ILS Law College, Pune

CENTRE FOR PUBLIC LAW'S

PUBLIC LAW BULLETIN

VOL. XIII

SUNDAY

MAY 31, 2020

THEME: CONSTITUTIONAL PUZZLES

Public Law Bulletin

CENTRE FOR PUBLIC LAW AT ILS LAW COLLEGE,
PUNE

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A. MESSAGE FROM THE EDITOR

Date: 31 May 2020

Dear All,

We are very happy to present this new volume of Public Law Bulletin with special focus on Constitutional Puzzles. Indian Constitution is a very complex terrain with a twist and turns through its various provisions and the matter is further complicated by the interpretative gloss put on it by the judiciary. By way of just one example, look at the term 'constituent power' employed in art 368 of our constitution. Does it mean original constituent power without any limitation or does it mean a constituted power subject to the provision of the constitution? It is difficult to solve this puzzle solely based on the text of the constitution. We would explore this issue further in some articles of this volume.

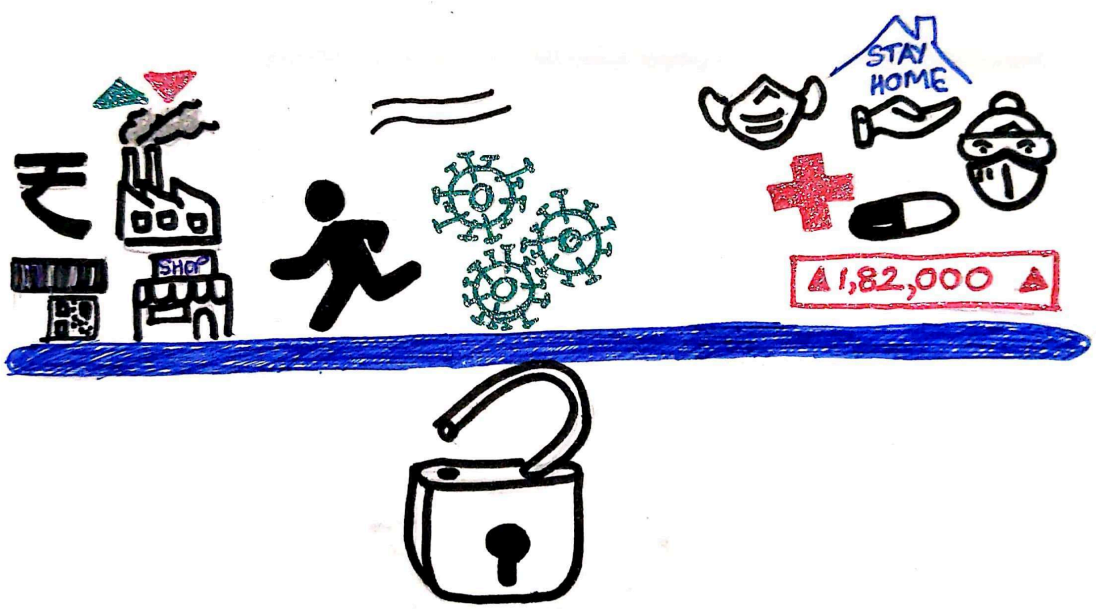
We congratulate the editorial team introducing a new section titled, "Objection your honour" wherein we are going to revisit celebrated cases. In this volume, we are going to relook at State of Madras vs Cha1mpakam Dorairajan.[1]

Dr Sanjay Jain, Associate Professor & Additional Charge Principal; Faculty Coordinator Centre for Public Law
(Editor-in- Chief)

Mr D.P.Kendre, Assistant Professor & Faculty Coordinator Centre for Public Law
(Faculty Editor)

[1] AIR 1951 SCC 226

B. Lockdown 5 (?)*



*RudhdiWalawalkar, IV BA LLB

C. PUBLIC LAW IN THE NEWS

COMPILED BY: ASHOK PANDEY, III BALLB

SUPREME COURT IN THE NEWS

SC directs constitution of a special committee to review internet shutdowns in Jammu and Kashmir.

Foundation for Media Professionals v. UT of Jammu and Kashmir[2]

SC constituted a special committee to review internet shutdowns in the UT comprising the Home Secretary, Department of Communications Secretary of the Union Ministry of Communications and the Chief Secretary of the Union Territory of Jammu and Kashmir. The Supreme Court, while passing the order said that it is looking to "balance" human rights and national security.

SC Seeks Centre & State Govt.'s Response in Plea asking for CBI probe into Assembly of People at Markaz& Bus Terminal in Delhi

SupriyaPandita v. UOI and ors[3]

A PIL was filed in the Supreme Court highlighting the failure of the state government of the NCT of Delhi and other concerned authorities to implement social distancing measures and other guidelines issued by the Centre in order to control the COVID-19 pandemic. The court has sought the reply of the governments and the concerned authorities regarding the same.

[2]WP (C) Diary no. 10817 of 2020

[3]WP(C) Diary no. 10866 of 2020

SC Issues Notice on Challenge to February 28th Presidential Order To Resume Delimitation Of Assam's Assembly, Parliamentary Constituencies

Brelithamarak and Bhanu Jay Rabha v. UOI and ors[4]

The SC has issued a notice on the challenge of the presidential order dated February 28 which seeks to resume the delimitation of Assam's state and parliamentary constituencies. The petitioner's senior advocate, KapilSibal contended that the delimitation being conducted without the enforcement of the Delimitation Act, 2003, defeats the purpose of the process by carrying out the delimitation on the basis of the population of the state in 2001.

Court issues notice to ministry of home affairs in plea seeking directions to the government for framing guidelines on timely disposal of mercy petitions

Shiv Kumar Tripathi v. UOI and ors[5]

The Petitioner, in the above petition contended that absence of specific guidelines and procedures leading to a timely disposal of mercy petitions is violative of the Fundamental Rights guaranteed under Article 14 and 21, and also violative of the principles of natural justice.

[4] To read more, https://www.google.com/amp/s/www.livelaw.in/amp/top-stories/sc-issues-notice-on-challenge-to-february-28-presidential-order-to-resume-delimitation-of-assams-assembly-parliamentary-constituencies-157403

[5]To read more https://www.google.com/amp/s/www.livelaw.in/amp/top-stories/timely-disposal-of-mercy-petitions-sc-issues-notice-on-plea-seeking-formulation-of-guidelines-seeks-centres-response-157383

SC takes suomotocognisanceof migrant labour issues

In Re: Problems and miseries of migrant labourers[6]

A bench comprising Justices Ashok Bhushan, SK Kaul and MR Shah said that effective and concentrated efforts are required to redeem the situation of the migrant labour, although both centre as well as state governments is working towards their welfare. In the light of the above, the Court directed the Centre and the State governments to submit their responses considering the urgency of the matter.

SC Dismisses Plea Seeking Social Media- Aadhaar Linkage to Remove 'Fake' Accounts to Curb 'Fake News'

Ashwini Kumar Upadhyay v. UOI and ors[7]

The Petitioner in his petition stated that around 10% of both Facebook as well as Twitter accounts are bogus and facilitate the propagation of fake news. This not only plays an instrumental role in shaping public opinion, but also causes violance. Although, the Supreme Court refused to entertain the SLP, liberty was given to file impleadment application in Transfer Case (Civil) No. 5 of 2020.

[6]Suomoto WP(C) no. 6 of 2020

[7]Petition for Special leave to appeal (C) no. 6218 of 2020

Supreme Court has agreed to permit 30 persons from the LG Polymers access to the chemical plant

M/s LG Polymers India Pvt. Ltd v. The State of Andhra Pradesh and ors[8]

The Supreme Court has agreed to permit 30 persons from the LG Polymers access to the chemical plant wherein the Vishakhapatnam Gas Leak Tragedy took place on 7th May 2020 leaving a large number of people dead.

Labour without Welfare Measures Constitutes 'Forced Labour' Under Article 23 of Constitution: SC

Nandini Praveen v. Union OfIndia[9]

The petitioner primarily contended that Central labour laws cannot be abridged by way of Executive orders issued by the states. The Petitioner also emphasised that such abrogation gives room to exploitation of labour and violates their fundamental rights to equality, life and liberty.

[8]SLP(C) Diary no. 11636 of 2020

[9]To read more, https://www.google.com/amp/s/www.livelaw.in/amp/top-stories/labour-without-welfare-measures-constitutes-forced-labour-under-article-23-of-constitution-plea-in-sc-157057

HIGH COURTS IN THE NEWS

Allahabad High Court issues notice in a PIL seeking enforcement of the fundamental rights of migrant workers

RiteshShrivastava and Another v. State of UP[10]

The Allahabad High Court issued notice in a PIL seeking enforcement of the fundamental rights of migrant workers who have been walking across the state of Uttar Pradesh to reach their hometowns. The High Court has also asked the state government to come up with a policy and norms for providing medical facilities and treatment to migrant workers and their families, and to stop the further spread of COVID-19 in rural parts of the state.

BhimaKoregaon Case: Delhi High Court prima facie opines that National Investigating Agency (NIA) acted in "unseemly haste" in moving GautamNavlakha from Delhi to Mumbai

GautamNavlakha v. National Investigation Agency and Anr[11]

The Delhi High Court has prima facie opined that the National Investigating Agency (NIA) acted in "unseemly haste" in moving GautamNavlakha from Delhi to Mumbai while his plea for interim bail in the BhimaKoregaon case was still pending before it. The observation forms part of the order passed by a Single Judge Bench of Justice Anup J Bhambhani while it was hearing Navlakha plea for interim bail on account of COVID-19 contagion.

[10]PIL no. 583 of 2020

[11]Bail appl. 986 of 2020

All employees to be treated equally, irrespective of their category of employment: Bombay HC

SamajSamataKamgaar Sang VsNavi Mumbai Municipal Corporation &Ors[12]

In a significant order, the Bombay High Court has ruled that said all those on COVID-19 related duties, irrespective of whether they are directly employed or contractual labourers, have to be treated equally in the payment of daily allowances allocated for those carrying out such duties. Justice SJ Kathawalla observed that it was "extremely unfair" to differentiate between direct employees and contractual workers in this matter thereby directing the NMMC to pay Rs. 300 daily allowance to every certified contractual worker who has been reporting for COVID-19 duty.

Delhi HC takes Suomotocognisance of viral video clip

Court on its own v. State of NCT of Delhi &Ors[13]

The Delhi High Court takes suomoto cognizance of a video clip showing a man struggling to find a hospital bed for his COVID-19 positive mother due to unresponsive helpline numbers.In the clip, DharmendraBhardwaj remarks that the tall claims of arrangements put in place by Central and Delhi Government to deal with COVID-19, who requireshospitalisation and treatment are far from true on the ground.

