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Pragyaan: Journal of Law

From the Chief Editor

It gives us great pleasure to present to readers, the Volume 11, Issue 1 of the Pragyaan: Journal of law, which is the product of our correspondence, collaboration and contribution over the years by the esteemed scholars whose scholarly research articles are published in our Journal.

This Volume of the Pragyaan is fully immersed with publications which have attracted high quality submissions with variety of research topic undertaken by Indian legal fraternity. We are pleased to present fourteen articles which in themselves are putting forth better understanding of a range of issues which are of contemporaneous importance.

The objective of Pragyaan: Journal of law is to publish up-to-date, high-quality and original research papers along with relevant and insightful reviews. As such, the journal aspires to be vibrant, engaging, accessible, and at the same time makes it integrative and challenging.

We offer scholars to contribute their research work, either individually or collaboratively for their own development and simultaneously for making the journal a leading journal among legal fraternity.

We acknowledge the support of our faculty advisors, the hard work of editorial staff and the interest shown by the contributors and readers that we have been able to come out successfully year after year with each volume . I express my sincere thanks to all our contributors, members of Advisory board and referees whose untired efforts made the publication of the journal possible

Prof. (Dr.) R.N. Sharma

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In the Hope of Transformation into and Egalitarian Society

Dr. Chidananda Reddy S. Patil*

ABSTRACT

Framing a Constitution is a bold venture on the part of a population to set direction and chalk out the course for the functioning of the nation to realise the primordial goals contemplated in the constitution. Our constitutional forefathers, with Dr. Babu Rajendra Prasad as the Chairman of the Constituent Assembly, Sir. B.N.Rau as the Constitutional Advisor to Constituent Assembly and Dr. B.R.Ambedkar as the Chairman of the Drafting committee, eminently supported by other scholarly members of the Constituent Assembly have framed a Constitution which fulfils all the requirements of a complete constitution. The Constitution scrutinizes the state power, securing a sphere of liberty for individuals and providing for a pluralistic society. A constitution is perceived as a document that sought to strike a delicate balance between, on one hand, governmental power to accomplish the great ends of civil society and, on the other, individual liberty.[1] Limitations on the part of the government are necessary for obvious reasons. As James Madison put it in The Federalist Papers, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught the mankind the necessity of auxiliary precautions."[2] The Constitution of India has adopted such auxiliary precautions.

The preamble mirrors the type of the republic into which India is constituted into. It is stated, law can and will operate only to the extent permitted by the society. The same equation applies to the fundamental law also. The real Constitution lies in the way it is obtaining in the society at a given point of time. After celebrating the festival of democracy over a period of seven decades, during which the organic Constitution has provided for the requirements of the society, it is incumbent upon the stakeholders to pause for a while, look back and assess whether the Constitution in practice is in consonance with the Constitutional aspirations.

Keywords: Constitution, Egalitarian Society, Simon Commission, Fundamental Rights

Introduction

In the words of H.R.Khanna J., "A Constitution is the basic law relating to the government of the country. It defines various organs of the State, enumerates their functions and demarcates their fields of operation. But a Constitution is more than that. It is the vehicle of a nation's progress. It has to reflect the best in the past traditions of the nation; it has also to provide a considered response to the needs of the present and to possess enough resilience to cope with the demands of the future. A Constitution at the same time has to be a living thing, living not for the one or two generations but for succeeding generations of men and women."[3]

As a consequence of the Simon Commission being vehemently opposed by Indians especially the Congress Party for the lack of a single Indian in the Commission in 1928, the Secretary of State for India, Lord Birkenhead challenged the Indian leaders to draft a constitution for India, implicitly implying that Indians were not capable of finding a common path and drafting a constitution. It is overwhelming to note that the Constituent Assembly not only successfully drafted a Constitution but it has drafted a complete Constitution, which has responded to the needs of the nation, to a great extent, over a period of seven decades. India has proved Lord Birkenhead wrong successfully.

John W. Burgess states the following as the fundamental parts of a proper constitution. A complete constitution may be said to consist of three fundamental parts:[4]

I. Organisation of the state for the accomplishment of the future changes in the constitution. This is usually called the amending clause and the amending power which it describes and regulates.

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1 Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution*, (London: Harvard University Press, 1991) p. 6.
2 *op.cit.*
3 H.R.Khanna, *Making of the India's Constitution*, 2nd ed. (Lucknow: Eastern Book Co., 2008), p.3.
4 Raymond Garfield Gattel, ed, *Readings in Political Science*, (Cambridge: Ginn and Company, 1911), Pp.287-88.

II. The constitution of liberty.

III. The constitution of government.

Again, Burgess classifies these three fundamental parts in to seven principles, Viz.,

1. The organisation of the state i.e., Sovereignty of the Constitution.
2. The continued organisation of sovereignty within the constitution.
3. The tracing out of the domain of civil liberty within the Constitution, by the sovereignty, the state.
4. The guarantee of civil liberty ordinarily against every power, except the sovereignty organised within the Constitution.
5. Provision for the temporary suspension of civil liberty by the government in the time of war & public danger;
6. Organisation of the government within the Constitution, by the sovereignty, the state; and
7. The security of the government against all changes, except by the sovereignty organised within the Constitution.

The Indian Constitution when tested against the above seven fundamental parts proves to be a complete constitution. The sovereignty that is with he people of India is organised within the Constitution by the use of opening words "We the people of India" in the Preamble of the Constitution. Further the sovereignty organised in the constitution is manifested in Art.395 of the Constitution which repeals *The Indian Independence Act, 1947* and the *Government of India Act, 1935* which are the enactments of British Parliament. The continued organisation of sovereignty within the constitution finds expression in Art.368 which provides for the power of the Parliament to amend the Constitution. A small amount of constitutive power i.e., the sovereign power is given to Parliament to amend the Constitution to meet the changing needs of the society. There is no need for the whole sovereign power to assemble through its representatives to amend the Constitution. As the power is limited, the Supreme Court has aptly held in *Keshavananda Bharati v. State of Kerala*[5] that the basic structure cannot be amended.

What we find in Part-III of the Constitution, the part relating to Fundamental Rights is the tracing out of the domain of civil liberty within the Constitution, by the sovereignty, the state. These are the rights which are limitations on the power of the state. Of all the restraints placed on the power of the state the most effective is considered the recognition by law certain areas which the Leviathan cannot penetrate, which have come to be known as "rights of Man" or "fundamental liberties."[6] The guarantee of civil liberty is against every power, except the as ordained within the constitution. This liberty will be available to citizens only when the nation survives. Therefore, a good constitution will have a provision for the temporary suspension of liberty in the time of war and public danger. Art.359 of the Constitution provides for suspension of the enforcement of rights conferred by Part-III during emergency (except rights under Arts.20 and 21). Emergency is proclaimed when there is threat to security of India by war or external aggression, or armed rebellion.

The Constitution has further provided for organisation of the government within the constitution by vesting of different powers in different wings of the state. Art.53 vests the executive power of the Union in the President and provides that there shall be a council of ministers to aid and advise the President. Art.79 provides that there shall be a Parliament for the Union and Art.124 provides that there shall be a Supreme Court. Similar provisions are made for states also. The parliamentary form of government, the federal character of the constitution, the independent judiciary with power of judicial review are all treated as basic structure and go to provide for security of government against any change.

This was possible because of the fact that what followed from the Constituent Assembly was an intensity of extensive discussion which was unprecedented in the annals of constitution making.[7] Rajeev Dhawan, an eminent Senior Advocate observes: "The making of the Indian Constitution was indeed a miracle. The task before it was massive. There were huge differences, both inside and outside the Constitution, including the murder of the Mahatma on 30th January 1948- four days before the Draft Constitution was laid before the Assembly. How did this motley crowd, with vociferous views, expressing dissents from each other produce such an elaborate Constitution of 395 articles and 8 schedules- the longest in the world for a democracy of over 300 million people with a framework for the future?"[8] He has attributed one more reason for calling the Indian Constitution a miracle, i.e., "if we were called upon to create a new Constitution afresh now, we would certainly fail."[9]

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5 AIR 1973 SC 1461

6 Karl Loewenstein, *Political Power and the Governmental Process,* (Chicago: The University of Chicago Press, 1961), p. 315.

7 Rajeev Dhawan, *The Constitution of India: Miracle, Surrender, Hope*, (Gurgaon: LexixNexis, 2017), p.10.

8 o*p.cit.*, p.24.

9 o*p.cit.*, p.27.

Apprehensions and cautions of Constitution Makers:

The observations of Dr. B. R. Ambedkar made in the Constituent Assembly on 25th November 1949 bear testimony to the fact that those who will be charged with the responsibility of working the constitution have to discharge their responsibility effectively to translate the constitutional objectives into reality. He observed:[10]

> "On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which is Assembly has to laboriously built up."

H.R.Khanna J., observes that whatever may be the provisions of the Constitution, its ultimate success and effectiveness depends upon the persons who work them and the way those provisions are worked. Persons who are to work the system should be men of caliber, endowed with vision and possessed of catholicity of approach. He proceeds to quote at length from the statement of Dr.Babu Rajendraprasad made in the concluding session of the Constituent Assembly:[11]

> "We have prepared a democratic Constitution. But successful working of democratic institutions requires in those who have to work them willingness to respect the view points of others, capacity for compromise and accommodation. Many things which cannot be written in a Constitution are done by conventions. Let me hope that we shall show those capacities and develop those conventions….
>
> Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. It is a trite saying that a country can have only the Government it deserves. Our Constitution has provision in it which appear to some to be objectionable from one point or another. We must admit that the defects are inherent in the situation in the country and the people at large. If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them. There is a fissiparous tendency arising out of various elements in our life. We have communal differences, caste differences, language differences, provincial differences and so forth. It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups and areas and who will rise over the prejudices which are born of these differences. We can only hope that the country will throw up such men in abundance."

The country always needs such persons of ability, character and commitment as contemplated above. Great statesman are always needed in any society to take the constitution in the set direction. Otherwise, the constitution will be failed.

IV. Indian Constitution's Goal of Social Revolution

The Indian Constitution is first and foremost a social document. It has established a sovereign, socialist, secular, democratic republic, securing justice, liberty and equality to its people assuring fraternity and dignity of individuals. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire constitution by the aim of national renascence, the core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive principles of State Policy. These are the conscience of the Constitution.[12]

The Fundamental Rights and directive Principles had their roots deep in the struggle for independence. And they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India. The Rights and Principles thus connect India's future, present, and past, adding greatly to the significance of their inclusion in the Constitution, and giving strength to

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[10] https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25 accessed on 7-5-2021

[11] http://loksabhaph.nic.in/writereaddata/cadebatefiles/C26111949.html accessed on 7-5-2021

[12] Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, 14th re.pt. 2009 (New Delhi: Oxford University Press, 1966), p.51

the pursuit of the social revolution in India.[13] If Constitutions have souls, the soul of the Indian Constitution was to bring social justice for all through a powerful democratic federation.[14]

With the adoption of the Constitution, India became the largest democracy in the world. A huge territory with the second largest population in the world, socially and economically backward, culturally diverse, was to attempt to achieve administrative and political unity and an economic and social revolution under a democratic constitution.[15] Equipped with their cultural heritage, professional achievements, faith in their ability to govern themselves Indians did not default their tryst with destiny.[16]

V. Working of the Constitution

The effectiveness of a Constitution can be perceived by the way it is used. It can be said to be effective if it is in a position to meet the situations as foreseen by the constitution makers. The closed it is to the inclinations of the people, the greater will be allegiance of people to it. Going by these criteria, the smoothness with which the power has passed from one elected government to another elected government is taken an example of effectiveness of the Constitution.[17] The neighbouring country of Pakistan had to wait for sixty years to achieve this fiat.

No other country in this subcontinent has celebrated constitutional democracy the way it is done in India. Pakistan's Constituent Assembly took seven years to produce the Constitution of the Islamic Republic in 1956. Two years later, it was taken over by dictators. The Constitution of Ceylon of 1948 had to be redone in 1978, the Constitution of the People's Republic of China is changed several times and the present one was adopted in 1982. Burma's Constitution of 1948 collapsed and its governance was taken over by Generals. Bangladesh's Constitution could not avoid turmoil and went the Pakistan way. After struggling for years, Nepal has adopted the present Constitution in 2015. India's Constitution survives the scar of emergency and has continued, its script rewritten by hundred amendments and its meaning transformed by the judiciary.[18]

The temporal survival of the Constitution is, of course, a miracle, but it is not enough. The important question is, has the Constitution worked? Democratic elections continue to take place and the rule of law provisions have been strengthened. But its working pathology show tensions which are more wear and tear, the first testis the absence of an intrinsic institutional morality to work its processes. Without a working morality, no governance is possible. The second test is to ask whether the constitutional socio-economic objectives have been met.[19] In short, have the three organs of the State, the Legislature, the Executive and the Judiciary vindicated in a substantial measure, the solemn promises incorporated in the Constitution? Definitely there is some progress, but not enough. As a result, the institutions of governance have been losing their credibility.[20]

The working of India's Constitution over 70 years also has a lot to answer- the use of military in the North East and Kashmir, the use of emergency provisions to collapse democracy and federalism on a 100 occasions, an unforgivable emergency (1975-77) and the continuing lawlessness and corruption of government, atrocities by its functionaries and its people and more than half of its people living in abject poverty. Preambles may deify a constitution, they cannot insure gross abuses of power and their effect on people's lives.[21] The performance of India in its efforts to achieve the UN Sustainable Development Goals is dismal. The most basic of the human rights- freedom from fesr, freedom from hunger and freedom of faith yet effectively to be secured. Constitutions are not just playgrounds for politics, but possess a purpose. If that purpose fails, the Constitution itself suffers diminution. The Constitution may continue to function, but the constitutional revolution would fail by the standards it set for itself.[22]

"Constitutional morality" is an off-shoot of the liberal constitutionalism. It is two faced. The ruler is promised stability and required to adhere to constitutional norms and purposes with integrity. The ruled must inculcate the culture of obedience, and pursue their constitutional rights

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13 Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, o*p.cit.*

14 Rajeev Dhawan, *The Constitution of India: Miracle, Surrender, Hope*, (Gurgaon: LexixNexis, 2017) p. 23.

15 Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, o*p.cit.*, p.308

16 o*p.cit.*, p.330

17 o*p.cit.,* p.309

18 Rajeev Dhawan, o*p.cit.,* p. 25; While interpreting the Constitution, a proper relationship should be established between the subjective and objective purpose in formulating constitution's ultimate purpose. See Tanasije Marinkovic̀ "Barak's Purposive Interpretation in law as a pattern of Constitutional Interpretative Fidelity," *Baltic Journal of Law & Politics* 9:2 (2016): 85–101

19 Rajeev Dhawan, o*p.cit.,* Pp. 25-26

20 Lokendra Malik ed. *Reclaiming the Vision: Challenges of the Indian Constitutional Law and Governance (Select works of P.P.Rao, Senior Advocate, Supreme Court),* (Gurgao: LexisNexis, 2013),p.277.

21 Rajeev Dhawan, o*p.cit.,* p. 38

22 o*p.cit.,* p. 42

to the point of strong dissent, but never revolution.[23] The values of constitution should be the life breath of everyone. Political leaders, bureaucrats, business houses and common people should all imbibe the values of the constitution and manifest them in their day to day life. There is great responsibility on public figures because ordinary people emulate them.

The Constitution has to achieve its transformative task of creating an egalitarian society by eliminating inequalities of all sorts. For this the constitution makers mandated in Art.37, the first provision of the Directive Principles of State policy that the principles therein laid down are fundamental in the governance of the country and it shall be the duty of the state to apply these principles while making laws. The fact that these principles are not enforceable through a court of law enhances the responsibility of state in implementing these principles. They are to be operationalised through appropriate laws and implementation machinery. The experiment of right to education and early childhood care show the route map in this regard. The entitlements of citizens should not be reduced to the level of government largess or freebees doled out as a gesture of charity. They should be available as a matter of right. Social welfare measures should be pursued irrespective of change in the ruling party. Needs of people in distress should be addressed on priority and not at the sweet will of the government. Help should be forthcoming when it is needed and expected.

Fali Nariman, an eminent jurist, having witnessed the working of the Constitution for more than six decades observes that the rights culture established under the Constitution has shown that it generates dissatisfaction among persons propounding different sets of rights. Too much emphasis on rights serves only to divide and fragment society apart from spreading discontent. People have forgotten the heritage of accommodation and tolerance and have completely overlooked the word 'fraternity' in the Constitution's Preamble. He cautions that it is high time 'we' remember it. Further, he feels that Part IV A - Fundamental Duties should have been included in the Constitution at the inception only; and its subsequent inclusion has not inspired much enthusiasm amongst Inida's ctizenry- simply because this part was added during the unpopular period of the internal emergency (June 1975 to March 1977).[24] It is the need of the hour that these duties are to be brought home to everyone and they should be accorded the place they deserve.

In the field of rights of weaker sections and minorities, there is a substantial shift in the perception. In a society where traditional forms of hierarchy and privilege have licensed exploitation, the Fundamental Rights and Directive Principles and the special provisions for the 'weaker sections' of society and for minorities have been especially important. Making the rules of representative, constitutional democracy specific has given them staying power.[25] The vulnerable have become conscious of their rights and asserting them through constitutional means. In a well-researched book *Working a Democratic Constitution:* The Indian Experience, Prof. Granville Austin, saw in India's document of governance three distinct strands: i) Protecting and enhancing national unity and integrity, ii) Establishing the institutions of democracy, and iii) fostering social reform. Taken together they form "*A seamless web*" but the strands are interdependent- "they must prosper together or not at all."However, lurking in the distance he also perceived an omnipotent fourth strand: '*culture*' which has reference to certain traits, and ingrained experiences and attitudes of India's citizenry "which makes India's soil infertile for democracy"! It is these cultural characteristics that have been inimical to the working of a constitutional democracy- "The written Constitution does provide the direction in which we are to move, but it is the social structures which decide how far we will be able to move and at what pace.[26] He attributes the inadequacies in fulfilling its promise to those working it and to the conditions and circumstances that have defied social and economic reforms.[27]

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[23] o*p.cit.,* p. 43

[24] Fali S. Nariman, *The State of the Nation*, (New Delhi: Hay House India, 2013), Pp.245-246.

[25] Granville Austin, *Working of a Democratic Constitution: A History of the Indian Experience*, 2nd re.pt. 2004 (New Delhi: Oxford University Press, 1999), p.634.

[26] Fali S.Nariman, God Save the Hon'ble Supreme court, (New Delhi: Hay House Publishers (India) Pvt.Ltd., 2018), Pp.66-67.

[27] 'A constitution may indicate the direction in which we are to move, but the social structure will decide how far we are able to move and at what pace,' wrote Andre Beteille. On the basis of this criterion, two thoughts are offered. First, the Constitution and its seamless web have met India's needs. The inadequacies in fulfilling its promise should be assigned to those working it and to conditions and circumstances that have defied greater economic and social reform during the short fifty years since Indians began governing themselves. The country has achieved greatly against greater odds. Second, the society and its hierarchical structure have shown themselves to be far more flexible and adaptable than might have been expected- due directly to incentives in the Constitution, and coincidentally from forces coming from within and outside society. The citizens initially disparaged- by many at home and abroad- as too backward intellectually, economically, and socially to participate successfully in representative democracy, have embraced the vote and turned it to their own account. Their influence is strongly felt in state legislatures and increasingly in parliament. They have used the weapon of their oppression, their castes, as the focus for mobilization, the gain of sand around which to build the pearls of upward social and economic mobility and political influence. No system other than representative democracy would have served society so well and justified the framers' faith that adult suffrage would break the mould of traditional society. Granville Austin, *Working of a Democratic Constitution: A History of the Indian Experience*, *op.cit.*, p.665.

Conclusion

Although there is much to be celebrated, it remains a harsh reality that the performance in achieving the primordial constitutional goals is not satisfactory given the fact that 70 years have elapsed since the adoption of the Constitution. Those at the helm of affairs should understand that, if people get disillusioned about the constitutional guarantees, it may lead to disastrous consequences.

There is a bitter truth is the observation of Rajeev Dhawan that "Despite what is said of India being the world's largest and most diverse democracy, it defies being amongst the best. Some of its politicians have retained the spirit of discourse, others have destroyed it. Amidst the celebration of India's democracy, there is much to mourn about its partial demise. Exhortations of constitutional morality and integrity have their place, but it is the voice and outrage of the people that must eventually restore subversions of the Constitution albeit by direct action."[28]

To produce and have a responsive and responsible government both political and bureaucratic, an alert and vigilant citizenry is of utmost essence. The following observations of H.R.Khanna J., are always relevant and deserve repetition:[29]

Petty minds ill go with the governance of great countries. The edifice of nations and national institutions, we should remember, take long to build. Behind them is the story of sweat, blood and tears, of untold suffering and sacrifice; yet they can be destroyed overnight by the banishment of principles or by the selfishness, petty mindedness or folly of men. If the Indian Constitution is our heritage bequeathed to us by our Founding Fathers, no less are we, the people of India, the trustees and custodians of the values which pulsate within its provisions. A Constitution is not a parchment of paper, it is a way of life and has to be lived upto. Eternal vigilance is the price of liberty and in the final analysis its only keepers are the people. Imbecility of men, history teacher us, always invites the impudence of power.

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[28] Rajeev Dhawan, *op.cit.,* p. 79

[29] H.R.Khanna, *op.cit.,* p.176-177

Compensatory Jurisprudence in India vis-à-vis Tortious Liability of State

Sakshi Agarwal*
Kshitij Kumar Rai**

ABSTRACT

In any civilized society the primary objective of law is to protect the rights and interests of the people. Whenever any injury is suffered by the person or property of an individual; compensation to the victim is a well-established norm which is enforced by the Courts as laid down in the relevant statute. In the light of philosophy to protect human rights, the concept of vicarious liability of State for torts committed by its servants has emerged. This concept of vicarious liability of State has been inherited from the Common law and embodied in Article 300 of the Indian Constitution. As is evident this concept is a part of the branch of tort law and is largely uncodified. With the passage of time the violation of fundamental rights due to tortious acts of the servants of the State has been termed as 'Constitutional Tort'.

As the concept of tortious liability of State remains largely uncodified in India, the extent to which the State should be held liable, has been an issue of contention in a plethora of cases and remains a complex problem till date. The present paper seeks to study the evolution of compensatory jurisprudence with regard to tortious liability of State apart from examining the various principles evolved by the Courts in application of the concept. The paper also attempts to study the various inconsistencies in the application of the present law and emerging trends in the interplay of State liability with fundamental rights.

Keywords: Vicarious Liability, Compensation, Constitutional Tort, State Liability

1. Introduction

Tortious liability of State actually refers to the vicarious accountability of the State for tortious acts committed by its employees. This concept of vicarious liability has originated on the basis of two maxims – Respondent Superior (employer should be held liable for wrongs committed by the employee within the scope of employment) and *Qui facit per alium facit per se* (master should be held responsible for the authorized acts of the servants). In *ICI Ltd.* v. *Shatwell*[1] it was opined by Lord Pearce that – 'the doctrine of vicarious liability is based on social convenience and rough justice'.

To understand the liability of State in India one must refer to Article 300 of the Constitution which, in simple words states that - the liability of the Union of India or States to sue or be sued would be same as that of the Dominion of India and corresponding provinces. So, in order to determine the extent of State liability one has to understand the liability as embodied under Section 176 of the Government of India Act, 1935. The outcome of the aforesaid provision is that the tortious liability of the State is same as that of East India Company in 1858. As the Company performed dual functions – commercial and sovereign; it enjoyed immunity from tortious liability arising out of sovereign functions.[2] As a result, in pre-independence era, State liability was fixed on the basis of distinction between sovereign and non-sovereign functions.

2. Reticent Approaches in Pre-Constitutional Era

Before the commencement of Constitution, as the imposition of State liability was dependent upon the fact whether the tortious liability has arisen out of sovereign function or not, the judiciary attempted to define the extent and ambit of activities which should be considered to sovereign function or otherwise.

2.1. Distinction between sovereign and non-sovereign functions

The *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State*[3] is leading case on point. The Court held the East India Company liable for damages suffered by the plaintiff due to negligence of the workmen employed by the Company. The principle emerging from this case was that if

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1 Imperial Chemical Industries Ltd. v. Shatwell, (1964) 3 WLR 329.
2 M.P. Jain, INDIAN CONSTITUTIONAL LAW, 1659 (Lexis Nexis, 8th Edn., 2018).
3 Peninsular & Oriental Steam Navigation Co. v. Secretary of State, (1861) 5 Bom. H.C.R. App. I [P&O Steam Navigation Co. case].

the liability arose out of activities which could be performed by private individuals too, the Company would be held liable. In nutshell, the proposition laid down in the instant case was that – firstly, if the liability arose out of activities which could be performed by private individuals too, the State would be held liable and secondly, the State cannot be held liable for anythingdone in exercise of sovereign powers. So, for the first time the Court distinguished between sovereign and non-sovereign function of State for fixing the tortious liability of the East India Company.

As is evident, the decision of Calcutta High Court was ill founded and superfluous as it cloaked the East India Company with powers which it did not possess. It is pertinent to note that this judgement not only granted unwarranted powers to the East India Company, but also debased the previous principle laid down in *Moodalay*v. *Morton*[4] wherein, the Privy Council did not acknowledge the sovereignty of East India Company and in all matters and proceedings the latter was held to be subject to jurisdiction of Municipal Courts in the capacity of private trading company.

The ratio laid down in the *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State*[5] case was reiterated and further expanded in a plethora of cases subsequently. For instance, in *Nobin Chunder Dey* v. *The Secretary of State for India*[6] when the defendant State refused to grant license for ganja shop, the plaintiff claimed damages along with refund of money deposited for procurement of license. However, the State was not held liable as grant of license for ganja shop was held to be a sovereign function.

Similarly, in *Gurucharan* v. *State of Madras*[7] the State was not held liable for wrongful confinement as it was discharging only a 'sovereign' function. But in *Secretary of State* v. *Sheoramjee*[8] the State was held liable for wrongful interference of the Forest Range Officer in the removal of timber by the purchaser of forest, as it was a 'commercial' and not a sovereign function.

2.2. Test of 'Act of State'

Although the test of distinction between sovereign and non-sovereign functions for determining State liability was extensively applied by the Courts before as well as after the commencement of the Constitution, in the midst of cases applying and further expounding upon the said distinction, in 1882 a slight departure was made from this approach by virtue of the ruling of the Madras High Court in *The Secretary of State* v. *Hari Bhanji*[9] case. In this case, the plaintiff sued defendant State to recover the enhanced rate of excise duty on salt which the former had to pay because of delay in transit by employees of Port authorities. The State pleaded immunity relying on the ratio of *Nobin Chunder Dey*v. *The Secretary of State for India*;[10] the Court however rejected the contention and held that the distinction of sovereign and non-sovereign function was not the appropriate test. It was elucidated by the Court that certain acts of the State do not fall within the ambit of municipal law such as concluding treaties, making peace or declaring war and with regard to such acts which were not within the cognizance of municipal law, thus State cannot be held liable for such 'acts of state'.

In simple terms, act of state is said to refer to acts of one sovereign against another sovereign or alien and such acts are not subject to municipal law. In a plethora of cases, the State has been exempted from liability by virtue of the concept of immunity with regard to 'acts of State' both in before and after commencement of the Constitution. In *Ex-Raja of Coorg*v. *East India Co.*[11] seizing of territory of Raja of Coorg by the East India Company was held to be an act of Company in its sovereign capacity. Similarly, in *Secretary of State* v. *Kamachee*[12] seizure of properties by the East India Company in absence of any heirs after the death of Raja of Tanjore was held to be an act of State. However, between state and its citizens there can be no act of state, in *P.V. Rao*v. *Khusaldas*[13] the Bombay High Court explained that any act done against the citizens is not immune from judicial scrutiny of municipal courts in accordance with the municipal law. The same has been reiterated by the Supreme Court.

It is to be noted that none of the tests discussed till now were applied consistently. Even though the test of 'act of state' was expounded by the Court in 1882, the test involving determination of sovereign function still outnumbered the former test in its application to a plethora of subsequent cases even in the post constitutional era.

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4 Moodalay v. Morton, (1785) 28 E.R. 1245.
5 *P&O Steam Navigation Co. case*, (1861) 5 Bom. H.C.R. App. I.
6 Nobin Chunder Dey v. The Secretary of State for India, (1876) ILR 1 Cal 12 [Nobin Chunder Dey case].
7 Gurucharan v. State of Madras, (1942) 2 MLJ 14.
8 Secretary of State v. Sheoramjee, (1952) AIR Nag 213.
9 The Secretary of State v. Hari Bhanji and Anr., (1882) ILR 5 Mad 273 [Hari Bhanji case].
10 *Nobin Chunder Dey case*, (1876) ILR 1 Cal 12.
11 Ex-Raja of Coorg v. East India Co., (1860) 54 ER 642.
12 Secretary of State v. Kamachee Boyee Sahaba, (1859) 7 MIA 676.
13 P.V. Rao v. Khusaldas, (1949) AIR Bom 277.

3. Ambivalence in Post Constitutional Era

After the commencement of the Constitution, insofar as codified law regarding vicarious liability of State was concerned, the position of the pre-constitutional era was retained as is evident from the discussion regarding Article 300 of the Constitution in the preceding section of the study. However different principles were applied by the Court in deciding tortious liability of State which will be discussed in the following paragraphs.

In *State of Rajasthan* v. *Vidhyawati*a[14] pedestrian lost his life due to rash and negligent driving of the driver of the jeep which was owned and maintained for official use by the state of Rajasthan. Consequently, the widow of the deceased sued the State and claimed damages. The State was held vicariously liable for the negligence of the driver by the Constitution Bench of the Supreme Court and upheld the decree of High Court of in favour of the plaintiffs allowing compensation of ?15,000.

The Supreme Court pointed out that the injuries resulting in the death of the plaintiff were not caused while the jeep car was being used in connection with sovereign powers of the State. In this case, the Court also pointed out that the rule of immunity – 'king can do no wrong' had no validity in India.

In *Kasturi Lalv. State of Uttar Pradesh*[15] , the plaintiff was prosecuted by the Court on suspicion of theft of certain gold and silver ornaments which were found in his possession. The ornaments were seized and kept in the custody of the police, however the Head Constable misappropriated the same and fled to Pakistan. When the plaintiff was acquitted by the Court he claimed damages against the State for loss due to negligence of the police authorities. The Supreme Court rejected the claim of damages and held that State was not liable because the police authorities were exercising 'sovereign' functions.

The Supreme Court also distinguished between the said case and formerly decided case of *State of Rajasthan* v.*Vidhyawati*[16] by elucidating that in the said case, the tortious liability arose out of the action of keeping the ornaments of the plaintiff in police custody which fell in the ambit of 'sovereign function' however in the former case, the tortious liability arose while performing a non-sovereign function.

Interestingly, in subsequent cases having similar facts, clear departure was made by the Supreme Court. In *State of Gujarat* v. *Memon Mohammed*[17] certain goods of the respondent were seized by the Customs Authorities on the allegation of being smuggled goods. However, when the confiscation order was set aside and the authorities were asked to return the goods; the Supreme Court held the state liable to preserve the seized goods and return them intact as the government was in a position of a bailee.Similarly, in *Basavva Patilv. State of Mysore*[18]*,* when seized ornaments were stolen from police custody before the disposal of the case, the Supreme Court held the State liable to pay compensation to the appellant for the same.

Regarding the relevance of the test of distinction between sovereign and non-sovereign function, a landmark case which becomes relevant is *N.Nagendra Rao* v. *State of Andhra Pradesh.*[19] In this case, when the confiscation order of goods was set aside, the appellant demanded return of goods or realization of price from the state. The Supreme Court held the State liable to compensate the plaintiff with the price of confiscated goods along with interest as the confiscation was illegal. After referring to previous cases on point i.e. *State of Gujarat* v.*Memon Mohammed*[20] and *Basavva Patilv. State of Mysore*[21] the Apex Court ruled that sovereign immunity cannot be claimed as a defence when – State is involved in commercial activities nor will it apply when the officers of State are guilty of interference with life and liberty of any citizen and the same is unwarranted by law. It is notable that in the present case, it was categorically stated by the Court that 'watertight compartmentalization' of functions of State into sovereign and non-sovereign is flawed and inconsistent with modern jurisprudential philosophy.

4. Interplay of State Liability with Fundamental Rights

With the passage of time the higher judiciary was faced with a spate of cases involving breach of fundamental rights of the citizens due to tortious acts committed by the employees of the State. In this regard it is notable that after 1977, in several cases involving unlawful detention and custodial deaths,the Supreme Court awarded compensation to plaintiff whenever ill treatment or gross

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14 State of Rajasthan v. Mst. Vidhyawati and Another, (1962) AIR SC 933 [Vidhyawati case].
15 Kasturilal Ralia Ram Jain v. State of Uttar Pradesh,(1965) AIR SC 1039 [Kasturi Lal case].
16 *Vidhyawati case*, (1962) AIR SC 933.
17 State of Gujarat v. Memon Mohammed Haji Hasam,(1967) AIR SC 1885 [Memon Mohammed case].
18 Basavva Kom Dyamangouda Patil v. State of Mysore, (1977) 4 SCC 358 [Basavva Patil case].
19 N.Nagendra Rao v. State of Andhra Pradesh, (1994) 6 SCC 205 [N.Nagendra Rao case].
20 *Memon Mohammed case,*(1967) AIR SC 1885.
21 *Basavva Patil case*, (1977) 4 SCC 358.

negligence by police officials was established.[22] As is evident by virtue of this trend a new concept was established i.e. Constitutional Tort.

However, for the sake of clarityit should be understood that these torts do not fall within the ambit of the term tort as we traditionally perceive. This is because – firstly, these torts are confined to specific category of civil wrongs by the State resulting in breach of fundamental rights; secondly, the redressal procedure of such torts is not fettered by ordinary course of litigation as they come within the ambit of writ jurisdiction of the High Courts and Supreme Courts and lastly, the defence of sovereign immunity is not applicable to such civil wrongs which result in breach of Constitutional law.

4.1. Evolution of Constitutional Tort

The development of the concept of Constitutional Tort is attributed to several judicial decisions, some of which will be studied in the following paragraphs. In *Devaki Nandan Prasad*v. *State of Bihar*[23] the petitioner was a member of Bihar Education service and was being denied his rightful claim of pension by the state government since his retirement on superannuation. The Supreme directed the State of Bihar to issue the payment of pension along with arrears and interest of 6% from the date of his retirement. In addition to this, the Apex Court along with payment of pension, also awarded exemplary costs of ?25,000 to be paid as the State was held liable for not just undue denial of pension but also for intentional and deliberate harassment of the petitioner.

This ruling is said to be one of the earliest decisions of the Supreme Court which laid down the foundation of awarding compensation for infringement of fundamental rights due to civil wrong committed by the State. Although the Supreme Court had awarded compensation in *State of Rajasthan* v.*Vidhyawati*[24] case which was decided in 1962, but the said case does not find place in discussion of evolution of Constitutional Tort for the simple reason that compensation was awarded because of negligence committed by the servant of the State while performing a non-sovereign function and nowhere was the breach of fundamental right, cited as a cause by the Apex Court for imposing tortious liability of State.

In *Rudul Shah v. State of Bihar*[25] even after his acquittal the petitioner languished in jail for more than 14 years and therefore claimed relief and rehabilitation for such unlawful confinement by the State officials. The Supreme Court in this case not only ordered payment of compensation of ?30,000 as an interim relief, it also clarified that the said compensation did not impede the petitioner from claiming appropriate damages from the erring State by instituting a suit. Although the said ruling of the Court is laudable; considering the costs of litigation and time already suffered in jail, the amount of compensation offered as interim relief to the petitioner could have been more in consonance of the said factors.

Similarly, in *Sebastian M. Hongray*v. *Union of India*[26] the State was held liable when army failed to produce two persons taken in custody before the Court and they were supposed to have met unnatural death while in custody of army. The Court awarded exemplary costs of ?1lac each to the wives of the deceased.

In another landmark case of *Bhim Singh*v. *State of J & K and Anr.*[27] the petitioner was awarded compensation of `50,000 as State of Jammu and Kashmir was held liable for wrongful detention of the petitioner by the police and preventing him from attending the session of the Legislative Assembly. Similarly, in a number of cases such as *Saheli* v. *Commissioner of Police*[28] the Supreme Court recognized tortious liability of State for infringing fundamental rights of the citizens.

4.2. Application of defence of Sovereign Immunity in Constitutional Torts

In context of Constitutional Tort, it has been affirmed by the Supreme Court that the defence of sovereign immunity is not applicable. This has been established by the Apex Court in various landmark cases. In *Nilabati Behra*v. *State of Orissa*[29] the petitioner's son was detained in police custody with regard to investigation for offence of theft, subsequently he was found dead on railway tracks with multiple injuries. The petitioner claimed compensation from State of Orissa as police atrocities had led to breach of fundamental right to life and liberty of her son. The Supreme Court held the State liable for infringement of fundamental rights of the deceased and awarded compensation of ?1,50,000 to the petitioner and also

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[22] National Commission to Review the Working of the Constitution, *A Consultation Paper on theLiability of State in Tort*, 26 (2001),*available at*https://legalaffairs.gov.in/sites/default/files/(XI)LiabilityofStateinTort.pdf (Last visited on March 09, 2021).

[23] Devaki Nandan Prasad v State of Bihar, (1983) AIR SC 1184.

[24] *Vidhyawati case*, (1962) AIR SC 933.

[25] Rudul Shah v. State of Bihar &Anr., (1983) AIR SC 1086.

[26] Sebastian M. Hongray v. Union of India, (1984) AIR SC 1026.

[27] Bhim Singh v. State of J & K and Anr., (1986) AIR SC 495.

[28] Saheli v. Commissioner of Police, (1990) 1 SCC 422.

[29] Nilabati Behera v. State of Orissa, (1993)2 SCC 746 [Nilabati Behera case].

directed the State to pay an additional sum of ?10,000 as costs to the Supreme Court Legal Aid Committee.

The Apex Court in imposing tortious liability on State highlighted that defence of sovereign immunity will not be available in cases of infringement of fundamental rights of the plaintiff as in such cases the State is held to be strictly liable. The rationale for award of monetary compensation was also elucidated by the Court in this case when it observed that for doing complete justice and upholding fundamental rights, it may become necessary in appropriate cases to award compensation in absence of any alternate mode of redress. The Apex Court also reaffirmed the right to compensation by referring to the International Covenant on Civil and Political Rights[30] wherein it has been expressly stated that in cases of unlawful arrest or detention by the State, the victim has an enforceable right to compensation and is in addition to remedy in private law.

The said proposition was reiterated in *D.K. Basu* v. *State of West Bengal*[31] where in it was held that claim for compensation due to breach of fundamental right is based on strict liability and is in addition to remedy in private law.

The Apex Court in *Chairman Railway Board* v. *Chandrima Das*[32] clarified that the doctrine of sovereign immunity is longer relevant in the present scenario of welfare state. In light of the fact that the State functions have increased manifold, the efficacy of doctrine of sovereign immunity as laid down in *Kasturi Lal*v. *State of Uttar Pradesh*[33] has considerably been eroded. In the instant case a Bangladeshi woman was gang raped by employees of railway in a guest house maintained by the Central Government. The Court held the State liable after declining the defence of sovereign immunity and also clarified that the establishment of guest houses at railway stations was not a sovereign function. The precedent laid down in the aforementioned cases has been followed consistently in the later cases as well. For instance, in *Vadodara Municipal Corporation* v. *Purshottam*[34] the Supreme Court held the municipal corporation liable for death of persons by drowning in Sursagar lake due to negligence in boat riding. The Court did not consider whether the said negligence was caused due to sovereign and non-sovereign function and held that the municipal corporation was discharging its statutory duty.

Recently in *Sanjeet Singh Kaila* v. *Union of India*[35] the petitioner suffered severe injuries when his aircraft burst into flames during a regular flight exercise. Subsequently it was found that the accident was triggered due to poor workmanship by Hindustan Aeronautics Ltd. and manufacturing defect in the aircraft. The Delhi High Court held Union of India liable to pay compensation of ?5,00,000 to the plaintiff for trauma and injuries suffered. In addition to this, Hindustan Aeronautics Ltd. was directed to compensate the petitioner for its poor workmanship by paying `50,00,000. In addition to reiterating strict liability of state in cases of breach of fundamental rights, the Court also emphasized on the responsibility to ensure right to safe environment in workplace which is applicable to the armed forces as well.

5. Legal Conundrums in determining test for tortious liability of State

Due to lack of uniformity in the tests applied by the judiciary for determining State tortious liability and absence of proper distinction between sovereign and non-sovereign functions the standards for determining liability of State for tortious acts of its servants are still vague because of - firstly, shortcomings in tests evolved by the Courts while attempting to establish a uniform standard for determining the ambit of what constitutes sovereign functions and secondly due to lack of proper codified law on the subject.

5.1. Ambiguity in scope and relevance of doctrine of Sovereign Immunity

As discussed in the previous sections of the study, by virtue of judicial decisions in the pre-constitutional era, the State was not held liable for tortious liability arising out of sovereign functions. This necessitated the need to clearly establish the ambit of sovereign functions of State, however, as is evident from the study on judicial trends in the post constitutional era, till date no consistent view on what activities constitute sovereign functions was established.

In *Kasturi Lal* v. *State of Uttar Pradesh*[36] the Supreme Court laid down that if tortious liability arises out of acts done in lawful exercise of powers by sovereign or by private individuals through delegation by a sovereign, no action will lie for such acts. Though the Court mainly expounded upon the previously established test of distinction between

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30 Art. 9cl. 5, UN General Assembly, *International Covenant on Civil and Political Rights*, March 23, 1976, *available at*: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (accessed April 4,2021).

31 D.K. Basu v. State of West Bengal, (1997) 1 SCC 416 [D.K. Basu case].

32 Chairman, Railway Board v.Chandrima Das, (2000) AIR SC 997.

33 *Kasturi Lal case*, (1965) AIR SC 1039.

34 Vadodara Municipal Corporation v. Purshottam, (2014) 10 SCALE 382.

35 Sanjeet Singh Kaila v. Union of India, (2017) SCC OnLine Del 8170.

36 *Kasturi Lal case*, (1965) AIR SC 1039.

sovereign and non-sovereign functions but the proposition laid down in this case substantially expanded the ambit of sovereign functions and it has been subjected to widespread criticism till date. Renowned jurist H.M. Seervaicriticized the said ruling by opining that the Court enlarged the scope of sovereign immunity beyond unreasonable limits as it failed to acknowledge the distinction between 'act of state' which can be allowed protection under sovereign immunity and tortious acts done by public servants ostensibly under the authority of municipal laws.[37]

The Supreme Court itself did not refer to the said decision in its subsequent decisions regarding tortious liability of State and in *Common Cause, a Registered Society*v. *Union of India*[38] while considering the issue of sovereign immunity it categorically stated that the course of justice was disturbed by its decision in *Kasturi Lal*v. *State of Uttar Pradesh*[39] case and effectiveness of the said decision has been eroded as it has not been followed in subsequent cases.

It is pertinent to note that by virtue of ambiguity in what constitutes sovereign and non-sovereign functions, in a number of cases, the Courts have adopted different views on largely the same factual matrix. For instance, running of railways was held to be a sovereign function in *Bata Shoe Co. Ltd.*v. *Union of India*[40] by the Bombay High Court however in *Maharaja Bose*v. *The Governor-General in Council,*[41] the Calcutta High Court held it to be a non-sovereign function. It was finally settled by the Supreme Court in *Union of India* v. *Ladulal Jain*[42] when it held running of railways to be a non-sovereign function.

In another landmark case of *N.Nagendra Rao*v. *State of Andhra Pradesh*[43] although the Supreme Court discredited the efficacy of doctrine of sovereign immunity in view of drastic changes in the concept of sovereignty; the doctrine itself was not rejected by the Court perhaps because the decision of the larger bench in *Kasturi Lal*v. *State of Uttar Pradesh*[44] could not be unheeded. The Court also attempted to restrict the ambit of sovereign functions to those acts for which the State cannot be sued in Courts of law i.e., defence of country, etc. making peace or war, foreign affairs, power to acquire and retain territory etc.

The ambit of State liability has been increased by the judiciary over a period of time, for example, recently the Supreme Court criticized the Central Government and opined that it should be held liable to compensate the citizens for not being able to ensure clean air and water to them.[45]

5.2. Overlap of Doctrine of Sovereign Immunity over Statutory laws

In India, several codified laws impose liability to pay compensation to the defendants for tortious acts resulting in death or injury to the person or property of the plaintiff. For instance, the Indian Fatal Accidents Act,[46] Consumer Protection Act[47] and Motor Vehicles Act[48] entitle the plaintiff to claim compensation for death or injury. However, in a plethora of cases while adjudicating the tortious liability in matters involving State, the Courts have resorted to the distinction between sovereign and non- sovereign function.

In *Municipal Corporation of Delhi* v. *Subhagwanti*[49] when the damages arose due to collapse of clocktower, the Apex Court held Municipal Corporation of Delhi liable by considering violation of general principles of negligence instead of imposing liability by virtue of Fatal Accidents Act. Similarly in *State of Haryana* v. *Smt. Santra*[50] the vicarious liability of government was ascertained for negligence of government hospitals on the reasoning that running a government hospital was a non-sovereign function instead of referring to Consumer Protection Act by the Apex Court.

In cases of Motor Vehicles Act as well the Courts have adjudicated the liability of Statelargely on the basis of distinction between sovereign and non-sovereign function rather than on the basis of the aforementioned law. In *Thangarajan*v. *Union of India*[51] an army vehicle deputed to

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37 H.M. Seervai, CONSTITUTIONAL LAW OF INDIA, 2132 (Universal Law Publishing, 4th Edn., 2015).
38 Common Cause, a Registered Society v. Union of India and Ors., (1999) AIR SC 2979.
39 *Kasturi Lal case*, (1965) AIR SC 1039.
40 Bata Shoe Co. Ltd.v. Union of India, (1954) AIR Bom 129.
41 Maharaja Bosev. The Governor-General in Council, (1952) AIR Cal 242.
42 Union of India v. Ladulal Jain, (1963) AIR SC 1681.
43 *N.Nagendra Rao case*, (1994) 6 SCC 205.
44 *Kasturi Lal case*, (1965) AIR SC 1039.
45 M.C. Mehta v. Union of India, (2020) SCC Online SC 29.
46 Sec. 1A, The Indian Fatal Accidents Act, 1977.
47 Sec. 39, The Consumer Protection Act, 2019.
48 Sec. 140, The Motor Vehicles Act, 1988.
49 Municipal Corporation of Delhi v. Subhagwanti, (1966) AIR SC 1750.
50 State of Haryana v Smt. Santra, (2000) AIR SC 1888.
51 Thangarajan v. Union of India, (1975) AIR Mad 32.

deliver carbon dioxide gas to a naval ship, knocked down a minor on account of driver's negligence. The Madras High Court lamented that in spite of severe injuries suffered on account of rash driving, the State could not be held liable as accident was caused while performing sovereign function. However, in *Pushpa Thakurv. Union of India*[52] the Supreme Court settled the position that sovereign immunity was not applicable in cases involving compensation under the Motor Vehicles Act.

6. Lack of Adherence to International Standards

With the passage of time the judiciary has time and again emphasized on the need to clearly establish strict accountability of the State for violations of fundamental rights due to tortious acts of the employees of the State. In this regard, the constitutional right to compensation has often been underscored by the Apex Court in a number of cases. In *Nilabati Behera* v. *State of Orissa*[53] and *D.K. Basuv. State of West Bengal*[54] the Supreme Court reaffirmed the right to compensation for breach of a guaranteed right in consonance with the International Covenant on Civil and Political Rights.

However it is lamentable that, the statutory right to compensation embodied in Article 9 of the International Covenant on Civil and Political Rights has been effectively barred by virtue of India's reservation to Article 9 Clause 5 wherein it has been categorically stated that Indian laws have not provided for any enforceable right to compensation for victims of unlawful or arrest or detention by the State.[55] Needless to mention that such reservation has attracted widespread criticism and is perceived as a big hurdle in the crusade for establishing redressal mechanism in cases of tortious liability of State.

Similarly Convention Against Torture provides for victim compensation in cases of torture by recognizing an enforceable right to fair and adequate compensation along with possible means of rehabilitation.[56] However much to the dismay of stakeholders at both domestic and international level, India has not ratified the Convention till date. The Law Commission has elucidated in this regard that India has articulated reservations against certain provisions of the Convention such as those relating to inquiry and State complaints.[57]

As is evident from the foregoing illustrations, with regard to establishing a concrete legal mechanism for ensuring compensation to victims of injustices perpetrated by the State, India has clearly failed in adhering to the customary international law. Ironically, this state of affairs continues in spite of clear directive embodied in the Indian Constitution[58] which encourages the State to foster respect for international law and treaty obligations.

