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CONTENTS

Editorial Note

The father of the Indian Constitution, Dr. B. R. Ambedkar, once famously said, "Mon are mortal. So are ideas. An idea needs propagation as much as a plant needs watering. Otherwise both will wither and die." In keeping with the spirit of this quotation, the Editorial Board of the ALSD Student Journal has always strived to help propagate new ideas and points of discussion with the hope that it would help take us as a legal community forward.

The overarching theme for this year's journal was accordingly chosen to be contemporary issues and developments in the field of Constitutional Law. The topic was allowed to have a wide ambit with a view to not pnt any fetters on the authors and have a free-flowing discourse over how the Constitution must be interpreted to reflect the needs and demands of the time and place it finds itself in.

This decision has definitely paid off well. The Editorial Board has been very pleased with the well-articulated and scrupulously researched submissions it has received for this edition of the Journal. Each contributor has brought a completely new perspective to the fore.

We at the Editorial Board would like to thank all of the authors for the hard work and effort they've put into their submissions. We'd also like to extend our gratitude to you, our readers for sparing the time to read every issue and supporting this venture.

Warm Regards

Seemant Sengar
Editor-in-Chief

New Economic Policy vis-à-vis the Constitution

Sanvid Tuljapurkar*

ABSTRACT

The industrial revolution, World War I and II and the establishment of various international institutions, have lead to states becoming more interdependent on each other than ever before. While this might be a positive development for international relations, it has not been considered the same by all, owing to the volatile economic market it creates and its unfair operations and outcomes with respect to the developing countries. Despite these negative impacts, several countries have been forced adopt this policy due to various circumstances, one of them being India.

Justice Holmes has famously stated that the ***Constitution*** *is a political and not an economic document as the economic policy needs to be updated or changed from time to time in correspondence with the national and international scenarios. Despite this, whichever economic policy is adopted; it must function to fulfill the aspirations of the people of the state as reflected in the Constitution. In India's case, the preamble of the Constitution along with the* ***fundamental rights*** *and the* ***Directive Principles of State Policy*** *clearly lay down the goal of economic justice and an aim of reducing economic concentration.*

The ***new economic policy*** *adopted by the government in 1991 ended the interventionist regime of the government and a stance was taken to support the private sector and promote a market oriented economy. This change was said to have been brought about, in order to attain a higher growth rate and to speed up the process of development. This year, India celebrates the completion of 25 years of this policy. Despite the passing of over two decades, farmer suicides are on a rise,* ***economic inequalities*** *are on a going up, concentration of resources has been transferred from feudal lords to owners of multi-national corporations and the state still faces problems such as malnutrition, poverty and illiteracy. In light of the same, this paper aims at assessing the new economic reforms introduced in 1991 and the various laws enacted in furtherance of this policy with respect to the Constitution and evaluating its constitutional validity.*

* *4th Year Student, B.A.LL.B. (Hons.), Symbiosis Law School, Pune*

I Introdnction

Since 1950, from the time the Indian Constitution was adopted, the state was placed at a pedestal; it was a benevolent actor which intervened in times of need for the welfare of the public.[1] Hence, India was recognized as welfare state[2] where the economy was regulated in order to ensure that the goals set immediately after independence were achieved and guarantee the formatian of a self reliant state. This policy was rationalized by denying the capability of the market to regulate itself.

Due to various internal and external factors, over the passage of time, neo-liberal policy was introduced, the basis of which was the opening up the economy for globalized capital flows with the market being governed by competition.[3] On one hand, the policy creates a "utopia" of free markets, liberated from all kinds of state interference, while, in practice it entails a coercive form of state intervention to facilitate market rule,[4] in addition to viewing an individual as an economic being instead of a social being. Moreover, such a change means a drastic modification in the role of the state, where it acts as a facilitator instead of a regulator to create, secure a competitive market economy and then leave it in order to allow private agents to function without any intervention; breaking boundaries between all that is economic and non-economic based on the assumption that everything can be priced.[5]

This, not so gradual shift in India, is not only in the role of the government but in the worth of individuals which is not in consonance with the Constitution as it dictates that certain features of the society and certain services and goods are not merely commodities but instruments towards the attainment of the inspirations of the nation. Hence, these cannot be naively deemed to be priced irrespective of their nature and significance. It is with this ideology that rights such as the right to health has been interpreted under fundamental rights and the right to education has been incorporated as one of the fundamental rights.

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1 Patnaik Prabhat, Economic Liberalisation and the Working Poor, Economic and Political Weekly, Vol. L1 No. 29, 16 July, 2016

2 Kesavananda Bharati v State of Kerala, AIR 1963 SC 1461

3 Patnaik Prabhat, Economic Liberalisation and the Working Poor, Economic and Political Weekly, Vol. L1 No. 29, 16 July, 2016

4 Brenner Neil, Nik Theodore (2002a): "From the New Localism to the Spaces of Neoliberalism", Antipode, Vol 34(3), pp 341-47.

5 Kohli Atul, 'Politics of Economic Growth in India, 190-2005, Part 1, Economic and Political Weekly, 1 April 2006

Hence it is of absoiute importance that, on completion of the twenty five years of the Ncw Economic Policy, the policy be assessed in view of the Constitution in order to determine its success or failure and make necessary changes so as to develop a nation in consonance with the spirit of the Constitution.

II India Tryst with Globalization

Indian eeonomy was turned aroand with a catatonie shift in its economie policy in 1991 with the introduction of the new economic reforms from a statist and socialist development modet to a growth first strategy.[6] Since these reforms are signiflcantly different from the policy that was pursued by the state since independence, the assessment of these reforms requires a comprehension of the incidences leading up to this change.

a. 1950 – Setting the stage for post independence goals

Post independence, a Soviet styled closed economic policy was formnlated with the strategy of industrialization by P C Mahalobnis. This policy was underpinned by the goal of rapid growth which was possible in a closed eeonomy only if there was sufficient domestic production of capital goods and hence the poliey was implemented with the public sector playing the role of a major investor in the capital goods sector.[7] In addition to this, private investments werc controlled through industrial hcensing in order to ensure that there was no diversion of investments to the non priority sectors.[8] Thereafter, import licensing was introduced in order to resolve the balance of payment prohlems that the economy faced at the time and to alloeate the scarce imports to priority use, but this eventually became a permanent phenomenon. Consequentially, only those imports which had absolutely no domestie substitute were permitted by the bureaucracy, bnt this had damaging consequences as well with domestic sector lobbying.[9]

Although the growth rate was low, this policy succeeded in the 1950s with a growth rate of 3.6%, until the mid 1960s when the growth rate was 4.9%, as this was significantly higher as compared to the growth rate in the pre-independence era when it was 0.8% per annum.[10] While this was the most important structural

6 Mohanty Piya , India, China and Globalizatinn, Palgrave Macmilan, Ed.2, 2010

7 Aluwalia Montek, The 1991 Reforms How Home Grown Were They, Economic and Political Weekly, Vot. L1 No. 29, 16 July, 2016

8 Aluwalia Montek, The 1991 Reforms How Home Grown Were They, Economic and Political Weekly, Vol. L1 No. 29, 16 July, 2016

9 Aluwalia Montek, The 1991 Reforms How Home Grown Were They, Economic and Political Weekly, Vol. Lt No. 29, 16 Joly, 2016

10 Rakesh Mohan, Innovation and Growth: Role of the Financial Sector, Hharti Annual Lecture at the Entrepreneurship Development Institute of India, Ahmedabad, 2008

break in India's national income, thereafter the rise was an average of 4% for three decades, known as the Hindu growth rate.[11] Thereafter, in the mid 1960s, till the 1970 the growth rate reduced to a 3% with the population increasing at 2.2%, hence becoming a cause of concern for economic growth,[12] which was accompanied by an inefficient and uncompetitive domestic sector and increase in the costs of production.[13]

These changes, over the years made a shift in the policy a necessity, in order to combat these problems and bring back an optimistic growth rate for rapid development. With this in mind, in Committee on Import-Export Policies and Procedures under P C Alexander which made several recommendations to liberalize the import and export policy and view imports not as a balance of payments threat but as a tool for development, and therefore progressively liberalize its licensing. This was accompanied by the Open General Licensing allowing the free import of 76 capital goods. These developments set a stage for the changes brought about in 1980s.

b. 1980s: A decade of minor policy changes

In the backdrop of the rapid development of East Asian countries and an extremely competitive global environment, the need for evolutionary reforms was realized.[14] Thus several initiatives were undertaken to mitigate the rigours of the control regime which included easing restrictions of the entry of the private sector into certain spheres, reducing import barriers, 90 out of 180 industries were freed from the Monopolies and Restrictive Trade Practices Act regulations, and export incentives and concessions on taxes.

As a result of this internal economic liberalization, India moved on from the Hindu growth rate to a growth rate of 10.5% in 1989-90. These changes were accompanied by an increase in productivity, rise in private investments and the expansion of the information technology (IT) industry. The changes were brought about in certain sectors without excluding the role of competition as against the policy pursued in the 1950s. Moreover, despite increasing budget deficits in the 1980s, the government kept up with its public investments which played a key role in the growth by supporting the demand side of the process.

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11 Kohli Atul, 'Politics of Economic Growth in India, 190-2005, Part 1, Economic and Political Weekly, 1 April 2006

12 Aluwalia Montek, The 1991 Reforms How Home Grown Were They, Economic and Political Weekly, Vol. 1.1 No. 29, 16 July, 2016

13 Mohanty Piya , India, China and Ginbalization, Palgrave Macmilan, Ed.2, 2010

14 Mohanty Piya , India, China and Globalization, Palgrave Macmilan, Ed.2, 2010

Although these changes might not seem significant from the perspective of external economic liberalization, it was a major step in the direction of a macroeconomic environment. It is through these changes that the tone was set for the major economic policy reforms that were made in 1991.

c. 1991: The New Economic Reforms

In the background of the gradual reforms in the 1980s, the current deficit was of 1.1% of the GDP from 1980 to 1984, but it rose in the second half of the decade.

In addition to this, India's relations with the Soviet Union played a key role in its balance of paymem shortage. Until the 1980s Soviet Union was one of India's most significant trade partners and the latter purchased oil from the former in rupees resulting in no external debts, but with the fall of the Soviet Union, this option was no more available. With these political and economic changes, India's current aceount deficit increased from 0.94% of the GDP in 1980 to 2.15% of the GDP in 1990. Moreover, India hecume the world's third largest debtor with a foreign debt of $72. Although this was a concerning situation, the biggest cause of worry was the foreign exchange reserve which wete hovering at $1.3 billion to $1.5 billion, burely enough to meet the coontry's import needs for three weeks. Hence, by 1991, India had become highly vulnerable to shocks such as Iraq's Kuwait invasion whieh caused a global price hike and recession that affect most of India's export partners including the United States, thus resulting in its growing current account deficit and greater reliance on short-term external financing.

Along with these international shock, political and economic uneertainty within the country, assassination of the then Prime Minister Rajiv Gandhi were internal factors that affected the economy.

These changes were not sudden and hence anticipating the situation, a loan of $550 million was takon from the IMF under a gold tranche facility. By the end of 1990, India's credit rating downgraded, thus cutting its access to sources of commercial credit resulting in placing India un the brink of default by early 1991.

As a result of these situations, the Indian government had to ask the IMF and the World Bank for a loan, the condition for which was the liberalization of the Indian economy. Thus, India's experience of liberalization was distinct as it was extraneously induced without considering whether the economy was prepared for open markets and its ramifteations on the vulnerable sections of the society.

III Economic Aspiratioos of the Constitution of India

The Indian freedom struggle which went on for three eenturies shaped the aspirations of the state which were enshrined in the Constitution of India (hereinafter referred to as 'the Constitution') after independence which is evident in the preamble whieh begins with the words, '*We the people of India give ourselves*'.

The preamble of the Constitution which is transeendental, while interpreting the Constitution[15] emphasizes on soeial, economic and political justiee and equality. While interpreting the preamble, the Supreme Court has stated that the constitution envisions estahlishing an egalitarian social order rendering every citizen, social, eeonomie and political justiee in a social and economic democracy.[16] It has been held that social justice and equality are complimentary to each other.[17]

Io addition to equality, the Constitution has incorporated the principles of socialism were incorporated by the 42nd Amendment whieh is established to be an integral part of the Constitution and has been used as a test to evaluate economie legislations.[18] Through socialism, the Constitution aims to eliminate inequality of income, status and standard of life,[19] end poverty and ignorance.[20] Thus, in furtherance of this prineiple, the state must aim at distributive justice i.e., equal distribution of material resources.[21]

Through the Preamble, it has also heeo inferred that the intent of the Constituent Assembly was to establish a welfare state[22] whieh has been strengthened by the Directive Principles of State Policy

a. Fundamental Rights

The preamble lays down the broad fromework of the Constitution, a necessary eonsequenee of this framework are the fundamental rights,[23] listed in Part III of the Constitution. Over the years, it has been held that the fundamental rights do not merely inelude what has been expressly stated but also what is implied in

15 Kesavananda Bharati v State of Kerala, AIR 1963 SC 1461

16 Samatha v State of Andhra Pradesh, AIR 1997 SC 326

17 Air India Statutory Corpn. v United Labour Union, AIR 1997 SC 645

18 Jain MP, Indian Constitutional Law, Lexis Nexis, 7th Edition

19 S R Bommai v Unioa of India, AIR 1994 SC 1918

20 G B Pant University of Agriculture and Technology v State of Uttar Pradesh, AIR 2000 SC 2695

21 G B Pant University of Agriculture and Technology v State of Uttar Pradesh, AIR 2000 SC 2695

22 Kuldip Nayar v Union of India, AIR 2006 SCC 1

23 Pratap Singh v State of Jharkhand, AIR 2005 SC 273

these rights in light of the changing social, eeonomie and pohtical circumstanees.[24] Moreover, these are intended not only to protect individual's rights but they are based on the high puhhc policy as well.[25]

b. Rigbt to Equality

Right to equality, the first of the fundamental rights granted under Article 14 of the Constitution is considered to be the eornerstone of Indian democracy.[26] From this right emanates the obligation of the state to bring about, through the machinery of the law, a more equal society as, equality before law ean be predicated meaningfully only in a equal society.[27]

Recognizing that that not all persons are equal, the judieiary has been of the opinion that tho varying needs and eireumstances of the people require them to be treated differently.[28] This differential treatment is aimed at bringing all the people at an equal footing so as to ereate and egalitarian society, the evidence of which can be seen in the interpretations of Article15 and I6 of the Constitution with respect to affirmative actions.[29]

c. Freedom to Carry on Trade and Commerce

Article I9(1) (g) guarantees all the citizens the right to practice any profession, or to carry on any oecupation, trade or business, however, reasonahle restrictions may be exereised on this right by the state in public interest under Artiele I9(6). This right need to he comprehended in light of the term 'socialist' stated in the preamhle. Although there may be greater emphasis on nationalisation and state ownership of industries, this cannot ignore the interests of private sector as well as the individnals.[30]

A restriction on this right must be reasonable i.e. it must not be arbitrary or excessive in any nature. Mereover, the reasonableness of sneh a restriction must be determined in an objective manner and from the standpoint of the interests of the general public.[31] It has been held that the term restriction includes prohibition as long as it passes the test public interest.[32]

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24 Unni Krishnan J P v State of Andhra Pradesh, AIR 1993 SC 2178
25 Dayarao v State of Uttar Pradesh, AIR 1961 SC 1457
26 Indira Sawhney v Union of Iodia, AIR 1993 SC 477
27 Sri Srinivasa Theatre v Govt. of Tamil Nadu, AIR 1992 SC 1004
28 Usha Mehta v State of Uttar Pradesh, 2013 AIR SC 132
29 M Nagraj v Union of India, (2006) 8 SCC 212
30 Excel Wear v Union of India, AIR 1979 SC 36
31 Krishnan Kakkanth v Govt. of Kerala, IAR 1997 SC 128
32 B P Sharma v Union of Iodia, AIR 2003 SC 3863

The right to carry on trade and eommerce has been subordinated to the right of the state to create a monopoly, partial or eomplete to the exelusion of all or some eitizens only.[33] This ean also be inferred from the power of the union or and each state to carry on trade and eommerce.[34] Although this right to monopoly has been given to the state, it has to be exercised by the state in its own favour and not in the favoor of a third party.[35] In addition to this, any

d. Right to Life and Personal Liberty

Article 21 lays down that, no person shall be deprived of his life or personal hberty except according to proeedare estahlished by law. It is believed that the spirit of man goes to the root of this article as personal liberty m ĸes life worth living.[36] While determining the ambit of the term 'life' in this article, a hberal view has been taken so as to inelude sometbing raore than raere animal existenee,[37] i.e., right to hve with human dignity along with the bare oecessaries such as adequate nutrition, clothing and shelter and facilities such a reading, writing and expressing oneself.[38] This interpretation is, in view of the fact thar it is the fine graces of eivilization that make life worth living[39] allowing the individual to grow physically, mentally and intellectually.[40] In addition to this, the Apex Court has taken a view that the 'right to hte' includes right to livelihood as no person can live without a means of livelihood and hence is an integral part of the right.[41] Thus, the state has the responsibility to ensare that all buman beings not only live hut live with human dignity, i.e., live a meaningful life.

e. Directive Principles of State Policy

Directive Prineiples of State Policy have been ineluded in the Constitution in view of the fact that mercly a political democracy in a eoantry like India would have ne meaning and hence an economic democracy is neeessary.[42] The goals and objectives of the Indian polity as stated in the preamhle are songht to be further elucidated, strengthened and eoncretised through these principles and hence they are of great significance while interpreting the Constitution. They aim to achieve

33 P T Socicty v RTA, AIR 1960 SC 80t
34 Article 298, Constitution of India, 1950
35 Akadasi Padhan v State of Orissa, AIR 1963 SC 1047
36 Maneka Gandhi v Union of India, AIR 1978 SC 597
37 Munn v Illinois, 94 US 113 (1877)
38 Francis Coralie v Delhi, AIR 1981 SC 746
39 P Rathinam v Union of India, AIR 1994 SC 1844
40 Shantisar Boilders v Narayanam Khimalal Totame, AIR 1990 SC 630
41 Olga Tellis v Bombay Municipai Corporation, AIR 1986 SC 180
42 Iain MP, Indian Constitutional Law, Lexis Nexis, 7th Edilion, pg. 1406

a welfare state and although not justieiable, they serve as the guiding prineiples that the government raust follow.

Article 38(1) aims at promoting social, economic and politieal justice, thus reemphasizing on the preamble,[43]and this includes minimising inequalities of income and mitigating sufferings of the weaker sections of the soeiety.[44] Thus economic justice is a necessity to attain social jnstice and an egalitarian society. The other aim of the state through its pohcy must be to secure means of livelihood for all its eitizens, ensare distrihution of goods and material reseurees for the eommon good and to avoid coneentration of wealth and means of production to the eommon detriment.[45] While the right to livelthood has been guaranteed under the right to hfe,[46] the distribution of material reseurces is said to entail not merely natural resources hut private and pubhe resources as weli,[47] and the distribution of these resources involves restructuring the economic order .[48]

Thus, even though the constitution is not an economie but a political docoment, in view of the fact that pohtical goals cannot be achieved if eeonomic conditions are not improved, certain provisions in the Constitution identify the economic aspirations of the people that are necessary in order to fulfil the dream which was the basis of the Constitution.

IV Growth v Development

As stated abovc, thc New Economic Pollcy was adopted in 1991 to avoid a balance of payment crises, but it was expected to signifieantly increase the rate of growth of the nation, hut, what is often forgotten is that there lies a basie difference between growth and development, the prior mercly being one of the instruments of the latter.[49] Growth refers to a rise in GDP whereas development is an equitable and inelnsive growth, whieh as elaborated on is the ultimate economie goal that the Constitution aims to achieve.[50]

These reforms function on the assumption that the markct will guard and ensure the smooth functioning of the economy by regulating the prices of goods and

43 Air India Statutory Corpn. v United Labour Unlon, AIR 1997 SC 645

44 Steel Authority of India Ltd. v National Union Waterfront Workers (2001) 7 SCC 1

45 Articlo 39, Constitution of India, 1950

46 Olga Tellis v Bombay Municipal Corporation, AIR 1986 SC 180

47 Sanjeev Coke Manufacturing Co. v Bharat Coking Co. Ltd., AIR 1983 SC 239

48 Air India Statutory Corpn. v United Labour Union, AIR 1997 SC 645

49 Ongu Tsabari, TINA, India and Economic Liberalization, Economic and Political Weekly, July 16, 216 Vol. No. 29

50 Preamble, Constitution of India, 1950

service, but, this assumption has been proven to be wrong over time with incidences such as the 2007 recession, where it was realized that the neither is the market efficient nor are the priees determined by it always eorrect.[51] Moreover, these reforms forced the state to govern for the for the competitive market economy and not govern it per se, thus significantly restricting government power.[52]

Therefore, the theory of market effieiency and minimal government intervention in the market economy as a result of the change in policy needs to be questioned and assessed with referenee to the ideals that it aims to achieve whieh ean only be inferred from the eonstitution.

a. Poverty

Poverty has been a major issue for the Indian economy since before independence. Despite several efforts and various five-year plans, poverty did not significantly reduce, hence being a major eause of eoncern for the state. With the introduction of a transformation in the pohcy, more than half of the population living below the poverty line was left to deal with economie instability existent in the glohal markets, and no social security against the onstable market situations.[53]

The policy reforms were clalmed to have caused a rise in the growth rate which is assamed to have had a positive effect on poverty, but the data proves otherwise. An indicator of poverty is ealorie intake, i.e., number nf calories per person. The urban population able to aceess less than 2100 calories per person declined from 60 in 1973-74 to 57 in 1993-94 but increased to 65 in 2011-12.[54] Similarly, in case of the rural population, the population unable to intake 2,200 calories per person rose from 56.4 in 1973-74 to 58.5 in 1993-94 and reached 68 in 2011-12.[55] Despite the growing hunger, data suggests that poverty is at a deeline due to its measurcs based on price indices. Even if this reduction is considered, the fall in the rate of poverty has not heen equitable, thus not only vioiating right to life hnt the principle of an egalitarian society itself, which lies ar the beart of the Constitution. This differential growth is also evident by the fact that while milhons of rupees

51 Patnaik, P (1994): "International Capital and Nutionat Economic Policy: A Critiqne of Indias Economic Reforms," Economic & Polltical Weekly, Vot 29, No 12, pp 683–89.

52 Chakrabarti Anjan, Indian Economy in Transition, Economic and Political Weekly, Vol. 51, Issue No. 29, 16 Jul, 2016

53 Goyal Ashima, History of Monetary Policy in India since Independence, Indira Gandhi Institute of Development Research, Mumbai, September 2011, WP 2011-018

54 Ministry of Finance, Economic Survey 2011- 12, Statistical Appendix, Government of India, New Delhi , 2012

55 Ministry of Finance, Economic Survey 2011 12, Statistical Appendix, Government of India, New Delhi, 2012

are spent on high-speed roads, etc., 63% of villages with a population 1000 or less are not even connected by a road. The cause of this varied growth is that the people in these villages do not have enough market power.[56]

In addition to this, there exists a stark unevenness between rural and urban areas; the latter growing 500% times faster than the former. A major cause of this is the stagnation of agriculture due to dwindled public expenditure and diverted public resources with the infrastructure projects being focussed as these are in the interests of big business.[57] Not only has public expenditure being reduced, the welfare benefits granted to the working class are gradually being withdrawn causing hardships to the working class.[58]

Hence, although the growth rate of the state has risen, the rich are getting richer and the urban areas being developed and the rural areas are being neglected more than ever, with the peasants and the working class rights being compromised on for maintaining the interests and profits of the large businesses. This not only goes against the constitutional aim of inclusive growth as has been emphasized on in the directive principles of state policy but also against right to equality of those living in the rural areas, the peasants and working class, and therefore failing to standing the test of the constitution.

b. Quality of Life

Under Article 21, livelihood has been stated to be a fundamental right without which there can be no quality of life. The change in the economic policy aimed at a rise in the growth rate and worked with the assumption that such a rise would eventually lead to higher rate of employment, thus providing for livelihood to people and consequentially raising their quality of life.[59] While this was the aim, the growth rate did increase significantly in the last 25 years but the employment in the organised sector has risen imperceptibly from 26.7 million in 1991 to just under 30 million with anorganised still employing 93% of the total employed population, thus making most of the means of livelihood unstable and unsecure.[60] This has also resulted in a significant part of the population seeking governmental

56 Das, R. "Looking, but Not Seeing: State and/as Class in Rural India", Journal of Peasant Studies, 34: 3-4, 2002

57 Banerjee-Guha, "Neoliberalising the 'Urban': New Geographies of power and injustice in Indian cities", Economic and Political Weekly, XLIV: 22, 2009

58 Harvey, D, A Brief History of Neoliberalism, Oxford University Press, New York, 2005

59 Aseem Shrivastava, A-Meri-India, Economic and Political Weekly, Vol. 51, Issue No. 29, 16 Jul, 2016

60 Ministry of Finance: Economic Survey 2015-16, Statistical Appendix, Government of India, New Delhi , 2016

jobs, a dearth of which has given rise to several sections demanding reservations in various parts of the country, resulting in fragmentation of the society as well as social unrest.[61] In addition to this, the secure jobs in the organised sector are predominantly occupied by the middle class of the society and thus, for the lower sections of the society, the primary means of employment is the unorganised sector,[62] thus making the growth in the employment sector non-inclusive. Along with the stagnancy in employment, the working class is being exploited with lenient work safety and employee benefit legislations and inefficient implementation of these laws. Furthermore, in the background of stagnancy of employment, and as stated above failure to reduce poverty worsens the quality of life even more in light of unstable costs of commodities which mirror the global price instability. In my opinion, if the market is to be governed by competition, with minimal government intervention, the market must be so established that it brings about inclusive and equitable growth.

Thus, the policy transformation has in no manner increased the rate of employed or job security and has lead to no significant impact on the quality of life, thus failing to uphold and abide by Article 21 of Constitution. Along with this, the failure to make this growth inclusive is against the Directive Principles of State Policy.

V Conclusion

Thus the new economic policy has been characterised by backtracking of the welfare state, dismantling of institutional constraints upon marketisation, increased corporatification, shrinking of organised jobs and hyper-exploitation of workers, downgrading of democratic rights earned through long-drawn struggles and a tremendous economic uncertainty.[63] In addition to this, the absence of socio-economic development at pace similar to that of the GDP clearly illustrates that growth is an instrument and not an indicator of equitable development.

Furthermore, emphasis on GDP to determine the development of the population of the state is clearly misleading and prioritizes state over the people, which in my opinion is not only similar to mercantilism, but also is against the very spirit of the preamble of the Constitution, which, with "We the people of India, give ourselves"

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61 Shrivastava, Aseem, Ashish Kothari: Churning the Earth: The Making of Global India, Penguin Viking, 2014

62 Ministry of Finance, Economic Survey 2015-16, Statistical Appendix, Government of India, New Delhi, 2016

63 Brenner Neil, Nik Theodore ,"From the New Localism to the Spaces of Neoliberalism", Antipode, Vol 34(3), 2002

indicates that tbe people are to be given a primacy over the state as the state is the sum total of the people who reside in it.

Hence, in my opinion, it is not to be forgotten that the economic goal of the Constitution, as interpreted from the Directive Principles of State Policy is equitable and inclusive development and not just a high growth rate. Therefore, in keeping with thc Constitutian, the state must not merely act as a watchdog of thc market econemy, but act as the representative of the people to uphold their aspirations frem the market.

Also, despite liberalisation being unavoidable as a result of the global environment, it needs to be realized that the price of constitutional values such as right to education, health, eeonomic justice cannot be determined, and their significance in the society be quantified. Therefore, the state must ensure that in the light of the constant changes in the economy, neither can these constitutional values be compromised on, nor can they be commodified, and hence it is the primary duty of the state to safeguard them,

The non-fundamental nature of fundamental rights in Gujarat: Discerning the legality on the mobile ban for women in the state.

Swapnil Tripathi and Chandni Ghatak**

ABSTRACT

Fundamental rights of a citizen have been termed as pivotal pillars of good governance in a country. Pillars such as like the right to equality, freedom of speech and right to life are so deeply embedded in the Constitution of our country that the father of our Constitution Dr. BR Ambedkar deemed them a necessity. With the passage of time, the scope of these rights' have expanded and the Courts have continued this endeavour on the premise of presence of dynamism even in law. However, a recent ban on use of mobile phones for women in a village of Gujarat brings out the harsh reality that no matter how noble the idea behind these rights are, equality and freedom within transactions is absent in practice. Also, despite the Prime Minister of our country propagating digitalisation, the move of the state on the face seems unjustified. The authors in the present paper tries to fathom this inconsistency between the action of the state and the appropriate law in place both nationally and internationally, with specifically focusing on the Gujarat instance.

I Introduction

The Indian constitution is one of its kind. It contains freedoms and rights which are elementary for the proper and effective functioning of democracy.[1]

- Justice Y.V. Chandrachud (In Minerva Mills)

The Constitution of India is one of its kind. It is a unique document with beth freedom of speech and right to life as its quintessential tenets, the existence of which makes India a one of a kind democracy. These rights are so pivotal to the good governance of a country and the robust development of its citizens that they are granted to all despite their caste, creed, sex, religion etc. both at a national and international plane. However, as idealistic it sounds, the protector of citizens i.e. the State time and again refutes these tenets as was recently done in Gujarat.

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1 Minerva Mills v. Union of India, A.I.R. 1980 S.C. 1789 (India).

The Suraj village of the stato of Gujarat recently banned the use of mobile phone by single woman.[2] Astonishing was the fact, that sueh a ban was imposed only on single women and more astonishing was the reasoning given by the panchayat wherein they stated that mobile phones distract such women from both their stndies and household work. However, as appalling as it sounds, Gujarat is not the only state whcrein the womeo have faced the wrath of the male dominated society as similat bans have been iniposed on certain villages in the states of Bihar and Uttar Pradesh as well.[3] Hypocritical is the fact that this ban is placed only on school going girls and not on school going boys. Hence, the underlying presemption seems to be that mobile phones only affeet girls while boys remain nnaffected.

Snch a ban not only raises questions of equality amongst men and women but also questions whether right to use a mobile phone can be categorised as a fundamental right under Article 19 and 21, and a universal right under international law. Another question that arises is of cempetency i.e. whether the Village Panchayat has the competency to impose such a ban on unmarried girls and women. The authors in the present paper, attempts to find answer to the above questions. **Part I** of the paper would discuss the ban and the circumstances surrounding it. **Part II** would analyse tbe aspect of competency of the Village Panchayat. **Part III** wnnld highlight whether the issue at hand involves violation of any fundemental right that can be claimed by such women and would discuss whether the access to mobile phones is a universal right under international law while **Part IV** would also provide an Indian perspective along with the conclusion.

II The Ban on usage of mobile pbone by women: Unravelling the story

The Honourable Prime Minister of India, at his inaugural speech at the launeh of tbe Digital Indta initiative stated, that digitalisation is tbe need of the hour and called it a necessity. He specifically focused on a tenet of digitalisalion, i.e. mobile phones and vowed to make every Indian own one phone, under his Digital India initiative. Ironically, on one side we have the Prime Minister of the ceantry promoting the usage of mobile phone amongst Indians, whereas on the other hand we have villages issning a ban against their usage. One sueh urbitrary incident was witnessed in Gujarat.

