in the blood of martyrs of Jallianwala and other. The people who have sacrificed their lives for the freedom of this country and members of the constituent assembly and people by and large, most of them, men and women of great sacrifice, wisdom, and knowledge. They knew this country, they knew the people of this country, they knew the history of this country. There was a huge debate. Each word of the constitution was incorporated after huge amount of debate.

Any human being is fallible even any institution is fallible. If there is something required to be changed you change it. I am not on that. But please don't treat that document casually. We have come to that stage, more or less. And if you are not looking at the basic text of the document and honoring it there is no point in talking about judicial activism subject of which Prof. Sathe was very fond of. Now Judicial activism only means, when I become a Judge I can do whatever I like, whatever I believe is the law for the country. Unfortunately, such people reach the Supreme Court also. We see a lot of these things happening. I gave you a concrete statement because I don't want to make an abstract statement and want you people keep guessing did he mean this or that. These are all facts on record and you can verify. And the whole theory of the constitution is the liberties of people, if it is required to be preserved, a proper constitutional arrangement is essential. That there should be checks and balances in each one of its branches only then people can say their liberties are safe. This is the basic, whatever beautiful language is used, in substance, this is the theory of the basis on which the constitutional documents are created. They are entitled, and required to be respected, treated with all respect we have to live in this country and our progeny and future generations with dignity and liberty.

On occasion like this and amidst the myriad of great constitutional scholars, and a gathering like this of younger generation, my speech is not meant for people who are of my generation or older than me. All that I have told is for the youngsters. If you want to live in this country with dignity if you want your children and grandchildren to live with dignity and liberty in this country respect the Constitution. Protect the constitution. Thank You!

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[12] Justice K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1

THEME I: CRITICAL JURISPRUDENCE

Ambedkar and Gandhi: Contributions to an Indian Jurisprudence[1]

Arvind Narain[2]

Introduction

In the iconography which has surrounded two of India's most important leaders Mahatma Gandhi and Dr. B.R. Ambedkar, there has been little focus on their contribution to thinking about the law. This in inspite of the fact that both of them were lawyers. With respect to Gandhi, this historical neglect may be partly because of his own disavowal of the law.[3] However, the fact is, Gandhi in his lifetime engaged, creatively, passionately and subversively with law. This engagement was multi-faceted and included his civil rights work in South Africa, his crucial role in initiating human rights fact-finding through his seminal report on the Jallianwala Bagh massacre, his use of legal journalism to generate popular support for the independence movement and his trial for the offence of sedition which he turned on its head and instead put the colonial state on trial.

When it comes to Ambedkar, while the iconography of Ambedkar is always of him holding the Constitution in his hand, there has been limited engagement with Ambedkar's contribution to thinking about the law.[4]Ambedkar in the course of his life tried to deal with the tyranny of a

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1 This paper brings together two longer papers which explore the thinking of Gandhi and Ambedkar about the law in greater detail. See Arvind Narrain, My Experiments with Law: Gandhi's Exploration of Law's Potential, 6 NUJS L. Rev. 273 (2013); Arvind Narrain, Radical Constitutionalism: Towards an Ambedkarite jurisprudence, Ed., Aakash Singh Rathore, B.R. Ambedkar: The Quest for Justice: Legal and Economic Justice Volume 3,Oxford University Press, forthcoming2020)

2 Founder, Alternative Law Forum

3 For instance, in Hind Swaraj, Gandhi launches a blistering attack on lawyers as one of the evils of western civilization:
"The lawyers, therefore, will as a rule, advance quarrels, instead of repressing them. Moreover men take up that profession, not in order to help others out of their miseries, but to enrich themselves... It is within my knowledge that they are glad when men have disputes. Petty pleaders actually manufacture them." See M.K. GANDHI, HIND SWARAJ, Orient Blackswan, Delhi,2010. p.51.

4 For an important engagement with the many facets of Ambedkar including Ambedkar the authentic Dalit, the exemplary scholar, the activist journalist, the pre Gandhian activist, the constitutionalist and the renouncer see the work of Baxi. Of seminal importance to this essay, is Baxi's delineation of Ambedkar as an 'incomparable archivist of suffering'. This is the beginning point of Ambedkar's thinking about the law. It stands in stark contrast to a Gandhian lack of interest in Dalit suffering. As Baxi notes, 'Ambedkar emerges as a most articulate archivist of atrocities against the Atisudras. His corpus is full of contemporary testament of Dalit suffering; Mahatma Gandhi's discourse, for example, on the 'removal of untouchability' is not haunted by a single lynched Dalit corpse, or a single raped and bloodied Dalit woman' Upendra Baxi, *Emancipation and justice: Babasaheb Ambedkar's legacy and vision* cf. Upendra Baxi and Bhikhu Parekh (Eds.), Crisis and Change in Contemporary India, Sage, New Delhi, 1995.

majoritarian society through the criminal law.[5] He introduced the term 'constitutional morality' into public and constitutional discourse to make the point that Indian democracy must not be founded on majoritarianism but rather must be based on a constitutional ethic of respect for dispersed and powerless minorities. While working closely with law, he was intensely aware of its limitations as seen by his advocacy of the concept of fraternity. Fraternity in his understanding, pushed positive law to its limits, as its operationalization had to be premised on a form of love of citizen for her fellow citizen.

If jurisprudence is 'thinking about the law', arguably there is a rich vein of insight in the collective corpus of both Gandhi and Ambedkar. This paper will seek to provide a preliminary overview of some of these insights. These insights may be useful to conceptualize the elements of an Indian jurisprudence. An Indian jurisprudence is a jurisprudence which is sensitive and responsive to the particular problems of a post-colonial society like India.[6]This paper hopes to demonstrate that the thinking about law by both Gandhi and Ambedkar are deeply relevant to the project of crystallizing the elements of an Indian jurisprudence.

Elements of an Ambedkarite jurisprudence

Conceptualizing Caste as Law

It is Ambedkar's deep insight that unless one came to terms with the system of caste as law, it was not possible to even speak of rights for the Dalit community. Ambedkar comes to the question of rights and law from his personal experience of being at the receiving end of caste based discrimination. Thinking autobiographically, Ambedkar notes that

"I knew that in the school I could not sit in the midst of my class students according to my rank but that I was to sit in a corner by myself. I

For an insightful account of Ambedkar's legal practice see, Rohit De, *Lawyering as Politics: The Legal Practice of Dr. Ambedkar, Bar at Law, cf.* Suraj Yengde and Anand TeltumbeEds., The radical Ambedkar, Penguin, New Delhi, 2019. De demonstrates that Ambedkar's practise of law was imbued with a civil liberties content and he represented poor people, trade unions and political and social dissenters in his practice.

5 See Article 17 of the Indian Constitution.

6 See the works of Upendra Baxi which seems to gesture in this direction. Both *Towards a Sociology of Indian Law* as well as *Crisis of the Indian Legal system* note the 'Indian' inflection to both sociology and law through an outlining of the problems in India to which the law responds.

knew that in the school I was to have a separate piece of gunny cloth for me to squat on in the class room and the servant employed to clean the school would not touch the gunny cloth used by me. I was required to carry the gunny cloth home in the evening and bring it back the next day…."[7]

This life long experience of discrimination in all aspects of social life becomes the basis of Dr. Ambedkar's understanding that to understand law in India one had to go beyond state law.

"Custom is no small thing as compared to law. It is true that law is enforced by the state through its police power and custom unless it is valid is not. But in practice this difference is of no consequence. Custom is enforced by people far more effectively than law is by the state. This is because the compelling force of an organized people is far greater than the compelling force of the state."[8]

The fact that the rules of caste enjoy the status of law in Indian society has the inverse implication that laws prohibiting caste based behaviour suffer from a lack of social legitimacy. In this context, Dr Ambedkar doubts whether rights which guarantee 'untouchables' freedom from discrimination have the character of rights at all.

As he puts it,

"Law guarantees the untouchables the right to fetch water in metal pots...Hindu society does not allow them to exercise these rights... In short, that which is permitted by society to be exercised can alone be called a right. The right which is grounded by law but is opposed by society is of no use at all." [9]

Thus, caste law in the Ambedkarite rendering emerges as a totalitarian system meant to keep the Dalit in a continued state of servility. How did caste law interact with the modern legal system?

Mark Galanter observes that colonial India was rife with instances of the Courts interpreting state law to reinforce the caste based order. Thus, for

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7 Ambedkar, B.R., (1990), Waiting for a visa, http://www.ambedkar.org/ambcd/53.%20Waiting%20For%20A%20Visa.htm, (accessed on 15.03.20)

8 Vasant Moon, Ed., *Babasaheb Ambedkar: Writings and Speeches*, *Vol V,* Govt of Maharashtra, Mumbai, 2014. p.283.

9 Narendra Jadhav, Ed., *Ambedkar Writes Vol. I,* Konark Publishers, *New Delhi,2013.* p.186

example, 'Courts granted injunctions to restrain members of particular castes from entering temples-even ones that were publicly supported and dedicated to the entire Hindu community. Damages were awarded for purificatory ceremonies necessitated by the pollution of lower castes; such pollution was actionable as a trespass on the person of the higher caste worshippers. It was a criminal offence for a member of the excluded caste knowingly to pollute a temple by his presence.'[10]

Thus state law reinforces caste law. In the most egregious cases as outlined by Galanter, state law puts the seal of criminal sanction on caste law. In other instances, state law is silent in the face of the violations enforced by caste law.

The limitations of state law are apparent to Ambedkar as he notes that,

The worst of it is that all this injustice and persecution can be perpetrated within the limits of the law. A Hindu may well say that he will not employ an Untouchable, that he will not sell him anything, that he will evict him from his land, that he will not allow him to take his cattle across his field without offending the law in the slightest degree. In doing so, he is only expressing his right. The law does not care with what motive he does it. The law does not see what injury it causes the untouchable.[11]

Combating Caste discrimination through State Law

Even as Ambedkar was conscious of the limitations of state law, he saw in it a potential to begin attacking caste law. One principle of modern law which Ambedkar found of value was the principle that law should be no respecter of persons. He referred approvingly to the provisions of the Draft Penal Code and the commitment of the Law Commissioners to the principle that, '[it] is an evil that any man should be above the law' and their reasoning that the promulgation of the code was an opportunity to ensure that, 'the Code was binding alike on persons of different races and religions'.[12]

Ambedkar also sought to draw on the principles of the common law to assert the civil rights of the Dalits. After the famous Mahad satyagraha, in

[10] Mark Galanter, *Untouchability and the Law*, Economic and Political Weekly, (January 1969),Vol4. No1/2 pp.133-170.

[11] Vasant Moon, Ed., *Babasaheb Ambedkar: Writings and Speeches*, *Vol V,* Mumbai, Govt of Maharashtra,2014.p.270.

[12] Ibid. p.103.

which the untouchables had drawn water from Chawdar tank against caste Hindu prohibitions, the caste Hindus of Mahad filed a civil suit, making Ambedkar a party, seeking to assert their customary right to the use of the water in Chawdar tank and their right to from now on, exclude the untouchables from the use of the tank. For the caste Hindus to succeed in their claim they would have to prove that the exclusion of untouchables was a custom which was certain, existed from time immemorial and was not against public policy.

Justice Broomfield[13] of the Bombay High Court in his judgment in the case, held that there was no immemorial custom and hence the caste Hindus could not exclude the untouchables from the use of the tank.[14]He did not adjudicate the question as to whether untouchability was a custom which was against public policy.

Ambedkar expressed his disappointment with this judgment and its failure to address the question as to whether the custom of excluding untouchables from the use of the tank was contrary to public policy. During the pendency of the litigation the Court had granted a temporary injunction against the untouchables using Chawdar tank and the untouchables under the leadership of Ambedkar did not violate the order of the court and go and drink water from the tank for a second time. According to Ambedkar the strategic reason for suspending their civil disobedience was because'they wanted to have a judicial pronouncement on the issue whether the custom of untouchability can be recognized by the Court of law as valid. The rule of law is that a custom to be valid must be immemorial, must be certain and must not be opposed to morality or public policy. The Untouchables' view is that it is a custom which is opposed to morality and public policy. But it is no use unless it is declared to be so by a judicial tribunal. Such a decision declaring the invalidity of the custom of untouchability would be of great

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[13] Interestingly Justice Broomfield was the same judge before whom Gandhi was tried for sedition.

Narhari Damodar Vaidya vs Bhimrao Ramji Ambedkar, (1937) 39 BOMLR 1295. Justice Broomfield held, 'We therefore, agree with the learned Assistant Judge that the appellants have not established the immemorial custom which they allege. Had they succeeded on this point, it might have been necessary to consider whether the custom was unreasonable or contrary to public policy (though strictly speaking that was not pleaded in the lower Courts).

value to the Untouchables in their fight for civil rights because it would seem illegal to import untouchability in civic matters.'[15]

What is apparent in both examples is that Ambedkar is thinking about the possibility and the potential of state law. It is true that state law, when it comes to combatting the millennial injustices of Indian society lacks social legitimacy. As such it is a deeply weakened instrument when it comes to dealing with caste based discrimination. However, in an otherwise totalitarian environment when all aspects of life are controlled by the rigid laws of caste, state law provides an entry point to begin to question caste domination.

Dr. Ambedkar asks whether, in a society with a deep rooted majoritarian bias, the law can be mobilized to protect the interests of a geographically scattered minority? He argues that the coercive power of the law is a force which should be mobilized against the culturally and socially sanctioned prejudice of the majority community.

As he puts it,

"Sin and immorality cannot become tolerable because a majority is addicted to them or because the majority chooses to practise them. If untouchability is sinful and an immoral custom, then in the view of the depressed classes, it must be destroyed without any hesitation even if it was acceptable to the majority."[16]

The coming of independence saw Ambedkar draw upon this legacy of struggle to mobilize the counter majoritarian power of the law to first articulate the norm that untouchability was a constitutional offence, then to legislate the norm through the enactment of the Civil Rights Act, 1955. This Ambedkarite legacy was taken forward through the subsequent enactment of the SC/ST Atrocities Act, 1989 and subsequent amendments.

The roots of Article 17 lay in a speech in 1930 at the First Round Table Conference, when Ambedkar first articulated the idea that untouchability should be considered a criminal offence.

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15 Ibid. p.252.

16 B.R. Ambedkar, *What Congress and M.K. Gandhi have done to the untouchables,* Kalpaz Publications, Delhi,2017. p.109.

"First of all, we want a Fundamental Right enacted in the Constitution which will declare 'Untouchability' to be illegal for all public purposes. We must be emancipated from this social curse before we can at all consent to the Constitution; and secondly, this Fundamental Right must also invalidate and nullify all such disabilities and all such discriminations as may have been made hitherto. Next, we want legislation against the social persecution to which I have drawn your attention just now, and for this we have provided certain clauses which are based upon an Act which now prevails in Burma in the document which we have submitted."[17]

Sixteen years after the idea was first articulated by Dr. Ambedkar, the practise of "untouchability" was criminalised, with the Constituent Assembly passing what was to become Article 17 of the Indian Constitution. [18]

The contribution of Dr. Ambedkar was to the articulation of the norm on which all subsequent work with respect to ensuring the dignity of the Dalit community is based, namely that the practise of "untouchability" should be considered a constitutional crime. At the heart of Article 17 is a recognition of what Gautam Bhatia describes as 'Ambedkar's revolutionary insight: that the denial of human dignity, both material and symbolic, is caused not only by public power, but by *private* power as well – and the task of constitutionalism is not limited to satisfactorily regulating public power in service of liberty, but extends to positively guaranteeing human freedom even against the excesses of private power'.[19]

Fraternity: At the limits of positive law

Dr. Ambedkar, was deeply inspired by the idea of liberty, equality and fraternity as propounded in the French Revolution. Taking these ideas forward in the famous Mahad satyagraha on March 20, 1927, he asserted the right to equality by giving the call for Dalits to break the social prohibition from drinking water from a public tank in Mahad. In his speech, he explicitly

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17 Narendra Jadhav, Ed., *Ambedkar Speaks Vol. III, New Delhi,* Konark Publishers, 2013 p. 126.

18 Article 17 Abolition of "Untouchability" "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

19 Gautam Bhatia argues Article 17, Article 15(2) and Article 23 should be seen as a golden triangle. 'Each of these articles protects the individual not against the State, but against other individuals, and against *communities*. https://scroll.in/article/806606/why-the-uniquely-revolutionary-potential-of-ambedkars-constitution-remains-untapped

saw the Mahad satyagraha as similar to the 'National Assembly in France convened in 1789'. As he put it, 'Our Conference aims at the same achievement in social, religious, civic and economic matters. We are avowedly out to smash the steel-frame of the caste- system.' He goes on to say that 'Our movement stands for strength and solidarity; for equality, liberty and fraternity'.[20]

While the importance of the idea of equality and liberty are self-evident when it comes to the question of protecting the rights of the Dalit community, what was the value of fraternity? In the Constituent Assembly, Dr. Ambedkar analysed the relationship of these terms.

"These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them."[21]

The insight that Dr. Ambedkar provides is that it is only when fraternity has become a way of life that the conflict between the different interests that liberty and equality seek to promote can be resolved. Fraternity has received step sisterly treatment when compared to her more famous kin, liberty and equality. In fact, 'fraternity' was even omitted from the precursor to the Preamble, namely the Objectives Resolution moved by Jawaharlal Nehru.(Constituent Assembly Debates, Vol I, 13 December, 1946, pp. 57-65) The reason 'fraternity' found its way into the Preamble owes a lot to the initiative of Dr. Ambedkar. As Chairperson of the Drafting Committee he explicitly introduces fraternity into the text of the Preamble.[22]

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[20] Vasant Moon, Ed., Babasaheb Ambedkar: Writings and Speeches Vol XVII, Mumbai, Govt of Maharashtra, 2014. p.62

[21] Constituent Assembly Debates, Vol XI, 25 Nov. 1949, p. 979.

[22] As Ambedkar put it, ' The Committee has added a clause about fraternity in the preamble, although it does not occur in the Objectives Resolution. The Committee felt that the need for fraternal concord and goodwill in India was never greater than now and that this particular aim of the new Constitution should be emphasized by special mention in the Preamble'. Cf. Shiva Rao Ed., The framing of India's Constitution Vol III, Universal Law Publishing, Delhi, 2010. P.510.

He expands in greater detail on why fraternity was the key term in this trinity.

"Fraternity means a sense of common brotherhood of all Indians....It is the principle which gives unity and solidarity to social life. It is a difficult thing to achieve... [This is because] In India there are castes. The castes are anti-national. In the first place because they bring about separation in social life. They are anti-national also because they generate jealousy and antipathy between caste and caste. But we must overcome all these difficulties if we wish to become a nation in reality. For fraternity can be a fact only when there is a nation. Without fraternity, equality and liberty will be no deeper than a coat of paint."[23]

The challenge of course is how does one promote the value of fraternity? How can the law build a common culture where fraternity becomes a way of life? How do you build links between members of different castes such that the feeling of difference ultimately dissolves? The answer to this question is really an acknowledgement of the limit points of positive law. To achieve fraternity as a way of national being, one's endeavours will have to go beyond the law.

In Dr. Ambedkar's writing one finds a clue that to achieve this change one needs to challenge the prejudice in the intimate sphere.

Do not be under the wrong impression that untouchability will be removed only by removal of a ban on personal meetings and drawing of water from wells..... it will remove untouchability at the most in the outer world, but not from the inner world. For that the ban on inter-caste marriage will have to be removed. Once that happens untouchability will vanish from inside the house.[24]

The question of inter caste marriage as a solvent of caste appears forcefully again in Annihilation of Caste

I am convinced that the real remedy is inter marriage. Fusion of blood can alone create the feeling of being kith and kin, and unless this feeling of

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[23] Constituent Assembly Debates, Vol XI, 25 Nov. 1949, p. 980.
[24] Jadhav, Narendra, Ed, *Ambedkar Speaks Vol. I,* Konark Publishers,New Delhi,2013. p.97

kinship, of being kindred, becomes paramount, the separatist feeling- the feeling of being aliens- created by caste will not vanish. The real remedy for breaking Caste is intermarriage. Nothing else will serve as the solvent of caste.[25]

Dr. Ambedkar's advocacy of the concept of fraternity has important implications for contemporary India not only with respect to challenging caste hierarchy but also other hierarchies in Indian society. There have been serious and sustained attacks on fraternal ways of living by the fundamentalists.[26] These need to be resisted using an Ambedkarite lens. We need to understand love relationships and social interactions across lines of caste and religion as not just an exercise of the individual right to love and the right to intimate association, but really as an active promotion of the principle of fraternity. These relationships of love and association, formed across lines of caste and religion, are really nothing less than a people's action to implement the preamble's promise of fraternity.

Constitutional morality: Its relevance in a majoritarian democracy

The most famous reference to the idea of constitutional morality by Ambedkar was in the Constituent Assembly while presenting the draft Constitution.

Dr. Ambedkar quoted Grote, the historian of Greece, who had said:

"The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is an indispensable condition of government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer the ascendancy for themselves."[27]

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25 Narendra Jadhav, Ed., *Ambedkar Writes Vol. II,*Konark Publishers,*New Delhi, 2014.* p.217.

26 An example (among myriad others) of a threat to fraternity due to the actions of the right wing is there in the series of human rights reports produced by the PUCL-K which document a series of attacks on social as well as romantic relationships between young people belonging to different religious communities in the context of Dakshina Peoples Union for Civil Liberties – Karnataka, (2009), Cultural policing in Dakshina Kannada, Bangalore, http://youngfeminists.wordpress.com/2009/04/20/pucl-report-cultural-policing-in-dakshin-kannada/

27 Constitutional Assembly Debates,Vol.VII, November 4, 1948, p.38.

Dr. Ambedkar goes on to say, By constitutional morality Grote meant "a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure sure of these very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents that in his own"[28]

He concludes that,

The question is, can we presume such a diffusion of constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.[29]

What could Dr. Ambedkar have meant in his invocation of constitutional morality? Plausibly the importance of the concept flowed from his own experience of advocating the rights of the depressed classes. He was acutely conscious that a democracy which was based upon a majority which was no political majority but a communal majority was deeply dangerous to the very notion of democracy itself.

As he put it, "in India, the majority is not a political majority. In India, the majority is born; it is not made. That is the difference between a communal majority and a political majority. A political majority is not a fixed or a permanent majority. It is a majority which is always made, unmade and remade. A communal majority is a permanent majority fixed in its attitude…".[30]

Pratap Bhanu Mehta, in one of the early academic engagements with the idea of constitutional morality, correctly identifies this important thrust in Dr. Ambedkar's work.

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[28] Ibid.
[29] Ibid.
[30] B.R. Ambedkar, *Communal deadlock and the way to solve it,* http://www.ambedkar.org/ambcd/09.%20Communal%20Deadlock%20and%20a%20Way%20to%20Solve%20It.htm (accessed on 15.03.20)

After all, the burden of Grote's great history of Athenian democracy was to defuse the criticism of Athens that popular sovereignty was a threat to freedom and individuality. Once popular sovereignty or the authority of the people had been invoked, who else would have any authority to speak?[31]

At its heart, Dr. Ambedkar's notion of constitutional morality is a response to the particular conditions of India, where majorities are often communal majorities and where minorities may not have bargaining power in parliament. If parliamentary representation only throws up communal majorities then where are minorities to go? Would not minorities be at the sufferance of majority opinion which misunderstands democracy to be equal to popular sovereignty?

The first time the concept of constitutional morality, as propounded by Dr. Ambedkar, found a contemporary public resonance was when it was cited by J. Shah in his celebrated decision in *Naz Foundation v. NCR Delhi* when the Court ruled that Section 377 of the IPC was *ultra vires* Articles 14, 15 and 21. [32]

The Court chose to sidestep the debate on religion and sexuality by arguing that it was not a relevant consideration at all. Even if a majority of the followers of a particular religion were against homosexuality and by extension the 'public morality' was against homosexuality, then the public morality would be superseded by 'constitutional morality'.

As Justice Shah put it,

Thus, popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong.If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly.[33]

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[31] Pratap Bhanu Mehta, *What is constitutional morality?,* Seminar 615: November 2010; http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm (accessed on 15.02.20)

[32] (2009) 160 DLT 277 (Del)

[33] *Naz Foundation v. NCR Delhi*, (2009) 160 DLT 277 (Del)

Since the decision in Naz Foundation in 2009 which first discovered the concept of constitutional morality in the Ambedkarite corpus, the notion has enjoyed a constitutional renaissance. It has been the heart of the decision in *Navtej Singh Johar v. Union of India*, in which the Supreme Court read down Section 377 of the IPC[34], in *Joseph Shine v. Union of India*[35], where the court struck down the discriminatory adultery provision in the IPC and the *Indian Young Lawyers Association v. State of Kerala*[36], where the court struck down the regulation barring women from the age of 10 to 50 from going to the temple. In all these cases the logic of the Court has been that it is the responsibility of the Courts to protect powerless minorities from the ravages of majoritarian prejudice in line with the protections embodied in part III of the Indian Constitution.

The implications of this line of thinking are profound for our very understanding of democracy in what is after all a diverse, plural and hierarchical society like India. In a country coming to grips with brute majoritarianism, this call to constitutional morality - and by implication the understanding that brute electoral majorities do not mean that minorities of every strip and hue can now be effectively lorded over -is even more important.

Gandhi's experiments with law

Gandhi's thinking of law should be understood not only in terms of what he wrote, but also in terms of what he did. In his lifetime, Gandhi engaged, creatively, passionately and subversively with law. The engagement with law is multifaceted and demonstrates an alternative Gandhian conception of the law. Arguably it was Gandhi's work as an early civil liberties lawyer in South Africa which was the early precursor to civil liberties lawyering in India today. Similarly the Fact Finding which Gandhi did post the Jallianwala Bagh stands as a model of how a good fact finding report contextualizes 'facts' within a wider historical framework. Of equal import is his grasp that court room based work must be supplemented by the building of public opinion and hence his work exposing legal injustice

[34] https://indiankanoon.org/doc/168671544/
[35] https://indiankanoon.org/doc/42184625/
[36] https://indiankanoon.org/doc/163639357/

through writing about it in the media. However where Gandhi went beyond any one else in a creative use of the law was the way he approached being an accused in the sedition trial in Ahmedabad. Among many of Gandhi's contributions to thinking about law, there is nothing more important than his statement in his trial for sedition which raises fundamental questions about the link between law, legitimacy and justice.

Questioning law's legitimacy: Gandhi and sedition

Gandhi was tried under Section 124-A of the IPC on the charge of 'exciting disaffection towards the government established by law in India'.[37] Drawing from his South African experience, Gandhi pleaded guilty.

He frankly states that, ' I have no desire whatsoever to conceal from this court the fact that to preach disaffection towards the existing system of government has become almost a passion with me'. [38] Gandhi's statement is an eloquent summary of why 'a staunch loyalist and co-operator should become an uncompromising disaffectionist and non–cooperator.'[39] Gandhi begins with his experience of British rule in South Africa:

"My public life began in 1893 in South Africa in troubled water. My first contact with British authority in that country was not of a happy character. I discovered that as a man and as an Indian I had no rights. More correctly, I discovered that I had no rights as a man, because I was an Indian."[40]

While Gandhi says that he still thought that this situation of rightlessness was 'an excrescence upon a system that was intrinsically and mainly good'[41], events in India changed that perception. In his words:

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37 124A. Sedition.—Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in [India], shall be punished with[imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine. Explanation 1.—The expression "disaffection" includes disloyalty and all feelings of enmity. Explanation 2.—Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section. Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.]

38 S.B. Kher ed., THE LAW AND LAWYERS, NAVJIVAN PUBLISHING HOUSE, AHMEDABAD,2001. P.115

39 *Id.*

40 *Id*.

41 *Id.*

"The first shock came in the shape of the Rowlatt Act, A law designed to rob the people of all real freedom. I felt called upon to lead an intensive agitation against it. Then followed the Punjab horrors beginning with the massacre at Jallianwala Bagh and culminating in crawling orders, public floggings and other indescribable humiliations."[42]

Gandhi then challenged the legal system, arguing that it bears no inherent connection with justice:

"The law in this country has been used to serve the foreign exploiter. My unbiased examination of the Punjab Marital Law Cases has led me to believe that at least ninety five percent of convictions were wholly bad. My experience of political cases in India leads me to the conclusion that in nine out of ten the condemned men were totally innocent. Their crime consisted in the love of their country. In ninety nine cases out of hundred justice has been denied to Indians as against Europeans in the courts of India…In my opinion, the administration of the law is thus prostituted consciously or unconsciously for the benefit of the exploiter."[43]

Gandhi also argued that 'the British connection has made India more helpless… politically and economically'[44] In a powerful indictment of the economic policy of the British, he observed:

"Before the British advent, India spun and wove in her millions of cottages, just the supplement she needed for adding to her meagre agricultural resources. This cottage industry so vital for India's existence, has been ruined by incredibly heartless and inhuman processes as described by English witnesses. Little do town dwellers know how the semi starved masses of India are slowly sinking to lifelessness…..No sophistry, no jugglery in figures can explain away the evidence that the skeletons in many villages present to the naked eye. I have no doubt whatever that both England and the town dwellers of India will have to answer, if there is a God above for this crime against humanity which is perhaps unequalled in history."[45]

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42 *Id*., 116.
43 *Id*., 118.
44 *Id*., 117.
45 *Id*.

Gandhi concluded his remarks by summarizing why he is a disaffectionist, before seeking the 'severest penalty':

"Section 124-A under which I am happily charged is perhaps the prince among the political sections of the Indian Penal Coded designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by law. If one has no affection for a person or system, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote or incite violence... I have no personal ill will against any single administrator; much less can I have any disaffection towards the King's person. But I hold it to be a virtue to be disaffected towards a Government which in its totality had done more harm to India than any previous system."[46]

This statement is a powerful indictment of the entire colonial system. Gandhi succeeded in disrupting the link between law and justice; after Gandhi's speech, the colonial state's legitimacy was disrupted, and the moral center cleaved towards Gandhi. This subtle change of mood is reflected in the exceptional judgement by Broomfield J.:

"The law is no respector of persons, nevertheless, it will be impossible to ignore the fact that you are in a different category from any person I have ever tried or am likely to try. It would be impossible to ignore the fact that, in the eyes of millions of your countrymen, you are a great patriot and a great leader. Even those who differ from you in politics look upon you as a man of high ideals and of noble and of even saintly life. I have to deal with you in one character only. It is not my duty and I do not presume to judge or criticise you in any other character. It is my duty to judge you as a man subject to the law, who by his own admission has broken the law and committed what to an ordinary man must appear to be grave offence against the state."[47]

The extraordinary nature of a trial is testified to contemporary accounts:

'A minute passed after the pronouncement of the sentence. The judge was evidently feeling happy that the whole business was over. He got up

[46] *Id*., 119.
[47] *Id*., 120.

bowed and departed- an instinctive tribute which truth claims from justice. The throne of truth is any day mightier that the claim of justice.[48]….. for a minute everybody wondered who was on trial. Whether Mahatma Gandhi before a British Judge or whether the British Government before God and humanity'[49]

In the sedition trial, Gandhi converted the charge against him of 'causing disaffection' into a powerful statement on why 'exciting disaffection' against the government was 'the highest duty of the citizen'. In short, as Sudipta Kaviraj observes, 'the trial of the rebel was turned into something that appeared more like a trial of the State.'[50] In the trial of the State what is contested most seriously is the link of the law to justice. As Gandhi demonstrates in eloquent prose, not only has the 'law been prostituted to the exploiter' but even more grave is the 'crime against humanity' of an economic policy that has succeeded in reducing people to 'skeletons in villages' 'as they sink to lifelessness'. The concept of justice both economic and political is what is at stake and Gandhi demonstrates that the British state has forfeited its claim on his affection and loyalty by completely violating its commitment to the Indian people.

The sedition trial also invokes another history, the history of a law which cannot be reduced to precedent alone. Law in this sense is born at the moment of disobedience. The older more ancient history which Gandhi's disobedience calls to mind goes back two thousand five hundred years to the disobedience by Antigone of Creon's law in the play by Sophocles[51] In the play, Antigone's two brothers engage in a fratricidal struggle for the throne of Thebes. Polynices attacks Thebes to take the crown from Eteocles. In this conflict the two brothers kill each other and Creon, Antigone's uncle, then becomes the king. Creon decrees that Polynices the traitor will be denied the rites of burial and nobody will bury Polynices. Antigone disobeys the Kings order and goes on to attempt to bury Polynices. Being discovered by Creon's

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48 K. P. Kesava Menon, Ed., *The great trial of Mahatma Gandhi & Mr. Sankarlal Banker,* Ganesh and Co, Madras, 1922. p.7.

49 Id.6.

50 SudiptoKaviraj, *Gandhi's Trial and India's Colonial State* in EXPERIENCING THE STATE 308 (Lloyd Rudolph & John Kurt Jacobsen eds., 2006).

51 SOPHOCLES, THE THREE THEBAN PLAYS, PENGUIN, LONDON, 1984.

guards, she is produced before Creon. In a powerful confrontation with Creon she asserts her right to bury her brother as she does not recognize the justice of the King's decree.[52] Douzinas argues that 'the force of the demand to bury the irreplaceable brother, which moves Antigone to her mad sacrifice, is not a violation of the law, but on the contrary, the ground upon which all law arises' [53]

Within this understanding, law cannot purely be understood within the framework of precedent and repetition but as something which is born outside this framework. Thus, when Gandhi makes the celebrated gesture of disobeying the law, he is in his defiance reaffirming the fact that law must have a connection to justice. He is implicitly asserting that if law is to be law at all, it cannot be linked to violence and force but rather to justice. The disobedience of law is premised upon the 'injustice' of the law and for the law to have a claim to a citizen's obedience it must be just.

Apart from raising fundamental questions about the legitimacy of law itself, the trial is also a great theatrical moment. By turning the trial of the rebel into the trial of the state, Gandhi demonstrates how the trial becomes in the 20 century a great space for the articulation of politics. The two great leaders who followed Gandhi in the use of the court as a space to reach out to a vast audience were Nelson Mandela and Fidel Castro. Just as Gandhi's statement that, it is 'a virtue to be disaffected towards a Government... which had done more harm to India than any previous system.' has achieved an iconic status so do did the trial statements of Mandela and Castro. Mandela in the famous Rivonia trial ended with the now iconic statement regarding his struggle for a non-racial democratic society that, 'It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die.' [54]In a similar sense, Castro, in a trial in which he was accused of armed insurrection ended with the fiery statement, 'But I do not

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[52] *Id*. In a famous confrontation with Creon she asserts her right to bury her brother:
Nor did I think your edict had such force
That you, a mere mortal, could override the gods,
The Great unwritten, unshakeable traditions.
They are alive, not just today or yesterday:
They live forever, from the first of time,
And no one knows when they first saw the light.

[53] COSTAS DOUZINAS, JUSTICE MISCARRIED: ETHICS AND AESTHETICS IN LAW 52 (1994).

[54] NELSON MANDELA, *NO EASY WALK TO FREEDOM,* PENGUIN, LONDON, 2002. p.170

fear prison, as I do not fear the fury of the miserable tyrant who took the lives of 70 of my comrades. Condemn me. It does not matter. History will absolve me.'[55]

Though they come from very diverse political positions, what is common to Gandhi, Mandela and Castro is a finely tuned understanding of the theatrical and political potential of law. They stand as examples of what can be achieved through a radical exploration of the limits of the law.

Conclusion

This paper has sought to indicate what a jurisprudence based on the thinking of Gandhi and Ambedkar might look like. How both Gandhi and Ambedkar approached the law is deeply relevant to any account of Indian jurisprudence.

From Ambedkar we learn that even though much of liberal theory is concerned with how to set limits to the power of the state, in India society is equally a source of violence. Any understanding of law in India must factor into account caste as law and hence society as the originator of unthinkable violence. I It is caste which makes a mockery of the constitutional right to equality and dignity of the Dalit community. The central problematic of Ambedkar's work, which was how to use the law of the state to combat the encoded prejudices of society, remains as relevant as ever.

The other important element of Ambedkar's thought of far reaching significance today is his insistence that India should be seen not as a majoritarian democracy but as a constitutional democracy. The institutions of democracy, especially the judiciary have to take seriously their counter majoritarian role, if democracy is not to degenerate into a bare rule of the majority. Ambekar also stressed the idea that democracy as a work in progress, and one has to move beyond the institutions of democracy and creating a constitutional culture.

Gandhi's contribution to Indian jurisprudence lies in his fundamental critique of the state. He saw the state as representing 'violence in a

[55] Fidel Castro, Prime Minister, Cuba, Speech before a Cuban court (October 16, 1953) available at http://www.marxists.org/history/cuba/archive/castro/1953/10/16.htm (visited on 15.03.2020).

concentrated and organized form' In his opinion the 'state is a soulless machine' which 'can never be weaned from violence to which it owes its very existence.' He went on to say that, 'I look upon an increase of the power of the state with the greatest fear…'[56]

Looking at the sedition trial with the vantage point of the contemporary, we can see how prescient, Gandhi was. The fact that the sedition law has remained on the statute books and is being increasingly used to prosecute all forms of dissent vindicates Gandhi's assertion that the state can 'never be weaned away from violence'.[57]

This caution on the rising power of the state and the tendency for the state to embody brute violence is perhaps more true than ever before. The Unlawful Activities Prevention (Amendment) Act, 2019 which increases the power of the state from deeming an organisation to be involved in terrorism to include also individuals who can also be deemed terrorists,[58]the abrogation of Section 370 and the downgrading of Jammu and Kashmir to a union territory all point to an increase in the power of the state.[59]

We must resuscitate the Gandhi who is the foremost critic of state violence and the Ambedkar who is a pioneering critic of societal violence as well as the Gandhi who struggled for political freedom and the Ambedkar who fought for social freedom. This is the need of our times.

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56 Rajmohan Gandhi, *Mohandas,* Penguin, New Delhi, 2007, p.396.

57 For an account of the way sedition law has been misused in post-independence India, See Sedition law and the death of Free Speech in India, https://www.scribd.com/doc/192469912/Sedition-Laws-the-Death-of-Free-Speech-in-India

58 See the Unlawful Activities Prevention (Amendment) Act, 2019, Section 35 gives the state the power to deem an 'individual to be involved in terrorism'

59 https://www.prsindia.org/sites/default/files/bill_files/Jammu%20and%20Kashmir%20Reorganisation%20Act%2C%202019.pdf

Towards Unrestricted and Disability Inclusive Legal Theory: Random Reflections[1]

Dr. Sanjay Jain[2]

It is argued in this paper to move towards evolution and recognition of inclusive theory / jurisprudence, and call for transformation [3] . A Transformative theory of Law is not only descriptive, analytical, and critical; but also idealistic, aspirational, performative, and at times even utopian[4]. In this paper, an attempt is made to question the limitations of traditional legal theory and expose the exclusionary and hegemonic conception of Law[5]. It is interesting to note that such an enterprise is a topical topic for several contemporary legal theorists representing the camps of feminism[6], critical legal studies[7], critical race theory[8], LGBT movement[9], Aboriginalism[10] etc. They also engage in analyzing the impact of all the aforementioned ideas on society from the prism of intersectionality[11]. To provide the recent sample, let us take the work of Margaret Davis, "Law unlimited Materialism, Pluralism and legal theory: 2017, It is a very thought provoking book engaging with the aforementioned ideas. The author repeatedly contests what she calls the 'limited conception of law' and insists the readers to espouse 'law unlimited',

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1 This Paper is based on a presentation on 7th March 2020 made by the author in international Conference a "Three day international conference on contemporary trends in comparative public law"(6th 8th March 2020) part of 14th remembering Prof. S P Sathe event. I dedicate this paper to the fond memory of Prof. S P Sathe who put creation and production of original knowledge ahead of ritualistic tokenism. His call for using Law as an instrument of Social transformation ceaselessly reflected in his writings and work.

2 Associate Professor and Additional Charge of Principal ILS Law College Pune.

3 Bob Peace " *Undoing the Privilege unearned advantage in a divided world*" Zed books 2010; Fiona kumari Campbell *" Contours of Abelism; the production of disability and Abledness"*Palgrave Macmillan 2009,

4 Chapters 1-2 Margaret Davies "*Law unlimited: Materialism, Pluralism and Legal theory*" Routledge 2017.

5 Chapter 9 "Socio-Legal theory in Margaret Davies " Asking the law questions" 4th Ed. 2017 Law Books.

6 Robin West and Cynthia Bowman " Research Handbook on feminist Jurisprudence" Edward Elgar Pub.Ltd.. 2019

7 Roberto Unger "critical legal studies movements: Another time greater task 'Verso Pub. 2015.

8 Richard Delgado " Critical Race theory " an introduction" NY University press third Ed. 2017. An Indian counterpart is Dr. B.R. Ambedkar "Annihilation of Caste: the Annotated critical edition" Navanya pub. 2014

9 Senthorun Sunil Raj " Feeling Queer Jurisprudence: Injury, intimacy, identity" Routledge 2020

10 Brian Robert and Erica Blythe " Essays on Aboriginalism" Brian Ross 2016 .Recently the High court of Australia by evolving " Doctrine of Constitutional belonging' has provided a public law shield for recognizing and protecting the identity of Aboriginals people. See Daniel Love v Commonwealth of Australia. 2020 HCA 3

11 Kimberlee Crenshaw " on Intersectionality : the essential writings" Perseus Distribution 2012

i.e. viewing law beyond any artificial, philosophical and legally theoretical boundaries in terms of both 'time and space' and any particular institutions[12].

She abandons the presumption that to understand law is to define it, or to capture its essence and concept, or to demonstrate how it is distinct from non-law norms, rather she advocates law to be mobile, material and plural. This approach is exploratory rather than analytical and seeks to imagine and extend the conception of Law. This approach by no means calls for giving a complete go bye to the pursuit of limited definitions of law. Limited definitions are useful for outlining the designs of Institutions and articulation of nuances of social life. However, a spacious perspective of legality can certainly stand hand in hand with the former. I endorsed her approach with the qualification that it has to be fully inclusive and representative of entire humanity. Legal theory with its Positivist, Statist, and formalist contours is getting increasingly challenged and there is shift in discourse towards law being, "more open, more pluralist, more grounded in social fact, more textual, and more attentive to the law–power nexus."[13]

There is an observable dialectics with certain jurists linking Law exclusively to State and allied authorities on one hand whereas Some scholars articulating the much broader notion of Law transcending the boundaries of State authorities on the other hand[14]. However, this so-called dialectics or transformation is strikingly exclusionary and oblivious vis-à-vis representation of Persons with disabilities (hereinafter PWDs) and the conception of Physical and Mental disability. Most of the philosophers representing the aforementioned vulnerable camps have simply moved on either completely forgetting to allude even scantly to PWDs or by characterizing them as outliers or at times by deferring their considerations to some unknown posterity. John Rawls observed, "Since we begin from the idea of society as a fair system of cooperation, we assume that persons as citizens have ***all the capacities that enable them*** to be ***cooperating members of society***. This is done to achieve ***a clear and uncluttered view*** of what, for us, is the fundamental question of political justice: namely, what is the most

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12 However, her picture of unlimited law is limited by her abelist and Myopic approach as her book does not have a single reference to either physical and mental disability or abelism.

13 Page no 1 F.Note 2

14 Brian Z. Tamanaha Legal Pluralism and Development 2012 Cambridge University Press ; for linkage of legal plurality with Constitutionalism see Guillaume Tusseau "Debating Legal Pluralism and Constitutionalism" 2020 Springer; legal pluralism under Indian Constitution is echoed in erstwhile article 370 and article 371 A,B etc.

appropriate conception of justice for specifying the terms of social cooperation between citizens regarded as *free and equal*, and as normal and fully cooperating members of society over a complete life? By taking this as the fundamental question we do not mean to say, of course, that no one ever ***suffers*** from illness and accident; such ***misfortunes*** are to be expected in the ordinary course of life, and provision for these ***contingencies*** must be made. But given our aim, ***I put aside for the time being*** *these* **temporary disabilities and also permanent disabilities or mental disorders** *so severe as to prevent people from being cooperating members of society in the usual sense.* Thus, while we begin with an idea of the person implicit in the public political culture, we *idealize and simplify* this idea in various ways in order to focus first on the main question."[15]

A careful analysis of Rawlsian discourse exposes how crude, numb and insensitive philosophers can get in order to conceive an idealist conception of Person. The unhesitant assumption on his part that the badge of citizens is worthy of only those who have all the capacities. Very clearly exposes the deep and pervasive abelism in the conception of Liberal theory in general and his theory of justice particular.

Indeed, there are numerous Philosophers at lodger head with restrictive and conceptual jurisprudence but even they invariably failed to notice the default Abelism oblivious to diversity arising out of Physical and mental disability, completely.[16]

Why interactions and encounters between able bodied and PWDs and why relations between the later inter se is not subject matter of Jural analysis in a non-paternalistic mode is an intriguing question with which legal theorist need to grapple. Why upon acquiring disability, persons occupying public offices would abruptly become ineligible to continue in such offices has been almost unquestioned assumption and the position is not any different even in respect of Private offices. Why difference arising out of acquisition of disability has not attracted the attention of the mainstream Philosophers, why concepts like accessibility, reasonable accommodation and Universal design have gone missing from the discourses of some of the most celebrated legal

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15 John Rawls "Theory of Justice" 1999 Harvard university press PP 11.

16 For critique of this approach from the perspective of Abelism see, Shelley Tremain Foucault and the Government of Disability 2005 University of Michigan.

Philosophers, are issues, which make me Anxious and as law scholar with disability, I feel to be laid down an alienated. I want to emphasize that Legal theory has enough conceptual resources to be inclusive, sensitive, open, dynamic, responsive and expansive. It is time to call for action to foster a polyphonic (Multi sounded) and multi sited version of Law embracing a variety of viewpoints. This ongoing dynamism may also be characterized as and echoed by the rejection of the notable features viz. authority of the nation-state, rationality and individualism, representational knowledge, and the cultural and political Eurocentrism underlying the traditional /Modern legal theory[17]. It is the crisis of Liberal conception of Law earnestly brining under the scanner autonomous able bodied or benchmark Man.[18]However this challenge is neither very organized nor even but of course, the shift sounds to be destabilizing and therefore exciting. Bonaventura De Santos celebrates this shift by observing, "Periods of paradigmatic transition are periods of fierce competition among rival epistemologies and knowledges. They are, therefore, periods of radical thinking – both deconstructive and reconstructive thinking.."[19]

Santos is of course on button in cautioning against labeling the paradigm shift as a new theory and abandoning the old as completely useless; as what might be perceived as part of New paradigm may be constitutive of some of the elements of Old Paradigm. Though belated it is a timely realization that Ableism is one of the immensely dominant constituent of

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[17] See generally Bonaventura De Sousa Santos "Epistemologies of the South : justice against Epistemicide" Routledge 2016' ; Bonaventura De Sousa Santos " Towards a new legal common sense " 2002 Wisconsin Madison It is submitted that the analysis of Professor Santos though trenchant and transformative, is still unrepresentative of lived experiences of PWDs and his focus on Patriarchy , capitalism and colonialism as the main sources of pathology of oppressed does not go far enough to implicate abelism. However his idea of absence of sociology is pregnant with potential to expand the notion of pathology to embrace the vulnerabilities of the disabled and to celebrate their abilities absent in the abelist register.

[18] In support of Liberal and democratic conception of Law , recently Johan van Der Walt has made out a very strong case,. "Typical liberal democrats are generally perceived to be at least somewhat uncomfortable with revolutionary changes and more at ease with incremental reforms of law. Perhaps that is also how they perceive themselves. This may be so because it seems easier to reconcile incremental law reform with the ideal of the rule of law." Johan van Der Walt has made out a very strong case, "The Concept of Liberal Democratic Law" 2020 Routledge PP 2.
It is submitted that if transition from Abelism to inclusion is revolution than aspirations of disabled to be the part of mainstream are bound to be the distant dreams.

[19] Santos , 569,"Three Metaphors for a New Conception of Law: The Frontier, the Baroque, and the South' Law and Society Review 29: 569–584.

protracted, and ever evolving world view[20]. Gone are the days when the able bodied humanity alone was sought to be controlled by law, it is now more than evident that the crisis arising out of exploitative abelism needs to be nipped into the bud. There is enough literature to demonstrate how the expanded conception of Law is capturing non-living beings like trees, rivers, wildlife etc. the focus now is increasingly on the relational model of the law.[21] Taking cognizance of legal properties of Human dignity as very emphatically articulated in the dedicated article (Article 3 of United Nations Convention of Persons with Disability) of Magna carta of Human rights of PWDs., Legal theory has to take the urgent call of fostering accommodation and jettisoning the vices of paternalism and tolerance towards PWDs. It is appropriate time for meta-ethicist[22] to revise cannon of Ethics and to clearly recognize perpetuation and reinforcement of Abelism as the other of Morality.

The Million-dollar question however is how to attain this objective? The answer lies in addressing constraints limiting and engendering imaginary potential of Legal theory and to evolve disruptive cum constructive notion of Law. Let us exemplify some of such constraints, purposely focusing on selective enquiries, fostering of regimented histories and habits, overlooking interdisciplinary gaps and silences, political imperatives and social currents, and the entire philosophical- cultural fabric, shaping the contexts and background of our preoccupation with the world. When I characterize the same as constraints, it should not be taken to mean that the same be dispensed with completely. Every theory has to have some constraint for its operation. The intractable difficulty however arises because of our affiliation to a particular cultural-philosophical setting and the same makes it far from easier

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[20] Michelle R. Nario-Redmond Ableism: The Causes and Consequences of Disability Prejudice 2019 Wily; James L. Cherney "Ableist Rhetoric " 2019 The Pennsylvania State University Press; Susan Baglieri, Priya Lalvani "Undoing Ableism" 2020 by Taylor and Francis;
How abelism is internalized is very vividly demonstrated by Glenn Stout in his noted work, "Able to play: Overcoming physical challenges" 2018 Houghton Mifflin Harcourt . He purports to hammer the point that how three basket ball players by overcoming their physical disabilities became able to play. In my submission rather than expecting the disabled to overcome their disabilities which is physically inconceivable, the abelist must create enabling environment allowing the disabled to absorb themselves in the mainstream of societies with their disabilities.

[21] Christopher Stone,"Should Trees Have Standing? "2010 Oxford university press.

[22] David Plunkett, Scott J. Shapiro and Kevin Toh "*Dimensions of Normativity new essays on metaethics and jurisprudence*" 2019 Oxford university press

to opt for any specific world view while engaging with a theoretical question. How a person influenced by able bodism to adopt culturally other approach to law in comprehending encounters and interactions between able bodied and PWDs or PWDs interse, is one of such intractable theoretical question. Understood from the western liberal perspective , rather than culturally other understanding, we may end up in reaching a hybrid theoretical result. The possible strategy to come out of this fix as suggested by Professor Margaret Davis and endorse by me is to challenge and question the matters at the epicenter of the Legal theory like idea of theoretical singularity, the presumption that authority is hierarchical, the is–ought distinction, the visibility of legal 'systems' at the expense of a broader legality, and the very idea of law being limited[23]. The need of the hour according to Prof Davis is to contest western perception of world as an intelligible theoretical space and to take cognizance of ideas challenging its certainty. For the same she join the band wagon of Prof Santos by conceiving a number of epistemological tools like the crisis of subjectivity, the dynamism of conceptualization, the 'new' materialism, and pre-figurative approaches to theory. Endorsing the same, I also add some more and elaborate my views on the same in following pages.

For systematic discussion the paper is divided into two section, section one having briefly examine the imaginative and transformative conceptualization of Law from the vintage of Disability studies, in section two I identify certain building blocks of disability inclusive legal theory. The analysis is considerably influenced by the work of critical philosophers Prof Margaret Davis, Amita Dhanda, John Law, Prof Santos, Davina Cooper, Fiona Campbell

Section One

Towards Multisited and Polyphonic conception of Law

In this section, I would make a case for liberation of Law from the clutches of Abelism and argue that Law's engagement with disability is not only instrumentally justified but intrinsically also it would amount to transformation of Justice. I would also problematize the notion of liberal and autonomous subject from the vintage of vulnerability.

[23] Id at Pp 4 F note 2.

Problematizing Liberal and positivistic conception of Law

Anglo centric tradition while addressing the question, what the Law is and what is its relation with social environment? Presumes separation between law and social i.e. Law as an entity and sphere external to it.[24]. Critiques of this tradition attach importance to the dichotomy between law and its conceptual others as it is about inclusion and exclusion. Though critical philosophers tend to challenge and even negate the absolute difference between law and it's others, while addressing questions such as Whom the Law represents? To whom and whose lived experiences it takes account of? By whom the Law is controlled and to whom it controls? How can Law be transformative in generating visible change? Positivists incline to embed the aforementioned separation thesis in legal thought. For them Law is inevitably to be super structural, exclusive, and is invariably pedigreed with the nation state. Under this perspective though Law relates and intricately intertwined with politics, society, culture, context—yet its super imposition over these externalities is uncontested.. I emphasized that such a view needs to be rigorously challenged as by invoking socio-legal theory it is plausible to demonstrate that law is inseparable from its so called externalities rather later are constitutive of it. Of course the challenge lies in capturing this idea in a language, problematizing insulation of Positive Law from variety of contexts

If I were to bring the above meta-ethical point down to specifics I contend that law with its exclusive focus on Able-bodied and its inclination to design socio, political, economic and cultural structures suitable only to them, it completely excludes even from consideration the aspiration and needs of the disabled. However, the categorical exclusion of the disabled and the overwhelming inclusion of the able bodied sounds asymmetrical and uneven if it is assumed that disability being an evolving phenomenon is dynamic and the abelism being contingent on a given world view is not static. In other words, at a given time characterization of certain members of the social group as disabled does not entail that they would retain their status perpetually. With the societal amelioration and progress in science and technology, they may get rid of their disabilities and join the band wagon of Abelist. Whereas

[24] Davies, M. Feminism and the Flat Law Theory. *Fem Leg Stud***16,** 281 (2008)/

the non-disabled in order to be the part of the disabled group do not have to wait for either societal amelioration or scientific or technological innovations. Abruptly by accident or illness they may become disabled. In other words, state of being non-disabled is merely temporary as it is contingent on many factors. The same therefore clearly establishes that the dichotomy between disabled and non-disabled seen as mutually exclusive of each other is based on a-priori and unempirical assumptions. The so called externalities like social, political and economic environment excluding PWDs, perpetuating and reinforcing primacy of non-disabled over disabled cannot be seen as being insulated and unrelated to law, if it were to be perceived as an engine and instrument of transformation, amelioration and empowerment of Humankind. Discounting of Lived experiences of the disabled while designing the societal structure is not justified and defensible. Moreover, cognizance of difference generated from physical and mental disability being all pervasive cannot and should not be lost sight of while conceptualizing Law as phenomenologically physical and mental disability has the propensity to pervade able bodied, permanently or temporarily. Thus, acquisition of disability being a state of things and which cannot be averted by able bodied, it is therefore but logical if law were insensitive to the needs and aspirations of PWDs. In other words, an inclusive conception of law is not only ameliorative to the disabled but it also covers the contingencies of non-disabled pushed into the realm of disabled.

Positivist conception of Law be it command of sovereign[25] or as system of rules[26] or as hierarchy of norms[27] being oblivious to the Abelism is ill-suited for evolution of a disability inclusive legal theory. Such a theory is conceivable by taking into account the interaction of socio-economic and cultural barriers with the bodily and mental impairments. Should Law aim at creating a level plain field binging disabled at par with non-disabled or put differently by affording treatment to the former like later? or should the level plain field be conceived in such a manner as to avail dignified treatment to

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[25] Wilfrid Rumble edited, "John Austin: The province of Jurisprudence determined" 2009 Cambridge university press.

[26] HLA Hart Leslie Green , Edited by Joseph Raz , and Penelope A. Bulloch *'Concept of Law'*2012 Oxford University Press.

[27] Ed.Kelsen, Hans. Max Knight (translator) (PAPERBACK) 'Pure Theory of Law'. English Translation, Revised and Enlarged 2009 Law books Exchange

PWDs on their own terms i.e. without the comparator of non-disabled, is a million dollar question. Though I tend to opt for the later choice, how to translate it in terms of legal theory is not yet clear to me. However, it is very clear that Law as hegemony of abelist in terms of embracement and perpetuation of the design of a society, exclusively suitable for the non-disabled and totally closed for the disabled cannot be the end game of those who aspire for society of equals. The idea that non-disabled being autonomous and independent are capable of self determination and disabled because of their physical and mental impairments being dependent [28], lack the competence of decision making is naïve to say the least. The same completely overlooks the phenomenon of support and its pivotal role in the lives of non-disabled. Do the non-disabled not thrive on support of one another?[29] Why philosophers like John Rawls unhesitantly ride on the support while emphasizing on the cooperative ability of the able bodied in the formation of basic structure of society. To translate it in Indian constitutional discourse, as a result of interpretative meditation, provisions like Articles 15 (3), (4), 16 (4) etc. are celebrated as enabling provisions and courts recognized that they are linked with substantive equality. Whereas, when it comes to redressal of the discrimination on ground of physical and mental disability than the policy makers are categorical to limit its reach to reasonable accommodation. In other words, discrimination on the ground of physical and mental disability be redressed as long as it is affordable and even the magna carta of rights of PWDs, UNCRPD goes only as far as recognizing human rights of PWDs as equal basis with other i.e. at par with able bodied. Why the law be guided by the bench mark of abelism ? Understood this way, we have to conceptualize a relational model of law akin

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[28] See Amita Dhanda, "Constructing a new Human Rights lexicon: Convention on the Rights of Persons with Disabilities" Sur, Rev. int. direitos human. vol.5 no.8 São Paulo June 2008.

[29] Ability to sign has to be internalized by a blind person to portray efficiency whereas Article 335 off Constitution of India is categorical in laying down that while providing reservations to SCs and STs in Jobs ,relaxation in qualifying marks in any examination or lowering the standards of evaluation is not to be perceived as antithetical to efficiency. Can we have a better celebration of Abelism than this? And let me add cherry on the cake , constitution of India through Article 317 further harnesses and augments the Abelism by empowering President of India to remove,…"from office the Chairman or any other member of a Public Service Commission" if they are 'in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body". I wonder whether acquisition of disability by any reason whatsoever tantamounts to conversion of human being into a chattel worthy of abrupt removal through public power.
I thank my colleague Ms. Rajalaxmi Joshi for bringing my attention to this extraordinary clause in our Constitution .

to nurturing diversity and fostering respect for physical and mental differences amongst human beings. To put it other way round, decontextualized conceptualization of Law devoid of and insulated from a variety of socio-political, cultural and economic contexts and unrepresentative of an ever evolving social group of PWDs is bound to provide its perfunctory picture.[30] It would also amount to blocking innovative, responsive and creative disruptions. I therefore espoused for a bottom of rather than a top down and horizontal[31] than a vertical[32] conception of Law. Professor Margaret Davis very aptly characterizes this venture as 'Flat theory of Law[33]'.

Disability studies and Law

"Disability studies' being multidisciplinary, extrapolates from many disciplines and at the same time occupying for itself a distinct space, provides inputs to other disciplines including law and creates new scholarship. It performs a crucial task of posing questions about the role, significance and status of disability in the society, overlooked completely by other disciplines.[34] Disability Study engages with disability as a social, cultural and political phenomenon, and counters it's Medical notion i.e. an inherent, immutable trait located in the person; looks at it as an outcome of socio-cultural dynamics, occurring in interactions between society and people with disabilities; locates the disability in society not in the body of Individual, challenges the notion of normalcy in society;[35] perceives people with disabilities not as patients or charitable cases but rather as human beings who exist as an important part of the social fabric [36] recognizes that disability is a

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30 See chapter 14 Julia Eckert "What is the Context in "Law in Context"? " ed. Lukas Heckendorn Urscheler "Concepts of Law" 2016 Routledge.

31 Location of power of law beyond State in Multiple sites is referred to as Horizontal law.

32 Location of Power of law in a single center like State is referred as vertical law .

33 Flat Law signifies indeterminate nature of the insides and outsides of law. It prioritizesthe multiple locations, manifestations, and interpretive possibilities of law; Though it is Statist it is interdependent on and not insulated from the social sphere. I.e. Exclusion of lived experiences of disabled and primacy to the abilities reflects outside and inside of Law from the standpoint of Abelism.

34 Arlene S. Kanter "*The law: what's disability studies got to do with it or an introduction to disability legal studies*" Columbia Human Rights Law Review · April 2011 vol (403-478) 42 issue 2. Id at PP 407

35 Ibid

36 Catherine J. Kudlick,"*Disability History: Why We Need Another "Other*", 108 Am. Hist. Rev. 763, 775 (2003).

social construct derived from a history of stigmatization[37] and exclusion, insisting thereby knowledge of disability is to be gathered from the lived experiences of and amongst people with disabilities themselves and calls for reexamination and reposition of disability in the society. Disability Studies provides a much leaded innovative lens to see disability as part of the human experience and to comprehend how the law, and society, in general, views difference as a deviation from an "unstated norm."[38]. Since the function of law is to decide how to recognize, legitimize, and allocate differences-different rights, responsibilities, resources, and even justice within society-the looking glass of Disability Studies enables us to view the legal profession, and the meaning of difference within the legal system, and society.[39] Learning lessons from how the issues of race, ethnicity, gender, and sexual identity have informed our understanding of society and power , the infusion of a Disability Studies perspective into the law has to be espoused to facilitate the analysis of complex lessons about our culture, society, minority rights, power, authority, and the role of law in changing society. Even if it is assumed that Law as system of rules shapes politics, power, and society, maintains the status quo and existing power relationships and is designed to nurture and preserve the rule of law. Question arise does it really perform the above functions and even if it does on whose behalf and for whom? Law and Society scholars and critical legal theorists raised such questions and even disability studies scholars are interested in such questions. Unlike Feminism, Critical Race theory, Postmodernism which have constantly challenged the hegemony of the liberal subject and have given call for problematizing the social hierarchy and power dynamics. The role of Disability in Law through disability studies is relatively a new and evolving scholarship. However, the same does not in any way discount the extraordinary prospect of disability studies to enable the domain of legal theory. Increasingly now it is the pursuit of the scholars to meditate in kind of legal theories having potential to transform and conceptualize Law and disability.

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[37] Erving Goffman "*STIGMA Notes on the Management of Spoiled Identity.*" 1990, Penguin Books; Paul Quinn "Stigma, State Expressions and the Law" 2019 Routledge

[38] See Martha Minow, "*Making all the Difference: Inclusion, Exclusion and the American Law"*51(1990) Cornell university Press.

[39] Arlene S. Kanter "*The law: what's disability studies got to do with it or an introduction to disability legal studies*" Columbia Human Rights Law Review · April 2011 vol (403-478) 42 issue 2. Id at PP 406

A number of poignant questions viz, how do legal definitions of disability regulate, exclude, and/or protect marginalized populations based on their physical and mental differences, gender, economic status, race, ethnicity and sexual orientation? What are the roles of human rights, formal equality, and anti-discrimination legislation in various approaches to disability? What can people with disabilities offer to reconfigure existing law?[40] Provide the much needed context for enabling and conceptualizing the Law vis-à-vis disability.

Crisis of Subjectivity : Crisis of subjectivity implies problematization of able bodism and calls for informing the world view with diversity arising out of physical and mental disabilities. How Interaction between the bodily impairments and socio, political, cultural, economic and legal barriers produces Disability has to be pondered about and reflected on .The realization that location of the disability does not lie in body but in societal barriers opens up the conception of legal subject and leads to the recognition of PWDs as equal human beings. The bodily difference no longer remains the reason for exclusion; rather it becomes reason of respect for difference. It opens up avenues for accommodation and sensitizes the world view to the notions of accessibility, reasonable accommodation, and universal design To allude Moser, "The conception of freedom espoused by the liberal theory mostly centers around an able-bodied and competent person, having a body with a set of given functions, skills and properties, which are steered by a central command unit - the consciousness - which is situated in the head. Agency, mobility, the ability to communicate verbally, to make discretionary judgments, make decisions and implement them - is thus located in the body and in the self-residing in that body"[41]. An inclusive and counter hegemonic law needs to problematize this idea. This worldview, which is a paradigm shift in the comprehension of Legal subject is best captured by the coinage of Social model of disability in contemporary critical disability studies movement.[42]

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40 Ibid PP 444.

41 Moser, I. 2000. "Against normalisation: Subverting norms of ability and disability." Science as Culture. 9, 201–240.

42 Anna Lawson and Mark Priestley "The social model of disability: Questions for law and legal scholarship?" (PP 3-15) in Peter Blanck and Eilionóir Flynn ed. "*Routledge Handbook of Disability Law and Human Rights"* 2017 Routledge.

Vulnerability

The presumption that the liberal subject is a competent social actor capable of playing multiple and concurrent societal roles: the employee, the employer, the spouse, the parent, the consumer, the manufacturer, the citizen, the taxpayer, and so on, is earnestly contested by vulnerability scholarship, thereby providing a vintage pint for the disability studies scholars to forge alliance with it. Questioning the idea of Liberal subject, Vulnerability scholarship joins hand with disability studies scholars by arguing that the vulnerable subject is a more accurate and complete universal figure to place at the heart of social policy.

Vulnerability ...is a powerful conceptual tool with the potential to define an obligation for the state to ensure a richer and more robust guarantee of equality" Martha Fineman observes, "Vulnerability initially should be understood as arising from our embodiment, which carries with it the ever-present possibility of harm, injury, and misfortune from mildly adverse to catastrophically devastating events, whether accidental, intentional, or otherwise. Individuals can attempt to lessen the risk or mitigate the impact of such events, but they cannot eliminate their possibility"[43] This analysis is very effective in depicting the relationship of disabled and non-disabled as the points of the spectrum/continuum and rightly guards against viewing them as dichotomous opposites.

"The vulnerability paradigm calls on courts to look beyond the identity of the disadvantaged developed over the past few decades under a discrimination paradigm. While the old identity categories-gender, race, sexuality, and so on-should not be totally removed from consideration, we must reframe our concerns in order to reveal and address things about the organization of society that are otherwise missed"[44]

Having examined the disability context of law and made out a case for espousal of vulnerable subjects over liberal, let me now briefly draw a blueprint for evolution of disability inclusive legal theory by identifying some of its building blocks in very scratchy details.

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[43] The Vulnerable Subject: Anchoring Equality in the Human Condition 20 Yale J.L. & Feminism 1 PP 5
[44] Ibid PP 10.

Section Two

Towards a Blue Print of Disability inclusive Legal theory

In this section I would make a modest attempt to evolve certain building blocks and call for dynamism in existing lego-therotical conceptualization for pioneering what I call the praxis of disability inclusive legal theory.

Dynamic conceptualization

Dynamic conceptualization results in problematisation and contestation of fixity and staticity of concepts. E.g. the liberal conception of equality is cabined and crewed by the ideals of 'equality before law and reasonable classification' embracing sameness and combating difference. However, its dynamic conceptualization presents a multi-dimensional and open-ended notion of equality. Thus, equality may be understood in terms of re-distribution, participation, recognition, inclusion, etc.[45]For individualization of justice, equality may further be harnessed by reading into it the notion of reasonable accommodation.[46] At any rate, concepts must be understood as contingent and contextualized tools and should not be perceived as the instruments for perpetuating a particular dogma. In other words, conceptions are not devices for pigeonholing.[47]

New Materialism

How law is embedded in a material space reserved for a particular class, what is the effect of human interactions with physical world is the point of exploration now for Legal geographers. How law can be both inclusive and exclusive becomes evident if one sees how a particular public street while amenable to navigation to the able bodied, is completely inaccessible to the PWDs. New Materialism from the perspective of disability studies

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45 See Sandra Fredman,*Discrimination Law*(2nd ed, Oxford University Press) 155-56. See Chapter 1for a detailed analysis of substantive equality; General comment 6 (2018) on equality and non-discrimination Adopted by the UNCRPD Committee at its nineteen session (14 February – 9 March 2018).; Dr. Sanjay Jain *"Disability Rights at a Crossroads: Reflections on Evolution of Public Law of Physical and Mental Disability*" (352-391) in Prof. M.P. Singh Ed. "Indian Yearbook of Comparative Law" (2016) Vol.I, Oxford University Press, New Delhi.

46 Dr. Sanjay Jain, *"Exploring the contours of principle of reasonable accommodation: critique of exclusion of blind persons as judges by the Supreme Court*." (Page 51-72) in General Editor: Arvind P. Datar "Essays & Reminiscences: a Festschrift in Honour of Nani A. Palkhivala" 2020 Lexi-Nexis

47 See Walter B Gallie, *Essentially Contested* **Concepts,***(1956) 56 Proceedings of the Aristotelian Society 167*

advocates an inclusive and accessible public street in particular and non-handicapping and barrier free environment in general.[48]

Re-Conceptualizing oppression

McIntosh identified and labeled the phenomenon of dominant group privilege, or systemic unearned advantage gained at the expense of another group[49]. In doing so, she highlighted key power dynamics operating in systems of oppression which most discussions of dominant/subordinate relationships tend to ignore. She recognized that focusing on the disparate treatment and victimization of a group was insufficient in explaining the perpetuation of oppression and therefore, she shifted the nucleus of the discussion from the damage to the victims of oppression to the benefits bestowed on the oppressors. By exploring the privileges, which perpetually advantaged one group over another, she exposed a hidden but fundamental component sustaining oppression. This analysis is directly relevant in exposing the lack of cohesivity in law and legal theory of not being cognizant to the hierarchical relationship between able bodied and PWDs, wherein former assume the unearned ability privileges. As a matter of fact, along the Ambedkar's lines, who perceive Law as caste[50], I perceive law as 'Abelism and Abelist'[51].

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[48] Although, Article 9 of UNCRPD casts obligation on State parties" to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas".(Article 9 clause 1) The nature of norm conceived by this Article is subject to multiple interpretations ; to some it is aspirational to others partially it is mandatory and there are some scholars who emphasize on its progressive realization. By casting obligations on the State parties to Develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public; (Article 9 Clause 2 a). Its teeth is blunted. See Anna Lawson , Chapter 9 " Accessibility" in Edited By: Ilias Bantekas, Michael Ashley Stein, Dimitris Anastasiou "The UN Convention on the Rights of Persons with Disabilities: A Commentary" 2018 Oxford University Press.; General comment 2 Committee on the Rights of Persons with DisabilitiesEleventh session CRPD/C/GC/2 (31 March–11 April 2014).

[49] McIntosh, P. (1992) 'White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences
Through Work in Women's Studies', 78 in M. Anderson and P. Collins (eds) *Race, Class and Gender: An Anthology*,
Wadsworth Publishing Company, Belmont, CA .

[50] See Arvind Narrain "*Ambedkar and Gandhi: Contributions to an Indian Jurisprudence"* part of this volume.

[51] See Chapter 8 "Ableist relations and the embodiment of privilege"
Bob Peace "*Undoing the Privilege unearned advantage in a divided world*" Zed books 2010.

Negative ontology of disability

Although the potential of law to make a positive difference in lives of some disabled is somewhat grounded, the same does not account for its structural exclusivity in favor of a dominant social group of able bodied. To quote Prof Campbell, "We need to keep returning continually to the matter of disability as negative ontology, a malignancy, a body constituted by what Michael Oliver terms 'the personal tragedy theory of disability', wherein disability cannot be spoken about as anything other than an anathema: 'disability is some terrible chance event which occurs at random to unfortunate individuals'. Disability is assumed to be ontologically intolerable, inherently negative."[52]

The necessity to embrace the narrative of suffering i.e. negative ontology signifies disability as a tragic state. The burden of negative formulations of disablement means that the disabled litigant would have difficulty if she wished to present an affirmative/alternative approach to living with an impairment colored, by a mixture of joy and despair[53]. A textbook example of the same is furnished by the recent decision of Supreme Court of India, wherein the court categorically embraced the negative ontology of Disability by observing that in absence of ability to read and write and to observe the demeanors of the witnesses, owing to absence of sight, a Blind person or even a person with low vision beyond judicial stipulations is ineligible to hold the position of judge in lower court.[54] Deployment of negative ontology forecloses any discussion of accommodation and hence it is extremely lethal.

Social injury

The conception of Social injury, a feminist phenomenon signifies transformation in conceptualization of remedies in both Public and Private

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[52] Fiona kumari Campbell *"Contours of Abelism; the production of disability and Abledness"* Palgrave Macmillan 2009, id at Pp 12.

[53] Rovner, L. 2001. Perpetuating stigma: Client identity in disability rights litigation. Utah Law Review. 2, 247.

[54] V. Surendra Mohan v. State of Tamil Nadu & Ors., (2019) 4 SCC 237, at 24,25& 33-35; Sanjay S. Jain and Saranya Mishra - 3rd July 2019 "*Non-abyssal and Ableist Indian Supreme Court: The Abyssal Exclusion of Persons with Disabilities*" Oxford Human rights Hub A global perspectives on Human rights available at https://ohrh.law.ox.ac.uk/non-abyssal-and-ableist-indian-supreme-court-the-abyssal-exclusion-of-persons-with-disabilities/ last visited 20 march 2020.

Laws. Social injury is translation of ones' privatized injuries into Collectivist raced, sexed, disabled domains and the same may be invoked to transform conventional remedies. It recognizes that the "Freedom is neither a philosophical absolute nor a tangible entity but a relational and contextual practice that takes shape in opposition to whatever is locally and ideologically conceived as unfreedom"[55]. Unfreedom in the context of abelism signifies the stigmatized impact of socio-cultural, political and economic barriers in interaction with law. E.g. categorical exclusion of totally blind persons from being eligible as Judges in absence of any consideration of provision for creation of enabling environment being the Exclusion of Acute degree is kind of social injury, worthy of redressed by law.

Towards Pre-figurative Politics

According to Professor Davis, all social theories including legal theory has the potential to be both performative and pre-figurative. Performative theory implies an act as well as a process. Performances can make sense only with in a context, and have to adequately cite and repeat the past.[56]

Translated in the domain of legal theory, law to the exclusion of socio-cultural conditions in the present time is non-performative. Thus, devoid of or bereft of sensitivity to diverse socio, political, economic, and cultural conditions of PWDs, law is both 'non-performative and exclusive. The main advantage of Performativity is its potential to bring new on table and to challenge and question the past. How Abelist Law is performative and impact negatively on the lives of PWDs is best illustrated by provisions in Majority of the Constitutions attaching disability as a disqualification to occupy Public offices and by the absence of physical and mental disability as one of the protected characteristics worthy of one of the prohibited grounds of discrimination.[57]

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[55] Id at Pp 6 Wendy Brown "*Freedom and Plastic Cage*" in Wendy Brown " *Social injury: Power and freedom in Late Modernity*" 1995 Princeton University Press.

[56] See Margaret Davies "*Law unlimited: Materialism, Pluralism and Legal theory*" Routledge 2017 Pp 16; Theodor Adorno " Negative Dialectics" Routledge 2004.

[57] See Dr. Sanjay Jain "Disability' in the Constitutions: Critical analysis of Exclusionary Constitutionalism" An unpublished paper and on file with author.; Amy Raub, Isabel Latz, Aleta Sprague, Michael Ashley Stein, and Jody Heymann "Constitutional Rights of Persons with disabilities: An Analysis of 193National Constitutions" 2016 Harvard Human Rights Journal / Vol. 29 (203-240)

Professor Davis calls for Practice of Prefigurative politics, as politics advocating for change. For her it is an effective complement to Performative theory in challenging the exclusivity and centering of law. Under this paradigm, one need not to wait for materialization of conditions for general social change, Pre-figurative legal theory espouses and acknowledges "change accumulates through repeated practices and that one part of making the imagined future real is to perform it now"[58]. Such praxis is "partly based on possibilities shaped by existing conditions, but is also part vision, part experiment, and part every day enactments."[59]

Thus, pre-figurative politics from the perspective of disability studies calls for secularization of and broadening of conception of support. Support no longer is stigmatized or paternalized, rather it becomes the acknowledgement of the idea of inter-dependence, thereby challenging the notion of autonomous and independent and subject, hallmark of ableism. Instead of reacting to the physical and mental disabilities in negative, the secularized notion of support would make the world view proactive. Support would not come as a retro; it would come by default as part of original.

It is necessary to experiment with legalities e.g., can we create a class room where students will learn both in audio as well as sign language? Would sensitivity to sign language not foster the temper of able bodied students towards their speech impaired counter parts and what about the special effect of multiple language pedagogy on all students[60]. Stretching the margins of the law beyond the Statist law, can we conceive institutions, critiquing the socio-economic interactions from the perspective of Abelism, what about problematizing the Abelist and Medicalized notion of law targeting the body of PWDs rather than overtly and covertly Privileged social conditions in favor of non disabled? Should the law not be cognizant to

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58 See Margaret Davies "*Law unlimited: Materialism, Pluralism and Legal theory*" Routledge 2017 Pp 16

59 Ibid.

60 See Tanmoy Bhattacharya "Diversity at Workplaces and in Education" (39-66) in Nandini Ghosh ed "Interrogating disability in India : Theory and Practice" Springer 2016
"My thesis of "centring disability" with respect to sign language is based on a conspicuous character of sign languages—the multi-modal nature of the language that achieves the impossible task of uttering two words at the same time in terms of a spoken language equivalent. Sound, as we know, is embedded in time; we can only utter Word after Word after Word, and so on. Sign language, on the other hand, being a visual language, makes use of both space and time to produce language.." Id at Pp 42.

intersection of disadvantages and their compounding effect on the weak and vulnerable? In other words, law needs to traverse beyond the self-defined boundaries.

Law needs to be inflected with and sensitive to the lived experiences of the PWDs. Such praxis cannot be strong enough to equalize power and is often tentative in its imagination of conception of justice. However, alternative imagination of law results in prefiguration of future legal strategies in constituencies affording convergence between theory and practice. Prefiguration is a bridge between the legal present and legal future. Enacting possible future in the present, such practices leave permanent marks on what is to come now and here. [61]

In the words of John Law, "The issue is not simply how what is out there can be uncovered and brought to light, though this remains an important issue. It is also about what might be made in the relations of investigation, what might be brought into being. And indeed; it is about what should be brought into being"[62].

Pre-figurative' does not necessarily impose a general and ideal vision as a corrective to the problems raised by contemporary critiques. It is a more practical, localized, and often tentative efforts to model new forms of practical–theoretical legality – and produce law practices that are more just, flexible, and attune to diversity.[63]

Prefiguration occurs both at the edges of law and at times with Statist Law also. The Judgment of SC of India enabling the Blind students to appear in Competitive examinations with the help of Scribe despite being an actual judgment was lot ahead of its time. It is also possible to write alternative judgments and hold Mock courts to review the abelist law and suggest alternatives. Even though at first blush, prefiguration may sound Utopian, it has the potential to shape future. Davina Cooper aptly narrates its significance, "Utopia can no longer be understood as an ideal or abstract

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61 See Margaret Davies "*Law unlimited: Materialism, Pluralism and Legal theory*" Routledge 2017 Pp 17.

62 Law, John and John Urry '*Enacting the Social' Economy and Society"* 2004 id at pp 33: 390–410.

63 See Margaret Davies "*Law unlimited: Materialism, Pluralism and Legal theory*" Routledge 2017 Pp 19.

construction of the perfect society. Rather, scholars of utopia now see it in more practical terms – as an attempt to practice ideas, which also incorporates the struggles and frequently conflictual relationships that go into developing and sustaining novel and counter-normative practices. Utopianism remains future-oriented, but the future is one that can be imagined and, more importantly, practiced in the present. The 'everyday utopia' is in part an experimental space where ideas are tested and where new ideas emerge. There is a vision and a common purpose, of course, but the utopia is actualization, not abstraction."[64]

Conclusion

I have argued in this paper that since Law is an instrument of transformation, it has to be representative of all groups and has to be attune to Socio-economic, cultural and political contexts. From the perspective of disability studies, law has to be destabilized so as to be derailed from the abelist path and to be cognizant of physical and mental disability. In short, I have argued for challenging the static and positivistic nature of law and has made out a case for its sociological and critical conception. A conception, which is transformative and emancipative. I have purported to provide tentative building blocks of a disability inclusive legal theory with focus on dynamic conceptualization, new materialism, re-conceptualized notion of Oppression, indignation of negative ontology of disability, social injury, and pre-figurative politics.

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[64] Cooper, Davina "*Everyday Utopias: The Conceptual Life of Promising Spaces*"2014, id at Pp 37,Duke University Press

Deepening the Alliance Between Intersectionality and disability: Prospects and Challenges

Rahul Bajaj[1]

In 1989, Kimberley Crenshaw's seminal article on unpacking the contours and scope of intersectionality was entirely framed as an intervention to shine the spotlight on the ways in which race and sex interact with each other and a clarion call for the adoption of an intersectional perspective to capture the lived experiences of black women.[2] Disability does not find a single mention in her article. Similarly, in a recent article in the prestigious Harvard Law Review on the 30th anniversary of the publication of Crenshaw's article, Carbado and Harris, while focusing on the relationship between intersectionality, dominance theory and anti-essentialism, make the object of their enquiry to attend to the ways in which: "racial power is gendered and gender subordination is racialized."[3] Disability is entirely absent from their line of sight.

While the central preoccupation of the intersectional tradition has been mapping the interaction between race and gender, disability has recently begun receiving some importance in the context of the movement. In General Comment ("GC") 6, the UNCRPD Committee offered a full-throated endorsement of the need to adopt an intersectional perspective in the context of disability, and arguably went farther than any other Human Rights Committee has thus far gone in this direction. [4]Notwithstanding this welcome development, case law in India and elsewhere still fails to meaningfully account for intersectionality when thinking about disability or for disability when thinking about intersectionality. It will, therefore, be my endeavor in this article to focus on how the disabled's fight for the full realization of the

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1 Advocate, Candidate for the MPhil in Law; Rhodes Scholar (India and Linacre 2018); University of Oxford

2 See generally Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, U. Chi. Legal F. 139 (1989)

3 Devon W. Carbado& Cheryl I. Harris, INTERSECTIONALITY AT 30: MAPPING THE MARGINS OF ANTI-ESSENTIALISM, INTERSECTIONALITY, AND DOMINANCE THEORY, 132 Harv. L. Rev, 2193 (2019).

4 See generally UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 6 (2018), Article 5: Equality and non-discrimination, 9 March 2018, CRPD/C/GC/6, available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsnbHatvuFkZ%2bt93Y3D%2baa2qtJucAYDOCLUtyUf%2brfiOZckKbzS%2bBsQ%2bHx1IyvGh6ORVZnM4LEiy7ws5V4MM8VC4khDIZJSuxotVqfulsdtPv

promise of equality can be bolstered by deepening and broadening the linkages between intersectionality and disability.

More concretely, I will first point to the gap in the intersectionality literature in dealing with disability and argue that that gap evidences a fundamental failure of intersectional theory, at the time of its emergence and initial growth, to account for disability in a meaningful sense. I will then focus on the shift in thinking on this relationship, as evidenced most sharply by the UNCRPD Committee's focus on intersectionality in GC 6. I will examine the extent to which this understanding finds reflection in case law in India and beyond and then flag some litigation and academic opportunities for the alliance between intersectionality and disability to be more fully strengthened. Lastly, I will conclude by examining how a disability-sensitive intersectional approach can provide us an inlet to bring into play the Indian Constitution's prohibition on discrimination under Articles 15 and 16, absent the insertion of disability as a prohibited ground of discrimination.

Intersectionality's early days – the marginalization of the disability perspective

The intellectual basis of the intersectionality movement can be traced back to Kimberlé Williams Crenshaw's article in 1989. The article made the core point of how the discrimination faced by black women was both unique and similar to race and sex discrimination. It was similar to race discrimination inasmuch as it mapped onto the discrimination faced by black men and to sex discrimination inasmuch as it mapped onto the discrimination faced by white women. And yet at the same time, it was unique. This was because it was qualitatively different from both, by virtue of being a combination between the two.[5] As Atrey says, Crenshaw: "exhorted discrimination lawyers, feminists, and civil rights campaigners alike to rethink and recast the established analytical frames of understanding and redressing discrimination so that they included intersectionality."[6]

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5 Supra note 1 at p. 149.

6 Atrey, S. (2019-09-25), The Theory: Outlining the Intersectional Framework in Intersectionality Discrimination, Oxford University Press, p. 34.

That Crenshaw's zone of enquiry was confined to the combination of race and sex is also borne out by the fact that the three cases on intersectionality that constitute the gravamen of her article relate to the interaction of the markers of race and sex. The first case, DeGraffenreid[7], involved a challenge to General Motors' rule of 'Last Hired, First Fired' which the claimants argued disadvantaged them on account of their combination of race and sex. Crenshaw's critique of the judgment is rooted in the fact that the Court's thinking of race and sex discrimination is entirely shaped by the experiences of black men and white women, thus obscuring the unique challenges that are faced by black women owing to the cumulative impact of their race and gender. [8] The second case, Travenol, concerns the refusal of the 5th Circuit Court of Appeals to allow a black woman to sue against Travenaul's discriminatory practices on behalf of black men and black women.[9] While the claimant was allowed to sue on behalf of black women, she was not allowed to do so on behalf of black men. Crenshaw's difficulty with the judgment is that it compels black women to choose between giving up their intersectionality [to only focus on race], to be able to represent black men, or embracing their intersectionality which would preclude them from representing black men. [10]

The third case, Hughes[11], gave rise to a similar, albeit slightly different, problem. In it, black women were not allowed to represent all women [irrespective of their race] but only black women. The gravamen of the complaint was that the employer, Hughes Helicopter, practiced race and sex discrimination in the context of promotion to upper craft positions and supervisory jobs. Crenshaw critiques the judgment for adopting a narrow and myopic view of remedies which shuts out those who intend to challenge an entire employment system in a bottom-up form. This results in black women being compelled to fend for themselves. [12]

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7 413 F Supp 142 (ED Mo 1976)
8 Supra note 1 at p. 143.
9 673 F2d 798 (5th Cir 1982)
10 Supra note 1 at p. 148.
11 708 F2d 475 (9th Cir 1983)
12 Supra note 1 at p. 145.

Subsequent scholarship also reveals intersectionality's tendency to privilege the experiences of black women. To illustrate, in her 2015 book, Vivian May traces the evolution of the concept of intersectionality. She locates its origins in the struggles waged by formerly enslaved black American women in the South. She maps its evolution in the feminist and women's studies traditions, by looking at its focus on women of colour and women in the Global South. [13]As a result, her thinking is grounded in race and sex. In their 2019 article in the Harvard Law Review, Carbado and Harris, as noted in the abstract, focus on the interaction of gender and race. While talking about the relationship between intersectionality and anti-essentialism, and making the point that they are not the same thing[14], they draw on experiences entirely involving gender and race. While it is true that the anti-essentialism tradition, developed by Angela Harris, was formulated in this context, they could have certainly referred to examples of disability in the article. Further, their conceptualization of intersectionality also foregrounds the perspectives of black women.[15] There is only one passing reference to disability in the paper. About explaining how feminist critiques of essentialism call into question the notion of the universalist woman, who is, amongst other things, able-bodied.[16]

The limited academic engagement with disability and intersectionality is also evidenced by the fact that a basic search for the combination of 'intersectionality' and 'disability' in the Index on Legal Periodicals yields ten results, only four of which appear directly to deal with the subject. On the other hand, a search for intersectionality and race gives rise to 66 results, and a search for intersectionality and gender gives rise to 72 results. This empirical finding is consistent with Atrey'sinsight:

"Similarly, breadth-wise, intersectionality is considered too narrow, focussed on the 'extreme' example of Black women, and hence having little of the generalizable and normative qualities supposed of a theory."[17]Atrey's

[13] See generally May, V. (2015-01-22), Pursuing Intersectionality, Unsettling Dominant Imaginaries, Routledge
[14] Supra note 2 at p. 2218.
[15] Supra note 2 at p. 2222.
[16] Supra note 2 at p. 2199.
[17] Supra note 5 at p. 54.

own attempt to remedy intersectionality's perceived myopia is confined to the experiences of Dalit Indian women which she cites as the basis to indicate the tradition's global appeal.[18] Disability is absent from this telling, too.

Lest I be accused of overstating the point, a clarification would be in order. As Alice Abrokwa notes, there has been a growing, albeit still limited, recognition of the intersection between race and disability.[19]She cites the examples of academic engagement in the shape of Daniel J. Losen & Kevin G. Welner on the experiences of students of colour in the special educational system and the work of Camille A. Nelson on police officers interacting with people of colour with mental health disabilities. [20] Perhaps the most emphatic example of the linkage between intersectionality and disability can be found in the fashion in which the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and the Committee set up under it, deals with the subject, as discussed below.

When intersectionality meets disability: the work of the UNCRPD Committee

The trend of the intersectionality tradition not adequately accounting for disability was most significantly bucked by the UNCRPD. The Convention is predicated on a full-throated endorsement of an intersectional perspective, concerning people with disabilities. This is most clearly evident from the fact that the Convention maps the linkage of disability with three markers of identity: race, children and women. As its starting point, the Convention recognizes how disability often combines with other markers of identity to cause multiple or aggravated forms of discrimination.[21]

Specifically, it recognizes that women and girls with disabilities face intersectional discrimination and steps need to be taken to ensure their full and equal enjoyment of human rights and fundamental freedoms. A similar provision exists as regards children with disabilities. As regards inclusive

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18 Id at P. 32.

19 Alice Abrokwa, "WHEN THEY ENTER, WE ALL ENTER": OPENING THE DOOR TO INTER-SECTIONAL DISCRIMINATION CLAIMS BASED ON RACE AND DISABILITY, 24 Michigan Journal of Race & Law, 15, 17 (2018)

20 ibid

21 UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I, preamble.

education, Article 24 on inclusive education states, inter alia, that steps need to be taken to ensure that the education of children with disabilities, especially those who are blind, deaf or deafblind, takes place in the most appropriate fashion. Similarly, Article 28 on adequate standard of living and social protection clarifies the need for women and girls with disabilities as well as older disabled people, to be provided access to the existing social protection infrastructure. Finally, Article 30(5)(d), which deals with access to sporting facilities for the disabled, singles out children as a specific class of disabled people who must be provided access to such facilities.

Further, in GC 6, the UNCRPD Committee offers a full-throated endorsement of intersectionality. More concretely, it defines intersectional discrimination in the following way. "Intersectional discrimination occurs when a person with a disability or associated to disability suffers discrimination of any form on the basis of disability, combined with, colour, sex, language, religion, ethnic, gender or other status."[22] The manifestations of intersectional discrimination that it recognizes are direct and indirect, harassment and reasonable accommodation. It cites the example of blind women who are unable to access family planning services, implicating them owing to the combination of their gender and disability.[23]

It also helpfully provides a conceptually neat distinction between intersectional and multiple discrimination. While multiple discrimination is aggravated due to multiple markers of disadvantage, intersectional discrimination is where the multiple markers cannot be distinguished from each other but are fused together in a way that heightens discrimination. [24] It states that states parties must specifically recognize those subgroups who face intersectional discrimination and take steps to ensure inclusive equality for them.[25] It recognizes that women and girls with disabilities most often experience multiple and intersectional discrimination and that children experience it often, too. [26] It goes onto note that intersectional discrimination

22 Supra note 3, para 19.
23 Ibid.
24 Ibid.
25 Id at para 32.
26 Id at paras 36 and 37.

can implicate any combination of multiple grounds, not just gender and disability which has received explicit recognition in the Convention. [27]

Finally, it calls on the need for awareness-raising about the complexity of intersectionality and how it manifests itself in particular forms of discrimination and oppression.[28] This explicit treatment of intersectionality in the GC is following from recommendations made by some legal scholars to the Committee. In them, it was argued that the committee should not conflate multiple and intersectional discrimination. This was on the rationale that multiple discrimination appears to be premised on being able to separately identify how each marker of one's identity results in discrimination, while intersectional discrimination is based on the markers being inseparable.[29] This suggestion received the Committee's endorsement, as the above para makes clear. And the recognition of the inseparable and synergistic character of intersectional discrimination is a significant advance, as Atrey points out.[30]

Further, the twin-track approach advocated by these scholars also received the Committee's endorsement. For instance, while talking about identifying people with disabilities, as pointed out above, there is a specific reference to intersectional groups. [31] The same is also seen in the context of awareness-raising. [32]

On the one hand, the focus on intersectionality in the Convention and the GC merits appreciation. At the same time, however, it bears mention that this is a manifestation of the wider tendency of the law dealing with disabilities in a silo, rather than mainstreaming disability consideration into other laws. To illustrate, disability is absent from the intersectional imaginary in many other mainstream conventions and comments. More specifically, in the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), there is a mention of women from different backgrounds,

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27 Id at para 36.
28 Id at para 55(a).
29 Sandra Fredman et al, Achieving Transformative Equality for Persons with Disabilities: Submission to the CRPD Committee for General Comment No. 6 on Article 5 of the UN Convention on the Rights of Persons with Disabilities, Oxford Human Rights Hub, pp. 11-12 (2017).
30 Shreya Atrey, "CRPD Committee Adopts New General Comment on Equality and Non-Discrimination" (OxHRH Blog, 2 April 2018), <http://ohrh.law.ox.ac.uk/crpd-committee-adopts-new-general-comment-on-equality-and-non-discrimination>
31 Supra note 3 at para 32.
32 Id at para 55.

such as pregnant women, mothers, rural women and married women.[33] However, it does not do so qua disabled women.

Further, in General Comment 28, the Human Rights Committee notes how gender combines with other markers of identity to heighten discrimination. The markers it refers to include: race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. [34]However, disability is missing from the list. Further, the CERD Committee recognizes in General Recommendation 25 that: 'racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men.'[35]

It does not recognize the combination of race and disability and their cumulative impact. This is a glaring omission, in light of the fact that the ways in which race and disability interact with each other is well-documented. To illustrate, the Centers for Disease Control and Prevention has shown how African-American children are more likely to suffer from developmental delays, owing to their exposure to lead and toxic waste [as they live in run-down housing and other localities where such exposure is more likely]. Similarly, African-American people are less likely to be be prescribed medicines when they report suffering from depression or other mental health disorders. [36]

Case law on intersectionality and disability in India and beyond also fails to account for their interaction, as discussed in the following section.

Treatment in case law of disability and intersectionality

In India, judicial engagement with intersectionality has been markedly absent. Article 15(1) of the Indian Constitution states:

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[33] See supra note5 at p. 16. Citing to: United Nations Convention on the Elimination of All Forms of Discrimination Against Women (opened for signature 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13. See pmbl, arts 4(2), 11(2), 12(2), 14, 16.

[34] United Nations Human Rights Committee, General Comment No 28: Article 3 (The Equality of Rights Between Men and Women), UN Doc CCPR/C/21/Rev.1/Add.10 [30].

[35] United Nations International Convention on the Elimination of All Forms of Racial Discrimination (opened for signature 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 at 3.

[36] Erevelles, Nirmala. "Race." Keywords for Disability Studies. Eds. Rachel Adams, Benjamin Reiss and David Serlin. New York: New York University Press, 2015.

"The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." The rigid interpretation of Article 15(1) that Indian courts have adopted has meant that it covers within its net only single-ground discrimination, not discrimination that implicates multiple grounds. The strongest endorsement of this principle by the Supreme Court was offered in the case of Air India v Nergesh Meerza[37] in which it was held as follows: "[W]hat Articles 15(1) and 16(2) prohibit is that discrimination should not be made only and only on the ground of sex. These Articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations."

As Atrey notes, this has meant that Article 15 has in fact helped perpetuate discrimination on the basis of, among other things, disability against women..[38] The only honourable exception to this trend is Justice Chandrachud's concurring opinion in the Navtej Johar case, decriminalizing homosexual intercourse. In it, he stated:

"[t]his narrow view of Article 15 strips the prohibition on discrimination of its essential content [because it] fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context."[39]

From the standpoint of this paper, this development is both positive and negative. It is positive, inasmuch as Justice Chandrachud, by pushing the frontiers of Article 15, has thrown open the possibility of intersectional discrimination being covered within its ken. To be sure, as Pillai argues, one reading of Justice Chandrachud's opinion suggests that he is merely endorsing capacious single-axis discrimination, as opposed to intersectional discrimination..[40] So how much of a real shift this view marks in judicial

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37 1982 SCR (1) 438.

38 Supra note 5 at p. 16.

39 Navtej Singh Johar v Union of India (Writ Petition (Criminal) No 76 of 2016) (decided on 6 September 2018) (Supreme Court of India) para 36 [Chandrachud J].

40 Gauri Pillai, NavtejJohar v Union of India – On Intersectionality (We're not quite there yet yet) [Indian Constitutional Law and Philosophy, 12th September 2018], https://indconlawphil.wordpress.com/2018/09/12/guest-post-navtej-johar-v-union-of-india-on-intersectionality-were-not-quite-there-yet/

thinking on intersectionality in India remains to be seen. At any rate, the negative dimension of Justice Chandrachud's view for present purposes is that his view supports the proposition that disability still remains absent from judicial imagination on intersectionality in India.

Atrey tells us about 2 American cases involving people with disabilities which underscore the absence of an intersectional lens. The first, Lowe v Angelo's Italian Foods[41], involved a fact situation in which a waitress alleged that she had faced sex and disability discrimination. On the sex discrimination front, she contended that she was made the object of a number of inappropriate remarks, such as telling her what to wear and calling her girl or girlie all the time. On the disability discrimination front, she argued that she had shown her employer a letter from her doctor indicating that she could not stoop, bend of lift weights, as she had been diagnosed with Multiple Sclerosis, at which point she was dismissed. While the Court accepted her disability discrimination claim, it did not do so as regards the claim on sex discrimination. It reasoned that the remarks that she complained of had not permeated the work environment with discriminatory intimidation, ridicule, and insult for it to constitute a hostile work environment. It was also held that, since the male employees with her were not similarly situated, the dictation provided as to what she could wear was not legally problematic. While this author has no difficulty with the court concluding that the tests for sex discrimination were not met in this case, what is lacking from the Court's analysis is an understanding of the ways in which the claimant's sex and disability combined to worsen her situation, resulting in the creation of an intersectional pattern of group disadvantage. [42]

The second case was that of Joseph v. HDMJ Restaurant, Inc. [43] This again involved a black woman of Haitian origin employed as a waitress by the defendant. She claimed that she had faced race, sex and disability discrimination. More concretely, she had faced abuse at the hands of the defendant, propositioned in many inappropriate ways[44], pulled down a flight of stairs and yelled at when she complained that she was not given any tables

41 87 F 3d 1170 (10th Cir 1996) (USCA).
42 Supra note 5 at p. 111.
43 685 F Supp 2d 312 (2009) (United States District Court, Eastern District of New York).
44 Ibid 139.

to serve in order to be able to receive tips. [45] In its judgment, while the Court accepted her claim for sex discrimination, it did not do so for race and disability discrimination. [46]While an intersectionality analysis certainly does not require courts to arrive at claimant-friendly outcomes in all cases, what it does require is exhibiting sensitivity to the unique confluence of vulnerabilities that are at issue in such a case. More specifically, the Court has to fully face up to the ways in which these markers intersect and interact. For, until such time as there is such an acknowledgment, "there is little to aid the recognition and redress of the experience of intersectional discrimination."[47]

The Lalit case in India is one unique example of the court fully accounting for intersectionality in its analysis.[48] The case was brought by older residents at the concerned blind school who, having passed out from the school, were desirous of continuing to receive accommodation in the institution. They framed the case as one where their right to housing should prevail against the right to education and housing of younger disabled students still studying at the institution. In its judgment, the Court accorded priority to the right to education of children still studying at the institution vis-a-vis the right to housing of older disabled residents.

What is important for our purposes, though, is the Court exhibiting sensitivity to the fact that these children faced discrimination on account of their multiple intersecting identities. It held, in pertinent part, as follows:

"In the facts of the present case, the Andh Mahavidyalay is a state-run educational institution which also provides shelter to a doubly disadvantaged child, up to the age of fourteen. Such child combines in herself or himself a bundle of inviolable rights: as a person, as a young person, a disabled young person, a disabled young person whose right to education is guaranteed."[49] It further held that the state had to account for the "cascading effect of multiple disadvantages that such children bear the burden of."[50]

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45 Ibid 139–40.
46 Ibid 148.
47 Supra note 5 at p. 112.
48 Lalit v Government of NCT, Writ Petition (Civil) No. 8568 of 2009 (decided on 2 December 2010) (High Court of Delhi).
49 Id at para 17.
50 Ibid.