7. Need for Codification

The foregoing discussion on evolution of tortious liability of State makes it amply clear that there is a pressing need for a codified law on the subject. It is notable that back in 1956 the Law Commission of India in its very First Report[59] approved the ratio laid down in *The Secretary of State* v.*Hari Bhanji*[60] case and stated that the test of distinction between sovereign and non-sovereign was no longer appropriate in view of increasing functions of the State.The Report also studied the legal position in England, United States of America and Australia in this regard and suggested principles on the basis of which a legislation should come into existence. So it was concluded that there should be a proper codified law on the issue so as to ensure uniformity and consistency in practice.

In view of the aforementioned recommendations, 'The Government (Liability in Tort) Bill, 1967' was introduced in the Lok Sabha, however it did not materialise into a statute. Subsequently the National Commission to Review the Working of the Constitution, in its Consultation Paper studied the position of State liability in tort and did not favour the existing legal position as it was on the basis of an archaic law which became a basis for further legal developments and considering the expanding ambit of activities of State it was not relevant. The need to codify a law in this regard was echoed again and the suggestions given by the Law Commission were reiterated after certain

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52 Pushpa Thakur v. Union of India and Anr., (1986) AIR SC 1199.

53 *Nilabati Behera case*, (1993) 2 SCC 746.

54 *D.K. Basu case*, (1997) 1 SCC 416.

55 United Nations High Commissioner for Human Rights, Compilation on India, (2016), available at, https://www.upr-info.org/sites/default/files/document/india/session 27-may2017/ahrcwg.627ind2indiaannexe.pdf (Last visited on April 5, 2021).

56 Article 14, UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, June 26, 1987, available at: https://www.ohchr.org/en/professionalinterest/pages/cat.aspx (accessed April 3, 2021).

57 273rdReport of Law Commission of India (2017).

58 Article 51(c), THE CONSTITUTION OF INDIA, 1950.

59 1st Report of Law Commission of India,(1956).

60 *Hari Bhanji case,* (1882) ILR 5 Mad 273.

modifications and the Apex Court in several cases such as *MCD* v. *Uphaar Tragedy*[61] case. Unfortunately, till date no legislation has come into existence to establish tortious liability of State in clear terms.

8. Concluding Remarks

Clearly, the relevance of doctrine of sovereign immunity in the present day scenario of welfare state has been consistently whittled down by the Courts however, the judiciary has still not abandoned the relevance of the said doctrine and is constantly struggling to circumscribe the scope. Even in cases of private statutes the Courts have resorted to this doctrine in fixing State liability. The existing parallel approaches of deciding State liability on the basis of 'act of state' or on the basis of 'test of sovereign functions' has further led to ambiguity as different tests have been applied by different Courts. Although much has been said till date about the judicial contribution on the subject; the distinction between sovereign and non-sovereign functions has still not been discarded; lack of codified law has further contributed to confusion and consequent injustice in many cases.

In addition to this, it is pertinent to note that in the absence of any established framework and standards to regulate amount of compensation the discretionary and inconsistent standards adopted by Courts is further ailingthis area of litigation.

Even though India is a signatory to various Conventions elucidating upon protection of human rights and is bound by Universal Declaration of Human Rights, till date no explicit legislation has been passed to implement the various ideals ensuring protection of human rights in the International law. This lack of adherence to international standards by not establishing legal framework to ensure victim compensation in cases of injustices by the State has not only resulted in loss of reputation of the country in the international sphere it has also deteriorated the faith of people in the justice system.

So it is the need of the hour to establish proper legal framework to regulate and ensure compensation to the victims along with codification of the concept of tortious liability of State as it is high time the country ceases to be dependent on an archaic law rooted in colonial era.

[61] MCD v. Uphaar Tragedy Victims Assn., (2011) 14 SCC 481.

Constitutional Right to Speech and Expression vis-a-vis Freedom of Press

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ABSTRACT

The constitution of India was made after extensively debating upon the various rights and duties that every citizen of the country and also other individuals along with the state hold. The constitution imparts various fundamental rights under part III which are judicially enforceable and are in line with the various human rights that have been inscribed in the numerous international instruments of which India is a part like UN Charter, International Covenant on Civil & Political Rights (ICCPR) and International Covenant on Economic, Social & Cultural Rights (ICESCR). Part IV of the constitution holds the Directive Principles of State Policy which impart duty upon the state with a vision for good governance, however these are not judicially enforceable. The framers of the constitution had the vision of providing such rights and conferring such duties upon the citizens and the state that will lead up to an ideal democratic republic that India is supposed to be.

The citizens and individuals enjoy various rights that help in upholding the basic structure of democracy in our country which are virtually absolute but come with their own sets of reasonable restrictions for the interest of sovereignty, security, public order and morality. Article 19(1)(a)[1] of the constitution of India provides for certain rights related to freedom of speech and expression to every citizen of the country. This right is the fundamental structure that upholds the base of democracy by granting citizens with the virtue of expressing themselves freely in all matters affecting their human right and thus has been interpreted very widely by the various courts of our country. The intention of the makers of the constitution by granting this right is clear that they wanted the citizens of the nation to enjoy the right of freely expressing themselves so that they can be a fair critique of the democratic republic they are living in. This enables the smooth functioning of the various institutions of democracy by making them answerable to the citizens and accountable to their actions. Article 19(2)[2] implies certain restrictions upon the rights conferred upon by Article 19(1)(a) and provides that reasonable restrictions can be imposed on the right of freedom of speech and expression in order to safeguard the "the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence". This prohibits the misuse of the power that comes along with the rights granted.

The freedom of press is a right that is an essential element of democracy as it enables transparency between the bodies of the government and the citizen thereby avoiding any arbitrariness in the functioning of these bodies and making them responsible for their actions.

Keywords: Freedom of press, Constitutional of India, Fundamental Rights, UN Chatter, Directive Principals of State Policy

Introduction

This right is impliedly included under Article 19(1)(a) but is nowhere expressly mentioned in the Constitution of India. It was greatly discussed by the constituent assembly during the drafting of constitution as to whether a separate provision for freedom of press was required in the constitution of India parallel to the one that has been provided in the American constitution and it was finally concluded that there arose no requirement for a separate provision for freedom of press as the right conferred by Article 19(1)(a) is wide enough to include the freedom of press under its ambit. Dr. Bhima Rao Ambedkar, chairman of Constitution Drafting Committee, in his speech stated that "The press is merely another way of stating an individual or a citizen. The press has no special rights which are not to be given or which are not to be exercised by the citizen in his individual capacity. The editor of a press or the manager is all citizens and therefore when they choose to write in newspapers, they are merely exercising their right of expression; and in my judgment therefore no special mention is necessary of the freedom of the press at all."[3]

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1 The Constitution of India 1949, Art. 19, cl. 1
2 The Constitution of India 1949, Art. 19, cl. 2
3 Hon'ble Mr. Justice G. S. Singhvi, TRIAL BY MEDIA: A NEED TO REGULATE FREEDOM OF PRESS, MANUPATRA (Jan. 28, 2021, 11.45 AM), http://docs.manupatra.in/newsline/articles/Upload/0158AEEE-1A16-473C-A41A-DB93A66000EB.pdf

This statement makes it clear that even the freedom of the press to express is limited by the scope of reasonable restrictions provided under art 19(2). There remains no doubt that the framers of constitution wanted a free and strong press that acts as a strong critique to the government and this intention has been upheld by various judgements of the judiciary as well but any attempt to go beyond the jurisdiction provided by this right must be contained as misuse of this freedom of expression by press will lead to crumbling of the democracy rather than upholding it. There have been various examples in the history of Indian democracy and media coverages that showcase how this right vested in the press and media has been over used by it and nuance has been created which has caused mockery of judicial, legislative and executive processes. There exists a fine line between what was actually intended by the framers of the constitution and what the right is being used for in today's arena.

The right to freedom of speech and expression has a long history which goes beyond the modern international human rights jurisprudence. The mention of this right can be traced in the ancient Greece period in around 5th century BC. The ancient Athenian Democratic principles included the right to freedom of speech and expression. The ancient Greek word "parrhesia" means "free speech," or "to speak candidly."During the classical period, parrhesia became a fundamental part of the democracy of Athens. Leaders, philosophers, playwrights and everyday Athenians were free to openly discuss politics and religion and to criticize the government in some settings.[4] The Roman Republic also imbibed the right of freedom of speech and freedom of religion as its basic value.

The primitive documents which lead to the formation of modern international human rights all included the right to speech.[5] In 1215, the Magna Carta was signed by King John which is regarded as the cornerstone of human liberty in England as well as the world and it included the right of freedom of speech and expression which gradually pathed way for freedom of press. In 1689, the Bill of Rights was introduced in England which constituted certain set of civil rights including the right to free speech and this act is still in effect.

In 1766, Sweden included the world's first freedom of press act because of the priest Anders Chydenius who was a classical liberal member of the parliament.[6]

Then in 1789, The Declaration of the Rights of Man and of the Citizen was adopted during the French revolution and it included the right to freedom of speech as an inalienable right of human kind. Article 11 of the French declaration reads as follows, "The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law."[7]

In 1791 the first amendment to the American Bill of Rights included 10 amendments to the US Constitution and it provided for five major freedoms- freedom of speech, press, religion, to assemble and to petition the government.

In 1948, the Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly unanimously and Article 19 of UDHR provided, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[8]

The International Covenant on Civil and Political Rights 1966 which came to effect on 23 March 1973 imbibed the right to freedom of speech and expression under Article 19 which provides,

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this Article carries with its special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order), or of public health or morals"[9]

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4 History.com editors, Freedom of Speech, HISTORY.COM (Jan 28, 2021. 3.50 PM) https://www.history.com/topics/united-states-constitution/freedom-of-speech#:~:text=In%20the%20United%20States%2C%20the%20First%20Amendment%20protects%20freedom%20of,to%20the%20United%20States%20Constitution.&text=In%20general%2C%20the%20First%20Amendment,to%20express%20ideas%20and%20informatio.

5 Smith, David "Timeline: a history of free speech". The Guardian, London, 5 February 2006.

6 "The World's First Freedom of Information Act (Sweden/Finland 1766)". *Scribd*.

7 Arthur W. Diamond Law Library at Columbia Law School (26 March 2008). "Declaration of the Rights of Man and of the Citizen". Hrcr.org. www.hrcr.org.

8 United Nations (10 September 1948). "The Universal Declaration of Human Rights". UN.org. www.un.org

9 United Nations (16 December 1966). "International Covenant on Civil and Political Rights". https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf

The European Convention of Human Rights which came into effect in 1953 under its Article 10 provides for the freedom of speech, "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."[10]

Article 13 of the American Convention on Human Rights, 1969 provides for freedom of thought and expression and reads "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice"[11]

African Charter on Human and Peoples' Rights 1979 includes under Article 9 "Every individual shall have the right to receive information and that every individual shall have the right to express and disseminate his opinions within the law."[12]

In India, before it became an independent sovereign state in 1947, the British regime had imposed various restrictions on the right of speech and expression. The rise in the freedom movement through speeches, publications and newspaper which were being run by the Indian nationals were all banned and numerous acts such as the Sedition Law of 1870, hate speech law (section 295A of IPC 1927), the Seditious Meeting Act 1907, all curbed the basic right of speech and expression from the Indian public. Any word disseminated against the British rule was considered as an act of sedition and penalties were imposed for the same. No one was allowed to have discussions regarding the political and social issues and also formation of unions was banned under these laws. Thus, after attaining independence it was clear to the framers of the constitution that every citizen of the country had to be provided with the right to free speech and expression in order to safeguard the basic human right of every individual in the country and to uphold the democratic character of the nation. As a result, after having extensive debates over the freedom of speech and expression, this right was finally included under Article 19 of the constitution. The right to freedom of speech and expression also included the freedom of press impliedly which was also curbed under the British period wherein any publication by Indian nationals were prohibited to be sold in the market.

Judicial Interpretation of Right to Freedom of Speech and Expression and Freedom of Press

The right of freedom of speech and expression is the tree that branches out into various other rights and covers them under its ambit. Various rights such as right to fair trial and court proceedings, right to privacy, right against defamation, right to information, and right to freedom of press are closely related to freedom of speech and expression. Freedom of expression is the cornerstone for media that enables it to impart information to the public at large. Freedom of press is a species of which freedom of expression is a genus. The American Press Commission has said, "Freedom of press is essential to political liberty. When men cannot freely convey their thoughts to one another, no freedom is secured." Lord Mansfield in *Lowell v Griffin*[13] stated that "the liberty of the press consists in printing without any license subject to the consequences of law." Freedom of press expands to every form of publication that has the capability of disseminating information and opinions.

However, it is not always necessary that freedom of press results in freedom of expression, as there are limitations to this as pointed out by Judith Lichtenberg that freedom of press suppresses freedom of speech by suppressing certain information or by voicing the opinions of only certain groups. The money hungry media houses work on the principle "no money, no voice" in today's world. It, therefore, becomes extremely important to restrain and impose certain restriction upon the freedom of press in expressing their views so that this right is upheld for the benefit of the society and public and not misused for the profit of a particular group. With the advent of internet media today, this right of press and speech has extended over an even larger population that makes it the need of the hour to have legislations that regulate these outlets so that false information, media trial and other such facets of this right are not celebrated by unwarranted groups. That being said, the gravity of this freedom was outlined by the

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[10] Council of Europe (4 November 1950). "European Convention on Human Rights". https://www.echr.coe.int/Documents/Convention_ENG.pdf

[11] Organization of American States (22 November 1969) "American Convention on Human Rights" https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf

[12] Organization of African Unity (June 27 1981) "African Charter on Human and Peoples' Rights". https://www.achpr.org/legalinstruments/detail?id=49#:~:text=The%20African%20Charter%20on%20Human,freedoms%20in%20the%20African%20continent.

[13] (1938) 303 US 444

words of Pandit Jawaharlal Nehru,"I should rather have a completely free press, with all the dangers involved in the wrong use of that freedom, than a suppressed or regulated press."

The various courts of the country have time and again pointed out the importance of freedom of press in numerous cases. Media stands as the fourth pillar of democracy in today's world and in order to uphold the vision of the constitution framers, it is important to protect this right for the foundation of democracy to sustain.

Before independence the privy council had laid down the importance of free journalism in the case of *Channing Arnold v King Emperor*"The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever length, the subject in general may go, so also may the journalist, but apart from statute law his privilege is no other and no higher. The range of his assertions, his criticisms or his comments is as wide as, and no wider than that of any other subject."[14]

The Honourable Supreme Court of India in *Romesh Thappar v State of Madras*[15] had struck down the ban on circulation and publication of the journal named *Cross Roads* by government of Madras under section 9(1-A) of the Madras Maintenance of Public Order Act., 1949 and held that such ban was a violation of Art. 19(1)(a) and also does not fall under the exception of Art. 19(2) stating "Freedom of speech & of the press lay at the foundation of all democratic organization, for without free political discussion no public education, so essential for the proper functioning of the process of popular government, is possible."

In *LIC v. Manubbai Shah*[16] the SC observed, "Freedom to air one's view is the lifeline of any democratic institution and any attempt to stifle, or suffocate, or gag this right would sound a death knell to democracy and would hold usher in autocracy or dictatorship."

The courts of India have covered the multiple facets of this right by upholding them in a number of judgements likewise in the case of *Anand Chintamani v. State of Maharashtra*,[17] the Bombay HC held that the right to freely express oneself even in the most controversial matters is an intrinsic part of freedom of speech and expression. The bench held that the gag on the publication of newspaper upon stories regarding scam involving the image of higher judiciary is violative of art 19(1)(a) and the right of the newspaper to bring the truth before people cannot be curtailed just because it tarnishes the image of members of superior judiciary whose name had been figured out in the scam.

In *Indian Express Newspaper v UOI*[18] the SC had held, ""In today's free world freedom of press is the heart of social and political intercourse…. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments." It was further held by the court that "the press is not immune from the laws of general application or ordinary forms of taxation, or laws of industrial relations and reasonable restrictions imposed in furtherance of such laws are not violative of right guaranteed under art 19(1)(a)."

Any regulation restricting the number of pages of the newspaper have been held violative of Art. 19(1)(a) by the Supreme Court in cases like *Sakal Newspapers Ltd. v UOI*[19] and *Bennet Coleman and Co. v UOI*[20] as such restrictions will deprive the newspapers of the advertisements which are main source of income for them and in turn affect the dissemination of information, news and views by them. Thence it is a violation of freedom of expression.

It is also pertinent to note here that any restriction or pre-censorship before the publication of material on the ground that it may be defamatory is violative of Art. 19(1)(a) and the press cannot be prevented from printing such materials. The remedy to people who comprehend defamation is available to them after the publication of such material. This was asserted by the SC in the case of *R. Rajagopal v State of T.N*.[21] and it was observed that "It is enough for the press to prove that it acted after a reasonable verification of the facts; it is not necessary for the press to prove that what it published was true." Relation of freedom of press and right to privacy under Art. 21 was also discussed in this case furthering that none can infringe the right to privacy and publish materials related to personal life without prior consent.

It is eminent from the above discussion that freedom of press is a requisite of proper democratic functioning but it is often that this right is misused by the numerous media houses that go beyond the scope of Art. 19(1)(a)

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14 AIR 1914 PC 116, 117
15 AIR 1950 SC 124
16 (1992) 3 SCC 637
17 (2002) 2 Mah LJ 14
18 (1985) 1 SCC 641
19 AIR 1962 SC 305
20 AIR 1973 SC 106
21 (1994) 6 SCC 632

amounting to media trials and violation of the other rights of citizens such as right to fair trial, right to privacy, etc. The sensationalism of certain cases affects the liberty of individuals violating their fundamental rights and also hinders the process of justice by affecting the court proceedings by forwarding their judgements prior to the judgement of the case.

In *Mohammed Ajmal Mohammad Amir Kasab alias ABU Mujahid v State of Maharashtra,*[22] the reckless coverage of the Mumbai terror attack by media houses giving away important and confidential information about the forces to terrorists was criticized by the supreme court and it was held that right under Art. 19 are subject to reasonable restrictions like all other right and any practice that violates the right of citizens under Art. 21 and jeopardises the national security cannot be justified by the plea of freedom of speech and expression. This also questions the argument that regulatory mechanism for media must only come from within and the credibility of the institution was tested wherein it failed to perform with responsibility.

In the *Parliament Attack case*[23] the media even before the conviction of Mohd. Afzal, portrayed him as a convict and shaped the mindset of the people. One of the co-accused, S. A. R. Geelani, was initially sentenced to death even upon lack of evidence of his involvement in the attack. The media had portrayed him as a terrorist through media trial. This order was later reversed by the Delhi HC which observed the conviction as tragic and absurd.

In *Nupur Talwar v. Central Bureau of Investigation and Another*,[24] the parents of the deceased were accused of the murder of their daughter but the media even before the trial could have been concluded conducted its own trial and convicted the parents calling them murderers, defaming the character of the deceased, and cooking various theories and narratives of the murder. They tarnished the reputation of the family in this process and later the accused parents were acquitted by the court for lack of evidence. It was seen many times while coverage that the parents of the deceased requested the media to leave them alone and let them spend some time with family but to no avail. The media in such cases violates the right to privacy and liberty of individuals under Art. 21 in the name of freedom of press.

In a recent case where in a renowned actor had committed suicide was sensationalized by the media so much that his close net relatives, friends and family were blamed for his death. It was even stated by the media that the actor was murdered and did not commit suicide and many narratives regarding the same were published and telecasted. The case was made a mockery of even though the conviction was still pending in the Bombay HC. The entire verdict for certain persons was formed by the media regardless of the verdict of the court of law. By doing so the media interferes with the justice delivery system by forming a prejudice in the minds of people and also violates the rights under Article 21 and 14. In this case the Bombay HC has laid down an indicative list of instances that would amount to media trial and includes:

a. In relation to death by suicide, depicting the deceased as one having a weak character or intruding in any manner on the privacy of the deceased;

b. That causes prejudice to an ongoing inquiry/ investigation by:

(i) Referring to the character of the accused/victim and creating an atmosphere of prejudice for both;

(ii) Holding interviews with the victim, the witnesses and/or any of their family members and displaying it on screen;

(iii) Analyzing versions of witnesses, whose evidence could be vital at the stage of trial;

(iv) Publishing a confession allegedly made to a police officer by an accused and trying to make the public believe that the same is a piece of evidence which is admissible before a Court;

v) Printing photographs of an accused and thereby facilitating his identification;

(vi) Criticizing the investigative agency based on half-baked information without proper research;

(vii) Pronouncing on the merits of the case, including pre-judging the guilt or innocence qua an accused or an individual not yet wanted in a case, as the case may be;

(viii) Recreating/reconstructing a crime scene and depicting how the accused committed the crime;

(ix) Predicting the proposed/future course of action including steps that ought to be taken in a particular direction to complete the investigation; and

(x) Leaking sensitive and confidential information from materials collected by the investigating agency;

c. Acting in any manner so as to violate the provisions of the Programme Code as prescribed under section 5 of the Cable Television Networks (Regulation) Act, 1995 read with rule 6 of the Cable Television Networks Rules, 1994 and thereby inviting contempt of court; and

d. Indulging in character assassination of any individual and thereby mar his reputation."

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[22] AIR 2012 SC 3565
[23] State v. Mohd. Afzal and Others, 107 (2003) DLT 385
[24] AIR 2012 SC 1921

The judiciary on many occasions has condemned this practise of media trial. It has been a recent trend that news channels and online portals use polls and other means asking for public opinion over matters of extensive judicial concern. This has become a trend after the infamous *Priyadarshini Mattoo*[25] case wherein media had played an important role in providing justice and bringing the matter in the eyes of the just authorities and public. However, this has led to the media to become an unchecked watchdog that goes beyond its jurisdiction on many occasions.

In the case of *M.P. Lohia v State of West Bengal*[26] the SC had expressed its concern over the phenomenon of trial by media, press and public agitation and stated, "This type of articles appearing in the media would certainly interfere with the administration of justice. We deprecate this practice and caution the publisher, editor and journalists who were responsible for the said article against indulging in such trial by media when the issue sub-judice."

In *State of Kerala v. Poothala Aboobacker*,[27] the Kerala HC observed, "Trial by media can do more harm the good to the society at large… Every such act of adventurism exerts unnecessary pressure on the Courts which are to eventually try the alleged offenders. The fickle minded public which has been conditioned to believe a particular version through a calculated process of media indoctrination will be loath to accept a different conclusion. Hence, if the court who finally tries the alleged culprit were to ultimately record an order of acquittal for want of legal evidence before it, it may not be out of place for the public at large to conclude that the verdict of the court is wrong."

Right to Freedom of Speech and Expression in Other Countries

USA

In USA, the right to freedom of speech and that of press was inscribed in the constitution through the first amendment via Bill of Rights in 1791 prior to which there was no provision of free speech in the US Constitution. USA was a colony of the British in the 17th and 18th century. Any criticism of the government at that time was considered to be a seditious act and heavy penalties were imposed in lieu of the same. This was followed by the 'Fever of 1798' where the US was at the brink of war and sedition law was enacted under which the free speech was curbed in all senses. USA then underwent the period of civil war which was a result of suppression of rights and liberties including that of free speech of the black slaves. With the advent of 13th amendment of the constitution, slavery was abolished and free speech was granted to all.

The US Supreme Court has also upheld the free speech imbibed in the constitution at various occasions. It has very widely interpreted the freedom of speech and has also recognised other categories of speech that have been given less or no importance under the first amendment. The free speech in USA has wide implication and with very limited restrictions which include obscenity, child pornography, etc. However, there is not much restriction of free speech and the government has very limited power to impose these restrictions. Freedom of press is explicitly mentioned in the US Constitution and no restriction is imposed on free speech.

North Korea

The constitution of North Korea was adopted in 1972 and Article 67 talks about freedom of speech and states, "Citizens are guaranteed freedom of speech, of the press, of assembly, demonstration and association. The State shall guarantee conditions for the free activity of democratic political parties and social organizations." This implies that the government has the absolute power to dictate the free speech of the citizens in all the matters.

Freedom of speech in North Korea is practically non-existent and the degree varies based upon the loyalty of the citizen towards the state. Any criticism of the leader of the state is considered as sedition and death penalty is imposed. It is prudent to say that North Korea does not disclose the cases of suppression by the state to the world and the only voice of the country is the supreme leader and ruling regime. Citizens are deprived of the basic human rights in the state let alone free speech and free press. Media is only allowed to glorify the ruling regime and military and no concept of criticism exits in the nation.

United Kingdom

The United Kingdom contains the idea of freedom of speech under Article 10 of Human Rights Act, 1998 which was inspired by the European Convention. Freedom of speech in UK has various exceptions and Article 10 states that this freedom"may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society".In regard to freedom of press, although the defamation laws are quite strict in UK, the ruling of House of Lords established the Reynold's defence in which journalism undertaken in the public interest shall enjoy a complete defence against a libel suit. Unlike America, Britain has no constitutional guarantee of free press. There was heavy licencing and no publication was allowed without the government granted licence. Despite being an implied law, freedom of speech and

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[25] Santosh Kumar Singh v. State through CBI, 2010 (9) SCC 747
[26] AIR 2005 SC 790.
[27] 2006(2) KLD (Cr 1 482)

freedom of press in UK enjoys wide array of power and has been upheld from the oldest days. UK has been liberal in granting free speech to its citizens.

Conclusion

Freedom of speech and expression in India has empowered the citizens of the nation to freely exercise and enjoy their right to intimate their thoughts, beliefs, opinions and values in written, audio or visual form while also imbibing the right to publish, circulate and criticize. Freedom of press is a facet of free speech guaranteed under Art 19(1)(a) of the constitution thereby enabling the courts to interpret this right in a liberal and wide manner. It was clear that the framers of constitution intended to provide a free and liberal press in India which was empowered to criticize and critically analyse the functioning and working of the democracy and institutions of the government, however, it is important to keep in mind that a balance must be struck between freedom of judiciary and freedom of press while also upholding the individual liberty. The media studios converting into court rooms, questioning the procedure of law and impacting the public opinion even before pronouncement of judgement is in all its sense misuse of the right enjoyed by media. Unlike USA, where the judiciary and government has very limited power to curtail and control press, Indian constitution embarks certain reasonable restrictions under Art. 19(2) on the freedom of speech and expression and therefore on press, which are quite similar to the restrictions imposed upon this right in UK. This is essential because there is an old saying that too much sweet is also bitter, and therefore giving a free hand to press without setting any boundaries would result in arbitrariness and violation of right to equality and individual liberty and life of people.

Press in today's world is a very powerful institution which shapes the public opinion. It upholds the rights of individuals and in doing so many a times supresses the freedom of speech of other sections of society. Selective journalism, sensationalism and media trial dilute the nobility of press. The question here arises is whether media really abiding to its social responsibility or is it posing a threat to the self-governing thoughts of individuals. Media has a larger role to play apart from just being a source of information and entertainment. It is thus important that certain regulations governing the functioning of media are legislated in order to keep a check over the watchdog rather than having only internal regulation. In words of Shri Somnath Chatterjee, ex speaker of Lok Sabha, "Freedom of the press, a cherished fundamental right in the country, is subject to reasonable restrictions as contemplated by the Constitution itself. It cannot and does not comprise deliberately, tendentious and motivated attacks on the great institutions of this Republic, and their officers and functionaries. Freedom of the press does not also contemplate making reckless allegations, devoid of the truth and lacking in bone fides. In the name of exercising freedom of the press, there cannot be trial by press in which it plays the role of both the accuser and judge. Freedom of the press also encompasses the fundamental duties of the press. These call for showing respect for others and responsible behaviour, and cannot permit denigration of constitutional bodies and institutions and their important segments."

The various legislations like Press Council of India Act, 1978 which was established with the purpose of preserving the freedom of press and of maintaining and improving the standards of newspapers and news agencies in India, is a toothless tiger in the sense that it has the power to issue guidelines and but it can't penalise the offenders for its enforcement. Moreover, it can regulate only print media like newspapers, magazines, etc. but can't exercise its jurisdiction over electronic media like television, radio, etc. Apart from this, for the purpose of broadcasting films, shows, documentaries, advertisements, etc on television and theatres sanction from CBFC is required but it can't issue any guidelines or codes for the content that is being broadcasted, it's scope therefore is also limited. Such codes for programs and advertisements being broadcasted over television are issued under the Cable Television Network (Regulation) Act, 1995, while for content being broadcasted over internet, codes have been prescribed by the IT Rules of 2011. In case of violation of these codes, the DM can seize the equipment of cable operator or in case of internet media, complaint can be filed to the internet service provider. Private television and radio channels have to conform to conditions which are part of license agreements. Nevertheless, even after having numerous legislations overviewing the content being broadcasted over print and electronic media, there exists no legislation that regulates the news media prohibiting media trial. The various authorities and statutory bodies that have been created under these regulations must have the power to enforce the guidelines and standards that they have set in regard to broadcasting content while also having the power to penalise the offender to ensure that the code is being followed by the broadcasters and content creators. Rules regarding media trial should also be included and a separate statutory body must be established which would look after the cases related to news that is being broadcasted, its credibility and source, with the power to entertain and determine the cases violating the standards that it has set and also with the authority to penalise the news agencies if they broadcast news that is false, with the intent of sensationalising the content, for TRP and conducting media trial.

Based on the above discussion it is pertinent to mention that freedom of speech and expression and that of press is

an indispensable requirement of democracy and a fundamental human right. However, it is also important that the responsibility that comes along while enjoying this right must be understood and fulfilled. Absolute control of the state over this right like in North Korea will result in collapse of democracy while excessive freedom of speech can result in violation of rights of others and pose a threat to security and integrity of the nation. Therefore, based on above discussion I believe it is the need of the hour to have laws that regulate the validity of reporting and coverages done by media in the name of free speech and unwarranted and unsolicited circulation of false information should be curbed and penalised. The media should be prohibited from shaping public opinions when a criminal or civil case is under trial and may criticize the case only once the judgement is pronounced.Restrictions as permitted by the ICCPR must be imposed on media so that the freedom of press is not hindered while also prohibiting it from extra-judicially exercising its rights, bullying into individual liberty and confidentiality of institutions.It is also important that there is more transparency between the media and public, the ownership of media houses should be disclosed more liberally so that there is more credibility of reporting. Also, there is an ardent need to regulate publication and circulation of information on online media forums as there is no law verifying the data that is being circulated online resulting in creation of public hate, obscenity and false information. Free, vigorous and factual reporting, criticism and debate are the fundamentals required for an effective democracy.

New Dimensions of Transparency in Governance in India: An Analysis

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ABSTRACT

Transparency is the core component of open government, it promotes accountability and provides information to citizens about what their government is doing. An open government is one where the business of the government and administration is thrown open to the public at all levels, to ensure effective public participation, scrutiny and oversight. Closer of public documents in the name of government matters threats the concept of good-governance.This paper deals with the concept of openness in governance, various dimentions of transparency in governance and its application in governance in India.

Keywords: Governance, ICT, RTI, Transparency, Government Accountabilty.

1. An Overview

Transparency in governance is inevitable for the success of any democratic government. In its absence, governments will lose the trust of the public and would be failed. Open Government in the most basic sense is the concept that the people have the right to access the documents and proceedings of the government. It is a term used to alternative formulation to 'freedom of information, access to information and right to information. In a wider sense, it is synonymous with transparency in governance. Transparency is the core component of open government. Transparency promotes accountability and provides information for citizens about what their government is doing. Open government denotes the transparency of government actions, the accessibility of government services and information and the responsiveness of government to new demands and needs of the public. Open government is one where the business of the government and administration is thrown open to the public at all levels, to ensure effective public participation, scrutiny and oversight. Openness in governance will strengthen democracy and promote efficiency and effectiveness in government. This paper is focused about to trace out the level of openness in governance in India and try to analyse the initiatives taken to strengthen this concept.

2. Initiatives taken for the Openness in Governance

During the post-independence, to address the concerns regarding open government some initiatives have emerged over the years in India. However, the early wave of open government in India can be said to have begun with the landmark judgements of P.N. Bhagwati J.in S.P. *Gupta v. Union of India and Indian*[1] *Express News Papers Pvt.Ltd. v. Union of India,*[2] where the Supreme Court held that Article 19 (1) (a) of the Constitution of India dealing with the freedom of speech and expression also includes right to know. A democratic government becomes an open government, so the public has a right to know about the government's proceedings.[3]

Further, the Supreme Court in *Peoples Union for Civil Liberties*[4] dealt with this aspect of freedom elaborately. The right of citizens to obtain information on matters relating to public acts flows from fundamental rights enshrined in Article 19 (1) (a). Securing information on the basic details concerning the candidates contesting for elections to Parliament or the State Legislature promotes freedom of expression and therefore the right to information forms an integral part of Article 19 (1) (a). Thus the Supreme Court has emphasised on the right to know or an informed citizenry. The Court held that democracy requires an informed citizenry and transparency of information. Besides giving a general description of open government

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1 AIR 1982 SC 149, SCC 87, 1982 2.
2 AIR 1986 515, 1985 SCR (2) 287.
3 J.N. Pandey, The Constitution of India,Central Law Agency Allahabad (2006).
4 (1997) 1 SCC 301.

the Court emphasised the need for increased disclosure in matters relating to public affairs.

In the case of *Chief Information Commission v. State of Manipur*[5] *and Ram Jethmalaniv. Union of India*[6], the Supreme Court once again has given a broad dimension to Art. 19 (1) (a) by laying down the proposition that freedom of speech involves not only communication but also receipt of information are the two sides of the same coin. Right to information is a basic right of the citizens of a free country and Art. 19 (1) (a) protects this right. The right to receive information, which is founded on the right to know, is an intrinsic part of the right to freedom of speech and expression enshrined in Art.19 (1) (a). Noting that open government means information available to the public with greater exposure of the functioning of government which would help to assure the people better and more efficient information; to set up system and mechanism that facilitate people's easy access to information; to promote transparency and accountability in governance to minimize corruption and inefficiency in public offices and to ensures people's participation in governance and decision making.

Open government can thus be said to have three components viz.(i) Right to receive information,(ii) Public participation in the process of governance, and(iii) Accountability of the government authorities for their declarations and actions. These components are discussed below-

2.1 Right to Information

James Madison wrote that the people are "the only legitimate fountain of power from which the constitutional charter, under which the several branches of government hold their power, is derived." Yet how might the people exercise their sovereignty over the government if they do not know what their government is doing? How can government be fully accountable to the people for the actions it takes on their behalf if it conducts itself in secrecy or behind closed doors? The modern practices of open government in which government conducts its business transparently to allow for public scrutiny and public participation is widely viewed as both a key feature and a necessary condition of a contemporary democratic state. It is based upon the conviction that the people can only effectively exercise their constitutional role as overseers of government actions where their unfettered rights of access to information and documents about government operations are secure. The right to access the information and documents conferred upon the public is one of the most important tools to ensure transparency in the work or actions of government. Right to information is a facet of the right to freedom of speech and expression as contained in Art. 19 (1) (a) of the Constitution of India. The right to information thus indisputably is a fundamental right.

In the second last decade of the twentieth century, the Supreme Court has approved the 'Right to Know' which is the basic component to the open government as a fundamental right under Art.19(1) (a) in the favour of all citizens. Later in 2005 this right to know was strongly advocated and introduced by the UPA Government through enacting the Right to Information Act, 2005. This is an Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.

The Act provides, subject to the provisions of this Act, all the citizens shall have the right to information. According to section 2 (j), Right to Information includes the right to inspection of the wok, documents, records; taking notes, extracts or certified copies of documents or records; taking certified samples of material; Obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or any other device.[7] The Act mandates the supply of information related to an administrative process. In cases, where the right to information has been denied by a public official, sufficient information must be provided of the reasons for refusal. That decision is always reviewable by the appellate authority i.e. the State Information Commission and the Central Information Commission (CIC).

The right to information does not carry with it an unrestricted right to gather information about some sensitive information. Sec. 8 gives an exemption from disclosure of information. The Act provides that notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, information disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the state, relation with foreign state or lead to incitement of an offence....[8] So some reasonable restriction on the exercise of the right to receive information is always permissible in the interest of the security of the

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5 (2011) 15 SCC 1.
6 (2011) 8 SCC 1.
7 The Right to Information Act, 2005 *s. 3.*
8 *Id. s.* 8 (a)

state. In the case of *Peoples Union for Civil Liberties*,[9] the petitioner sought disclosure of information relating to safety violations and defects in various nuclear power plants, the court upheld that data about fissile materials are matters of sensitive character which may enable the enemies of the nation to monitor strategic activities and therefore any information relating to training features, processes or technology of nuclear plants cannot be disclosed.

2.2 Public Participation in the process of Governance

Public participation in the process of governance is an essential as to open government initiative.It means to involve those who are affected by a decision in the decision-making process. It promotes sustainable decisions by providing participants with the information they need to be involved in a meaningful way, and it communicates to participants how their input affects the decision. Public participation takes the form of informing; engaging; consulting; collaborating and empowering, as has been suggested by the International Association for Public participation. In participatory governance, the government must provide information, receive feedback and complaints, give answers, enforce disciplinary sanctions civil and criminal, empowers citizens, confer civil, political and economic rights on the citizen, promote social capital, facilitate participation, promote collaboration; and be inclusive, equitable, responsive, open, transparent and accountable to the people. Public engagement enhances the government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from transparency and open government having access to that dispersed knowledge. Executive departments and agencies should offer increased opportunities to participate in policymaking and to provide their government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in government.

The constitutional methods of political participation of people at the grassroots is achieved through the process of devolution to the lower echelons of governance. Even though the government of India had initiated the process of devolution of power as early as in the 1950s through the *Panchayati Raj* system, and introducing the element of participatory rural works programme through financial participation of beneficiaries, the union government brought in the 73 and 74 amendments to the constitution to more firmly institutionalize local governments as the

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[9] (1997) 1 SCC 301.

[10] Mohammad Taqiuddin and Shabbeer Shaik, "Strengthening Open Government: India country paper", research paper presented in Seminar.

[11] 12th report- citizen centric administration by the Second Administration Reform Commission.

[12] Rigorous consultations done before framing new Education Policy: Ramesh PokhriyalNishank, *The Hindu* July 31 2020.

against the government and its authorites for what they declares to do or not to do.

3. ICT and Social Media Platforms as New Tools of Opennessin Governance

ICT and Social Media Platforms are effective tools for the transparency of governance. Information Technology (IT) is revolutionizing the way governments are being run. The relationship between the citizen and government is mediated by information system and their automation. Automation of government's businesses, regulations and delivery of service is a must for any e-governance plan. The country has been initiated it through the National e-Governance Plan(NeGP). The Government has approved the national e-governance plan, comprising thirty-one mission mode projects (MMPS) and eight components on May 18, 2006. Through this plan the Government of India is intended to make all government services available to the citizens of India via electronic media. NeGP has been formulated by the Department of Electronics and Information Technology (DeitY) and the Department of Administrative Reforms and Public Grievances (DARPG).National information technology infrastructure and nationwide distributed database with public information infrastructure are underway. Databases in India suffer from non-standardization, incomplete data collection at all levels, poor quality and unreliability of data, inconsistency in the methodology and technology employed, absence of universal digitization capability, slow digitization of past data, issues of inter-operability of systems etc. To solve these problemseffectively, the government has taken initiatives like national policy on open standards which has been published for soliciting public comments.

In meanwhile progress has been made by the central and state governments for progressive use of ICT including Geographic Information System (GIC) and satellite imagery to re-engineer transparency, participation and accountability of government as shown below:

1. Use of the internet to facilitate open government
2. Government portals for information
3. Web-based discloser of information
4. Use of mobile phones and Wi-Fi to facilitate engagement
5. Computerized grievance redressal mechanisms
6. E-petitions
7. Access to the process of service delivery system etc.

3.1 Social Media Plateform

Social media is being progressively used for seeking feedbacks from citizens; pronouncement of public policy; issue-based as well as generic interaction and brand building or public relation. To encourage and enable government agencies to make use of web 2 technologies such as social networking sites, blogs, wikis, folksonomies, video sharing sites hosted services, web applications and mashups which are a dynamic medium of interaction, the department of Information Technology, Government of India has released a draft social media strategy. The framework and guidelines for use of social media for government organization hope to help the government enhance its outreach, engage and interact with the Indian internet users. The Planning Commission of India (now abolished) had taken an initiative and put itself on Facebook with a page on the 12th Five Year Plan 2012 through 2017.

Though the Right to Information Act (RTI), 2005 has become the governing law regarding public disclosure of government information and accessibility to public data, data-sharing policies in India are still complex, as various provisions under law define and determine the scope of data provided. Taking note of this, the Department of Science and Technology was assigned the task of developing a comprehensive National Policy for Data sharing and accessibility, by the Cabinet, in June 2010.

According to the Report on Open Government Data in India, while the government has initiated many e-governance initiatives, very few of them have resulted in publicly accessible databases. To ensure the relevance of open government data, mechanisms have to be put in place to take its benefits to the common person and marginalised communities, both by the government as well as by civil society organizations. The concrete steps on these lines will help to realize the dream of open data in India shortly.

The Second Administrative Commission constituted in India in 2005,has after detailed studies into the working of government, made comprehensive recommendations in its detailed reports, among others, on the right to information, citizen-centric service delivery, local government, e-Governance etc. some of the recommendations relevant to this article, which are being followed up and will further the cause of transparency, improved citizen-centric service delivery, and participatory governance, are listed below:

Suo moto disclosures under the RTI Act, 2005 should not be confined to the seventeen items provided in section 4 (1)

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[13] The Constitution of India, A*rt.*299.

feedbacks from citizens; pronouncement of public policy; issue-based as well as generic interaction and brand building or public relation. To encourage and enable government agencies to make use of web 2 technologies such as social networking sites, blogs, wikis, folksonomies, video sharing sites hosted services, web applications and mashups which are a dynamic medium of interaction, the department of Information Technology, Government of India has released a draft social media strategy. The framework and guidelines for use of social media for government organization hope to help the government enhance its outreach, engage and interact with the Indian internet users. The Planning Commission of India (now abolished) had taken an initiative and put itself on Facebook with a page on the 12th Five Year Plan 2012 through 2017.

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Suo moto disclosures under the RTI Act, 2005 should not be confined to the seventeen items provided in section 4 (1) of the Act but other subjects where public interest exist should also be covered.

Citizens' charters should be made effective by stipulating the services levels and the remedy if these service levels are not met.

Regular citizens' feedback, survey, and citizens' report cards should be evolved by all government organizations for gauging citizens' response to their services. These should be used as inputs for improving organizational efficiency.

Citizens should be actively involved in all stages of the welfare and development programs implemented by the government.

Social audit should be made mandatory for all developmental programmes and be institutionalized for improving local service delivery.

Evaluation tools for assessing the performance of local bodies should be devised wherein citizens should have a say in the evaluation.

Reward schemes should be introduced to incentivize citizen's initiatives.

School awareness programmes should be introduced, highlighting the importance of ethics and means of combating corruption.

Citizens may be involved in the assessment and maintenance of ethics in important government institutions and offices.

24/7 channels for feedback, complaints, securely protected whistleblowing.

4. Conclusion

The good-governance is the single most important factor for promoting development, eradicating poverty and the prosperity of any nation. Good-governance can be ensured in an atmosphere where transparency in governance exists. In India several initiatives have beentaken to ensure transparency in working of government and administrative authorities. Discloser of government decisions, civic engagement in the process of governance, e-governance initiatives in the general public administrationetc. are some major steps of the government in the direction of transparency or openness of governance. It is strengthening the Indian democracy and promoting trust in the efficiency and effectiveness of governments. The Right to Information Act, 2005 has become the governing law regarding public disclosure of government information and accessibility to public data. Although, the Act has opportunitized all citizens easy access to government policies and actions through right to information. The unavailability of data, complex data-sharing policies, unwillingness of officials in providing information are big problems in transparency of governance in India. The right to information, civic engagement in government plans and the digitalization of records are needed more scope in the country.

An Analysis of the National Security Exception under WTO Law and Its Potential to Overturn World Economic Order

Ms. Farah Hayat*

ABSTRACT

The World Trade Organization (hereinafter referred to as WTO) ushered in a new era of a multilateral trading system when it was established in January 1995. WTO members are prohibited from taking trade measures that are against the tenets of WTO law, except under certain extreme circumstances. For the same reason the national security exception under Article XXI of GATT, 1994 (hereinafter referred to as GATT, 1994) mostly lay dormant for a number of years. But this has started to change in the past few years. Developed countries like Russia, UAE and the United States have justified the trade restrictive measures taken by them against other WTO members on the ground of national security. On being challenged, these countries have taken the similar approach of questioning the jurisdiction of the WTO to even review the respective cases claiming the self-judging nature of the exception. This seems to be going in the direction of undermining the authority of the WTO to review disputes arising from the invocation of Article XXI of GATT, 1994. This could be a problematic scenario showing signs of the pre-WTO times when trade autarchy prevailed. It could be especially disastrous now for developing and poor nations when the WTO Appellate Body has become dysfunctional and developed countries may not feel bound by the Panel rulings. If it really is a self-judging national security exception, then if abused, it has the capacity to undermine the whole WTO regime. Since the debate around the invocation of the national security exception is slowly but steadily gaining momentum, there is immediate need to dissect and analyze its fundamentals and the challenges the exception poses. Accordingly, the author shall make suitable suggestions as to how a balance can be rightly struck between the rights and obligations of member countries under the WTO regime and how the misuse of the exception can be controlled.

Keywords: National Security Exception under GATT 1994, WTO Jurisdiction, Trade-Restrictive Measures, Rights and Obligations of members under WTO, Multilateral Trading System

I. Introduction

The WTO is the global body that since its inception has been playing a very important role in ensuring smooth flow of trade among and within nations that are members of this great international organization. It also does so in its capacity as a dispute resolution body when conflicts arise between two or more nations that may have severe impact on trade not only between the countries at conflict, but sometimes even world trade. As rulings of the WTO have a binding effect on the parties to the dispute, it has successfully put a reign on many developed countries in committing actions and taking measures that are trade restrictive. WTO members are bound to adhere to the three Agreements, namely, GATT 1994 which is an advanced form of GATT, 1947, Trade Related Aspects of Intellectual Property Rights (hereinafter referred to as TRIPS) and General Agreement on Trade in Services (hereinafter referred to as GATS) which are crucial to the smooth functioning of trade among nations. But all these Agreements also carry certain provisions that allow members to take trade restrictive measures in exceptional scenarios, such as, when national security is at stake.

For the past about 25 years that it has been into existence, the WTO has solved a number of disputes between and among nations on a variety of trade-related issues. But it's a new challenge for the WTO to tackle the disputes among nations due to invocation of the national security exception. The exception, laid down under Article XXI of GATT, 1994, gives freedom to WTO member countries to breach their obligations as member of WTO and apply trade-restrictive measures if it is aimed at protecting national security. The member countries viewed the invocation of the national security exception equivalent to opening the Pandora's Box that would bring its own set of problems and thus avoided to invoke the exception as a defence in front of WTO Panels.[1] An outstanding example of the general acceptance by members of the particular character of the exception came when there was a panel

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[1] Geraldo Vidigal, *WTO Adjudication And The Security Exception: Something Old, Something New, Something Borrowed – Something Blue?*, Vol. 46(3) LEGAL ISSUES OF ECONOMIC INTEGRATION (2019), *available at* https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=3400717 (Last visited on February 6, 2021).

request before WTO in its early days regarding the Cuban Liberty and Democratic Solidarity Act (Helms-Burton) of 1996 and the United States had referred to its 'security concerns' in its response.[2] Eventually the European Communities had consented to a bilateral solution allowing the United States to continue having the legislation as it is.[3]

But a provision that lay dormant for decades altogether, like a dragon sleeping undisturbed in its cave, has now been awaken. It has recently been invoked by USA, Russia, UAE and some other nations respectively to justify trade restrictive measures taken by them against other WTO members. These measures are against the tenets of WTO law and have adversely affected the countries that have been on the receiving end of these measures. These trade-restrictive measures have also led to the filing of a large number of fresh cases in the WTO.