2 *Gujarat village bans mobile phones for unmarried women*, (Mar. 30, 2016) availablo at http://www.hindustantimes.com/india/gujarat-village-bans-mobile-phones-for-unmarried-women/story-iziKwjYckgmOOP8ZRBNn3K.html

3 *Girls and unmarried women in India forbidden from using mobile phones*, (April. 2, 2016) available at http://www.indcpendeat.co.uk/news/world/asia/girls-and-unmarried-women-in-india-forbidden-from-using-mobile-phones-to-prevent-disturbance-in-a6888911.html

The Suraj village of Gujarat, recently banned the usage of mobile phones by unmarried girls and women of the village. The Village Panchayat justified the ban by calling it in the best interest of the security and well-being of the subjects. The rationale behind such action was that unmarried women by carrying mobile phones attract a danger to their security whereas school going girls get distracted and lack focus if they possess mobile phones. Even if the reasoning of the Panchayat is to be accepted as being in the best interest of the unmarried women, the fact that it is discriminatory on the face cannot be ignored us no such restriction is placed on the school going boys. The rationale behind the same can either be that the Panchayat don't find the security of boys and men to be as important as women, or the patriarchy prevalent in the village does not allow for curtailment of rights of men. Practically, the latter reasoning appears to be more plausible aceeptable as the Surat village of Gujarat has more men than women.[4]

Such a ban is not only restricted to the Surat village, as it is in existence in various other villages of Bihar and Uttar Pradesh. It is qnite appalling and disappointing to see multiple states of a democratic nation allowing the prevalent patriarchy take over rights of individuals. It is this male dominance in these states which has led to the rights of women being curtailed. This ban has indeed raised questions abont the legality of such a ban on both grounds of lack of competency of the panchayat and also it violating the legal rights of the female population. The anthors in the following parts throws light on the same.

III Cnrtailment withont Competency: The panchayat's Incompetency

The order issued by the village panchayat was followed by every native in the vicinity, without secking a clarifieation as to whether the panchayat has the authority to issue such an order. This part of the paper would like to focus on the above aspect and establish that the village panchayat has no competency to pass such an order.

Artiele 243-G of the Constitution of India is the provision which deals with the powers of a village panchayat. It provides for the vesting of power necessary for self-governance and implementation of social justice on the village panchayat by the cennal/state legislature.[5] In Gujarat, the law providing powers to the Panchayats is the Gujarat Panchayat Act, 1993.[6] Section 99 and 130 of the said act provide

4 Page 263, http://www.censusindia.gov.in/2011census/dchb/2425_PART_B_DCHB_SURAT.pdf

5 India Const. art. 243 (g).

6 Gujarat Panchayat Act, 1993 (India).

the Panchayat with powers to take decision with respect to matters enlisted in the Schedule.[7]

Ironically, none of the reasnns mentioned by the village head for the ban finds a place in the said schednle. Instead of citing the probable particulars for the ban i.e. sanitation,[8] furtherance of education,[9] agriculture[10] or community development, [11] the village head citied reasons like distraction and ansafety, which are not grounds for any curtailment or restriction in the Act. Further, even if no such criterion was in place, the Panchayat eenld not have been able to jnstify its ban because of a contrary policy being propagated by the Union, whieh is providing universal access to mobile connectivity[12] and because of its international obligations. Hence, the actions of the Panchayat are not only contrary to the legislation governing, but also the policies of the Uniou government and its international obligations. Therefore, the ban is without competency and hence, invalid. The authors in the next part substantiates his elaim of obligations of the state in the following part, firstly by proving the international ohligations and then by elaborating the national obllgations.

VI Weighing the Absnrdities of the Panchayat's decision: An International Law Viewpoint

Gender discrimination, has for long been a chronic problem prevailing in the Indian landscape, especially in the rural regions. The action of the Gujarat Panchayat are not only enbancing this deep rooted discriminatien, defying logic as well as Indian Constitutional standards, it remains flawed even within the realm of iuternational law.

Strictly from an international law standing, gender equality in every endeavour has been a cherished principle, recognised by come of the most authoritative documonts of international law such us the United Nations Charter [13](Charter). In fact, women's rights have attained the slatus of human rights, indicating the realisation of the need of restructuring society and its institutions in a manner conducive for empowering women.[14] Such view, clearly signifies the importance

7 Section 99 & 130 , *supra* note 13.

8 Entry 1 (c), *supra* note 14.

9 Entry 3(a), *supra* note 15.

10 Entry 6, *supra* note 16.

11 Entry 7, *supra* note 17.

12 Programme Pillars, Digital India available at http://digitalindia.gov.in/content/programme-pillars

13 U.N. Charter art. 1(3).

14 The Four Global Women's Conferences 1975-1995: Historical Perspective, UN Women, available at http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm.

institutions prevalent in society play in eradicatiug sneh inequalities. This wonld mean that in the Indian context, Panchayats being un integral institute working toward smooth functioning of the vlllage community, have a vital role to play. On this first eount, the Panchayat in the present context has put forth a meusure detrimental to promotion of gender eqnality, failing to be part of this progressive vision aforementioned.

On further analysis of this situation, one can examine the erroneous nature inherent in the Panchayat's act with reference to the Convention on the Elimination of All Forms of Discrimination of Women, 1979 (**CEDAW**). Discrimination as defined onder CEDAW, covers any kind of exclusion, restriction erc; made on the basis of sex which disallows a wuman from certain enjoyments' amongst other things[15]. Additionally such ground of discriminatien has also been prohibited under the International Covenant of Civil and Political Rights[16] (**ICCPR**). In line with such understanding of the concept of discrimination, the Panehayat's decision of prohibiting the usage of mobile phones by women solely, falls under this as it is a distinction made exclusively on the criteria of sex and denies them enjoyment and access to such tool. This reference is pertinent here, because India has ratified CEDAW, in 1993[17] which creates upon India a legal obllgation to ensure that the principles so enshrined in this convention, are upheld. Public iustitutions present under the jurisdiction of state parties to this conventioo, further have a responsibility toward ensuring gender discrimination is avoided[18], the Panchayats' in India naturally also hold such responsibility. The prohibition discussed in this paper revolves around the usage of mobile phones, which not only act as a medium for communication allowing someooe to freely express themselves but also act as tools opening up possibilities of recreation. Participating in recreational activities have also been recognised as an essential factor contrihuting toward development for women, which must be promoted.[19] By imposing such restrictions, as in the diseussed scenario a creation of impediments oecur to this recreational process which again adds to the unreasonableness of such move, overall. A perusal of the reasouing used to justify such action, which includes reasons sucb as snpposed distraction from edacation on part of the girls and women due to usage of mobile phone is bizarre., In a reeent report prepared by the United Nations Educational, Scientifie and Cultural Organisatien (**UNESCO**) it was

15 Art.1, Convention on the Elimination of All Forms of Discrimination of Women, 1979.

16 Art.2(1), International Covenant of Civil and Political Rights, 1976.

17 Core International Human Rights Treaties, Optional Protocols & Core ILO Conventions Ratified by India, NHRC, available at http://nhrc.nic.in/documents/india_ratification status.pdf.

18 Art.2(d), *supra* note 15.

19 *Id* at art.13.

found that mobile phones have been used as learning tools for development of entrepreneurial skills by rural women in areas like Theni district, Tamil Nadu[20]. Additionally, mobile phones have been used as tools to ensure easy access to pre-natal health care amongst rural women in several countries[21] thereby demolishing the accuracy of the reasoning provided by the Panchayat which presents mobile phones to have a highly negative impact on the female population when it in fact has been proven to be effective in driving progress. Considering that most rural areas in India, have more or less similar socio-economic makeup amongst the populace, if such initiatives have been successful there, it would be rather baseless to presume that in a village in Gujarat mobile phones would in fact be entirely detrimental to the development of women and girls. It is necessary to gauge the reason why such scrutiny of the reasonableness of actions initiated at the lower levels of states is of utmost importance. This is because socio-cultural values cause differential treatment of women in society[22], an aspect influencing heavily the workings of such institutions enjoying such large extent of autonomy. Considering that a larger set of population reside in the rural areas of India, such attention is necessary to be directed toward actions directed at the lower level. Moving on to a constitutional analysis of this entire proposition, with the analysis of various judgments rendered by the honourable Supreme Court, it can be understood that international conventions' and their obligations are duly recognised as reference points, which enable the court to ensure that such principles of gender equality, a prime objective deemed to be included in the constitutional framework of this is regarded with the importance it deserves.[23]

In the case of *Masilamani Mudaliar & Ors*[24], it was also held by the Apex Court that specific articles of CEDAW prohibiting discrimination etc; were to be given due regard to do away with customs and other practices that may in fact have discriminatory effects, honouring even the principles so envisaged in the language of the Constitution[25]. This strengthens the authors' arguments that the action initiated by the Panchayat, being in complete disregard of such provisions mentioned must not be allowed implementation of any kind. Domestic courts, are

20 Mobile Phones & Literacy, empowerment in women's hands, UNESCO, p.38, available at http://unesdoc.unesco.org/images/0023/002343/234325E.pdf.

21 Reflection on CSW 55 Composite Report 2011, 4, Soroptimist International, available at http://nhrc.nic.in/documents/india_ratification_status.pdf.

22 Sapana Pradhan Malla, *Upholding Women's Rights through Litigation*, 2, Commerating 30 years of CEDAW, Commission on Status of Women, 54th session,2 010.

23 Vishaka v. State of Rajasthan, A.I.R. 1997 S.C. 3011 (India).

24 Masilamani Mudaliar & Ors v. Idol of Sri Swaminathaswami Swaminathaswami Thirukoli & Ors, 1996 8 S.C.C. 525 (India).

25 *Id* at ¶ 22.

also under a duty to attach due importance to the obligations enlisted under international couventions, for tailoring domestie laws in adherenee to the same[26]. Going by this rationale as well, even if snch action as initiated by the Gujarat Panchayat is challenged for onconstimtionality, the courts would perhaps consider the inherent inconsistencies prevalent in such arbitrary action violative of international standards would face the wrath of the court. Therefore, from an international law perspective, this arbitrary action by the Gujamt Panchayat is invalid. The authors in the next part throw light on the violation that is committed by the village panchayat under the domestie law.

V The nnjustness of the ban: An indian perspective

The ban imposed by the Panchayat, prohibits unmarried girls and women from using cell phones. Sach a prohibition apart from raising a qacstion en competency also raises a very important question on rights i.e. whether such a prohibition could be justified on the touchstone of eqnality and freedom enshrined in the Constitution. This part of the paper tries to find an answer to the above question.

a. Treating Men and Women Eqnal: The Equality Argument

Artiele I4 of the Constitution of India guarantees equality before law to every person.[27] Such equality has been called the qnintessence of a democratic nation and the basic feature of its Constimtion.[28] Therefore, every action of the State must be valid under Artiele I4 of the Constitution.[29] The Apex Court has time and again held that for such validity, the action of the State shenld be based on some reasonable ciassifieation, which is neither evasive nor atbitrary but is based on some considerable distinction.[30] In addition, a mandatory two-step test was laid down which provided for the classification to be based on an intelligible differentia and the differentia having a rational relation to the object sought.[31] A village panchayat is considered a state, due to the applicability of Part III of the Constitution on it, hence the above guidelines bind it mandatorily.[32]

A bare perusal of the order of the Village Panchayat shows that tbe constitutional mandate has not been followed by them. Snch a claim is backed by a two-fold

26 Githa Hariharan v. Reserve Bank of India, 1999 S.C.C. 2 228, ¶ 14 (India).

27 INDIA CONST. art. 14.

28 M Nagaraj v. Union of India, (2006) 8 S.C.C. 212 (India).

29 State of Maharashtra and Anr. v. Indian Hotel and Restaurants Assn. and Ors., (2013) 8 S.C.C. 519 (India).

30 R.K. Garg v. Union of India, A.I.R. 1981 S.C. 2138 (India).

31 *Id.*

32 Gram Panchayat of Village Jamalpur v. Malwinder Singh and Ors. (1985) 3 S.C.C. 661 (India).

argument. First, the order does not provide for any differential distinguishing unmarried women from men on grounds of mobile phone usage let alone intelligible differentia. The order despite providing any reasoning presumes that women will be distracted and men/boys won't, therefore no ban should be placed on the latter. In a country where equality of all is enshrined in the Constitution, accepting a justification that allows for patriarchy to seep in is outrageous and unacceptable.

The second argument is based on the object stated by the Panchayat. The Panchayat head states that the reason for such a ban is the safety of unmarried women (as according to the Panchayat head, mobile phone leads to girls getting into trouble) and eliminating their distraction from work. However, such a reasoning is fundamentally flawed as having mobile phones, helps in ensuring security rather than hampering it, as they can be used in cases of emergency.[33] Also, this argument is flawed as the act of ensuring security of the citizens of a state is entrusted majorly on the police and the same should not be shifted to the individual curtailing his rights.[34] Further, the argument of distraction free work for women does not hold water, as the work here proposed is the school and household work, however not all girls go to school neither do all girls do the household work, thereby making such an object faulty.

b. Special Provisions for Men: Misinterpreting Article 15.

The Constitution of India prohibits any kind of discrimination by an action of a State. To further such an aim the Constitution makers drafted Article 15. This article though restricted any kind of discrimination on part of the state allowed it partially in favour of women and children.[35]

In the present case, there is no denying that there does exist a discrimination against the unmarried women in the present case. However, what's amusing is that the village panchayat not only ignored the provision but also interpreted it wrongly, by making special provisions for men instead of women. Hence, the actions of the state is both violative and discriminatory.

c. Alienating the Unalienable: Right to Free Speech Argument

The Constitution of India, allows for numerous freedoms to its citizens. Freedom of speech and expression is one such freedom enshrined in Article 19(1) (a). The Apex Court has identified this right as a basic human right.[36] One tenet of this

33 See,The Delhi Race Club v. Government of NCT (Delhi), (2012) 48 VST 483(Delhi).

34 Shamit Sanyal v. State of West Bengal, 52 ,W.P. Nos. 19131 and 20515 (W) of 2014 (Cal.).

35 INDIA CONST. art. 15.

36 Romesh Thappar v. State of Madras, A.I.R. 1950 S.C. 124 (India).

right is the right to express oneself,[37] which eveu iueludes the right to talk on the phone.[38] The rationale behind the same being that when someone speaks over the phone, he manifests his views, making mandatory for the Court to guarantee freedom for such a speech. However, such a privilege is not unbridled as it ean be curtailed on grounds of security, morality and decency.[39]

It is ironic that despite the existence of such a constitutional mandate, the Village Panchayat went allead with its order curtailing the freedom of speech of its women. The women were banned from using mobile phones till they were married. We ueed to keep in miud that mobile phones are a medium for people expressing their views, and it logically flows that curtailment on tl eir usage is a eurtailment on freedom of expression. Such a curtailment would h ve been vatid if it would have been justifled under Article 19(2) but that clearly is uot the ease, as the ban is not on grounds of national security.

The ban on usage of mobile phones by women alienates an inalienable protection guaranteed by international law and the Constitutional law of India. The authors hope that the discrimination on grounds of patriarchy is cured by seeking intervention of Courts and the women of the country are set free from the clutches of male dominated society's discrimination.

37 All India Bank Employees' Association v. National Industrial Tribunal and Ors., A.I.R. 1962 S.C. 171 (India).

38 PUCL v. Union of India, (1997) 1 S.C.C. 301 (India).

39 India Const. art 19(2).

The Representation of the People (Amendment & Validation) Aet, 2013: Annihilation of Democracy?

Priyanka Priyadarshini & Saumya Tandon**

1 Introdaction

"If people who are elected are capable and men of character and integrity, then they would be able to make best of even a defective Constitution. India needs today nothing more than a set of honest men who will have the interest of the country before them."

Dr. Rajendra Prasad.

Words of wisdom spoken by our first President, before the Constituent Assembly of India on 26th November, 1949.[1] Indubitably, our Constitution makers envisaged a democracy with esteemed men having high values as law makers, a body ridden of any sort of criminal elements in the noble task of governance. The motto being *"law breakers should not be law makers"*. However, what we see today is annihilation of these ideals, with rampant criminalization in politics and utter disregard for maintaining probity in elections. As democracy forms a part of the basic structure of the Constitution[2], efforts should be made to uphold the principles which nurture and foster development of the democratic principles thereby strengthening the constitutional set-up of the country. In a respectable and elevated constitutional democracy purity of election and probity in governance are absolutely significant and imperative.[3] A democratic polity, is conceptually abhorrent to corruption and repulsive to the idea of criminalization of politics as it corrodes the legitimacy of the collective ethos, frustrates the hopes and aspirations of the citizens.[4] Hence, free and fair elections are quintessential for the growth of a healthy democracy.[5]

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1 Law Commission Report, 2014 on 'Electoral disqualifications' (Report 244).

2 Keshavananda Bharati v. State of Kerela AIR 1973 SC 1461.

3 Manoj Narula v. Union of India (2014) 9 SCC 1.

4 K. Prabhakarn v. Jayarajan AIR 2005 SC 688.

5 T.N. Seshan, CEC of India v. Union of India and Ors. 1994 (1) SCALE 7.

'Criminalization in politics', or undermining the constitutional fundamentals of India by persons associated with the three wings of the government began in Indira Gandhi's reign as Prime Minister. She won her elections to Parliament by gross violatien of election laws and thus sowed the seeds of criminalization in politics which has accentuated exponentially today. The nexus of crime and polities is rampant in the present day society so much so that instead of politicians having a link with criminals as the ease was earlier; persons with extensive criminal backgrounds have started contesting elections and entering the government.[6] This nexus is such that it seeps throngh the various strata of Indian society; right from the lowest rung babu charging a petty bribe for getting a job done, to the high ranking MPs and MLAs indulging in some form of perverted activity and undermining the ideal scenario of government.

A look at the statistics of the candidates with criminal backgroands and winners among them will make us realise the gravity of the situation. Iu the last decade since 2004, 18% of candidates contesting in either National or State elections have had criminal cases pending against them, with nearly half being eharged for serious offences such as rape, murder etc. The shoeking reality is that among these candidates 13.5% bave even won elections from their rnspective constituencies.[7] If these statisties seem repulsive, the present day statistics of the 16th Lok Sabha should be serutinized. Association of Democratie Reforms, a nun-political group aiming at governmental and electoral *reforms, stated 34% or 186 MPs in the present Lok Sabha face criminal charges*[8] *with 21% or 112 MPs facing charges for serious offences.*[9] *Also,* while only 12% of 'clean' eandidates without any criminal record win, 23% of those having criminal record win[10], implying the stronghold of criminals in the election scenario. *The appalling statistics pose a very serlous concern. With nearly a third of our legislators having criminal ties, what can be expected of the law and order situation in India, forget the noble ideals of justice, democracy, and integrity envisaged by our Constitution makers?*

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6 Vohra Committee Report (1993) NCRWC Report (2002).

7 Law Commission Report, 2014 on 'Electoral disqualifications' (Report 244).

8 http://www.thehindu.com/news/national/16th-lok-sabha-will-be-richest-have-most-mps-with-criminal-charges/article6022513.ece. Last accessed on: 16.7.2016.

9 http://www.ibtimes.co.in/186-indian-members-parliament-have-criminal-cases-including-murder-rape-600584. Last accessed oo: 16.7.2016.

10 Working Paper No. 436: Towards the De-criminalization of elections and Politics, Trilochan Sastry.

II The Representation of the People Act, 1951: Harbinger of an Era of free and Fair Elections

The Representation of the People Act, 1951[11] was enacted under Article 327 before the flrst general elections to govern the conduct of elections to the Houses of Parliament and the State Legislatures, the qualiflcations and disqualifications for mombership of these Houses, the practiees and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections. It was passed as the Representation of the People Act, 1950 wasn't exhaustive of all the provisions pertaining to elections.

One of the most important provisions is that of Section 8 of the 1951 Act, which provides for disqualification from being chosen as and from being the Momber of Parliament. It invokes disqualiflcatien of MPs over a series of offences and is inclusive ef offences for which one is imprisened for not less than 2 years.[12] The fundamental purpose sought to he achieved by enacting disqualification on conviction for certain offences is to prevant persons with criminal background from entering into politics who pollute the process of electien and have a propensity towards indulging into criminality to win success at an election. Thus, Section 8 seeks to promote freedom and fairness at elections and prevent criminalization of politics.[13]

In 2004, a PIL was flled in the Patna High Court, by Jan Chaukidar, an NGO, in wake of several electoral malpractices transpiriog in Bihar. The Patna High Court in its ruling debarred all those people who are in lawful police custody and serving jail terms, fiom voting, or contesting election for Parliament or State Assemblies, even if they are enrolled as voters.[14] The rationale omployed by the Hon'ble Iligh Court was that, under Section 4(d) of The Representatioo of the People Act, 1951 a candidate for elections has to be an elector. Ao eleetor is a person, who is legally entitlcd to vote, i.e., is a voter. However, under section 62(5) of the Aet, lays down that 'right to vote' is not available to anyene under the lawful custody or judicial custody, except a person under preventive detention. Thus, all prisoners who are not under preventive detention ean neither vote nor can they centest elections.[15]

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11 Hereinafter referred to as "the 1951 Act."

12 Section 8(3), 1951 Act.

13 Statement of Objects and Reasons accompanylog Bill No. 128 of 1988.

14 'R. Sedhuraman, Apex Court: *"Those in jail can't vote, contest polls"*, The Tribune (July 12, 2013), www.tribuneindia.com/2013/20130712/maln5.htm.

15 Jan Chaukidar v. Unioo of India, 2004 (2) BLJR 988

This verdict was challenged by Chief Election Commissioner[16] and others in the Supreme Court. On 10th July, 2013, a divisional bench, comprising of Justice A.K. Patnaik and Justice S.J. Mukhopadhaya, upheld the verdict of Patna High Court. An excerpt of their ruling is as follows:

"*We do not find any infirmity in the findings of the HC that a person who has no right to vote by virtue of the provisions of sub-section (5) of Section 62 of the 1951 Act is not an elector and is therefore not qualified to contest the election to the House of the People or the Legislative Assembly of a state. These civil appeals are accordingly dismissed.*"[17]

This ruling aroused concerns in the legislature which expeditiously passed the Representation of the People (Amendment and Validation Act), 2013 within three months of the judgment, amending sections 7, 62 and 43 of the Act of 1951.[18] This had the effect of nullifying the Supreme Court judgment and restoring the status quo prior to it. The Amendment Act which had repercussions of irreparable measures was rushed through the parliament in merely 15 minutes.[19]

III Implications of The Representation of The People (Amendment and Validation) Act, 2013: Obliteration of Probity in Elections

The Representation of the People (Amendment and Validation) Act, 2013[20] sought to make a few amendments in the Representation of the People Act, 1951.

Section 7(b) under Chapter III which deals with "*Disqualifications for membership of Parliament and State Legislatures* defines 'disqualified' as "disqualified for being chosen as, and for being, a member of either House of the Parliament or of the Legislative Assembly or Legislative Council of the a State".

The amendment, firstly, inserted the words "under the provisions of this Chapter, and on no other ground" after the words "or Legislative Council of a State" in Section 7, clause (b) of the 1951 Act. The implication of this amendment is that, disqualifications for membership of Parliament and State Legislatures will now take place only on the grounds included in Chapter III, i.e. Sections 8-11 and on no other ground which may be included in other statutes or even the Constitution of India. It is pertinent to note here that Articles 102 and 191 of the Constitution

16 Hereinafter referred to as 'CEC'.

17 C.E.C v. Jan Chaukidar 2013 (8) SCALE 487.

18 http://www.lawctopus.com/academike/jan-chaukidar-corrective-step-nullified.

19 http://www.thehindu.com/news/national/parliament-passes-bill-to-allow-those-in-jail-to-contest-polls/article5102099.ece

20 Hereinafter also referred to as "the Amendment Act."

provide for *"Disqualifications for membership"* of Parliament and State Legislatures respectively. They list certain grounds for disqualification such as holding an office of profit, being an undischarged insolvent etc. which by virtue of the enactment are no longer applicable neither serve as grounds for disqualificatinu as they do not fall under Chapter III of the 1951 Act.

Secondly, iu Section 62 of the 1951 Act, after the proviso to sub-section (5), the proviso: *"Provided further that by reason of the prohibition to vote under this sub-section, a person whose name has been entered in the electoral roll shall not cease to be an elector"* was inserted.

Throwing light ou **Section 62** which deals with the "Right to vote", sub-clause (5) stares:

"No person shall vote at any election if he is confined in prison, whether under a sentence of imprisoament or transportation or otherwise, or is in the lawful custody of the police". Persons subjected to preventive detention are saved under the proviso tn Section 62(5). This provision directly translates into *"jailed or imprisoned persons cannot contest elections."* This can deduced by the following reasoning. 'Qualifications for membership to the Parliament and State Legislatures respectively are provided in Section 4 and 5 of the 1951 Act wherein Sectiou 4(d) and 5(c) require a person to be an 'elector' to be qualified to fill a sit in the respective legislative bodies.

'Elector' is defined in Section 2(e) of the 1951 Act as *"a person whose name is entered in electoral rolls of the constituency for the time being in force and who is not subject to any of the disqualifications mentioned in Section 16 of the 1950 Act."* Referring to Section 16(1)(c) of the 1950 Act, the sectinu provides for disqualification of a person for registration in an electoral roll if he is for the time being disqualified from voting ander the provisions of any law relating to corrupt practices and other offences in connection with electinns. Thus, a person who is disqualified from voting, as in the case of jailed persons and those confined in police custody under Section 62(5); shall further be disqualificd for registration in the electoral roll; with their names being struck off[21]. Hence they would cease to be an elector and would not be qualified under Section 4(d) or 5(c) for contesting elections to the legislative bodies. Thus, jailed persons' right to vote as well as contest elections are being taken away by Section 62(5).

However, the present scenario is such that by virtue of the amendment, although a jailed person is prohibited from voting, thus losing his right to vote; his name is

21 Section 16(2) of the Representation of the People Act, 1950.

not struck off from the electoral roll therefore he does not cease to be an elector; hence is eligible under Section 4 and 5 to contest elections for membership to the Parliament and State Legislatures. Thus, jailed persons lose their right to vote but retain their right to contest elections. This poses as a grave threat to Indian democracy as it gives a direct ticket to potential criminals to enter into politics.

IV The grave ramifications caused by The Amendment Act

a. Promotion of arbitrariness and consequent violation of Article 14

India, one of the fastest developing economies in the world has no dearth of potential yet is a 'developing country' for the past six decades. This is primarily so due to the inequality that exists in different spheres of peoples' lives. Our Constitution makers were farsighted and laid emphasis on bridging this gap by incorporating an equality clause in the Constitution highlighting the principle of "*equality of status and opportunity*" given in the Preamble of our Constitution.

Article 14 of the Constitution of India[22] provides for "*Right to equality*" and strikes at arbitrariness and discrimination of any sort further encompassing concepts of natural justice and 'due process of law'.[23] To strike at the root cause of arbitrariness, one must first grasp the meaning of the terminology. '*Arbitrarily*' is defined as "*in an unreasonable manner, non-rational, not done according to reason and judgement*".[24] It is contended that the amendment Act of 2013 is **arbitrary**.

b. The Amendment Act segregates 'Right to Vote' from 'Right to Contest Elections'

The Right to Vote, inspite of being a Statutory Right forms the basis of a generic democratic government[25], as it plays the most significant role in the process of elections. There shall be a tear in the fabric of democracy if an equal Right to Adult Suffrage is not granted to all rightfully entitled voters.

Before the new amendment, with the rescission of Right to Vote of a person, he was not eligible to be an elector, thus making him ineligible to contest elections.[26]

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

23 Maneka Gandhi v. Union of India AIR 1978 SC 597; *R. D. Shetty v. International Airport Authority of India & Others. 1979 AIR SC 1628.*

24 M/S Sharma Transport Rep. v. Government of A.P. & Ors. AIR 2002 SC 322.

25 Indira Gandhi v. Raj Narain 1975 Supp SCC 1.

26 *Supra* note 17.

As because being a voter is a pre-requisite for being an elector. With the new amendment stating that a person's name shall not be removed from the electoral roll even if he is prohibited from exercising his Right to Vote, it is clear that the proviso seeks to conveniently treat that jailed person as an 'elector', giving him Right to Contest Elections even if he is not a 'voter'.

This step is absolutely arbitrary because being a 'voter' precedes being an 'elector'. Any candidate for an election or any elector for that matter needs to be a voter first. All persons who possess, or will possess on the day of the election the constitutional and statutory qualifications of electors are entitled on making proper application to the registrar to have their names registered on the voting list[27]. A person who stands thus enrolled, cannot be excluded from exercising his Right to Vote[28]. Conversely, persons who cannot vote are not entitled to be registered[29]. It can be inferred that there is no conspicuous bifurcation in the semantics between that of 'voter' and 'elector'. The term 'voter' applies to someone who has the Right to Vote and exercises it by partaking in the physical act of voting; while 'elector' is someone who is entitled to a Right to Vote.[30] Even the Corpus Juris Secundum provides that,

"In a general sense, an elector is one who elects or has the right of choice. Specifically, an elector is one who has a right to vote for public officers or the adoption of any measure; a person possessing the qualifications fixed by the Constitution, and duly admitted to the privileges secured and in the measure prescribed by that instrument."[31]

This amendment which specifically tries to twist the provisions to provide right to contest elections while withholding the right to vote of individuals is therefore unreasonable, as it tries to draw a distinction between the terms 'elector' and 'voter' whereas both of the terms are the same in essence.

The very possibility that a chunk of criminals are getting a license to contest elections should be deterrent enough for disallowing the jailed candidates from contesting elections, taking into consideration the gravity of elections and the imperativeness of conducting free and fair elections in a true democracy. If the convicted criminals do not have such a right, there is no reason why the ones yet

27 Cornelius v. Pruet, 85 So. 430, 2 04 Ala. 189. Pa.

28 Manzur Ahmed v. Budhi Lal, (6 E.L.R 470, Shyamdeo Prasad Singh v. Nawal Kishore Yadav, AJR 2000 SC 3000.

29 People v. Gabino, 23 Puerto Rico 675.20 C.J.

30 Clayton v. Hill City 207 R 770, 11 Kan 595, Words and Phrases, Permanent Edition, Vol 44, p. 46F.

31 Corpus Juris Secundum, Vol. 29, p. 16.

to be convicted should be provided with it. This in no way acts against the 'innocent until proven guilty' principle of criminal jurisprudence[32], applicable to jailed individuals and under trials as because the jailed individuals are deprived of quite a few rights, liberty being the foremost amongst them. There is an essential purpose underlying this practice and hence, in furtherance of the purpose of preservation of the democratic fabric and sanctum of governance, there would be no harm in depriving certain innocent individuals of the statutory right of contesting elections. Further, this right isn't a right intrinsic enough which they cannot be deprived of, in addition to the bundle of rights, inclusive of certain fundamental rights such as the 'freedom of movement'[33], 'right to choice', etc. which they anyway are not entitled to. The very reasoning employed in criminal jurisprudence for depriving the jailed individuals of certain rights should be employed in the matter at hand. Individuals are jailed so that anyone else's rights and existence are not jeopardized. Similarly, the nation's interests cannot be jeopardized in the efforts of ensuring that a few innocent individuals in jail are not deprived of a statutory right of contesting elections.

Also, there is no restriction in terms of age debarring people from contesting elections, and hence spirited individuals can contest the subsequent elections after the disposal of the cases they are charged with.

c. Transgression of the norm of *"Law breakers should not be law makers."*

The stealthy disposal of cases defers the conviction of a few jailed candidates, who by virtue of the amendment get a license to contest elections and thereby occupy a seat until their pending conviction. Hence, a law breaker is being provided with the prerogative to make laws; which is contrary to what the makers of the constitution envisaged and the roling of Supreme Court in the case of ***K. Prabhakaran v. Jayarajan***[34], wherein it was held that,

"Those who break the law should not make the law. Generally speaking the purpose sought to be achieved by enacting disqualification on conviction for certain offences is to prevent persons with criminal background from entering into polities and the house – a powerful wing of governance. Persons with criminal background do pollute the process of election as they do not have many a holds barred and have no reservation from indulging into criminality to win success at an election."

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32 Jaikrishnadas Manohardas Desai & Anr. v. State of Bombay, [1960] 3 S.C.R. 319, Dayabhai Chhaganbhai Thakker v. State Of Gujarat AIR 1964 SC 1563.