Andhra Pradesh HC institutes suomoto contempt case for derogatory comments in public against judges

Suo Moto contempt case no. 501 of 2020

The Andhra Pradesh High Court on Tuesday initiated suomotu contempt proceedings against 49 persons, including MP Nandigam Suresh and former MLA, Amanchi

[12]AD-HOC NO. WP-LD-VC-46 OF 2020

[13]Writ Petition (C) 3250 of 2020

Krishna Mohan for public statements alleged to have attributed motives, caste and corruption allegations to Supreme Court judges, High Court judges and the High Court itself.

Delhi HC has issued a notice in plea seeking removal of hate speech and fake news from social media

KN Govindacharya v. UOI and ors[14]

Delhi HC has issued a notice in plea seeking removal of hate speech and fake news from social media through their designated officers, following the Bois Locker Room incident and the suicide of a Gurgaon resident. The application emphasized on the misuse of social media by minors, violating the community guidelines of the social media platforms and affecting the overall development of juveniles in general.

Kerala HC takes cognisance of the rights of a non-COVID patient

Radhakrishnan R. v. State of Kerala and ors[15]

Kerala HC has directed the state authorities to take up the request for medical review of a cardiac patient at the earliest, after he moved the court complaining that Medical College and Hospital Alappuzha was denying treatment to non-COVID patients.

Patna HC passes order safeguarding the interests of the transgender community

VeeraYadav v. The Chief Secretary, Government of Bihar and ors[16]

The Patna HC directed the government to ensure that persons belonging to the transgender community are not deprived of food grains distributed under the social

[14]Writ Petition (C) no. 2705 of 2020

[15]WP(C) Diary no. 10223 of 2020

[16]Civil Writ Jurisdiction Case no. 5627 of 2020

security schemes, solely for not possessing a ration card. The petitioner emphasized on the plight of the community, especially in the light of the COVID-19 pandemic and sought immediate relief from the court.

D. CASES ACROSS THE POND

COMPILED BY: BHARGAVBHAMIDIPATI, III BA LLB

DATE	NAME OF THE CASE AND COURT	JUDGEMENT
9/04/2020	*University College London Hospitals NHS Foundation V. MB*[17] (High Court of Justice Queen's Division Bench)	The case arose because the Trust sought possession of a bedroom from a woman called MB in a hospital that it runs (where she had been since February 2019), on an urgent basis because of COVID 19 and requirement of beds. The Trust, the claimant, contended that the woman could be safely discharged to specially adapted accommodation provided by the local authority, with a care package, which the Trust considered more than adequate to meet her clinical and other needs. The Court heard MB's claims in detail, exhibited a sensitive approach and cautiously struck a

[17]To read more, https://www.bailii.org/ew/cases/EWHC/QB/2020/882.html last accessed 28th May 2020

		balance between the defendant healthcare rights and the rights of the community. The Court held that the defendant's needs are not the only needs that the law regards as relevant. The court addresses approach of public institution in a pandemic, and compares individual rights against the rights of the community.
15/05/2020	'Khosa Death Case'- *Khosa and Ors V. Ministry of Defence and Ors*[18] (High Court of South Africa, Gauteng Division, Pretoria)	The case involved the death of a man, Collins Khosa, after he was brutally assaulted by members of military and police while enforcing the lockdown. The judgment berated the country's military and police for their conduct in enforcing a nationwide lockdown. The court upheld the 'rule of law' and the 'supremacy' of the Constitution' while addressing

[18]To read more, https://drive.google.com/file/d/1v4zlGM0V9Ssz7mrYsMjLiCgF7Nkpk89O/view last accessed on 26th May 2020

		various provisions of UDHR, certain international conventions and Section 1 of its Constitution. The court further observes that people need to be able to trust the government to abide by the rule of law, especially in critical times. Yet the court's observation resulted in a limited verdict asking the defence force and the police to obey rule of the law (without any conviction or, compensation or damages to the family).
18/05/2020	In Re NCAA Athletic Grant-in-Aid CAP Antitrust Lit. - *Alston v. National Collegiate Athletic Association*[19](United States Court of Appeals for the ninth circuit)	The court was hearing in review of O'Bannon v. NCAA where the court affirmed in large part the district court's ruling that the NCAA illegally restrained trade, in violation of section 1 of the Sherman Act, by preventing FBS football and D1 men's basketball players from

[19]To read more, https://cdn.ca9.uscourts.gov/datastore/opinions/2020/05/18/19-15566.pdflast accessed 27th May 2020

		receiving compensation for the use of their names, images, and likenesses. Subsequent antitrust actions by student-athletes were consolidated in the court. The court held that NCAA's restriction on compensation and other educational benefits violated Antitrust rules and were unlawful restraints under section 1 of the Sherman Act. The court included educational benefits and scholarships as an important part of NCAA's ideas.
28/02/2020	*Nevsun Resources Ltd. V. Araya*[20] – (Supreme Court of Canada)	Three workers being Eritrean employees working in a mine claimed that their country's military "conscripted them" into a forced labour regime, compelling them to work in a mine.

[20]To read more, https://www.canlii.org/en/ca/scc/doc/2020/2020scc5/2020scc5.html last accessed 28th May 2020

		The Supreme Court of Canada decided (five to four) that the tort claims based on a breach of customary international norms of slavery, forced labour, cruel and degrading treatment, and crimes against humanity must proceed to discovery and trial. The court adopted customary international law provisions in the domestic law without the requirement of legislative actions from the federal parliament and thus held that stronger response is required in cases of corporations facing allegations of breach of jus cogens or customary international law.

E. PUZZLES UNDER INDIAN CONSTITUTION

Authored by: Dr Sanjay Jain*, Editor – in- Chief, Public Law Bulletin

When we look at the creation of the Constitution of India against the backdrop of Socio-economic Inequalities and vulnerability of the majority of the population, it looks like a very fragile topping. Some scholars also characterize the same as a supra-structure Para-dropped from an unknown destination. Be that as it may, unlike most of the Constitutions conceived in the second half of the second millennium, the Constitution of India has not only withstood the changing sickle of the time but has gone stronger by every passing hour. It is almost blaspheming in this country either for any politician or any political party to challenge the authority of the Constitution. Nevertheless, it would not be an exaggeration to contend that with all its resoluteness and resilience and ability to re-surge and re-emerge from most challenging circumstances, Constitution of India continues to remain a puzzle in many respects and dimensions.

Textually, it is puzzling in terms of lack of predictability, ambiguity and gaps. At an interpretative level also certain provisions sound extremely puzzling. In terms of silences too Constitution of India remains an interesting puzzle. Let us look at some examples of each of them.

TEXTUAL PUZZLE

Article 356 of our constitution empowers the President to either oust the State government or even dissolve the Legislative Assembly if she forms the opinion that the Government of that state was not being carried on by the provisions of the Constitution. This provision is extremely controversial and has potential for the ouster of a democratically elected government. Nevertheless, three are textual indeterminacies making it puzzling. Thus, the Constitution does not stipulate any chronology in terms

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of actions. Should President first merely dissolve the Government and suspend the Legislative assembly or is she also empowered to immediately oust the government and dissolve the State legislature without exploring the option of formation of an alternative government, are some of the poignant question awaiting a definitive decision. Similarly, although the extension of Presidential rule in any state beyond two months requires Parliamentary approval, what if President along with the dissolution of the State Legislature also notifies the fresh elections within the two months. Is she not trying to take an action indirectly which she is not supposed to take directly without the approval of the Parliament? On this aspect also this provision remains a puzzle.

INTERPRETATIVE PUZZLE

At interpretative level Court has created a puzzle by interpreting the term consultation as consent under articles 124 and 217. The text of articles 124 and 217 mandate for the consultation of CJI during the appointment of the judges of High Courts and the Supreme Court, however, in one of its landmark judgements in Supreme Court advocates in record Vs. Union of India[21] (Union of India (1993) 4 SCC 441), popularly known as second judges case, the Court turned these provisions on its head by holding that without the consent of CJI appointments cannot be made. In other words, the Court propounded an unprecedented principle that only judges should appoint the judges of the appellate Courts in India (Collegium System).

When Parliament purported to dispense with this Constitutional Aberration through 99th Amendment by amending these provisions along with the enactment of NJAC Act, the Court in an unprecedented judgement declared both as unconstitutional. But it did not stop at that, it also revived the Collegium System which was virtually nullified by the Parliament through the aforementioned amendments and Legislation. Even if it is assumed that Court is empowered to declare any amendment of the Constitution and legislation enacted by Parliament to be Unconstitutional, an assumption well-grounded in public law conventions and axioms, where is the authority or under what powers the

court can revive or resuscitate any law virtually nullified by the Parliament. Whether the power to revive or resuscitate is a judicial power or a legislative power purportedly exercised by the Court in the garb of interpretation of the Constitution is a most puzzling aspect of the matter awaiting clear exposition.

PUZZLES IN TERMS OF CONSTITUTIONAL SILENCES

So far as Constitutional silences are concerned one of the puzzles is created by the rule that under our Constitution more than 6 months shall not lapse between the two sessions of the Parliament or State Legislatures. However, the devil lies in details. What should be the duration of the session; should it be a session with Business; should a washed-out session due to pandemonium be considered as a session, are some of the questions begging the answers.

Last but not the least it does not sound less than a puzzle when we note that an academician or a jurist is eligible for appointment as a judge of Supreme Court, but when it comes to the appointment of High Court Judge this rule is conspicuously absent. In the same vein is it not surprising that though the President is elected by an Electoral College consisting of the elected Legislatures of the States, when it comes to her impeachment only Parliament is triggered. Does the mandate of federalism not imply a role for the states even during the ouster of the President, and what is more surprising is complete No-Go to the states in the appointment of Governor.

Thus, to sum up, the above discussion is merely the tip of the iceberg in the exploration of puzzles in the Constitution of India. In different levels of Constitutional Analysis we may find puzzles, i.e. due to interaction between two or more provisions of the Constitution, for example, integrated reading of articles 14, 19 and 21; encounters of two or more constitutional provisions, for example, articles 15(1) and 46. However, for the present volume, the aforementioned discussion is enough and I hope it would ignite further research and motivate the students to explore this topic in all its nuances.

F. GUEST ARTICLE: THE TUG OF WAR BETWEEN THE RIGHTS OF COVID AND NON COVID PATIENTS.*

The parks are lonely, the streets are empty and people are mourning the deaths of their dear ones. But there's more misery than what meets the eyes amidst the Corona Virus (COVID – 19) scare. There has emerged an unprecedented situation of rationing health care services to one group over another individual – the former being the group of COVID – 19 patients and the latter being the non – COVID - 19 patients. The cracks in the wall of the Indian healthcare services buttressed by bioethics and legal morality have gaped open.

A study published by the British Journal of Surgery has projected that due to the disruption of health services caused by COVID – 19, around 28.4 million[22]elective surgeriesworldwide will have to be cancelled or postponed. Bringing the lens closer home, it has been found that more than 580,000 planned surgeries,[23]might be cancelled as a result of the COVID-19 pandemic. Post lockdown 1.0, hospitals in India, have shut

*SamraggiDebroy, II BALLB. The views expressed here author's personal. The bulletin does not endorse them in any way.