II. What is the National Security Exception?

Article XXI of the GATT, 1994 provides the security exception and states:

"Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

  (i) relating to fissionable materials or the materials from which they are derived;

  (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

  (iii) taken in time of war or other emergency in international relations…"

The terminology in the chapeau of Article XXI(b) gives the liberty to a member of the WTO to take any such action, which implicitly includes trade restrictive measures, which "it considers necessary for the protection of its essential security interests". Before GATT 1994 became the norm for WTO members, Article XXI under GATT 1947 was invoked by Sweden in 1975 when it applied limitations with respect to import on a number of footwears such as rubber boots, leather shoes and plastic shoes and justified them to be in consonance with Article XXI. Sweden had explained that it was in the best interest of its national security that a minimal domestic manufacturing capacity should be maintained in industries that are vital, so that provision of those basic goods can be secured that are essential at the time of war or if there is any other emergency in international relations.[4]

More than forty years later, in 2017 Ukraine initiated a dispute in WTO against measures taken by Russia by way of which Russia had put restrictions on the transit of traffic commencing from Ukraine and destined for other countries like Belarus, Mongolia, Kazahkstan, Turkmenistan, Kyrgyz Republic, Tajikistan and Uzbekistan via Russia.[5] Russia cited Article XXI(b)(iii) as a justification for the measures it had undertaken. Russia argued that emergency in international relations had occurred in 2014 that had presented threats to Russia's essential security interests and the restrictions were taken in response for the same.[6]

In October, 2017 Qatar sent a request to the Dispute Settlement Body (hereinafter referred to as DSB) to establish a Panel against measures taken by the UAE to economically isolate Qatar. Qatar alleged violation of its rights under WTO's GATT, GATS and TRIPS. These conflicts stem from 2017 when Saudi Arabia and its Gulf Cooperation Council partners imposed an economic embargo on Qatar due to allegations the Qatari government funded terrorist organizations.[8] UAE defended its measures taken against Qatar under Article XXI of GATT while also denying WTO's jurisdiction to try the issue which it contended was not a trade related issue.[9]

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2 Dispute Settlement Body, Minutes of Meeting, 16 October 1996 (WT/DSB/M/24) at 7. See Request for the Establishment of a Panel by the European Communities, United States – The Cuban Liberty And Democratic Solidarity Act, 8 October 1996 (WT/DS38/2).

3 Marian Nash (Leich) (ed.), *U.S. -European Union Understanding on LIBERTAD Act*, Vol. 91 AJIL 497 (1997).

4 Sweden- Import Restrictions on Certain Footwear (Nov. 17, 1975), *available at* https://docs.wto.org/gattdocs/q/GG/L4399/4250.PDF (Last visited on February 7, 2021).

5 Russia- Measures Concerning Traffic in Transit (WT/DS512/R) (April 5, 2019), *available at*https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm (Last visited on February 7, 2021).

6 *Id.*

7 United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights (WT/DS526/2) (Oct. 6, 2017) , *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds526_e.htm (Last visited on February 8, 2021).

8 Bryce Baschuk, *WTO to Probe Qatar's TV Piracy Claim Against Saudi Arabia*, BLOOMBERG LAW (2018).

9 Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights (DS526), *available at* https://www.wto.org/english/news_e/news17_e/dsb_23oct17_e.htm (Last visited on February 8, 2021).

The American government imposed 25% import tariff on steel[10] and a 10% import duty on aluminium products[11] in March 2018 through presidential proclamations. This imposition was made as per Section 232 of the Trade Expansion Act, 1962. The said provision gives power to the President of the United States to make adjustments to the imports of any products or its derivatives that are being imported into the United States if national security demands it. A number of member States were of the view that these actions were not taken in good faith and could pose a threat to the world economic system that is largely reliant on sound inter-country trade. Trade agreements entail a delicately balanced set of commitments to reduce tariffs and other such barriers to trade, the objective being trade liberalization. Therefore, if countries will start adopting a protectionist approach by invoking national security, then the delicate threads of liberalized trade will begin to unravel.[12]

A number of countries have initiated WTO disputes against the USA with respect to these tariffs while also imposing retaliatory tariffs. Other countries that have been adversely affected by these tariffs are India, the European Union, Canada, China, Russia, Norway, Turkey among others. Although the United States has been justifying the import tariffs under Article XXI and not the Agreement on Safeguards, the countries that have been adversely affected by these tariffs have taken them to be under Agreement on Safeguards and have applied retaliatory tariffs allowed under Safeguards Agreement, Article 8 as a measure of restoring balance.[13] For example, as India is one of the major exporting countries of steel and aluminium to the United States, the measure has a repercussion of approximately 240 million dollars on domestic steel and aluminium industry.[14] India imposed higher tariffs in retaliation, affecting about $1.4 billion of U.S. exports as per 2018 data, on goods such as nuts, apples, and chemicals under the Agreement on Safeguards.In return, USA has also commenced disputes in the WTO against these retaliatory tariffs against India and other countries as well. Responding to violations of one set of trade rules with violations of another set of rules creates a question in the minds of everyone whether these rules even have any value in the first place.[16]

There are other conflicts currently involving national security at the WTO as well. Japan has restricted the export of certain chemicals crucial to South Korea's electronics industry, citing national security risks.[16] India has announced it will withdraw trade preferences to Pakistan due to national security reasons.[17]

III. Challenges Posed by the National Security Exception

GATT negotiators always feared that the security exception may be abused and misused. They were concerned that it would create a "very big loophole in the whole [GATT] Charter."[19] The US delegation responsible for drafting the exception expressed that there "was a great danger of having too wide an exception . . . that would permit anything under the sun."[20] Hence, the national security exception was drafted in such a manner that it could be resorted to under very limited situations, while it was left to the discretion of the member States to determine those circumstances:

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10 Presidential Proclamation on Adjusting Imports of Steel into the United States (March 8, 2018), *available at* https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/ (Last visited on February 8, 2021).

11 Presidential Proclamation on Adjusting Imports of Aluminum into the United States (March 8, 2018), *available at* https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/ (Last visited on February 9, 2021).

12 Simon Lester and Huan Zhu, *Closing Pandora's Box: The Growing Abuse of the National Security Rationale for Restricting Trade*, CATO INSTITUTE POLICY ANALYSIS, NO. 874 2 (2019).

13 For an overview of rebalancing under the Safeguards Agreement, see Matthew R. Nicely and David T. Hardin, *Article 8 of the WTO Safeguards Agreement: Reforming the Right to Rebalance*, Vol. 23 ST. JOHN'S JOURNAL OF LEGAL COMMENTARY 699 (2008).

14 *India has world's "worst" tariffs on US products: Senator Graham,* The Economic Times, (Last updated on Aug. 26, 2019), *available at* https://economictimes.indiatimes.com/news/economy/foreign-trade/india-has-worlds-worst-tariffs-on-us-products-senator-graham/articleshow/70835278.cms?from=mdr (Last visited on February 10, 2021).

15 *US-India Trade Relations*, CONGRESSIONAL RESEARCH SERVICE, *available at* https://fas.org/sgp/crs/row/IF10384.pdf (Last visited on February 12, 2021).

16 Simon Lester & Huan Zhu, *supra* note 12, at 7.

17 See Henry Farrell and Abraham Newman, *Japan has weaponized its trade relationship with South Korea*, The Washington Post (Aug. 1, 2019).

18 Bryce Blaschuk, *India Withdraws Trade Preferences to Pakistan; Cites WTO Clause*, BLOOMBERG LAW (Feb. 15, 2019).

19 United Nations, Econ. & Soc. Council, Preparatory Comm. of the U.N. Conference on Trade & Emp't, Thirty-Third Meeting of Commission A, at 19, U.N. Doc. E/PC/T/A/PV/33 (1947) (Dr. Speekenbrink on behalf of the Netherlands), *available at* http://www.wto.org/gatt docs/English/SULPDF/90240170.pdf ((Last visited on February 16, 2021).

20 *Id*., at 20 (Mr. Leddy on behalf of the United States).

> "I think no one would question the need of a Member, or the right of Member, to take action relating to its security interests and to determine for itself-which I think we cannot deny-what its security interests are .... I think there must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed for purely security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose . . . . This is the best we could produce to preserve the proper balance."[21]

Some of the major challenges posed by the national security exception under WTO law are as follows:

1. Self-judging Character of the National Security Exception

When Ukraine went to WTO with a dispute against Russia, Russian Federation made the argument that Article XXI GATT explicitly confers discretionary power on the WTO member invoking the Article to determine whether such trade measures are necessary, and also what the form, design and structure of those measures shall be. Russia argued that as it has invoked Article XXI(b)(iii) of GATT 1994, the WTO Panel lacks jurisdiction to further address the matter. Whereas Ukraine debated that any member who invokes Article XXI does not have total and unfettered discretion and it's the Panel who must objectively assess the invocation which includes examining whether the member invoked the exception under Article XXI in good faith.

The self-judging character of the national security exception under GATT 1994 has been recognized by the United States as well that goes on to even call it "non-justiciable".[22] In June, 2018 when the EU requested the US for consultations regarding the steel and aluminium import tariffs, the United States responded:

> "The President determined that tariffs were necessary to adjust the imports of steel and aluminum articles that threaten to impair the national security of the United States. Issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement. Every Member of the WTO retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests, as is reflected in the text of Article XXI of the GATT 1994."[23]

But it was held by the Panel in the Russia- Measures Concerning Traffic in Transit Case:

> "The adjectival clause "which it considers" in the chapeau of Article XXI(b) does not extend to the determination of the circumstances in each subparagraph. Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision."[24]

Although it may be interesting to see the view Russia may take in the dispute against the United States regarding the section 232 steel and aluminium tariffs.

2. Ambiguous Wording of Article XXI, clause (b) sub clause (iii) of GATT 1994

The terminology used in sub clause (iii) of Article XXI(b) is broad enough to include within itself a number of events that may not fit within the definition of war, but may very well fit within the ambit of "*other emergency in international relations*". How Sweden invoked Article XXI(b)(iii) to rationalize its import restrictions on footwear like, rubber boots, leather shoes and plastic shoes, is a good example of this. Russia justified its measure against Ukraine to be in response to a situation of emergency in international relations. It had happened in 2014 and presented threats to the essential security interests of the Russian Federation. Russia's invocation of the exception was even accepted by the Panel.[25] But any member country that invokes Article XXI(b)(iii) and justifies the measure it took to be taken in times of "*other emergency in international relations*" must clearly lay down the emergency situation without an iota of doubt remaining as to the emergency situation that led to the taking up of a

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21 *Id*., at 20-21.

22 Third Party Executive Summary of the United States of America, Russia – Measures Concerning Traffic in Transit (WT/DS512) (Feb. 27, 2018), *available at* https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Exec.Summ.fin.%28public%29.pdf (Last visited on February 18, 2021).

23 Communication from the United States of America, United States-Certain Measures on Steel and Aluminium Products, (WT/DS548/13), (June 11, 2018), *available at*

24 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009DP.aspx?language=E&CatalogueIdList=249128, 246598, 246199,246202, 246109,246110,246111,246115,246118,246147&CurrentCatalogueIdIndex=1&FullTextHash=& HasEnglish Record= True&HasFrenchRecord=True&HasSpanishRecord=True (Last visited on February 19, 2021).

25 *Supra* note 5, at 50, para 7.101.

trade-restrictive measure against another country. The panel report in Russia- Measures Concerning Traffic in Transit case lays down that "*political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii).*"[26]

The Panel in the Russia- Measures Concerning Traffic in Transit case had not accepted the argument by Russia that Article XXI(b) is entirely self-judging, including sub-clause (iii) and laid down that the circumstances referred to in item (iii) were in the Panel's view, clearly capable of objective determination. This interpretation by the Panel is although laudable, but is only applicable in that particular dispute, not binding future Panels to adopt a similar approach.

3. Whether National Security Includes Economic Security

When Russia invoked the national security exception to justify their trade-restrictive measure, it was in a situation of apprehended threat to internal peace and security. The Crimea has been occupied by Russia and there has been military conflict between forces in east Ukraine that have support of Russia and the Ukrainian army. The United Nations intervened and made an assessment of the state of affairs in Crimea and East Ukraine as "*threat or use of force against the territorial integrity or political independence of Ukraine by the Russian Federation*".[27] Nonetheless, it may be doubtful whether the restrictions on rail and road transit imposed by Russia could be measures "*necessary for the protection of security interests*" but it's for certain that they the circumstances in which they were adopted, amounted to a security conflict of an international nature and the States that were affected by these restrictions were also involved as parties to the conflict.[28]

But the United States invoked Article XXI to protect its economic interests. That raises a very pertinent question that whether national security includes economic security? Economic security is a notion that "*relates to the strategic ability of a state to maintain and develop their socio-economic system of choice and their relative economic power position*"; its capability to secure its economic interests and also balance economic environment globally, falls under economic security.[29] Liberalization of markets and globalization of supply chains have led to an economic interdependence among countries which actually guaranteed increase in prosperity. But lately, the same economic interdependence is seen as one of the sources of possible risk to the national security of a country because it diminishes the control and self-sufficiency of a particular State.[30]

Hence, if national security is conceptualized to include economic security, then there is the possibility of a significantly large number of measures being justified on the ground of national security under Article XXI of GATT.[31]

4. Whether National Security and Political Issues are Outside the Ambit of WTO

In Russia-Measures Concerning Traffic in Transit Case, Russia stated in its argument that the measures it took against Ukraine fall within the sphere of political and security matters and cautioned against the involvement of the WTO in it because it's neither designed nor equipped to review such matters.[32] Russia further expressed that intervention of the WTO in a State's security and political issues might disturb the fragile balance of rights as well as obligations under the WTO system and might also be hazardous for the multilateral trading system.[33] But this reasoning falls flat because trade actions, even if taken for security reasons, are after all, trade actions which must be scrutinized by the WTO dispute settlement system, if challenged. Moreover, if a WTO member country re-labels a trade interest as a national security interest and invokes Article XXI, it's only the WTO that can lift that veil and identify the true nature and intention behind a certain trade-restrictive measure.

IV. Balancing Rights and Obligations of Sovereign States under WTO Law

For the smooth functioning of world trade, the rights of sovereign States to take decisions and measures it deems best for its trade and development must be respected and upheld. But it must also be balanced with the rights of other States to not be at an unfair, disadvantageous position in terms of trade because one State is upholding its essential

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[26] *Id.,* at 54, para 7.123.

[27] *Id.*, at 50, para 7.103.

[28] See the Resolutions of the UN General Assembly, A/Res/71/205 and A/Res/73/194. Wolfgang Weiss, *Interpreting Essential Security Exceptions in WTO Law in View of Economic Security Interests*, (2019).

[29] Gustaaf Geeraerts And Weiping Huang, *The Economic Security Dimension Of The Eu China Relationship*, in SECURITY RELATIONS BETWEEN CHINA AND THE EUROPEAN UNION 187-189 (Thomas Christiansen And Han Dorussen, eds., Cambridge University Press 2016).

[30] J. Benton Heath, *The New National Security Challenge to the Economic Order*, Vol. 129 YALE LAW JOURNAL, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3361107 ((Last visited on February 22, 2021).

[31] *Id.*

[32] *Supra* note 5, at 29, para 7.22.

[33] *Id.*

security interests. That was the whole idea behind the establishment of the WTO and the Agreements that form its core and must be mandatorily adhered to by all its Members. In the past it has been seen that there remained an understanding among the WTO members that the national security exception will be invoked in a wise manner, in good faith and in very rare situations.[34] And this seemingly unfettered power remained unused for a long time for its dangerous nature. But of late, many developed countries are tapping into it to justify moves that are advantageous to their domestic trade but have the possibility of creating an imbalance in world trade.

All Members of the WTO that have invoked the national security exception, whether under GATT 1994 or under their domestic law, have objected to the jurisdiction of the WTO to review a trade measure when Article XXI of GATT has been invoked but the provision therein is not entirely self-judging and the discretion provided in chapeau of Article XXI(b) to invoking member, does not extend to the subparagraphs that follow. Another argument by invoking members is that WTO can't review what they consider are political and security matters. But trade actions taken for security reasons do not fall beyond the WTO dispute settlement system.

Hence, it's important to strike a balance between the rights of sovereign States and their obligations under WTO law. To do so, the role played by WTO Panels becomes very significant. Panels must follow an approach that doesn't encourage other WTO members to impose protectionist measures in the future while also not entirely limiting the right of a sovereign State to use the security exception.[35]

Turkey which was a third party in *Russia- Measures Concerning Traffic in Transit Case*, had suggested that Panels can adopt an analytical approach that may require the complainant country to first establish that a prima facie case of inconsistency exists. After that the respondent country can substantiate its justification under Article XXI. The European Union in its third party written submission in the *Russia- Measures Concerning Traffic in Transit case*, rightly emphasized upon the similarity between Article XX and XXI and suggested that the 'stringent necessity test' applicable to Article XXI is adaptable to Article XX. Therefore, WTO Panels should apply the test to decide whether measures taken by the respondent country were actually essential for national security.[37]

Moreover, in order to avoid knocking the doors of WTO DSB altogether, parties at conflict must try to find mutually beneficial solutions to disputes through negotiations and mediation. They may seek aid of other members of WTO and the Secretariat of WTO.[38] Furthermore, some additional rules may be needed allowing for national security related trade barriers on one hand, while also encouraging liberalization of trade for other goods and services as compensation. This may actually help in keeping the trading system stable while avoiding high level protectionism.[39]

V. Conclusion and Suggestions

The WTO was established to ensure predictability in flow of trade as one of its primary objectives. But the rise in trade-restrictive measures being taken by WTO members in recent times, and the invocation of the national security exception to justify the same, has shaken that very predictability, especially when the power of the WTO to adjudicate on such matters has itself been questioned. But it must be remembered that the role played by adjudication in case of inter-state disputes, is the same in 2019 as it was in 1899 when representatives from 26 States had gathered in the Hague seeking to go beyond ad hoc adjudication of specific disputes by establishing an apparatus that would allow claims to be brought unilaterally against States that have given their prior consent for the same. It's a manner of peaceful settlement of those disputes that couldn't be settled through diplomacy.[40]

Regarding the exception itself, while the best case scenario would have been that the phraseology of Article XXI as in GATT 1947 would have been amended to take away the power it renders on Members to decide the necessity of a trade restrictive measure it takes in the name of essential security interest, before it became a part of the WTO regime. But it was a modification not made then with implications that could be very difficult to handle in the coming days in the current political climate. Currently, a textual amendment is not in sight. Therefore, the national security exception must be sparingly used and with utmost caution. While the rights of sovereign States have to be

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34 Roger Alford, *The Self-Judging WTO Security Exception*, UTAH LAW REVIEW 697 (2011).

35 William Alan Reinsch & Jack Caporal, *The WTO's First Ruling on National Security: What Does It Mean for the United States?,* CENTRE FOR STRATEGIC AND INTERNATIONAL STUDIES (April 5, 2019), *available at* https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states (Last visited on February 26, 2021).

36 Art. XX, GATT, 1994.

37 European Union: Third Party Written Submission, Russia- Measures Concerning Traffic in Transit (WT/DS512) (Nov. 8, 2017), *available at* http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156602.pdf (Last visited on March 1, 2021).

38 Tania Voon, *Can International Trade Law Recover? The Security Exception in WTO Law: Entering a New Era*, Vol. 113 AJIL UNBOUND (2019).

39 Simon Lester and Huan Zhu, *supra* note 12.

40 Art. 38, cl. 1, Convention on the Pacific Settlement of Disputes, 1899.

upheld on one side, on the other side it must be balanced with their obligations under the WTO regime. They must abide by the good faith obligation of the national security exception. Unilateral determinations of the applicability of GATT Article XXI must be vehemently discouraged.

WTO Panels must also take cue from the ruling by the Panel in Russia- Measures Concerning Traffic in Transit case, even though the ruling does not create a binding precedent. They may apply a deferential approach and assess whether the respondent country acted in good faith. Whether national security exception could be invoked by a country to justify restrictive trade measures that were actually taken to secure economic interests, is also something only time will tell, perhaps by means of a Panel ruling in one of the cases currently pending against the United States in the WTO. Otherwise, now with the WTO Appellate Body having become dysfunctional as of now, and WTO Members invoking a provision under WTO law to justify their trade-restrictive actions while also denying the WTO's jurisdiction to decide on it, this could create a havoc on the multilateral trading system. This, could be bad, really bad news, for world economy.

Lastly, as Prof. Elizabeth Trujillo has rightly expressed, "*national security, as an emblem of national sovereignty, to be effective, will need to be used narrowly once again, rather than as a weapon for disengagement with others, as we move forward into a post-COVID-19 world of many unknown sources of insecurity.*"[41]

[41] Elizabeth Trujillo, *An Introduction to Trade and National Security: New Concepts of National Security in a Time of Economic Uncertainty*, Vol. 30 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 222 (2020).

Recognition of Live-In Relationship in India: Branding a New Concept or a Prelude to Marriage

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ABSTRACT

The focal point of this paper is the newly evolved style of living, which is rapidly becoming popular among youths in India as Live-In Relationship. Concept of non-marital cohabitation is slowly gripping its roots in Indian society as an easy and burden less life free from all the responsibilities of marriage, providing complete freedom to enjoy sexual ecstasy. The present paper attempts to explicate the current legal status of Live-in relationships and analyze the ramifications flowing out of it in a marriage centric India. In this paper we tried to look into the judicial viewpoint of Indian courts towards this new trend of living together without marriage with regard to various rights of live-in partners and rights of the children born out of their union and further went with a debate, that whether the legal recognition of this new style of non-marital living is a move towards branding it as a new legalized form of cohabitation in the name of live-in relationship, or it is just a marriage favoring attitude of Indian judiciary in order to keep the sanctity of Indian tradition intact. In this paper the authors have also tried to identify whether there is a need to amend the present laws or is it time to formulate a separate legislation to regulate and legalize live-in relationships.

Keywords: Live-In Relationship, Hindu Marriage, Legality, Couples, Succession, Maintenance

Introduction

Heterosexual couples when enjoy their conjugal rights while staying in the marriage are looked upon with pride and honor by rest of the community in India, just because such unions have acquired societal acceptance and recognition by law and hence they are encouraged by every religion in allover India.

Marriage in India is an age old well established institution formalized to regulate sexual activities between heterosexual couples and to promote legitimacy to such relationships including children born out of such unions.

Every human being on earth is a social animal and requires water and air as mandatory elements to survive; likewise companionship is also a must thing for every person to maintain their mental status. Every person is it male or a female after a certain age requires a companionship of opposite sex for number of biological as well as social reasons. Therefore, in order to maintain decency and decorum in the society, the institution of marriage was formulated. In a marriage, a man and woman ties sacred marital knots according to their respective religions; take vows and exchange promise to always stay together being loyal towards each other. Indian society always favours marriage considering it to be secure and prestigious. The trend of marrying each other and to stay with the same spouse forever is being followed from time immemorial I so in order to keep the society away from immoral activities and to discipline the relations between man and women. Married couples are always looked upon with due respect and holds high position in the society. Since Vedic times marriage has been considered as a sanskar and mandatory practice to attain salvation.

However the advent of industrial revolution led to the development in educational system providing room for economic independence of women and shift in moral and social values; especially those relating to relations of husband and wife has underwent radical transformation.

People nowadays have become more career centric and have made changes in the pattern of their priorities. Marriage is now considered as a bundle of burden, which is nothing more, than an unnecessary responsibility. Unlike old days when marriage was given paramount importance, it is now believed that marriage creates chaos in the lives of an individual as it carries number of obligations towards each other and their respective families. Earlier, when arranging marriage was an exclusive task of the elders of the house and interference by either the bride or groom was considered as a direct insult of the entire family; Nowadays this fashion has witnessed a major transformation where the children themselves take care of their matrimonial affairs and decide whether to marry or not, when to marry and with whom to marry by

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curtailing and disobeying the decision of their elders. This rapid change in the social values has left open the room for Indian tradition to be replaced by western culture, which is tolerant enough to let the people to alter the customs and tradition of the Indian society according to their needs and comfort. Indian youth is constantly getting influenced with the western culture due to its appealing and alluring nature. Westernization and globalization together has rapidly changed the social unit of the Indian society. Joint family culture, which is very popular in India, is disappearing while nuclear family system is blooming like mushroom in the rain.[1]

Marriage in contrast to live-in relationship

Live-in Relationship is a newer concept if compared to marriage. However, the latter is considered as one of the most important sanskar according to Hindu society. According to Manu, marriage or the vivah sanskara is considered supreme among the other sanskars as it is the most fulfilling one; not only with regard to the satisfaction of sexual desires but it also makes a man a complete individual. It provides a respectful socio-religious status to an individual in the society he lives in, while the wife is considered as the other half (Ardhangini) of the man she marries.[2] In Indian society a couple in marriage is assumed to be complementing each other in number of ways as their union gives birth to a family. It includes various customs and traditions, which eventually gets transformed into a civilized society free from chaos, illicit and adulterous acts. The concept of marriage is an age-old institution. It has been discussed many times in the Dharmashastras but the actual conceptualization of marriage as an institution is discussed in an ancient Indian Epic [3]of Mahabharata of Dwapara Yuga. The Adiparvain[4] its Adhyaya 122 of Upa Parva 19[5]the emergence of fidelity in marriage is described in detail through a gatha (tale) of the sage svetaketu son of Rishi Uddalaka who opposed infidelity in marriage and licensed marriage as a pre-requisite to procreation. [6]The institution of marriage in India is considered as a sacrament and not a mere socio-legal contract. [7]The Dharamshastras provides three important objectives of marriage in the life of an individual i.e. Dharma (honest and code of proper conduct conforming to one's duty and nature),[8] Praja (progeny) and Rati (sexual pleasure). However, a fourth objective is described in Mahabharata as Samarjuna that is the discharge of one's duty towards the society, which requires the presence of a wife.[9]

In India, the institution of marriage is given paramount consideration and despite the usage of such an age old custom of marriage the new and modern style of cohabitation is getting more and more famous among the new generation of our country. This is because the new generation is continuously lacking patience and maturity, which a marriage requires. Time has changed; people are more educated and busy with their career, sparing time, emotions and unconditional love seems old fashioned to the newer generation. They believe marriage to be an unnecessary check upon their freedom and lifestyle. So, in order to escape the responsibilities of marriage, people are leaning forward towards this fancy concept of companionship commonly known as live-in relationship, which is lucrative enough to draw attention of the young cohort of our country. It provides almost all the characteristics of marriage such as staying together like husband and wife, supporting each other in every walk of life. At times children are also begotten in live-in relationships; but what is missing in these kinds of living arrangement makes it entirely different from marriage. Legal recognition is completely absent (except in case of long cohabitation which attracts presumption of valid marriage)[10] in such kind of cohabitations, which makes them temporary, less secured and defenseless in nature. Institution of marriage is formulated for the benefit of the society, to prevent mayhem and to maintain decency. It is equipped with certain rights and duties of both the parties to marriage for their mutual understanding and healthy growth of their relationship. It also provides legal remedies in case of any dispute between the married couple ranging from right to inheritance, right to maintenance, legitimacy of children and succession rights of children, to seeking divorce from each other and process thereafter. However, on the flip side live-in relationship lacks every legal remedy that makes it more vulnerable and less reliable.

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1 Manju Jamwal "Live-in Relationship in India: Legal Moves And Judicial Attitude: Some Observations" Vol.4 *RJNLU Law Review* 1 (2014).

2 Prof vijender kumar "Live-In Relationship: Impact on Marriage and Family Institutions" 4 *SCC (J)* (2012).

3 Anindita Basu (ed.) Ancient History Encyclopedia, (Mahabharata), available at https://www.ancient.eu/Mahabharata/ (last visited on May 15, 2020)

4 "The Adiparva or The Book of Beginning" is the first of eighteen major books (Maha Parvas) of Mahabharata comprising 19 sections (Upa Parvas) and 225 chapters (Adhyayas), available at http://www.vyasonline.com/adi-parva/ (last visited on May 15, 2020)

5 Named as "Sambhava Parva" containing 67 Chapters (62-128), available at https://en.wikipedia.org/wiki/Adi_Parva, (last visited on May 15, 2020).

6 *Supra* note 7.

7 *Gopal Krishnan vs. Mithilesh Kumari*, AIR 1979 All 316

8 Irshad Ahmad Wani, *The Sociology: A Study of Society* 234 (Educreation Publishing, New Delhi, 2017).

9 *Supra* note 7 at 3.

10 *Badri Prasad vs. Dy. Director of Consolidation,* 1978 AIR 1557 (The first case in which Honorable Supreme Court of India first recognized by giving legal validity to a 50 year old live-in relationship of a couple)

Evolution and growth of live-in relationship in India

This cannot be deflected that live-in relationships were existed in the history of India; one such proof of existence can fairly be drawn from the practice of *gandharva vivah*,[11] one of the eight forms of marriages mentioned in Manusmriti prevalent in ancient times. According to Apastamba Grhyasutra, an ancient Hindu literature, Gandharva marriage is a practice of marriage where the woman chooses her own husband. They meet each other, consent to live together, and coitus consummates their relationship. This form of marriage was common during post Vedic period and never required consent of parents or anyone else; in-fact the parents of the girl themselves let their daughters stay free to search their husbands. The then society was very much casual about this procedure and it was not considered scandalous or unnatural at all[12]. The newer version of Gandharva vivah can very well be regarded as live-in relationship of today's world. In live-in relationship also, the partners themselves choose each other out of affection and agreeably live together and perform all the acts similar to the couples in marriage without going through the formalities required in a legal marriage. However, society nowadays has turned a little cold toward such living arrangements and they are perceived as a run away from marriage, its obligations and responsibilities. The orthodox compartment of Indian society, regards live-in couples as careless and self-centered group of people.

Another, example of live-in relationship in the recent years is an agreement of maitri karar or friendship contract prevalent in Gujarat; between a male and female which has now been struck down[13] considering it to be illegal as it was purposely designed to circumvent the rules of Hindu Marriage Act, 1955, which prohibits remarriage. It served to the formulation of a pact between a married Hindu male and a female, while his wife is alive; in the form of an agreement entered into, before the Sub-Registrar with his seal on an affidavit on a stamp-paper of Rupees 10, signed by both the parties with two witnesses[14]. Such agreements were customized according to the needs of both the parties; include financial support, by the male partner to her female counterpart. Since after maitri karar went illegal many other similar contracts sprang up to defeat the facets of Hindu Marriage Act, 1955; in the name of service contract, caretaker arrangements, guardianship agreements, and some were even called nursing contracts[15].

Similar arrangements under the shield of old tradition is also seen in various parts of Southern Rajasthan by Garasia tribe; where a custom of elopement followed by live-in relationship is practiced since long, by paying bride's price to her father and after the return from elopement they slip into live-in relationship and start living like husband and wife without performing any ceremonies of marriage. They can however marry each other after they have gathered full amount to pay as a bride's price. The Garasia male is free to keep more than one wife if his present partner is sterile or she is unable to bear a male child. This process always takes place on full moon of March at the annual Gaur Fair. The women is also free to search for another live-in partner at another fair if her another partner is willing to pay high price to her former partner[16].

Another similar instances are recorded in Madhya Pradesh, Gujarat and Rajasthan in the name of Nata Pratha. Under this custom a male is free to keep more then one women. And a woman is free to dissert her previous partner on various accounts of cruelty and misbehavior and can start living with another man. The women can also however be allowed to leave her children behind which she conceived from her previous husband. The custom initially was formulated for both married men and women who were unhappy with their respective marriages, but it is now being misused by the singles also who wish to stay together with each other[17].

Apart from such practices, live-in relationship is now becoming choice of every that individual who prefer cohabitation upon marriage. Though traces of live-in relationship can be witnessed in ancient Indian history and even in the recent past, where some out of them are being still practiced, but marriage always remained in

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[11] Manusmriti, Part 3, 32. (The voluntary union of a maiden and her lover one must know (to be) the Gandharva rite, which springs from desire and has sexual intercourse for its purpose.)

[12] Gandharva vivah, Available at: https://en.wikipedia.org/wiki/Gandharva_marriage (last visited on May 20, 2020)

[13] In the case of *Minaxi Zaverbhai Jethwa v. State of Gujarat* 2000 (2) GLR 1336, 2000 (3) GCD 1745.

[14] Maitri Karar, available at:https://en.wikipedia.org/wiki/Maitri_Karar (last visited on June 1, 2020)

[15] Essay on Maitri Karar Under The Hindu Marriage Act, available at https://unlocking-the-future.com/essay-on-the-maitri-karar-under-the-hindu-marriage-act/available at: https://heliosenlighten.org/essay-on-the-maitri-karar-under-the-hindu-marriage-act/(last visited on June 1, 2020)

[16] Garasia Community- The only community in Rajasthan where live-in relationships are a tradition, available at: https://www.ohmyrajasthan.com/garasia-community-rajasthan (last visited on June 1, 2020)

[17] Nata Pratha, a tradition that allows men and women to live with person of their choice, available at: https://www.thecitizen.in/index.php/en/NewsDetail/index/9/10641/Nata-P ratha-a-Tradition-That-Allows-Men-and-Women-to-Live-With-Person-of-Their-Choice(last visited on June 1, 2020)

dominance across the whole nation. It was always regarded as the most favorable, secured and prestigious institution for the welfare of public at large.

Our country, nowadays is encountering major shift and transformation in culture and lifestyle respectively on a very high pace. The youth of our country is getting influenced with the culture of the west where live-in relationship are the most common sort of relations between men and women and are legal in some of the countries. This radical change can be called as the by-product of globalization, which has turned the world into a small global unit, where with the advancement of human approach to different geographical reign has led western influence more probable in a developing country like India[18]. Globalization has left open bigger opportunities for both men and women across the world to grow personally and professionally. The new generation has taking it as a boon for their individual growth and migrating to different part of the world in search of jobs and livelihood. Resultantly, people are adapting new ways of life from different cultures they are living in, far and wide across the globe, leading to modification in their conventional thinking. Now people in India too, are no more stuck to the old followed traditions and are getting accustomed with new ways of life they discover.

Major impact of globalism can be witnessed in the matrimonial arrangements in India where gradual alteration in the institution of marriage is taking place not only among the present youth generation but also getting common between old age communities[19] too. People are getting more and more inclined towards arrangements which are similar to marriage in terms of staying together but have different perception when it comes to permanency and legal status of their union. Opting live-in relationship over marriage is getting famous for number of reasons. It has not bloomed full fledged in the whole nation, still the conservative class of the society frowns upon it considering it to be less secure, less permanent, less prestigious and an easy escape from one's responsibility. Despite being cursed for its easygoing nature innumerable times, the trendy and highly qualified class believes it to be more comfortable, less burdened and less demanding living arrangement as compared to marriage which provides more space to them in their professional as well as personal sphere and involves hassle free environment similar to marriage.

Live-in relationship is a new, fancy and glittery term; sufficient enough to provides larger freedom and involves no responsibilities. A person is free to enter and exit into a live-in relationship as many times as he or she wishes to. It has also been regarded as a "walk-in and walk-out" relationship by Justice Shiv Narayan Dhingra in Alok Kumar vs. State & Anr[20]. It is a living arrangement where two people of opposite sex live together under same roof like a husband and wife without performing any ceremonies required by a valid marriage. These kinds of arrangements are very common these days and people prefer them more than a marriage in order to keep the stress of divorce at bay. Marriage along with social security and advantages carries many disadvantages too i.e. separation from each other in case of bitterness is not easy, as it is a lengthy and costly affair which allows involvement of legal procedure. A couple to secure a divorce has to go through many legal technicalities and also have to invest so much time and money. Apart from being time taking and expensive, the process of divorce is traumatic enough to give emotional setback to both the partners and their families. Getting into live in relationship from the fear of divorce is becoming major reason responsible for increased rate of non-marital cohabitation in India these days. However, the aforesaid reason is not only the driving force giving boost to the growth of live-in relationship in India, there are many other reasons too which are letting people take resort to live-in relationship rather than opting for marriage.

People in today's time has become more career oriented and less tolerant, they consider marriage as a big compromise with their career and self respect. Bearing and rearing of children seems unnecessary and self-limiting task to the new generation. Thus, they prefer rather not to marry and live in each other's company in an easier way where they can demarcate their personal space unlike in marriage.

Beside these, financial instability of the struggling individuals in different parts of India namely in the big metropolitan cities like Delhi, Mumbai, Bangalore etc. where people have come from various parts of the country to work, forces them to stay together in order to pool their expenditures and they then eventually develop feeling for each other while staying together and start living in live-in relationship. Many a times these people falsely portray themselves to be married couples to the landlords just for the sake of acquiring good accommodations which are specifically available for married tenants only.

However, some couples slip into live-in relationship due to social hurdles where marrying each other is not possible

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[18] James Patole, "The Impact of Globalization on the New Middle Class Family in India" 23 *IOSR Journal of Humanities And Social Science* 16-17 (2018)

[19] Ketaki Latkar, "Living in on a prayer", *Pune Mirror,* June. 26, 2016, available at https://punemirror.indiatimes.com/others/sunday-read/living-in-on-a-prayer/articleshow/52918690.cms (last visited on July 4, 2020)

[20] (2010) SCC Online Del 2645.

either due to societal pressure or union of them is being barred by law. Such couples start living secretly in unmarried cohabitation instead of marrying each other.

With every passing day the list of reasons, which convince couples to opt for live-in relationship rather than love or arrange marriage, is increasing tremendously. This is because people in order to test their compatibility before marriage prefer to put their union into trial where they can easily decide whether to go for marriage or not. Surprisingly, courtship period is now turning into a trial period.

Abhorrence behind the charm in Indian live-in relationships

In India live-in relationship is no offence, people can freely choose to live together with each other without any legal hurdle as their fundamental right under Article 21[21] of the Constitution of India. The Honorable Supreme Court in S. Khushboo vs. Kanniammal[22] held that a living in a relationship with anyone of your choice comes within the ambit of Right to Life and personal liberty.[23] The court further held that live-in relationships are permissible and the act of two major living together cannot be considered illegal or unlawful. In India we have no law for the regulation of these kinds of living arrangements and have no rule book providing rights and duties for the parties in a live-in relationship, including status of children born to such couples[24]. These relationships are also not recognized by any law pertaining to marriage or succession except Protection of Women from Domestic Violence Act, 2005 (Hereinafter called as PWDV Act, 2005);which provides partial recognition by acknowledging them with sole aim to protect those females who are not legally married to their partners and living with them in a relationship similar to marriage. Section 2(f) of Protection of Women from Domestic Violence Act, 2005 while defining Domestic Relationship has included live-in relationship under the name of "relationship in the nature of marriage"[25] with regard to those females seeking protection under the said Act. The section reads as under:

"Domestic relationship means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."

A plane reading of the section mentioned above is suggestive about the clear intention of the legislature that justice should not be denied to any one and especially to those who are casualties of either misrepresented relationships or bigamous connections so as to give them some basic rights to insure themselves.

Therefore, putting live in arrangements in a straight jacket formula of a "walk-in and walk-out" relationship would not be correct as in the case of Madan Mohan Singh v. Rajni Kantthe[26] Court held that, the live-in relationship if continued for long time, would come under the protection of relationship in the nature of marriage and hence it cannot be termed as a "walk-in and walk-out" relationship and that there is a presumption of marriage between the parties[27]. Such a presumption of marriage would be drawn on the prima facie evidence and cannot be rebutted unless contrary is proved, by giving unquestionable proof, and to that a substantial weight lies on a party who looks to deny the relationship of lawful origin. Also in Lata Singh vs. State of U.P.[28] it was held by the honorable Supreme Court that live-in relationship is permissible only in unmarried major persons of heterosexual nature[29].

In India live-in relationships are not legally recognized but they are also not regarded as an offence. Though it may be immoral in the eyes of many sections of the society who prefer marriage as a sole institution for the union of an adult male and female as intimate partners in the name of husband and wife; but it is not yet declared as a legal wrong. Non-marital living arrangement is now growing as an absolute form of unison for those people who wish to stay together without involving them in the formality of marriage. But it is not as beautiful as it seems to be, it also involves number of issues, same as like marriage and unfortunately those issues remain unaddressed due to lack of any legislation as unlike in case of marriage, which is a secured institution with many laws guaranteeing the protection of rights to both husband and wife.

Indian judiciary has tried to provide limited recognition to some live-in relationships with a view to grant them validity

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21 The Constitution of India, Art 21:Protection of life and personal liberty-No person shall be deprived of his life or personal liberty except according to procedure established by law.

22 (2010) 5 SCC 600

23 *Ibid.*

24 Astha Saxena "Live-in Relationship and Indian Judiciary", available athttps://www.scconline.com/blog/post/2019/01/23/live-in-relationship-and-indian-judiciary/(last visited on July 4, 2020)

25 The Protection of Women from Domestic Violence Act, 2005, s. 2(f).

26 (2010) 9 SCC 209

27 *Supra* note 27 at 9.

28 (2006) 5 SCC 475; (2006) 2 SCC (Cri) 478.

29 *Supra* note 5 at 3.

as a legal marriage thereby allowing the live-in partners various benefits of marriage and left many such relationships outside the purview of marriage aiming to preserve the sanctity of marriage and Indian cultural heritage. All non-marital intimate relationships cannot be termed as relationship in the nature of marriage. Relationships that are kept only for sexual enjoyments for example keeping a mistress for sexual pleasure while being already married to another woman and helping the mistress financially, or occasional one night stands are excluded from the sphere of relationship in the nature of marriage; as continuous cohabitation in a shared household cannot be established from such kind of relationships.

In A. Dinohamy vs. W.L. Balahamy[30] the Privy Council has given recognition to a live-in couple by laying down a principle –

"Where a man and a woman are proved to have lived together as a man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage."

The same principle was reiterated in the case[31] of Mohabhat Ali v. Mohammad Ibrahim Khan[32]. In Gokul Chand v. Parvin Kumari[33] the court forewarned, that the couple would not get authenticity, if the proof of them living respectively was rebuttable[34].

The Supreme court in S. P. S. Balasubramanyam v. Suruttayan[35], held that if a man and lady are living under the same roof and living together for number of years, there will be an assumption under Section 114 of the Indian Evidence Act, 1872 that they live as a couple and children destined to them won't be ill-conceived.

In Vidyadhari & Ors vs. Sukhrana Bai & Ors[36] the Supreme Court in synchronization with Article 39(f)[37] of The Indian Constitution of India, 1950 has passed a milestone judgment wherein the Court allowed legacy to the kids conceived from the live-in relationship being referred to and credited them the status of "lawful beneficiaries"[38].

Further in Bharatha Matha & Ors. Vs. R. Vijaya Renganathan & Ors.[39] and Revanasiddappa vs. Mallikarjun[40] Honorable Supreme Court stated that the birth of a child out of live-in relationship must be seen separate from the relationship of the parents. It is as plain and clear as daylight that a youngster resulting from such relationship is totally blameless and is qualified for all the rights and benefits open to kids conceived out of marital relationships[41]. However, Section 16[42] of the Hindu Marriage Act, 1955 which talks about legitimacy of children of void and voidable marriages deals absurdly with regard to children born out of non-marital cohabitation if compared to those children who are conceived out of wedlock. Even after acquiring legitimate status similar like those children from marriages they are denied the right to claim from ancestral property and can only claim a share in the parent's self-gained property.

The inconsistent treatment of a youngster conceived out of a live-in relationship and a kid resulting from a conjugal relationship despite the fact that both are legitimate according to law can add up to an infringement of Article 14[43] of The Constitution of India, which guarantees

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30 AIR 1927 PC 185; (1928) 1 MLJ 388.

31 Manbir Bhinder "Live-In Relationship: In a Marriage Centric India" Available at: http://www.legalservicesindia.com/article/1618/Live-In-Relationship-in-A-Marriage-Centric-India.html (last visited on July 10, 2020)

32 AIR 1929 PC 135

33 AIR 1952 SC 231

34 Gurdial Singh v. Bhagat Singh, AIR 1934 Lah 517;Chockalingam Pillai v. Sami Bhattar, AIR 1925 Mad 426; Gokal Chand v. ParvinKumari, AIR 1952 SC 231; A. Dinohamy v. W. L. Balahamy, AIR 1927 PC 185

35 1992 Supp (2) SCC 304

36 AIR 2008 SC 1420

37 The Constitution of India, art.39 (f) states that the State shall, in particular, direct its policies towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

38 Enakshi Jha "Live-In Relationship: An Emerging Concept", Available at: http://www.legalservicesindia.com/article/1622/Status-of-Children-born-in-Live-in-Relationships.html (last visited on July 10, 2020)

39 AIR 2010 SC 2685

40 AIR 2011 SC (Supp) 155

41 *Supra* note 41.

42 The Hindu Marriage Act, 1955 (Act 25 of 1955), sec 16: Legitimacy of children of void and voidable marriages- Notwithstanding that marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

43 The Constitution of India, art. 14: Equality before law- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

Equality under the steady gaze of Law[44].

The vital pre-conditions for a child conceived from live-in relationship to be not rewarded as ill-conceived are that the live-in partners probably lived under one rooftop and co-habited for a significantly lengthy time span for society to remember them as a couple and "it must not be a "walk in and walk-out" relationship, as the court called attention to in its 2010 judgment in Madan Mohan Singh v Rajni Kant[45]. However, the PWDV Act, 2005, remains largely silent upon the duration of continuous cohabitation. The said Act does not provide with any specific time period, completion of which qualifies the live-in relationship into relationship in the nature of marriage. In such circumstances Indian judiciary has interpreted on the basis of merits of different cases.

In the landmark case of D. Velusamy v. D. Patchaiammal[46], Honorable Supreme Court of India has laid down following requirements to be fulfilled for every relationship to stand qualified for getting considered in the sphere of the term "relationship in the nature of marriage":

(a) The couple must hold themselves out to society as being akin to spouses.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

The court additionally expressed that a "relationship in the nature of marriage" under PWDV Act, 2005 should likewise satisfy the above prerequisites, and also the parties probably have lived respectively in a shared household as characterized in section 2(s) of the said Act. Simply going through ends of the week together or a single night rendezvous would not make it a domestic relationship.

In the case of Badri Prasad v. Dy. Director of Consolidation and Others[47], the Apex Court held that a solid assumption emerges for wedlock where the live-in partners have lived respectively for a long spell as a couple. Despite the fact that the assumption is rebuttable, a substantial weight lies on him who tries to deny the relationship of lawful birth. Law inclines for authenticity and frowns upon bastardy[48]. The Supreme Court reiterated the same view in the case of Tulsa v. Durghatiya[49].

Certainly, on account of the view taken by the Court, it would bar numerous ladies who have had a live in relationship from the advantage of the PWDV Act, 2005, yet then it isn't for this Court to administer or change the law. Parliament has utilized the articulation "relationship in the nature of marriage" and not live-in relationship. The Court in the get of understanding can't change or alter the language of the law.

In the Case of Indira Sarma v. V.K.V. Sarma[50] in order to simplify the situation Honorable Supreme Court has shown five classes where live-in relationship can be demonstrated in the courtroom:

a. Relationship between an adult male and an adult female both unmarried.

b. Married man and an adult unmarried woman entered knowingly.

c. An adult unmarried man and a married woman entered knowingly.

d. An adult unmarried female and a married male entered knowingly.

e. Relationship between same sex partners.

The present case revolved around the category "b" under which an unmarried woman entered into a non-marital cohabitation consciously with a married male and stayed together for a long spell of time. When things turned sour between them, the lady claimed maintenance under PWDV Act, 2005, to which the Apex court stated:

"The appellant's status was that of a mistress, who is in distress"[51] and "if any direction is given to the respondent to pay maintenance or monetary consideration to the appellant, that would be at the cost of the legally wedded wife and children of the respondent"[52]

Yet, for this situation, the Supreme Court felt that refusal of any assurance would add up to an extraordinary unfairness to survivors of unlawful connections. Accordingly, Court stressed that there is an incredible need to expand Section 2(f), which characterizes household connections in PWDV

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[44] Rebecca Furtado 'Rights of Child Born Out of A Live-in Relationship', available at https://blog.ipleaders.in/rights-child-born-live-relationship/live-relationship/, (last visited on July 15, 2020)

[45] *Supra* note 29 at 10.

[46] 2011 Cri LJ 320.

[47] *Supra* note 13 at 4.

[48] Rajendra Anbhule "Aggrieved Women and Live-in Relationships: Judicial Discourse", *Bharti Law Review*, Jan-Mar, p.69 (2013)

[49] (2008) 4 SCC 520

[50] (2013) 15 SCC 755

[51] Judgment delivered by K.S.P Radhakrishnan and Pinaki Chandra Ghose, JJ; In*dira Sarma v. V.K.V Sarma* (2013) 15 SCC 755

[52] *Ibid.*

Act, 2005 in order to incorporate casualties of illicit connections who are poor and ignorant alongside their youngsters who are conceived out of such connections and who don't have any wellspring of salary. Further, the Supreme Court requested Parliament to sanction new enactment so the casualties can be given security from any cultural wrong brought about by such connections[53].

Therefore, taking the above chronology of judgments delivered by Honorable Supreme Court into consideration it can rightly be observed that the intention of the judiciary slants towards marriage as an ultimate end and crystallization of non-marital cohabitation on the basis of various pre-requirementsinto "relationship in the nature of marriage" for the purpose of maintenance is a penultimate step towards marriage. The Indian judiciary nowhere supports providing legal stamp to live-in relationships as a unique concept.

Conclusion

The fact that non-marital cohabitations are rapidly growing in India cannot be denied and the modern class is accepting them simultaneously as well. Law is an instrument of social change and shapes itself according to the changing needs and requirements of the society. Law is amended taking into consideration the changes in the current scenario, but while altering it, the law makers cannot modify the same throwing blind eyes towards preserving the basic structure of the society.