33 Section 19 (1)(d).

34 AIR 2005 SC 688.

Many more landmark judgements have been delivered by Hon'ble court all over the country which have deferred criminality from entering into politics[35], while from cases like *Lily Thomas*[36], it is clear that the net effect of these judgments is to make it more onerous for criminal elements entrenched in Parliament from continuing in their positions. The importance of decriminalising politics has been harped upon in a catena of judgements.[37] The proviso which has been added to Section 62(5) of the Representation of the People Act, 1950 through the amendment, meanwhile makes all those judgements go into vain as it subtly gives opportunity to criminals to enter into the arena of politics. The very proviso defies the object and purpose behind Section 62(5) to which it has been added, which has been stated in *Anukul Chandra Pradhan case*[38] as:

"...to prevent criminalisation of politics and maintain probity in elections..."

Thus, in the context of the excessive criminalisation of politics, this Amendment Act is largely arbitrary and violative of Article 14.

d. The amendment defeats the Object of Section 8 of the Representation of the People Act, 1951.

Section 8- *Disqualifications on conviction for certain offences*; as seen in the Statement of Objects and Reasons accompanying Bill No. 128 of 1988 was enacted with the purpose of eradicating criminality in politics.[39]

However, the amendment to Section 62(5) of the 1951 Act allows for jailed persons, accused of an offence to contest elections. It is an undisputed fact that the disposal of cases by the Indian judiciary is extremely slow with a time lag of a couple of years, maybe even more between the filing of charge-sheet and conviction. Thus, a jailed person who may be convicted of an offence in the future gets a chance to contest elections and occupy a seat in the legislative bodies for a few years until he is disqualified vide Section 8 on conviction by the Court. It is pertinent to point out that such a person was guilty since the time he was accused and was jailed. This amendment violates the very object of Section 8, which is to disallow a criminal to occupy a seat in the legislative bodies of the

35 Purushottamlal Kaushik v. Vidyacharan Shukla, AIR 1980 MP 188 People's Union for Civil Liberties v. Union of India, AIR 2004 SC 456

36 (2013) 7 SCC 653.

37 ManojNarula v. Union of India, (2014) 9 SCC 1, Dinesh Trivedi v. Union of India, (1997) 4 SCC 306

38 (1997) 6 SCC 1.

39 L.K. Prabhu v. State of Kerela & Ors. MANU/KE/0902/2002.

country[40] and to de-criminalize polities as stated above. It is thus *prima facie* unreasonable and irrational; further arbitrary in nature.

It was held in the landmark case of **E.P. Royappa v. State of Tamil Nadu & Anr.**[41], "*equality and arbitrariness are 'sworn enemies' of each other.*" As the Amendment Act strikes at the very roots of equality by virtue of it being arbitrary, hence it is violative of Article 14.

e. Restraint on 'freedom' under Article 19: Stifling of the 'Act of voting'

In *Lily Thomas v. Speaker of Lok Sabha*[42], the Hon'ble Supreme Court has ruled that,

"Voting is a formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question and that right to vote means right to exercise the right."

The act of casting votes forms the foundation and carries the essence of a democracy. It is well settled and it needs no emphasis that the fundamental right of 'freedom of speech and expression'[43] should be broadly construed and it has been so construed all these years.[44] Though, the 'right to vote' is a statutory right, but the 'act of voting' of a rightfully entitled voter who has been provided with such a right comes within the precincts of Article 19(1)(a). The 'act of voting' is a means of voicing of opinion of a right as to whom one wants to be as his representative and who best aggregates a person's interests. Thus, this act is deemed to be protected by Article 19(1)(a) which seeks to protect an individual's right of speech and expression.

An atmosphere of free and fair elections has been regarded as indispensable for the proper conduct of elections. The importance of free and fair elections stems from two factors— instrumentality, its central role in selecting the persons who will govern the people, and intrinsically, as being a "*legitimate expression of popular will.*"[45] Elections being fundamental to a democracy, 'free and fair elections' have also been regarded as a component of the basic structure of the

40 The Statement of Objects and Reasons accompanying Bill No. 128 of 1988 stated *inter alia*, *"S. 8 of the RPA, 1951, deals with disqualification on grounds of certain offences. It is proposed to include more offences in this section so as to prevent persons having criminal record from entering public life."*

41 AIR 1974 SC 555.

42 (1993) 4 SCC 234

43 Article 19(1)(a).

44 Union of India v. Assn. for Democratic reforms, (2002) 5 SCC 294

45 Indira Gandhi v. Raj Narain and Others, 1975 Supp SCC 1, 252 para 664.

Constitution. Hence, it is imperative for such an atmosphere to prevail for the effective realization of one's act of voting which is protected under Article 19(1)(a).

In the case of ***Anukul Chandra Pradhan v. Union of India***[46], it was held *that "criminalization of politics is subversive to free and fair elections"*. The amendment under consideration has the effect of proliferating criminalization of politics and stifling the presence of 'free' and 'fair' elections. With the inclusion of jailed individuals or under trials into the foray of elections, electoral malpractices are bound to increase. It is because there is a chunk of the jailed candidates which comprises of criminals. The stealthy disposal of cases defers the conviction of such jailed candidates, who by virtue of the amendment get a license to contest elections. Such candidates are ultimately criminals and prevent an atmosphere of free and fair elections. Elections cease to be 'free and fair' with the inclusion of criminal elements. As a rightfully entitled voter cannot exercise his vote 'freely' in such an atmosphere, his freedom of speech and expression which encompasses this act of voting of his is violated by this Amendment Act which provides the jailed criminals with the right to be a part of the elections.

f. Infringement of 'Right to life and personal liberty'

From Article 14, equality for all, flows the right of life and personal liberty, enshrined in Article 21. Although simple in its structure, Article 21's definition and scope has gone a drastic change over the years incorporating principles of social welfare thus benefiting innumerable Indian citizens. Maximum cases of judicial activism have been seen under this Article and the interpretation of *'procedure established by law'* as *'due process of law'* have changed the course of India's judicial decision-making.

Article 21 states that: *"No person shall be deprived of his life or personal liberty except according to procedure established by law."* The landmark judgment in ***Maneka Gandhi v. Union of India***[47], completely changed the interpretation of Article 21 by holding that *"the 'procedure established by law' contemplated by Article 21 must answer the test of reasonableness (Articles 14 and 19)"* and must be *'just, fair and reasonable'* as opposed to being arbitrary or fanciful. It must thus meet the challenges of both Article 14 and 19; and violation of either of the Articles, leads to the automatic violation of Article

46 (1997) 6 SCC 1.

47 AIR 1978 SC 597.

21. This essentially is the *'golden triangle rule'* highlighted in ***Minerva Mills Ltd. & Ors. v. Union of India & Ors.***[48], and a plethora of cases.[49]

The impugned Amendment Act of 2013 when subjected to the test of Article 21 (to judge its constitutionality) fails. As proviously discassed, the Act fails to comply with the provisions of Article 14 and 19, as it is arbitrary and discriminatory. It thus fails the test of reasonableness and also Article 19 thus removing two sides uf the 'golden triangle' and in turn being violative of Article 21. An Act in violation of Article 21 should be allowed to continuc at uo cost as it goes against the basic human rights of individuals by snatching their fundamental right to life and liberty.

g. The Amendment Act is a piece of Colourable Legislation

Article 245(1) of the Constitution endows the Union and the State Legislature with legislative powers and deals with the territorial extent of the laws made by them[50] whereas Article 246 read with entries 1 to 96 of Seventh Schedule talks about the subject matter of their respective legislative powers.[51] Legislative Competence" is determined by reading Article 246 with the entries in the legislative lists mentioned therciu which find a placc in Schedule VII.[52] But, the laws made by the Parliament cannot transgress the limitations (such as legislative competence etc.) imposed by the Constitution.[53]

The impugned amendment to the 1951 Act relates to the elections to the Parliament and State Legislature falling under Entry 72 of the Uniou List[54]. The Union Legislature has the requisite competenee to enact a law with respect to all the Entries which feature in the Uuion List[55] henee, the legislatiou is within the competence of it. I lowever, the Parliament manipulates its legislative competence by legislating a colourable piece of iegislation and consequently doing somcthing that is beyond its competency.

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48 AIR 1980 SC 1789.

49 R.C. Cooper v. Union of India AIR 1970 SC 564; Bennett Coleman and Ors. v. Union of India and Ors., 1973 AIR SC 106; Haradhan Saha v. State of West Bengal, 1974 CriLJ 1479; Kathi Raning Rawat v. The State of Saurashtra, AIR 1952 SC 123.

50 Durga Das Basu, Commentary on the Constitution of India, Vol. 3, p. 8732

51 Ref. under Art. 143, AIR 1965 SC 745 (762); R.M.D.C. v. Union of India, (1957) SCR 930 (940)

52 *Id*; Koluthara Exports Ltd. v. State of Kerala, AIR 2002 SC 973.

53 Keshavananda Bharti v. State of Kerala, AIR 1973 SC 1461

54 Schedule VII of the Constitution of India.

55 Art. 246(1).

The doctrine of Colourable Legislation was dealt by the Hon'ble Supreme Court of India *in* ***K.C. Gajapati Narayan Deo and Ors. v. State of Orissa***[56] whereiu it was held, "*A legislative transgression may be patent, manifest or direct, or may also be disguised, covert and indirect. It is to this latter class of cases that the expression "colourable legislation" belongs to. The discerning test is to find out the substance of the Act and not merely the form or outward appearance. If the subject-matter in substance is something which is beyond the legislative power, the form in which the law is clothed would not save it from condemnation. The Constitutional prohibitions cannot be allowed to be violated by employing indirect methods.*" This has been reiterated in **R.S. Joshi, S.T.O. v. Ajit Mills Ltd**[57] , **Naga People's Movemeut of Human Rights v. Unlon ef India**[58] and a plethora of cases.[59]

Therefore, the doctrine of colourable legislatiou deals with the legislations which are purportedly within the limits of the powers of the legislature, yet in substance and in reality, transgress these powers.[60] This doctrine hasically deals with the principle, "*what the legislature cannot do directly, it cannot do that indirectly*"[61] and is inextricably related to (be issue of legislative competence.[62]

Through thc impugned areendmem, the words, "*under the provisions of this chapter ond on no other grounds*" have been inserted in sectiou 7(b) of the 1951 Act. The effect of this insertien is that, disqualifications from seeking membership to legislativc bodies shall take place only under the Sections 8-11 of the Act.

Articles 102 and 191 of the Constitutien, list down disqualifications from being a member of the either bouse of the Patliament and A State legislative assembly or the State legislative eouneil, respectively.

Now by virtue of the insertion in Clause (b) uf Section 7 of the 1951 Act, the Artieles 102 and 191 have been reduced to a nullity, have lost their significanee

56 AIR 1953 SC 375.

57 [1978]1 SCR 338,108.

58 AIR 1998 SC 465.

59 K. Nagaraj and Ors. v. State of Andhra Pradesh and Anr (1985) 1 SCC 523; Welfare Assn M.R.P, Maharashtra and Ors. v. Ranjit P Gohil and Ors. (2003) 9 SCC 358; State of Kerela and Ors. v. Peoples Union for Civil Liberties, Kerela State Unit and Ors. (2009) 8 SCC 46.

60 K.C Gajapati Narayan Deo v. State nf Orissa AIR 1953 SC 375.

61 Joydeep Mukherjee and Ors. v. Sate of West Bengal and Ors. 2011 2 SCC 706 , Sonapur Tea Co. Ltd v. Mst. Maziruonessa [1962] 1 SCR 724, Gujarat Ambuja Cements Ltd. v. Union of India ((2005) 4 SCC 214), State of Andhra Pradesh v.Mc Dowell and Company (1996) 3 SC 709)

62 *Supra* note 60 , B. R. Shankaranarayana v. State nf Mysore AIR 1966 SC 1571.

and have been nullified as long as this provision remains in operation. Therefore, this insertion in Clause (b) of Section 7 through a statutory amendment, i.e., The Representation of the People (Amendment and validation) Act, 2013 has the effect of bringing about a Constimtional amendment.

Snb-Sections 1 and 2 of Article 368 of the Constitution give the procedure of amendment to the Constitntion. Hence, exeepting eertain artieles of the Constimtion, amendment to the rest of the articles of the Constitution requires a special majority, i.e., a majority of the total membersbip of that House and a majority of not less than two-thirds of the members of that Honse present and voting.[63] On the other hand, a statutory amendment requires a simple majority, i.e., a majority of the members present and voting.[64] Henee, it can be inferred that the object of the Parliament behind inserting Section 7(b) was-to bring abont a Constitutional amendment whieb requires a special majority, through a statutory amendment which requires a simple majority.

Therefore, even if the Parliament had legislative competenee to enact a law related to elections, it manipulated its competence and indulged into a colourable exercise of legislation which it wasn't competent to do.

h. Importance of Articles 102 and 191: Hindrance for tainted politicians

The makers of our Constitution provided a safety valve of sorts to prevent criminal elements from claiming membership of the Parliament or State Legislatures, thns dissuading criminalization in polities. They tried achieving this noble objeetive by incorporating certain Artieles relating specifically to *"Disqualifications from membership of Parliament or State Legislatures"*.

Article 102 gives certain conditions which if fulfilled would disqualify a person fram being chosen as and from being a member of the Parliament. The article further vests residuary power of making *"any other disqualification"* with the Parliament of India.[65] This sub-clause essentially tackles the prohlem of criminalization of pohtics by introducing several legislations pertaining to the same, the most important being the Representation of the People Aet, 1951. Artiele 191, similarly worded applies to State Legislatures. Several MPs have been disqualified to hold a seat in the Parliamem owing to Section 8 which states a person if couvicted for any of the crimes listed in the section wonld be disqualified from either being chosen as or continuing as a member of the Parliament or State Legislatures. The most important pohtieians who fell prey to

63 Clause (2) of Article 368.

64 Article 108 (4).

65 Article 102(1) (e).

it were Lalu Prasad Yadav, former Chief Minister of Bihar; J. Jayalalithaa, Chief Minister of Tamil Nadu, Rasheed Masood, former MP from Congress party.

In addition to this, a landmark judgment was given on 10th July, 2013 in the case of *Lily Thomas v. Union of India*[66] leading to immediate disqualification of convicted MPs. The judgment repealed Section 8(4) of the Representation of People's Act, 1951 declaring it anconstitutional as it allowed for convicted MPs and MLAs to cominue holding their seat for three months after conviction or if an appeal or application for revision is filed during that period, till the disposal of the same. Thus, the effect of the judgment was, convicted legislators would have to immediately vacate their seat upon conviction vide Article 101(3)(a)- *Vacation of seats by MPs and MLAs.*

Seveml political big wigs fell prey to Section 8 and the Lily Thomas judgment. J. Jayalalithaa, the worst hit, had to step down from her post as Chief Mimster of Tamil Nadu as she was accused of misusing her office during her first tenure fram 1991-96 to amass properties worth ' 66.65 crores, following which she was convicted on 27th September, 2014 by a Speeial Court in Karnataka hence disqualified. However, after a three month bail she was acquitted of all charges by the Karnataka High Court on 11th May, 2015.[67]

Similarly, Lalu Prasad Yadav, former Chief Minister of Bihar and leader of Rashtriya Janata Dal (RJD), was implicated in tbe 'Fodder Scam' or *'chara ghotala'* whieh involved the fabrication of "vast herds of fictitious livestock" for which fodder, medieines etc. were procured. It also involved embezzlement of about ' 950 crores from the government treasury of Bihar around the year 1996. On 30th September 2013, Lalu Prasad and Jagannath Mishra along with 44 others were convicted for the same.[68] Thus, Lalu Prasad owing to both Section 8 and the Lily Thomas judgment had to immediately vacate his seat. In this way scores of convicted MPs were disqualified and were required to vacate their seat, the very first being Rasheed Masood, a Cougress MP.[69] This was thns a very welcome step in removing criminal elements from the political sphere.

As these Artieles had far-reaching consequences, the Parliament sought to drive these provisions to nullity by indulging in a colourable exercise of legislation. This move was a highly regressive and extremely condemnable step.

66 (2013) 7 SCC 653

67 *The Times of India, 4th Oct, 2013.* Last accessed on 17.7.2016.

68 *Hindustan Times.* 30 September 2013. Retrieved 30 September 2013. Last accessed on 17.7.2016.

69 *CNN IBN.* 1 October 2013. Retrieved 1 October 2013. Last accessed on 17.7.2016.

i. The Amendment Act of 2013 is an invalid 'Validation Act'

While judging the constitutionality of the Representation of the People (Amendment and Validation) Act, 2013; one must take into account the fact that it a Validation Act. Being so, its constitutionality must be tested in the light- whether it is valid as Validation Act or not. A Validation Act is defined by Black's Law Dictionary as "*a law that is amended either to remove errors or to add provisions to conform to constitutional requirements*".[70] It removes actual or possible voidness, disability or other defect by confirming the validity of anything which is or may be invalid".[71] In India, it is competent for the legislature to put an end to the finality of a judicial decision by passing a validating act to declare a law to be valid which has been pronounced by the court as void. It was held in ***Indian Aluminium Co. and Ors.*** v. ***State of Kerala and Ors.***[72] that a Validating Act will be deemed to be 'valid' if it satisfies the following tests:

- Whether the legislature enacting the Validating Act has competence over the subject matter.
- Whether by validation, the Legislature has removed the defect which the courts had found in the previous law.
- Whether the Validating Act is consistent with the provisions of Part III of the Constitution.

As discussed above, the Parliament has legislative competence to pass the impugned Act. Although, the first test is satisfied, the amendment Act, also a Validating Act fails to comply with the other two tests.

The second test requires the Parliament to remove the defect which the courts had found in the previous law before validating it. Only then will the Act be valid otherwise it will have the effect of overruling a judgement, which the legislature cannot do. The judgement of ***Chief Election Commissioner (CEC) v. Jan Chaukidar***[73] had the effect of diminishing criminalization of politics. However, the amendment Act of 2013, in a way reverses this judgement allowing for jailed persons, including convicts, to contest elections. It thus promotes induction of criminal elements into the public sphere going against the very objective of maintaining probity. Hence, the Validating Act does not cure any defect which was present in the previous law and for which the judgment was given. It on the contrary adds to the defect, aiding in criminalisation of politics.

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70 BRIAN A. GARNER, BLACK'S LAW DICTIONARY. 1545 (9th ed., 2009)

71 ITW Signode India Ltd. v. Collector of Central Excise, (2004) 3 SCC 48.

72 (1996) 2 SCR 23.

73 2013 (8) SCALE 487.

The third test requires the valldating act to be consistent with the provisions of Pan III of the Constitution. However, as elaborated above, the Act violates Articles 14, 19 and 21 thus violating Part III of the Constitutiou, henee failing the third test.

Therefore, the Validating Act, fails two of the three aforementioned tests, hence it is invalid.

V Conclusion

The Representation of the People Act, 1951, enacted at a time when Constitution came into force, sought to uphold the democratic principles envisaged by our Constitution makers. This was in pursuance of the power provided under Article 102 to rid the legislature of criminal elements and accommodate tu the varying ehanges in the society. It came into being with the noble ideals of guarantecing to the citizens their right to "free and fair elections", right of cboice, right to vote and right of having esteemed men of high moral charaeter governing them. The Representation of the People (Amendment and Validation) Act. 2013 bowever showed uner disregard for these ideals and negated whatever little progress was made by thc 1951 Act.

The Amendment Act, enacted as a response to the judgments pronounced in the Jan Chaukidar and the Lily Thomas case of 2013, was a desperate attempt by tainted MPs and MLAs to reverse these judgments which prevented the induction of criminals in legislative bodies of the eountry, Thns, the very purpose with which the Act came into existeuce was annihilation of democratic principles and coutrary to the objective of de-criminalization of politics. Further, the Act transgressed several constitutional provisions which never came to light dac to the hurried passing of the Act. Due to its arbitrary nature, it is an outright violation of Article I4 which encompasses the principle of equality. Along with it, there is violation of 'Freedam of speech and expressiou' enshrined in Article 19 and consequent violation of Article 21. Not only this, the Amendment Act is a colourable piece of legislation alung with being an invalid 'Validatiou Act.' Thc Act, right from its inception till the end transgresses several constitutional and subsequently democtatie principles,

The Amendment Act acts against all the nohle ideals that the Constitution makers sought to achieve. It provides the right to contest elections with a sanctimonious position. But, at what eost is the innocence of a few individuals to be rewarded with? The interest of the nation supersedes that of such individuals and thus, for these individuals in minority, the guilty cannot be allowed to take advantage of this provisiun. The very individuals wbo utterly disregard the law cannot be

allowed the prerogative of law making. The democracy is hence being made to suffer through this enactment. The very right to vote which forms the essence of a democracy is being affected by virtue of poliution of the atmosphere of free and fair elections, which again is a part of the basic structure of the Constitution. Thus, by taking a step towards criminalizing polltics and acting against democratie ideals it transgresses the very object of the Act to which it makes an Amendment, i.e., the objects of the Representation of the People Act, 1951 as well as the objects of the Constitution. This in itself ruptures the constitutional fabric of the country and consequently annihilates the democratic principles.

Despite such flagrant violations and transgressions, it is indeed appalling that such un enactment continues to exist. Such a legislation which corrodes he foundation of democracy cannot be allowed to exist if the constitutional essentials are sought to be npheld. Thus, there is an immiuent need to take down this enactment in order to restore the pristine position of the democratic ideals.

The only demerit arising out of the repeal of the legislation, would be the vindictive filing of FIRs in pursuance of politieal vendetta just before the elections to prevent such individuals from contesting elections. But, safeguards such as that of proper scrutiny of the veracity of the FIRs by the police officials cen be implemented. In any case, if the act is allowed to stay, the harm caused is greater thau the harm prevented. All in all, to undo the tear in the constitutional fabric of the nation caused by the deliberate indnctinu of criminals into the political arena, and to nphold the sanctimonions democratie principles carrying the nuble ideals of our forefathers, this impugned Representation of the Pcople (Amendment & Validation) Act, 2013 needs to be repealed.

Freedom of Speech and Expression, a Substantive Right or an Auxiliary Right- Emphasis on Media and Broadcasting

Gunjan Soni* and Vikram Gupta**

The domain of an individual's freedom to speech and expression is expanding with the expanse of time as people are more aware and tolerant of the realities of the contemporary socio- politieal scenario. With that, the coverage of such events via the mediom of media ineluding films, documentaries, television broadeasting has also taken a broader approach towards projecting what was previously been rejected as not being "acceptable to the public at large". Thus, freedom of speeeh and expression enshrined to the eitizens under Article 19(1)(a) proves to he an integral concept iu modern liberal democracies and without the same the people will be devoid of their right to speak freely.

Taking into consideration the recent incident of the screening of the movie "Udta Punjab" it was well noted the Central Board of Film Certification (CBFC) has been pursuing their actions out of the arena of their working and acting arbitrarily while considering the certification of the films. In the instant case, as presented in front of the Bombay High Court, the court observed that there is no mention of the word 'censor' in the Board and somehow dissented with the ruling provided in *K. A. Abbas vs. Union of India* which provided CBFC with the power to censor. The Board should use its powers under the constitutional framework and the SC's directions. It is pertinent to note here that there have been instances whereiu the films that have been eensored and not allowed to be broadcasted have been, while in the process of adjudication in front of varions High Courts and Supreme Court, given a green ehit withont any or with some minor changes.

Looking into such matter one question that is still unanswered is that why is there a dissent between the outlook of the courts and CBFC when they both work under the ruliug of a single legal framework?

In the paper the authors shall scrutinize the meaning and applieation of the word "Censor" with regards to the powers provided to CBFC under the Cinematography Act, 1952 and will further investigate into the validity of the rulings given by the

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administrative authorities in light of the *Phantom Films Pvt. Ltd. and Ors. vs. CBFC and Ors.* The authors shall also delve into the obsolete nature of the act and auxiliary rules as they require to be in consonance with the present socio-politieal framework and shall also provide plausible solutions to reach to a middle ground.

I Introduction

In light of the recent controversy regarding the certification of the movie 'Udta Punjab' there had been a hue and cry regarding the arbitrary nature of the decisions given by the Central Board of Film Certification (CBFC) which are borderline imprudent. This brings us to the only question whether the CBFC is in reality empowered to censor the movies in order to bring them in consonanee with the present standards of "morality" and if the same is answered in affirmative then can the arbitrary usage of this power be acceptable under the garb the Cinematograph Act, 1952.

Censorship is one of the most important aspects while demareating the encroachment of the state over the fundamental rights of an individual aud therefore mnst be handled with utmost scrutiny and reasonableness. For the same purpose it is pertinent te establish the domain of CBFC and the faulty adjudicatiou that has been done by it which leads to the inlringement of freedom of speech and expression of an individual enshrined under Article 19(1)(a) of the Censtitution of India, 1950.

II Relation Between Right To Freedum Of Speech And Expression And Constitution

The right to Freedom of Speech and Expression is a fundamental right granted to the citizens of the State which is defined as "*a supreme condition of mental and moral progress. The right to freedom of speech and expression has been described as the touchstone of individual liberty.*"[1] Freedom of Speech and expression is the inextricable part of the society and forms the basis of the democratic spiril. The freedom to express includes the freedom of the media and broadcasling to showcase movies without the unreasonable restrietions on the same. Broadcasting, majorly constituting films have been established to have different footing from other sources of expressiun as the viewership of the former is much wider *vis-à-vis* books, sculplures, paintings, ete.[2]

1 Durga Das Basu, Commentary on the Constitution of India, 2198, 8th Edition, Vol. 2, Wadhwa and Company, 2007

2 K.A. Abbas v. Union of India, AIR 1971 SC 481, 1971 SCR (2) 446

Further, the freedom of media in our country is being extracted from freedom of speeeh and expression which is guaranteed under Artiole 19(1)(a) of the Constimtion of India. The Hon'ble Supreme Court held that *"the right of a citizen to exhibit films is a part of the fundamental right of speech and expression guaranteed by Article 19(1)(a) of the Constitution"*[3] In the provisions, as enunciated in the Constitution of India, any iudividual as well as a corporation can invoke lreedem of speeeh und any other fundamental right against the state or by the way of filling a writ pelilion which is powered under article 32 and 226 of the Indian Constimtion.

The most prominent aspect of freedom of speech and expression is that it widens the scope of discussion and deliberations within the society and thus assists iu the growth of the society in an intelleetual manner. The right holds the scope of freedom of propagation and exchange and interehange of ideas. The Hon'ble Supreme Court observed that *"Democracy is based essentially on free debate and open discussion, for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his rights of making a choice, free & general discussion of public matters is absolutely essential"*[4].

It is imperative to bring to light that withiu the purview of the freedom of speech and expression mentioned under artiele 19(1)(a) of the Constitution of Indla, there has been expansive interpretation so as to include the right to receive and eirculate information. The right to spread the information can be achieved through any madium of pubheation. It can include print media, audio, television or electronic media. The signifieance of Freedom of Speech and expression can be understood by the simple fact that the preamble of the Constitution of India also shields to all citizens inter alia, liberty of thought, expression, belief, faith and worship.[5]

However, there is an inherent eonflict between the right to speech and expression and censorship. The freedom on one hand elearly provides one to express their ideas and thoughts as a matter of a fundamental right provided to him, whereas on the other hand, there is a restriction on the exercise of such right in terms of censoring the mode of expression on various greunds as the circumstances provide for. Thus, there is a dispute between the two eoncepts and the demarcation of the boundaries of either is of nebulous nature. Thus, there is always a struggle

3 Odyssey Communications Pvt. Ltd. V. Lok Vidyayan Sanghatana, AIR 1988 SC 1642

4 *Maneka Gandhi v. Union of India,* AIR 1978 SC 597: (1978) 1 SCC 248

5 Tanu Priya, *Freedom of Speech and Expression,* Academike, September 2 2014

of power between the two ideas, which brings us to the main contention dealt with in the paper vividly.

a. Restrictions on Freedom of Speech And Expression under Article 19(2)

Out of all the freedoms granted to the citizens of India, freedom of speech and expression is the most fundumontal form of freedom provided under the Constitutiou of India. "*Freedom of speech and that of the press lay at the foundation of a demoeratic society, for without free political discussions, no public education is possible, which is so important for the proper functioning of the government. It allows us to freely express our ideas and thoughts through any medium such as print, visual, and voice*".[6]

Every human has certain desires to fulfill, however, in the eivil society that we live in, the desires are restrained in respect of the similar desires that other human beings bave. This mindset elearly indieates that there is uo absolnte right. The government has the right to put reasonable restriction on anything or act whieh is against the interest of the eountry. The word restriction has a wide connotation and multiple Implieations flow from this word which ean either be partial restriction aud can also be total prohibition.[7] The act of censoring certain content carried out by the Central Board of Film Certification is also a form of partial restriction on against the showcase of some information which may not be appropriate for the general public. In the recent case of the movie "Udta Punjab", the restriction imposed by the board was total prohibition which was done out of the powers and scope of the CBFC and was even considered to be arbitrary and unreasonable iu the case of providing the eertifieation to the film.

The decisions made by the eensor board are considered to be eompletely discretionary. The censorship by the board should be reasonable and should possess substantive reasonableness. There have beeo examples in the past few years, which exhibits the inadmissible extent of discretionary power used by the board as the board provides eertificates to the movies without any reasonable explanation. Recently the Film Certification Appellate Tribunal (FCAT) mentioned in one of its orders that "*In our view, the whole approach of the CBFC is totally arbitrary and capricious. Decisions are taken by the CBFC without any transparency and without even informing the applicants as to why the certificate has been refused*".[8] The censor board, throngh censorship takes

6 Romesh Thaper vs. State of Madras, AIR 1950 SC 124

7 Durga Das Basu, Commentary on the Constitution of India, 2198, 8th Edition, Vol. 2, Wadhwa and Company, 2007

8 Himanshi Dhawan, *Tribunal Slams CBFC's "arbitrary"* film certification, The Times of India, 13 June 2016

away an individual's Right to Freedom of Speech and Expression granted under Art. 19 of the Constitution of India.

In order to not infringe the rights of a person, the censor board should order for the changes in the movies only when the information displayed will harm the public at large. The Supreme Court of India said that "*Such restriction is unreasonable because when the power is vested in the unfettered discretion of the administrative authority, there is no knowing whether he would use the power for extraneous purposes*",[9] and "it would be difficult for the courts, in the exercise of their power of judicial review, to limit the scope of power."[10]

Similarly, the censor board has the power to alter changes, however the same has to be done with reasonable grounds and not arbitrariness. "*Free speech is necessary to determine the truth. But what is truth, a postmodern skeptic might wonder.*"[11] Because of the unreasonable censorship the truth which is supposed to be brought in the front of the general public is always missing and the public is not able to gather the realities and intention of the director and the filmmakers which they want to convey with the exhibition of the film. In order to examine whether the law constitutes restriction on a particular fundamental right, the courts have to scrutinize the effect of the restriction of the fundamental right.

The restriction provided under Article 19(2) is that it allows the State to apply reasonable restrictions for a person who is willing to exercise this right. Section 5(B) of the Cinematograph Act, gives the censor board rampant powers to impose cuts in the movies, arbitrary orders, refuse certification and even grant certification which may vary from U (Universal) to S (specialized presentation). "*Censorship is done basically to protect the integrity and sovereignty, security of the state, friendly relations with foreign nations, public order, decency, morality, defamation, contempt of court or even incitement of an offence.*"[12] The rudimentary point is that unlimited, haphazard and punitive powers are being vested in the Central Board of Film Certification which can even coerce a conservative filmmaker to bend on his knees and follow the orders given by the board. Because of the large involvement of money invested by the filmmakers and producers, there is always a time restraint regarding the certification of the films and because of this the filmmakers become the puppets of the board's hands.