[22]PTI, "COVID – 19 Pandemic Lead to Over 28 million Cancelled Surgeries Worldwide: Study", *Economic Times,* May 15, 2020, *available at*<https://economictimes.indiatimes.com/industry/healthcare/biotech/healthcare/covid-19-pandemic-will-lead-to-over-28-million-cancelled-surgeries-worldwide-study/articleshow/75757140.cms?from=mdr> (last visited on May 31, 2020).

[23]*Supra* note 1.

down their outpatient services and deferred elective surgeries to contain the infection.[24] So far, the Union Ministry of Health has not issued any notice regarding the prioritization of COVID – 19 patients over the rest, *au contraire*, they have directed hospitals to not deny treatment on the basis of the type of ailment that the patient is suffering from.[25]With the conclusion of Lockdown 4.0 on 31st May, 2020, a significant number of deaths of individuals who were denied treatment by both public and private hospitals have been registered.[26] These patients' rights advocateshave condemned the denial of various essential healthcare services by both government and private sector hospitals.[27]

The issue has offered intriguing ethical and legal knots that have everyone baffled. With a global lack of human resources, lack of resources like PPEs and ventilators and unavailability of any long - term solution,[28] when countries are creating make – shift

[24]DivyaRajagopal and Teena Thacker, "Ease Lockdown, Let Other Critical Patients get Treatment: Hospitals", *Economic* Times, Apr. 23, 2020, *available at*<https://economictimes.indiatimes.com/industry/healthcare/biotech/healthcare/ease-lockdown-let-other-critical-patients-get-treatment-hospitals/articleshow/75305147.cms?from=mdr> (last visited on May 31, 2020).

[25]G. S. Mudur, "Don't Deny Non – COVID – 19 Patients care: Centre" *The Telegraph*, Apr. 29, 2020, *available at*<https://www.telegraphindia.com/india/coronavirus-lockdown-dont-deny-non-covid-19-patients-care-centre/cid/1768845> (last visited on May 31, 2020).

[26]*Supra* at 5.

[27]*Supra* at 6.

[28]Ken Alltucker and Nick Penzenstadler, "Too Many Coronavirus patients, too Few Ventilators: Outlook in US could get bad, quickly", *USA Today*, Apr. 16, 2020, *available at* https://www.usatoday.com/story/news/health/2020/03/18/coronavirus-ventilators-us-hospitals-johns-hopkins-mayo-clinic/5032523002/> (last visited on May 31, 2020).

hospitals[29] and with people having to wait for hours before getting health care services,[30] prioritization has become a necessary evil. A section of philosophers uses reasons such as age, chances of survival, time of arrival *et al*, to preserve the utilitarian notion (or ethics of outcome) of maximum good and minimum damage, this time COVID – 19 has been used to filter out a segment of the patient population. However, the Indian Constitution belongs to the school of deontology (ethics of morality) which asserts that each and every individual is valuable to the State and thus should have an equal chance of health care.[31]

The core contention of the subject is to analyse whether an individual's (here, a non COVID -19 patients) right to health is being trumped by a group's (here, the group of COVID – 19 infected patients) right to health. This is probably the first time in the history of India, and probably the world, that a disease is testing itself in constitutional waters.[32] Right to health that flows from Article 21 of the Constitution,[33] has not been literally spelt out by the Constitution but has been firmly installed by a series of

[29]YaronSteinbuch, "China Shuts All 16 Coronavirus Hospitals in Wuhan", *The New York Times*, March 11, 2020, *available at*, <https://nypost.com/2020/03/11/china-shuts-all-16-temporary-coronavirus-hospitals-in-wuhan/> (last visited on May 31, 2020).

[30]Jason Horowitz, "Italy's Health Care System Groans under Coronavirus – a Warning to the World", *The New York Times*, March 12, 2020, *available at*https://www.nytimes.com/2020/03/12/world/europe/12italy-coronavirus-health-care.html> (last visited on May 31, 2020).

[31]Olivia Goldhill, "Ethicists Agree on who gets Treated First when Hospitals are Overwhelmed by Coronavirus", *Quartz*, Mar. 19, 2020, *available at* https://qz.com/1821843/ethicists-agree-on-who-should-get-treated-first-for-coronavirus/ (last visited on May 31, 2020).

[32]ShivkritRai and NipunArora, "How COVID – 19 is Questioning the Constitutional Fabric of India", *Daily O*, Apr. 14, 2020, *available at* <https://www.dailyo.in/politics/covid-19-coronavirus-in-india-lockdown-fundamental-rights-constitution-of-india-right-to-health-right-to-education-midday-meal-privacy/story/1/32712.html> (last visited on May 31, 2020).

[33]The Constitution of India, a. 21.

progressive judgments, starting with *Consumer Education and Research Centre versus Union of India,* 1995. The Court held that:

> "*The jurisprudence of personhood or philosophy of the right to life envisaged under Article 21, enlarges its sweep to encompass human personality in its full blossom with invigorated health […] to sustain the dignity of person and to live a life with dignity and equality. […] Therefore, it must be held that the right to health and medical care is a fundamental right under Article 21.*"[34]

However, the Supreme Court has not articulated the contour of the right to health in a manner that is analytically structured and theoretically coherent.[35] The differentiation of the rights of an individual from the rights of a group leading to a conflict leads to the violation of Article 21 of an individual's fundamental right by a group's fundamental right. Non treatment of patients suffering from ailments other than the virus infection, is leading to degradation of morbidity and mortality rates in the society.

The reason submitted by the health care sector for the non – treatment of 'other' patients is to maintain social distancing. In order to preserve the health of a group marred by a common infection, the health system is systematically ignoring the lives of others, some of whom may have equal chance of survival. Non critical ailments like hernia or orthopedic issue needs timely intervention wherein a delay can cause deterioration of quality of one's life.[36] Reproductive surgeries and transplants are extremely critical and cannot be neglected at any cost.[37] Diseases like HIV and cancer, does not need

[34]*Consumer Education and Research Centre* v. *Union of India*, AIR 1995 SC 922.

[35]*Supra* at 14.

[36]ChaitanyaMallapur, "COVID – 19 held up 5.8 Lakh Elective surgeries in India", *Scroll.in*, May 28, 2020, *available at* <https://scroll.in/article/963085/covid-19-held-up-5-8-lakh-elective-surgeries-in-india-heres-why-further-delay-should-be-avoided> (last visited on May 31, 2020).

[37]*Ibid.*

immediate attention at all phases of the ailment, but lack of attention may lead to parallel morbidities and eventually death.

This is a classic case of conflict of fundamental rights, with a twist in the context. While conflict in fundamental rights has majorly been against a backdrop of religion, freedom of expression and personal liberty, here it is the pandemic caused by a novel virus. Rights that are practised by virtue of being an individual and a member of a community often clash. There are situations when individuals are pitted against communities when one believes that his/her right is being violated by the other. Here, the distinction between the two parties has been created by the neglect of the health care workers. The Constitution does not announce a hierarchy of rights or parties. To maintain neutrality, the Courts can practise neither individual supremacy nor group supremacy since both may have damaging consequences. From *DawoodiBohra case,*[38]to the latest*Sabrimala case,*[39]the judiciary has come a long way solving constitutional bottlenecks. In *MazdoorKisan Shakti Sanghatan v. Union of India*, 2018, the Supreme Court had stated a near perfect formula to solve such conflicts:

> "*[during] conflict on inter fundamental rights or intra fundamental rights, […] the Court has to examine as to where lies the larger public interest while balancing the two conflicting rights. It is the paramount collective interest which would ultimately prevail.*" [40]

To evaluate such conflicts, public interest needs to be favoured. Theoretically, the doctrines is convincing but not fool proof in situations like this when both sides pose an

[38]*SardarSyednaTaherSaifuddinSaheb*v. *State of Bombay*, AIR 1962 SC 853.

[39]*Indian Young Lawyers Association* v.*The State of Kerala*, Writ Petition (Civil) no. 373 of 2006.

[40]*MazdoorKisanShaktiSanghatan* v. *Union of India*, W. P. (Civil) no. 1153 of 2017.

equal amount of public interest.[41] The applicability of this doctrine in the conflict between intra fundamental rights of two parties is inefficient since it cannot be determined on which side of the line lies public interest. In order to achieve equity, we are falling deeper into the gorge in inequality. While the judiciary is the balancing wheel between the rights,[42] it is the executive's responsibility to enforce schemes and policies that protect the rights of both the parties. In the *Navtej Singh Johar case*, it was asserted that Article 21 enables the Court to impose positive obligations upon the State to take measures in order to provide adequate resources and treatment facilities to secure the enjoyment of the right to health.[43] Moreover the apex Court has also held that financial difficulties cannot come in the way of making medical facilities available to the people since it is the State's constitutional obligation.[44]

While isolated efforts, like registering criminal offences against hospitals that are not treating regular patients,[45] are being taken, there is still a long way to go. There is a need for well formulated and uniform regulations to tackle the dilemma. India is a welfare state, where right to health is constitutionally guaranteed to all. But as the visionary Justice Sikri once stated:

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[41]Rahul Garg, "Constitutional Dilemmas: When there is a conflict between two Fundamental Rights?",available at <https://lawlex.org/lex-pedia/constitutional-dilemmas-what-happens-when-there-is-a-conflict-between-two-fundamental-rights/16668> (last visited on May 31, 2020).

[42]Golaknath v. State of Punjab, AIR 1967 SC 1643.

[43]Navtej Singh Johar v. Union of India, W. P. (Crl.) no. 76 of 2016.

[44]PaschimBangaKhetMazdoorSamity v. State of West Bengal &Anr, 1996 SCC (4) 37.

[45]SanjanaBhalerao, "Lodge FIRs against Private Hospitals that have Failed to Reopen despite Orders", The Indian Express, May 20, 2020, available at<https://indianexpress.com/article/cities/mumbai/mumbai-civic-chief-ward-officers-coronavirus-covid-19-6419862/> (last visited on May 31, 2020).

"It is a hard and unpalatable fact that not everyone in India is able to enjoy this right, and the state cannot translate it into a reality for everyone."[46]

[46]Common Cause (A Regd. Society) v. Union of India, AIR 1996 SC 1619.

G. GUEST ARTICLE: PRISONERS, PANDEMIC AND RIGHT TO LIFE.*

It has been more than two months since Covid-19 has been declared a pandemic by the World Health Organisation. Avoiding mass congregations and 'social distancing' is crucial in curbing the spread of the virus which has claimed more than 2 lakh lives globally. Indian prisons are heavily overcrowded which is a major concern for the health and welfare of the prisoners as well as avoiding major outbreaks of the virus. According to the 'Prison Statistics of India' Report released by the NCRB, under trial prisoners constitute more than 60% of total prisoner population in India. [47] The average nationwide occupancy rate of the prisons is 117.6%, with States like Uttar Pradesh, Maharashtra and Madhya Pradesh having bizarre occupancy rates of more than 145%. In light of the staggering overcrowding in prisons; the health, hygiene and safety of the officials, under trials and convicts is severely undermined.