India is a country of values, both moral and social that rests upon the pillars of culture and traditions. Most of the Indian law is customary which is an outcome of long used customs, which were regarded as words of God. Marriage is also one of those that being practiced since time immemorial and being given high status in the Indian society. But with the passage of time, the attitude of different section of the country changed towards marriage and live-in relationship or non-marital cohabitation has started being preferred by the career oriented folks; while the conservative section of the country still looks down towards it as an unnecessary evil destroying the social fabric of India, apart from these two, those who fall in the middle of both the thinking, accept marriage plainly as considering it important for personal as well as social growth. Law always favors in the interest of public at large and tries to maintain equilibrium between both the extreme ends of diversified opinions so that the basic foundation of the society remains undisturbed.

It also cannot be neglected that Indian society needs a piece of regulation or an alternative to it so that these kind of relationships could be tamed and prevented from being misused but at the same time proper attention to be given towards maintaining the sanctity of marriage. As branding live-in relationship as an idiosyncratic concept parallel to the institution of marriage would definitely undermine the credibility of marriage and may lead to many adulterous, bigamous and illicit relations which further leads to stigmatization of long lived cultural heritage of India.

[53] Agarwal Jigyasa "Live-in Relationship: With Judiciary Recognition", available at: legalserviceindia.com/legal/article-2993-live-in-relationship-legal-status-with-judiciary-recognition.html (last visited on July 29, 2020).

Humanitarian Norms and Armed Non-state Actors: A Study of Compliance and Deviation

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ABSTRACT

Though the rules to conduct war are as old as the concept of war itself, as human beings have instinct of 'being human' towards friends and foe, though the guiding reasons for this may be many and may vary according to the purpose of war, duration of war and parties to the war. These instinct of 'being human' are not free from self interest of parties to such war. Recently we have observed war between the state and armed state actors as in Afghanistan and presently in Syria. Contemporary Armed conflicts are mostly characterized by an increase in violence and non compliance of International Humanitarian Law by both State and Armed Non State Actors (hereinafter referred as "ANSA"). This showed a severe human right violation and caused refugee crisis too. This research paper focuses on identifying the legal landscape regarding the international responsibilities and rights of armed non-state actors, is it possible to engage these groups in humanitarian norms implementation? If yes then further the key elements as well as challenges underlying the humanitarian engagement of ANSA. The whole international scenario of legality and applicability of humanitarian norms to non state actors is one of the aspects of study in this paper. An effort is made to study systematically the fact of and the severity of alleged violation by ANSA. International community can made sustained efforts so that such humanitarian norms violations can be curbed and international humanitarian law fully complied with in its true spirit, what can be those ways and efforts by the states.

Keywords: ANSA, Humanitarian Law, Armed violence, International armed conflict.

Introduction

"While engagement with non-state armed groups will not always result in improved protection, the absence of systematic engagement will almost certainly mean more, not fewer, civilian casualties in current conflicts".

-UN Secretary General Ban Ki Moon

The majority of armed conflicts[1] clashed in the latter half of the twentieth century, and the beginning of the twenty-first, some of which are still going on, involve in one way or another armed non-state actors (ANSAs), outside the control of states or governments recognized by the United Nations (UN). State-on-Sstate conflict is no longer the primary approach to war for a long time now. The decolonization period and subsequent recognition of a people´s right to self determination changed the constitution of armed conflicts and our belief in what entities in the international arena can trigger such conflicts. Even the mode of warfare has changed; despite the spectacular combat technology, most armed conflicts are fought on foot using low technology methods of guerrilla warfare. This resulted in the conclusion that civil wars are the concern of both international community and international law. Contemporary conflicts usually involve ANSAs who act autonomously from their or any other recognized government. They have simply become economically self-sufficient. This fact makes these groups and the armed conflicts in which they are involved dangerous, especially when many states are unwilling to apply the international humanitarian law to this kind of warfare.

Armed violence by ANSAs also poses a significant threat to human security outside situations of armed conflict[2]. While it is well established that ANSAs are bound by the law of armed conflict, also known as 'International Humanitarian Law' (IHL), the extent to which these actors have obligations under Human Rights Law (HRL) when they are a party to an armed conflict remains controversial. Even though the legal regime applicable to ANSAs is unclear, the United Nations has generally recognized the need to engage these actors on both IHL and HRL. For instance, in his report for the 2016 World Humanitarian Summit, the UN

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1 In fact between the end of the Cold War in 1989 and the dawn of the twenty first century (2003), 116 active armed conflicts in the world. Of these, only seven involved interstate conflict in some form. The other 109 were intrastate conflicts.

2 In 2015, for example, the Geneva Declaration on Armed Violence ranked the states of Honduras and Venezuela just below Syria in terms of violent death rates. Geneva Declaration, *The Global Burden of Armed Violence 2015: Every Body Counts*. Executive Summary (April 2,2018 3:43pm) http://www.genevadeclaration.org/measurability/global-burden-of-armed-violence/gbav-2015/executive-summary.html.

Secretary General emphasized that 'at a time when most conflicts are non-international, it is critical for impartial humanitarian actors to engage in dialogue with States as well as non-State armed groups to enhance their acceptance, understanding and implementation of obligations under international humanitarian and human rights law[3]'. In present scenario we need to understand the legal obligation on these actors regarding humanitarian norms and for that lets understand these armed group's formation and structure first

Definition and types of armed non state actors

Arrange of ANSAs operate today in armed conflicts or other situations of violence, but one can find very few definitions of the term in international law. There is no clear definition of ANSAs. Claudia Hofmann and Ulrich Schneckener[4] have offered the following characterization: distinctive organizations that are:

(i) Willing and capable to use violence for pursuing their objectives and

(ii) Not integrated into formalized state institutions such as regular armies, presidential guards, police, or special forces.

(iii) They, therefore, possess a certain degree of autonomy with regard to politics, military operations, resources, and infrastructure. Some ANSAs control territory; others rely on protection from the local community. Many are engagedin hostilities that amount to an armed conflict. Some see themselves as governments-in waiting; others are mere criminal organizations. Some populations manage to maintain a degree of normal life within the constraints imposed by ANSAs or a conflict situation; others are subject to brutal physical repression and economic hardship, and try to flee if they can. However no categorization of ANSAs is broadly accepted. The list below classifies groups in terms of their operational rationale and does not pretend to be a scientific definition. It should also be kept in mind that particular groups may present characteristics associated with several categories or may shift from one category to another.

Armed opposition groups seek the liberation of a social class or a nation and oppose the state or its administration.

Paramilitary groups or militias are irregular combat units that usually act on behalf of, or are at least tolerated by, agoverning regime.

Terrorist groups spread panic and fear in societies in order to achieve political goals.

Vigilante or self-defence groups are usually composed of armed civilians acting in self-defence, whose degree of organization varies and is often loose. Such groups do not necessarily have a political purpose (such as replacing the existing government) but rather aim to defend themselves against the attacks of enemy armed forces or other ANSAs.

Territorial gangs do not have political aims per se but try to gain control of a territory in order to oversee criminal activities or 'protect' residents in the area concerned[5].

Certain legal instruments define ANSAs as follows

The UN Security Council, for instance, has defined non-state actors quite broadly as an 'individual or entity, not acting under the lawful authority of any State'[6].

The African Union's Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention) defines 'armed groups' as 'dissident armed forces or other organized armed groups that are distinct from the armed forces of the state'[7].

For the European Union (EU), ANSAs 'retain the potential to deploy arms for political, economic and ideological objectives, which in practice are often translated into an open challenge to the authority of the State'[8].

Conciliation Resources considers ANSAs to be armed actors operating 'primarily within state borders, engaged in violent attempts to challenge or reform the balance and structure of political and economic power, to avenge past injustices and/or to defend or control resources, territory or institutions for the benefit of a particular ethnic or social group'[9].

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3 UN General Assembly (2016), One humanity: shared responsibility – Report of the Secretary-General for the World Humanitarian Summit, UN Doc. A/70/709, p51.

4 C. Hofmann, and U. Schneckener, (September 2011), 'Engaging non-state armed actors in state- and peacebuilding: options and strategies', *International Review of the Red Cross*, 93 (883): pp. 603–621.

5 C. Homequist, 'Engaging Armed Non-State Actors in Post-Conflict Settings', *Security Governance in Post-Conflict Peacebuilding*, DCAF (2005),p 46; and U. Schneckener, 'FragileStatehood, Armed Non-State Actors and Security Governance', in *Private Actors and Security Governance*, DCAF (2006), p 25.

6 UNSC, Resolution 1540 (2004), 28 April 2004.

7 Article 1.

8 European Union, 'Mediation and Dialogue in transitional processes from non-state armed groups to political movements/political parties', Factsheet – EEAS Mediation Support Project, November 2012.

9 Conciliation Resources, 'Engaging armed groups in peace processes' (Accord 2004), quoted in V. Dudouet, 'Understanding armed groups and their transformations from war to politics: A collection of insider perspectives', Conference paper presented at the Sixth Pan-European Conference on International Relations, Turin (2007), p 4.

Legal scenario and ANSAs

International Humanitarian Law (IHL) only applies in times of armed conflict. It distinguishes conflicts between States ('international armed conflicts') from conflicts between ANSAs or between ANSAs and a state ('non-internationalarmed conflicts')[10]. According to case law, two conditions determine the occurrence of a non international armed conflict: protracted violence and the level of organization of the ANSA involved. In the IHL context, 'protracted violence' implies that armed violence is intense as well as enduring, notwithstanding the ordinary meaning of these words.[11]With respect to ANSAs' level of organization, international tribunals and scholars have developed a variety of indicators and guidelines to establish whether a group has the requisite level of organization; taken alone, however, none are sufficient to fulfill the organizational requirement. Elements listed by the ICTY[12] include: the existence of a command structure and disciplinary rules and mechanisms with in the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease fires or peace accords[13].

Scholars continue to discuss the precise legal means by which ANSAs are bound by IHL[14]. However, state practice, international case law, and scholarship all agree that Common Article 3 of the 1949 Geneva Conventions, Additional Protocol IIof 1977 to the 1949 Geneva Conventions (AP II), and customary IHL apply to all categories of ANSA that are parties in non-international armed conflicts[15].Additional Protocol II also applies to conflicts of a non-international character. In addition to the existence of an armed conflict in the territory of a High Contracting Party between an ANSA and the government[16], three cumulative material conditions under para.1 of Article 1 must be fulfilled before the treaty is applicable to the ANSA in question:

1. The ANSA must be under responsible command.

2. It must exercise such control over a part of the national territory as to enable it to carry out sustained and concerted military operations.

3. Territorial control must be such as to enable the ANSA to be able to implement the Protocol.

Where these cumulative criteria for application of the Protocol are objectively met, the Protocol becomes 'immediately and automatically applicable', irrespective of the views of the parties to that conflict[17].Finally, customary international humanitarian law is applicable to all actors in

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10 S. Vité, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations', 91 *International Review of the Red Cross* 873 (2009), 69-94.

11 S. Sivakumaran, *The Law of Non-International Armed Conflicts*, Oxford University Press, 2012.

12 As spelled out by the International Criminal Tribunal for ex-Yugoslavia (ICTY), '*an armed conflict* exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peace settlement is achieved. Until that moment, international humanitarian law continues to apply to the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.' (ICTY, *Prosecutor v. DuskoTadic*, 2 October 1995, p70.)

13 ICTY, *Prosecutor v Haradinaj*, Case No IT-04-84-84-T, Judgment (Trial Chamber), 3 April 2008, p60.

14 For example, in 2004 the Appeals Chamber of the Sierra Leone Special Court held that 'it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties'. See *Prosecutorv Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Decision of 31 May 2004, p22, available at: www.unhcr.org/refworld/docid/49abc0a22.html. For the different theories on the applicability of IHL to ANSA, see S. Sivakumaran, 'Binding Armed Opposition Groups', 55 *International and Comparative Law Quarterly* (2006), 381; and A. Cassese, 'The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts', 30 *International & Comparative Law Quarterly* 2, (1981), 429.

15 In *Nicaragua v United States of America*, the International Court of Justice confirmed that Common Article 3 was applicable to the Contras (an ANSA). 'The conflict between the contras' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character". The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character.' See ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v UnitedStates of America*), Judgment of 27 June 1986, ICJ Reports 1986, p219.

16 In contrast to Additional Protocol II, Common Article 3 also regulates armed conflicts between ANSAs.

17 Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, p. 1353; and InternationalCriminal Tribunal for Rwanda (ICTR), *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgment, 2September 1998, p624.

international and non-international armed conflicts[18], including ANSAs that meet the necessary criteria. Customary IHL rules applicable to ANSAs include those on the conduct of hostilities, such as the principle that requires parties to an armed conflict to distinguish civilians and civilian objects from military objectives.[19]Moreover, a number of legal experts contend that certain standards of human rights law may bind ANSAs[20],while some of the most recent international and regional human rights treaties address the conduct of ANSAs, even if the language does not seem to create direct obligations[21].

So, now that it is recognized – at least with respect to IHL – that, for the most part, the same norms apply to ANSAs and states, what can be said about mechanisms to ensure compliance with these norms

Concern for Engagement and mechanism for compliance

Indeed the shock exerted by war, as noted in Pictet's epigraph, is even greater in internal armed conflicts, where state authorities often face an existential threat from within. In a recent speech marking the sixtieth anniversary of the Geneva Conventions, the President of the ICRC lamented the weaknesses of IHL compliance mechanisms, noting that they are not mandatory and they depend on consent of the parties once conflict has broken out. He further emphasized that 'while lack of compliance of non-Statearmed groups is also a very serious problem that we need to address, reinforcement of international law rules and mechanisms lies in the hands of States'[22]. While the ICRC President is certainly correct that states have responsibility for the development of international law mechanisms in the formal sense, this article shows that, in real terms, ANSAs can contribute not only to improved respect for humanitarian norms but also to the reinforcement and effective functioning of compliance mechanisms. In fact, when they do not contribute as such, there is a greater risk that ANSAs will perceive such mechanisms as biased in favour of states. There are different types of engagement and compliance mechanisms to ensure respect for humanitarian norms, going into detail of those mechanism is not possible for the purpose of this paper however it is being a suggested by intellectuals and scholars to adopt efficient mechanism for engagement with ANSAs for better compliance with armed conflict norms

First, it should be noted that it is by no means only ANSAs who violate humanitarian norms. In many armed conflicts, States can and do violate the most fundamental rules of human rights and humanitarian law. But there is a particular problem with respect for humanitarian norms by ANSAs, since the armed group, by virtue of the fact that it is not, or only partially, recognized as a State, is not entitled to ratify international treaties, and is generally precluded from participating as a full member of a treaty drafting body.[23]In addition to rejecting laws they had no role in adopting, ANSAs may further assert that they reject the legitimacy of states against which they are fighting and which are parties to those treaties. This argument, however, will not prevent their prosecution for international crimes[24] and in recent years relatively few ANSAs have used this argument to oppose the general application of

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[18] for example, Special Court for Sierra Leone, *Prosecutor v Morris Kallon and Brima Buzzy Kamara*, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 March 2004, p45–47. This asserted: 'There is now no doubt that this article [Common Article 3] is binding on states and insurgents alike, and that insurgents are subject to international humanitarian law. […] A convincing theory is that [insurgents] are bound as a matter of customary international law to observe the obligations declared by Common Article 3 which is aimed at the protection of humanity.' See also L. Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, 2002, p. 56–58.

[19] The customary international humanitarian law study conducted by the ICRC has identified 161 Rules of which the great majority are also applicable in non-international armed conflicts. See https://www.icrc.org/ customary-ihl/eng/docs/v1_rul.

[20] Andrew Clapham, Human Rights Obligations of Non-state Actors, Oxford University Press, Oxford, 2006; Christian Tomuschat, 'The applicability of human rights law to insurgent movements', in H. Fischer, U. Froissart, W. Heintchel von Heinegg, and C. Raap (eds), Krisensicherung und HumanitärerSchutz – Crisis Management and Humanitarian Protection: Fetschriftfür Dieter Fleck, Berliner Wissenschafts-Verlag, Berlin, 2004, pp. 586–587.

[21] For example, the word 'should' appears in Art. 4(1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which refers to armed groups.Also, Art. 7(5) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa starts off with the words, 'Members of armed groups shall be prohibited from: . . .' and subsequently lists several actions that are to be prohibited.

[22] JakobKellenberger, 'Ensuring respect for international humanitarian law in a changing environment and the role of the United Nations', 60th Anniversary of the Geneva Conventions – Ministerial Working Session, 26 September 2009, emphasis added, available at: http://www.icrc.org/eng/resources/documents/ statement/geneva-conventions-statement-260909.htm (last visited 12 March 2012).

[23] There were, for example, 11 ANSAs that participated, as observers, in the deliberations of the Diplomatic Conference that adopted the two *1977 AdditionalProtocols* to the Geneva Conventions. See Sassòli, *supra* note 6, 7, citing Y. Sandoz *et. al.* (eds), *Commentary on the Additional Protocols*, ICRC (1987).

[24] Hence individuals can be prosecuted whether or not armed groups accept the jurisdiction of the International Criminal Court as to the 1998 Statute of the International Criminal Court, as well as the various ad hoc international tribunals specifically permits the indictment and prosecution of members of ANSAs for war crimes.

international humanitarian norms. Lack of ownership—by all parties to a conflict—can also be explained to a certain extent by ignorance of the law applicable to the situation of armed conflicts in which a given ANSA operates. Indeed, while States have a clear obligation to provide instruction in IHL to their armed forces,[25]

Although the term "asymmetry" of parties to an armed conflict arouses strong—mainly negative—reactions from some quarters, the imbalance between a State's security forces (in size, weaponry and financial resources) and an ANSA may also be used by the latter as a reason for not respecting certain or many humanitarian norms in practice. They may claim to feel constrained to adopt certain tactics that violate humanitarian norms as to do otherwise would invite military defeat or even annihilation. They may further note that they will likely be prosecuted under domestic legislation for the mere fact of having taken up arms against the state, irrespective of their respect for international legal norms[26]. In fact,"asymmetric" conflicts are said to be highly problematic for the protection of civilians as they carry the risk of both parties disregarding basic principles of IHL.

Finally, the designation of certain ANSAs as 'terrorists' [27]may even, in certain instances, encourage the violation of humanitarian norms. Since it is typically far easier to be included on a list of terrorist organizations than it is to be removed from one, practical incentives to improve respect for humanitarian norms may be limited once an armed group has been so designated. Moreover, efforts to promote ownership of humanitarian norms by individuals or organizations may themselves fall foul of broad national legislation that criminalizes material support to any entity designated as terrorist. A recent US Supreme Court decision on the scope of activities with ANSAs listed as terrorist groups that could trigger criminal responsibility is one example of a worrying trend. Criminalizing humanitarian organizations or individuals that seek to engage ANSAs in enhanced respect for international norms is not the way forward. It may have serious consequences for humanitarian negotiators (and more generally anyone) seeking to negotiate peace treaties or other agreements for the promotion of international law.

There are, though, still reasons to believe that ANSAs can be influenced to better respect international law. Indeed, the practice of international organizations shows that a number of "incentives", also termed"resources and rewards"[28], may have a significant role to play.

Incentives for Compliance

The first and primary reason for compliance is the group's own self interest. This has military, political, and legal aspects. The military arguments for compliance comprise both an element of reciprocity and strategic choices. There is an obvious temptation – and often also pressure from within the armed group or the concerned communities –to respond to abuses by government forces or other non-state armed actors. Responding with abuses of their own will merely risk an increasing spiral of violence. It may be the case that better compliance by the state armed forces may lead to better compliance by non-state armed forces, too, but so far the evidence is largely anecdotal. In any case, restraint will ultimately help to retain the support of the civilian population. In terms of strategic choices, focusing on attacking legitimate military targets instead of unlawfully targeting civilians means that the armed non-state actor is more likely to further its military objectives[29]. Furthermore, an ANSA that treats captured soldiers with humanity encourages soldiers to surrender. Mistreatment or summary execution, on the other hand, is more likely to lead to soldiers fighting on to the death. The political arguments for compliance center on the desire of many armed non-State actors and/or the causes they may espouse, to be recognized as legitimate. In addition, many armed non-state actors need the support (e.g. human, material, and financial) of the "constituency" on behalf of whom they claim to be fighting. Further, in certain cases ANSAs may wish to be seen as more respectful of international norms than the state that they are fighting[30].

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[25] See for example Articles 47, 48, 127, and 144 of *1949 Geneva Convention IV*, 75 U.N.T.S. 287; and Article 83 of *1977 Additional Protocol I,* 1125 U.N.T.S. 3.

[26] Thus, there is no 'combatant's privilege' in non-international armed conflict, whereby combatants in an international armed conflict are entitled to prisoner of war status under certain circumstances. A prisoner of war benefits from the privilege of immunity of prosecution for the mere fact of having participated in hostilities against another state. Conversely, a fighter who is not recognized as a combatant under IHL faces prosecution under the national law of the State capturing him for simply taking up arms. See, *inter alia*, Articles 4 and 118 of *1949 Geneva Convention III*, 75 U.N.T.S. 135 and for example, A. Bellal& V. Chetail, 'The Concept of Combatant under International Humanitarian Law', in J. Bhuiyan*et. al*. (eds), *InternationalHumanitarian Law, An Anthology*, (2009), 57.

[27] Notwithstanding the plethora of widely differing definitions of the term under relevant national legislation. For instance, a 2003 study for the US Army quoted a source that counted 109 definitions of terrorism that covered a total of 22 different definitional elements. See J. Record, *Bounding the Global War on Terrorism* (2003), 6, citing A. P. Schmid, *et al.* (eds), *Political Terrorism: A New Guide to Actors, Authors,Concepts, Data Bases, Theories, and Literature* (1988), 5–6.

[28] H. Slim, *Killing Civilians—Method, Madness and Morality in War* (2007), 279–282.

[29] ANSAs may thus understand that certain means and methods of warfare are counterproductive or have excessive humanitarian costs, which lead to a loss in support.

[30] For example, many of the armed non-state actors that have signed Geneva Call's Deed of Commitment whereby they renounce the use of anti-personnel mines have done so in states that are not party to the 1997 Anti-Personnel Mine Ban Convention, 2056 U.N.T.S. 211.

Finally, some armed groups are sensitive to the argument that better respect for norms applicable in armed conflicts facilitates peace efforts and strengthens the chance of a lasting peace. The legal arguments for compliance are primarily the avoidance of international criminal sanction and other coercive measures, such as arms embargoes, travel bans, and asset freezes. Effective command and control by an ANSA over its own fighters is in the self-interest of the group's senior officials.[31]Fear of prosecution for international crimes is a factor that influences the behavior of certain ANSAs or of senior individuals within that group. Compliance with international norms will not prevent their risk of prosecution under domestic criminal law for taking up arms against the state, but in some instances governments have offered amnesties to those who have taken up arms against them[32]. Such amnesties should not, though, confer immunity for international crimes.[33] The humanitarian arguments for compliance relate to the fundamental desire of certain ANSAs to respect human dignity. Such a desire should not be underestimated and may allow for opportunities to go beyond actual international obligations and engage ANSAs on norms which provide a higher level of protection for civilians than that strictly demanded by international law. Humanitarian agencies may in turn provide assistance for activities, such as mine clearance, which benefit the communities on whose behalf the armed non-state actors claim to be fighting in addition to finding solutions to help the armed non-state actor to fulfill the commitment to the norm in question. So, for example, agencies may provide reintegration and education programmers for children formerly associated with armed forces to enable their safe release.

Good Practice in Engagement with Armed Non-State Actors

There has been considerable experience over the years in engagement with ANSAs on the protection of civilians in armed conflict. Below are included some of the key lessons that have been learnt and which may offer other opportunities to enhance compliance with international norms. First, even if it is not realistic for ANSAs to participate formally in the drafting of multilateral treaties nor that such actors formally adhere to those treaties, their views could, for example, be discerned by analyzing relevant agreements or unilateral declarations. It may be easier to include former members of ANSAs in such processes. In addition, greater efforts can be made to ensure that relevant international treaties address directly the behavior of ANSAs. Second, an important step in enhancing compliance with international norms is to ensure that the relevant ANSA is aware of its obligations under international law. In some cases, for example, such groups have not been aware of the prohibition on child recruitment and the potential individual liability. This can be done through dissemination efforts at a senior level or below by those engaged in promoting compliance, or by the ANSA itself. Further more, engagement with an ANSA should typically occur at the highest level within the group, but may also demand engagement with influential individuals outside the group. Engaging an armed non-State actor at the highest level helps, in theory at least, to ensure that a commitment is more likely to be honored in practice. However, enhancing compliance is made significantly more challenging by the fragmentation of ANSAs into different factions. In that regard, former members of other ANSAs may be able to play a helpful role in engagement. It is also important to consider whether constituencies and foreign patrons can help to secure better compliance with norms. Once an ANSA is clear about its obligations and undertakings, it willbe necessary for it to ensure that this is reflected in its practice. It should therefore internalize its international obligations and other commitments, for example by 'translating' norms into internal codes of conduct. There may be a need for outside technical assistance in achieving this, but care should betaken to ensure that the relevant ANSA assumes the responsibility for adoption, dissemination, and implementation of applicable norms. Finally, the practice of international organizations and NGOs shows that monitoring is a critical element in promoting compliance with norms, both in identifying norms whose respect needs to be specifically enhanced and in promoting successful implementation with relevant agreements ordeclarations[34].

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[31] This will also have implications for the attribution of command responsibility under international criminal law.

[32] Certain humanitarian actors, for example, have stressed that it may be worth encouraging states to treat captured fighters from ANSAs who respect international humanitarian law in accordance with the protection accorded to prisoners of war under applicable international law.

[33] Amnesties granted in case of violations of international crimes violate the right of individuals to an effective remedy which is protected by international human rights law. See the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 2005, C.H.R. Res. 2005/35, U.N. Doc. E/CN.4/2005/ L.10/Add.11 (19 April 2005); see also C. A. Bakker, 'A Full Stop to Amnesty in Argentina, the Simoó Case', 3 *Journal of International CriminalJustice* (2005) 5, 1106-1120

[34] AnnyssaBellal& Stuart Casey-Maslen- Enhancing Compliance with International Law by Armed Non-State Actors, Goettingen Journal of International Law 3 (2011) 1, 175-197

Conclusion

This article has sought to identify key elements in the international legal framework applicable to armed non-state actors, and to suggest ways that better compliance may be achieved. One thing is certain, however: dialogue, through sustained, coherent, and focused engagement, is needed to influence behavior. In this respect, the June 2010 US Supreme Court decision in the Holder case is most unwelcome. It flies in the face of logic and reality, placing dogma over the promotion of humanitarian norms. What is needed is greater engagement with armed non-State actors, not less.

The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020: Reviewing the Law in Light of the Fundamental Rights of the Constitution of India

Saif Rasul Khan*

ABSTRACT

The Constitution of India is robust living document that provides a strong fundamental base of basic rights and freedoms for all citizens of India. The framers of the Constitution drafted a document that enveloped all the essential and critical aspects for an operational new nation. Drawing inspiration from other functioning Constitutions of the world, and from its own indigenous experiences; the document was adopted on November 26, 1948. The uniqueness of the Indian subcontinent and the heterogeneity of the population resulted in the formation of a Constitution, that, in its core fundamental rights, protected numerous human rights, including right to equality and life, freedom of religion etc., among others. These fundamental rights, that were inspired from the Bill of Rights of the Constitution of the United States of America, safeguard a whole host of human rights that are critical for a life of basic dignity, equality, and respect. Over time, numerous other rights were brought in within the scope of Article 21 by judicial activism and thus, a more robust functional Constitution continued to develop over time. One specific law that has been under the legal scrutiny is the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020. This was introduced with the aim to prevent and prohibit, by criminal charges, forced conversions for the purpose of marriage. This law aims to criminalise the practice with the presumption of forced conversion, unless proven otherwise. Religious conversion after marriage shall be permitted only on the basis of an application to the District Magistrate. The law has been subjected to considerable criticism for being religiously and politically motivated with many questioning the legitimacy and constitutionality of the law. In light of the above, the researcher shall undertake a doctrinal study on the said law and its provisions. The main focus shall be on the question of constitutionality and the varied fundamental rights that it may be violating by virtue of implementation of the law. The analysis shall be based on the ideals of equality, freedom of choice and religion, privacy etc., among others to ascertain the possibility if the law can stand the test of constitutionality.

Keywords: Constitution of India, Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020, Equality, Religious Freedom, Privacy

Introduction

The freedom to religion is guaranteed as per Article 25 of the Constitution of India. This right is not limited to individual freedom but also provides for freedoms regarding the maintenance of religious institutions, freedom of taxes etc. These rights are, however, subject to limitations and restrictions and also state action regarding specific aspects that may be addressed individually. This freedom of religion is supported by the ideal of secularism, which is enshrined in the Preamble to the Constitution, added by the 42nd Constitutional Amendment Act, 1976. Secular activities can be regulated by the state by enacting a statute but there shall not be any discrimination or preference accorded to any religion. The Constitution of India is a living document that provides a stout fundamental base of basic rights and freedoms for all citizens of India. Acknowledging the uniqueness of the Indian subcontinent and the heterogeneity of the population, the framers of the Constitution ensured that the state is neutral in its religious aspects. The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020 was introduced with the aim to prevent and prohibit, by criminal charges, forced conversions for the purpose of marriage. The law aims to criminalise the practice with the presupposition of forced conversion, unless proven otherwise. There has been considerable criticism of the law as being politically motivated and extreme in its nature, with legal experts questioning the constitutionality of the law. Though such laws for forced religious conversion is implemented in many states within India, however, the U.P. law takes it a step forward with the presumption of guilt and of declaring all inter-religious marriages as void unless it has been approved and sanctioned by the State and compliances needed, as per the law, are excessive. The law has been brought before the Court and is currently being reviewed to ascertain the constitutionality of it.

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Freedom of Religion in the Constitution of India

Constitution of India is the culmination of ideals, values and principles that were drafted by the framers during the process of transition from the British rule to independence. The framers acknowledged the diversity of India and recognised the fact that India required a robust functioning Constitution, one that will stand the test of time. The process of drafting was exhaustive with extensive deliberations by various members of the drafting committee. Though not reflective of all possible variations, the members did their best to identify and adopt the fundamental values and principles for India. Owing to the unique nature of the country in terms of the sheer scale of heterogeneity in India, many principles reflective of human rights and values had to be imbibed into the Constitution, particularly in Part III.

Part III is the very core of the Indian Constitutional structure. This part, which was inspired by the Bill of Rights[1] of the United States Constitution, provides numerous rights and principles for the citizens of India and a few being extended to all persons, irrespective of citizenship. A clear reference to the Universal Declaration of Human Rights can also be observed if an analysis is done on the rights guaranteed in Part III[2]. The very fundamental principles of equality, life, liberty, freedoms, religion, etc., are clearly mentioned and guaranteed to all, subject to limitations thereof. These are not absolute rights and thus, the state is empowered to place limitations thereof to the extent of these rights.

One of the most cherished right is that of freedom of religion as guaranteed under Articles 25 to 28 of the Constitution. Though not limited to just Articles 25-28, the Preamble clearly states India to be a secular state[3] and one that affords to the citizens of India liberty of thought, expression, belief, faith, and worship. India is a secular but not an anti-religious state[4]. The Constitution guarantees freedom of conscience and religion and provides for a set of rights, including that of payment of taxes and management of religious institutions etc., among others. These rights are, however, subject to limitations. Article 25 states that it is subject to public order, morality, and health. This article is also subject to the other provisions of Part III.

It is interesting to note that there is no universal definition of the term religion and it is not susceptible to any rigid definition by law. It is quite challenging to identify one universal definition of religion which would satisfy all religions that exist in practice[5]. This right is also reflected in the Universal Declaration of Human Rights as a basic human freedom. The right to religion also provides the freedom not to believe in any religion. However, this right forms a part of the broader set of civil liberties which form the core of the Constitution of India.

The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020

It is acknowledged that every person has the freedom of religion, the freedom to practice, profess and propagate the religion of their own choice. This is the core of the freedom of religion and as mentioned above, also includes the freedom not to believe in any such religion. An analysis of the drafting history of this one freedom reveals an interesting perspective on the usage of the word *'propagate'* and the extensive debates that preceded its insertion into the constitution. Mr. K.M. Munshi reflected on this and stated, *"so long as religion is religion, conversion by free exercise of the conscience has to be recognised. The word propagate in this clause is nothing very much out of the way as some people think, nor is it fraught with dangerous consequences"*.

Numerous cases have discussed the varying aspects of the freedom of religion. One particular aspect that warrants analysis is the concept of propagation. The decisions in *Yulitha Hyde v. State*[6] and *Rev. Stainislaus v M.P*[7]*.* provide an interesting perspective on the idea of conversion and religious freedoms. While in the former, the Orissa High Court held the law to be ultra vires, in the case of Madhya Pradesh High Court, it was declared to be constitutionally valid. The Supreme Court reviewed the judgments of High Courts of Orissa as well as Madhya Pradesh in *Rev. Stainislaus vs. State of MP*[8]. The observations of the Court are reproduced below.

"We have no doubt that it is in this sense that the word 'propagate' has been used in Article 25 (1), for what the Article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion

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1 The Bill of Rights are the first 10 amendments to the US Constitution. It guarantees civil liberties, including freedom of speech, press and religion, due process of law, right to bear arms, protection from double jeopardy, self-incrimination.

2 The Universal Declaration of Human Rights and the Constitution of India were drafted almost simultaneously between 1946-1948. Many of the rights enumerated in the UDHR are reflected in the Constitution, including life, liberty, equality before law and equal protection of laws, protection from arbitrary arrests, freedom ofmovement and residence, religion, peaceful assembly and association, etc., among others.

3 In S. R. Bommai v. Union of India, AIR 1994 SC 1918, the Supreme Court held that "secularism is a basic feature of the Constitution".

4 H.M. Seervia, CONSTITUTIONAL LAW OF INDIA, Vol. 2 (Universal Law Publishing Co. Pvt. Ltd., New Delhi.)

5 Narayanan Nambudripad v. Madras, (1955) Mad. 356 at p.377.

6 Yulitha Hyde v. State, AIR 1973 Ori 116

7 Rev. Stainislaus v M.P., AIR 1975 MP 163

8 Rev. Stainislaus vs. State of MP, AIR 1977 SC 908. The validity of the two Acts- the Madhya Pradesh Dharma Swatantrya Adhiniyam, 1968 and the Orrisa Freedom of Religion Act, 1967 was challenged on the grounds of violation of Article 25(1) of the Constitution.

by an exposition of its tenets. It has to be remembered that Article 25 (1) guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom of conscience" guaranteed to all the citizens of the country alike."

It is clear that propagation cannot and does not connote forced conversions. Propagation only indicates persuasion and exposition without any element of coercion. Conversion by force or by fraud can be prevented on the grounds of public order or morality. However, propagation of a religion with a view to produce an action based on knowledge and moral conviction is permitted. Conversion does not interfere in any way with the freedom of conscience but is a fulfilment of it.

The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020[9] seeks to criminalise religious conversions based on fraud[10], allurement[11], coercion[12], undue influence[13] and marriage[14]. The Ordinance was the culmination of the report submitted by the State Law Commission, titled the Eighth Report of State Law Commission on freedom of religion (along with draft bill of) the Uttar Pradesh Freedom of Religion Bill, 2019.

The Ordinance provides for numerous circumstances, including that of marriage as a factor that may deem to be labelled as illegal conversion[15] and thus an offence punishable by law. [16]The Ordinance provides that a conversion that is free of any such factor is permitted but should follow the guidelines and attain the requisite permissions and approvals before engaging in a religious conversion. Furthermore, it states that the public at large should be informed[17] in order to qualify as a religious conversion and if any person related by blood, marriage or adoption is empowered to lodge a FIR for any alleged illegal conversion[18]. However, it is interesting to note that reconversion is clearly excluded, and it is not deemed to be falling within the definition of the term 'conversion' and thus, the person reconverting should not be punished[19].

The Ordinance makes special and additional penal provisions for conversion of Scheduled Caste and Tribes, as identified to be particularly vulnerable to such conversions owing to allurement of a better life. Various persons have been empowered to file a case of alleged forced conversion and the onus shall be on the accused to prove his innocence[20]. This ordinance presumes guilty unless proven otherwise and that creates problems, especially in cases where it is simply harassment for married couples who may have voluntarily changed their religion. The Bill provides a list of different punishments for various scenarios, all of which are cognizable and non-bailable in nature[21].

The law basically creates the situation wherein every conversion shall be presumed to be illegal and subject to punishment unless it has the sanction of the state. This directly affects the ideas of and the basic principles of liberty, freedom, privacy[22], and dignity of a human being.In *Shafin Jahan v Asokan KM*[23] the Supreme Court had said, *"Interference by the State in such matters has a seriously chilling effect on the exercise of freedoms."* The Ordinance dictates that a person cannot be trusted to make a sensible choice and that if one converts, it is for sure, based on

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9 Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020.

10 *Id*. Sec. 2(e) defines fraudulent means as 'impersonation of any kind, impersonation by false name, surname, religious symbol or otherwise.

11 *Id*. Sec. 2(a) provides an extensive definition of the term allurement, including any offer or temptation in form of gifts, gratification, easy money, material benefit in cash or kind; employment and educational opportunities in reputed school run by religious bodies; and also, lifestyle, divine displeasure. The definition is broad and includes a whole set of activities as falling within the term of allurement but without any delimitation whatsoever.

12 *Id*. Sec. 2(b) defines coercion as 'compelling an individual to act against his/her will by the use of psychological pressure or physical force causing bodily injury or threat.

13 *Id*. Sec. 2(j) provides the definition as 'the unconscientious use by one person of his/her power or influence over another in order to persuade the other to act in accordance with the will of the person exercising such influence'.

14 *Id*. Sec. 3.

15 *Id*. Sec. 6.

16 *Id*. Sec. 5.

17 *Id*. Ss. 9(2), 9(3).

18 *Id*. Sec. 4.

19 *Supra* note 12.

20 Sec. 12, Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020.

21 *Id*. Sec. 7.

22 The landmark case of K. S. Puttaswamy clearly stated that privacy is a basic fundamental right that affects dignity of an individual and that choosing a life partner is a matter of privacy. "The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world".

23 (2018) 16 SCC 368

some external factor unless it has been investigated and approved by the state. The interference of the state into affairs of private engagements affects the freedom of choice. As clearly seen even in the case of same-sex couples, the government stands in clear opposition and thus, interfering into the personal affairs of the relationship between two consenting adults[24].

The Ordinance in clear terms state that conversion for the purpose of marriage is deemed to be void and thus, such a presumption of void marriage is bound to affect the status of children born to such a couple.

There are elaborate provisions regarding declarations, both pre-conversion[25] and post-conversion[26]of religion to the District Magistrate or the Additional District Magistrate certifying that the conversion is out of free will and without any form of force, coercion, undue influence, or allurement. The responsibility of such communications has been given to the parties and also to the religious convertor to give the relevant and correct information and failure of complying with the same shall attract punishment.

Subsequent to furnishing of such information, the police are entrusted with carrying out an enquiry to ascertain the intention, purpose, and cause of the religious conversion[27]. When such compliances are followed through and the conversion is sanctioned, it shall be publicly displayed by the DM for information of all public to raise objections, if any[28]. This provision is particularly problematic and makes public private information and places the parties in a vulnerable position by compromising their right to privacy[29].

The information to be posted publicly include personal information such as date of birth, permanent and current residences, the names, and religions, both former and new, of the parties concerned, including the nature of process of conversion.

The unique aspect of this ordinance is that of the burden of proof of the offence shall lie on the person who has caused or facilitated the conversion and thus, this presumption of guilt has to be defended by the party in the court. This presumption goes against the general principle of criminal law that an accused shall be presumed to be innocent until proven guilty. This does provide the potential for any relative or member of the familyto file cases and accusations of alleged conversion, especially when a marriage is not sanctioned or approved by the parents. It will have a deterrence effect and inter-faith couples are bound to decline in numbers.

Political Hues of the Development

The political nuances of this legal development are also important to understand and analyse as no law is created without the influence of or intervention of the social organisation. The ordinance, which has been termed as the anti-Love Jihad law has an angle of religious discrimination. The presumption is heavily towards illegal conversions of Hindu girls by Muslim men and that sentiment has been espoused by sections of the political class. Though it is true that the law makes no such mention of any specific religion. The Chief Minister of Uttar Pradesh said, *"play with the honour and dignity of sisters and daughters by hiding their real names and identities…If they do not mend their ways, their 'Ram Naam Satya' journey will start."*[30]Such statements perpetuate a kind of aggression towards the alleged perpetrators of illegal conversions and also gives impetus to vigilante groups that often resort to violence as they know that they are protected by the law.

The Ordinance was condemned as discriminatory by certain groups and particularly by legal experts who felt that the nature of the law is in clear violation of the fundamental rights guaranteed and safeguarded by the Constitution of India. A collective of top bureaucrats in the state also wrote a letter questioning the need and intention of the legislation. The letter refers to the communal nature of the law and the potential of the law being misused to victimise Muslim men and women who choose their own partners, in conditions of lack of approval from the family[31].

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[24] In Sony Gerry v. Douglas Gerry (2018) 2 KLT 783, the Apex Court said, "It needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She/He is entitled to make her/his choice. In Shakti Vahini v. Union of India 2018 AIR SC 1601, had remarked, "When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal, and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation.".

[25] Sec. 8, Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020.

[26] *Id*. Sec. 9.

[27] *Id*. Sec 8(3).

[28] *Supra* note 15.

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

[30] Adeeti Singh, *UP's Anti-Love Jihad law: Is it Constitutional?,* CJP (5 December 2020), available at https://cjp.org.in/ups-anti-love-jihad-law-is-it-constitutional/ (Last visited on February 27, 2021).

[31] Express News Service, *104 ex-bureaucrats write to Yogi Adityanath: UP is now epicentre of politics of hate, bigotry*, INDIAN EXPRESS (30 December 2020), available athttps://indianexpress.com/article/india/104-ex-bureaucrats-write-to-yogi-adityanath-up-is-now-epicentre-of-politics-of-hate-bigotry-7125513/ (Last visited on February 27, 2021)."The U.P. has become the epicentre of the politics of hate, division and bigotry and that the institutions of governance are now steeped in communal poison… These atrocities, regardless of the indignation of all Indians devoted to the rule of law, continue unabated. The anti-conversion ordinance of your State is being used as a stick to victimise especially those Indian men who are Muslim and women who dare to exercise their freedom of choice."

The Ordinance did raise plenty of questions and a controversy regarding the design of the law and nature in which the law was drafted and passed via the process of ordinance in the state during the pandemic and when session was not in action. Nevertheless, the biggest concern raised is regarding the constitutionality of the Ordinance and whether it can stand true to the ideals and principles espoused in the Constitution of India.

Constitutionality of the Ordinance

The main question pertaining to this ordinance is that of constitutionality of the law. This law, which was introduced by way of an ordinance when the Vidhan Sabha was not in session, has been challenged on grounds of violation of fundamental rights as safeguarded under Part III of the Constitution of India. The fundamental safeguards, including that of right to life and personal liberty[32], right to equality[33], freedom of religion[34] and of privacy are said to be allegedly being violated by the law. There are limitations and restrictions to every right and freedom, however, the current law may not stand the test owing to the factors, including that of presumption of guilt and of blatant violation of privacy by public declarations. This opinion has been reflected by many leading experts of law, including many judges.

It is to be noted that at present, the Ordinance is under review in Uttar Pradesh. A PIL has been filed citing violation of fundamental rights as provided in the Constitution[35]. The PIL contended that the ordinance creates conditions of an autocratic state wherein choices of an individual over partners and religion are subservient to state approval. This affects the fundamental rights of privacy[36], dignity, and personal liberty under Article 21 of the Constitution. The plea also questioned the need for such prior scrutiny and approval via certification and the unnecessary interference of the state in the personal affairs of an individual. [37]At present, the state has filed a counter affidavit to the points raised by the petitioner and the matter is in Court for its review.

It is to be noted though that anti-conversion laws are in force in many states of India, including Odhisha, Madhya Pradesh,Gujarat, Arunachal Pradesh, Chhattisgarh, Jharkhand and Uttarakhand[38]. While the aim of these laws remain to punish those who induce or by force convert a person; none of them cites 'allurement into marriage' as a punishable offence. The law in Jharkhand and the one in Madhya Pradesh are under review, in Jharkhand by the High Court and in Madhya Pradesh by the state Governor. It is interesting to note that the Supreme Court, in a 5-judge bench decision in 1977, had upheld the legal validity of both, Odhisha and Madhya Pradesh conversion law. The Court stated that a person does not have a fundamental right to convert others to one's own religion but conversion out of one's free will, is permitted and forms a part of the right to practise and propagate religion as provided under Article 25 of the Constitution[39].

At the same time, in the notable Shafin Jahan case[40], the Supreme Court held that the right to choose to convert to any religion and the right to choose one's partner is intrinsic under Article 21 of the Constitution of India. The judgement, penned by Justice Chandrachud referred to the Universal Declaration of Human Rights, to the principles enshrined in the Constitution and the Puttaswamy judgement in its verdict. "*The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life.*"[41]The decision also spoke about the balance that is needed between the freedoms and the state regulation via legislations. The decision stated that while clearly the state is empowered to determine regulations regarding the conditions of a valid marriage; it cannot and should not interfere in the choice of partners[42].This was reflective of the

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32 Art. 21, THE CONSTITUTION OF INDIA, 1950.

33 *Id*. Art. 14.

34 *Id*. Art. 25.

35 Abhishek Mishra, *UP govt to submit response on anti-conversion ordinance in Allahabad HC today*, India Today (4 January 2021), available at https://www.indiatoday.in/india/story/up-govt-response-reply-anti-conversion-ordinance-allahabad-hc-1755609-2021-01-04(Last visited on February 27, 2021).

36 The landmark Justice K. S. Puttaswamy case unequivocally held that the right to privacy personal autonomy, bodily integrity and protection of personal information as facets of privacy.

37 *Id*.

38 Aneesha Mathur, *UP's 'anti-Love Jihad' ordinance: Past, present and legal hurdles ahead*, SCROLL (25 November2020), available at https://www.indiatoday.in/india/story/up-s-anti-love-jihad-ordinance-past-present-and-legal-hurdles-ahead-1744069-2020-11-25(Last visited on February 27, 2021).

39 *Supra* note 6.

40 Shafin, *supra* note 23.

41 *Id*.

42 *Id*."The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners."

privacy judgement[43] wherein the judges clearly referred to privacy as including preservation of personal intimacies and the right to making personal choices.

Many prominent former judges have also reflected on the same and have raised the same concerns, particularly in relation to the constitutionality of the ordinance. Justice A. P. Shah opined that the law reflects the attitude of a khap panchayat that dictates choice and subdues women from making a choice[44]. The former judge stated that the law strikes at the root of right to life and liberty and that it may create public mischief due to its possible misuse by vigilante groups and extremist groups that may exert pressures on inter-faith couples. According to Justice Shah, such laws are destroying the freedoms guaranteed by the Constitution and that the onus lies on the judiciary to reflect on such laws and provide requisite relief.[45]Justice M Sasidharan Nambiar, also said that in his view, *"the ordinance will not survive the test of constitutional validity as it violates Article 21 of the Constitution which guarantees personal liberty of every citizen of this nation irrespective of religion, caste and gender."*[46]

A similar opinion was forwarded by Justice Lokur who questioned the need for presumption of illegal conversions and guilt of the party accused of such conversions[47]. Justice Lokur also highlighted that the definition of the term allurement as provided in the law is far too vague and broad and that such a broad term may create problems during interpretation.[48] He also focused on the aspect of the concept of conversion after marriage and how the declaration of such marriages as void will change the status of children born out of such union as illegitimate.[49] With regard to the declarations as needed as per the law, Justice Lokur highlighted the fact that it violates the fundamental right of privacy as declared by the Puttaswamy judgement and that while other offences do not require such public display of personal information, why is there a need for this offence specifically.[50]

The current ordinance, though passed via the due process of law, has to be reviewed in light of the facets as aforementioned. These rights are central to the theme of life and liberty, autonomy, and dignity of a human being. Thus, preservation of such rights and freedoms are central to the idea and principles espoused by the Constitution of India.

Conclusion

The Ordinance has been critiqued by sections of society and questioned by some legal experts for being discriminatory and violating the Constitution and the principles that it espouses. It is true that the last decision on conversion by the Supreme Court did adjudge that such anti-conversion laws are permitted in a state and perhaps it is needed to ensure that forced and coerced conversions do not happen. However, the current U.P. Ordinance takes it a step too far with the criminalisation of all inter-faith couples without the prior sanction and approval of the state. It provides cumbersome methods and blatantly disregards the freedom of choice, of individual autonomy and privacy of a person. The law should perhaps be reviewed to ensure that it does not infringe upon the rights of a person to life and personal liberty. The question of free will shall be extremely difficult to identify and pressures from within the community and family will increase manifold. The judiciary will take its course as it has been set in motion by virtue of the PIL. The Court have to find a balance between the ideals of individual autonomy and privacy with that of state interference in personal matters like marriage and how far such an involvement by the state is necessary and required.