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9 Seshadri v Distt. Magistrate, 1955 1 SCR 686 (690), AIR 1954 SC 747

10 Banthia v Union Of India, (1969) 2 SCC 166 (183), AIR1970 SC 1453

11 Durga Das Basu, Commentary on the Constitution of India, 2370, 8th Edition, Vol. 2, Wadhwa and Company, 2007

12 Unknown, *State of the Union: Censor board must be junked,* Deccan Chronicles, June 11 2016

b. Definition and Scope of The Word Censor

The word censor can be defined as the vanquishing of the information which may be eonsidered objectionable, detrimental, sensitive, incorrect which is being determined by the authorities or institutions established by the government.

Censorship can also be defined as quelling of the free speech and all the objectionable information whieh cannot be shown or made available for the general public which might come with harmful conseqneoces for the society and citizens in general. An individual can indulge iuto censorship for the work created by them and on their own which is direct form of censorship and if the censorship is imposed by the governmnent or the authorities and agencies establisbed by the government, then it is called inditect censorship.

Censorship exists in various forms such as moral censorship, military eensorship, politicat censorship, religious eensorship and corporate censorship. Censorship can be applied to various source of information like books, speech, films, musie, arts, press, television and the most importantly internet, which is the most easily available source of information and publications. For example, the censorship on internet is done to avoid the jolt of child pornography, hate speech etc to protect the children or other people who can be affected form the iuformation shown.

The scope of censorship is vague and circumstantial, in tbe sense that the content may be at some point considored appropriate, however, it may prove to be arbitrary and unreasonable in others.If the present scenario is coucerned, some social control over the display of motion pictures has to be controlled because they possess a greater capacity to display evil which could be especially harmful for the youth of the nation. Censorship of films would of eourse be valid if some unarguable and constitutionally permissible set standards are laid down.[13]

Thc set standards concocted by the constitution should have some rationale set for the censorship or for the guidance of the censors whicb is uot uncertain and will help the authorities in censorship. The ceosors should approve only those films which are not immoral or which do not have any harmful character. The advent of censorship in India was accompanied by the creation of Cinematograpb Act (ll of 1918) which was replaced by the existing act Cinematograph Aet (XXXVll of 1952).[14]

13 Durga Das Basu, Commentary on the Constitution of India, 2645, 8th Edition, Vol. 2 Wadhwa and Company, 2007

14 Durga Das Basu, Commentary on the Constitution of India, 2647, 8th Edition, Vol. 2 Wadhwa and Company, 2007

The constitutionality of censorship has been in question and has been a debatable subject since the very beginning of the making of the act. Freedom of expression includes to propagate your ideas through visuals, audios, writing material etc. It also includes the right to promulgate other's ideas also. It is not possible to exclude moving pictures from the ambit of the freedom on theory of profit. Nevertheless, it does not follow that censorship as much would not be valid at all under our constitution.[15]

c. Legal Position Of Censorship In India

Taking into account, the diverse interests and ideologies of the populatiou of India, it is imperative for the legislature to establish a fine balance between the right to exercise freedom of speech and expression and censoring content. Thus, there exist certain provisions within the legal framework of India which provide for censorship and also promote freedom of speech expression, primarily under Art. 19 of the Constitution. So far censorship of films in India is concerned, the power of legislation is vested with the Parliament under Entry 6076 of the Union List (or List I) 77 of the Schedule VII of the Constitution. The States are also empowered to make laws on cinemas under Entry 3378 of the Sate List (or List II) 79 but subject to the provision of the central legislation. The prime legislation in this respect is the Cinematograph Act, 1952, No. 37 of 1952, (hereinafter 1952 Act) and the Cinematograph (Certification) Rules, 1983, Gen. S.R. 381(E) (hereinafter Rules). The uct was legislated in the year 1952 and the purpose of the uct was to provide the certification for the films or any other media stuff for exhibition or to be displayed in front of the general public. The central government possess the revisional power to eall for any proceeding which would have been taken place in front of Fiim Certificate Appellate Tribunal.

d. Varying standards of adjudication of CBFC and Judiciary

The Central Board of Film Certification and the Judiciary, while adjudicating the exhibition of various movies, documentaries, clips etc. have contrastiug standards. The judiciary in this matter seems more concerned about protecting the fundamental rights of the people as opposed to the CBFC and therefore people ultimately look forward to the Iudiciary to provide them a remedy rather than addressing their grievances in front of the CBFC.

Further, this dichotomy between the reasoning of the two authorities eventnally renders the purpose of the creation of a body, known as CBFC inept. The CBFC

15 Durga Das Basu, Commentary on the Constitutmn of India, 2647, 8th Edition, Vol. 2 Wadhwa and Company, 2007

was ostensibly a body created to certify and grade the movies in categories as provided iu the Cinematograph Act, 1952, however, the parties aggrieved by arbitrary or unjust decisions of the same, decide to appeal to the Hiigh Courts which eventually causes addition to the already pending cases and thus, results in undue delay in serviug justice and further, backlog of cases.

e. Lack of regard to the fundamental right to freedom of speech and expression

It is to be uoted that in *Srishti School of Art, Design and Technology vs. The Chairperson, Central Board of Film Certification and Anr.*[16] CBFC, while discussing the certification of the film Had Unhad (2011), proposed the petitioners to carry out four excisions without providing them an opportunity of being beard. Consequently, the petitioners approached the Hon'ble High Court of Delhi asking whether the CBFC was justified iu proposing exeisions or not. The court very clearly stated that

"*in the present case, neither the CBFC nor the FCAT has undertaken the task of 'drawing of the line'. Both have recommended complete deletion of all the visuals and words pertaining to the portion of the film where there is discussion of the Babri Masjid demolition.*"

Further, it also reiterated that "*Applying the tests which have been laid down by the Supreme Court and for the reasons that we have indicated, we are of the view that the decision of the Central Board of Film Certification was one which no reasonable body of persons could have arrived at.*"[17]

In another ease where the respondent had produced a film which displayed the incident of assassination of the late Prime Minister Rajiv Gandhi and its aftermath and subsequently applied for the grant of an A certificate to the fiim. The CBFC rejected the issuance of any certificate to the movie by stating that it was promoting sedition as well as the ideas of LTT, a banned organization. The respondent went to the Court after various appeals to the tribunals wherein the court held that

"*The objection of the Board that the film supports the banned orgonization is completely baseless and imaginary. On the other hand, the film clearly depicts the cruel and inhuman behaviour of the activists of the banned organization. It also shows that the assassination of Rajiv Gandhi is approved by none.*"

16 178(2011)DLT337

17 *F.A. Picture International v. CBFC*, AIR 2005 Bom 145

In addition to this the court also stated that "*It is rather unfortunate that the certification of the film has been delayed for more than 12 years without any acceptable and reasonable ground. In our opinion, there is nothing objectionable even in the last sequence in the film showing the attempt on the life of the former Chief Minister of Tamil Nadu by the LTTE Organisation. It has to be stated that the film ends with the message 'no more violence'*".[18]

It can most reasonably be inferred that the CBFC while pronoancing its decisions does not stand at an equal footing as the Judiciary and hence in order to safeguard the fundamental rights of the people, which shonld also be the prime agenda of the adjudicatory hody constituted under the Act, ha to iuterfere and take notice of the unjust actions of the CBFC.

Lack of regard to Rule 22(9) of the Cinematograph (Certification) Rules, 1983.

Rule 22(9) of the Cinematograph (Certification) Rules, 1983 states that

"*(9) Immediately after the examination of the film each memher of the Examining Committee attending the examining shall before leaving the preview theatre record his opinian in writing in Form VIII set out in the Second Schedule spelling out in clear terms the reasons therefore and state whether he or she considers...*"[19]

However, a bare perusal of Form VIII, as stated under Second Schedule of the Rules, wnuld evidently portray that the mere objective recording of the reasons would not justify the censorship of certification of a film. Further, the objective nature of the form is definitely not a reasonable defense against the curtailment of a fundamental right, more precisely the freedom of speech and expression. Reasoning should be such which answers all the aspects or probable qnestions which ean be brought forth while discussing the validity of the curtailment of fundamental rights as enshrined under the Constitution of India, 1950.

Further, in Krishna Mishra and Anr. v. Central Board of Film Certification[20] the court stated that

"*In our view, the requirement of recording reasons is an important safeguard. Where the fundamental right to the freedom of speech and expression under Article 19(1)a is involved, any regulation of that right has to be strictly in*

18 *The Central Board of Film Certification, rep. by its Chairperson, Ministry of Information,and Broadcasting* vs. *Yadavalaya Films, rep. by its Proprietor, Mr. C.R. Ravi Yadav and The Film Certification Appellate Tribunal, rep. by its Secretary*, 2007(5)RCR(Civil)7

19 Rule 22(9), The Cinematograph (Certification) Rules, 1983

20 Krishna Mishra and Anr. v. Central Board of Film Certification, Writ Petition No. 2006 of 2012

conformity with the governing principles of law and any restriction of that right must be confined to what is reasonable and subject to the requirements of Article 19(2) of the Constitution. The recording of reasons ensures that the exercise of certification is not arbitrary. This must equally apply to the appellate process before the FCAT."

Further, the court also opined that "*The fact that the criteria have been duly considered by the certifying authority and in appeal by the Appellate Tribunal can only emerge from the reasons which have been spelt out in the decision.*"

Therefore, it can be strongly asserted that the decisions provided by the Board, under the gossamer curtain of Rule 22(9), do not provide sufficient reasons in regard with the curtailment of the fundamental right of freedom of speech and expression.

f. The Udta Punjab judgement: a breakthrough in safeguarding the fundamental right of freedom of speech and expression

Nebulous Demarcation of the ambit of Censorship on the lines of Article 19(1)(a)

While discussing the validity of the cuts, as provided by the CBFC, to be made in the movie in question, the first point of dispute that the court had to look upon was that whether under Article 19(1)(a) and 19(2) the State operating through CBFC can censor movies or films. For the same reason the court clearly stated that

"*Article 19(1)(a) of the Constitution of India guarantees freedom of speech and expression. That takes within its import the right of a citizen to produce and make a film so also exhibit the same. The right guaranteed by Article 19(1)(a) includes a further guarantee to exhibit a film for viewing by the public.*"[21]

However, according to the Hon'ble High Court of Bombay the abovementioned rights are subject to certain restrictions and a film is not liable to be certified as it or any part of it is against the interest of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or involves defamation or contempt of court or is likely to incite the commission of any offence.[22]

Therefore, it can be noted that the Hon'ble court has not specifically stated the inclusion of the word censor while providing the ambit of Article 19 and henceforth

21 Phantom Films Pvt. Ltd. vs. The Central Board of Film Certification, CITATION REQUIRED

22 Article 19(2), Constitution of India, 1950

it cannot necessarily be stated that the CBFC is empowered to censor movies or films under the constitutional framework of the country.

III Power of CBFC to Censor Movies under the Cinematograph Act, 1952

Under the Act, the CBFC is not expticitly empowered to censor the movies as no specifie and definite provision is provided under the act which authorize the said authority to censor movies. The only power they have been granted is the examination, certification and refusal to grant certificate to movies, as stated under Section 4, 5A and 5B of the Cinematograph Act, 1952.

Further, the object of the Act, through which this body has come into pieture is to make provisiun for the certifieation of cinematograph films for exhibition and for regutating exhibitions by means of cinematographs. Nowhere in the object of the Act has the word censor been mentioned and hence the intention of the legislators[23] can clearly be established to not explicitly grant the power of censorship to CBFC.

The court in the Udta Punjab's case stated that "*certifying films may require censoring them, but the former is the power and the latter is a permissible act which may have to be performed while exercising the same. Every such power is coupled with a duty to uphold and not suppress the Constitutional freedom of speech and expression.*"[24]

It can be seen that, even otherwise recognizing the power of censorship the court is not stating it to be an imperative action while examining und certifying movies, rather it is a secendary and optional act which can be and not must be performed white deeiding the fate of a movie.

a. Arbitrary abuse of power granted to CBFC

In the case of Udta Punjab 13 cuts were suggested by the CBFC while examining and certifying the movie which were held not to be valid by the Hon'blc High Court while pronouncing the judgement.

The court stated that "*it is not for the board to determine as to how the subject of the film should be dealt with by the maker or producer of a film. The treatment of the subject and prior thereto the choice of the same or the selection of the theme is entirely left to the creative team. The cuts or excisions if at all to be directed must have a nexus with the object sought to be achieved by the Act. Merely because the board holds an opinion that*

23 State of West Bengal vs. Union of India, AIR 1963 SC 1241

24 Supra 6

some part or portion is unnecessary or is not required considering the story of the film, that would not enable it to cut or excise the film in that manner."

Further the court also stated that if the deeision is such that it seems that there is non-application of mind, pre-conceived notions of censoring films, the decision is arbitrary and perverse in the sense that no reasonabie man placed in the position of the board members would arrive at such a conclusion as in the present case of Udta Punjab.

One such iastance of the arbitrary use of power is the matter of cut no. 6 as proposed by the CBFC which asked for the deletion of the words 'election', 'MP', 'party' from party worker or 'MLA', 'Punjab' and 'Pariiament'.

The court expressed his concern that the utterance of such words wili how affect the sovereignty and integrity of lndia and stated that this is one more instance where the board, iastead of certifying the fiim for adult exhibition has gone to the extent of cntting and clipping it to snch an cxtent that its whole content is destroyed.

The court also stated that the CBFC, while examining the movies observes a pick and choose approach which is in compiete violation of the provisions of the Act and henceforth the Constitution.

"Deletion of one visual like this or deletion of close-up shot like this but permitting retention of other visuals where procurement, distribution and consumption of drugs is shown vividly and with details indicates as to how the Board has failed to ignore the applicable tests and settled principles."

b. Unnecessary Litigation

Thc court stated that the process of adjudieation eould have been avoided if the said dispute had been deeided at the ground level by CBFC and the appellate tribunal under the Act. Due to the arbitrary and unreasonable decision of CBFC the petitioner had to approach the court.

The court stated that *"A final word as to how a very small issue and event of regular happening has consumed nearly two days of our precious judicial time. We think that this could have been avoided by both sides. They ought to have realised that this court's time is too precious for such a litigation, when other deserving litigants are awaiting justice. Some of them having been deprived of their life and liberty. This is hardly a cause which should be brought before the highest court of the State. We hope this is the last occasion on which we have to deal with such a case."*

Is the Cinematograph Act, 1952 working under the garb of the Doctrine of Colourable Legislation?

The doctrine of colourable legislation primarily means *"you cannot do that indirectly which you are prohibited from doing directly."*[25] It is an important means of evaluating the validity of a provision of an Act or the Act itself.

In the case of *K.C. Gajapati Narayana Deo and Ors. vs. The State Of Orissa*[26]stated that *"Legislatures functioning under written Constitutions are subject to the limitations imposed by the Constitutions and when a statute is challenged as unconstitutional, it is one of the important functions of the Courts to decide whether by a colourable device the Legislature transgressed its constitutional limitations. No Legislature or draftsman would be so ingenuous as to reveal either in the Statement of Objects and Reasons of a Bill or in the provisions of the Bill itself its design to transgress the limits imposed by the Constitution or to evade some constitutional safeguards."*

In the present case the powers granted by the legislators to the CBFC, which are exercised arbitrarily, curtail and restrict the freedom of speech and expression to an inadmissible extent. This cannot be done by the legislature directly and therefore the incorporation of such provisions prove to the fact that the same is implemented impliedly. This is beyond the powers of the legislature and hence hints to the unconstitutional nature of the Act.

IV Suggestions and Recommendations

From the discussion in the present article it can be clearly stated that the CBFC while examining and certifying the films exercise arbitrary usage of the powers granted to it and hence encroaches upon the freedom of speech and expression of an individual enshrined upon him by the virtue of the Constitution of India.

For the same purpose the authors present the following recommendations which can be implemented in order to curb the problem stated herein:

- First and foremost it has to be clearly defined whether under the Cinematograph Act, 1952 the Central Board of Film Certification has the power to censor the movies as in light of the recent judgement of *Phantom Films Pvt. Ltd. vs. The Central Board of Film Certification.*

25 Madden v. Nelson & Fort Sheppard Rly.', (1899) A.C. 626, (Z9)

26 AIR 1953 Ori 185

- There is also a need to comprehensively expand the provision stating that the Central Board of Film Certification has to provide reasous to either grant a particular certificate to the film or refuse to graut the same.
- Rule 22(9) should he amended in such a manner to provide more subjectivity to the Form VIII stated in Second Scheduie of thc Cinematograph (Certification) Rules, 1983.
- Further, the reason behind the dissent of opinion between the CBFC and the Jndiciary should be ascertained in order to evaluate thc lacunae in law and also to curb the problem of arbitrary usage of the powers grantcd to CBFC
- To prevent the backlogging of cascs there must be a stricter framework to keep a check on the arbitrary usage of powers by the CBFC so that the litigation must end at the juncture of certification and appeal to the appellate tribunal and not reach the conventional judiciary.

V Conclusion

Censorship serves as a check on the unrestricted usage of the fundamental right of a person which at times encroaches upon the rights of other individuals and vitiates the whole purpose of establishment of these basic rights. Ilowever, in a country like India where the concept of censorship is not used in its true nature, results into the infringement of the fundamental rights of a person at the first juncture.

The Cinematograph Act, 1952 provides arbitrary powers to the Central Board of Film Certification to censor the films even when the same has not been expiicitiy stated in the Act. Due to this there bave been numerous cese of vexatious liligation wherein the aggrieved party approaches the conventional judiciary to get a remedy. There seem to be a changc of morality in between the standards of adjudication of the CBFC und the conventional courts.

There is a need to overcome this subjective morality in order to reach a common ground so that further infringement of the fundamental rights can be curbed and the constitutional norms can retain their prestigious position.

The Constitutional Validity of Living Wills

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I Introduction

The right to die has been subject to much deliberation and discussion in the Indian judiciary, and law and policy making bodies. The Supreme Court of India has recognised the right to die and the right to refuse treatment in a number of cases and their constitutional nature is thus implicit. Moreover, they are widely known internationally recognised rights of individuals. The implementation of these rights, however, remains unanswered. The recognition of advance directives has been contested to be neeessary in order to effectiveiy impiement the right to die with dignity and the right to refuse treatment. Advance directives are legal documents that allow a person to make decisious abont his/her own health care in advance of an incapacity.[1] These directives can be in two forms.

a. Medical Power of Attorney

b. Living Will

A medical power of attorney entails designating a health care agent who can take medical care choices such as end of life decisions on hchalf on the principal in the event of his/her incompetence to make such a decision. In the case of *Aruna Ramachandra Shanbaug v Union of India*[2] the Supreme Court has laid down directions for the principal's doctor, close relative or a 'next friend' to approach the High Court praying for withdrawal of life-saving measures. However, the Supreme Court or the legistature has not recognised these documents, and hence not legalised it.

"A Living Will is an advance declaration or directive in which a person, while competent, offers written advice on the sorts of consequence of treannent which he anticipates he would find oppressively hard to bear."[3] It is essential that the person making the living will where treatment is refused, be competent to do so. Hence it shall not appiy to non-voluntary passive euthanasia, which means

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1 http://www.christianliferesources.com/article/living-wills-vs-medical-directive-statements-there-is-a-difference-964 (last visited Sept. 22, 2016).

2 (2011) 4 SCC 454.

3 Linacre Center, Euthanasia, Clinical Pratice and Law 147 (Luke Gormally ed., Linacre Ctr. for Health Care Ethics 1994).

that the principal would be in a state where he/she cannot give consent due to being in a Persistent Vegetative State (PVS) or a coma.

Whether the right to live with dignity of an individual also includes the right to die with dignity has been disputed several times in the past and a consensus on the same has still not heen reached due to the ethical and practical complications it presents. The right to die is said to be subject to certain interests of society such us tbe protection of human life and the preservation of ethical standards in the medieal profession. A counter arguntent to this is that the artifieial prolongation of life for persons with terminal eonditions may offer only a precarious and hurdensome existence while providing nothing medically necessary or beneficial to the patient.[4] This has been contended to be a clear violation of Article 21. T!.ere have been a number of cases[5] in India where the idea of living wills has serɔcd as an *obiter dictu* while discussing the right to die with dignity. However, at present there is *no judgment* or *legislation where they have been addressed exclusively. On the* other hand, the declaration of advance directives and living wills as invalid has been recommended by the 196th and the 241st Law Commissiou Report of the 17th and 19th Law Commissions respectively. Thus, this paper seeks to bring the concept of advance direetives and living wills to the forefront and examine its eonstitutional nature in India as well as internationally by analysing case laws, legislations and reports maintained throughom the world, and directions stated within them.

II Examining the development of living wills

India

a. P. Rathinam v. Union of India[6]

In the *P. Rathinam*[7] case it was contended that Seetion 309 of the Indian Penal Code (IPC) was violative of Artiele 14 and 21 of the Constitution. Section 309, whieh criminalised suicide, was helieved to be arbitrary ander Article 14 which guarantees equality before the law and equal protection of the law to all within the territory of India. The laws making a classification thereof must do so reasonably by having an intelligible differentia and resultantly, not be arbitrary. It was held that the provision was not arbitrary and hence uot violative of Article

4 Elizabeth M. Andal Sorrentino, *The Right to Die?*, 8 J. of Health & Hum. Resources Admin. 361-373 (1986).

5 *Gian Kaur v. State of Punjab*, (1996) 2 SCC 648, *Aruna Ramachandra Shanbaug v. Union of India*, (2011) 4 SCC 454, *Common Cause v. Union of India*, (2014) 5 SCC 338.

6 AIR 1994 SC 1844.

7 *Id.*

14. The question of right to live and right to die with dignity is however addressed under Article 21. It was held that the right to life and personal liberty as encompassed within Article 21 includes the right to live with human dignity and *"the same does not connote continued drudgery"*[8]. Citing cases such as that of *Kharak Singh v. State of UP*[9] and *Ram Saran v. Union of India*[10], the Supreme Court said that Article 21 takes within its fold some process of civilisation which makes life worth living and the expanded concept of life would mean the tradition, culture, and heritage of the person concerned. The Supreme Court relied on the *ratio decidendi* of *RC Cooper v. Union of India*[11] that all fundamental rights can be read together. So the question in this case arose whether a person's right to live also amounts to his right not to live. Fundamental rights have their positive as well as negative aspects and therefore, what is true of one fundamental right has to be true of another. *"The freedom of speech and expression includes freedom not to speak. Similarly, the freedom of association and movement includes freedom not to join any association or move anywhere. So too, freedom of business includes freedom not to do business. It was, therefore, stated that logically it must follow that the right to live will include right not to live, i.e., right to die or to terminate one's life."*[12] Basing their decision on this, the Supreme Court in *P. Rathinam* equated the right to live under Article 21 to mean right not to live i.e. the right to die. Be that as it may, we see a shift from this position in the case of *Gian Kaur v. State of Punjab*[13] where the Supreme Court has contested otherwise.

b. Gian Kaur v. State of Punjab[14]

The appellants in this case, Ms. Gian Kaur and her husband Mr. Harbans Singh were convicted by the trial court on account of abetment of suicide by their daughter-in-law, under Section 306 of the IPC. A five-judge bench of the Supreme court, effectively overruling *P Rathinam*, held that it was the negative aspect of the right guaranteed under Article 21 that was invoked by violating Section 306 and 309 of the IPC for which no positive or overt act was required to be done by implication. The judges opined that under Article 19 the right guaranteed is of a positive kind such as freedom of speech, freedom of movement, freedom of business etc. which were held in certain decisions to include the negative aspect

8 Id. at 1853.
9 (1964) 1 SCR 332.
10 AIR 1989 SC 549.
11 (1970) 1 SCC 248.
12 *Supra* note 6 at 1854.
13 (1996) 2 SCC 648.
14 *Id.*

of there being no compulsion to exereisc that right by doing a guaranteed positive aet. In sueh cases, the right to do an act also includes the right not to do an act.

"*But it does not flow therefrom that if the right is for protection from any intrusion thereof by others or in other words the right has a negative aspect of not being deprived by others of its continued exercise e.g. the right to life and personal liberty, then the converse positive act also flows therefrom to permit expressly its discontinuance or extinction by the holder of such right.*"[15] Here, the Supreme Court emphasised on the fact that Artiele 21 secks to protect against the interference of a third-party in the right of life and personal liberty of an individual, thus making it a negative right. This makes it impractical to have a right not to llve or a right to die. The difference in the nature of rights, as hcid in *RC Cooper*[16], has to be borne in mind when making the eomparison for the application of such a prineiple.

This jndgment laid the groondwork for the case of *Aruna Ramachandra Shanbaug* by defining the right to live with dignity in the context of involuntary passive euthanasia. The right to live with human dignity was deemed to exist up until the end of an individual's uatural life span. This also includes the right to a dignified life up to the point of death including a "dignified procedure of death". When the issue of a dying man in a PVS was raised, the court acknowledged the fact that such cases would fall within the umhit of the "right to die" with dignity as a part of right to live with dignity when the death is certain and the process of uatural death has already bcgun. Yet the Supreme Court remained ambiguous on this matter by ultimately holding that this argument would not be suffieient to interpret Artiele 21 to include iherein the right to curtail the uatural life span due to thc unavailablity of eases regarding euthanasia and the resultant absence of authority. But a clear distinction was made between a natural termination of life and an unnatural termination of life, the latter being applicable to snieide. Thcrefore, the right to live with human dignity cannot be construed to include within its ambit the right to terminate natural life before the commencement of the natural process of death.[17]

c. Aruna Ramachandra Shanbaug v. Union of India[18]

This judgement acts as the yardstick for eases involving enthanasia and has subsequently laid down guidclines for the implementation of an individual's right to die with dignity. It does net however recognise this right, completely relying on

15 *Id.* at 650.

16 *Supra* note 11.

17 Dr. Durga Das Basu, 3 Commentary on the Constitution of India 3125 (8th ed. LexisNexis Butterworths Wadhwa Nagpur).

18 *Supra* note 2.

the *ratio decidendi* of *Gian Kaur*. In spite of this, the judgment given by a division beneh of Justice Markandey Katju and Justice Gyan Sudha Mism is widely reapected since it delves into the debate of euthanasia and physician assisted terminatien of life, whieh were deemed "inconclusive" by the constitutional bench in *Gian Kaur*. A person who is terminally ill or in a PVS may be permitted to refuse treatment leading to a premature extinction of his life under the right to live with human dignity which receives its validity from the right to life. Passive enthanasia was declared to be legal even without a legislation to that effect, provided the eonditions and safeguards mentioned in this judgment are adhered to. The withdrawal of medieal treatment with the dellberate intention of eansing the patient's death is the general detinition of passive enthanasia. The bench thus effectively excluded thc denial of food to the priucipal, who may hc in a PVS or a eoma, from the definition of passive enthanasia.

Since the Petitioner in the prosent case, Ms. Aruna Shanbaug, was a person io a PVS the case mainly centred itself around the coneept of uon-volantary passive enthanasia. This deliberates upen the plea of a person who wishes to die but is not in a position to give his/her consent, making it vastly different from voluntary passive euthanasia where the principal consciously and of his own free will refuses to take life-saving medieines. The matter before the bench in this case also warranted guidance and elarity in the event in which the patient has previously expressed a wish not to have life-sustaining treatments in case of futile care or a PVS and whether the patient's wishes be respected if such a situation were to arise. The petitioner brought up ecrtain cardinal prineiples of medieal ethics to make thc argument for the affirmativc. The eardinal principles were 'Patient Autonumy' and 'Beneficenee'.

"*Autonomy means the right to self-determination, where the informed patient has a right to choose the manner of his treatment. To be autonomous, the patient should be competent to make dectsions and choices. In the event that he is incompetem to make choices, his wishes expressed in advance in the form of a living will, OR the wishes of surrogates acting on his behalf (substituted judgment) are to be respected.*"[19]

This principle is based on the assumption that each person has value and is worthy of respect, is the bearer of basic rights and freedoms and is the final determinant of his/her destiny.[20] The surrogate is expeeted to represent the decisions that would have been made by the patient had he/she been competent

19 *Id.* at 482.

20 Marc Stauch, Kay Wheat & John Tingle, Texts, Cases and Materials on Medical Law and Ethics (4th ed. Routledge).

to do so. It is also expected of the surrogate to act in a manner that is best for the patient and is not influenced by their personal motives.

"Beneficence is acting in what is (or judged to be) in the patient's best interest. Acting in the patient's best interest means following a course of action that is best for the patient, and is not influenced by personal convictions, motives or other considerations. In some cases, the doctor's expanded goals may include allowing the natural dying process (neither hastening nor delaying death, but 'letting nature take its course'), thus avoiding or reducing the sufferings of the patient and his family, and providing emotional support. This is not to be confused with euthanasia, which involves the doctor's deliberate and intentional act through administering a lethal injection to end the life of the patient."[21]

The primary idea of the principles of both patient autonomy and beneficence flows from the Doctrine of Best Interest of the patient in case of a patient in a coma or a PVS. The Supreme Court with regards to this issue identified the petitioner's appropriate surrogate to be the Dean of KEM Hospital where the petitioner has been looked after for the past 37 years by the staff, and took into account these principles of medical ethics while outlining their responsibilities.

"If the doctors treating Aruna Shanbaug and the Dean of KEM Hospital, together acting in the best interests of the patient, feel that life-sastaining treatments should continue, their decision should be respected...acting in the best interest of the patient, feel that withholding or withdrawing life-sustaining treatments is the appropriate course of action, they should be allowed to do so, and their actions should not be considered unlawful."[22]

The basic principle and intention of advance directives can be assumed to have been accepted by the Supreme Court vide this opinion. Legal recognition to the neeessary documents however has been absent from this judgmeut. The question posed by the Petitioner regarding the choices of the patient in a PVS or a coma before going into such state was not answered by the Supreme Court either, thns leaving the fate of living wills in the dark.

Guidelines that are intended to serve as a legal proeedure in this regard were put forth by the Supreme Court[23], due to the absence of a statutory provision.

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21 *Supra* note 19.

22 *Id.* at 483.

23 Para 124,125 of *Aruna Ramachandra Shanbaug.*

i. The decision to discontinue life support is to be taken by close relatives such as parents or spouse, or in the absence of these options, the next friend or the doctors attending to the patient. The decision should be taken bona fide in the best interest of the patient.

ii. If such a decision is taken, the surrogate must approach the concerned High Court to receive their approval.

iii. The Chief Justice of the concerned High Court must forthwith constitute a bench of at least two judges to decide whether approval for the same should be granted.

According to the bench, these guidelines are in the interest of the patient, protection of doctors, and the surrogate and for the reassurance of the patient's family and the public. They stated that, "*Considering the low ethical levels prevailing in Indian society today and the rampant commercialisation and corruption, the possibility cannot be ruled out that unscrupulous persons with the help of some unscrupulous doctors may fabricate material to show that it is a terminal case with no chance of recovery.*"[24] The doctrine of *parens patriae* is applied here by the SC which states that the State is best qualified to act as a parent of a citizen who is in need of someone to make decisions or take some action. Since the judiciary is a 'State' within the meaning of Article 12[25], the Court alone, as *parens patriae*, can ultimately take the decision as to whether life-support must be withdrawn for an incompetent person, though the views of the near relatives, next friend and doctors must be given due weight.

d. Common Cause v. Union of India[26]

The Petitioner, Common Cause, in this case pleaded for a legislation to be passed which may authorise the execution of the 'Living Will and Attorney Authorisation' in order to represent the interests of the citizens suffering from chronic diseases who may go into a permanent vegetative state or a state of terminal illness. According to Petitioner-Society, the document can be presented to the hospital for appropriate action in the event of the executant being admitted to the hospital with serious illness which may threaten termination of life of the executant. A full bench of the Supreme Court stated that the Constitutional Bench in *Gian Kaur* had upheld the 'right to live with dignity' under Article 21 will include the 'right to die with dignity' as well. The contention of the petitioner was that the judgment in Gian Kaur with relation to right to die with dignity being a facet of right to live

24 *Supra* note 22 at 458.