After the national lockdown was imposed, the Supreme Court of India took *suomotu*cognisance of the issue of congestion in prisons and passed an order on March 23 directing all the State Governments and Union Territories to constitute High Power Committees to determine the category of prisoners that could be released. The order passed by a bench headed by Chief Justice S. A. Bobde, also comprising Justices L. NageswaraRao and Surya Kant asked the State and UT authorities to consider that prisoners convicted of or charged with offences having jail term of not more than seven

*Dewangi Sharma, II BA LLB and VishakhaPatil, II BA LLB. The views expressed here are authors' personal. The bulletin does not endorse it in anyway.

[47]https://ncrb.gov.in/sites/default/files/Executive-Summary-2018.pdf

years, and have not been awarded the maximum punishment can be given interim bail or parole with the objective of decongesting the prisons. The court had also suggested that the classification, which is to be made at the discretion of the High Powered Committee can be made on the categories of nature of crime, severity of the offence, duration of sentence or any other relevant factors.[48]

The order passed by the apex court is seemingly appropriate and necessary, but the solution suggested by the court to achieve the objective of protecting the health and lives of prisoners is questionable. As per Article 14 of the Constitution every individual is entitled to equal protection of law, even prisoners. Thus, any classification made between them should be made on non-arbitrary, reasonable grounds and should have a nexus with the objective. The court's order creates an arbitrary classification that differentiates between under trial prisoners on the basis of their charged offence. How does one differentiate between people who are yet to be proven guilty of the offence they have been charged with and allow one category of them to enjoy their right to life and personal liberty enshrined in Article 21 of the Constitution while denying the same to others?

EXCLUSION OF PRISONERS

As the Supreme Court did not itself pass any order directing the release of the prisoners but only directed The High Powered Committee(hereinafter 'HPC')to decide the same, the situation has only become more problematic. Many HCs in States and UTs have come up with perfunctory and arbitrary classifications to determine the release of the under trial prisoners. Most of them have ignored considerations like health of the under

[48]https://images.assettype.com/barandbench/2020-03/1d900e00-41c0-4a6a-a348-78bdcf26f0f7/In_re_Contagion_of_COVIC_19_Virus_in_Prisons.pdf

trials, seriousness of the offence, level of overcrowding in the prisons which are relevant factors that need to be taken into account while making a reasonable classification.

For instance, The High power committee of Maharashtra framed certain guidelines for release of prisoners for a period of 45 days or until the Epidemic Act is withdrawn. The guidelines provided for the consideration of release of those under trials who have been charged for such offences for which maximum punishment is 7 years or less and those convicted of offences where maximum punishment is 7 years or less. The guidelines completely ignore those under trial prisoners or convicted prisoners who are booked for serious economic offences/ bank scams and offences under Special Acts like MCOCA, PMLA, PC Act, etc., and also presently to foreign nationals and prisoners having their residence out of Maharashtra. This blanket exclusion of all those accused/guilty of offences under the Special acts is arbitrary and does not form any nexus with the objective the guidelines aim to serve. Justice BN Srikrishna, former Supreme Court judge said, "*If this is what the high-powered committee has stated then it's absurd. If prisoners have to follow the due process of law, then why was the high-powered committee made. How can the committee distinguish between prisoners booked for Special Acts, and others. It is like distinguishing between the rich and the poor prisoners. If this is how it is, the Supreme Court has done nothing to fight the pandemic.*[49]"

There is another class of excluded under trial prisoners which have been charged under Acts like MPID Act where the maximum punishment is 6 years. Despite being eligible for availing the bail as per the benchmark of '7 years or less' they have been left out. The reason for this exclusion narrows down to the additional restrictions on bail, in addition to those under the Code of Criminal procedure as per the Act. Those incarcerated for economic offences, or charged for offences under special acts are being denied their

[49]https://www.hindustantimes.com/india-news/maharashtra-panel-decides-to-release-50-of-prisoners-on-temporary-bail-to-prevent-spread-of-covid-19/story-U2yob9EHSa5TJXai12tHEI.html

equal right to personal liberty. Would the punishment for an offence and the procedure to obtain bail would determine the 'urgency' of bail application for an under trial prisoner? There is a need for the courts and the HPCs to formulate guidelines on the basis of reasonable classification based upon intelligible differentia. Justice V.R. Krishna Iyer had remarked in the GudikantiNarasimhulu case (1978)[50] that the unjust denial of bail is the grossest violation of an individual's right to personal liberty.

DELAY IN BAIL APPLICATION

The Corona virus induced crisis is extraordinary; WHO and UN bodies have already made statements about the alarming need to decongest prison cells to curb the spread of the virus. In one of the daily briefings of the World Health Organisation (WHO), Executive Director Michael J Ryan stated that prisoners cannot be forgotten in the current situation. They may be serving sentences, but they deserve no less protection under the law than others[51]. If prisoners are not released in a timely manner it could seriously jeopardise and risk their lives.

High courts and governments refuse to understand this and it was reflected in the order released by the Rajasthan High Court on April 3rd. The Court issued orders to the Court's registry to not list bails and appeals under the SC/ST Atrocities Act and application for suspension of sentences as a matter of "extreme urgency" at the risk of the tedious procedure that has to be followed and the exposure of the involved officials to the corona virus. Though the Supreme Court has put an interim stay on the matter, it shows how the authorities feel when it comes to protecting the rights of the prisoners.

[50] 1978 SCR (2) 371

[51]https://www.indialegallive.com/special/the-problem-of-prisoners-97966

On the very same day, the single bench judge at Bombay High Court passed a similar judgement observing that "unless extreme emergent cases, they (judicial and jail officials) cannot be asked to spend their time in defending regular bail applications.[52]" Both these courts undermine the equal rights that are guaranteed to those behind the bars and outside the bars under Article 21 i.e. Right to life. The chances of prisoners getting released on parole or bail became bleaker after the Supreme Court clarified that its order on the issue was not compulsory for every state to follow, in response to Bihar government's request for a modification in the Court's previous order to allow the state to refrain from releasing its prisoners.[53]As the courts are overburdened by work because of the lockdown and 'virtual hearings', they have scarce time to expedite the bail application proceedings. The maintenance of 'social distancing' is impossible in prisons, if prisoners are not released urgently and on a war footing, the direction of the Supreme Court and the HCs will have no meaning.

[52]CRI.BAIL APPLICATION NO. 691 OF 2020

[53]https://timesofindia.indiatimes.com/india/releasing-prisoners-on-parole/bail-risky-and-difficult-during-lockdown-bihar/articleshow/75021454.cms

H. VITAL CONSTITUTIONAL LAW QUESTION: (A) UNRAVELING THE TERRITORIAL JURISDICTION OF HIGH COURTS.

AUTHORED BY: NIHARCHITRE., IV BA LLB

INTRODUCTION

In 1983, when the Andhra Pradesh High Court ruled that S. 9 of Hindu Marriage act as unconstitutional[54] while the Delhi high court declared it as constitutional[55], this led to a peculiar situation where a statutory rightwas available in one state and was unavailable in another state. This particular situation was settled in 1984 by the Supreme Court. [56] But what if, the matter was never settled by the Supreme Court? Would it not amount to a violation of the constitutional right of "equality before the law"? This article tries to explore and understand the conflict of jurisdiction of state high courts concerning the decision on central laws.

The Constitution of India provides a structured and hierarchical system with Supreme Court at the apex. Art 141 of the Constitution binds that law declared by the Supreme Court is binding on all the High Courts and the subordinate courts. The intention behind this article is to establish thesupremacy of the Supreme Courtand to have uniformity in the interpretation and application of constitutional question or ordinary application of the law. The Constitution of India provides an appellate jurisdiction to the Supreme Court whether it is civil or criminal. Art 136 grants a special leave of appeal at Supreme Court for matters involving substantial question of law. The idea is

[54]T. Sareetha v VenkataSubbaiah, AIR 1983 AP 356

[55]HarvinderKaur v Harmander Singh Chaudhary, AIR 1984 Delhi 66

[56]Smt. Saroj Rani vsSudarshan Kumar Chadha, 1984 AIR 1562

the same, promoting the uniform appeal of interpretation and application and giving access to justice to the people.

Both the State High Courts and Supreme Court have jurisdiction to issue writs. Art 32 and Art 226 respectively empower the Supreme Court and state High Courts to issue writs. The writ jurisdiction of Supreme Court is enshrined under part III making it a fundamental right which can be used against the state, while the writ jurisdiction of the high court is wider as the writs may be issued not only against state but against individuals too.

The idea behind empowering both the Supreme Court and state High Courts with writ jurisdiction was a quick remedial of justice to people from adverse administrative or executive action. On the onset of the Constitution, the Supreme Court held that only Punjab High Court had jurisdiction to issue a writ against the Central government as the residence of the respondent is where the cause of action takes place.[57]

The Parliament of India passed the Fifteenth Constitutional Amendment in 1963, allowing High Courts to have jurisdiction where the cause of action arises.[58]

This amendment allowed state High Courts to issue writs against the Central executive. But the territorial jurisdiction of each high court is restricted to the state or the union territory or a group of states. The Constitution of India is silent about the binding effect of the high court's judgment on its subordinate court and authorities over which it exercises jurisdiction. But through judicial pronouncements, this principle has been reaffirmed.

[57]Election Commission, India v SakaVenkataRao, AIR 1953 SC 210

[58]The Constitution (Fifteenth Amendment) Act, 1963

THE PUZZLE

Getting a brief idea about the basic hierarchical structure of the Indian judicial system. Let us now understand the puzzle. We know through judicial pronouncements that a high court judgment is binding on the subordinate courts. But we as all know, the decision of one High Court is not binding on the other High Court; it only holds a persuasive significance. Therefore, if two high courts give conflicting judgments on a substantial question of law or constitutional validity of a statute it would create paradox i.e. a resident of one state would have a legal right and the other would not. Let us understand this situation with the help of an illustration.

Suppose the parliament of India passes a certain statute 'x' with ambiguous sections involving the constitutional validity of it. Public interest litigation is filed under art 226 of the constitution in two different state high courts, say 'a' and 'b'. The two high courts arrive at a different conclusion. High Court 'A' rules that the 'x' is perfectly valid whereas High court 'B' concludes that the 'x' is constitutionally invalid.

This illustration talks about presupposes that the statute is based on a subject in the list I of 7th Schedule. But what if, the act is a subject of List III of 7th Schedule where both the Parliament and state assemblies have the power to legislate as well as make amendments?