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

44 Mariyam Alavi, *UP's Anti-Conversion Law "Unconstitutional", Say 4 Former Judges*, NDTV (18 December 2020), available at https://www.ndtv.com/india-news/love-jihad-ups-anti-conversion-law-unconstitutional-say-4-former-judges-2340694(Last visited on February 27, 2021).

45 *Id.*

46 *Id.*

47 PTI, *UP's anti-conversion law cannot be sustained, contains many defects: Ex-SC judge Lokur*, THE WEEK, (Dec. 22, 2020), available at https://www.theweek.in/news/india/2020/12/22/ups-anti-conversion-law-cannot-be-sustained-contains-many-defects-ex-sc-judge-lokur.html (Last visited on March 2, 2021).

48 Madan B. Lokur, *An ill-conceived, overbroad and vague ordinance*, THE HINDU, (January 2, 2021), available at https://www.thehindu.com/opinion/lead/an-ill-conceived-overbroad-and-vague-ordinance/article33475179.ece(Last visited on March 2, 2021).

49 *Id*.

50 Abraham Thomas, *Love jihad' law goes against freedom of choice: Lokur,* HINDUSTAN TIMES, (Dec. 1, 2020), available at https://www.hindustantimes.com/india-news/love-jihad-law-goes-against-freedom-of-choice-lokur/story-Y07QJ3XfMYrCYxl272CmMO.html(Last visited on March 2, 2021).*Student, Army Institute of Law, Mohali.

Secular Character of Nation and its Disruption with Reference to Freedom of Religion, Liberty, Faith and Worship

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ABSTRACT

The Republic of India gained independence from the British Raj in 1947. However, its very birth is attributable to the puzzling horrors of communal violence. Initially when the draft of the Constitution was being prepared, inclusion of the principle of secularism was much debated upon[1]. However, the final draft of 1950 did not formally acknowledge it. It was only through the 42nd Constitutional Amendment Act of 1976 that India adopted the word "secular" in its Preamble.
Secularism is part of the basic structure of our Constitution, as is stated in Kesavnanda Bharati v. State of Kerala[2]. Even today India is struggling with maintaining equilibrium between multiple profanities. Moreover, there is visible an unintentional but direct conflict between the virtue of secularism and the Right to Religious Freedom.

The Cambridge Dictionary defines secularism as the belief that religion should be detached from the ordinary social and political activities of a State. However, is India a secular nation in its truest sense? Furthermore, can India ever become secular? Indian courts have time and again, adjudicated on religious affairs, for example in *Indian Young Lawyers' Association v. State of Kerala*[3]. The Karnataka government very recently passed the Prevention of Slaughter and Preservation of Cattle Bill, 2020, seemingly spinning communal tension. Finally, India's common masses, rather than simply following their denomination, are driven by a want of seeing their religion dominating over others. In 2017, on an average, India saw 161 riots with 247 victims every day[4]. This paper will mainly focus on the above mentioned sub-issues in great detail.

Keywords: Secularism, State, Religion, Constitution, Communal Violence.

Introduction

"Secularism is a religion, a religion that is understood. It has no mysteries, no mumblings, no priests, no ceremonies, no falsehoods, no miracles and no persecutions."

- Robert Green Ingersoll

If one ever thinks of the most scathing, popular and unending debate and discussion topics, the concept of secularism would undoubtedly top the charts. Secularism is a theory which when not interpreted properly, clashes with the powerful belief in religion. Religion has guided society since the day it was born, ultimately wrapping humans into all sorts of traditions and customs be it sane or insane. Therefore, secularism poses a challenge to the dominance of religion over all humanity, and is nothing less than a window of escape for individuals who wish to be independent of religious duties.

The word "secularism" was used for the first time, by British writer George Holyoake in 1851[5]. Holyoake invented the term "secularism" to describe his views of promoting a social order separate from religion, without actively dismissing or criticizing religious belief. He actively advanced that secularism is not an argument against Christianity, but one independent of it. Even though the concept of secularism intermittently appeared in the earliest of civilizations like the *Charvaka system of philosophy in India*[6], or the teachings of Zeno of Citium and Marcus Aurelius, it was finally during the Renaissance and the Reformation in the West, that secularism started taking proper shape. Various political thinkers and philosophers like David Hume, John Locke, Thomas Jefferson, James Madison, contributed to the notion of secularism, spreading it to wider horizons, with a belief that the rights of man are not God-given, but are de facto benefits of nature.

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1 Shefali Jha, *Secularism in the Constituent Assembly Debate, 1946-1950*, Vol 37, No 30 ECONOMIC AND POLITICAL WEEKLY 3175 (2002)
2 Kesavnanda Bharati v. State of Kerala, AIR 1973 SC 1461
3 Indian Young Lawyers' Association v. State of Kerala, 2018 (8) SCJ 609
4 Crime in India, Vol I, National Crime Record Bureau (2018)
5 Holyoake G.J., ENGLISH SECULARISM: A CONFESSION OF BELIEF, 17 (Kessinger Publishing, LLC Sept 24, 2009).
6 Seema Chishti, *Indian Nationalism, Charvaka to Narendra Dabolkar*, The Indian Express (August 21, 2018), available at https://indianexpress.com/article/explained/govind-pansare-mm-kalburgi-gauri-lankesh-murder-5316465/ (last visited on Feb. 20, 2021)

In proper terms, secularism is the concept which seeks to separate the State or government from religion. It aims to conduct human affairs based on naturalistic and secular conditions. It may or may not connote the phenomena of naturalism, atheism, etc. but it does signify anti-clericalism, which is opposition to the authority of religion, especially in social and political affairs[7]. Secularism has multiple theories and arguments favoring its prosperity like the notion that dominance of religion is divisive and regressive and that secularism is a blessing in disguise needed to achieve modernization.

In terms of politics, secularism means distinction between the state and religion (often referred to as separation of church and state). This may imply a gradual replacement of laws and regulations based on scripture with civil and uniform laws based on the requirements of a changing society. Secularism is a safe haven for democratic principles, which eliminates discrimination on the basis of religion and promotes individual liberty and protection of religious minorities. Each state may apply its own prescription of secularism, from separation of church and state to careful monitoring and regulation of organized religion to religious tolerance all over the nation.

Secularism is a shield for both democracy and freedom of religion, as it expels the dominance of one religion over anything and everything. Such separation of politics from religion, allows political leaders to take decisions over pertinent issues like abortions, same-sex marriage, stem cell research, etc. taking in view the humane needs of citizens, rather than forceful commitment to a religious order which is painful to observe.

Secularism in India

Although the word "Secular" has a western origin, but the concept is not novel to the country which is home to one of the oldest human civilizations known to the world, i.e., the Indus Valley Civilization. The principle of *"Sarva dharma sambhava"* which means - all religions lead to the same goal, which ultimately translates to equal respect for all religions, has been a credo to Indian civilization. This is the land where various religions are known to have co existed and evolved together for many centuries. Tolerance and harmony weave through Indian philosophy, culture and society since ages. Where Hinduism was the prevalent religion, Buddhism started spreading after the death of Buddha, especially when it was recognized by the Mauryan emperor, Ashoka the Great. Even in the Gupta Dynasty, where the rulers were Hindus, they continued to patronize Buddhism by donating and supporting various Buddhist monasteries and art[8].

With the advent of Muslim rule, even in the 12th century, India was the only nation with a Hindu majority which was ruled by Muslim rulers. The Mughal emperor Akbar introduced state policies, which aimed at *'Sulh-i-Kul'* that is, universal peace and amity. However, the religious tensions we witness today started growing their roots during the British rule due to the imperialistic divide and rule policy. Before that there was harmonious co existence. According to a government data the first Hindu - Muslim riot took place in 1713 in Ahmedabad[9]. Even after these little setbacks, the Revolt of 1857, Non-Cooperation Movement and *Khilafat Movement* saw the unity of various denominations. However, with the formation of Muslim League and some other developments along with the grant of separate electorates widened the differences between two major religions, which resulted in communal riots and ultimately tore the nation into pieces. Since, India has seen so much violence in the name of religion since its very inception; it was only prudent to follow up on the age old principle of secularism. And hence, India never adopted a state religion.

Constituent Assembly and Secularism

On October 17, 1949, when the preamble to the Constitution was discussed in the Constituent Assembly, debate over the incorporation of the principle of secularism took up most of the Assembly's time. It is relevant to mention that the proposal to insert the words 'Secular' and 'Socialist' in the Preamble was rejected thrice after due deliberation and exchange of views between the members of Constituent Assembly. On this issue, three alternatives were available before the assembly. The first was the No Concern Theory of Secularism according to which there must be a complete separation of state and religion. Given the principles of freedom of expression and religious liberty, it was up to the individual to decide whether to be a believer or not, or to adhere to this religion or that. Therefore the preamble could not contain any references to God, and neither could the Constitution establish links between the state and any religion. [10]This idea was proposed as there was a need to strengthen our identity as an Indian and not as a part of any community.

Dr. Radhakrishnan's speech on the Objectives Resolution on December 13, 1946 asserted that *"nationalism, not*

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7 Nader Hashemi, *Secularism* in THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD, (John L. Esposito Edn., 2009).

8 Shankara, *Secularism in India, a historical perspective*, Swarajya (October 19, 2011), available at https://swarajyamag.com/featured/secularism-in-india-a-historical-perspective-2 (Last visited on February 12, 2021)

9 Department of Animal Husbandry and Dairying, Government of India, *Survey on Hindu Muslim Riots (1917 to 1977): Politics of Communalism,* (1994) available at http://dahd.nic.in/hi/related-links/annex-ii-survey-hindu-muslim-riots-1917-1977 (last visited on February 12, 2021).

10 Jha supra note 1 at 3176.

religion, is the basis of modern life the days of religious states are over. These are the days of nationalism"[11]*.* Similar thoughts were expressed later by several members including, Guptanath Singh who stated that "The state is above all gods. It is the god of gods. I would say that a state being the representative of the people, is god himself."[12] Members advocating for this kind of secularism included K. T. Shah, who in December 1948, demanded the insertion of an Article separating the state from any religious activities. Tajamul Husain, another member not only wanted to define the right to religion as a right to 'practice religion privately', but also insisted that religious instruction was to be given only at home by one's parents and not in any educational institutions. He also wanted to include the following clause in the Constitution: *"No person shall have any visible sign, mark or name, and no person shall wear any dress whereby his religion may be recognized".* [13]This implied an understanding of secularism in which "religion is a private affair between man and his god. It has no concern with anyone else in the world". [14]It is this conception of secularism which led M. Masani and K. T. Shah to state earlier that while they supported an individual's right to religious freedom, they dissented from the inclusion among fundamental rights of any provision guaranteeing aids to any institution belonging to any religious community.

The second position on secularism, exactly opposite to the first, was that no links between the state and religion should be permitted, not because this would weaken the state, but because it would demean religion. Religion, a system of absolute truth, could not be made subject to the whims of changing majorities allowing the democratic state to have a say in religious affairs.

The third position is the Equal Respect Theory of Secularism. It also began with the principle of religious liberty, but held that in a society like India where religion was such an important part of most people's lives, this principle entailed not that the state stay away from all religions equally, but that it respects all religions alike. In this view, instead of distancing itself from all religions or tolerating them equivalently as sets of superstitions which could be indulged in as long as they remained a private affair, a secular state based its dealings with religion on an equal respect to all religions.

It was Brajeshwar Prasad from Bihar who moved the first sentence of the preamble which begins as follows:

"We the people of India, having resolved to constitute India into a secular cooperative commonwealth to establish socialist order and to secure to all its citizens…"[15]

The preamble was discussed in one of the last sessions of the Constituent Assembly. But the term "secular" was dropped from the Preamble as members, including Nehru and Ambedkar both were wary of the usage of this term. Using it would mean that state could not interfere in religious matters even to regulate it for providing equal rights regarding religion to every community including, the religious minority. This argument was rightly put forth by H. C. Mookherjee when he stated "that are we really honest when we say that we are seeking to establish a secular state? If your idea is to have a secular state it follows inevitably that we cannot afford to recognize minorities based upon religion." [16]However, all of them agreed on the point that India as a state must not have any religion and that all religions should get equal rights and respect.

42nd Constitutional Amendment, 1976

The 42nd Constitutional Amendment, 1976 which is one of the most significant and yet controversial amendments brought about during the period of emergency which made several changes not just to the Articles of the Constitution but also its Preamble, to include – "Secular" and "Socialist". These words were knowingly not inserted by the members of the Constituent assembly even after a thorough debate. Inevitably, the amendment was challenged in the case of Minerva Mills v. Union of India[17] and Article 4 and 55 of the amendment were struck down as being unconstitutional. However, the words introduced by the amendment in the Preamble were left unchanged. The reasons for addition of the terms seem to be mostly political.

However, a petition was filed in the Supreme Court under Article 32 for the removal of 'secular' and 'socialist' in the case of Balram Singh & Ors. v. Union of India & Anr (AIR 2005 Utr 59) which is still pending and the matter is yet to be decided.

Secularism as a part of basic structure of Constitution

As previously stated that the term 'secular' was not a part of our Constitution but still the spirit of Indian Constitution has always been inclusive of this concept that relates to harmonious co existence and equal rights to all religions. However, with the amendment as the term was

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11 Statement by Dr. Radhakrishnan, CONSTITUENT ASSEMBLY DEBATES 246, (December 13, 1946)
12 Statement by Guptanath Singh, CONSTITUENT ASSEMBLY DEBATES 865, (December 7, 1948)
13 Statement by Tajamul Hussain, CONSTITUENT ASSEMBLY DEBATES 189, (December 3, 1948)
14 Id.
15 Statement by Brajeshwar Prasad, CONSTITUENT ASSEMBLY DEBATES 447, (October 17, 1949)
16 Statement by HC Mookherjee, CONSTITUENT ASSEMBLY DEBATES 228, (May 25, 1949)
17 Minerva Mills v. Union of India, AIR 1980 SC 1789

incorporated in the Preamble itself, it gained more clarity. After the concept of basic structure was formulated[18] various judgments which came laid down several concepts which form a part of the basic structure of our Constitution.

In the case of SR Bommai v. Union of India[19] the centre - state relations were dealt with and the Court also laid down that Secularism forms a part of the basic structure of our Constitution. It stated that:

"Secularism is one of the basic features of the Constitution. While freedom of religion is guaranteed to all persons in India, from the point of view of the State, the religion, faith or belief of a person is immaterial. To the State, all are equal and are entitled to be treated equally. In matters of State, religion has no place. No political party can simultaneously be a religious party. Politics and religion cannot be mixed. Any State Government which pursues un-secular policies or un-secular course of action acts contrary to the Constitutional mandate and renders itself amenable to action under Article 356."

"Secularism"- In Conflict with Constitution

Can we say that the concept of "secularism" is in contravention to the Constitutional provisions? Did the Constitution makers intend to include "Secular" in Constitution and if not then what are the reasons for doing so?

A very simple and easy answer to the above questions is that if the makers of the Constitution intended to include 'Secular', they would have done it. The fact is that the Constitution makers never intended to introduce Socialist and Secular concepts for the governance of a democratic government. In fact, they intended to ensure that the government will not show its inclination towards any religion and will treat the subject equally without any religious bias.

There is one strong reason for not declaring India as a secular country and it is that some provisions in the Constitution have been made in favour of minority communities distinguished on the basis of religion and state has been empowered to give them grants and also that the State has been conferred with the power to make laws relating to religious matter and even reservation has been allowed in favour of Anglo Indian Community, a religious minority in the country. Thus, how can these both exist together?

Therefore, if we analyze carefully, following are the provisions which are in contrast to the concept of 'Secularism':

Article 25(2) (a) of the Constitution lays down that states can make law 'regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice'. So, basically the state can regulate religious activity which is not the feature of a secular state and thus, it is repugnant to secularism.

Article 25(2) (b) of the Constitution raises further doubts and questions, as it states that-

Nothing in this article shall affect the operation of any existing law or prevent the state from making any law- State is not prevented from making any law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

If we look at it, this is not just contradictory in the sense that it gives state the power to deal with religious matters but it also treats different religions differently. Why should a secular state control any religious institution? Why should the state only regulate Hindu religious institutions? This according to the authors is violative of not just secularism but also of right to equality.

Also Article 30 (2) provides that 'the state shall not in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.' However, a secular state cannot provide grants to any religious community. Such types of grant being given by the state are alien to the concept of secular state. Secularism and grant to minority institution cannot go together. These are antithesis to each other.

In addition to these there are some entries in the lists which are placed in the 7th Schedule which confer power to the either the Central government, State government or both, which are as follows:

(a) List 1- Entry 20: Pilgrimages to places outside India.

(b) List 2 - Entry 7: Pilgrimages, other than pilgrimages to Places outside India.

(c) List 2 - Entry 32:...religious and other societies and associations.

(d) List 3 - Entry 28: Charities and Charitable institutions, charitable and religious endowments and religious institutions.

[18] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461

[19] SR Bommai v. Union of India, 1994 AIR 1918

Furthermore, Article 331 provides that if in the opinion of the President of India, the Anglo Indian Community is not adequately represented in the House of the people he may nominate not more than 2 members of that community to the House of the people. Similar provisions are made in Article 333 to nominate one member of that community in the State Assembly by the Governor. Anglo Indians are basically Christian minority and the term is defined by Article 366(2)[20] of the Constitution. The President of India or the Governor of the States has been empowered to nominate persons from Anglo India Community, which is a minority community. In a secular state such types of nomination is not permissible.

By all these arguments, it is not disputed that the Constitution was enacted to establish a democratic form of Government but the fact is that if it is a democratic secular state, then the state must not have any powers to regulate any religious matter.

So, the problem here is not that the state is regulating religious matters in some sense or the other, because that is required anyways. But the problem is that the interference is increasing day by day and in this process all religions are not being treated equally, some are interfered more and some not regulated where they should be, and that is not what our Constitution makers envisaged.

Secularism v. Freedom of Religion

As per the 7th Schedule of the Constitution of India, religion is a subject which falls in the Concurrent List and can be adjudicated upon by both the state governments and the central government. This permits governments to control religious entities or delve into and pass legislations, which is contrary to the non-interference of government in matters of faith. This has caused an overlap of the religious and political affairs in India. There is major controversy over whether India truly is a secular state or not, since Indian government and courts have, in a plethora of instances rolled out religiously motivated bills or adjudicated upon such like matters. India is home to a diversity of religions, with each one getting some support from state/central governments, like religious charities, places of worship, religious schools, personal laws, etc. The fieriest point of clash is between true secularism and a completely Hindu state for India, which often motivates political campaigns and become the basis of a certain government coming to power.

Taking into account some very recent examples, where government has brazenly opined upon religious matters, one is the Anti Cow Slaughter Act, 2021 of Karnataka. The current government has imposed complete ban on transporting and slaughtering cows in the state. Moreover, the law has been passed under the shadow as an ordinance, without any apparent emergency in sight. The Act provides a maximum of seven years' imprisonment and a fine of Rs. 5 lakh for contravention[21]. Further, the Act demands setting of up cattle sheds and employs strict penalty for anyone indulging in illegal smuggling or slaughtering of cows. The fact that cattle is admired by the Hindu religion as an endeared and respectable living being cannot be ignored as a catalyst in the political agenda.

Another war of words is incited over the previous ruling government's policy of providing subsidy for the annual *Haj Pilgrimage* for Indian Muslims to Mecca. In 2011, the Central Government had spent $120 million in *Haj subsidies*, which was considered gravely discriminatory towards Hinduism and Christianity, due to no such scheme in place for them[22]. Subsequently, in 2012 the Supreme Court of India adjudicated that the scheme shall be abolished within a span of the coming 10 years. In a Wall Street Journal article, Muslim leaders supported the termination of *Haj subsidies*, stating that they did not deserve undue grants, just like any other religion[23].

The 1978 Shah Bano ruling of the Supreme Court, wherein Shah Bano was granted payment of maintenance by her ex-husband under Section 125 of the Code of Criminal Procedure and that India needs a Uniform Civil Code, sparked major discontentment among Muslim men. Shortly after the Supreme Court's ruling, the then government enacted a new law named Muslim Women Protection of Rights on Divorce Act, 1986, which provided that Muslim women cannot be granted maintenance under Section 125 of CrPC, unless there is mutual agreement between her and her spouse. Furthermore, she can only

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[20] (2) an Anglo Indian means a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for necessary purposes only;

[21] Chukki Nanjundaswamy, *Karnataka anti-slaughter law neither protects the cows, nor the poor who tend to them*, The Wire (February 10, 2021) available at https://thewire.in/communalism/karnataka-anti-slaughter-law-neither-protects-cows-nor-the-poor-who-tend-to-them (last visited on February 12, 2021).

[22] Rama Dwivedi, *After Haj subsidy scrapped, spotlight on state funded Hindu pilgrimages, including Rs.25000 crore by UP government for Ardh Kumbh,* Outlook available at www.-outlookindia-com.cdn.ampproject.org/v/s/www.outlookindia.com/website/amp/rs-200-cr-haj-subsidy-gone-but-what-about-rs-2500-crore-set-aside-by-up-alone for/306961(Last visited on February 12, 2021).

[23] Kurt Achin, *Indian Supreme Court orders end to Hajj Subsidies*, Voice of America (May 10, 2012), available at https://www.voanews.com/east-asia/indian-supreme-court-orders-end-hajj-subsidies (Last visited on February 13, 2021).

exercise this right under Muslim personal laws. This step was considered secular by Muslim men as in their opinion it upheld their religious sentiments and portrayed before the world that their religion and treatment of women is different from that of the world.

Another landmark judgment of the Supreme Court had gas lighted the nation into controversy, wherein it was declared on 14th November, 2019 that the ban on worshipping rights to women between the age of 10 and 50 at the *Sabarimala Temple* in Kerala is unconstitutional and orthodox, and reversed the same. The verdict passed by a vote of 4:1 upturned an age old practice and caused hue and cry from ardent believers of the faith. The judgment is only a revelation of the fact that India as a nation, urgently needs to prioritize the provisions within the Constitution. While Article 25 propagates freedom of religion, Article 14 enshrines the right to equality. Therefore, the prominent question is, what matters more within the walls of Republic of India, religious freedom or basic human rights?

One more immediate instance is the passing of the anti-conversion laws in three states, which invalidate conversion to another religion solely for the purpose of marriage. In the states of Himachal Pradesh, Uttar Pradesh and Madhya Pradesh, any such marriage is null and void, until and unless the couple gets a prior approval from the respective state[24]. These laws have thrown many couples in limbo due the undue vigil over their personal lives and choices. The government has justified the laws stating that it's a stringent action against love jihad, driving the country into further religious segregation. However, the law has again taken a jibe against Article 25 of the Constitution, wherein freedom to convert is a matter of individual decision.

It is but evident from the plenty of examples that in India, secularism is not what the world perceives it to be. There is complete nexus between religion and politics and the two thrive upon each other, something extremely unhealthy. A 1951 Religious and Charitable Endowment Indian law allows state governments to forcibly take over, own and operate Hindu temples, and collect revenue from offerings and redistribute that revenue to any non-temple purposes including maintenance of religious institutions opposed to the temple[25]. Thus, Indian government is undeniably embroiled within the religious affairs of the country, triggering communal violence and divide within common masses.

Conclusion

In the 21st century, India as a developing nation should strive to incorporate scientific temper and humanism in its system. Common masses, political leaders and government institutions should be guided by the light of logic and reasoning rather than false faith and political propaganda. We must allocate our much valuable resources correctly. For instance, the $120 million which was spent on Hajj subsidy in 2011 could be used to alleviate poverty, fund government education, etc.

As educated leaders, it should be our top concern to follow the extremely well written postulates of the law of our land and observe them in our current legislations, policies and judgments. Any ruling government must take the stringent step of rising above party politics, give up profanity related appeasement of the people and bring into reality the Uniform Civil Code, as envisaged under Article 44 of the Constitution. Even after 73 years of witnessing the gory partition of 1947, India hasn't risen above the clutches of communal violence, religion based discrimination, mala fide religious campaigning. We must espouse the real meaning of tolerance and *Sarva dharma sambhava*, and advance towards economic, social, political development and propagate individual liberty and humanism.

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[24] Apurva Vishwanath, *3 states, 3anti-conversion laws: what's similar, what's different,* The Indian Express (January 3, 2021) https://indianexpress.com/article/explained/religion-conversion-bill-bjp-7129285/ (last visited on Feb. 20, 2021).

[25] F.A. Presler, *The structure and consequences of temple policy in Tamil Nadu, 1967-81*, Vol 56(2) PACIFIC AFFAIRS, UNIVERSITY OF BRITISH COLUMBIA, 232-246 (1983).

The Aspiration to Achieve Income Equality in India: An Assessment of the Reality Vis-a-Vis Socio-Economic Rights

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ABSTRACT

The expression 'Socio-Economic Justice' implies removing economic inequalities and a fairer distribution of the country's wealth among its citizens. The Constitution of India based upon equality, dignity, liberty, fraternity, and justice represents a dedication to human dignity that is undeniable and a significant concern for society's poorest people. It enjoins the State to ensure for each citizen a decent standard of living through Fundamental Rights, Directive Principles of State Policy. However, little has been done by the State in recent years to promote income equality. The shoddy National Economic Policies have worsened the hitherto ailing situation. Consequently, the top 10% of the total population have clinched 77% of the national wealth. In this context, Part I of this paper enumerates landmark judgments wherein judiciary has reiterated the need to bridge the yawning gap between rich and poor, thereby upholding the principles fundamental in framing the policies. Even though the judiciary refrains from interfering in policy matters, the authors would analyse the courts' vital role in contemporary times. Additionally, this part sheds light upon the scope of judicial activism in the arena of economic justice with respect to wealth in India. Part II of this paper assesses the Government's approach to counter the reasons responsible for the terrible condition of the country's distribution of wealth. This part of the paper adopts a doctrinal research methodology and appraises the efficacy of recent policies introduced by the government in health and education sectors. In Part III, an analysis has been done to determine how through various measures, there is a crucial need for redistribution of wealth and material sources of the country equitably. The authors' objective is to highlight the condemnatory issue of income distribution in India and how the State has failed to abide by the Constitutional directive of Economic Justice.

Keywords: Constitutional Objective; Economic Justice; Income Equality; Article 38

Introduction

On August 8, 2020, Mukesh Ambani became the 4th richest person in the world[1], while contrastingly, on the same day, an impoverished labourer in Madhya Pradesh killed himself along with his three daughters out of despair[2]. The Indian billionaires' wealth between April and July 2020 saw an increase of 35%,[3] whereas, on the other hand, lakhs and crores of labourers lingered on the roads to return to their hometowns[4]. Such has been the diversified effect of the covid crisis on the world's largest democracy. While the consequences have been unfathomable, the issue of income inequality, in particular, has obtrusively generated a sense of exigency in the country[5]. The below graph reveals how the bottom 50% population of the country has been on a downwards trajectory, and the top 10% has amassed more than 50% of the aggregate national wealth.

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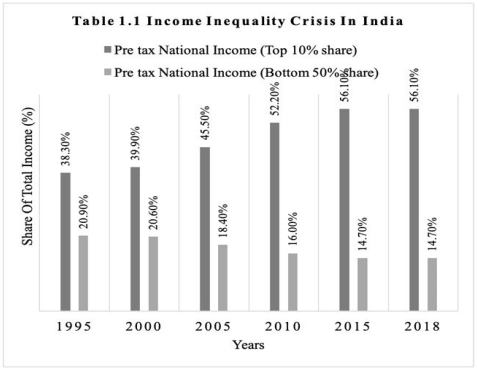
1 BansariKamdar, *India's Rich Prosper During the Pandemic While Its Poor Stand Precariously at the Edge,* THE DIPLOMAT (10 September 2020), available at https://thediplomat.com/2020/09/indias-rich-prosper-during-the-pandemic-while-its-poor-stand-precariously-at-the-edge/ (Last visited on February 9, 2021).

2 PTI, *Jobless Man Kills Three Daughters, Himself In MP Village,* THE INDIAN EXPRESS (8 August 2020), available at https://indianexpress.com/article/india/jobless-man-kills-three-daughters-himself-in-mp-village-6546239/ (Last visited on February 9, 2021).

3 Anonymous, *Wealth of Indian Billionaires Rose by Over a Third During the COVID-19 Lockdown,* THE WIRE (16 October 2020), available at https://thewire.in/business/indian-billionaires-wealth-rose-during-covid (Last visited on February 11, 2021).

4 *See generally* Covid 19 and the World of Work, Rep. of the ILO, Secondedn., WCMS_740877 (Apr. 07, 2020); *See also* Raman Kumar, *Migrant In My Own Country: The Long March Of Migrant Workers In India During The Covid-19 Pandemic 2020-failure Of Postcolonial Governments To Decolonize Bihar And Rebuild Indian Civilization After 1947,* Vol.9(10) J FAMILY MED PRIM CARE. 5089 (2020).

5 Rahul Jacob, *The Pandemic Will Leave India With Worse Inequality,* LIVEMINT (10 December 2020), available at https://www.livemint.com/opinion/columns/the-pandemic-will-leave-india-with-worse-inequality-11607531407514.html(Last visited on February 10, 2021); *See also* KunalDasgupta and Srinivasan Murali, *Income Inequality To Rise In The Aftermath Of Covid-19,* INDIAN INSTITUTE OF MANAGEMENT STUDIES BANGALORE (May 26, 2020), available at https://www.iimb.ac.in/turn_turn/income-inequality-rise-aftermath-covid-19.php (Last visited on February 10, 2021).



Source: World Inequality Database

The pertinent question is, who is responsible for the appropriate allocation of resources? The onus lies on the State and Central governments. The governments have resorted to altering the situation by introducing various policies aimed at uplifting its under-privileged population. However, have these policies been implemented judiciously? Have they achieved the purpose for which they were drafted? Before we evaluate these questions in Part II of the paper, it is crucial to review the judicial literature that elevated the status of Socio-economic rights.

The Constitution of India, through the Directive Principles of State Policy ('DPSP'), mandates that the Government ought to guard the socio-economic rights of the citizens of the country. However, initially the Courts did not pay much heed to the influence of DPSPs, and it was in the case of Minerva Mills Ltd. v. Union of India[6] wherein the Courts realised the importance of DPSPs. Subsequently, the Courts adopted a different approach and made it clear that the Government needs to consider DPSPs before implementing any policy in India. In this backdrop, Part I of the paper reviews the judicial literature and establishes an analogy between DPSPs, Fundamental Rights and Socio-Economic Rights in the context of income inequality. Part II of the paper examines various policies ushered by the Government in the medical and education sectors and sheds light on their critical roles in reducing income inequality. Part III of the paper adopts a solution-oriented approach and explicates some measures that the Government can adopt to reduce parity between rich and poor.

I. Judicial Legacy of Socio-Economic Rights

Judiciary acting as a sentinel of citizens' rights, is the foremost approachable institution upholding the Constitutional values owing to its vibrant legacy. The DPSPs, are a framework for the State to promulgate policies in ensuring socio-economic rights. The enforceable nature of these principles can be owed to the fact that the idea of a welfare state to protect economic needs was far-reaching due to the country's wretched economic and financial conditions.[7] Nonetheless, these principles are crucial in guiding the State and providing sustainable goals for state action. In the coming years, non-justiciability did not preclude Courts in considering them while interpreting the Constitution and laws but limited their power to "issue directions to the parliament and the legislature of the states to make laws." Over a period of time, the Judiciary has developed elaborate jurisprudence of applying these principles in ensuring fundamental rights using different approaches. The authors endeavor to enumerate the same in discerning their significance in the following paragraphs.

Initially, Courts considered the DPSPs as secondary to Fundamental rights and gave prominence to the enforceable rights[8]. Although the principles in the DPSP are "fundamental in the governance of the state" and "it is the duty of the state to apply them in making laws," nonetheless they cannot be "enforced by any Court."[9] However, on several occasions, the Judiciary has taken charge when legislative, and executive organs have failed to fulfil their Constitutional duty towards Part IV, stating that the Courts' duty is not only to apply DPSPs but also to make the other functionaries apply them and prevent any contrary action.[10] Therefore, one can observe that the power of judicial review has elevated the role of Courts. This approach explicitly became prevalent in the post-emergency period that witnessed the harmonious recognition of Part IV in tandem with Part III of the Constitution. Courts frequently used DPSPs in interpreting, balancing and maintaining laws. Giving community interest and public purpose importance over individual interests, Judiciary intertwined fundamental rights with socio-economic rights.

However, before this approach, the directives were invoked as much as they do not abridge fundamental rights. For example, in certain land reform cases such as State of Bihar v.Maharajadhiraja Sir Kameshwar[11],as per Patanjali Shastri C.J.,"The ideal we have set before us in Article 38 is to evolve a State which must constantly strive to promote the welfare of the people by securing and making as effectively as it may be a social order in which social,

6 Minerva Mills Ltd. v. Union of India, AIR (1980) SC 1789, [Minerva Mills Case].
7 Art. 37, CONSTITUTION OF INDIA, 1950.
8 State of Madras v. ChampakamDorairajan, AIR (1951) SC 226.
9 *Supra* Note 7.
10 Central Inland Water v. BrojoNath, (1986) SCR 2 278; Ratlam v. Shri Vardhichand, (1981) SCR 1 97.
11 State of Bihar v. Maharajadhiraja Sir Kameshwar, AIR (1952) SC 252.

economic and political justice shall inform all the institutions of national life. Under Article 39 the State is enjoined to direct its policy towards securing, inter alia, that the ownership and control of the material resources of the community are so distributed as to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."[12]

Unlike the previous trend of ignoring society's interest, the Supreme Court, in several judgments, acknowledged the economic rights even if unenforceable and non-justiciable. It ultimately acknowledged adopting the principle of harmonious construction as much as possible, reflecting the admission on the part of the Court that it was ignoring principles in its judicial pronouncements[13]. Directives received much-needed respect while interpreting the validity of legislation and have been rendered necessary to enhance life quality.

In U.P. State Electricity Board v. Hari Shankar Jain,[14] O.C. Reddy J., noted referring to Article 37 "...the injunction means that while Courts are not free to direct the making of legislations, Courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in DPSP…". Consequently, in the landmark judgment of Kesavananda Bharati v. State of Karnataka,[15]as per S.M. Sikri C.J.I., "it cannot be over stressed that the DPSP are fundamental in the governance of the country. What is fundamental in the governance of the country cannot surely be less significant than what is fundamental in the life of an individual." This judgment declared that both Part III and IV are significant in framing legislation and complementing each other.[16] Thereafter, Courts frequently initiated reading of directives and transformed their approach in adjudicating the State's legislative measures. These interpretations have been instrumental in realising socio-economic rights.

The word 'social and economic justice' incorporates the idea of 'distributive justice,' which includes the reduction of economic inequality and the redress of social injustices.[17]It entails that inequalities are minimized through various forms of taxation, the debt relief or the control of contractual relationships. Also, redistribution of wealth shall ensure that material resources are equally allocated between the members of society. It can be realised by distributing benefits and burden and concerned with the area of conflict between rights, needs and means. The era of the 1980s became the stepping stone for socio-economic justice wherein the Judiciary ushered in interpreting the directive principles, considering them equal to fundamental rights. The Supreme Court advanced a step ahead and expanded the scope of socio-economic rights as an inherent part of Article 21[18]. By expanding the meaning of 'life' and 'dignity', it read various rights of Part III and Part IV together. For example, livelihood[19], equal pay for equal work[20], healthcare, free legal aid[21], education[22] and basic needs[23].

In Bandhua Mukti Morchav. Union of India,[24] the Court effectively enforced socio-economic rights and ordered the State to release bonded labourers and ensure that they earn a minimum wage in the future. It further held that the inhumane work conditions were contrary to the right to life, which "derives its life breath from the directive principles."[25] In Ahmedabad Municipal Corporation v. Nawab Khan[26] Gulab Khan, the Court held that the State has a constitutional obligation, by distributing its wealth and capital, to provide the underprivileged with necessary facilities and opportunities to settle, thereby protecting their Right to live.

To achieve economic justice, Article 38, 39 (b) and (c) play a vital role in carving out a path for a welfare state. In D.S. Nakarav. Union of India[27] the Supreme Court elaborately held that the State should work to mitigate income

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12 *Id.*, at 136.

13 Uday Shankar and DivyaTyagi, *Socio-Economic Rights in India: Democracy Taking Roots*, Vol. 42 (4) VERFASSUNG UND RECHT IN ÜBERSEE / LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA 527 (2009).

14 U.P. State Electricity Board v. Hari Shankar Jain, (1979) SCR 2 355.

15 Kesavananda Bharati v. State of Karnataka, AIR (1973) SC 1461 [Kesavananda Bharati Case].

16 State of Kerala v. N.M.Thomas, (1976) AIR 490.

17 Mahantesh G. S., *Social and Economic Justice under Constitution of India: A Critical Analysis,* Vol. 2 (1) INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 1 (2019).

18 Maneka Gandhi v. Union of India, (1978) SCR 2 621.

19 Olga Tellis v. Bombay Municipal Corporation, (1985) SCC 3 545.

20 Randhir Singh v. Union of India, (1982) SCR 3 298.

21 M MHoskot v. State of Maharashtra, (1978) 3 SCC 544.

22 J P Unnikrishnan v. State of Andhra Pradesh, (1993) SCR 1 594.

23 Shantistar Builders v. Narayan Khimalal Totame, (1990) 1 SCC 520; Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, (1981) AIR 746.

24 Bandhua Mukti Morcha v. Union of India, (1984) AIR 802.

25 Natasha G. Menell, *Judicial Enforcement of Socio-Economic Rights: A Comparison between Transformative Projects in India and South Africa,* Vol. 49 (3) CORNELL INTERNATIONAL LAW JOURNAL 724 (2016).

26 Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan, AIR (1997) SC 152.

27 D.S. Nakara v. Union of India, (1983) AIR 130.

inequities and aim and eradicate status, services and resources inequalities. Eradication of poverty which, asper BJ Reddy J., 'is not to be exalted or praised, but is an evil thing which must be fought and stamped out' is one of the ideals set out in the Preamble of the Constitution as it postulates to achieve economic justice and exhorts the State under Article 38(2) to, 'minimise the inequality of income.'[28] Considering DPSPs fundamental in the governance of the country[29], this kind of interpretation gave legitimacy to the exercise of judicial enforcement of socio-economic rights by arguing that what was made justiciable already flows from an expressly justiciable provision in the form of Article 21.[30] It actively monitored specific state actions through detailed orders in ensuring justice such as in PUCL v. Union of India.[31]

In this process, wealth distribution and tackling economic inequality are essential areas where the Judiciary must require the State to take measures. To do so, stretching other rights such as health, education, and employment to eradicate economic inequality is crucial. The Supreme Court ruled that the right to life entails the right to a meaningful life, which is inextricably linked to the right to healthcare.[32] The Court also stated that the right to emergency medical care is an essential component of the right to health.[33] Similarly, the Supreme Court has also enumerated that education is crucial for the progress of citizens and that State should endeavour to provide educational facilities for the same[34], which later became part of the fundamental right under Article 21A. Furthermore, the Court reaffirmed the need for regulatory measures to prevent education from becoming a business[35]. These precedents make it imperative for the State to endeavour and provide these essential services to everyone.

The Judiciary's active role in enforcing the Government's socio-economic obligations made it incredibly popular and reassured that it would hold elected officials to account.[36] Far from frustrating democratic decision-making, the Court ensured accountability by enforcing these commitments in the Indian Constitution. However, several concerns on this Judiciary approach are also raised as it dilutes the very nature of socio-economic rights, creating a burden on the State in fulfilling the ever-expanding nature of rights. Further, the Court's directives, if enforced in good faith, restrict the ability of the State to make democratic decisions about how to prioritise various aspects of socio-economic development and assign limited resources.[37] Questions on the overreaching power to review have been raised. Giving itself an omnipotent character certainly, it creates a burden for the State in actualising those rights. However, the author contends that active judicial review is very much part of the Judiciary as evident from its intervention in PUCL case[38], such intervention is crucial to witness a transforming, evolving and dynamic Constitution. The crucial rights present in the Directive Principles of State Policy should not be permitted to become "a mere rope of sand". If the State fails to create conditions in which all could enjoy the Fundamental freedoms, the few's freedom will be at the mercy of the many and then all freedoms will vanish. Therefore, to preserve their freedom, the privileged few must part with a portion of it.[39] In forthcoming parts, the authors have tried to evaluate the actual reality of the above mentioned state failure and the rising gap between rich and poor.

II. Evaluating the Reasons Behind Income Disparity in India

The Covid crisis exacerbated the already struggling Indian economy, and, consequently, thousands of people lost their jobs, and the economy quickly slumped to stagnation. Notably, the Government has failed to acknowledge the multi-angular reasons behind this problem. Sequentially, it is imperative to explore such multifaceted challenges that have hindered the poor and their dream of living a dignified life. These problems can, inter alia, be categorised under the larger heads of health and education.

A paradigm shift of money from the private sector to the public sector ought to be the primary notion behind a tax system's development. The Government must spend taxpayers' money judicially. The annual government budget addresses this issue and helps identify areas of

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[28] Indra Sawhney v. Union of India, AIR (1993) SC 477, at 689.
[29] Shankar and Tyagi, *supra* note 13.
[30] Katharine G. Young, *A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review*, Vol. 8(3) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 385 (2010).
[31] PUCL v. Union of India, AIR (1997) SC 568; [PUCL Case],
[32] Paschim Banga Khet Majdoor Samity v. State of West Bengal, (1996) 4 SCC 37.
[33] State of Punjab v. Mohinder Singh Chawla, AIR (1997) SC 1225.
[34] *Supra* note 22.
[35] *Id.*
[36] RehanAbeyratne, *Socio-economic Rights in the Indian Constitution: Towards a Broader Conception of Legitimacy*, Vol. 39(1) BROOKLYN JOURNAL OF INTERNATIONAL LAW 1 (2014).
[37] Menell, *supra* note 25.
[38] PUCL Case, AIR (1997) SC 568.
[39] KesavanandaBharati Case, AIR (1973) SC 1461.

weakness for the appropriate allocation of resources[40]. Conventionally, the Government has resorted to introducing various schemes targeted at the concerned sectors. In the last six years, numerous policies[41] have been introduced by the Government to ameliorate the quality of services in the aforementioned two sectors. This part of the paper aims to evaluate the efficacy of such schemes introduced by the Government.

A. The Causal Relationship Between Healthcare Sector and Income Inequality

There is a direct relationship between the level of income and the affordability of healthcare services. People belonging to affluent families can afford better healthcare facilities than those who are not born with such privileges. People in developed countries have a higher life expectancy than in developing and underdeveloped countries[42]. Higher levels of income imply inter alia, better hygiene, sanitation facilities, availability of nutritional foods. Contrarily, low-income forces people to live in an inhabitable environment such as slums, which extrapolates the birth of several diseases. Therefore, undeniably health is an imperative factor for the socio-economic growth of the country.

The Healthcare sector's deplorable state of play is demonstrated by India's drop in two positions from 129 (Human Development Index Report, 2019)[43] to 131 (Human Development Index Report, 2020)[44] out of 180 countries, demonstrating the Government's sheer ignorance towards the country's medical sector. Inextricably, India spent meagre 2.9% of its GDP on the healthcare sector.[45] Therefore, there is a dire need to ameliorate healthcare facilities and make it affordable, even for society's low-income strata.

The Government, to reduce health inequality, has introduced numerous healthcare schemes in the country. However,[46] these schemes have proven to be mere paper tigers and have failed to alter the healthcare industry's hitherto ailing situation.

Ayushman Bharat Yojna

Ayushman Bharat Yojna, subset of the National Health Mission, 2017, is often perceived as the torchbearer of all the country's health schemes for its comprehensive approach to tackle the majority of the issues that distress the healthcare sector. The scheme, launched in 2017 with its tagline 'leave no one behind', aims to cover the gamut of people who cannot afford quality healthcare services in the country[47]. It is segmented into two chief components: Health and Wellness Centres; and Pradhan Mantri Jan Arogya Yojana.[48]

Health and Wellness Centres primarily aim to deliver complete healthcare services to people within the vicinity of their households. It aims so by transforming the existing sub-centres and primary health centres and providing free essential drugs and diagnostic treatments. The core idea behind the formulation of the scheme is to bring universality and provide more people with effective healthcare services. The scheme's priority population is the rural population, where people often have to travel far into urban areas for quality healthcare services. In toto, the scheme is an ambitious one as it aims to cover the wide range of population that is bereft of indispensable quality healthcare.

Likewise, Pradhan Mantri Jan Arogya Yojana promises that more than 10.74 crores of poor and vulnerable families (approximately 50 crore beneficiaries) who make up the lowest 40 percent of the Indian population will benefit from secondary and tertiary health care insurance.[49] The scheme purports to provide cash less and hassle-free

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[40] Anonymous, *Why Is It Important For The Government To Have A Budget,* THE ECONOMIC TIMES (30 December 2020), https://economictimes.indiatimes.com/budget-faqs/why-is-it-important-for-the-government-to-have-a-budget/articleshow/67450000.cms (last visited14 January 2021).

[41] Anonymous, *26 Important Schemes Launched By The Narendra Modi Government,* INDIA TODAY (27 August 2019), https://www.indiatoday.in/education-today/gk-current-affairs/story/26-important-government-schemes-narendra-modi-government-divd-1592157-2019-08-27 (last visited 14January 2021).

[42] Eileen M. Crimmins et al., EXPLAINING DIVERGENT LEVELS OF LONGEVITY IN HIGH-INCOME COUNTRIES, (National Academies Press, 2011).

[43] United Nations Development Programme, *Human Development Index Report,* (2019), available at http://hdr.undp.org/sites/default/files/hdr2019.pdf (Last visited 16 January 2021).

[44] United Nations Development Programme, *Human Development Index Report,* (2020), available at http://hdr.undp.org/en/content/latest-human-development-index-ranking (Last visited 16 January 2021).

[45] Puja Mehra, *India's economy needs big dose of health spending,* LIVEMINT (08 April 2020), available at https://www.livemint.com/news/india/ india-s-economy-needs-big-dose-of-health-spending-11586365603651.html (Last visited 20 January 2021).

[46] Anonymous, *15 Healthcare schemes in India that you must know about,* OXFAM INDIA (12 December 2018), available at https://www.oxfamindia.org/blog/15-healthcare-schemes-india-you-must-know-about (last visited05 January 2021).

[47] *About Pradhan MantriJan ArogyaYojana,* MINISTRY OF FAMILY HEALTH AND WELFARE, available at https://pmjay.gov.in/about/pmjay (last visited17 January 2021).

[48] *Id.*

financial assistance to vulnerable families. It primarily caters to the rural families and covers their expenses up to three days of pre-hospitalisation and 15 days post-hospitalisation.[50]

To our lamentation, there are major grey areas that need to be addressed for the effective implementation of the scheme. Factors such as acute staff shortage, low budgetary allocation, lack of awareness, lack of accessibility, accountability crisis haunt the effective implementation of the aforementioned pioneer scheme.[51] Additionally, many cases have recently emerged in the past, pinpointing the absence of the scheme's effective surveillance. For instance, according to the recent reports, Rs 7500/- crore had been utilised under the scheme until September 2019. Further analysis revealed that the average cost per patient under the scheme was Rs. 16,164/- which is substantially lower than the promised Rs. 5 lakhs.[52] Also, the setting up cover of a vast amount opens up new avenues for fraud. According to the above statistics, there has been a magnanimous misappropriation of funds and, lack of accountability has further allowed the perpetrators to veil behind.[53]

Take Uttarakhand's case wherein last year, several private hospitals' dubious cases surfaced when they resorted to unorthodox ways to misappropriate government funds.[54] These clinics showed surgeries done on patients who had been discharged weeks ago, manipulated common cold as severe flu in the records,[55] performed dialysis even when the hospital is bereft of a kidney specialist.[56] As more such cases came to the fore, a sense of reluctance unfurled among the private hospitals, and resultantly, most of them either withdrew their names from the scheme or hesitated to collaborate with the Government leaving the inefficient government hospitals with a herculean task to enforce ambitious schemes.[57]

The story of the Education sector correlates with the appalling story of the health sector. In the subsequent paragraph, the authors would explain how inefficiency has haunted the education sector like the health sector.

B. The Despairing Tale of Education and Income Inequality

Education plays a vital role in a country's economic development. Education opens up new avenues for employment and earning opportunities. It breaks the chain of inter generational poverty and reduces opportunity inequality, reducing the ambit of future income inequality. However, quality education attracts a significant amount of money that goes beyond the country's majority population's afford ability capacity. For example, NLSIU Bangalore, a prominent law college in the country, charges approx. Rs 2 lakhs p.a. from its students. IIMs, the torchbearers of the country's management study, charge a whopping average amount of Rs 20 lakhs p.a, thus dissipating able, albeit poor, students from university attendance. Therefore, universal and affordable access to education is one of the many daunting challenges the Indian Government faces. Let us take a look at India's recent policy approach launched to ameliorate quality and afford ability of education in the country.