25 *State of Kerala v. NM Thomas*; (1976) 2 SCC 310 at 343.

26 (2014) 5 SCC 338.

with dignity was given in a limited context to suicide and did not relate to the withdrawal of treatment by an incapacitated person.

This case primarily concerns itself with the execution of a living will by a person at a time when he/she is in a position to make a conscious decision as regards receiving medical treatment *if he/she were to be incapacitated at a future point in* time. It is contended by the petitioner-society that advance directives facilitate the voluntary passive form of euthanasia and right to refuse medical treatment which has been permitted in the *Aruna Shanbaug*[27] case. The case remains sub-judice after the three-judge bench referred the matter to a constitutional bench.

III International case laws

a. Airedale NHS Trust v. Bland[28]

Commonly known as the Airedale case, the House of Lords decided in favour of non-voluntary passive euthanasia. The patient, Anthony Bland, suffered severe injuries due to an accident that resulted in his lungs getting crushed and punctured which in turn interrupted the supply of blood to his brain. Bland was left in a PVS with no hope of recovery. The team of doctors treating him took the view that no useful purpose would come out of continuing medical care and using artificial measure to prolong his existence should stop. Here, the major issue was raised before the House of Lords which is "*In what circumstances, if ever, can those having a duty to feed an invalid stop doing so?*" This was also an issue raised in the Aruna Shanbaug case.

Living wills were recognised in this case by Lord Keith of Kinkel who stated that a person of conscious and sound mind is completely at liberty to decline to undergo treatment, even when he has the knowledge that refusing treatment may result in death. "*This extends to the situation where the person in anticipation of his entering into a condition such as PVS, gives clear instructions, that in such an event he is not to be given medical care, including artificial feeding, designed to keep him alive.*"[29] On receiving directions from the patient, even though they were made before the condition of PVS or a coma was entered into, the medical professional would have to adhere to them and he shall not be held liable for doing so. Citing Professor Glanville Williams, Lord Goff in the present case stated that when the doctor takes the patient off life support on his directions commits no breach of duty as the act in substance is 'not an act but an omission

27 *Supra* note 24.

28 (1993) AC 789.

29 Id.

to struggle', and that 'the omission is not a breach of duty by the doctor, because he is not obliged to continue in a hopeless case'.[30]

Lord Keith stated that the principle of sanctity of life "*forbids the taking of active measures to cut short the life of a terminally-ill patient*" while at the same also stating that it "*does not compel the temporary keeping alive of patients who are terminally ill where to do so would merely prolong their suffering*"[31]. He thus opined that the State does not have the responsibility to protect the lives of citizens who do not benefit from medical treatment and are leading a life of anguish. Lord Goff reiterated this view, while also placing the right to self-determination above the principle of sanctity of life and stated that the latter must yield to the former.

The United States of America has a number of legislations that legalise the acts associated with the right to die with dignity. The State of California legalised living wills in 1977, and several States followed suit. The Oregon Death with Dignity Act, 1994 of the United States was first legislation to legalise physician-assisted suicide for competent, terminally-ill adults. It provides such patients the right to hasten his/her death with certain safeguards such as the age of majority (eighteen years), the patient must be a resident of the State of Oregon and that the patient must have a terminal-illness with only six months or less to live. This enactment has been highly criticized for its elusiveness as it does not define who a 'resident' may be and restricts its scope by providing remedy only to those patients who have less than six months to live. It also fails to define 'terminally-ill'. According to eminent Professor KD Gaur, these may even include cases of irreversible and incurable conditions which reduces the life of the patient.

b. Cruzan v. Missouri Department of Health (MDH)[32]

The petitioner was in a PVS after sustaining injuries due to an automobile accident and the cost of her care was borne by the State of Missouri. Her parents applied to the Court for permission to withdraw her artificial feeding and hydration equipment and allow her to die. The State Supreme Court of Missouri reversed the decision of the trial court, holding that under a statute in the State of Missouri it was necessary to prove by clear and convincing evidence that the patient would have wished for withdrawal of life-sustaining treatment when competent to make such a decision. The US Supreme Court by majority affirmed the verdict of the State Supreme Court of Missouri noting that even touching of

27 *Supra* note 24.
28 (1993) AC 789.
29 Id.

one person by another without consent and without legal justification would amount to battery, and is hence illegal. The importance of advance directives can be observed in this case.

IV Law Commission Report

The 196th Law Commission Report of the 17th Law Commission, and the 241st Law Commission Report of the 19th Law Commission that primarily concern itself with the medical treatment to be provided to terminally-ill patients. The 241st Law Commission Report was published in the aftermath of the Aruna Shanbaug judgment and is therefore titled 'Passive Enthanasia: A Relook'. The report has analysed the judgment and primarily reiterated aft the recommendations of the 196th report. Therefore, the 241st report has not been separately discussed in this paper.

Chapter VII of the 196th report deals with 'Legal Principles applicable in India and position under Indian Penal Code, 1860'. Some of the proposed principles for consideration to Government are as follows:

3. Adult patients' right of self-determination and right to refuse treatment is binding on doctors if it is based on informed decision process.

4. Giving invasive medical treatment contrary to a patient's will amounts to battering or in some cases may amount to murder.

5. Advance directives (living wills) and powers of attorney in favour of surrogates to be invalid.

6. State's interest in protecting life and principle of sanctity of life are not absolute.

7. Refusal to obtain medical treatment does not amount to 'attempt to commit suicide' and withholding or withdrawing medical treatment by a doctor does not amount to 'abetment of suicide'.

8. *Competent and incompetent patients, 'informed decision' and 'best interests' of the patients, consultation with a body of three experts before treatment is withheld or withdrawn.*"[33]

These recommendations have been formulated keeping in mind the judgments discussed above, given by the Supreme Court. The Report allows for and

30 Glanville Williams, Text Book of Criminal Law (Delhi Universal Law Publ'g 2003).

31 Supra note 29.

32 111 L Ed 2d 224: 497 US 261 (1989).

33 196th Law Commission Report at 296,297.

recommends the legislation of a competent patient's right to refuse treatment and right to stop life-saving medical treatment as long as the decision made is an informed one. The report defines an 'informed decisioo' to be one where the patient is an adult who is able to understand the consequences of stopping medical treatment i.e. thar it may cause death, and is aware of alternative medical treatments, and the effect of remaining untreated.

The point regarding invalidity of advance directives was reasoned by the report, stating that advance directives could be oral which could cause severe problems and result in wide abuse. Even if they are in a written form, the report places concern over ensuriug that the patient's decision is an informed one, which may be qnestionahle due to the rampant illiteracy and lack of knowledge regarding science and technology in our country. Taking the view of the Supreme Court in *Aruna Shanbaug*, the 17th Law Commission conceded that advance directives, oral or written, are controversial as a matter of public policy in India und could lead to mischief. The 196th report proposed a draft bill titled 'Medical Treatment to Terminally ill Patients (Protection of Patients and Medical Practitioners) Bill 2006'. The Bill does not specify any guidelines for tbe implementation of the right to refuse treatment or the right to die with dignity, otherwise. However, Section 14 of the Bill states that it shall be necessary for the Medical Coancil of India to issue guidelines for the implementation of these rights.

V Conclusion

The right to die with dignity and the right to refuse unwanted treatment still remalus a widely disputed theme in constitutional law throughout the world. In the United States although these rights are considered to be deeply rooted in thc nation's history and tradition, specifically, in the common law tradition affording every individual the legal right to control his own body[34], active euthanasia continnes to he a matter of debate. The right to die with dignity, in principle, stili cannot be inferred from the right to live with dignity under Article 21 in India dne to the reasoning laid down in the *Gian Kaur* judgment, whieh serves as the precedent in this matter. The qnestion regarding living wills and medical power of attorney has however not heen extensively dealt with by the judiciary or the legislature. The chief tenets of these docaments have been accepted by the Supreme Court as well as the Law Commission and consequently legalised but the documents in themselves have not heen awarded this legality. The key reasons cited for this refusal or indifference are the scope for misuse due to

34 David L. Sloss, *The Right to Choose How to Die: A Constitutional Analysis of State Laws ProhibitingPhysician-Assisted Suicide*, 48 Stanford L. Rev. (1996).

widespread illiteracy, lack of knowledge and corruption in India. This is a concern that is raised in several cases. However, there may also be some other concerns that have not been taken into account. If advance directives were to be accepted in common law, there may be a tension between the interests of the competent maker of the decision and the incompetent person they become later.[35] This may occur in cases where there is moderate brain injury such as dementia where the patient may still derive pleasure from his/her existence, despite the terminal illness. Here, the question arises as to whether the patient should be denied life-saving medical treatmem on the basis of advance directives. Conversely, it is also argued that *"An individual's interest in dignity, privacy, and bodily integrity is encoded in his living will."*[36] The lack nf an advance directive may however have its own problems, such as in *Cruzan* case where the plea by the parents of the patient to take her off the ventilator was denied on account of an absence of a living will and their inability to prove her censent. Advance directives don't necessarily have to be in the form prescribed by the State as observed in the case of *Malette v. Schulman*[37] since the concerns that force one to form an advance directive may be fuelled by religion. In this case, the Ontario Court of Appeal awarded the patient damages since the doctor conducted a blood transfusien en the patient despite being aware of the fact that the patient was a card-carrying Jehovah's Wimess.

The right to die with dignity by definition implicates a general right to choose the time of one's death and it is logically interrelated with a human right or claim to medical assistance and to other assistance sufficient to assure a humane, dignificd process of dying.[38] This may or may not be achieved by legalising advance directives as observed in the aforementioned cases, but their constitutional validity seems to have been proved repeatedly. The problem primarily lies only in implementation of these documents, and the hindrance they may cause if negligently implemented.

35 *Supra* note 20 at 579.

36 *Id.*

37 (1990) 72 OR (2d) 417.

38 Jordan J. Paust, *The Human Right to Die with Dignity: A Policy-Oriented Essay*, 17 Hum. Rts. Quaterly (1995).

Economic Analysis of Article 370 of The Constitution of India

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ABSTRACT

Article 370 has been one of the most controversial provisions of the Indian Constitution. It provides a special status to the state of Jammu & Kashmir. The purpose of this paper is to analyze and check the efficiency of the said article using economic concepts like Market for Lemons, Pareto Efficiency, etc. The former part will deal with the description of the Article and the background in which it was incorporated. It will also contain the features and a brief explanation of the special position of the state conferred to it by Article 370. The latter part will include the economic concepts which will be used to determine its efficiency. The objective of this paper is to assess whether Article 370 leads to the most economically efficient outcome or not. In the end the authors shall put forth their conclusion regarding the same i.e. whether Article 370 is economically efficient for the people of Jammu & Kashmir and India. It should be noted that, the focus would be on the pre erosion i.e. pre 1954 condition of Article 370.

I Introduction to Article 370

As a result of Treaty of Lahore, followed by Treaty of Amritsar, the state of Jammu & Kashmir came into being in 1846 when principalities like Jammu, Reasi, Kishtwar, Baderwah, Rajouri, Poonch, Leh, Ladakh, Kargil, Gilgit etc. were conquered/annexed and integrated under the nomenclature of Jammu & Kashmir (hereinafter referred to as '**State**') by Maharaja Gulab Singh, the ruler of Jammu principality under the suzerainty of Ranjit Singh, the founder of Sikh empire in North India. The strategic location of the state is due to its borders with Pakistan, China and Afghanistan, coupled with its historical links with the central Asian republics. It serves as a brilliant platform for the natural resources, horticulture, and landscape. However, owing to political turmoil and the tussle between the two South Asian nuclear powers the state has been subjected to constant conflict, exploitation of the human resources, lawlessness and discontent among the masses.

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On the eve of the Indian independence, 540 princely states had already acceded to the Indian Union, while Junagadh, Hydeabad and Kashmir were the only states remaining undecided abont joining either of the two dominions. However, Kashmir was the first, out of the said three states, to uccede to India on 26th October 1947. Before its accession, the state of J&K had attained full sovereignty due to lapsing of British paramountcy and hence the state was independent from 15th August to 25th October 1947. The Maharaja, as a transitory arrangement had signed a standstill agreement with the dominion of Pakistan, and even though he wanted a similar arrangement with the dominion of India, no such agreement could be arrived at as the latter sought time for discussion. This arrangement with Pakistan envisaged that services such as trade travel and commonication would be uninterrupted.[1]

On 22nd Octobcr 1947, the tribesmen from the North West Frontier Province (now Khyber Phaktunkhwa) of Pakistan invaded Kashmir. Troubled from the law and order problem in the state, the Maharaja reqnested for armed assistance from India, which it initially refused, on the standpoint that its army could not have landed in Kashmir withont the state acceding to the dominion of India. The then Governor-General, Lord Monotbatten, belleved the developing situation would be less explosive if the state were to accede to India, on the understanding that this would only be temporary prior to "a referendem, plebiscite, election."[2] So, on 26th October, 1947, the princely state of Jammn and Kashmir became a part of the Republic nf India. Under the Instrument of Accessien (hereinafter referred to as '**Iustrumeut**'), only three snbjects – external affairs, defence and communications were surrendered by the state to the centre.

Clause 7 of the Instrument reads, "Nothing in this Instrument shall be decmed to commit me in any way to acceptance of any future constitution of India or to fetter my diseretion to enter in to arrangements with the Government of India under any sueh future constitution."[3] Therefore to further define and protect the relationship between the state and the eentre, Article 370 was incorporated into the Constitutiou of India, which enablcs the constitutional position of the state *vis-a-vis* the Indian union to be defined from time to time without much difficulty.[4] The state had the right in pursuance of the Government of India Act, 1935 and

1 Victoria Schofield, *Kashmir: The Origins of the Dispute*, BBC News, (Jan. 16, 2002, 02:05 GMT), http://news.bbc.co.uk/2/hi/south_asia/1762146.stm.

2 *Id.*

3 Instrument of Accession of the State of Jammu & Kashmir, Oct. 26, 1947, Legal Document No. 113.

4 MP Jain, Constitutional Law of India 784 (5th ed. 2007).

the Instrument of Accession, to have its own constitution for matters which were not surrendered to the Union.

a. The two characteristic features of the special relationship are:

i) the state has a much greater measure of autonomy and power than enjoyed by the other states; and

ii) the Centre's jurisdiction within the state is more limited than what it has with respect to other states.[5]

Due to these features, the Indian Constitution does not apply to the state, save those matters as covered under the Instrument of Accession, and it is Article 370, 'which acts as a tunnel'[6] for the application of the rest of the provisions in the prescribed manner as provided in the said article.

b. The redeeming features of Article 370 are as under:

i) The provisions of Indian Constitution are not applicable to the state except Article 370, and it is through this article that Article 1, defining the territory of Union of India, was made applicable to state.

ii) With regard to power of parliament to make laws for the state, the same are limited to those matters in the Union and the Concurrent List, which correspond to the matters specified in the Instrument, provided the President declares such corresponding/comporting of entries vis. the Instrument in consultation with the state government.

iii) Matters/Entries from Union & Concurrent List not covered in above, can be made subject to law making powers of parliament, with the concurrence of the State government, by Presidential Orders.

iv) Other provisions of the Constitution shall apply to the state subject to such exceptions and modifications as the President may by Order specify, provided with regard to matters specified in the Instrument shall be issued in consultation with the government of the state, and with regard to matters other than those referred to in preceding proviso the concurrence of the state government is required.

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5 *Id.* at 784-85.

6 Lok Sabha Debates, Volume XXXIII, Union Home Minister G.L.Nanda on Abrogation of Article 370, (Dec. 4, 1964).

v) The legislative power of the State, are exhanstive, and unbridgeable in respect of matters covered in the State List and as a special feature, residuary matters fall within the realm of state.

vi) This speeial provision cannot be repealed/abrogated unilaterally, by merely issuing a Presidential Order; it requires the recommendation of the Constituent Assembly of the State.

II Ecouomic Analysis

a. Market for Lemons

The concept of Market for Lemons deals with the issue of information asymmetry between the buyer and the consumers. It relates quality and uncertainty. The existence of goods of many grades poses interesting and important problems for the theory of markets.[7] Here the seller knows more about the good than the buyer.

Akerlof explains this concept with the example of market of used cars; lemons – the low quality cars, and the peaches – the high quality cars. Thc bnyers, here are unaware of the quality nf the car, they want to bny i.e. there is asymmetric information: buyers cannot tell which cars are lcmons and wbich are peach, bnt, of course, scllers know.

The icmons tend to drive out the high quality oars (in much the same way as bad money drives out the good – Gresham's law). Bad cars drive out the gond, because they sell at the came price as the good cars; similarly, bad money drives out good because the exchango rate is even.[8]

One of the many solutionc to lemen problem is, giving incentives in the form of guarantees and warranties to the bnyers to buy the high quality cars. Numerons institutions arise to coonteract the effects of quality uncertainty. One obvions institution is guarantees. One natural result of it is that, the risk is borne by the scller, rather than by the buyer.[9] This saves the bnyer from any ncgative consequences/implications.

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7 George A. Akerluf, *The Market for Lemons: Quality Uncertainty and Market Mechanism*, 84 The Quarterly Journal of Economics 488, 488(1970), http://www.econ.yale.edu/ ~dirkb/teach/pdf/akerlof/themarketforlemons.pdf.

8 *Id.* at 489-90.

9 *Supra* note 9 at 499.

When this concept is applied to Article 370, there is a need to first identify the parties involved and justify their position. The state of Jammu & Kashmir would be a buyer with asymmetric information, Pakistan; a lemon, and India; the high quality car. The reason for Pakistan being a lemon is because one of the many conditions for Market for lemons is that there must be an incentive for the seller to pass off a low quality product as a higher quality one. Pakistan has an incentive as it wants the State to accede to it, all the more reason, for it to present itself as a peach. Further, India which is secular, liberal, and has had an impeccable democratic history is undoubtedly a "peach", whereas Pakistan, where conformity is encouraged rather than diversity, a country with weak and failed democratic institutions, a theocracy, is certainly a lemon.

Now, as aforementioned, the buyer has a tendency to choose the low quality product i.e. the lemon over the peach, because of insufficient information. If we take a look at the State's history, there have been many agitations and protests, in favour of accession to Pakistan, which again have been because of lack of information. As per this concept, if it goes with Pakistan, it won't be an efficient choice. For achieving efficiency, an incentive (guarantee) was needed to be provided to the people of the State in the form of Article 370, for making them choose India over Pakistan.

The concept of Market for Lemons, propounded by George Akerlof, justifies, the need for incorporation of the said Article, upon the accession of the State to the dominion of India.

b. Kaldor – Hicks Efficiency

Pareto efficiency occurs when one party benefits from a decision, but others aren't made worse off. In other words, no one loses out. Kaldor Hicks states that a decision can be more efficient as long as in theory, everyone can be compensated to nullify any potential costs. The compensation does not necessarily need to occur, but must be possible in principle. Gainers should be potentially able to compensate the losers out of their gains. Under the Kaldor-Hicks definition of efficiency, "a reallocation of resources is efficient if it enables the gainers to compensate the losers, whether or not they actually do so. This is equivalent to wealth maximization."[12]

If teetotallers are willing to pay a billion dollars to have alcohol outlawed and the willingness of drinkers to pay in order to be allowed to drink is less than a billion,

12 Edward Stringham, *Kaldor-Hicks Efficiency and The Problem of Central Planning*, 4 QUARTERLY JOURNAL OF AUSTRIAN ECONOMICS 41, 44(2001), https://mises.org/files/qjae423pdf/download?token=7T2JY0RK.

tben the efficient policy would bc prohibition, as the outcomc attached to the former exceed that of the latter.[11]

A simple example of Kaldor Hicks wonld be: Suppose a company wants to establish a factory iu a village. The cost of cstablishing, for the villagers would be pollution noise, air and water. It would havc a detrimental effect on thc viliage's environment and society. The benefits for the eompany would be clieap labour and resources. As per the said concept, the compensation should move from the gain of thc gainer to the loser. Here, the compensatien can be in the form of employment opportunities for the villagers. If the company produces high quality fertilizers, that wonld benefit the villagers.

Compensation is not a requirement in Kalder Hicks efficiency. It is often costly actually to compensate losers. Compensation is a transaction and has certain costs associated with it: transaction costs. When the Kaldor Hicks criterion is employed, the "hypothetical compensation" condition assumes that eompensation is to be costlessly rendered. Actual compensation is not costless, however, and that is primarily why it is not paid.[12]

Article 370 aims at giviug autonomy to tbc state. The state can make its own laws, and central laws can be made applicable to the state only after ratifieation by the state legislature. If the parliament wants to extend any provision of the Indian Constitution, uot covered in the Instrument, to the State, the latter's concurrencc would be required, without wliich the provision would be nullity for the people of the State. Artielc 370 can be repealed only by a presidential order, when the State constituent assembly recommends it. Clearly, it can be said that, the State legislature is the gainer (as it enjoys more legislativo power), and the parliament is the loser (as it cannot legislate ovcr ail the matters for J&K, which it can for other states of thc Union).

The gain for the state here is more legislative power. For Article 370 to be Kalder Hicks efficicnt, the loss to the parliament should be compensated in principle, if uot necessarily, and out of the gaiu of the state only.

As mentioned before too, parliament can legislate over any matter/cutry in the Uuion or Concurrent List, only after the consultation of the State govemment, wliere as for other provisions of the Constitution, the concnrrence is necessary, only after whicli the said provision would stand applieable to thc State. For

11 *Id.* at 44.

12 Jules L. Colcman, *Economics & The Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 University of Chicago Press Journal 649, 651-52(1984), http://www.jstor.org/stable/pdf/2380323.pdf.

applying, an ordinary central law to the state, it will need to be ratificd by the state legislature first i.e. enacted iu a new form for the people of thc State. As far as, abrogation or repealing of tbe Article is concerned, the President can do so hy issuing a Presidential Order, only after the Constituent Assembly recommends it.

It means, out of the gain of the state only, the loser i.c. the parliament can be compensated. Article 370 proves to be Kaldor- Hicks efficient, as gainers can compensate the losers, ont of the former's gains and the compensation if not nccessarily made, is possible in priuciple.

c. Pareto Efficiency

Pareto efficiency has long hcld a central place iu welfare economics. One reason is that the concept provides not only an intuitively attractive criterion, but one regarded as largely independent of sentimcnt.[13]

'One state of the world, S1, is Pareto snperior to another, S, if and only if no one is worse off in S1 than in S, and at least onc person is better off in S1 than in S. Whether or not a person is better off in onc state or another usually depends on his relative welfare, and each person is presumcd to be the exclusivc judge of liis relativc wcll-being.'[14] Iu the present case, the legislature of the J&K state is relativcly hetter off than the legislatures of other states, because of Article 370.

Exchange efficiency occurs when, for any given bundle of goods, it is not possible to redistribute them such that the utility (welfare) of oue consamer is raised without reducing thc utility (welfare) of another consumer.[15]

Pareto cfficiency need uot he fair; an allocation can be Pareto efficient even if thc distribation is unequal. A simple example of this would be; suppose there are two iudividuals and only one resource to be distributed betwcen the two of them. A situatiou wonld be Pareto cfficient, if hoth get half of the resource. If the whole resource is allocated to one individual, it would again be Pareto efficiem, because even though the distribntion is unfair the second individual does not really lose anything.

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13 Steven R. Beckman, John P. Formby, W. James Smith and Buhong Zheog, *Envy, Malice, Pareto Efficiency: An Experimental Examination*, 19 Social Choice & Welfare 349, 349-50(2002), http://www.jstor.org/stablc/pdf/41106454.pdf.

14 *Supra* notc 14 at 649-50.

15 SOAS, http://www.soas.ac.uk/cedep-demos/000_P570_IEEP_K3736-Demo/unit1/page_26.htm (last visited Sept. 15, 2016).

Pareto Optimality or Effieiency as it is known in Economics, thongh devoid of fairness or equality, can be likened to jnstice delivery in the courts; because a law eourt must always resolve a dispute in favoar of a party or partics and not all the parties before it in a particular matter.[16]

As we know, Pareto cfficiency in layman's words is the state in economy in which one cannot be better off, without worsening the position of another person in the same economy. Applying the concept of Pareto to Article 370, we learn that, it is because of this special provision in the Indian Constitution, that the State enjoys more legislative power than any of the other states of the Union.

Assuming that the 'resource' in question is legislative power; it is Artiele 370 which confers more legislative power to the State (as has already been explained) – it can even legislate en matters, over which the Parliament has the anthority for the rest of the states. Consequently, even though the 'distribution' of legislative power is unfair, the J&K state enjoying more legislative power than any other state, the latter is not really at loss i.e. the other states do not lose anything.

Therefore, even though, the J&K state benefits from the decision, the other states of India, are not made worse off i.e. they dou't incur any losses. Because no onc is made worse off, there are no losers in Pareto improvements whiose losses are to be subtracted from, that is, eompared to, the winners' gain.[17]

d. Cost – Benefit Analysis

Cost-benefit aualysis (CBA) is a broad-based methodology developed by economists to assist in analyzing the advantages and disadvantages of a particular course of action. As a decision- maker's tool, this method fulfils two basic needs: it is applicable to a wide range of problems, and it ean be used objectivcly to support a particular course of action and justlfy certain tradeoffs.[18]

It is an analytical tcchniqne, whereby we wcigh a course of actions' costs incurred in its implementation and the benefits accrued. If the latter, exceed tlie former, the coursc of action is finalized/pursued, whereas if the costs exceed the benefits, then it shows that it isn't efficient to go ahead with the project.

16 Ahuraka Isa, *Can Supreme Court Judgement end Electoral Frauds*, Sahara Reports (Feb. 18, 2016), http://saharareporters.com/2016/02/18/can-supreme-court-judgements-end-electoral-frauds-ahuraka-isah.

17 *Supra* note 14 at 650.

18 John D. Blum, Ann Damsgaard and Paul R. Sollivan, *Cost Benefit Analysis*, 33 Proceedings of the Academy of Political Science 137, 137(1980), http://www.jstor.org/stable/pdf/1173862.pdf.

Imagine that A has recently opened a new industry, and his people ure struggling to kccp up with the increased workload. A is therefore considering whether to hire a new team membei. Clearly, the benefits of hiring a new person need to significantly ontweigh the associatcd costs. This is where Cost-Benefit Analysis is aseful.

'Cost' is defined as "which the decision taker sacrifices or gives up when he makes a choicc."[19] Eg. The cost for the parliament, in the accession of the state of J&K to India, was the sacrifice of legislativc power/authority over thc State, whicli it enjoyed over other ordinary statcs.

The first step in Cost Benefit Analysis is always to eompile a list of all the costs and henefits of thc project. The last step is to quantitatively look at the results of the total eosts and henefits to figure out whether the iatter exceeds the former. Provided that this is true, then the reasonable ehoice is to go ahead with projeet.

Artielc 370 was incorporated in the Constitution of India after much resistance. Thc stare of Jammu & Kashmir enjoys more autonomy than any other state or Union Territory of India, because of this articlc. In a country which is not purely federal, but has Unitarian tendencies, to havc a state whieb enjoys an autonomous status, should not be acceptable. Firstty, becausc it can lead to discontentment amang other states, in general and thc erstwhile princely states, in particular as they too can claim for such constitutional provisions. Secondly, becausc of this article the parliament does not havc the fioal authority over the state, and cven the Constitution of India is not wholly applicablo. We can say that for the people of Jammn & Kashmir the Constitution of India is not severeign, as they have their own constitution. This leads to derogation of both the parliament and the Constitution.

Tliese were the costs, now we will talk abont the possible benefits. Firstly, Artiele 370 prevents any non resident to buy any immovable property in the state. A non resident can become a resident only by marriage to a resident. Therefore, if India decides to hold a plebiscite in the state, none can accuse the government of fiddling with the demography of the state. The image of Iudia whieh has been so well maintained in the global world will be preservcd. Secondiy, most of the coentries are giviug more and more freedom to their constituent units i.e. granting autonomy. It means they are adopting a more federal structure of governance. Sincc independenee, demands have been raised in favour of a fedcral form of government in India, wliereby the states will have more freedom. Now, if the government decidcs to make a transitien to a federal structure, it will be mucli

19 *Supra* note 12 at 42-43.

easier as they just have to follow the blueprint as has been conceived in the Instrument of Accession and Article 370. Third and the most important benefit is that Jammu & Kashmir acceded to India, as Article 370 provided the incentive for the people to choose India over Pakistan. Otherwise, many people suggest, considering the condition prevalent on the eve of independence, the state could have gone to Pakistan.

Since the benefits exceed the costs, it can be concluded that Article 370 is very much efficient in its working and hence it should not be repealed, because if repealed, it could further alienate the people.

III Conclusion

The whole idea behind an economic analysis of a law is to check its efficiency. The purpose of this paper was to analyze and check the efficiency of Article 370 using various economic concepts; and to determine if it leads to the most economically efficient outcome.

Upon applying the microeconomic concepts, it has been established that Article 370, is an economically efficient piece of legislation, which leads to an economically efficient outcome for J&K and India, both. The recent debate that has been going on pertaining to its abrogation will only lead to more conflict, chaos, and an 'inefficient' outcome, for the State and the Union too.

The advantages accruing to the state are offset through the mechanism of 370 itself, which is reflected by 47 Presidential Orders issued from 14th May 1954 to 19th February 1994, thereby extending 94 entries from out of 97 entries of the Union List, 26 out of 47 entries in the Concurrent List, 7 schedules out of 12 schedules, and 260 Articles from out of 395 Articles of the Indian Constitution to the State.[20]

A G Noorani, Article 370:

Constitutional History of Jammu & Kashmir Oxford University Press 2009), and therefore can be aptly described as "erosion of autonomy by conformist governments enjoying autonomy for the purpose." Such postulations could not have been thought of, had the power of consultation/concurrence as the case may be, in the matter of application of various provisions of the Constitution been domain of State legislature with rider that such resolutions should be passed in both houses of State legislature (legislative assembly and council) by not less than

20 A G Noorani, Article 370: A Constitutional History of Jammu & Kashmir (Oxford University Press 2009).

two-third majority of the membership of each house. Nevertheless, this Article as it was on coming into force of the Constitution of India on 26th January 1950 clothed the State with autonomous status in a moderately Unitarian country.

The only inefficient character of this law according to the authors is that, it can be amended by merely issuing a Presidential Order to that effect, while the other provisions of the Coastitution require an exhaustive procedure to be followed under Article 368 for an amendment. This power of the President has been misused a number of times in the past.

A G Noorani, in his book *Article 370: A Constitutional History of Jammu & Kashmir*, has suggested a draft Article 370, through a Presidential Order, which would supersede all the previous Orders made under Article 370(1)[21], which sought to abridge the autonomous character of the State. This would restore the autonomy as it was in 1950, and since the law as it was in 1950 is economically efficient as has been established, would lead to an efficient ontcome for both the State and the Union.

21 *Id.* at 472.

Critical Anylysis on Issue of Beef Bau

Saloni Jain & Amit Ranjan**

ABSTRACT

This article explores the conceptions regarding the paradoxes of beef ban ongoing in the country. Nation where morals and religion are given tremendons values , where cattle is considered as pillar of sacredness , slaughtering of cattle for beef raises excessive politicol temperature.

This article takes an objective look inta the legal strategies, amendments and constitutional structure dealing with Article 48, Article 48A, Article 51A, Article 19(1)(g), Article 25 of constitution of India. Grounds for challenging the constitutional validity for these laws are discussed.

It takes an subjective look as to whether there should be a ban or not and if yes , whot should be the reasonable restriction .In country with this problem over the course of decades, course took o variety of talks, with changes in policies, amending laws and framing reasonable restrictions.