For Example, Under the List III of the 7th Schedule, the criminal procedure code may be amended by both Parliament and state assemblies. In such a situation, two states may bring in two different amendments. In such a situation, when a substantial question of law or constitutional validity of any act or code, which court should have the jurisdiction to confirm this? Right now, both State High Courts and Supreme Court have the jurisdiction but essentially this too would create conflict.

In the above illustration, the residents of the two states are by two different rulings, effective and a prima facia violation of art 14 i.e. *equality before law* and *equal protection of law*.

TRACING THE CONSTITUTIONAL AMENDMENTS

In 1976, the Indira Gandhi government passed the Constitution (Forty Second Amendment) Act inserting art 32A, art 131A, art 139A, art 144A and art 226A in the Constitution. It also amended art 145. The 42nd amendment tried to solve this conflict. Art 131A mandated that the Supreme Court should have exclusive jurisdiction questions as to the constitutional validity of central laws and art 226A took away the power of high courts to consider the constitutional validity of Central laws. Art 226 was amended restricting its writ jurisdiction with subject to art 131A and art 226A. The most interesting insertion was art 144A. This article laid down that the minimum number of judges of Supreme Court that would sit to determine any question as to the constitutional validity of any central law or state law would be seven. Further, it stated that a central or state law will not be constitutionally valid unless two-third of sitting judges declares it unconstitutional.

Another interesting insertion was art 32A which stated that Supreme Court would not consider the constitutional validity of any state law in any proceedings under art 32 unless the constitutional validity of any central law is also involved in the issue.

At instance, the Supreme Court believed that art 144A would receive immediate attention from the Parliament and would be amended. The Court opined that it alone should be left with deciding the strength of the bench and furthermore, directing the court to mandatorily have seven-judge benches for confirming the constitutional

validity seemed unnecessary for all types of cases which did not have the weight of precedent by a larger bench.[59]

But in 1977, the parliament of India passed the Constitution (43rd Amendment) Act omitting 32A, 131A, 144A and 226A. The statements and objects mentioned in the 43rd amendment stated that it posed a considerable hardship on litigants living distant parts in India. Art 32A would lead to multiplicity of proceedings as cases relating to the validity of state law which could be disposed of by the Supreme Court itself have to be heard first by the High Court.[60]This eventually brings the Constitution back to 1963 position.

UNDERSTANDING M/S. KUSUM INGOTS CASE AND ITS PRINCIPLE

In 2004, a three-judge of bench Supreme Court while hearing case deciding whether the seat of the Parliament or the Legislature of a state would be a relevant factor for determining the territorial jurisdiction of a High Court to entertain a writ petition under art 226 of the constitution. [61] In this case, the Supreme Court said that

"*A parliamentary legislation when receives the assent of the President of India and published in an Official Gazette unless specifically excluded, will apply to the entire territory of India. If the passing of legislation gives rise to a cause of action, a writ petition questioning the constitutionality thereof can be filed in any High Court of the country….*"

"*The court must have the requisite territorial jurisdiction. An order passed on writ petition questioning the constitutionality of a Parliamentary Act whether interim or final keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution of India, will affect the territory of India subject of course to the applicability of the Act.*"

[59]Misrilal Jain Etc. Etcvs State Of Orissa & Another, 1977 AIR 1686

[60]Statements of Objects and Reason, the Constitution (Forty-Third Amendment) Act, 1977.

[61]M/S. Kusum Ingots & Alloys Ltd vs Union Of India And Anr, 2004 (6) SCC 254

If we read the judgment, the above paragraph is *'obiter dictum'* or incidental remarks. Obiter Dictum, as stated in Oriental Insurance Co. Ltd. v. MeenaVariyal[62] may bind the high courts in the absence of any other direct pronouncement on that question by the Supreme Court. The obiter dicta of the Supreme Court are entitled to considerable weight[63] and '*normally even an "Obiter Dictum" is expected to be obeyed and follow*ed'[64].

However, although *obiter dictum* of Supreme Court should be accepted as binding by High Courts, it does not mean that every statement contained in a judgment of the Supreme Court would be attracted by Article 141. The same was held by Kerala High Court in the case of **State of Kerala v. ParameswaramPillai[65]** and relied upon by Supreme Court in **Municipal Committee, Amritsar v. Hazara Singh.**[66]It was further held that '*Statements on matters other than law have no binding force*.'

Ambica Industries case[67] and Durgesh Kumar Case[68] provide a partial answer to the Kusum Ingots case.

In Ambica Industries, Supreme Court held that High Court exercises its power to issue a writ of *certiorari* and its power of superintendence only over subordinate courts located within the territorial jurisdiction of that High Court or if any cause of action has arisen within such territorial jurisdiction.

[62] (2007) 5 SCC 428

[63] CIT Hyderabad, Deccan v. Vazir Sultan and sons, AIR 1959 SC 814

[64] Sarwan Singh Lamba v. Union of India, (1995) 4 SCC 546

[65]1974 SCC OnLine Ker 87

[66]AIR 1975 SC 1087

[67]Ambica Industries v. Commissioner of Central Excise, (2007) 6 SCC 769

[68]Durgesh Sharma v. Jayshree, (2008) 9 SCC 648

Whereas in Durgesh Kumar case, the Supreme Court observed that *'writs issued by a High Court cannot run beyond the territory subject to its jurisdiction and the person or authority to whom the High Court is empowered to issue such writs must be within those territories*.'

Both Ambica Industries and Durgesh Kumar limited the extraterritorial jurisdiction under art 226 that Kusum Ingots confirmed. But both these cases had a two-judge bench and secondly, it did not talk about the question of a constitutional challenge to central legislation.

The principle in paragraph 22 of Kusum Ingots case has been followed by various high courts and Supreme Court itself in All India JamiatulQuresh Action Committee v. Union of India, [69]

Union of India v R Thiyagarajan[70] is a recent judgment of Supreme Court where the hon'ble court has said that the order of the Madras High Court has usurped the jurisdiction of other high courts. If one reads the facts of the case, then it may be that the relief provided more than what the respondent has asked for.

Both Durgesh Kumar and R Thiyagarajan case misinterprets art 226(2) which provides the jurisdiction to High Courts if the cause of action arises wholly or partly in its jurisdiction.

Kusum Ingots case may be considered a 'cloud with a silver lining' as it has allowed uniform interpretation of statutes and acts.

[69]Writ Petition (C) No. 422 of 2017

[70]Civil Application No. 2229 of 2020

SUGGESTION FOR RESOLVING THE CONFLICT

Law Commission of India understood this conflict in 1990[71] and has suggested certain changes.

The first and foremost recommendation of the Law Commission is the legislative intervention. Legislature in a phased manner may clarify the law through appropriate amendments.

The second recommendation is in the form of a draft bill named "The Conflict of Decisions (Restoration of Uniformity) bill, 1990. Reproducing below are the contours of the suggested solution are:

(1) When High Court ***A*** is faced with a problem pertaining to an all-India law (excluding the Constitution of India) on which High Court ***B*** has already made a pronouncement, if High Court ***A*** holds a view different or inconsistent from the view already pronounced by High Court ***B***, High Court ***A***, instead of making its own pronouncement, shall make a reference to the Supreme Court. The order of reference shall be accompanied by a reasoned opinion propounding its own view with particular specification of reasons for differing from the view pronounced by High Court ***B***.

(2) (*a*) The party supporting the reference may arrange for appearance in the Supreme Court but will not be obliged to do so.

(*b*) The said party will have the option of submitting written submissions supplementing the reasoning embodied in the order of reference.

[71]Law Commission of India, 136th Report on Conflicts in High Court decisions on Central Laws — How to Foreclose and How to Resolve (February 1990)

(*c*) The party opposing the reference shall also have a similar option for engaging an advocate in the Supreme Court and submitting written submissions, *inter alia* to counter the written submissions, if any, submitted by the other side.

(3) The Supreme Court may require the Government of the State in which the High Courts ***A*** and ***B*** are situated to appoint at the State's cost any advocate from the State panel of lawyers of the States concerned to support by oral arguments the viewpoints of the respective High Courts.

(4) All such references may be assigned to a Special Bench which may endeavour to dispose of all such references within six months of the receipt of the references in the Supreme Court in view of the inherent urgency to ensure uniformity.

(5) If any SLP or appeal is already pending on the same point from judgment of High Court ***B*** or any other High Court, the said matter may be clubbed along with the reference. Any interested party may be permitted to appear as interveners.

(6) The Supreme Court may return the reference if it appears that the parties are acting in collusion.

(7) The Attorney General may be served with a copy of the reference and he shall be entitled to urge the point of view of the Central Government in regard to the relevant provision of the concerned Central Statute, if so desired.

(8) The referring High Court shall finally dispose of the appeal on all points in the light of the decision of the Supreme Court in regard to the referred point.

(9) The decision of the Supreme Court in the reference will have no impact or effect on the decision of High Court ***B*** in the event of the Supreme Court upholding the reference in case it has become final between the parties by reason of the matter not having been carried to the Supreme Court and the said decision shall remain undisturbed as between the parties in High Court ***B***.

In 1984, Law commission published another report titled, "Constitutional Division within Supreme Court- a Proposal for."[72]

The Supreme Court should be consist of two divisions, namely,-

a. Constitutional division
b. Legal Division

The Jurisdiction of this constitution division:

(i) A case involving substantial question of law as to the interpretation of the constitution or an order or rule issued under the constitution
(ii) Question of constitutional law.

The Constitution Division should consist of not less than seven judges.If more than seven judges are required in a matter the Chief Justice of the Supreme Court should have the power to assign temporarily Judges to this division from the other division. If there is a temporary increase in the work of the other division, the Chief Justice should have the power to assign temporarily a Judge from the Constitutional Division to the other Division.

To implement the above suggestions, amendments to art 124 and art 145 are recommended.

CONCLUSION

The recommendations by the Law Commission can be incorporated for removing the conflicts but this may apply to subjects mentioned in the Union list but the subjects

[72]Law Commission of India, 95th Report on Constitutional Division within the Supreme Court — A Proposal for (March 1984)

mentioned in the concurrent list are still left unanswered. This possesses us with another puzzle which may be explored later.

(B) THE CONSTITUTIONAL CONUNDRUM THE TUSSLE BETWEEN THE CLASSIFICATION TEST AND ARBITRARINESS DOCTRINE

AUTHORED BY: SOHAMBHALERAO, IV BALLB

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Its uncanny how one sentence in the Constitution has the ability to move mountains? It can provide solace to the downtrodden but at the same time can rouse a nationwide discourse on its unwarranted interference in the private lives and long standing customs of the people by the Courts, Legislative or the Executive alike. It would not be a hyperbole to say that Article 14 along with Article 19 and Article 21 or what is fashionably called as the "Golden triangle" forms the holy grail of the Indian Constitutional jurisprudence. The root of all intellectual discussions, deliberations and debates on the exact meaning of the words mentioned in these articles is undoubtedly the vague nature of the words used. Concepts like "Equality", "Freedom", and "Life" are ever changing dynamic buzz words which take different forms with a different social setting and different times. Hence in a country of 1.3 billion people with its levels of diversity unmatched anywhere around the world, it would hardly be an exaggeration to say that conflicts on its interpretation and subsequent implementation are bound to happen or in fact are but natural.