That the UNCRPD's endorsement of intersectionality has not translated into judicial outcomes in which disability is seen as part of an intersectionality analysis also becomes clear if one surveys Indian case law engaging with the UNCRPD. Out of the 28 cases surveyed by a scholar in which the UNCRPD was either cited or interpreted by Indian courts[51], only the Lalit case [discussed above] adopts an intersectional lens.. It appears that arguments based on intersectionality were not even made in the other cases, so the blame for this gap cannot be laid at the doorstep of the courts concerned.

Reclaiming the intersectionality tradition: litigation and academic opportunities

I will now flag some avenues for considering disability through an intersectional lens, in order to provide a pathway for such engagement in case law and academic commentary going forward.

First, the DU photocopy case involved the legality of making coursepacks – summaries/digests of the textbooks at issue. At one point, the Court issued an interim order, pursuant to which the dissemination of coursepacks had to be stopped. Mr. Mohanty tells us about a visually impaired student who had to bear the bunt of this decision. More concretely, the parent of that child reported the consequence of the order for her. On account of it, he would have to purchase the underlying books in order to be able to access them, which was a financially challenging proposition or scan them himself.[52] This is a powerful illustration of the way in which a disability, when combined with economic disempowerment, results in a situation in which a disabled person is impacted by a measure. While the measure detrimentally impacts everyone, it does so more for those who are economically disempowered. Similarly, while it affects the disabled and the able-bodied, it impacts the disabled more. This is because they need to incur the additional burden of scanning and making accessible the content at issue.

S Atrey, 'Indian Supreme Court Jurisprudence and the Implementation of the UNCRPD ' in A Lawson and L Waddington (eds), The United Nations Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Court (Oxford University Press 2018) [51]

[52] Amlan Mohanty, educational exceptions to copyright law in India [NUJS-CUSAT Conference, 29th December, 2012] available at https://www.youtube.com/watch?v=KNDrmzHOAvE&t=1025s, 16-17 minute mark.

In this way, to use Crenshaw's framing, an economically disempowered disabled student here faces discrimination that is similar to that faced by those economically disempowered and other disabled people but that is also unique. An intersectionality perspective has the potential to fully account for the same.

Second, under Sec. 80U of the Income Tax Act, 1961, a person is allowed to claim a deduction of Rs. 75,000 on their taxable income, if they are more than 40% disabled. If the disability is more than 80%, the amount of deduction allowed is Rs. 1,25,000/-. [53] It is possible that this may be challenged in a Court, on the basis that it is violative of the constitutional guarantee of equality. Specifically, citing to examples of financially affluent disabled people, it may very well be argued that there is no reason for there to exist a legislative scheme on the premise that the disabled should be given a financial benefit not given to others. How can this irrelevant characteristic make a difference, the argument could run.

Intersectionality can provide the answer to such a question. Specifically, by taking into account the ways in which disability combines with socio-economic disadvantage, a court would be able to fully appreciate how a disability impacts one's life outcomes, from an economic standpoint. For instance, in India, recent data shows that only 34 lakh of the 1.34 crore disabled people of an employable age have a job, resulting in an almost 70% unemployment rate..[54] Further, 69% of disabled people in India live in rural areas[55], on the basis of which economic disempowerment at the macro level can be safely assumed. It is also a fact that the disabled have to bear the cost of accessing additional resources to be on an even keel with others, such as screen reading software, cochlear implants or other disability-specific assistive technology. Therefore, a court adopting an intersectional approach would be able to fully account for all of these factors and grant the Constitutional imprimatur to this classification.

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[53] PreetiMotiani, Sections 80DD, 80U: Tax saving deductions for disabled persons, [Economic Times, 14th Feb, 2020] available at https://economictimes.indiatimes.com/wealth/tax/sections-80dd-80u-tax-saving-deductions-for-disabled-persons/articleshow/68282374.cms?from=mdr

[54] Prachi Verma and Anjali Venugopalan, India Inc has long way to go in employing disabled people, [Economic Times, 11th Dec, 2019], available at https://economictimes.indiatimes.com/jobs/india-inc-has-long-way-to-go-in-employing-disabled-people/articleshow/72449585.cms?from=mdr

[55] 'Poverty and disability closely interlinked' [India CSR Network, 10th October, 2019] available at https://indiacsr.in/poverty-and-disability-closely-interlinked/

Third, at present, there does not exist meaningful work on the ways in which a disability affects one's life infrastructure more broadly. To explicate, let us take an example of a blind student who is not able to access academic content because of their blindness. This then means that their sensory disability impacts their mental health in a causative way. To explain further, let us assume that someone faces a persistent pattern of discrimination at their workplace because of their blindness, such as not being given a promotion, being denied access to the information needed for them to perform their job successfully and offensive remarks. In such a case, their physical disability certainly affects their mental well-being and mental health. If they bring a claim of discrimination before a court, and the Court adopts an intersectional approach, it would have to account for the mental health implications of what happened to them. This will have very concrete, practical impacts, for instance in the amount of compensation and remedies that a court grants.

Abrokwa provides two excellent examples of litigation opportunities involving the intersection of race and disability in the American context. Let us assume that a potential employer refuses to hire a black person on the basis of their HIV status, fearing the spread of the infection. They further think that black people are more likely to contract HIV and hence refuse to hire black people. In this case, an intersectional claim could be brought by a black person suffering from HIV who is excluded from consideration owing to the combination of their race and disability.[56] Similarly, this may take place in the context of providing reasonable accommodations to black employees with disabilities. Examples include an employer feeling that black people are lazy and hence refusing to offer them a flexible working schedule that their disability necessitates or thinking that black people generally have behavioral problems and hence refusing to engage in the interactive process mandated by the ADA as part of the reasonable accommodation exercise.[57]

Constitutional relegation of disability: is intersectionality part of the answer?

Much of the debate in India on constitutionally prohibiting disability discrimination thus far has been on including disability as a prohibited

[56] Supra note 18 at p. 70.
[57] Id at p. 71.

ground of discrimination. To illustrate, in its concluding observations concerning India submitted late last year, the UNCRPD Committee urged India to include disability as a constitutionally prohibited ground of discrimination in the following words:

"13. The Committee recommends that the State party, guided by the Committee's general comment No. 6 (2018) on equality and non-discrimination and taking account of targets 10.2 and 10.3 of the Sustainable Development Goals:

(a) Amend the Constitution to explicitly prohibit disability-based discrimination."[58]

While this development would be ideal, it is unlikely to become a political reality anytime soon. More concretely, there is no gainsaying the fact that the disabled do not have much sway in the political process in India. To illustrate, the Government dragged its feet on the enactment of a new disability rights law for a number of years[59] and there are at present no members with disabilities in Parliament, as far as this author is aware. As a result, disability is likely to be far off the priority list for the Government in the near future.

This being so, the judicialization of intersectionality might be the one way in which to bring disability within the remit of Article 15 for the disabled and to invest the provision with vitality and significance for the disabled. As Kanabaran states:

"An intersectional reading of articles 15(2) and 17 with the right to personal liberty under article 21 places the articulation of the right to non-discrimination for persons with disabilities outside the webs of constitutional inarticulation and disaggregation."[60]

To illustrate, a Court can take into account how gender and disability combine to result in heightened vulnerability and thereby open a pathway to

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58 UNCRPD Committee, Concluding observations on the initial report of India (Advance Unedited Version), CRPD/C/IND/CO/1, 24th Sep, 2019

59 Rahul Bajaj "Twenty Years on, Inclusion Remains a Distant Dream for India's Disabled" (OxHRH Blog, 29 October 2015) <http://ohrh.law.ox.ac.uk/twenty-years-on-inclusion-remains-a-distant-dream-for-indias-disabled/>

60 Kalpana Kannabiran, Tools of Justice: Non-discrimination and the Indian Constitution, March 2012, published by Routledge India, p. 118.

expand the Reach of Article 15. For instance, in the Jeeja Ghosh case[61], the Court was faced with a fact situation of a woman with cerebral palsy being made to de-board a flight, as the airline was unsure if it would be safe for her to travel. While the Court dealt with the case, constitutionally speaking, through the prism of human dignity, it could have also taken her gender into account and thereby held the case to be one under Article 15(1). This would have provided it a constitutional pathway to hold the state to account for failing to put in place the appropriate legal regime to prevent the violation of her rights by a private airline.

Further, in Jeeja Ghosh itself, the Court takes note of a disabled woman who faced ill-treatment owing to the combination of disability and gender. It states:

"Ms. Anilee Agarwal was recently forced to sing [sic sign] an indemnity bond before she could fly from Delhi to Raipur on Jet Connect, threatened with being "body-lifted" by four male flight crew members, and finally "thrown down the steps" in an aisle chair when she refused to be carried by hand."[62]

It is clear that Ms. Anilee Agarwal faced a combination of gender-based discrimination [in being carried by men forcibly] and disability [in the shape of being thrown down the steps with her wheelchair]. A case with a fact pattern such as hers would be amenable to the adoption of an intersectional perspective under Article 15.

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[61] Jeeja Ghosh v. Union of India (2016) 7 SCC 761
[62] Id at para 15.

Looking Through the Glass of Ableism

Ms. Rajalaxmi Joshi[1]

This article is a sequel to the article "Towards Unrestricted and Disability Inclusive Legal Theory: Random Reflections" by Dr. Sanjay Jain, wherein he makes an attempt to question the limitations of traditional legal theory and expose the exclusionary and hegemonic conception of law. He highlights 'ableism' or 'ableist ideology' as one of the constraints that limit and engender imaginary potential of legal theory to evolve disruptive cum constructive notion of law. Taking the argument further the focus of this article is to articulate the idea of 'ableism'and demonstrate reflections of ableist characteristics, norms, and presumptions towards Persons with Disabilities (PWDs) in legislations, rules and judgments.

What is Ableism?

While one aims to study 'disability' as a subject, a very common approach to the subject would be to look at disability by focusing on the disabled bodies, and not focusing on the practices that perpetuates 'disabilities'. We often miss on to study the 'privileges' that are retained to perpetuate 'disability'. scholarship on the subject would not be without loopholes if the concept of disability is not studied from the prism of 'ability'. Ableism is a norm that separates human beings into the classes of 'able' and 'disabled'. The two being two sides of the same coin it is important to turn the coin and look at 'disability', through the side of 'ability'.

Ableism as a concept cannot be confined in terms of definitions and specificities. However, the author would like to allude to two ideas that expresses different contours of ableism.

Fionna Kumari Campbell defines ableism as *"A network of* ***beliefs, processes and practices*** *that produces a particular kind of self and body (the corporeal standard) that is projected as the perfect, species-typical and therefore essential and fully human. Disability then is cast as a diminished state of being human*[2]*".*

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This article is an outcome of the paper presented during Remembering Prof. S P Sathe- 14th International Conference on Contemporary Trends in Comparative Public Law (6th – 8th March 2020) at ILS Law College. This paper is a homage to the memory of Prof. S P Sathe with whom I had a very close association.

[2] Fionna Kumari Campbell, *Contours of ableism- the production of disability and abledness* (Palgrave Macmillan 2009) 5

Veronica Chouinard *defines ableism as*

*'**ideas, practices, institutions and social relations** that presume ablebodiedness, andby so doing, construct persons with disabilities as marginalised, oppressed and largely invisible "others"'*[3]

Both the definitions highlight how ableism generates standards, norms that defines essential characteristics of a 'full human'. These standards and norms may get expressed (intentionally or unintentionally) through beliefs, processes, practices, institutions, or social relations. The idea of ableism insists on strict adherence to these standards and norms. A body outside the frame work of these norms would be treated as 'unfit', 'abnormal', 'less worthy', 'invalid' etc. It looks at 'disability' as contrary to 'able bodiedness'. To put it simply ableism is an attitude that looks at disability as a negative concept, opposite to the idea of 'ability. It looks at disability as something that needs to be eliminated, cured and ameliorated at the first opportunity.[4] Phyllis M. May- Machunda describes ableism as systemic disempowerment of persons with Disabilities for the advantage of able-bodied persons.[5]

Ableism as an overarching concept

Ableism as a system of oppression can be seen or experienced by PWDs everywhere and in everything around them. At meta level ableism can be experienced in attitudes, behaviours, in treatment that is given to PWDs though it often has a tone of sympathy and protection. It can also be experienced through infrastructures, language,tools of communication etc. In the next part of this article the author would demonstrate with various examples reflections of ableist attitudes, characteristics in and beyond law.

Ableism and language

Language is an effective tool of communication and a good indicator of thoughts and ideas of its users. Usage of certain terminologies and

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3 Veronica Chouinard,'Making space for disabling differences: challenging ableist geographies (1997) Environment and Planning D: Society and Space volume 15<https://journals.sagepub.com/doi/pdf/10.1068/d150379> accessed on 9 Dec 2020

4 Fionna Kumari Campbell, Contours of ableism- the production of disability and abledness (Palgrave Macmillan 2009) 5

5 Phyllis M. May-Machunda, Exploring the invisible knapsack of Able-bodied privilege,<https://vetvoicenational.files.wordpress.com/2018/10/exploringinvisibleknapsack.pdf> accessed on 9 Dec 2020

phrases[6], go to show the predominance of ableist ideology in language. Passing of (un)intentional or casual remarks in respect of physical or mental capacities of a person reflect the ableism in language.

The concept of ableism is so much ingrained in the language that it often goes unnoticed. A tag line in the advertisement of a dance academy read "Have Feet, Will dance". Apparently, the tag line looks encouraging, and assuring its readers that no specialised skillsare required to dance. However, the present advertisement insists on having 'feet' to dance and simply ignores those who lack 'feet'. Ableism stresses on having certain physical characteristics to perform a particular activity.

Legal language is no exception to the usage of ableist terminologies. The Motor Vehicle Act, 1988 (till it was amended recently in 2019) referred to a motor vehicle specially designed and constructed, for PWDs as "invalid carriage"[7]. The extremity of ableism goes to such a level that the idea of 'invalidity' is attached even to the tools/ supports that are used by PWDs.

Sec 339 of Code of Civil Procedure, 1973 deals with 'Delivery of lunatic to care of relative or friend'. The section reduces the identity of persons with mental disabilities to goods or commodity by providing for their 'delivery'. The ableist approach of looking at disability is reductionist, wherein the identity of aPWD is reduced to his disability and sometimes even as a non-human object.

Incapacity follows disability

Inherent to the idea of ableism is negative attitude towards 'disability' and the 'disabled'. This attitude generates two-fold effect. It devalues potential of PWDs and presumes their incapacity. And at the same time, it nurtures the privilege of 'presumed capacity' in favour of non-disabled. This presumption of 'incapacity' justify exclusion of PWDs from legal framework and policies. Art 317[8] of the Constitution of India is a good illustration that nurtures this presumption. It empowers the President to remove/ suspend by

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6 Calling persons as 'idiot', 'mad', 'fool', 'do you think I am blind?'

7 Motor Vehicle Act, 1988, s 2 (18) "invalid carriage" means a motor vehicle specially designed and constructed, and not merely adapted, for the use of a person suffering from some physical defect or disability, and used solely by or for such a person; Post 2019 amendment the word is replaced with "adapted carriage"

8 Constitution of India, 1950 Art 317 Removal and suspension of a member of a Public Service Commission... (3) …. the President may by order remove… if…. (c) in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body

an order a member of Public Service Commission, amongst many other grounds, on the grounds of unfitness to continue in office **by reason of infirmity of mind or body**. It is interesting to see that the power conferred on the president is power of direct removal or suspension. It allows automatic removal or suspension from holding a public post on the basis of'existence of disability'. The discussion in the Constituent Assembly[9] concerning this Article, shows that**infirmity of body or mind**was regarded as without dispute **a fit** case for an automatic disqualification. The Ableist ideology assumes incapacity as a necessary consequence of disability. The present provision of the Constitution gives no due regard to concepts like 'reasonable accommodation[10]', 'Support'etc. which would help the PWDs to overcome hurdles (if any) created by disability. Post ratification of United Nations Convention on Rights of Persons with Disabilities (UNCRPD), such a groundfor automatic disqualification in no way resonate with India's obligations incurred under UNCRPD.

At this juncture reference to Delhi Higher Judicial Service Rules, 1970 is appropriate which helps in substantiating the claim as to how legal systems are able bodied centric and carries presumption of incapacity towards PWDs. Rule 22 refers to direct recruitments to judicial services. It states that such *"...direct recruitments shall be subject to provisions regarding reservation...for...Persons with Disability candidates {suffering from any of the disabilities mentioned in sub section(1) of Section 34 of the Rights of Persons with Disabilities Act, 2016} as provided by law or orders issued by the Central Government from time to time."*

The rule complies with the mandate of providing reservations to PWDs as per the Rights of Persons with Disabilities Act 2016 (RPWD Act).It is interesting to see that the said rule is added with the proviso which applies only to PWDs. The proviso reads as under:

*"Provided that the Persons with Disability candidates should be **capable of efficiently discharging** their duties as Judicial Officer as per the*

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9 Draft Constitutionof India, Art 285 A"*Similarly the third disqualification, namely, that he has become infirm in body and mind may also be regarded, without any kind of dispute, as a **fit** case for automatic disqualification*"

10 UNCRPD, Article 2 defines Reasonable accommodation as necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms

satisfaction of the Medical Board that may be constituted before or after their names are recommended for appointment."

The proviso provides for an added qualification/ requirement of proving 'efficiency to discharge duties as judicial officer' to get the appointment on part of PWDs. To put it simply, the proviso assumes that not all PWDs, though entitled to reservation under RPWD Act, are FIT for the job of judicial officer. Therefore, a separate assessment as regards their efficiency and fitness needs to be conducted by the medical board. Further, it mentions that such medical board is to be constituted **before or after the name of PWDs are recommended for appointment.** It is strange that the assessment of efficiency to discharge duties **as a Judicial Officer** will be done even before the person is given a chance to work or assume office. Rule intends to assess the efficiency of PWDs not in general but in specific as a 'Judicial Officer', therefore unless a reasonable opportunity to work is given, no presumptions in respect of his (in)efficiency could be drawn. It is interesting to see that no other categories of classes like SCs, STs etc. who are entitled to reservations and other benefits are required to or assessed for their efficiency before assuming office. The requirement of proving efficiency and fitness applies only to PWDs. This rule is an epitome of ableist presumption towards PWDs, requiring them to prove their efficiency for being considered as fit. On the contrary in case of able-bodied persons the presumption of fitness to discharge the obligations of work follows automatically.

By no stretch of imagination, the rule can be said to be doing reasonable classification, and is discriminatory on face of it. The RPWD Actwhile providing for reservation under Sec. 34 nowhere empowers the State to provide for an added/precondition in respect of proving efficiency. The said rule is, on face of it, excessive and ultra-vires the RPWD Act and also the international principles of UNCRPD and will not stand the test of principles of administrative law governing delegated legislation[11].

The plight of PWDs is compounded when PWDs are made to prove their efficiency on standards which are themselves 'ableist'. In the case of *V.*

[11] M P Jain and S N Jain, *Principles of Administrative Law* (Lexis Nexis 2017)

Surendra Mohan v. State of Tamil Nadu[12] the Supreme Court held that in discharging the function of a judge a person is required to read, write, record evidence, prepare judgments maintaining confidentiality of papers etc. which a person who's disability is more than 50% cannot practically do.[13] The Supreme Court further observed *"Therefore, creating any reservation in appointment for those with disabilities beyond the 50% level is far from advisable as it may create practical and seemingly other avoidable complications"*.[14]The rule perpetuates 'medical model' of disability which locates disability in the body of an individual. It focuses too much on the impairment and functions of the job than on the person. On the contrary the RPWD Actbases the idea of 'disability' on 'social model of disability'. The obligations under the Act on the State to provide 'reasonable accommodation' and 'support'[15]to PWDs are not given consideration in this judgment while assessingperson's 'efficiency'.

If the same parameter of efficiency and fitness are applied by the medical board under Rule 22 referred above, then by no stretch of imagination a PWD can ever be held efficient or fit to discharge the duties of a Judicial Officer.

Sanism as an off shoot of Ableism

Akin to the idea of ableism, Sanism operates specifically in the arena of 'mental disabilities.'

Michael L. Perlin prescribes sanism as *"an irrational prejudice of the same quality and character as other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry. It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition, and deindividualization, and it is sustained and perpetuated by our use of alleged "ordinary common sense" (OCS) and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process".*[16]

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12 *V. Surendra Mohan v. State of Tamil Nadu*(2019) 4 SCC 237
13 *ibid*Para 45 and 46
14 *ibid*Para 45
15 Rights of persons with Disabilities Act, 2016 s 13
16 Michael L. Perlin,*Mental Disability and Death Penalty- the shame of the states*, (Rowman & Littlefield Publishers, Inc. 2013) 11-12

He speaks about 'basic sanist myths' that have developed towards Persons with Mental Disabilities.[17]

Amongst many for the sake of brevity the author reproduces only those which are relevant to the present discussion; *"(a) Mental illness can easily be identified by lay persons and matches up closely to popular media depictions. It comports with our common sense notion of crazy behavior.*

(b) It is, and should be, socially acceptable to use pejorative labels to describe and single out people who are mentally ill; this singling out is not problematic in the way that the use of pejorative labels to describe women, blacks, Jews, or gays and lesbians might be."[18]

These sanist myths can easily be seen in the provisions of laws.

Registration Act, 1908

*"**Section 35. Procedure on admission and denial of execution respectively:***

*(3) (a) If any person by whom the document purports to be executed…**appears** to the registering officer to be…**an idiot or a lunatic**…the registering officer shall refuse to register the document as to the person so appearing…".*

TheRegistration Act, 1908 leaves it to the discretion of the Registrar to decide if the person is *an idiot or lunatic*[19] on the basis of his appearance. The Sanist presumption that Persons with Mental Disabilities can be easily identified through their appearance, behavior, the thinking process, the way they express themselves etc. is well reflected in the law. The present provision of the Registration Act requires reconsideration in light of Sec. 3(3) of the Mental Health Care Act, 2017.[20]

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17 Michael L. Perlin, *Sexuality, Disability and the law-Beyond the last frontier*, (Palgrave Macmillan 2016)16-17

18 *Ibid*

19 From the perspective of international obligations on being signatory to UNCRPD and read with General Comment 1 on Art 12 of UNCRPD, usage of words like 'idiot', 'lunatic' is prohibited and requires revision.

20 Mental Health Care Act, 2017 s 3(3) Mental illness of a person shall not be determined on the basis of, — (a) political, economic or social status or membership of a cultural, racial or religious group, or for any other reason not directly relevant to mental health status of the person; (b) non-conformity with moral, social, cultural, work or political values or religious beliefs prevailing in a person's any present

Similar sanist prejudices can be seen to haveplayed a decisive role during the discussion in the Constituent Assembly.[21] While the discussion was on the point of, if ***declaration by the court***as regards 'unsoundness of mind' of a person should be made necessary to disqualify a member of Parliament[22], one of the members of the Assembly[23], who was not in favour of insisting on such declaration expressed the concern in following terms;

"*I hope that soundness of my mind will not be questioned if I say that this clause is not so happily worded as it should be. Sir, I presume that it is the desire of the authors of the Draft Constitution that no person of unsound mind should be allowed to be a member of this House, and I believe that the present House has been so selected, and that no person of unsound mind has been able to creep into this House. Sir, if you allow this clause to stand as it does, it will mean that there will be a large number of persons of unsound mind coming in, because the qualification is there that the man must be declared to be of unsound mind, by a competent court. we know that in every village and in every town, there are certain number of persons who go about like lunatics, and whom everybody even the child who pelts stones at them, knows to be lunatic".*[24]

Judiciary and Ableism

As demonstrated earlier, the laws, law makers and the law-making process all exhibited ableist and sanist traits and prejudices. Analysis of illustrative judgments below, show that ableism and sanism have exerted a fair amount of control even over the judiciary and the decision-making process.

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or future determination of the person's mental illness. (5) The determination of a person's mental illness shall alone not imply or be taken to mean thatthe person is of unsound mind unless he has been declared as such by a competent court

21 Rajalaxmi Joshi, 'Giving political voice to Persons with Mental Disabilities- Some reflections', ILS Abhivyakti Law Journal (2018) 222

22 Draft Constitution of India Article 83 [COI Article 201], *Constituent Assembly Debates*, Vol. 8, 19 May1949

23 *Ibid*Shri. Rohini Kumar Chaudhari (Member of Assembly)

24 Draft Constitution of India Article 83 [COI Article 201], *Constituent Assembly Debates*, Vol. 8, 19 May1949

Case I

Jyotindra Bhattacharjee v. Sona Bala Bora and Ors.[25]

In this case, validity of Sale deed was under challenge inter alia on the ground that the executant was a person of unsound mind. While the Single Judge to whom the appeal was preferred against the order of the trialcourt was deliberating on the issue, the court made following observations:

"Besides, ***the conduct*** *of late Bora itself* ***indicatesthat he was not a normal person in view of the fact that he instituted a case against his wife and children, picked up quarrel with the members of his family, remained away from the house for a long period and transferred the entire property by way of sale rendering the members of the family home-less…"***[26]

The remark passed the court suffer from vices of ableism and sanism. Amongst other things, the court was considering the conduct of the person while deciding if he can be classified as person of unsound mind? The ableist and sanist standards of behavior require a person to act/behave in a particular manner, which is coined as normal, expected or appropriate pattern of behavior. Any deviation from such set patterns of behavior would attract attention and lead to the conclusion of 'unsoundness of mind'. The risk is higher when such common/ Sanist beliefs are taken into account by judiciary while doing decision making.

Case II

Yogesh Dutt v Union of India & Others[27]

Facts

In this case the Petitioner was selected as a Probationary Officer in bank. He had applied under unreserved category, as his disability was 30%, he could not qualify as 'Disabled' as per the provisions of Persons with Disabilities Act, 1995. After his selection, he appeared for medical test, he was declared unfit to discharge his duties in the service on account of "left

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[25] *Jyotindra Bhattacharjee v. Sona Bala Bora and Ors*(2005) 4 SCC 501 against the decision of Gauhati High Court appeal was filed in SupremeCourt,

[26] *Ibid* para 12

[27] *Yogesh Dutt v Union of India & Others*Allahabad H C 2011,<http://elegalix.allahabadhighcourt.in/elegalix/WebShowJudgment.do>accessed on 27 Nov 2020

eye absent". It was stated that since his application was under General Category, to be eligible under such category he should have had both the eyes. In short, the standards of fitness required by the Applicant under General Category were not fulfilled.

Arguments

The Petitioner simply argued that if the Reservation policy of the State allowed a blind person or a person with low vision to hold the post, by what rationale the petitioner with one healthy eye with normal visionbe denied appointment.

On behalf of Union of India, among other things it was argued, that the Petitioner had not approached the court with clean hands as he had not disclosed the fact of loss of left eye. Even the photo affixed by him was not clearly indicating loss of left eye.

The ableist ideology is well reflected even from the contentions raised by both the sides. Ableism compels an individual to disclose his disability. The person should necessarily address himself as disabled if he has impairment. Ableism puts an individual in fix, the Petitioner was not regarded as disabled by the law but he was held 'medically unfit', so by perception he was regarded as 'disabled'. The medical model of disability classifies people as 'abled' or 'disabled' on the basis of percentage of their disability. In present case the person was held not disabled as his disability was less than 40%. This classification puts many at disadvantageous position as those below the percentage of 40% do not qualify for the benefits given to PWDs and at the same time are generally considered as 'medically unfit' because the standards of fitness that would be applied to them would be the same as applied to able-bodied.

Decision

After hearing both the parties the court directed the state that the Petitioner be appointed as a Probationary officer.

The court held *"There is nothing which he cannot do, which a person with two healthy eyes can do."*[28]

The underlying tone of the judgment is ableist. The Court ended up applying Ableist Standards of 'normalcy' to the Petitioner. Since he could do what 'able-bodied' could do, the court was rest assured in offering him the post. The present judgment would be taken as a good gesture towards PWDs showing sympathy towards PWDs. Though, at his personal level the Petitioner could achieve what he desired, it was '*justice in personam*', but for the community of PWDs this judgment has set a wrong precedent which leads to '*injustice in rem*'.[29]

Case III

Syed Bashir-Ud-Din Qadri v. Nazir Ahmed Shah & Ors.[30]

Facts

Appellant was suffering from cerebral palsy. He was appointed as a teaching guide. However, his appointment came to be challenged, by one of the competitors for the post, on the ground of Appellants disability. After many rounds of litigation, the matter ultimately reached Supreme Court. Committee was appointed to assess his fitness to work as a teacher.

The Committee in its report pointed out *"appellant was found reading and talking well and able to teach, but his problem was that* ***he could not write***"[31]

"*….In order to overcome the difficulty of not being able to write, the Appellant requested the students to write the lessons on the blackboard, but, of course,* ***a student could not be a substitute for a teacher*** *in the matter of drawing diagrams and writing lessons on the blackboard.*"[32]

"…Appellant seems to be intelligent and well-versed with the subject taught by him, which would have made him a good teacher, his speech and writing were impediments in his way."[33]

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28 *Ibid* para 27

29 The author has borrowed the idea of 'Justice in rem and injustice in personam' from Mr. Arvind Datar's (Advocate Supreme Court) speech at Remembering Prof S P Sathe 14 International Conference on Contemporary Trends in Comparative Public Law held at ILS Law College, Pune 6th to 8th March 2020.

30 *Syed Bashir-Ud-Din Qadri v. Nazir Ahmed Shah &Ors*(2010) 3 SCC 603

31 *Ibid* Para 10

32 *Ibid*Para 39

33 *Id*

It was argued by the Respondent that "*without being able to write on the blackboard, it was next to impossible for a primary school teacher to teach children at the primary stage"*[34]

The act of Appellant in taking help of the students to write on the board was argued as substitution of the teacher by the student, and was not considered as 'support' in performing his duties. The question, what is support? is understood through an ableist lens. When a person with disability takes support or aid or assistance it is posed as tool of dependence. PWDs are expected to work independently without assistance and support to qualify the test of 'fitness'. Need of any support is considered as proof of dependence, that justifies their exclusion. On the contrary the idea of support with able-bodied persons is looked at positively. Majority of the times the support taken by able-bodied persons is not even classified as support but termed as 'obvious requirements.'If at all the same is identified as support, then it would be regarded as 'tool' to enhance skills of the able-bodied.

The ableist proposition looks at independence, self- reliance being the only markers of 'ability' and deny the idea of interdependence.[35] Seeking of support is projected as incapacity and lack of autonomy on part of PWDs. The support and interdependence of able-bodied often goes unnoticed or termed as 'obvious- requirements.' The UNCRPD has introduced a paradigm shift in the perception that 'support' and 'autonomy' cannot co exists. It recognizes that PWDs have right to equal recognition as a person before law. The convention further imposes a positive obligation on the State Parties to provide 'support' to PWDs in exercise of their legal capacity. This approach of looking at capacity regime states that Support and autonomy can be co-terminus. And use of support is not a justified ground to deny legal capacity to act.

It is relevant to see that the above referred judgment was passed in the year 2010, where in the idea of support was not expressly mentioned in the Persons with Disabilities Act, 1995. Despite of that the court looked at support regime vis-à-vis PWDs very positively. In conclusion the court gave

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[34] *Ibid*Para 38

[35] AmitaDhanda, 'Constructing A New Human Rights Lexicon: Convention on The Rights of Persons With Disabilities',Sur - International Journal On Human Rightsvol 5 no 8 (2008) <https://sur.conectas.org/en/constructing-new-human-rights-lexicon/> accessed on 9 Dec 2020

due regard to fact that with electronic and other assistive aids the Appellant could overcome his disability easily. The court set aside his disengagement from the post.

Conclusion

The analysis of legislations, bye-laws, judgments above clearly reflect that the legal system could not escape itself from the impact of 'ableism' or 'ableist ideology'. In light of India having ratified the UNCRPD laws made prior or post ratification needs urgent attention and revision if they go contrary to the spirit of UNCRPD. The duty created by the fact of ratification is 'positive one'. Any legal system that is developed from the perspective of one social group would always fall short in serving the other social group. Real successful legal system would be the one which is 'inclusive' and not catering only to the needs and aspirations of one social group. The present law to become inclusive needs to shift its 'ableist' lens and look through the 'diverse and inclusive glass'.

■

THEME II: BASIC STRUCTURE CONSTITUTIONALISM

Basic Structure of the Constitution

Arvind P. Datar[1]

1. From 1950 to 1965, it was accepted that Parliament had the unlimited power to amend the Constitution. This was concluded by two judgments of the Supreme Court in 1951 and in 1965.

2. While the 1951 decision was unanimous, the decision in1965 raised, for the first time, doubts about the unlimited power of Parliament.

3. The 1965 decision was a split verdict and two of the judges expressed concern about the theory that Parliament's power was unlimited. These were Justice Hidayatullah and Justice Mudholkar.

4. In particular, the judgment of Justice Mudholkar is extremely significant as he has used the words "essential features" or "fundamental features" for the first time. It is interesting that Justice Mudhholkar relies on a decision of the Supreme Court of Pakistan which had held that the power conferred upon the President by the Constitution of Pakistan to remove difficulties did not extend to making an alteration in a fundamental feature of the Constitution.

5. Justice Mudhholkar posed the question as to whether making a change in the basic feature of the Constitution could be regarded as an amendment or would amount to re-writing a part of the Constitution. Consequently, whether such re-writing would be within the purview of Article 368?

6. By 1965, the Constitution had been amended 17 times and hence the concern was: was there any limit to the amending power?

7. It is often mentioned that the question of basic feature started with the lecture by the German jurist Prof. Dieter Conrad. The lecture of Prof. Conrad was rendered to the law faculty of the Banaras Hindu University in 1965. The title of the lecture was "Implied Limitations of the Amending Power". Prof. Conrad remarked that India had not faced (upto 1965) any extreme type of constitutional amendments and

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the question remained whether such amendments could be within the purview of the amending power.

8. In 1965, an extreme view was taken that Parliament could not amend any portion of Part-III of the Constitution. This view was taken in the *Golaknath* case but was subsequently overruled in 1973 in the *Kesavananda Bharati* case.

9. In his argument, Palkhivala cited 12 essential features of the Constitution. However, in the judgments of the judges constituting the majority, different views have been taken as to what constitutes the "basic features". By and large, each of them, have stated that five or six features which are basic.

10. In the *Indira Gandhi Election* case, Justice Chandrachud set out certain tests to decide what constitutes *"Basic Structure"*. These relate to the object and purpose of the amendment, the consequences of that amendment, the impact it will have in the overall scheme of the Constitution and whether it would alter the integrity of the Constitution.

11. Over the years, the following have been held to be part of the basic features:

    (a) Independence of the judiciary;

    (b) Judicial review under Articles 226, 227, 136 and 32;

    (c) The Preamble; and

    (d) Secularism, Federalism, Separation of Powers, free and fair elections.

12. The Ninth Schedule prevented any challenge to an amendment. But, in 1996, the Bombay High Court held that if an amendment violated the basic features, including it in the Ninth Schedule would not grant it protection — *Bennett Coleman & Company v. Union of India,* AIR 1986 Bom 321.

13. Any constitutional amendment can be struck down only if it violates the Basic Structure. Initially, it was held that it would not apply to ordinary legislations but this erroneous position was later rectified.

14. The decisions of various courts have dealt with various constitutional amendments and whether these have violated the Basic Structure. In the past, the Basic Structure doctrine was used to strike down only the following amendments:

Article	Amendment	Year	Case-law
13(2)	17th	1964	*I.C. Golaknath v. State of Punjab,* AIR 1967 SC 1643
31C	25th	1971	*Kesavananda Bharati v. State of Kerala,* AIR 1973 SC 1461
371(1)	32nd	1973	*P. Sambamurthy v. Union of India,* AIR 1987 SC 663
329	36th	1975	*Indira Nehru Gandhi v. Raj Narain,* AIR 1975 SC 2299
368(4) & (5)	42nd	1976	*Minerva Mills v. Union of India,* AIR 1980 SC 1789
10th Schedule Para 7	42nd	1976	*KihotoHollohan v. Zachilhu,* AIR 1993 SC 412
323-A(2)(d)	42nd	1976	*L. Chandra Kumar v. Union of India,* (1997) 3 SCC 261, affirming *Sakinala Harinath v. State of A.P,* (1994) 1 AP LJ 1 (FB).
124-A, 124-B and 124-C	99th	2015	*SCOARA v. Union of India,* (2016) 5 SCC 1.

15. There is no doubt that basic structure has proved invaluable to save the Constitution. But for the Basic Structure, the 42nd Amendment would have become the law and the power of the High Courts and the Supreme Court would have been severely crippled, and the worst casualty would have been the power of judicial review.

■

Basic Structure Constitutionalism: Some Emerging Problems

Shreehari Aney[1]

Scope of this Paper

While the basic structure doctrine has been a part of our Constitution for almost half a century, it functioning in today's context ought to be a cause of alarm. What began its life as a test to determine which portions of the Constitution were beyond the pale of the amendment process has now become a tool for interpretation of the Constitution. It is this mutation that is discussed in this paper.

Introductory Observations

The popular assumption that the concept of basic structure was brought about by the Supreme Court in the *Kesavanand Bharati*[2] case is not entirely correct. Although perhaps not in those terms, it was alluded to while explaining the doctrine of Separation of Powers by the Supreme Court, in *Re. Special Reference No.1*[3] popularly referred to as the Legislative Privileges Case. But basic structure, as we understand it today, became focus of the debate in the true sense in *Kesavanand Bharati.*

We have, as alumni of this institution, Y.V.Chandrachud, ex-Chief Justice of India, who – and if I may say so, rightly- dissented from the majority view on the basic structure doctrine when it was first propounded in *Kesavanand Bharati* case*,* although, in keeping with the law of precedent and the judicial discipline that requires its observance, in the later judgments including *Minerva Mills*[4]he followed and applied the doctrine. *Minerva Mills* stated with utmost clarity the realm of the operation of the basic structure doctrine thus: "If by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity."

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1 Senior Advocate
2 Kesavanand Bharati- (1973) 4 SCC 225
3 Re. Special Reference No.1- (1965) 1 SCR 413
4 Minerva Mills- (1980) 3 SCC 625

The basic structure doctrine has been defined in various ways. Salman Khurshid labels it as *"...an attempt to identify the moral philosophy on which the Constitution is based."*[5]On the occasion of the first Remembering S.P.Sathe Memorial lecture, late T.R.Andhyarujina, in an address[6] on the basic structure doctrine, using a more legal terminology, described it as a noble fiction of the Supreme Court. While asserting that he did not agree with the doctrine, Andhyarujina felt that it was a necessary development when he argued; *"...it is a fiction because I firmly believe that there was never a juridical basis for what is believed to be the basic structure theory… But at the same time, I tell you that it is a fiction that we require, and we must have. If Kesavanand Bharati did not invent it, sooner or later some limitation on the exercise of the amending power would have to be recognized perhaps in a better juridical, more understanding way than the 13 judges of Kesavanand Bharati did. Therefore, I say that a fiction it may be, but it is a noble fiction, and we have to maintain that fiction."*

While I agree with the sentiment that this was a necessary fiction, I am constrained to observe that the current application of the doctrine ought to be a matter of grave concern. I am also of the view that the importance of this doctrine is sought to be extended beyond its intended boundary. It is about this that I wish to speak.

The Evolution of the Doctrine

Indian constitutional law borrows extensively from English and American sources[7], but the doctrine of basic structure was brought to India from Germany. Dietrich Conrad, a German professor and an expert on South Asian law, presented it in his lecture to the law faculty of Banaras Hindu University in 1965. It came to the attention of M. K. Nambyar, who, while arguing the *Golak Nath*[8]case*,* presented it to Supreme Court, when he argued that there existed implied limitations on the power to amend the Constitution. The Supreme Court saw the considerable force of this argument, but did not

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5 Salman Khurshid - The Court, the Constitution and the People, in The Supreme Court Versus the Constitution: A Challenge to Federalism 95, 98 (Pran Chopra ed., 2006)

6 ILS Law Review Volume I, March 2008, pg 119

7 Rajeev Dhavan- Borrowed Ideas: On the Impact of American Scholarship on Indian Law, 33 AM. J. Comp. L. 505 (1985).

8 Golak Nath –(1967) 2 SCR 762

go into it. It was in the *Kesavananda Bharati* case that Justice Khannacited with approval Conrad's remark that *"any amending body organized within the constitutional scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority."*

Yaniv Rozani, in his study of the comparative amendment processed to be found in various world constitutions said that as the doctrine was employed by courts in India in the times that followed, Conrad wrote *"there are, beyond the wording of particular provisions, systematic principles underlying and connecting the provisions of the Constitution ... [which] give coherence to the Constitution and make it an organic whole."*[9]. Yaniv Rozani also quoted the German Constitutional Court in the Southwest case to say *"A Constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit, a Constitution reflects certain overarching principles and fundamental decisions to which individual provisions of the Basic Law are subordinate*[10]*."*

The Full Court was constituted in *Kesavanand Bharati* to consider whether or not the earlier view in *Golak Nath* case that Parliament had no power to amend the Constitution was correct. The assertion that the majority view in *Kesavanand Bharati* concluded that Parliament did not have the power to amend the basic structure of the Constitution, is open to criticism, including the factual criticism that this was not the view of the majority. In *Kesavanand Bharati* judgment, six judges[11] concluded that Parliament's power was limited because the Constitution itself contained certain implied limiting restraints. On the other hand, the exact same number of judges[12] were of the view that there were no such limitations contained in the Constitution. Justice Khanna stood outside the two camps. While maintaining that Parliament had the full constitutional authority to amend the Constitution, he chose to place a limitation of the meaning of the term 'to

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9 Unconstitutional Constitutional Amendments- The Migration of a Constitutional Idea by Yaniv Roznai - The American Journal of Comparative Law 61 Am.J.Comp.L.657

10 1 BVerfGE 14, 32; see Kommers, at 54-55; (An English translation of the case is available in Comparative Constitutional Law - Cases and Commentaries 659 (Walter F. Murphy & Joseph Tanenhaus eds., 1977).

11 Sikri C.J., Shelat, Hegde, Reddi, Grover and Mukherjee.

12 Ray, Palekar, Mathews, Dwivedi, Beg and Chandrachud.

amend'. According to him any amendment could be a modification to something that already existed. By its very nature, an amendment could not cause alterations in the fundamentals of what it was seeking to amend. It followed that while Parliament could amend the Constitution, it could not amend something that was basic to the Constitution. In other words, it could not amend the Basic Structure. Clearly, this was a view which neither of the camps propounded. But in a paper prepared by Sikri CJ, called 'View of the Majority' one of the conclusions set out was 'Parliament did not have the power to amend the basic structure or framework of the Constitution'. This over-simplified generalised conclusion of Justice Khanna's view was signed by nine judges, with four refusing to endorse it. If one were to identify the exact point at which the notion of basic structure was ushered into our constitutional law, this would have to be the point. This conclusion, not supported by any numerical majority, much less accepted in any common reasoning, became part of our Constitutional law.

Had things been left at this nascent stage, perhaps the doctrine would have sunk into the abyss of constitutional interpretation as just one of the many ideas of limited importance that surface from time to time. But historical events overtook the course of life of this doctrine. Events followed, starting with the Allahabad High Court invalidating Indira Gandhi's election. In order to overcome the effect of the Allahabad High Court's judgment, Parliament effected the 39th Constitutional Amendment introducing Article 329 A on August 1, 1975. On August 11, 1975, in *Indira Gandhi*[13] case, a 5-judge bench of the Supreme Court headed by Chief Justice Ray considered Indira Gandhi's appeal against the Allahabad decision, and applying the basic structure doctrine, concluded that the 39th Constitutional Amendment introducing Article 329A was unconstitutional. Ray C.J. did try to distance himself from this application of the basic structure doctrine by observing that he was proceeding to judge the validity of the 39th Amendment "…on the assumption that it was not necessary to challenge the majority view of *Kesavanand Bharati* case…". But he did, in fact, constitute a new bench of 13 judges to review the *Kesavanand Bharati* judgment to reconsider, amongst other things, the basic structure doctrine. But the attempt at review was

[13] Indira Gandvhi v Raj Narain- (1975) Supp SCC 1

abandoned when after a two-day hearing, the bench was dissolved. With that the question mark hovering over the basic structure doctrine was finally erased.

It is worth remembering that the basic structure doctrine, as it was fashioned in the *Kesavanand Bharati* case, was limited in its function. It was a test to decide which parts of the Constitution could be subject to amendment by Parliament, and which could not be touched. But in the decades that followed, through a series of judgments, the basic structure doctrine was increasingly employed as a major plank whenever any *ultra vires* challenge to violation of the rights imparted under the Constitution was raised. Thus followed the judgments in *Indira Gandhi* (supra), *Minerva Mills* (supra), *Waman Rao*[14], *KihotoHollohon*[15], *Indra Sawhney*[16]*Bommai*[17], *Faruqui*[18], *Kunungo*[19], *L.Chandra Kumar* [20], *Coehlo*[21], *M.Nagraj*[22], *National Legal Services Authority*[23], *Madras Bar Association*[24]**……..**

Such enlargement of the doctrine is open to several problems which may now be considered.

The Problem of Extension of the Basic Structure Doctrine

What needs to be kept in mind is that the concept of basic structure began its life in our Constitutional law in the context of Parliament's power to amend the Constitution. However, over a period of time, it was elevated to the status as one of the principle tools of interpretation of the Constitution.

It is necessary to understand the difference between a principle of statutory or Constitutional interpretation, and a doctrine that has specific application, because the first and perhaps the most fundamental objection to the current use of the basic structure doctrine is that it was never designed as

14 Waman Rao v Union- (1981) 2 SCC 362
15 KihotoHollohon v Zachillhu and Others- (1992) Supp 2 SCC 651
16 Indra Sawhney v Union -1992 Supp (#) SCC217
17 S.R.Bommai v Union- (1994) 3 SCC 1
18 Ismail Faruqui v Union- (1994) 6 SCC 360
19 G.C.Kanungo v Orissa- (1995) 5 SCC 96
20 L.Chandra Kumar v Union- (1997) 3 SCC 261
21 I.R.Coehlo v Tamilnadu- (2007) 2. SCC 1
22 M.Nagraj v Union- (2006) 8 SCC 12
23 National Legal Services Authority v Union- (2014) 5 SCC 438
24 Madras Bar Association v Union- (2014) 10 SCC 1

a principle of interpretation. There is in-built difference between a doctrine that serves as a principle for interpretation of the Constitution, and a doctrine which was intended to serve as a specific test.

Principles of Interpretation are aimed as tools to lead to comprehension of whichever statutory or constitutional provisions were under scrutiny. Such principles are norms, or legal ideas, similar to legal maxims, which help first and foremost in the understanding of the concerned provisions. They also help as indicators to show how the concerned provisions operate within a given framework. They have the quality of being sufficiently generalised so as to be capable of wide, and almost universal applicability. They are also not confined to a given provision or a given situation.

As against this in the function of a doctrine, such as the basic structure doctrine, is very different. It was created as a test: to find out if a particular Constitutional amendment was *ultra-vires* or *intra-vires*. It had no existence beyond or outside this function. It was not intended either to understand the language of the provisions under consideration, nor was it intended It was certainly not a means to test whether any provision of a central or state law was *ultra-vires* any constitutional provision. It lacked the necessary grounding in a wider philosophical base which is a precondition for the very existence of a principle of interpretation. The basic structure doctrine is therefore a term of art, comparable to a tool of limited function, as against a principle of interpretation which relies for its sustenance on a larger jurisprudence.

Therefore, to import the basic structure doctrine, as is now often done, to test the validity of a statutory provision, is to use tool not designed for the purpose. There are many problems that arise with such a truncated use. First, much like unrestrained Equity, which varied with the Chancellor's foot, the basic structure doctrine becomes capable of *ad-hoc* use, which can vary from case to case. It is capable of arbitrary use, not only because it would depend on the intention of its user, but because it does not afford any intrinsic guidance to its user as to how it is to be employed. Although it has been extensively used, the judgments resulting from its use do not throw up a body of jurisprudence that would explain how the doctrine is to be applied. Nor do

the judgments disclose the principles that operate for invocation or enforcement of basic structure doctrine.

The Current Area of Conflict

Wisdom lies in understanding that the doctrine is not a tool for interpretation. But the law, as Dickens was delighted to observe, is an ass. In less than a decade of its pronouncement, the Supreme Court had extended the doctrine beyond its intended scope when it decided the First Judges Case[25] It was brought into play in one of the most fraught areas of constitutional law – for addressing matters concerning the Right and Power of Judicial Review. This application of the doctrine to the area concerning the power Judicial Review was only one step away from taking it into another relatable area that has had serious effect in the continuing conflict between the Legislature and the Judiciary, particularly in the matters of appointment of Judges.

It all began with the law that has evolved from as far back as 1981 in the First Judges' case *(S.P.Gupta – supra)* and has continued as an inconclusive controversy into the National Judicial Commission appointment case[26] (NJAC case). It may be argued that shift of focus from the use of the basic structure doctrine for testing the validity of constitutional amendment to testing the nature of a constitutional right such as in the NJAC case, was perhaps as logical as it was inevitable. All said and done, after all the power to amend, as a facet of the right to legislate, and the power of judicial review, as a facet of the right of an independent Judiciary are the foundational issues that are in conflict. It may also be argued that the resolution of this conflict is possible by employing the doctrine of basic structure. But there lies the rub.

So long as the basic structure doctrine was used as a means to identify those parts of the Constitution which could not be subject to the process of constitutional amendment, it served as a test for the task of labeling portions of the Constitution that could be considered as unalterable. Thus, the function of the basic structure was designed to achieve only one objective – to find out whether any impugned amending legislation was of such nature as would alter the very core of the Constitution in so fundamental a manner that would

[25] S.P.Gupta v Union- 1981 Supp SCC 87
[26] Supreme Court Advocates on Record Association v Union - 2016 5 SCC 1

make the Constitution cease to be itself. As explained above, apart from this test, the basic structure doctrine had no further role to perform. In effect, the basic structure doctrine was only a method of identification, and not a means of interpretation. But with the extension of the doctrine to the challenge in the First (1982) and Third[27] (1998) Judges' cases, and by converting the basic structure doctrine into a principle for interpretation of the Constitution, the Supreme Court opened the doors to an area that would only lead to problems.

The Problem of the Doctrine's Use as a General Principle of Interpretation: Arghya Sengupta, in his paper on *Judicial Primacy and the Basic Structure; A Legal Analysis of the NJAC Judgment* [28]sets out some interesting arguments as to why this generalisedapplication of the basic structure doctrine is fraught with problems. Although this aspect i.e. the problems of generalized application of the basic structure doctrine was not its central theme, the paper argues with considerable force that to apply the doctrine to interpret the true meaning of Articles 124 and 217 is to employ it for a purpose that goes beyond identification of something basic to the Constitution. It is one thing to say that the establishment and constitution of the Supreme Court and the High Courts under Articles 124 and 217 respectively are a part of the Constitution's basic structure. But it is quite a different thing to urge that any law, such as the 99th Constitutional Amendment of 2014, or the National Judicial Commissions Appointment Act, 2014, is violative of the basic structure if it seeks to regulate the method of appointment of judges. Put in another way, the role of the basic structure doctrine was useful so long as it was limited to identifying inalienable parts of the Constitution immune from the amending process; but it would be stretching the doctrine too far to make it a tool of interpretation and to apply it as a general means of interpretation the Constitution in order to determine whether the regulation of the process of appointment of judges was extraneous to the scope and extent of the provisions that related to establishment and constitution of Courts under Articles 124 and 217.

It could perhaps be argued that the basic structure doctrine can be employed to determine whether Judicial primacy is basic to the Constitution,

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[27] In re. Special Reference 1 of 1998- 1998 7 SCC 739

[28] See Economic & Political Weekly Vol.I No.48 dated Nov. 28, 2015

and indeed, it has been so employed. However, to extend the application of the doctrine to support the conclusion that it can be further used to strike at a law that seeks to govern or regulate the process of appointment of Judges is to stretch the doctrine into the realm of Interpretation of Statutes, to which it has no application, and where it does not belong. While Judicial primacy may be seen as a basic feature of the Constitution, laws such as the 99th Constitutional Amendment of 2014, or the National Judicial Commissions Appointment Act, 2014, which seek to govern the process of appointment of judges may be challenged on the ground of arbitrariness, but not on the ground that they violate the basic structure doctrine.

Looked at in another way, the departure from the position in the original Constitution and the subsequent evolution of the law concerning the process of appointment of Judges as has happened through the First, Second and Third Judges' cases, has resulted in the establishment of a collegium and the creation of a machinery of recommendation of names for appointments. There is no reason why such a process of appointment should be seen as being violative of the basic structure doctrine. Even if it is argued that the process that results from the 99th amendment to the Constitution, it does not detract or curtail any basic feature of the Constitution. It follows that the basic structure doctrine cannot then be relied upon.

Assuming for the sake of argument that the basic structure doctrine can be employed to safeguard the right of Judicial Primacy when it manifests itself in the consideration of appointments by the Collegium; then equally must the doctrine be available for application to the primacy of the Legislature or the Executive, which reposes all law-making power in Parliament or State Legislatures, or all executive power in the Union or State government. It may be noted in the passing that in the NJAC case, Justice Lokur expressed some reservation about the concept of Judicial Primacy, and favoured the idea of 'shared responsibility' between the Judiciary and Executive. It would indeed be anomalous to urge that the basic structure doctrine can be used to save Judicial Primacy when it cannot be employed to save Legislative Primacy. The well entrenched doctrine of separation of powers cannot be exposed to imbalance by employing the doctrine of basic structure. There can never be any resolution of a conflict between two basic

features viz. the Judiciary and the Legislature, by selectively applying the basic structure doctrine for one but not to the other.

Conclusion

The ongoing developments in Constitutional law lead to the conclusion that the basic structure doctrine, a noble fiction that it may be, should be understood to be no more than a test to determine whether any constitutional amendment is *ultra-vires* the Constitution. It lacks the necessary definition and jurisprudence to elevate it to a principle for general interpretation of the Constitution. Because it lacks an articulated body of jurisprudence to sustain its existence, it is also seen to function in a defective manner when it is applied to interpret provisions of the Constitution or statutes, where it betrays imbalanced and partial applicability. When challenges are raised to the constitutional validity of any statute, and sometimes even to executive acts, Courts are being increasingly persuaded to accept it as an independent argument, and not as an aspect of the Equality principle under Article 14. Unfortunately, at least today, there just does not exist sufficient jurisprudence or precedent to justify this additional ground to the well known three grounds of *ultra-vires* challenge viz. absence of Legislative competence, violation of Fundamental Rights, and violation of some other part of the Constitution of another applicable governing statute.

P.P.Rao summed it best when he said *"The 'basic structure of the Constitution' is an imprecise and elastic concept. There is no unanimity among the Judges regarding the components of the basic structure…The task of identifying the basic features is tough and time-consuming. Neither is the court in a position to identify all the components of the basic framework of the Constitution once and for all, nor has Parliament any clear idea of the scope of its amending power as of now…"*[29]

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[29]P.P.Rao – Basic Structure of the Constitution – The Alladi Memorial Trust Lectures 179 (1999)

THEME III: COMPARATIVE CONSTITUTIONALISM AND THEORY

Dynamics of E-Governance Policy in a Prismatic Society: A comparative Study of the Theoretical Underpinnings of E-Governance Public Policy in India

Maithili S Sane[1]

Introduction

Public sector reforms have undergone a paradigmatic shift post the neo-liberal reform agenda. Based on Osborne and Gaebler's'Re-inventing Government'[2] (From Rowing to Steering mode), the literature on public sector reforms has shifted from Governance to Good Governance to E-Governance and now, New Governance. All these reforms have focussed on increased efficiency, improved resource management, increased accountability, decentralization, and marketization. Information systems are considered to be central to this performance improvement effort and ICT has been identified as "the key to the reinvention and indeed to the reinvigoration of public administration" (Bellamy and Taylor 1994).

India has not been immune to these shifts; in particular judicial administration has undergone a structural and functional shift post the ICT revolution in 90's. The judicial bureaucracy is now increasingly referred to as technocracy and this is challenging traditional Weberian notions. This decade will see India beginning the third and final phase of its E-Courts Mission Mode Project under the National Policy and Action Plan for Implementation of Information and Communication Technology, 2005. Yet, issues such as low case clearance rates, procedural lacunae's, inaccessibility and an increasing case load against a decreasing resource base remain entrenched in the judicial system. The Economic Survey 2018-19 states that delays in contract enforcement and dispute resolution are the single largest hurdle to Ease of Doing Business in India and higher GDP growth. Heeks[3] estimates

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1 Advocate and Ph.D Research Scholar, Dept. of Politics and Public Administration, University of Madras.

2 David Osborne and Ted Gaebler, '*Reinventing government: How the entrepreneurial spirit is transforming the public sector*', New York: Addison-Wesley, 1992

3 Heeks, R. (2003) Most eGovernment for Development Projects Fail: How can risks be reduced, *iGovernment — Information, Systems, Technology, and the Public Sector, Working Paper No. 14*, Institute of Development Policy and Management, University of Manchester.

that one third of ICT initiatives in developing countries are total failures, and a further one-half are partial failures. A recurring theme in studies of the e-Government research field, is that most e-Government research is empirically based, lacking theoretical foundations.

On this backdrop, this paper examines the theoretical underpinnings of E-Governance by doing a comparative and inductive thematic analysis of secondary sources. The first part discusses the concept of E-Governance by comparing various definitions. The second part briefly discusses the six most used theories in e-Government research. The third part delineates the E-courts Policy in India. Finally, the discussion focusses on evaluating this policy vis a vis its theoretical underpinnings, if any, before concluding.

E-Governance - From Police state to Participatory state

The evolution of notion of State can be understood beautifully if we look at the evolution of the locus and focus of Public Administration. For the longest time, there was no delineation of the discipline of Public Administration as such. It remained merged with political science because the State was performing only limited functions. From the earliest societies where the State was involved in maintenance of law and order, and collecting taxes to the modern age, where the State started assuming more functions – the study of politics was thought to encompass all. It was only in 1887 that Woodrow Wilson recognized the politics – administration dichotomy and said – 'it is getting harder to run a constitution than to frame one'[4]. He emphasized that in democratic countries the voice of the people makes it harder for administration to run as compared to monarchies and hence a separate study of the 'how' of administration was necessary. This was followed by classical thinkers who looked upon Government as the umbrella organization which had to be run on strict scientific principles of centralization, hierarchy, division of labour, structure, authority to achieve the maximum possible efficiency, effectiveness and economy[5]. The classical school was criticized for ignoring the human aspect of the government

[4] Wilson, Woodrow, "The Study of Administration," *Political Science Quarterly*, Vol. 2, No. 2 (June, 1887), pp. 197–222

[5] Max Weber, Henry Fayol, Gullick and Urwick and Taylor belong to this classical school of thought

organization, and thereby the Human Behavioural School[6] came about which broadened the theoretical leanings of public administration. Post the world wars, the role of the State widened as it became the chief producer and distributer of various public services. Even in laisse's faire and neo liberal states, the State machinery was large and entrenched in the society. This brought upon a new series of challenges and hence the behavioral school was also challenged by the dawn of the New Public Administration (NPA), which for the first time brought out a fourth 'E' ie 'equity' as an important dimension of public service. NPA said that the State should focus on citizen participation, change orientation and value laden administration. Then in the 1990's came a new wave of reforms where States were increasingly rolling back to accommodate private players. This is the time of New Public Management which advised States to be run on the principles of private organizations which focus on public choice theory, privatization- or disinvestment, profit making managerial attitudes and adopt technology for quick and efficient service delivery. Governance and good governance became watchwords of this era. Post 2000 in most countries, the State is now both, a participant as well as a regulator, a producer as well as a facilitator, a distributer as well as a dis-investor. In such a duality of roles 'E-Governance' has become the buzzword, for it seems to deliver the values of governance through technology.

Understanding the evolution of the notion of State is thus critical to the way we look at e-Governance. For instance, if we look at State as the authoritarian entity which takes unilateral and centralized decisions for its people, then the definition by UNESCO is apt - Governance refers to the **exercise of political, economic and administrative authority** in the management of a country's affairs, including citizens' articulation of their interests and exercise of their legal rights and obligations. E-Governance may be understood as the performance of this governance via the electronic medium in order to facilitate an efficient, speedy and transparent process of disseminating information to the public, and other agencies".

If we view from the standpoint of the traditional twin goals of administration – economy and efficiency, then the World Bank definition

[6] Elton Mayo and his Hawthorne Experiments pioneereed the 'social and informal' nature of organizations

succinctly summarizes e government as - "It is the use by government agencies of information technologies that have the ability to transform relations with citizens, businesses, and other arms of government. The resulting benefits can be **less corruption**, increased **transparency, greater convenience, revenue growth, and/ or cost reductions.**

The US E-Government Act of 2002 has a more democratic understanding of e-Government. It states that "electronic Government" means "the use by the Government of web-based Internet applications and other information technologies, combined with processes that implement these technologies, to- (a) **enhance the access to and delivery of Government information and services** to the public, other agencies, and other Government entities; or (b) bring about improvements in Government operations that may include **effectiveness, efficiency, service quality, or transformation".**

The 2nd Administrative Reforms Commission defines e-Governance as- "e-Governance is basically associated with carrying out the functions and **achieving the results of governance** through the utilization of what has today come to be known as ICT (Information and Communications Technology)"[7]. It has equated e governance with SMART Governance – Simple, Moral, Accountable, Responsive and Transparent.

If we examine these various definitions, one thing is interestingly clear. All e-Governance definitions have the implicit assumption that e-Governance is the exclusive domain of the State. It is the State which is to use ICT and frame suitable public policies in this regard to deliver services efficiently, economically, transparently – whichever adjective one chooses. Citizen participation is limited only as an end user/consumer to question non delivery or mal-delivery of services. The reason for this assumption appears to lie in our understanding of governance itself as a State activity. The corollary then is, if the State is to ensure good governance, the State needs to tap the benefits of ICT in its functioning.

It is submitted that this view of 'e-Governance' or 'e-Government' is based on an erroneous understanding of the nature of role that ICT plays in

[7] Report 11 : Promoting e-Governance: The SMART Way Forward

any organization. In other words, technology is presumed to be a 'tool', a 'procedure', an 'infrastructure' which once set in place will yield the expected results; and if these results are not achieved, it is for the State to revisit its ICT policy. This view neglects to understand that technology is not a non-participant observer but an active actor in the running of the organization. ICT policy may be decided by the State at the beginning, but its actual deployment in an organization will gradually determine its character. This is because government organizations are not just structural and functional entities but also human ones. Additionally, several organizations operate in various socio economic and cultural settings – which is why ePDS can be a success in Tamil Nadu but not so much in some other states. It is this entire ecosystem of ICT operation that one must bear in mind before assigning a unidimensional and unilateral authority to the State to decide its e-Governance public policy.

Theoretical Leanings

The above submissions will be understood better in the light of briefly examining the various theories of e-Governance. E-Governance, being multidisciplinary in nature draws from theories related to its 'e' component as well as 'governance' component. Thus, on one hand we have theories from management and information systems while on the other we have theories from law, public administration and sociology. All these theories however posit a far more active rold to ICT than the aforementioned definitions have envisioned. A review of secondary literature shows that the following theories are most frequently used in the dictionary of e-Governance.

Stakeholder Theory[8]

This is primarily a management theory which advises managers of private sector firms to strategically address various stakeholder concerns rather than only shareholder concerns. Stakeholders are those which have either a legal, moral or even presumed interest in an organization, which in turn affects the organization's internal working. This theory has three components (Donaldson & Preston)[9].

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8 R. Edward Freeman's seminal book "Strategic Management. A Stakeholders Approach" published in the mid-1980s

9 T. Donaldson, L.E. Preston, 'The stakeholder theory of the corporation - concepts, evidence, and implications', Academy of Management Review, 20 (1995), pp. 65-91

a) A descriptive core which identifies stakeholders and understands the depth and scope of their interest

b) A normative core which makes it morally imperative for managers to address the above interests rather than acting solely as agents of the organization

c) An instrumental core which actually translates stakeholder interests into organizational outcomes.

Bannister and Connolly[10] argue that stakeholder values underpin all forms of e-Government transformation. It is submitted however, that in case of India's ICT programs, there is only a lose sprinkling of the 'stakeholder' world. All policies have been made centrally without understanding the ground realities. The E-courts project is a classic example in this regard.

Structuration Theory

Having its origins in sociology, structuration theory first proposed by Anthony Giddens[11], states that individuals and structures interact, change and reinforce each other (as contrasted to the Agency theory which states that structures shape human behavior). The interface where an actor (citizen) encounters the structure (e.g family) is called 'structuration'. This theory is often used to understand organizational change due to the introduction of ICT. Thus, government organizations are not only shaped by technological interventions but also by the social structures within – the human actions in particular – which will accept, apply, reinforce and change the use of that technology.

Orlikowski sums it very well - "Technology is physically constructed by actors working in a given social context, and technology is socially constructed by actors through the different meanings they attach to it and the various features they emphasize and use. However, it is also the case that once developed and deployed, technology tends to become reified and institutionalized, losing its connection with the human agents that constructed

[10] '*ICT, public values and transformative government: A framework and programme for research*', Government Information Quarterly (2014), pp. 119-128

[11] Giddens, A. (1984) *The Constitution of Society: Outline of the theory of structuration*, Polity Press, Cambridge.

it or gave it meaning, and it appears to be part of the objective, structural properties of the organizations."[12]

In other words, just as ICT will change human behavior, so also, human needs and usage patterns will shape the manner, extent and nature of ICT employed in the organization. This is essentially why it is argued, that it is pertinent to keep the ecosystem of the technology applied in mind. ICT does not operate in a vacuum. It is used by and for human beings, whose socio-economic and cultural values will end up influencing the success of its implementation.

Actor Network Theory

The actor-network theory (ANT) (Latour and Woolgar 1986) is frequently used to study e-Governance projects. An 'actor' is not necessarily a human being but everything that is a source of action. In other words, ideas, social rules, organizations, all can be construed as actors. Naturally then, there will be a myriad of relations and interactions between these actors. In particular, if the interaction is transformatory, the theory refers to them as 'translations'. A network is an aggregate of such actors whose relations and translations have been established (stable). However, with the passage of time, new relations and translations within the same actors will result in changing the character of the network and in turn, the actors as well. Additionally, a new actor such a technology may be added and all this will give rise to newer networks. E-Government projects reflect this interdependency very well.

Systems Theory

Systems theory is gleaned from Herbert Spencer and Emile Durkheim's work. A system is an integrated whole of interdependent and interacting parts. These interactions establish regular patterns of information exchange. And it is through such patterns that the system maintains itself in the absence of any center of control. This is a concept of governance which indicates limited role of the state or any sovereign authority. Instead, there is

[12] W.J Orlikowski, ' *The duality of Technology: Rethinking the Concept of Technology in Organizations*' in "Technology, Organizations and Innovations: Theories, Concepts and Paradigms", Routledge, edited by Ian McLoughlin, David Preece, Patrick Dawson

a self organized set up which is composed of independent yet interdependent and thereby interacting actors. System theorists distinguish between governing (unilateral, target oriented intervention) and governance (system maintaining itself). The 'new governance' paradigm believes that the society as a system becomes centerless or at least, has multiple centres. The State then is not to govern but to facilitate, not to rule but to regulate.

In the context of ICT, it is suggested that the e-Government engages the Management Information Systems to achieve bureaucratic efficiency through greater access to information, automation, and systems integration. In due course, technological determinism throws this effort off balance. The technology prompts the system's designers to promote their own self-serving ends.[13] Technology, here is not treated as an actor unlike in the ANT theory.

Socio Technical Systems Theory

Under the overarching premise of Systems Theory, Socio Technical Systems Theory (STS) states that organization as a system consist of both social (human) and technical (non-human) sub systems. Therefore, it is essential to understand their interactions and interdependency without prioritizing one over the other. The people who work in any organization share certain cultural assumptions, have their own value systems, capabilities, strengths and limitations. Since they are the ones who will use the technology, it is pertinent to note the behavioural, social and motivational needs of the human sub system so that technology implementation will be a success.

Bounded Rationality

Herbert Simon's work on administrative decision making was the backdrop to the Human Behavioural School in Public Administration[14] and [15]. He states that no human being can be truly rational, because at any given

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[13] CALISTA, DONALD J., and JAMES MELITSKI. "E-GOVERNMENT AND E-GOVERNANCE: CONVERGING CONSTRUCTS OF PUBLIC SECTOR INFORMATION AND COMMUNICATIONS TECHNOLOGIES." *Public Administration Quarterly*, vol. 31, no. 1/2, 2007, pp. 87–120. *JSTOR*, www.jstor.org/stable/41288283. Accessed 18 Mar. 2020.

[14] Simon, Herbert A., 1947, *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization*, first edition, New York: Macmillan.

[15] 1955a, "A Behavioral Model of Rational Choice", *Quarterly Journal of Economics*, 69(1): 99–118. doi:10.2307/1884852

point a person is constrained by the facts that are known to him as well as his value system. These facts (knowledge, resources, time, place) and values (personal prejudices, upbringing) will act as bounds to a person's rationality. Thus, no person can make a truly rational decision; a person cannot even make the optimum decision but rather what a person makes is always a 'satisficing' decision. A decision which suffices for the situation and also satisfies the bounds of his rationality.

This is why, Simon advocated and experimented with computation. He treated human minds and computers, both as information utilizing machines. As such, he argued that computers would aid in in expanding the bounds of rationality since they will take purely factual decisions and not be constrained by human value systems. In the context of e-Governance, it is submitted that Artificial Intelligence (AI) machines are apt candidates to test this theory. We are already witnessing AI's defeating human s in mind games such as Chess, a fact tried by Simon decades ago. Using AI to make decisions regarding public service delivery will be a whole other challenge since the programming will have to include dimensions of equity, diversity, citizen participation – as a 'fact' and not value.

In light of the above theories therefore, it is now time to examine the policy on e-Courts in India and identify which theoretical base it subscribes to.

E-Courts Mission Mode Project in India

The e-Courts MMP is under the umbrella of the National e-Governance Plan (NeGP), which is now part of the 'Digital India' initiative. The NeGP had the following vision - "*Make all Government services accessible to the common man in his locality, through common service delivery outlets and ensure efficiency, transparency and reliability of such services at affordable costs to realise the basic needs of the common man*." There is no separate financial approval for individual MMP's, but rather existing projects under Center and State are aligned with the NeGP objectives.

The e-Courts MMP was conceptualized in 2007 with a vision to transform the Indian judiciary by making use of technology. It was based on The National Policy and Action Plan on Implementation of Information Communication Tools in the Indian judiciary. It has the following objectives:

1. To provide efficient and time-bound citizen centric services delivery
2. To develop, install and implement decision support systems in courts.
3. To automate the processes to provide transparency in accessibility of information to its stakeholders.
4. To enhance judicial productivity, both qualitatively & quantitatively, to make the justice delivery system affordable, accessible, cost effective, predictable, reliable and transparent.
5. To provide services to all key stakeholders including the Judiciary, the District and Subordinate Courts and Citizens/ Litigants/ Lawyers/ Advocates by ICT enablement of all district and subordinate courts in the country.

To be implemented in Three Phases, the first two Phases focused on building Infrastructure capability and then Integration with judiciary across the country and also with the police machinery. Knowledge data banks were created. The third phase, which is to begin soon is going to focus on Cloud computing, Big data mining and incorporating Artificial Intelligence in the judicial ecosystem.

If one looks at the successes of the first two Phases, Phase I has completed 95%[16] of its mandated activities while Phase II stands at 75%[17]. These statistics are impressive indeed; yet they fail to account for the persistent and historical problems in Indian Judicial system. For instance, the oldest pending Civil Case in India was registered in 1951 and was due for its next hearing in the District Court (Civil Judge, Senior Division, Hooghly)

[16] https://doj.gov.in/national-mission/ecourts/ecourts-phase-i Accessed on 17/02/2020
[17] https://ecourts.gov.in/ecourts_home/static/manuals/Objective%20Accomplishment%20Report-2019.pdf Accessed on 17/02/2020

Calcutta in August 2019. If one compares the Case Clearance Ratios for India with the world, it seen that India lags behind most of Europe, USA and UK(In UK as regards Civil Cases only). Apart from this, undertrials languishing in jails, inaccessibility to justice by vulnerable groups, witnesses turning hostile, loss of crucial records, declining quality of judgements, questions on the independence of judiciary are the various other problems that we face.

How then, is the so-called success of the two phases of the e-Courts MMP to be understood in this light? The reason is revealed on a closer examination of the contents of the Objective Accomplishment Reports of both phases. The achievements are evaluated against primarily *quantitative* benchmarks such as number of computers, degree of digitization of records, creation of dedicated personnel, number of people trained, mobile app creation, horizontal and vertical data integration etc. While these benchmarks are absolutely essential to achieve a 'functional' e-Court, do they really transform the qualitative dimension of the judicial ecosystem? Apart from a certain degree of efficiency and transparency, how is creating hardware and integrating systems helping the common litigant? After more than a decade of the e-Court MMP, can we say that justice delivery system has improved or even changed definitively? To a large degree, the answer is in the negative.

Discussion and Concluding Remarks

The reasons for e-Courts MMP not to have achieved a transformatory role yet can be traced to the National Policy and Action Plan on Implementation of Information Communication Tools in the Indian judiciary. This plan focusses firstly, and rightly so, on creation of ICT Infrastructure. It then focusses on customized software development, personnel, training, listing of services to be brought in within e-Courts, digitization, troubleshooting and finally, data integration. However, nowhere either in this plan or the e-Courts Phase reports have the theoretical bases been stated. Objectives and Implementation strategies have been drafted on the assumption of technology as an enabler and not an actor. Neither is the Socio-Technical Dimension of the environment of ICT is considered, nor is ANT or Structuration applied to understand how people shape technology as well.

This is why the Plan has a very constricted view of ICT's role in the judicial ecosystem.

Secondly, even though the word 'stakeholder' is regularly used, there is no effective discussion on how stakeholder concerns are to be incorporated in the digital judicial setup. The Stakeholder approach finds no constructive use either in plan formulation, implementation, monitoring or evaluation. Even though a passing reference to implementation impediments acknowledges the importance of human endeavor and motivation, there is no roadmap to harness it. To give an example, manpower training is categorized as 'Change Management'. Since the training has been completed, this Change management goal has been ticked off as a success. However, this is a very superficial understanding of the word 'Change management'. Introduction, Acceptance and Use of ICT require behavioral, motivational and systemic changes – a stakeholder fact completely passed over.

Thirdly, lack of any theoretical leanings has made the e-Courts project to be shortsighted focusing on achieving measurable goals only. It ignores fundamental policy questions such as has the introduction of ICT reducing lower judicial administration's role to *Non-Progammed Decision Making* as stated by Simon? How does e-Courts treat *administrative side and litigation side* of judiciary differently, since the stakeholders are different in both? Finally, will e-governance gradually result in downsizing or rightsizing India Judicial administration, or will it *create newer functional authority positions?* Such shortsight has made the MMP just a sophisticated version of the computerisation that started in 1990's rather than creating any substantive change.

Finally, lack of theoretical understanding s means the e-Courts project is without an anchor. Had there been a clear theory applied, such as ANT or STS, then we could have evaluated and revamped the plan on qualitative and transformative benchmarks such as access, equity, and inclusiveness. As matters stand now, with just quantitative outputs, the e-Courts Phases have been ticked off as success and the same fate will be met for Phase III and with that ending the project.

India is a classical example of Riggs Prismatic Society[18] with features of Overlap, Heterogeneity and Formalism existing in every sphere of society. The judiciary just cannot ignore the ecology in which it operates. Dimensions of caste, gender, religion, region are determining factors not just to justice system access but in the framing of the laws itself. This is why it is suggested that the e-Courts public policy be reviewed keeping in mind this prismatic nature of Indian society. An amalgamation of the ANT, System and STS theory is proposed which is now being called as the Systemic Interaction Network Theory (STIN)[19]. This theory recognizes technology as a non-human actor operating in a human dominated network. Consequently, it keeps the social and cultural dimension in mind while applying the rational efficiency of ICT. Even though Klingsspoke of it from a research perspective and not empirical one, it is submitted that this approach would be well suited to the Indian e-Courts project. Before we begin with Phase III or even think of reforms beyond it, it is necessary to step back and evaluate on which theoretical base do we propose to base further reforms on. Otherwise we will just be 'mudding through' with incremental changes – a disastrous time-wasting consequence for a judiciary fighting for itself and the 130 crore Indian people.

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[18] *Administration in Developing Countries—The Theory of Prismatic Society*. By Fred W. Riggs. (Boston: Houghton Mifflin Company), 1964.

[19] Kling, R., McKim, G., & King, A. (2003). A Bit More to IT: Scholarly Communication Forums as Socio-Technical Interaction Networks. Journal of the American Society for Information Science and Technology, 47-67.

Mob-Lynching, Mobocracy and Rule of Law: Reflections on Indian and International Statutory Response

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The menace of lynching once very rampant in American society has surfaced in India under the guise of 'cow protection', 'child abducting'. The act of lynching is undoubtedly unlawful and goes against the principle of rule of law by violating fundamental right to life with dignity which our Constitution guarantees and which must be secured at all costs by the States. Lynching is also an affront to the rule of law and to the exalted fundamental constitutional values and undermines not only the legal and formal institutions of the State but also the constitutional order of the nation. It also erodes the basic principles of the constitution. The preamble of our Constitution expects prevalence of genuine orderliness, devoted discipline and sanguine sanctity by constant affirmance of constitutional morality. We should note that a history of tolerance for violence has always laid the groundwork for injustice which has ultimately culminated into the lawlessness indicating the failure of State machinery to protect the lives of their citizens. Such acts also undermine the administrative system of a nation. Therefore, such incidents of heinous and despicable mob violence,if not dealt stringently and in time, may lead to rise of anarchy and lawlessness. Taking cognizance of the matter, the Supreme Court of India, in *Tehseen S. Poonawalla v. Union of India and Others, (2018)*suggested preventive, remedial as well as punitive measures and recommended that Parliament pass a new 'special law' that would instil fear in the would-be attackers. The then Chief Justice of India, Dipak Misra, observed that horrendous acts of mobocracy cannot be permitted to inundate the law of the land. Response to this has been enactment of anti-mob lynching law by various states in India but Federal stringent statutory response to deal with the menace is still awaited. Glance on the issue around the world presents complex picture of statutory responses by the governments to deal with the issue of mob-lynching & mobocracy. In this respect, the present paper reflects on the issue of mob-lynching, mobocracy and rule of law and attempts to offer

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comparative discussion of statutory responses by States to the problem not only within India but in different parts of the world.

I. Introduction

A country with shaken roots of democracy and rule of law cannot build the dreams of a prosperous future. Effective administration of rule of law forms the backbone of vibrant, functioning democracy. Therefore, law and the rule of law must create a secular lens that refracts stereotypes and prejudices. However, the growing recurrence of mob-lynching and mobocracy in India is worrisome as these incidents have directly challenged the authority of rule of law of our nation. Country is witnessing ruthless, cold blooded series of mob lynching under various pretext of being 'cow smugglers', 'beef eaters', 'child lifters', 'practitioners of witch craft', 'Romeos', 'anti-nationals', 'blasphemers' and so on[2]. India today is witnessing an appalling clash between *Mobocracy* and *Democracy*. Democracy, which is the bedrock of Indian society, is on the blink of disaster. Mobocracy is an aberration in democracy. Insofar as the power is in the hand of mob, the perennial infliction of human rights will be inevitable which goes against the constitutional morality and cherished goals of our founding fathers.

The word 'lynching' implies an unlawful murder by an angry mob of people. The word originated in the United States in the mid-18th century. The term 'lynch' or lynch law' was first used by planter Charles Lynch to describe extrajudicial authority assumed by private individuals like him and later came to be applied to extra-judicial killings by crowds, most commonly of African-Americans in the late 19th century. Lynching' can be best described as premeditated extrajudicial killing by a group. It is most often used to characterize informal public executions by a mob in order to punish an alleged transgressor, or to intimidate a group. As Fr. Cedric Prakash SJ puts it, it is an extreme form of informal group social control and often conducted with the display of a public spectacle for maximum intimidation[3]. Unearthing the underlying impetus for this kind of mob-rule, it seems that

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2 NaeeshaHalai , (2017) "Mob Frenzy And Lynching…#Not In My Name", *International Journal of Management and Applied Science (IJMAS),* pp. 40-45, Volume-3, Issue-11.

3 https://www.sabrangindia.in/article/lynching-indias-shame

majoritarian democracy in India today seems to be ruled by the mob. The mob sees itself as an extension of the regime and a substitute for civil society. The mob operates on suspicion and rumour. Rumour acquires a pandemic power and the lie becomes the new virus as it spirals into society with the help of social media networks. Such rumours then leads to a witch-hunt, a pandemic of mob lynching which is almost surreal and macabre. And, unfortunately, looking around, unbelievable, barbaric displays of lynch mob mentality are becoming routine sights across the country today.

II. Mobocracy & Mob Lynching in Contemporary India

Although the word 'lynching' is of foreign origin, according to Rights' activist, Harsh Mander, this does not mean that mob killings are alien to India. Instances of lynchings and similar mob violence can be found in every society. Single women have frequently been lynched through the centuries branded them as witches. Dalits have been lynched with enormous cruelty for millennia with recent instances being of Jhajjar, Khairlanji and Una on mere petty excuses of growing a moustache, riding a horse, or building a two-storey home[4].

Image: 1 Una Attack in 2016 in Gujarat- seven Dalits were brutally beaten for skinning adead cow

[4] https://www.thehindu.com/opinion/lead/lynching-the-scourge-of-new-india/article29693818.ece

Lynching has been a new trend in India recently. This has been linked to messages circulated on WhatsApp or any other social media sites and rising hate mongering from top politicians to local bigots. Accounts of outrages committed by mobs are a warning for an internally building unrest in the stratum of society. Mobs incite the onslaught, make videos on their mobile phones and howl in excitement. They seize victims and subject them to every imaginable manner of physical torment. Bodies desecrated, victims die in extreme fear and pain, pleading innocence and begging for mercy. It has also been, sadly, observed that many of the incidents take place amid the presence of police officials who act as on lookers, forgetting their moral and constitutional duty.

Image: ***2 Qasim Lynched to Death in Pilakhuwa village in Hapur District, Uttar Pradesh. Dead Victim beendragged by mobs in the presence of cops.***

Image: 3 Sheikh Naim pleading innocence and begging for mercy in Bagmeda village of Jharkhand, A mob stopped and lynched three men to death including Sheikh Naim

The impunity enjoyed by the perpetrators is promoting the spread and increase of mob violence and killing. Some of the hysteric mob violence are done deliberately to help the vested interests of the politicians to achieve their electoral goals. Lynching is an unlawful murder by an angry mob of people. This illegitimate violence triggered by a few who serve as the accuser, judge and executor use varied weapons in enforcing their version of justice. Mob violence becomes possible in our country because conditions are created for the perpetrators to dehumanise a fellow human being. Religiously charged mobs become active in dispensing vigilante justice. They take on themselves duty of protecting the sacred order. These self-fringe often barge into the homes of minorities and vulnerable groups and check the meat in the refrigerator, attack places of their worship, protest outside educational campuses, pubs, theatres & multiplexes and brand people as 'antinational'.

The administrative machinery is a dumb spectator to the new pattern of violence so lynching takes place with an easy absence of guilt. To add this, there are news channels that have become kangaroo courts with half a dozen selective biased panellist and the impetuous anchors who become judge and executioner often blaming the victim. It is sad reality of the day that religious sentiments have replaced the rule of law and often the nation's sheep is

sacrificed in the name of protecting the cow at the altar of Lady Justice. Role of Social Media in instigating, promoting and spreading this vice cannot be neglected. With more than 200 million users, India is WhatsApp biggest market. Its users forward more messages, photo and videos, than any other country in the world. Fake videos showing children being abducted from streets gone viral instigated locals to target any stranger, or someone who cannot speak their language.

Image: 4 Women mourn the lynching of their family members in Dhule, Maharashtra[Raju Bhonsle, Dadarao Bhonsle, Bharat Bhonsle, Bharat Malve and Agnu Ingole- were members of the Nath Panthi Davari Gosavi nomadic tribe from Solapur's Khewa village. They had travelled to Dhule to beg for alms and food grain, as is the custom in the community. The sedentary mob armed with a mobile saw them as child lifters and lynched them to death.]

Horrific case of mentally disabled Otera Bibi (42) perplexes us with the ghastly nature the mobocracy is acquiring. Otera Bibihad been living with her parents but wandered from her home to a nearby village in West Bengal. On a suspicion that she was trying to snatch children, a furious mob pounced on her tying her to a tractor and attacking her for three hours with sticks and pelting her with stones. Locals ripped off her clothes and shaved her head as they beat her mercilessly leading to her death.

Image: 4mentally disabled Otera Bibi was lynched to death by the mob

One of the most stinging descriptions of the dangers of mob violence was Mark Twain's response to a racial lynching in Missouri in 1901. He saw in it the danger of America turning into "The United States of Lyncherdom". The secular republic of India, more than a century later, appears to be amidst the shadow of a similar fear today. The data between January 2011 and June 2017 shows that violence related to mob lynching and mobocracy has spiked up dramatically.

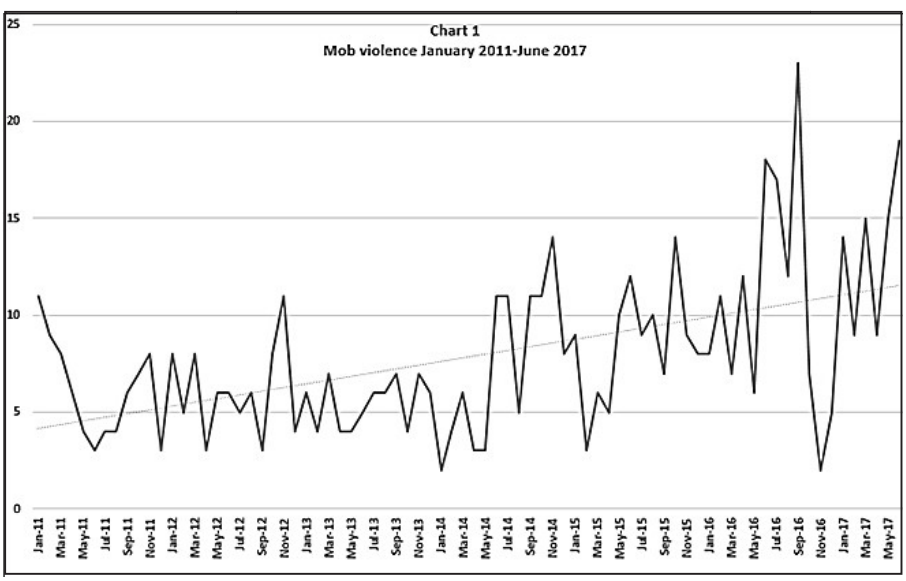

Chart 1: overview of incidents of mob violence by month from January 2011 to June 2017. (Source: Observer Research Foundation[5])

[5] https://www.orfonline.org/expert-speak/has-india-become-lynchistan/

The culture of impunity enjoyed by the fanatical right wing groups indulging in these hate-crimes is an outcome, intended and unintended, of the same strategy. The response of the government machinery and the administration since the very first case of bovine-related mob lynching under the current dispensation reflects the construction of this culture of impunity. Filing of cases against the victims of these hate-crimes as the first step of action is just one example, there has been no dearth of subtle and non-so-subtle hints as to where the sympathies of the administration lie. Not a single instance of strong condemnation by government institutions has been witnessed in these cases. On the contrary, such incidences have at times been followed by shows of strength and statements of encouragement for the perpetrators. While the acts of such lynching have served the purpose of striking fear into the minority community, the official responses, rather the lack of any response worth the name, to these acts of a public spectacle of violence, have created an impression that such fanaticism is beyond the realm of law. This impression, in turn, has engendered a self-perception among the perpetrators of being acceptable. It has implied a mainstreaming, in fact, glorification, of, what till very recently was considered, the fringe.

III. Mobocracy, Mob Lynching & Rule of Law

The Rule of Law is the backbone of Indian Democracy. Article 21 of the Constitution of India guarantees to every person his life and liberty which can only be deprived according to procedure established by law. Every person in India as well as the Government are supposed to follow the Rule of law. Even the death penalty by way of shooting publicly which is not permitted under the law, cannot be so executed even by the Government for, howsoever, serious and heinous crime may be. The entire justice system works on the premise that the courts determine guilt before punishment and mob lynching and mobocracy are antithetical to this principle of rule of law.

Lynching begets from hatred for specific group of people in society (especially minorities, Dalits, transgender, gay and dissents etc.) to whom the bigots hate to the extent of not considering them worth living in society. It is a way of communicating by majority to minority that law cannot save you however fair/stringent that law may be. It is often justified with absurd

arguments that there is reaction for an action. It puts a very big question on the State as State came in existence for securing, for civility and maintaining harmony. If the State fails to provide security to its citizens which is the first and foremost duty of the State, then its meaning and existence comes into doubt. If people fail to abide by laws it would lead to real anarchy which is against the aspiration of becoming a welfare state. What empowers mob to attack an individual without any considerations for rule of law? What empowers them to publicize their crimes without utter fear? It wants to communicate that law of the land cannot protect the victim. And as SC State that it is horrendous act of mobocracy which wants to assert that law or justice system would mean nothing and justice will be the one which a mob would determine without any trials and instant justice would be done without determine the office or innocence of the victim. Social media has contributes tremendously to its increase. It is not happening because there are no laws. Of course there is no specific law to deal with this offence. But there are various provisions under IPC &CRPC to deal with the crime & can be punished if there is conviction to punish. When monster is created to reap political benefits, it goes out of control and undermines not only their political masters but the very rule of the law and justice system of the land undermining its very authority with utter contempt.

It needs to be accepted that it is not a fringe element which is doing this but it is a political reality of our country. Its solution does not lie in only in the law put political will of the political parties who wish to stop it by going beyond short-sighted political electoral gains. If such elements are supported by political masters, felicitated with garlands visiting them in jails, defending them on TV channels, it will only go on increase. This clear message that lynching does not have any place in our social, political society must come from ruling party which is not seen yet.

Criminalising the victim itself abusing powers by the police is also shocking and worrisome. Feeling of insecurity, hatred, bigotry needs to be erased from society otherwise the monster would not spare anyone. It is the obligation of the Union and the States to take immediate action warranted in law to stop such activities. It is the duty of the States, as has been stated in

Nandini Sundar and others v. State of Chhattisgarh[6], to strive, incessantly and consistently, to promote fraternity amongst all citizens so that the dignity of every citizen is protected, nourished and promoted. That apart, it is the responsibility of the States to prevent untoward incidents and to prevent crime. In *Mohd. Haroon and others v. Union of India and another*[7], it has been clearly held that it is the responsibility of the State Administration in association with the intelligence agencies of both the State and the Centre to prevent recurrence of communal violence in any part of the State. If any officer responsible for maintaining law and order is found negligent, he/she should be brought within the ambit of law.

Vigilantism cannot, by any stretch of imagination, be given room to take shape, for it is absolutely a perverse notion. It should be noted that lynching is an affront to the rule of law and to the exalted values of the Constitution itself. Lynching by unruly mobs and barbaric violence arising out of incitement and instigation cannot be allowed to become the order of the day. Such vigilantism, be it for whatever purpose or borne out of whatever cause, has the effect of undermining the legal and formal institutions of the State and altering the constitutional order. These extrajudicial attempts under the guise of protection of the law have to be nipped in the bud; lest it would lead to rise of anarchy and lawlessness which would plague and corrode the nation like an epidemic.

The unrestrained dark clouds of vigilantism have the effect of shrouding the glorious ways of democracy and justice leading to tragic breakdown of the law and transgressing all forms of civility and humanity. Unless these incidents are controlled, the day is not far when such monstrosity in the name of self-professed morality is likely to assume the shape of a huge cataclysm. It is in direct violation of the quintessential spirit of the rule of law and of the exalted faiths of tolerance and humanity.

IV. Indian Supreme Court on Mob-Lynching & Mobocracy

The Indian Supreme Court in *Tehseen S. Poonawalla v. Union of India and Others*[8] has asked Parliament to consider passing a special law on

6 AIR 2011,SC,2839
7 2014 Latest Case Law, 192, SC, March/2014
8 (2018) 9 SCC, 501

lynching. This, it maintains, is essential to protect citizens and ensure that the "pluralistic social fabric" of the country holds against mob violence. A new law will work if gaps in existing law are what prevent state administrations from acting decisively and fairly against lynch mobs. Lynching is not just "mobocracy", it is collective hate crime. The Supreme Court issued a slew of directives for the Centre and State governments to check the epidemic of wanton mob lynchings. The verdict by the top court, authored by Chief Justice Dipak Misra, said: "a special law in this field (cow vigilantism and mob lynchings) would instill a sense of fear for law amongst the people who involve themselves in such kinds of activities." He asserted that "horrendous acts of mobocracy cannot be permitted to inundate the law of the land".

Laying out a slew of preventive, remedial and punitive measures to be taken by the Centre and State governments in cases related to cow vigilante groups and mob lynching, the Supreme Court directed state governments to prepare a lynching/mob violence victim compensation scheme within one month. It also ordered that cases of lynching and mob violence shall be specifically tried by designated court/Fast Track Courts earmarked for that purpose in each district and that "upon conviction of the accused person(s), the trial court must ordinarily award maximum sentence as provided for various offences under the provisions of the IPC. The Chief Justice asserted that, "There can be no shadow of doubt that the authorities which are conferred with the responsibility to maintain law and order in the States have the principal obligation to see that vigilantism, be it cow vigilantism or any other vigilantism of any perception, does not take place. When any core group with some kind of idea take the law into their own hands, it ushers in anarchy, chaos, disorder and, eventually, there is an emergence of a violent society. Vigilantism cannot, by any stretch of imagination, be given room to take shape, for it is absolutely a perverse notion.

IV. Mobocracy, Mob Lynching & Remedial Statutory Provisions

At a time when the democracy mutating into mobocracy, stringent statutory measures are the need of the hour. Lynching is murder by a mob with no due process or rule of law. In the US South in the 19th and 20th Centuries, thousands of African Americans were lynched by white mobs, often by hanging. From America to Nigeria it spread like fire in the 19th

century and thus a need was felt to implement strict laws to eliminate this practice. Thus various laws were enacted to eliminate the menace by the respective countries. Some of the notable anti-lynching laws around the globe included-

5.1 Dyer anti-lynching law 1918

This bill classified lynching as a federal felony, which allowed the US to prosecute such cases. It called for the prosecution of lynchers in federal court and State officials who failed to protect lynching victims or prosecute lynchers could face five years in prison and a $5,000 fine. The victim's heirs could recover up to $10,000 from the county where the crime occurred.

5.2 The anti-lynching law of 1928 in Virginia

This bill was a breakthrough in curbing violence against African-American in Virginia. The law gave the state the power to enforce stiff penalties against localities that did not report vigilante murder.

5.3 Nigerians anti-lynching bill 2009

It was very difficult to charge the offenders of lynching under the laws that covered murder and assault in Nigeria so it has to pass an anti-lynching bill in 2009to maintain the rule of law and due process. A person found guilty of instigating any of these three criminal offences will be punished by imprisonment for life or not less than 25 years. The bill stipulates that a security officer who fails to make reasonable efforts or prevent an attack, or to apprehend a perpetrator, will be punished by up to five years imprisonment orface a fine of up to N 500,000 (US$1400).A security officer who takes part in, or conspires to an extrajudicial attack, would be guilty of a capital offence. Those who have failed at prevention would be subject to dismissal and15 years imprisonment.

5.4 Manipur's new anti-lynching law (2018)

It is one of the important anti-lynching law based on the directions of the SC and breaks important ground in attempting to control hate crimes and ensure police action[9].

[9] https://www.thehindu.com/opinion/lead/manipur-shows-the-way/article26007016.ece

5.5 Rajasthan Protection from Lynching Bill[10] (2019)

It provides for life imprisonment and fine up to five lakh to convicts of cases of mob lynching involving the victim's death.

V. Way Forward

A political correction is Fascism pretending to be manners as rightly noted by George Carlin. The mob-rule under any disguise threatens rule of law thereby subverting and weakening functional democracy. Therefore, an ideal welfare, functional State should have no place to mobocracy in its system. Lynching erodes the right to life. People are beaten up and paraded, women are stripped and assaulted. Though mobocracy and mob lynching are indeed a law and order issue, we should not let that become an excuse to carpet over the essential elements of communal prejudice and hate that constitutes these lynching deaths. The collusion of the government machinery and the law enforcement agencies encourages this menace. We should understand that any explicit / implicit support to mobocracy can cause an irreversible harm to the tenets of democracy that has shaped the idea of India. A failure to recognise this new form of violence in India and call it out only absolves us from introspecting the rot in our society, and more damningly precludes us from moving forward politically to resolve it. It is submitted that complying with the directions of the SC, States should enact stringent anti-lynching law to curb the nuisance. Meanwhile, relevant provisions of IPC related to murder and unlawful assembly are adequate enough to investigate, prosecute and punish those who lynch. It is an unlawful assembly that attempts to murder. The law recognises common intention, common object, abetment, incitement of offence and intentionally provoking a riot. The problem is not the absence of the law but how the law is employed. The deficiency is not so much in the law as in law enforcement. The police should punish those who spread propaganda and fake news and attempt to reap electoral benefits at the heat of hatred and killing of vulnerable in the society.

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[10] https://www.thehindu.com/news/national/rajasthan-assembly-passes-anti-mob-lynching-bill/article28823205.ece

Law on Recusal of Judges: A Comparison Between India and International Law

Ronak Chhabria[1]

"*Independence and impartiality are the twin pillars without which justice cannot stand and the purpose of recusal is still to underpin them.*"

- Sir Stephen Sedley[2]

A common murmur in the hallowed halls of Court is almost always something about a judge, about his comments, his outlook. It would not be wrong to state that the fate of the entire case rests with the perspective and temperament of the judge. It would also accordingly be entirely appropriate to decipher that the role of a judge in a case is of major concern to the parties and their faith in the judicial system, which warrants it to be of significant interests to advocates and certainly academicians.

When there is any dispute between parties, more often than not they approach the Courts to adjudicate the matter, and after complying with the procedural requirements, the matter is listed before a Judge. It is often said that a judge should be a 'neutral adjudicator,'[3] and should decide the matter only keeping law in mind. Justice and adjudication tainted with bias and unfairness is certainly a matter that must not be taken lightly due to it's implication on the integrity of the Court. It is only when this is compromised that aspersions are raised against the Court.

The word recusal originates from a religious concept of a recusant,[4] who was one who refused to attend services of the Church of England and thereby committed a statutory offense.[5] However, the definition of this word in the context of this thesis can best be gotten from a lexicon to mean- "*Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest*."[6] There are other contexts in

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2 Grant Hammond, Judicial Recusal: Principles, Process and Problems (Hart Publishing, 2009). This is in the Foreword section of the book, written by Sir Sedley of the Royal Court of Justice, London.

3 Peter M. Friedman, Don't I Know You from Somewhere?: Why Due Process Should Bar Judges from Presiding over Cases When They Have Previously Prosecuted the Defendant, 88(2) The Jour. Of Crim. Law and Criminology 686, 683-720 (1998).

4 Grant Hammond, supra, Foreword.

5 Recusant: Religious Dissenter, Britannica Encyclopedia (Feb. 10, 2020, 20:38 IST), https://www.britannica.com/topic/recusant.

6 Black's Law Dictionary 1303 (8th ed., 2004).

which recusal is used, as evident from an authoritative lexicon; therefore it is imperative to point out that this thesis is only limited to judicial recusal.

Judicial recusal, a concept that "*dates back to antiquity*,"[7] refers to a judge stepping down from hearing or adjudicating a case, either under their own volition, or as a response to a litigant's plea.[8] The doctrine of judicial recusal enables and may require a judge before whose court a matter is listed to hear and adjudicate a case to stand down and leave the case's disposition to another judge.[9] By necessary implication, if a matter is listed before a judge, and due to disqualifications as prescribed by law or due to any form of bias that may have an impact on the fair trial of a case, he may either voluntarily stand down or upon an application filed by the litigants stand down from disposition of the case.