To counter the education crisis, the Central Government introduced the Samagra Shiksha scheme in 2018-19.[58] It subsumes three erstwhile Centrally Sponsored School Education Schemes, namely Sarva Shiksha Abhiyan, Rashtriya Madhyamik Shiksha Abhiyan, and the Centrally Sponsored Scheme on Teacher Education, thereby making it the torchbearer of all the education schemes in the country. The scheme adopts a holistic

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[49] *Id.*

[50] Anonymous, *All About Pmjay-ayushman Bharat, The National Health Mission,* INDIATODAY (25 September 2018), available at https://www.indiatoday.in/india/story/all-about-pmjay-ayushman-bharat-the-national-health-mission-1348387-2018-09-25 (last visited18 January 2021).

[51] Shailender Kumar Hooda, *With Inadequate Health Infrastructure, Can Ayushman Bharat Really Work?,*THE WIRE (26 November 2018), https://thewire.in/health/with-inadequate-health-infrastructure-can-ayushman-bharat-really-work (last visited 18 January 2021); *See also* Arvind Kasthuri, *Challenges to Healthcare in India - The Five A's,* Vol.43(3) INDIAN JOURNAL OF COMMUNITY MEDICINE 141 (2018).

[52] Ministry Of Family Health And Welfare*, Ayushman Bharat Pradhan MantriJan ArogyaYojana 2019-2020,* (21 September 2020) available at https://pmjay.gov.in/sites/default/files/2020-10/Annual-Report-Final_1.pdf (last visited19 January 2021).

[53] MaitriPorecha, *A year on, Ayushman Bharat faces multiple challenges ahead,* BUSINESS LINE (24 September2019), available at https://www.thehindubusinessline.com/economy/a-year-on-ayushman-bharat-faces-multiple-challenges-ahead/article29497106.ece# (last visited19 January 2021).

[54] Ishita Mishra,*How Hospitals Use Bizarre Ways To Siphon Off Public Funds,* THE TIMES OF INDIA (28 August 2019), available at https://timesofindia.indiatimes.com/india/under-ayushman-bharat-how-hospitals-use-bizarre-ways-to-siphon-off-public-funds/articleshow/70654696.cms (last visitedJanuary 19, 2021).

[55] *Id.*

[56] Gloria Methri, *171 Hospitals De-empanelled, Rs 4.6 Cr Penalty Levied For Committing Fraud In PMJAY,* REPUBLICWORLD.COM (4 January 2020), available at https://www.republicworld.com/india-news/general-news/171-hospitals-de-empanlled-rs-4-dot-6-cr-penalty-levied-for-pmjay-fraud.html (last visited11 January 2021).

[57] Afshan Yasmeen, *Most Pvt. Hospitals Still Reluctant To Get Empanelled Under Health Scheme,* THE HINDU (7 September 2019), available at https://www.thehindu.com/news/national/karnataka/most-pvt-hospitals-still-reluctant-to-get-empanelled-under-health-scheme/article29363139.ece (last visited11 January 2021).

approach, and accordingly, some of the most prominent features have been highlighted below:

- Improved quality of education by upgrading the standards and facilities at the Teacher Education Institutions like SCERTs and DIETs to ameliorate quality of prospective teachers;
- Ensuring digital education through smart classrooms, digital boards and DTH channels;
- Increasing composite school grants from 50,000 to 1 Lakh and library grants from 5000 to 20,000.
- Increased grants for uniforms, textbooks, and children with special needs under the Right to Education Act, 2009.
- Promoting balanced education by primarily catering to the needs of Educationally Backward Blocks, Special Focus Districts (SFDs) and Border areas.

While the scheme is a crucial step in the right direction, one needs to ponder about the compulsion of merging three schemes and renewing them under a single name with an estimated budget of Rs. 30,000 crores. The authors support the scheme's formulation, but at the same time, we need to look if corrective measures could have been taken to eradicate the shortcomings of the three erstwhile schemes. For instance, Sarva Shiksha Abhiyan proved to be successful in promoting the inclusion of children at the elementary level. The below table reflects how children's participation in schools was boosted after implementing Sarva Shiksha Abhiyanin 2000-2001.

Table 1.2: Effects of Sarva Shiksha Abhiyan

Year	Children admitted in elementary schools (Classes I-VIII) (in millions)
2002-2003	169.3
2005-2006	184.3
2008-2009	189.9
2011-2011	199
2015-2016	196

Source: Ministry of Education, Statistics of School education reports of 2007, 2008, 2010, 2011, 2014, 2018

The Government had obliterated the Sarva Shiksha Abhiyan to shift its focus from elementary to the secondary level of education. Nevertheless, has the Government done enough in the field of elementary education? Let us find out. According to the Ministry of Statistics and Programme Implementation, the number of government schools in the country remained stagnant from 2011-2018.[59] The factors such as poor quality of education, lack of infrastructure, deteriorated quality of widely emphasised mid-day meals impelled the students to shift towards private schools. Consequently, the average enrolment of students fell from 122 to 99 in the relevant period.[60]Therefore, the conundrum about figures' reliability in the above table cannot be negated. Instead of creating a new scheme, the Government could have rectified the shortcomings of the existing schemes.

Concluding, factors such as poor management, bureaucratic deficiency, and corruption continue to haunt the effective implementation of potential rich policies. If enforced judicially, these policies would have altered the distressing scenario of income distribution in the country. The resources would have been distributed more evenly; underprivileged sections of the society would have been accorded with many more employment opportunities; children would have realised their dream of studying in the country's top institutions.

III. The Arduous Path to the Coveted Income Equality: Adopting a Solution Oriented Approach

The adroit American author Seth Godin once said, "Good ideas come from bad ideas, but only if there are enough of them." The Indian Government has a history in which, due to several factors, the plethora of potential rich policies and plans have been reduced to mere paper tigers. These policies, instrumental for the respective sectors, would have contributed to reducing income inequality, only if implemented prudently. This part of the paper would explicate the various measures that the Government can adopt to successfully implement policies and eradicate income inequality.

A. Checks and Balances over Monopolies

The concept of 'free market' is largely emphasised around the globe, it also carries a certain degree of government intervention to ensure a fair market and opportunities for the new players. Monopolies have certain positive aspects on the economy, but the gloomy prospects supersede the positive ones and deteriorate the economy. Monopolies

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[58] Ministry of Education, *SamagraShiksha,* available at https://samagra.education.gov.in/features.html (last visited12 February 2021).

[59] Ministry of Statistics and Programme Implementation, *Statistical Year Book India*, (2017), available at http://mospi.nic.in/sites/default/files/statistical_year_book_india_2015/Table%2029.1_2.xls (last visited 8 February 2021).

[60] *Id; See also* Geeta Gandhi Kingdon& Arvind Panagariya, *View: India's Public Elementary Schools Are In Crisis — And Hiring More Teachers Is Not The Solution,* THE ECONOMIC TIMES (7 June 2020) available at https://economictimes.indiatimes.com/industry/services/education/view -indias-public-elementary-schools-are-in-crisis-and-hiring-more-

can inter alia, dictate prices, control market forces, and most importantly create trade barriers thereby restricting the entry of new players into the market.

These barriers deny any business opportunity to the new entrants, and the monopolies continue to enjoy abnormal profits in the long run, thereby widening the gap between rich and poor and augmenting the concentration of wealth into the few big hands . One may argue about the role played by the Competition Act, 2002 in this sector. However, the stark reality is that the legislation has been primarily rendered futile due to the Competition Commission of India's (CCI) callous attitude. The enforcement mechanism has been lacklustre. Since its inception, CCI has levied Rs 13,981 crore fines, of which only 96 crores had been recovered till March 2016.[61]

While we need not to delve deep into the procedural inefficiencies, it is fair to extrapolate that implementation of such a relevant legislation like Competition Act, has been adversely affected due to several factors such as lack of accountability crisis, shortage of manpower, paucity of resources, high backlog of cases. These factors have only worsened the situation thereby rendering the legislation futile. The bureaucratic deficiency has restricted the Government to check over monopolies, thereby assisting in the concentration of wealth and denying opportunities to the deserving entrepreneurs.

B. Taxation Reforms

The progressive rate of taxation implies a heavier tax burden on the higher income households, while low- and middle-income households share a relatively small tax burden.[62] The progressive taxation system is perceived as an ideal tool to reduce wealth inequality. However, since the imposition of Progressive taxation system in 1961, the inequalities have sprawled to unacceptable standards.[63] India needs to rethink its taxation system.

The probable solution is the imposition of wealth tax, inheritance tax and higher income tax. Microsoft co-founder Bill gates had also advocated in favour of the imposition of the trio tax system.[64] Wealth tax is usually imposed on the individual's assets. The relevant tax can be imposed on both current and fixed assets. Individual's net worth plays a major role in estimating the amount of taxation. While the concept has gained some popularity in the U.S, India is yet to usher wealth tax.[65] The Indian Billionaires make money predominantly from three sources; ancestral wealth, self-made, inherited and growing.[66] Therefore, wealth tax and inheritance tax shall prevent the excessive concentration of money and handing down of exorbitant wealth in the few hands, thereby providing more opportunities to the middle and lower strata of the society. It would also give government control over the resources which can be spent judicially towards public benefit. However, in order to make this policy efficacious, India needs to revamp its governance structure and fixate accountability for the appropriate allocation of resources.

C. The Dire Need of Major Governmental Reforms

Manpower crisis, corruption, procedural complexities, outrageously ambitious projects, departmentalisation, are some of the chief components that hinder the effective implementation of any key policy in India. Further, the tussle between Central and State governments has led to a huge accountability crisis. The inability of the governments to work in congruence has rendered several policy projects futile. Who will take the credit? Who will do the needful? Who will provide funds? These questions have adversely affected implementation of several policy plans. While unemployment rate continues to surge in the country, the stark reality is that government sectors have been crippled due to non-availability of man-power.[67]

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teachers-is-not-the-solution/articleshow/76249780.cms?from=mdr (last visited 10 February 2021).

61 Deepali Gupta, *CCI Verdicts Fail To Act As Deterrents To Malpractice,* THE ECONOMIC TIMES (2 January 2018), available at https://economictimes.indiatimes.com/articleshow/62329440.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited 14 February 2021).

62 *What is a Progressive Tax?,*TAX FOUNDATION, available at https://taxfoundation.org/tax-basics/progressive-tax/(last visited 14 February 2021).

63 CP Chandrasekhar Jayati Ghosh, *The Wealthy Barely Pay Taxes — Will The Govt Make Them Pay?,*THE HINDU BUSINESS LINE (5 November 2018), available at https://www.thehindubusinessline.com/opinion/columns/c-p-chandrasekhar/the-wealthy-barely-pay-taxes-will-the-govt-make-them-pay/article25429311.ece (last visited 14 February 2021).

64 Leonid Bershidsky, *Why Bill Gates is Right To Support A 'Wealth Tax' For The Super Rich,* SYDNEY MORNING HERALD (20 September 2019), available at https://www.smh.com.au/business/the-economy/why-bill-gates-is-right-to-support-a-wealth-tax-for-the-super-rich-20190919-p52ssc.html (last visited 16 February 2021).

65 Paul Sullivan, *Raise Billions From Billionaires? Tax Experts Say It's Not That Simple,* THE NEW YORK TIMES (15 November 2019), available at https://www.nytimes.com/2019/11/15/your-money/wealth-tax-warren-sanders.html (last visited Feb. 15, 2021).

66 ShaleenAggarawal, *What's Keeping India's Poor, Poor; This Triple Tax On Rich Could Be The Solution,* FINANCIAL EXPRESS (12 February 2020), available at https://www.financialexpress.com/economy/whats-keeping-indias-poor-poor-this-triple-tax-on-rich-could-be-the-solution-oxfam-interview/1865456/ (last visited 14 February 2021).

67 Kalyan Ray, *Manpower Shortage Derails Drdo As Govt Sits On Proposal To Increase Manpower,* DECCAN HERALD (17 February 2020), available at https://www.deccanherald.com/national/dh-exclusive-manpower-shortage-derails-drdo-as-govt-sits-on-proposal-to-increase-manpower-805398.html (last visited 15 February 2021); *See also* Anonymous, *A crippling shortage: on vacancies in courts,* THE HINDU (17 November 2018), available at https://www.thehindu.com/opinion/editorial/a-crippling-shortage/article25521118.ece (last visited 14

Envision the outcomes if a comparatively major chunk of population is involved in enforcement of the policy plans in India. Thus, Government reforms in the shape of increased transparency, greater accountability and decentralisation, are need of the hour. Decentralisation, can be perceived as the utopian example for the accountability crisis in India. The Government needs to augment powers in the hands of urban local bodies, panchayats who are better aware about the local issues than secretaries and ministers.

D. Need for Public Activism and Entry of Other Institutions

The advent of Public Interest Litigation sparked an unprecedented consciousness amongst citizens, and it continues to provide relief against government misactions. Civil Societies or public-spirited persons are using this tool to fill the vacuum of socio-economic rights, thereby legitimizing the Constitution's transformative approach. However, one must ponder that sole dependence on the judiciary for interpretation and the mere recognition of DPSP cannot fruitfully materialize these rights; instead, a conducive approach of policymakers, experts, executors and observers is pertinent at this juncture. Rather than wholly occupying the space for the debate, the courts can provide an additional forum for such debates.[68] It is imperative to acknowledge this institution's limitation; therefore, there is a dire need for alternative institutions to enforce these rights. Judiciary has only given directions; however, effective measures lie in the legislature's hands in realising the rights, for which it requires continuous monitoring of the implementation of policies and involvement of players other than judiciary.

Conclusion

Through this paper, the authors have attempted to put forward the significance of economic justice outlined in India's Constitution. The zest portrayed by the judiciary in upholding these principles is highly commendable, and its dynamic role in times of crisis has set an example throughout the world. Its transformation from negating DPSPs to adopting harmonious recognition, thereafter giving them equal prominence, has been instrumental in laying the jurisprudence for socio-economic rights. Further, the elaborate discussion on India's current health and education scenario displays the urgent need to revamp the policies for their better implementation amongst the masses. The ideal of wealth distribution and eradicating economic inequality can only be fulfilled if the standard of living is improved consistently. This can become a reality by focusing on socio-economic policies and legislations to reach grass root levels, rectifying red-tapism and allocating the resources responsibly. Besides this, promoting economic justice must not be limited to judicial approaches pushing the legislature to take action; instead, other institutions should enter to create a healthy materialization of an equal society.

February 2021).

[68] ManwendraTiwar, *Democratic Legitimacy of Constitutional Socio-economic Rights Adjudication in India*, Vol. 7 (2) PRAGYAAN: JOURNAL

A Comparative Study on the Indian Constitution with respect to Secularism and its features in the France and USA's Constitution

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ABSTRACT

India's Secularism has always been a topic of heated debate and discussion whether prior or post its inclusion by 42nd Constitutional Amendment. It is mainly due to the distinctive nature of Secularism Approach from countries like France and USA, who are considered to be the benchmark countries for defining the terminology of being 'Secular'. Firstly, this research paper gives a critical and empirical analysis on the social and historical circumstances of India's approach to religion-state relations on secularism. Secondly, with a constructive and comparative approach, the paper also tries to answer the question of why it's implementation differs from France's and USA's practical approach, despite it being modern and liberal-democratic in Constitutional approach? The Constitutional disparities are described mainly on the basis of supremacy, flexibility and dependency of both religious and State or Political affairs. The Indian Constitution provides the Right to Freedom of Religion under the Articles 25 to 28 which allegedly created ambiguity in the principle of Secular State. The paper also talks about the aspects like religious freedom, free speech, citizenship and separation of State and religion which are constantly revolving around the Indian Secularism. Hence, lastly it talks upon the question, does the approach create disparities among different groups, despite the existence of Constitutional equality and affects other Constitutional aspects?

Keywords: Secularism, Secular State, Comparative Constitution, Constitutional Flexibility, State-Religion Separation.

Introduction

The Indian Constitution is an extensive set of principles for governing a state with a modern and liberal-democratic approach. Its distinctive nature lies in the act of protecting every individual's freedom and guaranteeing fundamental rights regardless of ethnicity. The Indian constitution, when drafted, took into consideration borrowing of a few sections from the constitutional structure of countries like the USA, Ireland, Britain, Canada, Australia, Germany, the USSR, France, South Africa, Japan, and other countries. This brings into the picture the concept of a "borrowed" constitution and the comparison of these provisions concerning the current timeframe and the countries' certain provisions were borrowed from.

One of these allegedly borrowed concepts is "secularism". There are both stigma and integrity attached to this ideology creating ambiguity around its scope and meaning in the present Indian society. Though we cannot compare two models of society with just one ideology, we also cannot ignore the impact of any problem on every individual of the society. These problems can be similar or dissimilar in various societal constructs. Hence, comparing the constitutional differences or variance in interpretation and execution of the secularism theory in all three secular countries such as India, France and the USA gives a better conclusion towards acknowledging benefits and limitations.

India borrowed what it thought was appropriate for its Constitution and changed it over time through the process of trial and error. While, both French and American Constitutions are rigid in terms of choosing religious freedom over economic and social growth despite inheriting the idea of a secular state. However, it is the Indian Constitution that despite having borrowed certain provisions from the USA and France has surpassed it in matters of flexibility and perspective to secularism.

What is the Indian Constitutional concept of Secularism?

Secularism is the product of historical and modern sovereignty, or the Enlightenment and rationality.[1] It is a complete process from the colonial era to a democratic era and extends from the concept of borrowing to self-originating. Hence, the objective of the constitutional definition is not limited to the historical process of India, it does include the political process of the country.

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[1] Bowen, John R., *Secularism: Conceptual Genealogy or Political Dilemma?* In COMPARATIVE STUDIES IN SOCIETY AND HISTORY, 681 (Cambridge University Press Edn., 2010).

With ideologies and theories being perceived in different ways by different individuals, the term 'secular' is also 'subjective' in nature due to varying meanings of Secularism, Secularization and a Secularist. But the three pillars of religious freedom, neutrality and reformatory justice are the constant core elements of secularism in India.[2]

Secularism is the "doctrine having true religious morality, tolerance and reasonable margin for freedom of worship and faith to each and all the citizens of a country irrespective of their colour, caste, sex, sect, religion, faith, nationality and other conditions of faith."[3] This substantiates that secularism is more than an 'idea of secular state and religious tolerance'. It is also responsible for developing the underpinning constitutional element for various fundamental or constitutional provisions including "Right to freedom of religion," "Right to Speech and Expression" and "Right to proper Education".

The concept of secularism is widely surrounded by the 3 predominant conceptions namely,[4]

1. Religious freedom
2. Citizenship
3. Separation of state and religion.

Firstly, Religious freedom principally includes freedom of religious associations, freedom of conscience and the right to administer an educational and charitable trust. Secondly, the criteria of religion in an ideal secular state are irrelevant when it comes to Citizenship. Thirdly, the State here consists of every person under the system of politics and governance of India. The personal laws in a secular society like Indian give rise to the Right to practice any chosen religion but dividing laws based on religion might be a harm to the unity and law and governance of the Secular State. This makes religion a political affair rather than just a personal affair. Hence, India as a secular country cannot be just simply called "secular" as it is more to that.

Whereas, a secular state according to D.E Smith, is 'the state which neither has any particular constitutional and biased religion nor does it attempt to promote and interfere in the same.'[5] Similarly, V.P Luthra identifies a secular state to be discrete and separate from any religion. But the definition of "secular" is to "not be connected with spiritual or religious matters".[6] This corroborates how following the concept of secularism doesn't make the country a secular state. As respecting and not following any religion by the State or its authorities are different elements. It also leads to no connection between religion and the citizenship of an individual. Hence, it regards every citizen of the country as an individual rather than someone belonging to a particular religion and sect. This disparity can lead to ideological clashes as in the case of India. However, France does not impose the title of "minority" on any particular religious community contradictory to the condition of the Indian constitutional and political system. Moreover, the State cannot have official ties with any religious movements of the country. Hence the sheer undefined provision of a 'secular state' in the constitution is the ultimate cause of chaos between the previously stated criteria and secularism itself.

Secular construct and religion of the USA and France

The true meaning of secularism always reclines towards equality in viewing all the religions rather than being equally disdainful towards all religions. The crux for the same is simple but due to the diversity of India, the French or USA's model does not completely justify the purpose. Hence, an accommodating concept of secularism was adopted.

In France, the dominant ideology is 'assertive secularism', which aims to exclude religion from the public sphere, while in the U.S., it is "passive secularism," which tolerates public visibility of religion.[7] Moreover, France's secularism has the complex essence of 'Secular prejudicialism' as it is tilted towards anti-religion, spiritual cynicism and a Marxist viewpoint.[8] This ideology is not completely followed as on one hand, the lawmakers through a national plan desire to combat racism and anti-Semitism(hatred against the Jewish community), whereas, they are all set to bring a plan in the view to control religious extremism.[9] This displays the predetermined character of French lawmakers,

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2 Dhavan, Rajeev, *Religious Freedom in India* in AMERICAN JOURNAL OF COMPARATIVE LAW, 209, (Winter Edn., 1987).

3 Chishti, S., *Secularism In India: An Overview* in THE INDIAN JOURNAL OF POLITICAL SCIENCE, 183-198 (Indian Political Science Association Edn., 2004).

4 *Id.*

5 Donald E. Smith, *India: India as a Secular State* in INDIA QUARTERLY: A JOURNAL OF INTERNATIONAL AFFAIRS, 501 (Oxford University Press Edn., 1963).

6 Chisti, supra note 3, at 184.

7 Kuru, Ahmet T., *Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies toward Religion* in WORLD POLITICS, 568–594, (Cambridge University Press Edn., 2007).

8 L. Ali Khan, *French Secularism in Crisis*, JURIST (1 Jan, 2021), available at https://www.jurist.org/commentary/2021/01/l-ali-khan-french-secularism/ (Last visited on Jan 10, 2021).

9 *2019 Report on International Religious Freedom: France,* OFFICE OF INTERNATIONAL RELIGIOUS FREEDOM (JUNE 10, 2020), available at https://www.state.gov/reports/2019-report-on-international-religious-freedom/ (Last visited on Jan 10, 2021).

considering equality, liberty, and fraternity superior to the concept of religion. A societal transformation to validating human rights above religion is observed in India leading to several threats due to conflicting ideas and political prejudices. But as a democratic state, welfare and people's liberty is going hand in hand without prioritising any one particular fundamental right, unlike France.

Whereas, the Constitution of the United States incorporates the idea of 'Secular neutralism' making it a secular state which has to equally respect all religions but should not have a particular identity of any religion or denomination. Additionally, it should not adopt the laws of any one religion and impose them on all individuals without realising their cultural diversity. Besides, the USA's First Amendment explains the separation thesis in words like, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[10] This substantiates that the American Constitutional law over through ages has been highly protective of religious practices including the acceptance of Islam by eradicating many restrictions on freedom to practice their religion.

Pragmatically, the belief of the state's society as a secular one cannot be determined by the state's official nature. The provisions based on secular ideology in the public sphere is not sufficient due to the unique yet democratic political setup of India, unlike France. This can be deduced by Gajendragadkar's analysis on the objective of democracy which is to establish 'a new social order'[11] based on social, political and economic equality, which will only be achieved when accepted by the Indian community through secularism. Hence, there needs to be some social differences and similarities accounted to compare France's and India's secularism.[12]

From the very beginning, leaders like Nehru, Ambedkar and other reformists made sure that the ideology of a modernizing, socially reforming country concerning religion was reflected in the Constitution. India was never eyeing the separation of church and state theory established by America. While the USA offers a more elaborate point of view and frame concerning the separation of church and state, India only mentions the prohibition of discrimination on a religious basis.

'Separation of church and state' is always the prominent concept in separating the State or the government from the religious expanse. In the USA, it was introduced as a part of Establishment Clause jurisprudence in *Reynolds v. United States,*[13] where the court examined the history of religious liberty in the US, determining that while the constitution guarantees religious freedom, "The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted."[14] Furthermore, in *Lynch v. Donnelly*,[15] O'Connor noted that the establishment clause prohibits the government from making adherence to a religion relevant to a person's standing in the political community. Her fundamental concern was whether government action conveyed a message to non-adherents that they are outsiders. The endorsement test is often invoked in religious display cases.

The American scenario also represents its liberalism by granting absolute freedom under 'right to freedom of conscience' but 'freedom of religious practice' subject to restriction.[16] This is dissimilar to the interpretation of Articles 25 and 26 of the Indian Constitution which highlights the difference between the two rights but also applies restrictions on the grounds of public order and morality, representing the democratic constitutional nature. One of the many Indian cases where interpretations and distinctions made between religious beliefs and practices is the Narasu Appa Mali case. It was held that the State has the responsibility to protect every citizen's religious faith and beliefs and not the religious practices which are against public order, morality and social welfare of the state.[17] Hence, Freedom of conscience was held to be an absolute and superior right against the prior ones, linking it with the concept of the USA, though it was later neglected due to limitations under clause (1) of Article 25.[18]

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10 *First Amendment: The Religion Clauses: Historical Background,* CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-1-1/ALDE_00000390/ (Last visited on Jan 15, 2021).

11 P. B. Gajendragadkar, *Secularism and the Constitution of India* in THE CAMBRIDGE LAW JOURNAL, 357-358 (Cambridge University Press Edn., 1972).

12 Udai Raj Rai, *Secularism And The Constitution of India* in JOURNAL OF INDIAN LAW INSTITUTE, 179 (Indian Law Institute Edn., 1971).

13 Reynolds v. United States, 98 U.S. 145 (1878).

14 *Id*.

15 Lynch v. Donnelly, 465 U.S. 668.

16 Art 18, THE AMERICAN CONSTITUTION.

17 The State Of Bombay vs Narasu Appa Mali, AIR 1952 Bom 84.

18 *Narasu Appa Mali case*, AIR 1952 Bom 84; C.H. Alexandrowicz, *The Secular State in India and in The United States* in JOURNAL OF INDIAN LAW INSTITUTE, 273-296 (Indian Law Institute Edn., 1960).

The debated pros and cons around Secularism

India as a state does not favour any religion, nevertheless it does not ignore society's religious affairs by playing the role of *parens patriae*. It follows positive secularism by not separating the state from religion to protect the multi-religious and multi-cultural society. Despite its positive approach and ideology to unite people by religious tolerance and freedom, the rule has its Constitutional limitations in many ways. It has been questioned due to its historical background and called a western concept. The words secular and socialist were added in the preamble by the 42nd Amendment in 1976 but the critics fail to acknowledge that the concept of secularism was very much embedded in our constitutional philosophy before the amendment like the provisions which grants freedom of religion in the Constitution.

Moreover, it is believed to be an 'alien and flawed concept' which disregards the promotion of religious tolerance by practices of indigenous traditions. This can be evident with the historical status of India where both Ashoka and Akbar were religiously tolerant without practising secularism.[19] On the contrary, the concept of secularism is also considered to be a response to intolerant-nationalist forces which wanted to divide India based on religion for political gain.[20]

The possibility of India abandoning the religious majority population can be observed after the interpretation of Article 29 which deals with the protection of cultural diversity of minorities[21] but indirectly secure their religious places. Hence, places of worship or religious- educational institutions of minorities are protected by the State but the same religious places which are meant to be for the majority (Hindus) are not assured to be given the same level of protection. Though this was not interpreted in the case of *Dr M Ismail Faruqui v. Union of India*[22] where the constitutional validity of the Acquisition of Certain Areas in Ayodhya Act, 1993 was questioned, subject to the Article 25 and 26, to which the court observed the sovereign power State to acquire places of religious worship like mosques, churches, temples etc. It also mentioned the crucial role of the state to preserve the public order over religious acquisition and maintain equality.

The limitation exceeds as the existence of different sects, castes and sub-castes of the Hindu majority population are disregarded from the section and ultimately clubbed under the umbrella of the majority population. This creates a sense of injustice and partiality deciding the scope of equality in diversity. The irregularity in defining "minority" can also be a supposed unsecular behaviour generated in the society through politicians rooting for pseudo-nationalism and appeasements.

Though the 42nd Amendment is blamed for the inclusion of the theory of Secularism, there will be no significant change by removing Secularism from the preamble. It's because the constitutional provision which is the result of the foundation created by secularism is present on it, whether the Right to speech and expression, right to equality and right to religion. Moreover, provisions like Section 29 A (5) of the Representation of People Act, 1951 makes it compulsory for every political party to be secular and socialist.[23] Without the foundational idea of a secular state, there is a possibility of political parties exhibiting open biases towards the citizens, ultimately ruining the very democratic nature of Indian society and democracy.

While debating on whether its a westernised or non-westernised doctrine, the question was touched and subtly answered by Rajeev Bhargava. He derived that neither the concept is fully pinned by the western civilisation and nor the non-western or the Indian traditional society.[24] Hence, the unique and chaotic system does have western roots yet at the same time, it cannot be surely said that the originator of secularism is only the west or the European countries. Secondly, to differentiate the nature of Indian secularism from the rest of the world, he named it a principled-distanced ideology that follows both "mutual exclusion" and "strict neutrality"[25] unlike France and the USA where utmost religious freedom is meant to oppose the overall development of the state and hence avoided.

Authoritative role on the separation of State and Religion

In the prominent case of *State of Bombay v. Narasu Appa*,[26] the Bombay High Court stated, "It is for the Legislature to determine what laws to make in order to advance the welfare of the State. The Court cannot sit in judgment on that decision." Furthermore, the Allahabad court strengthened this opinion in *Ram Prasad v. State of U. P.*[27] that "If the Legislature as the lawmaking authority regards a

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19 Ashish Nandy, *An Anti- Secularist Manifesto* in INDIA INTERNATIONAL CENTRE QUARTERLY, 35- 64 (India International Centre Edn., 1995).
20 Bipan Chandra et. al, INDIA AFTER INDEPENDENCE, 49 (Penguin Books 2017).
21 Art. 29, THE INDIAN CONSTITUTION, 1950.
22 Dr M Ismail Faruqui v. Union of India, (1994) 6 SCC 360.
23 Sec. 29A(5), Representation of People Act 1951.
24 Rajeev Bhargava, *Distinctiveness of Indian Secularism*, THE FUTURE OF SECULARISM, 20-53 (Oxford University Press Edn., 2006).
25 *Id*.
26 *Narasu Appa case*, AIR 1952 Bom 84.
27 Ram Prasad v. State of U. P., AIR 1957 All 411.

particular measure as a measure of social reform, the Courts should not say that it should not be regarded as a measure of social reform." Does it mean that the boundaries set by this judgment are the limits to secularism in India?

The answer to this question is left uncertain as there are various judgements setting precedents for the same, unlike France and the USA wherein similar matters the government should take the responsibility of repairing, reconstructing and even rebuilding such places of worship. This will be one way of translating secularism into reality and creating a sense of confidence among the citizens of the country. Particularly disconcerting is the unanimity among the five judges in this decision of the apex court.

After the demolition of the Babri Masjid, in the *Bommai case (1993)*, The Court declared that "in matters of state, religion has no place".[28] It also stated that "No political party can simultaneously be a religious party. Politics and religion cannot be mixed. Any state government which pursues unsecular policies or unsecular course of action acts contrary to the constitutional mandate and renders itself amenable to action under Article 356."[29] Hence, the Supreme Court upheld the importance of Constitutional fraternity, integrity and pluralism-secularism between multi-religious faiths and communities.

But a similar outlook was not observed in the scenario of passing the Citizenship Amendment Act, 2019 (CAA) as it failed to recognise this basic constitutional relationship between people of different religions. The CAA also observed it as an ignominious step due to a violation of principles mentioned in AADHAR judgement,[30] like the intrinsic value of every person, autonomy and community. Basically, it is violating the concept of a secular state.

The instances of triple talaq and CAA are the ones where the debate is around equality in granting social justice as a part of a secular state. Similarly, cases like Ayodhya[31] and Sabarimala[32] are purely religious and worship based contributing an insufficient ability to the scope and meaning of secularism.

Role of Constitutional Flexibility on Secularism

The progressive nature of France's Constitution is reflected by its extensive amendments including the willingness to protect citizens' rights through the agreements with the European Union and the Council of Europe's human rights regime.[33] Its extreme flexibility in protecting fundamental rights can be observed through France's separate constitutional jurisprudence and various constitutional amendments. Moreover, the amendment of 2008 recognised the increased importance of "civil liberties, freedom and pluralism"[34] and regional languages as part of France's core cultural heritage,[35] widening the scope for secularism in a more liberal-democratic way. This is similar to the Indian democratic system where pluralism and multilingualism are one of the central notions of secularist society with no one particular national language and promising pluralism in the entire country.

On the other hand, the Constitution of the United States has rigidly outgrown the concepts of colonialism and European influence. It also persists with a lesser number of amendments in comparison to the Indian Constitution. Besides, the USA's continuation of the strict demarcation between 'State and the Church' is cultivating an entrenched nature of intolerance and discrimination against the religious minorities, especially against Jews and Muslims.[36]

Interlinked concepts of Speech and Expression, Religion and Secularism

After the eminent Article 25 and 26, Article 27 provides religious individualism by prohibiting the state from imposing any tax on the promotion of any religion and Article 28 puts a restriction on imparting religious teachings in State-owned or funded schools. Similarly, students in private schools cannot be compelled to participate in religious teachings, protecting both the right to religion and freedom of speech and expression. This kind of secularism is both of positive nature and maintaining the "idea of principle distance"[37]. Similarly, in

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28 S.R. Bommai v. Union Of India, 1994 SCC (3) 1.

29 *Id*.

30 Justice K.S. Puttaswamy Vs. Union Of India, (2017) 10 SCC 1.

31 M Siddiq (D) Thr Lrs vs Mahant Suresh Das & Ors (2019), Civil Appeal No. 10866-10867 of 2010.

32 Indian Young Lawyers Association & Ors. vs. The State of Kerala & Ors. (2018), Writ Petition (Civil) No. 373 of 2006.

33 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 5, COUNCIL OF EUROPE (1950).

34 Dominika Bychawska-siniarska, PROTECTING THE RIGHT TO FREEDOM OF EXPRESSION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Council of Europe, 2017).

35 *European Regional and Minority Languages Charter (European Charter for Regional or Minority Languages)*, CC decision no. 99-412 DC, June 15, 1999, Rec. 71.

36 Umar Farooq, *Americans say Muslims face most intolerance in US,* AA (17 April, 2019), available at https://www.aa.com.tr/en/americas/americans-say-muslims-face-most-intolerance-in-us/1455214 (Last visited on Jan 20, 2021).

37 Rajeev Bhargava, *Reimagining Secularism: Respect, Domination and Principled Distance*, ECONOMIC AND POLITICAL WEEKLY (5 December, 2013), available at https://www.epw.in/journal/2013/50/revisiting-secularisation-special-issues/reimagining-secularism.html (Last visited on Jan 20, 2021).

Aruna Roy v. Union of India,[38] the court observed that the state and its departments are the epitome of secularism with neither a religion nor the feeling of religious discrimination. Moreover, In the case of *Bijoe Emmanuel v. State of Kerala*,[39] the choice to not sing the national anthem in schools is protected by Article 25 despite its religious reasonability.

In the USA, students are given the freedom to use their religious prayers and symbols unless not restricting someone else's belief and faith. This also includes the American used phrase in "Pledge of Allegiance" which is "one nation under God" with creating "liberty and justice for all."[40] Though the country had this phrase as an epitome to create equality and oneness, often this is used for the mainstream Americans by ignoring the country's minorities. School prayers in the public schools of the country are largely banned for elementary, middle and high schools level by a series of Supreme Court decisions including the *Lee v. Weisman*,[41] but there is no ban on students' religious symbols. Though the private schools, parochial schools, colleges and universities are not covered by these rulings, there is no fund allocated to the private-religious schools.

Religious Propagation is also considered to be one of the basic rights to communicate beliefs to another person or to explicate the same without forcible conversion.[42] whereas, the idea of including the right of propagation (Article 25) was not appreciated by Sir Alladi in the constituent assembly as the right was already interpreted in Article 19. Likewise, in the case of *Ratilal P. Gandhi v. Bombay,* it was pertinent that "A religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well."[43] Besides, to protect that speech and expression, the State also has to form neutrality according to Article 19 of the Indian Constitution to protect every citizen's fundamental right. Where the system of India imposes restriction through Article 19(2) on the rights given in Article 19 to avoid social tensions, France supports freedom of speech and expression and freedom to offend the State on non-secular activities. This makes France an ideal combination of secularism and freedom of expression in Europe's construct but is it a valid structure for India?

The differences lay in the varying social and political history of secularism of both these countries. The French Secularism was introduced in 1905 through a system of *laicite*, which sealed the separation of Church and the State. Later they banned many religious symbolic clothings in the public space. This step was introduced to prevent the State and the society from the extreme authority of the Church. Later, it evolved in the present system of combined extremities of Freedom of expression and secularism. Charlie Hebdo is an epitome of both France's tradition and combined extremities by using satire as means of freedom of expression in the projection of several religious and political figures in the forms of caricatures. Hence, there is no rule to guarantee religious freedom by downgrading free speech. Likewise, in the case of *S.A.S. v. France*,[44] a young French-Muslim woman aged 23, challenged the ban on full-face veil in the European Court of Human Rights in a public place, though she was willing to show her face at airports and other security-sensitive places. Despite acknowledging the self-defeating nature of the ban and Islamophobic comments by French parliamentarians, they upheld this French law under "the margin of appreciation," i.e, "in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight."[45]

But many find this extreme kind of secularism can create social divisions due to changing times and social patterns of France where the country is more diverse than the era of Catholicism. This is due to the growing population of both Muslims and Atheists (who are expected to outnumber all other groups of France in 2050) and with around 2/3rd of France supporting a ban on hijab and burkini and individualised version of Islam, proves the greater level of differences in opinion than expected in the country and clashing ideologies with immigrants of Francophone countries.

Conclusion

The idea of secularism should be neutral rather than erasure of differences without any distortion and prejudices created by political parties or governing authorities. Intervention is sometimes necessary to separate religion and state to safeguard individuality in a country like India just like France does. Indian constitution enshrines the Right to profess and propagate their religion but they are not absolute and include restrictions to avoid embezzlement and chaos in the country. Besides, diversity of faith and religion can be abolished with France's and the

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38 Aruna Roy v. Union of India (2002) 7 SCC 368.
39 Bijoe Emmanuel v. State of Kerala, AIR 1987 SC 748.
40 Francis Bellamy, The Pledge of Allegiance, THE YOUTH'S COMPANION 61 (8 September, 1892).
41 Lee v. Weisman, 505 U.S. 577 (1992).
42 Rev Stanislaus v. State of Madhya Pradesh, AIR 1977 SC 908.
43 Ratilal P. Gandhi v. Bombay (1954) SCR 1055.
44 S.A.S. v. France [2014] ECHR 695.
45 Khan, supra note 8.

USA's concept of standardisation. Though there are no specific definitions for religion, secularism, freedom of speech with religious expression etc in France and the USA's Constitution, they tend to define the scope of what activities can interrupt a state's supremacy in the public domain. Where wearing veils are not objectionable in public space, it is non-secular by the government of France. Hence, there is a need to make some specifications in the scope of separating state and personal-religious acts in India.

Moreover, the constitution and laws lack the stringent responsibility on one authority to deal with the matters of secularism. In India, we fall under the purview of precedents and sometimes courts changing the burden of deciding such matters on governments. This is dissimilar to the two other countries where religious matters are seldom burdened under courts. The jurisdiction and specificity of laws can bring some positive change to protect the supreme 'right to equality' which is above all the other laws.

To lay the school of thought that seeks to compare and conclude the fact that the progress of a nation depends on its Constitution, which is the foundation of the nation in contrast to the provisions we have borrowed from other progressive countries, just to rectify if we still need to live off a borrowed constitution or we have come across as progressive enough to function on our own. Because despite the need for freedom and human rights, there are many historically inherited differences between France or the USA and India. The westernised concept of secularism acknowledges multiculturalism but does not refer to its importance in making and implementing secular-nature laws. Whereas, India through a lens of Gandhian and Constitutional secularism, will always execute policies based on traditional as well as modern concepts of 'separation of state and religion'.

Environmental implications of Construction of Tehri Dam

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ABSTRACT

The flooding of surrounding habitat around dams kills trees and other plant life that then decomposes and releases large amounts of carbon into the atmosphere. Because the river is no longer flowing freely, the water becomes stagnant and the bottom of the reservoir becomes depleted of oxygen. This lack of oxygen creates a situation where methane (a very potent greenhouse gas) is produced from the decomposition of the plant materials at the bottom of the reservoir that eventually gets released into the atmosphere, contributing to global climate change. Dam given effect to fauna-flora of the environment and violate the people rights, like human right, fundamental rights because many people migrant with our culture, customs, and daily routine life which effect to their regular behavior of life With them Childs, Pets & animals. Its means that overall effect of fall to change their life, reasoned behind that, makes of the dam project by the government for generation of the energy for the benefits to society. But question that:

1. Is it right to make this kind of energy

2. Energy is our need, but how should it be fixed

3. That our development is also sustain and human life is also save

Suggestion;

1. Why not we consider renewable energy or conventional energy.

2. Is it possible to recognize as Doctrine Act of Optional instead Non-Conventional Energy?

Introduction

In fact, Energy is the most important aspect of today living and convenience. We couldn't sustain most of our routine work without energy. The energy use to us in our daily lives falls into three broad categories—food that gives us energy, energy that makes a house a home, and the fuel we put in our vehicles. Most of the energy generate through the act of men in the world. Act of men means which is making by following categories like Coal, Dam, Natural Gas, and Nuclear, these are all provides energy in the world. Coal is substance or Fossil Fuels,[1] Dam is an artificial lake,[2] Natural Gas is fossil gas which prepared by methane, nitrogen and carbon dioxide,[3] and Nuclear is fission of a radioactive elements called uranium to generate electricity.[4] These are all very harmful direct to human life. Coal mines destroy directly to earth, Natural gas and nuclear direct attack to air and water space, and Dam degrade to ecosystem.

It has been found that the less care is shown while constructing the water retention structures as compared to the amount of care shown in designing for it. This is more often in earthen embankments, where soil properties need to be controlled within the designed limits. The life and stability of embankments are entirely based on the extent to which the design assumptions are achieved in the field. History shows many failures were due to the lack of quality control during construction. In India every year many water storage structures fail, but very few were reported.

This paper specially focuses on Dam energy generation; it is negligence by act of man? Negligence directly to effect on climate, geography, culture and human life. In spite question origin why not use optional methods of energy generation. If we want to save all environments that we should adopt the act of optional methods of energy generation.

Previously looking many disaster held through Dam energy generation. In India, country have example on disaster. Its biggest disaster in Indian history, 'The Machchhu dam failure or Morbi disaster was a dam-related flood disaster which occurred on 11 August 1979, in India. The

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1 www.collinsdictionary.com.
2 http://dictionarycambridge.org
3 http://www.eia.org.
4 www.scholarschool.net

Machchu-2 dam, situated on the Machchhu River, burst, sending a wall of water through the town of Morbi of Gujarat, India. According to study estimated Deaths: 1800-25000 and damaged Property Estimated 100 crore (equivalent to 21 billion or US$290 million in 2019).[5]

Another disaster held in India, 'The Panshet Dam Bursts, flooding the City of Pune on 12th July, 1961, following a night of heavy rainfall around the city of Pune, in the Indian state of Maharashtra, in Panshet Dam burst, the resulting flood killed around 1,000 people, led to the displacement and relocation of tens of thousands more, and brought the bustling city to a complete halt.[6]

On 7th February 2021, a sudden flood devastated a Himalayan valley in the Indian province of Uttrakhand. It tore through two hydroelectric dams, killing dozens of people and trapping hundreds more in construction tunnels. The floodwater was first noticed by residents of Raini village, which sits 3,700km above sea level, who filmed videos on their phones. The fast-flowing flood water swept away bridges, roads, homes and livestock, forcing officials to hurriedly evacuate villages along the banks of the Alaknanda and Dhauliganga rivers. Two-and-a-half thousand people in 13 villages were cut off by the floods.[7]

Climate change is increasing these vulnerabilities in Uttarakhand. Major human interventions like hydropower projects and highways implemented without an informed or democratic decision-making process act as force multipliers during such disasters. The violations of legal and other prudent norms in their implementation further increase the damages. The absence of necessary monitoring, early warning systems and the overall disaster management system add another layer of damages during the disasters. The lack of the ability to learn lessons from disasters and lack of any accountability ensures the perpetuation of the situation.

In a way, that says a lot about the disaster management in Uttarakhand. Besides this as yet unquantified economic damage running into over 2,000 crore (the damage to just the Tapovan Vishnugad HEP is estimated at over 1,500 crore), at least 72 people are confirmed dead, and over 135 still missing.[8]

Dam breaks have catastrophic consequences for human lives. Major loss of life can occur in a flood when people are toppled by floodwater currents. Millions more have lost land and homes to the canals, irrigation schemes, roads, power lines and industrial developments that accompany dams. Many more have lost access to clean water, food sources and other natural resources in the dammed area.

The dams will bring more problems than they will solve. Hydropower dams flood large areas and force people to relocate, threaten freshwater biodiversity, disrupt subsistence fisheries, and leave rivers dry substantially affecting the ecosystem. Large dams have junction rectifier to the extinction of the many fish and alternative aquatic species, huge losses of forest, the disappearance of birds in floodplains, erosion of deltas, wetland, and farmland, and many other irreversible impacts.

Dam effects as reservoirs fill to upstream forests are flooded, eliminating their function as carbon sinks. As the drowned vegetation decomposes, decaying plants in manmade reservoirs release methane, a powerful greenhouse gas. Among water infrastructure options, dams especially have been ascribed an unparalleled importance in fostering long-term economic development, because they facilitate multiple uses of water, including for productive activities (e.g. irrigation, industrial production, low-cost cooling of power plants. Dam reservoirs in tropical areas, due to their slow-movement, are literally breeding grounds for mosquitoes, snails, and flies, the vectors[9] that carry malaria, schistosomiasis,[10] and Onchocerciasis (river blindness).[11]'These studies demonstrated that severe Onchocercal skin disease (OSD) causes suffering to millions of people, particularly to those in the forest zone, where the blinding form of the disease is less prevalent'.[12]

Article also focuses on some advantages and disadvantages of dams. Likewise

1. These are the main source of power generation.
2. These projects control the floods because water can be stored in them. These projects have converted many, 'rivers of sorrows' into 'rivers of boon'.
3. These projects are the main source of irrigation and also help in conserving soil

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5 www.wikipediya.org

6 Deluge in Poona aftermath and rehabilitation,Gokhale institute of politics and economic, Asia publishing house.

7 http//edition.cnn.com.

8 https://sandrp.in/2021/03/18/the-factors-that-worsen-the-uttarakhand-disasters

9 Definition Vector from: www.merriam-webster.com. An organism, typically a biting insect or tick, that transmits a disease or parasite from one animal or plant to another.

10 Definition from https://www.cdc.gov: Schistosomiasis, also known as bilharzia, is a disease caused by parasitic worms. Although the worms that cause schistosomiasis are not found in the United States, people are infected worldwide. In terms of impact this disease is second only to malaria as the most devastating parasitic disease.

11 https://www.who.int/water_sanitation_health/diseases-risks/diseases/oncho/en/

12 https://www.ncbi.nlm.nih.gov/books/NBK2287/

Dam project harmful to Environmental in different shades. These are :

The construction of large dams completely change the relationship of water and land, destroying the existing ecosystem balance which, in many cases, has taken thousands of years to create. 'Currently there are around 40,000 large dams which obstruct the world's rivers, completing changing their circulation systems: this is not going to occur without dire environmental impacts. Throughout the past few years, the negative impacts of dams have become so well known that most countries have stopped building them altogether and are now forced to invest their money into fixing the problems created by existing dams.[13]

1. Soil Erosion

One of the first problems with dams is the erosion of land. Dams hold back the sediment load normally found in a river flow, depriving the downstream of this. In order to make up for the sediments, the downstream water erodes its channels and banks. This lowering of the riverbed threatens vegetation and river wildlife. A major example of soil erosion problems is the 'one major example of the social impacts of large dams is the Aswan Dam in Egypt. The Aswan dam, a rock-fill dam across the Nile River, was completed in 1970...at the cost of about $1 billion of the greatest engineering projects ever executed, with a bulk 16 times that of the Great Pyramid at Giza'.[14]

2. Species Extinction[15]

As fisheries become an increasingly important source of food supply, more attention is being paid to the harmful effects of dams on many fish and marine mammel populations. The vast majority of large dams do not include proper bypass systems for these animals, interfering with their lifecycles and sometimes even forcing species to extinction.