Article 14 is the 'fonjuris' of our Constitution, the fountainhead of justice.[73]If the Constitutional debates are to be taken into consideration Article 14 of the Constitution of India, 1950 was not a standalone provision in the Draft Constitution; it was part of Draft Article 15 which read: '*Protection of life and liberty and equality before law - No person*

[73]SunitaBugga v. Director of Education , (2010) 7 AD (DEL) 727

shall be deprived of his life or liberty except according to procedure established by law, nor shall any person be denied equality before the law or the equal protection of the law within the territory of India.' Thereafter in its letter to the President of the Constituent Assembly dated 3rd November 1949 presenting its revised Draft Constitution, the Drafting Committee mentioned that – '*We have considered it more appropriate to split this article into two parts and to transfer the latter part of this article dealing with "equality before law" to a new article 14 under the heading 'Right to Equality*'.[74] And thus, Article 14 was introduced into the Constitution of India, 1950.

Article 14 in its ambit and sweep involves two facets; it permits reasonable classification accommodating the practical needs of the society and does not allow any kind of arbitrariness in order to ensure fairness and equality of treatment. It is a settled position of law that fundamental rights have to be interpreted in a liberal manner in order to ensure justice and hence the Courts have taken it upon them to interpret provisions like Article 14 differently for different situations hence leading to various doctrines and various applications born within a single Article.

The traditional "classification" test used to determine Article 14compatibility was the one that dominated judicial interpretation, initially. As laid down in Anwar Ali Sarkar , in order to pass the test, two conditions must be fulfilled, namely, "*(1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them.*"[75] Hence it is evidently clear that the Constitution does not prohibit differentia per se but does so if it is discriminatory in nature and if the differentia does

[74]https://www.constitutionofindia.net/constitution_of_india/fundamental_rights/articles/Article%2014

[75]State of WB v. Anwar Ali Sarkar 1952 AIR 75

not serve the purpose of the Act. It is pertinent to note that once an act is challenged, due to the operation of the presumption of constitutionality, the burden on proving that the Act is ultra vires lies on the one challenging the Act. This burden is not a simple case of arguing before the Court so as to how the Act could be interpreted in a different way than was is claimed by the Act itself and hence is liable to be struck down but a case of systematically proving before the Court how the Act is contrary to principles enshrined in the Constitution which is a considerably higher and a harder burden to argue. It is perhaps for this reason alone that Learned scholar M.P. Jain reviews the cases under Article 14 to conclude that the Courts '*show a good deal of deference to legislative judgment and do not lightly hold a classification unreasonable.*' A study of the cases will show that many different classifications have been upheld as constitutional[76] .However, an analysis of the contents of the classification test in accordance with the framework described in the previous section will show that such deference is in-built in the test and it is structurally designed to uphold most constitutional challenges under Article 14[77]. It is perhaps for this reason alone that the Court felt the need to revisit the meaning of this article and give it a palatable and glamorous packaging via the test of arbitrariness. The test of reasonable classification has been used in a plethora of Constitutional challenges ranging from Indira Sawhney's case on reservations , the Aadharjudgement justifying the Aadhar Act to the recently challenged Citizenship Amendment Act,2019.

Post the emergency era, the habaes corpus case had damaged the reputation of the Supreme Court to a large extent. Eager to restore the Supreme Court's image as the 'Sentinel on the qui vive' J. Bhagwati in his majority opinion in the case of E. P Royappa expounded the meaning of Article 14 and held that "*Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to*

[76]MP Jain, Indian Constitutional Law 858 (5th Edn., 2004)
[77]TarunabhKhaitan , Journal of Indian Law Institute (JILI) , Volume 50 , 2008

arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14"[78]. This was the first instance of the Apex Court going away from the otherwise popular 'reasonable classification test'. This approach of the Apex Court trickled down in the Maneka Gandhi case as well where Bhagwati J again concurring with the majority in a 6:1 decision observed that "*Article 14 strikes, at arbitrariness in State action and ensures fairness and equality of treatment.*"[79] The doctrine was continuously used in subsequent judgments like the Ajay Hasia case[80] to strike down State action which was deemed to be arbitrary. This doctrine was simply a case of the Court deeming that a particular State action was ***so erroneous*** in the letter and spirit of law and the Constitution that it did now warrant comparisons or justifications of any sort hence effectively throwing out the doctrine of reasonable classification. While the articulation of a seemingly new standard was celebrated by many scholars and constitutionalists, who had lamented the inadequacy and inappropriateness of the 'reasonable classification' test when applied to certain cases, the doctrine of arbitrariness was not without its critics. The most piercing criticism came from the celebrated constitutional expert H.M. Seervai who stated that "*The new doctrine hangs in the air, because it propounds a theory of equality without reference to the language of Art. 14* [81]." Notwithstanding the soundness or otherwise of the arguments against the enunciation of the 'new doctrine', there is certain amount of vagueness associated with the theory of non-arbitrariness that has troubled lawyers and academicians alike. Considering the fancy looking but yet bewildering nature of the article it was only a matter of time till the Apex Court held in the case of State of A.P. v. McDowellthat "*no*

[78]E.P. Royappa v. State of Tamil Nadu (1974) 4 SCC 3
[79]Maneka Gandhi v. Union of India (1978) 1 SCC 248.
[80]Ajay Hasiavs Khalid MujibSehravardi&Ors. 1981 AIR 487
[81]ARBITRARINESS ANALYSIS UNDER ARTICLE 14 WITH SPECIAL REFERENCE TO REVIEW OF PRIMARY LEGISLATION , ILI Law Review , Shivam LLM (2015-16)

enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act."[82] However the question of whether the judiciary can strike down a legislation only on the basis of it being arbitrary in nature was finally put to rest in the case of Navtej Singh Johar where the Court read down S.377 of the Indian Penal Code on the account of it being "manifestly arbitrary" in nature. It finally lays to rest the dilemma of whether Article 14 contains any residual positive content, beyond the 'classification' test. If the new doctrine i.e. the test of arbitrariness comes with no further prescription, it is truly formless and structure-less. It is incapable of controlling judicial decision-making in any meaningful way. The doctrines risks conferring an executive like power to the judiciary to strike down a piece of legislation passed by a democratically elected parliament using a tool which has no discernible limitations and hence in the process also runs a risk of violating the basic structure of the constitution vis-à-vis the theory of separation of powers. It can be argued that instead of using a different arbitrariness doctrine altogether an effort must be made to fit the concept of arbitrariness within the reasonable classification doctrine itself. The classification tests as mentioned above warrants an intelligible differentia between the ones who have been grouped together and the ones who have been excluded from the ambit of State action and a rational nexus between the classification made and the object sought to be achieved via that classification. For a classification to be termed as "intelligible" it cannot be such without an application of mind. Therefore, as a natural corollary to that argument, an intelligible differentia or exclusion of a particular group cannot be arbitrary in itself as it needs to have a certain rationale behind it.

For example, assuming that "teacher" is a state entity, if a teacher expels a random student everyday out of his class of 60 students, one might argue that since there lies no intelligible differentia between the expelled student and the remaining 59 students, it

[82]State of Andhra Pradesh v. Mcdowell and Co. 1996 AIR 1627

violates the reasonable classification doctrine. However, if the teacher expels all 60 students every day, one might not be inclined to use this doctrine as there was no apparent unequal treatment meted out to any particular student. In such a case an argument saying that the teacher's actions are arbitrary in nature would arise. Herein should the arbitrariness doctrine be read into the classification doctrine as has been argued above, the result would be that the teacher's actions are still capable of violating the reasonable classification doctrine because there lies no intelligible differentia between the students of this particular school and students of other schools all around the nation who have a legitimate expectation of being treated in a particular manner and not be expelled every day. In such a manner, the facet of non-arbitrariness is read into the term "intelligible differentia" as for the classification to be intelligible it necessarily cannot be fanciful, evasive or arbitrary. This however has not been dwelled into by the Courts and they continue to use either of the two doctrines interchangeably as there has been a lack of guidelines on the precise usage of these doctrines according to changing situations either by judicial pronouncements of the Court or by the force of law via the Legislative and the Executive alike.

Therefore as rightly summed up by Professor Khaitan, as far as current jurisprudence on Article 14 goes, the following conclusions emerge: (a) the 'reasonable classification test' continues to be applied for testing the constitutionality of classificatory rules; (b) it is a limited and highly formalistic test applied deferentially; (c) the 'arbitrariness test' is really a test of unreasonableness of measures which do not entail comparison with each other. Hence Article 14 has become a victim of the weak 'reasonable classification' doctrine and the over-the-top 'arbitrariness' doctrine. The former needs expansion and

substantiation, the latter relegation to its rightful place as a standard of administrative review only[83].

As far as existing state of affairs are concerned, the lack of a clear and decisive mechanism for the judiciary to effectively use either of the tests not according to the discretion of the judge but according to a fool-proof modus makes Article 14 a bothering Constitutional conundrum.

[83]https://indconlawphil.wordpress.com/2020/05/06/rethinking-manifest-arbitrariness-in-article-14-part-i-introducing-the-argument/

I. INTERSECTION OF PUBLIC LAW: ANALYSING THE MIGRANT CRISIS FROM THE PERSPECTIVE OF INTERNATIONAL LABOUR LAW

-AUTHORED BY: ADITHI RAO, IV BA LLB

INTRODUCTION

In the time of crisis due to the outbreak of novel disease COVID-19 the apex court and the governments seem to have forgotten the plight of migrant workers arising out of it. India is home to 45.36 crore or 37% of the country's population of migrant workers as per the 2011 census. This includes inter-state migrants as well as migrants within the state. Estimates based on census 2011, NSSO surveys and Economic survey show that there are about 65 million inter-state migrants and 33% of these are workers.[84] These are the number of people practically wanting to go back to their home states. The class of migrant workers can be divided into two: One being the poorest and uneducated; people from not so socially acceptable groups (Scheduled castes, Schedules tribes and other backward classes). The work taken up by these people are low income jobs like unskilled work at construction sites, agricultural fields and in project sites. The other class of migrant workers are slightly better off groups with partial education and certain skill sets. These workers usually work as household help, or in small industries like textile, cab services etc. This lockdown has resulted in loss of income of both these classes but largely the first type of migrants. This is a direct result of the state action of announcing a lockdown on a four hour notice, thereby giving no time to the migrants to

[84]https://indianexpress.com/article/explained/coronavirus-india-lockdown-migran-workers-mass-exodus-6348834/

prepare or plan their normal subsistence during this time. Due to non- availability of transportation for them to return home, these migrant workers with their families have taken the desperate but only option of walking, bicycling or hitchhiking thousands of kilometres. Dozens have died as a result of accidents or from mere exhaustion of trying to get home. In spite of India entering the fourth phase of the lockdown, the government as well the temple of justice have shown a blind eye towards the plight of these migrant workers. Though the government has started ShramikTrains, the question still remains as to whether its implementation is proper and will trains alone be able to overcome this plight?