Fundamentally, judicial disqualification and judicial recusal are distinct concepts, although in most scholarly work on recusal, the two terms are used interchangeably.[10] Judicial disqualification is a categorical rule of law by virtue of which a judge is disqualified from hearing a matter. The word itself, 'disqualification' implies that the judge although under other circumstances is qualified to adjudicate the matter, due to a certain attribute is now no longer qualified, rather his qualification is vitiated by virtue of the disqualification.

Recusal on the other hand is a process by which as a consequence of a disqualification, a judge steps down. The two terms are related to each other and are almost inseparable, however are two fundamentally distinct concepts.

Tracing the origins of the doctrine of recusal leads us to common law origins, since most controversies and even the mention recusal in Indian cases seems to be quite recent. To begin with, Sir Nicholas Bacon's Case[11] held that a judge was to recuse himself if he had "*direct pecuniary interest*"

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7 Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges 5 (2d ed., 2007). The term antiquity here does not merely connote antiquity of the term, but rather of the concept. Adjudication of disputes has existed from time immemorial, and therefore so should have been the concept of recusal.

8 Matthew Menendez and Dorothy Samuels, Judicial Recusal Reform: Toward Independent Consideration of Disqualification 3 (Brennon Centre for Justice, NYU School of Law, 2016).

9 Grant Hammond, supra, 1.

10 See Mattew Menendez and Dorothy Samuels, supra.

11 (1563) 73 ER 487 (KB).

in the matter before him.[12] Sir Edward Coke CJ in Dr Bonham's Case[13] held that "*no one shall be a judge in their own cause*." In another prominent case, a judge was '*layed by the heels*' because he was the lessor of the plaintiff in a case of ejectment.[14]

However, sometimes this rule was stretched too far, for instance when it came to a case concerning a pauper where the judge was disqualified to adjudicate the matter because he was a tax paying citizen. The major conflict arose because when taxpayer money is spent in a certain fashion, then as a taxpayer one is inclined to take objection to expenditure one does not agree with. However, that would disqualify anyone that paid taxes, which would be very impractical.

When it came to when a party in the case was a relative of the judge, in Vernon v. Manners[15] it was held- "*All the inhabitants of the earth are descended from Adam and Eve, and so [they]are cousins of one another, [however] the further removed blood is, the more cool it is*." What this means is that if the relative is distant, the judge may still adjudicate the matter.

In India, some important questions to address are- How many cases regarding recusal have been adjudicated by the Honorable Supreme Court of India, and what are the holdings in those cases? Additionally, whether there are any guidelines, or circulars or notification concerning recusal in the Supreme Court of India?

First, concerning the question regarding the cases, the Right to Information Applications have been filed before the Central Public Information Officer of the Honorable Supreme Court of India under Section 6 of the Right to Information Act in accordance with the Rules of the Supreme Court of India on the 29th of November 2019. However, due to the lack of maintenance of information by the Honorable Supreme Court of India as stated in their reply dated December 23, 2019, the author has found the information using digital databases including Manupatra, Heinonline and Westlaw, and the Supreme Court Archive of Judgments and Orders

12 Earl of Derby's case, 77 ER 1390 (KB).
13 77 ER 638 (CP).
14 Anon, 91 ER 343 (KB).
15 75 ER 639 (KB).

accessible on the website of the Supreme Court of India, a list of 43 judgments/orders have been procured that have in any context even mentioned 'recusal' or 'recuse.' However, not all of them are relevant to this thesis, and some of the orders have been passed in cases where the judgment has already been analyzed. Therefore, the only orders and judgments that are distinct have come to include 37 cases.

These cases have been read and the relevant portion on recusal has been extracted and presented in a tabular form, which has been presented as an Appendix-SC to this thesis. The objective of engaging in this research is to be able to comprehensively determine the current status of the law related to recusal, and to be able to determine proper conclusions comprehensively on the drawback and perhaps what the law ought to be.

With regard to the second part, since all circulars, notifications, guidelines are not available in the public domain, and regardless of the same, there is no such document available to the public. Therefore, it is appropriate that an application under Section 6 of the Right to Information Act is filed, and the same has been done. The author has received a reply dated December 24, 2019 with an identical reply as to the previous application.

First, addressing the data procured from the Supreme Court of India, the RTI application sought information in the words- "*Case Numbers of cases where a judge has recused himself voluntarily*," and "*Case Numbers of cases where an advocate has prayed before the bench for the judge to recuse himself/herself*."

The Honourable Central Public Information Officer via reply dated December 23, 2019 stated that information is not maintained by the Supreme Court in the manner sought. However, all matters listed before the Supreme Court are available in the public domain on the website of the Court and it may be accessed on the same. A photocopy of the reply has been attached to this thesis as Annexure 1. Accordingly, using a common word search on the website and online databases including Manupatra, Heinonline and Westlaw India a total number of 37 order and judgments have been read and the relevant observations and ratio on recusal has been extracted and presented in Appendix I- SC.

This exercise has been fruitful in holistically determining the current status of the law related to recusal and to identify the major problem areas in the law- including inconsistency in the judgments and a lack of clarity on the proper law and procedure relating to recusal. Another significant trend noticed in the orders and judgments in a rather sanctimonious outlook of the bench when it comes to recusal. A significant number of judges consider a prayer seeking recusal to be disrespectful and have even gone to the extent of holding it to be in Contempt of Court. Judges have not taken it lightly when a prayer seeking recusal has been made before them and on occasion have even held that "*that a litigant should not be permitted and allowed to question a Judge on perceived bias especially after hearing has commenced and orders on different dates have been passed.*"[16] Another common observation is that recusal is a right of the Judge; essentially implying that it is the prerogative of the Judge to decide whether he wants to recuse himself/herself or not. Judges also have cited the oath taken under Schedule III to the Constitution of India, that:"*...I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws*."[17]

It must also be mentioned that in some cases, an application for recusal has been filed only to delay the proceedings of the Court and to buy time.[18] Such practices should be stringently frowned upon and are completely unacceptable.

The common arguments made against recusal in these cases are that recusal results in form shopping, that it is violative of the oath taken under Schedule III of the Constitution, and that it is the prerogative of the Judge and the litigant does not have the right to make that prayer.

When it comes to the third RTI Application filed seeking notifications, circulars, guidelines, instructions or any document regarding recusal of judges, the reply dated December 24, 2019 that all Circulars issued by the

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16 Harsh Mander v. Union of India and Another (02.05.2019 - SC Order): MANU /SCOR/15495/2019.
17 Supreme Court Advocates on Record-Association and Others v. Union of India, (2016) 5 SCC 1.
18 Subrata Roy Sahara v. Union of India and Others, AIR 2014 SC 3241.

Court are available in Public Domain on the website. The reply has been attached as Annexure 2. On a detailed perusal of the circulars and notices, there is nothing issued relating the recusal.

A significant point to note is that to the first two RTI Applications filed asking distinct questions, a common reply was given by the Central Public Information Officer. Another interesting point to note is that all three Applications that have gotten two replies have exactly the same content. However, it must also be acknowledged that although the replies did not provide any substantial data, they did provide a route to find it and for that gratitude must be expressed.

The Law Relating to Judicial Recusal in India

While discussing the law related to recusal, it becomes imperative to discuss the basis of recusal stemming from the rule against bias, which is a principle of natural justice. Natural justice in its broadest sense may simply mean "*the natural sense of what is right and wrong*,"[19] and can even be equated with fairness.[20] Principles of Natural justice are not articulated by a saint or a sage,[21] they are justice as per a 'higher law' or 'natural law' where the "*lion and the lamb lie down together and the tiger frisks with the antelope*."[22] Rules of Natural Justice are not codified canons, they are principles ingrained in the conscience of man.[23] In courts of law, tribunals and other judicial and quasi judicial bodies, "*it can be taken for granted that these rules must be observed*."[24]

Of the principles of Natural justice, the one of particular interest and importance in this thesis is the Right to a Fair Hearing, and particularly the Rule against Bias. It is obvious to deduce that a biased judge is incapable of pronouncing a fair and just judgment although that might not be the case for every biased judge.

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19 Voinet v. Barrett (1885) 55 LJQB 39, at 41, Moses v. Macferlan (1760) 2 Burr. 1005, at 1012. See also, DharmapalSatyapal Ltd. v. CCE, (2015) 8 SCC 519.

20 William Wade and Christopher Forsyth, Administrative Law 372 (Oxford University Press, 2009)

21 I. P. Massey, Administrative Law 188 (Eastern Book Company, 2017).

22 Union of India v. Tulsiram Patel, (1985) 3 SCC 398, at 464. See also, Maharashtra State Financial Corporation v. Suvarna Board Mills, (1994) 5 SCC 566.

23 I. P. Massey, supra, 188.

24 William Wade and Christopher Forsyth, supra, 372.

Bias is a conscious or unconscious operative prejudice in relation to a party or issue that is a result of a predetermination, predisposition or preconceived opinion to decide a case a particular way, so much so that this obstinate prejudice impacts the fairness of a trial.[25] There can be two kinds- pecuniary and personal.[26] Concerning personal bias, in Ranjit Thakur v. Union of India,[27] the test of "real likelihood of bias" is when a reasonable man in possession of the relevant information would've thought that bias was likely. What is relevant is the reasonableness of the apprehension in that regard in the mind of the party and not so much from the perspective of the Judge.[28] In Metropolitan Properties Ltd. v. Lannon,[29] Lord Denning said "*…justice must be routed in confidence, and confidence is destroyed when right-minded people might think that the judge was biased*."

The classic case of R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2)[30] provides comprehensive insight into the rule against pecuniary bias. There are other kinds of bias- subject matter, department, policy notion and bias due to obstinacy.[31]

In India, concerning recusal, the oldest case mentioning the word 'recusal' for the first time is State of Punjab v. V. K. Khanna[32] where it was held that in case of a real doubt, it should be resolved in favor of recusal. To be precise, there is no substantive or procedural law that has dealt with recusal comprehensively, all we have are a bunch of conflicting judgments.

As per the judgments, recusal is the prerogative of the judges, and it is for the judge to decide whether he must recuse himself or not.[33] A judge has taken an oath during his swearing under Article 124(6) and Article 219 read with Schedule III of the Constitution of India that enjoins the Judge to "duly and faithfully and to the best of his knowledge and judgment, perform the

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25 I. P. Massey, supra, 193.
26 G. N. Nayak v. Goa University, (2002) 2 SCC 712.
27 (1987) 4 SCC 611.
28 I. P. Massey, supra, 197.
29 (1996) 4 SCC 64.
30 (2000) 1 AC 119.
31 I. P. Massey, supra, 202-210.
32 AIR 2001 SC 343.
33 Indore Development Authority v. Manohar Lal and Others, 2019 (14) SCALE 470. See also, Supreme Court Advocates on Record-Association and Others v. Union of India, (2016) 5 SCC 1, and Seema Sapra v. Court On Its Own Motion, AIR 2019 SC 4020.

duties of office without fear or favour affection or ill will while upholding the constitution and the laws."[34] It is a duty of the judge to decide matters fairly and he would fail in such duty if he endeavours to become popular among members of the bar.[35] However, although it is the judge's duty to adjudicate, upon reasonable ground if recusal is sought, the judge should recuse himself.[36] If in any case there is real ground for doubt, that doubt should be resolved in favour of recusal[37] and it should be done before any objection is raised.[38] Once a judge has recused himself from a case, the recusal is permanent. He can not adjudicate it at any other stage.[39]

The major cause for concern is the holding in order dated 2nd May, 2019 of the Supreme Court in the case of Harsh Mander v. Union of India. The then Chief Justice of India, Justice Ranjan Gogai categorically stated that- "*that a litigant should not be permitted and allowed to question a Judge on perceived bias especially after hearing has commenced and orders on different dates have been passed*." This statement is problematic primarily because on one hand the Courts have recognised the rule against bias. In some cases, the Judge is just not willing to recognise his bias and fails to recuse himself. As an officer of the Court, is it not the duty of the litigant to make a prayer before the Court to recuse himself? By curbing the right of the litigant to question the judge's prejudice and bias, how effectively can the principles of natural justice be upheld?

Additionally, the statement interestingly uses the word 'especially after' that connotes that there is actually no holding to that effect. Further, there are precedent of the Supreme Court where recusal applications have been heard,[40] and one case where the lack of Mr. Prashant Bhushan's intention to file an application seeking recusal was noted.[41] However, subsequent to this order, this has become a binding precedent. However, as

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34 R.K. Anand v. Registrar, Delhi High Court, (2009) 8 SCC 106.
35 National Lawyers' Campaign for Judicial Transparency and Reforms and Others. v. Union of India and Others, ILR 2019 (2) Kerala 157.
36 Seema Sapra v. Court On Its Own Motion, AIR 2019 SC 4020.
37 State of Punjab v. V. K. Khanna and Others, AIR 2001 SC 343.
38 State of Punjab v. Davinder Pal Singh Bhullar and Others, AIR 2012 SC 364.
39 Mahendrabhai Kashibhai And Others v. Chandrakant Valjibhai And Others (15.05.2015 - SC Order): MANU/SCOR/30518/2015.
40 Kamini Jaiswal v. Union of India (UOI) and Others, AIR 2017 SC 5334.
41 Tehseen Poonawalla and Others. v. Union of India and Others, AIR 2018 SC 5538.

stated in *Ranjit Thakur*[42]a judge should not think about it from his perspective, in the fashion- "Am I biased," rather he should look at it from the mind of the litigant pleading before him.[43] In Metropolitan Properties Co (FGC) Ltd. v. Lannon,[44] Lord Denning M.R. observed:

> "*. . . in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.*"

Further, several other judgments of the Supreme Court use extremely theatrical language against recusal. Some interesting ones are- "*Recusal will be destructive for the Institution [of the Judiciary]*."[45] "*Calculated psychological offensives and mind games adopted to seek recusal of Judges, need to be strongly repulsed. We deprecate such tactics and commend a similar approach to other Courts, when they experience such behaviour*."[46]

While the integrity of the Court is undoubtedly recognised, is it not to be considered an argument in favour of recusal? When the concern is it integrity of the Court, what better way to ensure that than by being a fair adjudicator, and stepping down if one can not be a fair adjudicator? Although it is fair for some judges to have the mental capacity to keep their bias aside and truly fairly adjudicate a matter, on some level a personal bias will impact the fairness of their decision.

Remedies In Case Of Abstinence From Recusal And Their Effectiveness: Although the jurisprudence on the rule against bias exists,

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42 Ranjit Thakur v. Union of India, (1987) 4 SCC 611.

43 This was also cited and noted in another precedent of the Supreme Court- Kamini Jaiswal v. Union of India (UOI) and Others, AIR 2017 SC 5334.

44 [(1969) 1 QB 577, 599.

45 Dushyant Dave, Bias and Recusal of Judges: The Harsh Mander case, Bar and Bench (May 7, 2019, 9:49 IST), https://www.barandbench.com/columns/bias-and-recusal-of-judges-the-harsh-mander-case.

46 Subrata Roy Sahara v. Union of India and Others, AIR 2014 SC 3241.

there are Orders and Judgments of the Supreme Court that hold that a litigant can not be permitted to question a judge based on bias. Therefore, some judges may cite them and deny the litigant the right to file an application seeking recusal. It must be noted that it is customarily accepted to file an application seeking recusal as seen in State of Gujarat and Others. v. Hon'ble Justice R.A. Mehta and Others.[47] However this may be vitiated by the order dated 2nd May, 2019 of the Supreme Court in the case of Harsh Mander v. Union of India.

An application may be filed for transfer of the case before a District Court, High Court or the Supreme Court based on the nature of the suit and the hierarchy of the Court as seen in order dated 14th March, 2014.[48]

Further, other remedies are available including appeal, review and revision provided all the requisite statutory conditions are fulfilled under the Civil Procedure Code or the Criminal Procedure Code and under other relevant Rules. It must be noted that there are no provisions under the Karnataka Civil Rules of Practice, Karnataka Civil Courts Act, Bangalore Civil Courts Act, Karnataka High Court Act, Civil Procedure Code or High Court of Karnataka Rules or Supreme Court Rules on recusal.

These remedies that are available are costly and not time sensitive. Since an application seeking recusal has to be filed before the same judge who the litigant is seeking recusal of,[49] it is a clear violation of '*NemoJudex in CausaSua*.' When it comes to transfer, it is almost impossible to make such an application without attracting animosity from the Bench, threatening the harmony between Bar and Bench.

When it comes to Appeal, Revision or Review, if the recusal application is admitted and dismissed, only then this dismissal may be challenged. Further, in some cases, the adjudication of appeal, revision or review may take a long time, and in the meanwhile the case might be decreed, or in case of stay on proceedings, it would not be in the best interest of the parties.

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47 AIR 2013 SC 693.

48 Arun Kumar Mishra v. Anil Kumar Verma and Others, (14.03.2014 - SC Order): MANU/SCOR/9924/2014.

49 Supreme Court Advocates on Record-Association and Others v. Union of India, (2016) 5 SCC 1.

Addressing Some Arguments Against Recusal: Judges seem to be infatuated with using oath taken during his swearing under Article 124(6) and Article 219 read with Schedule III of the Constitution of India that enjoins the Judge to "duly and faithfully and to the best of his knowledge and judgment, perform the duties of office without fear or favour affection or ill will while upholding the constitution and the laws;" as an argument against recusal.[50] However, in order to duly and faithfully without affection adjudicate a matter, if the particulars of a case affect that, there should be a law governing the disqualification and recusal procedure. The rhetoric of the oath can certainly be used in favour of recusal.

Another significant argument used against recusal is that recusal results in forum shopping, as was stated in Supreme Courts Advocates on Record Association.[51] Forum shopping is a practice adopted by litigants to choose a particular forum that is likely to give a favourable decision in their favour.[52] In essence, going by this definition the litigants should have the capacity to choose a forum, which is not the case here. When a judge due to his prejudice is unable to adjudicate in a just manner, that trumps the alleged 'forum shopping.' For forum shopping, technically, it should normally not be a consequence of judicial disqualification.

There have been some incidents where judges have recused themselves for no rhyme or reason. Ultimately, a mistaken case of recusal can prove just as destructive to rule of law as those cases where a judge refuses a recusal despite the existence of bias. We mustn't allow recusals to be used as a tool to manoeuvre justice, as a means to picking benches of a party's choice, and as an instrument to evade judicial work. As the Constitutional Court of South Africa held, in 1999, "the nature of the judicial function involves the performance of difficult and at times unpleasant tasks," and to that end judicial officers "must resist all manner of pressure, regardless of where it

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[50] R.K. Anand v. Registrar, Delhi High Court, (2009) 8 SCC 106. See also, Indore Development Authority v. ManoharLal and Others, 2019 (14) SCALE 470, Supreme Court Advocates on Record-Association and Others v. Union of India, (2016) 5 SCC 1.

[51] Supreme Court Advocates on Record-Association and Others v. Union of India, (2016) 5 SCC 1. See also, R.K. Anand v. Registrar, Delhi High Court, (2009) 8 SCC 106, Union of India and Others. v. M/s. CIPLA Ltd. and Anr., AIR 2016 SC 5025, KaminiJaiswal v. Union of India (UOI) and Others, AIR 2017 SC 5334.

[52] Forum Shopping Law and Legal Definition, US Legal (Feb. 11, 2019, 13:54 IST), https://definitions.uslegal.com/f/forum-shopping/.

comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself."[53]

Conclusion

It is particularly interesting when it comes to international law to have a deliberation on bias and problematic adjudication considering the very nature of international law and the nature of disputes that are adjudicated in international courts. The nature of International law is well acknowledged in legal academia as being 'soft law.' What this essentially means is that international law is not backed by sanction, and for this very reason that T. E. Holland famously remarked that "*international law is the vanishing point of jurisprudence*".[54] Whether or not that statement is truly accurate or not is something that can not be commented in this thesis, however it surely can be said that on paper international law is a ferocious beast, but when it is attacked, it can not defend itself without the ammunition of artificial sanction that is imposed by counties, and not the law itself.

The real issue in this thesis is philosophical, substantive and procedural- and to seek some answers from international law is the main objective of this portion. In international law, the main disputes are between nations. The modern law has clear answers, but it would be insightful to deeply investigate how this modern law came into being. This is not a comprehensive history on the law related to recusal or bias in international law, only select instances and incidents will be analyzed, and these have been chosen carefully and meticulously, those that have a significant impact on neutral adjudication and fairness of the trial. The first case that comes to mind is the Tokyo Trial, that was adjudicated under the Statute of the International Military Tribunal of the Far East established with the intention to implement the Cairo Declaration of the 1st of December, 1943, the Declaration of Potsdam of the 26th of July, 1945, the Instrument of Surrender of the 2nd of September 1945, and the Moscow Conference of the 26th of

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[53] Suhrith Parthasarathy, Not Without an Explanation: When Judges Recuse Themselves, The Hindu (Feb. 19, 2019 00:02 IST), https://www.thehindu.com/opinion/lead/not-without-an-explanation/article26305917.ece.

[54] Thomas Erskine Holland, The Elements of Jurisprudence 392 (13th ed. 1924).

December, 1945. Japan began invading several parts of South East Asia and the Pacific Ocean, committing several atrocities in China and Indonesia, especially in the Shanghai- Nanjing region of China and the Manila region of Indonesia including rape, torture and mass murder.[55] One of judges in this case- Justice Radhabindo Pal remarked in his dissent that this trial was a 'show trial,'[56] and by virtue of the very constitution of the bench, it is clear. The problematic inclusion of Justice Delfin Jaranilla in the bench due to the fact that he was a prisoner of war and a survivor of the horrific and inhuman Bataan Death March severely casts aspersions on his ability to be a neutral adjudicator implicit from his separate opinion with significantly graver punishment on the perpetrators and belligerents under trial.[57]

When it comes to the International Court of Justice, procedure on voluntary recusal is clear from the statute. In case of bias or disqualification, the role of the President is interesting. The President of the Court plays a fundamental role in ensuring that the independence of the Court is maintained. Thus, Article 24 provides that "if the President considers that for some special reasons one of the Members of the Court should not sit in a particular case, he shall give him [or her] notice accordingly." This power has been used rarely; indeed only one instance is known. In the South West Africa case (Ethiopia & Liberia v. South Africa), the President, Sir Percy Spender, announced in the opening of the substantive hearings that Sir Mohammed Zafrullah Khan would not participate in the case. Though there is no public record, it appeared from subsequent declarations by Judge Khan that the President himself had asked Judge Khan not to participate in the case, as he had at one point been nominated as an ad hoc judge by one of the parties, though he had not acted in that capacity.[58]Article 34 of the Rules of the Court further provides that in case of any doubt arising as to the application of Article i7(2) of the Statute or in case of a disagreement as to

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55 International Military Tribunal of the Far East- Judgment of 4 November 1948, https://werle.rewi.hu-berlin.de/tokio.pdf.

56 Gerry Simpson, Law, War and Crime, Polity Press, London, 108 (2007).

57 Yuma Totani, The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II 16 (Harvard, 2008).

58 Sir Robert Jennings & Philippe Couvreur, Article 24, in The Statute of the International Court of Justice, A Commentary 461-62 (Andreas Zimmerman et al. eds., 2nd ed., 2006); see also Rosanne, supra note 4, at 1058.

the application of Article 24 of the Statute, the President shall inform the Members of the Court, who retain the final power of decision.

However, although the role of a Judge in International Law is distinct from the role of Judges in Domestic Law in India, by virtue of election of Judges in International Law, the position of law is clear, and that is what lacks clarity in Indian law, especially with no procedural law addressing it and conflicting Supreme Court cases. This must be addressed, especially in the current scenario where judicial independence and integrity is a genuine concern for the public and the Bar.

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Citizenship and Immigration: A Comparative Study of the India, U.S., and the German System

Vindhya Gupta and Sanya Agarwal[1]

Introduction

There is no legal definition of a migrant given in any international instrument.[2] The common understanding of a migrant as explained by experts, is that a migrant "is someone who changes his or her country of usual residence, irrespective of the reason for migration or legal status. Generally, a distinction is made between short-term or temporary migration, covering movements with duration between three and 12 months, and long-term or permanent migration, referring to a change of country of residence for duration of one year or more."[3]

'Migrant' is a neutral term that simply refers to a group of people who are outside their State of origin or habitual residence, for any reason. It has no connotations attached to it due to the reason for migration.[4]

Migration happens for a number of reasons, and may be voluntary or involuntary. However, a common thread in all types of migration is that a migrant leaves the original country of residence in search of better living conditions and opportunities. Voluntary migration happens when people move from one country to another in search of better work opportunities, or to be closer to their family members. Involuntary migration happens when a person is forced to move from their country of origin due to abuse of their human rights, or persecution due to their race, religion, ethnicity, or any other cause.

The reason for migration is the basis for the categorization of a migrant as a migrant worker, a refugee, stateless person, or a trafficked person.[5] This categorization is important for the reason that there are a number of

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2 *Who is a Migrant?* International Organization for Migration, https://www.iom.int/who-is-a-migrant [accessed 24th March 2020].

3 *Definitions,* Refugees and Migrants,https://refugeesmigrants.un.org/definitions [accessed 24th March 2020].

4 *Difference between migrants and refugees,* UN Human Right Office of the High Commissioner for Refugees, https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/MigrantsAndRefugees.pdf [accessed 24th March 2020].

5 *Id.*

instruments in International Law that address the concerns of each category, almost exclusively. This is because each of these categories of migrants face different problems, directly related to the reason for their immigration. Some of the important conventions addressing such issues are:

- Convention against Torture[6]
- International Convention on the Elimination of All Forms of Racial Discrimination[7]
- International Convention on the Protection of the Rights of Migrant Workers and Members of their Families[8]
- International Covenant on Civil and Political Rights[9]
- International Covenant on Economic, Social and Cultural Rights[10]
- UN Convention on the Reduction of Statelessness, 1961[11]
- UN Convention relating to the Status of Refugees, 1951, and 1967 Protocol[12]
- UN Convention relating to the Status of Stateless Persons, 1954[13]
- UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children[14]

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6 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: https://www.refworld.org/docid/3ae6b3a94.html [accessed 25 February 2020].

7 *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: https://www.refworld.org/docid/3ae6b3940.html [accessed 25 February 2020].

8 *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, available at: https://www.refworld.org/docid/3ae6b3980.html [accessed 25 February 2020].

9 *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 25 February 2020].*I*

10 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: https://www.refworld.org/docid/3ae6b36c0.html [accessed 25 February 2020].

11 *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at: https://www.refworld.org/docid/3ae6b39620.html [accessed 25 February 2020].

12 *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: https://www.refworld.org/docid/3be01b964.html [accessed 25 February 2020].

13 *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: https://www.refworld.org/docid/3ae6b3840.html [accessed 25 February 2020].

A common concern with regard to migration is the loss of rights that a person faces as soon as he or she changes their country of residence. The lack of citizenship prevents them from enjoying the full protection of the State. Where the migration is voluntary, the lack of such enjoyment is outweighed by the benefits that are available, such as better remuneration, living conditions, medical aid, etc. However, where the migration is forced, for reasons such as war or persecution, the loss of such rights affects the person more acutely. Such involuntary migrants are generally referred to as refugees.[15]

The situation is compounded when such immigration happens illegally. Illegal immigration happens when a person enters another state without complying with the legal requirements of the country, or continues to stay even after the duration of the permission to stay has expired.[16] A voluntary migrant or a refugee can fall within the category of illegal immigrant, depending upon the legal status of their stay in the country of migration.

This paper will focus on several problems that India faces, with respect to illegal immigration. India's colonial history, as well as its later credential of becoming a multi-ethnic, multi-religious, democratic country, with a strong record of upholding fundamental rights has put it into a unique position of having a large Indian diaspora, as well as being host to a large influx of immigrants from its neighbouring countries, fleeing for a variety of reasons.[17] Despite this, India lacks adequate systems to protect its diaspora from vagaries of statelessness, as well as a well defined, systematic immigration law that will allow regulation of entry of immigrants, and protect them from abuse of their human rights.

This does not mean that India has been lackadaisical in its attitude towards the problems of immigration. Rather, its response to each problem

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14 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, available at: https://www.refworld.org/docid/4720706c0.html [accessed 25 February 2020].

15 *Id.* at 2.

16 Christopher Angevine, *Amnesty and the Legality of Illegal Immigration: How Reliance and Underenforcement Inform the Immigration Debate*, 50 S. Tex. L. Rev. 235 (2008).

17 Sanjeev Tripathi, *Illegal Immigration from Bangladesh to India: Towards a Comprehensive Solution*, Carnegie India, (Jun. 29, 2016), https://carnegieindia.org/2016/06/29/illegal-immigration-from-bangladesh-to-india-toward-comprehensive-solution-pub-63931.

has been tailored to its specific concerns[18], allowing the addressal of India's political concerns alongside. However, this leaves immigrants dependent upon the goodwill of the current government, without a guarantee of rights and humane treatment.

This paper will compare the systems and laws present in India which deal with immigrants with systems and laws present in various countries such as U.S., and Germany to highlight the inadequacies of the Indian system, and suggest better models which will help mitigate the problems. Part A deals with the problems India faces due to the lack of proper immigration laws which address the concerns of immigrants to India, whereas part B of the paper deals with the problems that Indian migrants to other countries face because of a lack of comprehensive citizenship law.

Part A

Legislative Framework dealing with Immigration in India

As mentioned above, India does not have a specific law dealing with all concerns of immigrants, as well as illegal immigrants. The framework consists of the Foreigner's Act, 1946 and Citizenship Act, 1955, as well as several administrative and policy measures undertaken in response to each specific problem of illegal migration that India has faced.[19] While the definition of a migrant is not given in any Indian law, section 2(1)(b) of the Citizenship Act, 1955 defines 'illegal migrants' as someone who has entered the territory of India without a valid passport or valid travel documents, or someone who entered with valid documents but has overstayed beyond the permitted duration. This definition is in consonance with the internationally understood meaning of 'illegal immigrants'.

However, apart from defining the term, the Citizenship Act, 1955, deals only with the process by which a person may get Indian citizenship, and excludes illegal migrants from being eligible for becoming an Indian citizen.

The Foreigner's Act specifies the restrictions that can be placed upon the activities of a migrant, including their entry into India, or stay in India, by

[18] *Id.*
[19] *Id.*

the Government. It also prescribes a punishment if the orders restricting such movement or stay are contravened by any person.[20] It does not provide any rights to such migrants that come to India, nor does it provide a mechanism with which an illegal migrant can contest the legality of the orders made under this Act, although the recourse to the Writ Jurisdiction of the Supreme Court would still be available in case of fundamental rights that are available to aliens.

To deal with illegal immigrants, India also has the Foreigners Tribunal Act, 1941[21] and the Foreigners Tribunal Order, 1964, most recently amended in May 2019.[22] India also had the Illegal Migrant (Determination by Tribunal) Act, 1983, which was struck down by the Supreme Court in 2005.[23] The Foreigners Tribunals have mainly been constituted in Assam in order to deal with the problem of illegal Bangladeshi immigrants. The power to detect and deport illegal migrants has been conferred upon State Governments and Governments of Union Territories under section 3(2)(c) of the Foreigner's Act 1946, and the Tribunals are the forums where appeals against orders of determination of any person as an illegal migrant, or their deportation are heard.[24] Currently, Assam is the only state which has such tribunals.[25]

A notable lacunae in the entire system is that India does not recognize the difference between an illegal migrant and a refugee. There is no law which defines a refugee, and India has been steadfast in its refusal to sign the UN Convention relating to the Status of Refugees, 1951, citing concerns regarding sovereignty. While India has always alleged that its actions against illegal immigration are in consonance with the principles of international law, and it tries to ensure that any action with regard to an illegal immigrant happens through due process, it has stubbornly refused to homogenize the immigration laws in order to ensure guarantee of humane treatment. Our

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20 Foreigners Act, 1946, sec. 14.

21 Vijaita Singh & Rahul Karmakar, *Why does Assam need more Foreigners Tribunals?* The Hindu, (Jun. 16, 2019), https://www.thehindu.com/news/national/other-states/why-does-assam-need-more-foreigners-tribunals/article27951416.ece [accessed on 25th March, 2020]

22 *Foreigners Tribunals,* Press Information Bureau, Government of India, (Jun. 11, 2019), https://pib.gov.in/newsite/PrintRelease.aspx?relid=190360 [accessed on 25th March, 2020].

23 Sarabnanda Sonowal v UOI 2005 SC

24 *Information under RTI Act,* Ministry of Home Affairs, (Jul. 23, 2014), https://mha.gov.in/sites/default/files/72_RTI_NE_AK_280714.PDF [accessed 25 Feb. 2020].

25 *Supra note 20.*

government has always insisted that illegal immigration is a bilateral issue and is best resolved with a response tailored not only to the humanitarian aspects of the problems, but also the political ones.

The result is that India's immigration policy is unclear, especially with regards to illegal refugees, and it is not bound by the principle of non-refoulement[26] because of non ratification of the UN Refugee Convention of 1951. Most of it exists within administrative decisions and policies taken during various events, such as in dealing with Tibetan refugees, Tamilian refugees, and most recently, Rohingya refugees.

The result is that different rights are available to different refugees. The Tibetan refugees who came with Dalai Lama - welcomed by the Indian government and issued Registration certificates - enjoy all rights commensurate with Indian citizenship except right to vote, and the right to work for the government.[27] Tamilian refugees on the other hand have not been conferred with such broad rights. Apart from note being able to vote, or work for the government, they cannot own land, but are allowed to own movable property.[28] They are also issued identification documents by authorities. Rohingyas were refused entry into the country, although many have still managed to enter as illegal migrants.[29] Many have been deported to Myanmar, despite concerns regarding their safety, considering UN findings regarding ongoing genocide of Rohingyas in Myanmar.

An important reason for maintaining the status quo is our incapacity to deal with a huge influx of population, considering the already strained resources, as well as concerns regarding terrorism and nationals security. Signing the convention, or even preparing a model law based on it, would oblige the Government to accommodate the refugees, provide them with minimum rights, and prevent their refoulement, despite their illegal presence

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[26] Article 33, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: https://www.refworld.org/docid/3be01b964.html [accessed 25 February 2020].

[27] Sagnik Chowdhary, *India's 'asylum policy': What it is, who it applies to*, The Indian Express, (Sept. 26, 2016), https://indianexpress.com/article/explained/balochistan-leader-brahamdagh-bugti-political-asylum-in-india-3041252/ [accessed 25th Feb, 2020].

[28] *Id.*

[29] Meenakshi Ganguly, *Rohingya Refugees caught between Indian and Hard Place*, Human Rights Watch, (Feb. 2, 2019), https://www.hrw.org/news/2019/02/02/rohingya-refugees-caught-between-india-and-hard-place [accessed 25 Feb. 2020].

in the country. Considering the conflict ridden areas that surround the country, making India a haven for refugees would open the doors not only for actual refugees, but also illegal migrants alleging to be refugees.

However, the lack of a comprehensive law regarding the status of refugees in India, and the consequent differential treatment to different groups of refugees raises question regarding violation of their Article 14 rights, considering that they are all people fleeing persecution in their own country and as such, are in a similar situation, but have been treated differently. While India's decision to not become a signatory to the Refugee Convention protects it from most liability, India is a signatory to UDHR, which guaranteed the right to equality of every human being. Moreover, the Constitution does not discriminate between citizens and aliens when providing right to equality.

Legislative Framework Dealing with Immigration in Germany

The German experience of immigration has been as wide and varied as the Indian one, however, because of its unique experience with nazism, genocide, and World War II as well as its ratification the Refugee Convention in 1953, its immigration laws developed with a complete cognizance of the difference between a migrant, a refugee, and the needs of an illegal immigrant fleeing persecution or war.

Germany saw a huge wave of immigration in the decade of 1980s, when it received war refugees from Iran, Lebanon, Yugoslavia, Romania, and other war torn Eastern European countries.[30] Due to its World War II experience, it had operated an unqualified right to asylum, however, due to this large influx, the Government opted to restrict the right.[31] Since then Germany has reformed its immigration laws a number of times to maintain its inclusionary status while at the same time addressing the concerns regarding public safety and national security.

The Immigration Laws in Germany consist of two important legislation, the Asylum Act, as well as the Residence Act. The Asylum Act

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[30] Ulrike Davy, *Refugee Crisis in Germany and the Right to a Subsistence Minimum: Differences That Ought Not Be*, 47 Ga. J. Int'l & Comp. L. 367 (2019).

[31] Daniel Kanstroom, *Wer Sind Wir Wieder-Laws of Asylum, Immigration, and Citizenship in the Struggle for the Soul of the New Germany, 18 Yale J. Int'l L. 155 (1993).*

deals with the grant or denial of asylum to refugees, who are defined in conformity with the Refugee Convention. The Residence Act deals with the general processing of immigrants to Germany - their entry, exit, stay, and employment.[32] Moreover, the principle of non-refoulement and non-expulsion of illegal refugees is applicable in Germany due to its ratification of the Refugee Convention and is incorporated in the Asylum Act.

The Asylum Act provides a legal mechanism through which an application for asylum can be made to the Federal Office of Migration and Refugees, whose caseworkers are given guidelines for enquiry into the circumstances of each applicant.[33] While the process is ongoing, the refugees have access to all the rights guaranteed by the Refugee Convention, including standard living conditions as well as minimum economic provisions to enable them to sustain themselves.[34] Grant of asylum leads to the immediate inclusion of the asylee into the social welfare net, for the duration of the grant of residence permit.

The Residence Act was most recently amended in 2005, when the number of residence permits for non-European migrants were reduced to two - 'limited term residence permit' and 'unlimited term settlement permit'.[35] These permits are linked to the reasons for migration - employment, education, family reunification, and humanitarian considerations.

A key feature of Germany's process is inclusion of states in the administration process. The application for the permits is processed by each states resident registration office, which applies the federal law in such processing. The Residence Act provides for immediate deportation of a person "on the basis of a prognosis based on facts, in order to avert a special danger to the security of the Federal Republic of Germany or a terrorist threat."[36] Only a single avenue of appeal is available in such cases.

The Act also provides grounds on which orders for expulsion of foreigners can be made, such as association with a terrorist organization,

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32 Stella Burch Elias, *Comprehensive Immigration Reform(s): Immigration Regulation beyond Our Borders,* 39 Yale J. Int'l L. 37 (2014).

33 Rachel Morico, *Response to the Syrian Refugee Crisis in Germany, the United States, and Japan: Who Should Be Prioritized in Light of International Obligations,* 26 Tul. J. Int'l & Comp. L. 189 (2017).

34 *Id.*

35 *Supra note* 31.

36 *Id.*

participation in acts of violence, instigation of violence, endorsement of a war crime, crimes against peace, crimes against humanity, incitement of hate against specific sections of population, etc.[37]

Another key feature of the immigration regulation in Germany is the role of the Federal Office for Migration and Refugees in the inclusion and integration of accepted migrants into the German society. This not only includes maintaining a database of resident aliens, and keeping a track of migration patterns, but also implementation of mandatory integration programs designed by the federal government in collaboration with state and local government to provide resources to the resident aliens which would enable their integration into the society. These resources include providing language competency, basic information about history and culture as well as general laws and legal system, as well as counselling services for migration related issues.

Prior to the 2005 reforms, such integration programs were carried out by different governments at all tiers of government with very little collaboration. The Residence Act provided for large scale cooperation across all tiers of government in this arena. This model has been largely successful, although the current Syrian refugee crisis has led to a rollback of Germany's inclusionary immigration policy.

One reason for this roll back was the huge volume of immigration to Europe that started happening after the start of the Syrian civil war. While initially, Germany set the example for the other countries with excellent refugee intake commitments, and speedy disposal of asylum applications, the immigration infrastructure proved inadequate to deal with the strain placed due to the heavy burden of incoming refugees and their needs, especially considering the liberal social benefits available to accepted refugees.[38] Nevertheless, the German model of immigration law still has excellent teaching for the Indian system.

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[37] *Id.*

[38] *Supra note* 32.

Comparative Analysis

The key takeaway of the German model of immigration infrastructure is integration programs run collaboratively by federal, state, and local governments. The integration programs are an acknowledgment of the better living conditions and employment opportunities that Germany provides to its residents in comparison to its neighbours, and that an upward mobility in its economic growth would continue to make it an attractive destination for migration, which also follows the trends of upward mobility.

Instead of closing its borders to ensure the insulation of the benefits of its social welfare system to its own people, the German model takes advantage of its robust economy to ensure that the talent it attracts is eventually integrated into the society. Furthermore, the Asylum Act, and Residence Act, together ensures assimilation of those refugees into the German society, who are better able to adapt, while at the same time ensuring the provision of minimum human rights to all of them.

In contrast, the Indian immigration system is arbitrary, and based on the policy and attitude of the ruling government. It lacks clear rules of inclusion and expulsion, as everything is done on the basis of executive orders, leading to an exploitative system without adequate checks and balances to prevent abuses of human rights. Furthermore, the entire process is excessively centralised, creating conflict between the Central and State Governments as the ability of state governments to respond to the situation is fettered by the decisions and directions of the central government. Moreover, India has not yet taken any active steps to promote integration of refugees/migrants into its society, which, considering its ethnic and religious diversity, is a huge oversight.

Part B

The concept of citizenship is not a new concept. The idea of citizenship is important as it gives identity to the people which help them securing civil and political rights in their country. Hence, the debates related to citizenship become relevant and important. In India, the provisions related to citizenship are provided under Article 5 to 11 in Part II of the Indian Constitution. In

addition to that we have a separate act which deals with the citizenship in our country, The Citizenship Act of 1955. Although the act has been amended six times, the latest one being in 2019, it provides for all the details related to citizenship in our country. As per the act, there are five ways of acquiring citizenship of our country i.e. by birth, by dissent, by registration, by naturalization and by incorporation of territory.[39]

Indian Constitution provides for single citizenship i.e. any Indian citizen can stay citizen of only one country at a time i.e. India. However, there is one more concept recognized in our country that is of Overseas Citizen of India (OCI).[40] This is comparatively a new concept which provides certain rights to the OCI cardholders in India excluding the political rights like right to vote. Moreover, it is provided in the Citizenship Act, 1955 that if any Indian citizen acquires the citizenship of any other country then their citizenship of India gets terminated.[41] During our constituent assembly debate, there was a dilemma regarding the citizenship in India and the Constitution makers voted for single citizenship, the reason being India has many religious, cultural and ideological differences and the constitution makers wanted to surpass these differences which existed during the time of British rule and bring the country together under one citizenship. However, now Dual citizenship has become a trend and it has shown interest as it paves way for many other transitional advantages.

Dual citizenship now in the changing times

Dual citizenship also sometimes referred to as multiple citizenship or plural citizenship was initially considered as a threat to the autonomy of any country as at that time the inter country relations were not well established. But however, now with time treaties are signed between countries and these have created links between the countries which demands better international coordination, communications and relations and since it is the people who makes or creates relations that is why dual citizenship can help the countries in building a better coordination among different countries.

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39 Section 3 to 7 of The Citizenship Act, 1955.
40 Section 7A of The Citizenship Act, 1955.
41 Section 9 of The Citizenship Act, 1955.

Dual citizenship helps in bridging the gap between the countries and their citizens as it brings the two countries closer by allowing the people to have loyalty towards both the countries. While in cases of single citizenship, the whole life of the person is wrapped up in a single nation and he doesn't get the significance of dual citizenship.

Dual citizenship is not recognized as right in some countries then they provide it as a freedom to the people like in US, where any individual can obtain permanent citizenship by continuously residing there for some period, or marrying to a resident citizen of that country and residing with the spouse for some years or by taking birth in that country, following the principal of *jus soli.* However, this is not so in India, here no such freedom of dual citizenship is provided and if anyone wants to obtain the citizenship of India then he/she has to expatriate the original citizenship. Though dual citizenship is not a human right nor is recognized as a right in any of the international law but then took the world countries can choose to guarantee that freedom to the individuals whenever it is deemed necessary.

Effects of Dual Citizenship

Under this concept of dual citizenship, a person becomes citizen of two countries who is then vested with civil and political rights of both the countries and in addition to that has to perform dual duties and dual loyalties towards both the countries.[42] Dual citizenship is generally acquired in the cases when –

a. He/she is born to the parents of two countries that allow dual citizenship
b. He/she is born in one country and decides to migrate to other country for the purpose of development, employment, education etc.

But in cases where the parents come from those countries that don't recognize dual citizenship then that individual has to make choice of the country i.e. the country in which he/she resides or the country of one of his parent without his/her parents residing with him/her. Thus, dual citizenship affects both the country and the citizens in different ways.

[42] Available at https://www.investopedia.com/articles/personal-finance/031315/advantages-disadvantages-dual-citizenship.asp

In cases of dual citizenship, the person holds two passports at the same time. A passport is basically used to identify a person's nationality[43] and used by him to travel from home country to other countries. These people are not subject to any immigration procedure such as visa clearance for both of the countries. They also enjoy the right to have unrestricted entry to travel back and forth to both the countries. The person enjoying the benefit of dual citizenship also has dual privileges and enjoys the rights in both the countries like political and social rights like to right to contest elections and right to vote in both of the countries. He can also acquire different government offices available only to citizens, eligible for government exams; can hold property in both of the countries and is also subject to the tax laws of both the countries and so on. Hence along with the privileges there are certain burdens too put up on such person like that of double taxation. Since, he is bound to make payment of taxes of both country so if he is carrying on trade in two countries, then he has to pay taxes twice. Although now the countries have come together and signed some bilateral double taxation avoidance treaties and agreements so as to reduce this burden on the people. However, this doesn't mean that they are fully exempted in one of the country, they are obliges to make such payment in both of the countries.

As we have seen some of the advantages and disadvantages of dual citizenship, but along with that the concept isn't that simple, there are many different complexities attached to it. For example, in US for acquiring citizenship there you need to stay there for a period of 5 years and if you are married to a US citizen then the period of continuous stay reduces to three years. However, this requirement of even three years is too much for a person to stay continuously at one place. Moreover, in addition to this, cost of application of dual citizenship, permanent residence of the people is also very high in many nations.

[43] At one time "nationality" and "citizenship" had important distinct legal meanings, the former generally applying to the international aspects of attachment to a state, the latter the marker of equal membership in constitutional democracy. Although the distinction persists in a dwindling number of contexts (where individuals are nationals but not citizens). the latter is more appropriate after the advent of human rights and the decline of membership short of citizenship.

Different concepts related to citizenship in India

In India as we have already discussed we do not recognize the concept of dual citizenship. The reason being we are a very diverse country and there is a need of protection of security, confidentiality of our country along with maintaining the sovereignty. Moreover, there are many internal groups in our country which do not promote dual citizenship and this step can lead our government into a compromising position. Hence, our country provides for some other different concepts related to citizenship like Overseas Citizen of India (OCI) who is any person who was born in India or was a person of Indian origin but now not a citizen of India and has acquired the citizenship of some other country. Other than this, we have Non Resident Indians (NRI) as those people who are still the citizens of India and hold Indian passport but now reside in some other country and not in India. Initially from 2002, there was a concept of Persons of Indian Origin (PIO) for the people who became overseas citizen. But then due to the demands of the NRIs who then became the citizen of some other country, the concept of OCI was introduced.

Persons of Indian Origin – In order to obtain the Persons of Indian origin card the person themselves or either of their parents, grandparents or spouse had to be of Indian origin. They get the lifelong right to enter and travel in India without any visa and they don't even need to renew the cards as it has lifetime validity. They are known as persons of Indian origin but are considered as a foreign national only. They are given some rights related to acquiring and selling of the property, however, political rights like talking part in election and right to vote are not provided to them. Children born to Indian citizens in other countries and are the citizens of those countries but were eligible for PIO cards. However, if they want to acquire the citizenship of India then a procedure is given as per which they have to reside in India for a period of continuous 7 years[44] and in addition to that they have to give away their citizenship of some other country as India doesn't recognize the concept of dual citizenship.

Overseas citizen of India – The provision related to OCI were made after the demands from NRIs who have acquired citizenship of some country

[44] Section 5 of The Citizenship Act, 1955.

so as to obtain better rights in India. The holders of this card get a lifelong entry to the country. But the card's validity has to be renewed after every renewal of their passport is obtained. This scheme covers almost every country's citizens except for Pakistan and Bangladesh. They are also provided with almost all the rights available to the citizens of India except the right to contest elections and right to vote or right to acquire or sell or deal in any agricultural property. Moreover, OCI card holders need not to renounce citizenship of any country; it gets automatically terminated as soon as the holder acquires the citizenship of India.

Flaws in Indian concept of citizenship

India didn't obtain the system of dual citizenship because we wanted to unite our country under the one head of citizen of India. Moreover, it was expected that the citizens should have the right to move freely in the whole territory of India without any restrictions. However, our country is already divided under the head of domicile of different states. All the states have separate law of domicile to enjoy certain rights and the method of acquiring the same.

Dual Citizenship in India

To check the effects of dual citizenship in our country and its possible effects on people, a committee was set up, High Level Committee on Indian Diaspora[45]. They prepared a report which states that the main reason of migration from our country is for educational and employment related matters. So like any other immigrants they also feel that their ancestral roots have been cut off when they are denied the citizenship of India. The main effects can be seen as –

i) To save the diaspora of our country – The Indian citizens who have migrated to other countries post-independence constitute the diaspora of our country.[46] While some of them have acquired the citizenship voluntarily for the purpose of better employment and education but many of them are still struggling to keep their citizenship of India intact without any effect to their rights and

[45] Set up in September 2000 under the Chairmanship of Dr. L M Singhvi.
[46] Cambridge English Dictionary

privileges. This diaspora should be eliminated and it cannot be eliminated by OCI and PIOs but by the introducing the concept of dual citizenship.[47] This will also help in reducing the problem of migration and immigration created by our country. As at present, the people who move out of India are forced to reside in some other country till the time they earn enough so as to get money to return to their home country. However, due to the problem in the citizenship laws of our country, if they spend more than 180 days in other country then they are declared as NRI and then later as OCI or PIOs.

ii) Internal security of India – This is one of the main concerns of our country against the application of dual citizenship. As it can include working with our sensitive organizations, armed or paramilitary forces. But the commission while giving recommendations has suggested that the people applying for dual citizenship can be controlled by proper scrutinisation and rejection. Moreover, the influx of questionable personalities can be controlled by the Foreigners Act of India.

iii) Restrictions on dual citizens – This is not a guaranteed right worldwide to provide the right to acquire dual citizenship to people so the activities and the privileges of those who are taking the advantage of dual citizenship can be restricted. For example, giving them the limited rights related to political rights or property rights like that is given to OCI recipients. Their entry or long term stays can also be regulated but then too it will be a better concept than the OCI as this will give a sense of belongingness to them and they will not be termed as immigrants. Moreover, this step can help in reducing the number of illegal migrants from our country, to a large extent.

iv) Feeling of belongingness – The people who have been expatriated are facing the problem of removal of the ties related to their ancestor, cultural and communal roots. Allowing them to acquire dual citizenship and Indian passport will give them a sense of

[47] Part IV of the Report of the High Level Committee on Indian Diaspora, September, 2000

belongingness as well as they will free more close to their home country and culture.[48] Moreover, they can be verified easily under Foreigners act, Passport act, 1920 of India etc.

Conclusion

The lack of proper immigrations laws in India and the consequent reliance on administrative decisions and policies has led to arbitrary treatment of different groups of refugees. The provision of different rights to different groups of refugees, where no intelligent differentia can be identified for such classification, is a violation of right to equality given in Article 14 - A right available to all human beings.

While the decision to not become a party to Refugee Convention is a policy decision that may have justifiable reasons, there is no reason to not have complete immigration laws for India, which address migration, illegal migration, and forced migration such that basic rights guaranteed to all human beings, through UDHR, as well those provided by the Constitution are available to all immigrants in India.

Moreover, the German example has shown that with proper management and optimal utilization of resources, immigrants can prove to be an asset not only to the economic growth, but also in maintaining the unity and integrity of the nation. The development of appropriate imigration infrastructure, as well cooperation between central and state governments with regard to implementation or immigration laws, can lead to the achievement of similar results in India.

Moreover, most the Indian diaspora is present in the developed countries with better technology, research, services etc and dual citizenship can truly contribute in the democratic transitioning of India and can carry our country forward in the development process. According to commission there are millions of persons of Indian origin in about 200 world countries who are awaiting the dual citizenship of India. The problems as are cited by our country can be overcome easily by Indian Parliament and therefore, it's high time that we should start thinking on this matter also to give the people the freedom of embracing their culture and ancestry.

[48] indiandiaspora.nic.in

Emerging Trends of Marble Cake Federalism: A Comparative Study

Supriya Pathak[1]

"Power tends to corrupt and absolute power tends to corrupt absolutely"

- Lord Acton

The above sentence holds significance in not only generality but also in the varied systems of Governance around the world. With diminishing boundaries between Centre and States in modern Constitutions and their overt interdependence questions the true meaning of Federalism. This paper attempts to compare and examine Cooperative Federalism also known as marble cake federalism, adopted by various federal systems. The first section of this paper deals with the historical perspective of India behind adopting the federal structure. In the second part, models of cooperative federalism and the provisions in the Constitution is discussed. The third part of the paper talks about the various instances in India which have merited cooperative federalism. Lastly, the paper analyses the cooperative model as an efficient collaborated governance by discussing about the Constitutions of Australia and United States of America.

Introduction

Comparative analysis has a long history dating back to the origin of systematic political studies in ancient Greece and Rome. Even the ancient people, compared their situations with those of other's with whom they came in contact. Ancient Greeks carried out the earliest systematic comparisons of a more modern comparative analysis of political systems. Plato and Aristotle, the two greatest ancient Greek philosophers, wrote two books 'Republic' (Plato) and 'Politics' (Aristotle) and these are considered as great books of all the time. Aristotle is considered as the father of political Science, had used a comparative method for understanding and examining the norms and issues at his times. He had used comparative analysis to develop his theories. Other political thinkers like J.S Mill, Montesquieu, and Cicero had used comparative analysis to develop their respective theories. The comparative

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studies were used for reaching at valid conclusions about organization of Governments. By doing this, their primary objective was to understand the contrasts and the similarities of various governments.

A Constitution is regarded as the backbone of a country. As, it is the Constitution which directs the country how to run. Hence it is considered as the law of the land. There are many countries in the world with different kinds and forms of the constitution, unique in their own way. The importance of making a comparative analysis between different constitutions, particularly the amendments, is for the very purpose of studying and critically analyzing the principals adopted by various countries in their respective constitutions. By doing so, the strengths as well as the weaknesses of a particular constitution would come to fore.

History of Indian Constitution

Prior to the adoption of the Constitution of India in 1950, the fundamental law of the land was mostly embodied in a sequence of statutes enacted by the British Parliament. Vital among them was the Government of India Acts of 1919 and 1935.

The Government of India Act, 1919

The prime purpose of this act was to expand native participation in the government. Important reforms of the Act were the **establishment of a dual form of government with limited powers for the major provinces**. The imperial legislative council was transformed into a **bicameral legislature for the whole of India**. Also the Act created the **position of a High Commissioner** with residence in London to Represent India in the United Kingdom.

The Government of India Act, 1935

This Act was brought into existence due to the criticisms and oppositions to the 1919 Act for doing too little in terms of giving autonomy. The major provisions of the Act are as follows:-

- Introduction of direct suffrage and extension of the franchise to 37 million people from the original 5 million

- Abolition of the dual form of government and the granting of a larger amount of autonomy for the provinces
- Establishment of a Federation of India.
- Membership of the provincial assemblies was altered so as to include more elected Indian representatives, who were now able to form majorities and be appointed to form governments
- The establishment of a Federal Court

The Independence of India Act, 1947 and Constituent Assembly of 1948

In the year 1946, the British decided to grant independence to India. For that reason a British cabinet was send to India to discuss the framework

- Set up a constituent body and an executive council.
- Hold discussions with the representatives of British India and the Indian States in order to agree on the framework for writing a constitution. Following this task and subsequent negotiations, the provincial legislatures of 278 members and 15 females indirectly elected a Constituent Assembly. The parties represented in the Constituent Assembly were the majority Congress Party, the Muslim League, the Scheduled Caste Federation, the Indian Communist Party and the Union Party. The Constitution entered into force in January 1950 and converted the Constituent Assembly into a Provisional Parliament.[2]

Federalism in India

The most remarkable achievements of the Indian Constitution is to confer upon a federal system the strength of a unitary government. Though usually the system of government is federal, the constitution enables the federation to transform itself into a unitary State at times of emergencies. Such an arrangement of federal and unitary systems in the same constitution is unique in the whole world.

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[2] Constitutional History of India (January 25, 2020, 3:30 P.M) available at http://constitutionnet.org/country/constitutional-history-india

While submitting the draft Constitution, Dr. Babasaheb Ambedkar, stated that "Although its Constitution may be federal in structure, the term 'Union' had been used because the Indian Federation is not the result of an agreement by the units and that the component units have no freedom to secede from it."[3]

The Constitution of India has a Federal form of Government. It creates a dual political system, a two-tier system of government, with the central government at one stage and the state government at the other. The Constitution marks off each level of government's sphere of practice by developing an elaborate system for the allocation of parliamentary, administrative and economic authority between the Center and the States. A government has the right to act within its allocated field and cannot go out of it or invade the other government's assigned field. The federalism of India is therefore a flexible system. Chief Justice Beg called the Constitution of India as an 'Amphibian' in the sense that it can either federal or unitary according to the need of the situation.[4] The Constitution develops several structural methods for promoting intergovernmental coordination, thus providing India with a remarkable instance of cooperative federalism.

Marble-cake Federalism

Before the 1930s, the popular concept of federalism was one in which the federal and state governments ' functions were independent, distinct, and within their own spheres. This was referred to as "dual federalism" and was similar to each government having its own sovereignty, symbolized by a cake, in the larger structure. The definition was referred to as "layer cake federalism" because of the analogy, and it rested on the premise that federal and state governments had separate functions. Morton Grodzins introduced a new, more dynamic way of conceptualizing the federal system in the year 1960. Morton Grodzins suggested that isolated layers or spheres did not describe the relationship between governments and suggested a new picture.[5]

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3 Durga Das Basu, Introduction to the Constitution of India,(Lexis Nexis, 22nd edn)
4 State of Rajasthan v. Union of India (AIR 1977 SC 1361)
5 Morton Grodzins, "The Federal System," in Goals for Americans (Englewood Cliffs, NJ: Prentice Hall, 1960).

He suggested "marble cake federalism," a concept originally coined by Joseph E. McLean, as an effort to view federalism in a more nuanced and collaborative way. It is a definition of federalism that seeks to understand the relationship between federal and state governments as one in which all government entities are interested in various issues and policies rather than rigid dividing lines.[6]

Cooperative Federalism in India

The basic principle of federalism is that the legislative and executive power is separated not by any legislation to be created by the Center but by the Constitution itself between the Center and the States. That's what made the Constitution. States are in no way dependent on the Centre for their legislative or executive authority under our Constitution. In this way the Center and the States are co-equal. The Constitution may assign too large a field to the Center for the operation of its legislative and executive authority as found in any other Federal Constitution. The residual powers may be given to the Centre, not to the states. But those features do not form the core of federalism.

Through his seminal writing, Granville Austin may have coined the word "cooperative federalism," which he called the cornerstone of our constitutional system, recognizing that it is a federal arrangement that presumes interdependence between the Union and the State Governments, rather than offering total freedom throughout their allocated spheres.[7]

Cooperative federalism refers to a system in which state, local and federal governments share responsibility for people's governance. They collaborate in the working details about which level of government takes responsibility for specific areas and in the development of policies in that region. The idea of cooperative federalism set forward the view that in exercising governmental authority, the national and state governments are partners. It's also called the new Federalism or marble cake federalism.

Cooperative legislation

Center-state legislative ties are at the heart of every federal system. In Article 246, the Indian Constitution expresses this concept, which determines the legislative powers of the Center and the States

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6 Available at http://encyclopedia.federalism.org/index.php/Layer_Cake_Federalism last accessed on 5th January, 2020 at 10 A.M

7 Granville Austin, The Indian Constitution: Cornerstone of a Nation (1966).

Structure of Cooperative federalism under Indian Constitution

The Constitution adopts from the Government of India Act, 1935, a threefold distribution of legislative powers between the Union and The States.[8] The Indian Constitution adopts this scheme majorly from the Act of 1935 by enumerating possible subjects of legislation under three lists in schedule VII of the Constitution.

List I and List II i.e. the Union List and the State List include subjects over which the Union and the State Governments can legislate on the subjects enumerated in the lists respectively.

List III gives concurrent powers to the Union and the State Legislatures to legislate over the subjects. In case of overlapping of a matter as between the three Lists, predominance has been given to the Union legislature. Thus the power of state legislature to legislate with respect to matters in state list has been made subject to the power of Parliament to legislate in respect of matters in the Union and Concurrent List. The residuary powers lies with the Union instead of the State.[9]

Cooperative administration

The Constitution contains the following provisions to secure cooperation between Centre and the States:

All India Services

The center and the States has their own public services. There are all-India services like IAS, Indian Police services and Indian Foreign services. The members of these services occupy key positions under Centre and the States and serve them by turns. These members are recruited and trained by the center. These services are jointly controlled by center and the States. The ultimate control lies with the central government. Though the all-India services violate the principle of federalism under the Constitution by restricting the autonomy and patronage of the States and help in maintaining high standards of administration in the center as well as in the States and ensure uniformity of the system throughout the country.

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8 Article 246, The Constitution of India,1950
9 Article 248, The Constitution of India, 1950

Judicial System

There is no dual system of administration of justice in the Indian judicial system. The constitution establishes one Supreme Court at the top and all the High Courts below it. This single judicial system enforces both the central as well as the state laws. The cooperation and coordination can be seen in the appointments. The judges of the State High Courts are appointed by the President in consultation with the Chief Justice of India and the Governor of the State. The Parliament can also establish one common High Court for two States like, Maharashtra and Goa or Punjab and Haryana have a common High Court.[10]

Full faith and credit laws

Since each State's authority is limited to its own territory, one State's actions and documents may have been denied recognition in another State, without any mechanism for requiring such recognition. Thus the Constitution provides the '*Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State.*'[11] This means that authenticated copies of statutes, instruments, judgments, documents of one state shall be given recognition in another State in the same manner as the latter States itself.

Inter-State Council

The President is empowered to inter-state council if at any time it appears to him that the public interests would be served thereby.[12] The role of such council would be to investigate and discuss topics of common interest between the Union and the States, or between two or more States.

Till date, the President has set up a Central Health Council, Local Self-Government Central Council, and Transport Development Council to coordinate the state's policy on these matters. Also advisory bodies to advice on interstate matters have also been established under authority. Further with a view to ensure more harmonious and healthier relationship between the Centre and the States in future as well as for further strengthening of the third

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10 M Laxmikanth, Indian Polity (Mc Graw Hill Education, 5th edn, 2017)
11 Article 261(1)
12 Article 263

tier of the governance, the Government had set up the second Commission on Centre State relations has made 273 recommendations which are still under consideration by the Inter-state Council.

The Zonal Councils established under the 1956 State Reorganization Act provide another institutional mechanism for center-state and inter-state cooperation in order to resolve the differences and reinforce the cooperation structure. The National Development Council and the National Integration Council are the two other relevant forums that provide dialogue platforms to address differing views. Different ministries have formed central councils to strengthen cooperation.

A reference can be made to NITI Aayog (National Institution for Transforming India) which replaced the Planning Commission and was set up mainly to promote the co-operative federalism and giving the State more freedom to design the developmental plans. The NITI Aayog also seeks to end the slow and tardy implementation of policy, by fostering better Interstate coordination, recognizing that strong states make a strong nation.[13]

Judiciary and Cooperative Federalism

Although the Indian Constitution separates the legislative and executive powers between the Union and the states, the former has no exclusive administrative apparatus to enforce its own laws. Article 256 therefore provides that it is the responsibility of each State to enforce the laws of the Union as applicable in that State.

Article 256 does not allow the Union to intervene in any matter relating to the sole concern of the State. The full potential of Article 256 has not yet been checked, although Article 365 provides for a prohibition underlying the Union's power to give directions. Under this Article[14], where any State has failed to comply with or give effect to any direction given in the exercise of executive power under any of the provisions of the Constitution, it is lawful for the President to claim that a situation has arisen in which the State Government cannot be exercised in compliance with the Constitution.

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[13] Available at "https://niti.gov.in/objectives-and-features" assessed on 1st February,2020, 5 P.M

[14] Article 365, The Constitution of India, 1950

The Government enacted the NFS Act (National Food and Security Act) to provide for food and nutritional protection in a human life cycle manner, by ensuring access to adequate quantities of quality food at affordable prices for people to live a dignified life. The effectiveness depends on how quickly and honestly the states set up and make the authorities and bodies functional as required by the act.

A PIL was filed in the Supreme Court drawing attention towards the non-implementation of the Act by the States. The Supreme Court observed that the Act deals with the essence of federalism as a working framework for cooperative action. Recognizing that India, on the one side, has divided sovereignty in the form of a Center and, on the other, states, Justice Ramana clarified that these bodies meet and collaborate at different levels to achieve the cherished constitutional goal of cooperative federalism. He added that a joint effort on the part of both the Center and the states is needed to implement the Act in the areas affected by drought to save people from abject poverty and poor quality of life.[15]

Cooperative Federalism in Australia

Australian federalism for the first two decades remained relatively faithful to the framers ' "coordinate" dream. The Commonwealth and the States, under organized federalism, were both financially and politically sovereign within their own areas of responsibility. This was reinforced by the High Court which rejected the Commonwealth government's attempts to expand its authority to areas of state jurisdiction in a number of decisions in those early years.

The 1920s and 1930s saw the rise of a form of cooperative federalism. Cooperative federalist components included

- The formation of the Australian Loan Council in response to intergovernmental competition in the loan markets.
- Coordination of economic management and fiscal policies during the Great Depression.

[15] Swaraj Abhiyan v. Union of India and Ors (2016)

- The creation of joint advisory bodies, usually in the form of ministerial councils.

Responding to the increasing gap between government levels, Australian federalism has developed comprehensive intergovernmental relations practices. The Federal States & Territories Heads ' Meetings have been formalized as the Australian Governments Council (COAG).

The statutory tax system allowed tax levies for both the Commonwealth and States. The Commonwealth nevertheless introduced legislation in 1942 to give it a monopoly on income taxes. It achieved this by providing financial grants to states, provided they didn't collect their own income taxes.[16]

The Australian Constitution specifically provides for a gradual adjustment in the balance of powers between States and the Commonwealth.[17]

The High Court in a case found the constitutional validity of the establishment of a Coal Industry Tribunal, invested with both Commonwealth and state power. It was explicitly stated that "nowhere in the constitution the Commonwealth and States are forbidden from exercising their respective powers in such a way that each complements the other."[18]

Cooperative Federalism in United Sates of America

The US Constitution does not explicitly address cooperative federalism. In comparison, the Constitutions of India, Canada and Australia specifically provide for some form of co-operative legislation by authorizing the Federal Government to legislate on behalf of the States with the consent of the latter. In the United States, that form of cooperative legislation is not possible. The only way to achieve a balance of powers is through the Constitutional amendment process.

In United States v. Bekins[19], the United States Supreme Court recognized that while operating within their own realms, States and the Union

16 Section 96
17 Section 51(xxxvii)
18 R v. Duncan; Ex parte Australian Iron and Steel Pty Ltd.
19 58 S.Ct.811 (1938).

could operate in coordination. Finally Dual Federalism gave way to the cooperative federalism model. Since 1937 onward, cooperative federalism has become an important feature of American government, overlaying the line between national and state roles and duties.

Another important development in the creation of a structure for collaboration between the different levels of government in the United States was the establishment of a Permanent Advisory Commission on Intergovernmental Relations

Conclusion

It is an undisputed fact that federalism is not a static term but a dynamic one. It has to undergo many evolutionary testing and modification processes from time to time, to make it fit to meet the challenges and demands of modern times. It is recognized that in order to eliminate the frictions and problems of intergovernmental cooperation constant discussions and negotiations between the Center and the State are required.

In India, the ties between the Centre-States are the core elements of federalism. The Central Government and Government of the State shall collaborate for the well-being and health of the citizens Works together in the environmental protection, terror prevention, family management and socio-economic planning sectors. The Indian constitution aims to achieve national unity, thus granting the state governments the power to maintain democracy. It is true that the union has been given greater powers than the governments of the state, but this is a matter of degree and not of nature, since the Indian constitution includes all the essential features of a federation.

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Constitutional Adjudication and Feminist Constitutionalism in Canada and India

Vini Singh[1]

Introduction

All around the world, Constitutions have been used as tools to bring about gender equality. Various issues ranging from political participation, privacy and autonomy, reproductive rights, discrimination, employment, violence and abuse, matrimonial rights have been addressed through constitutional adjudication.

In India as well, the judiciary has grappled with issues of gender equality and ensured women's rights. However, the question remains that if examined from a feminist perspective, have these decisions recognised the voice and representation of women or have they protected their rights while constituting them as victims? One may further ask, that why should we even ask the question? If the rights are guaranteed and protected eventually, does it matter that why these rights have been protected? Should the approach of the decision maker matter?

The answer lies in another pertinent question, which is, what does a Constitution seek to achieve by protecting certain rights, particularly when these rights are considered to be inherent and pre-existing? While pre -war Constitutions may have guaranteed certain rights in order to limit the powers of the government and to secure individual liberties, most modern Constitutions like the Indian Constitution have been envisaged as transformative and have guaranteed rights to that end.

And therefore, it is not only the outcome of the constitutional adjudication which matters but also how it was arrived at. If constitutional decision making excludes the voices of the oppressed, it can never truly address the oppression. This calls for the examination of constitutional adjudication from a feminist lens to ascertain whether we are any closer to achieving the transformative goal of gender equality.

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In many of its decisions over the past decade, the Indian Supreme Court has taken a gender - conscious approach to substantive equality. For instance, in Anuj Garg v. Hotel Association[2], the Court utilised the anti - stereotyping principle to set aside a law that prohibited women from working in places where liquor was served and stereotyped women on the basis of biological differences. Similarly, In Indian Young Lawyers Association v. State of Kerala[3], Chandrachud J. equated the practice of prohibiting women who can menstruate from entering into the holy shrine of Sabrimalai to the practise of untouchability. This bodes well for feminist constitutionalism. However, there are many issues such as polygamy, restitution of conjugal rights, marital rape etc that remain unaddressed. Further, the Supreme Court has not always been faithful to the cause of feminist constitutionalism, for instance, in Shayara Bano[4], only Nariman J. has addressed the issue from the perspective of substantive equality and though Kurian Joseph J. concurred with him, he adopted a completely different rationale.

Through this paper, I have attempted to analyse the approach of the Indian judiciary and to compare it with its Canadian counterpart to shed light on the concept of feminist constitutionalism.

What is Feminist Constitutionalism?

Although every Constitution guarantees fundamental rights, including equality, substantive gender equality remains a goal for every society. There is still a huge gap between what is and what every constitution should achieve in terms of women's rights. Feminist Constitutionalism looks at constitutional law from a feminist perspective in order to "identify, sustain and promote" those constitutional norms and strategies that will achieve gender equality for women.[5]For instance it may include an examination of the role of women in framing and shaping the constitution, constitutionally

2 (2008) 3 SCC 1.
3 (2018) SCC OnLine SC 1690.
4 ShayaraBano v. Union of India, (2017) 9 SCC 1.
5 See, Beverley Baines & Ruth Rubio – Marin (eds.), THE GENDER OF CONSTITUTIONAL JURISPRUDENCE, (Cambridge University Press, 2005).

mandated affirmative action for women and constitutional adjudication pertaining to their rights.

Some of the key features that underlie this approach are (Beverly Baines feminist constitutionalism global perspectives)[6] -

A. Substantive equality - Feminist constitutionalism aspires that substantive equality should not only pervade the constitutional text but must be a reality in the social order and revisits the concept of constitutionalism to that end.

B. Bringing women's rights into the spotlight - Feminist constitutionalism seeks to bring women's rights and their issues at the forefront of constitutional discourse. The premise being that women's reproductive rights, their socio -economic rights, their political participation should be as central and important to constitutional law as "big issues "like separation of powers or independence of judiciary.

C. Questioning and redefining constitutional assumptions - Feminist constitutionalism challenges those constitutional assumptions that have shaped constitutional law over the years. For e.g. they are critical of the primacy given to civil and political rights over socio - economic rights. It also focuses on the constitutional agency of women and recognises that they can offer a lot to constitutional discourse through lobbying, legislating, litigating, adjudicating and scholarship. Considering that most constitutional texts contain gender equality provisions, one might assume that this is a given just as a free speech clause is. However, history shows that it is the women who have lobbied for decades before gender equality provisions and women's rights were given a space in constitutional discourse. The inclusion of gender equality provisions in both Canadian Charter of Rights and in Part III of the Indian Constitution can be attributed to the women who

[6] See generally, Beverley Baines et al (eds.), FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES (Cambridge University Press, 2012).

pushed for their inclusion. Particularly, if one examines the making of the Indian Constitution, several women who were part of the independence movement and the constituent assembly have left their mark on the constitutional text. For example, it was because of the women members of the drafting committee that the provision for a uniform civil code was inserted in the Constitution, because no one could comprehend better than the women, the injustice that personal laws meted to them.

D. Assessing both rights and institutions - Feminist constitutionalism not only assesses the manner in which women's rights are ensured but also delves into how institutions promote the rights of women.

E. And, lastly feminist constitutionalism opens up avenues for comparative constitutional law.

Constitutional Adjudication and Feminist Constitutionalism in Canada and India

Various provisions in the Constitutions of Canada and India reflect a commitment to gender equality. For instance, Section 15 (1) of the Canadian Charter of Rights and Freedoms proscribes discrimination based on sex. And, Section 15(2) provides for affirmative action to ameliorate the condition of those disadvantaged due to their sex. Section 28 is a complementary provision to Section 15 that requires that the Charter guarantees must be implemented without discrimination between the sexes. Likewise, Article 15(1), Article 16(2) and Article 29 (2) of the Indian Constitution forbid discrimination on the grounds of sex. Article 15(3) allows the State to make special provisions for women. Further, the directive principles such as Article 39 (d) that provides for equal pay for equal work and Article 42 which mandates that the State should make provision for maternity leave.

Both Canada and India adopt a living tree approach to constitutional interpretation. As a result, the judiciary has been able to significantly enhance the ambit of the guaranteed rights and other constitutional provisions regarding women. Much has been done by Courts in both jurisdictions for

advancing gender equality, yet much remains to be done in terms of violence, exploitation, marginalisation, powerlessness and cultural imperialism that women face.[7]

For instance, even when one considers the ratio of men to women engaged in constitutional adjudication in both jurisdictions, it is heavily skewed in favour of men. This is also true of the bar in both jurisdictions. The legislatures are no different and more representation from women is needed. Although, the glass ceiling is breaking gradually, women do not define "constitutional moments" as frequently as men. There are however several instances in both jurisdictions wherein women's rights have been enforced and many of these decisions have defined constitutional norms and shaped constitutional law in both Canada and India.

Before Edwards v Canada (AG)[8], the non - participation of women in political life was considered a norm. The British North America Act, 1867 (The Canadian Constitution) used the word "he" to refer to a person, which was interpreted to the effect that women were not persons under the BNA Act. The Supreme Court of Canada took into account that women were not a part of political life nor a part of the British parliament and concluded that women were not persons for the purposes of the BNA Act. However, the Privy Council reversed the decision of the Supreme Court and treated the exclusion of women as a relic of barbarous times. The decision opened up the doors for women who could now occupy public offices. Similarly, in R v. Morgentaler[9], wherein the Supreme Court of Canada recognised the autonomy of women and did away with the criminal code provision that prohibited abortion unless it was a danger to the woman's health as certified by a therapeutic board.

Likewise, in Brooks v. Canada Safeway Ltd.[10], the Supreme Court found an insurance policy that denied sickness and accident benefit to women during pregnancy. The Court overturned a previous decision that had

7 Ruth Rubio Marin, Women in Europe and in the World: The State of the Union 2016 (2016) 14 International journal of Constitutional Law 547.
8 1929 UKPC 86.
9 [1988] 1 S.C.R. 30.
10 [1989] 1 S.C.R. 1219.

stereotyped women due to biological differences and denied them benefits on pregnancy and held that the insurance policy was discriminatory. Similarly, in its recent judgment in R v. Barton[11], the Court analysed the concept of reasonable steps to ascertain consent for a sexual activity under Section 273 of the Criminal Code and observed that implied consent has no place in Canadian law. The fact that the complainant was a prostitute and frequently engaged in sexual activities could not lead to a presumption on part of the accused that she had consented for sexual activity.

Despite these wins for women, less constitutional agency for women translates to less parity for them. For instance, in Symes v. Canada[12] the Supreme Court disagreed with the argument of the practising lawyer Elizabeth Symes that she should be able to deduct daycare expenses from her tax assessment as business expenses, as without daycare she would not be able to practise. The Court comprised of a majority of male members failed to interpret the constitutional right to equality in a gender sensitive way. Patriarchal norms about family have also influenced how the Court interprets family law matters. Though some if its decisions may seem progressive from an autonomy perspective, they fail to take into account the social realities that influence the exercise of this autonomy. For instance, in Hartshorne v. Hartshorne[13], the Supreme Court interpreted a provision of the Family Relations Act that allowed the setting aside of unfair prenuptial agreement. The Court observed that since such agreements reflect the choice of the parties, they would only be set aside if they are grossly inappropriate or unconscionable. The Court set a very high bar. It completely failed to take into account that a woman may have agreed to certain unfair terms in the prenuptial since she may not have been in an equal bargaining position or may have agreed due to other considerations.

The lack of constitutional agency for women has not just disadvantaged women. As demonstrated by the Women's Court of Canada project, a feminist's perspective could have resulted in a richer equality

[11] 2019 SCC 33.
[12] [1993] 4 S.C.R. 695.
[13] 2004 SCC 22.

jurisprudence. They have rewritten several decisions from a feminist perspective to demonstrate how constitutional law could benefit from feminism. For example, the WCC rewrote the decision in Eaton v. Brant County School Board[14] wherein the Supreme Court had accepted the separate but equal reasoning and permitted the segregation of a specially abled child against her parents wishes. The WCC version of the decision highlights how the Supreme Court easily accepted and normalised inequality. On the other hand, one need only trace the contribution of McLachlin J. to understand how feminism can contribute to constitutionalism. For instance, in Vriend v. Alberta[15], wherein a gay lab coordinator was dismissed from service from a Christian college, her court struck down the discriminatory Alberta Individuals Rights Protection Act since it excluded homosexuals from its ambit. Similarly, in R v.Seaboyer and Gayme[16], she found the cross examination of victims of sexual offences about their sexual histories as unconstitutional. One may also see her humane approach in her decision on legalisation of assisted suicide in Carter v. Canada.[17] Her work shows the advantages a feminist perspective may bring to constitutional adjudication and to rights jurisprudence.

The Indian Supreme Court has also been hailed for its rights jurisprudence. Over the years it has expanded the ambit of the guaranteed rights and taken measures to enforce them. Many of its decisions have been a stepping stone towards achieving gender equality. For instance, in Visakha v. Rajasthan[18], the Court issued guidelines for prevention of sexual harassment of women at workplace and filled the legislative vacuum. The Court's objective was to ensure that women would feel safe at work and would not desist from joining the workforce or would not leave their jobs out of a fear of sexual harassment. Similarly, in Bodhisatwa Gautam v. Subhra Chakraborty[19] and Delhi Domestic Working Women's Forum v. Union of

[14] [1997] 1 S.C.R. 241.
[15] [1998] 1 S.C.R. 493.
[16] [1991] 2 S.C.R. 577.
[17] 2015 SCC 5
[18] AIR 1997 SC 3011.
[19] (1996) SCC 1 490.

India[20], the Court took into account the social realities associated with rape to observe that consent based on deception is no consent and the fact of submission does not equate to consent. It also took into account the long term effects of rape and made a compensatory remedy obligatory in rape cases. Similarly in Gaurav Jain v. Union of India[21], the Court criticised the tradition of devadasis, who were forced into prostitution under the garb of service to the deity. The Court took into account the social pressure, coercion and torture that forced them to enter and stay into prostitution. Taking these underlying causes into account the Court recommended the establishment of child development and care centres to rehabilitate child prostitutes and children of prostitutes.

The Court's feminist approach can also be seen in its guidelines regarding the procedure to be followed during arrest in D.K. Basu v. State of West Bengal[22] wherein specific safeguards such as the bar on the arrest of women post sunset have been laid down by the Court. Over the last decade as well the judiciary has been instrumental in promoting gender equality. It utilised the anti - stereotyping principle in Anuj Garg[23] to ensure that women enjoyed equality in employment and were not restricted from pursuing a career of their choice due to patriarchal stereotypes and paternalism of the State. A similar approach was taken in Joseph Shine wherein adultery was decriminalised as the provision furthered gender stereotypes, denied sexual agency to women and treated them only as victims deserving of protection by the State. There are several such recent examples like the opinion of Chandrachud J. in the Indian Young Lawyers Association[24] case wherein he equated the bar on women of menstruating age to enter the holy shrine of Sabrimala to the practice of untouchability. Or, the very recent judgment of the Supreme Court wherein it has upheld the Delhi High Court's decision and

[20] (1995) SCC 1 14.
[21] AIR 1990 SC 292.
[22] (1997) 1 SCC 416.
[23] *Supra*, note 1.
[24] *Supra*, note 2.

paved the way for women to have permanent commission in the army, yet again shattering gender stereotypes[25].

Although one may not discount the contribution of the Supreme Court to the cause of gender equality, one may also not deny that the judiciary's report card regarding rights jurisprudence and in particular equality jurisprudence could have been better if coloured with a feminist perspective. One may very well imagine that if the Supreme Court had been conscious of the principle of substantive equality, we may never have had seen a Koushal[26] and would not have had to wait for a Johar[27] to see LGBTQ rights vindicated. Rights jurisprudence in India is littered with missed opportunities that may have been utilised if women had more constitutional agency or the issues were considered from a feminist perspective.

For example, in Madhu Kishwar v. State of Bihar[28], the Supreme Court gave up the chance to open the gates for constitutional review of personal laws. The Court refused to strike down the discriminatory Chota Nagpur Tenancy Act, 1908 which conferred the right of intestate succession over tenancy only to male descendants of the deceased tribal. Though the Court interpreted male heirs to include female heirs, it refused to strike down the provision as discriminatory and violative of the Constitution simply because the law was a personal law and the Court did not want to admit similar challenges to personal laws, many of which are discriminatory and deny women their rightful status.

Even in Shayara Bano[29], the Court seems to have completely bypassed this opportunity. Though it was a welcome move that the Court struck down the practice of triple talaq, the judgment cannot be categorised as a landmark in our rights jurisprudence. The 3-2 majority was divided on their approach to the question, and 3 out of the five judges addressed the issue of triple talaq in a manner quite unlike a constitutional court should have. Although the

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25 The Secretary, Ministry of Defence v. Babita Puniya & Ors, AIR OnLine SC 198.
26 Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.
27 Navtej Singh Johar v. UOI, (2018) 1 SCC 791.
28 (1996) 5 SCC 125.
29 *Supra*, note 3.

minority and Kurian Joseph J. From the majority arrived at different conclusions, they went down the same path as their predecessors in treating personal laws as untouchable, as something even superior to the Constitution. Although, the concurring majority opinion penned by Nariman J. addresses the issue from the perspective of manifest arbitrariness and condemns the practise as discriminatory and violative of the Constitution, it does not open the doors for the constitutional scrutiny of all personal laws. It only scrutinises them so far as they may be covered by a legislation. Thus, by acting like an ecclesiastical court, the Supreme Court has ignored not only the feminist voices but also the supremacy of the transformative constitution.

This is also true of its decision regarding the restitution of conjugal rights in Saroj Rani v. Sudarshan Chadha.[30] Herein, the Supreme Court refused to find the provision of restitution of conjugal rights as discriminatory and offensive to dignity, privacy and autonomy of women. The Court completely ignored the social realities and the fact that marital rape is legal in India and this provision may put a woman in such a situation where she may be raped without impunity. The Court ignored that in a society where domestic violence is so prevalent and marital rape is not penalised, the provision may be used by men to strong arm women and may lead to drastic consequences.

Conclusion

Thus, feminist constitutionalism is very much called for and would undeniably impact the rights jurisprudence for the better. Not only in Canada, but in other jurisdictions like the U.S. one may find that feminist voices have changed constitutional law for the better. Who can deny the contribution of the fiery Ruth Bader Ginsburg to the rights jurisprudence?

In India too, if we look at how women in the pre - independence era have contributed to the freedom movement, to the development of the country post independence and in limited numbers at the bar and bench, one cannot deny that their voices have much to bring to the table. Was it not the

[30](1984) SCC 4 90.

two brave homosexual women lawyers who argued so passionately for LGBTQ rights in Johar? The judgment is much more theirs than the bench.

Feminism promotes a more humane approach and envisions equality in a substantive fashion. There are only benefits to listening to a diversity of voices when it comes to constitutional questions. Looking at constitutional law from a feminist perspective offers us that chance and in my opinion, its time that we take it.

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THEME IV: DISABILITY RIGHTS, JUDICIAL ACTIVISM AND FEMINIST CONSTITUTIONALISM

The Social Function of Ius Dicere: The Impact of the Epistemologies of the South on the Development of the Theories of Justice - Judicial Activism Twenty Years After S. P. Sathe's Contribution

Domenico Amirante and Maria Sarah Bussi[1]

1. Investigating judicial activism: a South-South comparison

In 2002 Professor Sathe published his seminal work on *Judicial activism in India*, which represented the outcome of a research started at the end of the nineties.[2]

In the eyes of many scholars trained in continental law, judicial activism appears as a mere occurrence mainly connected to political reasons and finding its explanation in the *humus* of the balance of power.

Nevertheless looking at judicial activism from India, a country where it has ancient roots, offers the opportunity to appreciate the complexity of this practice, which does not necessarily represent an exception to the ordinary relations between the Legislative, the Executive and the Judiciary.

From a comparative law standpoint, this consideration drives us to take into account other Global South countries, in particular Brazil. This perspective requires an inversion of the ordinary comparative analysis focused on the United States experience that appears today to be unsatisfactory to evaluate judicial activism in a globalised world, although it remains valid and essential for its historical and philosophical profile[3]. In

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2 As mentioned in the Acknowledgements of the 2nd edition of the book, it represented the development of the subject dealt within four articles that appeared in the *Journal of Indian School of Political Economy* between 1998 and 1999. *cf.* S.P. Sathe, *Judicial Activism in India. Transgressing Borders and Enforcing Limits* (Oxford India Paperbacks, New Delhi, 2nd edn., 2003), p. vii. In 2001 the Author also published the article "Judicial activism: the Indian Experience" 6 *Washington University Journal of Law & Policy* 29 (2001).

3 On this point *cf.* R. Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Harvard University Press, Cambridge, 2004), that - after mentioning the work by G. Fletcher, "Comparative Law as a Subversive Discipline", 46 *American Journal of Comparative Law* 683 (1998) - affirms 'American parochialism with regard to other countries' constitutional arrangements and practices is especially remarkable given the scope of the trend toward the adoption of constitutional catalogues of rights, the fortification of judicial review, and the consequent judicialization of politics that has recently swept the world' (*Id.* at 6). *See* also L. R. Barroso, "A

fact, a comparison of constitutional systems outside the *western legal tradition* on this topic is needed for a better understanding of the sociological and cultural factors influencing the role of the Judiciary in the contemporary era[4].

With a focus on the function that society entrusts to magistrates, Sathe concludes his work stating 'The judiciary is the weakest organ of the State. It becomes strong only when people repose faith in it. Such faith of the people constitutes the legitimacy of the Court and of judicial activism'.[5] Boaventura de Sousa Santos, in a paper dating back to 1986, recalled that law is a social phenomenon influenced by centuries of intellectual production and stressed the importance of the studies on the Judiciary as a political and professional institution.[6] The fact that the Courts represent a sub-system within a global political system, and as such they receive a series of inputs and produce some outputs of a social nature, has two consequences. On one hand, their decisions depend on many factors (e.g. professional training and political/sociological ideology of judges), and on the other, *ius dicere* cannot be considered a neutral function.[7]

Besides the sociological issues, one must take into account also the cultural ones,[8] because 'once comparatists move on to the *constitution as culture*, they transgress the borders of an instrumental understanding and

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Americanização do Direito Constitucional e Seus Paradoxos: Teoria e Jurisprudência Constitucional no Mundo Contemporãneo" v. 12-n. 59 *Interesse Público* 13 (2010). The Author, who analyses the phenomenon of judicial activism in the U.S. experience, underlines that it concerned only a short period of American constitutional history, in particular the years of Earl Warren's Supreme Court Presidency and the early years of the Warren Burger one. With regard to the debates in the United States,*see* among others K. Roosevelt III, *The Myth of Judicial Activism* (Yale University Press, New Haven-London, 2006) and M. Tushnet, *Taking the Constitution away from the Courts* (Princeton University Press, Princeton, 1999).

4 As to the importance of broadening the horizons of legal comparison 'towards' non-Western legal systems one can refer to D. Amirante, "Al di là dell'Occidente. Sfide epistemologiche e spunti euristici nella comparazione 'verso Oriente'" 1 *DPCE* 11 (2015), and to the bibliography contained therein.

5 *Supra* note 1 at 310.

6 The reference is to B. De Sousa Santos, "Introdução à Sociologia da Administração da Justiça" 21 *Revista Crítica de Ciências Sociais* 11 (1986).

7 *Id.* at 23-24. For a reflection on the political role of the Supreme Court of India *see* G. H. Gadbois Jr., "The Supreme Court of India as a Political Institution" in R. Dhavan, R. Sudarshan, *et al.* (eds.), *Judges and the Judicial Power* 250-267 (Sweet&Maxwell- Tripathi, London-Bombay, 1985).

8 About the necessity to take into due account the socio-cultural issues *see* P. de Cruz, *Comparative Law in a Changing World* (Cavendish Publishing, London, 2nd edn., 1999), p. 228 ff., and in particular W. Menski, *Comparative Law in a Global Context* (Cambridge University Press, Cambridge, 2006). Among the Indian scholars, *cf.* P. Ishwara Bhat, *Law and Social Transformation in India* (Eastern Book Company, Lucknow, 2009) and with regard to the role of Judiciary R. Sudarshan, "Judges, State and Society in India" in R. Dhavan, R. Sudarshan *et al.* (eds.), *Judges and the Judicial Power* 268-288 (Sweet&Maxwell-Tripathi, London-Bombay, 1985).

beginto encounter the symbolic dimension', that of culture, in which 'the real is imagined, constructed, and made sense of'.[9]

In ancient Greece, for example, two notions of Justice can be found, embodied by the Goddess Dike and her mother Themis. The first represents human justice, while the second expresses that of the traditional pre-existences, the rules of divine origin, and evokes an ideal concept of justice[10].

All these aspects, however, have to be appreciated in a constitutional framework.

Indeed, only through the investigation of the role that the Constitution entrusts to the Judiciary we can properly address the issue of judicial activism, without associating it with other phenomena based on different assumptions or confining it to very few experiences, as a mere exception in the worldwide landscape.

If we want to analyse judicial activism in the framework of the theories of constitutionalism, India and Brazil become important references for what has been defined the 'transformative role of postcolonial constitutions'. This research perspective has been recently investigated in a well-known study proposing an innovative methodology based on a South-South horizontal comparison, whose approach has inspired our present work[11]. With this paper, taking into consideration the authoritative contribution given by Sathe for the study of judicial activism in India, we

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[9] *Cf.* G. Frankenberg, "Comparing Constitutions: Ideas, Ideals, and Ideology – toward a Layered Narrative" Volume 4-Issue 3 *International Journal of Constitutional Law* 439 (2006), p. 449.

[10] The conflict between these two concepts emerges in *Antigone*, Sophocles' tragedy, when Creon the king of Thebes met Antigone, who had buried the body of her brother Polinice against his edict. *See* Sophocles, *Antigone*, ll. 446-457, and the commentary on this passage by C. H. McIlwain, G. Ferrara (ed.), *Il pensiero giuridico occidentale dai Greci al tardo Medioevo* (Neri Pozza Editore, Venezia, 1959), pp. 30-31. On the idea of Justice in Ancient Greece, *cf.* M. Cacciari and N. Irti, *Elogio del diritto. Con un saggio di Werner Jaeger* (La Nave di Teseo, Milano, 2019) pp. 67 *et seq*. About Greek legal philosophy, but also on the connection between Themis and Hindu thought, *see* W. Menski, *Comparative Law in a Global Context. The Legal Systems of Asia and Africa* (Cambridge University Press, Cambridge, 2nd edn., 2006) pp. 134 ff. On the current symbolic meaning of the role of the Supreme Court of India in relation to the iconography and with reference to philosophical issues, *see* M. Jagannadha Rao, "The Goddess of Justice: The Constitution and the Supreme Court" in B. N. Kirpal, A. H. Desai, *et.al.* (eds.), *Supreme but not Infallible. Essays in Honour of the Supreme Court of India* 87-96 (Oxford India Paperbacks, New Delhi, 2004).

[11] *Cf.* O. Vilhena, U. Baxi, *et. al.* (eds.), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (National Law University, Delhi Press, New Delhi, 2014). On the idea of social revolution inside the Constituent Assembly *see* G. Austin, *The Indian Constitution. Cornerstone of a Nation*, (Oxford University Press, Oxford-New Delhi, 1999), p. 26 ff.

follow the exhortation of the legal Indian doctrine to listen to the voices of postcolonialjudges in order to pluralise the theories of Justice.[12]

As underlined by U. Baxi, placing judicial activism in a comparative scenario makes it possible to realise how indeterminate and fungible this category is, as its very notion remains 'inescapably localised'.[13]

Our purpose is to ascertain if its definition is actually bound to be confined to each national dimension or if, through the epistemology of the South, it is possible to outline some common features of judicial activism, by tracing its origins in the context of the 'constitutionalism of the Global South'.[14] By comparing India with Brazil, far from presuming to be the long awaited interpreters of south activist jurisprudence[15], we would like to stimulate a reflection exploring new possible readings of the role of the Judiciary beyond the western paradigm.

2. *Ius dicere* and the social legitimacy of the Judiciary: S. P. Sathe's contribution

'The politicians as well as the people need the Court and judicial activism. There is a general feeling that despite a few failures and the consequent disappointments, the Court has continued to inspire the anti-establishment forces to seek its intervention in defence of democracy and the rule of law'.[16]

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[12] *See* U. Baxi, *On being an 'activist' judge not just an 'active' one!*, 11th Commonwealth Magistrates' and Judges' Association Triennial Conference, held in Cape Town on 27th October 1997, available at <http://upendrabaxi.in/> (last visited on 25th October 2019) and W. Twining, *Human Rights, Southern Voices. Francis Deng, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi* (Cambridge University Press, Cambridge, 2009). With reference to the contribution of the Brazilian doctrine to legal pluralism, *see* among others A. C. Wolkmer, *Pluralismo Jurídico. Fundamentos de uma nova cultura no Direito* (Editora Alfa Omega, Sãn Paulo, 1stedition, 1994).

[13] The reference is to the preface to Professor Sathe's book, *supra* note 1 at xv. *See* also U. Baxi, *Courage Craft and Contention. The Indian Supreme Court in the Eighties* (Thipathi, Bombay, 1985), p. 4, where one can read 'No meaningful discussion concerning judicial role is thus possible without a grasp of ideologies on the one hand and the organization of relations of force in societies on theother. It may even be said that a theory about judicial role does not make much sense without a theory of state. Be that as it may, this much is clear: *there can be only theories about judicial roles, never a single cross-cultural theory about the judicial role*'.

[14] 'Constitutionalism of the Global South' is the title of a recent work that draws a comparison between the role of the Indian Supreme Court, the South African Constitutional Court and the Colombian Constitutional Court, *cf.* D. B. Maldonado (ed.), *Constitutionalism of the Global South. The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press, New York, 2013).

[15] In the preface to Sathe's book U. Baxi speaking of Latin America underlined how at that time a comparison between India, Brazil and Mexico on this subject was missing and 'a comparative study of south activist jurisprudence awaits its raconteurs'. *Supra* note 12,in particular footnote 3 in the text.

[16] *Supra* note 1 at xxxviii.

In this way Sathe started his reflection about judicial activism, namely underlining the link that exists in the Indian legal context between the Judiciary, the rule of law and the social dimension and introducing it in the judicial review discourse. He described the historical evolution in India since the origins, evoking the classical idea of the limitations to the political power and stressing the influence that the English parliamentary supremacy theory and the black letter law interpretation had before Independence and later in the debates of the Constituent Assembly.[17]

The first important aspect of his theoretical contribution is dating back to the fifties the beginning of an evolving process transforming the Supreme Court of India into an active court. The second one is the notion that the genesis of judicial activism is to be found mainly in judicial review[18].

On the first point, in contrast to those who believe that activism starts with the post-emergency period and in spite of the gradual character of its development, the reference is constituted by the decision *A.K. Golapan v. Madras*.[19] The emergency regime would have exclusively strengthened, in his opinion, the basic structure doctrine and the link existing between the latter and the Court[20], expressing a counter-majoritarian check on democracy. As underlined by other authors, the counter-majoritarian dilemma[2120] and in

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17 *Supra* note 1 at 25 ff.

18 *Cf.* S.N. Jain, "Parliament and the Judiciary" in V. Grover (ed.), *Political Process and Role of Courts* 121-131 (Deep & Deep, New Delhi, 1997), V. Singh Shekhawat, "Judicial Review in India: Maxims and Limitations" in *Id.* at 160-165 and R.C.S. Sarkar, "Some Aspects of Constitutional Reforms: Judicial Review and Directive Principles" in *Id.* at 371-385.

19 AIR 1950 SC 27.

20 S.P. Sathe defines the basic structure doctrine as 'the high water mark of judicial activism' (*Supra* note 1 at 98). In particular, this evolution can be grasped in the decisions Golaknath v. Punjab (AIR 1967 SC 1643), Kesavananda Bharati v. Kerala (AIR 1973 SC 1461), Indira Gandhi v. Raj Narain (AIR 1975 SC 2299) and Minerva Mills v. India (AIR 1980 SC 1789). On this topic *see*, among others, A. K. Thiruvengadam, *The Constitution of India. A contextual analysis* (Hart Publishing, New Delhi, 2018), p. 221 *et seq.*, L. Templeman, "The Supreme Court and the Constitution" in B. N. Kirpal, A. H. Desai, *et.al.* (eds.), *Supreme but not Infallible. Essays in Honour of the Supreme Court of India* 159-192 (Oxford India Paperbacks, New Delhi, 2004), R. Ramachandran, "The Supreme Court and the Basic Structure Doctrine" in *Id.* at 107-133, R. Prakash, P. Sharma, *Constitution, Fundamental Rights and Judicial Activism in India* (Mangal Deep, Jaipur, 1997), chapters 4 and 5, U. Gupta, "The Supreme Court of India and Social Justice" in V. Grover (ed.), *Political Process and Role of Courts* 9-18 (Deep & Deep, New Delhi, 1997) and J.C. Pande "Judges Thwarting Constituent Power of Parliament" in *Id.* at 110-120.

21 The counter-majoritarian difficulty is drawn up by A. M. Bickel in 1962, *cf.* A. M. Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics* (Yale University Press, New Heaven-London, 2nd edn., 1986). For a discussion of the role of Constitutional Courts in the current democracies in Brazilian persective *see* L.R. Barroso, "Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies" Volume 67-Issue 1 *The American Journal of Comparative Law* 109 (2019), *available at* <https://doi.org/10.1093/ajcl/avz009> (last visited on 25th January 2020).

general the legitimacy of judicial review is one of the most discussed topics of contemporary constitutional doctrine, making room for new readings based on empiricism.[22] Of course, situating the beginning of judicial activism at the time of the advent of the Constitution reveals that the foundations of this practice lay inside the constitutional charter whilebeing also inherent to the general legal system.

With regard to the second profile mentioned above, Sathe argues that the Court slowly abandoned a strict positivist approach in favour of an active posture, while after 1975 it became aware that certain values, such as independence, impartiality and objectivity, had a positive impact on its legitimation.[23] This consciousness, although with a non-linear path of progression, made the apex court 'the main bulwark of Indian democracy',[24] to such an extent that it was considered the guardian of people's rights and the protector of democracy.[25] In short, in the post-emergency era a connection between people and the Supreme Court was built[26]. This was increasingly consolidated by bringing some directive principles of the State within the framework of article 21 of the Constitution[27], the well-known *social action litigation* and the expansion of social actors' *locus standi* in the judicial process.[28]

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22 *Cf.* G. Tusseau, "Afrontar la objeción contramayoritaria a la justicia constitutional: en defensa de más empirismo" Vol. 9-Núm. 09 *Avances Revista de Investigación Jurídica* 24 (2014), where it is underlined that the debates about the counter-majoritarian objection move away from the most important discourse on the justice of institutions, which requires the appreciation of factors related to a specific empirical context.