3. Changes to Earth's Rotation

NASA geophysicist Dr. Benjamin Fong Chao found evidence that large dams cause changes to the earth's rotation, because of the shift of water weight from oceans to reservoirs. Because of the number of dams which have been built, the Earth's daily rotation has apparently sped up by eight-millionths of a second since the 1950s. Chao said it is the first time human activity has been shown to have a measurable effect on the Earth's motion.[16]

4. Sedimentation:

It is the process by which larger sediments in water entering a reservoir are deposited as its upper end forming a delta and steadily raising the level of the upper reaches of the reservoir. This causes flooding due to its bank water effect, and in the case of the Sardar Sarovar Dam, this process shortens the utility of the dam.

5. Siltation:

It is the outcome of silt being deposited at the bottom of the reservoir, which inevitably reduces the utility of the dam. In the case of SSP there is the possibility of premature siltation, which decides the life span of a reservoir. Siltation reduces the water storage capacity of the reservoir, undermines its effectiveness for power-generation, irrigation and flood control and renders it usefulness in the long term.

6. Water logging:[17]

Rich soils in the states of Punjab and Haryana have been robbed for their use because of water logging. The Indian Institute of science estimates that 40 percent of the command area for Sardar Sarovar Dam will become waterlogged. This area contains black cotton soils which are particularly prove to water logging under perennial irrigation due to high water retention capacity. Soils become water logged and crop yields fall.

7. Salinisation:[18]

The arid and semi-arid areas are incapable of handling large amounts of water brought by irrigation. Irrigation water has more saline content and adds more salt to the system leading to the increase of Salinisation. Changes in the salt regime can affect the entire ecosystem and disrupt breeding of fishes. Large areas on the river banks are likely to be affected by an increased quality of salt after dam construction. In total, over 32,000 hectares of land have been submerged by the SardarSarovar Dam, 13,000 of which is forest land and 11,000 hectares of agricultural land.

8. Dams Effects on Tribal People[19]

This lack of awareness can be explained by the fact that for many years large hydroelectric dams have been portrayed

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13 http://www.arch.mcgill.ca/prof/sijpkes/arch374/winter2001/dbiggs/enviro.html
14 www.britannica.com.
15 http://www.arch.mcgill.ca/prof/sijpkes/arch374/winter2001/dbiggs/enviro.html
16 http://www.arch.mcgill.ca/prof/sijpkes/arch374/winter2001/dbiggs/enviro.html
17 http://www.arch.mcgill.ca/prof/sijpkes/arch374/winter2001/dbiggs/enviro.html
18 ibid
19 https://www.yourarticlelibrary.com/

as synonymous with development. Another reason can be that most users of hydro-electricity live far away from the impacted areas and that the sites selected for dam building have been often those inhabited by indigenous peoples, tribal people, ethnic minorities and poor communities having little capacity of being heard by the wider national community. However, dams constitute a major direct and indirect loss of environment. Hydroelectric dams as being one of them also effect as a cause of human rights violations.

9. Dams Effects on farmer and forest[20]

They have also resulted in deforestation elsewhere, as farmers displaced by the dams have had to clear forests in other areas in order to grow their crops and build their homes. Additionally, dams imply road building, thus allowing access to previously remote areas by loggers and "developers", resulting in further deforestation processes.

However, the dams' effects have included much more than forest loss and the major environmental changes have impacted on local people, at both the dam site and in the entire river basin. Not only are the best agricultural soils flooded by the reservoir, but major changes occur in the environment, where the river's flora and fauna begins to disappear, with strong impacts on people dependent on those resources.

10. Effect of Tehri Dam on Ecology of Garhwal Region[21]

As we know that dam is essentially an artificial wall constructed across a river which converts a running water ecosystem into a lake type ecosystem. This causes some changes in basic riverine ecosystem. Therefore, thorough studies were got conducted for the likely negative impacts of dam and its reservoir, through expert agencies. Mitigating measures, where necessary, were taken on likely negative impacts.

Probable impacts identified were as follows:

a. Adverse change in the (i) water chemistry, especially with respect to dissolved oxygen and (ii) turbidity of water.

b. Bad impact on biodiversity, i.e., flora and fauna of the area.

c. Likely obstruction of movements of migrating fish species during breeding season.

d. Rivers carry a lot of sediment, which on construction of a dam, will be locked up behind the dam wall. The collected silt in the reservoir eats away the capacity of the reservoir. This impact of reducing the capacity and life of reservoir was studied.

e. Adverse impact of water accumulation on the upstream side of the dam, which causes inundation of land including forest-land.

f. Since 109 villages (full or partial) and Tehri town (full) were affected and the residents were to vacate their ancestral homes and agricultural fields, a scheme was prepared, to resettle these people, with the idea to improve their living standard, keeping their social bonds intact.

g. Problem of water-logging and salinity of the land in the command area.

11. Sunderlal Bahuguna's view on Tehri Dam with reference to ecological imbalance

Eminent environmentalist Sundarlal Bahuguna agitated against the construction of Tehri dam and forced the central government to bow down. Due to that resistance of Bahuguna, the Central Government had to form committees in many matters related to dam construction and displacement.[22]

After the last phase of the Chipko movement, Bahuguna started the anti-Tehri dam movement in 1986. He left his village and moved to Tehri in 1989 after the government did not pay attention to this and started living in a hut on the banks of river Bhagirathi. In spite of this, when the government remained silent, in 1995, they fasted for 45 days in protest against the Tehri Dam. After this, the then Prime Minister PV Narasimha Rao listened to Bahuguna and assured him to end his fast. In addition, the Center also constituted a committee to study the impact of ecology on Tehri Dam.

Sunderlal Bahuguna did not sit silent with this only. Again, he fasted for 74 days in protest against the environmental interests not being taken care of in the dam. During this period, due to their movement, the work of Tehri Dam was also stopped for some time, which was later resumed in the year 2001. Due to their opposition, the impact of Tehri dam on the environment was seriously thought about and the initiative was taken towards its disposal.

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[20] ibid

[21] S.C.Sharma, Former General Manager THDC Ltd "EFFECTS (IMPACTS) OF TEHRI DAM"

[22] https://www.jagran.com/uttarakhand/tehri-garhwal-environmentalist-sundarlal-bahuguna-was-not-in-favor-of-construction-of-tehri-dam-21665757.html

SDM stopped the construction of the dam

In the year 1989, Bahuguna fasted for 11 days. Then the construction work of Tehri Dam was stopped by the then SDM Kaushal Chandra. Historian Mahipal Singh Negi says that the dam work was disrupted across the country. Seeing the impact of Bahuguna's movement, the SDM had stopped the dam work citing law and order deterioration. After this, the Secretary and all the senior officials of the Central Government had reached Tehri. Then somehow the construction of the dam was started again. Bahuguna also staged a sit-in in 1996, after which the dam was closed in April-May.

Committees formed due to the movement

After the movement of Bahuguna, the Central Government constituted a high-level committee called SK Rai Committee, Bumla Committee, Dhoundiyal Committee, Hunmant Rao Committee and Group of Experts. These committees made several recommendations regarding the interests of the environment and local residents, which benefited the environment and local residents. The construction of bridges and roads in the dam affected area was also done on the recommendations of these committees. Similarly, the plantation work in the dam area was also done on the recommendations of the committees.

Conclusion/Suggestion

In view of the above studies and observation, the Researcher propounded following suggestions to combat the problem of scarcity of energy. India should use, Sun Energy, Wind Energy, Geo-Thermal Energy, Hydro-Energy&Bio-fuels Energy. For utilizing these energy sources India have to develop the necessary infrastructure.

Corporate Fraud: An Analysis in relation to Social Responsibility

Ms. Gargi Bhadoria*
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ABSTRACT

The topic titled 'Corporate Fraud: An Analysis in relation to Social Responsibility' is a topic which is currently drawing attention of the state & society because of non-disclosure and tempered disclosures in respect to profitability of company. It is a fact that Law has created obligations on corporation towards the society by contributing in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years. The law and obligations thereto are in pursuance of its Corporate Social Responsibility Policy as framed under the power provided in the Company Law statute read with section 135 of Company Act,2013. For understanding the Corporate Fraud and procedure for proceeding against the corporation is provided in the Companies Act itself but may need to be read with other statutes providing for civil and criminal liability for breach. The corporation cannot escape liability, under the law an obligation has been created against the corporation but at occasions for committing any breach of trust or cheating as provided in the penal laws , the procedure under the Criminal Procedure may also be attracted . It is debatable that for simple reason an amount of 2% out of the profit can be said to be held as trust by the corporation towards statutory Corporate Social Liability. The deliberations referred hereinbefore are specific to breach towards Corporate Social Responsibility , though their do exist other deviations /breaches on the subject some of which may have penal consequences but the topic herein is confined to 'Corporate Frauds' in reference to Corporate Social Responsibility. Accordingly the Research Topic is dealt on 'Doctrinal Methodology' with the help of primary and secondary sources of data whereby one set of data has been corroborated with other to arrive at conclusions for research this Research Article with research question that up to what extent corporate fraud in relation to social responsibility exist ? and What is the ambit of such fraudulent act/activity and curative measures thereto .

Keywords: Corporation, Social Responsibility, Fraud, Deviations, Breach of Trust, Non-Disclosure, Cheating

Introduction

The topic under consideration has its own importance keeping in view the economically weaker section in India and obligation of the state to eradicate the poverty. For this among others the legislative and executive concerns are of essence especially by introducing corporate social responsibility (CSR) upon companies. The concept CSR was implemented in the Companies Act, 2013 to make sure that more and more entities came forward and participated in the growth and development of the society. The legal provision for CSR funding is given under section 135 of the Companies Act,2013 and the Corporate Social Responsibility rules,2014.The society is of key importance to these companies as they derive their major resources / inputs from the society and hence it becomes their obligation to act towards the benefit of this very society. However, the number of companies doing this is declining. Companies have found countless ways of dodging their corporate social responsibility.

How Corporate Social Responsibility Compliance acts as boon for the company?

India is one and the only country which has done the CSR spending's as mandatory part of its corporate law. Corporate Social Responsibility is no longer a mere slogan or an idea. It has grown to become one of the most important indicators of a company's responsibility towards the social growth. It has become indispensable for various firms to demonstrate such activities. Compliance to CSR rules does not only benefit the society but is also crucial for the success of an enterprise as it involves more customer engagement. It leads to strong brand positioning, enhanced corporate status, market share/sales, increase in its ability to attract and retain employees, appeal to investors and financial analysts.

As per the 2015 Cone Communication/Ebiquity Global CSR study, 91 % of the Consumers go for those companies who work towards addressing various environmental and social issues. They seek for responsible products.[1]

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[1] https://www.conecomm.com/research-blog/2015-cone-communications-ebiquity-global-csr-study

Customers are more inclined towards companies that according to them are not only minting profits but are also making sure that they are ethical and are benefitting the society. Non-compliance to the CSR norms acts as a detriment to the companies. Customers now adays are ready to compromise on the quality or price of the products but not on their ethical standards. However, there are companies that are not one-dimensional and focus on creating an impact. The Tata group, carry out CSR activities aimed at upliftment of the poor strata of the society and empowerment of women, it provides academic scholarships and organizes awareness programs for various health care services like immunization, AIDS etc., UltraTech Cement carries out philanthropic activities across 408 villages in the country, Mahindra &Mahindra's field of action is promoting education and to extend a helping hand to the economically backward classes in that field.The DHL group as a part of their CSR activity aims to reduce all the logistics related emission by the 2050,to achieve the goal of limiting global warming below 2 degrees as prescribed in 2015 Paris Climate Conference and United Nation's 2030 Agenda for Sustainable Development. CSR has become an inseparable part of these companies as they themselves benefit from it by creating a good brand image amongst the employees and their customers.

Failure of Corporate Social Responsibility

Although, CSR is proved to be fruitful, yet we cannot say that it has achieved its objects in totality. One of the major reasons for this is the lack of effective enforcement of these provisions. Simply mandating them will not be helpful. One of the major stumbling blocks is finding credible projects that these companies can support under the ambit of their CSR requirements.

As per the KPMG report, geographical bias is also one of the major reasons for the failure of CSR.This discrepancy is because of the simple reason that most companies tend to distribute their funds to projects, which are located close to where they are based. This eventually leads to the industrialization of the areas that are already developed or developing. All the resources get diverted from the underdeveloped and poorer sectors of the nation that are in ardent need of these resources to the already developed sectors.

According to the same report more than 52 out of the country's 100 largest companies failed to spend the required 2% on CSR activities.[2]

State owned ONGC, IT giants like Tata Consultancy Services and Infosys, lenders like ICIC Bank, Axis Bank, HDFC Bank, Telcom major Bharti Airtel are amongst the top business tycoons that have not complied with 2% rule of CSR LAW. According to Media DNA money, companies like Bharti Airtel (22%), Idea (33%), Hindustan Zinc (37%), BHEL(41.8%) and Cairn India(48%) have spent less than half of what they were mandated to spend as earmarked for CSR during financial year 2015-16. It said that about Rs 13,828 crore was spent by over 19,000 companies during FY16, in the subsequent year, only Rs 4,719 crore was spent by 6,286 companies. Over 9,200 eligible companies did not spend a single penny on CSR during FY16 as compared to 346 firms in FY17.The CRISIL and Prime Database analyses show that only a little more than half of the companies (57%) have complied with the 2% stipulation.[3]

The government had warranted prosecution proceedings against 284 companies and sent 5832 notices to company for not having fulfilled the mandatory CSR expenditure rules.

Different ways of evading the responsibility

Companies in our country have found ways and means to evade their responsibility and avoid distribution of their funds towards CSR activities. To avoid paying towards CSR many companies across industries have convoluted sustainability with their business strategy. They have strategically formulated ways that combine sustainability, their social obligation with their business ideas. The idea behind this is not to accelerate the growth of the society but to simply increase their profit margins. Hindustan Unilever (HUL) was seen following the same strategy to deceive the customers. They spent a lot of money in the underdeveloped rural areas to create awareness amongst them about sanitation and the need of good hygiene. At face value this activity done by them would constitute to be an act that complied with the CSR laws but in reality, it's a veil. The CSR rules of the Companies Act, 2013 would not take such activities under the purview of CSR. The society outreach activities by HUL were considered to be activities undertaken in their normal course of business and not as CSR activities.It was more of a marketing strategy. The sole driving force behind such activities was profit making. This was because HUL derived direct monetary benefit from such an activity. By creating awareness amongst the targeted consumers, they were indirectly increasing the demand of the products they primarily dealt with – toiletries and detergents. All such expenses would be counted as business promotion expenditure. They would not amount to CSR expense. While considering the case of HUL, it was also decided that the CSR activities undertaken by a department within the company would not qualify as CSR

[2] https://assets.kpmg/content/dam/kpmg/in/pdf/2019/01/India_CSR_Reporting_Survey_2018.
[3] https://taxguru.in/company-law/failure-csr-india.

activity under the Companies Act. Moreover, the new act has made it imperative for the companies to spin off the CSR activities carried out by them, internally into a separate distinct entity registered as a trust or a society or a not for profit company. CSR does not allow shared value propositions.Activities that benefit the employees of the company along with their families cannot be considered as CSR activities in accordance of Section 135 of the Act. Activities like marathons, T.V sponsorship programs, charitable contribution, advertisements would not be qualified as a CSR expenditure. The Finance Act, 2014 provides that any expenditure incurred by a company towards its CSR initiatives mentioned in Article 135 of Companies Act, 2013 shall not be deemed as an expenditure incurred in the normal course of their business.

A very strong argument used by most companies to justify their underspent towards CSR activities is that they are not able to identify the right projects or organization to associate with.However, this excuse cannot be taken into consideration after seven years of the enactment of the Act in 2014. With the surfeit of specialists and consultancy agencies at their disposal, these problems can easily be solved.

Most companies spend the required CSR amount on NGO's that they have been associated with. However, this spending has not been transformational, as they do not spend the stipulated amount. This under spending could also mean that they do not make enough efforts to locate worthy projects or try to nurture grassroots level NGOs. In addition to this, most companies that are in dire need to meet with the CSR requirement choose NGOs without exercising proper diligence. This lure of money leads them to unethical practices. CBI had very recently filed a complaint against an NGO, Advantage India, based in Delhi for misusing the CSR funds given to them by a company. Mumbai police had very recently uncovered CSR funding scam wherein the accused had forged the documents of Hexaware Technologies and approached various NGOs and charitable funds across the country with a proposal to provide them CSR funds worth over 100 crores. Such malpractices defeat the whole purpose of incorporating and mandating the CSR provision.

In India, companiesin order to avoid paying money for CSR activities, follow poor disclosure standards when it comes to revealing the details of their spending on the CSR initiatives. This was confirmed by a report made by the Institutional Investor Advisory Services.[4] According to the report, 51 companies listed on the Bombay Stock Exchange's Sensex defaulted under this category. The report says that in order to spend less than what is required on CSR initiatives, the companies are not very forthcoming when it comes to sharing the details of their CSR spending. For example, Bajaj Auto followed the same strategy. It did not only conceal the amount spent on CSR activities but also did not mention whether the amount unspent in the given financial year was carried forward in the next year. The Companies (Amendment) Bill 2019 introduced a few rules to tighten the CSR laws of the country.The proposed Amendment required the companies to transfer the unused funds meant for CSR activities in a specific year towards a fund set up by the government. The fund is set up for a better and an efficient utilization of resources for public welfare. The main aim of the amendment was to increase accountability and make the entire procedure more transparent.

CSR money is being diverted towards the pursuit of individual growth rather than fulfilling the wider goals of society. Governmental officials and senior staffs in PSUs have constantly been engaged in laundering of CSR money for their own benefit. Such practices have been well documented before the CSR provision was made mandatory. Embezzlement of CSR funds become easier as there is very little oversight on CSR spending. Redesigning projects to make them look CSR friendly by abusing the power of position, facilitates the act of dodging the CSR provisions. Examples of this would be the NALCO case in 2012 where crores of money was diverted towards a private university, accusation made against the former Steel Minister Beni Prasad Verma for having misused SAIL's CSR funds. Most of its CSR funds were utilized for hiring choppers for the ministers and for their advertisement's activities. Disclosure of financial accounts is a very rare occurrence for the PSUs.

Non-compliance to the CSR laws does not only happen when the funds are misused. It also happens by misgoverning and misdirecting funds. A perfect example of this would be donations made to the Prime Minister Relief Fund and any another similar central government funds. Such donations are apparently considered as a part of CSR. For most companies diverting funds towards any such scheme becomes an easy way out through which they can be on the right side of the CSR regulations. It gives them a green card without even devoting extra time and investment in taking up actual CSR projects of their own and internalizing its true concept.

Why do Frauds Happen in Corporate Social Responsibility?

Companies many times for the purpose of fabricating the CSR spending make use of charitable trusts. The money

[4] https://www.businesstoday.in/current/corporate/companies-follow-poor-disclosure-norms-on-csr-says-proxy-advisory-firm/story/201206.html

donated is returned to the company. Modus operandi for this is very simple. The company in order to comply with the CSR law writes a cheque in favor of the trust that works in any of the ten important field of activities (Healthcare, education, environmental protection) as prescribed by the law. The trust, after deducting its commission, reverts the money directly to the company or its promoters or directors, in cash. At that very instance, white money is converted to black money, the impact of which is adverse on the economy. Most of the times, politicians and rich businessmen establish these trusts so that it provides them with an escape mechanism for all the unaccounted CSR fund. Money flows into these trusts through legitimate banking channels but are eventually returned to the company in cash. This is the most favored route to launder CSR funds, as it is not very meticulously monitored by the government and there exists a lack of a centralized repository that could administer the activities of such trusts. All this is done with the sole intention of deceiving its customers and evading the CSR law requirements.

In 2017-2018, the mandatory CSR expenditure under Section 135 of The Companies Act was rupees 10,000 crore, according to the PRIME Data Groups Analysis of 1627 NSE listed companies. The companies did not meet such a requirement.[5]

To evade CSR laws, most companies advance money towards any major project started or a scheme implemented by the political party in power. These funds are made available for the extra budgetary spending of the government. The underlying motive behind this to make sure that the government provides these companies a protective shelter against any proceedings that might get instituted against them for non-compliance of the CSR law. It's basically a give and take policy that is being practiced by these affluent business tycoons and the governmental officials. It leads to a flagrant misuse of the CSR funds. This practice can be understood by going through the report analyzed by Good era, a CSR sustainability management platform. Through the filings reported by the companies, the CSR expenditure has been analyzed and It has been observed that the total CSR expenditure by companies has increased substantially by 44% from the year 2014-15 to 2015-16 and thereafter marginally declined in the year 2016-17. It has further dipped by 6.9% in the year 2017-18. The number of reporting companies which carry CSR obligation has steadily increased from 10,418 in the year 2014-15 to 13,182 in the year 2016-17 and then declined to 11,584 in the year 2017-18. However, it may be pertinent to mention that the figures for CSR expenditure and number of reporting companies for the year 2017-18 may improve in due course, as more filings are made[6]. As per the report, in FY19-20, only 46.51 crores were spent, whereas 2107 saw a sudden shoot in the spending to Rs 155.78 crores. This happened because five of the most important PSUs – ONGC, HPCL, BPCL, IOCL and Oil India Limited, together contributed Rs 146.83 crores towards BJP's pet project, the Statute of Unity in Gujrat. These funds were designated for CSR under the preservation of national heritage category.[7] In addition to this, 14 other companies from Gujarat also contributed to this project, in the name of CSR.

Former Steel Minister, Beni Prasad Verma was accused for misusing CSR funds by investing more than half of it in two Uttar Pradesh districts under him.

CSR funds are being used to further the political goals of the government in power. There has been a recent trend where the companies have been seen diverting their CSR funds towards animal welfare. The PRIME database report shows that 41 listed companied have made 73 separate donations between 2015-2018 to cow-based activities and for the establishment and administration of Gaushalas.[8] Companies like Genus Power Infrastructure and Paisalo Digital have spent around 19.5 million towards activities aimed at protection and wellbeing of cows. The Schedule VII of the Companies Act, though mentions animal welfare as one of the categories on which the CSR money can be spent, it does not explicitly talk about the protection of cows. This is used a tool to dodge the CSR laws. The statutory provisions of CSR rules have made it mandatory that the activities undertaken by the companies should be in pursuance to the activities mentioned in Schedule VII of the Companies Act, 2013. Though the activities mentioned in the schedule VII should interpreted in way that it can include a wide range of activities, the main motive behind the said provision should not get lost amidst all this. It's very sad to see how these companies neglect more pressing concerns in the society and channelize all their resources towards the protection of cows and other animals. They are cynically aligning their activities to suit the political concerns of the government negating the true objective of the Act.

Most companies often justify their non-spending or underspending towards CSR activities by claiming that they have already spent the required amount while hiring

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5 "Using CSR Funds for Political Gain." The Wire. Accessed September 1, 2019. https://thewire.in/business/modi-government-csr-political-gain.

6 https://www.mca.gov.in/Ministry/pdf/CSRHLC_13092019.

7 Supra

8 https://www.business-standard.com/article/companies/gau-seva-in-india-inc-s-csr-stable-donations-by-41-firms-hit-bullseye-118111301467_1.html

personnel exclusively for implementing the CSR activities. The CSR Policy Rules, 2104, disregarding all these claims made it very clear that the salaries paid to the CSR staff would be a part of the Administrative overheads of the company. This expenditure should not exceed 5 % of the total CSR expenditure as per Rule 4(6) of CSR policy, Rules 2014.[9]

The fact that no tax exemptions have been extended to CSR expenditure as per Finance Act, 2014, further discourages the companies from undertaking activities that would comply with the CSR laws. The attitude that most companies have towards CSR laws is not very favorable. They are averse to its provisions. For them it's just an extra burden in addition to the income tax that they pay every year. There is no specific tax exemption for any CSR expenditure, but there are certain subjects mentioned in the VII Schedule like scientific research, rural development projects, donation in Prime minister relief fund , Swachh bharat Abhimaan , Clean Ganga campaign ,skill development projects, agricultural extension programs that enjoy exemptions under different sections of the Income Tax Act, 1961.

Conclusion & Suggestions

CSR has been reduced to a mere accumulation of projects without creating any social impact, the main reason for which it was formulated and mandated in the first place. The aim of the act was to inculcate business responsibilities towards every individual that is stakeholder in the business. Social responsibility should not be equated with monetary contributions only. The way these companies are making profits is as important a consideration as they are spending the profits made by them is. Companies have been seen behaving irresponsible in this front in addition to their non-compliance with the CSR laws. Companies are using the scarce resources of the economy, therefore they ought to behave responsibility towards its development. Instead of focusing only on financial contributions they should also be mindful of providing client value that will serve the society in a longer run. There is a need for stringent measure and auditing procedure so that any leakage in the account of CSR is prevented and/or proceeded in accordance with the law either for breach of trust under penal laws for the fact of having profit and retaining the same without addressing the CSR Obligation under section135 of the companies act.

It is the duty of the companies to realize and comprehend that their activities play an integral role in the development of the nation. The government should be making policies that will ensure stricter implementation of the CSR laws. Initiatives should be taken to make sure that all the areas are benefitted from the social activities undertaken by these companies, so that there is no disparity and bigotry between different regions of the country. There exists a lack of knowledge about the CSR provision in the rural areas and the penalizing provisions all over the country. The penalizing provision should be a pocket burn to these companies. However, all this is only possible, when to contribute towards the development of the society comes for one's inner conscience and not because of the fear of getting sanctioned in case of non-compliance. Government efforts are going to be futile unless and until companies themselves willingly come forward and shoulder the responsibility to serve the community by honestly complying with the CSR requirements, failing which the stringent measure as suggested under penal laws ought to be adopted to have an demonstrative effect.Accordingly, the topic has been dealt on doctrinal methodology with the aid of primary and secondary and source of data for arriving at conclusion and suggestions. In this way the proper accountability towards the corpus earmarked forCSR for upliftment of poor and downtrodden can be addressed to have man making and nation building in India that is Bharat.

9 https://www.mca.gov.in/Ministry/pdf/General_Circular_21_2014.pdf

Female Genital Mutilation: A Challenge To Women Empowerment In India

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ABSTRACT

The present paper is an attempt to highlight an unexplored prejudice and a challenge to women empowerment in India. One major hurdle to women empowerment is female genital mutilation. Female genital mutilation/ cutting (FGM/C) is the partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons. FGM is performed on young woman, predominantly minors, under the garb of religious practices and ancestral traditions. This practice is associated with concept of 'purity and cleanliness' of the women aimed at curtailing their sexuality. Performance of FGM/C creates an abundance of health hazards amongst the victims including scarred tissues, menstrual issues, complications during child birth and in extreme cases, even death. This practice thereby violates basic human rights of these women. Globally, it is prevalent in African countries like Sudan, Nigeria and Somalia as well as in the Kurdistan region of Iraq in the Middle-East. While there exists no national piece of legislation explicitly dealing with the subject of FGM, the States are bound by an obligation imposed under various international conventions including the Convention on Elimination of Discrimination against Women, the International Covenant of Civil and Political Rights etc. In India, the practice is particularly rampant among the Bohra community found in Gujarat, Rajasthan, Maharashtra and Madhya Pradesh. The Bohras are a part of the Shia sect of Muslim community. Even in India, there is no explicit legislation prohibiting FGM but it can be dealt with under various provisions of the Indian Penal Code. In the case of a minor, the perpetrator can be proceeded against under the Protection of Children from Sexual Offences Act. Nevertheless, it can be said that the punishment under these Acts does not justly correspond to the offence. The authors of the paper seek to illustrate the reality of this practice and its consequences on women's health, both physical and psychological, thus amounting to a blatant violation of their constitutionally protected rights.

Keywords: sexual offence, religion, health, female exploitation.

Introduction

Female Genital Mutilation is the partial or total removal of the female genitalia. It includes causing injuries for cultural, traditional and non-therapeutic reasons. This is widely practiced in places like Ethiopia, Nigeria, Egypt, Iran and in some regions of India including Gujarat, Rajasthan, Maharashtra and Madhya Pradesh. Around 132 million girls worldwide and 2 million girls every year, have to undergo this procedure. In a lot of these places, this is considered as a celebratory event and is decked with music, gifts, feasts etc.

The age at which this is done ranges from ages 4 to about 49 years. However, in usual circumstances, it is conducted between the ages of 4-8 years. This medical procedure is carried out by religious leaders, older female members of the family like grandmothers, midwives, doctors etc. The question regarding whether the people performing such procedures are trained or not, is uncertain. Originally, this procedure is performed by people with little to no training and simple tools are utilized. These basic operating tools comprise of scissors, knives, razor blades, piece of glass, scalpels etc. In order to stop excessive bleeding, chemicals like iodine or a combination of herbs are applied to the wound to tighten the skin. However, this process has now evolved in some areas and is also performed by healthcare facilities.[1]

The history of FGM dates back to multiple regions and countries. Some academics suggest Ancient Egypt as its main place of origin due to discovery of various circumcised mummies from fifth century BC. Other theories include that this practice was spread all over the world from the slave trade routes that covers the Red Sea, west and middle African regions through Arab traders. This was also prevalent in various regions in Rome and was done to female slaves to prevent unwanted pregnancies.[2]

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1 World Health Organization, *Female Genital Mutilation – New Knowledge Spurs Optimism,* WORLD HEALTH ORANIZATION (15th Oct. 2020, 8:20pm), https://www.who.int/reproductivehealth/topics/fgm/progress72_fgm.pdf.

2 Jewel Llamas, *Female Circumcision: The History, the Current Prevalence and the Approach to a Patient,* UNIVERSITY OF VIRGINIA SCHOOL OF MEDICINE (Oct. 12, 2020, 9:30pm). https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2017/01/Llamas-Paper.pdf.

One of the primary reasons why women have failed to step up for themselves, is the fear of excommunication and social boycott. In tight-knitted communities, where social constructs like customs and traditions are the backbone of people's lifestyles, women don't have the courage to voice their concerns. Even a slight cross beyond the lines puts them at risk from being disowned by their own communities, not being able to participate in religious and social gatherings, not being able to marry into their own community and turning into an outcast. These heavy social baggage have prevented the women from protesting against the process of Female Circumcision or khatna, which still manages to have its roots deep into the mindsets of people and continues to flourish.[3]

On the basis of the severity of procedure, FGM/C is categorized under four types:

i. Type I: It involves the complete or partial removal of the clitoris which is also known as clitoridectomy.

ii. Type II: This involves the complete and partial removal of the clitoris and the labia minora, either with or without the excision of the labia majora

iii. Type III: It includes the narrowing of the vaginal orifice by creating a covering seal by cutting and positioning the labia majora or labia minora, with or without the excision of the clitoris (infibulation)

iv. Type IV: This includes all the other ways of causing harm to the female genitalia for non-medical purposes.[4]

During and after the performance of FGM/C, the women undergo a lot of difficulties like excessive bleeding and wound infection. The mentality behind this idea concerning the woman's purity and chastity and the extremely painful procedure has been proved to affect the woman's psychological and mental health drastically. Apart from that, if it is not carried out properly, it could lead to severe long-term health consequences like infections and menstrual difficulties. For pregnant women, it could lead to a lot of complications during childbirth. FGM affects the sexual function of the woman and some studies have suggested that eventually, this could also lead to infertility.[5]

At the international level, various organizations like Wadi in Iraq, 28 Too Many in England and Wales, Stop FGM in Austria, World Health Organization etc. have been working towards bringing justice to the women who have undergone this painful tragedy. Multiple projects have also been dedicated towards the preservation and protection of the rights of these women and urging them to fight for their own as well.

Female Genital Mutilation: A Global Perspective

The practice of Female Genital Mutilation is an extremely pressing issue in multiple countries of the world including Ethiopia, Sudan, Nigeria and more, in the African continent, Egypt, and Kurdish-Iraq and Central Iraq in the Middle East.

The reasons behind the consistent performance of such practices remain common between all the countries and places they are being carried out in. The procedure is usually carried out by religious leaders, medical practitioners, midwives, birth assistants etc. without any certainty of their training experience. The stringent traditional values, cultural influences and ideologies, and customs mainly provide impetus to this procedure. In some places, this is viewed as an event of celebration inclusive of music, presents and food.

I. African Continent

1. Nigeria:

Nigeria as a country, bases its legislations from various sources. Laws are implemented based on the Nigerian Constitution and statutes, Common Laws (English Law), Customary Laws like Sharia (Islamic Laws) and various precedents set.[6]

As of June 2018, the frequency of women undergoing Female Genital Mutilation in Nigeria amounts to 24.8% aged between 15-49 years which approximates to 20 million women worldwide.[7] The methods used to perform this act in Nigeria are called *angurya* (the scrapping off of the vaginal tissue) and*gishiri* (the posterior cutting from the

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[3] Lawyer's Collective and Speak Out on FGM, *Female Genital Mutilation: Guide to Eliminate FGM practice in India,* LAWYER'S COLLECTIVE AND SPEAK OUT ON FGM (Oct. 18, 2020, 7:15pm), http://www.lawyerscollective.org/wp-content/uploads/2012/07/Female-Genital-Mutilation-A-guide-to-eliminating-the-FGM-practice-in-India.pdf.

[4] Centre for Disease Control and Prevention, *Female Genital Cutting,* CENTRE FOR DISEASE CONTROL AND PREVENTION (Oct. 6, 2020, 5:15pm), https://www.cdc.gov/immigrantrefugeehealth/guidelines/domestic/general/discussion/female-genital-cutting.html.

[5] Dan Reisel and Sarah M. Creighton, *Long Term Health Consequences of Female Genital Mutilation (FGM),* Volume 80 Issue 1, MATURITAS 48 (2014).

[6] Ngozi Efobi and Rachel Ehima, *Legal System in Nigeria: An Overview,* THOMAS REUTERS PRACTICAL LAW (Oct. 2, 2020, 11:45am), https://uk.practicallaw.thomsonreuters.com/w-018-0292?contextData=(sc.Default)&transitionType=Default&firstPage=true.

[7] 28 Too Many and Thomas Reuters Foundation, *Nigeria: The Law and FGM, June 2018,* 28 TOO MANY (Oct. 5, 2020, 1:00pm), https://www.28toomany.org/static/media/uploads/Law%20Reports/nigeria_law_report_v1_(june_2018).pdf.

vagina). It also involves use of corrosive substances and herbs, all of which were later classified into 'Type IV' under Forms of FGM.[8]

There are certain Nigerian legislations which could be used to argue against the practice of FGM. Article 34(1) of The Constitution of the Federal Republic of Nigeria, 1999 proclaims that no person shall be liable to be subjected to torture or any inhumane or degrading treatment. However, this does not specifically target the practice of Female Genital Mutilation. It refers to general acts which are degrading in nature.[9]

On 25th May 2015, The Violence Against Persons (Prohibition) Act ('VAPP Act') came in force. This Act was formulated to prevent various gender-based violence, both in public and private lives. VAPP Act seeks to prevent atrocities like rape, child abuse, violence against women and criminalizing FGM. This particular Act has its ambit only in the Federal Capital Territory of Abuja, as a Federal Law. The rest of the states have to pass their own legislation similar to the VAPP in their own states to prevent such wrongs. Section 6(1) of the VAPP Act emphasizes that the act of circumcision and genital mutilation against any woman or girl child is prohibited. Section 6(2) criminalizes and punishes anyone who performs, or engages another to perform, female circumcision or genital mutilation. Section 6(3) criminalizes and punishes anyone who attempts to perform, or engage another to perform, the practice. Finally, Section 6(4) criminalizes and punishes those who incite, aid, abet or counsel another to perform or attempt to perform FGM along with penalties.[10]

Nigeria has signed and ratified on the major African Declarations and Treaties pertaining to Human Rights and Rights of Women and Children. These include the African Charter on Human & Peoples' Rights (1981) (ACHPR) (Banjul Charter), African Charter on the Rights and Welfare of the Child (1990) (ACRWC) and African Charter on Human and Peoples' Rights on the Rights of the Women in Africa (2003) (ACHPRRWA) (Maputo Protocol) apart from various other International Declarations and Treaties.[11]

2. Sudan:

Similarly, in Sudan, the percentage of women who have undergone FGM amount to 86.6% between the ages of 15-49, as of July 2018. The concept of Female Genital Mutilation evolved within the Sudanese communities due to its association with an old heritage by the name of 'Pharaonic Circumcision' which was practiced for hundreds of years in the past.[12] This is also known as infibulation in the modern times. Infibulation is considered to be the worst form of FGM as it involves the complete removal of the external female genitalia. This has been categorized into 'Type III' under Forms of FGM. However, this slowly transitioned into 'Sunna Circumcision' over the years mainly due to the association of FGM with religion. The transition was mainly due to a fatwa issued by the Islamic Jurisprudence Council in 2005, which stated that this method was more religiously favourable. The nature of this kind of circumcision comes under 'Type 1', which is known to be relatively safer.

There is no national legislation in Sudan which is against FGM. Although there are certain laws against causing harm to another person and laws regarding protection of children. These laws are applicable throughout the country.

Section 138 of the Criminal Act, 1991[13] emphasizes upon the definition of a 'wound' and the intention behind causing them. It also talks about its different types which includes Intentional, Semi-Intentional and Mistake. Section 139-141[14] deals with the penalties against causing different kinds of wounds. Section 141 of the Act states as to what constitutes committing the offence of hurt along with the necessary penalty. As on May, 2020, FGM has been criminalized with 3 years of imprisonment in Sudan which proved to be a momentous occasion for its women.

II. Middle East

1. Kurdish-Iraq

The cumulative percentage of women to undergo Female Genital Mutilation in the Kurdistan region of Iraq amounts to 72.7% excluding the Dohuk Governorate. At a regional level, the rates differ from place to place. In the Arbil Governorate, the same amounts to 63%; in Sulaymaniyah, it averages to about 77.9% and in Garmyan/New Kirkuk, the numbers amount to 81.2%. Similarly, the types of mutilations that take place also differs from region to region. Several reports were published by human rights

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8 28 Too Many, *Country Profile: FGM in Nigeria, October 2016,* 28 TOO MANY (Oct. 5, 2020, 3:00pm), https://www.28toomany.org/static/media/uploads/Country%20Research%20and%20Resources/Nigeria/nigeria_country_profile_v2_(november_2017).pdf.

9 NIGERIAN CONST. Art 34 cl. 1.

10 Violence Against Persons (Prohibition) Act, 2015, S.6.

11 Supra, n.10.

12 Samar Khalid, *FGM in Sudan: A Comprehensive Exploration,* SAFE AMNA (10 Oct. 2020, 12:00pm), https://safeamna.org/2020/09/07/fgm-in-sudan-a-comprehensive-exploration/.

13 CRIMINAL ACT, 1991, S. 138.

14 CRIMINAL ACT, 1991, S. 139-141.

organizations like WADI and the Ministry of Human Rights, which majorly consisted of surveys, statistics and interviews conducted with the women who have undergone this. It proved the widespread existence of this practice all over Kurdish Iraq.[15]

The people of Kurdish-Iraq predominantly belong to the Sunni community of Muslims and therefore, follow the tenets of the Sha'fi school of Islam. According to this school, male circumcision is considered obligatory and female circumcision is considered to be optional. However due to deep religious affiliations and cultural identities, people of Kurdish-Iraq justify this practice by stating that they are merely adhering to their ancient customs and traditions and that it is Islamic Sunnah. This practice, apart from having religious importance, is also considered as a sign of 'purity' and 'cleanliness' amongst women and is also used as a means to control their sexuality.

In 2010, the highest Muslim religious group authority for religious rulings and decisions, issued its fatwa regarding female genital mutilation. The Fatwa issued by the High Committee for Issuing Fatwas at the Kurdistan Islamic Scholars Union, does not 'completely prohibit' the practice but states that it is up to the choice of the parents provided that it is better to avoid it due to health complications.[16]

United Nations and Female Genital Mutilation

FGM/C as a violation of human rights of a woman, is covered under various international instruments. Recently, this practice has been recognized under an 'act of violence against women' and many states have been encouraged to make more laws prohibiting the same.

1. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

CEDAW, 1979 emphasizes on the preservation of human rights of women and also provides an essence for FGM as a form of violence against women.

Article 1 of CEDAW states, "*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*[17]

Here, FGM has been recognized as an act 'nullifying the exercise of human rights and fundamental freedoms." Despite the many cultural and religious ground, FGM still causes a great deal of mental and physical harm to its victims and in extreme situations, grievous harm. It furthers fuels the prejudiced ideology regarding the subordination of women, with tradition and religion as an excuse.

Article 2 of CEDAW[18] *states that states bodies shall restrict this by taking up the following:*

a) *"To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;*

b) *To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;*

c) *To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;*

d) *To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;*

e) *To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;*

f) *To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;*

g) *To repeal all national penal provisions which constitute discrimination against women."*

2. Commission on the Status of Women (CSW)

The CSW adopted a resolution named as 'Ending Female Genital Mutilation' on 10 March, 2010. It recognized female genital mutilation as an extremely harmful issue having severe consequences on the mental and physical

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[15] WADI - Association for Crisis Assistance and Development Co-operation, *Female Genital Mutilation in Iraqi-Kurdistan: An Empirical Study by Wadi,* WADI – ASSOCIATION FOR CRISIS ASSISTANCE AND DEVELOPMENT CO-OPERATION (Oct. 15, 2020, 4:15pm), http://www.stopfgmkurdistan.org/study_fgm_iraqi_kurdistan_en.pdf.

[16] Human Rights Watch, *Iraqi-Kurdistan: FGM Fatwa Positive but not Definitive,* HUMAN RIGHTS WATCH (Oct. 4, 2020, 6:45pm), https://www.hrw.org/news/2010/07/17/iraqi-kurdistan-fgm-fatwa-positive-not-definitive.

[17] Convention on the Elimination of All Forms of Discrimination Against Women, Art. 1.

[18] Convention on the Elimination of All Forms of Discrimination Against Women, Art. 2.

health of women. It recognizes this as an immense threat to women and tries to eliminate it by giving state level recommendations. It encourages the states to abolish this practice, recognize the seriousness of it and make appropriate legislations for the same as well as impose penalties.

It also emphasized the need to spread awareness about the same through education and training programs for families, communities, religious leaders, healthcare providers, legal personnel and all of the people who work towards the cause of women empowerment and their protection.

3. Universal Declaration of Human Rights, 1948 (UDHR)

The following provisions under UDHR provides for protection and empowerment of women against FGM

i. Article 3 of the UDHR[19] states that, "Everyone has the right to life, liberty and security of person."

ii. Article 5 of the same,[20] it states that, "No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment."

iii. Article 8[21] states that, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"

4. International Covenant on Civil and Political Rights, 1966 (ICCPR)

ICCPR prohibits any kinds of discrimination on the basis of sex and as per Article 2[22], it ensures an effective redressal for any person whose rights have been violated. As per Articles 7 and 17, it protects any person enduring any kind of torture, cruel, inhumane or degrading treatment and an illegal breach of privacy.[23] Articles 9 and 24 state that, "every child shall have the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."[24]

Female Genital Mutilation in India

Despite the attempts towards abandonment of the practice of female genital mutilation at the global and national levels, it is still prevalent in many parts of the world including India. In India, FGM is particularly practiced by the Bohra community which belongs to the Shia sect of the Muslim community.

The Bohra community traces its origin to Mustalis, an Ismaili Shia sub-sect formed under the rule of Fatmid in Egypt and later shifted to Yemen. It is estimated that the total number of Bohras across the world is more than a million.[25] In due course of time, the Bohra community split into factions due to disagreements that arose with regard to succession and authoritarian control. At present, there are 3 sub-sects within the community namely the Dawoodi, Alvi and the Suleimani Bohras. The Dawoodi Bohras are the largest among the other sub-sects of the Bohra community. FGM as a religious practice has been recognized and performed by all the three sub-sects. They reside in many parts of the world including, but not limited to, Pakistan, Sri Lanka, Singapore, East African countries, United Kingdom, Canada, Australia and the United States of America. In India, they are mainly found in Gujarat, Rajasthan, Maharashtra and Madhya Pradesh. The seat of power of the High priest of the Bohras, known as the Syedna Saheb or Maulana, was originally established in Yemen which was then moved to Surat where it remained for more than hundred and fifty years. At present, it is located in Mumbai.[26]

The Bohras are popularly deemed to be people with successful businesses with a strong focus on education. The women in the community are highly educated. The Bohra women are historically seen as more empowered, educated, and economically independent compared to other women in Indian society in general. What is interesting is that despite attaining high level education, the people of the Bohra community endorse the practice of FGM on girls after they reach the age of 7 years. It is a popular belief among the Bohras that by practicing *khatna* or female genital mutilation, a woman can maintain hygiene, control sexual urges, enhance her complexion and make her more earnest and spiritual. While khatna is observed as a religious obligation by the Bohras, there is no reference to it in the Quran, the Holy Book. The tradition finds its mention in the religious texts such as the Hadiz (Hadith), an authoritative source of Mohammedan law describing the words, actions and habits of Prophet Muhammed. Further, even the Sydena is a staunch

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19 Universal Declaration of Human Rights, 1948, Art. 3.
20 Universal Declaration of Human Rights, 1948, Art. 5.
21 Universal Declaration of Human Rights, 1948, Art. 8.
22 International Covenant on Civil and Political Rights, 1966, Art. 2.
23 International Covenant on Civil and Political Rights, 1966, Art. 7, 17.
24 International Covenant on Civil and Political Rights, 1966, Art. 9, 24.
25 Engineer. A.A, *The Bohras. Mumbai: Central Board of Dawoodi Bohra Community* (1980).
26 Indira Jaising, *Guide to eliminating the FGM practice in India*, LAWYERS COLLECTIVE, (Oct 19 2020, 6:46 PM), http://www.lawyerscollective.org/wp-content/uploads/2012/07/Female-Genital-Mutilation-A-guide-to-eliminating-the-FGM-practice-in-India.pdf.

supporter of this tradition which further reinforces the beliefs of the Bohras to continue such a practice.[27] According to members of the Dawoodi Bohra Women for Religious Freedom (DBWRF), a group of pro-khatna women, circumcision is a long-standing tradition in Islam dating back to thousands of years to the time when the Prophet Abraham accepted the commandments of God and was asked to purify himself. For many women on the pr-khatna side, circumcision is a tradition equally applicable to both sexes. However, anti-khatna feminists argue that this is not an issue about equality but of interfering with genitals of girls at tender ages.[28]

The social control among the members of the Bohra community is immense. Members are put under constant pressures to abide by religious practices. Religious leaders frequently resort to social boycott, excommunication or ostracism of the rebel elements to ensure obedience. The members who revolt are subjected to banishment from the community and are not allowed to participate in any social or religious activities, marriage of their children into families of other members of the communities is disallowed and they are prohibited from being buried in community burial grounds. Such catastrophic consequences prevent women from raising their voices against the practice of khatna or FGM leading to a rise in the number of instances of FGM.

Law on FGM in India

While female genital mutilation has been internationally recognised as a practice harmful to the body of young female, there is no explicit law in India regulating this gruesome practice. An attempt was made to curb the practice of FGM among the Dawoodi Bohra community in 1949 with the passing of the Bombay Prevention of Excommunication Act. Under the provisions of the Act, the right to worship in religious places, right to property and the right to perform any rituals of anti-khatna members were protected. No person could be expelled from his or her religious creed, caste or subcaste and any such excommunication was declared to be invalid. However, after the coming into force of the Constitution of India, the 51stSyedna, Taher Saifuddin, challenged the constitutional validity of this Act. Consequently, in Syedna Taher Saifuddin Saheb v. the State of Bombay,[29] the Supreme Court declared excommunication to be a legitimate and valid practice of a community protected under Article 26 of the Constitution. The reformists Bohras filed a review petition against this judgement but the matter still remains pending. Amidst the prolonged legal proceedings before the Court, the government of Maharashtra passed the Maharashtra Prohibition of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016. This Act penalised the acts of social boycott of individuals or families by members of any community or the by the caste panchayats. Any such behaviour by any person was deemed to be an offense punishable with imprisonment which may extend up to seven years or with a fine that may extend to five lakh rupees or both. The Act applied uniformly to all communities, including the Bohras. However, these legislations have failed to curb the practice as the fear of excommunication is inherent within them and they would not act against the norms of the community. It is this terror that makes the parents in the Bohra community[30] indulge in such practice which is widely supported by the Syedna.

In absence of any law directly dealing with the subject of FGM and its penalisation, any person can be tried under the existing general laws pertaining to injury to the body of a person.

Performance of FGM on a female can lead to excessive bleeding or haemorrhage, genital tissue swelling, problems in the healing of wounds, injury to surrounding genital tissue while in the long term, it can cause urinary, vaginal, menstrual and sexual problems and in certain extreme cases, it can even lead to death of the female.[31] Depending on the consequences, a person performing such an activity can be prosecuted under different provisions of the Indian Penal Code (IPC)[32] particularly under chapter XIV, offences against human body, for causing hurt or grievous hurt of varying degrees under Sections 319 to 326 of the IPC. According to R.K. Raghavan, former Director of the Central Bureau of Investigation, when a complaint alleging FGM is received by a police officer, in the absence of any specific provision dealing with the same, the police are obligated to register a case under Section 326 of the IPC.[33] Section 3 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) that addresses penetrative sexual assault by

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[27] Daftary, F, *A Modern History of the Ismailis: Continuity and Change in a Muslim Community (*2010*).*

[28] Lakshmi Anantnarayan, Shabana Diler, Natasha Menon, *The Clitoral Hood A contested site*, (Oct 19 2020, 6:59 PM), https://www.wespeakout.org/site/assets/files/1439/fgmc_study_results_jan_2018.pdf.