This article discusses following questions:-

1. *Why beef ban is considered as one way scenario?*
2. *Despite of ban, Indians remain as one of the top most exporters of beef.*
3. *Who is responsible for the ongoing violence against weaker section of soeiety in the name of Gaurakshaka? Is individual's sentiment above law order?*
4. *Will beef ban not create negative impact on economy? What about the products which are made of using beef?*

On all this article talks about having constructive approach regarding ongoing dilemma ef beef ban. It talks about some of the tentative constitutional reforms, proposals and thereby enhances democracy.

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I Introduction

"It is easy to talk on religion, but difficult to practice it."

-by Ramakrishna

In a nation where variety of cultures, traditions, religions, customs exist, there is no particular functionality prevailing. With distinct and unique working of nation in relation to its citizens, democracy works as icing on the cake. People residing in a democratic country like India, enjoys many rights and protections against the state. Though these rights comes with the 'reasonable restrictions'[1] but the nation sustains the rights. Although this beef ban does not Implies with reasonable restrictions and this has been discussed below in this article.

India is rich in its culture and tradition. It being a seenlar state does not restrict any person from practicing any religion or belief. When there is such a wide scope of religion, eating habits of individuals certainly is of no questicn. Even then there is a huge controversy on beef consumption and ban.

Consnmption of beef has been a burning topic in the recent times. Political pressure and anger among the people is increasing vigorously. We have valued our religious beliefs above the rule of law. Rule of law states that according to Article 19(1) (g) every citizen of India has fundamental right to practice any occupation. With these fundamental rights, reasonable restrictions come along. The complete ban does not seem to be reasonable. With the ban, first question arises is what about those whose livelihood will be affected. According to Indian constitution Right to livelihood is also part of our fundamental right under Article 21. None of the government has mentioned anything about those whose livelihood will be affected with this ban. Are they not citizens of Indion society? They also have equal rights along with others guaranteed by the coustitution. Constitutional validity of the provisions which are pre existing in the country are being challenged[2]. This article takes an subjective look un the issue of beef ban to be valid or not and an objective look into the provisious and laws prevailing and their need to be amended or improved. Various issues have been discossed in the paper ahead which is critically analyzed.

II Why Beef Ban is Considered as one way scenario?

Considering the ban on beef and cattle slaughter, to be complete and total is not justified. Various provisions are present in our country regarding the ban and its

1 Dr. J.N.Pandey, The Constitutional Law of India, (50th ed.).

2 Durga Das Basu, Shorter Constitution of India, VOL J, 651(14th edition)

implication; they are formed keeping in mind all the dimensions of democratic nature. Religion and minorities based on it being the vital.

There is no definite explanation of the term 'minority' in the Indian Constitution, and there is no particular methodology for the determination of the same. Religion depends upon the faith and belief of a particular community. There is nowhere mentioned or written that beef will be consumed by a particular community or people following a particular religion. Riots and violence created on the basis that beef ban is exploiting the freedom of particular community is inadequate.

The prevailing law in the country prohibits the cow slaughter and its consumption partially. The complete ban on beef is not regulated by any state. There is lack of uniformity in the execution and administration of laws on cattle slaughter. Some states have total provisions on slaughter of cattle. Some states have laws for the prohibition but are not strictly enacted in the state.

Banning beef considering the sentiments of particular community or religious beliefs of a group is very well valid. Total prohibition of a particular product is practically not enforceable. Also it is not justified to impose beliefs of one religion over other. India is a secular country where we provide individuals to practice own religious beliefs of each section of the society. As long as the culture of a particular state and majority eating habits are concerned it can be a valid ground on the prohibition of been in particular region.[3]

This could raise the question on slaughtering of other animals, which will be the reason for the political tension and aggressiveness among the individuals. The appropriate way to deal with the restrictions on the beef will be to regulate provisions on the basis of public welfare on the whole. Before making the policy of banning beef as whole, only religious sentiments should not have been considered, large picture such is economical impacts, violation fundamental rights should have been taken into account.

a. Despite of ban, Indians remain as one of the top exporters of beef

According to the FAS/USDA (metric tons), India is ranked as the greatest exporter of beef in 2016. U.S Department of Agriculture released the data and named india as the top exporter of beef. India is ranked 5th in the prodaction of beef all over the world.[4]

3 http://thewire.in/12170/what-mahatma-gandhi-said-to-those-who-wanted-beef-banned-in-india/ (last updated on May 23, 2015)

4 http://thewire.in/12170/what-mahatma-gandhi-said-to-those-who-wanted-beef-banned-in-india/

If there is such a fuss about the cattle slaughter aud its ban, commercial export of beef becomes a contradicting question. In a nation where people and communities are demanding total ban on beef, its export doesn't provide a clear view as to the bustle on the issue.

Religious aspects of the country hugely depend upon the majority group. Hindus have sacred beliefs aud faith in cow. Slaughtering and consumption of beef will obviously boil the blood of such community. Open and direct export of beef will violate the religious sentiments and will lead to violence in the nation.

A recent case of *Dadri Mob Lynching*[5] which occurred in 2015 where a murderous mob attacked a Muslim family suspectiog them to possessing beef. Mohummad Akhlaq Safiq was killed and brutally murdered. This case raised the political pressure in the country. If such will be the scenario in the country, exportation of beef will lead to riots aud bloodshed on an extreme level.

But if a practical and commercial view is considered, export of beef is not wrong. Since India has the largest population of cattle in the world, its usage is appropriate after it becomes unproductive. Cattles are left to survive on their own once they become useless and unproductive. If they are used to feed and commercially beucfit the nation, there is uo harm in its export.

Depending upon the circumstances and situational errors, constitutiun holds the laws governing the enforcement of beef export. There is a need to clarify and improve the laws existing.

b. Violence doe to beef ban controversy

In October 2015, former Iustice Markandey Katjn made a statement that 'I eat beef, and don't consider cow as mother'. This statement went viral real quick and the after protest by a group of students of IIT- Banaras Hindu University was superfluous.[6]

In a nation where a merc statement can create violence among the people and can lead to murders and bloodshed, taking further steps towards the implementation of peace laws and presentational means is the necessity.

After this incident, in Ahmed Nagar, Maharashtra, on mere suspicion, the local people set a van on fine considering a rumor saying there was 100 kilos of heef in the van. This unnecessary increase of violence and agitation among the people is destructing the harmony of the country.

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5 "Indian man tynched over beef rumors". BBC News, 30th September 2015.

6 Rajeev Dikshit, Tho Times of India, Oct3, 2015, 06.37 PM IST.

Another incident occurred in Srinagar, Kashmir, where a truck driver was killed for suspicion on cow slaughtering.

Complete and total ban on slaughter of bulls and bullocks under the Maharashtra Animal Preservation (Amendment), in 2015 gave the wide roads for further violence.[7]

A total of 26 Indian states have banned cow slaughter completely or partially, but lacks any provisious or laws on consumption of beef. There ere no central or uniform laws on cattle slaughter, beef possession and consumptiun.

Andhra Pradesh, Telangana , Bihar, Chhattisgarh, Delhi, Goa, Gujarat, Haryana, Himachal Pradesh, I&K, Jharkhand, Karnataka, Madhya Pradesh, Maharashtra, Punjab, Rajasthan, Uttar Pradesh, Uttarakhand are the states which have total ban un slaughter[8].

Assam, Tamil Nadu and West Bengal are the states which allow cattle slaughter with the certificates.

Arunachal Pradesh, Kerala, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura are the states where there is no ban on cattle slaughter, its consumption and trade.

c. Economic aspects of beef ban

In a country where there is diversification in terms of religion, values attached with it has its deep route in the society, it is tough to understand and make people believe about the importance of economic values related to beef. We are so obsessed with our religious beliefs that even livelihood of some of the communities is affected and we are ready to make compromise on that. Worrying about religious beliefs, economical and logical aspects are also to be understood. We find our religious beliefs above the means of survival. It is hard to believe the fact that how does others belief gets hurt because of individuals eating habits. Is the restriction reasonable enough and whether it is backed by enough logics? These questions needed to be answered by all those who have their minds behind this beef ban. The recent beef ban in Maharashtra and Haryana has created large unemployment scenario in these two states. It will create impact on those poor households who are solely depended upon the beef for their means of survival. Sume of the key points related to beef industry are below mentioned.

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7 http://www.legalservicesindia.com/article/article/is-beef-ban-in-maharashtra-constitutional-1930-1.html

8 https://prasadmodakblog.wordpress.com/2015/08/29/why-was-beef-banned-in-india-the-real-reason/ (last updated on 2015, Oct 23)

- Several products are made of beef or have some content of beef. Products like shampoos, conditioners, shops etc have some content of beef. They are openly sold in the Indian markets although this fact is unknown to several peoples.
- India ranks 5th in terms of beef production.
- Banning beef has led to decline in the exports. These exports created large amount of revenue through taxes, exports etc. These restriction and prohibitions on beef disturbs the balanced economy which is essential for development of each and every section of the society.
- Data collected from National Sample Survey Office (NSSO) round shows that around 80 million people—around 1 of every 13 Indians—eat beef or buffalo meat. All though the bigger chunk is Muslim. Several Muslim, Dalits and other minor communities depend on beef for their Livelihood. They will be completely deprived from their source of livelihood because of this ban. This awakens a question that is these minority groups not citizens of India; they also have right to livelihood.

Beef ban might lead to increase in old and infirm cow population which Supreme Court in 1958 judgment held that keeping "useless cattle" alive would be a "wasteful drain" on the nation's cattle feed. It becomes difficult for an former to take due care of any buffalo or cow after approximately three to four years. Complete ban on beef will gradually lead to increase in the unused cattle. It also creates negative impact on the nature. It will create huge amount of pressure on natural land leading to degradation of local farm lands. Burying or cementing 20 to 30 million animals per year is an expensive proportion.[9]

Leather industry in the Kolhapur region of Maharashtra produces leather slippers and shoes. Kolhapuri chappal is quite famous in Maharashtra as well as in the whole country. The basic raw material used in making of Kolhapuri chappal is leather which comes from buffalo skin.

Beef by products are used and produced in the areas where beef usage seems impossible. Oleo stearin, Gelatin, footballs, industrial oils and lubricants are made by the by-product of the beef. Beef is even used in medicinal by-products for production of various drugs.

Due to the restrictions and legislations of beef several people are left with no job and no means of livelihood. More than four lakh are now left unemployed. The

9 http://indiatoday.intoday.in/story/beef-ban-and-bloodshed/1/493111.html, The Hindu, March 22, 2015.

whole cycle of farming-slaughter-tanning-leather goods production has been seriously disrupted and destroyed.

The sudden ban in Maharashtra on cow slaughter has affected the economy on whole. Our country needs to have a balanced economy where constructive and logical approach should be foliowed before making any policy.

III Constitutional Aspects of Beef Ban

India is a country where we have believed and even followed the principle of equality. The coustitution of India provides certain rights to the citizens for their protection of Interests. *Article19 (1)(g) States Individuals right to freedom of Trade, profession and occupation.* With complete beef ban trade practiees of several minorities is affected. It has created large unemployment scenario. Maharashtra government argued that constitution also provides power to the government to impose reasonable restrictions. If livelihood of more than four lakh people is lost than how does it even stand as reasonable restriction? *Article19 (6) says that state can make laws to impose restriction on this right "In the interest of Public"*[10]. So those who are now left unemployed, whose livelihood is last are they not citizens of this country. Is it not the duty of the government to consider the economic conditious of certain minorities who are completely dependent on beef before making any policy .So by denying the livelihood to several people, how this restriction stands in the interest of the people?

One such instance or religious conflict was seen in the State of Maharashtra, where in possession and slaughtering of beef and cows respectively was declared illegal by passing the Maharashtra Animal Preservation (Amendment) Act, 1995. Recently, it has liamed the possession and sale of beef and has extended its ban on the slanghter of cows to include bulls and calves.

Maharashtra government stated that it is the directive principal of state which provides authority for government to make laws in the interest of general public as it deems fit. In the same directive principles of state under *Article 38 it has been clearly stated that state has to secure a social order for the promotion and welfare of the people*. The social, economical, justice aud political rights of the citizens of ali institation shall prevail. Even directive principles are not legally binding. *According to the Part (IV) of the directive principal under Article 37 it has been clearly mentioned that the provisions contained in this part is not enforceable by any court of law. Article 48 which states that sate should in particular take steps for preserving and improving the breeds and*

10 Universals, The Constitution of India (amended by The Constitution Act,2015).

prohibition of cow slaughter and calves. Now if we are talking about preservation of animal husbandry and agriculture then why not ban slunghter of Goats which is dune by several communities on oceasions like bakri eid or after Navratri is finished. Goats also provide several useful products like milk which is essential for health purpose and it also plays important role in agriculture activities. If religious sentiments is started to be considered before making any law, then more than 90% things related to food will be banned. This ideology is threat to democratic society where we believe in providing equal rights and respect to each section of the society.

There are no clear economical and agricultural benefits of complete beef bau. Ultimately due to complete beef ban buffalos and other animals will be left with no use. They wili only roam around the streets and consume waste particals which will eventually lead to the death of these animals. Article 48 is clearly in conflict with fundamental rights provided by the coustitution. In no context it shall be prevailed upon the basic fundamental rights of the citizen of the India, There shoald be constructive and balanced approach towards making of any policy.

IV Soggesstive Policy for the Issne of Beef Ban

After the thorough evaluation and critical study of issue of beef bau, some of the suggestions by the authur are below mentinned:

1. Constitutional provisions which are prevailing in our Indian Constitution shonld be umended and improved keeping in mind the so lhat the provisions are not violating any of the fundamental rights of all the citizens of India.

2. Committees on cow slaughter

Duc to the inhumane and ill slaughter of cattle in country, government has set up various committees for the protection and development of cattle.

- **Cattle Preservation and Develnpment Committee (1947)**

  The Cattle Preservation and Development Committee was appointed by the Mimstry of Agriculture in November 1947 to consider the question of banning slaughter of cattle in all its aspects and to recommend a comprehensive plan of action for preserving the cattle wealth of the eountry und for promoting its development. The committee was set np to find the loopholes in the terms whieh are followed for the classification of useless cattle. The government asked for the immediate steps to eradicate or prohibit slanghter.

Due to the execution by the committee several states took into consideration and banned the slaughter of cows below the age of 14 years.

- **Uttar Pradesh Committee (1948) and Nanda Committee (1954)**

  The committee was set up by the supervisiou and support of the judges. Priory in 1955, the U.P. Cow Slaughter Prohibition Act was enacted where stoeking and salc of beef was made exception. Nanda committee focused on the steps to be taken to prevent thc slaughter of milk cows. The committee stated that a total ban on slaughter would be unreasonable. And in explanation said that India can maintain only 40% of eattle and rest should be culled.

- **Expert Committae oo The Prevention of Slaughter of Mileh Cattle in Iodia (1954)**

  The eommittee was set up to determiue the steps that should be taken to prohibit the slaughter of milk cows. The committee suggested that the remedial measures on prohibition on cow slaughter will be duly misused.

- **Gosamvardhan Seminar (1960)**

  The seminar eonducted in Moont Abu brought forward the problem of preservatiun of cattle in breeding areas. it was aforesaid that the milk cattlc must be removed from cities to rural areas. The committee further suggested that the provisions of Prevention of Cruelty to Animals Act should be rigidly enforeed.

- **Special Committee on Preserving High-yielding Cattle (I961)**

  A special high powered committec was set up for suggesting the long term and short measures for solving the problem. This committee paid focus on the measures for preserving the cattle of high yielding, prohibition on their export. Many other recommendations were taken into consideration for their implementation.[11]

These committees are formed by government regularly from the very beginning since the issue on beef ban is raised. These eommittees were formed keeping iu mind thc preservation and pretection of the cows. Even though they hold the provisions for thc preservation of eattle, these need to be amended and modified for the bettermont

11 Mahima Godha, Article on Constitutionality of beef ban (2015)

3. The society needs to be educated to change their mindser. We as eitizens of our society need to be more liberal towards our religious beliefs and sentiments. Stress should be made upon logical thinking rather than being too much sentimental abont our beliefs.

4. Stricter laws and provisions should be made against those groups wbich try to ereate mnecessary havoc in the society leading to violenee and disharmony.

5. Those individuals which are totally dependent upon the beef industry must be takcn eare of by the government. Required compensations should be provided to these groups wlio are affected by the government's policy.

V Conclusion

India is a country whicli has diversification in its root since the Indcpendence. There is differonce In terms of Religious beliefs & practices, eating habits etc since ages. We as a citizen of this country are too much confined to our beliefs that it if anytbing goes against our beliefs it boils up our blood and it even results in violem riots and killings. The recent beef ban and actives followed by after that is example of how we have kept our religious beliefs above the rule of Law. We have even imposed heliefs of one community over other. Our eonstitution gives freedom and rights to each & every section of the society.

It is also duty of the government of the government that before making any law they must take this fact into account that it must not violate any fundamental rights of any section of the soeiety. There has to be balaneed approach bcfore making any particular law. The beef ban certainly violates the some of the non-negotiable Pundamental rights guaranteed by the constitution of India whicli are Right to livelihood, Right to freedom of Trade and practices, etc. These rights are essential pillars for democratic country like India. This beef ban has completely ueglected the economical aspect. The beef ban alone in Maharashtra has created large unemployment seenario emong those who were part of the beef industry and completely depended on Bcef as their means to earn Livelihood. The government has not mentioned any point regarding what about the economieal lossc̀s and what is the possible solution. If religious beliefs are only taken into account then it will become almost impossiblc to eat anything. This is not how any democratic country works. After the beef ban several Incidents of violence has been reported in the name of Gaurakshaka. So what about those whose life is lost. For example Dadri Incident where an person was brutally murdered in fiont of bis own child just beeause some ideologieal had doubt that the person

had some beef meat in his possession. These kinds of iucidents implicate what kind of mentality we are following even in today's society.

Before giviug excessive focus on these kinds of social issues we must think about the other important social problems like poverty, food etc. It is tough to understand that how Individuals eating habits eau disturb beliefs of some other person. We must respect each others heliefs and for thut there should be a balanced and constructive approach. Like it is understood that Hindu community has religious beliefs regarding cows so we must respect that and avoid slaughteriug of cows where there is majority of these community. We must not indulgc ourselves into some violont riots. In the samc way if some sections are depended on beef for their livelihood they should uot be denied from that.

A balanced approach where all the individuals following their beliefs freely without uny pressure from the government or other eommunities can hc deait with peaccfully and those who feel their freedom is being violated can be guaranteed with proper and improvcd enacuments.

We must keep our mind and logics above our beliefs.

NJAC : A Subject of Constitutioual Legitmacy

Shiaddhaujali Dash and Nupur Kumari**

I Introdnction

The Judicial system of India is one of the oidest and complex legal system of the world. The entire judicial system in India is onitary in natore. It is tbe legacy India revived from the British culonial rnle of 200 years and obviously from the various similarities of which our country's legal system shares with the English iegal system. As the whole framework of the present judicial system is set up by the Indian Constitution and the system formulates its powers from it. Organised on a pyramidal hierarchical form, at the apex of the integral judieial system stands the Supreme Court of India. Directly below it lies the high courts and then the subordinate courts und various tribunals in India. There are even fast track courts and lok adalats to clear backlog of cases.

The decision given by the Supreme Court is unalterable and all the subordinate courts under are controlled by it. Framing a structure of our eountry's judicial system, it also imposes powers functions and duties in the union and state levels. Designed to follow on the pattern of adversarial system our well informed judges deliver their judgements referring to tbe earlier judgements, precedents and orders. ***Adversarial system*** is the one where two sides each presenting its arguments to the jury who would be neutral and give their judgements basing on thc merits of the case.

Every natiou in its judicial system should have briiliant judges who shoald understand thc value of complete justice. Our Constitution of India lays down the proeedure for the appoinunent of judges of Supreme Court, High Courts and all other lower courts. Judges being appointed by the President of India in a consultation with the Chief Justice of Iudia, the appointment is made under thc collegium system- a group consisting of the chief justice and four senior judges of the Supreme Court.

As noted by Granvile Austin that "***An Independent Judiciary begins with who appoints what calibre of judges***"[1] NJAC recommonds a clear and broad-based process of selecting the judges of the Supreme Court and high courts. The

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1 Granvile Austin, Working On A Democratic Constitution- Thc Indian Experience, (new Edition,2003)

members are being taken from the judiciary, legislative and the civil society. The selected members are then appointed by the commission. NJAC broadly outplaces the collegiam system. Along with the NJAC amendment, Articles 124 A, B and C has been further added to tlie Constitution to make NJAC a valid one where Article 124 A, B denotes NJAC and its members and their duties while Article 124 C says parliament to make laws in future to regulate the procedures for the appointment of judges.

There are six members in the panel to decide where the CJI will be the chairperson, two senior most Supreme Court judges, the law and justice miuister and lastly are the two eminent persons, to be selected by a committee consisting of CJI, Prime Minister and the leader of opposition.

Before the NJAC came forward, Articics 124 and 217 of the "Constitution of India" dealt with the appointmant of judges in our independent judiciary. These articles says that the judges would be appointed by the Presideut of india with a prior "consultation" with CJI and other senior most judges of Supreme Court. With reference to the word consultation, "*the constitutional phraseology of consultation has to be understood and expounded consistent with and to promote this constitutional spirit*"[2] which was a major discussion in the year 1993 held in the su-called "second Judges Case[3]" where SC has held that CJI should agree to all the judieial appointments which is known as "eoncurrence". So this led to the creation of the collegium system wherein the three senior most judges of Supreme Court had to decide that who would be High Court or a Supreme Court judge.

Prevailing from the constitutional history of India the selection of judges in the higher eourts has been very much controvcrsial iu nature. It is very mucb seen in the "Three Judges Cases" held in 1982, 1992, 1998 and specifically referring to the ***RE SPECIAL REFERENCE*** [4] of 1998 it was decided that the CJI has to "consalt" with the senior most judges. His soie or exclusive verdict do not constitute the meaning of the term "consultation". Including other members from the legislature and executive with the CJI of India can land up figuring out the major concerns in the legal fraternity.

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2 P.K. Majumdar And R.P. Kataria, Commentary On The Constitution Of India As Amended By The Constitution (ninety-fourth Amended) Act, 2006, p-1686 (10th ed. 2009) Volume 2.

3 Supreme Court Advocates · on- Record Association v. Union of India,

4 1998 (7) SCC 739

A modification in the actual collegium system was very much necessary for making it a bit more clearly transparent and accountable. The selection of "two eminent persons" is very much significant as they should be eligible enough being a part of the commission of appointing a Snpreme Conrt or a High Court Judge. Every member of the commission carry an equal importance as no two members could unite hands und make the third person opinion as irrelevunt. This clash between the Judiciary and the Executive ideutifies all the leading problems of the legal political system. The selection process to the highest anthority should be known to the common people.

NJAC allows the members from executive und legislature where half of the power lies on them whether to appoint a particular judge where as in the collegium system the senior most jndges appoint the higher court jndges itself. Judiciary which is one of the most important organ of the government should be maintained with order and accuracy. Hence it is of immediate need of reconsidering the rules of NJAC Act in order to protect the principles of tbe constitution and its framework to make it valid.

Separation of Powers with Respect to NJAC

As clearly defining the separation of powers, in recent times the Apex Court has struck down the NJAC Bill passed in parliament as "unconstitutional" and allowed the collegium system. This long time debate has come up with issues which are contrary to each other. Judiciary should be made answerable to the common people or the democracy and next is the other two organs i.e. the Legislature and the Executive is trying to interfere in the independence of jndleiary.

The revival of the collegium system has brought abont many criticisms stating that India is a single country where judges appoint judges and make their own transfers and modify themselves. There should be a commission where not only it looks upon the appointments and transfers but also can keep a record that judges should do their duties without taking any favour.

II The Broader View of The 99th Amendment

The Legislature of India passed the 99th amendment act[5] in the 65th Republic year in the form of the offieial Gazette Report. The main purpose of the act was to omit the words "*after consultation with such of the judges of the Supreme Court and of the High Courts in the states as the President may deem necessary for the purpose.*" On the other side the omitted words were substituted

5 The Gazette of India, the Constitution (Ninety-nineth Amendment) Act, 2014.

by the following words "the composition of National Judicial Appointment Commission is referred to in article 124 A"[6]. However the second provision snbstitnted through the 99th Amendment Act as depicted through the words "provided that" instead of "provided further that." The article 124 was broadened. The act was passed with a motive to insert new articles 124 A, 124 B and 124 C and apart from this it aimed to make amendments were made to articles 127, 128, 217, 222, 224 and 224A.

The articles 124 A, 124 B and 124 C aimed to constitute the composition, duties and limitations of the National Judicial Appointment Commission (NJAC) respectively. Bur the articles of the Indian Constitution such as the Article 127 (1), the words "the Chief Justice of India may with the previous cunsent of the President, was omitted und substituted with the National Judicial Appointment Commissien on a reference made to it by the Chief Justice Of India, may with the previoas consent of the President." The Article 128 inserted the word "National Judicial Appointment Commission" and omitted the use of word "the Chief Justice of India". As mentioned in the act the Article 217 (1), the phrase whieh states "after eonsultation" and the High Court shall be substituted with "on the reeommendation of National Appointment Commission referred to in article 124 A". Similarly in the Article 222 the sentence "after consultation with the Chief Justice Of India was substituted with on the recommendation of the National Judicial Appointment Commission as referred to in Article 124 A".

The Article 224 (1), addition was made to the sentence "the President may appoint" was widened and it also constitnted the words "in consultation with National Judicial Appointment Commission".[7] However the last Article which was aimed to be inserted through this act was the Article 224A of the constitution the sentence "the Chief Justice of High Court for any state may at any time with the previous consent of the President" was substituted with the words "the National Judicial Appoinunent Commission on a reference made to it by the Chief Justice of High Court for any state, may with the previons consent of the President shall be replaced".

III The Background Behind NJAC: The Colleginm System

Prior to establishment of National judicial Appointment Commission (NJAC) there was a collegium system which was established after the need was felt for the Separation of Powers. The collegium system for the purpose of appointment of judges was established in the year 1990's after the judgement given by the two

6 The Constitution of India, 1950.

7 Ibid

senior most judicial bench. Earlier the executive was responsible for appointing the judges. But due to the rising corruption in the country the shine of the Indian Judicial System was fading continuously and there was a need of an independent body for appoinunent of judges.

According to Dr. B.R Ambedkar, "***There can be no difference of opinion in the house that our judiciary must both be independent of the executive and also be competent in itself. And the question is how these two objects could be secured.***" The concept of Collegium System came into light iu the famous "Three Judges" case.[8] These three case laid the foundation to reflect the need to establish the collegium system which would appoint judges. The first case was ***S.P Gupta vs. Union of India***[9], there was an urge to secure Independence of Judiciary. The Judiciary is a separate branch und neither the legislature nor exeeutive have powers to appoint the judges. The case served the foundation stone for constituting the collegium system. The secoud landmark case was the ***Supreme Court Advocute on Record Association v Union of India***[10], the judgement of this ease reflects the executive's power to appoint judges of the Judicial System may lead to abuse of power which would reduee the prestige of Indian Judiciary. The executive may not be diligent enough to appoint the judges according to their knowledge, experience and skills. In the third case ***Re Special Reference Case***[11], the President of Iudia Shri K.R Narayanan gave his opinion abont the Apex court with respect to the collegiem system and the Snpreme Court answered his opinions. However for appointing the judges the collegium system was established bnt it was surrounded by various debates and controversies by the eminent philosophers, jurists and legal scholers since there is no mention of the collegium system in the Constitution of India. There were efforts made to change the collegium system. In the year 2013 the NGO called as 'Suraz Indiа' challenged the anthenticity of the collegium System through the PIL but the Apex court had dismissed the petition on the ground that there was no locus standi for filing the PIL. In the same year the then Chief Justice of Indiа Shri P.Sathasivam sald that the collegium system for appointment of judges cannot be removed.

a. Procednres for appointment by NJAC

The National Indicial Appointment Commission was established for the purpose of appoinunent of Judges of the Supreme Court and High Courts. There were

8 H.M. Seervai, Constitutional Law of India Critical Commentary, p-17(4th ed.)
9 AIR 1982 SCC 149
10 1983 (4) SCC 441
11 1998 (7) SCC 739

various rules which were stated in the NJAC Bill for the appointment of Judges[12] in the Supreme Court and High Courts.

b. The Chief Justice of India (CJI) - The CJI holds the most prestigious position in the Indian Judicial System. He presides over the Supreme Court. The Chief Justice of India heads the constitutional bench of the nation for deciding cases regarding the national issues. The NJAC suggests the name of the senior most Judge of the Supreme Court to be appointed as the CJI. However the name of the senior most Judge is recommended by the commission, this is because of his knowledge and experience which he has but not his age.

c. The Chief Justice of High Courts - The Chief Justice of the High courts shall be also selected by the NJAC. The National Judicial Appointment Commission shall appoint the senior most Judge as the Chief Justice of the High Court. However again age is not the barrier for the appointment of the Chief Justice of High Court but merit, capability and experience play a vital role for the appointment.

d. The Judges of the Supreme Court and High Courts - The NJAC plays a key role in the selection of judges in the Supreme Court. The commission selects the individuals according to their merit, ability and skills in order to be appointed as the Judge of the Apex Court. But suppose if the situation happens to be that the two members of the commission does not approve the selection of the particular individual as a Judge of the Supreme Court then in that case the commission shall not recommend the name of that individual to be appointed as the Judge of the Apex Court. It is essential that all the members of the commission must give their approval regarding the appointment.

With respect to the selection of Judges in the High Courts the eminent Justice Shri Krishna Iyer said ***"The choice of Judges for the High Court which makes and declares the laws of land, must be in tune with the social philosophy of the constitution. Not mastery of law alone but social vision creative craftsmanship are important inputs in successful justicing"***

In order to be appointed as the Judge of the High Courts, the commission shall ensure the nominations from the Chief Justice of that High Court and while he gives his views it must be taken into account that the Chief Justice must also consult the two senior most Judges and senior Advocates of that High Court as specified in the rules of the commission. The commission while selecting the Judges of the High Court must also educe the opinions of the Governor and also

12 Dr. J.N. Pandey, Constitutional Law of India, p-522-23 (51st ed.2014)

the Chief Minister of that state. However it must be ensured that all the members of the commission must approve the proposal for the appointment of the individual as a Judge.

IV NJAC: Whether Constitutional or Not

The Supreme Court's judgement in the year 2014, with respect to striking down NJAC[13] was considered to be one of the milestone judgement in the Indian Judicial history. Even though the 99th Amendment Act was passed in order to abolish the Collegium System which was followed over the decades. The main motive of establishing the collegium system was to separate the boundaries of Executive and Judiciary. Earlier all the appointments were made by the executive himself. This further led to the abuse of power by the executive.

The collegium system consisting of the closed group of the Chief Justice of India and two senior most Judges for the purpose of appointment of the Judges. But since the establishment of the collegium system was not clearly mentioned in our constitution of India, it was considered to be unconstitutional. This led to abolition of the old collegium system and NJAC came into light through the 99th amendment act passed by the Parliament in the year 2014. The NJAC comprised of the committee consisting of the Chief Justice of India, the union minister of law and justice and the two eminent persons who shall be nominated by the CJI, The Prime Minister of India and leader of Opposition.

In a free democracy, separation of powers says that the three powers and functions of government is always to be kept separate and exercised by three different organs of government. The three branches of the government function independently. However the establishment of NJAC led to merging the two branches the executive and judiciary which was totally against the rules stated in the constitution of India.

If we take into account the powers of the executive. It is not that the executive must have no say in the appointment of Judges. But the executive's opinion is not the final opinion, the NJAC includes the Judges as well, so the simultaneous views of Judges also in the appointment related matters. The foray of establishment of the Judicial Commission was when National Front Government which came to rule in the year 1990's.