23 For an analysis of judicial activism in that period from a comparative standpoint with European countries, *see* D. S. Manindranath, *Judicial Activism in post-emergency era* (Notion Press, Chennai, 2015).

24 *Supra* note 1 at xxxviii.

25 *Supra*, note 1 at 21. *See* also T. B. Mukerjee, "Supreme Court as a Guardian of the Constitution of India" in V. Grover (ed.), *Political Process and Role of Courts* 3-8 (Deep & Deep, New Delhi, 1997) and M. P. Jain, "The Supreme Court and Fundamental rights" in S. K. Verma, Kusum (eds.), *Fifty Years of the Supreme Court of India. Its Grasp and Reach* 1-100 (Oxford University Press, New Delhi, 2000).

26 U. Baxi underlines that in the post-emergency era 'constitutional interpretation almost assumed the dimensions of a new social movement that had as its principal mission the task of taking peoples' suffering seriously as almost the very essence of constitutional adjudication', *cf.* U. Baxi, "The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]justice" in S. K. Verma, Kusum (eds.), *Fifty Years of the Supreme Court of India. Its Grasp and Reach* 156-209 (Oxford University Press, New Delhi, 2000), p. 157. This Author, after defining judicial activism as a catharsis of the years from 1977 to 1979, notes that this initial social euphoriais also accompanied by chaos and disenchantment.

27 *Cf.* on this point, G. Sharma, *Human Rights and Social Justice* (Deep & Deep Publications, New Delhi, 2007), p. 299 *et seq*.

28 *See* about the social action litigation U. Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" in R. Dhavan, R. Sudarshan, *et al.* (eds.), *Judges and the Judicial Power*

A third issue stemming from Sathe's contribution, maybe the most innovative, consists in defining judicial activism as an approach 'giving new meaning to a provision so as to suit the changing social or economic conditions or expanding the horizons of the rights of the individual'.[29] It is a precursory notion, which was valid at that time, and is still crucial today to understand judicial activism in the contemporary era, because it describes the core of this phenomenon. This change of attitude of the Indian Supreme Court must be traced to the inclination toward a model of judicial review oriented to the spirit, rather than the text, of constitutional provisions[30].

legislation[31], because, under Articles 32 and 226 of the Constitution, the Supreme Court and High Courts are called upon to enforce the rights conferred by Part III and, in the second case, even any legal right.

This primary setting of judicial activism, which has to be considered the cradle of public interest litigation,[32] deserves to be analysed in the context of the classical systems of constitutional justice elaborated by public comparative doctrine[33]. In fact, although tributary to the Anglo-American

289-315 (Sweet&Maxwell-Tripathi, London-Bombay, 1985).

29 *Supra* note 1 at 5.

30 S.P. Sathe talks about two models of judicial review, opposing the technocratic and positivist one to the activist one. He defined the first referring to the notion of legal positivism as, quoting R. Dworkin, 'a theory which holds that the truth of legal propositions consists in facts about the rules that have been adopted by specific social institutions, and in nothing else' (*supra* note 1 at 41, but see also at 79 ff.), in which the Author analysed the basic structure doctrine in the context of theories of Justice. Indeed rather than models of judicial review, Sathe's theoretical elaboration appears to refer to two different approaches to judging under the interpretative profile. On this topic *see* L.L. Streck, "O (Pós-)Positivismo E Os Propalados Modelos De Juiz (Hércules, Júpiter e Hermes) – Dois Decálogos Necessários" 7 *Revista de Direitos e Garantias Fundamentais* 15 (2010). For an analysis of Dworkin thought in the Indian and Brazilian context *see*, respectively, U. Baxi, "'A known but an indifferent judge': Situating Ronald Dworkin in contemporary Indian jurisprudence" Volume 1 – Number 4 *I.CON* 557 (2003) and R. S. Melo Filho, "Crítica ao protagonismo hermenêutico judicialno Brasil" in R. Siqueira De Pretto, R. Pae Kim, *et al.* (eds.), *Interpretação Constitucional no Brasil* (Escola Paulista da Magistratura, São Paulo, 1st edn., 2017), pp. 469-490.

31 Furthermore, as underlined by M. P. Singh, the same 'judicial review in India goes far beyond its counterpart in U.S. insofar as the validity of the constitutional amendments can also be reviewed by the courts on the ground that an amendment violates the basic structure of features of the Constitution'. *Cf.* M. P. Singh, *V.N. Shukla's Constitution of India* (Eastern Book Company, Lucknow, 11thedn., 2010), p. A-55.

32 *Supra* note 1 at 284.

33 For one of the earliest studies of the judicial systems in a comparative key *cf.* J. R. Schmidhauser, *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis* (Butterworth, Essex, 1987); in particular, with regard to constitutional adjudication *see* L. Pegoraro, *Sistemi di giustizia costituzionale* (G. Giappichelli Editore, Torino, 2019), F. Biagi, *Three Generations of European Constitutional Courts in Transition to Democracy* (Cambridge University Press, Cambridge, 2020) and M. Caielli, E. Palici Di Suni, *La giustizia costituzionale nelle democrazie contemporanee* (Wolters Kluwer, Milano, 2017). As an overview of Asian context, *cf.* H. Chen, Andrew Harding (eds.) *Constitutional Courts in Asia* (Cambridge University Press, Cambridge, 2019).

system, the role of the Supreme Courtin this scenario suggests exploring the possibility to relate the Indian system to the model originated in the Yucatan Constitution of 1841, namely the *juicio de amparo*.

'Processual activism', a new paradigm founded on the idea that the Court 'had to protect the rights of the poor and illiterate people of India and to ensure that the rule of law was observed by citizens as well as the rulers'[34], exemplifies, in our opinion, the role of Indian judicial activism in the global context.

Finally, Sathe discusses the activity of the Supreme Court within the political framework of India, considering the doctrine of the separation of powers and embracing the theoretical domain of the realist school of jurisprudence. He underlines that 'Judicial activism does not have its legitimacy because the other organs of government have failed. That is only one reason for judicial activism bordering on excessivism. Even if the other organs of government function efficiently, there will be the need for judicial activism for recognizing and protecting the rights of powerless minorities'[35]. Defining the Supreme Court as 'the main educator in constitutional values and democratic culture',[36] he suggests that the apex court should try and get over the contradictions between the political sphere and the social and economic ones, on the lines of the renowned debate opened by B. R. Amberdkar at the Constituent Assembly.[37]

3. Judicial activism in a 'transformative constitutionalism' context. The Indian ideal of social justice.

For the Supreme Court of India, like for the *Supremo Tribunal Federal* of Brazil, constitutional adjudication intends 'to establish a new political and

About cross-fertilisation and the use of foreign law by Courts *see* G.F. Ferrari (ed.), *Judicial Cosmopolitanism: The Use of Foreign Law in Contemporary constitutional systems* (Brill/Nijhoff, Leiden-Boston, 2019), T. Groppi, M.-C. Ponthoreau, *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing, Oxford, 2013) and P. Martino (ed.), *I giudici di common law e la (cross)fertilization: i casi di Stati Uniti d'America, Canada, Unione Indiana e Regno Unito* (Santarcangelo di Romagna, Maggioli, 2014).

34 Supra note 1 at 199 and 201.

35 *Supra* note 1 at 279.

36 *Supra* note 1 at 284.

37 *Supra* note 1 at 285. S.P. Sathe quoted the discourse of Dr. B.R. Ambedkar at the sitting on the 25th of November 1949, *cf.* Constituent Assembly Debates on November 25, 1949 *available at* <http://loksabhaph.nic.in/Debates/Result_Nw_15.aspx?dbsl=503> (last visited on 20th January 2020).

moral foundation' for these societies through their current Constitutions, showing particular attention towards the promotion and the protection of fundamental rights.[38] However, taking into account the differences between these two legal systems as regards the geographical, historical, political and institutional profile[39], the idea of 'transformative constitutionalism' provides only a common starting point to evaluate the possibility of comparing them[40]. In fact, the high level of social and economic diversity, which determined a choice in favour of a pluralist and multicultural constitutionalism, combined with the impetus to overcome the inequalities, might not be sufficient. Overemphasising this scenariomeets the risk of increasing distances with the Western legal tradition and giving rise to dystopian readings connected to the mere belonging of these countries to the Global South.

In this milieu, emphasising the marginalisation of certain legal areas by the scholars of Global North[41] might however jeopardise the vision of these systems as the finest laboratory of a new and different constitutionalism of the post-modern era.[42]

On this point, it is useful to mention some civil law approaches to the concept of human rights, founded on the ethic of reciprocity and dialogue

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38 O. Vilhena, U. Baxi, *et. al.* (eds.), *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (National Law University, Delhi Press, New Delhi, 2014), p. 3.

39 On the one hand there is India, which moves toward the constitutional state ceasing to be an English dominion; on the other Brazil, which since 1824 has known eight charters (included the *Emenda Constitucional nº 1 de 17.10.1969*), one monarchical, some republicans, three authoritarian and one liberal-bourgeois with social matrixes, everything after about three hundred years of Portuguese colonisation. Under the constitutional profile, there are two Constitutions: one has been in force for seventy years and the other is thirty years old, in addition one opted for a parliamentary system and the other for presidentialism and different concepts of federalism and dissimilar structures of the Judiciary were chosen.

40 About the construction of a new political order both in India and Brazil, *see* S. Sen, *The Constitution of India. Popular Sovereignty and Democratic Transformation* (Oxford University Press, New Delhi, 2007), p. 87 ff. and A.C. Wolkmer, *História Do Direito No Brasil* (Editora Forense – Grupo Editorial Nacional, Rio de Janeiro, 6th edn., 2012).

41 The scarcity of the studies on Global South by the scholars of western legal tradition is inarguable and deserves to be constantly underlined. On this point *see* W. Twining, "Globalisation and Comparative Law" in E. Örücü, D. Nelken (eds.), *Comparative Law. A Handbook* 69-89 (Hart Publishing, Oxford, 2007), claiming that 'The Anglo-American, and more broadly the Western, intellectual traditions in law have tended to be quite parochial and inward-looking (…) in future comparative law must extend this de-parochialising role to reducing our ignorance of non-Western legal cultures and traditions' (*Id.* at 71-72). *See* also W. Menski, *Comparative Law in a Global Context* (Cambridge University Press, Cambridge, 2006) that underlines how the colonial mindset influences the world of Law still today, because it has created 'a strong spirit of Western superiority and a self-conscious claim of a civilising mission' (*Id.* at 37).

42 About the contribution of India in the post-modern constitutionalism debate refer to D. Amirante, "Post-Modern Constitutionalism in Asia: Perspectives from the Indian Experience", 6 *NUJS L. Rev.* 213 (2013).

between different cultures, because other legal *ethos* 'should not be judged, but interpreted and seen with the eyes of those who live it'.[43] From the common law arena, Patrick Glenn reminds us that 'sustaining diversity means accepting (not tolerating) the major, complex legal traditions of the world (all of them). It means seeing them as mutually interdependent, such that the loss of any of them would be a loss to all the others, which would then lose a major source of support, or at least of self-interrogation. It means seeing all traditions as one's own, in some measure, since each is dependent on the others'.[44]

A common feature to India and Brazil is that the very 'idea of Justice' can be located in their constitutional texts and in some procedural mechanisms available to individuals for the enforcement of fundamental rights against the State. Anticipating the result of our analysis, what brings these two countries closer is the social function of *ius dicere* as a narrative[45] of the decision-making process of the Judiciary, expressing whatcomparative law doctrine defines as the jurisprudential formant.[46]

In the Indian experience there is a defined path linking the Preamble, article 13, the 'right to constitutional remedies' of article 32 and the provision of article 141, in the context of Parts III and IV of the charter that represents 'the conscience of the Constitution'[47].

In the connection existing between rule of law, social justice, protections of rights and judicial activism, we can locate the role of the

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43 *Cf.* S. Bonfiglio, *Costituzionalismo meticcio: Oltre il colonialismo dei diritti umani* (G. Giappichelli Editore, Torino, 2016), p. 105 *et seq*. and *see*, in particular, p. 107 and 110 (our translation). On the value of diversity see R. Cotterrell, "Is it so Bad to be Different? Comparative Law and the Appreciation of Diversity" in E. Örücü, D. Nelken (eds.), *Comparative Law. A Handbook* 133-154 (Hart Publishing, Oxford, 2007).

44 P. Glenn, *Legal tradition of the world* (Oxford University Press, New York, 3rd edn., 2007), p. 359.

45 About the meaning of the narratives as a new trend of comparative law, see G. Marini, "Diritto e politica. La costruzione delle tradizioni giuridiche nell'epoca della globalizzazione" 1 *Pòlemos* (2010). The Author, referring to G. Frankenberg, "Critical Comparisons: Re-thinking Comparative Law" 26 *Harv. Int'l. L. J.* 411 (1985), notes that law has also a discursive and productive force (*Id.* at 38).

46 For a general view on the structure of Judiciary in the Constitution of India refer to D. Amirante, *La democrazia dei superlativi* (Edizioni Scientifiche Italiane, Napoli, 2019), chapter 6, and C. Petteruti, "Il sistema giudiziario indiano ed il controllo dei conti pubblici" in D. Amirante, C. Decaro, *et al.* (eds.), *La Costituzione dell'Unione Indiana. Profili introduttivi* 150-166 (G. Giappichelli Editore, Torino, 2013).

47 The expression is used by G. Austin, *The Indian Constitution. Cornerstone of a Nation*, (Oxford University Press, Oxford-New Delhi, 1999), p. 50 *et seq.,* as mentioned by P. Viola, "Stato, Sistema di governo, diritti e doveri nello sviluppo costituzionale indiano" in D. Amirante (ed.), *I sistemi costituzionali dell'Asia meridionale* 69-101 (Wolters Kluwer, Milano, 2019), p. 94.

'guardian of the Constitution' of the Supreme Court, as defined by D.D. Basu[48].

Despite its apparent nature of a mere procedural provision, article 141, declaring that the Supreme Court decisions are binding for all Indian Courts[49], recognises that its judgements have indirectly an *erga omnes* effect. In fact, as underlined by Shukla, 'the expression "law declared" is wider than the "law found or made" and implies the law creating role of the Court'.[50]

With reference to Article 32 B.R. Ambedkar's remarks about the content of the draft article 25, during the Constituent Assembly debates, appear of particular interest. After defining this article as the very soul and heartof the Constitution, in replying to other members of the Assembly who had observed that some fundamental rights or principles had not been recognised in the charter, he clarified, that 'it is the remedy that makes a right real'[51]. Recalling a received idea of common law that *remedies precede rights*[52], the constituent fathers have opted for an open fundamental rights catalogue, as the related case law subsequently demonstrated[53].

In fact, in India the procedural right of article 32 has represented the flywheel to guarantee substantial rights, essentially through three expedients: expanding the jurisdiction of the Supreme Court beyond writs, de-formalising

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48 *Cf.* D.D. Basu, *Introduction to the Constitution of India* (Wadhwa and Company Law Publishers, New Delhi, 2005). On this topic *see* also G. Austin, "The Supreme Court and the Struggle for Custody of the Constitution" in B. N. Kirpal, A. H. Desai, *et.al.* (eds.), *Supreme but not Infallible. Essays in Honour of the Supreme Court of India* 1-15 (Oxford India Paperbacks, New Delhi, 2004) and R. Prakash, P. Sharma, *Constitution, Fundamental rights and Judicial Activism in India* (Mangal Deep, Jaipur, 1997), p. 231 ff., that analyse the question of the amending powers from the point of view of the social philosophy that characterises the Indian Constitution, in the tension between individualistic ideology and the socialist one. On this point it was underlined that 'in the ultimate count the balance was made to tilt in favour of the principle of social good assuming that beyond a point the compromise would not stand to test' (*Id*. at 232).

49 Supreme Court's decisions are binding as for *ratio decidendi*, not for *obiter dicta*, that have only a persuasive value, as affirmed in *Sreenivasa General Traders & Ors. v. State Of Andhra Pradesh & Ors*., (1983) 4 SCC 353, in *Krishena Kumar v. Union of India & Ors.*, 1990 (4) SCC 207.

50 *Cf.* M.P. Singh, *V.N. Shukla's Constitution of India* (Eastern Book Company, Lucknow, 11th Edition, 2010), p. 519.

51 *See* B.R. Ambedkar discourse at the sitting of 9th of December 1948, *cf.* Constituent Assembly Debates on December 9, 1948 *available at* <http://loksabhaph.nic.in/Debates/Result_Nw_15.aspx?dbsl=529> (last visited on 3rd February 2020).

52 It should be noted that in England the concept of *forms of actions* inherent in the writ, with his rigidness tributary to the Roman Law and its *formulae*, led to the sclerotisation of the common law system to such a degree that the equity system developed.

53 As an example may be mentioned the role of the Supreme Court in environmental law that with its interpretative force has converted a duty into the right to a healthy environment, moving from article 21 and giving an extended interpretation of the term "life".

the proceedings to go to the Court and extending *locus standi* to social actors through the well- known representative standing and the citizen standing[54].

With an extensive interpretation of 'appropriate proceedings' every remedy for the enforcement of fundamentalrights (injunctive, preventive and compensative) is admitted, because 'the procedure, being merely a hand-maiden of justice, should not stand in the way to access to justice'[55].

Indeed, this profile allowed for the increase of public interest litigation[56].

In this matter the concurrence of the jurisdiction of the Supreme Court and of the High Courts laid down by article 226 of the Constitution, appears to respond to the need to facilitate the access to justice to the lower layers of society.

The ideal of social justice – enunciated in the Preamble[57] and reaffirmed in articles 38 and 39 – permeates Parts III and IV of the

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[54] On the relationship between procedural aspects of public interest litigation and judicial activism, N. Jain, *Judicial Activism in India with Special Reference to the Quest for Social Justice* (Kalpaz Publications, Delhi, 2013), p. 62 ff., A. Chandra Sahoo, "PIL promoting judicial activism in India" in Volume 2-Issue 1 *International Journal of Academic Research and Development* 107-108, (2017) and M. N. Sehwal, S. Khosla, "Judicial Activism", Vol. 69-No. 1 *The Indian Journal of Political Science* 113-126 (2008).

[55] *Cf.* M.P. Singh, *V.N. Shukla's Constitution of India* (Eastern Book Company, Lucknow, 11th Edition, 2010), p. 325; in particular, onthe extension of *locus standi* rule *see Id.*, p. 331-334.

[56] Among the wide literature about public interest litigation, *see* U. Baxi 'Taking Suffering seriously: Social Action litigation in the Supreme Court of India" in R. Dhavan, R. Sudarshan *et al.* (eds.), *Judges and the Judicial Power* 289-315 (Sweet&Maxwell-Tripathi, London-Bombay, 1985), M. Rao, *Public Interest Litigation in India: A Renaissance in Social Justice* (Eastern Book Company, Lucknow, 2002), A. H. Desai and S. Muralidhar, "Public Interest Litigation: Potential and Problems" in B. N. Kirpal, A. H. Desai, *et.al.* (eds.), *Supreme but not Infallible. Essays in Honour of the Supreme Court of India* 159-192 (Oxford India Paperbacks, New Delhi, 2004), A. Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press, New York, 2017) and R. Abeyratne, D. Misri, "Separation of powers and the potential for constitutional dialogue in India" 5:2 *Journal of International and Comparative Law* 363-385 (2018). For the contribution on the topic by Italian scholars, M. Caielli, "Governo debole, giudiziario forte: alcune riflessioni sull'azione di pubblico interesse in India", *Forum di Quaderni Costituzionali*, 2 nov. 2012, *available at*<http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0364_caielli.pdf> (last visited on 21st February 2020) and P. Viola, "'Giustizia sociale' e Public Interest Litigation nell'evoluzione costituzionale di alcuni ordinamenti asiatici", v. 37-n. 4 *DPCE Online*, 3 jan. 2019, *available at* <http://www.dpceonline.it/index.php/dpceonline/article/view/585> (last visited on 21st February 2020).

[57] The Preamble also contains the reference to socialism. An interpretation of the term socialism has been given by the same Supreme Court in *D.S. Nakara & Others vs Union of India*, 1983 SCC (1) 305, in which the apex court states that 'The principal aim of a socialist State is to eliminate inequality in income and status and standards of life'.

Constitution[58]; however, article 21 surely represents a keystone[59], for opening the way to 'restitutive Justice'[60].

V.R. Krishna Iyer's vision of social justice, which revolves around economic justice, is synthesised in the Sanskrit *vasundhara katumbkam* or *lokah samastha sakno bhavantu*, demonstrating how social justice has been rooted in Indian culture[61]. In the context of the humanism of the Indian Constitution evoked in *Ediga Anamma* v. *State of Andhra Pradesh*[62] the relevance of another concept emerges, namely the rule of law[63], which 'should be close to rule of life', being Law, Society and Justice strictly

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58 The term has a double sense, on the one hand, it implies 'the rectification of injustice in the personal relations of the people' and on the other, more general and wide, is oriented 'to remove the imbalances in the political, social and economic life of the people', *cf.* M. Saxena, H. Chandra (eds.), *Law and Changing Society* (Deep & Deep Publications, New Delhi, 2007), p. 190. The Authors underline that Part III and IV only in appearance are in conflict, being the Principles traditionally not justiciable, because the Supreme Court with its action has raised to Fundamental rights some rights contained in the Principles (*Id.* at 208). *See* also J. Narain, "Judges and Distributive Justice" in R. Dhavan, R. Sudarshan, *et al.* (eds.), *Judges and the Judicial Power* 191-213 (Sweet&Maxwell-Tripathi, London-Bombay, 1985) and S. Raman, "Social justice and the Indian Constitutional jurisprudence" in V. Grover (ed.), *Political Process and Role of Courts* 60-70 (Deep & Deep, New Delhi, 1997). The philosophy of social justice was defined as 'the philosophy that the courts, while interpreting the Constitution and the statute should adopt a pro-active and goal-oriented approach for achieving social justice', *cf*. A.K. Johri, "Judicial activism and social transformation" in V. Grover (ed.), *Political Process and Role of Courts* 386-397 (Deep & Deep, New Delhi, 1997).

59 The extension of the rule of *locus standi* passed through the interpretation of article 21, also thanks to the activity of Justice KhrisnaIyer. *Cf.* S. Khurshid, L. Malik, *Justice at Heart. Life Journey of Justice V.R. Krishna Iyer* (Eastern Book Company, Lucknow, 2016), p. 73, that refers to *Fertilizer Corporation Kamgar Union v. Union Of India & Ors*, (1981) 1 SCC 568, and *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union Of India & Ors*, (1981) 1 SCC 246.

60 *Cf.* M. Saxena, H. Chandra (eds.), *Law and Changing Society* (Deep & Deep Publications, New Delhi, 2007), p. 193. For the case law on human rights *see* A. M. Setalvad, "The Supreme Court on Human Rights and Social Justice: Changing Perspectives" in B. N. Kirpal, A. H. Desai, *et.al.* (eds.), *Supreme but not Infallible. Essays in Honour of the Supreme Court of India* 232-255 (Oxford India Paperbacks, New Delhi, 2004) and G. Sharma, *Human Rights and Social Justice* (Deep & Deep Publications, New Delhi, 2007). About the Judiciary as 'an arm of the social revolution' *see* G. Austin, *The Indian Constitution. Cornerstone of a Nation*, (Oxford University Press, Oxford-New Delhi, 1999), p. 164 ff.

61 The definition is mentioned in V. Singh Jaswal, S. Jaswal, *Justice V.R. Krishna Iyer's Concept of Social Justice* (Deep & Deep Publications, New Delhi, 2011), p. 5, that quote V.R. Krishna Iyer, *Law versus Justice. Problems and Solutions* (Deep & Deep Publications, New Delhi, 1981), p. 51. See also K.M. Sharma, "The Judicial Universe of Mr. Justice Krishna Iyer" in R. Dhavan, R. Sudarshan, *et al.* (eds.), *Judges and the Judicial Power* 316-336 (Sweet&Maxwell-Tripathi, London-Bombay, 1985).

62 AIR 1974 SCC 799

63 On the worth of the rule of law in K. Iyer's thought, *see* S. Khurshid, L. Malik, *Justice at Heart. Life Journey of Justice V.R. Krishna Iyer* (Eastern Book Company, Lucknow, 2016), p. 120. For an overview about this principle in the United Kingdom, from itshistorical roots to the contemporary age, *cf.* T. Bingham, *The rule of law* (Penguin Books, London, 2011). The Author identifies the fulcrum of the rule of law in the idea that 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts' and analyses also the relationship between it and the conception of Parliament's sovereignty in its recent evolution.

connected[64]. The rule of law was identified asthe objective to be pursued by article 32, serving 'the needs of the people'[65], and, far from being limited to *equality before law* under the procedural outline, it answers the aim of substantive justice[66].

As Justice Bhagwati emphasised in *S.P. Gupta v. Union of India*[67], it is up to the Judiciary to maintain and enforce the rule of Law that – underpinning public confidence in the administration of justice, because it is connected to its independence and accountability – in 'its universality and omnipotence' imposes itself against the three powers of the State.

4. Neo-constitutionalism and social rights in Brazil

Moving on to the analysis of the Brazilian legal system, we want to start with the words used by the President of the National Constituent Assembly, Ulysses Guimarães, to define the new charter promulgated in 1988: *Constituição cidadã* and coragem. Those terms express the idea that Man is the centre of a Constitution struggling against poverty and opens to the government of many[68]. Within the broader framework of the theories of the Constitution, this doctrine refers to the culture of *neoconstitucionalismo.*[69]

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64 V. Singh Jaswal, S. Jaswal, *Justice V.R. Krishna Iyer's Concept of Social Justice* (Deep & Deep Publications, New Delhi, 2011), p. 98-99.

65 *Cf.* M.P. Singh, *V.N. Shukla's Constitution of India* (Eastern Book Company, Lucknow, 11th Edition, 2010), p. A-56.

66 *Cf.* S. Saberwal, H. Sievers (eds.), *Rules, Laws, Constitutions* (Sage Publications, New Delhi/Thousand Oaks/London, 1998), p. 119*et seq*. On this point *see* M. Saxena, H. Chandra (eds.), *Law and Changing Society* (Deep & Deep Publications, New Delhi, 2007), p. 39 ff., which refers to the Report on the International Congress of Jurists held in New Delhi from the 5th of the 10th of January 1959, titled *The Rule of Law in a Free Society* by International Commission of Jurists, also known as Delhi Declaration.

67 *See* AIR 1982 SC 149, par. 865.

68 The speech is reported by I. Mártires Coelho, "Evoluçao do Constitucionalismo Brasileiro Pós-88" in J.J. Gomes Canotilho, G.F. Mendes, *et. al.* (eds.), *Comentários à Constituição do Brasil* 61-65 (Saraiva/Almedina, São Paulo, 2013), p. 61, that, defining its maincharacteristics, underlines that the Constitution of 1988 represents also the response to certain social problems (textually it is a 'Constituição-Resposta').

69 About the theory of Neoconstitutionalism *see* L. Pegoraro, A. Rinella, *Sistemi costituzionali comparati* (G. Giappichelli Editore, Torino, 2017), p. 93 *et seq*., referring to – among others – L. Prieto Sanchís, "Neoconstitucionalismo y ponderación judicial", in M. Carbonell Sánchez (ed.), *Neoconstitucionalismo(s)*, (Unam-Trotta, Madrid, 4th edn., 2009), that defines it through five characteristics: more principles than rules, more weighting than subsumption, omnipresence of the Constitution, omnipotence of the Judiciary and coexistence of a plural constellation of values. *Cf.* J.J. Gomes Canotilho, "Os Métodos do Achamento Político" in J.J. Gomes Canotilho, G.F. Mendes, *et. al.* (eds.), *Comentários à Constituição do Brasil* 45-51 (Saraiva/Almedina, São Paulo, 2013), p. 45. Among the recent theoretical contributions to neo-constitutionalism *see* the work by M. Neves, *Transconstitucionalismo* (Editora WMF Martins Fontes, São Paulo, 2009).

According to Brazilian doctrine neo-constitutionalism is based on post-positivism and on the normative strength of the Constitution (*força normativa da Constituição*[70]), but also on the expansion of constitutional adjudication and the advent of a constitutional interpretation founded on a new dogmatic[71]. Those factors, combined with the historical foundations of the constitutional State, contribute to a process of constitutionalisation of Law, meant as 'the stimulative effect of constitutional provisions, whose material and axiological content radiates, with normative force, throughout the legal system'.[72]

The consequences of this phenomenon are reflected in the constitutional case law, in which the increasing demand for justice coming from the society under the new Constitution is conjugated with the circumstance thatthe Judiciary gained a symbolic function, all in the context of a peculiar system of judicial review.[73]

In fact, the Brazilian case has been defined as a *combined model*, more than a mixed one, for its high level of complexity.[74]

In the vast panorama of debates about neo-constitutionalism[75], it is necessary to mention the theoretical proposal of *Constituição dirigente* by J.J. Gomes Canotilho dating from the eighties[76]. Although referring to the Portuguese charter, in which *metanarrativas emancipatórias* (emancipatory

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70 The term is conied in German by K. Hesse, *A Força Normativa Da Constituição*, tradução de Gilmar Ferreira Mendes (safE, Porto Alegre, 2004). See on this topic E. S. Dantas, "A Força Normativa da Constituição e a Eficácia das Normas Constitucionais no DireitoBrasileiro", v. 11 *Revista de Direito e Liberdade* 13-27, 2010.

71 *Cf.* L.R. Barroso, "Neoconstitucionalismo e Constitucionalização Do Direito (O triunfo tardio do direito constitucional no Brasil)" 240 *Revista de Dereito Administrativo* 1, 2005.

72 *Id.* at 12 (our translation).

73 *Id*. at 36 ff.

74 *Cf.* A. Ramos Tavares, "Sistemi e modelli di giustizia costituzionale (con particolare riferimento agli ordinamenti latinoamericani)" in S. Bagni, *Giustizia costituzionale comparata. Proposte classificatorie a confronto* 159-174 (Bononia University Press, Bologna, 2013), p. 166 and also A. Ramos Tavares, "Il ruolo della giustizia costituzionale in Brasile e sua trasformazione nel secolo XXI" vol. III, 2/3 *Percorsi costituzionali: quadrimestrale di diritti e libertà* (2010). For a complete overview on the constitutional jurisdiction in Brazil *see* L.L. Streck, *Jurisdição constitucional* (Editora Forense, Rio de Janeiro, 6th edn., 2019).

75 On this point a distinction is made between *neoconstitucionalismo fundador*, *principialista*, *judiciário-activista* and *democrático- deliberativo*, *cf.* J.J. Gomes Canotilho, "Os Métodos do Achamento Político" in J.J. Gomes Canotilho, G.F. Mendes, *et. al.* (eds.), *Comentários à Constituição do Brasil* 45-51 (Saraiva/Almedina, São Paulo, 2013).

76 *Cf.* J.J. Gomes Canotilho, *Constituição dirigente e vinculação do legislador : contributo para a compreensão das normas constitucionais programáticas* (Coimbra Editora, Coimbra, 2nd edn., 2001). This idea was elaborated by P. Lerche (*Dirigierende Verfassung*) and Canotilho adapted it to the Portuguese Constitution.

metanarratives) can be identified, it has deeply influenced the Brazilian context and has been discussed in the light of the succeeding elaborations of the same Author.[77]

Defined as 'a normative constitution, which proposes lines and directions for the policy of concretisation and implementation of the constitutional programme in sensitive domains such as that of social rights (…) and that instruments for rights protection',[78] it calls into question the classification of social rights in the Brazialian context.[79]

In this dialogue between rights and judicial remedies, one can observe, also in Brazil, a link between some provisions (in particular, Articles 1-III, 3, 5-XXXV and 6) that define the Judiciary's social responsibility as connected to the advent of the Constitution and to the detailed nature of rights clauses.[80]

The preamble refers to principles such as the exercise of social and individual rights, well-being and development, but also to equality and justice 'as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony'.[81] As a consequence, Article 3 sets as fundamental objectives of the Federative Republic of Brazil those designed 'to eradicate poverty and substandard living conditions and to reduce social and regional inequalities' (III) and 'to promote the well-being of all' (IV).[82]

Article 1, dedicated to fundamental principles – among which human dignity is prominent – must be read incombination *inter alia* with art. 170

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77 About the development of this theory in the works of J.J. Gomes Canotilho, *see* F. de Oliveira, "A Constituição Dirigente: Morte e Vida no Pensamento do Doutor Gomes Canotilho" 28 *Revista Brasileira de Direito Comparado* 2003, *available at* <http://www.idclb.com.br/revistas/revista28.html> (last visited on 7th February 2020)

78 Cf. J.J. Gomes Canotilho, "Os Métodos do Achamento Político" in J.J. Gomes Canotilho, G.F. Mendes, et. al. (eds.), *Comentários à Constituição do Brasil* 45-51 (Saraiva/Almedina, São Paulo, 2013), p. 48.

79 On this topic *see* the debate between L. R. Barroso and J.J. Gomes Canotilho in J.N. de Miranda Coutinho (eds.), *Canotilho e a Constituição Dirigente* (Renovar, Rio de Janeiro, 2nd edn., 2005), p. 31-37.

80 *Cf.* V. Passos de Freitas, "Responsabilidade social do Juiz e do Judiciário" Ano XIV-n. 51 *Revista CEJ* 6-13 (2010). For the historical evolution of the function of judging *see* J. R. A. Vianna, "A função social do Poder Judiciário no Estado Democrático de Direito" Ano IX-n. 16 *Ánima: Revista Eletrônica do Curso de Direito das Faculdades Opet* 64-78 (2017) *available at* <http://www.anima-opet.com.br/> (last visited on 7th February 2020). For a detailed analysis on the Bill of rights of Brazilian Constitution, *see* O. Vilhena Vieira, "Descriptive overview of the Brazilian Constitution and Supreme Court" in O. Vilhena, U. Baxi, *et. al.* (eds.), *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* 75-104 (National Law University, Delhi Press, New Delhi, 2014).

81 *Cf.* Constitution of the Federative Republic of Brazil (English text) *available at* <http://www2.senado.leg.br/bdsf/handle/id/243334> (last visited on 7th February 2020)

82 *Supra* note 80, art. 3.

caput, stating that the economic order 'is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice', and with article 6 dedicated to social rights.[83] Indeed, as underlined by others, article 6 fits into a wide context, since a strong commitment to social justice[84] already emerges in the Preamble. In the comparative scenario this determines a vanguard position of the Brazilian Constitution, including a chapter on social rights under Title II dedicated to fundamental rights andguarantees.[85] In addition, Article 5 § 1 declares the latter immediately applicable.[86]

In the brief cameo of provisions here presented, under the profile of judicial remedies, the Brazilian legal system, in case of a total or partial lack of legal provisions, allows the enforcement of constitutional rights and liberties through the well-known *mandado de injunção*.[87]

Besides this action, which can be addressed to any state or federal judge during a process, the *ação de inconstitucionalidade por omissão* is also relevant: it is designed to give effectiveness to the constitutional provisions and is aimed to sanction the omissions by the legislative or administrative powers.[88] However, being part of the abstract jurisdiction of *Supremo Tribunal Federal*, it is reserved to the subjects legitimated to go to the Court through the *ação direta de inconstitucionalidade* and *ação declaratória de*

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83 *Supra* note 80, art. 6.

84 About social justice and the Critical Theory of Law *see* A. M. Pieroni, M. A. Antunes. "A Justiça Social como fundamento doDireito nas Decisões Judiciais" v.9-n.2 *Revista Eletrônica*

85 *See* I.W. Sarlet, "Comentario ao artigo 6°" in J.J. Gomes Canotilho, G.F. Mendes, *et. al.* (eds.), *Comentários à Constituição do Brasil* 533-548 (Saraiva/Almedina, São Paulo, 2013). Carlos Blanco de Morais underlines that the Constitution of 1988 consecrates both the social rights with direct application and those contained in programmatic provisions, which are also enforced direcly by Tribunals with an interpretation of article 5 § 1, *cf.* C. Blanco de Morais, *O Sistema Político no contexto da erosão da democracia representativa* (Almedina, Coimbra, 2018), p. 403-405.

86 The provision provokes debates among the scholars in relation to the enforceability of social rights, because by implying an intervention from the State it could be subjected to a '*reserva do possível*', *see supra* note 84 at 543 ff. and the bibliography cited therein.

87 *See* article 5-LXXI of the Constitution and Law no. 13.300/2016. The *mandado de injunção*, in spite of its belated implementation, is designed to give a term for the adoption of the absent regulation and to dictate a temporary discipline for the exercise of the rights, both by an individual and in collective form, but in the second case only in certain matters and under certain conditions. In fact the decision produces effects only among the parties at trial and until the advent of the regulation. In some cases, an efficacy *ultra partes* or *erga omnes* can be attributed to the decision, if it is necessary for the nature of the right or indispensable for its exercise; moreover, the effects can be extended to similar cases with a monocratic judge bench judgement.

88 *Cf.* G.F. Mendes, L.L. Streck, "Comentario ao artigo 103°" in J.J. Gomes Canotilho, G.F. Mendes, *et. al.* (eds.), *Comentários à Constituição do Brasil* 1409-1424 (Saraiva/Almedina, São Paulo, 2013) and C. Blanco de Morais, "Direitos sociais e controlo de inconstitucionalidade por omissão no ordenamento brasileiro" 20 *Revista Brasileira de Estudos Constitucionais* 2011 (2012).

constitucionalidade of article 103 § 1.[89]

These two remedies, indeed, take place within the framework of a series of actions – without prejudice to due differences, such as *ação de descumprimiento de preceito fundamental*, *habeas corpus*, *ação popular* and *ação civil pública* – that have transformed the Judiciary, during the validity of the Constitution of 1988, into a power with a political nature.[90]

At this stage, it must be recognised that both legal systems have shown, since their respective constitutional charters came into force, a strong commitment, both textual and factual, to the enforcement of fundamental rights. In the conclusions we are going to enquire if in the constitutional contexts illustrated above, it is possible to identify the founding myth of judicial activism.

5. The contribution of the epistemologies of the South in defining judicial activism

On the occasion of the thirtieth anniversary of the Brazilian Constitution, the greatest achievements attained by the *Supremo Tribunal Federal* in the field of fundamental rights were recalled.[91] Among them, it is important to mention the decisions related to social rights such as the rights to health and education, but also those concerning the protection of minorities, such as the granting of equal status to same-sex union[92].

The Brazilian experience, like the Indian one, is known in the world-wide scenario for its judicial activism. According to some readings, it can be

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89 However it must be reported that, with reference to *ação direta de inconstitucionalidade*, law no. 9.868/1999 introduced the figure of *amicus curiae* in the trial (see article 7° of this law). *Cf.* M. Fogaça Vieira, F. Annenberg "Remarks on the role of social movements and civil society organisations in the Brasilian Supreme Court" in O. Vilhena, U. Baxi, *et. al.* (eds.), *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* 491-518 (National Law University, Delhi Press, New Delhi, 2014), that analyses the role of *amici curiae* in the numerous proceedings before the *Supremo Tribunal Federal*.

90 *See* A.T. Nunes Júnior, "A constituição de 1988 e a judicialização da política no Brasil" v. 45-n. 178 *Revista de informação legislativa* 157 (2008), that mentions also M.G. Ferreira Filho, "Poder judiciário na Constituição de 1988: judicialização da política e politização da justiçã" 198 *Revista de Direito Administrativo* 1 (1994). The latter Author underlines that *mandado de injunção* and *ação de inconstitucionalidade por omissão* make the Judiciary an active legislator.

91 *Cf.* L.R. Barroso, "Trinta Anos Da Constituição: A República Que Ainda Não Foi" *available at* <https://luisrobertobarroso.com.br/publicacoes/> (last visited on 7th February 2020), p. 14-15.

92 For an in-depth analysis of case law about social rights in a global perspective, *see* M. Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, Cambridge, 2009).

defined as a '*Supremocracia*' (Supremocracy) in connection with the role of its Supreme Court[93].

This term refers to the authority that the *Supremo Tribunal Federal* has acquired, both within the judicial system and in its relation to the other powers [94].

As regards the first point, the reference is the choice in favour of a strong 'constitutionalisation' of social and economic relations, as a process defined critically as *compromisso maximador*. On the second point, the key to understanding this phenomenon is in the allocation of three functions to the *Supremo Tribunal Federal*,indicated in article 102 of the Constitution[95].

Looking to the Brazilian Judiciary from this perspective, we will conclude that Brazil has undergone the well- known judicialization of politics.[96]

This phenomenon, which occurs in a large part of the legal systems of the world (almost as if it were a global trend), implies 'the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators, that is, the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts' or 'at least, the spread of judicial decision-making methods outside the judicial province proper'.[97]

It denotes the growth of the role of the Courts in the political arena, as they are increasingly called upon to offera resolution to controversies raising debate in the public opinion.

However, as correctly pointed out, 'the judicialization of politics is

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93 *See* O. Vilhena, U. Baxi, *et. al.* (eds.), *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (National Law University, Delhi Press, New Delhi, 2014), p. 96 ff.

94 O. Vilhena Vieira, "Supremocracia" vol. 4-no. 2 *Rev. direito GV* 441 (2008), pp. 444-445. The Author underlines that the authority within the judicial system also depends on the introduction in 2005 of a mechanism known as *súmula vinculante* (*cf.* article 103-A § 3 of Brazilian Constitution).

95 *Id.* at 446 ff.

96 *See* on the subject the forward-looking work by C.N. Tate, T. Vallinder (Eds), *The Global Expansion of Judicial Power* (New York University Press, New York and London, 1995). For a most recent analysis on the topic *see* Martin Belov, *Courts, Politics and Constitutional Law. Judicialization of Politics and Politicization of the Judiciary* (Routledge, London, 2019).

97 T. Vallinder, "When the Courts Go Marching In" in C.N. Tate, T. Vallinder (eds.), *The Global Expansion of Judicial Power* (New York University Press, New York and London, 1995) p. 13.

often used indiscriminately to refer to what in fact are several distinct phenomena: these range from judicial activism and rights jurisprudence to debates over judicial appointments and the politicization of the judiciary – the inevitable flip side of judicialization'.[98]

Juristocracy[99] is the term used to refer to the attribution of new and relevant powers to the Judiciary, in the context of the establishment of judicial review after the Second World War, transforming 'courts and tribunals worldwide into major political decision-making *loci*'.[100]

In this analysis, the Indian experience is placed in an 'independent scenario', while the Brazilian one is set in a 'single transition scenario'[101].

In our opinion this theoretical approach risks falling into standardization, as if the European model (built on the English and French revolutions principles and its Kelsenian elaborations), could be applied without mediation to the African, Latin American or Asian contexts. In this respect, despite many distinguished doctrinal reconstructions referring to judicial activism in relation to trends existing in some Roman-Germanic democracies, our impression is that prudence is needed in examining the trends relative to the Judiciary in continental law.

The constitutionalisation of Law and the affirmation of the judicial review of legislation represent almost worldwide phenomena, connected to the introduction of rigid Constitutions – as the judicialization of politics became a global trend after the nineties – but judicial activism, in our opinion, is something different.

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98 *Cf.* R. Hirschl, "The Judicialization of Politics"in R.E. Goodin (ed.) *The Oxford Handbook of Political Science* Online Publication: Sep 2013 *available at* <DOI: 10.1093/oxfordhb/9780199604456.013.0013>, p. 2. This Author defines the judicialisation of politics, distinguishing three phenomena. The first identifies 'the spread of legal discourse, jargon, rules, and procedures into the political sphere and policymaking fora and processes'; the second 'the expansion of the province of courts and judges in determining public policy outcomes, mainly through administrative review, judicial redrawing of bureaucratic boundaries between state organs, and "ordinary" rights jurisprudence'; the third 'the reliance on courts and judges for dealing with what we might call "mega-politics" : core political controversies that define (and often divide) whole polities.' (*Id.* at 2-4).

99 The term is coined by Ran Hirschl, *Towards Juristocracy: The origins and consequences of the new constitutionalism* (Harvard University Press, Cambridge, 2004).

100 *Supra* note 96 at 19.

101 *Supra* note 97 at 7.

Furthermore, and contrary to common belief,[102] judicial activism, in the present time and in the contemporary scenario of global comparative law, is far from being simply a judicial behaviour, opposite to judicial self-restrain[103]. The idea of judicial activism as a mere attitude of *ius dicere* is the result of the application of the U.S. paradigm to the most recent constitutional experiences deriving from colonialism or unstable regimes. This paradigm is unsuitable to evaluate the role of judicial review in pursuing social justice[104].

Such considerations show the fallacy of the idea of a simple transmigration of legal models from the western democracies, labelled as consolidated under the profile of their theoretical and philosophical elaboration of constitutionalism, to legal systems that are struggling for the affirmation of their own legal identity. In this complex relationship, made of courageous transpositions and critical rejections, it is necessary to look at the role of the Judiciary by analysing the complex political, social and constitutional dynamics governing these countries.

Regarding the Indian experience, it has been underlined that judicial activism has structural, institutional, political and sociological reasons[105].

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[102] *Cf.*, among others, N. Jain, *Judicial Activism in India with Special Reference to the Quest for Social Justice* (Kalpaz Publications, Delhi, 2013), that notes: 'unlike judicial review, judicial activism is not a legal term. It represents only an attitude or approach of the judge handling a case and monitoring its progress. It has its roots in the power of judicial review but it takes on its attributes from the personality and working style of the judge in question. This is why judicial activism is the characteristic of the judge rather than of thejudicial system' (*Id.* at 56). Regarding Brazilian doctrine, *cf.* L.R. Barroso, "Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies" Volume 67-Issue 1 *The American Journal of Comparative Law* 109 (2019), available at <https://doi.org/10.1093/ajcl/avz009> (last access on 15th February 2020), p. 9. On the topic *see* also L. R. Barroso, "Judicialização, ativismo judicial e legitimidade democrática" *ADV Advocacia dinâmica: seleções jurídicas* 34 (2009), A. Teixeira Nunes Junior "Ativismo judicial no Brasil. O caso da fidelidade partidária" Ano 51-Número *Revista de Informação Legislativa* 97 (2014), R. Soares de Melo Filho, "Crítica ao protagonismo hermenêutico judicial no Brasil" *available at* <http://www.tjsp.jus.br/download/EPM/Publicacoes/ObrasJuridicas/ic19.pdf?d=636676094064686945> (last visited on 7th February 2020) and L. R. Barroso, "Constituição, democracia e supremacia judicial : Direito e política no Brasil contemporâneo" 12 *Revista latino-americana de estudos constitucionais* 661 (2011).

[103] About the decision-making process of the Supreme Court of India, *see* the earliest works on the topic by V. K. Gupta, *Decision making in the Supreme Court of India* (Kaveri Books, Delhi, 1995) and M. Chakrabarty, *Judicial Behaviour and Decision-Making of the Supreme Court of India* (Deep & Deep, New Delhi, 2000).

[104] *Supra* note 97 at 7.

[105] *See* S. Ruparelia, "A progressive Juristocracy? The Unexpected Social Activism of India's Supreme Court", Kellogg Institute for International Studies Working Paper #391 (2013). About the topic of judicial activism in India *see* also R. Shunmugasundaram "Judicial Activism and Overreach in India"

Recently the keystone for its understanding has been detected in elite institutionalism theory, according to which 'the roots of judicial activism and assertiveness can be better understood by looking to the institutional context, and the professional and intellectual elite atmosphere of judicial decision-making'[106].

Among Brazilian scholars a rather common notion is that judicial activism is an interpretative approach to the Constitution, which extends its scope[107]. The Judiciary, in order to make constitutional value effective, applies constitutional provisions in case of regulatory gaps, declares the unconstitutionality of laws referring to less rigid criteria and address public power for the adoption of certain public policies[108].

A careful analysis of the differences between the judicialisation of politics and judicial activism has underlined that in the second case the Judiciary takes upon itself the responsibility to guarantee the implementation of the Constitution and of fundamental rights, on the basis of the above mentioned theory of the *força normativa da Constituição* (the normative strength of the Constitution)[109]. In this perspective, the Brazilian legal system comes closer to the Indian one, in which the Judiciary is called upon to 'ensure justice as well as the rule of law for the realization of the noble ideals mentioned in the Preamble'[110].

The study of these two experiences has shown that judicial activism has a multifactorial genesis, but its roots must be found in the constitutional texts. This is the perspective that we chose in approaching the topic, considering that it has been quite often not sufficiently evaluated.

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72 *Amicus Curiae* 22 (2007) and M. M. Semwal, S. Khosla, "Judicial Activism" Vol. LXIX-No. 1 *The Indian Journal of Political Science* 113 (2008). Among the first studies *cf.* U. Baxi, *Courage Craft and Contention. The Indian Supreme Court in the Eighties* (Thipathi, Bombay, 1985). The Author noted that 'judicial role is *constituted* by dominant ideologies and organisation and relations of force in society' and 'judicial activism consists in articulation of counter-ideologies, which when effective, initiates significant recodifications of power relations within the institutions of governances', being '(…) a response to the problem of the lawlessness of the state, which is the most intransigent problem of the people of India' (*Id.* at 13 and 15).

106 *See* M. Mate, "The Rise of Judicial Governance in the Supreme Court of India" 33 *Boston University International Law Journal* 169 (2015).

107 *Cf.* L. R. Barroso, "Constituição, democracia e supremacia judicial : Direito e política no Brasil contemporâneo" 12 *Revista latino-americana de estudos constitucionais* 661 (2011).

108 *Cf.* L. R. Barroso, "Judicialização, ativismo judicial e legitimidade democrática" *ADV Advocacia dinâmica: seleções jurídicas* 34(2009).

109 *See* H. Leal, M. Clarissa, "La jurisdicción constitucional entre judicialización y activismo judicial: ¿Existe realmente 'un activismo' o 'el' activismo?" vol. 10-núm. 2 *Estudios Constitucionales* 429 (2012).

110 *See* B.S. Tyagi, *Judicial Activism in India* (Srishti Publishers & Distributors, New Delhi, 2000).

As a tentative conclusion, judicial activism in a comparative overview needs to be appreciated as an overall legal phenomenon, not only as an attitude of adjudication. Global South countries reveal this side of judicial activism, which merits further consideration and explorations by reflecting on the possibility of conceiving a 'new trend in contemporary constitutionalism' that, in the era of globalisation, is oriented towards the achievement of social justice.

■

Challenging the Constitutional Foundation of Reproductive Rights in India

Gauri Pillai[1]

Introduction

Let me introduce you to Neelam Choudhary. Neelam was married in 2012. She is subject to continuous physical and mental harassment by her husband and parents-in-law. She is a patient of epilepsy and is under constant medication. She is unable to use oral contraceptive pills fearing a potential reaction of the pills with the epilepsy medication. Though she repeatedly requests her husband to use contraception, he refuses to do so. She becomes pregnant. She wishes to undergo an abortion at 23 weeks, since she has filed for divorce, and wants to pursue further education. She is denied an abortion under the Medical Termination of Pregnancy Act 1971 ('MTPA').[2] Neelam's story will provide the backdrop for my arguments in this paper.

The Constitution of India does not provide explicit protection to reproductive rights. As a result, courts have singularly located reproductive rights within Article 21, the right to 'life' and 'personal liberty'.[3] In this paper, I challenge Article 21 as the constitutional foundation for reproductive rights in India. I begin by arguing that reproduction is not simply a biological process affecting an individual woman. Instead, it is 'social' in two senses, which interrelate to one another (**Part II**). I then show that when assessed against this normative understanding of reproduction, Article 21 falls short, by failing to capture these 'social' dimensions of reproduction. To make this argument, I look closely at the way Article 21 constructs the right to an abortion, particularly what it identifies as the *source* of the right, and the *trigger* for the violation of the right. The source and trigger, I argue, implies that Article 21, *in its very structure*, is incapable of understanding reproduction as 'social' (**Part III**). Finally, I conclude by looking at the way forward, and questioning whether the rights to equality and non-

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1 The author is a DPhil (law) candidate at the University of Oxford.

2 *Neelam Choudhary v Union of India*, 2019 (1) BomCR 681.

3 For instance see: *Suchitra Srivastava v Chandigarh Administration*,(2009) 9 SCC 1 (on abortion); *Laxmi Mandal v DeenDayalHarinagar Hospital*, 172 (2010) DLT 9 (on maternal health care); *Devika Biswas v Union of India*, (2016) 10 SCC 726 (on sterilisation).

discrimination—Articles 14 and 15—can contribute that which is missing under Article 21 (**Part IV**).

The 'Social' Dimensions of Reproduction : Reproduction has an undeniable biological component. Pregnancy has tangible effects on women's bodies, and can cause constant exhaustion, vomiting, loss of appetite, sleeplessness, swelling, soreness, hormonal fluctuations, moods swings, and finally hours of agony during the process of labour.[4] As McDonagh notes, even in a medically normal pregnancy, some hormones in a woman's body rise to 400 times their base level; a new organ, the placenta, grows in her body; all of her blood is rerouted to be available to the growing fetus; her blood plasma and cardiac volume increase forty percent; and her heart rate increases fifteen percent.[5]

However, as Neelam's experiences show, reproduction is not *only* about the biological consequences of pregnancy and childbirth, during a nine month period. Neelam sought an abortion not because she was concerned about the biological burdens of carrying the pregnancy to term but because she was in an abusive marriage, had filed for divorce, and wished to continue her education. She evidently had no control over the decision of whether to become pregnant since she could not use contraception herself, and her husband refused to heed to her request. On childbirth, she would be expected to assume primary responsibility for childcare, which would prevent her from continuing her education. Thus Neelam's decision to undergo an abortion went beyond accounting for the bodily burdens of an unwanted pregnancy. This is the ***first*** **sense in which reproduction is 'social'**: **for an individual woman**—here, Neelam—**reproduction often goes beyond her body and implicates the circumstances leading up to her pregnancy**—here, the physical and mental harassment including her husband's refusal to use contraception—**and the consequences after it**—here, being the primary carer for the child, bringing up the child on her own, and its impact on her education. Being denied reproductive control is thus not merely about

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4 Donald Regan, "Rewriting Roe v. Wade" 77 *Michigan Law Review* 1579-82(1979); MaithreyiKrishnaraj, "Foreword", in JasodharaBagchi (ed), *Interrogating Motherhood* (Sage, 2017) xvii.

5 Eileen McDonagh, "My Body, My Consent: Securing the Constitutional Right to Abortion Funding" 62 *Albany Law Review* 1073(1998).

Neelam's loss of bodily control during gestation and childbirth, but reinforces the lack of power which preceded the denial of control, and furthers her powerlessness going ahead.

Reproduction is also **'social' in a *second* sense**. In the second sense, **it goes beyond the individual woman herself: it pertains to an entire class of persons—*women*—who have been historically disadvantaged on account of their biological ability to reproduce**.[6]The fact that women *can* reproduce is translated into the essentialist, universal assumption that women *must*.[7] Through explicit and implicit signals, society conveys to women that 'to be a mother is to be normal, and properly feminine'.[8] Infertile women are ridiculed, verbally and physically abused, prevented from attending social functions on the pretext that they bring bad luck, and deserted or divorced by their spouses. These women experience emotional turmoil, along with a sense of shame, some saying that they are '[in]complete women' with 'defective and useless' bodies.[9] On the other hand, women who opt not to have children are labelled selfish, lazy and deviant, and face 'inquisitive questions, biased judgments, and a phenomenal amount of pressure', with their reproductive systems becoming exhibits for the public.[10]

For some women, pregnancy is the result of sexual abuse, by strangers and sometimes by their own partners. Women are also denied control over the decision of whether to become pregnant due to inadequate access to contraception and abortion.[11]

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6 Transgender persons are excluded from the immediate scope of this paper. The principles and argument developed here might be arguably extended to transgender persons. However, this is not within the scope of the current project.

7 Evelyn Glenn, Grace Chang and Linda Forcey, *Mothering: Ideology, Experience, and Agency*3 (Routledge, 1993).

8 Mary Boulton, *On Being a Mother*17 (Tavistock Publications, 1983).

9 Sabiha Hussain, "Motherhood and female identity: Experiences of Childless Women of Two Religious Communities in India" 15(3) *Asian Journal of Women's Studies* 82-103(2009); Chandni Bhambhani and Anand Inbanathan, "Not a mother, yet a woman: Exploring experiences of women opting out of motherhood in India" 24(2) *Asian Journal of Women's Studies* 160(2018).

10 Amrita Nandy, "Outliers of Motherhood: Incomplete Women or Fuller Humans" 48(44) *Economic and Political Weekly* 53-59(2013); Maitreyi Das and IevaZumbyte, "The Motherhood Penalty and Female Employment in Urban India" World Bank Group Policy Research Working Paper 8004, 5 (2017) available at https://www.researchgate.net/publication/316086648_The_Motherhood_ Penalty_and_Female_Employment_in_Urban_India (last visited on4 February 2020).

11 See generally Sama and Partners for Law in Development, "Country Assessment on Human Rights in the context of Sexual Health and Reproductive Health Rights" (2018) available at http://nhrc.nic.in/sites/default/files/sexual_health_reproductive_health_rights_SAMA_PLD_2018_010 12019.pdf (last visited on4 February 2020).

Further, women are not only expected to bear children, but also assume primary responsibility for their care.[12]This largely unilateral responsibility of child-care has historically confined women to the domestic sphere, and maintained the distinction, and the hierarchy, between the public and private spheres.[13] Motherhood and paid employment are constructed as incompatible, with women being required to choose between the two, or, if they have to undertake paid work, choose work which conflicts least with their role as a mother.[14]Working women with children are subject to social stigma,[15]and labelled 'career-minded' or 'un-woman-like'.[16] Several empirical studies demonstrate that the presence of young children in the house is associated with lower female workforce participation in India.[17] Women's confinement to the domestic sphere leads to loss of power within the family as they are unable to earn income independently, and hence are dependent on their husbands or other male members.[18]

Those women who do undertake paid work experience the 'double day' burden, as they attempt to perform their responsibilities in the workplace, along with their domestic roles.[19]The difficulty in scaling this 'maternal wall'[20] has been recorded as a crucial reason inhibiting Indian women's rise to top positions in management, with women often refusing

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12 Adrienne Rich, *Of Woman Born: Motherhood as an Experience and Institution*11 (WW Norton and Company, 1976); Nancy Chodorow, *The Reproduction of Mothering*3 (University of California Press 1999); Das and Zumbyte, supra note 10 at 4.

13 Maithreyi Krishnaraj, *Motherhood in India: Glorification without Empowerment?*9 (Routledge, 2010).

14 Sanghamitra Buddhapriya, "Work-Family Challenges and their Impact on Career Decisions: A Study of Indian Women Professionals" 34(1) *Vikalpa* 32(2009).

15 Sonalde Desai and Devaki Jain, "Maternal Employment and Changes in Family Dynamics: The Social Context of Women's Work in Rural South India" 20(1) *Population and Development Review* 128(1994).

16 Buddhapriya, *supra* note 14 at 38.

17 Ratna Sudarshan and Shrayana Bhattacharya, "Through the Magnifying Glass: Women's Work and Labour Force Participation in Delhi" ILO Asia-Pacific Working Paper Series, 21(2008) available at http://www.oit.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_098839.pdf>(last visited on 4 February 2020); PirittaSorsa et al, "Determinants of the Low Female Labour Force Participation In India" OECD Economics Department Working Paper 1207, 23 (2015) available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2015)25&docLanguage=En (last visited on 4 February 2020).

18 Desai and Jain, *supra* note 15 at 119.

19 Sudarshan and Bhattacharya, *supra* note 17at 22; KuntalaLahiri-Dutt and Pallabi Sil, "Women's 'double day' in middle-class homes in small-town India" 22(4) *Contemporary South Asia* 389-98(2014).

20 Diksha Madhok, "What happened to the women who graduated from the IITs in the 90s?"*Quartz India*. June 15 2015, available at https://qz.com/india/424276/what-happened-to-the-women-who-graduated-from-iits-in-the-90s/ (last visited on 4 February 2020).

transfers or promotions, as it could disturb their family life.[21]Employers also tend to discriminate against female employees by viewing them as potential mothers (and therefore, non-committed employees).[22] This is then reflected in their wages, with women being paid lesser wages than men for comparable work.[23] Thus, motherhood places a 'penalty' on female workers in India,[24] and is responsible for the low rates of female labour force participation in India, one of the lowest in the world, and lower than that in most countries of a similar income level.[25]

At the same time, childcare—women's contribution in the home—has a low status. Though 'reproduction entails incredible liabilities and workload, [it] is still considered to be of lesser value compared to men's engagement in production that yields market value'.[26] Labour performed by women within the home is thus invisible and 'inferiorised'.[27]

It is important to acknowledge, however, that women's experiences of motherhood are not homogenous. Women in middle or upper class families have the financial flexibility to opt out of employment, as the income brought in by their spouse is often sufficient.[28] On the other hand, if they do undertake paid work, they can employ domestic help to take over their household responsibilities,[29] allowing them to avoid the double-day shift. In poorer households, in contrast, economic necessity compels women to work.[30] A large proportion of these women belong to marginalised communities, such as the Scheduled Castes, Scheduled Tribes or Other Backward Classes,

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21 Buddhapriya, *supra* note 14 at 31; ReimaraValk and Vasanthi Srinivasan, "Work family balance of Indian women software professionals: A qualitative study" 23 *IIMB Management Review* 39(2011).

22 Das and Zumbye, *supra* note 10 at 5.

23 Maitreyi Das, "Do Traditional Axes of Exclusion Affect Labor Market Outcomes in India?" Social Development Papers: South Asia Series 97 (2006) available at http://documents.worldbank.org/curated/en/195941468034790110/pdf/369630sdp970web.pdf (last visited on 4 February 2020); Anindita Sengupta and Panchanan Das, "Gender Wage Discrimination Across Social and Religious Groups in India: Estimates with Unit Level Data" XLIX(21) *Economic and Political Weekly* 72(2014).

24 Das and Zumbyte, *supra* note 10 at 4.

25 World Bank Group, "India: Women, Work and Employment" Report Number ACS7935, 2 (2014) availablehttps://openknowledge.worldbank.org/bitstream/handle/10986/18737/ACS79350ESW0wh00Box385252B00PUBLIC0.pdf?sequence=1&isAllowed=y (last visited on 4 February 2020).

26 Bhambhani and Inbanathan, *supra* note 9 at 176.

27 Bagchi, *supra* note 4 at 45.

28 Das and Zumbyte, *supra* note 10 at 45; Sorsa et al, *supra* note 17 at 22.

29 Valk and Srinivasan, *supra* note 21 at 46; Lahiri-Dutt and Sil, *supra* note 19 at 401.

30 Desai and Jain, *supra* note 15 at 119; World Bank Group, *supra* note 25 at 11.

whose poverty drives their participation in the labour market.[31]These women often work in the informal sector,[32]which remains unregulated in India. They are thus not offered child-care friendly options like flexible work hours.[33]They also cannot afford paid help. Thus, while all women experience the 'squeeze of reproduction', middle and upper class women can 'buy their way out of the squeeze' by relying on the caring labour of women from disadvantaged socio-economic backgrounds, who could also be mothers.[34]

These examples powerfully indicate the **'social' dimension of reproduction** in the ***second* sense**, by highlighting the close relationship between women's historical disadvantage and their reproductive ability. At the same time, they reveal that

> it is not the fact of mothering that makes women vulnerable, but [its] social construction, the implications for women flowing from the meaning attached to the idea of motherhood, and the terms and conditions under which it is allowed to express itself.[35]

Thus, the disadvantage—both historical and present—experienced by women in their reproductive roles is *not an inevitable consequence* of their reproductive ability, but originates from the *institution of motherhood*, a form of patriarchal social control which has 'ghettoised and degraded' female potentialities.[36]

When Neelam is denied an abortion, it is undoubtedly a decision affecting *her* intimately. However, it also goes beyond Neelam. Neelam is a member of a historically disadvantaged group, and crucially, a group whose members have been disadvantaged on account of their ability to reproduce. Denying Neelam an abortionnot only perpetuates her own powerlessness, but also perpetuates the disadvantage experienced by women as a group by (i)

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31 Sorsa et al, *supra* note 17 at 21; Das and Zumbyte, *supra* note 10 at 13.
32 Uma Rani and JeemolUnni, "Do Economic Reforms Influence Home-Based Work? Evidence from India" 15(3) *Feminist Economics* 194(2009).
33 Das and Zumbyte, *supra* note 10 at 7.
34 Shellee Colleen, "Like a mother to them", in Faye Ginsburg and Rayna Rapp (eds.), *Conceiving the New World Order*97 (University of California Press, 1995).
35 Krishnaraj, *supra* note 13 at 7.
36 Rich, *supra* note 12 at 13.

subordinating women's interests to those of the foetus, (ii) potentially furthering stereotypes about women as mothers or 'baby-machines', and (iii) confining their participation to the private sphere without challenging the divide, and the hierarchy, between the public and private spheres. It is this that the social dimension of reproduction in the second sense highlights. Therefore, reproduction is not simply a biological process affecting an individual woman. Instead it is 'social' in two senses. *It goes beyond an individual woman's body*: it implicates the circumstances leading up to her pregnancy, and the consequences after it. *And, it goes beyond her*: it pertains to an entire class of persons—*women*—who have been historically disadvantaged on account of their biological ability to reproduce.

The two senses of the 'social' dimension are also interrelated. The 'social' dimension in the first sense flows from the 'social' dimension in the second sense. To illustrate, the *reason* reproduction has consequences for Neelam beyond her body—whether it be, for instance, the coercion or violence that preceded the pregnancy or the unequal responsibility of care after it and its educational implications—is *because* she is a *woman*. Thus her experiences of reproduction, bodily and beyond, are not isolated incidents occurring to an individual woman. Rather, they are manifestations of *women's* historical disadvantage, and markers of perpetuation of their subordination, tied closely to their reproductive ability. This normative framework is now used to assess whether Article 21 provides a sufficient constitutional foundation for reproductive rights.

Conceiving Reproduction: The limitations of Article 21

Article 21 guarantees to all persons the right to 'life' and 'personal liberty'. This section examines cases constructing a right to abortion under Article 21. The section will demonstrate that reproductive rights under Article 21 accrue to an individual *because* reproduction involves the individual's body and her intimate decisions concerning it, and has an impact on her health, both mental and physical, and her life. Her claim to the right to abortion arises from the impact of reproduction on her body and the personal nature of reproductive choices. The fact that she is a *woman*, as highlighted

by the 'social' dimension in the second sense, bears no significance under Article 21.

This is evident in cases which view the right to abortion from the prism of the 'right to life'. In *Nand Kishore Sharma*, the constitutionality of the MTPA was challenged. It was argued that the MTPA violates Article 21 because it permits termination of foetal life. The Court refused to enter into 'a debate as to when foetus comes to life'.[37]It instead rejected the claim of unconstitutionality, arguing that the MTPA is in consonance with Article 21:

> The object of the Act being to **save the life of the pregnant woman or relieve her of any injury to her physical and mental health**, and no other thing, it would appear **the Act is rather in consonance with Article 21 of the Constitution of India than in conflict with it**.[38]

Abortion was thus recognised as preserving the life of the individual—here, *incidentally*, the woman—under Article 21, and the MTPA was upheld as constitutional. Applying this principle, the Court, in *X v Union of India*, granted a minor rape victim permission to terminate a 25 week old pregnancy because '**continuing the pregnancy would then lead to maternal mortality**, and violate her right to live a life with dignity under Article 21 enshrined in the Constitution'.[39]Similarly, in *Meera Santosh Pal*, the Court held, '**given the danger to her life**, there is **no doubt that she has a right to protect and preserve her life**.'[40]These examples indicate that the *source* of the right to abortion, i.e., the reason the right to abortion is constitutionally protected under the 'right to life' clause of Article 21, is the role of abortion in preserving the life of an individual. The *trigger* for the violation of this right is then the threat to life. Both the source and trigger under Article 21 are unrelated to the fact that the individual in question is a *woman*, a member of a group historically disadvantaged on account of their reproductive ability.

This is so even if 'life' is interpreted liberally as in *Poornima Devu Mandarkar*. While elaborating on the right to life in the context of abortion, the Court held that 'life' must be interpreted in a 'broad and expansive spirit'

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37 *Nand Kishore Sharma v Union of India*, AIR 2006 Raj. 166, para 4 ('Nand Kishore').
38 *Id*. at para 6, 7.
39 *X v Union of India*, WP 14261/2018 (Bombay High Court, 9 May 2018).
40 *Meera Santosh Pal v Union of India*, AIR 2017 SC 461,para 11.

in order to 'enhance the dignity of the **individual** and the worth of the **human person**'.[41]The right to life was thus recognised as going beyond physical survival or mere animal existence, and capturing the right to 'comprehend **one's being** in its fullest sense'.[42] The Court also held that:

> life is worth living because of the freedoms which enable **each individual** to live life as it should be lived. The best decisions on how life should be lived are entrusted to the **individual**. They are continuously shaped by the social milieu in which **individuals** exist. The duty of the State is to safeguard the ability to take decisions—**the autonomy of the individual**—and not to dictate those decisions.[43]

These cases demonstrate that Neelam has a right to abortion, under the 'right to life' clause, for two reasons. *First*, because an unwanted pregnancy could cause death, or physical harm, and thus threaten Neelam's life. *Second*, because being denied reproductive control prevents Neelam from deciding the course of her own life, which would affect her right to 'life' under an expansive interpretation of 'life', even if there is no threat to physical health. In both these formulations, the fact that Neelam is a *woman* is irrelevant. It is in fact telling that these cases stop at emphasising on the life, dignity and autonomy of an *individual*, without going the additional step of recognising that the individual is a *woman*.

This trend is further evident in judicial decisions which source the right to abortion from the right to 'personal liberty', also protected under Article 21. In *Suchitra Srivastava*, the Supreme Court observed:

> There is no doubt that a woman's right to make reproductive choices **is also a dimension of `personal liberty'** as understood under Article 21 of the Constitution of India. It is important to recognise that **reproductive choices can be exercised to procreate as well as to abstain from procreating**. The crucial

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41 *Poornima DevuMandarkar v Union of India*, WP No 10835/2018 (Bombay High Court, 3 April 2018),para 81('Poornima Devu').

42 *Id*. at para 112.

43 *Id*. at para 85.

> consideration is that a woman's right to **privacy, dignity and bodily integrity** should be respected.[44]

While the Court made reference to women in the context of reproductive decision making, women were not identified as *women*, members of a historically disadvantaged group, and crucially, a group disadvantaged on account of their reproductive ability. Nor was there an interrogation of the impact denying abortion would have on the perpetuation of such disadvantage. Thus, *Suchitra Srivastava* extended constitutional protection to the 'right not to procreate' not because the individual is a *woman*, butbecause the decision not to procreate was in exercise of an individual's personal liberty.

Similarly in *Z v State of Bihar*, the Court held:

> The legislative intention of [the] 1971 Act and the decision in Suchitra Srivastava…prominently emphasise on **personal autonomy of a pregnant woman** to terminate the pregnancy…The fundamental concept relating to **bodily integrity, personal autonomy and sovereignty over her body** have to be given requisite respect while taking the decision.[45]

In *Puttaswamy*, the Court recognised the '**autonomy** of a woman and, as an integral part, her **control over the body**'.[46] The right to privacy under Article 21 was held to protect intimate personal choices, such as those governing reproduction.[47] A woman's 'freedom of choice whether to bear a child or abort her pregnancy' was therefore recognised as falling within the realm of the right to privacy under Article 21.[48]

In *R v State of Haryana*, the Court observed that:

> The woman has an **exclusive and inalienable right over her body** and her reproduction and that cannot be transferred to her family or the State…Article 21 of the Constitution of India provides right to

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44 *Id*. at para 11.
45 *Z vState of Bihar*, CA No 10463/2017 (Supreme Court, 17 August 2017) ,para 58.
46 *KSPuttaswamy v Union of India*, (2017) 10 SCC 1,para 71 (Chandrachud J.).
47 *tId*. at para141, 329.
48 *Id*. at para 229 (Chelameswar J.).

> life and right to privacy…Thus even in the best circumstances, this Court believes that no law or a person can ethically compel a woman to carry on pregnancy that she does not want.[49]

In *Jhuma Roy Sarkar*, the Court held that 'reproductive choice…is an **inseparable part of personal liberty** as protected under Article 21'.[50] Similarly, in *Ayesha Khatoon*, the Court held that 'the freedom of a pregnant woman of **making choice of reproduction** which is **integral part of "personal liberty"** to continue with the pregnancy or otherwise cannot be taken away'.[51]In *X v Union of India*, the pregnancy of the petitioner was unwanted, and thus deemed 'violative of her personal liberty' under Article 21.[52]Thus, the *source* of Neelam's right to abortion, under the 'personal liberty' clause, is the nature of reproductive choice as an exercise of Neelam's liberty. The *trigger* for the violation of the said right is the failure to respect such exercise of liberty.

Reading these cases together makes clear that the *source* of the right to abortion, as a component of reproductive rights under Article 21, is the impact of reproduction on the life or health of an individual *and* the nature of reproductive choice as an exercise of intimate decision making. The *trigger* for the violation of this right is then a threat to life or health, or the failure to respect intimate decisions.

Since the source and trigger are such, Article 21, *in its very structure*, renders irrelevant that (i) Neelam is a *woman* (ii) women are a historically disadvantaged group (iii) women's disadvantaged status is closely related to their reproductive ability, and (iv) denying Neelam an abortion perpetuates the disadvantage and powerlessness of both Neelam and women as a group.

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[49] *R and another v State of Haryana*, CWP No 6733/2016 (Punjab and Haryana High Court, 30 May 2016), para 33.4

[50] *Smt. Jhuma Roy (Sarkar) v State of Tripura*, WP(Civil) 337/2019 (Tripura High Court, 8 March 2019); See also *BhatouBoro v State of Assam*, WP(Civil) 6307/2017 (Guhawati High Court, 31 October 2017), para 6; *X and others v Union of India*, AIR 2017 SC 1055, para 8; *Sarmishtha Chakraborty and Others v Union of India*, 7 SCC 3 (2017), para 11; Hallo Bi v State of MP, WP(Civil) 408/2013 (Madhya Pradesh High Court, 16 January 2013), para 19.

[51] *Ayesha Khatoon v Union of India*, WP 36727/2017 (Bombay High Court, 9 January 2018), para 14('Ayesha Khatoon'); See also *X (Since Minor Through Her Father) v State Of Maharashtra*, WP 12408/2017 (Bombay High Court, 13 October 2017), para 11; See also *Abc v State Of Maharashtra*, WP 3053/2019 (Bombay High Court, 7 March 2019), para 9; *X v State of Maharashtra*, 2018(6)ALLMR262, para 11.

[52] *X v Union of India*, WP 14173/2017 (Bombay High Court, 12 December 2017),para 13.

Thus, my claim is not merely that the *jurisprudence* on the right to abortion as a component of reproductive rights under Article 21 fails to understand reproduction as 'social' in the second sense and is thus limited. By unearthing the source and trigger of the right under Article 21, I go a step forward to show that the *very structure of the right* is what results in this jurisprudence. Thus, even if 'life' under Article 21 is interpreted expansively to go beyond mere survival, as has been in fact been done, it still would be incapable of capturing the 'social' dimension in the second sense as the source and trigger of the right under Article 21 is, in no case, linked to membership of groups, and the history of disadvantage of the said group(s).

In contrast, the 'social' dimension of reproduction in the second sense emphasises that reproduction cannot be viewed *solely* as an intimate decision to be taken by an abstract individual—in the abortion context, a woman. Instead, it pertains to an entire class of persons—*women*—who are historically disadvantaged, and crucially, who have been disadvantaged on account of their biological ability to reproduce. The social dimension of reproduction in the second sense would thus locate Neelam within this specific group history of disadvantage. Through this lens, the *source* of Neelam's right to an abortion lies in her status as a *woman*, a member of a historically disadvantaged group, and especially, a group whose disadvantage is closely associated with their reproductive ability. The *trigger* of the violation of this right is a measure which perpetuates such disadvantage. **The basis for the claim to reproductive rights thus differs under Article 21 and the 'social' dimension of reproduction in the second sense**. Under Article 21, abortion is a woman's issue because only women have the biological ability to reproduce, and denying a woman an abortion could threaten her life, health and liberty. Under the 'social' dimension of reproduction in the second sense, abortion is a woman's issue because women have been historically disadvantaged on account of their biological ability to reproduce, and denying a woman an abortion would further such disadvantage.

The next section examines the way forward, by raising the question of whether the rights to equality and non-discrimination—Articles 14 and 15—

capture the 'social' dimension in the second sense, and thus bring in what Article 21 leaves out.

The Way Forward: The Role of Equality and Non-Discrimination: Do the rights to equality and non-discrimination account for the 'social' dimension of reproduction in the second sense? If so, is there a case to be made for incorporating Articles 14 and 15 within the constitutional foundation for reproductive rights in India? At the outset, it should be clarified that this section does not aim to answer these questions comprehensively. Instead, it raises the questions, and sets out some tentative factors which point to an affirmative response.

The Indian jurisprudence on equality and non-discrimination has been criticised for adopting a formal understanding of equality, with the assessment being restricted to the form of the classification: whether it is based on an intelligible differentia, bearing a rational nexus to the objective of the classification.[53]Under this test, equality requires equal treatment—all those who are the same must be treated the same. If the individuals or groups in question are seen as different, then there exists an intelligible differentia between them, and the differential treatment is justified, even if the differences are the product of historic or systemic discrimination. However, recent scholarship suggests that there is a shift from this formal enquiry to a more substantive one, which focuses not on the form of the classification adopted within the provision, but on the impact of the provision in perpetuating the disadvantage of an already disadvantaged group.[54]This substantive understanding 'takes the position that equality is not predicated on sameness or vitiated by difference but is a practice of social subordination, second-class status, of ranking as inferior and superior, **producing and produced by historical hierarchy**'.[55]The nature of enquiry thus shifts from difference (formal equality) to disadvantage (substantive equality).

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53 This test was set out in *State of West Bengal v Anwar Ali Sarkar*, 1952 SCR 284.

54 Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts*13-38, 56-58(Harper Collins, 2019); RatnaKapur, "Gender Equality" in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta(eds.),*The Oxford Handbook of the Indian Constitution* 744-47 (Oxford University Press, 2016); Catherine A MacKinnon, "Sex equality under the Constitution of India: Problems, prospects, and ''personal laws" 4(2) *International Journal of Constitutional Law* 188-90 (2006).

55 MacKinnon, *supra* note 54 at 186 (emphasis added).

This more substantive enquiry, focused on disadvantage rather than difference, has several features. *First*, the rights holder at the center of this substantive understanding of equality and non-discrimination remains an individual (and not a group). However, unlike Article 21, the individual is not understood abstractly, but is looked at *through the lens of her group membership*: 'because historically the individual has been discriminated against *in virtue* of her membership of a particular group (e.g. *as* a woman, or *as* a Dalit)' it is necessary to take group identity into account to achieve 'genuine equality' for the individual.[56]

Second, group membership is tied closely to the history of disadvantage of the said group, with the objective of the equality and non-discrimination provisions being to redress such disadvantage. This substantive understanding of equality 'makes the recognition of historical reality into an adjudicative principle' by requiring that the law 'promote equality for subordinated groups by ending subordinating practices that promote group-based disadvantage'.[57]As observed by Justice Malhotra in *Navtej Johar*, 'the object of [Article 15][58] was to guarantee protection to those citizens who had suffered historical disadvantage, whether it be of a political, social, or economic nature'.[59]Similarly, the Court in *NALSA* held that 'Article 15…sought to prohibit discrimination on the basis of sex, recognising that sex discrimination is a historical fact and needs to be addressed'.[60]In *Sabarimala*, the Court observed that 'substantive notions of equality require the recognition of and remedies for historical discrimination which has pervaded certain identities'.[61]Finally, in *Joseph Shine*, the Court held 'substantive equality is directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society'.[62]Thus, the 'fulcrum' of the equality and non-

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56 Bhatia, *supra* note 54 at 91, 92 (emphasis in original).
57 MacKinnon, *supra* note 54 at 187.
58 The Constitution of India, art. 15(1) reads: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them".
59 *NavtejJohar v Union of India*, (2018) 1 SCC 791, para 15 (Malhotra J.) ('Navtej);See also Bhatia *supra* note 54 at 57, 58.
60 *NALSA v Union of India*, AIR 2014 SC 1863, para 59.
61 *Indian Young Lawyers Association v State of Kerala*, (2017) 10 SCC 689, para 117 (Chadrachud J.).

discrimination provisions is the 'individual, who, by virtue of her group identities, [is] subjected to disadvantages and disabilities'.[63]

Third, a measure falls foul of this substantive understanding of equality and non-discrimination when it perpetuates such disadvantage. As the Court recognised in *Anuj Garg* 'no law in its ultimate effect should end up perpetuating the oppression of women'.[64]Similarly, in *Joseph Shine*, the Court held that 'the primary enquiry to be undertaken…towards the realisation of substantive equality is to determine whether the provision contributes to the subordination of a disadvantaged group of individuals'.[65]The Court refused to construe the provision in 'formalistic terms' since it would amount to 'a refusal to recognise and address the subjugation that women have suffered as a consequence of the patriarchal order'.[66]The impugned provision was struck down as unconstitutional because it was premised on gender stereotypes which view women as being 'passive', 'devoid of sexual agency'[67] and the 'exclusive sexual possession of a man'.[68]By 'build[ing] on existing gender stereotypes and bias',[69] the provision was held to perpetuate the subordination of women within a 'deeply entrenched patriarchal order'.[70]

Can this substantive understanding of equality and non-discrimination, unlike Article 21, accommodate the 'social' dimension of reproduction in the second sense? To recall, the 'social' dimension in the second sense argues that reproduction goes beyond an individual woman to a class of persons—*women*—who have been historically disadvantaged on account of their biological ability to reproduce. In this sense, it requires that an individual woman seeking an abortion, say Neelam, be located within this specific history of group disadvantage. It also reveals that Neelam's experiences of reproduction, both bodily and beyond ('social' dimension in the first sense), occur to her *because* she is a *woman*. They are not isolated experiences of an

62 *Joseph Shine v Union of India*, (2019)3SCC39, para 38 (Chandrachud J.) ('Joseph Shine').
63 Bhatia,*supra* note 54 at 95.
64 *Anuj Garg v Hotel Association of India*, (2008) 3 SCC, para 145.
65 Joseph Shine, *supra* note 62 atpara 38 (Chandrachud J.).
66 *Id*. at para 65.
67 *Id*. at para 24.
68 *Id*. at para 25.
69 *Id*. at para 45.
70 *Id*. at para 38; For similar analysis, see Navtej, *supra* note 67 at para 37-53 (Chandrachud J.).

individual but, as Part I shows, map onto the various ways *women's* disadvantage is associated with their reproductive ability within the patriarchal institution of motherhood. In this manner, as set out earlier, the social dimension in the first sense emerges from the social dimension in the second sense.

The mode of analysis adopted under the substantive notion of the rights to equality and non-discrimination, I argue, captures the 'social' dimension in the second sense, and by consequence, its interrelationship with the 'social' dimension in the first sense. The structure of reproductive rights (here, the right to abortion) under Article 21—evident in its *source* and *trigger*—means that the right flows from the impact of reproduction on an individual's life, health and intimate choices. Whether the individual is a member of a historically disadvantaged group or not is irrelevant to the analysis under Article 21. This is also borne out within the jurisprudence under Article 21, which does not view the individual as a *woman*. In contrast, as set out above, this enquiry lies at the heart of the substantive understanding of the rights to equality and non-discrimination. These rights, while granted to an individual, look at the individual through the lens of her group membership, recognise the history of disadvantage of the group, and aim to redress that disadvantage by targeting provisions and practices which perpetuate such disadvantage. In essence, the rights to equality and non-discrimination recognise that the individual at the centre of abortion is a *woman*, not merely because only women have the biological ability to reproduce, but also because the history of women's disadvantage is tied to this reproductive ability. These rights, if incorporated within the constitutional foundation of reproductive rights in India, thus have the potential to capture the 'social' dimension of reproduction in the second sense, and its interrelationship with the social dimension in the first sense.

What then is the consequence of this shift in the constitutional foundation of reproductive rights in India? Constitutional rights are used to assess the constitutional validity of legislative provisions—the MTPA, in the context of abortion. So far, the MTPA has been upheld as consistent with

Article 21.[71] A recent petition challenging the constitutionality of MTPA under Article 21, and Articles 14 and 15, uses the latter only to make the limited claim that the MTPA discriminates between married couples and others, since it permits only married couples to terminate on failure of contraception.[72]The petition does not interrogate how a restrictive abortion legislation could further the historical disadvantage experienced by women on account of their reproductive ability. Constitutional rights are also used to interpret statutory provisions. For instance, in *Poornima Devu Mandarkar*[73]and *Ayesha Khatoon*,[74] Article 21 is used to interpret Section 5 of the MTPA expansively. It thus remains to be seen whether Articles 14 and 15, with their potential to capture the 'social' dimension of reproduction in the second sense, can offer additional tools to challenge the constitutionality of the MTPA, and expand the limits of its interpretation. However, regardless, the rights to equality and non-discrimination under Articles 14 and 15 offer a perspective on reproduction that Article 21, due to its very structure, is incapable of providing.

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71 Nand Kishore, *supra* note 37.
72 "SC issues notice on PIL seeking decriminalisation of abortion", *Live Law*, Jul. 15 2019, available at https://www.livelaw.in/top-stories/sc-issues-notice-on-pil-seeking-decriminalization-of-abortion-146377 (last visited on 5 February 2020).
73 Poornima Devu, *supra* note 41.
74 Ayesha Khatoon, *supra* note 51.

Rethinking Equality

Rashmi Raghavan & Neha Sagam[1]

"It would be tragic if the law were so petrified as to be unable to respond to the unending challenge of evolutionary or revolutionary challenges in society"

-W. Friedman

Introduction

The law being the tool of the masses has given a footing for the weak to fight against the powerful. While the oppressed were voiceless when it came to the overwhelming subjugation of society, they are always seen as one unit before the law. The Rule of Law is celebrated as an eternal principle of law as it treats everyone before it equally. However, the Rule of Law has also created problems for those who are either not similarly situated to others or are facing barriers in terms of balancing interests of others or the community. Equality has been restricted to a limited role in the changing nature and norms of society when it is looked at from this singular dimension rather than as an evolving ideal. While the feminist movement has claimed a right to claim its religious spaces on the norm of Equality, the moral itself is overshadowed by its inapplicability to the current body of precedent created for the Rule of Law and its complete absence in the right to practice religion. Thus, women and their claim to be treated equally are sidelined by the technicalities of religion created by the Constitutional Courts that seeks to emancipate them.

This paper in its first part highlights why access to religious spaces is a liberating tool for women who have been hitherto excluded from such spaces. Secondly, we seek to highlight the problems with the Rule of Law doctrine and how it limits claims of discriminatory treatment from being successfully adjudicated within a restrictive body of case law. Thirdly, we show how the right to religious freedom is mired with difficulties in terms of the '*essential religious practices test'* while the '*woman*' question is left to the background. Fourthly, we seek to highlight the '*morality*' clause under Article 25 and

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what possible meanings can be derived from such a reading of the contentious word. Finally, we argue why 'Equality' ought to be read as a part and parcel of '*morality*' within Article 25 to give a fruitful meaning to the clause.

Claiming Religious Spaces: More than God, More than Resistance!

The feminist movement has always been motivated towards securing access; either to opportunities, to welfare, to justice or to spaces. These spaces were usually those inaccessible to them by virtue of their womanhood or the barriers that womanhood placed on them. While the male philosophers have throughout history pondered upon ideals of equality and freedom for all, this freedom was to people similarly situated; which were ultimately the able-bodied, free-thinking men.[2] Women were seen to have a different body, emotional temperament and purpose in life than her male counterpart. She was never seen as equally human to enjoy either the 'vain pleasures' of life or toil towards 'intellectual emancipation'.[3] While it is useful to look at male philosophers' ideas of Equality, it is isolated from the experience and discrimination faced by women and paints a universal picture without taking a majority of its actors and agents into picture.

Women's writing on the other hand is a narrative filled with individual experience in a world that sees them as alien and keeps them aloof from the products of independence.[4] Thus, while Mary Wollstonecraft argues that intellectual emancipation is kept away from women as they are excluded from the sphere of education, Virginia Woolf talks about the necessity of a 'Woman's Space' in '*A Room of One's Own*': a space which is truly her own to freely express creative thought.[5] While Emmeline Pankhurst and her husband see Voting as a means of Political Participation for women to highlight and represent their unique issues as citizens; Catherine Mackinnon, Andrea Dworkin and Martha Nussbaum seek greater interference of the State

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2 See Lynda Lange, Rousseau and Modern Feminism, Social Theory and Practice, Vol. 7, No. 3 (Fall 1981), pp. 245-277

3 See Joseph Hartel, The Integral Feminism of St. Thomas Aquinas, Gregorianum, Vol. 77, No. 3 (1996), pp. 527-547

4 See Riet Turksma, Feminist Classic Philosophers and the Other Women, Economic and Political Weekly, Vol. 36, No. 17 (Apr. 28 - May 4, 2001), pp. 1413- 1417+1419-1424

5 Ibid

into spaces of domesticity when they became increasing sites of violence.[6] While some feminists and authors saw Equality between the sexes as the end goal, philosophers like Simone de Beauvoir saw Equality as a pre-requisite to claim *Moral Freedom*, one that would lead to the emancipation of womankind as a whole; on her own terms and conditions.[7] Therefore, the feminist movement has always been pushing for entry into spaces that would secure equality with her counterparts. While this equality came to be marked as one of access to opportunity when it came to discrimination in employment[8] or access to justice when it comes to harassment of her body[9] or access to liberty when it came to exercising reproductive freedom[10], it ultimately secures the independence and liberation of womankind.

While the Constitutional Drafters were aware of the sub-human status of women and the social reform movement of the 19th century, they shaped the Constitution to secure access to all kinds of public places which were formally or informally forbidden to women.[11] However, such legal equality did not pervade into religious activism, where centuries of tradition and traditional roles have continued to be preached to and followed by women. Thus, while women caused the *'Downfall of Mankind'* in mythology; in reality they bore the additional downfall of being excluded from religious scripts, positions of power in religious institutions and even places of worship. Such religious spaces were not mere geographic locations of prayer, but they continue to be places where meaning is continually made and re-made by those who inhabit them.[12] Such meaning could be philosophical, identity based or even cultural.[13] Inhibiting women from such spaces, is stealing them of such experiences and the ability to make sense of such experiences on the basis of their womanliness.

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6 Ibid

7 See Tove Pettersen, FREEDOM AND FEMINISM IN SIMONE DE BEAUVOIR'S PHILOSOPHY, Simone de Beauvoir Studies, Vol. 24, CELEBRATING A CENTENARY (2007-2008), pp. 57-65

8 Air India v NergeshMeerza&Ors., AIR 1981 SC 1829

9 Visakha v State of Rajasthan, AIR 1997 SC 3011

10 Devika Biswas v. Union of India & Others, W.P. (C) 81/2012.

11 See Constitution of India, Article 15.

12 See SasankaPerera, Space as Political Text: Urban Coherence and Dissonance in the Politics of Beautifying Colombo, Economic and Political Weekly, Vol. 53, Issue No. 50, 22 Dec, 2018

13 Ibid

This intrinsic sense of meaning derived from the practice of Christianity is evident from an ethnographic study conducted among the Dalits of Kerala reveals how religion can completely transform the identities as well as social realities of women.[14] In slave society Kerala, Dalit women were never allowed to bear witness to the Black magic that menfolk performed. In certain other narratives of black magic, although there are examples of women witnessing such rituals and partaking in meals, there is no evidence of actual participation of such women. The missionaries were highly effective in crystallizing the role of women in Christianity as such women played the dual roles of agricultural labourers and wives. The domestication of the religion through daily prayers and hymns were led and conducted by women of the households. Christianity gave them new names and with that new meaning to endure their suffering. Most people who were relegated as the polluted members of their community now found solace in their new identities provided by their missionaries. The education from the churches, the ability to write songs in their native language and moreover; the feeling of being sacred in the eyes of God, gave such slaving men and women newfound self-worth. Such worth is not only a form of religiosity but also a sign of resistance towards religious practices that otherwise oppressed Dalits.

Another study amongst the Muslim women of Bombay shows how technological advancements help women access religious resources which they otherwise couldn't; given the religious orthodoxy.[15] Whilst some women attend women only groups where they discuss religious teachings and interpretations, it also extends to teachings on the internet or personal readings. Whilst older women like Shaheen Apa were satisfied with learning ritualistic practices for herself to practice Islam fervently, newer generation women used such methods to satisfy their curiosity about their identity and history. While some women discard practices which are outdated based on modern reasons and collective reading, other women choose to follow and propagate traditions based on newer interpretations or justifications that

[14] See P Sanal Mohan, Women and Religiosity: Dalit Christianity in Kerala, Economic and Political Weekly, Vol. 52, Issue No. 42-43, 28 Oct, 2017

[15] See Tanvi Patel-Banerjee, Rowena Robinson, Inhabiting or Interrogating Faith Piety among Muslim Women in Mumbai, Economic and Political Weekly, Vol. 52, Issue No. 42-43, 28 Oct, 2017

reason to their beliefs and faith. Here they see a firsthand access to knowledge as essential to form their faith or reject it. Even if it does not make the voice of such religious women 'political', it gives them a sense of purpose and meaning.[16] It increases their spiritual worth in a space which otherwise only tells them to '*act ethically'* but not *'discover their ethical self'* on their own terms. Such forms of religiosity are yearned by women.

The focus on everyday lives and routines of people suggest that religion is not a transformative political tool for everyone but is rather a transformative spiritual tool. The structures that institutionalize religion and faith may be outdated and regressive, but its practitioners continuously claim it either to revive it or discard it in the changing face of modernity. Religious spaces give women a sense of personal affinity and experience, not one of hearsay that the elderly provide. Early feminist positions that outright rejected religion may have ignored the liberation that spiritual engagement could provide. Such personal engagement is nevertheless an exercise of personal choice and freedom and therefore emancipatory to the women who make it. Ultimately, such equality of access to public spaces is only a battle in the ultimate war for women's freedom.[17]

The Cloak of Rule of Law: Choking Equality!

The basic necessity for implementing the Rule of Law, as we know it, is to maintain coherence and consistency in the legal system. As a corollary, this system also promotes precedents which further rigidify the structure of the law. Feminist critique points out that most laws reflect their norms from a male perspective, considering it to be a universal human perspective. By way of illustration, let's look at the Maternity *Benefit* Act, which entitles women with a certain period of paid leave pre and post child-birth. However, the only way this provision can be judged as a 'benefit' is if the norm against which they are being evaluated is male. If the standard was female, or even human, such benefits could not be considered special since they are far more commonly needed than, say, benefits for a broken leg, or prostate cancer

[16] See Janaki Nair, Faith, Belief, Piety and Feminism-Beyond an Awkward Relationship, Economic and Political Weekly, Vol. 52, Issue No. 42-43, 28 Oct, 2017

[17] Supra Beauvoir, at 6

(neither of which are considered special benefits).[18] Such standards are visible in many laws and preserving the status quo in this way is against the interests of women.[19]

Critics suggest that this form of law both denies and advances women's claim to equality with men. To substantiate the claim of denial, they refer to philosophical assumptions about the limits of law in the liberal state, as reflected by a refusal to intervene in the realm of the personal.[20] Consequently, the status quo is preserved for the sake of non-intervention and women's perspectives are conveniently ignored.[21]In case of the Indian Constitution, the same view can be extended to the protection given to patently discriminating religious practices and personal laws under the garb of neutrality of the State.

Our Courts have consistently showed their commitment towards interpreting our Constitution in a progressive manner, even if that meant going in stark opposition to what the Drafters had in mind.[22] This means that the Constitution is transformational although the text is transfixed.[23] A transformative Constitution (or, more accurately, transformative constitutional provisions) must be distinguished from Constitutions (or constitutional provisions) that merely recognise or preserve an existing status quo, as well as Constitutions that – in pursuit of political liberalism – refrain from endorsing any comprehensive theories of the good.[24]

Secondly the 'reasonable classification' test seems like a compulsory test that is a non-derogable metric when it comes to discrimination lawsuits. The test of reasonable classification or rational nexus was borrowed from the

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18 See Francis, Leslie and Smith, Patricia, "Feminist Philosophy of Law", *The Stanford Encyclopedia of Philosophy* (Winter 2017 Edition), Edward N. Zalta (ed.), available at https://plato.stanford.edu/entries/feminism-law/ .

19 Ibid.

20 Engendering Justice: Women's Perspectives and the Rule of Law, Engendering Justice: Women's Perspectives and the Rule of Law, available athttps://www.jstor.org/stable/825736 .

21 Ibid.

22 See the evolution of the 'Procedural Due Process' Doctrine, Maneka Gandhi v Union of India, (1978) 1 SCC 248

23 S.C Advocates on Record Association v Union of India, AIR 1994 SC 268

24 John Rawls, *Political Liberalism* (Columbia University Press 1993). See 'Freedom from Community', Gautam Bhatia.

American equality jurisprudence. This is a two-pronged test that requires the satisfaction of the following criteria:

1. The classification of persons or objects, in the same class or similarly situated, must be based on an intelligible differentia;
2. Such classification shall have a rational nexus to the object that it seeks to achieve.

However, the problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so, it risks elevating form over substance.[25]Meaning, it fails to take into account the perspectives of the participants in the legal process in its race to crunch the 'relevant facts' into the pre-existing formula. Like stated before, the qualms of women and their civil rights are left aside as secondary and the primary focus of the debate is shifted to whether the classification of women as a separate class is justified according to the tenets of a particular religion.

It is therefore, in the opinion of the authors, unable to deal with complex inequalities arising from social institutions like religion, caste and patriarchy. The institution of religion, for instance, exists in virtual and intangible beliefs of the people. The application of any standard of reasonableness or rationality to a religious practise goes against the inherent nature of this institution and is vehemently rejected by its followers. There ranges a looming threat that anything can seem to be '*reasonable'* to institutions that accommodate beliefs that range from a spectrum of convenient to superstitious, spiritual to outlandish and sometimes outright whimsical.

Even in a modern, secular, liberal state that is explicitly committed to individual freedom, women's fundamental liberties can be obscured and mystified by language and action that uphold and impose longstanding restrictive modes of thought and custom that may not always be recognized

[25] Navtej Singh Johar v. UOI, (2018) 10 SCC 1, p.409 (hereinafter Navtej).

as religious in origin but that have no other plausible explanation. Such restrictions are often expressed in and defended by the use of religious language (such as celibacy or sanctity) that is applied to controversial religious doctrines as though they were settled, basic and uncontroversial.[26]

Thus, confining equality to a dogmatic approach excludes the standpoint of women and fails to fulfil the constitutional commitment to equality before the law and equal protection of law.

Gatekeepers of Religion: Intellectualizing Faith!

Religion has since long been a site of reform of women. For colonial rulers, the atrocities practiced against Indian women became a confirmation of their rule and mission against the backwardness of Indians.[27] The barbarity at that time was marked by Sati, female infanticide, enforcement of celibate, ascetic widowhood and pre-pubertal marriages. The newer Indian social reformers, enriched with a touch of humanism, saw these practices for their barbarity and took it as their mission to fix them within their struggle for independence.[28] 'Women' were seen to be at the forefront of the social reform movement. Sometimes these reforms were through the legislation whilst others were through developing the social sensibilities of people, like in the case of women's education. While the new formed liberal class urged for administrative and legal support from the British, the largely conservative Indian population saw this as an attack on their traditions and way of life. Thus each group took it upon themselves to redefine tradition; using tradition itself. Thus, measures of social reform inevitably became battlefields where one Shastric verse was countered with another, while the moral necessity of such reform and gender parity was left at the backseat, never seeing sufficient discourse or argument. As Lata Mani argues, women were neither 'the subjects nor objects of this discussion' but merely 'a site' on which this

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26 Supra Francis, at 17.

27 See Chatterjee, Ratnabali. 1992. "The Queen's Daughters: Prostitutes as an Outcast Group in Colonial India", Report, Chr. Michelsen Institute, Bergen.