This article will firstly discuss the result of such a drastic step by the government on the fundamental rights of these migrant workers. Secondly it will discuss the consequences of such a state action under the international law. It will cover the substantive rights which have been guaranteed to workers under certain international conventions through national legislations. Thirdly, it will discuss the possible ways forward as to whether an action can be initiated internationally or not?

INDIAN LAWS AND THE SITUATION TILL NOW

The irony is that not a single legislation defines who a migrant labour is. A brief history of them takes us back to the 1970s, when in Orissa and some other parts of the country - this system of inter-state migrant workers known as *dadan* labour started emerging. These workers were recruited by contractors/Khatadars/Sardars and in return were promised wages and certain facilities. Unfortunately this promise was never kept and when this was realised by the government, it resulted in the enactment of the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979. Certain key features of the Act are that every establishment with five or more inter-state workers will have to be registered under the Central government or the State government and subsequently acquire a licence. This section in the present scenario

seems to be an illusion. If the provisions of this section would have been complied with, the state/central government would already have data in hand and could have come up with a plan for their transportation rather than to make them waiting for more than a month. It is mandatory under the Act to pay wages, any dues payable to the workman and pay for his displacement.[85]The migrant workers due to lack of resources were not able to contact their contractors who in turn blamed their superiors for not being able to pay these workers. [86] This has led to a lot of the workers with no basic facilities such as food, water, shelter. The rate of food distress is high and more than half of the workers do not have access to government rations. The International Convention on Economic, Social and Cultural Rights states that the right to adequate food includes adequacy, availability and permanent access to food with dignity. This right has also been affirmed by the apex court in PUCL v Union[87] of India wherein it held that it is the duty of the states and union territories to ensure that no one dies of starvation or malnutrition. This means that the government has to aid and assist the people to make sure that their fundamental right to food is not jeopardized.

Justice Bhagwati while delivering a judgement[88] rightly said that:

"*Rule of Law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the Rule of Law is meant for them also, though today it exists only on paper and not in reality.*"

[85]Sections 12(1)(c), 13, 14

[86]https://www.newindianexpress.com/cities/chennai/2020/apr/22/migrant-labourers-not-paid-bosses-engage-in-blame-game-2133571.html

[87] (SC 2001) Writ Petition No. 196/2001

[88]People's Union For Democratic Republic vs Union Of India & Others 1982 AIR 1473, 1983 SCR (1) 456

Sadly, even after 38 years the scenario has not changed much. It was absolutely heart-breaking to witness that the first time when the case of migrant workers was filed before the apex court it rejected the petition. The Centre blatantly denied the presence of any migrant workers on the roads and this was simply accepted by the Supreme Court.[89] This is highly problematic mainly because there is ample evidence such as photos and interviews of the workers themselves - walking on the roads in spite of the scorching sun and lack of basic facilities.[90] However after much criticism because of such insensitive inactions, the apex court took suomoto cognizance of the matter and issued guidelines for safe return of the migrants. The Court directed the states to bear the train fare (Shramik Trains), ensure that they are provided with basic facilities during their journey. The states shall ensure registration of all the workers and those found walking on roads should be provided with immediate assistance to prevent future mishaps. This might be one small step taken by the Supreme Court. [91]The High Court of various states like Karnataka, Gujarat, Andhra Pradesh however rightly took swift action way before and provided similar reliefs through directions. It is important to note that this is just one small step. There are new issues cropping up every day. The National Human Rights Commission (NHRC) observed that poor labourers were treated without any human decency in these trains such as food which resulted in death on board. These trains were taking more than normal time to reach the destination. It refused to entertain any excuses and called for a thorough investigation.

[89]https://scroll.in/latest/962027/how-can-we-stop-it-if-they-sleep-on-railway-tracks-sc-rejects-plea-seeking-shelter-for-migrants

[90]AlakhAlokSrivastava v Union of India.WP (C) NO. 468 of 2020

[91]SUO MOTU WRIT PETITION (CIVIL) No(s). 6/2020 IN RE : PROBLEMS AND MISERIES OF MIGRANT LABOURERS

INTERNATIONAL CONVENTIONS AND SUSPENSION OF LABOUR LAWS

The ILO Director-General Guy Ryder expressed his concerns over real faces of work and the urgent need for the nations to formulate policies which are flexible and targeted to support workers and businesses particular in the informal economy and others who are vulnerable. It also said that economic reactivation should follow a job-rich approach, backed by stronger employment policies and institutions, better-resourced and comprehensive social protection systems. [92]

India has been a member of the International Labour Organisation since 1919. It has ratified six out of eight fundamental conventions of the ILO. Unfortunately India has not ratified certain technical conventions on migrant workers like that of Migration for Employment Convention, 1949 (C097) and Migrant Workers (Supplementary Provisions) Convention, 1975(C143). [93] For example: Article 4 of C097 stipulates that each member shall be responsible for taking appropriate measures to facilitate the departure, journey and reception of migrants for employment. The state is also responsible for the provision of appropriate medical services for these migrant labourers.[94] Under Section 14 of Vienna convention on Law of Treaties a country will be bound by the provisions of a treaty only when it has ratified it. As India has not ratified these conventions it will not be bound by the principles under those conventions.[95] However it is important to understand that post the lockdown the chances are less that the workers will return from their hometowns and the job opportunities are limited in their villages. Therefore it is the responsibility of the government to make sure that there is alternate employment for them and in case they decide to return, they should be welcomed with job security and safe spaces. Instead certain state governments like

[92]https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_740877.pdf

[93]https://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102691

[94]Article 5, Migration for Employment Convention, 1949 (No. 97)

[95]https://www.oas.org/legal/english/docs/Vienna%20Convention%20Treaties.htm

Uttar Pradesh, Madhya Pradesh, and Himachal Pradesh etc have in a hasty manner repealed certain essential labour laws such as the Industrial Disputes Act 1947, Trade Unions Act, 1926 among other acts which guaranteed the fundamental rights of the workers.[96]

Nationally it will be interesting to see the constitutional validity of the suspension before a court of law. Under the Constitution, labour is a concurrent subject, i.e., both the Central and State governments can enact labour legislation, with the clause that the state legislature cannot enact a law which is repugnant to the central law. Industrial Disputes Act being a central legislation just cannot be done away with selectively by a state government.

It is also pertinent to note that the suspension has been done through an Ordinance. Under Article 213 of the Constitution of India such an ordinance has to receive the president's assent at times when an ordinance is passed by the state government considering that the matter to be so urgent that it cannot wait for the central government. The ordinance is to have the same effect as a law when it passes the state legislature. But the catch here is that such an ordinance is to come before the assembly within six months. In such a case the question remains is that can a state government suspend the laws for a period of straight three years without first getting it approved.

CERTAIN POSSIBLE STEPS UNDER ILO

Under the International law conventions, whenever a Member state violates the articles under the conventions that it has ratified to, a complaint can be filed by :[97]

- another Member State also having ratified the same convention

[96]https://www.obhanandassociates.com/blog/suspension-of-labour-laws-amidst-covid-19/

[97]Article 26 of the ILO Constitution

- any delegate to the ILO Conference (each Member State is also represented by a delegate representing the employers and a delegate representing the workers)
- the ILO Governing Body.

In other words, the complaint cannot be filed by an individual. It is mostly done by the trade unions of the country which are represented in the ILO.

Having received a complaint, the Governing Body has the powers to appoint a Commission of Inquiry, composed of three independent members, which has the mission to carry out a close examination of the complaint, to prove the facts and formulate a recommendation as regards measures to be taken for solving the raised issues.

If a State refuses to comply with recommendations of the Commission of Inquiry, the Governing Body can take measures to which it deems fit in virtue of Article 33 of the ILO Constitution. In 2003 the ILO set up a commission for the serious violations of workers' rights in Belarus. The ILO observed that due to its membership in the ILO it is the government's responsibility to abide by the provisions of the conventions. In case of non- observance and cooperation the ILO said that it will mobilize support from the European Union to form launch an inquiry which will lead to possible withdrawal of trade privileges under the EU Generalised System of Preferences. [98]In 2000 the ILO also took the harshest step of imposing sanctions against Myanmar for the failure on the part of the government to end forces labour and was not following the recommendations given by the commission. The country also stopped getting assistance from ILO and these were relaxed only in the year 2012.[99] However, the ILO has also

[98]https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/pressrelease/wcms_112358.pdf

[99]https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_183287/lang--en/index.htm

expressed its concerns over these drastic actions of suspension taken by the state governments.[100]

CONCLUSION

One needs to see how effective the SC guidelines are going to be given the fact that the number of migrant workers in each state is undocumented and whether it will reach the beneficiaries. The present situation shows that there is a huge gap and lack of nexus between judicial decision and executive implementation. The courts should be vigilant and on their toes to ensure compliance by governments.

The route for relief via international platforms seems unviable due to applicability of different convections. Instead, the principles imbibed through this conventions must be used to pressurize Governments to give labour its rightful status. At this juncture it is not a matter of just labour laws but also human rights which India is obligated to follow under various international conventions such as UDHR and ICESCR. Labour is not expendable and cannot be a bargaining chip for increasing investments in a manner contrary to international norms

[100]https://www.newindianexpress.com/opinions/editorials/2020/may/28/ilos-concerns-on-labour-laws-should-be-heeded-2148908.html

J. OBJECTION YOUR HONOUR!

AUTHORED BY: RASHMI RAGHAVAN, IV BA LLB

Education seems to be the modern age's solution to most problems. Being a standard of Human Development means that education is seen as a means to reduce a country's economic dependence on primary sectors, it is shown to alleviate poverty and raise the standard of living, and on a broader level; facilitates the emergence of a consciousness varied from caste, class and gender. Since education is the very foundation of good citizenship, the State has taken the responsibility to ensure that education remains accessible to all its citizens in the form of Public Institutions that it administers and runs. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. Unfortunately, such opportunity sees cut-throat competition among students ultimately leading the battle to the Courts.

When the constitution was taking its first steps, the High Court of Madras, and the Supreme Court grappled with their first case on 'reverse discrimination'. While both Courts held that a person from a majority community should not be discriminated against solely because of their caste, this article tries to analyse the points that the Court may have overlooked in a bid to do justice to the literal text of the Constitution.