In the year 1993 the land mark judgement was passed in the case of the ***Supreme Court Association of Record v Union of India***[14] in which the article

13 http://www.thehindu.com/news/national/supreme-court-verdict-on-njac-and-collegium-system/article7769266.ece (Last Updated on Sept 2nd, 2016)

14 1983 (4) SCC 441

124 (2) was recommended to be changed. This Article granted power to the President of India that he shall have final say in the appointment of Judges of the Supreme Court as well as High Courts after consulting the Chief Justice of India or in case of his absence the two senior most Judges of the Supreme Court. Thus in one way or the opinion of the President was given the major weightage. *The Supreme Court's motive behind interpretation of the article 124(2) was with the motive to give primary importance to the opinion of Judiciary, in order to appoint the Judges of the Supreme Court and High Court the opinion of the Chief Justice of India shall be given primary preference*[15].

The collegium system was then introduced but the system could not continue more than a decade since it was not clearly mentioned in our constitution and was called as "antidemocratic" in nature. Later on the Judicial bench headed by Justice Verma decided that for judicial appointments rests upon the collaboration of the views of Judiciary as well as the executive.

The Constitution of India speaks about the Independence of Judiciary but Judicial independence can only be secured if the Judges are allowed to select their own representatives, unlike the tradition followed in U.S.A which considers its Judicial System to be Independent in nature but unfortunately the judges are selected by the Legislature and executive and Judiciary has no role to play. The Judicial System in India should be made independent so that the Judges are given freedom to perform their functions effectively. If we look into the account the drawbacks in the Indian Judicial System we could observe the lack of transparency and accountability.

The Judiciary has become puppet whose control lies in the hands of the executive. The constitution grants the "sovereign" title to the High Courts. The High Courts function independently and however they are not subordinate to the Supreme Court. It is often observed that the Judges of the High Courts are involved in the selection of the Judges of the Supreme Court. This has disturbed the constitutional balance. The Supreme Court is considered to be the Guardian of the Indian Constitution, it must be diligent enough to preserve the independence of High Courts.

The legislature, executive and the Judiciary are the three different branches of the government. They are assigned to look into different tasks. The legislature makes the laws, the executive deals with their implementation and Judiciary interprets and checks whether the laws are according to the Fundamental

15 Dr. Durga Das Basu, Commentary on The Constitution of India, p-5574 -88 (8th ed. 2009) Volume 5.

established in the constitution. Bnt with the new rules and procedures of judges appointment has unbalanced the Separation of Powers concept.

Thus it could be lastly concluded that there is no system which is purely perfect in the appointment of Judges. The system should welcume public scrutiny. This is the way through which the transparency and accountability of the Indian Judicial System could be restored.

V Judicial Independence as Saviour of Constitutioual Balance

The Indian judicial system is an ideal Judicial System which has incorporated best features of Judicial Independence. The Judiciary is given full freedum to work without any kind of interruption and fear. The Judieial Independence is an important characteristics of the democratic nation. 'It enhances the stability of social order' as stated in an article ***"Seeuring the Independence of Judiciary"*** by M.P Singh,' The Indian Judicial System is an active branch of Judiciary which looks into the maners related to the water disputes problem umong the states, takes up the corruptiou case matters in government uffices and Patliament.

The Supreme Court transfers the cases from subordinate courts if those cases are dealt unfairly or the cases which are based upon the constitutional issues. The Supreme Court serves the last hope of the people if they are unsatisfied with the Judgement of the luwer cnurts. In the case of ***Union of India v SGPC***[16], it was held that the Supreme Court has power to andertake any case dealt by the High Courts in case if it finds out that the ease is not fairly dealt. The Supreme Court being the Guardian Of our Constitution has the Judicial Review power. The court checks whether the decisions and orders passed by the Legislature and Executive respectively are aecording to the fundamental principles of oar Constitution. It also strikes down the orders which are "unconstitutional".

It was observed that the Independent Judiciary is essential for restoring law and order in the society. The main goal of the Judicial System in India is to preserve the "Rule of law". The rule of law is responsihle for good governanee. This could be only possible through the impartial Judicial System. The Jndieiary plays a very seasitive role in safeguarding the principles of Democracy. The idea of Judicial Indepeudence means to provide indepeudent status to the Judiciary and keeping it beyond the control of Legislature and Exeeutive. The Judiciary is not bound to foilow the improper orders of the Legislature and the Executive.

16 1986 SCR(3) 472

The idea of the Judicial Independence was first observed in England in the "ACT OF SETTLEMENT". England being the follower of Montesquien's "theory of Separation of Powers. U.S later followed Britain's path as their ideal model for securing the Independance of Judiciary.

The Independence of Jndiciary is important in order to preserve the concept of Separation of Powers. The Judieiary keeps the two branches of the government in their air tight eompartments and checks whether they work within their constitutional boundaries. In case of any umbiguity in understanding the provisions of the Constitution, it is the Judiciary which interprets those provisions in a correct manner but in order to interpret there is a ueed tbat the judicial interpretations should be free and unbiased. The main task of Judieiary is to deliver Justice but while delivering Justice, the Judiciary must eonsider all the aspects connected to the case but in order to do this there is a need to grant Independent status to the Jndges.

Now the main question which arises is how we could grant Judicial Independence. With respect to providing Judicial Independence there are different provision mentioned in our Constitution. The tenure of the Judges should be fixed and they must be given freedom to continue their profession for a longer period of time ontil they attain the retirement age of 65 years. They can only be removed in case of incapacity and proven miscondnct through the proeess of "Impeachment". In the case of ***C. Ravichandran Iyer v A.M Bhattacharjee***[17], the loeal Bar Assoeiation put a pressure npon the Judge for his resignation. The Supreme Court had held that oniy the Chief Justiee of India has power to take ueedful aetion against the Jndges for their resignation.

The Salaries and Allowances of the Judges are fixed and hence cannot he altered by the Legislature. The Judges are pald their salaries througb the Consolidated Fund of India. The privileges and perks cannot be changed except in the cases of the Financial Emergeney.

The powers of the Supreme Court are broad and the legislature eannot limit the powers of the Supreme Court. The legislature can only add to the powers and Jurisdiction of the Supremo Court in order to enable the eourts to function in a more effective manner. The Snpreme Court has power to issue writs for various purposes except those provisinns as stated in the Artiele 32 of the Constitution of India.

As mentioned in Artiele 211, the parliament shall not make any discussion with regard tn the eonduct of any Judge of Supreme Court and High Court or make

17 1995 SCC (5) 457, JT 1995(6) 339

any comment upon the their discharge of their duries except the situation of their Impeachment while passing the resolntion for tbeir removal.

If we go through the provisions mentioned in the Constitution of India in the Articles 129 and 215 the Supreme Court and High Courts respectively have equal powers to punish any individual for the contempt of court. In the case of ***Delhi Judicial Service Association v State of Gujarat***[18] it was held that the "Supreme Court being the Apex Court of India has the power to punish the Subordinate Courts also for the contempt of court".

The Judiciary has power to check the validity of laws made by the Parliament. Through the process of Jndicial Review the Judges of Supreme Court and Iligh Court can invalidate any law made by the legislature as well as the orders passed by the Executive and declare them to be "*Ultra vires*" if it infringes the provisions of our Constitution. In the ease of ***L. Chandra Kumar v Union of India***[19]it was held that under Artiele 226 of the Constitution of India the High Courts ure bestowed with the power of Judicial Review and under Article 32, the Supreme Court are granted with the powers of Judiciai Review. It is the hasic fundamental Provisions of our constitntion which cannot be umended.

Besides all these the Article 50 of Indian Constitution states the separation of Judiciary from the Legislature and Executive. Thns as we have observed through the above proeedure of granting Judieial Independenee, it needs to change accurdingly to the ehanging circumstances and needs of the soeiety.

VI Later Developments of NJAC

With the changing times there have been developments in our Judieial System so that our system is able to deal aceordingly during the tough times. There has been question mark on the constitutional validity of NJAC[20]. There has been controversies arising from every side with regard to the Judicial Appointment by NJAC. In the year 2015, it was planned to bring transparency in the working of the eommission as it is essential to ensure aceountability. The constitutional validity of NJAC was ehallenged in the court. The Supreme Court decided that both the petitioner and the government are open to introduee uew changes in the NJAC in order to make the commission more transparent and responsible. It was then decided that the transparency could be attained only through fixing the eligibility criteria for the candidate to be selected for bis appointment as a Judge.

18 1991 AIR 2176, 1991 SCR (3) 936

19 (1995) 1 SCC 400

20 http://blog.scconline.com/post/2015/07/02/developments-associated-with-the-njac/ (LAST UPDATED on Sept 10, 2016)

Since the Judges are considered to as *"idols of Justice"* there should be no question upon their eligibility. So there is a ueed to fix their eligibihty criteria. Merit should be given first preference in their selection, age should never be a harrier. The ones who are capable and eligible of granting Justice and protecting the needs and interests of the individuals should be selected as Judges of the Supreme Court and High Courts.

The Judicial Indepeudence should uot be compromised at any cost. In order to secure an unbiased justice, there is a need to preserve the independence of the Judiciary. The Judicial Inclependence is one of the basic to preserve Justice. It is essential to remove the ills which could hinder the fair delivery of Justice. Due to rising eorruption in nur society there is no corner which has not come onder the purview of it. In spite of ail the measures and efforts the corruption is something which eanoot be removed completely but yes it can be minimised through our own efforts.

Iu the Judieial field also there was a fear that our Judges can be affeeted if the eorruption acid touches it. So with great efforts through the grant of Jndicial Independence it was aimed to minimise corruption hy giving all the great pleasures to the Judges and making them more dedicated towards their profession. This was through inereasing their tenure, fixing their salaries, granting them the power uf Judicial Review, separating Judiciary from the control of the other two hranches. However till now these efforts have proved to be successful In lessening the greed iu this system. There is a need to decide whether a separate secretariat is to be appointed for the appointment of the Judges. And if it is appointed then what would be its powers, functions and eomposition.

Ou 19th November, 2015 Mr. Mukul Rohatagi[21], informed the Apex Court that "the government will not interfere in the appointment of the Judges end ueither the eentral government would prepare the draft memorandum for the appointment nf the Judges any mare".

As we have noticed earlier there has been cunstant efforts to ensure free and fair Justice to the ones who ere in need. There has been changes to remove the "lacks" of the system in order to gain unbiased Justice. In spite of rising controversies and debates, the NJAC has survived and continuing its task of selecting the eapable ones as the Judges of Supreme Court and Iligh Courts.

VII Critical Analysis

With regard to the judicial appointments the collegium system and the National Jndicial Appointment Commission seems to be like head and tail of the coin. The

21 Attorney Genernt of India (Current)

121st NJAC Commission Act 2014[22] has led to stave off the collegium system and replaced with National Judicial Appointment Commission. The main question of challenging the coostitutionality of the amendment act has beeo raised by the Supreme Court. There are four petitions filed which are challenging the constitutional worthiness of the 121st amendmeut Act. As *Prof Mr Faizan Mustafa,* Vice chancellor of NALSAR Uoiversity Hyderabad has rightly said criticising NJAC ***"Appointment of judges is seen as crucial mechanism to achieve judicial independence. Judges must be independent of executive, senior judges and in their ideology. The NJAC in its present form may not achieve these ideals"***[23]

If we eompare thc two system of Judges Appoiutment the collegium system seems to be more appropriate forms for the appointment of Judges. The prior system of judicial appoiutment was rejected for being too opaque or lack of transparency and the shroud of secrecy through which it functioned was considered to be the primary drawbacks of this system. The eollegium system was adjudged as an extra constitutional system.

But if we look into account of the Nationai Judicial Appointments Commission, this is uo more or less surrounded by the eontroversies. The new system has failed to maintain the constitutional balauce. The system has led to the blending of the executive and judicial powers. Apart from this emioent personalities fram the civil and political societies particularly the stakeholders and ministers are being involved in the procedure of Judges Selcction. This has further led to overriding the uon-judicial opinion upon the expert judges. The judieial preferences were overlooked. The NJAC appoints the judges en the basis of their skill, ability and merit which is contrary to the to the collegium system which appoiuts the judges on the basis of their seniority. The NJAC has proved to be a major threat to independence of Judiciary. Some eminent senior most Judges of the Supreme Court believe that with the "outside participation" there would be eompromise over the independence of Judiciary.

However after comparison of the two system we con ensure that the prior Collegium system for the appointment of the Judges was much better than the later system NJAC. What is good in the eollegium system is that the system works in accordance to the principle of separation of powers and sccures constitutional balance. The collegiam system is free from any kind of influence of the legislature and executive ond has kept the selection of judges free from any

22 Ratified by 16 State Legislature out of 29

23 http://www.firstpost.com/india/collegium-system-not-perfect-superior-njac-says-former-cji-2242812.html, (Last Updated on Sept 16, 2016)

such outside poiitieal interference. Thc prior system gave more preference to judieial opiuion as the Judges conld only better select the Judges. In NJAC the veto was upheld in the hands of the non-judicial members primarily the eminent persons the prime minister and the leader of opposition whieh overrides the opinion of the Chief Justice of India and the two senior judges. With respect to transpareney of NJAC, the proeedure of shortlisting the candidates and as well as the veto power exercised by the non-judicial members secrecy is maintalned eonsiderably.

a. Judicial System in United States of America

As it is very much clear that India has adopted the coneept of judicial review as well as judicial independence from the constitution of United States. The judiciary of United States has been eategorised into two systems i.e. – the state court systems and the federal systems. Ail cases regarding to the state laws and the state constitution arc brought before the state eourt and the federal court have a dominion over the eases involviug states with the nation and the natien with foreign governments. Their criteria of appointing judges is completely based en merit. It is their capability and a record of past performance through which they fulfil the criteria of seleetion. The whole judicial set up of United States is way more prominent than in India. In United States the Executive has its absolnte sphere on appointment of judges and it's much ahead than a politicai affair. The fact of eompiling together the two theories of separation of powers and checks and balances into a whole single document makes the American constitutiott distinct from all other eonstitutions.

The president reserves its absolute powers in the process of selectien of judges and thc eonstitution incorporates powers to the president that he shall nominate with the consent of the senate, shall appoint judges to the higher courts i.e. federal courts. The country's judieial mechanism also consists of direct elections for the post of state supreme courts. Heoce the country's judicial system has a elear cut mechanism of keeping it answerable to the law.

b. Judicial System in Canada

Likewise in US, Canada's judieial structure has also been divide into two categorics: federal eourt system and provincial court system[24]. Same as of India, Canada has its Supreme Court as the apex court hearing appeals from all other lower eourts. And the judges of the Supreme Court are selected by the Prime Minister in

24 http://www.prsindia.org/uploads/media/Judges%20(Inquiry)%20/bill88_2007100588_Judicial_Commission_NAC.pdf (LAST UPDATED on Sept15, 2016)

sueh outside political ioterference. The prior system gave more preferenee to judicial opinion as the Judges could only better select the Judges. In NJAC the veto was upheld in the hands of the uon-judicial members primarily the eminent persons the prime minister and thc leader of opposition whieh overrides the opinion of the Chief Justice of India and the two senior judges. With respect to transparency of NJAC, the procedure of shortlisting the candidates and as well as the veto power exercised by the tton-judicial members seerecy is maintained considerably.

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24 http://www.prsindia.org/uploads/media/Judges%20(Inquiry)%20/bill88_2007100588_Judicial_Commissiou_NAC.pdf (LAST UPDATED on Sept15, 2016)

"consultation" with the Minister of justice. It is the Judicial Advisory Committee who has been a very crucial part iu the process of appointing of judges of the Federal Courts since 1988. The Pariiameot has hasieally no role to play iu this part exeluding the Prime Minister. The committees are simply charged for commenting on their personal history forms which the candidate submits to the committee.

As briefly discussing about the eomposition of the eommittees, each one has tbree lawyers, tbree laypersons and one judge. The Minister of Justiee appoints all the members out of which three of them are appointed directly and four are from the nominees provided. They serve for a two years term basically with a possibiiity of reviving it a once. As exactly the committee does not recruit the candidates hut considers them who are being are allowed by the Executive.

VIII Conclusion

The Judiciary is considernd to be the backbone of our constitution. Iu the delivery of Justice the role of Judges is eardinal. The Judges acts as a "watch dog" to ensure that all the branehes of the government work within their limits, the main motive behind this is to ensure proper appiication of rule of law. The judiciary aims to bring social change in the society and thereby promoting Jnstice and restoring the prestige of demoeracy.

The Judiciary is the final interpreter of the eonstitution, but in order to do such tasks we ueed to be careful that those who are competent to grant unbiased justice must be selected to the prestigious positions of a Judge. The future of Judicial System depends upon the Judges themselves. So the selection of one Judge would determine the qnality of Judges in the Judieial System. The choice of Judges plays a erucial role in shaping the structure of our natioo.

There has beeu vast changes in the method of selection Judges sioce the pre independence times to the present times. As we have read above, there has beeu frequent changes in the selection of Judges since the past. These changes havc been made so that there is no question upon the capability of the oues who grant Justice. There has been every possible attempts to wash away those stains which hampers the beauty and prestige of our Judicial System. So there has been utmost focus upon the knowledge, training, skills, experience and integrity of the individnals iu order to be appointed as a Judge.

As we have notieed above the NJAC was backed by various coutroversies and debales. Qnestions were raised npon its validity which finally came to an end with the establishment of NJAC. With the few years of establishment of NJAC,

there ate questions raised against the commission with regard to its authenticity. There are comparison made with different countries with regard to their procedure of judiciai appointments.

Although NJAC selects judges on the basis of their merit but the system gives primary preference to opinions of the "eminent persons" and ignores the idea and opinion of the chief justice and the two senior most judges as it is oniy the Judges who have better idea as who should be selected as a Judge since they better know the demands and challenges of the profession they belong to. Therefore with the consistent interference of the Legislature and executive the constitutional balanee has been also disturbed thus leading to abuse of power.

Our constitution follows Montesquieu's ideas of Separation of Powers, thns there has been limitations of each hranches to act within their own circumference. The eonstitutional balance is disturbed with the establishment of NJAC and it was also increasing thrust upon the exeeutive further decreasing its effieiency in implementing the laws.

With the great efforts the 99th Amendment bas tried to restore order in the working of the different organs of the government tbrough establishment of NJAC. It is important to note that the Apex Court has dismissed few writ petitions which were challenging the validity of NJAC.

Therefore in the future years the collegium system of appointing Judges would surely prove to be sneeessful as the model also respects diversity in the forms of race, religion, culture and ethnicity. The eollegium system gives power to Judiciary to select the Judges ou the basis of their preference. The collegiure system seems to be more preferential system for the appointment of Judges as it maintains constitutional balance and keeps Judiciary beyond the eontrol of legislature and executive. With the arrival of eollegium system Judiciary was made iudependeut of all the ongoing iufluenee of party politics and the idea of Separation of powers was upheld and secured.

Human Rights and The Constitution

Agrima Lailer and Vaidik Bajpai**

ABSTRACT

Human beings by the virtue of being human possess certain basic rights relating to life, liberty, property, equality and dignity, which are commonly known as human rights. Devoid of these basic rights, humans are less human, more being. Though the concept of human rights has been present since time immemorial but the adoption of Universal Declaration of Human Rights (UDHR) on 10th of December, 1948 marks a watershed moment as it recognized the inherent dignity and the equal and inalienable rights of all members of the human family. When UDHR was adopted, Indian constitution was in the offing. There is conspicuous similarity between the provision of UDHR and the rights codified in Part III and Parts IV of the constitution Part III and Part IV of the Constitution have been devoted to protect various civil, political, social, economic and cultural rights of people. Part III of the Constitution, which deals with fundamental rights, is justiciable in nature unlike Part IV (Directive Principles of State Policy) and hence, plays a greater role in safeguarding human rights. The objective of this article is to study various provisions safeguarding human rights enumerated in the Constitution of India and new emerging trends adopted by courts in Human Rights Jurisprudence in India.

I. Introduction

Human Rights are definitive moral and legal entitlements which are possessed by an individual for the virtue of being a human. These rights work on the egalitarian principle by dint of their universal application irrespective of one's nation, language, location, ethnic origin, religion or any other ground of distinction. Human Rights are neither crafted nor can be abrogated by any State. Emphasizing the bond between a government and its subjects' fundamental rights, V.K. Krishna Iyer remarks –

"Human rights are those irreducible minima which belong to every member of the human race when pitted against the State or other public authorities or groups or gangs and other oppressive communities."[1]

Originating from the Code of Hammurabi to the Cyrus Cylinder, ancient ages offered little insight to the concept of Human rights, until Middle Ages brought

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† VRK Iyer, The Dialectics and Dynamics of Human Rights 54 (1999).

with it the boon of 'Magna Carta'. This British document, signed in 1215, is widely claimed as the first noted instance when people identified that no soverelgn body has the authority to take some of their rudimontary rights away. Several revolutions and movements like American Declaration of Independence, Freneh Declaration further moulded the ambit of these intrinsic, inalienable rights. Titl the dawn of 21st century, Human rights were well acknowledged owning to Universal Declaration of Human Right which was implemented after World War II.

Human rights of individuals dwelling under the governance of a State can be elassified into two aspects, positive and negative obligations of the State. Negative obligation implyiog that the State shall not interfere with some pivotal, ingrained rights of people and Positive obligation entailing that the State shall work for the welfare and development of the people under its sovereignty. In Indian Constimtion, these rights are divided into two parts following the aforementioned classification called Fundamental Rights and Directive Principle of State Policy. Jointly they comprise Human Rights regime, neither of them being superior or inferior to each other. Fundamental rights concretize the supercilious objectives of Justice, Equality, Fraternity and the Dignity of an individual. DPSPs work for the overall development of a country on social, economic and political grounds, but lack the element of enforceability in Court of laws.

Through this artiole, the writers want to analyze the similarities between the rights stated in the Indian Constitution and various International Covenants which lay out the root, necessary rights of an individual. To lielp the same, the writers have clussified this paper into two parts busecl on the nature of rights viz. Expressed rights and Derived rights. Constitution makers tactfully demarcated the amhit of Human Rights into parts which are enforceable and unenforceable in Court of laws. Thus, Fundamental rights and DPSPs spront into part IIF and IV respectively. International agreemonts and docureents like UDHR have pervasive influence on the Indian Constitution.

II Fundamental Rights

Expressed Rights

Part III of the Indian Constitution guarantees certain Fundamental Rights to the citizens of India. Some explicit Fundamental Rights are discussed below.

a. Right to equality

Artiele 1 of the **Universai Declaration of Human Rights** proclaims that-

'All humans are born free and equal in dignity and rights'

Artiele 2 of the Declaration entitles everyonc to all the rights and freedoms set forth in it, without any distinction like that of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The notion of equality has also been provided effective recognition in the international conventions, International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Soeial and Cultural Rights (ICESCR). Article 3 of the ICCPR and also of ICESCR obliges the State Parties to ensure "equal right of men and women to the enjoyment of all" the rights mentioned in each of the covenants. Article 14 of ICCPR states that all persous shoald be treated equal before the Courts and Tribunals and Article 26 talks about equal protection of law. Thus, it can be said that the right to equality is an inherent right of humans and it is dnty of the State to ensure that everyone is treated equally in front of law and no one is discriminated against on the basis caste, color, sex, religion, race, place of birth or residence.

In India, Article 14 to 18 of the **Indian Constitution** constitutes Right to Equallty. Article 14 says-

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

Article 14 guarantees every person, citizen as well non- citizen, the right to equality before law or the equal protection of laws. The first expression, 'equality before law' means that law is administered equally in the territory of India and no special privileges are granted to any individual. The second expression, 'equal protection of laws' implies that in certain eircumstances, 'unequals' cannot be treated as equals. These two expressions are simaltaneously used in Article 7 of the UDHR, which may have influenced the formulation of Article 14. The underlying purpose of the two expressions is to give as wide amplitude to Artiele 14 as possible.[2]

Artiele 15 of the Constitution prohibits State to discriminate on certain grounds. It guarantees to all its eitizens protection against discrimination only on the grounds of race, religion, caste, sex, color, place of birth. The expression 'discriminate against' used here signifies that the State cannot pass any legislafion wbich involves an element of prejudice only on these grounds. Ctause (2) of this Artiele states that no eitizen on the basis of these grounds wili be snbject to disability with regards to access to shops, public restaurants, liotels and pluces of publie entertainment. Similarly, no one can be restricted or discriminated against the use of welis, tanks, bathing ghats, roads and places of publio resort. This prohihition

2 MahendraSingh, V.N. Shukla's Constitution of India 45(11th ed. 2008).

will apply only if these places are either maintained wholly or partly out of State funds or dedicated to the use of general public.

Clause (3) of Article 15 permits state to make special provisions for the upliftment of women and children. Women and children belong to certain groups of people who either by nature or due to deep- rooted custom are weak and vulnerable, and need provisions for upliftment.[3]

By virtue of Article 15(3), Parliament has been able to make provisions for women empowerment. For instance, 74th constitutional amendment provided for 33% reservation for women in Panchayats and Municipalities. It is not only the legislature which has been able to make provisions for women upliftment, but also the judiciary which has been able to declare certain rules and regulations found to be discriminatory against women as unconstitutional. The case of C.B. Muthamma v. Union of India[4] challenged the validity of Indian Foreign Service (Conduct and Discipline) Rules of 1961 which disallowed any married woman to join service and required permission from government before the solemnization of marriage. Supreme Court on the basis of Article 15(3) was able to struck down this provision. In addition to this, India has also ratified Convention on the Elimination of All forms of Discrimination Against Women (1979).

Article 15(3) and Article 24 of the Constitution have enabled our legislature to pass certain legislations to remove the enathema of Child Labor which still haunts our country. Indian Factories Act, 1948; Indian Mines Act, 1952; Motor Transport Workers Act, 1961 all prohibited employment of children in different occupations. Commission for Protection of Child Rights Act, 2005 was enacted on 20th January, 2006 to give effect to policies adopted by the government for protection of the rights of children.

Similar to Article 15, Article 16 of the Constitution provides for "equality of opportunity for all citizens" in matters of public employment, i.e., in matters relating to employment under the state. It also empowers state to pass any legislation "for reservation of appointments or posts in favour of any 'backward class of citizens' " who are not adequately represented in the services under the state.

Article 17 of the Indian Constitution abolishes untouchablility and declares any disability arising out of it as a punishable offence. The term untouchability is not used in its literal or grammatical sense but as a result of repressive caste system

3 H.O. Agarwal, Human Rights 113 (14th ed. 2013).

4 C.B. Muthamma v. Union of India, A.I.R. 1979 SC 1868.

which has developed in this country over thousands of years. Parliament using the power conferred upon it by Article 35 can make laws prescribing punishments for practicing it. Two major acts dealing with untouchability in India are – The Protection of Civil Rights Act, 1976 and The Scheduled Castes and the Sehedaled Tribes (Prevention of Atrocities) Act, 1989. India has ratified the convention on the Elimination of All Forms of Racial Discrimination, 1965. In the context of untouchability, it becomes quite pertinent to mention this convention because the efforts of various NGOs and Human Rights activists to include "caste" in the agenda of the convention have failed because Indian Governmont took a stand against the inelusion. The government's stand in this regard clearly shows that it has failed in its attempr eliminate discrimination based on caste.[5]

b. Right to personal freedom

The term 'Personal freedom' connotes absence of an external agent who exercises control over our actions, In its literal sense it means absence of constraint. It includes freedom to form an assembly, of speech and expression, of movement, of residence etc. However, the gamnt of personal freedom is limited; it can be enjoyed only to a certain extent as long as it doesn't infringe the rights of others. If no constraint in exercise of personal freedom is observed, then there wili be no guarantee that anyone would be able to enjoy these rights.

Para 3 of the Preamhle of **ICCPR and ICESR** states-

"Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom.... Can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights..."

Article 29 of UDHR formulates that the limitations on personal freedom are to be "determined by law" solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of "morality, public order and the general welfare in a democratic society." Thus, as per UDHR, restrictions imposed on personal freedoms must be "determined by law" and must meet the requirements of morality, public order and general welfare.

Artieles 19(1) (a) to (g) of the Indian Constitution provide personal freedoms to the citizens of India and sub articles (2) to (6) impose reasonable restrietions on these freedoms. Freedom of speech includes freedom to freely express one's views and opinions and freedom to seek and receive information. Article 19(1)

5 Justice Hosbet Suresh, All Human Rights are Fundamental Rights 30 (2d ed. 2010).

(a) of the Constitution, secures every citizen the right to freedom of speech and expression. Article 19 of UDHR provides for freedom of opinion and expression. Similar provision has been provided in Artiele 19 (2) of ICCPR. Article 19(2) of the Constitution imposes restriction on freedom of speech and expression in India. It authorizes state to make any law whieh imposes reasonable restriction on the exercise of this right in the interest of sovereignty and integrity of the eountry, security of state, friendly relations with other states, pnbhc order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

Article 19(1)(h) of the Indian Constitution confers the right to form peaceful assembly to the citizens of India. This Artiele is eqnivalent to Article 20 of UDHR. Sub- artiele 19(3) of Indian Constitution imposes reasonable restrietion related to sovereignty and integrity of India or the public order, on this right. Such restrictions can be imposed on the assembly when it is armed, is of riotous or volatile eharacter or if the object of such assembly is unlawful. Article 21 of ICCPR mentions that certain restrictions whieh are in the interest of national security, public order, pubhc safety, pubhe health are necessary to be imposed on the freedom to assemble.

Article 19 (1)(c) of the Constitution guarantees freedom to form associations and unions. Article 19(4) imposes restrictions on this clause of Article 19. These restrictions conform with the restrictions imposed in Article 22(2) of ICCPR. Article 19(1)(d) and (e) of the Constitution entrust the right to move freely ,and reside and settle anywhere in the territory of India. However, Article 19(5) allows states to make any laws in interest of general public and thereby imposes a restriction on these rights. Artiele 13 of UDHR and Article 12(1) of ICCPR provide for these rights whereas Article 12(3) provides for reasooable restrictions which can be imposed on their enjoyment.

Article 19 (1)(g) of the Constitution guarantees the right to practice any profession, or to carry on any oecupation, trade or business. This rights is not ancontrolled, Article 19(6) authorizes state to make laws which are in the interest of general public. Article 23 of UDHR and Article 6 ICESR, guarantee everyone's right to work and the right to free choice of employment.

c. Right to Religieus freedom

Article 18 cf UDHR stipulates that

"Everyone has the right to freedom of thought, conscience, and religion."

Freedom to change one's religion and Freedom to manifest one's religion have also been included in this right. Article 18 of ICCPR deals with this right more extensively and states that freedom to adopt a religion or bchef of one's choice should not be impaired due to coercion, also that freedom to manifest one's religion may bc subject to reasonable limitations.

In India, it is Article 25 of the Constitution which guarantees freedom of religion. Artieles 26, 27, 28 provide for freedom to manage religious affairs, freedom to not pay taxes for promotion of any particular religion and freedom not to attend any religious instruction in educational institutions. These articles must be understood with Article 19 (1)(a), freedom of speech and expression, Artielc 19 (1)(e), freedom of association, Article 14, guaranteeing equality and Article 21, guaranteeing right to life and liberty.

Reasonable restrietions provided for in Article 19(2) may also be imposed on Artiele 25 as propagation of a religion can also be considered to be a part of Freedom of speech and expression [Article 19 (1)(a)], but it can be restricted only on the groonds mentioned in Artiele 19 (2), not otherwise. On the other hand, right to change one's religion following propagation cannot be restricted. Meaning, no restriction can be imposed on freedom of conscience- freedom to choosc or not to ehoose a religion which is being propagated.[6] In other words, reasonable restrictions can be imposed on freedom of conversion but there ean be no restriction on freedom to convert as the freedom to choose one's religion depends on eonscience and that right is absolute. However, in the case of Rev. Stanislaus v. Madhya Pradesh[7], Supreme Court npheld the Freedom of religion Act in 1967 and 1968, prohibiting forcible conversion, in the states of Orissa and Madhya Pradesh. This judgment of the court has been criticized on the grounds that it prohibits the right of conversion persons mther than force or fraud, probably due to which the conversion took placc in the first place.[8]

Due to sectarian politics and lax attitude of the governmont, crimes against religious minorities are not unheard of in our country. Slaughter of Sikhs in Delhi in 1984, Maslims in Mumbai (1992-1993) and Gujarat riots of 2002 are some major instanees of the somc. Many jurists argue that such crimes are not mere crimcs under penal law but are crimcs of genocide. Successive governments have failed to bring genocide law in the country even though we have ratifred the Convention on the Prevention and Punishment of the Crimes of Genocide, 1948.