28 See Samita Sen, Toward a Feminist Politics? The Indian Women's Movement in Historical Perspective, POLICY RESEARCH REPORT ON GENDER AND DEVELOPMENT Working Paper Series No. 9

debate was conducted.[29]The social reform movement of the 19th century was subsumed within Shastrik texts, where each side cited religious sources and the real plight of women and their claim to equality failed to see a footing of its own. Therefore, it is evident that defining or redefining religion and its practices has taken away from the essence of the 'woman' question while making it a site where cultural identities are contested; either before the British Parliament then or before the Courts now.

The Constituent Assembly while reaffirming the Right to Freedom of Religion heavily debated whether the right should extend to 'propagate' it as well. Herein, K Santhanam rightly remarks that

It is not so much the words "All persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion" that are important. What are important are the governing words with which the article begins, viz., "Subject to public order, morality and health".

Hitherto it was thought in this country that anything in the name of religion must have the right to unrestricted practice and propagation. But we are now in the new Constitution restricting the right only to that right which is consistent with public order, morality and health. The full implications of this qualification are not easy to discover. Naturally, they will grow with the growing social and moral conscience of the people. For instance, I do not know if for a considerable period of time the people of India will think that purdah is consistent with the health of the people. Similarly, there are many institutions of Hindu religion which the future conscience of the Hindu community will consider as inconsistent with morality."[30]

Coupled with this, Dr. Ambedkar tried to separate the confluence of religion with those elements which were merely incidental to the functioning

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[29] See Mani, Lata. 1986. "The production of an official discourse on Sati in Early Nineteenth Century Bengal, Economic and Political Weekly, 26 April 1986, pp. 32-40.

[30] See Constituent Assembly Debates, Vol. VII, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-06

of social life, such as tenancy or succession.[31] Here religion was not to have precedence as that would virtually imply an absolute diktat over an individual's actions even if they were civil in nature.

Placing these two restrictions makes the Constitution expressly distinguish between those practices which are religious and those which are only associated with it. Implicitly, therefore, it tasks the Courts with drawing the dividing line between the religious and the secular. Secondly, the Constitution allows the State to intervene in, and recalibrate, the relationships within religious groups or communities, in the interests of "social welfare and reform" – an instance of which is requiring public Hindu religious institutions to be open to all Hindus. Once again, the Constitution makes the Courts the ultimate arbiters of the question.[32]

The court therefore was tasked with firstly, checking whether the practice is secular enough to warrant state intervention which it did robustly in cases related to administration of religious institutions[33] or when it came to appointment of head priests to such temples.[34] However, when it came to the second test, which was the determination of whether the practice was religious enough when contested against measures of social reform, the court has taken an inconsistent and isolated approach while ultimately deciding questions of religion.[35]

When it came to determining the practice, the Courts picked up Dr. Ambedkar's '*essentially religious*' wordings to mean an '*essential religious practice*.' This meant that the Court devised a test of its own and became the arbiter of whether a practice was essential to the religion itself. The jurisprudence of what is essential evolved from what was *important* to

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31 Parliament of India, Constituent Assembly Debates, Vol. VII, 2nd December 1948 (speech of Dr. B.R. Ambedkar), available at http://164.100.47.132/LssNew/constituent/vol7p18.html

32 See Bhatia, Gautam, Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution (February 28, 2016). Available at SSRN: https://ssrn.com/abstract=2739235 or http://dx.doi.org/10.2139/ssrn.2739235

33 *PannalalBansilalPitti v State of AP,* (1996) 2 SCC 498

34 N Adithyan v Travancore Devaswom Board, (2002) 8 SCC 106

35 See Faizan Mustafa and Jagteshwar Singh Sohi, Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy, 2017 BYU L. Rev. 915 (2018), Available at: https://digitalcommons.law.byu.edu/lawreview/vol2017/iss4/9

the religion to what was *integral* to the religion itself.[36] Thus, the burden to prove that the ritual or ceremony was a central tenet to the religion without which the religion loses its significance became an uphill battle before the highest Court.

The Court at one instance used the short length of time of the religious practice to discard it to be integral. Thus, the ritual of dance of *Ananda Margis*, did not constitute to be integral enough as it was only a recent practice.[37] Sometimes the lack of texts and sacraments to show proof of specific usage were reason enough to show that appointment of Malayali Brahmins was not an essential tenet of the religious denomination of Hinduism.[38] Even the availability of sacred texts has not precluded the court from discarding their importance. These texts have especially made an appearance in cases relating to the religious freedom of the practice of Islam. In *Gulam Abbas v State of UP*,[39] the Court without commenting on whether maintenance of graves as per Shia faith was central to the faith of Islam moved on to discuss why the action of shifting them was a necessity to maintain peace among the conflicted Shia and Sunni sects. The Court justified its interference in order to enable the larger interest of the society and to enable performance of religious ceremonies by both the sects.[40] When the entry into the Haji Ali Dargah was made by women[41], the respondents produced verses of the Surrahs to show how the practice had religious backing. Without commenting on whether such a practice was antithetical to gender equality, the Court used the fact that the Dargah was previously open for women to call it non-essential to the religion itself, again relying on history rather than the provisions of law set in the Constitution. The most confusing of interpretations comes across in the Triple Talaq judgments as the Court tries to separate religious theology from religious law. Whilst the majority contended that what was bad in theology was ultimately bad in law, they did not seem to draw a legitimate inference on whether such a practice

36 Supra Bhatia, at 31
37 Comm'r of Police v Avadhuta, Civ. App. No. 6230 of 1990
38 Supra note 33
39 (1984) 1 SCC 81
40 Ibid
41 NoorjahanSafia Niaz v State of Maharashtra, 2016 SCC Online Bom 5394

was anathema to public order or morality to not warrant continuance within the meaning of Article 25 and 26.[42] It seems somehow that practices that are inconvenient to continue due to changing social attitudes around it, get conveniently judged as 'unessential religious practices'. Since, they are not essential in the eyes of the law, the Court does not have to justify the extent of restrictions placed on them and whether they are proportionate or even relevant. Thus, the Court has circumvented a series of restrictions placed on religions by calling the practices themselves as incidental and/or arising out of superstition.

While the dual tasks of defining religion and essential religious practices using theology, sacraments and textual commentaries seems like an attractive task for the Constitutional Courts what it ends up doing is having a sharply varied opinion on religion and its tenets which is isolated from the parties that plead for its continuance/discontinuance or those practicing it. In the words of T.J Gunn such definitions "establish rules for regulating social and legal relations among people who themselves may have sharply different attitudes about what religion is and which manifestations of it are entitled to protection."[43]

Thus, while the Court seems to eliminate superstitious or redundant practices as un-essential it gets into a quagmire of discarding any and all sorts of religious practices as merely incidental or worse, some practices which have continued through ages are side-lined without a proper explanation on why despite their high credence, they ought not to be continued. The problem with using such a definitional test is that it precludes a religious freedom claim by determining that it falls outside the scope of a constitutional guarantee, before any consideration could be made concerning the appropriate balance between the right and competing rights or interests.[44] The Haji Ali case deserved a broader argument on the competing interests of women to enter *vis a vis* the right of the denomination to preserve its practice,

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42 ShayaraBano v Union of India, (2017) 9 SCC 1

43 See T.J.Gunn, The Complexity of Religion and the Definition of "Religion" in International Law, 16 HARV. HUM. RTS. J. 189,195 (2003)

44 See Jaclyn L. Neo, Definitional imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication, available at https://academic.oup.com/icon/article-abstract/16/2/574/5036472

as regressive it may be. The Court would have been better off having taken the practice at face value and then balancing it with the changing notions of morality of society.

The definitional test used by the Indian Courts has become popular in other south Asian countries like Malaysia and Singapore. This has created similar problems of using international interpretations of sacred texts over localized versions to hold the practices as unessential.[45]A refreshing change was brought about by the High Court of Singapore when it held that the playing of music during the Thaipusam festival was indeed integral to the celebration of the festival by Hindus. This led them to further the discussion on the whether the restrictions on playing the music was legitimate for maintaining public order and found in favour of the Government as they had given due regard to the freedom of the members and had not imposed a complete ban thereof.[46] This approach is sensitive towards religion and its followers by giving them a grounding to place their religious tenets before the Court without those being dissected as irrational by their arbiters. It is equally sensitive towards the State and reformers of religion as their claims are taken at face value, without placing a burden on them to prove the banality of the religious practice itself.

The Constitution being one of the guarantors of Equality for all sexes and classes of people, can be seen to draw a distinction from the colonial period's reform movements where abhorrent practices were protected and demystified using religious texts. The Constitution was meant to be the foreground for such competing claims, and the Courts were meant to be its arbiters. The bare text itself is clearly indicative that religious practices which overwhelmingly encroach on an individual's or collective society's functioning, shall not be upheld. The text itself gives the scope of this right and its limitations in practice. Thus, even the most integral religious practices need not be upheld if they are immoral or lead to the oppression of others or are a public health hazard. Once the Court holds that religious belief can incorporate irrational beliefs, it does not dwell to comment on their

[45] Hjh Hadimatussaadiahbte Hj Kamaruddin v Public services Commission, Malaysia and Anor.,[1993] 3 M.L.J. 61

[46] Vijaya Kumar s/o Rajendran and Others v Attorney General, [2015] S.G.H.C. 244

essentiality to the specific person and/or the community. When the Courts have agreed that the freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life and such a journey is personal between the individual and his creator[47], it cannot discredit such faith and practices as merely incidental. What it could do is test the restrictions and reforms within the anvil of restrictions placed under the constitutional scheme.[48]

The Morality of Religious Freedom: Right and Wrong Meanings!

Articles 25 and 26 of the Constitution make individual rights as well as the right of religious denominations subject to *"public order, morality and health"*. In light of the recent judgement of the Supreme Court in the Sabarimala Case as well as the petitions currently sub-judice, it is imperative to decode the term '*morality*' keeping in mind the intention of the drafters of the Constitution. This section tries to show that "*constitutional morality*" is the only justified interpretation of the morality clause.

a. Public Morality[49]

As a rule of interpretation of statutes, the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said.[50]Thus, where the article dealing with the clause itself omits the word "public" before morality (as opposed to 'public order'), it would be incorrect to use additional words and supply a different meaning to it. Similarly the use of a comma between the two phrases shows the intention to distinguish them.

Apart from this analytical interpretation, courts have held that public morality is a transient notion which changes with the change in popular opinions.[51] Advancing this idea, the Delhi High Court in the *Naz Foundation* casequoted Dr.Ambedkar's words from the proceedings of the Constitutional Assembly,

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47 S R Bommai v Union of India, (1994) 3 SCC 1

48 See Vipula Bhatt, Rise of Religious Unfreedom in India: Inception and Exigency of the Essential Religious Practices Test, 3 RSRR 126 (2016)

49 See Gautam Bhatia, *Offend, Shock or Disturb: Free Speech under the Indian Constitution,* Oxford University Press, 2016.

50 GP Singh*, Interpretation of Statutes*, 14th edn., LexisNexis, 2016.

51 See Naz Foundation v. NCT, 160 (2009) DLT 277, (hereinafter Naz Foundation), Navtej,Young Indian Lawyers Association and Ors. v. State of Kerala and Ors., (2018) SCC Online SC 1690, (hereinafter Sabarimala Case).

"***Popular morality, as distinct from constitutional morality derived from constitutional values, is based on shifting and subjecting notions of what is right and wrong***".[52]

Thus, the morality clause could not have been founded on such fleeting and impermanent ideas.

Additionally, it was never the intention of the drafters of the Constitution to make individual liberty a secondary consideration. This is reflected in the premise of Justice Chandrachud's judgement in the Sabarimala temple entry case where he stated that individual dignity cannot be allowed to be subordinate to the morality of the mob. Nor can the intolerance of society operate as a marauding morality to control individual self-expression in its manifest form.[53]This means majoritarian perceptions cannot be the basis for determining the constitutionality of any custom having the force of law. The Constitutional Court is tasked with upholding the principles enshrined in the Constitution even against popular notions that perpetuate inequality and injustice.

The provisions in Part III, have directed the State to undertake affirmative action and facilitate social reform. It has enabled the State to eliminate institutionalized horizontal discrimination faced by the backward and vulnerable sections of the society. This very idea counters the hegemony of the prevalent social morality that the majority seeks to impose on individuals in the society. It reflects that 'Collective Morality' could not have been envisaged under this wording.

b. Individual Morality

In the normative sense, '*morality*' refers to a code of conduct that would be accepted by anyone who meets certain intellectual and volitional conditions, almost always including the condition of being rational.[54]

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52 Naz Foundation, p.79.

53 Sabarimala Case, p.188.

54 See Gert, Bernard and Gert, Joshua, "The Definition of Morality", *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/fall2017/entries/morality-definition/

In a society as diverse as India, inclusive of all major religions and numerous ways of life, individual morality is not based on any universal idea. For example A may believe that women are impure on religious grounds, while B – an atheist - does not believe in the authority of religion at all. The parameters of ascertaining individual morality will differ to great lengths.It is not sound therefore for a law to be based on such variant moralities because it acts as a hindrance to the uniform application of law. Ultimately, it will end up requiring an external authority (legislature or court) to label one set of values as good, or true, or integral.[55] This brings us back to the same problem, where other perspectives disagreeing with the values adopted by the State, will be disregarded in an effort to maintain consistency and stability in the law.

Such a paternalistic model of State is neither necessary nor desirable in a liberal democracy that values personal autonomy.

c. Constitutional Morality

In its most basic understanding, constitutional morality is adherence to the values and principles promoted by the Constitution for the functioning of our democracy. It is an "enabling framework that allows a society the possibilities of self-renewal"[56]

It can be distinguished from popular morality because constitutional morality cannot be temporary or merely a reflection of what the majority believes, in this time and age, to be desirable. It hasa permanent value rooted in the founding values of the Constitution – justice, equality, liberty and fraternity.

Constitutional morality is an over-arching principle that governs the ethical and immoral, the ignorant as well as the knowledgeable, the ones seeking to reform and those guarding their positions using the law. Although a recent principle, it envisages an imagined order that binds all persons irrespective of their inclination towards it. Therefore, any social order that goes against this fabric will inevitably succumb to it.

[55]Supra note 48 at p.120
[56] Govt of NCT of Delhi v. UOI, CIVIL APPEAL NO. 2357 OF 2017.

Individual rights are of paramount importance in all liberal constitutions and effectively, a guarantee of fundamental rights is equally given to everyone. It cannot therefore be construed that the practise of fundamental rights by an individual is at the desire of the majority. This design of the Constitution forms an integral part of constitutional morality.

Equality as a Constitutional Moral: Undeterred!

Most notions of Equality follow a distributive principle where giving to the poor for their sustenance, affirmative action for correcting past injustices or medical aid for the seriously sick will bring '*them'* on par with '*us'*. Such a notion follows the idea from a humanistic perspective that the 'Weak need our help!'. However, as feminist and philosopher Elizabeth Anderson argues, such perspectives of Equality are at best conservative and not in tandem with the current political movements that actively seek it to build a better life.[57] She argues that Equality is not about distributing divisible private resources such as income, wealth and welfare among the misfortunate rather, in its purest political form is about fighting oppressive social attitudes that bind movement and free thinking. It builds to break away from social structures that impose identities and unjust practices onto its bodies to a more respectable and meaningful life. Such Egalitarianism ought to reflect a generous, humane, cosmopolitan vision of a society that recognizes individuals as equals in all their diversity. It should promote institutional arrangements that enable the diversity of people's talents, aspirations, roles, and cultures to benefit everyone and to be recognized as mutually beneficial. True egalitarianism is when claims to social and political equality are on the fact of universal moral equality.[58] This universality is indicative of its true democratic sense, one that exists for all.

She expounds that such moral equality negatively opposes social relationships of hierarchy that marginalize, demean and inflict violence on others. Positively, it seeks a social order in which persons stand '*in relations'*

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[57] See Elizabeth S. Anderson, What is the Point of Equality?, Ethics, Vol. 109, No. 2 (Jan., 1999), pp. 287-337

[58] Ibid

of equality.[59] Here, people seek to live in a democratic community as opposed to a hierarchical one. Such a democracy cares not only about the distribution of goods, but the relationships *within* which goods are distributed. She claims that this form of 'democratic equality' guarantees the social conditions of living a free life where one stands in relations of equality with others. To live in such a community, then, is to be free from oppression, to participate and enjoy the goods of society and to participate in democratic self-government. Such an equality then expands a person's access to gain those talents that make her capable in life. While it does not guarantee equal capabilities for all, it strives for an equal pathway for all to access those resources which shall enhance their capabilities.[60] Thus, while citizens can claim their capabilities as equals it means that citizens ultimately owe one another the social conditions by which they can also function as equals. This sort of 'Democratic Equality' ultimately creates a space where Inequality is a by-product of people converting natural diversities into oppressive hierarchies. Such a view ultimately locates unjust deficiencies in the social order rather than in people's innate endowments.

This very idea of democratic equality is embodied in the Constitution of India. Our Constitution never believed in the concept of hand-outs, but the provisions were framed in a way where naturally occurring differences like sex and place of birth as well as socially constructed hierarchies like caste and titular status of persons never disembodied their access to *goods or capabilities* in Anderson's terms.

The golden thread of equality runs through the bulk of the Constitution, albeit in different forms. Though the principal provision relating to equality before the law is embodied in Article 14, the four articles which follow it are a manifestation of its basic doctrines.[61] Our constitutional ethos rejects any discriminatory or arbitrary action that infringes upon the guaranteed freedoms. Article 19 recognises six freedoms as an equal entitlement "of all citizens" without exception or discrimination of any

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[59] Ibid

[60] See 75. Amartya Sen, Inequality Re-examined (Cambridge, Mass.: Harvard University Press, 1992), pp. 39-42, 49.

[61] Sabarimala Case, p.191.

kind.[62] Article 25 protects the equal entitlement of all to a freedom of religion, placing everyone on the same platform. Such equality is embedded by principles like:

1. Anti-subordination

Equality as envisaged under Article 14 surpasses the notion of formal equality. It aims to achieve a civil society which believes that all human beings are created equally. The anti-subordination tone of equality can be traced in the formulation of Articles 15 to 18. Article 15 and 16 prohibit any discrimination by the State in access to public places and public employment respectively. Article 17 prohibits untouchability of all kinds, and Article 18 abolishes titles with the aim of eliminating any notions of hierarchy amongst the citizens.

However, gendered roles of men and women act as a hindrance to such development. Traditionally, in the patriarchal society, women have always been seen as subordinate to men. This subjugation was made permanent through religion, social practices and economic dependence. After independence, the adoption of the Constitution aimed at emancipating women from this second-class treatment and made them equal citizens of this country. The anti-subordination conception of equality is that, the Constitution is committed to achieve equality by tackling practices of historical and present subordination, whether they are at the instance of the State, or at the instance of private individuals, groups or communities.[63]

For instance, the respondents in the Sabarimala case argued that women, by virtue of their menstrual cycles, are unable to complete the 41 day Vratham required for the pilgrimage. Further, it was also said that the period of menstruation signifies uncleanliness of the body and women in this time are not allowed by Hindu customs to partake in religious activities. Rejecting all such claims, the bench held that the contentions of the respondent stigmatizes women and stereotypes them as being weak and lesser human beings than men.[64]

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62 Reasonable restrictions are allowed within the permissible limits. See Sabarimala Case, p. 191.
63 Supra note 48 at p.128
64 Sabarimala Case, p.63

Gender being a social construct, it takes whatever shape the society gives it and this case was a prime example of the negative impact of discriminating religious beliefs of "purity and pollution". This patriarchal idea and the resultant stigma attached to women creates a vicious cycle of subordination of women in religious life, which gradually translates and results into further isolation of women in public spaces.

It is the duty of the State to ensure that the Constitution is read progressively and equal rights are guaranteed in consonance with the evolving nature of the society.

2. Non-exclusionary

In the Fundamental Rights Sub-Committee, and in particular, in the "Notes on Fundamental Rights" submitted by K.T. Shah and B.R. Ambedkar, it has been noted,

"The term [right to equality] by itself is likely to be misconceived or interpreted unduly narrowly, if it is not added that equality is not merely equality of treatment before the established system of Law and Order but also of opportunity for self-expression or self-realisation that may be inherent in every human being. One important condition for the due maintenance of such equality is that no restriction be placed in such matters on any human being on the ground of sex, race, speech, creed or colour. All these have in the past been used as excuses for exclusiveness, which must go if equality is to be real and effective for all persons."

Thus, the Constitution in its conception of equality also addresses indirect or horizontal discrimination by private individuals and groups. While Article 15 specifies five such identities (religion, race, caste, sex, place of birth), its logic of protecting vulnerable groups from discrimination forms the basis of Article 14's equal protection guarantee as well, only in more general language. Or, in other words, Article 14 (equal protection) embodies, in abstract terms, the concrete logic of Article 15(1) (non-discrimination).[65] The same is reflected in Article 17 that gives way for action against the State as

[65] Equal Moral Membership: Naz Foundation and the Refashioning of Equality, Gautam Bhatia (hereinafter Equal Moral Membership).

well as individuals. A manifestation of this guarantee can also be seen in the enactment of the Protection of Civil Rights Act and the SC/ST Atrocities Act by the Parliament, which flows from the logic of Articles 14 to 18.

The governing principle behind what eventually became Articles 15(2) and 17 of the Constitution was therefore something that we can now define as the anti-exclusion principle: the Constitution limits the power of groups and communities to exclude their constituents in a manner that would interfere with their freedom to participate in normal economic, social and cultural life[66]

The fact that almost all recognized traditional texts have been male narratives has meant that what a community defines as its central stories spring largely from male definitions and priorities. Female views have either been absent or expressed through male imaginations. The study of classical religious texts and scriptures shows that women have absent as authors and subjects – but not necessarily as subjects.[67] The juxtaposition of this understanding of religion with the status and role of women in religion, creates a stark picture of the discrimination faced by them. It entails that in this age, where women are actively seeking to empower themselves it is necessary to redefine religion and make it more inclusive with women as equal stakeholders rather than passive bystanders. Article 25, which is subject to Part III provisions, is necessarily therefore subject to Article 17. To use the ideology of "purity and pollution" is a violation of the constitutional right against "untouchability".[68]

3. Access to Public Goods

"Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of

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66 Supra Bhatia at 31

67 See Diane Dsouza, *Shia Women - Muslim Faith and Practice*,Zubaan an Asso. Of Kali for Women, 2012.

68 Sabarimala Case, p. 259.

society."[69] This was held by the Supreme Court of Canada to note that if an action has a disproportionate impact on a class of persons, it would be suspect.[70]

According to Tarunabh Khaitan, the author of 'A Theory of Discrimination Law', four basic goods that we need to access securely to be able to lead flourishing lives are : satisfaction of one's biological needs, negative freedom, an adequate range of valuable opportunities, and an appropriate level of self-respect.[71]Even if the rational, agonists and atheists perceive religion as pervasive and derogatory in the life of humans, the faith that religion gives life meaning and purpose is reason enough to make that institution an attractive 'social good'.

Women, in the religious sphere, have largely been deemed secondary based on immutable characteristics like physiology and pre-defined gender roles. The conflict between religion and individual rights originates at the helm of this discrimination which confines women to the private sphere The need of the hour is to bring forth a progressive reading of civil rights in a way that secures the access of this disadvantaged section of people to the above mentioned basic social goods for the ultimate realization of their freedom.

Conclusion

The idea of India was forged on treating people alike, therefore, those of different religions, of hierarchical royal entitlements, the systemically oppressed and the voiceless, all simultaneously found legal personhood and equal status in the new legal order. This legal order created a body of rules that formed the Equality principle, but these principles have been found to limit the oppressed when they try to find a footing for their rights within the traditional doctrinaire. The exercise of claiming 'essentiality' in religious practices automatically provides a secondary status to claims of gender equality as women have to legally defeat their Gods in order to gain access to them. A purposive reading of the Right to Religious Freedom itself underlies

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69 Andrews v. Law Society of British Columbia, 1989 SCC OnLine Can SC 8.
70 Navtej, p.445.
71 *'A Theory of Discrimination Law',* TarunabhKhaitan, Oxford Press University.

'Morality' as a restrictive ideal to this practice. This unexplored morality encompasses the ideal of Equality, one that secures a space for the excluded as simultaneously entitled to all benefits as part of the new constitutional legal order. While Equality would liberate women, it is of utmost urgency that Equality itself be liberated from a strictly legal interpretation to what it truly means; an eternally fluid and flexible ethic.

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THEME V : SEXUALITY RIGHTS

The Concept of Transformative Constitutionalism with Reference to Sexual Minorities in India

Aishwarya Peshwe & Dr. Mrs. Varsha Deshpande[1]

"When you speak of transformative constitutionalism, you speak of infusion of the values of liberty, equality, fraternity and dignity in the social order".

- Justice Chandrachud

Constitution is a living document and thus it has to adapt to ever changing circumstances without losing its intrinsic characteristics. Change is inevitable and thus no society can remain static and it is the duty of the courts through its expansive and purposive interpretation to interpret the provisions in consonance with changing demands and situations. The concept of transformative constitutionalism is very important when the group/ community in question is discriminated, ridiculed not only by the public but also by their family members. If the courts do not incorporate an expansive interpretation so as to protect their rights, the development of law would be insignificant.

The concept of transformative constitutionalism finds its origin in South Africa. The people of South Africa had suffered from many evils ranging from colonisation, unjust legal systems and other discriminatory practices which created inequality and imbalance in the society and thus to redress the problems of the past, the concept of transformative constitutionalism was originated. The basic principle in incorporating transformative constitutionalism is to recognise the rights of the disadvantaged groups of the society whose rights have not been expressly recognised. The first case in which the Constitutional Court of South Africa interpreted the constitution to be transformative, was Road Accident Fund and another V. Mdeyide[2] in which the Court held the constitution to be

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[2] 2011 (1) BCLR 1 (CC)

transformative to the extent that the rights of the weaker sections of the society are realised and they can lead a respectable and dignified life.[3]

Transformative constitutionalism considers the text of the constitution, its structure, and the historical moment of its framing. It examines the discussions of the drafting committee, where these provisions were first proposed and given shape, and then the constituent assembly debates, where they are passed through the furnace of fierce opposition before being moulded into their final form. Transformative constitutionalism rules out interpretations that cannot be simply reconciled with historical reading of the constitutional text.

Transformative constitutionalism recognises that the framers of the constitution of any country draft it to make it last for generations. Transformative constitutionalism's task is to identify and express these founding principles that constitute the framework within which constitutional interpretations are to be carried on. Transformative constitutionalism does not seek to engage in a purely historical enquiry, rather it takes the constitutional text and the principles embedded in it as its starting point, and attempts to place them in their extended interpretive context in order to understand their meaning.[4]

Transformative constitutionalism not only includes within its ambit the recognition of rights and dignity of individuals but also propagates an environment where every individual is given equal opportunity to develop socially, economically and politically. When guided by Transformative constitutionalism, the society is prevented from indulging in any form of discrimination so that the nation is guided towards a bright future[5]. The judiciary of a country plays a very important role in adopting transformative constitutionalism as it is through their dynamic and expansive interpretation that the extended meaning can be assigned to the words of the constitution.

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3 The Section 377 Judgement has also brought in Transformative Constitutionalism, available at https://www.newsclick.in/section-377-judgement-has-also-brought-transformative-constitutionalism (last visited on February 2,2020)

4 Gautam Bhatia, The Transformative Constitutionalism (Harper Collins Publishers India, Noida, 1st edn., 2019).

5 Navtej Singh Johar V. Union of India, available at https://indiankanoon.org/doc/168671544/ (last visited on February 2, 2020)

In India as well as the United States of America the judiciary has played a critical role in incorporating transformational constitutionalism in reference to neglected and oppressed groups. The homosexuals i.e. LGBT community have been suffering from decades as they are criminalised and they are not given even their basic human rights. The LGBT community has been ridiculed at, prosecuted, discriminated and even abused in the past due to orthodox statutes. It is only through incorporating transformative constitutionalism that the LGBT community in India and United States of America has now been decriminalised and can enjoy their basic human rights. The rights of the LGBT community could be protected as the constitution of these two nations could transform itself according to the changing needs of the society because if the constitution is static it will become mere stale document having no contemporary relevance.

The Supreme Court in State of Kerala V. N.M. Thomas[6] observed that the Indian constitution is a great social document and almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy and therefore the purpose of having a constitution is to transform society for the better and this objective is the fundamental pillar of transformative constitutionalism.[7]

Origin of S.377 of Indian Penal Code

To understand the concept of homosexuality with reference to India it is important to study the origin of S.377 of Indian Penal Code.

In 1833, Thomas Macaulay was appointed as the chairperson of the Indian Law Commission and under his leadership the draft penal code was submitted to the Government of India in 1837. The two main sources from which Lord Macaulay was inspired in drafting the code was the French (Napoleonic) Penal Code,1810 and Edward Livingston's Louisiana Code. This penal code was then submitted o C.H. Cameron and D.Eliott who suggested slight modifications in the draft. The revised Penal Code was then forwarded to the Supreme Court judges and also to the Judges of Sudder Court at Calcutta.

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6 AIR 1976 SC 490

7 *Supra* note 4 at 2

Later on, a council was formed with Mr. Bethune, Legislative Member of Legislative Council of India along with Chief Justice and Justice Buller of Supreme Court at Calcutta and Justice Colvile along with Sir Barnes Peacock to review the Penal Code. It was this committee that submitted the draft equivalent to S.377 of Indian Penal Code.

The Buggery Act of 1533 and The Offences against the Person Act, 1861 also inspired and guided Lord Macaulay in drafting S.377.

1] The Buggery Act, 1533

This law was enacted during the reign of King Henry VIII. The word 'buggery' is derived from the french word 'bougre' which means anal intercourse. As per the act 'buggery' was an unnatural sexual act against the will of God and man and thus it criminalised anal penetration, bestiality and also homosexuality.

2] The Offences against the Person Act,1861

The Buggery Act was repealed in 1828 and was replaced by the offences against the Person Act, 1828. This act provided for easier prosecution of rapists and homosexuals, as the act broadened the definition of unnatural sexual acts. Later on this act was replaced by the Offences against the Person Act, 1861.

Later on, Section 377 was introduced by Lord Macaulay as part of the Indian Penal Code. Thus it can be seen that Section 377 is actually rooted in the legacies of the British colonial state.

Finally, homosexuality was decriminalised in United Kingdom by the Sexual Offences Act, 1967 but it nearly took more than 40 years to decriminalise the same in India.

The 172nd Law Report published in the year 2000 recommended deletion of S.377 of Indian Penal Code consequent to changes made in the preceding sections relating to rape etc.

S.377 in Chapter XVI of Indian Penal Code which defines unnatural offences is as follows –

S.377 – Unnatural Offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punishable with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Transformative Potential in Naz Foundation V. Government of NCT of Delhi[8]

In November – December 1991, AIDS Bhedbhav Virodhi Andolan, an organisation fighting for protecting HIV or AIDS affected persons against discrimination submitted a 70-page report stating the problems faced by homosexuals like extortion, violence, blackmail etc. The report called for decriminalisation of S.377 of Indian Penal Code as it was discriminatory towards LGBT community.[9] This was the first effort taken publicly to protect the LGBT community against discrimination.

Later on in 2006, Naz Foundation filed a PIL in Delhi High Court for decriminalising S.377 which was supported by various organisation's like 'Voices against 377' and 'National AIDS Control Organisation' which stated to exclude adult consensual sex from the ambit of S.377 of Indian Penal Code. Naz Foundation initiated the process of transformative constitutionalism with reference to sexual minorities as the court gave expansive and dynamic interpretation to the provisions of the constitution.

Coram – CJ Ajit Prakash Shah, J. S. Murlidhar.

Interpretation of Art. 14 –As Art.14 does not prohibit reasonable classification, 2 conditions must be fulfilled for the classification to be reasonable –

1] That the classification should be founded on intelligible differentia.

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8 160 Delhi Law Times 277.

9 Timeline: The struggle against section 377 began over two decades ago, available at https://qz.com/india/1379620/section-377-a-timeline-of-indias-battle-for-gay-rights/ (last visited on February 1,2020)

2] That the differentia should have a rational nexus to the objective sought to be achieved by the legislation.

While analysing the legislative purpose of enacting S.377 of Indian Penal Code, the court came to the conclusion that the purpose of enacting S.377 i.e. to prevent child abuse or to fill lacuna in rape law and to protect public health by criminalising homosexual behaviour does not qualify the test of reasonable classification as the objective of protecting children and women has no relation in regard to consensual sexual acts between adults in private and also enforcement of S.377 of Indian Penal Code hampers HIV/AIDS prevention efforts as the health of LGBT members is left unaddressed due to the fear of prosecution. The court interpreted S.377 to be arbitrary and unreasonable as it criminalised private sexual relation between consenting adults which does not have any harmful effect on anyone else. Another aspect of S.377 which violated Art. 14 was that S.377 of Indian Penal Code criminalised sexual acts which were associated with one class of persons i.e. homosexuals and thus targets them as a class.

Interpretation of Art. 15 –The most dynamic interpretation by the court was in relation to Art. 15. The word "sex" in Art. 15 was interpreted by the court expansively to include sexual orientation because discrimination on the basis of the sexual orientation is based on stereotype conduct on the basis of sex. And thus, discrimination on the ground of sexual orientation was considered to be violative of Art.15.

Interpretation of Art. 21–In relation to Art.21 the court stated that right to privacy gives the right to an individual to have relations with whoever he/she likes without interference from outside community. Under the Indian Constitution, right to live with dignity and right to privacy both are dimensions of Art. 21 and Art 377 criminalises his/her identity only on the basis of sexuality and also affects the person's dignity. Thus, the court gave prominence to constitutional morality over public morality as constitutional morality is derived from constitutional values whereas public morality is based on the shifting notions of right and wrong and that constitutional morality and pass the test of compelling state interest and not public morality.

The court highlighted the one basic theme of our Constitution i.e. inclusiveness and thus stated that those perceived by the majority as 'deviant' or 'different' cannot be excluded from the society as constitutional morality should have precedence over public morality.

The Court gave wide interpretation to the Articles of the Constitution so as to protect the rights of homosexuals and held that S.377 violated Arts.14,15 and 21 in so far as it criminalises consensual sexual acts of adults in private, whereas for non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors, S.377 of Indian Penal Code was valid.[10]

The Court interpreted Art14,15 and 21 in a way different from its traditional interpretation. As these rights, i.e. Equality before law, Prohibition against discrimination and protection of life and liberty were earlier interpreted by the courts in reference to male and female only but the Court gave dynamic interpretation so as to include homosexuals in its context so as to protect their rights. The court being the *sentinel on qui vive* protected the rights of the homosexuals by incorporating transformative constitutionalism as they were discriminated only because of their sexual choices.

Later on, this decision of the Delhi High Court was overruled in Suresh Kumar Koushal V. Naz Foundation.[11] But again the constitutional validity of S.377 of Indian Penal Code was challenged in the case of Navtej Singh Johar V. Union of India.[12]

Transformative Constitutionalism in Navtej Singh Johar V. Union of India[13]

In this case, again the constitutional validity of S.377 of Indian Penal Code was challenged by members of the LGBT community, dancer Navtej Singh Johar, journalist Sunil Mehra, chef Ritu Dalmia, hoteliers Aman Nath and Keshav Suri and businesswomen Ayesha Kapur. Already in the case of Naz Foundation the Delhi High Court had expressed its transformative stand, interpreting on the same lines the Honourable Supreme Court decriminalised S.377 of Indian Penal Code unanimously.

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[10] Naz Foundation V. Government of NCT Delhi, available at https://indiankanoon.org/doc/100472805/ (last visited on February 1,2020)
[11] (2014) 1 SCC 1
[12] (2018) 10 SCC 1
[13] *Supra* note 8 at 5

Coram – Dipak Misra CJI, A. N. Khanwilkar J, D.Y. Chandrachud J, Indu Malhotra J, R F Nariman J.

The Court interpreted Arts. of the Constitution in the following manner–

Interpretation of Art. 14 – The main contention for retaining S.377 was to protect women and children against carnal intercourse but consensual carnal intercourse performed by LGBT community is neither injurious to women or children. The court also held that S.377 was targeting one section i.e. the homosexuals and was thus discriminative. Also, S.377 restricted the right of LGBT community of choosing a partner as it criminalised carnal intercourse but right to choose a partner is entirely a matter of choice and cannot be restricted. Therefore S.377 was held to be arbitrary and irrational.

Interpretation of Art. 15 – The court stated that feeling attracted toward someone of the same sex is completely natural as these decisions are controlled by biological and neurological factors. And therefore, it is his/her natural orientation that constitutes core of a person's identity. And if a person is discriminated on the basis of his sexual orientation it affects the self-worth and dignity of the individual.

The court took a very paramount stand as it is completely natural that a person may feel attracted towards someone of the same sex, and prosecution or discriminating a person for his/her personal choice is extremely improper.

Interpretation of Art. 19 -- The right to expression as given under Art 19 can be reasonably restricted only when it is against decency, public order and morality. The acts done by LGBT community in public cannot be stated to be against morality or decency until they are obscene and affect the public order. But S.377 discriminated against them even though they may not get involved in any activity against decency, public order and morality. Thus S.377 of Indian Penal Code violated the fundamental right to expression of LGBT community.

Interpretation of Art. 21 – Interpreting Art.21, the court held that criminalising an individual's choice to perform certain acts in their personal life on account of age old perceptions is violative of dignity of LGBT persons

as these are very personal choices. Although the homosexuals are very meagre in number still they have a right to life and liberty and cannot be discriminated on unsubstantiated grounds. Also, individual autonomy of a person is an important concept within privacy and therefore sexual orientation of a person which is reflective of his/her autonomy is inalienable from him/her and the same cannot be interfered with unless it is against morality or decency. Engaging in consensual sexual acts with someone of the same sex in private cannot be considered to be against decency or morality.

The right to health of the members of the LGBT community is also affected because of S.377 of Indian Penal Code as due to the fear of stigma, violence etc. they refrain from taking medical help and thus have the threat of being exposed to infections like HIV/AIDS. Thus S.377 is also violative of right to health of LGBT community.

Relying on its own decision in the case of National Legal Services Authority v. Union of India[14], it reiterated that "gender identity is intrinsic to one's personality and denying the same would be violative of one's dignity."

The Court also referred to judgements given in Shafin Jahan v. Asokan K.M.[15] and Shakti Vahini v. Union of India[16] reinstating that an adult's right to "choose a life partner of his/her choice" is an aspect of individual liberty and the court cannot interfere with it as it forms an integral part of one's personality.[17]

The Court unanimously decriminalised S.377 of Indian Penal Code as it was violative of Arts. 14, 15, 19 and 21 of the Constitution of India. S.377 was a law enacted in the colonial era and had no contemporary relevance. Therefore, the court through transformative constitutionalism interpreted the text of the constitution in such a way so as to protect the rights of the LGBT community. Decriminalising S.377 was the need of the hour as the LGBT community had been discriminated and oppressed for decades without any fault on their part.

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14 AIR 2014 SC 1863
15 AIR 2018 SC 357
16 AIR 2018 SC 1601
17 *Supra* note 4 at 2

The judgements given in Naz Foundation and Navtej Singh Johar have taken a reformative stand by decriminalising S.377 and declaring that members of the LGBT community are equal to all citizens of the country. These judgements have taken transformative constitutionalism altogether to a new level and will definitely pave way for various other reformation in the legal field in relation to sexual minorities and will help India to bring changes in consonance with the global scenario.

Transformative Constitutionalism in United States of America with Reference to Sexual Minorities

While studying the history of sexual minorities in United State of America it is evident that in the 20th century the homosexuals were discriminated greatly but eventually in the 21st century the rights of the LGBT community were recognised by the judiciary. One of the main reasons for recognition for their rights was change in societal perceptions. As the societal perception regarding homosexuals and their rights changed, the judgements given by the Courts were also easily accepted.

The first lesbian magazine was started in United States in 1947 and after that many organisations were formed for homosexuals similarly various magazines were started for gay and lesbians thus giving them a platform to express themselves and convey solidarity. But in 1952, the American Psychiatric Association listed homosexuality as a form of mental disorder. In 1953, the then President of United States Dwight .D. Eisenhower signed an executive order banning gay people or people guilty of 'sexual perversion' from federal jobs. This was discrimination at altogether new level as people were banned from being appointed in federal jobs because of their sexuality.

The year 1961 saw some progress as Illinois became the first state to decriminalise homosexual acts. The LGBT were still harassed and prosecuted in many areas, like homosexuals in New York city could not be served alcohol in public due to liquor laws which considered gathering of homosexuals as 'disorderly', and thus the authorities would deny drinks to homosexuals and even kick them out. But later in the year 1969, a history changing event catalysed the gay rights movement: The Stonewall Riots. The police raided the Stonewall Inn in Greenwich village in New York, which

was a popular bar for queer people. The Police would frequently raid such bars and arrest homosexuals. But the patrons of the Stonewall Inn fought against police and these riots continued for many days. This event gathered mass support and is therefore one of the defining event in LGBT history. In 1970, to celebrate the one-year anniversary of the Stonewall Riots, the members of the New York City community marched through the local streets and the day was named as 'Christopher Street Liberation Day' and the march was country's first gay pride parade.

Kathy Kozachenko becomes first LGBTQ American lady to be elected to public office in Michigan State Council similarly in 1978, Harvey Milk, who campaigned for gay rights became the first gay man to be elected to a political office in California as a City Supervisor. In the same year, the rainbow flag of the LGBT community which is now considered as a symbol of pride by them was stitched by Gilbert Baker and was unveiled at a pride parade.

In 1979 the first National March on Washington for Lesbian and Gay Rights was organised and more than 1,00,000 people took part in it. In the 1980s and 1990s, with the outbreak of AIDS the homosexuals had to face many struggles as they being easy targets were also harassed by the state authorities. In 1993, President Clinton signed a "Don't Ask, Don't Tell" military policy, that prohibited American gay and lesbians, who were open about their sexuality from serving in the military. But it also prohibited harassment of 'closeted' homosexuals. This was a highly discriminative move by the Government as the homosexuals who were open about their sexuality were prohibited from serving in military.

In 2011, President Obama repealed the "Don't Ask, Don't Tell" policy as many officers were discharged from the military service for refusing to hide their sexuality. In 2015, the Supreme Court legalised same sex marriage throughout the country.[18]

The judiciary also played a very important role in protecting the rights of the homosexuals.

[18] Gay Rights, available at https://www.history.com/topics/gay-rights/history-of-gay-rights (last visited on February 2,2020)

Lawrence V. Texas[19]

In this case four deputy sheriffs from Texas entered into an apartment in Houston as they received a report of someone waving a gun. However, after entering into the apartment they found two men, Tyron Garner and John Lawrence engaged in homosexual conduct and thus they were charged for violating S.21.06(a) of Texas Penal Code.

Coram–Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer, Rehnquist, Scalia, Thomas.

The Court held that there is no historical precedent in America, of laws directly prohibiting homosexual conduct. As till 1970's no state had criminally prosecuted same-sex relationship and after that only nine states have done so. Homosexuals consensually engaging in homosexual activity are protected by the substantive due process clause of the 14th Amendment as an individual's liberty is in question when decisions that are intimate and sexual are regulated by the government. This Judgement recognised the rights of the homosexuals to engage in homosexual conduct and gave the right to them to engage in intimate and personal relationships.

The Court overruled Bowers V. Hardwick[20] that upheld a Georgia statute that prohibited consensual private sodomy amongst homosexuals and heterosexuals. It also held that Bowers was highly overstated as it relied on historical traditions banning homosexual activity and stated that the judgement was mainly based on the religious and moral beliefs of the Justices.[21] Thus the Court by 6-3 struck down sodomy laws in Texas and by extension invalidated laws in 13 other states.[22]

Another Significant Judgement is:

Obergefell V.Hodges[23]

Many same-sex couples sued in various state courts that their protections under Fourteenth Amendment were violated as they are denied the right to marry.

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19 539 U.S. 558 (2003)
20 478 U.S. 168 (1986)
21 Lawrence V. Texas, available at https://legaldictionary.net/lawrence-v-texas (last visited on February 2,2020)
22 Brief History of LGBT Movement in the United States, available at https://www.versiondaily.com/brief-history-of-the-lgbt-movement-in-the-united-states/ (last visited on February 3,2020)
23 83 U.S.L.W. 4592

Coram – Justices Kennedy, Ginsburg, Breyer, Sotomayor, Kagan, Roberts, Scalia, Thomas, Alito.

The Court gave 5-4 decision and held that marriage is one of the fundamental rights as it historical and traditional and is therefore protected under the Due Process Clause under the Fourteenth Amendment as it prevents states from depriving anyone of life, liberty or property without due process of law and thus the right of same-sex couple to marry is also protected by it. He gave four principles to state that marriage is a fundamental right under the United States Constitution –

1] The right to marry is a personal choice, and therefore important to individual autonomy.

2] Marriage is a union unlike any other and should be regarded for its importance to the individuals joined in matrimony.

3] Marriage is proven to be important for raising children, therefore impacting other fundamental rights such as education and procreation.

4] Marriage is a "keystone of the Nation's social order."[24]

Denying same-sex couple the right to marry, amounts to denying them the right simply because they did not have it in the past with no justifiable reason for denying the same. Same-sex couples should be given the same legal treatment in marriage as opposite-sex couples regarding marriage rights, as otherwise it would demean their personhood and deny them their basic human right.

Thus, now same-sex couple are entitled to various benefits like spousal benefits, inheritance rights etc. like opposite sex couple.

These Judgements along with various social incidences shaped the rights of sexual minorities in United States of America.

Study of the Problems Faced by Sexual Minorities in India

There are plethora of problems faced by LGBT community in India like unemployment, discrimination, homelessness, medical problems like

[24] Obergefell v. Hodges: Supreme Court Case, Arguments, Impacts, available at https://www.thoughtco.com/obergefell-v-hodges-4774621 (last visited on February 2,2020)

HIV, depression alcohol abuse etc. They also face problem for inheritance of property, marriage and adoption of children. They are not accepted as an integral part of the community and are treated as social outcaste. As they are out casted by the society they may end up begging and have to live in poverty.

The LGBT persons have very limited employment options. No employer is willing to employ a transgender person because in India we still lack acceptance of LGBT community. Similarly, gays, lesbians also suffer from this problem because society has problem from the way they dress or behave. The transgenders have no access to toilets/bathrooms in public places.

Generally, families do not accept if their male or female child starts behaving in certain ways that are considered inappropriate to the expected gender role and thus as a result the family members may scold, assault even throw their son/sibling out of their house for not behaving as per the roles expected from their child. The families may behave in this way due to various reasons such as: the family is disgraced and ridiculed by the society; diminished chances of their child getting married in the future and thus end of their generation due to opening up about their sexuality. Sometimes it so happens that the person may run away from their home unable to tolerate the discrimination. Even the police physically and mentally abuse LGBT persons, extort money and even arrest them on false allegations.

A study conducted in 2007 documented that in the past one year, the percentage of those MSM and Hijras who reported: forced sex is 46%; physical abuse is 44%; verbal abuse is 56%; blackmail for money is 31% and threat to life is 24%.[25]

The LGBT community also face a lot of discrimination in healthcare settings such as intentional use of male/female pronouns in addressing them, or having issues whether to admit them in “male” or “female” wards, they are also harassed by the hospital staff and the co-patients as they not trained as how to treat or care for persons belonging to LGBT community.

[25] Transgender issues and right in India, available at https://archanasabba.com/transgender-issues-and-rights-in-india (last visited on February 5,2020)

While conducting the research, one of the respondents told the researcher that one of their community member being a transgender was thrown out of her house and thus use to earn her livelihood by begging in trains. But on one unfortunate day, she met with an accident and when they took her to the hospital, for nearly an hour the hospital staff were discussing with each other that whether the patient should be admitted in male or female ward. The patient eventually succumbed to the injuries as she did not receive any treatment. Thus, the LGBT community does not even have basic human rights which everyone deserves to have and thus lead a very disrespectful life.

Non-inclusion of LGBT's as another form of human diversity is the root cause of their human rights violation as they are not respected even as a human being.

Even though S. 377 of Indian Penal Code has been decriminalised by the Honourable Supreme Court but it was done as a result of precedence of constitutional morality over public morality. Thus, the people in India still lack the acceptability of LGBT community. And though S.377 of Indian Penal Code has been decriminalised but the community still faces a many problems.

Conclusion and Suggestions

Conclusion:

In India, S.377 of Indian Penal Code was an outcome of colonial era and was thus decriminalised by the Honourable Supreme Court in Navtej Singh Johar V. Union of India[26]. It was a much-needed step taken by the Supreme Court because the sexual minorities in India have been at the receiving end from many decades. The judgements given by the court in Naz foundation and Navtej Singh Johar gave prominence to constitutional morality over public morality. It was in Naz Foundation's case that the Court invoked the concept of Constitutional morality which was delineated by Dr. Babasaheb Ambedkar in the Constituent Assembly, thus transformative constitutionalism operationalised the concept of constitutional morality.

[26] *Supra* note 11 at 8.

Therefore, though the courts have recognised the rights of homosexuals even then the society has still not accepted them to be integral part of the society. The homosexuals are still ridiculed at, made fun of, addressed by sexually coloured remarks. They still have the fear that their family or society might not accept them and thus they keep their identity under wraps. They are often the victim of bullying, violence, social exclusion, drug abuse, psychological distress, homelessness etc. The society still lacks the acceptability towards LGBT community. They have to deal with all this just because of their sexual preference which is extremely disturbing as it is a very personal matter.

The LGBT community has been facing discrimination from so many years, thus mere recognition of their rights won't give them their deserved respect. But efforts from the society as a whole will give them their deserved respect and position in the society.

The situation in United States of America is quite different from the situation in India. In United States the decriminalisation was done as a result of change in societal situations and perceptions. Various incidences like the Stonewall Riots, repeal of the "Don't Ask, Don't Tell" policy, first gay pride march, election of first gay and lesbian person to federal government have played a key role in changing the societal perceptions regarding homosexuality. And thus, unlike India, the society in United States is more accepting towards LGBT community. As the Indian approach was top-down approach, the acceptability of homosexuals in United States is much more as compared to that in India as in United States it was bottom-up approach. In United States, same sex marriages have been legalised in all the states and they are also entitled to various benefits of marriage, thus the homosexuals are at a better footing as compared to India.

The social conditions and incidences in United States made an atmosphere of acceptance of homosexuals and thus recognising their rights became easier for the courts, but the social conditions in India being more traditional, the rights of the LGBT community have not been yet recognised but decriminalisation of sexual minorities have brought the issue in the

landscape of public discussion which will eventually lead to their acceptance and recognition of their rights.

Thus, it is rightly said that,

> Equality is the soul of liberty; there is, in fact, no liberty without it.
>
> -Frances Wright

Therefore, every human being has the right to be treated with dignity including the LGBT's. Thus, a little change in our ideology, behaviour and acceptability can bring about a lot of change in the society and will definitely make this world a better place to live for everyone.

Suggestions:

Various changes need to be brought to improve the position of LGBT community in the Indian society as they are still not accepted completely. The various changes that need to be brought are –

- The parliament should make laws relating to civil rights of LGBT community such as the right to inherit property, marry and adopt children.
- Special law should be enacted for the protection of homosexuals.
- To check the violence that is perpetrated in the house as well as in the public sphere, the domestic violence law has to be expanded to include non-spousal and parental violence as well.
- The families should be more understanding towards homosexuals as they themselves are in dilemma regarding their sexuality and harsh treatment from family members makes things harder for them.
- The society should also be understanding towards homosexuals as they always have a fear of being excluded from the society.
- The police administration should appoint a standing committee comprising station house officers and human rights and social activists to promptly investigate reports of gross abuses by the police against lesbians, gays, bisexuals and transgenders in public areas and police stations, and the guilty policeman be immediately punished.

- Protection and safety should be ensured for lesbians, gays, bisexuals and transgenders to prevent rape in police custody and in jail. Different cells should be made for them in order to prevent harassment, abuse, and rape.
- The police at all levels should undergo sensitisation workshops by human rights groups/queer groups in order to break down their social prejudices and to train them to accord LGBT community the same courteous and humane treatment as they should towards the general public.
- A comprehensive sex-education program should be included as part of the school curriculum that alters the heterosexist bias in education and provides judgement-free information and fosters a liberal outlook with regard to matters of sexuality, including orientation, identity and behaviour of all sexualities. Vocational training centers should be established for giving the transgender new occupational opportunities.
- The Press Council of India and other watchdog institutions of various popular media (including film, video and TV) should issue guidelines to ensure sensitive and respectful treatment of these issues.
- Counsellors should be appointed in each school so that children if facing any crisis regarding their identity can share their feelings and seek help.
- National as well as state government should develop initiatives to support employers in making workplace and workplace culture more supportive and inclusive of LGBT people.

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Socio-Cultural Analysis of Child Sexual Abuse in India: Impact of POCSO Act

Siddhi Nigam[1]

Introduction

Through years the concept of child sexual abuse was kept in shadows and not discussed openly but was prevalent. Since the medieval era young girls were subjected to sexual abuse which was rationalised in form of marrying young girls or even rulers keeping them in their '*harems'*. Our tradition justified child sexual abuse in form of the '*Devdasi pratha*'[2], *'joginis'*[3] and also practices like *'khafz'* or *'khatna'*[4]. The land where a girl child is considered as an incarnation of 'devi' in that very land there are four children as victims of child sexual abuse in every hour (Report of NCRB 2016).

Child sexual abuse is involving a child in sexual activity that he or she does not completely understand, is incapable of giving informed consent to, or for which the child is not developmentally prepared or that violates the laws or social taboos of society. Child sexual abuse is evidenced by this activity between a child and an adult or another child who intended to gratify the needs of the other person. This may include but is not limited to:

- the inducement or coercion of a child to engage in any unlawful sexual activity;
- the exploitative use of a child in prostitution or other unlawful sexual practices;
- the exploitative use of children in pornographic performance and materials". (WHO)

There have been cases of children imprisoned by relatives, Child erotica[5], Child Exploitation Tracking System(CETS,) Child-on-child sexual

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[2] Devadasi means a woman who performed the service for some deity in a temple. They were unmarried temple servants who had been dedicated to temple deities as young girls through rites resembling Hindu marriage ceremonies

[3] 'Jogini' is used in a derogatory sense by locals to label women dedicated to the Devadasi system. It is used as a means of undermining the women's self-worth as well as taking what is left of their identity.

[4] Female genital mutilation (FGM)--also known as khatna or khafz in the Muslim Bohra community, Young girls aged six and seven are regularly being cut right here

[5] Child erotica is non-pornographic material relating to children that is used by any individuals for sexual purposes.

abuse, Child pornography, Child sex tourism[6] and child marriage which are a mirror of the atrocities faced by children. Paedophiles[7] are also seen in India who are a contribution to increase in crimes against children. According to NHRC Report on Trafficking in Women and Children, in India the population of women and children in sex work in India is stated to be between70, 000 and 1 million of these, 30% are 20 years of age. Nearly 15% began sex work when they were below 15 and 25% entered between 15 and 18 years (NHRC -2002-03). UNICEF has stated that child marriage "represents perhaps the most prevalent form of sexual abuse and exploitation of girls". India considers 'a child' means a minor i.e. anyone under the age 18 and the now with time the people of India have started grasping and accepting the concept of child sexual abuse. We see our government making laws in this regard to stop the increase in cases of child sexual abuse. A report by the Ministry of Women and Child Development in India (supported by Save the Children and UNICEF) shows its major findings in respect of child abuse. The following are the major findings on sexual abuse in India by the Study, Child Abuse, India, 2007.

1. 53.22% children reported having faced one or more forms of sexual abuse.
2. 21.90 % child respondents facing severe forms of sexual abuse and 50.76% other forms of sexual abuse.
3. 50% abuses are persons known to the child or in a position of trust and responsibility.
4. Children on street, children at work and children in institutional care reported the highest incidence of sexual assault.
5. Most of the children did not report the matter to anyone. (Srivastava, A. R., & Mohanty, 2019.)

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6 Child sex tourism is tourism for the purpose of engaging in the prostitution of children, which is commercially facilitated child sexual abuse.

7 Paedophilia is a psychiatric disorder in which an adult or older adolescent experiences a primary or exclusive sexual attraction to prepubescent children.

Historical and Cultural Perspective

Historical perspective

Child abuse is a socially defined construct. It is an artefact of a specific culture and not an outright unchanging occurrence. Anthropological studies show clearly that what is viewed as abusive in one society today is not necessarily seen as such in another. Korbin (1981:4) cites examples of culturally approved practices against children in societies that we would almost certainly define as abusive: these include extremely hot baths, designed to inculcate culturally valued traits; punishments, such as severe beatings, to impress the child with the necessity of adherence to cultural rules; and harsh initiation rites that include genital operations, deprivation of food and sleep, and induced bleeding and vomiting. These all have been practices since the ancient times and were very explicitly shown in paintings and scriptures from not only India but also various other places of the world.

Ancient era, the child, mainly the female, was considered the chattel of her father, to do with as he saw correct. His approval was vital for all her dealings. She was a property with which he could barter for lands and money. With the father's authorization, a troth could be sealed by intercourse with the underage (under 12 years) daughter. Marriage of extremely young girls was not uncommon. Kings used to keep young girls in his harems[8] and there was sale of children in the market along with trafficking which resulted into child sexual abuse. It was seen that rulers like Allauddin Khilji had harems which had not only young girls but young boys as well.

In Hinduism as well as Islam child marriages were considered normal and the appropriate. Dharmaśāstra[9] dictates that girl should be married after they have attained puberty. In Manusmriti[10], a father is said to have done wrong to his daughter if he fails to marry her before puberty and if the girl is not married under 3 years of reaching puberty. Medhātithi's *Bhashya*[11] states the age for marriage of a girl is 8 years old, this can also be inferred from

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8 Conceptions of the harem as a hidden world of sexual subjugation where numerous women lounged in suggestive poses have influenced many paintings, stage productions, films and literary works

9 Dharmaśāstra is a genre of Sanskrit theological texts, and refers to the treatises of Hinduism on dharma.

10 Manusmruti, is an ancient legal text among the many Dharmaśāstras of Hinduism.

11 Medhātithi is one of the oldest and most famous commentators on the Manusmrti

Manusmriti. Even famous leaders like Bal Gangadhar Tilak advocated child marriage. This gave full consent from the side of the family to rape their daughters although there was no consideration of her consent which lead to child sexual abuse. Another prevalent practice in the ancient times was that girls from infancy were carefully selected and fed on poisonous herbs and venomous foods. They were called Vishkanyas (Poisonous virgins). They were used to destroy enemies of kings and nobles and utilized as prostitutes (Biswanath), 1984).

Since early times, fathers paid dowries for the marriage of their daughters. Sociologists stated that some communities hint its derivation to the Muslim invasions. Invaders raped unmarried Hindu girls or carried them off, stimulating Hindus to marry off their daughters almost from birth to guard. At the time of the Delhi Sultanate, political situation was stormy and ruled by Muslim Sultans in an absolute monarchy government. During this period the Sultans fashioned practices such as child marriage and rape of young girls was a very normalised practice. In medieval India, the Mughals had the tawaifs, who were courtesan dancers. The term tawaif was an Arabic word meaning a band of dancing females. The tawaif were meant to excel in dancing, etiquette and poetry along with seducing (Chatterjee, 2008). It thrivedas a profession with full royal patronage. In certain Muslim communities, girls were taught dance and music from their childhood and once they attained maturity they were used as tawaifs and performed mujras for their clients.

Some girls entered the convent, sometimes by the age of 9, to take their vows by age 13. The young nuns were treated like wives by the monks associated with the convent. They were sexually abused were threatened with excommunication[12] if they told of this sexual exploitation. (Crosson-Tower, C, 2010)

Cultural perspective

Apart from child marriages there were various practices in our culture which considered the element of child sexual abuse but swept it under the

[12] Excommunication is the action of officially excluding someone from participation in the sacraments and services of the Christian Church.

carpet. The Indian institution of Devadasi is a religious practice, which offers girls to the deities in Hindu temples. The dedication usually occurs before the girl reaches puberty and requires the girl to become sexually available for community members. It is considered that these girls are serving the society as predestined by the goddess. Her sacred condition and her belonging to the divinity, a Devadasi cannot be married to one particular man, as in the traditional idea of marriage women are transferable property gifted to husbands. Instead, she is a property of a divinity that benevolently concedes her to the whole community. (Jeevanandam and Rekha Pande, 2012)

A more menacing form of the Devadasi sub-culture began engulfing young girls and women of the lowest caste and a type of village prostitute was born – the Jogini. The term 'Jogini' is used in an offensive sense by locals to tag women devoted to the Devadasi system. It is used as a means of devaluating the women's dignity. Conflicting to their historic foils, the Jogini are seen as nothing other than the lowest of low – a prostitute who gets no payment for the acts she's constrained to involve in. Engaged at a young age, the tradition says that the Jogini girl is not to be 'used' till she reaches puberty. When she attains puberty, the priest who remunerated for her devotion gets to 'use' her first and then presented to the rest of the village. At a tender age, all paths of escape seem to be vanished. Here begins the sexual slavery that she will undergo for the rest of her life.

The cruel practice of female genital cutting or female genital mutilation is not just being practised in tribal societies. Practice known as khatna or khafz believes that the clitoris part of a woman's vagina, also known as 'haraam ki boti' is a 'source of sin' or more simply 'unwanted skin'. The concept of cutting off this part of the vagina is embellished with years of patriarchy, young girls go through this torture as it is believed if a woman knows the pleasure she might go "astray" in the marriage, or bring "shame" to the community. India abounds with inexperienced midwives who continue to blemish young girls from the Bohra community. In Volume 1 of *The Pillars of Islam* (Ismail Poonawala's English translation of *Da'im al-Islam*[13]), on page 154, a very analogous sentence is translated like this: "O women, when

[13] Da'a'im al-Islam is an Ismaili Shia Islam Muslim book of jurisprudence. The book was written by Al-Qadi al-Nu'man.

you circumcise your daughters, leave part (of the labia or clitoris), for this will be *chaster for their character*". These all practices are so ingrained in our customs and traditions that it blurs the aspect of child sexual abuse going on in the name of culture.

Social Perspective

Many times the beginning of child sexual abuse are within their households. Victims are not aware but are abused by their own family members. In most (95%) of the cases, the perpetrator is known to the child. They are either relatives or step parents or neighbours or highly trusted people.(MM Singh - 2014) Sexual abuse within the family is generally not reported as it is considered a taboo to blame your parent or relatives for such a practice. As a child we are taught to let the parents or relative do whatever they want even if it is physical violence or sexual. There is an indecisive attitude towards family members who abuse children sexually and are hesitant to impose charges against them. The state rationalises nonaction in such cases on the basis of privacy of the family. (Adenwalla, M. 2000)

Child trafficking has a hand in increasing child sexual abuse cases(CSA). Factors like poor socio-economic status, death of a parent or guardian, and being born to a commercial sex worker were causes of being sent in to commercial sex work and leading to CSA experiences for minor girls that had been trafficked. Early childhood experience of CSA escalates a risk factor for re-victimization as well as initiation into commercial sex work (Choudhry, V., Dayal, 2018).There has been an increase in trafficking in children for sex work in the country. The preferential market for trafficked children can be attributed to their vulnerability, as traffickers find it easy to handle them. (Sen & Nair, 2002). Furthermore, being young means that they can put in more years of work and produce long-term income (Pandey, Sonal. 2018.) As per the Ministry of Women and Child Development estimates, out of the three million females in prostitution in the country, an estimated 40 percent are children and they chained into this gruesome task due to the lack of education and support. These rackets trap the children in such darkness that they are psychologically traumatised throughout their lives.

Apart from the victim's trauma, psychology is involved in cause of such behaviour on the part of the person committing the crime. Paedophilia, a psychiatric disorder that implies an ongoing sexual attraction to pre-pubertal children. A paedophile's sexual gratification makes him commit child sexual abuse. The topic of Paedophilia gained prominence in India only after Freddy Peats was arrested in 1991. He was charged with forcing boys into activities of homosexuality and possessing drugs and pornographic material. For over a decade, Freddy Peats, who appears to be an Anglo-Indian, has been a Goa resident. Investigations, following his arrest found that Peats ran a paedophile den where boys aged 6-16 were forced into prostitution, primarily for German visitors[14].

Incidents of paedophilia often go unnoticed, mostly due to the naive nature of the victim and otherwise due to taboo and societal pressure accompanied with its revelation. The child victim is often threatened by the paedophile against any disclosure. Hence, the ambit of sexual abuse is traumatic not only on the physiological growth, but also on the psychological wellbeing of such a child. (2013, Gargi Whorra and Sudipto Mitra). Even though pedophilia is a mental disorder, it has not been considered as unsoundness of mind, in Indian Penal Code 1860 pursuant to Section 84, crimes committed by pedophilia are not excluded or are not exempt. (Srivastava, A. R., & Mohanty, 2019.) Childcare institution contain a huge portion of victims of CSA which can be seen in the report of the Centre which informed the apex court that around 1575 children out which 1286 are girls and 286 are boys have suffered from such abuse, also there were 140 boys and 40 girls used in child pornography.[15] The place which is established to protect these children are not capable of providing a safe environment. The society's traditions and the mind-set has not altered enough, to give a sense of protection to these innocent lives therefore we don't see much reduction in such cases.

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[14] (http://www.irenees.net/bdf_fiche-analyse-618_en.html)

[15] (http://timesofindia.indiatimes.com/articleshow/65406848.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

Pdophiles' are a specific category of 'Pedophiles' are a specific category of

SITUATION BEFORE POCSO (Protection of Children against Sexual Offences Act)

Though child sexual abuse was prevalent, India had no distinct legislation on it. The laws dealing with sexual offences do not explicitly address child sexual abuse. It is upsetting but true, the India Penal Code 1860 does not identify Child sexual abuse. It is through the application of certain other provisions in the IPC that a child sexual offender is criminalized--these are, inter alia, the offences of rape (Section 375), outraging the modesty of a woman (Section 354), and 'unnatural offences' (Section 377) on a major basis. None of the above sections define in legal terms what constitutes CSA. Only rape and sodomy can lead to criminal conviction. While Sec. 376 IPC seeks to provide women redress against rape, it is rarely interpreted to cover the broad range of sexual abuses [particularly of children] that actually takes place. The word 'rape' is too specific, this does not include abuse on 'boys'; moreover, 'intercourse' is often interpreted to mean with an 'adult' (Kumar, 2003).

The Juvenile Justice (Care and Protection of Children) Act, 2000: Under this act, child in need of care and protection means a child who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts, who is found vulnerable and is likely to be inducted into drug abuse or trafficking or who is being or is likely to be abused for unconscionable gains etc. Sec. 23 of the Act deals with assault, exposes, wilful neglect, mental and physical suffering, for which imprisonment for a term of just 6 months is prescribed.

The Indian Brahmo Samaj[16], had taken up an important role against the practice of child marriage under the leadership of Kesab Chandra Sen[17]. The Government received 'Native Marriage Bill' on 18th November 1868.

[16] Brahmo Samaj is the societal component of Brahmoism, which began as a monotheistic reformist movement of the Hindu religion that appeared during the Bengal Renaissance

[17] Keshub Chandra Sen was an Indian Bengali philosopher and social reformer. He became a member of the Brahmo Samaj in 1856 but founded his own breakaway "Brahmo Samaj of India" in 1866 while the Brahmo Samaj remained under the leadership of Debendranath Tagore

(Nayan, M.2015). The Bill proposed fourteen years as minimum marriageable age for girls and in 1872 the bill passed. The Indian penal code 1860 stated rape is an offence and prescribed punishment. It stated that, if husband has a sexual intercourse with his wife who is below 12 years, it would be treated rape. The social reformers appealed to increase age of consent for girls and Beheramji Malbari[18] was one of them. Finally, 'The age of Consent Act' passed in 1891, which increased the age from 10 years to 12 years. In 1925 India conference under the leadership of Maharani of Baroda took up the resolution which appealed to pass legislation to make marriage under the age of sixteen a penal offence and it demand that the age of consent be raised to sixteen. In 1927, Rai Sahib Haribilas Gour Sarada[19] proposed a bill against child marriage. The bill is known as' The Marriage Restraint Bill', popularly called Sarada Bill. Finally, the bill became an Act in 1929 and came into force in 1930. The Act prescribed punishment for child marriage, if marriage practiced below mentioned age. The Act declared all child marriage illegal, but not void. Therefore, child marriage had unabated after enforcing of the Act. According to child marriage Restraint Act 1929, child marriage is a marriage to which either the contracting parties is a child. Further, section 2 'A' defines child is a person who, if male and female, has not completed 21 years and 18 years of age. (Rajasree, M. R., & Kalesh, P. H,2019).

The principal law that addresses trafficking and prostitution in the country is the Suppression of Immoral Traffic Act (SITA) of 1956 that was later amended to as the Immoral Traffic in Persons Prevention Act (ITPPA) in the year 1986. ITPPA is the main legislative tool to prevent and combat trafficking for the sex trade in India. Its prime objective is to inhibit/abolish commercialised vice i.e. traffic in women and girls for the purpose of prostitution as an organised means of living. The cases of pornography were taken care of under the Young Persons (Harmful Publication) Act, 1956.

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[18] Behramji Merwanji Malabari was an Indian social reformer best known for his ardent advocacy for the protection of the rights of women and for his activities against child marriage

[19] Rai Sahib Har Bilas Sarada introduced The Hindu Child Marriage Bill. This alongwith the bill on age of consent by Sir Hari Singh Gaur

The Act defines the terms 'brothel', 'child', 'corrective institution', 'prostitution', 'protective home', 'public place', 'special police officer', and 'trafficking officer'.

Important provisions and cases for the building of POCSO:

Mathura Rape case:- The Mathura rape case was an incident of custodial rape in India in1972, a tribal girl who was a minor, was raped by two policemen. There were public protests, which eventually led to amendments in Indian rape law via The Criminal Law

Sakshi vs. Union of India[20] 2004 :- The NGO Sakshi filed a writ petition in Public Interest to widen the definition of rape in cases involving children where the child is abused by insertion of objects into the vagina or insertion of the male organ into body parts. The Supreme Court rejected the Plea & dismissed the PIL. But it issued valuable guidelines for trial of rape and sexual abuse which relates to children. A horrific description of Indian pedophile crimes relies on the case This case revealed the shortcomings in the Indian legal system that did not find the heinous act of lust to be rape, and the High Court found the accused guilty of minor offenses to offend women's modesty and hurt

In Satish Mehra v. Delhi Administration[21], where a mother painfully claimed that her father had sexually abused her own daughter at the age of three while in the United States, the demand for a strong legal framework to deal with child abuse cases was reinforced.

Anchorage Case[22]:- Duncan Grant, a charity worker and UK citizen, had set up Anchorage shelter in Mumbai, in 1995 along with Allan Waters, another UK citizen, was a visitor to the home were charged in 2001 with sexual assault after five boys complained to the police about repeated sexual and physical abuse by them. The Supreme Court gave guilty verdicts which sentenced the men.

Article 23 of the Indian Constitution talks about prohibition of all forms of trafficking of human beings and beggar and other forms of forced

[20] Sakshi v. Union of India, (1999) 6 SCC 591
[21] AIR 2004 SC 3567;
[22] (2011) 6 SCC 261

labour and Article 24 explicitly prohibits employment of children below the age of 14 years in any hazardous employment. This provision is incorporated in the Constitution for the safety of the life of children, yet there are cases of forced employment of children in brothels and are trafficked to be sexually exploited.

According to a survey commissioned by the Ministry of Women and Child Development in 2007, the 53% children interviewed reported some form of sexual abuse (Kacker et all, 2015). The cause due to which the rise in child sexual abuse is seen is because of failed acknowledgement by the society. Since there was failure of legislature, a group of offensive behaviours such as sexual assault against children (not amounting to rape), harassment, and exploitation for pornography were never legally sanctioned. (SIROHI, N., & JUNAID, M, 2017).

The Children's Act, 1989, attempts to strike a balance between the state's position, parents ' obligations, and children's rights. Under the British system, it is possible to sue parents who harm or neglect children. The law includes protective measures to seek emergency aid and directives for treatment and supervision. This act could be used by the children facing any kind of abuse by their parents including sexual abuse and hence provided some amount of protection for the children. The Domestic Violence and Matrimonial Proceedings Act, 1976, also stood as a safeguard for women and children from violence at home. The police had the authority to arrest without a warrant if they suspectany kind of violation. There is an indication that child abuse and domestic violence are connected, child abuse and domestic violence quite often occur in the same family along with some cases of the child bride being abused.

Immoral Trafficking (Prevention) Act 1956---- Section 3. Punishment for keeping a Brothel or allowing premises to be used as a Brothel and Section 5 talks about Procuring, inducing or taking person for the sake of prostitution.

Procuration of Minor Girls (Sec. 366A IPC)
Selling of Girls for Prostitution (Sec.372 IPC)
Buying of Girls for Prostitution (Sec. 373 IPC)

POCSO ACT 2012 (Protection of Children against Sexual Offences Act)

The POCSO Act, 2012 is a gender neutral legislation. It defines a child as any individual below 18 years and offers protection to all children against sexual abuse. Definition of child sexual abuse is broad and incorporates the following: *(i)* penetrative sexual assault, *(ii)* aggravated penetrative sexual assault, *(iii)* sexual assault, *(iv)* aggravated sexual assault, *(v)* sexual harassment, *(vi)* using child for pornographic purpose, and (vii) trafficking of children for sexual purposes. The above offences are treated as "aggravated", when the abused child is suffering from mental illness or when the abuse is committed by a person in a position of trust. The Act proposes severe punishment graded in accordance to the magnitude of the offence, with a maximum term of rigorous imprisonment for life, and fine. (Moirangthem, S., Kumar, N. C., & Math, S. B,2015).

This Act incorporates a child friendly process at several stages of the judicial process. A Special Court has to finish the trial within a period of one year, as far as possible. Revealing the name of the child in the media is an offence, punishable up to one year. The law delivers respite and rehabilitation to the child, as soon as the complaint is made to the Special Juvenile Police Unit (SJPU) or to the local police. Instantaneous & adequate care and protection, such as admitting the child into a shelter home or to the hospital within twenty-four hours of the report are provided. The Child Welfare Committee (CWC) is also essential to be informed within 24 hours of the complaint. Moreover, it is a mandate of the National Commission for the Protection of Child Rights (NCPCR) and State Commissions for the Protection of Child Rights (SCPCR) to observe the implementation of the Act. 20 Telephonic help lines (CHILDLINE 1098) and Child Welfare Committees (CWC) under the Juvenile Justice Act (2000) have been established, where reports of child abuse or a child likely to be threatened to be harmed can be made and help sought. (Saini, N, 2013).

Limitations of Pocso Act 2012

Child sexual abuse is a problem having legal, social, medical and psychological repercussions. There are certain drawbacks in the law around the following issues:

Consent: If the child/adolescent refuses to undergo medical examination but the family member or investigating officer is insisting for the medical examination, the POCSO Act is silent and does not give clear direction. There is an urgent need to clarify the issue of consent in such cases. (Moirangthem, S., Kumar, N. C., & Math, S. B, 2015).

Medical examination: The POCSO Act, Section 27(2) dictates that in case of a female child/adolescent victim, the medical examination should be done by a female doctor. On the other hand, the Criminal Law Act, Section 166A of Indian Penal Code mandates the Government medical officer on duty to examine the rape victim without fail. This inconsistent legal position arises when female doctor is not available.

Child marriage: Child marriage and consummation of child marriage are considered illegal under the POCSO Act, 2012. In India even though child marriage is prohibited under secular law, it enjoys sanction under certain Personal Law thus complicating matters[10]. These issues need to be addressed when the law is open for amendment. (Raha , Giliyal, 2012).

Role of mental health professional: The role of mental health professional is crucial in interviewing the child in the court of law. Child sexual abuse can result in both short-term and long-term harmful mental health impact. Mental health professionals need to be involved in follow up care of the victim with regard to emergence of psychiatric disorders, by providing individual counselling, family therapy and rehabilitation. (Sathyanarayana Rao , Nagpal, Andrade , 2013)

Social transforformation

Before POCSO

Indian government's assessment say that 40 percent of India's children are vulnerable to threats such as trafficking, drug abuse, and crime

(MWCD[23], 2011). Therefore, it should be our chief concern to defend them from all kinds of abuse since it's their fundamental right to be secure. Child abuse report by MWCD (2007) revealed that every second child has been sexually assaulted in India. This report also showed that India has one of the world's biggest figure of sexually abused children, below 16 years raped every 155th minute, a child below 10 every 13th hour and one in every 10 children sexually abused at any point of time. (Renu, R., & Chopra, 2019).

A total of 22,500 cases of Crimes against Children were reported in the country during 2008 in comparison to 20,410 cases during 2007, suggesting an increase of 10.2%. Among IPC crimes, number of Kidnapping & Abduction cases increased from 6,377 in 2007 to 7,650 in 2008, registering an increase of 20.0% over 2007. Cases under Child Marriage Restraint Act reported an increase of 8.3% (96 cases in 2007 to 104 cases in 2008). Cases of Selling of Girls for Prostitution decreased by 29.0% during the year 2008 (69 to 49 cases). Cases of Buying of Girls for Prostitution decreased by 25.0% (40 cases in 2007 to 30 cases in 2008).

After POCSO

National Crime Report Bureau (NCRB 2016) states further emphasis on the need for the study to make people conscious in regard to such atrocious crimes which are deep rooted in our system. Total of 36,022 cases of child sexual abuse including rape were reported under POCSO act in India during the year of 2016. (Subramaniyan et al. 2017) reported in their study that to make this world safer for children, we need to guard our sons and daughters equally. The study testified a very low rate of reporting and seeking of help among victims of sexually abused boys in India could be due to the supremacy of patriarchy. This social paradigm is usually applied to comprehend the relegation of girls and women, the fact that it is subjugating all children who are perfect victims irrespective of their gender is being ignored. Male children who are supposedly superior due to their biology, there are irrational expectations from them to overcome the damaging effects of sexual abuse of childhood without treatment.

[23] Ministry of women and child development

Conclusion

It is well known that the cases of child sexual abuse are usually not reported. Even the societies have adopted the so called "ostrich psychology". This attitude of the society has resulted in the unwillingness of the affected individuals to share their distressing and agonizing experiences with anyone close to them or health professionals. Further, knowing and reporting child sexual offence is highly difficult and personal take for many family members and also for survivors. Both survivors and family members feel ashamed bearing the emotional turmoil of the act. The fright of re-victimization because of medical examination, criminal justice system and poorly cognizant society members keeps them mum and go through the anguish for long duration.

The recent Unnao case or Kathua case, all of it stands as a proof that there is something still lacking in our laws or its execution. The legal ambit lacks the strictness as the laws do not discuss about instant justice for the victims. The judicial processes and the following of the hierarchy delays the justice so much that the case starts to lose its essence. Other countries have direct death sentence which inflicts some amount of fear in the minds of people not get involved in such action. Though the POCSO Act, 2012 is an admirable piece of legislation and it identifies almost every form of sexual abuse against children as punishable offence, a few limitations remain. A child not only goes through the physical torture but also suffers from psychological and emotional trauma. Many victims suffer from post-traumatic stress disorder, requiring care and assistance. Hence access to psychosocial support is to be made available to deliver holistic care under one roof for victims of child sexual abuse. Government has been working on improving the situation of child sexual abuse victims in our country and to combat rising cases of child sex abuse, the Union Cabinet approved amendments to strengthen the POCSO Act by including death penalty for aggravated sexual assault on children, besides providing stringent punishments for other crimes against minors.

Few states like Madhya Pradesh have already the law for death penalty for child rapists and even other states like Haryana and Karnataka are

considering for such a step. At such a tender age the child witnesses the dark shades of this world but the law continues to try to bring hope and justice to the child's life by providing them the required justice and taking strict measures to curb such crimes, making the world safe for children.

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Struggle for Recognition –Unaccepted and Unexpected

Tejaswini Malegaonkar[1]

Introduction

Law plays a vital role in the society and the lives of all individuals across the globe. Irrespective of whether they are consciously aware of it or not. It plays a prominent role in the lives of all those individuals who identify themselves as the LGBT (lesbian, gay, bisexual, and transgender) community. The law is the means for justice, equality, and recognition of freedom. All humans have dignity and all humans should be treated as equal is the tenant of law. But anything against it is the violation of principle of laws and could pave the way for discrimination. Freedom from discrimination is based on race, gender, religion, or ethnicity. At times, however, law tends to play a paradoxical role for the LGBT community when used as a tool for repression, oppression, and unrequited control. But we cannot ignore the simple fact that law is also the means for resistance as well as liberation.

This paper will examine the status of sexual minorities in India. There will be study of some real-life instances, based on various media reports, studies, and judgements from the Courts and will primarily bring in to light various privacy violations and other violations continuously being committed by individuals and state authorities against individuals belonging to the LGBT community.

LGBT persons are regularly subjected to various forms of discrimination and violation that are based on the society's perception of their gender identity, sexual orientation, gender expression, or merely because of the fact that their bodies somehow differ from the generally accepted notion of femininity and masculinity. These situations, conditions, or circumstances of discrimination and violence clearly show the apparent violation of their

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basic human rights. The legal obligation of the state and society as a whole is neglected. The LGBT community must have the same rights as it is for any other human being. The violation of any of their rights is a direct violation of human rights. Therefore, there is a dire need to safeguard their rights and protect them from further violations as it is also the need of an hour.

Concept of LGBT

LGBT is an initialism that essentially stands for lesbian, gay, bisexual, and transgender. It emphasises a complex culture diversity of gender identity and sexuality. As with anything else in life, both gender and sexuality tend to exist on a spectrum. They are all primarily defined based on their sexual orientation, which is an archetypically understood as a combination of various terms, including unusual behaviour, distinct identity, and sexual attraction. The common thread that binds all those who identify as LGBT is the fact that they don't exclusively believe their orientation is entirely heterosexual. All those who identify themselves as non-heterosexuals could be men and women, individuals who label themselves as lesbian, gay, bisexual, or any other related terms, and all those who don't identify with these labels experienced the same attraction or engage in sexual behaviour typical to those who identify with the aforesaid labels.

The entire community encompassed by this small acronym LGBT highlights different sections of society and each of these letters represents a specific group that exists within its own sphere with respect to ethnicity, race, geographic location, age, and socio-economic status.

Privacy in India

Talks associated with privacy and sexuality in India are not completed without mentioning section 377 of the Indian Penal Code (IPC). Lord Macaulay institutionalized IPC in 1860 and section 377 effectively criminalizes homosexuality by stating that it is a, "communal intercourse against the order of nature," and is punishable by law. This section was finally legalized, and the archaic law was the instance of whatever is wrong

in the society and state with no acceptance of homosexuality or the LGBT community.

The law was used as a shield and a weapon for systematically arresting, terrorising, prosecuting, and blackmailing all the sexual minorities in the country. This law effectively manages to stick to one public intolerance and abuse, which was unfairly directed towards a specific sexual minority. Thereby, it has successfully forced tons of millions of men and women who identify themselves to be a part of the LGBT community to live in extreme fear and secrecy.

When privacy is understood as the idea of noninterference by the state,[2] as the right to being left alone, it isn't particularly a right that can empower the LGBT community. Any claim related with right to privacy, especially when it comes to same-sex acts, it is often misunderstood as a claim for secrecy- to carry, engage in, or promote so-called "clandestine" acts so that the sexual minorities must seek refuge from the law and the State. This strategy can also backfire whenever there is a dire need for heightened scrutiny, especially in matters about discriminatory actions.[3]

For an unreasonably long time, the idea of privacy was believed to be a negative right that was the infringement of an individual's right to a private life by the state. This primary mistake and understanding of essential concepts laid down in an international regime, has for a long time insisted on the division of civil and political rights from the social and economic rights of an individual. It gave the idea that civil and political rights constituted negative rights, whereas economic and social rights were more positive in their content. Civil and political rights serve to reinforce the present unequal distribution of all social and material goods and stopped the process of development or rather they come as a hurdle. It, in turn, give rise to a presupposition which stated that states require to expand their resources for

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2 Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

3 Cathy Harris, Outing Privacy Litigation: Towards a Contextual Strategy for Lesbian and Gay Rights, 65 Geo. Wash. L. Rev. 248.

upholding social and economic rights, whereas the state doesn't have any such obligation for observing the civil and political rights of its citizens.[4]

Only in the recent past it has managed to acknowledge the reasoning that both civil and political rights, coupled with economic and social rights, give rise to certain positive and negative duties. The judgement given in The Naz Foundation[5] furthers the understanding of the idea of privacy as a positive right. The right to privacy is corollary to the basic right of individuals to lead their life with dignity. The Delhi High Court in its judgement, divided the right to privacy into three important concepts. The first concept discussed the right to privacy as dealing with individuals instead of places. This concept implies that the basic right to privacy is not merely a claim space from state intervention, but it is also directed towards protecting the autonomy of an individual's private will and freedom of choice, as well as action. The second concept is that the right to privacy is intricately linked with an individual's dignity and is therefore connected with the worth and value of all human beings. The third concept about the right to privacy is based on an individual's freedom for autonomous identity. In this context, privacy might be understood as sacrosanct or the harmless space for a concerned individual, so his or her sexual preferences, domestic life, and home environment could be guarded from evasion by any conflicting rights of the society in general.

Institutionalized Homophobia: An account of the State's atrocities against the LGBT Community

In the city of Lucknow in July 2001, a search operation was conducted by the police in a public park were they believed that men were engaged in homosexual activities. The next operation was conducted by two NGOs working on promoting awareness about safe sex issues. 10 people were arrested as a result of these operations. The media resorted to

4 AmitaDhanda, Constructing a New Human Rights Lexicon : Convention on the Rights of Persons with Disabilities, Year 5 No. 8 Sao Paulo June 2008.

5 Naz Foundation v. Government of NCT, Delhi, 160 (2009) DLT 277.

sensationalization of this incident and further fueled homophobia. The Court denied all the accused bail and their photographs along with residential addresses were published and freely presented by the media. Instead of pronouncing a reasoned order, the Magistrate in this case denied bail to the men stating,they "…are polluting the entire society by encouraging young persons and abetting them for committing the offence of sodomy." [6]

Shockingly, another set of arrests took place in 2006 in the same city, wherein the police ended up arresting persons under section 377 of the IPC for allegedly engaging in sexual intercourse in a public park. Once again, news reports were published revealing the identity and home addresses of all the alleged accused. The final conclusion of this case resulted that all the investigation and fact-finding conducted by lawyers and activist was in direct contradiction of the fabricated information provided by the police in the FIR. It was shocking to see that one of the accused was arrested by the police on their personal system issuance of his homosexuality, following which all his contacts were tapped for staging the entrapment of the other three men who were allegedly, accused and arrested.[7] In 2008 at the outskirts of Mumbai there was a raid by police on a gathering of homosexuals, wherein six persons were detained on suspicion and no satisfactory explanation was sought for organizing the event.[8]

In privacy laws if we take a survey and observe the Supreme Court's decision in Kharak Singh v. State of U.P,[9] then this was a clear and blatant violation of the NGO member's right to privacy because of the unrequited search and seizure operations carried out by the local police department. In Govind v. State of MP,[10] the court stated that any "domiciliary visit or picketing by the police must not be the case of danger or risk to the community and its security." The state along with media has caused immense

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6 Arvind Narrain, Queer: Law and Despised Sexualities in India.Criminal Misc. Case No. 2054/2001

7 The Times of India 2006, available at:http://timesofindia.indiatimes.com/Mumbai/Police_bust_gay_party/articleshow/2753740.cms

8 Human Rights Violations in the Transgender Community: A Report by PUCL-K, 2nd ed. 2016.

9 AIR 1963 SC 1295, it was Justice Subba Rao's minority decision here that laid the foundation for the right to privacy in India.

10 AIR 1975 SC 1378

harm to all the accused, regardless of the final decision. As their sexual identities were made public information, it had a direct effect on their future prospects along with present perceptions of the society. This brings to light the issue of suitability of the courts for protecting the rights of all individuals who have not yet openly accepted their gender identity or sexual orientation. The three primary issues of privacy violation highlighted by this case is the primary intrusion because of polices lawlessness, unwarranted sensationalization by media that left the accused at the society's mercy, and the magistrate's inherent bias that legitimized the previously mentioned privacy violations.

All these instances merely go on to show the homophobia of the police machinery, judicial system and the media and their ineptitude to handle such sensitive cases. Unwarranted arrests are not uncommon in this country, and neither is publicizing private accounts of individual sexual behavior. This leads to violations of privacy rights of an already vulnerable group in the society which leads them to be ostracized.

Right to privacy of LGBT minorities

The rudimentary fundamental rights of life and personal liberty includes the basic right to privacy. The Constitution of India does not directly provide any provisions for the right to privacy. However, in several cases, the Supreme Court of India has interpreted this right to be a part of the fundamental rights of Indian citizens. Therefore, this right to privacy is sacrosanct and cannot be encroached upon by the State under any pretext. If we take a survey in our country then we find how this LGBT community and their rights are violated. There are multiple issues and problems related with privacy. For example The Ministry of External Affairs printed the passport application form with an option of entering a person's sex as either "M" or "F" or "E", meaning "Eunuch". This categorization proved to be ambiguous and problematic. The term "eunuch" represents only one part of the transgender community. This categorization seemed to have ignored and

neglected a large part of the community who did not identify as 'eunuch'. The Government afterwards made corrections by changing the category to "Other."[11] The logical question which is aroused is regarding identification of a "sex". There is a violation of privacy when such kind of incidents takes place. Some similar examples are related with Aadhar Card, Pan Card, Admission form or Bank application form.

Legal Developments

The Delhi High Court gave a landmark judgment in 2009 declaring Section 377 of the Indian Penal Code as unconstitutional. It was a public interest litigation which challenged the aforesaid section on the grounds of violating Articles 14, 15 and 21 of the Indian Constitution.

It is the NAZ Foundation case[12] which speaks to and highlights the vision of India's founding fathers to construct a 'comprehensive' and 'tolerant' republic. The choice advises us that the Indian Constitution is dynamic and it covers, and incorporates new conditions and tests. It was expressed that Section 377 is established on conventional Judeo-Christian good and moral norms and is being utilized to legitimize victimization of sexual minorities, for example LGBTs.

It was Suresh Kumar Koushal and another v NAZ Foundation and Others[13]The petitioners argued that the section is destructive to the individuals' life and general wellbeing as it has an immediate effect on the lives of all the people of this community and forms a weapon for police misuse.

It was additionally contended by the Petitioners that Section 377, to the extent that it condemns consensual sexual exercises between two grown-ups of a similar sex and hetero penile non vaginal sex between consenting grown-ups is violative as of Articles 14, 15 and 21 of the Indian Constitution. The

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11 The Internet Centre For and Society, 24th October 2011, available at: http://passport.gov.in/cpv/ppapp1.pdf

12 Civil Appeal 10972 0f 2013

13 Ibid

State contended that Section 377, by all accounts, doesn't make reference to or arrange a specific gathering or sexual orientation and hence isn't violative of Article 14 and 15 and 21 separately. The Court acknowledged their contentions and held that Section 377 isn't violative of Articles 14, 15 and 21 and that intercourse, as planned and characterized by the candidates to mean unnatural desire should be rebuffed. Justice Singhvi additionally said that Section 377 is a pre-protected enactment and in the event that it were violative of any of the rights ensured under Part III, at that point the Parliament would have seen the equivalent and cancelled the section sometime in the past.

In light of this thinking, he proclaimed the section to be unavoidably substantial. He likewise said that the doctrine of severability and the act of perusing a specific lawcomes from the assumption of constitutionality. In the said case, choice to peruse the section wasn't correct in light of the fact that there is no application of the doctrine of severability. It wasn't possible to cut off a piece of the section without influencing it overall. He stated that, it was also the main law which oversees instances of pedophilia and child sexual assault. Thus, the Supreme Court held that Section 377 of the Indian Penal Code doesn't experience the ill effects of unconstitutionality and left the issue to the Legislature to think about and to erase the Section from the rule book or adjusting the equivalent to permit consensual sexual action between two grown-ups of a similar sex in private.

Article 21 promises us the privilege to life and insurance of individual freedom. The private, consensual sexual relations are ensured under the privilege to individual freedom under Article 21 under the protection and respect guarantee. While thinking about the issue of Article 21, The High Court portrayed the expanded degree of the privilege to life and freedom which likewise consolidates the right to insurance of one's pride, independence and protection, the Division Bench alluded to Indian and outside decisions, the Yogyakarta Principles[14]relating to sexuality as a

[14] Yogyakart Principles – Application of International Human Rights law, November 2017, available at https://yogyakartaprinciples.org/principles-en/about-the-yogyakarta-principles/

structure of character and the overall examples in the affirmation of security and honorability benefits of gay individuals and held:

"The circle of security permits individual to create human relations without obstruction from the outside network or from the State. The activity of self-sufficiency empowers a person to achieve satisfaction, develop in confidence, fabricate connections willingly, and satisfy every genuine objective that he/she may set. In the Indian Constitution, the option to live with pride and the privilege of protection are perceived as measurements of Article 21. Section 377 of IPC denies an individual's poise and condemns their core personality exclusively because of their sexuality and along these lines disregards Article 21 of the Constitution. The way things are, Section 377 denies a gay individual the option to full personal identity which is certain in idea of life under Article 21 of the Constitution."

In Maneka Gandhi v Union of India,[15] the Court repeated that the term 'individual freedom' is of "the most extensive sufficiency and it covers an assortment of rights which go to establish the individual freedom of a man." Sexual direction and sexual movement involves one's protection.

In a similar case, the court proceeded to clarify the expectation of the founding fathers in regards to guideline of Article 21 and said "Subsequently extended and read for interpretative purposes, Article 21 plainly draws out the suggestion, that the founding fathers perceived the privilege of the State to deny an individual of his life or individual freedom as per reasonable, just and sensible strategy built up by law." But, in the above case, Section 377 is utilized subjectively and it groups between procreative sexual exercises and non-procreative sexual exercises which shows no convincing state enthusiasm to make such a law to control and deny such a significant right.

The issue went to the Supreme Court of India in Suresh Kumar Koushal and another v NAZ Foundation and Others where the Supreme Court struck down the judgement of the High Court in the NAZ Foundation

[15] AIR 1978 SC 597

Case. The lawfulness of Section 377 of the Indian Penal Code which condemns sexual action 'against the request for nature', for example condemns any sexual movement other than the hetero penile-vaginal. Homosexuality is the sexual penchant for people of one's own sex. The social development of sexuality ruins any sexual movement that isn't 'valuable' of the male semen. Homosexuality is denounced and punished in light of the fact that it prompts the loss of the semen which holds the seed for procreation.

The human privileges of lesbian, gay, cross-sexual, transgender and intersex individuals (LGBTI) are coming into more keen concentration around the globe, with significant advances in numerous nations lately, including the appropriation of new legitimate assurances. The preamble to the Indian Constitution orders equity - social, financial, and political uniformity of status - for all. The privilege of balance under the watchful eye of the law and equivalent security under the law is ensured in Articles 14 and 21 of the Constitution. In April 2014, the Supreme Court of India in NALSA[16]held that that the rights and opportunities of transgender individuals in India were secured under the Constitution. The Court needed to choose whether people who fall outside the male/female sexual orientation parallel can be legitimately perceived as "third sex" people. It pondered and gave an idea on in the case of ignoring non-twofold sexual orientation characters is a rupture of principal rights ensured by the Constitution of India. It alluded to a "Specialist Committee on Issues Relating to Transgender" comprised under the Ministry of Social Justice and Empowerment to build up its judgment.

This was a path breaking case where the Supreme Court legitimately perceived "third sexual orientation"/transgender people and talked about "sex character" finally. The Court perceived that third sex people were qualified for principal rights under the Constitution and International law as well. Further, it guided state governments to create instruments to understand the privileges of "third sexual orientation"/transgender people.

[16] NALSA v. Union of India, WRIT PETITION (CIVIL) NO.400 OF 2012

The Court maintained the privilege of all people to self-distinguish their sexual orientation. Further, it pronounced that hijras and eunuchs could be lawfully recognized as "third sexual orientation". The Court explained that sexual orientation of a personality didn't allude to organic qualities but instead alluded to it as "a natural view of one's sex". In this way, it held that no person with third person sexual orientation ought to be exposed to any clinical assessment or organic test which would attack their entitlement to protection

The Court deciphered 'dignity' under Article 21 of the Constitution to remember decent variety for self-articulation, which permitted an individual to have a dignified existence. It put one's sexual character inside the structure of the principal right to respect under Article 21.

Additionally, it noticed that the privilege to justice and opportunity of articulation was surrounded in impartial terms "all people". Subsequently, the privilege to equity and opportunity of articulation would reach out to transgender people.

It caused to notice the way that transgender people were dependent upon "extraordinary separation in all circles of society" which was an infringement of their entitlement to correspondence. Further, it incorporated the option to communicate one's sexual orientation "through dress, words, activity, or conduct" under the ambit of opportunity of articulation.

Under Articles 15 and 16, separation on the ground of "sex" is unequivocally denied. The Court held that "sex" here doesn't just allude to organic traits, (for example, chromosomes, genitalia and optional sexual qualities) yet in addition incorporates "sex" (in light of one's self-observation). Along these lines, the Court held that separation on the ground of "sex" remembered segregation for the premise of sexual orientation character. Thus, the Court held that transgender people were qualified for key rights under Articles 14, 15, 16, 19(1)(a) and 21 of the Constitution. Further, the Court alluded to the worldwide arrangement of human rights the Yogyakarta Principles to perceive transgender people's human rights.

It ought to be noticed that Yogyakarta standards is a record distributed after a gathering of worldwide human right gatherings in 2006, in Yogyakarta, Indonesia. The principles address the human rights infringement relating to the LGBT people group, and endorse norms for the universal law that manages the privileges of the network.

In September 2018, the Supreme Court[17] decriminalized Section 377 of the IPC allowing adult consensual same-sex relations. These decisions are viewed as a milestone both as far as protecting rights and enabling the LGBT people. The two decisions mark a significant and critical moment for members of LGBT community in protecting their rights. They not only discarded the Victorian morality but also assured the Indian LGBT community of their rights of sexual orientation being protected. This was indeed a win but yet it doesn't change the perception of the LGBT individuals in India. They are not completely free or seen as equivalent among their kindred residents. It underscores how much work needs to be done in India and rest of the world to discard out of date and harsh laws against the LGBTQ community.

The passing of The Transgender Persons (Protection of Rights) Act, 2019 is an act of the Parliament of India with the objective to provide for protection of rights of transgender persons, their welfare, and other related matters. But this Act impugns on the privacy rights of LGBTQ community. It mandates a transgender person to approach a District Magistrate to obtain a certificate stating that they are transgender. It's only after this that they will be able to change their gender to either male or female on government-issued identification cards. The process to obtain this certificate is to show proof of sex reassignment surgery, which is not something all transgender people want. It is a very expensive procedure, which many aren't able to afford. It doesn't even have a clear definition regarding how the District Magistrate will actually examine the person or their documents and so it is a violation of privacy. It also does not specify the kind of surgery they are expecting,

[17] Navtej Singh Johar v. Union of India, (2018) 1 SCC 791

because there is more than one type. This contradicts the 2014 NALSA (National Legal Services Authority of India) judgement by the Supreme Court, which gave transgender people the right to self-identify, and did not mandate surgery. This Act is a total violation against human rights. How can they force to opt for surgery and then validate them as transgender? We should all have the freedom to express ourselves the way we want to. The fact that they have to prove the iridentities with surgery makes no sense. By checking their gender and giving them certificates, they are treated as inhuman. This is not the Act they had thought of, it's against them. The Act defines a transgender person as one whose gender does not match with the gender they were assigned at birth, including trans men and trans women, or one who is gender queer, or belongs to communities like kinner, hijra, aravani, and jogta. It also says that a transgender person is someone with intersex variations. However, the fact that the Act conflates transgender people with intersex people proves that it was not thought through, and has been made with inadequate knowledge. Not every intersex person identifies as transgender, and not every transgender person is intersex. It also says that a person's identity as transgender is valid whether or not they have undergone sex reassignment surgery. However, this directly contradicts the point about having to receive a certificate from a District Magistrate, proving that they have undergone surgery. The only protection here is about them. Putting intersex and Trans identities in one box is not only barbaric but also erases both identities synchronously.[18]

Conclusion

An individual's proclivity towards gender identity and sexual orientation are immensely personal decisions. This personal right as well embedded within the institutional framework of the Indian Constitution enshrined under the virtue of article 21. If any discrimination is promoted on the basis of sexual preference, it is in direct violation and contradiction of

[18] Trans Bill 2019 – Why India's transgender community is opposing the Bill which is supposed to protect their rights, Nov 2019, available at : https://yourstory.com/socialstory/2019/11/stoptransbill2019-india-transgender-community-rights

article 14 present in the Indian Constitution that guarantees the right to equality before law to all citizens. A person's choice of partner must never be restricted because of his or her sexual orientation. It not only effectively restricts once fundamental rights of privacy and equality, but also takes away their right to live with dignity granted by the Constitution of India.