[29] Syedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853.

[30] Supra, n.28.

[31] World Health Organisation, *Female Genital Mutilation,* WORLD HEALTH ORGANISATION, (Oct 19 2020,07:15 PM), http://www.who.int/mediacentre/factsheets/fs241/en/.

[32] Indira Jaising, *Guide to eliminating the FGM practice in India*, LAWYERS COLLECTIVE, (Oct 19 2020, 6:46 PM), http://www.lawyerscollective.org/wp-content/uploads/2012/07/Female-Genital-Mutilation-A-guide-to-eliminating-the-FGM-practice-in-India.pdf.

[33] Rasheeda Bhagat, *India: Ban this barbarous practice*, STOP FGM MIDEAST, (Oct 19 2020, 7:20 PM), http://www.stopfgmmideast.org/india-ban-this-barbarous-practice/.

any person on any child defines it as, inter alia, an insertion of any object into the vagina of the girl. It has been accepted by the Courts that penetration in sexual offences need not be complete penetration. In fact, Explanation 1 of Section 375, IPC categorically states that the term vagina includes labia majora. FGM/C, which requires insertion of a sharp object into the vagina of a child, may be covered under Section 3, POCSO Act read with Explanation 1 of section 375 IPC.[34] Under the criminal law, a person responsible for FGM practiced upon any women can only be made punishable under the provisions of the Indian Penal Code dealing with injury to body. It is pertinent to note that punishment under these sections does not justly correspond to the gravity to the offence that is female genital mutilation.

Religious freedom and female genital mutilation

While it is true an individual has the freedom of conscience and the right to practice, propagate and promote any religion of his choice being his fundamental right guaranteed under the Constitution of India,[35] but the extent of such religious freedom needs to be determined so as to initiate steps towards banning of this gruesome practice. Article 25 itself lays down that such religious practice is subject to public order, morality or health. Therefore, the right to practice any religion is not an absolute right and can be restricted on grounds of health and morality. The cutting of a female's genitalia without any professional help solely in the interest of religion is barbaric and illogical. The practice of FGM/C is often sought to be justified on grounds of protecting women from sexual desires and on grounds of religious freedoms of communities. A victim of FGM may face long-term health complications such as scarred tissues, menstrual issues, complications during child birth and in certain cases, death. The only explanation that the proponents of this practice can provide is that the practice has religious affiliations that makes the female pure and clean. It is an established precedence that the non-essential religious activities can be regulated and that protection under Article 25 does not extend to non-integral aspects of a religion.[36] The State thus, has the power to regulate non-essential religious affairs that are against public order, morality and health.

Article 25 is also subject to other fundamental rights laid down in Part III of the Constitution. FGM is not protected under Art. 25 as it is violative of Articles 14, 15 and 21 of the Indian Constitution. While, Article 14 provides for the right to equality and equal protection of laws, Article 15 prohibits the state from making any discrimination on the basis of religion, sex, race, caste, creed etc. Article 21 expressly lays down that no person shall be deprived of their right to life and personal integrity.

The Supreme Court has played a vanguard role in protecting rights of women and in eliminating gender biases. It has been held that the right to life encompasses within its scope the right to bodily integrity.[37] This can also be extended to mean that a woman has a right to bodily integrity and as such, no person can violate her bodily integrity. Further, every individual has a right to privacy[38] as well as a right to sexual orientation.[39] Therefore, however an individual chooses to live is his own choice and the same has been protected by the Constitution. A woman has a right to privacy and no one can invade her bodily integrity[40] especially for commission of acts that are as unjust and unfair as FGM.

There is no law in India expressly dealing with the practice of FGM however, in 2018 a writ petition was filed before the hon'ble Supreme Court by one Sunita Tiwari[41] seeking a ban on FGM in India. It has been alleged that the practice is inhuman and violative of Article 21 of the Constitution. The matter has been referred to a higher Bench but the Court has decided that FGM is a cultural and not a religious issue.[42]

Conclusion

Female genital mutilation or cutting is the partial or removal of external female genitalia or other injury to the female genital organs for non-medical reasons. As discussed above, this causes varied health threats, scarring both mental and physical self of the female. In majority of cases, this practice is conducted upon young girls who have little or no knowledge about what the practice is and its adverse effects. The proponents of the practice attach religious significance to it, it is alleged that the practice is essential for hygiene and to control the female's sexuality.

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34 Supra, n. 34.
35 INDIAN CONST., Art 25.
36 Dr. M. Ismail Faruqui v. Union of India, AIR 1995 SC 605.
37 ADM Jabalpur v. Shivkant Shukla, 1976 AIR 1207.
38 Justice K.S. Puttaswamy and ors. v. Union of India and ors., (2019) 1 SCC 1.
39 Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.
40 State of Maharashtra v. MadhulkarNarain, AIR 1991 SC 207.
41 Sunita Tiwari v. Union of India, 24 September 2018.
42 HT Correspondent, *Female genital mutilation petition pending before Supreme Court*, HT, 15 Nov 2019.

Not only can FGM/C provide physical protection by creating a barrier to intercourse but it is also perceived as a way to cleanse a girl from impure thoughts and desires.[43] This not only invades into her right of bodily integrity but also her right to choose her sexuality and her partner. In Lata Singh v. State of UP,[44] the Court recognised the right of a female to live or marry any person she likes. This can also be interpreted to mean that the Courts have recognised the rights of females to decide her sexual partner. It is only cruel and unfair to restrict a person's natural tendencies by cutting off her genitalia.

The need of the hour is to prevent this inhumane practice by introducing legislations and penalising the perpetrators with substantial punishments so as to create a deterrent effect in the society. FGM has been acknowledged by the Apex Court itself as a practice associated with the community and not religion. Regardless of its nature, it is important that Bohra community bows down to the morality, equality and non-discrimination that is inherent in the Constitution and stop this practice.

The first and the foremost step in this regard would be to bring out a legislation dealing with the matter. It is also important to create widespread awareness and sensitisation on the issue so as to make these women aware of there rights and the remedies available. Helplines should be established that would provide immediate relief to a woman involved in any such situations. Since in most cases, it is the family members that perform FGM on women in their house, it is absolutely integral to encourage them to raise voices and to provide rehabilitation facilities in case they are excommunicated. The families should also be made to realise the consequences of their actions and attempts should be made to gradually remove the fear of 'social outcast' amongst the members of the families.

This is an aspect of human rights that requires collective efforts mainly including academics, healthcare professionals, advocates and legal personnel, religious and community leaders, activists, various organizations and many more. It requires a rational study of all the complex beliefs, significance and history of its presence. For this practice to be completely eradicated, there is a need for a holistic and a sensible approach and the need for global action.

Book Review

'Who Owns You? The Corporate Gold-Rush to Patent Your Genes Author : David Koepsell Publisher : Wiley-Blackwell Year : 2009, ISBN: 778-1-444-30858-7

Hardik Daga*

Genes, a product of nature may be patentable in some jurisdictions but should not be- This is the central argument of the book. The Patent Act, 1952 of the United States in addition with the landmark decision of the Supreme Court has allowed exclusive monopoly rights to the first inventor for selling his/her new, useful, and non obvious invention or improvement upon an existing invention. Patents per se do not protect ideas but the use of those ideas in the form of an invention. Genes, a popular subject matter of inventions lately have also been allowed to be patented upon the fulfillment of certain patentablity criteria as is laid down by the Patent Act, 1952. This practice of allowing patent over genes is now acceptable legally in a number of jurisdictions. Even so, the author has argued that genes are a product of nature and exist in living organisms naturally. Thus the mere act of isolation and purification of gene does not make it patent worthy.

The introductory chapter introduces the readers to the realm of gene patenting by discussing the basic foundations of molecular biology. The title of the book sets a provocative tone and sketches a scenario wherein humans have been equated to a robot whose parts and portions are all patented and usage of any part without the authorization of the patent owner will lead to infringement in the form of a patent suit. This is followed by a less hypothetical scenario wherein the so-called Elephant Man whose physical deformity was exploited by others for economic benefits. This is done on purpose to propose the very argument as to how moral is it to patent genes.

It is evidently clear that the book provides a historical overview of findings which have defined DNA as the basic unit of life which stores information in a living organism. Beginning with Mendel's empirical means for determining the statistical truth of inheritance for certain traits for instance colour, much before the concept of genetics came into being to be understood. The author also draws attention to the fact that there is an intertwined relation between environment and genes as one cannot exist without the other.

With introduction to the slippery slope which is the process of patenting of genes the author arrives to the book's core business. The same is done by providing the well expanded examples that form the legal foundations of the patentability of living organism and, of genes such as Diamond vs. Chakrabarty, Moore vs. the Regents of the University of California which leads to the current situation in which there exist no obvious administrative or legal prohibition against patenting of human genes, tissues or any other products, although, the author has argued that the scenario is strictly and precisely regulated. In this manner the reader of the book gets a good amount of information which one requires on patenting of genes. For instance, such patents usually do not cover the genes in their natural form and thus the patent is allowed in isolated or purified form of the gene which is considered a new composition of matter.

In conclusion it may be stated that this book presents an excellent introduction to the main topics and concepts related to gene patents. It is also very well written and researched and also has already had an impact within the academia as is evidenced from the number of times it has been reviewed. The topic of the book is highly relevant considering the increasing number of patents on genes and the expanding horizon of patenting scenario. The author uses strong, provocative and normative tone while addressing the topics. The author has included technical, legal and moral perspectives to understand gene patenting and address the relevant issues. All in all this is a must read for those looking to understand the basics of gene patenting.

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Book Review

Whither Indian Judiciary (2018)
Author : Markandey Katju
Publisher : Bloomsbury India Year : 2018
ISBN : 13-978-9386141125

Harsh Kumar*

Justice Katju is belonging to a family, in which most of the members are either lawyers or judges, So, having such an environment of litigation in 1970s and a judge up to supreme court of India until 2011. So, this book is the compilation of all the experiences from both the sides in court as from both the sides in court as a lawyer as well as a judge. This book also gives detailed views over historical aspects, working environment and functions of court system. The book starts with speech of justice Thakur delivered in 2016 in the conference jointly organized for chief Ministers and chief Justice of the high courts, in which the concern over more than 3 crore pending cases was raised because of not having enough men force and resources as well as drawbacks litigation part. While stating the practical problems in the courts, Mr. Katju has been very conscious to make the balance between the criticism of the system on the one hand and keeping the judiciary on higher footing so that people don't lose hopes.

Justice Katju has made a persona over the years that he is a person who speaks his mind. He has reflected that quality in his various judgments where he passed the judgements for public welfare and welfare of society. Justice Katju in this book has been very critical regarding the imposition of western ideas and principles of laws on the backward Indians. He has illustrated those ones as fundamental rights from USA, Directive principles from Ireland etc. he has questioned their suitability of application in Indian Scenario.

Throughout this book, Mr. Katju has tried to corelate the problems in the court system through his personal experience of events. He has questioned the appointment system of judges as by referring one personal instance in which he was being pressurized by political leaders to choose the judges of their choice. Mr. Katju refers rule of law. Several times in the book but he fails to corelate it with the late delivery judgement and its impact in degradation of belief system of people in the judiciary.

In this book Mr. Katju has raised several problems and supported his arguments by giving example of china that notwithstanding this fact china is bigger than India both in population as well as in area still china has successfully maintained the homogeneity in the skirty. But he failed to explain the functions of judiciary of system. So, the argument is not based by thoroughly investigated information. Mr. Katju also criticized the use of ages old system for imparting justice & that of several laws which are of pre-independence time period which are still imposed on the Indian people. All these have been told responsible factors for making our system lethargic.

Since it is considered that judiciary is the third pillar on which democracy stands. Mr. Katju expresses this concern that if judiciary would not act properly, a democracy ruling through laws based on the constitutional principles would be a far dream. He has also criticized the collegium system through his personal experienced instances. He suggests in the book that efforts must be made that judiciary is kept free from the pressure from external or internal factors making it very independent.

Throughout this book, Mr. Katju has tried to raise all the possible problems which is being by Indian judiciary & court system in the current scenario. And after suggesting ways he has hoped betterment & improvement in the justice system in India. But in this book, Justice Katju has not given the answers thoroughly of the question, “whither is Indian judiciary?"

*Assistant Professor, School of law, IMS Unison University, Dehradun

Case Comment

Common Cause (A Regd. Society) v. Union of India, AIR 2018 SC 1665

Sarita*

The five-judge constitution bench of supreme court granted legal recognition to medical directives or living wills. It also reiterates the legal recognition of the right to "passive euthanasia" and draws upon article 21 of Indian Constitution interpretating that the right to life includes right to die with dignity.

In this case, a five-judge constitution bench of supreme court unanimously held that the right to die with dignity is a component of the right to life under Article 21. In doing so, there is no requirement of a legislation to legalise passive euthanasia. The right of the individual to die with dignity takes precedence over the interest of state in preserving the sanctity of life.

The judgement overruled the finding of the Aruna Shanbaug judgement i.e mechanism of passive euthanasia can only be provided for through legislation. The court has left the door open for an appropriate legislation for passive euthanasia with the judgement to hold forth in the interim.

The ruling stems from a petition filed by an NGO "common cause" who had approached the court seeking a direction for recognition of "living will" and contended that when a medical expert said that a person afflicted with terminal disease had reached a point of no return then he should be given the right to refuse being put on life support.

A living will is a written document by way of which a patient can give his explicit instructions in advance about the medical treatment to be administered when he or she is terminally ill or no longer able to express informed consent including withdrawing life support system if a medical board declares that all life saving medical options have been exhausted. The living will would specifically instruct next of kin and medical professionals to not revive or allow for passive euthanasia on the basis of advance directives no longer need to live in fear of legal action against them. Doctors allowing passive euthanasia on the basis of advance directives no longer need to live in fear of legal action against them.

The court itself has provided guidelines for living will. These guidelines include who can execute the will and under what conditions can the medical board endorse passive euthanasia. Advance directives must be clear, specific and unambiguous and can only be issues by adults of sound minds with informed consent. Court has mandated that the written document must be signed by at least two persons. The advance directive would also require the signature of judicial magistrate who has to satisfy himself that all the requirements have been fulfilled.

Advance directives can be acted upon by a doctor with due regard to and after affirmation of the patient's terminal or vegetive state. Doctors are also required to verify the authencity of living will from the judicial magistrate before acting upon the same. The doctor must then inform the guardian or close relatives of the patient and apprise them of the status of the patient. Thereafter the hospital where the patient is admitted is required to constitute an appropriate medical board to assess the patient condition and provide their preliminary opinion. If the preliminary opinion is that the advance directive needs to be acted upon or not. If the second medical board concurs with preliminary opinion, then the same is then forwarded to the judicial magistrate of that jurisdiction to confirm the same. The magistrate then must visit the patient and give his final approval for execution of advance directives and approve the same. The patient however has the power to revoke advance directives anytime before it is acted upon.

The Supreme Court has extended the above mechanism even to cases where there are no advance directives, thus providing for "passive euthanasia" in the absence of living will.

The judgment no doubt has certain limitations. For instance, it has not been able to resolve the crisis in relation to active and passive euthanasia, which has adverse implications for the ethical obligations of a healthcare provider to her/his patients.

The four "key criteria"for determining "legal and ethical permissibility"invoked in the judgment i.e freedom from suffering, the ability to exercise the right to self-determination under Article 21, the International Covenant on Civil and Political rights and the applicability of sections 76, 79, 81 and 88 of the Indian Penal code which are about good faith protections are inconsistently applied to passive and active euthanasia to justify the legal permissibility of the former and impermissibility of

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the later. It may have been possible for the apex court to opt for a consistent position on passive and active euthanasia and qualify it by saying that the larger context of India did not give the court sufficient confidence to make active euthanasia legal at the present time.

The proposed mechanism for developing and administering or implementing advance directives is too cumbersome for it to be effective in practice. The Shanbaug judgement also required a fairly complex process involving approval from a high court of the decision to discontinue life-saving system. A review of litigation after this judgement shows that it has been invoked only once, in a case that did not involve a terminally ill patient. This implies that decisions in such cases continue to be made outside the courts post Shanbaug judgement. With processes being made more cumbersome in the Common Cause judgement, even experts doubt the usefulness of the judgement.

Also, the judgement has failed to conceptualize the right to die debate taking I to consideration the existing inequity in access to healthcare. The Common Cause judgement missed the opportunity to at least make a reference to the fact that a large number of people in India are forced a undignified death due to lack of resources to access necessary care. As a result, judgement responds, it at all, to the needs of only of a small segment of the population which may be able to access care a situation such as when a patient is in a permanent vegetative state.

It is critical significance that the Bill of 2016 [medical treatment of terminally ill patients (Protection of Patients and Medical Practitioners) Bill 2016] pending before parliament be revived immediately seeking deeper involvement of the people at large, reconsidering the misleading distinction between active and passive euthanasia, and pushing the govt. to invest in universal access to health care and making peoples right to equitable and quality care a justiciable right.

In the absence of a systematic overhaul the Common Cause judgement status to be either potentially misused or remain ineffective.

Case Comment

In Re: Distribution of Essential Supplies and Services During Pandemic [Suo Motu Writ Petition (Civil) No. 3 of 2021] Date of Decision 22 April, 2021

Dr. Shoaib Mohammad*

The Court while manifesting perfect example of judicial activism issued several directions related to Covid management in this suo motu action. The focus of the directions was on vaccine capacity, its disbursal, pricing and potentiality of compulsory licensing. The Central Government apprised the Supreme Court of its constitution of a National Expert Group on Vaccine Administration for COVID-19 on 7 August 2020 and operationalization of the immunization programme from December 2020. It was further stated that by the government as of 26 April 2021, over 13.5 crore vaccine doses (approx. 9% of the Indian population) have been administered to Frontline Workers, Healthcare Workers and persons who are 45 years of age and higher in the 3 Phases of immunization.

It was submitted that these vaccines have been centrally procured and administered free of cost to the abovementioned groups who were identified based on specific vulnerabilities and a higher mortality rate on account of the COVID-19 infection.

On 20 April 2021, the Central Government rolled out a revised strategy of COVID-19 vaccination for all persons over 18 years of age, with effect from 1 May 2021.This new age group consists of approximately 59 crore people, which would require 122 crore vaccine doses under the current two-dose vaccine regime of Covishield and Covaxin which have been authorized for emergency use in India. This revised strategy enables vaccine procurement by State Governments and private hospitals, purportedly for accelerating the immunization programme which is critical to curb the pandemic.

In response to the query of this Court on the necessity of the revised strategy, the Central Government furnished the following justification: "During the ongoing consultation with the states, demands/concerns were raised by the various State Governments to expand the scope of vaccination drive to include the beneficiaries beyond the priority groups identified by NEGVAC as approved by Central Government. As a matter of co-operative federalism, it was felt necessary to allow play in the joints and to de-centralize vaccine procurement and to enable the States to expand vaccination drives to other groups between the age of 18-44 years.

However, since the priority group as identified by Union of India (which had more vulnerability) was not fully vaccinated, it was considered imperative to carry out two drives separately i.e. in a decentralized manner to achieve higher efficiency and reach. Thus the States were given a participatory role to undertake the procurement of vaccine and for vaccination of any other 'groups identified drive' for the 18-44 age group. This would also keep the existing drive of critical groups unobstructed as the 50 percent of the vaccines procured through the GoI channel would continue to support and provide free of cost vaccine to the most vulnerable age groups of 45 years plus in the country health care workers and frontline worker identified by the Union of India who were entitled to get vaccinated under Phase II."

In response to the queries of the Court on how the supplies of vaccines will be allocated between various states if each State Government is to negotiate with vaccine producers, the Central Government has furnished the following justification in order to iron out the inequities between States:

"For the remaining 50% non-government of India channel, the states and the private hospitals are free to procure vaccine for 18-44 years population, however, to have an equitable distribution of vaccine across the country, states have been allocated the available vaccine quantity in proportion to the population between 18-44 years of age of the respective state so as to ensure equitable distribution of vaccine as there is a possibility of some states having better bargaining power due to geographical advantage etc."

During the course of the hearing, this Court has expressed its reservations prima facie on the validity of the revised policy under which the states and private hospitals are to procure 50% of the vaccines in order to immunize persons in the 18-44

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years age group. For one thing, even this age group would consist of persons who suffer from vulnerabilities. Once the vaccination programme has been opened up for persons other than the 45 plus age group, it would not be logical to impose the obligation to source vaccinations for the 18-44 age group on the State Governments.

This will, inter alia, leave each State Government to negotiate supply schedules, delivery points and other logistical arrangements with the manufacturers. At present, there are only two manufacturers for the authorized vaccines (with one other vaccine - Sputnik V, in the process of manufacture). The available stock of vaccines is not adequate to deal with the requirements of both the categories.

The Central Government must take the responsibility of providing guidance to every State on the quantities to be supplied to each State, the vaccine(s) being allocated, the period of delivery, and the number of persons who can be covered for vaccination, among other details. Leaving the State Governments to negotiate directly with manufacturers will produce chaos and uncertainty. The object of vaccinating the 18-44 age group cannot be achieved in the absence of stocks being available.

Besides the above issues, the Central Government is directed to clarify the following issues in order to ensure the protection of the fundamental rights to equality and to life and personal liberty for all persons who will be eligible to take the vaccine from 1 May 2021:

(i) Whether the Central and State Governments have introduced any initiatives for ensuring the immunization of persons who do not have access to digital resources as otherwise the mandatory requirement of registration over the Co-WIN digital portal for persons in the age group of 18-44 years will deprive a large class of citizens of vaccination;

(ii) Since the Central Government commits to vaccinating persons over 45 years, free of cost, in view of their vulnerability, whether walk-in facilities for vaccination will continue for these persons after 1 May 2021;

(iii) Whether the Central or State Governments propose to undertake targeted vaccination drives for persons who are providing on-ground assistance during the second wave of the pandemic - such as crematorium workers, who were not considered as Frontline or Healthcare workers for Phase 1 of the vaccination drive;

(iv) Whether, and if so what, steps being undertaken by INYAS, the nationwide mass awareness campaign for COVID-19 vaccination, for ensuring outreach in rural areas and socio-economically underprivileged sections of society including the possibility of using mobile vans, vehicles and railways to vaccinate such people as well as those living in remote areas, near their doorsteps so as to minimize their travel and potential infection with COVID- 2019. Efforts must also be made that a lack of an identity proof does not create a hindrance in the process of immunization of all individuals, specifically, the underprivileged;

(v) Whether the Central government will revisit its policy by procuring 100% of the doses which can then be equitably disbursed to the State Governments; and

(vi) Since the vaccine administration is now to be a shared responsibility of the Union and the States, the Central Government and the State Governments shall provide- (a) a breakup of the current and projected availability of vaccine stocks for the next 6 months; and (b) a timeline for achieving immunization of the newly eligible 59 crore persons who are aged between 18-44 years.

These issues are of vital importance, since vaccination appears to be one of the most important strategies to combat further spread of the pandemic, and would also provide a measure of security and assure the people about their health and well-being.

Vaccine pricing

Since the advent of the revised rollout strategy with effect from 1 May 2021, only persons aged 45 years and above are guaranteed a free vaccine. The reason of higher efficiency and speed has been furnished as a justification for enabling State Governments and private hospitals to directly procure vaccines. We have come to understand that a few State Governments have committed to free immunization under the revised strategy. On specific enquiry on the rationale in regard to the differential pricing for procurement by the Central Government and the State Governments, the Central Government has furnished the following justification:

"It is submitted that liberty to decide prices on arm's length basis by and between the State Government and hospitals is based on the concept of creating an incentivized demand for the private vaccine manufacturers in order to instill a competitive market resulting in increased production of vaccines and market driven affordable prices for the same.

Simultaneously, the free vaccination by the Central Government for above referred priority age groups would continue and it is always open for each State Government either to offer free vaccination or subsidise it for the additional identified earmarked priority group identified by the State Governments [age 18-44 years].

The new strategy was devised after multiple Inter- Ministerial teams were deputed by Govt. of India to various manufacturing sites to understand their requirement and to provide pro-active and customized support to significantly augment vaccine production capacities [which is the prime priority of the Central Government at this juncture], in the form of advance payments, facilitating more sites for production etc.

This approach, on the one hand, incentivizes vaccine manufacturers to rapidly scale up their production and on the other hand, it would also attract new vaccine manufacturers. It would make pricing, procurement and administration of vaccines more flexible and competitive and would further ensure augmented vaccine production as well as wider availability of vaccines in the country."

Prima facie, there are several aspects of the vaccine pricing policy adopted by the Central government which require that policy be revisited. All vaccines, whether in the quantity of 50% purchased by the Central Government or the remaining 50%, are to be used for vaccinating citizens. The end use is the same. The Central Government proposes to purchase half of the total quantity falling within its fifty per cent quota while for the rest, the manufacturers would declare in advance the price to be fixed, allowing the State Governments to negotiate their terms.

As of date, the manufacturers have suggested two different prices, a lower price which is applicable to the Central Government and a higher price which is applicable to the quantities purchased by the State Governments. It is likely that compelling the State Governments to negotiate with manufacturers on the ground of promoting competition and making it attractive for new vaccine manufactures will result in a serious detriment to those in the age group of 18 to 44 years, who will be vaccinated by the State Governments.

The social strata of this age group also comprises persons who are Bahujans or belong to other under privileged and marginalized groups, like many in the other population age groups. They may not have the ability to pay. Whether or not essential vaccines will be made available to them will depend upon the decision of each State Government, based on its own finances, on whether or not the vaccine should be made available free or should be subsidized and if so, to what extent.

This will create disparity across the nation. The vaccinations being provided to citizens constitute a valuable public good. Discrimination cannot be made between different classes of citizens who are similarly circumstanced on the ground that while the Central government will carry the burden of providing free vaccines for the 45 years and above population, the State Governments will discharge the responsibility of the 18 to 44 age group on such commercial terms as they may negotiate.

Prima facie, the rational method of proceeding in a manner consistent with the right to life (which includes the right to health) under Article 21 would be for the Central Government to procure all vaccines and to negotiate the price with vaccine manufacturers. Once quantities are allocated by it to each State Government, the latter would lift the allocated quantities and carry out the distribution. In other words, while procurement would be centralized, distribution of the vaccines across India within the States/UTs would be decentralized.

While we are not passing a conclusive determination on the constitutionality of the current policy, the manner in which the current policy has been framed would prima facie result in a detriment to the right to public health which is an integral element of Article 21 of the Constitution. Therefore, we believe that the Central Government should consider revisiting its current vaccine policy to ensure that it withstands the scrutiny of Articles 14 and Article 21 of the Constitution.

In light of the justification offered for non-interference in the prices that are set by the manufacturers, irrespective of their variance from the prices for procurement of the Central Government, we would like to seek the following clarifications:

(i) Whether any other alternatives were considered by the Central Government for ramping up the immunization drive in India, particularly in light of its initial strategy of a centralized free immunization drive;

(ii) The methodology which the Central Government was envisaging to procure adequate vaccine doses for the population prior to the revised strategy which was announced amidst the second wave of COVID-19; and

(iii) Whether any studies and figures were relied upon in order to arrive at the conclusion that decentralized procurement would spur competitive markets to incentivize production and eventually drive down the prices of the vaccines. Whether these studies are of relevance in a pandemic when vaccines are a scarce and essential commodity which is being produced by a limited number of manufacturers for a limited number of vaccines.

The Central Government has submitted that the Finance Ministry has sanctioned a credit of Rs 3000 crores for Covishield manufacturer - Serum Institute of India20 and Rs 1500 crores to Covaxin manufacturer - Bharat Biotech. Additionally, another Rs 65 crores is stated to have been provided to Bharat Biotech's production center at Bangalore. In bolstering its argument for augmentation of vaccine production, the Central Government has provided the Court with further information on advance funding (of unspecified amounts) that is being provided to R&D and manufacturing facilities.

In light of this investment, the Central Government should consider revisiting its policy bearing in mind what has been stated above, the following issues and other relevant information:

(i) Whether, and if so, the Finance Ministry or any other funding organization of the Government of India have made any grants/sanctions to Bharat Biotech and the SII in the past, like the current infusion of Rs 1500 crores and Rs 3000 crores, respectively. If so, breakup and corelation with the total cost of development and production of the two vaccines;

(ii) Whether the current procurement prices for the Central Government account for infusion of funds for production, infrastructure and other aid provided by it. If so, the basis on which the same benefit is denied to procurement by State Governments which equally service the needs of citizens; and

(iii) The full extent of direct and indirect grant/aid provided for research, development and manufacture of all existing vaccines and future vaccines that it proposes to authorize. For instance, the Central Government has submitted in its affidavit that the Department of Biotechnology has facilitated the trials for Sputnik V.

Potentiality of Compulsory Licensing for vaccines and essential drugs

Several drugs that are at the core of the COVID treatment protocol are under patents in India including Remdesivir, Tociluzumab and Favipiravir. On 2 October 2020, a communication was issued by the UOI, along with South Africa, to the Council for Trade-Related Aspects of Intellectual Property which stated that there were several reports about intellectual property rights hindering timely provisioning of affordable medical products to patients. The communication also reported that some members of the World Trade Organization had carried out urgent amendments to their national patent laws to expedite the process of issuing compulsory/government use licenses.

In India, the patent regime is governed by the Patents Act, 1970, Section 92 of which envisages the grant of a compulsory license, inter alia, in circumstances of national emergency and extreme urgency. Once a declaration of national emergency is made, and the relevant patents notified, any person interested in manufacturing the drug can make an application to the Controller General of Patents who can then issue a compulsory license. The patentee would be paid a reasonable royalty as fixed by the Controller General of Patents.

Further, under Section 100 of the Patents Act, the Central Government can authorize certain companies to use any patents for the "purpose of the government". Indian companies can begin manufacturing the drugs while negotiating the royalties with the patentees. If the Central Government or its authorized company is not able to reach an agreement with the patentee, the High Court has to fix the reasonable royalty that is to be paid to the patentee.

Another alternative is for the Central Government to acquire the patents under Section 102 from the patentees. If the Central Government and the patentee is not able to reach a consensus on the price of the patents, it is up to the High Court to fix the royalty. Additionally, under Section 66 of the Patents Act, the Central Government is also entitled to revoke a patent in the public interest.

The utilization of these flexibilities has also been detailed in the Trade Related Aspects of Intellectual Property Rights Agreement. Even as TRIPS obliges countries to ensure a minimum level of patent protection, it creates a permissive regime for the carving out of exceptions and limitations that further public health objectives. This is evident from a conjoint reading of Articles 7, 8, 30 and 31 of TRIPS. Article 7 outlines the objectives of the TRIPS as being to ensure the effective enforcement of intellectual property in a way that, inter alia, is 'conducive to social and economic welfare'. Article 8 gives member countries the freedom to take measures that protect public health and nutrition.

Article 8(2) allows for the taking of TRIPS-compatible measures aimed at preventing the abuse of intellectual property rights. Articles 30 and 31 deal with exceptions to the rights of patent owners, by allowing grant of compulsory licenses. It leaves countries with significant breathing space to determine how the compulsory licensing or government-use levers can be triggered. While such determinations must be made on the individual merits of each case, the aforesaid caveat does not apply when the compulsory license grant is for national emergency, extreme urgency or public non-commercial use.

According to the 2001 Doha Declaration, TRIPS should be interpreted in a manner supportive of the right of members to protect public health and to promote access to medicines. It recognizes the right of WTO members to use the full extent of the TRIPS flexibilities to secure this objective. Para 5(b) of the Doha Declaration provides the freedom to each member to grant compulsory licenses and to determine the grounds on which the licenses are granted. Para 5(c) leaves it up to each nation to determine what constitutes a national emergency or extreme urgency.

In the context of the COVID-19 pandemic, we note that several countries such as Canada and Germany have relaxed the legal regimes governing the grant of compulsory licenses. Whether and if so, the extent to which these provisions should be utilized is a policy decision for the Central Government. We have flagged the issue for its consideration. We have only outlined the legal framework within which the Central Government can possibly consider compulsory licensing and government acquisition of patents.

The Central Government is free to choose any other course of action that it deems fit to tackle the issue of vaccine requirements in an equitable and expedient manner, which may involve negotiations with domestic and foreign producers of vaccines. We clarify that it is up to the Central Government to choose the best possible measures it can undertake during the current crisis keeping in mind that public interest is of paramount importance.

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EDITORIAL POLICY

PRELUDE

Pragyaan: Journal of Law is a flagship law journal of School of Law, IMS Unison University and is a bi- annual peer-reviewed journal, first published in 2011. It seeks to promote original and diverse legal scholarship in a global context. It is a multi-disciplinary journal aiming to communicate high quality original research work, reviews, short communications and case report that contribute significantly to further the knowledge related to the field of Law. The Editorial Board of the Pragyaan: Journal of Law (ISSN: 2278-8093) solicits submissions for its Volume 11 Issue 1 (June 2021). While there are no rigid thematic constraints, the contributions are expected to be largely within the rubric of legal studies and allied interdisciplinary scholarship.

CONTRIBUTION

We seek contributions in the form of:

1. Articles (Maximum 8,000 words inclusive of footnotes and Abstract)
2. Essays (Maximum 4,000 words inclusive offoot notes)
3. Case Comment/Legislative Critique & Notes (Maximum 3,000 words inclusive of footnotes)
4. Book Review (Maximum 2,000 words inclusive of footnotes) besides other forms of scholarly writing

   ? Place tables/figures/images in text as close to the reference as possible. Table caption should be above the table. Figure caption should be below the figure. These captions should follow Times New Roman 11point.

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2. Main Text:

   Title of the paper should be bold 16 point, and all paragraph headings should be Bold, 12point.

3. Cover Letter:

   First page: It should include (i) Title of the Paper; (ii) Name of the Author/s ;Co-authored papers should give full details about all the authors; Maximum two author permitted (iii) Designation; (iv) Institutional affiliation; (v) Correspondence address. In case of co-authored papers First author will be considered for all communication purposes.

   Second page: Abstract with Key words (not exceeding 300 words).

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5. Plagiarism Disclaimer:

   Article should contain a disclaimer to the effect that the submitted paper is original and is not been published or under consideration for publication elsewhere. (Annexure I) The signed document must be e- mailed/ posted to The Editor along with manuscript.

6. Citations:

   All citations shall be placed in footnotes and shall be in accordance with format specified (Annexure II). The potential contributors are encouraged to adhere to the Appendix for citation style.

7. Peer Review:

   All submissions will go through an initial round of review by the editorial board and the selected papers will subsequently be sent for peer-review before finalization for publication.

All Correspondence/manuscripts should be addressed to:

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Annexure I

PLAGIARISM DISCLAIMER

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PRAGYAAN-JOL - CITATION STYLE

CASES

IN MAIN TEXT:

Jassa Singh v. State of Haryana

IN FOOTNOTE:

Jassa Singh v. State of Haryana, (2002) 2 SCC 481

The full citation should be provided in the footnote even if the case name has been mentioned in full in the main body.

Government to be written in full.

Example:KesavanandaBharati v. State of Kerala ; M.C. Mehta v. Union of India.

SHORTENED FORM

If the same case is going to be cited subsequently, the full citation used the first time should be followed by the shortened form by which the case will be referred to subsequently, in inverted commas, and in square brackets.

Example: M.C. Mehta v. Union of India, [1997] 2 SCC 353 [Taj Trapezium case] Subsequent references

Taj Trapezium case, [1997] 2 SCC 353

The shortened form should be used every time after the first time a case is cited.

QUOTES FROM CASES

Per Subba Rao J., "a construction which will introduce uncertainty into the law must be avoided. It is conceded by the petitioner that the power to amend the Constitution is a necessary attribute of every Constitution". (Footnote original citation of case or shortened form as perrules stated above)

Single Judge:
S.H. Kapadia J.

Chief Justice of India
Thakkur C.J.I.

More than one Judges

K.G. Balakrishnan C.J.I., S.H. Kapadia, R.V. Raveendran, B.S. Reddy and P. Sathasivam (JJ.)

UNPUBLISHED DECISIONS

Name of the parties, Filing No of Year, Decided on date (Name of Judges) (Name of Court) Example:

> BP Singhal v. Union of India, W.P. (Civil) No.296 of 2004, Decided on May7, 2010(K.G. Balakrishnan C.J.I., S.H. Kapadia, R.V. Raveendran, B.S. Reddy and P. Sathasivam (JJ.) (Supreme Court of India).

INTERNATIONAL DECISIONS

Case name, (Party names) Judgement, Year, Publisher, Page No (Court Name) Example:

Case Concerning Right of Passage over Indian Territory (India v. Portugal) Judgment, 1957, ICJ reports, 12 (International Court of Justice)

LEGISLATIVE MATERIALS

When citing Constitution it should be in Capital letters while other Statutes it should be First letter of the word in Uppercase followed by lower cases.

CONSTITUTION

Art. 21, THE CONSTITUTION OF INDIA, 1950.

OTHER STATUTES

Sec. 124, Indian Contract Act, 1872.

BILLS

Cl. 2, The Companies (Amendment) Bill (introduced in Lok Sabha on March 16, 2016).

PARLIAMENTARY DEBATES

Question/Statement by Name, DEBATE NAME, page no (Date) Example:

? Question by N.G. Ayyangar, CONSTITUENT ASSEMBLY DEBATES 116 (August 22, 1947).

? Statement of V. Narayanasamy, LOK SABHA DEBATES 5 (March 10,2010).

BOOKS

TEXT BOOKS

Name of the Author, NAME OF THE BOOK, Volume (Issue), Page (Publisher, Edition, Year)

Example:

H.M. Seervai, CONSTITUTIONAL LAW OF INDIA, Vol. 3, 121 (Universal LawPublishing Co.Pvt. Ltd.,4th Edn., 2015)

? In the case of a single author, M.P.Jain,
INDIAN CONSTITUTIONAL LAW, 98 (Kamal Law House, 5th Edn., 1998)

? If there is more than one author and up to two authors,
M.P.Jain and S.N. Jain, PRINCIPLES OF ADMINISTRATIVE LAW, 38 (Wadhawa, 2001)

? If there are more than two authors,
D.J. Harris et al, LAW OF THE EUROPEAN COMMUNITY ON HUMAN RIGHTS, 69 (2nd Edn., 1999).

? If there is no author then the citation would begin from the Title of the Book.

? If the title of the book includes the author's name then the book should be cited as an authorlessbook.

Example:

Chitty on Contracts, Vol. 2, 209 (H.G. Beale ed., 28th edn., 1999).

EDITED BOOKS

Name of Editor/s (Ed.) NAME OF BOOK, page no./s (Publisher Name, Year of Publication)

? In the case of a single editor,
Nilendra Kumar (ed.), NANA PALKHIVALA: A TRIBUTE, 24 (Universal Publishers, 2004).

? If there is more than one author and up to two editors,
S.K. Verma and Raman Mittal (eds.), INTELLECTUAL PROPERTY RIGHTS: A GLOBAL VISION, 38(2004).

? If there are more than two editors,
Chatrapati Singh et.al.(eds.), TOWARDS ENERGY CONSERVATION LAW 78 (1989).

COLLECTION OF ESSAYS

Name of Author, Name of Article in Name of Collected Book Page No (Editor Name, Year of Publication)

M.S. Ramakumar, India's Nuclear Deterrence in NUCLEAR WEAPONS AND INDIA'S NATIONAL SECURITY 35 (M.L. SondhiEdn., 2000).

REGILIGIOUS AND MYTHOLOGICAL TEXTS

TITLE, Chapter/ Surar Verse (if applicable)

Example:

THE BHAGAVAD GITA, Chapter 1 Verse46

ARTICLES

Name of Author, Name of Article, Volume (Issue) NAME WHERE ARTICLE IS PUBLISHED page no (Year of Publication)

LAW REVIEW ARTICLES

A.M. Danner, Constructing a Hierarchy of Crimes in International Criminal Law Sentencing, Vol. 87(3) VIRGINIA LAW REVIEW 415 (2001).

MAGAZINE ARTICLES

? Articles in print versions of magazines
UttamSengupta, Jack of Clubs and the Cardsharps, OUTLOOK 22 (June 11, 2016).

? Articles published in a magazine arranged by volume
A. Bagchi, Sri Lanka's Experiment in Controlled Decentralization: Learning from India, 23(1) ECONOMIC AND POLITICAL WEEKLY 25 (January 2, 1988).

? Articles in print versions of newspapers
Robert I. Freidman, India's Shame: Sexual Slavery and Political Corruption are Leading to an AIDS Catastrophe, THE NATION 61(New York Edn., April 8, 1996).

MAGAZINE ARTICLES ONLINE VERSIONS

Name of Author, Name of Article, NAME WHERE ARTICLE IS PUBLISHED (Date of issue)

available at link where it is published (date of last visit)

It is mandatory to use exact link where the article of published removing the hyperlink

? Articles in online versions of newspapers

MehboobJeelani, Politics stretches list of Smart Cities from 100 to 109, The Hindu (2 July 2016), available at http://www.thehindu.com/todays-paper/politics-stretches-list-of-smart-cities- from-100-to-109/article8799010.ece(Last visited on July 2,2016).

? Articles in online versions on magazines
UttamSengupta, Jack of Clubs and the Cardsharps, OUTLOOK (11 June 2016), available at http://www.outlookindia.com/magazine/story/jack-of-clubs-and-the-cardsharps/297427(Last visited on July 2, 2016).

REPORTS

LAW COMMISSION REPORTS

243rdReport of the Law Commission of India (2012)

ONLINE REPORTS

World Trade Organization, Lamy outlines "cocktail approach" in moving Doha forward, (2010), available at http://www.wto.org/english/news_e/news10_e/tnc_chair_report_04may10_e.htm (Last visited on May 10, 2016).

INTERNATIONAL TREATIES

Art. 5, UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010),July 12, 1998, ISBN No. 92-9227-227-6, availableat:http://www.refworld.org/docid/3ae6b3a84.html (accessed July 2, 2016)

GENERAL RULES

FORMATTING

? Single numbers do not begin with a0

? Remove hyperlinks in all citations ofURLs

? The format of dates should be – June 25,2016

? Capitalisation – The start of every sentence should be in capitals. In titles, do not capitalise articles, conjunctions or prepositions if they comprise of less than fourletters.

- Italics – Italics are to be used in the followinginstances:
- Case names when used in the maintext
- Non-Englishwords
- Emphasis in the main text, but not forming part of aquote
- Short forms – The short forms of words which are not mentioned in this guide are not acceptable. Short forms which are acceptableare:
  - Art. forArticle
  - Cl. forclause
  - No. for number
  - Reg. forregulation
  - Sec. forsection
  - Vol. forvolume
  - Edn. Foredition
  - Ed. Foreditor
  - Ltd. forLimited
  - Co. forCompany
  - Inc. forIncorporated
  - Add "s" to the short form for the pluralform.

FOOTNOTES

- Multiple citations in the same footnote should be separated by asemicolon.
- Connectors–
  - Id. and Supra are the only connectors which may be used for cross referencing
  - These connectors can only be used to refer to the original footnote, and may not be used to refer to an earlier reference.
  - The format for referring to the immediately prior footnote shall be one of the following:
  - When the page number(s) being referred to are the same as in the previous footnote
  - Id.
  - When the page number(s) being referred to are different from the previous footnote
  - Id., at 77-78.
  - The last name of the author, when available, should be used before the supra. The format for referring to footnote earlier than the immediately prior footnote shall be: Seervai, supra note 6, at 10.
- Introductory Signals
  - No introductory signal to be used when the footnote directly provides the proposition.
  - The signal 'See' shall be used when the cited authority clearly supports the proposition.
  - All footnotes must not end in a period (fullstop).

QUOTES

- For quotations below fifty words in length, the quote should be in double inverted commas and should beitalicized.
- For quotations above fifty words in length, separate the text from the main paragraph, indent it by an inch from either side, and provide only single line spacing. If the main text has only single line spacing, the font size of the quote shall be reduced by1.

Ethics Policy for Journal

1. Reporting Standards

Authors ofresearch paper should present an accurate account of the work performed as well as an objective discussion of its significance. Underlying data should be represented accurately in the paper. A paper should contain sufficient detail and references to permit others to replicate the work. Fraudulent or knowingly inaccurate statements constitute unethical behaviour and are unacceptable. Review and professional publication articles should also be accurate and objective, and editorial 'opinion' works should be clearly identified as such.

2. Data Access and Retention

Authors may be asked to provide the research data supporting their paper for editorial review and/or to comply with the open data requirements of the journal. Authors should be prepared to provide public access to such data, if practicable, and should be prepared to retain such data for a reasonable number of years after publication. Authors may refer to their journal's Guide for Authors for further details.

3. Originality and Acknowledgement of Sources

The authors should ensure that they have written entirely original work, and if the authors have used the work and/or words of others, that it has been appropriately acknowledged, cited, quoted and permission has been obtained where necessary. Authors should cite publications that have influenced the reported work and that give the work appropriate context within the larger scholarly record. Information obtained privately, as in conversation, correspondence, or discussion with third parties, must not be used or reported without explicit, written permission from the source.

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ii. All references, footnotes, endnotes, bibliography, table of contents, preface, methods and acknowledgements.

iii. All generic terms, phrases, laws, standard symbols, mathematical formula and standard equations.

iv. Name of institutions, departments, etc.

5. Multiple, Redundant or Concurrent Publication

An author should not in general publish manuscripts describing essentially the same research in more than one journal of primary publication. Submitting the same manuscript to more than one journal concurrently constitutes unethical behaviour and is unacceptable.

In general, an author should not submit for consideration in another journal a paper that has been published previously, except in the form of an abstract or as part of a published lecture or academic thesis or as an electronic preprint.

Publication of some kinds of articles (e.g. clinical guidelines, translations) in more than one journal is sometimes justifiable, provided certain conditions are met. The authors and editors of the journals concerned must agree to the secondary publication, which must reflect the same data and interpretation of the primary document. The primary reference must be cited in the secondary publication. Further detail on acceptable forms of secondary publication can be found from the ICMJE

6. Confidentiality

Information obtained in the course of confidential services, such as refereeing manuscripts or grant applications, must not be used without the explicit written permission of the author of the work involved in these services.

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Authorship should be limited to those who have made a significant contribution to the conception, design, execution, or interpretation of the reported study. All those who have made substantial contributions should be listed as co-authors.

Where there are others who have participated in certain substantive aspects of the paper (e.g. language editing or medical writing), they should be recognised in the acknowledgements section.

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It is not acceptable to enhance, obscure, move, remove, or introduce a specific feature within an image. Adjustments of brightness, contrast, or color balance are acceptable if and as long as they do not obscure or eliminate any information present in the original. Manipulating images for improved clarity is accepted, but manipulation for other purposes could be seen as scientific ethical abuse and will be dealt with accordingly.

PRAGYAAN: JOURNAL OF LAW

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Peer review is an integral part of our research journal. All the research papers will be sent to Reviewer after concealing the name of the author and any other identification mark in this regard. We ensure that Peer review will be fair, honest and maintain confidentiality.

The practice of peer review is to ensure that only good research papers are published. It is an objective process at the heart of good scholarly publishing and is carried out by all reputable scientific journals. Our referees play a vital role in maintaining the high standards and all manuscripts are peer reviewed following the procedure outlined below.

Initial manuscript evaluation The Editor first evaluates all manuscripts. It is rare, but it is possible for an exceptional manuscript to be accepted at this stage. Manuscripts rejected at this stage are insufficiently original, have serious scientific flaws, have poor grammar or English language, or are outside the aims and scope of the journal. Those that meet the minimum criteria are normally passed on to at least 2 experts for review.

Type of Peer Review: Our Policy employs blind reviewing, where both the referee and author remain anonymous throughout the process.

How the referee is selected Whenever possible, referees are matched to the paper according to their expertise and our database is constantly being updated.

Referee reports: Referees are asked to evaluate whether the manuscript. Follows appropriate ethical guidelines - Has results which are clearly presented and support the conclusions - Correctly references previous relevant work.

Language correction is not part of the peer review process, but referees may, if so wish, suggest corrections to the manuscript.

How long does the review process take? The time required for the review process is dependent on the response of the referees. In rare cases for which it is extremely difficult to find a second referee to review the manuscript, or when the one referee's report has thoroughly convinced the Editor. Decisions at this stage to accept, reject or ask the author for a revision are made on the basis of only one referee's report. The Editor's decision will be sent to the author with recommendations made by the referees, which usually includes verbatim comments by the referees. This process takes one month. Revised manuscripts may be returned to the initial referees who may then request another revision of a manuscript or in case second referee the entire process takes 2-3 months.

Final report: A final decision to accept or reject the manuscript will be sent to the author along with any recommendations made by the referees, and may include verbatim comments by the referees.

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