The Madras Government, in account of its Communal Govt. Order (hereinafter, G.O), had certain specific allocations for students belonging to different religious, caste and gender groups to its medical colleges. The allocation covered Brahmins, Non Brahmin Hindus, Harijans, Muslims, Christians and women. Since only 2 seats were available for Brahmins within this group, both (Brahmin) Petitioners challenged the communal G.O as being violative on the grounds of Articles 15(1) and 29(2). They alleged that admission was being denied to them solely because of their caste identity. Although the lead Petitioner, Mrs. ChampakamDorairajan did not appear for the entrance exams, the

second Petitioner claimed that despite his high scores he was denied entry, whereas a lower scoring Harijan was allowed admission.

The submissions involved a debate over the word "*only*" used as part of Articles 15(1) and 29(2). Both articles restrict the state from facilitating discrimination among citizens only on the grounds of religion, race, caste, sex and other protected grounds. Here, the State argued that the exclusion of students was not based *exclusively* on their religion or caste, but in addition to their qualifying marks in the examination. Thus, marks + membership within a group was not against the mandate of both challenged provisions and hence not discriminatory towards the applicants in any way. However, the Court refused to read any meaning into the scope of the word "*only*". Two judges admitted that the meaning of both articles would not change even if the word "only" was omitted from the bare text. Only *Venkatachala Moorthy J* was convinced with the explanation of the word only as meaning "***solely because of, exclusively and without anything else***". This case involved an exclusion of some students on grounds other than their religion and such exclusion cannot be called as discrimination that unfairly pits one against another. An apt case for scrutiny of legislations on this ground is the celebrated case of *Brown v Board of Education*.[101] In the case, Linda Brown and several other coloured students were denied admission into white schools because of their race. The prevailing doctrine at that time was *"separate but equal"*.[102] Thus, coloured children had to attend schools exclusively set up for them but which were similar in standard to white schools. While striking down such a blatantly discriminatory provision, *J Warren*, writing the majority opinion held that

[101]347 U.S 483

[102]The U.S Supreme Court in a series of cases held that the Equal Protection Clause did not mean that the Constitution was to treat everyone similarly in all situations. Thus, different people could be segregated and still be treated equally. This interpretation led to segregation in train coaches, shops, restaurants, schools and even telephone booths between White and coloured people.

Segregation of children in public schools solely on the basis of race deprives children of the minority group of equal educational opportunities, even though the physical facilities and other "tangible" factors may be equal.

Thus, if the State of Madras conducted no exams (thereby closing all ways to ascertain academic spirit and merit) and set up caste and community as an entry level barrier itself, the case would aptly attract the scrutiny of Articles 15(1) and 29(2).

The originalist approach of the Court also prevented it from a more cohesive reading of the Constitution. The bench opined that since no affirmative action provision existed for public institutions, there was no fundamental right for minorities to claim protection. The judges opined that Article 16(4) which provided for reservations in public employment was limited to the scheme of Article 16(1) and no similar analogy could be drawn about 15(1). They refused to read Article 15(3) making special provisions for women and children as a way to interpret affirmative action as an embodiment of equality in public institutions run by the State. Even if Article 15(4) didn't exist in 1950, the Court had the all encompassing Article 14, to test whether the scheme was arbitrary. The Court saw that since all citizens were equal, the G.O was choosing caste and community over other factors. However, the fact that the G.O divided people into categories made this apt for testing whether such criteria were intelligible and had a rational nexus to the object as per the scheme of Article 14. Such a test would have surfaced that categories were made based on the population statistics of the state, mixed with literary and economic attainments of its people. The effect of such a categorization was to ensure that a proportionate number of seats are filled by all the communities. Such an order goes beyond formal equality to ensure equality of result. As the State pleaded, if such a G.O didn't exist, there would be a lopsided admission of 249 Brahmins, no Harijans and only 3 Muslims to the course. Admission solely on merit deprived all other communities at accessing universities, thereby making the right to

equality an unattainable ideal for such groups. The court could have also factored in whether such measures were primarily meant to improve diversity and alleviate backwardness of vulnerable groups or rather provides them with no tangible benefit after all.[103] Most times, Courts confused such affirmative action measures as penalizing the privileged and further contributing to stereotypes. If the Court would have seen the groups as having structural differences in class, status and income to the Petitioners, it could have held that the G.O did not nullify the equal protection of laws.

Finally, the judges failed to appreciate the argument made under Article 46. This DPSP allowed the state to take measures for the upliftment of weaker sections of society. The judges felt that since these provisions were not enforceable in a Court of law, they were subservient to existing fundamental rights of the Petitioners. The Court believed that such apportionment could not be called as 'social justice' when it unfairly pitted one community against the other. However, a broader reading of Article 46 provides that the State has the exclusive mandate to decide "*who*" were the weaker sections of society and "*what*" measures were necessary for their educational and economic upliftment. Justice according to Rawls depends not only in equality to access social goods but also in facilitating the interests of those who are the least well of in the scheme of inequality. The communal G.O did not categorize people on a whim, but rather on the specific realities of caste and gender discrimination in Tamil Nadu existing since the pre-independence era. A further enquiry could have aided the Court in concluding that the measures were aimed at protecting the ideals of social justice and individual dignity; two of the most cherished values enshrined in our Preamble.

The fallout of this judgment was the passage of the Constitution (First Amendment) Act of 1951. Here, the Parliament specifically gave effect to Article 46 by bringing in Article 15(4). This provision cast a wide net over affirmative action by including other

[103]TarunabhKhaitan, Journal of Indian Law Institute, Vol. 50, 2008

backward classes of citizens within its fold and additionally broadened it to other areas of socio-economic welfare. Thus, the Parliament overrode the pronouncement in Champakam Dorairajan by a specific amendment. As Justice Marshall commented on affirmative action[104],

"If we are to ever become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors."

[104]University of California v Bakke, 438 U.S 265

K. APPURTENANT SCHOLARSHIP

COMPILED BY ASHOK PANDEY, III BALLB

1. Constitutional Amendments: Making, Breaking and Changing Constitutions; by Richard Albert

A masterpiece by Richard Albert which presents the first comprehensive study of constitution amendment rules. It draws from constitutions across the word and lays emphasis on how and why leaders make amendments in defiance of their own constitution amendment rules. It also presents a contrasting idea of "constitutional dismemberment" as a contrast to the idea of "Constitutional amendment". An amazing read to understand one of the fundamental puzzles in constitutional law.

2. The Invisible Constitution; by Laurence Tribe

In this book, renowned legal scholar Laurence Tribe shows that what is not written in the Constitution also plays a key role in its interpretation. Tribe argues that there is an unseen constitution--impalpable but powerful--that accompanies the parchment version. It is the visible document's shadow, its dark matter: always there and possessing some of its key meanings and values despite its absence on the page. As Tribe illustrates, some of our most cherished and widely held beliefs about constitutional rights are not part of the written document, but can only be deduced by piecing together hints and clues from it.

3. Vicissitudes and Limitations of the Doctrine of Basic Structure; by Setu Gupta

The doctrine has altered the itinerary of India's Constitutional jurisprudence. Setu Gupta, in his article pays a mark of respect to its origins and its efforts protect it and preserve it throughout history. Furthermore, it is considered that the basic structure doctrine is applicable only to constitutional amendments; however, many judges of the Supreme Court have seen this aspect in a different way and there have been opposing opinions on this area under discussion. Since this does not seem to be a simple concept already with the applicability of the doctrine under discussion, this article will try to track down what numerous Supreme Court judges have affirmed in their rulings on the applicability of the basic structure doctrine to ordinary legislations and finally wrap up with some observations which indeed is a puzzle in the Constitutional law of India.

4. 136TH REPORT OF THE LAW COMMISSION OF INDIA

The applicability of a High Court's adjudication upon the constitutionality of a Central law beyond the jurisdiction of the High Court has indeed been an intriguing puzzle in India's constitutional law arena. The 136th report of the Law Commission of India, titled "Conflicts in High Court Decisions on Central Laws- How to foreclose and how to resolve" submitted in 1990 to the legislative department, deals with the same.

5. DIVIDED LAWS IN A UNIFIED NATION: TERRITORIAL APPLICATION OF HIGH COURT DECISIONS; by Jasmine Joseph [2 NUJS L. Rev. 471 (2009)] [105]

This research paper was written after the passing of the Naz foundation judgment by the Delhi High Court to address the question of territorial applicability of High Court judgments.

6. **Right to Equality-Reasonable Classification Rule versus Rule against Arbitrariness under the Indian Constitution: A Note; by Uday Raj Rai**[106]

7. Arbitrariness Analysis under Article 14 with special reference to review of Primary legislation; by Shivam [ILI Law Review (Summer Issue 2016)][107]

Article 14 of the Constitution of India guarantees to every person equality before law and equal protection of law. Any act of the state which abridges this right undergoes the tests of reasonable classification i.e. intelligible differentia and rational nexus. However, the treasures of judicial pronouncements in this regard are witness to the arbitrariness which kicks in and this has made arbitrariness a heavily discussed topic

[105] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2047626

[106]Available at:: https://www.researchgate.net/publication/334284805_Right_to_Equality-Reasonable_Classification_Rule_Versus_Rule_Against_Arbitrariness_Under_the_Indian_Constitution_A_Note_

[107]Available at: https://www.google.com/url?sa=t&source=web&rct=j&url=http://ili.ac.in/pdf/shivam.pdf&ved=2ahUKEwiIjrGaxdjpAhUMfX0KHYEMApAQFjACegQIARAC&usg=AOvVaw1PslvFhKzKgn09b9ge_i1M&cshid=1590737378305

under public law, especially with regards to Article 14. This is a unique puzzle in the Constitution of India and the research papers mentioned in serial number 6 and 7 are written by renowned scholars which throw some light on this discussion.

L. PUBLIC LAW ON OTHER BLOGS

COMPILED BY ASHOK PANDEY, III BALLB

1. https://www.google.com/amp/s/www.livelaw.in/amp/columns/constitutional-silences-156363
2. https://www.google.com/amp/s/indconlawphil.wordpress.com/2019/11/09/guest-post-constitutional-silences-balancing-of-rights-and-the-concept-of-a-neutralising-device/amp/
3. https://indconlawphil.wordpress.com/tag/arbitrariness/
4. https://indconlawphil.wordpress.com/category/equality/article-14/arbitrariness/
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M. MESMERISING QUOTES

COMPILED BY: BHARGAVBHAMIDIPATI, III BALLB

"However good a Constitution may be, if those implementing it are not good, it will prove to be bad. However bad a Constitution may be, if those implementing it are good, it will prove to be good."

- Dr. B. R. Ambedkar

"Arbitrary governing hath no alliance with god..."

-Samuel Rutherford

"On every question of construction, let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed."

-Thomas Jefferson

"The survival of our democracy and the unity and integrity of our nation depend upon the realization that constitutional morality is no less than constitutional legality. Dharma lives in the heart of public men; when it dies there, no Constitution, no law, no amendment, can save it."

-NanabhoyPalkhivala (Privy Purses case[108])

[108]MadhavRaoJivajiRaoScindia v. Union of India (1971) 1 SCC 85

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