Myopic reactions that threaten to restrict the free idea of privacy into a closed epistemic cycle of judicial discourse. The courts can keep harping on the significance of privacy, but it will all be for nothing if the flagrant violation of basic civil liberties continues. The issues faced by the sexual minorities suggest that privacy doesn't always encompass a one size fits all approach and raises various questions that need to be answered immediately. The institutionalized disrespect and disregard for privacy doled out to the marginalized sexual minorities cannot stop until strict action is taken against all such practices. The law is a vehicle that can only get us from one destination to another, unless action is taken and the law is strictly imposed, no change can occur.

Regardless of the laws that are introduced or changed, no true progress can be observed. Unless the society unanimously takes a stand against discrimination based on sexual preferences. It is only then that the sexual minorities can finally thrive and take their place as respected members of society.

Human rights are the basic rights every human being deserves and safeguarding these rights must be a priority regardless of any societal norms or connotations. It is not just about protecting their interests, but about speaking out, taking a firm stand, and acting immediately to ensure the visibility of this unfairly marginalized community, understanding the challenges they face, and becoming aware of all human rights violations they deal with. The primary aspect of tackling and rectifying this situation is to codify policies, laws (country-specific and international), for recognizing their rights and helping them overcome any prejudice they face so that everyone treats LGBT community as humans who are worthy of human

rights like any other human being. Certainly, the world has come a long way, and it is not as close minded as it was a couple of decades ago. However, there is a long way to go before the world is finally and truly equal in all senses of the word.

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THEME VI: RIGHTS CONSTITUTIONALISM

The Dichotomy between Transparency and Privacy: an Analysis from the Perspective of Data Protection

Ashok Pandey[1]

Introduction

1.1 Privacy: Meaning and incorporation in Indian Jurisprudence

The general meaning of Privacy, according Cambridge Dictionary, is "someone's right to keep their personal matters and relationships secret"[2]. It is the right of an individual to keep one's personal life or personal information a secret, or let it be known to a select few persons. From the constitutional law perspective, Privacy is the right which protects the liberty of people to protect certain crucial decisions regarding their well-being without any external coercion or interference. Be it from government agencies or private enterprises or individuals. Crucial decisions include religious faith, political affiliation, moral values, procreation etc.

Indian post-independence jurisprudence encountered the question of whether privacy is a fundamental right or not in the case of *M.P Sharma v. Satish Chandra*[3]. The Supreme Court was deliberating upon the power of search and seizure of documents and it came to the conclusion that there was no intention of the Constitution makers to include a Right to Privacy in the Constitution on the lines of that envisaged in the 4th Amendment to the U.S Constitution. After a span of nine years, in the case of *Kharak Singh v. State of UP*[4], the Supreme Court reiterated its stance of there being no fundamental right to Privacy. However, the only silver lining was in Justic Subba Rao's dissent. He said that although the Right to Privacy is not expressly mentioned in Article 21, it is an essential ingredient of personal liberty guaranteed under Article 21 of the Constitution. He said,

"Nothing is more deleterious to a man's physical happiness and health than a calculated interference with his Privacy"

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1 Student ILS Law College,Pune III BA LL.B
2 https://dictionary.cambridge.org/dictionary/english/privacy
3 *M.P Sharma v. Satish Chandra*1954 AIR 300
4 *Kharak Singh v. State of UP*1964 SCR (1) 332

The silver lining given by Justice Subba Rao became brighter in the case of *Gobind v. State of Madhya Pradesh*[5] wherein it was held that Right to Privacy did exist under Article 21, however, it was not an absolute right and it could be interfered by a procedure established by law.

In the post-liberalisation period, *R. Rajagopal v. State of Tamil Nadu*[6] and PUCL v Union of India were two important cases on Right to Privacy. In the former, the court dealt with the question of Freedom of Press and Right to Privacy and held that Right to Privacy had acquired a constitutional status. In the latter, the court asked the government to comply with strict guidelines when it comes to telephone tapping of prominent politicians. However, since these judgements were given by small benches, the stakeholders were left in dilemma over the inclusion of Right to Privacy under Article 21 of the Constitution.

After 54, years, the question of Right to Privacy faced the strongest challenge in the landmark case of *Justice Puttuswamy v. Union of India*[7]. The upholding of Right to Privacy as a fundamental right by a 9 judge bench has indeed broadened the horizon of Indian jurisprudential analysis.

1.1.1 Privacy and Data Protection

In 1987, US Supreme Court justice delivered a lecture titled "The Constitution: A Living Document" in which he argued that the constitution must be interpreted in light of the moral, political, and cultural climate of the age of interpretation. Our Constitution too, has been interpreted across ages keeping this in mind. We are living in an era of rapid technological advancements which have penetrated almost every walk of our life. These advancements, coupled with cut-throat competition and growing complexities of human existence, has led to the initiation of a "Data Race" which is nothing but the constant urge to collect, process and analyse data for purpose of finding solutions to problems, understanding market behavior, consumer demands etc. (Data Analytics). And in doing so, the personal data to individuals is also collected, processed and analysed. However, due to

5 *Gobind v. State of Madhya Pradesh*1975 SCR (3) 946
6 *R. Rajagopal v. State of Tamil Nadu*1994 SCC (6) 632
7 *Justice Puttuswamy v. Union of India*2017 SCC (10) 1

absence of strong legislative safeguards, the processing, analysis and sometimes transmission of personal data takes place without the consent of the person concerned. This amounts to a violation of Data Privacy which is an important aspect of Right to Privacy. Richard A Posner, in an illuminating article, has observed:

"Privacy is the terrorist's best friend, and the terrorist's privacy has been enhanced by the same technological developments that have both made data mining feasible and elicited vast quantities of personal information from innocents: the internet, with its anonymity, and the secure encryption of digitized data which, when combined with that anonymity, make the internet a powerful tool of conspiracy. The government has a compelling need to exploit digitization in defense of national security…"[8]

However, as easy as it sounds, the creation of a regime for data protection is a difficult task and this difficulty has been enshrined in the Puttuswamy judgement by Chandrachud J., in the following words:

"Formulation of a regime for data protection is a complex exercise which needs to be undertaken by the State after a careful balancing of the requirements of privacy coupled with other values which the protection of data sub-serves together with the legitimate concerns of the State. One of the chief concerns which the formulation of a data protection regime has to take into account is that while the web is a source of lawful activity-both personal and commercial, concerns of national security intervene since the seamless structure of the web can be exploited by terrorists to wreak havoc and destruction on civilised societies. Cyber-attacks can threaten financial systems"[9].

1.2 Transparency: Meaning and genesis in India

According to the dictionary of Merriam-Webster, keeping the present context in mind, Transparency is **"**characterized by visibility or accessibility of information especially concerning business practices"[10]. In the Indian

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8 Richard A. Posner, "Privacy, Surveillance, and Law", The University of Chicago Law Review (2008), Vol.75, at page 251

9 Supra 6; Para 179

10 https://www.merriam-webster.com/dictionary/transparent

context, transparency is generally used to denote accountability in governance practices in order to have a corruption-free administration. Transparency serves as a tool to keep the citizens informed about the working of the government thereby giving power to civil society activism through Right to Information[11].

Tamil Nadu was the first state to pass a freedom of information law way back in 1997, not only in India but in the entire South Asian region. Though the law was essentially weak and ineffective, it was soon followed by somewhat more effective laws in many of the other states[12]. The first national legislation came in the form of Freedom of Information Act, passed in 2002. However, this too, was a very weak legislation and it did not come into effect. It was later replaced by a much stronger Right to Information Act. The credit for the emergence of the RTI regime should go to the manifestation of the desire to make Indian democracy more participative and inclusive[13].

The Supreme Court in the case of *Mr. Kulwal v. Jaipur Municipal Corporation*[14] made it clear that the Right to Freedom of Speech and Expression provided under Article 19(1)(a) of the Constitution has a clear implication of Right to Information. This is because, without the freedom of information, the freedom of speech and expression cannot be exercised fully. This judgement was followed by a plethora of civil society led movements and political discussions which eventually culminated into the Right to information Act, 2005, one of the most powerful and globally celebrated legislations of the country.

1.2.1 Transparency and Data Protection

Now, how is transparency associated with data protection? The starting point of the inception of the concept of data protection is protecting individual liberty. However, an outright prohibition on data processing will hamper the achievement of individual liberty. Data Processing cannot be prohibited outright in the name of Privacy. The purpose of Data Protection is

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11 C. Raj Kumar, Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India, 17 Colum. J. Asian L. 31 (2003)

12 The Genesis and Evolution of the Right to Information Regime in India, Shekhar Singh

13 Ibid

14 AIR 1988 Raj 2

to ensure that personal data is processed in ways that make it unlikely that personal integrity and privacy will be infringed or evaded[15].

The regime of data protection, in fact, comes with a natural presumption that public authorities can process data as it is necessary for the tasks they have to perform, since, public authorities in democratic societies are construed to be acting on behalf of the people[16]. These laws are enacted to channel power, i.e. to promote meaningful public accountability and provide individuals with an opportunity to contest inaccurate or abusive record holding practices.

Present Legislative Safeguards And Jurisprudence

2.1 Present legislative position on Data Protection

2.1.1 Information Technology Act, 2000

Although the Personal Data Protection Bill, 2018, has been passed by the lower house, it is yet to get clearance from the upper house and presidential assent in order to see the light of day. However, there are certain legislations in India which have sections dealing with data protection. The primary legislation being, The Information Technology Act, 2000. In order to regulate the disclosure of 'sensitive personal information' which is held by private intermediaries, the 2009 Amendment to the IT Act added a Section 43A[17].

It should be noted that this section does not specify any upper limit as to the amount of compensation. It should also be noted however, that this section is very limited when it comes to its scope and it only provides for safeguards against the negligent disclosure of sensitive personal data or information, the meaning of which has been elaborated by the Central Government in the Sensitive Personal Data Rules, 2011[18] (explained further). Negligent disclosure of personal data is just one of the several privacy harms which may occur and become apparent if one looks at the EU General Data Protection Regulations, 2015[19]

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15 P Blume, The Citizens' Data Protection, The Journal of Information, Law and Technology, 1998/1
16 Supra 10
17 Information Technology (Amendment) Act, 2009 (Act 10 of 2009)
18 Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011
19 Commentary on IT Act, 3rd edition, Apar Gupta (revised by AkshaySapre)

Moreover, although the explanation of "reasonable security practices and procedures" has been elaborately given to explain what all it should include, the onus of prescribing the practice is statutorily imposed on the Central Government. In regard to this, the government has made the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 and the IS/ISO/IEC 27001 on "Information Technology- Security Techniques- Information Security Management System- Requirements has been referred to as one such standard[20]. The Rules further provide that practices should be audited and certified by entities through an independent auditor, duly approved by the Central Government[21]

Further, the Central Government in Rule 3 of the Sensitive Personal Data Rules, 2011 also gives an inclusive list of what personal information comes under the category of "sensitive personal data or information". It includes password, financial information, information pertaining to sexual orientation, medical records, biometric information etc.

ULTRA VIRES NATURE OF SENSITIVE PERSONAL DATA RULES

The Central Government derived authority to frame the Sensitive Personal Data Rules, 2011 from explanations (ii) and (iii) of Section 43A of the Act. This limits the scope of the power of delegated legislation to prescribe "reasonable security practices and procedures" and "sensitive personal data or information". However, the government has exceeded its scope by including a provision for privacy policy[22] as well as providing lawful circumstances in which sensitive personal data may be gathered. Therefore, in this regard, these rules may be termed to be substantially ultra vires because they go beyond the parent legislation and make rules which the parent legislation does not authorize, thereby violating the principles of delegated legislation[23].

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[20] Supra 16, Rule 8(2)
[21] Supra 16, Rule 8(4)
[22] Supra 16, Rule 4(1)
[23] Yassin v. Town Area Committee, AIR 1952 SC 115

Another Section inserted by the 2009 amendment to the IT Act is section 72A. For a service provider to be penalized under this section, the following ingredients need to be fulfilled:

1. The service provider has to obtain personal information while providing services under a lawful contract,
2. Information has to be disclosed without the consent of the person,
3. And that such information is disclosed knowing that it would cause, or that it would be likely to cause wrongful gain or wrongful loss.

It is quite a straightforward section which imposes penal sanctions on a contractually appointed service provider for wrongful disclosure of personal data. However, this section too, has a highly limited scope and it covers only those service providers who possess data by virtue of a contract. Moreover, it is silent on various aspects such as data anonymization, storage of data after the contract has been discharged etc. However, there is a section 67C which penalizes unauthorized retention of data by intermediaries. Other sections of the IT Act, 2000 which are remotely associated with personal data protection are Section 66C (Punishment for Identity Theft) and Section 67C (Punishment for retention of information by intermediaries).

2.1.2 Right to Information Act, 2005

Section 8 of the Right to Information Act lists the exceptions which may be used to deny information to any citizen. It has ten such exceptions of which Section 8(1)(j) talks about denial of information which is personal and not of any public interest.

The legislators realized the importance of maintaining a balance between privacy and public interest by way of transparency through RTI by incorporating Section 8(1)(j) in the RTI Act by exempting purely personal information which has no public interest.

An examination of the section reveals that it has three parts:

1. Personal information which has no relationship with any public activity or interest need not be disclosed,

2. Any information which should cause unwarranted invasion of privacy of an individual should not be disclosed unless the third part is satisfied,

3. Such information shall only be disclosed when the public information officer or appellate authority is satisfied that the larger public interest calls for the disclosure of such information.

A full bench of the Delhi High Court, while examining the scope and ambit of the Section said that personal information including tax returns, medical records etc. are not to be disclosed[24]. In case the Public Information Officer or Appellate Authority thinks that the information sought serves the larger public interest, appropriate orders may be passed to provide the information. However, it should be noted that this information cannot be sought as a matter of right. And it is justifiable to not keep the disclosure of personal information as a matter of right[25]. That is because, the disclosure of personal information, even though it is available with the government, would amount to violation of his right to privacy, as guaranteed under Article 21. It is relevant to mention that even where an individual is placed under an obligation to speak, the law can only draw adverse inference from his failure or refusal to speak and cannot go further to invade his privacy of private life[26]. In *Girish Ramchandra Deshpande v. Central Information commissioner and ors*[27], the Supreme Court reiterated upon the aspect of protection of privacy of an individual in case the information requested does not serve any public interest.

On the basis of the above description of the legislative and judicial stance, it can be inferred that the position of data protection on both, private as well as government level, is quite weak and full of lacunae. And this issue needs to be taken up on priority basis, considering the importance of data privacy as pointed out in the Puttuswamy judgment through the following paragraph:

Presently, the RTI Act only protects the disclosure of personal information from public authorities if the personal information is of no public

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24 Secretary General, Supreme Court of India v. Subhash Chandra Agarwal, AIR 2010 Del 159
25 Santosh Kumar Pathak, RTI Act, 2005, Kamal Law House, Kolkata, 2nd edition 2018
26 KuncheDurga Prasad v. Public Information Officer IV, (2010) CLT 102 AP
27 *Girish Ramchandra Deshpande v. Central Information commissioner and ors*(2013) 1 SCC 212

importance. Whereas, the regulations in the IT Act have entrusted crucial responsibilities of prescribing the right practices, defining sensitive public information, on the government. Moreover, these regulations cover a very small aspect of the threats associated with improper regulation for safeguarding data privacy. Section 43A only covers those body corporates with whom there is a contractual relationship. All the regulations are silent on crucial aspects such as data anonymization, cross border data transfer and non-consensual processing. Also, the penal sanctions too, under the IT Act are not adequate.

The Hon'ble Supreme Court has given various judgements on Section 8(1)(j) of the RTI Act highlighting the importance of maintaining a balance between privacy and transparency. However, we have already seen that these regulations only apply to government bodies and with regards to private bodies, the scope of the regulations is very narrow.

The purpose of the researcher while examining the legislative as well as judicial positions was to check the position on the balance between privacy and transparency. But, it turns out that the lack of proper regulations for data protection from the private sector disturbs the balance between privacy and transparency on a sectoral level.

The Dichotomy as Addressed in the Personal Data Protection Bill, 2019 with Reference to Eu Gdpr

Under the auspices of Retd. Justice BN Srikrishna, a committee was formed in 2017 in order to study and identify the key data protection issues in the country and give suggestions to address them. In July 2018, the ten-member committee finally submitted its report titled "A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians" along with a draft Data Protection Bill to the Ministry of Electronics and Information Technology.

After a long wait of 2 years, the Data Protection Bill, 2019 was finally introduced in the winter session of the parliament on 11th December 2019 and is presently with the standing committee whose report is due on the first day of the last week of the budget session[28].

[28] https://prsindia.org/billtrack/personal-data-protection-bill-2019

The Hon'ble Supreme Court in the case of *Thalapallam Ser. Coop. Bank Ltd. v. State of Kerala*[29]has rightly pointed out the importance of maintaining a balance between the conflicting rights of privacy and transparency. The title of the report submitted by the Srikrishna Committee makes it clear that they don't intend to propagate the right to data privacy as an absolute right and that a balance needs to be maintained so that the digital economy can flourish with responsible and lawful processing of data without any compromise to the rights of the Data Principal. And regulations pertaining to lawful processing of data should be made for both state as well as non-state actors.

With regards to the above, Section 2 of the Data Protection Bill, which defines its applicability, makes it clear that it shall be applicable on the state, as well as any Indian company, citizens, persons and body of persons incorporated under Indian law. This helps in eliminating the imbalance of regulations on private and government entities under the present legislative stance.

The Act makes it clear that no data shall be processed except for specific, clear and lawful purposes and that the processing shall be done in a fair and reasonable manner with adequate safeguards to the rights of the Data Principal. Also, it mandates that personal data shall only be collected to the extent of its requirement for the processing thereby preventing unwarranted collection of data.

One of the major drawbacks of the present legislative stance was the absence of regulations on retention of data after its purpose has been fulfilled. The Data Protection Bill, by incorporating Section 9 solves this problem by mandating that the Data Fiduciary shall not retain the data for a period longer than that required for the lawful processing and periodic checks should be undertaken to figure out whether the data possessed by the fiduciary is required or not. It is also important that the consent of the Data Principal be taken before his data is processed.

With regards to the dichotomy of Privacy and Transparency, Chapter III, Chapter VI and Chapter VIII of the Data protection Bill are relevant

[29] (2013) 16 SCC 82

which talk about grounds for processing of personal data without consent, transparency and accountability measures and exemptions respectively.

PROCESSING OF PERSONAL DATA WITHOUT CONSENT

In the Puttuswamy judgement, Chandrachud J. recognized four 'legitimate state interests' to be considered while dealing with the right to privacy; (i) National security (ii) prevention and investigation of crime (iii) protection of revenue (iv) allocation of resources for human development[30]. Broadening the scope of "legitimate state interests" as described by Chandrachud J., the Srikrishna committee has included various other aspects which make it permissible for the state to process personal data without the consent of the individual concerned. These aspects include journalistic purposes, following judicial orders, processing for purely domestic and personal purposes, promotion of a digital economy etc[31]. Although these are not state interests, the report points out that the free flow of such information is vital for societal interests[32].

Chapter III of the Data Protection Bill, comprising sections 12 to 15 deal with Non-consensual processing of personal data. It allows for the processing of personal data without the consent of the Data Principal by the state for provision of any benefits to the Data Principal, issuance of any license or permit, for the compliance of any order or judgement of a court, for medical emergencies involving a threat to life or health or any help required to alleviate conditions during an epidemic and to provide assistance or services to an individual during the breakdown of public order[33].

The bill further gives exemptions to the Data Fiduciary in cases where there is an employer-employee relationship between the Data Fiduciary and the Data Principal. The exemptions pertain to matters relating to termination, recruitment or employment, provision of benefits or services to the Data Principal, verifying attendance etc. However, the processing of sensitive personal data has been excluded from this section[34].

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30 Supra 6, Para 181
31 Section 12, Personal Data Protection Act, 2019 (Act. 373 of 2019)
32 A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians, Report of the Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, Page 106
33 Supra 29
34 Section 13, Personal Data Protection Act, 2019 (Act. 373 of 2019)

Section 14 is a broad section which endorses non-consensual processing for "reasonable purposes" as specified by the Data Protection Authority (DPA). Specifications as to what includes "reasonable purposes" is given under sub-section (2) of Section 14. It includes prevention and detection of frauds, whistle blowing, debt recovery, credit scoring etc. The DPA has been entrusted with an additional obligation, under sub-section (3) of section 14, to lay down regulations in order to safeguard the rights of the Data Principal once the "reasonable purpose" has been specified by the Authority.

Section 15 goes on to give guidelines as to what all can be classified as "sensitive personal data" for its non-consensual processing to not take place under the other sections of this part.

TRANSPARENCY AND ACCOUNTABILITY MEASURES

Part VI of the Act contains sections 22 to 32. It begins by mandating every data fiduciary to submit a privacy by design policy containing a host of provisions which safeguards the rights of the data principal[35]. Furthermore, it emphasizes on the necessary steps to be taken by the data fiduciary to ensure that there is transparency in the processing of personal data. It also gives the Data Principal the option to withdraw consent from the data fiduciary to through a consent manager. However, it should be noted that the Act puts all the liability arising out of such withdrawal on the Data Principal[36].

The Act further mandates that certain security safeguards need to be implemented keeping into account the risks and purpose of the processing and the likelihood and severity of harm that may result to the Data Principal from such processing[37]. It further puts an obligation on the Data Fiduciary to inform the Authority through notice about breach of personal data where such breach is likely to cause harm to any data principal. This leaves the declaration of the data breach at the discretion of the Data Fiduciary. The Act further goes on to say, that upon receipt of such notice, the Authority shall determine whether such breach should be reported to the Principal or not,

35 Section 22, Personal Data Protection Act, 2019 (Act. 373 of 2019)
36 Section 11(6), Personal Data Protection Act, 2019 (Act. 373 of 2019)
37 Section 25(3), Personal Data Protection Act, 2019 (Act. 373 of 2019)

taking into account the severity of the harm[38]. The discretion of the authority when it comes to informing the Principal and deciding upon the severity of harm for the principal are too broad and arbitrary. It not only deprives a person of his right to be informed, but also compromises upon his right to personal liberty because the Authority invested with the discretion to decide upon the severity of the harm which will be caused to the data principal.

SIGNIFICANT DATA FIDUCIARIES

The Authority has been given the right to notify any Data Fiduciary or class of data fiduciaries as Significant Data Fiduciary (SDF), on the basis of the volume of personal data processed, sensitivity of the personal data, turnover, and risks involved with the data principal and the use of new technologies[39]. And if such fiduciaries are engaged in processing which carries a risk of causing significant harm to the data principal, sections 27 to 30 of the Act shall apply.

Now, the Indian Data Protection Act has incorporated a new concept of social media intermediaries whose suggestion was not even given in the Justice Srikrishna committee report. The Act mandates that any social media intermediary whose actions have or are likely to have a significant impact on the electoral democracy, security, public order or sovereignty of India, shall also be notified as SDF[40]. However, intermediaries which primarily enable commercial or business oriented transactions, provide internet access or search engine facilities have been excluded from this purview. This is a welcome addition in the light of the growing problem of fake news being propagated and the interference of social media on free and fair elections in the west. The Act further mandates that the social media intermediaries to allow the persons who avail their services to verify their account. And all such verified accounts shall have a visible mark which shows that the account is verified[41]. However, the Act does not elaborate on the kinds of documents that shall be accepted while verification. Moreover, such verification shall help in curbing the propagation of fake news. However, it shall undoubtedly

[38] Section 25(5), Personal Data Protection Act, 2019 (Act. 373 of 2019)
[39] Section 26, Personal Data Protection Act, 2019 (Act. 373 of 2019)
[40] Section 26(4), Personal Data Protection Act, 2019 (Act. 373 of 2019)
[41] Section 28(3), Personal Data Protection Act, 2019 (Act. 373 of 2019)

become a cumbersome task for the intermediary because of the technical changes involved and hence, the government should delay the implementation of this section, giving time to them to get accustomed and prepared.

The Act further mandates that no SDF shall commence with data processing unless a Data Protection Impact Assessment (DPIA) has been carried out[42]. This DPIA shall include a detailed description of the processing, assessment of potential harm that may be caused to the Data Principals and the measures for mitigating such harms. Upon completion, the Data Protection Officer appointed under Section 30 shall review the assessment report and send it to the Authority who will decide on whether the SDF can process personal data or not[43]. Apart from this, the SDFs are required to maintain a record of the data life cycle, periodic reviews of the security safeguards and records of the DPIAs[44]. This maintenance of records, as per the Act, shall also be a responsibility of the state[45]. However, there is some ambiguity in this section because there is no mention anywhere of the state being subject to Data Protection Impact Assessment. Hence, the legislators should bring some clarity on this because regulations pertaining to DPIA and SDF will be given by the DPA, which is a body created by the state.

The policies and processing activities of SDFs shall be audited by Independent Data Auditors. A data trust score shall be assigned by such audit and the criteria of the score shall be decided by the Data Protection Authority[46].

EXEMPTIONS

The Central government under this part of the Act is empowered to exempt any government agency from any or all sections of the Act in the interest of sovereignty and integrity of India, security of the state, friendly relations with foreign states and public order. It also empowers such

42 Section 27, Personal Data Protection Act, 2019 (Act. 373 of 2019)
43 Section 27(5), Personal Data Protection Act, 2019 (Act. 373 of 2019)
44 Section 28, Personal Data Protection Act, 2019 (Act. 373 of 2019)
45 Section 28(2), Personal Data Protection Act, 2019 (Act. 373 of 2019)
46 Section 29, Personal Data Protection Act, 2019 (Act. 373 of 2019)

government agency to collect any personal data from any data fiduciary, data processor or data principal. The inclusion of a broadly interpretable term like "public order" gives widespread powers to the government, leaving immense room for misuse, thereby compromising on the right to Data Privacy guaranteed under the Act.

Moreover, the chapters relating to obligations of data fiduciary (except processing for lawful purposes), non-consensual processing of data, sensitive data of children, rights of data principal and transparency and accountability measures (except maintenance of security safeguards), shall not apply where the processing takes place for the enforcement of law and order, where the processing is by any natural person for personal or domestic purposes or when it is necessary for journalistic purposes[47]. Again, the broad scope of this section and exclusion of important Chapters of the Act from processing for "journalistic purposes" and "enforcement of law and order" leave room for misuse by the government. Furthermore, the Act also exempts such classes of research, archiving or statistical purposes from the Act, provided that the compliance with the Act disproportionately diverts resources, it is not specific towards any particular data principal or when it causes no significant harm to the data principal[48]. And just like natural persons, manual processing by small entities is also excluded from the purview of the Act, subject to the conditions laid down in the Act[49]. However, the words "significant harm" are again arbitrary and such an opinion is again on the discretion of the Authority.

SANDBOX

For the purpose of encouraging innovation in Artificial intelligence and machine learning, the Authority, under the Act is empowered to create a Sandbox[50]. It refers to a testing environment, where new soft wares or programs can be executed in isolation before they are rolled out on a mass scale. The Authority is empowered to accept the requests of different Data fiduciaries to join the Sandbox subject to certain conditions. An important

47 Section 36, Personal Data Protection Act, 2019 (Act. 373 of 2019)
48 Section 38, Personal Data Protection Act, 2019 (Act. 373 of 2019)
49 Section 39, Personal Data Protection Act, 2019 (Act. 373 of 2019)
50 Section 40, Personal Data Protection Act, 2019 (Act. 373 of 2019)

pre-condition of joining it is that the Data fiduciary should have its privacy by design policy certified by the Authority. Access to the Sandbox is granted for a period of 12 months, which may exceed to a maximum of 36 months. This too is a welcome step because India being a developing country requires an atmosphere which gives impetus to technological advancements and research.

While the 2019 Bill has relaxed some stringent provisions found under the 2018 Bill recommended by the Srikrishna committee, it also seems to dilute few of the salient features of the law that aims to protect the right to privacy of Data Principals. The government has been provided with unregulated and broad powers to exempt government agencies from the provisions of the 2019 Bill for certain circumstances. Such broad, unexplained and unelaborated exemptions jeopardize the rights of the Data Principal thereby defeating the Right to Privacy as guaranteed by the Puttuswamy judgement. Moreover, this dis balance does not even go in the favour of transparency because the transparency, as guaranteed under Article 19 of the Constitution is of such nature that it ensures that the citizens enjoy their right to freedom of speech and expression under Article 19(1)(a). The only part of the Act which promotes transparency is the relaxation for research purposes that too only to the extent that the Rights of the Data Principal are not jeopardized. The provision of a Sandbox is also a welcome step considering the development of Digital Economy to be the need of the hour.

The Act further deletes Section 43A of the Information Technology Act, 2000 which has a very limited scope, as explained in the preceding chapter.

The RTI Act going by the purpose for which it was enacted, leans in favor of disclosure of information. The Committee understands the fact that this feature of RTI Act has contributed tremendously to securing the freedom of information and enhancing accountability in public administration. This feature has to be accounted for in any balancing test created under the RTI Act. Therefore, in addition to the likelihood of harm, disclosure should be

restricted only where any likely harm outweighs the common good of transparency and accountability in the functioning of public authorities.

In this regard, the committee suggested that nothing in the Data Protection Act shall Act as a hindrance to the revelation of information. This amendment seeks to prevent privacy from becoming a stonewalling tactic to prevent transparency. It further goes on to say that information disclosure can only be denied if the personal harm or injury to the person outweighs the public good the revelation seeks to achieve. Such an amendment to the RTI Act not only safeguards privacy of an individual but also maintains the sanctity of the Right to Information Act, thereby appreciating the judicial stance of maintaining a balance between privacy and transparency. However, the PDP Bill, 2019 has conveniently omitted this amendment and only accepted and incorporated the amendments to the Information Technology Act.

COMPARISON WITH EU GDPR

The Justice Srikrishna committee report has rightly pointed out that different jurisdictions have different Data Protection laws and these laws complement the ideology of these jurisdictions. For instance, the US has adopted a laissez-faire approach to regulating data handling by private entities whereas, it imposes stringent obligations on the state. Such an approach is based on its constitutional understanding of liberty as freedom from state control. In this regard, legislations such as the Privacy Act, 1974, the Electronic Communications Privacy Act, 1986 and the Right to Financial Privacy Act, 1978 protect citizens against the federal government. Whereas, there are tailored, sector specific legislations for the private sector. For example, the GLB Act has well defined provisions for the collection and usage of financial data.

China, on the other hand, has framed its data Protection regime with the interests of the collective as the focus and not individual liberty. It has approached the issue of data protection primarily from the perspective of averting national security risks. Its cybersecurity law, which came into effect in 2017, contains top-level principles for handling personal data. A follow-up standard (akin to a regulation) issued in early 2018 adopts a consent-based

framework with strict controls on cross-border sharing of personal data. However, the implementation of this framework still has not seen the light of the day.

In Europe on the other hand, data protection norms are founded on the need to uphold individual dignity. Central to dignity is the privacy of the individual by which the individual determines how his/her personal data is to be collected, shared or used with anyone, public or private. The state is viewed as having a responsibility to protect such individual interest. The European approach is closest to the one India has adopted with Article 21 entrusting the state with the responsibility of not depriving anyone to the right to live with dignity and personal liberty. Therefore, it would be appropriate to compare the standards of the Data Protection laws in the EU, i.e. the General Data Protection Regulations (with country specific laws deriving inspiration from it) with the proposed Personal Data Protection Bill, 2019 of India.

As far as the exemptions go, both the EU GDPR as well as the PDP Bill look similar with regards to allowing the processing of data for preventing, investigating, detecting and prosecuting criminal offences. However, the Indian Law goes a step further by allowing the government to give its own agencies a free hand for the maintenance of "public order". This boils down the spirit of the Right to Privacy under the Act significantly because of the broad scope of misuse.

The EU GDPR further mandates that the Right to Freedom of Speech and expression should be protected including processing for journalistic purposes and the purposes of academic, artistic or literary expression which is also similar to what the Indian PDP Act has adopted. Furthermore, just like the EU GDPR, the PDP mandates exemptions to processing for such purposes from chapters pertaining to rights of data principal, Non-consensual processing, Exemptions and Transparency and accountability measures.

Overall, the EU GDPR is more uptight than the PDP Bill when it comes to safeguarding the rights of the Data Principal.

Conclusion and Suggestions

In conclusion, at the outset, the research would like to point out the flaws in the present legislative stance on Data Protection in the country and the balance between Privacy and Transparency thereon. Firstly, section 43A the Information Technology Act lays down very narrow and constricted sections with regards to Data Protection wherein only a "body corporate is held responsible for the mishandling of personal data. Moreover, the onus of describing the reasonable security practices and defining "sensitive personal data" is also given to the government. This not only leaves the government unregulated, but the kind of control required to be exercised on body corporates is also to be decided by the government which is quite arbitrary. Section 72A of the IT Act is also very limited in scope and only deals with malicious disclosure of personal data to third parties where such disclosure is likely to cause harm to the person whose personal data has been disclosed. Moreover, it is necessary that the person and the data holder are under a valid contract. This is again a very arbitrary section because firstly, it talks about the presence of a malicious intent to be a prerequisite. Therefore, disclosure of personal data without wrongful intent will not be punishable, although it might be prejudicial to the safety and security of the person whose data has been leaked. As far as the Right to Information Act goes, Section 8(1)(j) of the Act and the judicial stance on the same has made it quite clear that there needs to be a balance between privacy and transparency. However, since the RTI Act is only applicable to public authorities and covers information held by public authorities, there is again lack of supervision on the private sector. It can therefore be said, that the present legislative stance is not adequate to maintain a balance between privacy and transparency. More so, there is a dis balance on the sectoral level as well.

For the purpose of mitigating this discrepancy and recognizing the right to data privacy of an individual, the Personal Data Protection Bill was introduced in the parliament. However, there are quite a few discrepancies in bill as well. The bill defines the Rights of the Data Principal and lays down procedures on when and how personal data can be processed with the consent of the Data Principal. It should however be understood that we are still a developing country and for the growth of a digital economy, data processing

is of utmost importance and it might not be possible to obtain consent of the Data Principal in every situation and hence, certain exemptions and grounds have been laid down for non-consensual processing of personal data, with the intention of maintaining a balance between privacy and transparency. However, the provisions of the Bill, are compared to that of its counterpart, i.e., the EU GDPR it is clear that the government has given itself wide powers when it comes to processing data without the Principal's consent. Maintenance of public order is one such exemption and it gives very arbitrary powers to the Central government. In case of a data breach, the data fiduciary is required to inform the Data Protection Authority about the same when the fiduciary thinks that there is a likelihood of loss to the Data Principal. This is an arbitrary discretionary power given to the fiduciary. Moreover, upon receipt of notice about such breach, the Authority shall decide whether the Data Principal needs to be informed about the same or not. This is again a very arbitrary provision and it severely jeopardizes the rights of the Data Principal.

Therefore, as the Bill is now with the joint parliamentary standing committee, it would be interesting to see what changes will be inculcated in the report. For upholding the belief of the judiciary and to make sure that individual liberty is truly safeguarded, it is of utmost importance that the arbitrary powers given to the Central government be either curtailed or restricted by law, so that, in the true sense, the balance between privacy and transparency can be maintained for the maintenance of right to privacy and individual liberty, as guaranteed under Article 21.

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Understanding Discrimination: A Sociological Perspective

Madhura Sawant[1]

"Discrimination isn't merely differentiating amongst people on the basis of presence or absence of certain traits. It is a complex term and occurs at various levels like institutional, cultural and interpersonal. This paper aims at understanding how discrimination operates through implicit and explicit channels in order to maintain the hierarchy and status quo in the society. It emphasizes on understanding the discriminatory practices as systematic and structured often getting internalized as a normative social order. The paper further throws a light on discrimination occurring across different lived experiences, and how the failure to recognize it prevents us from comprehending one of the most pervasive complexities of our time."

Discrimination isn't merely differentiating amongst people on the basis of presence or absence of certain traits. It's a complex term and occurs at various levels like institutional, cultural and interpersonal. It can occur across a wide spectrum like housing, dietary preferences, education, political choices, sexuality etc. A discussion on 'What is Discrimination?' should begin by situating the concept of discrimination within the theoretical framework of intersectionality, wherein one considers the complex amalgamation of varied experiences of different social categories. Kimberle Crenshaw was the first person to use the term 'intersectionality' within a political framework. In her writings she asserts-how the experiences of women of colour are the product of intersecting patterns of racism and sexism[2].

Let's have a look at these three incidences reported in a local newspaper-

- *Payal Tadvi, a Muslim tribal student was a resident doctor at BYL Nair Hospital. Payal allegedly committed suicide after facing harassment by three of her seniors.*

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[2] Kimberle Crenshaw, "Mapping the margins: Intersectionality, Identity Politics, and Violence against Women of Colour 1241-1299 Standford Law Review.

- *On 28th, August, 2016, There was a plea from Northeast people in Pune, "Call us Indians, Treat us as Indians" after a group of miscreants beat up a 17 year old student, Takam Todo of Arunachal Pradesh at the Premises of Government Polytechnic in Pune.*
- *On 9thFebruary , a 10 year old disabled Dalit girl dies in Kerala, Family says school denied untimely treatment.*

A common phenomenon in all the above three incidents is the social identities of the people seem to be overlapping and leading to added discrimination. For instance, in the case of Payal, she is a Muslim tribal and a woman. All the social groups that Payal belongs to are vulnerable and marginalized and hence she becomes even more vulnerable to discriminatory practices .Gail Omvedt, a renowned feminist sociologist has written extensively on gender and caste[3]. She calls Dalit women 'The Dalit amongst Dalit'[4]. Most of the Dalit women in India face abject poverty and live in extremely vulnerable conditions. In a patriarchal society Dalit woman are subject to double oppression, they face oppression for being a woman and for belonging to the lowest rung in the caste hierarchy. Thus, the experiences of discrimination of a lower caste woman and an upper caste woman are going to considerably vary.

Discrimination can be explicit as well as implicit. Explicit discrimination is when someone is unjustly treated because of a personal characteristic or for belonging to a particular social group. For instance- in a university hostel if the security check is repeatedly done only in the case of tribal students then that is prima-face explicit discrimination. Such kind of discrimination occurs on a conscious level. The discriminator is well aware of the unjust treatment that is being inflicted on the other person.

However, discrimination isn't always explicit. In-fact, in most of the cases discrimination is implicit. It is subtle. A person who is being implicitly discriminated may not even know about it. Implicit discrimination occurs at a

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3 G.Omvedt, *Violence against Women: New Movements and New Theories in India*(Kali for Women, New Delhi, 1995)

4 Gail Omvedt, "The Downtrodden among the Downtrodden: An Interview with a Dalit Agricultural Labourer"4 *The University of Chicago Press*763-774 (1979).

subconscious level. Implicit discrimination often has the undertones of a pretext-based discrimination[5]. Gautam Bhatia in his article Let's Talk about Housing Discrimination throws a light on the implicit and pretext-based discrimination in the housing sector[6]. He says if a Muslim man is refused housing by an owner then its direct discrimination on the basis of the person's religion. But now say, if the same person refuses to rent his house to people eating non-vegetarian food then its discrimination under a pretext.

How does a discriminatory practice evolve? People often create social categories. Social categories contain discernable features, and consist of members who are comparable in a certain way. One such type of social categorization is in-group and out-group[7]. In-groups are social groups with whom you share certain similar characteristics. Out groups are groups which aren't part of the shared characteristics. For instance- In India, the age-old system of caste, patriarchy are linked to social categorization. Stereotypes and prejudices are a product of social categorization. Implicit discrimination gets perpetuated because of certain prejudices and stereotypes.

According to Prof. Khaitan, discriminatory practices may include segregation, harassment, boycott and discriminatory violence[8]. He further illustrates these practices by certain interesting examples[9]-

"Harassment: A schoolboy, who refuses to play sports, is called a 'sissy' by his teacher.

Boycott: A khap panchayat orders villagers to stop all interaction with the families of a couple who belong to different religions. This is boycott in relation to religion- cum-marital status.

Segregation: A Hindu boy is threatened with violence unless he breaks off his romantic relationship with a Muslim girl.

Discriminatory violence-A woman belonging to a Scheduled Caste is stripped and paraded around a village. This is an act of discriminatory violence in relation to caste and sex".

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5 Gautam Bhatia, "Let's talk about Housing Discrimination" *The Wire*, June.12,2015.
6 ibid
7 B.Harriss-White, A.P. (2010). Social Discrimination in India: A case for economic citizenship. *Semantic Scholar*.
8 K. Tarunabh, *A Theory of Discrimination Law* (OUP Oxford, Oxford, 2016).
9 Tarunabhkaitan, "15 Examples of Discrimination in India" National Herald, March. 17, 2017

The above mentioned discriminatory practices are often a systematic attempt to reduce a person to their mere social identity. This was exactly what happened in Payal Tadvi's case, she was the first person in her community to become a doctor. This meritorious achievement of Payal was reduced to her mere identity of being a Muslim Tribal student. Discriminatory practices often call for a control of certain symbolic and material resources and restrict one's upward mobility[10]. For instance- in the caste system the Dalits were systematically denied the rights of landownership, they were denied the right of worship, the right of education, the right of using water and the list is endless. This kind of discrimination can't be merely understood as an act of segregation or boycott. Here, there is a systematic attempt was made by a social group to control certain resources from passing into the hands of other social groups.

Thorat and Newman in their book, Blocked by Caste: Economic Discrimination in India, assert that Dalits aren't adequately represented in the entrepreneurial market[11]. They further assert that the reason Dalits aren't represented in the entrepreneurial markets is because they aren't able to build influential networks of their own or access large amount of capital[12]. Based on their study one can assert that discrimination leads to restricted access of social and cultural capital. According to Max Weber, within capitalist societies social groups tend to monopolize certain valued economic opportunities[13].

How does discrimination become normative? Discriminatory practices often get perpetuated in the society over a period of time. One of the core aspects of discrimination is upholding of socially legitimized hierarchies[14]. But, what legitimizes hierarchies in the society? Hierarchies in the society are legitimized by certain socially created normative frameworks. For instance, the normative framework of caste legitimizes the discrimination of the upper

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[10] Gayatri Nair and Rahul Menon, "Structures of Discrimination: A Response" 48 *Economic and Political Weekly*77-78 (2013).

[11] S. Thorat, *Blocked by Caste: Economic Discrimination in India* (Oxford University Press, New Delhi, 2012).

[12] SukhdeoThorat and Paul Attewell, "The Legacy of Social Exclusion: A Correspondence Study of Job Discrimination in India" 42 *Economic and Political Weekly* 4141-4145 (2007).

[13] S. Thorat, *Blocked by Caste: Economic Discrimination in India* (Oxford University Press, New Delhi, 2012).

[14] Jim Sidanius, F.P. (1999). *Social Dominance Theory.* Cambridge: Cambridge University Press.

caste over the lower caste or the normative framework of gender, which legitimizes the oppression of women by men. The subordination and marginalization which results from discrimination often gets internalized and accepted as a normative social order[15].

Discrimination is quite a complex term; discrimination operating through explicit or implicit channels maintains the hierarchies and status quo in the society. One needs to understand discriminatory practices as systematic and structured and hence while theorizing discrimination we need to distinguish between freedom of personal choice and the social goal of striving towards a non-discriminatory, non-oppressive and inclusive society. One needs to acknowledge that discrimination occurs across different lived experiences, and our failure to recognize it will prevent us from comprehending one of the most pervasive complexities of our time. It is within this context and theoretical framework one should re-align discrimination law in India.

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[15] B. Harriss-White, A.P. (2010). Social Discrimination in India: A case for economic citizenship. *Semantic Scholar.*

Citizenship Amendment Act, 2019: Boon or Bane?

Manasi Joglekar and Aniruddh Awalgaonkar[1]

There are two types of countries in the world - those that treat minorities equally and those that don't. India is the only country in the world which follows a third path and gives extra-special status to their minorities.

-Sunil Rajguru

Citizenship being an interwoven concept involving the individuals and the State, and their rights and obligations, it has also been connected to political and civil rights of an individual belonging to the state. Citizenship means "the state of being a member of a particular country and having rights because of it".[2] The concept of citizenship holds two independent views, namely; Individualistic view and civil (political) republican view. The rights of citizens are dynamic in nature; changing according to the needs of individuals in a society. These rights are socially, politically linked together which are peculiar to one state, recognizing one's identity and are inalienable and fundamental rights of the individuals of a nation.

Before citizenship originated, the individuals of society were connected and affiliated to a kin or a tribe, thereby lacking solidarity between the state and the individuals. The origin of Citizenship has been credited to the Greeks for recognizing the individuals of the Greek city-states; whereas the Romans went on to develop citizenship as a sign of power to the one who had acquired it. For citizenship to come into the picture there was a need for common hood, common beliefs, common recognition; considered to be a rudimental citizenship. Since then, there has been a sea change from the ancient citizenship to what it is today. The ancient citizenship was restricted to men; barring women, children and slaves and without any lawful act governing the rules of citizenship; whereas the modern citizenship stipulates the inclusion of all individuals residing legally, lawfully and in line with the Citizenship Act of the country.

The recent Citizenship Amendment Act, 2019 (CAA) has been condemned and denounced for being unconstitutional and against the secular

[1] IV BA, LL.B Students ILS Law College, Pune
[2] Cambridge English Dictionary

values nurtured in the Indian soil. The insertion in the CAA contains, "Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India or before the 31st day of December 2014 and who has been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made thereunder, shall not be treated as illegal migrant for this Act;"[3] The classification based on religion has been severely censured for specifically excluding Muslims in the act. The Citizenship Act established in 1955 has been amended in 1986, 1992, 2003, 2005, 2015 and 2019 by the Citizenship Amendment acts. A person can acquire citizenship by birth, descent, registration and naturalisation.[4] The recently amended act has provided a measure to protect and grant citizenship to the minorities who have been victims of religious persecution in Pakistan, Afghanistan and Bangladesh. The abovementioned criterion has been considered as being targeting a specific religion as well as blemishing the basic structure of the Indian constitution.

The three countries which share a border with India; Pakistan, Bangladesh and Afghanistan have been considered as theocratic nations (official and non-official) for India and various other countries as well as international organisations, having proclaimed a state religion i.e. Islam. The minorities in these countries i.e. Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities have been subjected to religious persecution; i.e. ill-treatment to a group practising a particular religion and its affiliated beliefs or traditions. The temples, as well as churches, have been destroyed. Hindu women are subjected to rape, forcefully marry their rapists and made to bore the child of the rapist(s).[5] There have been instances of rapes of girls who are below the age of 7. In certain cases, the family of the woman is forcefully made to watch their wives/daughters being raped. Hindu men are usually forced to convert to Islam and if they refuse to do so, they are killed.

In Afghanistan, during the Taliban rule, all the males of a family were killed and the women were taken as sex slaves and were forced to bear the

3 Citizenship Amendment Act,2019, S. 2(1)(b)
4 Citizenship Act, 1952, S. 3-6
5 Pak Hindus not treated equally under law' Zee News – 20 April 2012

children of their "owners". There have been many cases where on Muslims in Afghanistan were punished because they were not present in the mosques during prayer times as even this was considered to be a sign of infidelity and disrespect to Islam. In Afghanistan, The Islamic State in Khorasan Province (ISKP), an affiliate of ISIS and the U.S. - designated terrorist organization, and the Taliban continued to target and kill members of minority religious communities because of their beliefs or their links to the government.[6] Hindu women subjected to rape, forceful conversion into Islam is commonplace in these countries.

The crimes in Pakistan increased after the introduction of blasphemous laws by Gen. Zia Ul Haq in 1975. After these, most of the crimes against minorities were state-sponsored. Gen. Zia Ul Haq also said that this was a way to "Islamize " Pakistan who considered this as a necessary measure, the campaign was termed as 'Governance by the Prophet'.[7] The minorities in Pakistan have been a victim of the treacherous blasphemy laws; People belonging to minority religions are always considered as falsely accused of using derogatory remarks against the Prophet Muhammad which can result in fines, lengthy prison sentences, and sometimes the death penalty.[8] Into the bargain lies, Khawaja Nazimuddin, the 2nd Prime Minister of Pakistan, stated: "I do not agree that religion is a private affair of the individual nor do I agree that in an Islamic state every citizen has identical rights, no matter what his caste, creed or faith be".[9] The condition of the minorities since the partition has never been better; it has gotten worse with each passing day.

Also, in Bangladesh, the conditions of minorities are as unwelcoming as that in Pakistan. With an increasing population of the minorities in Bangladesh, the persecution has intensified blatantly, Hindus are being forced to leave, Hindu women raped and temples pulled to pieces. Further, in Bangladesh and Afghanistan, Hindu houses have an 'H' mark in yellow paint that shows that they belong to the Hindu community which makes it easier for the persecutors to identify and harass them. Christians are also subjected

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6 Afghanistan International Religious Freedom Report for 2017
7 Lisa Sharlach, 'Veils and four walls in Pakistan', April 2008
8 Global Human Rights Defence. "Human Rights Report 2019" (PDF). Retrieved 4 June 2019
9 Qasmi, Ali Usman (2015). *The Ahmadis and the Politics of Religious Exclusion in Pakistan*. Anthem Press. p. 149. ISBN9781783084258

to killings. Through the passage of the 5th and 8th amendments of the Bangladesh constitution, the government paved the way for Talibanization of Bangladesh and licensed atrocities against the country's minorities.[10] Also, the law enforcement agencies of Bangladesh directly participate in atrocities against minorities.[11] The ruling government has failed/refused to investigate the atrocities and rehabilitate the victims of religious and ethnic cleansing.[12] The Bangladeshi governments have denied these allegations time and again. The conditions of the minorities in these countries has been deteriorating with each passing day.

Article 14- Reasonable Classification

The clause in the Citizenship Amendment Act has been determined as violative o Article 14 as well as Constitution of India. Article 14[13] provides for the right to equality to individuals within the territory of India. Even though Article 14 gives citizens and noncitizens the right to exercise their fundamental rights and redress the inequality, it provides for a redressal system which is based on "equality to equals and inequality to unequal". Article 14 provides for reasonable classification which is discrimination done in good faith. Equality amongst unequal would in itself result in arbitrariness.

In the case of Vijay Lakshmi vs Punjab University and Others, it was held that Equality of opportunity admits discrimination, with reasons and prohibits discrimination without reason — Discrimination with reasons means rational classification for differential treatment having nexus with constitutionally permissible objects. — It is now an accepted jurisprudence and practice that the concept of equality before the law and the prohibition of certain kinds of discrimination do not require identical treatment. Equality means relative equality, namely the principle to treat equally what is equal and unequally what is unequal. To treat unequals differently according to

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10 11thSession of the working groups on minorities, the United Nations High Commissioner for Human Rights, U.N., Geneva, May 30 - June 3, 2005

11 *The Daily Star*, June 3, 2003

12 See, Prime Minister Khaleda Zia's response to Amnesty International's in *The Daily Prothom Alo*, Jan 13, 2003

13 The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

their inequality is not only permitted but required. Geographical classification is considered valid if historical reasons may permit and justify the reasoning.[14]

Shri Ram Krishna Dalmia vs Shri Justice S. R. Tendolkar, a landmark case on constitutionality of reasonable classification has set out principles; (a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself; (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles; (e)that to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.[15]

Article 14 in any classification stands constitutional if the notion of classification is based on intelligible differentia, the difference on which an individual or a group of persons are classified separately from others. This intelligible differentia also needs to have a rationale with the objective set out in the act. Herein, the classification made in the amendment has been based on religious persecution of the minorities from the Muslim dominated states. The geographical selection of the three countries i.e. Afghanistan, Pakistan and Bangladesh is based on historical reasons. The Supreme Court in Clarence Pais v. Union of India held that 'Historical reasons may justify differential treatment of separate geographical regions provided it bears a reason and just relation to the matter in respect of which differential treatment is accorded.'[16]

The partition of 1947 witnessed a huge refugee crisis i.e. exodus of Muslims into India; minorities (Hindu, Sikhs, Jains, Buddhists and Christians) to Pakistan and East Pakistan. To redress the same, the Nehru-Liaquat Pact was signed between Jawaharlal Nehru and Liaquat to ensure

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14 Vijay Lakshmi vs Punjab University And Others, (2003) 8 SCC 440
15 Shri Ram Krishna Dalmia vs Shri Justice S. R. Tendolkar, AIR 1958 SC 538
16 Clarence Pais v Union of India, AIR 2001 SC 1151

equality and protection at par with the other nationals of the states, to which Pakistan deliberately failed to fulfil their obligations under the pact. The then Law Minister of India, J.N. Mandal,[17] resigned on account of relentless persecution on the Hindus in Pakistan.

Also, the classifications are based on nations that advocate theocracy in their lands, making the minorities suffer who do not accede to the interests of the theocrats, which justifies the classification under Article 14 of the Constitution of India.

Also, in determining the validity or otherwise of such a statute the court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things.[18] Where the court finds that the classification satisfies the tests, the court will uphold the validity of the law.[19] Herein, the geographical classification based on historical reasons between the minorities and the majority in the three countries on account of religious persecution is a reasonable nexus to achieve the objective sought to be achieved in the Statement of Object and Reasons of CAA.

The constitutions of Pakistan, Afghanistan and Bangladesh provide for a specific state religion. As a result, many persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities have faced persecution on grounds of religion in those countries; Under the existing provisions of the Act, migrants from Hindu, Sikh, Buddhist, Jain, Parsi or Christian communities from Afghanistan, Pakistan or Bangladesh who entered into India without valid travel documents or if the validity of their documents has expired are regarded as illegal migrants and ineligible to apply for Indian citizenship under section 5 or section 6 of the Act.[20] Thus, the geographical

[17] J.N Mandal quoted, "I cannot bear the load of untruth and pretensions that Hindus live with honour and security of their life, religion and property in Pakistan."
[18] Supra note 13
[19] Supra note 13
[20] CAA, 2019, Statement of object and reasons

classification based on historical reasons is a reasonable nexus for the objective to be achieved in the amendment of the Citizenship Act, 2019.

CAA- A supplement to Secularism

The Preamble of the Constitution of India asserts that India is a Secular nation.[21] The secular concept of India is divergent from the Western concept of secularism, which does not separate religion and state, instead, it gives due regard to all the religions without any reference to a specific religion. In India, "All persons are equally entitled to freedom of conscience and the right to freely profess, practise, and propagate religion subject to public order, morality and health."[22] India is the only country which professes the ideology of not only coexisting with other religions but also providing special status to the minorities. Indian Secularism respects such diversity because of the importance it attaches to freedom of conscience and choosing one's religion.[23] The ideology of India since ages revolves around following one's own religion and at the same time respecting other religions, it can be safely inferred that the concept of secularism in India has been incorporated taking into consideration the importance of protecting rights of the minorities as well as one's religion in India.

In CAA, the provision focuses on persecution based on religion. The legislature while formulating the law, focuse not only on constitutionality of the act, but also the social significance and moral consciousness of the people.[24] The increasing atrocities based on the religion of the majoritarianism on the minorities in the countries viz. Pakistan, Bangladesh and Afghanistan have been the root cause of the framework of the CAA. Since India bestows significance on the protection of minorities based on religious factors in its constitution as well as legislatures, the amendment, too, focuses on persecution based on religion. Also, one cannot fail to consider the historical factors that have contributed to the formulation of the law. The partition of 1947 leading to the refugee crisis; the exodus before the Bangladesh Liberation War of 1971; the subsequent ill-treatment, unequal

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21 42nd Amendment, 1976

22 The Constitution of India, Art. 25

23 Pseudo-secularism in India, J. SUBRAMANYAN1 & AJITH KUMAR, Vol. 2, Issue 5, May 2014, 7-12

24 Rakesh Sinha, Article on Citizenship Act is an extension of and commitment to the idea of secularism.

and inhumane conditions of the minorities by the radicalistic majoritarianism in the countries has made it potent to implement provisions in the interests of the minorities which were once a part of the undivided India.

Even before the secular values of India were enshrined in the Constitution of India, Indians have been sympathetic and welcoming to protect the rights and identities towards the minorities who had taken refuge in India. The Parsis (originally Iranians) fled to India in the 6th Century to preserve their religious identity which was being subject to conversion by the Muslim conquerors in Iran. The Indians, then too actively assimilated the Parsi minorities into our motherland. The reasonable classification itself justifies the exclusion of the Muslims from the Muslim dominated countries since the objective in itself is to protect the identity, rights of the minorities and protect them from the existential threat posed by the radical majoritarianism. The CAA extends its support to secularism ingrained in the form of humanitarianism and morality. The citizens of the country have been looking at it as discriminatory to the Muslims due to under-inclusiveness, but fail to appreciate the initiative taken up by the nation to lend support to the minorities who have been victims of extreme religious fanaticism and unceasing atrocities in the lands of theocratic and radical majoritarianism.

Article 21 read with Article 14

Article 21[25] of the Constitution of India deals with the fundamental right of life and personal liberty, but this is not an absolute right enjoyed by the citizens as well as the aliens. The 'Procedure established by law' provided under Article 21 has a different set of meaning from that of 'due process of law' termed under the American Constitution of India. The framers of our Constitution had created an essential difference in the meaning of the phrases "due process of law" and "according to the procedure established by law", the former implied the supremacy of the judiciary and the latter the supremacy of the legislature.[26] The procedure of the law implicitly means the law established by the statute. Moreover, the intent of the legislature is presumed to be done in good faith the power of legislature (Parliament) which

[25] No person shall be deprived of his life or personal liberty except according to procedure established by law.

[26] A.K. Gopalan vs The State Of Madras.Union Of India 1950 AIR 27

legislated Citizenship Act and amended the CAA falls under Article 246 (1) of the Constitution.[27]

It is far too well-settled to admit that of any argument that the procedure prescribed by law for the deprivation of the right conferred by Article 21 must be fair, just and reasonable.[28] The fairness and reasonableness of the legislative amendment has been substantiated under Article 14 in the previous segment of the paper. When reading with Article 14, Article 21 makes the alleged classification in the CAA, 2019- fair, reasonable, non-arbitrary. Also, in the case of Shri Ram Krishna Dalmia vs Shri Justice S. R. Tendulkar, it has been put forward by the Hon'ble Supreme Court of India that when any statute determines a law, the intention of the statute for any classification should have a reasonable nexus with the objective that ought to be sought even though there are individuals or group of individuals reasonably differentiated from other.[29] This validity for the same has been held in Chiranjitlal Chowdhry v. The Union of India.[30] Article 21 read with Article 14 for reasonable classification justifies the exception established by the procedure of law to one's right to life and liberty.

Loopholes: Are they real?

Ambiguity in the CAA

The wordings in CAA are ambiguous and vague when it comes to defining "religious persecution" which is the basis on which classification has been made in the amendment. The word "religious persecution" needs to be added in the definitions of the Act.

Also, the statute does not comment on the status of the illegal migrants who would not be given citizenship on account of lack of proof of origin or travel documents. Whether their status would be stateless, whether they would be still accommodated in the refugee camps or sent back to their home country are open to question. The ambiguity in the amendment should be

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27 Subject matter of laws made by Parliament and by the Legislatures of States (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the Union List)

28 Maneka Gandhi V. Union of India, AIR 1978 SC 597

29 Supra Note 13

30 AIR 1951 SC 41

rectified, which in itself has made the Act open to arguments and interpretations, thus blemishing the authenticity of the act.

Religious Persecution: On what basis?

An important issue raised by the critiques is how can we say if an individual is persecuted based on his religion and is trying to come to India? In other words, while giving the illegal migrants measures to live in a country with respect and dignity who have been victims of religious persecution in the three countries, how is it possible to decipher those individuals that have approached for citizenship under the CAA, 2019 as the ones who have been victims of religious persecution? The answer to this is- This act is merely a preventive measure to prevent these minorities from further persecution. On a moral basis, India cannot wait for every individual to be persecuted for him/her to come to India. Before CAA came into the picture, the law excluded everyone, but now it has opened doors to the minorities. This act aims to prevent further persecution of these minorities by the neighbouring states.

Exclusion of Shias, Ahmaddiyas, and Hazaras from the minorities' list:

Yes. These sects of Muslims have also been subject to religious persecution in these countries due to their faith which minorly differs from the majority Sunnis in these countries. Particularly in Pakistan, the Ahmaddiyas are not even recognized as Muslims according to the Constitution of Pakistan. Thus, they have been subjected to a lot of brutality in the country. One of the most important arguments raised by the critiques of CAA is the exclusion of these sects from the act.

The Indian Government in response to this argument has said that Ahmaddiyas are recognized as Muslims according to Islam and according to the Government and Constitution of India. The exclusion of Ahmaddiyas as Muslims in Pakistan is an internal issue and the Indian Government holds absolutely no jurisdiction to interfere in the internal matters of Pakistan. Also, the inclusion of these sects would mean that India is further classifying and dividing Muslims by breaking them down into sects and giving "preferred" treatment to certain sects as the Ahmaddiyas and the Hazaras. Neither does

the Indian Government nor does the Indian constitution holds any power to do this. When the act provides for the exclusion of Muslims, it includes all Muslims from these countries, irrespective of their faith, sects or other reasons. India is absolutely no one to interfere in the internal matters of these countries and create a divide or classification in Muslims.

Exclusion of Tamils from Sri Lanka and Rohingyas from Myanmar:

When the act classifies the people, who will be allowed to seek citizenship in India, it clearly states that the persons who are subject to RELIGIOUS PERSECUTION in these countries. Tamils and Rohingyas are not religiously persecuted communities in their respective countries; there is discrimination against them based on ethnicity and not religion. The Legislature cannot include these communities in the act as the act is only applicable to minorities who have faced religious persecution and nothing else.

Demographic and Cultural changes in the Assam:

The refugee crisis in Assam started in the year 1971 when approximately 10 million people from East Pakistan (now Bangladesh) immigrated to India. They settled mostly in parts of West Bengal and Assam and other states of the NE. This led to severe demographic and cultural changes in Assam. With the application of CAA, there is an estimated increase of 19 million Bangladeshi non-Muslims in the state of Assam. This tremendous increase in the population has speculated that the Assamese speaking population of Assam will be severely affected as it would result in fierce competition for employment, education and other factors such directly affecting the daily lives of the Assamese speaking population. Assam has a total of 115 ethnic communities, speaking 55 languages and dialects. With such a massive increase in the population, this demography of Assam is likely to change in large proportions, as most of the immigrants are Bengali speaking Hindus from Bangladesh and may become the majority population of Assam, while pushing the original population of Assam into minority, causing a major demographic and cultural change in the state.

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Electoral Finance Reforms

Nihar Chitre[1]

Introduction

India- A land that is truly a rainbow country consisting of different sub-nationalities, races, creeds and religions contributing to its richness and vivacity. What are the most attributing feature of this diversity is the sense of unity and integrity. Seventy-one years back India adopted a constitutional system that guides and decides the destiny of billions of people. The Constitution of India declares it as Sovereign, Socialist, Secular, and Democratic Republic. The concept of democracy as visualised by the Constitution presupposes the representation of the people in parliament and state legislatures by the method of elections.[2]

Though modern India's engagement with elections or electoral rolls began in 1909 with the Indian Councils Act, 1909, it was the Government of India 1919 which made Indian elections participative "...Under this Act, a bicameral legislative body was created at the Centre- the Council of State as upper House, and the Central Legislative Assembly as the lower House (s. 63, 1919 Act)... Though the Act provided for direct elections from the constituencies to both the Houses, only a limited number of persons were granted the right to vote based on certain high qualifications, like the ownership of property, or the holding of land etc."[3]

After independence, the Republic of India enacted the Representation of People Act 1950 and 1951 ("the act'). Presently, the 1951 act governs the method of elections and election practices. According to Webster's dictionary '*election*' means "*the act or process of choosing a person for an office, position or membership by voting."*

Section 2(d) of the Representation of the People Act defines election as-

"election means an election to fill a seat or seats in either House of Parliament or the House or either House of the Legislature of a State other than the State of Jammu and Kashmir."

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1 IV BALLB, ILS Law College.

2 N.P Ponnuswami v. Returning Officer, AIR 1952 SC 64

3 S.K Mendiratta, *How India Votes Election Laws, Practice and Procedure5-6*(Lexis Nexis, Gurgaon, 3rd edn., 2014).

The Representation of People Act aims to provide for the conduct of elections to the Houses of Parliament and the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections.[4]

This paper is divided into two parts – 1. Critique of Amendments introduced through the Finance Act, 2017 and the notification of 02nd January 2018 by the Department of Economic Affairs, Ministry of Finance. [5] 2. Analysis of Campaign Finances in the USA.

Critique of Amendments Introduced through the Finance Act, 2017 and the notification of 02nd January 2018 by the Department of Economic Affairs, Ministry of Finance

The Finance Act 2017 proposed amendments to Representation of People Act, Income Tax, The Companies Act 2013 acts under the garb of bringing transparency in the electoral finance system. Further, the Department of Economic Affairs, Ministry of Finance notified the Electoral Bond Scheme on 2nd January 2018. The scheme allows any "person", who is a citizen of India or incorporated or established in India. The notification defines a person as "an individual"; a Hindu undivided family; a Company; a firm; an association of persons or a body of individuals, whether incorporated or not; every artificial juridical person, an agency, office or branch owned or controlled by such person. The scheme allows a "person" to buy an electoral bond from the designated branches of State Bank of India. The electoral bond is like a promissory note and may then donate the money to a political party registered under S. 29 A of the Representation of People Act, 1951 or has secured at least 1% of the votes polled in the most recent General Elections or Assembly elections is eligible to receive electoral bonds.[6] The Election Commission allots the party a verified account and the transaction can be made only through this account. The electoral bond may be issued in the

4 Representation of the People Act, 1951 (Act 43 of 1951 as amended up to Act 7 of 2017)
5 AIR 1985 SC 1133
6 What is an electoral bond? *Available at* https://www.business-standard.com/about/what-is-electoral-bond (last visited on February 7 2020.)

denomination of Rs 1000; Rs 10,000; Rs 1, 00,000 and Rs 1, 00, 00,000 and can be bought by any KYC[7](compliant account may purchase the bond and donate it to a party of their choice. The receiver can encash the bonds through the party's verified account. [8] Earlier the bonds were valid for fifteen days but recent order by the Supreme Court dated 12th April 2019 the window period was reduced to five days.

The exact controversy surrounding the electoral bond is the apprehension raised by the civil society and certain political parties are that the electoral bond scheme is that would further the nexus of political parties and corporate houses. The scheme violates the fundamental right of 'right to know' enshrined in art. 19 1(a) of the Constitution of India and developed through the various judicial decision of Supreme Court of India and state High Courts as information of donations made to political parties are neither reported nor recorded by the parties and such information is unavailable in the public domain.

The introduction of Electoral Bond Scheme opens the floodgate to unlimited political donations from Indian Corporate and foreign companies. This scheme legitimises electoral corruption at large scale and opaqueness in the political funding.

The Finance Act, 2017 was enacted as a money bill on 1st February 2017 and removed the previous limit of 7.5 per cent of the company's average three year-net profit for political donations and as a result, the companies are no longer required to name the political parties to which they shall contribute. This Finance Act also amends the Reserve Bank of India Act, 1934, the Representation of People Act, 1951 and the Income Tax Act, 1961. The amendments in each of this act shall be dealt with later.

The introduction of proviso and explanation to S. 29-C[9] through the Finance Act, 2017 does not require disclosure of names, addresses and electoral bonds.

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7 Know your Customer

8 Supra, note 6.

9 [29-C. Declaration of donation received by the political parties.—(1) The treasurer of a political party or any other person authorised by the political party in this behalf shall, in each financial year, prepare a report in respect of the following, namely:—

The amendment made to S. 29C of the Representation of the People Act is a retrograde step. The said amendment contributes to electoral bonds outside the ambit of Contribution Report mandated under S. 29C of the Representation of People Act.

The amendment to Companies Act, 2013 has made the corporate donations political parties extremely discreet through the removal of the requirement of disclosure of the names of political parties to whom contributions have been made. Neither the Corporate House nor the political party is required to disclose the identity of other furthering the quid pro quo arrangement between a political party and corporate houses and undermining free and fair elections and interest of the general public.

While introducing the Electoral Bond Scheme, Minister of Finance Mr.Arun Jaitley said that Electoral bond will ensure clean money and significant transparency against the current system of unclean money. [10] The scheme reduces the influx of "black money" in the financing of political parties.

The Electoral Bond Scheme was vehemently opposed by both Reserve Bank of India and Election Commission. But the current regime's record for upholding the opinion of these apex institutions is well known.

Reserve Bank of India through its letter dated January 30, 2017, had opposed the amendment of s. 31 of the Reserve Bank of India act, 1934 and the scheme itself. The Reserve bank of India opines that the proposed mechanism militates against its sole authority for issuing bearer instruments i.e. cash. Bearer instruments have the potential to become the currency and if issued in sizeable quantities can undermine the faith in the banknotes issued by the central bank. Amending S.31 of the RBI Act would seriously

(a) the contribution in excess of twenty thousand rupees received by such political party from any person in that financial year;

(b) the contribution in excess of twenty thousand rupees received by such political party from companies other than Government companies in that financial year:

88[Provided that nothing contained in this sub-section shall apply to the contributions received by way of an electoral bond.

Explanation.—for the purposes of this sub-section, "electoral bond" means a bond referred to in the Explanation to sub-section (3) of Section 31 of the Reserve Bank of India Act, 1934.]

[10] FM announces contours of electoral bonds for political funding *available at* https://economictimes.indiatimes.com/markets/bonds/fm-announces-contours-of-electoral-bonds-for-political-funding/articleshow/62338824.cms?from=mdr (last visited on February 18 2020)

undermine a core principle of central banking legislation and would certainly set a bad precedent.

The intended purpose of transparency may not be achievable, as the original buyer of the instrument need not be the actual contributor to a political party. These bonds are bearer bonds and are transferable by delivery. Therefore, the final and the actual contributor of the bond to the political party shall remain unknown.

Even though the person buying the bearer bond shall have to abide by the Know you Customer (KYC) parameters, the identities of intervening persons/ entities shall remain unknown. Thus violating, the spirit and substance of Prevention of Money Laundering Act, 2002.

If the established international practise allows the donation to a political party by an individual or entity through cheques or demand draft or any other electronic or digital mode of payment. There is no need to introduce a special need or advantage by the creation of an Electoral Bearer Bond.[11]

Not only RBI, but the Ministry of Finance did also value the opinion expressed by Election Commission and its senior officials.

A letter written in May 2017, by the Election Commission of India to the Ministry of Law and Justice warned that electoral bonds would help political parties hide illegal donations from foreign sources. Dubious donors could now set up shell companies to funnel black money to politicians and mask the true source of the money.

The Election Commission of India opined that the amendment proposed to S. 182 of the Companies Act, 2013 where the first proviso has been omitted and the consequent removal of the limit of 7.5% of the average net profits in the preceding three financial years on contributions by

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[11] The above views are reproduced by the author from the letter dated 30th January 2017 by Mr P. Vijaykumar, Chief General Manager to Joint Secretary, Ministry of Finance, Department of Economic Affairs; Government of India. The letter was obtained by transparency activist Commodore Lokesh Batra (Retd) under the Right to Information Act. Electoral Bonds: Seeking Secretive Funds, ModiGovt Overruled RBI *available at https*://www.huffingtonpost.in/entry/rbi-warned-electoral-bonds-arun-jaitley-black-money-modi-government_in_5dcbde68e4b0d43931ccd200 9 (retrieved on 15th February 2020)

companies. The proposed amendment as mentioned in the above paragraph opens up the possibility of shell companies being set up for the sole purpose of making donations to political parties, with no other business of consequence having disbursal profit.

The amendment to S. 182(3) abolishing the provision that firms must declare their political contributions in their profit and loss statement and reducing it to only show a total amount, would again compromise transparency.

Further, the amendment to S. 13of the Income Tax Act forbidding donation exceeding Rs 2000 can be received by a political party otherwise than by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account or electoral bond. However, the limit for receipt of anonymous donations by political parties remains at Rs. 20000 in S. 29C of the Representation of People Act, 1951. The Representation of the People Act needs to be amended to reduce the limit of anonymous/cash donations to Rs. 2000 to bring these two Acts in consonance with each other.[12]

Electoral Bond Scheme and the subsequent amendments in Finance Act, 2017, Representation of People Act, 1951, Income Tax Act 1962, the Companies Act, 2013, the Reserve Bank of India Act, 1934, the Foreign Contribution Regulation Act, 2010 violate the Constitution and Doctrine of Separation of Powers and citizen's fundamental right to information which are parts of the basic structure of the Constitution.

The Violation of fundamental 'Right to Know' and is not saved by any of the eight reasonable restrictions under art. 19 (2). The amendments place an unreasonable and irrational restriction on information and are a severe blow to the tenets of transparency and accountability.

The Supreme Court of India has emphasised on the importance of freedom of speech and expression in a democratic form of government and

[12] The above paragraphs are reproduced from the letter obtained under RTI Act written by Mr.VikramBatra, Director, EE to Secretary, Legislative Department, Ministry of Law and Justice. Electoral Bonds: Confidential EC Meeting Exposes ModiGovt's Lies To Parliament *available at* https://www.huffingtonpost.in/entry/electoral-bonds-narendra-modi-election-commission-opposition-arun-jaitley_in_5dce3cd1e4b01f982eff5c62 (last visited on 23rd February 2020)

also held that freedom of information is necessary for an informed citizenry. Freedom of speech lay at the foundation of all democratic organisations. [13]. In Sakal Papers (P) Ltd. & Ors. v. Union of India[14], Supreme Court observed that freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and governments and must be preserved.

"The right to know which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security". The Court pertinently observed as under[15]:-

"74. In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing…"

In Secretary, Ministry of Information and Broadcasting, Government of India and others v. Cricket Association of Bengal and Others[16] summarised the law on the freedom of speech and expression by:

"44. The freedom of speech and expression includes the right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self- fulfilment. It enables people to contribute to the debate on social and moral issues. It is the best way to find a truest model of anything since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts…"

The Hon'ble Supreme Court in para. 82 of the judgment observed that a successful democracy posits an 'aware citizenry'

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13 Romesh Thapar v. State of Madras, [1950]S.C.R. 594
14 [1962] 3 S.C.R. 842at 866
15 State of Uttar Pradesh v. Raj Narain and Others [(1975) 4 SCC 428]
16 (1995) 2 SCC 161

"82. True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non- information all equally create an uninformed citizenry which makes democracy a farce when the medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisation. This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1 ½ per cent of the population has access to the print media which is not subject to pre-censorship."

Electoral Bond Scheme and the amendments introduced in the Finance and other acts contravene the judgment of the Hon'ble Supreme Court in C. Narayanswamy v. C.K. Jaffer Shereif[17] where it observed that

"...If the call for 'purity of elections' is not to be reduced to lip service or a slogan, then the persons investing funds, in furtherance of the prospect of the election of a candidate must be identified and located. The candidate should not be allowed to plead ignorance about the person who has made contributions and investments for the success of the candidate concerned at the election. But this has to be taken care of by the parliament..."

Further, it observed:

"*...It is true that with the rise in the costs of the mode of publicity for support of the candidate concerned, the individual candidates cannot fight the election without proper funds. At the same time, it cannot be accepted that such funds should come from the hidden sources which are not available for public scrutiny..."*

The Report of the Santhanam Committee on Prevention of Corruption[18], says:

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17 (1994) Supp. 3SCC 170

18 S. 11. 'Social Climate', Para. 11.5

"*The Public belief in the prevalence of corruption at high political levels has been strengthened by how funds are collected by political parties, especially at the time of elections. Such suspicions attach not only to the ruling party but to all parties, as often the opposition can also support private vested interests as well as members of the Government party It is, therefore, essential that the conduct of political parties should be regulated in this matter by strict principles concerning collection of funds and electioneering. It has to be frankly recognised that political parties cannot be run and elections cannot be fought without large funds. But these funds should come openly from the supporters or sympathisers of the parties' concerned."*

The Hon'ble Bombay High Court in Jayantilal Ranchhoddas Koticha v. Tata Iron & Steel Co. Ltd. [19] exhibited '*considerable uneasiness of mind and a sinking feeling in the heart',* expressed, "*any attempt on the part of any business house to finance political party is likely to contaminate the very spring of democracy."*

In 1978, the Report of the Expert Committee on 'Companies and Monopolies and Restrictive Trade Practices Acts'[20] speaks at length about evils of nexus between political parties and companies and the danger of allowing the role of money power in the electoral process of the country.

In March 2002, the National Commission to Review the Working of the constitution observed:

"...The Sources of some of the election funds are believed to be unaccounted criminal money in return for protection, unaccounted funds from business groups who expect a high return on this investment, kickbacks or commissions on contracts etc... Citizens are directly affected because apart from compromised governance, the huge money spent on elections push up the cost of everything in the country. It also leads to unbridled corruption and the consequences of widespread corruption are even more serious than

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19 AIR 1958 Bom. 155

20 Quoted from Justice TS Doabia, *Law of Elections and Election Petitions 1381*(Lexis Nexis, Gurgaon, 5thedn., 2016).

many imagine. Electoral compulsions for funds become the foundation of the whole superstructure of corruption..."

The Electoral Bond Scheme does not satisfy the test of reasonable restriction laid down in M.R.F. Ltd. v. Inspector Kerala Government.[21]

Presently, two Public Interest Litigation under art. 32 of the Constitution of by India have been filed in the Supreme Court by Association for Democratic Reforms and Communist Party of India (Marxist). The Election Commission of India has filed Counter Affidavit before the Hon'ble Court mentioning its apprehension and reservation about the amendments made through the Finance Act, 2017 and the introduction of Electoral Bond Scheme. [22]

The Ministry of finance in its Rejoinder contains that the scheme is a step towards greater transparency and defends the scheme, stating India's ranking Corruption Perception Index in its rejoinder. It is the ridiculous stand of the central government to rely solely on the Corruption Perception Index of 2018 as a justification for the Electoral Bond Scheme. The Author does not doubt the authenticity of the index. It cannot be the sole criterion for the success of Electoral Bond Scheme.

Further, the Ministry of Finance relies on Ashok Shankarrao Chavan v. Madhavrao Kinhalkar and others.[23]In this judgment, the Supreme Court of India has observed the enormous power of money in elections. Further, it observes that the sanctity of Member of Parliament and the state legislature is not being seriously weighed by even those who sponsor these candidates.

If money and muscle power play a greater role in the elections of this state, then the whole purpose of electing representatives by the general public is defeated. It is agreed that election campaigns are expensive but if the entire campaign is transparent, crowd-funded and due returns and contribution reports are filed under the Representation of People Act 1951, it allows truly deserving candidates to work for the welfare of the general welfare. Thereby,

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21 AIR 1999 SC 188

22 Electoral Bonds *available at* https://www.scobserver.in/court-case/electoral-bonds (last visited 23rd February 2020)

23 (2014) 7 SCC 99

India as a state can truly achieve the Justice-political and social enshrined in our Preamble.

Analysis of Campaign Finances in the USA

The oldest and the largest democracies of the world have different methods for campaign finances. In this part, the author shall look at campaign finances that take place during the presidential elections in the USA.

In the United States of America, Campaign finance is supervised by the Federal Election Commission. It is an independent federal agency. It looks after the campaign finances for the US House, Senate, Presidency and the vice presidency. This agency was created in 1975. The Agency maintains the integrity of election campaign finance. It reduces opacity and administrating federal election laws.

In the US, under the presidential public funding programme, eligible presidential candidates receive federal government funds to pay for the qualified expenses of their political campaigns in both the primary and general elections.[24]

There are two types of funding: - a. primary matching funds b. General election funds.

The primary matching funds are available for candidates who wish to seek nomination form a political party to the office of president. The candidate must show wide public support and should be able to raise more than $5,000 in each of at least 20 states. The contribution from each individual is counted up to $250 therefore at least 20 individual should contribute to his campaign to make him eligible for funds.

There are various requisite conditions to be fulfilled for a candidate to be eligible for these funds. There is a national and state-wise ceiling for election expenditure.

For General Election Funds, the presidential nominees are granted $20 million-plus the cost of living adjustments. The nominee must limit the

[24] Public Funding of Presidential Elections *available at* https://www.fec.gov/introduction-campaign-finance/understanding-ways-support-federal-candidates/presidential-elections/public-funding-presidential-elections/ (last visited 23rd February 2020)

spending of the amount and may not accept private contributions for the campaigns. Although they may spend $50,000 from their funds.

Similar to the Indian system, the Federal Election Commission audits all campaigns which have received public funds for both primary and general elections. Candidates owe a repayment to Treasury department, if the public funds are used for non-campaign expenses, exceeded the expenditure limits, maintenance of surplus of public funds or received more than they were entitled too. [25]

Conclusion

Electoral finance reforms are major concerns around the democracies of the world. Here the author has critiqued the electoral bond scheme introduced by the central government. The Electoral bond scheme legalises and institutionalises corruption at a high level. This corruption further percolates down systematic corruption and kick back at middle and lower levels. The scheme and the subsequent amendments need to be withdrawn with immediate effect.

The system of campaign system though impressive and transparent is quite difficult to be implemented in India. The US follows a presidential form of democracy whereas India follows a West Minister model of Democracy. Although both states have quite similar compliances concerning election audit.

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[25] Id.

Contesting Elections from more than one Constituency: Revisiting India's Stance on a Major Electoral Canton

Varad S. Kolhe[1]

Introduction

Standing tall as the largest democracy in the world, India has the distinction of perpetuating the most magnanimous electoral exercise in magnitude by means of parliamentary, assembly, biennial or bye-elections. However, the robustness of this electoral exercise has come under the scanner for several reasons. One of the many reasons which come into the fore is candidates being allowed to the contest from more than one seat in the same election. This has been at the epicenter of contentious debate, both legal and political.

The origin of this debate stems from Section 33(7) of the Representation of Peoples Act, 1951 (RPA). [2] Section 33(7) of the RPA permits a candidate to contest any election (parliamentary, assembly, biennial council, or bye-elections) from *up to two* constituencies, presumably to accord greater flexibility to candidates and increase their chances of winning

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2 *[(7) Notwithstanding anything contained in sub-section (6) or in any other provisions of this Act, a person shall not be nominated as a candidate for election,--*

(a) in the case of a general election to the House of the People (whether or not held simultaneously from all Parliamentary constituencies), from more than two Parliamentary constituencies;

(b) in the case of a general election to the Legislative Assembly of a State (whether or not held simultaneously from all Assembly constituencies), from more than two Assembly constituencies in that State;

(c) in the case of a biennial election to the Legislative Council of a State having such Council, from more than two Council constituencies in the State;

(d) in the case of a biennial election to the Council of States for filling two or more seats allotted to a State, for filling more than two such seats;

(e) in the case of bye-elections to the House of the People from two or more Parliamentary constituencies which are held simultaneously, from more than two such Parliamentary constituencies;

(f) in the case of bye-elections to the Legislative Assembly of a State from two or more Assembly constituencies which are held simultaneously, from more than two such Assembly constituencies;

(g) in the case of bye-elections to the Council of States for filling two or more seats allotted to a State, which are held simultaneously, for filling more than two such seats;

(h) in the case of bye-elections to the Legislative Council of a State having such Council from two or more Council constituencies which are held simultaneously, from more than two such Council constituencies.

Explanation. For the purposes of this sub-section, two or more bye-elections shall be deemed to be held simultaneously where the notification calling such bye-elections are issued by the Election Commission under sections 147, 149, 150 or, as the case may be, 151 on the same date.

a seat. However, sub-section (7) was introduced only through a 1996 amendment, which meant that prior to the amendment, there was no bar on the number of constituencies from which a candidate could contest; although the amendment failed to elaborate on the rationale for restricting the number to two.

Further, Section 70 of RPA stipulates that a candidate can hold *only one* seat at a time, regardless of whether he/she has been elected to more than one seat. The consequence of Section 70 entails that if a candidate wins from more than one seat, he/she has to redact from one of them thus compelling bye elections in the constituency from which he/she redacts. Neither does this serve well on the voters who have to re-caste their votes, nor on the public exchequer and election commission's re-do of the entire process.

Given that a candidate cannot hold two seats at the same time, the election commission proposed that RPA should be amended to provide that a person cannot contest from more than one seat at a time.[3] This proposal was in tandem with the Goswami Committee in 1990,[4] endorsed by the 170th Law Commission Report in 1999,[5] and also found concurrence in the Background Paper on Electoral Reforms prepared by the Legislative Department of the Law Ministry in 2010.[6]

With the Supreme Court being seized of the matter by way of public litigation filed in March 2018,[7] this paper seeks to examine the all angles and tenets of this issue, focusing majorly on its comparative legal aspect.

Statistics: Candidates contesting from more than one Constituency

Before Rahul Gandhi in the 2019 Lok Sabha elections, several national leaders have contested from two or more Lok Sabha seats in a single general election.

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3 Election Commission of India, Proposed Electoral Reforms, D.O. No. 3/ER/2004 (2004),

4 Government of India, REPORT OF THE COMMITTEEON ELECTORAL REFORMS, May 1990, available at: https://adrindia.org/sites/default/files/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf

5 Law Commission of India, Reform of Electoral Laws, Report No. 170, May 1999, available at: http://www.lawcommissionofindia.nic.in/lc170.htm

6 Background Paper on Electoral Reforms prepared by the Legislative Department of the Law Ministry in 2010.

7 Ashish Tripathi, 'SC to hear PIL to bar contesting of multiple seats', *Deccan Herald* (27th March, 2018), https://www.deccanherald.com/national/national-politics/sc-to-hear-pil-to-bar-contesting-of-multiple-seats-725440.html

The Congress president, who contested from Wayanad in north Kerala besides Amethi in Uttar Pradesh, followed in his mother's footsteps and is now in the same club of multi-seat contestants as Narendra Modi, Atal Bihari Vajpayee, Mulayam Singh Yadav and Lalu Prasad, among others.

Atal Bihari Vajpayee in 1957, 1991, 1996

Balrampur, Mathura and Lucknow in Uttar Pradesh in 1957

As an activist of the Bharatiya Jana Sangh, Vajpayee contested from three constituencies in the second general election in 1957. He won from Balrampur, finished as runner-up in Lucknow and forfeited his deposit in Mathura.

Vidisha in Madhya Pradesh and Lucknow in Uttar Pradesh in 1991

He won both seats against Congress candidates, getting over 50 per cent of the vote share.

Gandhinagar in Gujarat and Lucknow in Uttar Pradesh in 1996

Again, he won both seats. In Lucknow, the Samajwadi Party's Raj Babbar had contested against Vajpayee.

Indira Gandhi

Medak in Andhra Pradesh (now Telangana) and Rae Bareli in Uttar Pradesh in 1980

Indira defeated Vijaya Raje Scindia in Rae Bareli. In Medak, she won against S. Jaipal Reddy, who was then with the Janata Party.

Sonia Gandhi

Amethi in Uttar Pradesh and Bellary in Karnataka in 1999

In Amethi, she won with a massive margin of 3 lakh, defeating the BJP's Sanjay Singh.

In Bellary, Sonia's contest was against the BJP's Sushma Swaraj, who was in the fight as the country-bred *beti* taking on the "*videshi bahu*". Swaraj lost by more than 56,000 votes. Like Amethi, Bellary too was considered a traditional Congress seat. But Bellary turned saffron in 2004 and has remained so since.

Mulayam Singh Yadav

Sambhal and Kannauj in Uttar Pradesh in 1999; Mainpuri and Azamgarh in 2014

Mulayam defeated the BJP's Chaudhary Bhupendra Singh in Sambhal. He had won Sambhal in the general election the previous year too. He won Kannauj but relinquished it.

In 2014, Mulayam won both Mainpuri and Azamgarh in an election that saw the BJP sweep the state with 71 seats. He relinquished the Mainpuri seat where his grand-nephew Tej Pratap Singh Yadav was re-elected in a bypoll.

Lalu Prasad

Chhapra and Madhepura in Bihar in 2004; Saran and Pataliputra in Bihar in 2009

Rashtriya Janata Dal chief Lalu Prasad defeated the BJP's Rajiv Pratap Rudy. In Madhepura, he beat Sharad Yadav of the Janata Dal (United). Sharad Yadav was defeated thrice from Madhepura, including twice by Lalu Prasad in 1998 and 2004.

Lalu was up against Rudy again in Saran and won. He lost Pataliputra to Janata Dal (United).

Akhilesh Yadav

Firozabad and Kannauj in Uttar Pradesh in 2009

Akhilesh won both the seats. Kannauj sent Akhilesh to the Lok Sabha in 2000 after a by-election win. The seat vacated by his father after he chose to represent Sambhal.

Narendra Modi

Vadodara in Gujarat and Varanasi in Uttar Pradesh in 2014

Modi had announced his desire to contest from Varanasi by saying: "Varanasi mujhe Ma Ganga ne bulaya (Ma Ganga has called me to Varanasi)." BJP veteran Murli Manohar Joshi was the MP from Varanasi and had to forego the seat. He contested from Kanpur and won. Modi got more than 55 per cent votes and won Varanasi. Aam Aadmi Party's Arvind Keriwal had challenged Modi in Varanasi and lost by a margin of 3,71,784.

Proposed Amendment Restricting Candidature to One Constituency: Arguments for and Against

Goswami Committee Report (1990)

The first voice for prohibiting a candidate from contesting elections from multiple constituencies resounded in the Report of the Goswami Committee. The report, which came through the legislative affairs department of the Ministry of Law and Justice, recommended a blanket ban on permitting candidates to contest from more than once constituency of the same class.

170th Law Commission Report (1999)

The above view was further vigorously endorsed by the Law Commission of India in its 170th Law Commission Report, released in 1999.

Report of the Election Commission of India (2004)

The Election Commission of India, in its Report on Proposed Electoral reforms reiterated with further conviction that a candidate should strictly be allowed to contest from only one constituency in an election. When a candidate wins for two seats, it means that he/she has to give up one of the constituencies in which he has secured the win. The consequence is that another bye-election has to be conducted in the same constituency. Thus, the labour and expenditure incurred by the bye election is humongous and detrimental to the ethos of a constitutional democracy.

Background Paper on Electoral Reforms (2010)

Since the report of the Election of Commission of India, this issue has echoed on several occasions, only to be ignored and left astray by the legislative machinery of the country. The Background Paper on Electoral Reforms prepared by the Legislative Department of the Law Ministry once again called from imposing a blanket ban on a allowing a single candidate to contest from multiple constituencies in the same class.

Recommendations & Conclusion

The moot question which arises out of this debacle is whether subjecting the entire electoral machinery of the state: the voters, the election officials and the electoral exercise to restart and re-function again in the bye election amounts to public mischief? To the author's mind, even if the candidate who gives up a constituency wherein he has secured a victory is compelled to reimburse the expenses of the election, the determination of how these expenses are to be quantified and determined is a controversy in itself.

The very provision allowing a candidate to contest from more than one constituency of the same class leads to constituencies being treated unequally. This provision does satisfy the test of Article 14 of the Constitution. Article 14 of the Constitution of India constitutes the touchstone of equality in India. It allows for classification in two prongs: (a) classification, if any made, should be reasonable; and (b) such classification should be contain a rational nexus to the object sought to be achieved by perpetuating such classification. Furthermore, even if (a) and (b) are indeed met, doctrine of arbitrariness permeates the sphere and if evaded, the classification is deemed as not tenable in law.

All in all, it is incumbent that Section 33(7) of the RPA is amended to limit a candidate to contesting in an election only from one constituency of the same class.

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THEME VII: FUNDAMENTAL RIGHTS AND RULE OF LAW

Assessing Assamese WOES: An Analysis of the Constitutionality of the Foreigners' Tribunal

Avirup Mandal[1] and Vishwajeet Deshmukh[2]

"We enter parliament in order to supply ourselves, in the arsenal of democracy, with its own weapons. We are becoming deputies in order to paralyse the Weimar sentiment with its own assistance. If democracy is so stupid as to give us free tickets and salaries for this purpose, that is its own affair. We do not come as friends, nor even as neutrals. We come as enemies. As the wolf bursts into the flock, so we come."

-Joseph Goebbels, Der Angriff (The Attack), dated April 30, 1928[3]

1) Introduction to National Register of Citizens ("*NRC*")

India is amidst a tumultuous situation wherein it has disenfranchised nearly 2 million people in enabling its exercise of updating the NRC in its north-eastern state of Assam.

A six-year protest beginning from 1979 led to the culmination of a historic document which later found its presence in deciding key citizenship issues for the state of Assam, which was known as the Assam Accord[4]. The authors answer the ramifications of the cumbersome National Register of Citizens ("NRC") process being set aside on the premise that the provisions enabling the same, which in this case is Section 6A of the Citizenship Act of 1955, is to be held ultra vires the constitution wherein the said NRC is a process dependent on the incorporation of the provisions of the Assam Accord in the statutory law of citizenship in India. At the same time, whether

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3 The New Cambridge Modern History, Volume XII, The shifting Balance of World Forces, 1898-1945, A second edition of Volume XII of The Era of Violence, Edited by C L Mowat, Published by Cambridge University Press, Page 241: Also to be found at The Frontline, Published by N.Ravi, Kasturi Buildings, Chennai-2, Volume 37, Number 01, January 04-17, 2020, Page 5.

4 The Assam Accord was a Memorandum of Settlement (MoS) signed between representatives of the Government of India and the leaders of the Assam Movement in New Delhi on 15 August 1985. A Six-year agitation demanding identification and deportation of illegal immigrants was launched by the All Assam Students' Union (AASU) in 1979 concluded with the signing of the Assam Accord: Assam Accord, available at https://assam.gov.in/en/main/ASSAM%20ACCORD (last visited on February 9, 2020).

the Supreme Court has driven NRC process had crossed the ethical limits of action promised in a political document as that of the Assam Accord, which may not have been treated upon and be left on administrative and executive discretion is questioned as traversing from the orders passed by the Supreme Court. A thorough analysis of the action is necessary for the wake of its predicted undesirable consequences. The article traces through the judicial mandate for detailed scrutiny of applications of those left out from the list of National Registry of Citizens. Pertinent questions arise on whether 'procedure established by law' was made available in a *bonafide* manner to those declared as "Foreigners".

2. An Assessment of Citizenship Through Political Theory

In order to understand the philosophical and theoretical debate in the political theory of citizenship and state, the relationship between the two is to be keenly studied. Rousseau's social contract theory of the sovereign is uniquely different from the absolute authority within a given state as enunciated by John Locke or Hobbes who felt that the sovereign was usually an absolute monarch. In *The Social Contract*[5], a healthy republic is one which Rousseau defines as the sovereign as all the citizens are acting collectively. As a whole, the citizens voice the general will including the laws of the state. The sovereign cannot be represented, divided, or broken up in any way: only all the people speaking collectively can act as the sovereign.[6]

Civic self-rule is also at the heart of Rousseau's project in the *Social Contract*: it is their co-authoring of the laws via the general will that makes citizens free and laws legitimate[7]. Active participation in processes of deliberation and decision-making ensures that individuals are citizens, not subjects[8].

It is here that the idea emanates that citizens contract to bring the state into existence which is inline within the modern concept of constitutional democracies wherein the citizens decide on making a constitution applicable

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5 Rousseau, Jean-Jacques. *The Social Contract.* Trans. Maurice Cranston. Harmondsworth, England: Penguin Books, 1968.:Rousseau, Jean-Jaques, The Social Contract or Principles of Political Right, Translated by H.J.Tozer, Edition 1998, Published by Wordsworth Editions Limited, Hertfordshire.

6 Wokler, Robert. *Rousseau.* Oxford: Oxford University Press, 1995.

7 As Rousseau famously wrote: "obedience to the law one has prescribed for oneself is freedom" (Rousseau, J.-J., 1762, On the Social Contract with Geneva Manuscript and Political Economy, R. D. Masters (ed.), J. R. Masters (trans.), New York: St. Martin's Press, 1978, Page 56).

8 See, for instance, book. I, chapters. vi and book. III, chapters. xv of *On the Social Contract* (ibid).

to themselves for achieving certain socio-political and economic goals of the society at large. Welfare states decide to achieve these goals on behalf of their citizens in an inclusive manner distributing a share of the growth among all sections of the state's population. Accordingly, it is significant to discuss the manner in which citizenship is defined as a relationship in the legal world between the individual and the state.

3. A Primer on the National Register of Citizens

The National Register of Citizens (NRC) is the register containing names of Indian Citizens. The only time that a National Register of Citizens (NRC) was prepared was in 1951 for Assam when after the conduct of the Census of 1951, the NRC was prepared by recording particulars of all the persons enumerated during that Census.[9] The NRC will be now updated to include the names of those persons (or their descendants) who appear in the NRC, 1951, or in any of the Electoral Rolls up to the midnight of 24th March 1971 or in any one of the other admissible documents[10] issued up to midnight of 24th March 1971, which would prove their presence in Assam or in any part of India on or before 24th March 1971[11].

All the names appearing in the NRC, 1951, or any of the Electoral Rolls up to the midnight of 24th March 1971 together are called Legacy Data. Thus, there will be two requirements for inclusion in updated NRC –

1. Existence of a person's name in the pre-1971 period &
2. Proving linkage with that person[12].

The burden is upon citizens to mandatorily having to submit Applications Forms (family-wise). Application Forms received by Government shall be verified and based on the results of verification of particulars submitted by the citizens in their Application Forms; the updated NRC shall be prepared[13].

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9 NRC in a Nutshell, available at http://www.nrcassam.nic.in/nrc-nutshell.html (last visited on February 9, 2020).

10 NRC Documents, available at http://www.nrcassam.nic.in/admin-documents.html(last visited on February 9, 2020).

11 What is NRC, available at http://www.nrcassam.nic.in/what-nrc.html(last visited on February 9, 2020).

12 NRC FAQ, available at http://www.nrcassam.nic.in/faq01.html(last visited on February 9, 2020).

13 NRC FAQ, available at http://www.nrcassam.nic.in/faq01.html(last visited on February 9, 2020).

However, to afford another opportunity to the applicants before the publication of the final NRC, a draft NRC shall be published after verification of the Application Forms and the citizens are given chance to submit claims, objections, corrections etc. After verification of all such claims and objections, the final NRC would be published[14].

The provisions governing NRC update in Assam are The Citizenship Act, 1955, and The Citizenship (Registration of Citizens and Issue of National Identity cards) Rules, 2003[15].

The modalities for NRC updating have been developed jointly by the Government of Assam and the Government of India in adherence to these statutes.

Phases of NRC

The entire process[16] of NRC Updating consists of the following phases:

1. Legacy Data Publication Phase
2. Application Form Distribution & Receipt Phase
3. Verification Phase
4. Publication of NRC Part Draft
5. Complete NRC Draft Publication & Receipt of Claims and Objections Phase
6. Final NRC Publication.

4. Constitutional Assessment of NRC

In order to understand the scope of the violation of the constitutional mandate, the definition of citizenship and its width in the Indian context vis-à-vis the global context is extremely pertinent and necessary.

Definition of Citizenship

As per Merriam Webster, citizenship is membership in a community and the quality of an individual's response to membership in a community[17].

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[14] NRC in a Nutshell, available at http://www.nrcassam.nic.in/nrc-nutshell.html (last visited on February 9, 2020).

[15] What is NRC, available at http://www.nrcassam.nic.in/what-nrc.html (last visited on February 9, 2020).

[16] NRC Flowchart, available at http://www.nrcassam.nic.in/images/pdf/process_flow-chart.pdf (last visited on February 9, 2020).

A dichotomous idea emerges while understanding the relationship of the state with an individual and in regard to the usage of the word 'citizen' and 'subject' as substitutable to each other. These two broad challenges have led theorists to re-examine the concept of citizenship: first, the need to acknowledge the internal diversity of contemporary liberal democracies and their citizenship; second, the pressures wrought by globalization on the territorial, sovereign state[18].

After a long period of relative calm, there has been a dramatic upsurge in philosophical interest in citizenship since the early 1990s[19]. Therefore, the idea of citizenship has slowly moved from a monolithic to a multicultural society and the trend is witnessed in most liberal democratic nations of the world.

The Indian Context

The Indian Parliament, under the Constitution of India, has the power to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship[20]. A tabular representation of the modes of acquiring Citizenship of India is reflected below.

	Under the Constitution of India, 1950	**Under the Citizenship Act, 1955 (as existing on the 9th of February, 2020)**	**Under the Citizenship Amendment Act, 1985**
Citizenship by Birth (*jus soli*)	At the commencement of the constitution, every person who has his domicile in the territory of India and	Every person born in India: - On and after 26th January 1950 but before 1st July 1987	There exists a clash in between the provision of Citizenship by Birth amongst

[17] Citizenship, available at https://www.merriam-webster.com/dictionary/citizenship(last visited on February 9, 2020).

[18] Leydet, Dominique, "Citizenship", *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), Edward N. Zalta (ed.), available at https://plato.stanford.edu/archives/fall2017/entries/citizenship/> First published 13th October, 2006 and substantive revision has taken place on 17th July, 2017 (last visited on February 9, 2020).

[19] Kymlicka and Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory", *Ethics*, 104 (2) (1994).

[20] Article 11, Constitution of India, 1950.

	who was born in the territory of India[21]	- Either parent is a citizen of India at the time of the individual's birth when birth date is on or after 1st July 1987 to 2nd December 2004 - For a person born on and after 3rd December 2004 and onwards, either both his parents are citizens of India or any one of his parents is an Indian citizen and the other is not an illegal migrant at the time of the individual's birth[22].	Section 3 and Section 6A of the Citizenship Act of 1955 for individuals in India except in Assam. The legacy data is mandatory for even individuals born after 24th March 1971 to 1st July 1987.
Citizenship by Descent (*jus sanguinis*)	At the commencement of the constitution, every person who has his domicile in the territory of India and either of whose parents was born in the territory of India[23]	For a person born outside India shall be a citizen by descent - if he is born on or after 26th January 1950 but before 10th December 1992 - On or after 10th December 1992, if either of his parents is a citizen of India at the time of the individual's birth[24]	Every person of Indian origin who: - Came to Assam on or after 1st January 1966 but before 25th March 1971 - And has been ordinarily resident in Assam since his date of entry from specified territory[25]

[21] Article 5 (a), The Constitution of India, 1950.
[22] Section 3, The Citizenship Act, 1955.
[23] Article 5 (b), The Constitution of India, 1950.
[24] Section 4, The Citizenship Act, 1955.
[25] Section 6A (1) (c), The Citizenship Act, 1955 reads that 'specified territory' means the territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985.

			- And has been detected as a foreigner Then he shall be registered as a citizen of India[26].
Citizenship by Registration and Naturalization	At the commencement of the constitution, every person who has his domicile in the territory of India and who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement[27]	Section 5 and 6 of the Citizenship Act of 1955 allows for citizenship by registration, marriage and also by naturalization.	

Therefore, a clear violation exists to the extent that an individual who is travelling from the specified territory, which means the territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985, is out rightly discriminated if he enters India from the northern borders of Bangladesh vis-à-vis the western or Eastern borders of Bangladesh. The Supreme Court of India clearly highlighted that the cause and effect relationship of illegal migration from another country cannot be handled without introducing a law that checks the migration not just to one state but to the rest of India as well[28]. Accordingly, the Illegal Migrants (Determination by Tribunals) Act, 1983 was struck down[29] on the very same reasons that a province-specific statute will not be able to remedy the problem of influx of illegal immigrants from a particular country. Relying on similar grounds, the definition of citizenship is narrow and pedantic for those travelling to the state of Assam from the specified territory vis-à-vis those who travelled from the specified territory to the western borders of

[26] Section 6A (3),The Citizenship Act, 1955.
[27] Article 5 (c), The Constitution of India, 1950.
[28] Sarbananda Sonowal vs. Union of India (Judgment 12th July 2005) Writ Petition (Civil) 131 of 2000 before the Supreme Court of India.
[29] SC strikes down IMDT Act as Unconstitutional, available at https://economictimes.indiatimes.com/sc-strikes-down-imdt-act-as-unconstitutional/articleshow/1168803.cms?from=mdr(last visited on February 9, 2020).

Bangladesh. Hence, it is argued that the provision of Section 6A is similarly liable to be struck down for its discriminatory treatment among the same class of individuals.

The problems with the types of citizenship across the world

In a world characterized by significant levels of migration across states, birthright citizenship — acquired either through descent (*jus sanguinis*) or birth in the territory (*jus soli*) — may lead to counterintuitive results: while a regime of pure *jus sanguinis* systematically excludes immigrants and their children, though the latter may be born and bred in their parents' new home, it includes descendants of expatriates who may never have set foot in their forebears' homeland. On the other hand, a regime of *jus soli* may attribute citizenship to children whose birth in the territory is accidental while denying it to those children who have arrived in the country at a very young age.

The stakeholder principle (or *jus nexi*) is proposed as an alternative (or a supplement) to birthright citizenship: individuals who have a "real and effective link"[30] to the political community, or a "permanent interest in membership"[31] should be entitled to claim citizenship. This new criterion aims at securing citizenship for those who are truly members of the political community, in the sense that their life prospects depend on the country's laws and policy choices. However, the subjectivity of the stakeholder principle may be put to use by fundamentalist governments and

A new scheme of acquisition of citizenship by investment

Previously, the majority of countries with citizenship-by-investment programs were located in the Caribbean, for example, Antigua and Barbuda, Saint Kitts and Nevis and Dominica. More recently in the European Union, Malta[32] and Cyprus have both developed successful programs[33]. It is

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30 Shachar, A., TheBirthright Lottery. Citizenship and Global Inequality, *Cambridge, MA and London: Harvard University Press*, Page 165 (2009).

31 Bauböck, R., "Stakeholder Citizenship: An Idea Whose Time Has Come?" in *Delivering Citizenship. The Transatlantic Council on Migration*, Gütersloh: Verlag Bertelsmann Stiftung, Page 35 (2008).

32 120 million generated through IIP scheme income for 2016 estimated at 80 million, available at https://www.independent.com.mt/articles/2016-02-01/local-news/120-million-generated-through-IIP-scheme-income-for-2016-estimated-at-80-million-6736152648 (last visited on February 9, 2020).

33 Cyprus Citizenship By Investment Remains Preferred Citizenship in Europe, Report by Charles Savva, 7th July 2016, available at http://www.mondaq.com/cyprus/x/507782/Investment+Immigration/CySECs+Consultation+Report+For+Application+And+Adherence+Of+Articles+61+62+Of+The+Prevention+Suppression+Of+Money+Laundering(last visited on February 9, 2020).

estimated that each year, hundreds of wealthy people spend a collective USD 2 billion to add a second or third passport to their collection[34].

5. Analysis of Section 6a of the Citizenship Act of 1955 with Respect to Voting Rights

The debate over voting rights, in particular, is complex and covers both external (extending voting rights to non-resident citizens) and internal voting (expanding the franchise to resident non-citizens).[35] Theorists with sympathies to the social membership thesis (arguing that residence over time in a specific territory is the key to membership in society) or to the stakeholder conception of citizenship usually consider that long-term residence in a country should be the basis for the allocation of democratic rights.[36] The argument may cover not only migrants who qualify for permanent resident status but also those who have entered illegally in the country[37] as well as temporary migrants, in particular 'guest workers' who are often denied any access to citizenship[38]. In this view, safety from deportation and the entitlement to the state's protection when abroad is what distinguishes citizens from resident non-citizens. Citizenship rights are understood as extra-territorial ("they follow the citizen rather than the territory") while voting rights are best understood as territorial[39].

Though some states do extend voting rights to resident non-citizens at the local level, it is the growing extension of voting rights to non-resident citizens over the last decades that is particularly striking[40]. It shows the persistence of a conception of membership premised on understanding that the nation-state is a historical community of citizens with common values and

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34 Where is the cheapest place to buy citizenship?, Report by Kim Gittleson, BBC Reporter, available at https://www.bbc.com/news/business-27674135(last visited on February 9, 2020).

35 Leydet, Dominique, "Citizenship", *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), Edward N. Zalta (ed.), available at https://plato.stanford.edu/archives/fall2017/entries/citizenship/ (last visited on February 9, 2020).

36 Leydet, Dominique, "Citizenship", *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), Edward N. Zalta (ed.), available at https://plato.stanford.edu/archives/fall2017/entries/citizenship/ (last visited on February 9, 2020).

37 Carens, J.H., Immigrants and the Right to Stay, *Cambridge (Mass.): MIT Press and Carens*, J.H.,(2013), The Ethics of Immigration, Oxford, *New York: Oxford University Press*.(2010).

38 Lenard, P.T., "Residence and the Right to Vote", *International Migration and Integration*, 16: 119–132 (2015).

39 Ibid.

40 Pogonyi, S, "Four Patterns of Non-resident Voting Rights", *Ethnopolitics*, 13 (2): Page 122–140 (2014).

shared ethno cultural traits[41]. In this view, voting rights are not understood territorially but follow the citizen when she settles outside of her home country. Though one can understand some of the pragmatic reasons that often motivate certain states in recognizing voting rights to expatriates (e.g. acknowledging and encouraging their continued contribution to the home country through payment of remittances), normative theorists have been mostly critical of this phenomenon[42]. In particular, the policy followed by certain states in the former socialist federations (USSR and Yugoslavia) of recognizing voting rights to co-ethnics residing in territories integrated in neighbouring independent states, as well as the more recent decisions by states like Hungary and Romania to extend voting rights to trans-border ethnic kin populations, should alert us to the dangers to regional stability that the "re-ethnicization of citizenship" involve[43]. Moreover, where the electoral system is not designed to limit the potential political impact of the non-resident electoral body, external voting may affect the "resident constituency's right to democratic self-determination"[44].

The Indian Aspect

The NRC is based on a statutory provision[45] which discriminates amongst the same class of illegal migrants[46] who have migrated from the specified territory to the state of Assam vis-à-vis to those who have migrated, as the same class of persons, to other parts of India from the specified territory.

For example, if an individual has migrated from the specified territory to Assam in between the notified dates of 1966 to 1971, the individual is said to be conferred with Indian citizenship but the citizenship is limited to the enjoyment of rights and obligations of all kinds except that to the right to vote for the upcoming ten years.

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41 Leydet, Dominique, "Citizenship", *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition).

42 Lopez-Guerra, C., "Should Expatriates Vote?", *The Journal of Political Philosophy*, 13 (2): Page 216–234 (2005).

43 Joppke, C., "Terrorists Repudiate Their Own Citizenship", in *The Return of Banishment: Do the New Denationalization Policies Weaken Citizenship?*, A. Macklin and R. Bauböck (eds.), EUI Working Paper RSCAS 2015/14 cited in Pogonyi, S, 2014, "Four Patterns of Non-resident Voting Rights". (2015).

44 Pogonyi. S, "Four Patterns of Non-resident Voting Rights", *Ethnopolitics*, 13 (2): Page 135-136 (2014).

45 Section 6A, The Citizenship Act, 1955.

46 Defined under Section 2 (1) (b), The Citizenship Act, 1955.

However, an individual who migrates from the specified territory to other parts of India except for Assam, then the said individual is said to acquire Indian Citizenship by his period of stay and the conferment of citizenship would tantamount to his enjoyment of voting rights from the time of such conferment of citizenship.

Therefore, it is evidently clear on how the same class of persons have been discriminated against on voting rights even after the conferment of citizenship upon both which clearly stands as a violation of the principle against arbitrariness which emanates from Article 14 of the Constitution.

Another Perspective to Discrimination of the Citizenship Amendment Act of 1985

Individuals who have migrated after midnight of 24th March 1971 to Assam have been barred from acquiring citizenship while the same class of persons who have travelled from the specified territory to other parts of India except for Assam may qualify to apply under Citizenship by birth[47], descent[48], registration[49] or naturalization[50] which creates a two-tier citizenship status which is against the constitutional spirit of one citizenship across the entire territory of India.

Accordingly, in *Assam SanmilitaMahasangha*[51], along with other organizations, the petitioner/s challenged the constitutional validity of Section 6A of the Citizenship Act, 1955 in 2012. In 2014, a Division Bench of the Supreme Court heard the matter and passed an order under Art 145(3) of the Constitution, referring the matter to a larger Constitutional Bench. On 19th April 2017 a 5-Judge Bench, comprising of Justices Madan B. Lokur, R. K. Agrawal, Prafulla Chandra Pant, D.Y. Chandrachud, and Ashok Bhushan was constituted[52]. The petitioners argued that there is no rational basis for having separate cut-off dates for regularising illegal migrants who enter Assam as opposed to the rest of the country.

47 Section 3, The Citizenship Act, 1955.
48 Section 4, The Citizenship Act, 1955.
49 Section 5, The Citizenship Act, 1955.
50 Section 6, The Citizenship Act, 1955.
51 Assam Sanmilita Mahasangha vs. Union of India, (2015) 3 SCC 1: WRIT PETITION (CIVIL) NO. 562 OF 2012 before Supreme Court of India.
52 Assam Accord, available at https://www.scobserver.in/court-case/assam-accord-case(last visited on February 9, 2020).

Presently, the matter continues before the Supreme Court. A new bench has to be constituted as 3 Judges - Madan B. Lokur, P.C. Pant and R.K. Agarwala have retired.

Section 6A Fiasco

In *Assam Sanmilita Mahasangha vs. Union of India*[53], a number of questions have been framed by the Supreme Court which requires an assessment before holding the NRC final list to be valid. Certain pertinent questions raised by the court includes whether Section 6A of the Citizenship Act, 1955, violates Article 14 by singling out Assam from other border states and whether there is a rational basis for having a separate cut-off date for citizenship of Assamese Residents through NRC. The twelve questions sub-judice before the constitutional bench are as follows:-

> *"(i) Whether Articles 10 and 11 of the Constitution of India permit the enactment of Section 6A of the Citizenship Act in as much as Section 6A, in prescribing a cut-off date different from the cut-off date prescribed in Article 6, can do so without a "variation" of Article 6 itself; regard, in particular, being had to the phraseology of Article 4 (2) read with Article 368 (1)?*
>
> *(ii) Whether Section 6A violates Articles 325 and 326 of the Constitution of India in that it has diluted the political rights of the citizens of the State of Assam;*
>
> *(iii) What is the scope of the fundamental right contained in Article 29(1)? Is the fundamental right absolute in its terms? In particular, what is the meaning of the expression "culture" and the expression "conserve"? Whether Section 6A violates Article 29(1)?*
>
> *(iv) Whether Section 6A violates Article 355? What is the true interpretation of Article 355 of the Constitution? Would an influx of illegal migrants into a State of India constitute "external aggression" and/or "internal disturbance"? Does the expression*

[53] Assam Sanmilita Mahasangha vs. Union of India, (2015) 3 SCC 1: WRIT PETITION (CIVIL) NO. 562 OF 2012 before Supreme Court of India.

"State" occurring in this Article refer only to a territorial region or does it also include the people living in the State, which would include their culture and identity?

(v) Whether Section 6A violates Article 14 in that, it singles out Assam from other border States (which comprise a distinct class) and discriminates against it. Also whether there is no rational basis for having a separate cut-off date for regularizing illegal migrants who enter Assam as opposed to the rest of the country; and

(vi) Whether Section 6A violates Article 21 in that the lives and personal liberty of the citizens of Assam have been affected adversely by the massive influx of illegal migrants from Bangladesh.

(vii) Whether delay is a factor that can be taken into account in moulding relief under a petition filed under Article 32 of the Constitution?

(viii) Whether, after a large number of migrants from East Pakistan have enjoyed rights as Citizens of India for over 40 years, any relief can be given in the petitions filed in the present cases?

(ix) Whether section 6A violates the basic premise of the Constitution and the Citizenship Act in that it permits Citizens who have allegedly not lost their Citizenship of East Pakistan to become deemed Citizens of India, thereby conferring dual Citizenship to such persons?

(x) Whether section 6A violates the fundamental basis of section 5 (1) proviso and section 5 (2) of the Citizenship Act (as it stood in 1985) in that it permits a class of migrants to become deemed Citizens of India without any reciprocity from Bangladesh and without taking the oath of allegiance to the Indian Constitution?

(xi) Whether the Immigrants (Expulsion from Assam) Act, 1950 being a special enactment qua immigrants into Assam, alone can apply to migrants from East Pakistan/Bangladesh to the exclusion of the general Foreigners Act and the Foreigners (Tribunals) Order, 1964 made thereunder?

(xii) Whether Section 6A violates the Rule of Law in that it gives way to political expediency and not to Government according to law?

(xiii) Whether Section 6A violates fundamental rights in that no mechanism is provided to determine which persons are ordinarily resident in Assam since the dates of their entry into Assam, thus granting deemed citizenship to such persons arbitrarily?"[54]

Constitutional Anachronism

The Supreme Court went ahead with the NRC without deciding the constitutional validity of Section 6A of the Citizenship Act of 1955. If the constitutional validity of the said provision is struck down then the NRC developed on the basis of Section 6A would face a legal consequence of void ab initio. For the very same reason, an amendment was proposed in the Citizenship Act, 1955 and was argued as required to protect the rights of the refugees from Bangladesh and Pakistan who had to leave their homeland owing to religious persecution or fear of such persecution or fear of civil disturbances and also to honour the solemn assurance given by the Government of India" [55] However, the same did not see the light of the day till the passage of the same in a convoluted manner took place through the Citizenship Act of 2019.

6. Judicial Scrutiny of Applications Excluded from NRC

As many as 57 orders of a Foreigners' Tribunal at Assam were recently quashed by the Guwahati High Court for serious discrepancies[56] that even prompted the Bench of Justices Manojit Bhuyan and Kalyan Rai Surana to record in its order[57] that:

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54 Assam SanmilitaMahasangha vs. Union of India, (2015) 3 SCC 1: WRIT PETITION (CIVIL) NO. 562 OF 2012 before Supreme Court of India.

55 KabindraPurkayastha presenting the Citizenship Amendment Bill, 2012 on 15th November, 2011, India, available at http://164.100.47.4/billstexts/lsbilltexts/asintroduced/4066ls.pdf(last visited on February 9, 2020).

56 Citing Irregularities Gauhati High Court Quashes 57 Orders of Assam Foreigners Tribunal, available at https://www.latestlaws.com/latest-news/citing-irregularities-gauhati-high-court-quashes-57-orders-of-assam-foreigners-tribunal/(last visited on February 9, 2020).

57 Gauhati High Court quashes 57 orders of Assam Foreigners' Tribunal for serious discrepancies, available at https://www.barandbench.com/news/gauhati-hc-57-orders-assam-foreigners-tribunal(last visited on February 9, 2020).

> *"We express our disappointment over the way the Member conducted himself. This was not expected. In the ordinary course this would have called for some action, disciplinary or otherwise. We leave it at that."*

It was also mentioned that mere noting in the note-sheet or passing of an order that reference was disposed of without a reasoned opinion/absence of judgment copy/dual judgment/without vacating earlier order in the case file would be no order in the eye of law.[58] Such a noting or order cannot be construed to be an order disposing of a reference case by a Foreigners Tribunal.[59] There has to be an opinion on record which must carry the seal and signature of the Presiding Officer of the Tribunal. In the absence thereof, such a reference will have to be treated as not being disposed of and be considered as a pending reference, which would have to be heard afresh.[60] In all the 57 references of the Foreigners Tribunal No. 4, Morigaon, the 'orders of disposal' were held as *non-est* in the eye of law and were held liable to be set aside.[61]

Multiple discrepancies have been reported in regard to the Judgments by the Foreigner's Tribunals that have been deciding lakhs of applications of individuals who have been left out of the final NRC list of 2019. However, the issue at hand is extremely significant for the determination of the individual into a foreigner can cause a subsequent condition of the individual being sent to a Detention Camp or being expelled from the state.

The Supreme Court has, however asserted that the power of the Government to expel a foreigner is absolute and unlimited[62]. There is no provision in the Constitution fettering this discretion of the Government[63]. However, the constitution equally provides for protection against arbitrariness[64] and accordingly, the government's discretion is limited to legal grounds for expulsion of foreigners.

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58 Judgment in Guwahati High Court, Case No. : Writ Petition (C) (Suo Moto) 11 of 2018.
59 Ibid.
60 Ibid.
61 Judgment in Guwahati High Court, Case No. : Writ Petition (C) (Suo Moto) 11 of 2018.
62 Jain, M.P., Indian Constitutional Law, 8th Edition (2018) , Lexis Nexis, First Edition 1962.
63 Jain, M.P., Indian Constitutional Law, 8th Edition (2018) , Lexis Nexis, First Edition 1962.
64 Article 14, The Constitution of India, 1950.

The Supreme Court has allowed the government to maintain an unrestricted right to expel a foreigner as held in *Hans Muller of Nuremberg vs. Superintendent, Presidency Jail, Calcutta*[65], *Louis De Raedt vs. Union of India*[66], *Gilles Preiffer vs. Union of India*[67], *David John Hopkins vs. Union of India*[68]and *Sarbanand Sonowal vs. Union of India*[69]. However, a foreigner can claim the protection to his life and liberty under Article 21[70], but the right to reside and settle in India as conferred by Article 19 (1) (d) is available only to the citizens of India and not to non-citizens[71].

7. The Foreigners' Tribunal Judges

International fact-finding reports have been critical of Foreigners' Tribunal Judges being assessed on the number of "foreigners" declared by a judge than on the quality of opinions issued by the Tribunal[72]. An additional issue of the temporal nature of employment of the Tribunal Judges is presently being put to use on which judge declares the highest number of foreigners. It is, therefore, significant to question the composition of the Foreigners' Tribunal hearing appeals against the non-inclusion of names as citizens in the Final NRC list in the wake of a nation-wide scheme of the same order named the NRIC and its precursor being the National Population Register (NPR) which is to start from April 2020.

8. Conclusion

The contours of citizenship have a clear nexus with the political theories that have persisted in the regard to the inclusion and exclusion principles of citizenry. The National Register of Citizen stands as the challenge for the nation, it's analysis with the Foreigners' Tribunal, provides for avenues that are in dire need of legislative contemplations. An in depth analysis of various sections read in consonance provide for a different

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65 AIR 1955 SC 367: (1955) 1 SCR 1284.
66 AIR 1991 SC 1886.
67 1996 Writ LR 386.
68 AIR 1997 Mad 366.
69 AIR 2005 SC 2920: (2005) 5 SCC 665 at page 693.
70 Jain, M.P., Indian Constitutional Law, 8th Edition (2018) , Lexis Nexis, First Edition 1962, Chapter XXVI.
71 Jain, M.P., Indian Constitutional Law, 8th Edition (2018) , Lexis Nexis, First Edition 1962, Chapter XXVI, Section F.
72 Designed to Exclude, How India's Courts Are Allowing Foreigners Tribunals To Render People Stateless In Assam, First published in 2019 by Indians For Amnesty International Trust

perspective. Alongside, the functioning of the Foreigners' Tribunal the understanding of the judges at the Tribunal is absolutely necessary. The contours of the National Register of Citizens extend in avenues of various legalities, the authors have deliberated on the Foreigners' tribunal to the best of their understanding of constitutional anachronism and how the same has been interpreted by the Supreme Court of India and other nations.

■

Doctrine of Legitimate Expectation: A Check on Administrative Discretion

Aayush Mayank Mishra [1]

Concept of the Doctrine of Legitimate Expectation

"A man should keep his words. All the more so when the promise is not a bare promise but is made with the intention that the other party should act upon it"

In the era of 21st century the concept of state as defined in Article 12 of The Constitution of India is widened by various judicial pronouncements. Various new authorities with wide powers are treated as states as a result of it the states interference in the life of citizen has increased a lot. For the smooth functioning of the administration, various doctrines, principles are evolved and Doctrine of Legitimate expectation is one such principle to address the issues of public if their expectations are not fulfilled and incorporated by the court to review administrative action. This doctrine talks about the inter dependence between citizens and public authority. As per this doctrine, the authority is liable for the legitimate expectation of the individual. A person may have a reasonable or legitimate expectation of being treated in a certain way by the administrative authorities owing to some consistent practice in the past or an express promise made by the concerned authority. Lord Denning in the year 1969 came up with this doctrine. Legitimate expectation means expectation which shall be protected must be 'legitimate' though it may not right in a conventional sense.[2] In other words we can say that even though a individual has no enforceable right but then also his/her interest may be protected under the doctrine of Legitimate Expectation.

Legitimate expectation can also be called as 'reasonable expectation' meaning "expectation which go beyond enforceable legal rights but it should be reasonable."[3]. As stated earlier the legitimate expectation has evolved by Lord Denning. Lord Denning in Schmidt case[4] held that

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1 Assistant Professor of Law, ILS Law College, Pune.

2 Basu, D.D., Human Rights in Constitutional Law, (2003) at 457.

3 A.G. vs. Ng Yuen (1983)2 ALL ER 346(350) P.C.

4 Schmidt vs. Secretary of State for Home Affairs(1969) 2 Ch. 149.

"*The speeches in Ridge vs. Baldwin*[5] *shows that an administrative body may in proper sense are bound to give who is affected by their decision an opportunity to make representations. it all depends on whether he has some right or interest or I would add some legitimate expectations of which it would not be fair to deprive him without hearing what he has to say …"*

In this case the foreign students had no right to stay for the time permitted but because to the application of doctrine of legitimate expectation they were given an opportunity to be heard.[6] This case was the triggering point when we talk about legitimate expectation and since than this doctrine is followed in various judicial pronouncements.[7]

In one of his renowned article, Alexander Brown has discussed three different aspects of legitimate expectations namely predictive, prescriptive and justifiable. Predictive means legitimate expectations are more or less based on beliefs in respect to future happening or non-happening of certain events. Prescriptive means they involve an agent's expectation about what some other agent or agency should do or not do in the future. Thirdly, they are not baseless but instead justifiable, meaning that the agent has epistemic justification or warrant for expecting, in both the predictive and prescriptive senses, that some other agent such as a governmental administrative agent or agency will and should do or not to do something in future.[8]

In De Smith's Judicial Review, it is observed that, normatively "a public authority that is the object of a legitimate expectation is under a legal duty, albeit qualified, in relation to the fulfilment of that expectation".[9] To qualify as "legitimate" the expectation must possess the following qualities[10]

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5 (1963)2 All ER 66: (194) Al 40.

6 Pandey, B.N., Doctrine of Legitimate Expectations, The Banaras Law Journal, Vol.31, (2002) at 58.

7 A.D. 1470(1) Yearbook 8 Edward !V.21, as quoted by Krishna Iyer, The Social Dimensions of Lawand Justice in contemporary India. The Dynamics of a New Jurisprudence, Problems, Prospectives and Prospects (1979) at 35.

8 Alexander Brown, A Theory of Legitimate Expectations for Public Administration (Oxford University Press 2018); Soren Schønberg, Legitimate Expectations in Administrative Law (Oxford University Press 2003); Robert Thomas, Legitimate Expectations and Proportionality in Administrative Law (Hart 2000).

9 Harry Woolf and others, De Smith's Judicial Review (8th edn, Thomson Reuters 2018) 686, citing R (on the application of SRM Global Master Fund LP) v Commissioners of HM Treasury [2009] EWHC 227 (Admin) [129] (Stanley Burnton LJ commenting also on the contrast with a "reasonable expectation" which denotes "a purely factual expectation, with no normative content".

10 Ibid.

(a) The representation must be "clear, unambiguous and devoid of relevant qualification". (b) The expected benefit or advantage must be more than a "mere hope". (c) A legitimate expectation must be induced by the conduct of the decision-maker. (d) The representation must be made by a person with actual or ostensible authority. (e) A person who seeks to rely upon a representation must be one of the class to whom it may reasonably be expected to apply. (f) The representation must be preceded by full disclosure. (g) Legitimate expectation should not be conflated with an expectation of fairness in general or the reasonable exercise of the decision-maker's discretion.[11]

Doctrine of Legitimate Expectation in India

Though this doctrine was evolved in the year 1969 by Lord denning but the concept or the essence of this doctrine is followed in India from time immemorial. Various Mythological story, various legislations etc. is based on the concept of legitimate expectations though the nomenclature is not used.

Talking about Vedic Era, Rig Veda is the oldest literature. Rig Veda generally the poems and proses narrated by rishis appreciating Gods. Rishis were of the opinion that these gods were very powerful but then also they have to follow the orders of the universe and they have to act fairly.[12]In Vedic Era the first law was 'Rit' or 'Order'. This law is inclusive of all the physical, social, moral, ritualistic norms.[13] 'Rit' is an independent body and is superior to all the gods.[14] It is not an expression of any divine will[15] but it is based on the ordering principles of universe. [16] Keith has observed Rit in Triple sense i.e. physical order of universe, religious order, and order of moral behavior. [17] 'Rit' is to be observed by everyone including the Kings as Kings were treated as an agent of the Kingdom. Taking other view of 'Rit' by Kane, it is also an expectation that King will work for the welfare of the people and the working of King will be based on two principles. Firstly to fulfill the promises and

[11] Public law foundation of the doctrine of legitimate expectations in India, Sanjay Jain and Shirish Deshpande, Indian Law Review 2019, VOL. 3, NO. 1, 61–96.
[12] Pandeya, R.C., A Panorma of Indian Philosophy. (1966) at 3.
[13] Purohit, S.K., Ancient Indian Legal Philosophy, (2002) at 18.
[14] Gupta Uma, Materialism in the Vedas 1987) at 161.
[15] Ibid.
[16] Supra note 12
[17] Keith as quoted by Gupta Uma, Materialism in the vedas, (1987) at 158.

secondly to take care of everyone and not to cause injury to anyone.[18] Therefore we can say that in Vedic era also rule of Law was prevalent. As doctrine of Legitimate Expectation talks about the fulfillment of promise, no harm to anyone, fair hearing, principle of equity is above the legislations; the 'Rit' or 'Order' also aims the same. Hence, we can say that though the nomenclature 'Legitimate Expectation, was not used in India before 1989 but the essence andconcept was prevalent right from Vedic Era.

Promissory Estoppel *vs.* Legitimate Expectation

There are various kinds of Estoppel as per Law of Equity which is prevalent in English Law and Promissory Estoppel is one such kind. The concept of Promissory Estoppel is applicable generally in Law of Contracts. It is applied when the promisor is withdrawing his promise. The Judiciary has applied promissory estoppel for the first time by Calcutta High Court in 1880 in ***GangesManufacturing Co. v. Souruimull***[19]and then by Bombay High Court in ***Municipal Corporation of Bombay vs. Secretary of State***[20]**,** in this case court held that to invoke promissory estoppel it is not necessary that promise must be recorded, even if the promise is not expressly mentioned in the contract than only promisor has to perform the said promise.

Discussing promissory estoppel in brief we can say that promissory estoppel and doctrine of legitimate expectation has some close relation as both the doctrine are evolved from the principles of law of equity and is based on the promise which should be clear and unambiguous. Both the doctrine is based on the representation made, in the case legitimate expectation by the public authority and in case of promissory estoppel by the promisor.

As we have understood the similarity between both the doctrine, there are certain differences between the two. The first and major difference lies in the context of against whom it is enforced. Legitimate expectation is enforced generally against the public authority while promissory estoppel can be enforced against any person. In legitimate expectation it is not mandatory to

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18 Kane, History of Dharamashatra, Vol III.
19 1880 ILR 5 Cal 669.
20 1905 ILR 29 Bom 580; (1904) 29 Bom 580.

proof injury/damage but in promissory estoppel the injury/damage is essential ingredients. The legitimate expectation is cover the principles of natural justice, unreasonable and arbitrary action of public authority, fairness etc. but promissory estoppel is applicable to any kind of representation, therefore we can say that in this respect we can say the ambit of promissory estoppel is wider. .

Legitimate Expectation: Substantive and Procedural Aspects

The Doctrine of Legitimate expectations has two dimensions, first the procedural aspect and second the substantive aspect. In 1969, Lord Denning[21] dealt with the procedural aspects of the doctrine as he examined the doctrine in the light of principles of natural justice. In other words, we can say that the principle of natural justice is applicable to all the administrative actions if there is any promise or practice which is followed from long back. If the person has the expectation that he has the right of being heard than this procedural legitimate expectation. In India, procedural legitimate expectation is very well established but the substantive dimension of legitimate expectation is at very nascent stage.

Substantive legitimate expectation means when because of legitimate expectation an individual is seeking for some substantial benefit. The position of substantial legitimate expectation is not clear and it vary from one legal system to other legal system. Talking about Australia, In ***Attorney General for New South Wales vs. Quin***,[22]The court was of the opinion that in doctrine of legitimate expectation is applicable only in procedural aspects. CJ Mason states that:

"Substantive LE as opposed to procedural protection would encounter the objection of entailing curial interference with administrative decisions on the merits by precluding the decision maker from ultimately making the decision which he or she considers most appropriate in the circumstances".[23]

Under English Law, the court is delivering the judgment which protects both substantive legitimate expectation as well as procedural

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21 Supra 3.
22 (1990) 170) CLR 1 (High Court of Australia).
23 Supra 10.

legitimate expectation. To study substantive legitimate expectation, we will study ***R v North and East Devon Health Authority***[24], popularly known as Coughlan case. In this case patient were initially being cared in Newcourt Hospital. One of the patients was Coughlan. They were shifted to Mordon House with the promise that they can live there for as long as they choose and Mordon house will suit them the best. This promise was express promise. After few days the authority planned to shut down Mordon house and shift the patients to other hospitals. Coughlan challenged this decision as it was in breach of the promise made. The Wednesbury test was rejected as a test for judicial review of legitimate expectation of this nature and the test of abuse of power was established. According to the Court of Appeal, *"[The Courts task] is then limited to asking whether the application of the policy to an individual who has been led to expect something different is a just exercise of power".* This test in effect gave a much larger scope for application for violation of substantive legitimate expectation to succeed. Had the Wednesbury test been applied, the chances of success in a judicial review would be almost non-existent.

The Coughlan case was rejected in some of the legal system like that of Australia but in the countries like India, The Supreme Court has accepted the rationale given in the Coughlan Case.

In ***National Building Constructions Corporation v. S Raghunathan***[25]**,** the Supreme Court held that legitimate expectation is a source of both, procedural and substantive rights. The person seeking to invoke the doctrine must be aggrieved and must have altered his position. The doctrine of legitimate expectation assures fair play in administrative action and can always be enforced as a substantive right. Whether or not an expectation is legitimate is a question of fact.

In ***Punjab Communication Ltd. Vs. Union of India***[26], The Apex Court discusses substantive dimensions of legitimate expectation and held that substantive aspects of the doctrine are accepted as the part of Indian law. The Apex Court accepts Wednesbury Test as the test for determining whether

[24] (2001) QB 213 (CA).
[25] 64(1996) DLT 509.
[26] 1994 SCC 727.

legitimate expectation is denied and whether denial is reasonable or not. The Court relied on The Raghunathan Case, for the definition of Legitimate expectation

"..claims based on "Legitimate Expectation" have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppels".

The Court also states that for the application of the doctrine of legitimate expectation the promise or representation is must. The court was not able to differentiate between promissory estoppel and Substantive Legitimate expectation.

Judicial Interpretation to the Doctrine of Legitimate Expectation

In ***Council of Civil Service Unions and Others v. Minister for the Civil Service***[27], The court held that the person is affected by the verdict of public authority when his rights or obligation is altered or when he is deprived of certain benefits which he was authorized or which he could expect legitimately to avail the benefit unless withdrawal on reasonable ground and the withdrawal has to be communicated to the person along with the reasons of the withdrawal and opportunity of being heard must be given to the person by the authority who is withdrawing the right.

The first case in Indian legal jurisprudence which discussed the doctrine of legitimate expectation is ***State of Kerala v. K.G. Madhavan Pillai*** [28]**.** In this case a notice was issued to the opposite party and as per the notice they have to upgrade the existing school and start a new aided school. After 15 days of the previous notice a new notice was issued which states that the previous notice is to be suspended and should not be implemented. The respondent has challenged the new notice on the ground of violation of principles of natural justice. The Apex Court held that the previous notice had entitled the respondents with the legitimate expectation and therefore the second notice was violative.

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27 [1984] 3 All ER 935; [1985] AC 374.
28 ((1988) 4 SCC 669.

In ***Navjyoti Coop. Group Housing Society v. Union of India***[29]**,** the Apex Court has discussed the doctrine of legitimate expectation. In this case a new rule was implemented for allotment of land. As per the old policy the date of registration was taken into consideration to determine seniority but as per the new rule date of approval was taken into account for deciding seniority. Then new rule was challenged.

The Apex Court held that there lies a legitimate expectation on the part of housing societies as the previous rule was followed for long period in the matters of allotment. The Supreme Court furthers states that a doctrine of legitimate expectations has different outcomes and one of them is that the authority shall not fail to meet the legitimate expectation unless there is some reasonable ground for the same. The court further dealt with the concept of reasonable opportunity and held that the reasonable opportunity comes under the ambit of acting fairly and court further states that the housing societies should have been given an opportunity by way of public notice.

The Apex Court in ***Food Corporation of India vs. Kamdhenu Cattle Feed Industries***[30], explained the nature of Doctrine of Legitimate expectations. The court held that it is the duty of every public authority to act fairly, in other words it entitles every citizen to be treated in fair manner and therefore this doctrine is important as it will eradicate arbitrariness in the state's action and indirectly it will put a check on state's power. The court further held that though this sort of expectation is not enforceable in the court of law but not adhering to legitimate expectation will amount to arbitrariness. The court states that what is legitimate expectation is very subjective in nature and it depends on facts and circumstances of the case. We cannot use legitimate expectation as a precedent.

The constitutional Bench of the Apex Court has discussed the concept of legitimate expectation in respect to judicial in ***Confederation of Ex-Servicemen Associations vs. Union of India***,[31]

"No doubt, the doctrine has an important place in the development of Administrative Law and particularly law relating to 'judicial review".

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29 ((1992) 4 SCC 477).
30 ((1993) 1. S.C.C. 71).
31 (2006) Supp (4) SCR 872; 2006 (8) SCC 399

The court held that the person may have expectation that the public authority will treat him/her in a certain way even this particular expectation is not enforceable in the court of law. Such expectation may arise either from the express promise or from long lasting practices. The judiciary may not enforce this expectation but court may insist the administrative body to act fairly. The court further held that it can be invoked only by the person who has certain expectations, in other words who is dealing with the administrative authority.

In ***Union of India vs. Hindustan Development Corporation***,[32] the Supreme court has discussed the doctrine of legitimate expectation in detail. While discussing the doctrine of legitimate expectation the court has explained the scope as per Halsbury's Laws of England[33] which states that an individual can have an expectation to be treated in a certain manner though he/she may not have the right to enforce it.

In one of the Latest case ***Kerala state beverages corporation ltd. vs. P.P. Suresh &ors.***[34] the Apex Court has discussed the doctrine of legitimate expectation and how the public interest have the overriding effect over doctrine of legitimate expectation. The Facts of the goes like this, Retail outlets for sale of arrack were started by the Corporation in the year 1995, in view of the decision taken by the Government of Kerala to abolish arrack shops which were hitherto run by private parties. Thereafter, on 01.04.1996, arrack was banned in the State of Kerala. Consequentially, 12,500 arrack workers were deprived of their livelihood. Protests followed and finally on 20.02.2002, the Government ordered that 25% of all daily wage employment vacancies which would arise in the Corporation in future shall stand reserved to be filled up by displaced workers who were members of the Abkari Workers Welfare Fund Board and whose services were terminated due to the ban of arrack. The order dated 20.02.2002 was altered G.O.(Rt) No. 567/2004/TD dated 07.08.2004. Vide this Order, 25% of all daily wage employment vacancies likely to arise in the Corporation, were directed to be earmarked for the dependent sons of arrack workers who had perished

[32] ((1993) 3 SCC 499).
[33] Fourth Edition, Volume I(I) 151.
[34] Civil appeal no. 7804 -7813 of 2019.

consequent to the loss of employment, due to the ban on arrack in the State. In case the claimants exceeded the number of available vacancies, employment would be provided after a selection. The eligibility for seeking re employment was that the dependent sons of deceased arrack workers should not have completed 38 years of age.

The single as well as division bench of the Kerala High Court held that State Government has to implement G.O.(Rt) No.81/2002/TD dated 20.02.2002 The learned Judges were of the view that the displaced workmen had a legitimate expectation of continued employment, which they could claim. The government cannot change the policy without giving the reasonable opportunity to the people affected by the change. The justification of the Government that the change of policy was on account of overriding public interest, was not accepted by the Judges of the High Court.

The Appeal was preferred to the Apex Court. The court discussed both the aspects of legitimate expectation. Talking about procedural legitimate expectation the court said that if the policy of government affects a large number of person than it is not expected that right to be heard must be given to all the person. Even if the right of being heard is given to few people or before altering the policy few people were consulted than it is said that government has acted fairly. Talking about substantive legitimate expectation, the court held that as the decision of the Government to the change policy was to balance the interests of the displaced Abkari workers and a large number of unemployed youth in the State of Kerala and in the public interest the government can change the policy unless the government is not acting arbitrary or in unreasonable manner.

The bench of Supreme Court comprising Justice Nageswara Rao and Justice Hemant Gupta has observed that overriding public interest can be a reason for change in policy of the Government and that has to be given due weight while considering the claim of legitimate expectation.

Concluding Remark

Legitimate expectation is the vital part of the administrative law as it is based on the principles of natural justice and rule of law. Legitimate expectation is protected so that the public authorities don’t misuse the power

conferred to them. Though the administrative authority has the discretion but after the evolvement of the doctrine they will exercise the discretion fairly. The doctrine of legitimate expectation has close significance with Article 14 of the Constitution as Article 14 is also based in the concept of unreasonable and non-arbitrariness and the same is the basis of legitimate expectation as well. Doctrine of Legitimate expectation is in consonance with the Constitution of India, Principle of Natural Justice, Rule of Law, Human Rights therefore is one of the most essential and popular doctrine as it checks the power of administrative Authority.

Till date Supreme Court has involved the Doctrine of Legitimate Expectation in more than 100 cases and the latest is in 2019 while the High court has invoked the doctrine in more than 1000 cases and latest is in the year 2020.[35]

Discussing legitimate expectation at stretch now we analyze the grey area in this doctrine. As discussed earlier there are two aspects of legitimate expectation i.e. procedural legitimate expectation and substantive legitimate expectation. Procedural legitimate expectation is settled and needs no modification but when it comes to substantive legitimate expectation it is still in very early stage. It requires a lot of modifications. The judiciary have to list down the conditions or tests in which substantive legitimate expectation as the courts in India is still confused when to invoke substantial legitimate and when not to invoke. As judiciary is protector of the rights as well as the expectation of the persons therefore while deciding whether there is denial of legitimate expectation or not, there should be a uniformity. For the doctrine to grow individually, it is necessary that lower standards are set as qualifiers which undoubtedly may run its own risks like a too much judicial intervention.

I like to end this paper by making a statement that Doctrine of Legitimate expectation is a check on the discretional power of the Administrative body and in the democratic country like India it is very essential to protect the interest of the citizens.

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[35] Data as per SCC Online.

Horizontal Application of Fundamental Rights in the Contemporary Constitutional Law

Deepak Kumar[1]

Introduction

In contemporary juncture, the existing application of fundamental rights is not enough in the era where the scope and the nature of the State becoming limited gradually. The State, limited up to the police, army and the railways and others national emergence services, on the contrary, all other services fulfil solely either by the private individual or organization or under the Public Private Partnership schemes. In that case if the non-State actors acquire the larger space than the State in the society without any constitutional obligation. Therefore, it is needed to look upon other way that how to tackle the issues rise before the nation regarding the application of fundamental rights.

The roots or foundation of the origin of HRs lies in the failure of the State's obligation to deal with discrimination between two individuals. Rights and duties are the primary fundamental instrument through which a society achieves the essence of democratic values. Rights and duties are available against both the State as well as individual to perform certain obligations. It is the duty of the State to not discriminate or violate the FRs of its citizen. As the State has under the constitutional obligation to not discriminate, the citizen or non-State actors also have the duty to not discriminate to the fellow citizen.

To bring home this point it may be noted that every day there are news headlines detailing crimes against women by fathers, husbands and employers. The father, brother, and husband, society and religious institutions rather than the State commit the violations of the fundamental rights of women. An echo of this can be found in the fact that the corporation enjoys rights as a citizen in both under domestic as well as international law but when a corporation violates human rights on a large scale, it is not considered as human rights[2]. Knox argued that the governments are often controlled by

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[2] John H. Knox, "Horizontal Human Rights Law" 102 *American Law Review* 40 (2008).

the elites with little interest in protect the rights of minorities. There is need, then, for international human rights law to play a role[3].

D. Kairys has the following to state on the public and private sphere in contemporary times:

> In the public sphere, which includes selection of government officials and political expression, basic concepts of freedom, democracy, and equality are applicable. However, in the private sphere, which encompasses almost all economic activity, we allow no democracy or equality, only the freedom to buy and sell....Fundamental social issues, such as the use of our resources, investment, the energy problem, the work of our people, and the distribution of our goods and services, are all left to 'private'-mainly corporate-decision makers[4].

In that era (post Second World War) it was the state that abuse perceived as the violator of human rights rather than powerful private bodies:

> Consciousness of the dangers of abuses by the state was higher than that of abuse by the powerful private bodies at that time, though the human rights infringements by professional bodies, schools and universities, commercial and industrial enterprises, and scientific and cultural institutions in Hitler's Germany and Mussolini's Italy had already shown the significant dangers that human rights are exposed to in the private sphere. States are, however, the parties to international instruments, individual are not[5].

Oliver and Fedtke further stated that "The application of human rights protections in the private sphere may be 'direct' as in Indian and Ireland, among our examples or 'indirect' as in most of the jurisdictions in our study, notably Canada, Denmark, Germany, Israel, New Zealand and the United

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3 *Id.* at 20.

4 Andrew Clapham, *Human Right in the Private Sphere* 137 (Oxford University Press, New York, 1998).

5 J. Oliver, DawnFedtke, "Human Rights and Private Sphere-the Scope of the Project" in J. Oliver and DawnFedtke (Ed.), Human Rights and the Private Sphere a Comparative Study 10 (Routledge-Canvendish, New York, 2007).

Kingdom"[6]. At the time of post war-era, the imposition of a duty on private individual or non-State actors was objectionable but in the contemporary era, the scenario has been changed[7]. Oliver and Fedtke go on to state that:

> The power of private bodies over individuals has increased over the last few decades with globalization, concentrations of monopolistic power locally, nationally or internationally, technology, and the increasing dependence of individuals on bodies such as banks, buildings societies and insures for their security , which has grown as state bodies have shifted some of the responsibilities they took on in the second half of the twentieth century (for providing housing, health services, education and so on) to the private sphere.[8].

Gardbaum stated that there are "two polar poisons" regarding the application of fundamental rights in the Constitution. The first is, "purely vertical"; in that case the relation of fundamental rights is limited to as being between the State and the individual, and in case of infringement of fundamental rights, the State machinery is liable for the same. In that approach the application of rights is against the State in a strict sense and it is the State's duty to protect the rights of individual not the duty of the other private individual to function as the State. On the contrary, the second approach is "horizontal application fundamental rights"; in that case, in the scheme of the fundamental rights under the Constitution, the fundamental rights are available not only against the State but the private individual also. It can be said that in contemporary times given the traditional prominence of the vertical approach, private individuals, institutions or organizations violate fundamental rights more than the state[9].

There are three kinds of verticals positions of constitutional rights. First, 'Strong vertical effect' which primarily regulates the relation between the State and the individuals, in other words it is applicable only against the

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6 *Id.* at 14.
7 *Id.* at 17.
8 *Id.* at 20-21.
9 Stephen Gardbaum, "The "Horizontal Effect" of Constitutional Rights" 102 *Michigan Law Review* 395 (2003).

State and not the private individual. The second, 'weak indirect horizontal effect', which is applied through private law under the ambit of constitutional rights indirectly not directly - through the application of constitutional values by the courts. Third, 'strong indirect horizontal effect', which takes the position that all law whether public or private, are subject of constitutional rights and may be invoked as so by a private individual in a court. All of these are in contrast to 'direct horizontal rights' which are available against the State as well as the private individual for protecting the constitutional rights directly[10].

Gardbaum defines 'direct horizontal rights' as being enforceable against private actors. 'Indirect horizontal rights' are two kinds, first is the case where vertical rights impose a positive obligation on the state to protect the fundamentals rights of the citizens through various actions. These rights require a positive duty not only on the State but also on the private bodies. Second, indirect horizontal rights emphasise the impact of fundamental rights on private individuals to the extent that private law depends on fundamental rights. Gardbaum has argued that "whereas under direct horizontal effect a bill of rights governs all actions, under indirect horizontal effect it governs all laws[11].

Gautam Bhatia has argued on the concept of horizontal application of fundamental rights in two ways. First, he says that it should be clear in a horizontal application of fundamental rights as to against whom the remedy is available. This may be done either directly by making a private individual the respondent or by making the respondent state control the actions of private actors. Second, the question needs to arise-"what is the remedy being sought against? This second enquiry proceeds parallel to, but is not identical with, the first. What is impugned might be private *action,* or it might be State action that *allows* certain kinds of private action which are at issue"[12].

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10 *Id.* at 436-37.

11 *Id.* at 601.

12 Gautoum Bhatia, "Horizontality under the Indian Constitution: A Schema" last visited on 09th Feb 2020 https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/#comments

Gardbaum stated that it can be said that in contemporary times given the traditional prominence of the vertical approach, private individuals, institutions or organizations violate fundamental rights more than the State[13]. Knox argues that 'As social creatures, humans must comply with duties to one another individually and collectively for society to work. Every society must therefore impose *some* duties on private actors'[14].

It was post Second World War time when the international community was trying to avoid next World War by making effective institution, i.e., United Nations which makes and implements the international laws, conventions and treaties to equalise all humans. During that time period, expansion of the rights jurisprudence at both national as well as international level took place. At the same time, the countries like India, after getting freedom from colonial rule made their own Constitution to govern themselves. Also, Germany had a bad experience of the genocide committed by the State as well as non-state actors, during post Second World War, it imposed constitutional obligation on the non-State actors. The Indian Constitution has also adopted some provisions to make the application of fundamental rights among individuals.

On the basis of above analysis on the definition of horizontal application of fundamental rights, it can be said that it simply a horizontal application of the fundamental rights or the bill of rights envisaged under the constitution. The horizontal application of the fundamental rights further can be divided into direct or indirect. In direct application of fundamental rights, the private parties or non-State can be compelled to protect and respect the fundamental rights of the individual. On the contrary, in the indirect application of fundamental rights, the individual or non-State actors not compel to enforce fundamental rights of the fellow citizen but can be cover through private law. In other words, the idea of the concept of horizontal application of fundamental rights is to put individual or citizen or non-State actors under the constitutional obligation.

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13 *Supra* note 8 at 365.
14 *Supra* note 1 at 10.

India

The Indian Constitution is a social document as described by a number of jurists. Granville Austin[15] and Gopal Guru[16] described the Indian Constitution as a social revolution. Rajiv Bhragava[17] stated that the Indian Constitution is a moral document. There are reasons that why scholars have declared Indian Constitution as a social and moral document. It is because, it abolished thousands years old inhuman social evils in one single stroke. Citizens were divided on basis of various discriminatory grounds such as caste, class, religion, place of birth, creed, colour, etc. before the enforcement of the Indian Constitution. It makes all citizens a single entity without any discrimination before the eyes of the law. Granville Austin[18] has aptly observed:

> India's founding fathers and mothers established in the Constitution both the nation's ideals and the institutions and processes for achieving them. The ideals were national unity and integrity and a democratic and equitable society. The new society was to be achieved through a social-economic revolution pursued with a democratic spirit using constitutional, democratic institutions.

The extent to which we have received this revolution seems to be debatable. When the Indian Constitution came into force on 26th January 1950, it was first time when all citizens began to possess equal rights and duties. Moreover, it was for the first time in India, that citizens had equal social, political and economic rights. Untouchability became an offence. The Constitution made guarantees of entitlements for the socially and educationally disadvantaged groups of the society i.e. SC/ST/women and children, etc.

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15 Granville Austin, *The Indian Constitution Cornerstone of a Nation* 50 (Oxford University Press, New Delhi 2000).

16 Gopal Guru, "Constitutional Justice: Positional and Cultural", in Rajeev Bhargava (Ed.) *Politics and Ethics of the Indian Constitution* 230 (Oxford University Press, 2008).

17 Rajeev Bhargava "Introduction: Outline of a Political Theory of the Indian Constitution", in Rajeev Bhargava (Ed.) *Politics and Ethics of the Indian Constitution* 4 (Oxford University Press, 2008).

18 *Supra* 14 at xi.

The Indian constitution framers bore in their minds the religious genocide at the time of Second World War and also the partition. In both incidents the fundamental rights were violated at large by the State as well as the non-State actors. The Constituent Assembly knew that the non-State actors play a key role to control the life and liberty of an individual. That is why the constitutional framers were unanimously in favour to abolish all kinds of discrimination especially the caste practice, the untouchability, *begar* or forced labour, the human trafficking, and the child exploitation in hazardous works.

The constitutional framers made individuals liable under the constitutional obligation to not discriminate with the fellow citizens. The Indian Constitution envisaged Articles 15 (2), 17, 23, 24 and 29 (2) under Part III (Fundamental Rights) under which the private individual has the constitutional obligation as the State has. These are the unique feature of the IC that imposes constitutional duty on the private individual equal to the State. Though the application of fundamental rights of the individuals is available against the State, but these articles are the exception of this general rule.

In India, these articles 15 (2), 17, 23, 24 and 29 (2) are the essence of social democracy because these provisions put negative duty on the individual to not discriminate with the fellow citizen. It makes collective responsibility on the State as well as the individual to make an egalitarian society in India.

The Indian Constitution has adopted the concept of horizontal application of fundamental rights in Part III. The idea of horizontal application of fundamental is based on the distribution of the duty with the State by the non-State actors. The constitutional framers envisaged Articles 15 (2), 17, 23, 24 and 29 (2) to fulfil the object mention in the Preamble i.e. equality, fraternity and the justice social, economic and political. The discussion finds that these provisions are the self-content code and anyone can approach before the Supreme Court (u/a 32) and the High Courts (u/a 226) for enforcement of these rights.

It is extraordinary provisions in the context of FRs in the IC that Articles 15 (2), 17, 23, 24 and 29 (2) does not need of the State action under article 12 of the Constitution. In other words, HRs in the IC makes the State Action doctrine irrelevant. The judiciary expanded the HRs though Article 12, 14, 21 and 21A. The Concept of HRs became prominent as the judiciary developed it by these articles. However, on the contrary the original articles of HRs failed to achieve its objects. The Indian judiciary needs to relook of its approach towards HRs and entertain cases under Article 15 (2), 17, 23, 24 and 29 (2) directly.

Article 12 states the definition of the State for the purpose of fundamental rights under Part III. Though this definition includes the governmental bodies but the two phrase of the article make is inclusive first, "unless the context otherwise require" and second "other authority". The *Report of the National Commission to Review the Working of the* Constitution headed by Justice M.N. Venkatachaliah (2002) suggested that article 12 should be amended and in the definition of the word "other authority" it should be including the word "any person" who functions like the State. That will help to put constitutional obligation on the non-state actors which enjoy right and liberty without constitutional obligations.

Gardbaum elaborated about article 15 (2) of the Indian Constitution that 'It is an entirely different idea, and therefore, it is absolute essential'[19]. H.M. Seervai stated that if the violation of article 17, 23 and 24 occurs, the remedy is available under article 32 of the constitution[20]. Likewise, Granville Austin also stated that there are three articles 15 (2), 17 and 23 which provide protection against fellow the citizen[21].

The commission on the review[22] of Indian constitution stated that 'any person' shall be inserted into the definition of the State[23]. M.P. Singh articulated on the relevance of State definition for the application of

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19 *Supra* note 8 at 603.

20 Seervai H. M, I *Constitutional law of India* 374-75(Universal Law Publishing, New Delhi, 2005)

21 *Supra* note 14 at 51.

22 The Report of the National Commission to Review the Working of the Constitution headed by Justice Shri M.N. Venkatachaliah in 2002, on Article 12 stated that 'the expression "other authority" shall include any person in relation to such of its functions which are of a public nature'.

23 Subhash C Kashyap, *The Framing of India's Constitution A study* 320(Universal Law Publishing Co. Pvt. Ltd. 2nd New Delhi, edn., 2004)

fundamental rights that the Constitution framers made provisions to safeguard the fundamental rights of citizens not only against the state but the non-state actors that could violate the FRs because of the not-action or connivance of the State[24].

In *BandhuaMuktiMorcha*[25]and *PUDR*[26], the apex court enforced fundamental rights against State as well as the non-state actors against the inhuman treatment of several workers and bonded labours. In *MC Mehta*[27] the Supreme Court of India entertained a PIL against a private company or non-State actor for violation of fundamental right. The apex court enforced fundamental rights of Article 21(right to life) against *Shriram Fertilizer* a private Corporation. The court held that:

> [T]his historical context in which the doctrine of State action evolved in the United States is irrelevant for our purpose especially since we have Article 15(2) in our Constitution. But it is the principle behind the doctrine of State aid, control and regulation so impregnating a private activity as to give it the colour of State action that is of interest to us and that also to the limited extent to which it can be Indianised and harmoniously blended with our constitutional jurisprudence.

In *M.C. Mehta*[28] the apex court enforced the Article 21 (right to life) under Article 32 against a private corporation that polluted the environment and damages were awarded for the same. In *ICELA*[29], at 238, J. Jeevan Reddy held that it is the court's obligation to take action against a private entity when it disobeyed the law of the land.

In *Vishaka*[30], the Supreme Court has put out guidance for the safety of women at the work place in the absence of legislation at all public as well as private places. In*Mohini Jain*[31], a writ petition entertains by the apex court

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24 M.P Singh, "Protection of Human Rights against State and Non-State Action" in J. Oliver, Dawn and Fedtke (eds.), *Human Rights and the Private Sphere a Comparative Study* 191(Routledge-Canvendish 2007).

25 *BandhuaMuktiMorcha v Union of India and Ors*(1984) 3 SCC 161.

26 *People's Union for Democratic Rights and Others v Union of India and Others*(1982) 3 SCC 235.

27 *MC Mehta v Union ofIndia* (1987) 1 SCC 395.

28 *M.C. Mehta v Kamal Nath and Others* AIR 2000 SC 1997.

29 *Indian Council for Enviro-Legal Action and Others v Union of India and* Others (1996) 3 SCC 212.

30 *Vishaka v State of Rajasthan and Others* MANU/SC/0786/1997.

31 *Mohini Jain v State of Karnataka and Others*AIR 1992 SC 1858.

against a private medical college. The court makes it clear that there is a constitutional obligation on the State as well as on private institutions to provide education to all citizens.

In *Naz Foundation*[32] the Delhi High court declared section 377 (criminalise same sex) of Indian Penal Code, 1860 unconstitutional under article 15 (2), the court held that:

> [W]e hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15. Further, Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined in Article 15.

However, in *Suresh Kumar Kaushal*[33] the apex court reversed it. In *SUPSR*[34] the court held that Article 21A and Right to Education Act, 2009 is available against private schools with 25% reservation of students having economically weaker and socially disadvantaged background. In *BCCI*[35]the apex court states that 'BCCI may not be State under Article 12 of the Constitution but is certainly amenable to writ jurisdiction under Article 226 of the Constitution of India'. In the *privacy*[36] judgement decided on 24 Aug 2017, the nine judges' bench concerned about the horizontal application of fundamental rights of privacy against non-state actors in the matter relating to privacy.

In 2018, the Supreme Court of India has applied fundamental rights horizontally against the fellow citizen in the cases of Sabarimala, adultery and same sex 377 of IPC. In the *Adultery*[37] case, the five judge constitutional bench unanimously decriminalises adultery that is section 497 of IPC. The bench held that this provision treat wife a chattel of husband and it controls the sexual autonomy of the women.

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32 *Naz Foundation v Government of NCT Delhi And Others* MANU/DE/0869/2009.
33 *Suresh Kumar Kaushal v Naz Foundation* (2014) 1 SCC 1.
34 *Society for Un-aided Private Schools of Rajasthan v Union of India and Another* (2012) 6 SCC 1.
35 *Board of Control for Cricket in India v Cricket Association of Bihar and Others* (2015) 3 SCC 251.
36 *Justice K S Puttaswamy v Union of India* Civil Writ Petition No 494 of 2012.
37 *Joseph Shine v Union of India,* SC. 27 Sept 2018.

In the case of *Sec 377 of IPC*[38], the five-judge bench of the SC unanimously held that sec 377 of IPC is unconstitutional which criminalise the consensual sex between same-sex couples. The bench held that its fundamental rights of every person who has same-sex felling and it is not against the order of nature. It upholds the individual autonomy and liberty.

In the case of *Sabarimala*[39], the five judges bench of the hearing the matter that whether the restriction on the entry of the women aged 10 to 50 in a Hindu Temple is discrimination. The majority of the bench (4:1) held that it violets the fundamental rights of women and it constitutes the notion of untouchability. Conversely, InduMalhotra J. gave her minority opinion and held that this ban is valid.

These articles 15 (2), 17, 23 and 24 are the essence of social democracy in India because these article or HRs put negative obligation on the individual to not discriminate with the fellow citizen. The constitutional framers had the dream that the practice of caste and untouchability, which exists in India for 2500 years, would be dealt with. It should not be left on the shoulders of the State to eradicate these social evils but the individual and the society also has some obligation. It makes collective responsibility on the State as well as the individual to make an egalitarian society in India.

The reason behind insertion of the horizontal rights is to share the duties and rights among the citizens. According to Hohfeldian analysis, the rights and duties are co-relative with each other. The new rights come into existence when the duties are violated by the State or individual. If the constitution framers make liable only the State under the Constitution, then it was the constitutional obligation only on the State to curb the social inequality but if they not put this obligation on the citizen then citizen was only under moral obligation which has no legal sanction. Moral duty impels individual through the heart to do or to abstain from doing something which based on conscience of human being.

This discussion will address the reasons that prohibit fellow citizens to abide by the Constitution. This discussion will analyse the problems of

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38 Navtej Singh Johar&Ors v Union of India thr. secretary ministry of law and justice, scsept 6,2018

39 *Indian Young Lawyers Association V The State of Kerala* SC, September 28, 2018

society or individuals that allow them to discriminate between particular sections of the society. To attempt to tread towards a social democracy, horizontal application of fundamental rights may be a strong prelude. Horizontal application of the fundamental rights, as in the application of rights horizontally, is converse to the current scenario.

The United Kingdom

In the UK, Clapham stated that 'by jettisoning the state-nexus test as a jurisprudential trigger, the application of human rights in the private sphere demands a concentration on victims rather than on the state actors'[40]. Hunt argued that 'It is beyond argument that Human Rights Act does not [require the creation of entirety new causes of action], but the courts will undoubtedly develop *over time* causes of actions such as trespass, confidence, and copyright'[41]. Hunt concludes that through section 6 the Convention applies to all laws. Philipson and Williams argued that the Convention must take full horizontal effect in domestic law whereas it is beyond the doubt that the Convention rights generate some level of horizontal effect in domestic law and private bodies which adversely affect the individual's rights[42].

Wade discussed for the full indirect horizontal effect of human rights in the UK. Wade stated that it is court's duty to interpret Convention rights into HRA, 1998[43]. On the contrary, Buxton argued that the Act does not have any horizontal effects[44]. Alexander Horne and Lucinda Maer on HRA stated that 'it has not found popular support amongst the general public and has been subject to sustained criticism by parts of the press'[45]. Joanna Dawson on HRA stated that it has lack of public enthusiasm and political parties talked to reform it[46]. Gardbaum has argued that 'Accordingly, a suitably drafted

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40 *Supra* note 3 at 353.

41 M. Hunt , "The "Horizontal effect" of the Human Rights Act" *PL* 442 (1998).

42 G. Philipson and A. Williams, "Horizontal Effect and the Constitutional Constraint"74 *The Morden Law Review* 884 (2011).

43 W. Wade, "Horizons of horizontally" 116 *LQR* 217 (2000).

44 R. Buxton, "The Human Rights Act and private law" 116 LQR 48 (2000).

45 From the Human Rights Act to a Bill of Rights?' http://www.parliament.uk/documents/commons/lib/research/key_issues/Key-Issues-From-the-Human-Rights-Act-to-a-Bill-of-Rights.pdflast visited on 30 Jan 2018.

46 'The Human Rights Act: proposals for reform' http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06825last visited on 11 Feb 2018.

'British bill of rights' might provide a somewhat better practical test of the new model than the HRA'[47].

In *Charter*[48], the House of Lord did not recognise the Convention rights and held that a private club does not come under the race Relation Act, 1968; therefore the club can do discrimination on the basis of colour. In *Whitehouse v Lemon*[49], the majority of the House of Lords relied on the ECHR. In *Bellinger v Bellinger*[50]the petitioner seeks a validity of marriage of a transsexual women and declaration that section 11 (c) of the Matrimonial Causes Act 1973 is incompatible with articles 8 and 12 of the ECHR. The House of Lords dismiss the appeal but make a declaration that section 11 (c) of the Matrimonial Causes Act 1973 is incompatible with articles 8 and 12 of the ECHR.

In *Wilkinson*[51]the petitioners claimed to legalise their same-sex marriage in the England and Wales which was solemnised in Canada, and argued that section 11 (c) of the Matrimonial Causes Act 1973 and section 1 (1) (b) and chapter 2 of part 5 of the Civil Partnership Act, 2004 (CPA) violated their human rights (same-sex marriage) under article 8, 12 and 14 of the ECHR, therefore these provisions are incompatible with the Convention. The court has dismissed the petition.

In *Fitzpatrick*[52]the House of Lords with the majority of 3:2 held that the appellant who had a longstanding homosexual relationship with the original tenant comes under the meaning of family for the purpose of Rent Act 1977. On April 2010 the Supreme Court of UK declared section 82 of the Sexual Offence Act 2003 incompatible with Article 8 of ECHR[53].

Recently in 2018, in *Lee (Respondent) v Ashers Baking Company Ltd*[54]the UK Supreme Court unanimously (five judges) held there is no

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47 *Supra* note 8 at 203.
48 *Charter v Race Relations Board* [1973] AC 868.
49 [1979] AC 616.
50 [2003] UKHL 21 https://publications.parliament.uk/pa/ld200203/ldjudgmt/jd030410/bellin-1.htmlast visited on 28 January 2018.
51 *Wilkinson v Kitzinger and Attorney General* [2006] EWHC (Fam) 2022 http://www.familylawweek.co.uk/site.aspx?i=ed2118last visited on 28 January 2018.
52 'Fitzpatrick v Sterling Housing Association Ltd' https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/fitz01.htmlast visited on 28 January 2018
53 *R (on the application of F and Angus Aubrey Thomson) v Secretary of State for the Home Department* [2010] UKSC 17.
54 [2018] UKSC 49.

discrimination held by the Ashers bakery's refusal to make a cake with a slogan supporting same-sex marriage. The customer, a gay rights activist Gareth Lee, sued the company for the discrimination on the grounds of sexual orientation and political beliefs.

To analyse the journey of the Human Right Act 1998, the proposed research will trace the political debate, Commissions and Committee's Reports. Since the inception of HRA till date, various academic as well as political debates have happened in the UK. Meanwhile, there were some voices has upraised to scrap the HRA throughout the UK but at the same time some peoples have raised their voice to strengthen it. On 23 Feb 2004, Joint Committee on Human Rights stated that section 6 (3) (b) of HRA revealed real gaps and inadequacies in the UK[55]**.** In July 2006, the Department of Constitutional Affairs in Review of the Implementation of the Human Right Act, states that HRA has been widely misunderstood by the public[56]. In 2006, David Cameron (a Conservative leader) argued to repeal the HRA and proposed a 'Bill of Rights and Responsibilities'[57].

In 2007, the Labour Government proposed a British Bill of Rights and Duties[58]. On 21 July 2008, The Joint Committee on Human Rights stated that 'we agree that there must be no question of repealing the Human Rights Act unless and until a Bill of Rights, protecting human rights to at least the same extent as the Human Rights Act, is enacted'[59]. In March 2009, the Green paper stated that the Bill of Rights includes the HRA as the part of the Bill of Rights and Responsibilities and it might preserve the HRA as a separate Act[60].

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55 'Joint Committee on Human Rights, Seventh Report on Horizontal application: the protection of rights in the private sphere?' https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/3902.htmlast visited on 30 Jan 2018.

56 'Review of the Implementation of the Human Rights Act' http://webarchive.nationalarchives.gov.uk/+/http:/www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdflast visited on 30 Jan 2018.

57 David Cameron, 'Balancing freedom and security A modern British Bill of Rights' http://www.britishpoliticalspeech.org/speech-archive.htm?speech=293last visited on 30 Jan 2018.

58 'British Bill of Rights and Duties' http://www.official-documents.gov.uk/document/cm71/7170/7170.pdflast visited on 30 Jan 2018.

59 'Twenty-ninth Report , A Bill of Rights for the UK?' https://publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdflast visited on 30 Jan 2018.

60 'Rights and Responsibilities: developing our constitutional framework' https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228938/7577.pdf last visited on 30 Jan 2018.

These committees and Green paper make an equipoise approach regarding the HRA and not argued to repeal it. In 2010 general election, the Labour Party Manifestostated to set up an All Party Commission in a direction towards a written constitution and the Manifesto further states that 'We will not repeal or resile from it'[61]. On the contrary, the Conservation Party' manifesto stated that 'we will replace the Human Rights Act with a UK Bill of Rights'[62]. The Commission published its report in 2011 and 2012 for seeking the views on the UK Bill of Rights.

On 26 Dec 2012, the Commission on Bill of Rights stated that the idea of UK Bill of Rights should not be rejected and it needs further exploration for a suitable time[63]. On 28 February 2013, the House of Common proposed a Bill to repeal the HRA[64]. However, on 28 Feb 2013, the Bill has withdrawn[65]. On 30 Sept 2013, Theresa May (then home Secretory) stated that 'Conservative party' will withdraw ECHR and 'The next Conservative manifesto will promise to scrap the Human Rights Act'[66].

In 2015, Michael Gove, the new justice secretary of the Conservative Government planned to repeal the HRA and make ECHR ineffective in the UK[67]. However, several civil liberty experts, activists and lawyers have cautioned against this move and advocated that it would lead the constitutional crisis in the UK[68]. On 26 Jan 2018, the Joint Committee on

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61 'Labour Party Manifesto 2010' http://worldofstuart.excellentcontent.com/repository/TheLabourPartyManifesto-2010.pdflast visited on 30 Jan 2008.

62 'The conservative Manifesto 2010' http://conservativehome.blogs.com/files/conservative-manifesto-2010.pdflast visited on 30 Jan 2018.

63 'A UK Bill of Rights? The Choice Before Us' http://webarchive.nationalarchives.gov.uk/20130206065653/https://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdflast visited on 30 Jan 2018.

64 'Human Rights Act 19998 (Repeal and Substitution) Bill' https://publications.parliament.uk/pa/bills/cbill/2012-2013/0031/2013031.1-7.htmllast visited on 30 Jan 2018.

65 'Latest news on the Human Rights Act 1998 (Repeal and Substitution) Bill 2012-13' https://services.parliament.uk/bills/2012-13/humanrightsact1998repealandsubstitution.htmllast visited on 30 January, 2018.

66 The Guardian, 'Conservatives promise to scrap Human Rights Act after next election' *The Guardian* (London, 30 Sept, 2013) https://www.theguardian.com/law/2013/sep/30/conservitives-scrap-human-rights-actlast visited on 30 Jan 2013.

67 'Michael Gove to proceed with Tories' plans to scrap human rights act' https://www.theguardian.com/politics/2015/may/10/michael-gove-to-proceed-with-tories-plans-to-scrap-human-rights-actlast visited on 16 Feb 2018.

68 'Tories' repeal of Human Rights Act will spark constitutional crisis, erode civil liberties – experts' https://www.rt.com/uk/257469-tory-human-rights-act/last visited on 16 Feb 2018.

Human Rights stated that the UK has not incorporated Article 13 of ECHR in domestic (HRA) law and the court must consider ECtHR case law on Article 12[69].

Ireland

The Constitution of Ireland enacted on 1 July, 1937, came into operation on 29 December, 1937. The Irish Supreme Court makes horizontal effect of Constitutional rights not only against the State but private individual as well. In *Meskell v. CorasIompairEireann*[70]the Supreme Court held that "[I]f a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who infringed that right"[71].

ColmO'Cinneide stated that: "Its application by the Irish courts has been often cited to demonstrate that the 'direct horizontal effect' of constitutional rights is possible, practicable and even desirable". Further, O'Cinneide states that the Irish Constitution 1937 had a controversial right inserted in 1983 (Art 40.3.3) "right to life of the unborn child" through a constitutional amendment. This can be seen as having a horizontal effect on fundamental rights[72].

Irish constitutional law has adopted the legal method through which any infringement of a fundamental right can be subject to the constitutional scheme whether they come under the state authority or private individual or corporate bodies. The Irish courts treated all private action as the State under the doctrine of "constitutional tort". Using this doctrine the court can directly apply the idea of a constitutional obligation on the private individual to protect rights. O' Cinneide[73] stated that:

> The existence of this 'constitutional tort' as a mechanism for giving 'direct horizontal effect' to provisions of the

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69 'Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis' https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/774/774.pdflast visited on 30 Jan 2018.

70 [1973] I.R. 121, 133.

71 *Supra* note 8 at 396.

72 C. O'Cinneide, "Irish Constitutional Law and Direct Horizontal Effect- A Successful Experiments?" in J. Oliver, Dawn and Fedtke (Ed.), Human Rights and the Private Sphere a Comparative Study0 214-16 (Routledge-Canvendish, New York, 2007).

73 *Id.* at 219.

> constitution confirmed by the Supreme Court in a sequence of decisions in the early 1970s, including Meskell v CIE (1973) and Glover v BLN Ltd (1973). These decisions held that the interference with constitutional rights of individuals by private individuals, companies or trade unions constituted a 'constitutional tort', to which the Irish courts will provide a remedy via injunctive relief and/or damages.

Justice Wash in *Meskell v CIE* (1973) stated the reasoning behind the judgement that why private individual comes under the same obligation as the State: "....if a person has suffered damages by virtue of breach of a constitutional rights or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed the that right"[74].

In subsequent judgments of the Supreme Court of Ireland the doctrine of 'constitutional tort' has been followed. In *Glover v BLN Ltd*[75], the court applied constitutional rights directly to the internal affairs of a private body. In *Rodgers v ITGWG*[76]the court applied the constitutional obligation to the issue of internal governance in a trade union. O'Cinneide stated that "private bodies, including limited companies and trade unions, are therefore bound by the requirement of procedural fairness, which have been established by judicial interpretation of the provisions of the Constitution governing fair trial and the administration of justice"[77].

On the contrary a few authorities writing on the Irish constitution have declared the 'constitutional tort' doctrine as being uncertain. Frode, McMahon and Binchy suggest that this doctrine is not clear on how private bodies come under a constitutional obligation; therefore, it is extremely uncertain[78]. John Kelly suggested that the Irish court should apply the German approach that guarantees equality in the private sphere as the public. In 1995, the 'Constitutional Review Group' also mentions that it was inappropriate to give direct horizontal effect of constitutional rights and it

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74 Ibid 220.
75 [1973] IR 388.
76 [1978] ILRM 51 (HC).
77 *Supra* note 71 at 221.
78 *Ibid* at 228.

would 'constitute an unjustified intrusion upon individual autonomy'[79]. O'Cinneide argued that the 'direct horizontal effect' is incompetent in making private bodies liable under the constitutional obligations[80].

Though, the Ireland Constitution as well as the Supreme Court has the concept of direct horizontal effect of under the doctrine of 'constitutional tort' but the authorities are not happy with it. Might be the authorities do not allow to impose constitutional cap on the private individual or non-State actors, or they want to provide more freedom and liberties to the non-State actors. The approach that restricts the non-State actor to come under the constitutional obligation will be stopping the living nature of the Constitution of Ireland. The Constitution is the living document if it not accepts the changes on the society then it will become rigid Constitution. It might be changed the position of application of the constitutional rights in future.

South Africa

The Constitution of the Republic of South Africa comes into force on 4 February, 1997, which was called as Final Constitution. Prior to the Final Constitution 1997, there were two previous constitutions in South Africa one 'Tricameral Constitution 1983'and another Interim Constitution 1993. In South Africa, the Constitution is the supreme law of the land and no other law can override the provisions of Final Constitution of 1997 (South African Constitution: 1997).

South Africa has envisaged under its Final Constitution of 1996, Horizontal effect of Bill of Rights. Section 8 of the Bill of Rights discuss the application of the charter and sec 8(2) declares that "A Provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right". Section 9 (4) of the Bill of Rights imposes a duty on private individual as well as the State not to discriminate against anyone directly or indirectly.

In the South African' Constitution 1993 and 1996 (Final Constitution), the constitutional drafter crafted the Bill of Rights in way that covers or

[79] *Ibid* at 230-31.
[80] *Ibid* at 251.

makes a private individual liable for the violation of constitutional rights. This approach of the constitutional drafter comes from the experience of the history of apartheid that was followed by the private individuals as well as the State[81].

Fedtke stated two things, first, that the Final Constitution 1996 does not expressly deal clearly with the position of the fundamental rights in case of private sphere. In other words, there is no specific remedy available in the constitution in case the infringement of the fundamental rights by the private individual and there are no clear steps for a person whose rights have been infringed to approach the constitutional court for seeking a remedy. It is the court which through common law interprets the horizontal effect or the application of fundamental rights between individuals. Second, "the South African legislator, too, is (vertically) bound by the Bill of Rights. The mere existence of a supreme constitution will itself have a strong impact on the private sphere through judicial review of an ever increasing amount of parliamentary legislation regulating private relationship"[82].

Khaitan has stated that generally the constitutional duties are imposed on the governments and public authorities but the exception to this rule can be found in the text of the South Africa's Constitution and European Union which imposes duties on not-state actors[83].

In the case of *Du Plessis v. De Klerk*[84]the court held that the application of Bill of Rights is indirect horizontally rather than directly horizontal. On the contrary, the dissenting opinion of J. Kriegler on the horizontal application of the constitutional rights said:

> An employer is at liberty to discriminate on racial grounds in the engagement of staff; a hotelier may refuge to let a room to a homosexual; a church may close its doors to mourners of a particular colour or class. But none of them can invoke the law to enforce or protect their bigotry.

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81 *Supra* note 4 at 12.

82 J. Fedtke, "From Indirect to Direct Effect in South Africa: A System in Transition" in J. Oliver, Dawn and Fedtke (Ed.), Human Rights and the Private Sphere a Comparative Study 237-77 (Routledge-Canvendish, New York, 2007).

83 TarunabhKhaitan, *A Theory of Discrimination Law* 63 (Oxford University Press, New York 2015).

84 1999 (3) SA 850 (CC).

Gardbum describes J. Kriegler's dissenting opinion on the application of the rights as indirect horizontal effect as it exists in Germany[85]. Gradbum stated that the state action doctrine should be abolished because it "misstates the existing constitutional position on the reach of individual rights, properly understood"[86]. JorgFedtke stated that there were three arguments raised in favour of direct effect of constitutional rights in the Interim Constitution of South Africa[87]:

> First, much criticism of uneven distribution of (private) power and wealth in post-apartheid South Africa, and coupled with this, the fear that past discrimination by the state could continue within the sanctuary of private law. Full application of the human rights in the private space was regarded as the most appropriate safeguard against 'privatised apartheid'. Direct effect was, second, regarded as preferable in terms of legal certainty because it renders unnecessary the difficult distinction between public and private action. Finally, supporter of direct effect felt that a limited impact of human rights on judge-made common law would be a contradiction to the full subordination of the legislator to human rights considerations: [T]he mere form of law should not dictate a difference in result.

Justice Madala argued that "the question of direct or indirect effect should be reviewed on a case-by-case basis and with a view to the particular constitutional right involved"[88].The text of the Final Constitution specifically envisaged the direct horizontal application of the Bill of Rights but the Supreme Court has not agreed with direct application of the Bill of Rights between individuals before the constitutional courts.

The United States

The United States has restricted itself to the vertical approach in a strict sense in relation to the fundamental rights question and does not take up the

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85 *Supra* note 8 at 410.
86 *Supra* note 8at 421.
87 J. Fedtke, "From Indirect to Direct Effect in South Africa: A System in Transition" in J. Oliver, Dawn and Fedtke (Ed.), Human Rights and the Private Sphere a Comparative Study 361 (Routledge-Canvendish, New York, 2007).
88 *Ibid* at 368.

horizontal position. On the contrary, Canada and Germany, allow a much more horizontal approach more than the United States's vertical position[89]. In the United States the application of constitutional rights arise when government or state action is in violation of the fundamental rights through any means but when the issue is between private individuals. Eric Barendt stated that "it is clear constitutional law in the United States, both from the text of the Amendments and the jurisprudence of the Supreme Court, that constitutional right binds only government and public authorities"[90].

Eric Barendt argues that individuals, private entity, corporation, private universities, private employer, media and deductive agencies are not under the obligation to follow the constitution in sense as the government or the public authority bound to do. These private bodies simply do not follow the due process of law under equal protection clause and they are free to discriminate anybody as they can, but the Supreme Court in Washington, said that constitutional rights can be claim against the private person only if the state action's doctrine involved in that matter[91]. Barendt further stated that the 'state action' doctrine protects the individual autonomy or freedom from constitutional obligation and the doctrine protects the state rights and federalism[92].

In *Burton v Wilmington park Authority*[93] the American Supreme Court held by the 6:3 majorities that a private restaurant owner practised the racial discrimination and denied to serve black peoples. It was a clear violation of the 14th Amendment of the United States Constitution that prohibits racial discrimination. The court found that, though in that case the state is not directly involved but the land used by the restaurant was on rented out by the government, and therefore, on account of the state's involvement the restaurant owner was liable not to discriminate on racial ground against anyone. In the subsequent decisions by the US Supreme Court this approach

89 *Supra* note 8 at 391.
90 E. Barendt, "State Action, Constitutional Rights and Private Actors" in J. Oliver, Dawn and Fedtke (Ed.), Human Rights and the Private Sphere a Comparative Study 400 (Routledge-Canvendish, New York, 2007).
91 *Id.* at 400-1.
92 *Id.* at 403-4.
93 365 US 175 (1961).

was denied. In *Mosse Lodge v Irvis* (1972) the court held that "there was no state action when a licensed private club refused service to blacks"[94].

Gardbaum stated that in the US, the jurisprudence of Horizontal Rights is an end story because the "state action" doctrine is cover issue regarding fundamental rights in the Constitution. In *New York Times v. Sullivan*[95]the court held that matter of private affairs does not come under "state action" doctrine so the private body is not bound under the equal protection clause[96]. Murray Hunt[97] describes the situation of the application of fundamental rights in the U.S. Constitution:

> The jurisdiction which is close to the position favoured by the verticalists is the United States. As is well-known, U.S. constitutional law requires there to be "state action" in order for the constitutional protections in the Bill of Rights to apply. The text of the Constitution itself makes clear that those protections apply only to the activities of either the state or federal governments, and where a constitutional right is relied on in litigation between private parties and the Supreme Court has made clear that courts must determine whether the activities of the private party alleged to have infringed the protected right are sufficiently connected to the government to constitute state action to which the Constitution applies.

Recently in 2017, in Masterpiece Cakeshop[98] case the US Supreme Court held by 7:2 majority that an owner of the Masterpiece Cakeshop refused to a gay couple to delivered cake for their marriage on ground of his religious and philosophical understanding that does not allowed him to believe in gay marriages and the Civil Right Commission act against him which violate his right to free exercise his business. It was an occasion in the hand of the judiciary to enforce fundamental rights against the non-state actors but the judiciary did not allowed the horizontal application of the Bill of Rights. The minority opinion of Ginsburg J., and Sotomaor J., must be

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94 *Supra* note 89 at 406.
95 376 U.S. 254 (1964).
96 *Supra* note 8 at 389.
97 *Supra* note 89 at 395-6.
98 *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* 584 U.S. 1-3 (20018)

considered a millstone in future of horizontal application of the Bill of Rights against the non-state actors.

The United States has the strong vertical effect of constitutional rights. Neither the Constitution nor the Supreme Court allows the application of constitutional rights in cases between two private individuals.

Conclusion

A closer look into the existing literature proposes that horizontal application of the fundamental rights may be a strong prelude for moving towards effective implementation of fundamental rights as well as the socio-economic democracy. However, there is a lack of study on the limitation of the horizontal application of the fundamental rights and its impact on the constitutional framework. There is no literature and study available that shows the horizontal application of the fundamental rights are not curtailing the individual' autonomy, freedom, privacy and liberty.

Therefore, it can be concluded that traditional application of fundamental rights, i.e., vertical application of fundamental rights, between State and the individual is not enough to do justice to the citizens. The horizontal application of fundamental rights has to control the discrimination or violation of the individuals' fundamental rights by the non-State actors. The standard rights-based approach has not been able to emphasise duties adequately. Therefore, it is a high time to make application of the fundamental rights horizontally because in the changing nature of the State's function it leads to injustice to the citizens in the world.

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Whistle Blowing in Indian Judiciary: Protecting the Firemen

Rajveer Gurudatta and Harshita Kakar[1]

'The purpose of Whistle Blowing is to expose secret and wrongful acts by those in power in order to enable reform'

-Glenn Greenwald

Introduction to Whistleblowing

The unembroidered meaning of 'whistle blowing' or 'raising an alarm' is that where an individual raises voice or brings to light some hazard to caution the potential victims of such an abuse. The legal definition is somewhat similar, while defining the whistle blowing in corporate world we often convey,' any public-spirited individual holding an office of power, having access to certain confidential information relating to an immoral or scandalous activity which he lets out to the public by way of either disclosure or complaint'. Various scholars have defined the term 'whistle blowing', some of the relevant ones can be considered in this text. The **International Labour Organization (ILO)** defines whistle blowing as "the reporting by existing or former employees of illegal, irregular, dangerous or unethical practices by employers". According to Ranasinghe JAAS[2], "When employees discover unethical, immoral, illegal transactions or potentially damaging information for the well-being of the workplace in which they are employed, they are expected to disclose this sensitive information to an authority in the hierarchy through a formal/informal mechanism, which in common parlance is called 'Whistle-blowing'. A potential whistleblower is one who may represent a judge or a third-party-then decides whether to send a costly public signal (i.e. to blow the whistle) in the form of dissent, an appeal or petition.

In ordinary sense, whistle blowing activity revolves around certain key issues relating to the moral and ethical dilemma, nature of disclosure and accusations involved. These are often coupled with decisions relating to truthfulness of the disclosure, organizational structure of the company,

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2 Ranasinghe JAAS "Whistle-blowing – a failure of organization culture?"*Financial Times*. Vol 42. No.25(2007).

redressal mechanism, magnitude of the scam, aftermath and consequences of the disclosure on the whistle blower, including the protection and rewards. Keeping many of these outlined factors in mind, it can be carefully interpreted that whistle blowing is not a random disclosure; rather it is a very mindful activity- a very calculated risk.

Broadly, two ways of whistle blowing have been identified. The ***primary or 'Insider Whistle Blowing'***, is one where the people from within the management or departments of the organization bring in light the overt acts. These are people from within the organization who decide to bring out the mismanagement and ill practices of the organization done by the fellow employees, co-workers or superiors. Internal whistle blowing largely depends on the complaints system followed as well as the confidentiality of such complaints.[3] The usual subjects addressed under internal whistle blowing, perceptibly relate to intrinsic details and working of day to day business management.

The other type, ***Secondary or 'External Whistle Blowing'***, is one where an independent body like a government agency, media personnel or non-profit organization etc. highlights the wrong doings of the organization. These can be dramatic disclosures to media hubs and lawyers or a simple complaint to supervisory agencies like Tribunals and government bodies. The consequences of such a disclosure evidently would result in bad publicity of that organization and economic losses.

On parlance, if a professional comes out as a whistle blower, the entire profession or service can be seen in color. A simple instance to this can be, if a doctor raises an alarm to expose the ill will and money scamming techniques of his fellow professionals, by putting a dead body on life support and charging hefty fees from the kins of the patient, being practiced as a trend. This disclosure is most likely to rob off the entire medical practice of its goodwill and faith of the patients. The case of Edward Snowden[4] is one on similar lines, where he disclosed the most corrupt and secret activities of the National Security Agency (NSA) of the US.

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3 Khushbu Mohanty *'Whistle Blowing- Balancing on a tight rope'*, Institute of Company Secretaries of India, Knowledge Paper Series-5, 17November (2017)

4 Wample E.,"*Edward Snowden: 'Leaker', 'source' or 'whistleblower?",New York Times,* June 10, 2013

1.1 Ill Treatment of Whistle Blowers

Whistle Blowing is often regarded as a tool for good corporate governance. Though, it is a noble and heroic act that exposes or unfurls frauds and wrongdoings, the whistle blowers may be subjected to severe and unaccounted retaliation by the host organization. This can be seen in the form of differential and harassing treatment by the employers, taunting and unfriendliness of the colleagues, hate comments and mental torture, tainted self-respect and degraded reputation in the work society which might even affect the employability of the whistle blower. Furthermore, in cases involving large sums of money or powerful political influences, these disclosures might even result in physical harm to the employee's life and limb. The protection is needed for the life, career, job, family and personal image of the whistle blowers. The employees face loss of job or forced retirement, negative performance evaluations, criticism or avoidance by co-workers and even blacklisting.[5] Living under this continued fear of retaliation, many sincere workers choose to turn their backs to the wrongdoings occurring at their workplaces. This is not only toxic for the potential whistle blower's sense of public responsibility and truthfulness but also, a sharp blow to the state's inefficiency to extend protection to its honest citizens. Therefore, there exists an established need for whistle blowers' protection in every country.

1.2 Global Whistle Blower Protection Legislations

As discussed above whistle blowing is a calculated risk. It is termed as a risk, because of the nature of dangers that may follow the repercussions behind the disclosure. Here, it must be considered that, whistle blowing is intended towards the ultimate goal of public interest[6]. It is nevertheless, an act of bravery and ethical display of courage, which needs to be protected. Various countries have developed their own models for protection of whistle blowers, including India.

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5 Rothschild, J. and T.D Miethe:, "Whistle-blower disclosures and management retaliation", *Work and Occupations Journal* 6(1), 107-128 (1999).

6 Sandoval"Whistle blowing: International Standards and Developments' in Corruption and Transparency: Debating the frontiers of between State, market and society" *World Bank- Institute for Social Research*, p.64. (2011)

The **United States** have codified legislations for health, safety and welfare of the whistle blowers. The three principal legislations are, Whistle Blower Protection Act, 1989 (amended Whistle Blower Protection Enhancement Act, 2012), Corporation & Criminal Accountability Act, 2002 and The False Claims Act. The Whistle Blower Protection Act (WPA) was a guiding law envisioned to protect the federal employees. However, the legislation was to a large extent handmade at the discretion of judiciary. The ancient legislation had major fallouts, on instances where it did not cover the whistleblowers on various aspects.[7]These were however, reconciled by the Whistle Blower Protection Enhancement Act, 2012 in various provisions covering disclosures made to superiors, previously disclosed information etc. As the name suggests, Corporation & Criminal Accountability Act, informally known as the, Sarbanes- Oxley Act (2002) is aimed at combating criminal frauds and strengthening Corporate accountability. This Act is specifically targeted to the Corporate Sector and provides for financial disclosures and auditor independence of public companies. This Act doesn't restrict the whistle blower's disclosure to employer; it rather empowers him to approach any federal regulatory or enforcement agency.[8]Lastly, The False Claims Act, which was passed during US Civil War during the regime of Abraham Lincoln, which was projected to control governmental frauds. This indeed is the most affective whistle blowing legislation in the States, as it is based on an incentive model. Whereby, the alarm raiser is provided a share in government's total recovery based on his active participation. This also, provides room for anonymous disclosure.

In **United Kingdom**, whistle blower protection legislations were enacted as a result to various scandals. The Public Interest Disclosure Act (PIDA), 1999 came out as an amendment to Employment Rights Act, 1996. The former Act expands to include employees of both public and private sectors. The Act prescribes channels for public disclosure to retain law and order. Disclosure to media is strictly forbidden, considering the citizens' faith in the Crown.

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7 Christoph & Henkel, "*Whistle Blower Rights & Protection under US law in the Private Sector*", (2017)

8 Corporation & Criminal Accountability Act, 2002,s.301

Countries like **Canada**, which do not have numerous laws protecting the whistle blowers, have in place certain local and provincial legislations governing this aspect. The Public Servants Disclosure Protection Act, 2007 is intended to protect public services from reprisals for reporting wrongdoings. This Act is however, not accommodative to all kinds of whistle blowing. In **Australia**, there is no separate whistle blower's protection legislation; however, the Corporations Act (which is a Company legislation) has been expanded to extend protection to officers, employees and employers. This Act is unique, in the sense it gives a special civil right to whistle blowers against their employers, this includes reinstatement. This legislation acts as a shield for employees are protected against claims of secrecy and defamation by the employers. However, this Act mandatorily requires the whistle blower to disclose their names to avail protection under this Act.

In India, Companies Act 2013, under Section 177(9) provides all public listed companies to mandatorily establish a vigilant mechanism. Also, there has to be in place a whistle blower policy with adequate safeguards against victims. There are various sections which provide for inquiry, investigation and inspection. The Securities & Exchange Board of India (SEBI) under clause 49 of the Listing Agreement mentions Whistle-Blowers Policy for Companies.[9] Lastly, the Whistle Blower Protection Act, 2014 (which was amended in 2015) provides for Central Vigilance Commission (CVC) which is responsible for receiving written complaints. Also, the Act aims to keep confidential the identity of whistle blower.

Applicability on Whistle Blowing Laws in Judiciary

2.1 Constitutional & Human Rights of Judges

The rational, and perhaps a constitutionally well backed, argument behind granting whistle blowing to judiciary would be, that as human beings we are vested with certain natural inalienable rights, this includes the right to speak, or formally, the right to freedom of speech and expression as enshrined in the Indian Constitution under Article 19(1)(a). Freedom of speech and expression is not only a Constitutional right, but a part of

[9]Refer to SEBI (Listing Obligations and Disclosure Requirements) Regulations, Regulation 22 (2015).

Fundamental Rights of the citizens. It is thus obligated on the state to ensure that these rights are meaningfully interpreted and employed. Judicial office does not exempt officers off their fundamental rights as citizens. Therefore, Article 19 firmly stands rooted even in case of judicial officers.

Before identifying the whistle blowing mechanism, systematic disclosures and protection to such alarm raisers; it is required to understand the concerns of a potential whistle blower. It can be seen in practice, the different genre of cases reach different positions in the ladder of justice. In simpler terms, it is at the discretion of Appellate Courts and tribunals to decide which matter to take up for hearing or allowing the appeal.[10]The whistle can be blown over certain hidden ill wills, harassments, extra judicial activities, unhealthy political connections, bribery, inappropriate disbursement of the funds and the like. Paying due consideration to the elevated and respectful stature of judiciary, these activities are often blanketed and seldom get any light in the colossal corridors of the higher courts. However, such incidents are highlighted when the whistle is blown.

Potential whistle blowers in the judicial sector are again classified on the primary and secondary level. Primary or internal whistle blowers in judiciary are consisted of judges with dissenting opinions on application of law or members of the jury who do not incline with the majority. This sect plays an important role in the disclosures of certain aspects which have been either overlooked or despite deliberate discussion, have not found due emphasis in the judgment. Such internal whistle blowing is imperative, as it voices the views of judicial minds which were closely linked with the case. Dissent is a core principle of the democracy. It finds its roots in the individual and collective rights of assembly, expression and public participation. Furthermore, Article 7 of the Declaration on Human Rights Defenders, 1988[11] explicitly recognizes that 'Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance'. Dissenting opinions are pregnant with persuasive value and can be precedential in matters of law where

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[10] *Hukam Singh v. Khubdan*, Civil Misc. 1820/2018, Rajasthan HC

[11] Declaration on the *Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms"*

multiple interpretations can be drawn. Through the medium of dissent, the judges can raise alarm in the judiciary.

Secondary or external factors include any *amicus curie,* aNon-Governmental Organization (NGO), a public-spirited individual who might file a PIL or an authority which might suggest the court to specifically look into a matter e.g. The President or the Solicitor General. These agents, who despite being non-parties to the trial are interested in the judicial pronouncement and therefore, in one or more ways play a key role in blowing the whistle against such misconduct. It is reasonable here, to interpret that a case with some authoritative backing has a better chance to be heard than the one without it. Perhaps, this remains the reason behind highly controversial cases with high public involvement tend to secure a faster justice administration than low profile cases with less or no media attention. For instance, the cases of Jessica Lal Murder[12], Nirbhaya rape case[13], Arushi Talwar- Double Murder case[14], Sunanda Pushkar Murder.[15] Countless, other cases are reported on daily basis but fail to get the media attention and often are unable to pass through the district courts.

Judicial office does not immune the officers of a liability arising out of their misdeeds. As a matter of fact, judges themselves are in the best capacity to highlight any ongoing wrong doings in the Courts. They therefore, deserve a reasonable opportunity to voice their opinion. Therefore, an outline can be drawn that, the judges have certain moral, constitutional and humanistic rights which empower them to blow the whistle in cases of any sighted misconduct. Thus, there exists a need to inculcate whistle blowing provisions within the judiciary, especially when currently there exist none.

As judiciary is often placed on a higher pedestal than any other office, the misdeeds of judges are often either not sighted or casually overlooked. There exists a limited literature in the field of whistle blowing in judicial sector, throughout the world.

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12 *Bina K. Ramani v. State* ILR 2010 Supp. (3) Delhi 476
13 *Mukesh & Anr. v. State for NCT Delhi*, (2017) 2 SCC (Cri) 673.
14 *Dr. (Smt.) Nupur Talwar v. State of U.P & Anr*. (2018)102 ACC 524
15 *Subramanian Swamy & Anr. v. Delhi Police & Ors*. (2017) 166 DRJ 473

2.2 United Kingdom's Model on Whistle Blowing

In England, the very recent case of *Gilham v. Ministry of Justice*[16](2019) has set a landmark. It is indeed a laudable judgment to actually emphasize on why whistle blowing policy is a must in the judicial sector. The facts of the case revolved around the appellant being appointed as a district judge by Lord Chancellor in 2006 as per the provisions of Country Courts Act, 1984 (existent then). In Feb 2015, she initiated a suit against the Ministry of Justice under Part IVA of Employment Rights Act 1996 highlighting her concerns on poor and unsafe working conditions and excessive workload affecting the judges' efficiency. Consequent to which she was subjected to mental torture by fellow judges and suffered a breakdown. The disclosure was however, contrary to section 47B of the Act that provides for protected disclosure; as whistle blowing claims could only be brought by a 'worker'[17] under crown employment. This led to an interesting debate that whether a judge qualified as a 'worker' or not. In the magnified view, *is adjudication a contract of service?*

The letter of appointment subjected her to certain terms and conditions of service including eligibility[18], work hours, salary, tenure[19], functions and discipline[20] among other guidelines. The Employment Tribunal on analyzing the position of judge considered if the existence of a contractual relationship between judges and the Lord Chancellor was inconsistent with judicial independence.[21]The noteworthy judgment by Lady Hale along with four of her brother judges observed that, "This case is about the employment status of district judges, but this could be applicable to the holder of any judicial office."

The Court took into consideration the exclusion of judges from certain whistle blowers' protection legislations as a breach of their rights. Furthermore, this exclusion would be a direct hit at Article 14 &10 of The European Convention on Human Rights to which UK is a signatory. It is

16 *Gilham v. Ministry of Justice,*[2019] UKSC 44
17 Employment Rights Act, 1996s. 230(3)
18 Crimes and Courts Act, 2013s. 6(1)
19 Country Courts Act, 1984 s.11
20 Constitutional Reforms Act, 2005s.108
21 *O'Brien v. Ministry of Justice,*UKSC 6 [2013] 1 WLR 522

further elaborated, that if the judge does not fall under the category of a 'worker' or 'employee', does he have an alternative recourse to get his claims, those arising out of whistle blowing, addressed. To this, the Court answers that there exists a general right of action to the victim of any breach of his human rights committed by any public authority under Section 7 of Constitutional Reforms Act, 2005. The court regarded that detriments faced by a whistle blowing judge might not limit to a mere reduction in salary, but also informal mistreatments in the form of unlawful behaviour.

The judgment critically examined the set ratio in the case of Perceval Price[22]where it was held the relationship created by appointment has many characteristics of employment, and in particular the district judges do not have freedom to work as they please, they are provided with detailed terms in the Memorandum which are akin to the terms of an employment contract. Though the relationship between Lord Chancellor and the judge may seem as that of an employer and employee, it must be considered that judiciary is not a mechanized activity, it is rather a skill or perhaps an art. It is the skill of the advocates to present the best possible arguments for the justice of his client, and equally essentially, it is the skill of the judicial officers to adjudicate based on the facts and circumstances of each case. A memorandum or terms of appointment can in no way, dictate or direct the judge as to how a particular case has to be adjudicated. It is left on his own sense of judgment and interpretation of the laws and the disputes. Therefore, a judge may *prima facie* seem to be under a contract of service, but in true sense does not qualify as an employee.

The UK's case of J. Gilham is perhaps the only reported judgment in this regard, and forms the basis of our research. Evidently, there exist no laws which extend whistle blower protection to judges and they have to resort to their constitutional and human rights which are very basic in nature. These do not provide any special safeguard to the whistle blower in terms of appointment or indifferent attitude experienced as an aftermath of whistle blowing.

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[22] *Perceval-price, and others v. Department of economic development*: CANI 12 APR (2000)

2.3 Indian Laws and Whistle Blowing in Judiciary

India, is one of the largest democratic and republic countries of the world. The democracy stands strong and the reason behind this is the well-structured nature of centre-state relations within the country. The three pillars of the democracy, the legislature, the executive and the judiciary are firmly rooted so as to maintain a healthy balance of independence and interdependence. In Indian context, judiciary has always been placed on a higher pedestal. The Constitution of India itself has always placed on a significant scale; the functions performed by the judiciary. The faith of the masses in the justice administration system revolves around the confidence that the common man has developed over judges. This faith might have developed on singular cases of justice administration but now lies on the judicial system as a whole. Even in the delivery of judicial pronouncements though, there is one decision, the dissenting opinions are always acknowledged. It can be rightly inferred that, when a judge acts in his professional capacity he represents the collegium and not his singular self.

The ultimate office of good faith and guardian of Constitutional rights, judiciary, is thus vested with uninterrupted faith of the masses which, if compromised, is likely to disintegrate the entire democratic system and shatter the federal set up in entirety. The common man will not resort to judiciary for dispute settlement, because of the lost trust, and the law would be at the peril of the powerful. This goes against John Locke's theory of Social Contract. It states that the man is expected to return to his innate nature, which is to be at complete liberty to conduct one's life as he sees to be the best fit, and does not like interference from others. This will ultimately lead to the breakdown of law and order condition in the society. No State can afford to allow such a situation to occur, therefore, best possible measures are taken to uphold the interests of the society members while ensuring them their rights. In cases where the parties believe that justice has not been served, they are even vested with the right to approach the higher judiciary. These efforts have been made to keep the Constitutional fiber intact.

A whistle blowing claim arising against a judicial officer is likely to raise questions upon the entire Bench. However, this is not a sufficient reason

in law to oversee the misconduct of defaulting judges. Like various nation states India, is also deprived of any legislation regarding whistle blowers' protection in matters of judiciary. The Whistle Blower Protection Act of 2011, provides a mechanism to investigate alleged corruption and misconduct by public servants. It also extends to protect anyone who exposes wrongdoings in government bodies.

The Whistle Blower Protection Act, 2014 term "public servant"[23] shall have the same meaning as assigned to it in clause (c) of section 2 of the Prevention of Corruption Act, 1988 (49 of 1988) but shall not include a Judge of the Supreme Court or a Judge of a High Court. This makes a clear inference that, the judges of High Court and Supreme Court are not covered under the ambit of Whistle Blower Protection Act, 2011. Further, the definition in Consumer Protection Act, 1986 (COPRA) provides that"complainant" means— (i) a consumer; or (ii) any voluntary consumer association registered under any law for the time being in force; or (iii) the Central Government or any State Government; or (iv) the Central Authority; or (v) one or more consumers, where there are numerous consumers having the same interest; or (vi) in case of death of a consumer, his legal heir or legal representative; or (vii) in case of a consumer being a minor, his parent or legal guardian. Therefore, COPRA also does not include judges in its definition of a complainant.

Hence, judicial officers are not accommodated in either of the legislations that provide whistle blower protection in some form. Conversely, instances were sighted where whistle was blown in judiciary and no protection was rendered thereto. The case of sexual harassment against former CJI Ranjan Gogoi, was brought to Supreme Court by an NGO, 'Lawyers Collective' headed by senior advocates Ms. Indira Jaising and Mr. Anand Grover who are themselves members of judicial faculty. Here the whistle blowers claimed that they were subject to victimization and penalized for voicing their opinions. In a similar incident it was stated by a whistleblower judge for corruption in Patna High Court by J. Rakesh Kumar, "Instead of discharging duty we are more indulged in enjoying privileges."

[23] Whistleblower's Protection Act, 2014 s. 3(G)(i)

Such incidents are seldom reported and therefore, no regulation has been made to such regard.

In the current scenario where no legislation is available with regards to protection of whistle blowers in India, it is imperative to take reference from the budding law for judicial whistle blowers in the United Kingdom in light of positive international morality.[24] The European Countries are bound by The UN Convention against Corruption (UCAC), 2005, OECD Anti-Bribery Convention and the European Criminal Law Convention on Corruption and various other legislations. The UCAC provides for transparency and accountability in management of public finances and preventing corruption in public sector including judiciary.[25] However, being a soft law is not enforceable. Further, India is not a signatory to UCAC and therefore, the provisions do not ply.

The Council of Europe recommends a "national framework" that establishes a "comprehensive and coherent approach" to empower and protect whistleblowers. This comprehensive and coherent approach requires passing a standalone whistleblower law that gathers all key provisions within a unified legislative and regulatory framework.[26] The research aims at suggesting the need to make a comprehensive legislation or set up a framework for adjudication of whistle blowing claims with transparency.

Proposed Model

McCubbins and Schwartz[27] in 1984 gave the Congress's dilemma, that can be rightly considered here, to decide how best to oversee executive agencies that may choose to implement policies that differ from what members of Congress desire. If there exist autonomy, between patrolling for non-compliance and waiting for third parties to notify Congress of non-compliance (fire alarm), it is more often efficient to wait for the fire alarm.[28]

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[24] John Austin&Wilfrid E. Rumble (ed.), *The Province of Jurisprudence Determined*, Cambridge University Press,Cambridge p. 112(1995)

[25] Chapter II, Article 5-14

[26] Mark Worth, *'Gaps in the system: Whistleblower Laws in the EU*', Blue Print for free speech Report Series- II, (2018)

[27] Mathew D. McCubbins & Thomas Schwartz*'Congressional Oversight Overlooked: Police patrols v. Fire Alarms'*, *American Journal of Political Science*, Vol. 28, Issue 1, 165-179, (1984)

[28] Deborah B., Alexander V.H. & Jonathan P., *Whistle Blowing and Compliance in the Judicial Hierarchy*, *American Journal of Political Science*, Vol. 58, No. 4, Pp. 904-9182014)

Simple reasons behind this can be lower monetary or social costs involved. Therefore, in theoretic prescription, it would always be advisable to deploy executive agencies or surveillance organizations that have been set up to detect malpractices, rather the deployed funds be invested in reward-based incentives to the general public who may raise an alarm as and when the contingency may arise. This proposition, however has limited practical feasibility, considering various aspects. Firstly, no state can function in an orderly fashion without proper mechanism to combat ill practices prevalent in the State. Thus, in a *laissez faire*style of executive system, the accountability aspect is overlooked.

There exists a possibility that some whistle blowing claims are either unreported or vexatious claims to threaten the reputation of concerned industry. Here, a transition can be sighted from whistle blowers being public spirited individuals to a group of unruly ransom seekers. In the case of unreported claims, no whistle is blown, possibly because the whistle blower finds less incentive to highlight the low-key issue due to high social costs of information and reporting. Also, in a money-based incentive system, there are chances when the potential whistle blowers are bribed off to not raise the alarm altogether. In the second scenario, an insider might resort to complaining false claims in lieu of extortion of money.

Therefore, in light of the few mentioned above and other possibilities of frivolous whistle blowing, it is essential to set up an autonomous whistle blowing mechanism which can validate the genuinity of each claim and take necessary action. As discussed priory, there are well established laws for whistle blowing in the corporate sector almost globally. However, hardly any compliance is available as a resort to judicial whistle blowers. Consequently, a sincere attempt has been made to device a model for whistle blowing in judiciary, particularly in the Indian context.

As the basic structure of the Indian Constitution, separation of powers between the three pillars of democracy cannot be compromised. Thus, any agency which might be invested with the duty to adjudicate and reflect upon the whistle blowing claims arising thereupon must be a wing of judiciary itself. On contrary, if the executive or legislature bodies are appointed to

adjudicate whistle blowing cases of judiciary, it would strike a blow at the independence of judiciary. Independence of judiciary, which is not a part of the basic structure *per se,* is still a fundamental concept. Nevertheless, an entirely judiciary dependent model may also result inefficient as certain claims may not be addressed due to discrimination in form of nepotism and favourism among judges. There can be other fallouts to this in the form of politically connected judges, who are likely to manipulate whistle blowing claims against them with their resources.

The main objective to achieve through establishment of a separate whistle blower cell is to set up an independent body free from influence of either wings of democracy to eradicate the opaqueness in penalizing wrongdoers in the judiciary. This end can be achieved by the means of ensuring separate funding. It is proposed for the Whistle blower cell to receive funds out of the allocated funds to judiciary in the budget. This is necessary, as it will be a clear signal that Whistle Blower Cell is an extended organ of the judiciary and the independence of judiciary is intact. Also, this would rule out any possible claims of Whistle Blower Cell to be higher than the Supreme Court itself. Furthermore, it would reinstate and strengthen the faith of general public in judiciary, by establishing that even judges themselves are subject to judicial scrutiny in case of misconduct.

Secondly, it is proposed that the working of this Whistle Blower Cell be and independent framework and the constitution of the cell be a mix of inter-institutional model.[29] It needs to be mentioned, that whistle blowing in judiciary is required to be discussed in two scenarios. The first one being a claim of whistle blowing arising in an inferior court. In this case, a superior court is already in place and can take due cognizance of the matter. Second case is that of a whistle blowing claim against a judge of the Supreme Court or the Chief Justice of India. These are the offices of highest powers in judiciary, and do not have a superior authority to adjudicate disputes.[30] Here is the need to appoint an autonomous body to adjudicate whistle blowing claims. There should be a deliberate discussion on the constitution of such a

[29] *Recasting the Judicial Appointments Debate*: Constitutional Amendment (120th Amendment) Bill, 2013 and Judicial Appointments Commissioner Bill, 2013; *Centre for Law & Policy Research*.

[30] President has been granted certain powers of pardon which are not included in this aspect.

body. However, reference can be drawn out from the National Judicial Appointments Commission (NJAC) which came out as the Ninety Ninth Constitutional Amendment in 2014. Though, NJAC model was not very successful, it was a unique idea of inter-institutionalized model for judicial appointments, where executive and judiciary had equal roles to play. A similar model can be in place for the settlement of whistle blowing claims arising in higher judiciary.

These whistle blower cells can consist of a panel of retired Supreme Court judges, President of India, Union Minister and persons of eminence in human rights. Further, there should be a diligent investigation in these matters before initiation of proceedings after filing of the complaint with the whistle blower cell, considering the noble reputation of judges. A frivolous complaint may result in tarnishing of a judge's reputation.[31]

Lastly, it is proposed that the Whistle Blower Cell model must be in compliance of the constitutional rights of the citizens and international conventions. With the developments in law, the whistle blowing mechanism must also incorporate world models for whistle blowing to stand the global competence.

Conclusion

The research aims at establishing the need to extend protection to whistleblowers in the judiciary. The paper begins with defining whistle blowing in various private and public institutions. The paper seeks to highlight the atrocities faced by the whistle blowers as an aftermath of disclosure in public interest. Further, protection of whistleblowers' legislations in various countries is discussed to give a global comparison. The second chapter seeks to narrow down the focus on whistle blowing in judicial sector. The various humanistic and constitutional rights of judges are taken into considerations. Considering the noble status of judiciary seldom are these cases reported. The recent UK case of J. Gilham is one of its kind where the judiciary evaluated the status of a judge in comparison to that of contract workforce. The research then inclines towards Indian context where

[31] United States Supreme Court J. Brett Kavanaugh

an account of whistleblowers' claims in judiciary are provided. The paper critically examines the limited reach of current legislations to not cover judiciary in its ambit.

Towards the end, a sincere attempt has been made to suggest an autonomous body for settlement of whistle blowers' claims in judiciary. In India, judiciary has always been placed at a high pedestal. Therefore, in order to reinstate the lost faith in judiciary it is pertinent to address the issues taking place within the judiciary. The suggested model is comprehensive enough to encompass the separate funding, independent framework, feasibility, a suggested constitution and integration with world models.

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Freedom of Information and Right to Information Act

Yamini Sharma and Janhavi Deokar [1]

Introduction

"A nation that is afraid to let its people judge the truth and falsehood in an open market is afraid of its people"- John F. Kennedy

Today's world of information has created lot of buzz about foreign trip of ministers & corruption in government schemes, developments projects, benefits and entitlements etc. So, when the Prime Minister is prompted to write to its ministers to curtail their foreign travel expenditure, what makes him answerable? It's the Right to Information ("RTI") regime & the groundbreaking legislation of 2005 which is committed towards operationalizing fundamental rights, transparency and accountability for curbing corruption and providing independent appellate mechanism. The Right to Information Act ("the Act") is a paradigm shift in the approach of governance which recognized official discretion, secrecy and control over transparency and accountability. The new era has emerged for more progressive, participatory & meaningful democracy by overriding all existing laws including the Official Secrets Act, 1923. Drawing provisions from Canada, Jamaica, Mexico and South Africa, it provides key platform for citizens to access information and records held by public authorities and to establish three-tier grievance-redressal mechanism for dealing with cases of non compliance. Success basket of the Act includes MGNREGS scheme, supporting education of poor including New Delhi's elite public school, opening up of internal assessment system in examination including Delhi Universities, greater transparency in public distribution system and other basic necessities. Scams like Common Wealth Games, Vyapam wouldn't have seen the light of the day in the absence of RTI.

On paper, it enshrines the principle of maximum disclosure, minimum exemptions, independent appeals, penalties and universal accessibility with law[2]. However, in practical scenario, there were about 2.23 crore RTI

[1] Student, V BALLB, ILS Law College, Pune

[2] Parliament of India, "Third report on RTI bill, 2004" 8 (March, 2005).

applications filed during 2003 to 2017, but the disposal rate is very slow and the penalty rate is just 4%[3]. It has prompted many countries to enact their own legislation in order to bring improvement in government services. But ironically, when it comes to implementation, it faces many hurdles like lack of skills and training for compliance, unrelenting efforts of the government to resist proper and fair implementation, inadequate infrastructure and insufficient budgetary and human resources, low levels of awareness, training, and capacity building as well as poor records management, internal rules, structures and processes, frivolous and vexatious use of RTI etc.

In International arena, Sweden was the first state to enact RTI law followed by USA and by 2010, over 85 countries had national-level RTI laws or regulations. In India, it is recognized as an extension of art. 19(1)(a) and also as a facet of art. 21 through judicial interpretation.

Scope

The Act covers bodies established, constituted , owned or substantially financed by the Central, State or local government bodies and organizations substantially controlled or financed by government funds (directly or indirectly), including nongovernmental organizations[4]. By virtue of this, it covers all organs of state i.e. legislative, executive and judiciary at all levels and various other bodies. However, there are certain exemptions which don't apply in cases of corruption and human rights violation. It's an essential and fundamental right for any democratic setup and good governance. The Supreme Court widened its horizon by holding that a person has right to know about every public act and the details of every public transaction undertaken by public functionaries[5]. The agents of the public must be reasonable & responsible for their conduct and people are entitled to know the particulars of every public transaction in all its bearing[6].

Here, the term "substantially financed" has a huge room for interpretation. Though the Supreme Court has interpreted it to be not

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3 Chetan Chauhan, "How RTI is dying a slow death in India", *Hindustan Times*, May 03, 2018, available at <https://www.hindustantimes.com/india-news/how-rti-is-dying-a-slow-death-in-india/story>.

4 Stephanie E. Trapnell, *Right to Information: Case studies on implementation*, World Bank Group, 2014, available at <http://www.worldbank.org/publicsector/gpa/transparency>.

5 *S.P.Gupta* v. *Union of India,* (1993) 4 SCC 441.

6 *State of U.P.* v. *Raj Narain*, AIR 1975 SC 865.

moderate or ordinary etc.[7], several High Courts have spared from giving any rigid or narrow definition for it. While reading it along with the purpose and object of the Act, they held that it cannot be called as "majority" or can't be given any mathematical formula for that matter. It aims to cover other benefits like subsidies, grant, duty etc. and should merely be construed as opposite to trivial and financed by public funds. One interesting case is of political parties, even so the matter is yet to be decided by the Apex court, in the case of *Subhash Chandra Aggarwal* & *Anil Bairwal* v. *Indian National Congress & Ors.*[8], has held that political parties very well come within the ambit of the Act as there is considerable direct and indirect financing by way of the concessional allotment of land and buildings in prime locations at capital cities and Income Tax exemption of around 30%. This rationale is in tandem with the freedom of information and openness about the bodies which originate, function and survive because of people. So, transparency in their functioning is in larger interest of people in democracy. But what about the status of those who had given such judgment?

Enforcement Machinery

Generally, the Constitution ensures institutional independence of the Election Commission, Judiciary etc which are required to act as an arbiter between citizens and the government, which could misuse its powers by threatening, enticing or manipulating the machinery. Inspired by this constitutional regime, the final appellate authorities and guardians of the Act i.e. Information Commissioners ("the Commissioners") were given fixed tenure and their conditions of services were equated with that of the Election Commission to maintain neutrality, objectivity and fairness in their functioning. However, the latest amendment has substituted that by giving charge to the government, which is the primary subject of the Act, to determine the terms and conditions of the Commissioners, who can hear appeals and complaints under the Act, monitor the law's implementation, impose penalties on PIOs and recommend disciplinary action against erring officials and award compensation to applicants for any loss or detriment suffered[9].

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7 *Thalappalam Ser. Coop. Bank ltd. & Ors.* v.*State of Kerela & Ors.,*2013 (16) SCC 82.
8 2013(3) RCR(Civil) 400.
9 *Supra* note 3 at 68.

The principle of constitutionalism is now a legal principle which requires control over the exercise of governmental power to ensure that it doesn't destroy the basic structure and necessitates different independent centers of decision making[10]. Wherein, the basic structure includes protection of fundamental rights and their protectors[11]. Since, this right comes for effective exercise of art. 19(1)(a), it's important to consider this twofold test which includes- (1) whether there is a restriction; (2) whether that restriction is reasonable.

In the light of it, the present amendment affects that functioning of the Information Commission ("the Commission") which is ultimately responsible to protect, promote and fulfill the RTI by applying their judicial mind while adjudicating on appeals and complaints of persons who are aggrieved of violation or haven't been able to secure information in accordance with the Act[12]. If such thread is broken or twisted according to whims and fancies of one side, it would surely create an imbalance in accessibility of information which goes against the public interest and the object of the Act. Thus, the amendment puts certain restriction on the direct, full and effective exercise of the right. Dealing with reasonability, the criteria is to come within the restrictions provided under art. 19(2) of the Constitution. However, the present amendment doesn't fit within that criterion as well.

Further, it is within government's positive obligation to secure institutional independence for protection of this right[13]. Proper implementation is vital for achieving good governance in any vibrant democracy[14]. And if the commissioners become vulnerable, crippled and insecure for their job then it'll create a hindrance in the positive and smooth implementation of the Act. Thus, it gives back seat to the basic object by giving control of steering wheel to the government.

Nevertheless, the government has backed it as correction of the anomaly which was created by giving constitutional status to a statutory body

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10 *State of West Bengal and Ors.* v. *The Committee for Protection of Democratic Rights*, AIR 2010 SC 1476.
11 *Namit Sharma* v. *Union Of India*, (2013) 1 SCC 745.
12 *Anjali Bharadwaj* v. *Union of India*, 2019 SCC OnLine SC 205.
13 *Justice K.S.Puttusawamy & Ors.* v. *Union of India & Ors*., (2019) 1 SCC 1.
14 *Supra* note 11.

like the Commission and thereby putting it at par with the Election Commission and the Supreme Court Judges. However, that analogy makes it disproportionate and excessive as it takes away a crucial fundamental right at the cost of mere correction of an anomaly. Thereby, instead of promoting the social interest of the people, the amendment adversely affects it. Additionally, we also have statutory bodies which enjoy the same terms and conditions like that of constitutional bodies. Such as Central Vigilance Commissioner was never envisioned by our Constitution but it enjoys fixed tenure and salary and allowances[15] at par with the members of Union Public Service Commission- a constitutional body[16]. Interestingly, if we look at the object of both these bodies which is prevention of corruption and upholding the rule of law, then "why wasn't this possible in case of the Commissioners?

Generally, the statutory character is given to strengthen these bodies by entrusting more important function, ensuring freedom from administrative control and providing additional support in exercise of constitutional rights[17]. Also considering the object, historical background, evil sought to be achieved and other complexities, it's very clear that maintaining independent mechanism comes within the legislative policy of the Act[18]. Thereby, the present amendment suffers from the vice of excessive delegation by entrusting the central government with an essential legislative function of determining the policy.

Further, this Act reinforces the basic concept of art.14 that "Be whoever you are, the law is supreme and equal for all". Art. 21 also envisages protection and enforcement of the right by following fair and unbiased procedure established by law. In that way, the personnel of the enforcement agencies shouldn't lack the courage and independence to go about their task as they should, even where those to be investigated are prominent and powerful persons[19].And any kind of external influence, pressure or any kind of other consideration would hamper proper implementation of rule of law.

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15 The Central Vigilance Commission Act, 2003(Act 45 of 2003), s. 5(7)(a).
16 The Constitution of India, art. 315.
17 Lok Sabha secretariat, "Joint Committee on the Central Vigilance Commission Bill, 1999" (October, 2000).
18 *Supra* note 1.
19 *Vineet Narain* v. *Union of India*, 1996 SCC (2) 199.

Like in case of Central Bureau of Investigation, which was called "caged parrot" by the Apex Court, wherein the committee clearly stated that an agency should have a protected tenure and must be independent of the political executive and the bureaucracy. If not done so the enforcement personnel of investigative agency will be beholden to the political executive and would always think of their career prospect, individual ambition and loyalty towards power and benefactor[20]. Unless this is done, fair inquiry of complaint made under s. 18(1) of the Act isn't possible.

However, downgrading their level is also procedurally unsound and against the natural justice as there shouldn't be any conflict between duty and interest in order to work in fair and reasonable manner. In other words "justice should not only be done, but should manifestly and undoubtedly be seen to be done". Any kind of pecuniary or personal bias, no matter however small or not proved to have affected the person, will be termed as violation Interestingly, the Apex Court in the case of *Union of India v. Namit Sharma*[21] held that the commission performs administrative function and not quasi judicial which can also be argued otherwise. If we even consider this, the Court in the same judgment emphasized on the fair and impartial functioning of it by applying judicial mind. And there are numerous cases wherein, it has been held by the Apex Court that the control of government over tenure and the financial dependence adversely affects impartiality and judicial efficiency of the body. So it's worrisome especially when the government is the largest litigator under the Act.

Despite the provision related to their removal and immunity from disadvantage in their condition of service, it could still create huge vested interest in the mind of the commissioners while dealing with the senior bureaucracy. The commissioners will be paralysed and subjugated to senior bureaucrats in the government and make them mere paper lions like in the case of NHRC wherein their dependency on the government hampered its effectiveness in implementation of human rights[22]. In the opinion of T.T. Krishnamachari : "[T]he Judiciary shouldn't feel that they are subject to

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[20] *Supra* note 16.
[21] (2013) 10 SCC 359.
[22] *Extra Judicial Execution Victim Families Association.* v. *Union of India and Ors.,* AIR 2013 SC 818.

executive might as this would naturally influence their decision in any matter involving executive interests. Extraordinary safeguards to protect the tenure and service conditions of the members of the judiciary are provided in the Constitution; with a fond hope that those who hold judicial offices so protected and are able to discharge their functions with absolute independence and efficiency[23]. There is an old saying that "if it ain't broken, don't try to fix it". The implementation of the Act is integral to the effective RTI, undermining of the same by dilution of their independence is *ipso facto* a violation of that right.

RTI and the Indian Judiciary

There cannot be two rules of democracy-one to preach, and one to practice. The courts have frequently preached about the RTI and public participation in a vibrant democracy. Recently, the Supreme Court finally bought its preaching into practice by ruling that the higher judiciary, by virtue of being established by the Constitution, would fall under ambit of "public authority" u/s 2(h) of the Act. It's a significant step towards encouraging transparency and holding judiciary accountable for the disclosure of information. The whole tussle began when Mr. S.C. Agrawal sought information relating to asset declaration of the judges under 1997 resolution from the Central Public Information Officer of the Supreme Court which ultimately became the question of determination of the scope and applicability of the Act to the judges of higher judiciary. For which the judgment clearly hold that the office of CJI is a pubic authority and isn't distinct from other judges by the Constitution. Further, it also upheld that the information about asset declaration isn't received in fiduciary capacity and thus not exempted from disclosure. However, since it constitutes personal information, it can only be disclosed in larger public interest. Notably, if Parliament had any intention to exempt judiciary it could have expressly mentioned it u/s 8 of the Act. Therefore, it can be inferred that the exemptions sufficiently safeguards the judiciary.

Independence of judiciary is the part of basic structure of our constitution[24]. The constitution provides for various safeguards through the

[23] *Supreme Court Advocates on Record Association & Ors.* v. *Union of India* , (2016) 5 SCC 1.
[24] *Kesavananda Bharati Sripadagalvaru* v. *State of Kerala*, (1973) 4 S.C.R.225.

selection, appointment, transfer, and termination of judges of the higher judiciary, non-interference of the legislature in judicial functions, and financial independence. The judiciary has also tried to insulate itself from executive interference as well by prioritizing the collegium. However, this has to be balanced with healthy democratic deliberations and framework of our country. The question here is that whether application of RTI Act undermines the independence of judiciary? Is there any other way to deal with the allegation of misconduct and corruption except impeachment? While answering this broadly, in *S.P. Gupta case*[25], it was laid down that the openness must characterize the functioning of judicial apparatus as well and there is no reason why improper conduct of CJI shouldn't be exposed to public gaze. It is the disclosure and not secrecy which would enhances the independence of judiciary. The recent judgment answers this succinctly by laying down that judicial independence and accountability go hand in hand as accountability ensures, and is facet of judicial independence[26].

There were several apprehensions while discussing this matter with respect to sharing draft judgments, notes and other communications among the judges. However, the Act only mandates disclosure of the information which is already with the public authority. Further, the legislature is prohibited from discussing matters pertaining to the duties performed by the judiciary and it also empowers courts and tribunals to forbid certain disclosure. The only instance when it won't be considered is when the larger public interest outweighs privilege of non-disclosure.

There are four major arguments which were discussed in the judgment, namely, (i) confidentiality concerns; (ii) data protection; (ii) reputation of those being considered in the selection process, especially those whose candidature/eligibility stands negated; and (iv) potential chilling effect on future candidates given the degree of exposure and public scrutiny involved[27]. For which the court said that judicial independence directly relates to public welfare and when pubic interest test is applied, judicial independence has to be kept in mind while exercising discretion. Independence is not synonymous

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25 *Supra* note 4, para. 84.

26 *Central public Information Officer, Supreme Court of India* v. *Subhash Chandra Agrawa*l , 2019 SCC OnLine SC 1459.

27 *Id.* at 69.

to denial of access to information. Infact, openness and transparency may contribute to its enhancement in some cases. However, the majority judgment didn't answer any of these issues in absolute terms and only emphasized in applying the public interest test to weigh the scales and on balance determine the question of disclosure. Moreover, in the separate but concurring opinion of N.V. Ramana, J., stated that transparency can't be allowed in its absolute terms as efficiency is an equally important consideration. He warned against using RTI as a tool of surveillance to undermine efficiency of judiciary. To give more clarity, he laid down two fold step test to balance privacy with public interest, which is :- 1) whether the information is private and individual's reasonable expectation of privacy ; and 2) whether public interest justifies disclosure of such information.

Most importantly, it has also listed some non exhaustive factors which could be considered while assessing the 'public interest' u/s 8 of the Act, namely, a)Nature and content of the information; b) Consequences of non-disclosure; dangers and benefits to public; c) Type of confidential obligation; d) Beliefs of the confidant; reasonable suspicion; e) Party to whom information is disclosed; f) Manner in which information acquired; g) Public and private interests; and h) Freedom of expression and proportionality. Further, there were also concerns that putting it in front of public gaze might adversely affect the free and frank behavior of judges. However, D.Y. Chandrachud J., in his separate but concurring opinion, stated that it might be relevant to determine level of protection but at the same time can't be the reason to preclude disclosure which concern appointment of judges and especially when it is in discharge of their duties in a fair manner in accordance with the principles of the Constitution.

Specifically, with respect to judicial independence, he asserted that it can't be said that increasing transparency and lifting of veil of secrecy would threaten independence. Judicial accountability is important for upholding rights of the citizens which would otherwise harm impartiality and integrity of the institution. Essentially, he opined that RTI and transparency are crucially linked to the rule of law. He took a broader view and held stated that judicial independence is secured by accountability wherein transparency and scrutiny are important instruments to secure accountability. Independence

shouldn't become a shield to protect wrong doing but an instrument to ensure constitutional values.

The judgment clearly lays down the public interest test wherein the balance has to be established between the right of an individual and of community. As such there is no definite meaning of "Public Interest". It has to be determined contextually by the PIOs' and the Commissioners. In the case of *Janata Dal v. H.S. Chowdhary and Others*[28], the court referred to the Black's law Dictionary, which provides as something in which community at large has pecuniary interest or some interest by which their legal rights and liabilities are affected. The majority judgment defines it as something which is in the interest of public welfare to know. The test would involve consideration of object of the Act, right of privacy and consequence of its breach and possible harm and injury to the third party. It would ultimately be discretionary value judgment of the PIO & the Commissioners who will apply their mind while weighing the competing interests keeping in mind the object, scope and the purpose of protection to reach to fair conclusion. It thus takes us to again consider the importance of independence of such appellate forum in order to ensure fair & impartial decision. If they become puppet of the government, it could also undermine judicial independence. Furthermore, it also involves consideration of motive and purpose of the applicant, wherein special interest could be weighed more. This seems to be quite worrisome as it's very subjective and one need not seek information about any public agency for its public work. In reality, this might increase the possibility of abuse of power by the discretionary authority.

Despite having an enormous power and robust mechanism, it cannot be considered as unquestionably right authority. There has to be a check as the judges are not infallible and for preventing corruption and misuse of power. There are instances of alleged corruption among Indian Judges which many a times aren't even identified, if identified and reported, they are not always proven. Also the process to remove judges is very difficult and there is no clarity and categorization in the domain of contempt of court jurisprudence. Sometimes, there are just one sided allegations without any

[28] AIR.1993 SC 892.

substance. But all of this severely damages the image of an independent mechanism. Therefore, in order to build public trust and unshakable public confidence over the higher judiciary, RTI will act as a tool in furtherance of democratically rooted independence. It casts a duty of openness, transparency and accountability over the institution which would better secure the independence. Though it has taken a welcome measure, but there is still a long way to go to clear out complete transparency in the selection, appointment, transfers and other details for public scrutiny so that our Indian model can inspire the whole world.

Comparitive Analysis

Information is a double edged sword. Over the years, freedom of information has gained huge importance internationally to provide openness, transparency and accountability in the public agencies. The United Nations general assembly has formally adopted this right under art. 19 of Universal Declaration of Human Rights & International Covenant on Civil and Political Rights. The covenant guarantees right of freedom of expression which includes right to seek, receive and impart information of all kinds, regardless of frontiers. It has been recognized by various international forums including UNESCO, African Union, and European Union etc. It's also important to analyze this law in the other countries which have inspired making of Indian Constitution. Notably there, unlike India, this right isn't limited to their respective citizenry for claiming right of information.

United States of America

It is very well said by the former U.S. president Thomas Jefferson that "Information is the currency of democracy". The American Constitution doesn't mention this right specifically. Nevertheless, the US Supreme Court has read it into the first amendment to grant access to information. It has also enacted Freedom of Information Act, 1966, ("FOIA") to enable access to information which administrators are tempted to keep confidential[29]. As compared to India, the law is applicable on executive branch of the federal government including public corporations, military department and

[29] Anshul Jain, *A Treatise on The RTI Act* (Universal Law Publishing Co. ltd., New Delhi, 2014).

independent regulatory agencies[30]. It could be said that definition of our Act is wider which covers all the constitutional and statutory bodies. Notably, unlike the U.S. law, the Act in India enjoys higher stature which has overriding effect over all the other law in case of inconsistency. The FOIA is often described as a means for citizens to know 'what their Government is up to'[31].

Regarding its enforcement, U.S. machinery is similar like India regarding the PIO's. They have request service centre and mediation bodies to resolve disputes. However, the main enforcement agency is the Department of Justice. At first, the application is dealt by the officers in the agencies. If not satisfied with agency's initial response, one can move ahead with the administrative appeal. After an independent review, there is an option to go either for mediation to Office of Government Information Services or for litigation, wherein the U.S. district courts are vested with exclusive original jurisdiction over FOIA cases by s. (a)(4)(B) of the Act. It has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaint. So, there is an independent judicial mechanism which would be dealing with the subsequently. However in India the Commission is the final authority and after that there can only be a writ against the order of the Commissioners.

Interestingly, FOIA had replaced the earlier act which failed because of broad exemptions and vagueness of language. It provided easy escape zones for the recalcitrant government officers when it involved provisions involving exemptions when "any function of the US requiring secrecy in the public interest" or "held confidential for good cause found"[32]. Furthermore, the burden is on agency to sustain its action of withholding information. In *Consumers Union v. Veterans Administrator*, the court held that the act aims to make disclosure as the general rule and only information specifically exempted by the FOIA could be withheld. Thus, specific exemptions and not withholding information only to them has changed the self protective attitude

30 The Freedom of Information Act, 5 U.S.C. 552, s. 552 (f)(1).
31 *NARA* v. *Favish*, (2004) 541 U.S. 157.
32 M.P. JAIN & S.N. Jain, *Principles of Administrative Law* 988 (Wadhawa, Nagpur, 2001).

of an administrative agency to a proactive and open door agency. Wherein, an individual is no longer seeks information as a mere suppliant. It works both ways; on one hand this rigidity is used to get competitive advantage which has started "reverse FOIA cases" wherein they are fighting back to forbid government from releasing their documents and the government is now facing greater difficulty is collecting sensitive information. On the other hand, it has created a pervasive preventive effect by virtue of the sobering influence of prospective public scrutiny[33].

With respect to the judicial branch, the federal constitution doesn't provide for public right to access government information. But many state constitutions do provide for such right which has been interpreted by courts to include only executive and legislative branches. Only the Florida Constitution expressly provides for giving open access to judicial records[34]. Even, the FOIA doesn't apply to congress and federal judiciary. Due to the lack of constitutional and statutory law, federal and state judges enjoy vast discretion to determine access to court records and files. Even they need to find a balance between the privacy concerns and public right to access information. In *Nixon v. Warner Communications, Inc.*,[35] the Supreme Court held that "every court has supervisory power over records and files and can deny access when it would be used for improper purposes. And "the decision as to access is one best left to the sound discretion of the trial court which is to be exercised in light of the relevant facts and circumstances of the particular case". Consequently, the accessibility with respect to judicial branch varies from court to court and state to state.

United Kingdom

"Unnecessary secrecy in government leads to arrogance in governance and defective decision-making."[36]

The RTI is not formally included in the constitutional expression. Nevertheless, the Freedom of Information Act provides public access to

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33 *Id.* at 990.
34 The Constitution of Florida, art. 1.
35 435 U.S. 589 (1978).
36 Information Commissioner's Office, U.K. *available at* <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/what-is-the-foi-act> (last visited on August 14, 2017).

information held by public authorities which obliges them to publish certain information and also entitle members to request information. The Public Authorities includes government departments, legislative bodies, armed forces and numerous other bodies as listed under the sch. 1 of the Act. The Secretary of State has power to add or remove bodies which are established or wholly or partly appointed by the crown, minister of crown, government department or other ministers[37]. And also to designate any person who appears to exercise functions of a public nature as a public authority[38]. It doesn't require the individual to state any reason for its request on contrary refusing to them need justification. It provides for duty to provide assistance to the extent as laid down in form of code of practice u/s 45 and 46. They need to consider the request while giving due regard to privacy, public interest and few other consideration relating to data protection.

As per part V of the U.K. act, a complaint against the decision of the authority can be filed before the Information officer, which can be further challenged before Information Tribunal. Furthermore, one has the right to appeal against the Tribunal's decision to the High Court on the question of law. Notably, the Information Commissioner is appointed and removed by the Crown and its term and conditions though determined by the House of Commons through a resolution, it still has to be equivalent to any crown appointed officer and has to be charged out of consolidated fund[39]. Thus, the Commissioner and Tribunal are not only independent bodies but also enjoy judicial power especially the power of contempt of court.

The exemptions are either absolute or qualified, which are subject to the public interest test, which is similar to India. It means disclosure for public good and to serve the interest of society. However, the test varies depending in the circumstances of the case or the law which is involved[40]. So, it's usually whether the disclosure is going to "prejudice" those interests[41] such as defence, international relations, law enforcement or commercial

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37 The Freedom of Information Act, 2000, s. 4.
38 *Id.,* s. 5.
39 The Data Protection Act, 2018, sch. 12.
40 *E Upper Tribunal in APPGER* v. *ICO and Foreign and Commonwealth Office*, [2015] UKUT 377 (ACC).
41 Campaign for Freedom of Information, *A Short Guide to the Freedom of Information Act and Other New Access Rights*, 2005, *available at* <https://www.cfoi.org.uk/pdf/foi_guide.pdf>.

interest. The term isn't defined but helps to ensure to secure information that involves significant decision about public debate, effective participation and adequate scrutiny of decision making process, accountability for public money expenditure, job and operation, health and safety, fair dealing, exposition of misconduct etc. It can't be rejected merely because of motive of applicant or private interest of requester or if information is complex and could be misunderstood[42]. It has to balance legal privilege, severity, the age of information and the outcome while considering exemptions against need of transparency, amount of public money involved, number and class of people involved and the information already in the public domain.

Specifically, with respect to courts and tribunals, the right will apply to the information about their administrative functions but not about the cases they deal with[43]. As per Rule 39 of the Supreme Court Rules of UK, all documents held by the court may be inspected on application to registrar, who may refuse an application on the ground of confidentiality, national security or public interest. Elaborately, the classes of information includes disclosure relating to officials and their work, expenditure, priorities and their application, decision making process, policies and procedure, list and registers, services offered[44]. Therefore, the UK Act is quite broader than Indian Act in terms of scope, application and redressal mechanism.

Suggestions

The famous slogans like ―Hamare Paisa, Hamara hisab (our money, our account) and ―Ham Janenge, Ham Jiyenge (We will know, we will live) need to lived and attained in real sense. It's said that "once we are aware, we can't help but change".

- It is suggested that providing good infrastructure, reducing overburden and recruiting more people who are trained and competent officials or introducing dedicated and well staffed cell with more formalized system like Central Public Works

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42 *Christopher Martin Hogan and Oxford City Council* v *Information Commissioner*, EA/2005/0026 and 0030.

43 *Supra* note 40.

44 Access to Information- The Supreme Court, U.K., *available at* <https://www.supremecourt.uk/about/access-to-information.html> (last visited on August 2, 2020).

Department[45] could improve machinery. It is also suggested that practice of record keeping and management could be improved by issuing appropriate guidelines. It'll help in speedy and efficient service-delivery system. Capacity building programmes and better human resource management are required which includes annual personnel performance appraisal, incentive or reward for good performance to PIO's and other officials etc. Additionally, there can by periodic review by the information commission to monitor and evaluate implementation with proper feedback.

- Another significant issue is lack of financial resources and financial dependency especially at local levels. Therefore, government should focus on allocating dedicated budget for RTI implementation and financial independency otherwise they would remain paper lions.
- Further, time lines could be introduced for the Commissions to determine appeals and complaints with more stringent penalty. And the Chief Information Commissioner should also ensure frequent interaction and better coordination amongst the commissioners, departments and other agencies.
- The officials are resistant and fearful of recording their views on files as it could be used to harass and blackmail them. Its misuse to settle scores, to harass government department are unproductive, frivolous and time consuming. In 2010, an all-India perceptions survey of over 4,000 civil servants revealed that they view the law with trepidation[46]. Therefore, it's suggested that grounds should be more specific and penalty should be introduced for deliberate misuse of this right.

Conclusion

"There is no need to fear the ill wind when your haystacks are tied down"- Irish Proverb

[45] *Supra* note 3 at 80.
[46] *Id.* at 85.

In sum, the Act serves as medium for effectuating freedom of information. It can only be possible when citizens are able to enjoy legal right to demand information & clarification from power and patronage in real sense and not as empty formality. It's the responsibility of each line of agency to set systems, approach and processes in its place which will translate it into a tangible right. Every year there are millions of requests for information. It's important to abridge the gap between the written words of law and its actual implementation. It is high time that we don't just read and study about the Constitution but also live the Constitution. Social welfare programmes can be free from corruption, pilferage and mismanagement only when they are constantly under public eye to uncover and check such practice. RTI is sometimes quoted as 10 rupees public interest litigation for poor. Gradually, people are becoming more aware and vigilant but there is still a long way to go when it comes to its actual implementation in terms of infrastructure, adequate planning, resolution of disputes, protection of RTI activists etc. We need more amendments to make it stringent and better instead of curbing or smothering it to a soulless law. Finally, this path making legislation needs to be revamped for full and effective exercise of freedom of information which will unlock the door to good governance by promoting transparency, accountability and participation. Otherwise, our democracy would die behind the closed doors in obscurity.

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THEME VIII: CONSTITUTIONAL MORALITY

Competing Challenges of Public Morality to Constitutional Morality: Comparative Study of Mob Justice in Sub-Continent Countries

Aditya Rawat[1] & Divyanshu Chaudhary[2]

"The Pathways of justice are not linear nor without obstacles. But we have, as a people, chosen the routes of democracy and the Constitution, so we really have no option but to school ourselves in constitutional morality".

-Dr. B.R. Ambedkar

Recent news of police encounter of four alleged rape accused in a Hyderabad vet case and public celebration over the heroic deed of police force has again sparked the discourse over collision course between public morality and constitutional morality.

Through this paper we enquire into constitutional designs of subcontinent countries (For purpose of this paper, countries taken into consideration are India, Pakistan and Bangladesh) when it is in direct confrontation with public morality. We have used the context of religious lynching (Example, lynching of Mashal Khan in Pakistan over alleged blasphemy) to examine constitutional address or silence over it.

Through this paper we argue that as long as constitutional morality is not in sync with public morality, its imposition will face stiff resistance and project in itself would be a manifest failure. We also intend to touch upon the argument that maybe it is time to revisit our constitutional designs to look at public morality as a strong marker of legal system.

The paper is divided into four parts. In first part we examine the theoretical concept of constitutional morality and contextualise it in accordance with constitutions of sub-continent countries. In second part we engage with mob lynching incidents over last decade in sub-continent countries. In third part we summarise the constitutional response or silence to mob lynching and in fourth part we conclude with our arguments about lack of redressal on part of constitutions to address the mobocracy.

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I. Introduction

There are different structures which exist within a state. Societies and communities are two of the most important structures of the state without which the existence of state itself can be questioned[3]. The people living within these structures are the reason for the ultimate existence of the state as an instrumentality[4].

The society being a diverse entity also involves bad elements; crime being one of such bad elements has always been challenging the instrumentality of state in its duty to protect the rights of people. As the interests (*public morality*) of the individuals differ, conflict arises in various forms & therefore there is no society in the world which can claim to be free from crimes[5]. Therefore, the state is responsible for maintaining the law and order in the society and thereby protects the basic rights of the people[6]. For this purpose, the state engages various institutions as to make laws and to implement them[7].

In our context, it is the Constitution which lays down various ideals and values. The basic idea enshrined under the Constitution forms the basis of constitutional morality which has to be taken into consideration by people while forming their public morality. Mob justice or lynching which is committed by a group of people who are essentially motivated by their constitutionally unguided public morality, challenges the very idea of constitutional morality that is applicable to all.

Lynching being one of the forms of both, *conventional crimes*[8] *and hate crimes*[9], has, *in recent times*, emerged of great significance. The concept of lynching cannot be defined into limited sense as the evil can take place out of distinct factors based on one's *religion*, *race*, *caste*, *sex* etc[10]. Arising out

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3 R.M. Maclver, "Society and State", 20(1) *The Philosophical Review*, 30-45, 40 (1911).

4 Jean Jacques Rousseau, G.D.H. Cole, *et.al*., *The Social Contract and Discourses* 142 (Dent, London, 1973).

5 Michael Newton, *Crime and Criminals* 7 (Chelsea House Publications, 1st edn., 2010).

6 Karabi Konch, *Crime and Society* (Notion Press, 1st edn., 2017).

7 John Harrison Watts and Cliff Roberson, *Law and Society: An Introduction* 7 (CRC Press, 1st edn., 2013).

8 *Black's Law Dictionary* 409 (9th edn., 2009), "customary, traditional". Therefore, the conventional crimes would include such as murder, theft, rape etc.

9 *Id*. at 428, "a crime motivated by the victim's race, color, ethnicity, religion, or national origin".

10 *Id*.

of the sense of public morality, this evil needs serious deliberation in the light of constitutional morality. What needs to be seen is as to how far the idea of public morality can be sustained and when does it fall within the breach of constitutional morality?

In Sub-Continent countries of India & Pakistan, the lynching has become a routine phenomenon which has, *on one hand*, affected the human rights of people, *on the other hand*, also posed certain questions as to its acceptability by those parts of the society who are engaged in it as a matter of their constitutional right. How far can the claims of mobs be accepted to be legitimate when the target is based on features (*such as religion, caste, sex etc*.) which are constitutionally protected?

This paper, *therefore*, is deliberative attempt to discuss the conflict between public morality and constitutional morality as far as their relation is concerned with the increasing mob violence in India & Pakistan; for the purpose, the paper is divided into four sections—*firstly*, the paper discusses religious lynching in Indian context and how the constitutional morality oppose it; *secondly*, the paper goes on to discuss the epidemic in the context of Pakistan along with its constitutionality; *thirdly*, the authors engage in the discussion of public and constitutional morality and how should the two be reconsidered; *fourthly & lastly*, the author conclude the paper while considering that the authoritarian & majoritarian outlook has to be rejected in the context of constitutional morality.

II. Religious Lynching in India

India as a nation consists of different societies which cherish and preserve different *religions*, *languages*, *cultures*, and *traditions*[11]. Such immense diversity where, *on one hand*, strengthens the idea of *Vasudhaiva Kutumbakam (refers to world as one family)*[12], it, *on the other hand*, also involves community conflicts (*emerging out of individual interests*)[13]. Religious lynching in India is one of the examples of these conflicts;

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11 Jawaharlal Nehru, *The Discovery of India* 55 (Penguin India, new edn., 2008).

12 B.P. Singh, *Bahudha and Post 9/11 World India's Culture: The State, The Arts and Beyond*, 51 (Oxford University Press, 2009).

13 Girjesh Shukla, "Hate Crime: Politico-Legal Dimension of Hate Speech in India", *Journal of Parliamentary and Constitutional Studies*, 1 (2011).

however, it being not a new[14] phenomenon in India has recently taken the shape of an epidemic[15].

This instantaneous growth in religious mob lynching shows how the people belonging to Muslim community are being targeted in different states in the name of *cow vigilantism*[16], *love jihad*[17] and *religious conversion* (*among others*). What is happening, *resultantly*, is that the basic human rights of the people are getting trampled upon; it *therefore* not only challenges the very foundational rights of the people but also works as an affront on the Constitutional fabric of India.

Incidents of religious lynching

The National Crime Record Bureau (NCRB) which is responsible for the collection of crime data does not separately collect data of crimes committed out of religious mob lynching[18]. *However*, data from the Amnesty International's *Halt the Hate* initiative shows an unparalleled growth in the incidents of mob lynching based on religion[19]. After the change in political power in 2014, India has seen a significant growth by 41 % in Hate Crimes including mob-lynching[20]. In one of the most gruesome acts of mob lynching in India in 2015, a Muslim man named Mohammad Akhlaq was attacked in the name of killing & eating a cow; he was dragged out of his house by the villagers and lynched until his death[21]. The said incident took place on the suspicion of such an act on the part of Akhlaq.

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14 For example: Sikhs riots in 1984, Bombay riots in 1992, Gujarat in 2002, Muzaffarnagar in 2013; *See also*, Sandipan Bakshi and Aravindham Nagarajun, Mob Lynchings In India: A Look at Data and the Story Behind the Numbers, *available at:* https://www.newslaundry.com/2017/07/04/mob-lynchings-in-india-a-look-at-data-and-the-story-behind-the-numbers (last visited on February 12, 2020).

15 India: Massive rise in hate crimes, *available at:* https://gulfnews.com/world/asia/india/india-massiverise-in-hate-crimes-1.2064850 (last visited on February 12, 2020).

16 How cow vigilantism is undermining the rule of law in India, *available at:* https://www.aljazeera.com/indepth/opinion/cow-vigilantism-undermining-rule-law-india190102143126368.html (last visited on February 12, 2020).

17 India: Hate crimes against Muslims and rising Islamophobia must be condemned, *available at:* https://www.amnesty.nl/actueel/india-hate-crimes-against-muslims-and-rising-islamophobia-must-becondemned (last visited on February 12, 2020).

18 M. Mohsin Alam Bhat, "The Case for Collecting Hate Crimes Data in India", Vol IV Issue 9, *Law & Policy Brief* (2018).

19 *Available at:* http://haltthehate.amnesty.org.in/ (last visited on February 12, 2020).

20 India: Massive rise in hate crimes, *available at:* https://gulfnews.com/world/asia/india/india-massiverise-in-hate-crimes-1.2064850 (last visited on February 12, 2020).

21 Dadri Beef Rumour: Hindu Mob Lynches Muslim Man Suspected Of Killing And Eating A Cow, *available at:* https://www.huffingtonpost.in/2015/09/30/beef-killing-up_n_8219828.html (last visited on February 14, 2020).

In another incident, in June 2019, a young Muslim man named Tabrez Ansari of Jharkhand was caught by a mob; his hands were tied up and then was beaten up profusely while asking to chant *Jai Shree Ram* & *Jai Hanuman* (*Glory to Lord Rama and Lord Hanumana*)[22]. Consequently, the man succumbed to the injuries and died. In the same week, a Muslim teacher named Hafeez Mohammed Haldar was asked to chant *Jai Shree Ram* and thrown out of running train[23]. *Similarly*, a Muslim cab driver in Mumbai was beaten up and forced to chant the same slogan[24].

These incidents clearly establish that the violence has taken place in the name of religion which is not only constitutionally protected feature but also is very inherent to one's consciousness[25]. Most of the perpetrators in these incidents belong to various non-state groups including *gau rakshak dals*, *Bajrang Dal*, *Karni Sena*, *Vishwa Hindu Parishad* etc. that not only promotes the religious violence but also furthers the idea of religious intolerance & Hindu Nation[26] (*in contravention of secular idea*).

Legal framework in India

Indian Penal Code, 1860 (hereinafter as IPC) lays down different categories of crimes and punishment; *however*, it does not deal with the crimes which are specifically committed for the reason of one's religion and profession (*such as related to cattle*)[27]. This is one of the reasons as to why the NCRB is also not having any recorded data for the crimes based on religious lynching[28]. Such a situation has also, *in a way*, worked as a catalyst for promoting these crimes in absence of any legal provision or sanction.

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22 USCIRF Statement on Mob Lynching of Muslim Man in India, *available at:* https://www.uscirf.gov/news-room/press-releases-statements/uscirf-statement-mob-lynching-muslim-man-in-india (last visited on February 14, 2020).

23 Rana Ayyub, What a rising tide of violence against Muslims in India says about Modi's second term, *available at:* https://time.com/5617161/india-religious-hate-crimes-modi/ (last visited on February 14, 2020).

24 *Ibid*.

25 The Constitution of India, 1950, art. 25, "Freedom of conscience and free profession, practice and propagation of religion".

26 *Available at:* https://www.thecitizen.in/index.php/en/NewsDetail/index/2/173/RSS-CHIEFBHAGWAT-DECLARES-INDIA-A-HINDU-NATION (last visited on February 14, 2020).

27 The Indian Penal Code, 1860, ss. 146, 153A, 153B, 295A & 298.

28 *Supra* note 16.

Constitutional morality or endorsement?

The preamble to the Constitution of India, 1950 (hereinafter as COI) is reflective of what We, the People of India, intend to constitute India into—a *secular* state[29] which not only refers to state's neutrality to a specific religion but also is a basic feature of the COI[30]. *Therefore*, India being a secular nation endorses what is known as secular constitutional morality that is devoid of any special preference to a religion[31]. Following which, the fundamental rights under Articles 25-28 also strengthen the similar idea of equality of all religious in their profession, practice and propagation of religion[32].

What follows from it is that every individual is free to engage with religion of his choice and practice and profess it, *until it is not in conflict with similar rights of others*. The exceptions relating to public order, morality and health carved in Article 25 are not those which relieve one of violating others' similar right but put an obligation on the enjoyer to exercise the right within the limits of constitutional morality[33].

Therefore, forcing someone to chant Jai Shree Ram and Jai Hanumana is not only violation of one's consciousness but it results into gross disregard of Indian Constitutional morality. The definition of public morality under Article 25 and the idea of secularism as enshrined in the preamble clearly establish the freedom of enjoying one's religious freedom within the Constitutional limits. However, the present day statistics for religious lynching say otherwise. The majoritarian outlook seems to take over the constitutional morality in the real life which has certainly affected the social and constitutional fabric of India[34].

III. Religious Lynching In Pakistan

Incidents of religious lynching Asia Bibi is a Christian. She took a sip of water from a jug which got her Muslim co-workers furious. In Pakistan,

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29 The Constitution of India, 1950, preamble.
30 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.
31 *S.P. Mittal v. Union of India*, (1983) 1 SCR 729.
32 *Supra* note 23.
33 *T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481.
34 For example: See, RSS Leader Boasts of Hindus Killing 2,000 Muslims in Gujarat, Wants Kerala CM Beheaded, *available at:* https://thewire.in/communalism/rss-behead-kerala-cm-gujarat-killed-2000-ranawat (last visited on February 14, 2020).

many conservative Muslims don't like to eat or drink with people of other faiths. They believe that non-Muslims are impure. The incident was followed by heated arguments and after 5 days, she was dragged of her house out by police accusing of blasphemy. The mob brazenly began to beat her, right in front of the police. She was arrested and charged with blasphemy. Chapter XV of penal code talks about offences relating to Religion.[35] The relevant section is stated as below:

> *295-C. Use of derogatory remarks, etc., in respect of the Holy Prophet: Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.*

During the trial Asia maintained her innocence. Once someone has been accused of blasphemy, before their case has even gone to trial, they and their families come under attack. In 2010 she was sentenced to death. Advocates for her right also met resistance and, in some cases, hostility resulted in death (For example, Governor of Punjab Salman Taseer who was assassinated by his security guard, Malik Mumtaz Hussain Qadri – celebrated by conservative section of society as a martyr after his execution for assassination). It was only in 2019 that the Supreme Court of Pakistan overturned the verdict and allowed her to walk free.[36]Within hours, outraged by the landmark ruling, demonstrators took to the streets demanding one thing - that Asia Bibi be put to death.[37] There were even calls for killing of judges who acquitted her.[38]

In March 2011, Pakistan's Minister of Minority Affairs Shah Bhati (The only Christian in the cabinet) was shot dead while he was coming to the work. His vehicle was sprayed with bullets while he was travelling. Shah Bhati was championing the cause for reforming blasphemy laws and had received multiple death threats for it. Pamphlets by al-Qaeda and Tehrik-i-

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35 Pakistan Penal Code, XLV of 1860.

36 *Mst. Asia Bibi v The State*, Crl.A. No.39-L of 2015.

37 Shumaila Jaffrey (BBC), Asia Bibi: Pakistan's notorious blasphemy case, *available at:* https://www.bbc.co.uk/news/resources/idt-sh/Asia_Bibi (last visited on February 14, 2020).

38 *Id.*

Taliban Punjab, a branch of the Taliban in Pakistan's most populous province, were found at the scene. Tehrik-i-Taliban told BBC Urdu they carried out the attack.[39] *"This man was a known blasphemer of the Prophet [Muhammad],"* said the group's deputy spokesman, Ahsanullah Ahsan. *"We will continue to target all those who speak against the law which punishes those who insult the prophet. Their fate will be the same."*[40]

2013 saw coordinated attacks on Christian dominated localities. It led to wide scale destruction of property and life (In one such event in Joseph colony, about 178 houses, 18 shops and 2 churches had been damaged by fire, said Ahmad Raza, who was leading the rescue operation).[41] The mentioned event resulted in 400 families fleeing their home and neighbourhood.[42]

Mashal Khan was a Pashtun and Muslim student at the Abdul Wali Khan University, Pakistan. On 13 April 2017, he was dragged out of his university accommodation in north-west Pakistan in April 2017 by a crowd of hundreds of his fellow students. He was badly beaten before being shot and his body mutilated. Khan's death was filmed through mobile phones and was shared on social media. At least 25 policemen were present in the university premises when Khan was killed.[43] The event stirred the conscience of Pakistani sentiments and gathered attention of international media with increasing pressure on getting rid of blasphemy laws in Pakistan. During their investigation, police determined there was no evidence Mr. Khan had committed blasphemy. His killing was ruled to have been premeditated murder.

On 7 February, 2018 A Pakistani court has sentenced one man to death and handed life terms to five others for murdering a student who was falsely

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39 BBC News, Pakistan Minorities Minister Shah Bhati shot dead, 2 March 2011, *available at:* https://www.bbc.com/news/world-south-asia-12617562 (last visited on February 14, 2020).

40 *Id.*

41 Declan Welsh & Waqar Gilani, Attack on Christians Follows claims of Blasphemy in Pakistan, *available at*: https://www.nytimes.com/2013/03/10/world/asia/explosion-rips-through-mosque-in-peshawar-pakistan.html (last visited on February 15, 2020).

42 Amalendu Mishra, "Life in Brackets: Minority Christians and Hegemonic Violence in Pakistan", 22 *Int'l Journal on Minority Rights and Group Rights*, 157-181 (2015).

43 Zaidi Mubashir, Pakistani student killed over alleged blasphemy, available at: https://www.thehindu.com/news/international/pakistani-student-killed-over-alleged-blasphemy/article17992006.ece (last visited on February 15, 2020).

accused of blasphemy. Twenty-five others were convicted of lesser offences in the case and 26 people were acquitted. The trial took place inside Haripur Central Jail for safety reasons. Security was tight for the verdict, with hundreds of police deployed and roads closed around the prison.

Empirical data pertaining to sectarian violence is stated below to illustrate the reality.[44]

Year	Incidents	Killed	Injured
1989	67	18	102
1990	274	32	328
1991	180	47	263
1992	135	58	261
1993	90	39	247
1994	162	73	326
1995	88	59	189
1996	80	86	168
1997	103	193	219
1998	188	157	231
1999	103	86	189
2000	109	149	NA
2001	154	261	495
2002	63	121	257
2003	22	102	103
2004	19	187	619
2005	62	160	354
2006	38	201	349
2007	341	441	630
2008	97	306	505
2009	106	190	398
2010	57	509	1170
2011	30	203	297
2012	173	507	577

[44] South Asia Terrorism Portol, Sectarian Violence in Pakistan, *available at*: www.satp.org/satporgtp/countries/pakistan/database/sect-killing.htm (last visited on February 15, 2020).

2013	131	558	987
2014	91	208	312
2015	53	276	327
2016	35	137	182+
2017	16	231	691
2018	5	7	4
Total*	**3072**	**5602**	**10780+**

Legal Framework in Pakistan

Legal history of blasphemy can be traced to 1860 when British Government promulgated laws known as Sections 295, 296, 297 and 298 (Chapter XV) which imposed a two year prison sentence, plus a fine on the offence. They were retained when the Islamic Republic came into being and were retained for a span of thirty years. In 1982, General Zia Ul Haq (credited with Islamisation of Legal Framework in Pakistan) added Section 295 (A). followed by series of additions of 298-A, B and C.[45] Relevant provision is stated as below:

298-B. Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places:

(1) Any person of the Quadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name who by words, either spoken or written, or by visible representation- (a) refers to or addresses, any person, other than a Caliph or companion of the Holy Prophet Muhammad (peace be upon him), as "Ameer-ul-Mumineen", "KhalifatulMumineen", Khalifa-tul-Muslimeen", "Sahaabi" or "Razi Allah Anho"; (b) refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammad (peace bi upon him), as "Ummul-Mumineen"; (c) refers to, or addresses, any person, other than a member of the family "Ahle-bait" of the Holy Prophet Muhammad (peace be upon him), as "Ahle-baft"; or (d) refers to, or names, or calls, his place of worship a "Masjid"; shall be punished with

[45] *Supra* note 33.

imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

(2) Any person of the Qaudiani group or Lahori group (who call themselves "Ahmadis" or by any other name) who by words, either spoken or written, or by visible representation refers to the mode or form of call to prayers followed by his faith as "Azan", or recites Azan as used by the Muslims, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Sec. 298-B ins. by Anti-lslamic Activities of Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, XX of 1984.

298-C. Person of Quadiani group, etc., calling himself a Muslim or preaching or propagating his faith :

Any person of the Quadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name), who directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

Sec. 298-C. ins. by the Anti-Islamic Activities of Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, XX of 1984.

The provisions declared Ahmaddiyas (formerly regarded as a sect of Islam) a non-muslim minority.

Another legislative endeavour for Zia came in form of addition of 295-C. The definition was dipped in ink of sectarian ideologue and it was apparent that the law could be misused. In 1990, under aegis of

Nawaz Sharif Federal Shariat Court went step further and eliminated life imprisonment and making the death sentence mandatory.

Constitutional Morality or Endorsement?

At this junction, it becomes imperative to understand contours of **constitutional morality** of country. The Apex Court of Pakistan in string of recent cases (Example, judgment on the amendments made in the Election Act, 2017, the Panama leaks judgment and Imran Khan/Jehangir Tareen cases) deliberated upon issue of constitutional scheme. Chief Justice Mian Sadiq Nisar in his judgment explained how the morality of constitution could be traced to the Islamic principles. The Preamble expressly states that – *Pakistan would be a democratic state based on Islamic principles of social justice.*[46]Article 2 declares that Islam is a state religion.[47] As pointed out earlier, addition of 298 A-C in Pakistan Penal Code declared Ahmadis as non muslim minority. However, Constitution has officially declared them as non muslims in definitional clause.[48]

Pakistan's first constitution in 1956 was penned by catholic Justice A Cornelius. Right to religious freedom was central to the struggle of Pakistan since freedom from Hindu domination was one of foundational premise for two nation theory. Mohammad Ali Jinnah, popularly known as Quaid–e–azam, reiterated this vision in his presidential address to the first Constituent assembly on 11august 1947[49]:

> *"You are free; you are free to go to your temples, you are free to go to your mosques or to any other place of worship in this state of Pakistan. You may belong to any religion or caste or creed — that has nothing to do with the business of the State."*

Ironically, over the period of next 7 decades, Christian and other minorities have faced severe persecution owing to country's sectarian

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46 The Constitution of Islamic Republic of Pakistan, 1973, preamble.
47 *Id*., art. 2.
48 *Id*., art. 260(3b).
49 Mohammad Ali Jinnah, Quaid–i–Azam Mohammad Ali Jinnah Speeches as Governor General of Pakistan 1947–1948 (Feroz Sons Ltd, 1962) (*emphasis added*).

policies. The slogan *'kafir kafir jo na mane who bhi kafir'* (infidels, infidels those who are not believers are infidels too) and consequently, these infidels are *'wajibulqatl'* (deserving of legitimate killing) have become a sad reality. Hegemonic violence further takes its strength from legal framework in form of blasphemy laws and constitutional endorsement of it. The landmark ruling in Asia Bibi case also did not offer much of a respite. Though the Supreme Court has issued a landmark verdict in the Asia Bibi case, there was nothing to cheer. The court has spoken nothing about the merits of the blasphemy law. It just set aside the high court's decision due to lack of evidence produced by the prosecution against the alleged blasphemy. The Section 295-C stays intact in the Penal Code and so is its potential to misuse.

IV. Public Morality Needs to be in Symbiotic Understanding with Constitutional Morality

It is to clearly understand that the societies in which we live are going through constant change—be it in terms of values, ethics or morals[50]. *Therefore*, what was earlier considered as wrong may now be considered right[51]. Public morality also is not an exception to this universal rule. It also needs to be transformed as soon as the law and the constitution changes or transforms; it is therefore the morality of law which influences the public morality & vice-versa[52]. Therefore, the law must assume as one of its primary functions to maintain this public morality[53].

It is also to be understood that every society has a different sense and standard of morality; sometimes even if the idea of a particular morality is accepted by a dominant group of that society, it may not extend its protection to all the people of society equally[54]. In such a scenario, a valid question can be asked as to what and whose morality is accepted by law? Does the law has to uphold to the accepted

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50 Lira Goswami, "Law and Morality: Reflections on the Bearer Bonds Case", 27(3) *Journal of Indian Law Institute* 496-510, 505 (1985).

51 In case of Section 377, Indian Penal Code, 1860 (Unnatural Offences).

52 A. Raghunadha Reddy, "Role of Morality in Law-Making: A Critical Study", 49(2) *Journal of Indian Law Institute*, 194-211, 199 (2007).

53 *Ibid*.; See also, Lord Devlin, *The Enforcement of Morals* (Oxford University Press, 1965).

54 Hart, *Concept of Law* 196 (Oxford University Press, 1961).

morality of the dominant group that applies it on an unequal basis and excludes some classes of people of benefits?, *or*, does the law has to uphold the morality of those (*enlightened and rational minded people*) who advocate equal treatment and respect for all?[55]

At this juncture, the Constitutions play an important role; they not only provide for equal rights for all but also rejects the idea of majoritarianism based on dominant public morality. Such eternal principles which form the idea of constitutional morality can never be changed. However, if the state engages with those dominant groups and moulds the constitutional morality thereby excluding those at lower strata, the individuals who are morally progressing must resist the same to uphold the natural morality of the Constitution[56].

The present scenario relating to mob justice in India makes it imperative to understand India's approach towards the public and constitutional morality. As earlier discussed, the Indian Constitution clearly asserts the religious constitutional morality under Article 25 that in a way defines the conduct of public morality[57]. Now, the question is, "why is presently the Muslim community being targeted in the name of religion?" Dr. B. R. Ambedkar can be rightly quoted for answering the very question, who said: *"Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people are yet to learn it."*[58]

Certainly, it is the state which is obligated for making constitutional morality realized amongst the masses. It can therefore be questioned as to whether the state has failed in its duty? The current situation when there is no law (*to prevent lynching*) at place to control the public morality of people answers it affirmatively. It is for this reason that the applicability of a constitution (*in absence of constitutional morality*) turns to be one which is arbitrary, erratic and capricious[59]. In India, the double standard exercise of constitutional

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55 *Id*. at 201.

56 Vishwanath Prasad Varma, "State and Morality", 18(3), *Indian Journal of Political Science*, 200-209, 207 (1957).

57 *Supra* note 23.

58 VII, *Constituent Assembly Debates*, 1989..

59 Andre Beteille, "Constitutional Morality", 43(40) *Economic and Political Weekly*, 35-42, 36 (2008).

morality by political parties can also not be negated which is also one of the reasons for creating confusion in the ultimate result of public morality[60].

While understanding the principle of morality in the context of Pakistan, what can be appreciated is the state's acceptance of a particular religion that is Islam[61]; the formal acceptance of Islam as a state religion therefore has a direct impact on the very formation of constitutional morality which ultimately endorses the public morality[62]. What should now be problematized is that what happens when a state itself recognizes one religion as a state religion? Applying the earlier principle, it can be arrived at that the public morality is destined to follow the constitutional morality and the state is under an obligation to fulfill it.

Therefore, to fulfill the obligations of constitutional morality, the state in Pakistan has enacted various laws under Pakistan Penal Code, 1860[63] which specifically endorses the Islamic principles and do not include any other religion (*in case of blasphemy laws*). The incidents of mob violence on the basis of religion in Pakistan are one of the outcomes of religious constitutional morality which the people are unmindfully adhering to. Citizens are expected to adhere to the constitutional morality to which the state subscribes[64]. Pakistani people seem to strictly following this idea of one religion preference on others. The Blasphemy laws are also based on the constitutional morality of Pakistan which protects only one religion and not all.

What is therefore missing in the constitutional morality of Pakistan is the element of civility. Civility being one of the important components of constitutional morality requires tolerance, restraint and mutual accommodation of diversity[65]. Its concentration on one religion is one of the greatest reasons for the present situation of violence

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60 *Id*. at 41. For example: Their approach to the constitutional morality differs as soon as they assume and leave the political power.
61 *Supra* note 45.
62 *Supra* note 50.
63 *Supra* note 33.
64 *Supra* note 57 at 42.
65 Edward Shils, *The Virtue of Civility* (Liberty Fund, 1997).

against religious minorities to which the constitutional morality looks completely supportive.

It can, *therefore*, be compiled that the constitutional morality in India presents a wider outlook by making the state a secular one; however, what it lacks is the proper realization of the secular idea by the masses. Whereas in Pakistan, the scenario is just opposite; herein, the state itself is endorsing one religion, thereby moulding the public morality into narrower sense of constitutional morality.

What is required, *therefore*, is that in order to prevent such epidemic as religious mob violence, the state cannot afford to have a biased outlook, either on the basis of religion or public morality; it has to go along with the best practice (*of constitutional morality*) that is to further equality & justice and that is what the public morality should adopt to. Neither the dominant authoritarian public morality nor the biased or dominant religious constitutional morality can be sustained.

V. Conclusion

Be it in the context of public morality or constitutional morality, the role of state as a regulator cannot be neglected. This role has *therefore* to be sincerely performed while keeping constitutional ethos in mind. What the scenario at hand, *however*, describes is the dominance of public morality over the constitutional morality. Both, *in the context of India & Pakistan*, the state seem to succumb to public morality. India even being a secular state is failing in its obligation to protect the constitutional morality and certainly the public morality has taken over the constitutional sense of secularism. *Therefore*, the dominant Hindu forces have asserted to be rightful in their acts of mob-violence against the religious minorities and the state has been consistently failing in its duty to protect (*in terms of lack of legislation etc*.). What can therefore be said is that India in 21st century though have its own distinct sense of Secularism is walking on a dangerous path wherein public morality attributable to majoritarian regime might suppress morality envisioned by constitutional makers.

Similarly, *in Pakistan*, the problem becomes two-fold from the point of view of a professedly Islamic state like Pakistan; *firstly*, it must recognise the long-term futility, as opposed to short-term utility, of using Islam as an essential, even central, tenet of its statecraft, and *secondly*, it must approach the question of blasphemy not from the religious but from a secular point of view, *that is*, not as an insult to God, but as an insult to the people who believe in a God, *that is*, from the point of view of regulating hate speech.

It has therefore also to be considered that when Pakistan started its constitutional design, it was dipped in morals of U.S. concept of Secularism *i.e.* of strict wall of separation between the Church and State. However, *over course of time*, Islamization of legal framework resulted in evolution of constitutional morality getting its attribute from Islamic legal tradition which accelerated the persecution and mob lynching using the concept of Islamic morality.

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Analysis of the Concept of Constitutional Morality within the Dynamics of Deliberative Democracy

Varsha Deshpande[1]

Introduction

The concept of Constitutional morality is gaining ground in contemporary times in India and the court has used this concept in some of its recent noteworthy judgments[2]. Though the Constituent Assembly Debates do contain scattered references to constitutional morality in the speeches of Dr Ambedkar[3], this term lay into dormancy thereafter and was never used as a standard by the courts, until only recently. In contemporary times however one notices a sudden upsurge in the Court's repeated invocation of this principle for adjudication of some of the contentious issues that were tabled before it. The fact that the rather fluid concept of constitutional morality is now forming the basis for guiding the decisions of Indian courts, it has thereby opened up space for constitutional researchers to explore what the contents and contours of this concept are. It is an inviting project to analyse the historical references to constitutional morality, to attempt a delineation of some minimum content thereof and in that backdrop, to evaluate its recent invocation by the Indian judiciary. This is the precise study that the present paper attempts to undertake.

Meaning of Constitutional Morality

A. Historical references to Constitutional Morality:

As a starting point, the discourse on constitutional morality in the Indian context commences with the famous speech of Dr Ambedkar[4] where he is seen using this concept in the context of pressing on the need to include the details of administration within the Constitutional text. However when Ambedkar uses constitutional morality here, he makes further back references

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2 See for example *Naz Foundation vs Govt of NCT* 2009,SCC OnLine Del 1762*; Navtej Singh Johar vs UoI, (*2018) 10 SCC 1; *Indian Young Lawyers Association and Others vs State of Kerala and others,* (2019) 11 SCC 1 etc.

3 VII, Constituent Assembly Debates, Official Reports, 4th Nov 1948, 38

4 Ibid

to George Grote's rendition of this principle in his *History of Greece*[5]. Both of them present us with a formulation of constitutional morality which is meta-legal. However, the purposes for which both of them invoked constitutional morality were distinct. While Grote's concerns centered on a zealous *preservation* of Athenian democracy, Dr Ambedkar's concerns reeled around the prior act of *establishing* democracy in the first place, in a society which he believed, is inherently undemocratic[6]. When the Founding Fathers framed a Constitution for India, their concern was not merely confined to the one-time act of framing the constitution; the underpinning concern rather was the creation of a grammar of constitutionalism in India. Ambedkar's invocation of constitutional morality has to be understood in this light. Pratap Bhanu Mehta, in his incisive analysis of Ambedkar's idea of constitutional morality, points to some of its very essential elements in his formulation. These are "self-restraint, respect for plurality, deference to processes, scepticism about authoritative claims to popular sovereignty, and the concern for an open culture of criticism that remains at the core of constitutional forms"[7]. And constitutional morality meant "a paramount reverence to these constitutional forms"[8]. It referred to "a set of adverbial conditions to which agents in a constitutional setting must subscribe"[9]. These logically coherent elements which Mehta scans for us, help in somewhat outlining the otherwise fuzzy concept of constitutional morality.

If one studies the project of framing of India's constitution, one notices that the Constituent Assembly perhaps was the highest epitome of reverence to constitutional morality. The proceedings before the Assembly resound a thundering manifestation of what Ambedkar meant by constitutional morality. Amidst fierce disagreements between members of the Assembly, one notices the profound respect that each one had for the other and for each other's views. The floor of the Assembly was the site on which respect for

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5 G. Grote, *A History of Greece: From the Time of Solon to 403 B.C.* 93,Condensed and Edited by J.M. Mitchell and M.O.B. Caspari, Routledge, London and New York, 2001.

6 Ambedkar, 'Speech Delivered on 25 November 1949' in *The Constitution and Constituent Assembly Debates*, p. 174.

7 Pratap Bhanu Mehta, 'What is Constitutional Morality', *Seminar* 615, November 2010, available at www.india-seminar.com › 615_pratap_bhanu_mehta (last visited on 6th Feb 2020)

8 Supra note 2

9 Sujit Chaudhary, Madhav Khosla (*et al. eds*), *Oxford Handbook of Indian Constitution*, Locating Indian Constitutionalism, Oxford University Press 2016, 45

plurality of opinions and an open culture of criticism flourished at its best. It created spaces for questioning as well as for dissent. Thus the Constituent Assembly embodied the tenets of constitutional morality outlined above and was a living example of what a deliberative democracy stands for.

B. Use of Constitutional Morality by the Courts

After the Constitution of India came into force, one does not see much explicit reference, and definitely not any reliance, on the principle of constitutional morality by the Indian judiciary, for adjudication of issues brought before it. This trend of seeking some guidance from constitutional morality becomes visible only recently; more particularly from the Naz Foundation case onwards. Some of the recent judgments of the Indian courts, seem to pull out the concept of constitutional morality from the cupboard, wherein it probably lay for all the years after Dr Ambedkar made reference to it. But one distinction between its invocation by the Founding Fathers during the framing of the Constitution as against its recent invocation by the Indian judiciary is noteworthy; namely the distinction in the frame of reference. The Constituent Assembly was framing a Constitution for a democratic state that was to come into being with the commencement of this Constitution. Hence their concerns were all macro-level concerns. Though an individual figured as an important entity in the minds of the framers generally, yet they were not looking at any specific concerns of individual like the court was, in the recent cases. The courts in India were required to address some specific concerns/issues about certain individuals/groups that were presented to it, and it is in those specific contexts, that the court is seen relying on the notion of constitutional morality. This frame of reference was completely different in case of the Constituent Assembly.

In contemporary times, the *Naz Foundation*[10] case gave currency to the idea that constitutional morality could form a valid basis for the court to arrive at a decision. In deciding a challenge to the constitutional validity of Section 377 of the Indian Penal Code, insofar as it applies to consenting homosexual adults in private, the court draws a clear distinction between popular morality on one hand and constitutional morality on the other. It

[10] *Naz Foundation vs Govt of NCT* 2009,SCC OnLine Del 1762

clearly says that between popular morality and constitutional morality, the court would not only be guided by the latter but that the court is also duty bound to act as a custodian to uphold it. Hence even in the face of society's disapproval of homosexual individuals as another form of human diversity or as co-equal members of the human society, the court saw in itself a duty to uphold constitutional morality, that includes respect for plurality and diversity. In *Naz*, the court did not indulge into the exercise of identifying the substantive content of constitutional morality, but it certainly gets the credit of inaugurating a new trend in constitutional adjudication; the trend of relying upon the concept of constitutional morality for the determination of some valuable claims of individuals that were striving for recognition before the courts. It used constitutional morality as a determinable standard for deciding whether there was a compelling state interest or not.

In *Manoj Narula*[11] the court was called upon to decide on the correctness of the appointment of certain ministers in the Union Cabinet who were being tried for certain grave charges that involved moral turpitude. The Supreme Court, in holding these appointments as bad, took recourse to the principle of constitutional morality. The court opined that constitutional morality works at the fulcrum and guides as a laser beam in institution building. It emphasized that constitutional morality requires bowing down to the norms of the constitution and that it is necessary for people at large as well as persons incharge of institutions to respect these norms[12]. On a closer scrutiny it appears that the idea of constitutional morality as expressed by the court in this case, lines up with Mehta's analysis of this concept. Constitutional morality again figured into discussion in *State (NCT of Delhi) vs UoI*[13], where the Supreme Court reminds yet again that this principle demands a strict adherence to all constitutional principles contained in different segments of the constitution and that it is very essential for every member of the polity, whether ordinary citizens or high constitutional functionaries to idolize constitutional fundamentals[14].

11 Manoj Narula vs Union of India (2014) 9 SCC 1
12 Ibid 49, para 75
13 (2018) 8 SCC 501
14 Ibid, 573, para58

Later in 2018 in *Navtej Sing Johar and Others vs Union of India and Others*[15] when the Supreme Court of India got another opportunity to reconsider the issue of homosexuality under Section 377 of the Indian Penal Code, one notices a robust reliance on the principle of constitutional morality. Justice Deepak Misra's exposition of constitutional morality depicts atleast four startling features. First, he chose to see constitutional morality as a means for realizing constitutionalism[16]. He believes that the Preambular goals of Justice, Equality, Liberty and Fraternity can only be achieved through the loyalty of the organs of the state to the principles of Constitutional morality. Second, his repeated emphasis lay specifically on constitutional morality being observed and practiced by *officials of the state*, as opposed to citizens. He said that while the constitution guaranteed some inalienable rights to the citizens to facilitate their development, it also sought to ensure that the *three organs of the state* 'practise' and 'stay alive to the concept of constitutional morality'[17]. While agreeing with Dr Ambedkar that constitutional morality was not a natural sentiment in us by virtue of our domination by a foreign power back then, he however locates a duty in the organs of the state, including the judiciary, to strengthen the fabric of constitutional morality in contemporary India. Third, he is seen using constitutional morality to emphasize how pluralism and diversity have formed the basis of our constitutional culture. Hence constitutional morality obligates the state to assume the responsibility for the creation of an eco-system in which asymmetrical attitudes are allowed to sustain. On this view, constitutional morality becomes diametrically opposed to any attempts to shove homogeneity in society. Fourth, he joins company with Naz in drawing a clear distinction between popular/social morality and constitutional morality and also in according a clear primacy to the latter in deciding causes before the court. According to him, the concept of constitutional morality would serve as an aid for the court to arrive at a just decision. This further concretized the idea that was floated by Naz that constitutional morality furnishes the court with yet another parameter for deciding validity of legislation. The culmination of this is seen in the following observation of J.

[15] (2018) 10 SCC 1
[16] Id 105
[17] Id 106

Deepak Misra: "While testing the constitutional validity of impugned provision of law, if a constitutional court is of the view that the impugned provision falls foul to the precept of constitutional morality, then the said provision has to be declared as unconstitutional for the pure and simple reason that the constitutional courts exist to uphold the Constitution"[18].

As a contrast to this version, Chandrachud J. in his judgment speaks about the need for *citizens* (as against only officials of the state) to imbibe constitutional morality consistently and continuously[19]. He seems to gather the contents of constitutional morality from the ideals set out in the Preamble and the paramountacy that must be accorded to these values. Constitutional morality, according to him, is the means for achieving the transformation which the Indian Constitution envisages. But because the process of imbibing constitutional morality in society is gradual, he says that it is the duty of the constitutional courts to act as 'external facilitators' and to be 'a vigilant safeguard against excesses of state power and democratic concentration of power'[20]. Hence monitoring the preservation of constitutional morality, under this analysis, is seen as sacrosanct duty of the court. The learned judge emphasises on the counter-majoritarian role of the judicial institution in the protection and preservation of constitutionally entrenched rights regardless of what the majority may believe.[21] He validly places reliance on Dr Ambedkar's ideas of social reform wherein he highlights the importance of giving space to individuals for asserting against group ideologies: "The assertion by the individual of his own opinions and beliefs, his own independence and interest – over and against group standards, group authority and group interests – is the beginning of all reform. But whether the reform will continue depends upon what scope the group affords for such individual assertion"[22] This observation seems particularly relevant for guiding the court to decide the issue at hand in *Navtej Johar*. Similarly, in *Sabarimala*[23] case, there was again a reliance on constitutional morality. Chief Justice Deepak Misra as well as Chandrachud J. equated the word

18 Id 108
19 Id 284,285
20 Id 286, Para 601
21 Id 288, Para 608
22 As cited in Governemnt of NCT of Delhi vs UoI 2018(8)SCALE 72, at para 12.1
23 *Indian Young Lawyers Association and Others vs State of Kerala and others*, (2019) 11 SCC 1

'morality' in the text of Art 25 of the Indian Constitution with constitutional morality. Such a formulation of constitutional morality clearly places legitimacy in the courts to speak a language different from the shared morality of the society; to allow constitutional principles and values to triumph over popular perceptions of good and bad. This judgment gives a clear message that society cannot dictate the expression of sexuality. Thus the courts hereby assume a vast transformative potential to even bring in social reforms, which conventionally speaking, has been the domain of the representative legislatures.

Operationalizing Constitutional Morality through Transformative Constitutionalism

Any discourse on transformative constitutionalism is premised on the thesis that Constitutions are meant to be enduring documents. The aspirations of the founding fathers of Indian Constitution, derivable directly from their engagement in the freedom struggle, got pinned on the pages of the Constitutional text. However they were not meant to remain there for resolving the issues or concerns of the people of those times only; they helped sketch the broader vision behind this monumental document. The Founding fathers saw this Constitution as a bridge to connect our moments of history with its envisioned future. Built upon injustices of the past, there was a very specific dream of a future that was captured within the covers of the Constitutional text. Clearly therefore, constitution writing was never meant to be a short-term project confined to the needs of that particular time only. It was rather always meant to be an enduring code that could evolve, adapt and accommodate all that was envisioned at the moment of its framing, as also all that was not. It was always supposed to be a constitution that could help address the diverse concerns of people for all times to come. If this thesis be accepted then the task of constitutional interpretation assumes vibrancy. It remains a powerful tool at our disposal to prevent the rusting and eventual decay of the constitution occasioned by stagnancy. Constitutional interpretation must be infused with dynamism to make constitution a living document and one of unfading vitality. It is here that transformative constitutionalism becomes relevant. Constitutional history and Assembly Debates help judges glean some semblance of insights about both, the

contextual specificities that led to the incorporation of a particular provision in the text as also the general tone of the constitution. In Constitutional adjudication, judges have to keep both of these in mind. While the historical specificity cannot be ignored, the general tone of the Constitution cannot be lost sight of either. Judges must be able to accommodate contemporary issues within this frame through dynamic interpretation. Only then can courts become the bridge to connect our history to our future. A brilliant example of this is furnished by J Chandrachud's invocation of Art 17 in *Sabarimala*[24] in the context of ban on women's entry into temples. While the historical specificity of its application to Dalits was not lost sight of, the learned judge chose to extend its application to exclusion of menstruating women also, since both exclusions were founded on notions of pollution and purity. Such an interpretation helped uphold the inclusive tone of our Constitution.

Legislations are an embodiment of the majoritarian voice. Hence they are often structured upon the silencing of individual narratives. They often ignore the substantive disadvantages faced by individuals. This disadvantaged class then finds a refuge in the judicial institution to address these disadvantages by adopting an interpretation that is no doubt, guided by the past, but alive to needs of the present and future. The judiciary has the facility, if need be, to go even against popular sentiment, which legislatures will rarely do. Hence transformative constitutionalism equips the courts with an avenue for addressing these specific disadvantages faced by individuals or groups. The judges would have to be always in search of newer principles and doctrines to ensure that Constitutions keep pace with changing times. One such principle that the judiciary has re-invented in the recent times is the principle of constitutional morality. This principle has been operationalised through transformative constitutionalism.

In *Naz Foundation* and *Navtej Singh Johar*, constitutional morality triumphed over public morality and served as a foundation for the de-criminalization of homosexual associations. In Sabarimala it operated as an immortal principle for throwing open the doors of the said temple to women in the age of 10 to 50 years who were hitherto excluded. In Shayara Bano, it

[24] Ibid

came in aid for declaring the customary practice of triple talaq unconstitutional and in Joseph Shine it helped do away with an abhorrent provision like adultery in our criminal law. None of these results could have been easily achievable through legislative initiative alone. But the judiciary, through transformative constitutionalism, could invoke constitutional morality and not just hear individual narratives but also undo the injustices that certain individuals or classes had suffered for long. As a contrast to this if we look at the American case of *Bowers vs Hardwick*[25], the American Supreme Court was found distancing itself from the lived experiences of homosexuals in that society. This lapse in this judgment was corrected by the court subsequently in *Lawrence vs Texas*[26].

If one views the history of constitutional adjudication in India, it becomes clear that Maneka Gandhi onwards is marked as an era of creative interpretation of the constitution. The post-Maneka period heralded an age of 'unenumerated rights'. This was a new strategy adopted by the courts to address the diverse issues that were brought before it. However, the strategy of unenumerated rights differs significantly from the strategy of using constitutional morality. While the former's focus lay on the creation of a new right, the latter was used for the removal of specific substantive disadvantages. The judicial coinage of a right may or may not be of immediate help for addressing a particular concern. So for example when a court of law says that right to food is a fundamental right[27], saying so did not per se ensure that every individual gets food. At best, it only served as a significant milestone to lead to the enactment of the National Food Security Act, several years after the right to food was coined. However when the court used constitutional morality as a ground for de-criminalizing homosexuality or adultery, or for lifting the years old ban on entry of women into temple, the specific disadvantages on individuals or groups were immediately removed. This is an important distinction between the two different strategies of the court. By building into the Constitution, certain meta-ethical dimensions, the SC has found a new insight to interpret and apply provisions of the

[25] 1986 SCC OnLine US SC 165
[26] 2003 SCC OnLine US SC 73
[27] PUCL vs Union Of India AIR 2004 SC 456

Constitution that go much beyond the theory of integrated reading of the Constitution as sanctioned by the *Maneka Gandhi*[28] case. By adopting meta-ethical concepts, the courts have built upon the notion of constitutional morality and developed a tool for fighting majoritarian political battles.

The Use of Constitutional Morality and Deliberative Democracy

Several objections surround the use of constitutional morality by the courts. First is the fluid nature of the concept. Many argue that it is necessary to devise some logically coherent methodology to define the exact content thereof[29]. Else, we run the risk of individual discretion of judges reflecting as constitutional morality. A second possible objection can be that constitutional morality is applied and realized through courts. But judicial process is not designed to carry out fundamental social and political reforms but to develop the law in an incremental manner. Furthermore, the judicial institutions and processes are de-limited by the kinds of parties which can be represented before a court thereby striking at the very root of deliberative democracy and processes which alone can legitimize the exercise of political power in this context.

However it is important to realize that channels of deliberative democracy are often blocked by cultural temperaments and biases. Such biases would never allow certain issues to be ever deliberated upon, as they run the risk of political parties becoming unpopular. No platform is thus available for discussion on such issues. The social and cultural biases against homosexuality for example, could never foster the recognition of the dignity and equality claims of homosexuals through the deliberative process. The criminalization of homosexuality since the enactment of the Penal Code till as late as the year 2018 bears testimony to this fact. The least that judicial intervention in this arena has served was to atleast bring the issue on the landscape of public discussion in the first place and then eventually to bring the matter high up on state agenda. Hence constitutional morality contributed to de-constructing the taboo surrounding homosexuality. By de-criminalizing homosexual associations, the judiciary has set the ball in motion, which

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[28] *Maneka Gandhi vs UoI* AIR 1978 597

[29] Surabhi Shukla, *Constitutional Morality in the Indian Constitution*, available at law.ox.ac.uk, (last visited on 2nd February 2020)

hopefully will culminate in legalization thereof through laws that will recognize their rights. It will, sooner or later, foster some thinking and deliberation in Parliament on this issue. But such legislative initiative without prior judicial intervention would have been impossible owing to cultural biases. In this sense then, constitutional morality cannot be seen as antithetical to deliberative democracy; it rather facilitates deliberative democracy.

Conclusion

The aforesaid discussion makes it clear that the concept of constitutional morality refers to certain overarching values that seek to define the basic nature and spirit of the constitution. Hence what is demanded of both, citizens as well as Constitutional functionaries is a reverence to these overarching values. While it is absolutely non-negotiable to respect the specific expectations revealed from the text of the Constitutional provisions, it is equally important that in operationalizing the constitutional text, the underlying spirit and values of the constitution are never allowed to be lost sight of. In that sense, constitutional morality operates as a guiding principle or norm to help judges fashion their interpretation in the light of these indispensable values. Thus in *Navtej Johar* for example, the Court did arrive at a finding of violation of specific fundamental rights under Articles 14, 15 and 21 for example. But the court's repeated reiteration of the fact that our Constitution celebrates diversity and that it is one that respects plurality and heterogeneity served well to recognize that homosexuals are just another form of human diversity, worthy of an equal membership of the human community. This was the underlying value of our constitution that triumphed ultimately. Thus constitutional morality has furnished the judicial institution with a tool to safeguard those values which the Constitution holds dear.

However, these initiatives which the judiciary has indulged into, will have to be further endorsed through the deliberative process in Parliament, to make them complete. So for example, the judicial initiative in de-criminalization of homosexuality will be of real meaning when this process culminates into a legislative law that legalizes the same, by recognizing concrete rights of homosexuals like those pertaining to marriage, adoption

etc. Right now only the stigma attached to homosexuality has been removed. But they cannot get effective and equal membership in society without recognition of their rights. Hence the whole process can be complete only when the initiative of the judiciary is met with equal co-operation by the legislative branch. The legislatures will not just have to engage in the deliberative process for enactment of a law but will have to ensure that the law is coherent with the line of development brought about by the judiciary. The *Shayara Bano*[30] case struck down the abhorrent practice of triple talaq. This judgment was a great milestone in ensuring to Muslim women their freedom from the arbitrary will of their husbands. Towards that end, it was a move to bringing about their empowerment. But when the legislature enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019 and made the practice of triple talaq a criminal offence[31] that was a retrograde step. The strategy of extending criminal law to this domain will reap the result of leaving the woman as vulnerable as before. Because once the husband is arrested and kept in custody, there's no way he can maintain his wife. Hence it is extremely important that the legislature maintains consistency and coherence with the judicial initiative in making these transformations fruitful and effective. It would thus be far better if we could substitute the theory of *separation of powers* with the theory of *association of powers*. The three organs of the government need not operate in water-tight compartments; it seems a better idea to suggest that they work with increasing co-operation and co-ordination with each other.

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[30] *Shayara Bano vs Union of India and Others* (2017) 9 SCC 1
[31] Muslim Women (Protection of Rights on Marriage) Act, 2019, (Act No 20 of 2019), s.4

New Directions in Comparative Public Law

Professor Paul Craig[1]

1. Legal Concepts, Legal Conceptions and CPL

- I claim no novelty concerning the point in this regard. It was elaborated by, inter alia, Ronald Dworkin, who reminded us that different legal systems could accept the same legal concept, such as freedom of speech or equality, but imbue it with very different detailed meanings
- The point that flows from this is simple and foundational: it is necessary to be clear as to the level of abstraction at which the comparative exercise is conducted. If it is too abstract, then it is of little use.
- Pretty much everything looks the same from 35,000 feet. The conceptual terrain appears very similar from this height, which connotes for present purposes the fact that all systems can claim some attachment to precepts of the rule of law broadly defined.
- If, by way of contrast, the level at which the comparative exercise is conducted is too proximate or detailed, 1,000 feet, then everything looks different, and that is because there are institutional, doctrinal, cultural and constitutional specificities that are peculiar to each system
- The 'trick' is therefore to discern the appropriate level of abstraction at which to conduct the comparative exercise. To say that it should be somewhere between 35,000 feet and 1,000 feet is, it can be accepted, of limited use. This does not alter the fact that realization that there is an issue of level of abstraction is a necessary condition, a sine qua non, for making headway in this respect, even if it is not sufficient. The matter is rendered more, rather than less, complex by the realization that the appropriate level of abstraction may not be the

[1] This is the copy of presentation of Professor Paul Craig, Professor Emeritus of English Law, Faculty of Law, University of Oxford. Presentation shared with the organizer during the conference, the recording are available on Youtube.

same for all aspects of, for example, administrative law, or whatsoever other topic might be the relevant subject matter

2. The Constitution and CPL

- All areas of law will be affected, directly or indirectly, by the constitution of that particular country, and this is more especially so for areas such as administrative law which are so proximate to constitutional ordering within the state.
- This point is both self-evident and foundational. It is nonetheless of particular importance for comparative public law, insofar as that signifies comparative administrative law.
- This can be seen from the following two examples.

Example 1

- The constitution will shape administrative law in a plethora of different ways even in countries that can all be counted as liberal democracies. Consider the following example concerning rule-making, a great many others could be given.
- USA: The legitimation of rule-making in the USA is shaped markedly by the fact that Congressional veto of agency rules is very sharply circumscribed by interpretation of the Constitution that precludes this, with the consequence that control and accountability is framed largely through participatory input combined with judicial review.
- Germany: in Germany, by way of contrast, there is much greater constitutional distrust of the idea that rules can be legitimated by participatory input from bodies that are perceived, almost by definition, to be partial and hence not represent the public interest. This in turn affects the very legal status accorded to such rules.
- UK: The UK system is constitutionally predicated on the formalistic assumption that when such measures have been denominated as statutory instruments then they must be subject to some form of

parliamentary scrutiny, however exiguous, but that there is nothing constitutionally to demand that rules of a legislative nature must be denominated as statutory instruments, and thus many are not subject to the parliamentary light of day at all.

Example 2

- It is noteworthy that we implicitly if not explicitly think of CPL as a force for the good. There is empirical warrant for this. The default assumption is that people engage in CPL because they seek, inter alia, to improve the existing regime by learning lessons from elsewhere.
- There is however a dark side to CPL, whereby regimes that seek to curb or constrain the rule of law learn from each other. Kim Lane Scheppele has written with vigour and insight on what she terms the 'garb or cloak of constitutionalism'. This signifies three related ideas:
    - 1st: The change that is detrimental to the rule of law is cloaked with the veneer of constitutionalism, through legislation that formally is alleged to meet constitutional standards.
    - 2nd: It has a detrimental effect on precepts that are central to constitutional and administrative law, such as the independence of the judiciary
    - 3rd: There is an exercise in comparative public law insofar as the states engaging in this practice learn from each, eg Poland, Hungary, Turkey Venezuela. Thus, that precepts regarded as central to administrative law, such as independence of the judiciary, have come under increasing strain in countries such as Poland and Hungary.

3. CPL: The Subject-Matter to be Covered – Institutional, Doctrinal, Regulatory

- The study of administrative law inevitably entails choices to be made as to the subject matter that should be covered. It is inevitable that there can be significant differences of view as to the balance of material to be covered within any single legal system.
- The balance between the institutional, the doctrinal and the regulatory is a choice that is made, implicitly or explicitly, in most books, articles etc.
- The very fact of heterogeneity in this regard in the study of administrative law in a particular legal system is to be welcomed.
- There, as they say, many views of the cathedral, and the fact that different books give differing degrees of weight to these component features is to be welcomed, not deprecated, since it thereby attests to the plurality of academic view that adds richness to the tableau of scholarship in any particular area
- Comparative administrative law is enriching, illuminating and also difficult in this respect. The authors must inevitably make choices as to the balance of coverage, as between the institutional, doctrinal and regulatory.
- The choices that must be made are, however, more difficult than when engaged in study of any one system. This is so for at least two related reasons.
- First: the balance of coverage will inevitably be predicated on a view as to what are regarded as central or salient issues in five or six different legal systems, depending on the number of systems covered. Those systems will not accord the same degree of importance to institutional, doctrinal or regulatory issues, and indeed the very meaning to be ascribed to these labels may have a different connotation in the respective systems.

- For example: the concept of the administrative act plays a central role in civilian legal systems, the particular meaning accorded to the concept can vary as between civilian systems, whereas the concept is not central to common law thinking in administrative law.
- For example: the nature of review proceedings in civilian systems, and the extent to which it is shaped by the classification of the administrative action, is an issue that is largely absent in common law regimes, or if it plays a role it is far more interstitial in the overall scheme of things.
- Second: The relative degree of importance of topics that do feature in different legal systems will nonetheless vary as between those systems.
- For example: doctrinal intricacies of judicial review and administrative institutions receive more detailed treatment in common law regimes than in their civil law counterparts
- For example: judicial machinery, and classification of administrative acts are afforded greater treatment in civil law countries than in those that have a common law foundation

4. CPL: Value and Output

- Comparative law is important both instrumentally and non-instrumentally.
- It is important instrumentally: it causes us to rethink the possibility of dealing with a problem differently than we had done hitherto; it opens up a range of possibilities of which we had hitherto been unaware.
- It is also important non-instrumentally: for the very insight that it sheds on the way in which endemic or similar problems are treated in a different legal order; the value resides in the knowledge that we gain thereby as to how issues that we are interested in are treated elsewhere.

- There is no reason why comparative insight should necessarily lead us to change the status quo as it exists in our own system. It might, it might not.
- We might decide that we just prefer the way we do things, or that the way in which matters have been done elsewhere are ill-suited to our domestic legal order.
- Whatsoever the answer might be in this respect, comparative insight will tend to reveal similarity, or difference of degree, or deeper differentiation.
- The skill in comparative law, including comparative public law, is to discern whether there is similarity, difference of degree or deeper differentiation

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