6 Justice Hosbet Suresh, All Human Righta are Fundamental Rights 45-46 (2d ed. 2010).

7 Rev. Stanislaus v. Madhya Pradesh, AIR 1977 SC 908.

8 Seervai H.M., Consitutional Law of India 55 (4th ed. 2015).

Article 2 of the convention states that the acts committed with the intent to destroy, in whole or in part, "a national, ethical, racial or religious gronp" will be considered as crimes of genocide.

Under the convention, the State parties are supposed to enact suitable legislation to give effect to the provisions of the convention. Indla has not complied by this till now.[9]

Though freedom of thought, conscience and religion are guaranteed by the Constitution, there are many spheres where this freedom is denied. Many personal laws, in particular, are in opposition to fundamental right but Supreme Court has takon the view that personal laws are not susceptible to Part III of the Constitution.[10]

III Derived Rights

Indian Constitution makers while incorporating several provisions from international covenants and treatics expressly stated some rights while, leaving other vital rights to the interpretation of the Courts. Indian Judiciary has taken conclusive steps to demereate the ambit of derived or implied rights which have sprouted through varions landmark judgments. It must be noted that the ambit of 'personal liberty' embodied in Article 21 of Indian Constitution has been exploited most by the Courts of Laws. Some of the important derived rights are discussed below.

Ambit of Personal Liberty (Procedure Established by Law v. Due Process of Law)

Stark differenec arises between USA and India regarding the ambit of application of fundamental rights as they follow a diverse approach to the subject. Io USA, the principle of natural justice is expressly gratified in the doctrine of 'due process of law'. Thus, a legal liability arises for the legislature to make a law keeping in mind the principles of justice, equity and good conseience. In India, a eontrary position exists. The Constitution gives an edge to the legislature to make arbitrary laws which may or may not conform to the principles of natural justice.

Thus, realm of 'personal liberty' enlarges to a great extent under U.S. Constitution than Indian Constitution. This happens because of the varions fetters to liberal approuch which mars the Indian Judiciary's ambit with restriction.[11]

9 Justice Hosbet Suresh, All Human Rights are Fundamental Rights 48 (2d ed. 2010).

10 Krishna Singh v. Mathura Ahir, AIR 1980 SC 707.

11 A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

This obstacle was overcome in the all famous case of Maneka Gandhi v. Union of India[12], where the Hon'ble Supreme Court of India created a relationship between three articles; Article 19, Article 14 and Article 21, thus giving a fundamental identity to the content of Article 21.

Principles of reasonableness which are embodied in Article 14 shall also be related to the 'procedure, which is talked about in Article 21. It shall be "right, just and fair" and not "arbitrary, fanciful or oppressive". Thus, Indian Judiciary follows the notions and principles of 'due process of law' although it is not expressed in the Constitution.

a. Right to Privacy

Right to privacy in its extreme stripped sense means living your life with minimal interference and the justification to be left alone. Article 17, Para (1) of **International Covenant on Civil and Political Rights** formulates Right to privacy as –

'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

Article 8 of **European Convention of Human Rights** also reflects a similar image about an individual's right to privacy.[13]

As per the Indian Constitution, Right to privacy is not expressly guaranteed. Over the years, Right to privacy has gone through a case by case development where the abridged interpretation of certain statues of our Constitution was exterminated.[14] According to **Article 21** of Indian Constitution,

Protection of life and personal liberty – 'No person shall be deprived of his life or personal liberty except according to procedure established by law'

The scope and nature of the phrase 'personal liberty' was first exploited in the case of Kharak Singh v. State of Uttar Pradesh[15], where it was held by the

12 Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

13 European Convention on Human Rights, art. 8, Nov. 4, 1950. – (a) Everyone has the right to respect for his private and family life, his home and his correspondence.

(b) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

14 A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

15 Kharak Singh v. State of U.P., AIR 1963 SC 1294.

Hon'ble Supreme Court of India, only the clause of domiciliary visits was invalid but the rest of the impugned regulation (which provided local police arbitrary powers for surveillance) was considered free from the vice of unconstitutionality.

Justice Subba Rao hailed right to privacy as "an essential ingredient of personal liberty" and it is "a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures."[16]

In the case of Gobind v. State of Madhya Pradesh[17], the Hon'ble Supreme Court of India contemplated that although not expressly declared, but right to privacy is embedded in the fundamental right of life and personal liberty.

These landmark decisions resulted in a conclusive approval of inculcating right to privacy as a fundamental right of an individual. The Supreme Court congealed the aforementioned principle in a string of imperative cases.[18]

Citing the initial ambiguity regarding the inclusion of right to privacy under the ambit of 'personal liberty', the National Commission to Review the Working of the Constitution recommended that a separate clause of right to privacy shall be added under the ambit of Article 21 which must be inspired from the rules laid in the International Covenant of Civil and Political Rights, 1966.[19]

b. Right to Travel Abroad

The **International Covenant on Civil and Political Rights** lays down specific rights regarding one's right to free movement and travel abroad under **Article 12.**[20]

In India, Right to travel abroad is not explicitly illustrated under any article but through the case of Satwant Singh Sawhney v. Passport Officer[21], it was held by the Hon'ble Supreme Court of India that right to travel abroad comes under the ambrella of 'persoual liberty' enshrined in Artiele 21 of Indian Constitution.

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16 Kharak Singh v. State of U P., AIR 1963 SC 1306.

17 Gobind v. State of Madhya Pradesh, (1975) 2 SCC 148.

18 R. Rajgopal v. State of T.N., (1994) 6 SCC 632. ; People's Union for Civil Liberties v. Union of Iodia, (1997) 1 SCC 301. ; Ram Jethmalani v. Union of India, (2011) 8 SCC 1,37.

19 Report of National Commission to Review the Working of the Constitution, Vol 1, P. 62

20 International Covenant on Civil and Political Rights, art. 12, Dec. 16, 1966. - 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose bis residence.

2. Everyone shall be free to leave any country, including his own

21 Satwant Singh Sawhney v. Passport Officer, AIR 1967 SC 1836.

Case of Maneka Gandhi v. Union of India[22] further solidified Supreme Court's stance on the issue as Justice Bhagwati held that –

"Personal liberty in Article 21 is of the wildest amplitude and it covers a variety of rights wliich go to constitute the personal liberty of the man and some have them have been raised to the status of distinet fundamental rights and given additional protection under Articlc 19."

c. Right to Speedy Trials

Right to speedy trials is laid down in the **International Covenant on Civil and Political Rights** under Article 9 Para (3) whicli reads –

'Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.'

In India, right to speedy trials is not expiioitly mentioned, but it is implied under Artiele 21. In a string of important cases, the Hon'ble Supreme Court of India has vatidly inculcated this right under Article 21's wide ambit. Starting from the easc of Hussainara Khatoon (I) v. State of Bihar[23], where the Hun'ble Supreme Court of India ordered that all women and children under-trials in Bihar jails must be acquitted. Justice Bhagwati while giving the judgment held that –

'If a person is deprived of his liberty under a procedure which is not 'reasonable, fair or just', such deprivatiun would bc violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release... No procedure whicli docs not ensure a reasonabiy quiek trial can be regarded as 'reasonable, fair or just' und it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, und by speedy trial we mean reasonably cxpeditious trial, is an integral and essential part of fundamental right to life and liberty enshrined in Article 21.'[24]

Proving the fundamental nature of this article, it was held by the Supreme Court that right to speedy trials in all criminal prosecutions is an immutable right under Article 21.[25]

22 Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

23 Hussainara Khatoon (1) v. Statc of Bihar, (1980) 1 SCC 81.

24 Hussainara Khatoon (1) v. State of Bihar, AIR 1976 Supreme Court, p. 1365.

25 Vakil Prasad Singh v. State of Bihar, (2009) 3 SCC 355.

d. Right to provide legal assistance

Paragraph 3 (d) of Article 14 **of International Covenant on Civil and Political Rights** talks about the right to provide legal assistance to an accused who can't meet the expense of legal services for reasons like poverty, indigence etc. It states –

'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality –

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.'

In India, this right is derived from Article 21. Like other implied rights, this right has also gone a case by case development. In the case of M.H. Hoskot v. State of Maharashtra[26], the Hon'ble Supreme Court of India held that right to free legal services for the people abject to penury is a vital part of reasonable, fair and just procedure mentioned in Article 21.

In the aforementioned judgment, Justice Krishna Iyer pointed that –

"*If a prisoner sentenced to imprisonment, is virtually unable to exercise his constitutional and statutory right of appeal... for want of legal assistance, there is implicit in the court under Article 142 read with Articles 21 and 39-A of the Constitution, power to assign counsel for such imprisoned individual 'for doing complete justice'.*"[27]

e. Right of Prisoners to he treated with Humanity

International Convention on Civil and Political Rights under **Article 10 (Para 1 and 3)** deals with general humane treatment of prisoners. It states –

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

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26 M.H. Hoskot v. State of Maharashtra, (1978) 3 SCC 544.

27 M.H. Hoskot v. State of Maharashtra, AIR 1978 Supreme Court, p. 1556.

There is ne explicit demarcation of Right of Prisoners in Indian Constitution, bur through various Court judgments, this right has acquired a fundamental nature under Article 21. The courts have observed that right to life is not a mere animal existence, or vegetable substance.[28]

Indian Courts have been extra-cautious in terms of criminals so that jall authorities don't impose barbaric or inhumane treatment on prisoners. The eourts have also issued eertain guidelines for the jail anthorities to protect the fundamental rights of prisoners.[29]

In the matter of D.K. Basu v. State of West Bengal[30], the Supreme Court declared –

'The precious right guaranteed by Artiele 21 of the Constitution of India cannot be denied to convicts, under-trials, detunes and other prisoners in custody, except according to the procedure established by law by placing sucli reasonable restrictions as one permitted by laws.'

IV Directive Principles of State Policy

Directive Principle of State Policy, as enumerated in Part IV of the Indian Constitutiun pavc way to fulfili the positive obligatious of the State. This part euntalns directions and guidelines for the government or State to achieve for a 'welfare state'. The rights specified in this part bear a stark resemblance to certain duties specified in **the Iotemational Covenant on Economic, Social and Cuttural Rights.**

Various rights under DPSPs seemed to be emanating from Article 7 of ICESCR which reads as –

The States Parties to the present Cnvenant recognize the right of everyone to the enjoymem of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a miuimum, witli:

    (i) Fair wages and equal remuneration for work of equal valne without distinction of any kind, in particular women being guaranteed cunditions of work uot inferior to those enjoyed by men, with equal pay for equal work;

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28 Charles Shobraj v. Superintendent, Central Jail, Tihar, New Delhi, AIR 1978 Supreme Court, p. 991.

29 Sunil Batra v. Delhi Administration (No. 2), AIR 1980 Supreme Court, p. 1579.

30 D.K. Basu v. State of West Bengal, AIR 1997 Snpreme Court, p.610.

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(e) Equal opportunity for everyonc to be promoted in his emplnymunt to an appropriate higher lcvel, subject to no consideralions other than thosc of seniority und competence;

(d) Rest, leisure and reasonable limitatiun of working hours and periodic holidays with pay, as well as remmeratiun for publie holidays

Under Article 26 sub article (2) of UDHR, it is enumerated that "education shall be directed to the full development of the liuman personality and to the strengthening of respect for human rights and fundamental freedoms." Artiele 13(1) of ICESR states "The State Parties to the present Covenant recognize the right of everyone to education." Educatiou has been internationally recngnized as essential for human development. It has been acknowledged nationally as well. Artiele 45 of the Constitution provides for free and compulsory education for children until they reach the age of 14 years.

Article 48A of the Directive Principles imposes a duty on State to protect environment. Though there is no express mention of right to environment in ICESCR, Article 12 of the Covenant recognizes everyone's right to enjnyment nf highest attainable standard of pliysical and mental beaith. In India context, Right to Environment has also been recognized as a fundamental right by enlarging the scopc of Article 21 of the Cnnstitutiun.

DPSPs like raising thc standard of living, level of uutrition and to improve publie health(Articlc 47), to promote educational and economie interests of Scheduled Castes, Scheduled Tribcs and other weaker seetious (Article 46), scientific reorganizatiun of animal husbandry and agriculture(Article 48), protectiun of monuments and things of artistie and historical Importance(Article 49), separation of judiciary from executive (Article 50), promotion of International peace(Article 51) and to onsure civil uniform code in the country(Article 44), Equal pay for equal work (Artiolc 39(d)), Safe and liumane condition of work (Article 42), Maternity relief (Article 42), Living wages (Article 43), Conditions of work (Articlc 42) and right to work (article 41) emanate from this part. These rights help in achieving constructive conditions of work and thus upliold various rights embodied in Part IV of Indian Cnnstitution.

V Conclusion

Indian Constitution guarantees certain iualienable, unbridgeable, indivisiblc and inherent liberties to the citizens of the Iudia in its Part III and IV. Presence of

many facets of universal Human Rights embodied in Universal Declaration of Human Rights and various international covenants is eminent in the Constitution. Remarkable activism has also been displayed by Indian Judiciary in the advocacy of Human Rights in the country. By widening the ombit of some expressed Fundamental Rights, it has been to incorporate internationally recognized Human Rights in the Constitution which were not previously inculcated.

Broadly speaking, international humanitarian law recognizes three obligations of State – the obligation to respect, the obligation to protect and the obligation to fulfill human rights.[31] Despite the aforementioned Constitutional provisions, Indian government has not been able to fulfill its obligations in entirety. Human Rights violations are not unheard of in our nation. On top of that, reluctance of the government to enact a genocidal law and strict stand adopted by the government against the inclusion the word 'caste' in the agenda of the International Convention on the Elimination of All Forms of Racial Discrimination are some of the instances which show the unwillingness of the state to achieve an egalitarian society. Not only the executive and legislature, but Judiciary has also sometimes turned a blind eye to Human Rights. In the case of ADM Jabalpur[32], the judiciary negated the application of provisions of Universal declaration.

With the passage of time, there is emergence of strong civil society and robust media in the country. Human Rights violations are still rampant in our country, but with growing awareness among the citizens it has become impossible for human rights violators to escape the clutches of law. By widening the scope of traditional concept of locus standi, judiciary has ensured that justice can be delivered to the downtrodden and weak, who are farthest from it.

31 Justice Hosbet Suresh, All Human Rights are Fundamental Rights 8 (2d ed. 2010).

32 ADM Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521.

'Freedom' To Speech and Expression- A Right In 'Peril'

Abhimanyu Chopra* and Samali Verma**

"Censorship is to art as lynching is to justice."

– Henry Louis Gates Jr.

"My own opinion is enough for me, and I claim the right to have it defended against any consensus, any majority, anywhere, any place, any time. And anyone who disagrees with this can pick a number, get in line, and kiss my ass."

– Christopher Hitchens

ABSTRACT

The paper intends to focus on the issues of Freedom of Speech and Expression, Intolerance, Sedition and Social Media Trials and intends to synergies these concepts to bring out a whole picture and highlight specific laws which are in place to handle the said violations are being often (mis) used. The paper aims to bring out a legal argument and put forth the point that certain provisions of the Indian Penal Code and Information Technology Act, 2000 are redundant while the Information Technology Act, 2000 stands revised in terms of Section 66A, the need of the hour is also to revise our Indian Penal Code and other provisions, which obviate the need our freedom of speech and expression and understand the entire concept with specific reference to the Constitution of India. The paper further aims to highlight these concepts in context of certain landmark views taken in judicial pronouncements, which are at the core of the issues dealt with namely the judgments of Shreya Singhal v. Union of India, Devidas Ramachandra Tuljapurkar vs. State of Maharashtra & Ors, Kanhaiya Kumar v. State of NCT and the recent judgment of Perumal Murugan v. the Government of Tamilnadu.

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I Introductiou

This pieee is best explained by the two quotes mentioned above, though the paper is extensively self-explanatory to a studeot of law or a layman altogether, but understanding the nit bit integrities are not. A Division Beneh of a Hon'bie High Court rightly puts it in context that, *"India has the benefit of one of the most modern and liberal constitutions. It is reflective of its rich and diverse heritage, yet enunciating the modern principles of democracy, as distinguished from a feudal society."*[2] However, it is indeed sad that sometimes the preamble is bereft of its meaning and instead the people and the media become the judge, jury and exeeutioner iu such sensitive eases where the views of others are different to their own and this by definition becomes an onti-national or a seditious act and the better part of 2013- 2016 bas brought about a lot of outrage in context of Fondamental right to Speech and Expression, Issues of Sedition and Social Media Trials on such exact poiuts.

This paper intends to focus in detail on the above mentioned concepts and also to synergies these concepts to bring out a complete picture. And while speeific/ special laws are in place to handle such violations, this paper aims to bring out a legal argument and put forth the point that certain provisions of the Indian Penal Code 1860 *(hereinafter referred to as the 'IPC')* and Informatiou Technology Aet, 2000 are redandant and are often being misused While the Information Technology Act, 2000 stands revised in terms of § 66A, the real need of the hour is also to revise the IPC and other laws, whieh obviate the need our freedom of speech and expression and the object of this paper is to bring about a wholesome and heipful understanding to this entire concept, with specifie reference to the provisions under the Constitution of India, 1950.

The paper further aims to highlight these coucepts in context of certain landmark views taken in judicial prououncements, which are at the eore of the issues dealt with namely the judgments of *Shreya Singhal v. Union of India*[3], *Devidas Ramachandra Tuljapurkar vs. State of Maharashtra & Ors*[4], *Kanhaiya Kumar v. State of NCT*[5] and the recent judgment of *Pernmal Murugan v. the Government of Tamilnadu*[6]

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2 *Madras High Court, W.P (C) 1215 and 20372 of 2015, available at https://www.scribd.com/document/317574828/Perumal-Judgment#from_embed (Last visited on August 11, 2016).*

3 (2015) 5 SCC 1

4 (2015) 6 SCC 1

5 *Delhi High Court, W.P (CRL) 558 of 2016, available at* http://lobis.nic.in/ddir/dhc/PRA/judgement/02-03-2016/PRA02032016CRLW5582016.pdf *(Last visited on April 05, 2016.)*

6 *Madras High Court, W.P (C) 1215 and 20372 of 2015, available at https://www.scribd.com/document/317574828/Perumal-Judgment#from_embed (Last visited on August 11, 2016.)*

To bring into context, it is imperative to iterate the events of 2013 in Mumbai where two girls in Thane District were arrested by the Police, one for posting a status message of Facebook criticizing the *Bandh* of two days in Mumbai due to the death of the Shiv Sena leader Mr. Bal Thackeray and the other for liking the status that the first girl posted[7]. The duo was reportedly booked under § 295A[8] of the IPC *(for hurting religious sentiments)* and §66A [9]§ 66-A Information Technology Act, 2000

This was the first instance in the recent times that we as the Indian society learnt the most fundamental principle that shook our traditional beliefs, we saw firsthand and for the very first time *"that Virtual has Real Consequences"*, we saw teens get arrested on posting a simple status online on social networking sites[10], we learnt that public rebelled for such an act when Public Interest Litigations like *Shreya Singhal* were filed and the Hon'ble Supreme Court of India as a

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7 Zeenews, *Two Girls Held For FB Post Questioning Bandh For Thackeray's Funeral, November 19, 2012*, available at http://zeenews.india.com/news/maharashtra/two-girls-held-for-fb-post-questioning-bandh-for-thackeray-s-funeral_81632.html (Last visited on March 27, 2016.)
See also Pranesh Prakash, *Arbitrary Arrests for Comment on Bal Thackeray's Death*, November 19, 2012
http://cis-india.org/internet-governance/blog/bal-thackeray-comment-arbitrary-arrest-295A-66A (Last visited on March 27, 2016.)

8 **Indian Penal Code, 1860- § 295A.** -Deliberate and malicious acts, intended to outrage religious feelings or any class by insulting its religion or religious beliefs. — Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of 2[citizens of India], 3[by words, either spoken or written, or by signs or by visible representations or otherwise], insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to 4[three years], or with fine, or with both.

9 **§ 66-A Information Technology Act, 2000**
Punishment for sending offensive messages through communication service, etc. —Any person who sends, by means of a computer resource or a communication device,—
(a) any information that is grossly offensive or has menacing character; or
(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or
(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.
Explanation.— For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message."

10 *See Infra* 11, 12 and 13.

consequence declaring the provision of § 66A of the Information Technology Act, 2000 as unconstitutional, for it is in gross violation of the fundamental rights provided to the citizens under the Constitution Of India.

However, this event while being the core of the issues that songht resolution wherein Justice RF Nariman, laid down the reasons by way of the *'Community Standards Test' vis a vis the Obscenity Test* as laid down by the Hon'ble Supreme Court of India in the matter of *Aveek Sarkar v. State of West Bengal*[11], which post the judgment of *Shreya Singhal*[12], stood quite diluted when Justice D Misra, passed the judgment in the matter *Devidas Ramachandra Tuljapurkar vs. State of Maharashtra & Ors*[13]while referring to the case of Shreya Singhal, coined the new expression *'historically respected personalities'*. Justice D Mishra has held that when *'historically respected personalities' (in the present matter, Mahatma Gandhi)* is alluded or used as a symbol, speaking or using obscene words, the concept of *'degree'* comes in and the *'contemporary community standards test'* become applicable with more vigor to a great decree and in an accentuated manner, thereby diluting the aspect of freedom of speech and expression which was provided by Justice R.F Nariman in the Shreya Singhal judgment and gave a broader range to the aspects of Reasonable Restrictions, which according to the author has again diluted the scope of freedom and expression to a great extent.

To explain this the author would like to state, that *Aveek Sarkar v. State of West Bengal*[14]laid quite extensively while reiterating a quite a few judicial precedents passed by the apex court such as the ease of *Chandrakant Kalyandas Nakodar v. State of Maharashtra*[15]*and Ranjit D. Udeshi v. State of Maharashtra*[16], wherein the ***Constitutional Bench*** of the Hon'hle Supreme Court of India indicated that the concept of obscenity would change with the passage of time and what might have been *'Obscene'* at one point of time would not be considered as obscene at a later period and also explains that the standards of contemporary society in India are also fast changing and to determine this Community Standards Test are to be applied, which essential means that the issue at hand would be judged from the point of view of an average person by applying the contemporary community standard, similarly, the issue of 'who' or 'whom' is a *historically respected personalities'* would be determined accordingly, but since the judgment

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11 (2014) 4 SCC 257.
12 Ibid 10,11,12 and 13.
13 ibid 2.
14 Supra.
15 1969 (2) SCC 687
16 AIR 1965 SC 881

is vague, it now increase more vagueness and the strict test made would be more constricting, since people would also vary with their '*historically respected personalities*' , so while A could be historically respected personalities for B, same would not be a historically respected personalities in the eyes of C and *vice versa.*

II Concept of Sedition

Sedition as it stands today under §124-A[17] of the IPC was not present in the original draft of the Penal Code in the year 1860, and the same was subsequently added by an amendment in the year 1870. This section was then amended by the Indian Penal Code Amendment Act (*IV of 1898*). As a result of the amendment, the single explanation to the section was replaced by three separate explanations as they stand now. Enquiringly the word '*Sedition*' is not mentioned in the Indian Penal Code.

The offence is Cognizable, Non-bailable, Non-compoundable and triable by a Court of Sessions and the punishment, which can be, awarded for the above offence is:

(i) Imprisonment for life, to which fine may be added, or;

(ii) With imprisonment which may extend to three years, to which fine may be added, or;

(iii) With fine.

The first case on Sedition dates back to the year 1892 in the matter of *Queen Empress v. J G Bose*[18], which is popularly known as the "*Bangobasi case*" and set the first test of determination of violation of §124-A, many Indian freedom

17 **Indian Penal Code, 1860, § 124-A.** Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1.The expression "disaffection" includes disloyalty and all feelings of enmity.

Explanation 2. Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3. Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

18 ILR (1892) Cal 35

fighters including Mahatma Gandhi and Bal Gangadhar Tilak were charged with Sedition during the freedom Struggle of India.

However, after the implementation of the Constitution of India, 1950, all laws before or after the commencement of the Constitution of India, 1950 were subjected to Part-III of the Constitution of India, 1950 namely, the Fundamental Rights.

In this context, it would be imperative to state Article 19 that talks about the Fundamental Right of the freedom of speech and Expression provided to the citizen of the India, although this right is not absolute and subjected to the 19(2) of the Constitution of India, 1950. Article 19(2) of the Constitution provided for 'reasonable restrictions' and can be imposed in 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. Therefore, Sedition laws were automatically justified under 19(2) of the Constitution.

Then came the judgment of *Kedar Nath Singh v. State of Bihar*[19], whereiu the constitutional bench of the Hon'ble Supreme Court of India was faced with two conflicting interpretations to § 124-A of the Federal Court and of the Privy Council. The constitutional bench opined, "*The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence. As already pointed out, the explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, etc. which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the section, in our opinion, strikes the correct bolance between individual fundamental rights and the interest of public order. It is also well settled ihat in interpreting an enactment the Court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent histary of the legislation, its purpose and the mischief it seeks to suppress and Viewed in that light, we have no hesitation in so construing*

19 AIR 1962 SC 955

the provisions of the sections impugned in these eoses as to limit their application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence."

As a resuli the Constitution Beneh of the Hon'ble Supreme Court of India read down § 124A while construing it narrowly and stating that the offence would only be complete if the words complained of have a tendency of creating public disorder by violence ond upheld the section accordingly. However, it was further clarified that comments, however strongly worded, expressing disapprobation of actions of the Government, withoul excitiug those feeling which generate the Inelination to cause publie disorder by acts of violence, would noi be penal.

Iu light of the above, comes the present day talked about topic of Kanhaiya Kumar *(hereinafter referred to as KK, for the purpose of brevity)*, who been in the center of controversy for giving the alleged speech at the JNU campus, the contents of which were termed as seditious[20].

Io the matter of *Kanhaiya Kumar v. State of NCT*[21], Jusfice P Rani, Hon'ble High Court of Delhi has very elegantly decided the matter of KK's bail but before going into thc details for the samc, the brief history of the matter is that in an event which was told as a poetry event, requite permissions were taken from the JNU authorities, was being performed, in which certain anti-national activities were done purportedly such as critiquiug thc judieial killing of Afzal Guru and Maqbool Bhatt by KK, which were likely to disrupt the peace and harmony of the JNU campus and therefore, the permission rescinded. Also, apprehending the breach of peace at the campus, the Chief Security Officer, JNU as well local police was informed.

Subsequently, there were arguments between the students on one side and security staff on other side on fixing the mike and other equlpment's. The local police assisted by security staff and positioned themselves between the two groups to maintain distance between them. The shouting of anti-national slogans continued unabated which were opposed/countered by the other group of students by shouting slogans in support of the nation. In this process, the students from both

20 The matter beling *sub-judice*, sensitlve and being a reason of controversy, the author has revisited the entire debate only as per the statements as explained before the Hon'ble High Court of Delhi and has refrained from commenting in any manner and therefore has brought only the facts and circumstances as explained by the counsels of KK and the Union of India before the Hon'ble Court. All the facts and circumstances mentioned in the present chapter are devoid of views of the author, however the author for the purpose of the present paper explains the concepts on a *'As is Where is basis'*.

21 *Supra.*

the groups had at many times engaged In verbal as well as physical jostling and heckling. This situation led to law and order prohlem, whioh disturbed the pubhc order in JNU campus. The situation was brought under contrul by 8.30 to 9.00 pm[22].

As submitted by Mr. Tushar Mehta, the Ld. Additional Solicitor General of Iudia who was arguing for the state that on the basis of telecast by Zee News on 10th February, 2016 about the incident at JNU on 9th February, 2016, raw video footage was obtained from that channel and thereafter FIR No.110/2016 under Sections 124-A/120-B/34/147/149 IPC was registered at PS Vasant Kunj North. The order[23] passed assails the matter in length and points out at Paragraph 31, that, "*The petitioner is President of JNU Students Union and actively involved in various activities carried out in the University. He admits his presence at the spot on the alleged date of occurrence. The photographs of the incidents placed on reeord have been filed to show his presence at the spot. The limited controversy as on date is whether the petitioner was actively participating in the alleged anti-national activities on that day ar he was present there only to intervene between two rival factions of the students. What was the role played by the petitioncr on that day is subject matter of investigation and it is desirable at this stage to leave it to the investigating agency to unearth the truth.*[24]"

And in our view, rightly so. However, it would be noteworthy to mention thal the Hon'ble judge has in concluding paragraphs has tried to teach KK a little hit of the Constitution and reminded KK about *Part-IV* and Article 51A of the Constitution of India and that Introspection is required uot by just KK but the entire student community at large while emphasizing that, "*such persons enjoy the freedom to roise such slogans in the comfort of University Campus but without realizing that they are in this safe environment because our forces are there at the battle field situated at the highest altitude of the world where even the oxygen is so scarce that those who are shouting anti-national slogans holding posters of Afzol Guru ond Maqbool Bhatt close to their chest honoring their martyrdom, may not be even able to withstand those conditions for an hour even.*"[25]

While explaining the present topic, il would be worthwhile to also note the view of the jndgment passed by the Hon'ble High Court of Gujarat In the matter of

22 **FIR No.110/2016** onder Sections 124-A/120-B/34/147/149 IPC registered at PS Vasant Kunj North, New Delbi.

23 *ibid 3.*

24 *id 6.*

25 *ibid.*

Hardik Bharatbhai Patel vs. State of Gujarat & Ors.[26]Wherein the Hou'ble High Court has held in paragraph 14 as to what constitutes Sedition, *"I should be mindful of the fact that the case in hand is one wherein the accused is praying for quashing of the F.I.R. at a stage when the investigation is in progress. I should look into the allegations levelled in the F.I.R., as they are without adding or subtracting anything from it. I am of the view that a speech or a statement, in which the speaker exhorts the persons, who are listening to him, to resort to violence, prima facie, could be said to be intended to excite disaffection towards the established Government and amounts to an offence under §124A of the Indian Penal Code. To put it in other words, to advise a person to persuade to violence as a means of attaining a particular goal or seeking revenge is not less objectionable then advising that person to commit violence himself for that purpose. In either case, the advice is to pursue a course of action, it is calculated to disturb the tranquility of the State. It is a recommendation to oppose the established Government by force."*[27]A reference is also required to be mentioned to the matter of *Shreya Singhal v. Union of India*[28], however the same is extensively covered in the latter half of this paper.

III Constitution of India, The Information Technology Act 2000

Under *Article 19(1) (a)*[29] *of the Constitution of India*, freedom of speech is a guaranteed fundamental right. We are living in a democracy, not a fascist dictatorship. Infact, Hon'ble Justice R.F Nariman, while dictatiug the judgment of

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26 2016 (1) RCR (Criminal) 542

27 *ibid 11,12 and 13.*

28 *infra.*

29 **Constitution of India, 1950; Article 19.** Protection of certain rights regarding freedom of speech etc.

(1) All citizens shall have the right

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(g) to practice any profession, or to carry on any occupation, trade or business

(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in 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.

Shreya Singhal v. Union of India[30] most foremost noted, *"The Preamble of the Constitution of India inter olia speaks of liberty of thought, expression, belief, faith and worship. It also says that India is o sovereign democratic republic. It cannot be over emphasized that when it eomes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme."*

In India it is the Constitution that is supreme and that same Constitution provides its citizen's with the Fundamental Right of Freedom of Speech and Expression contained under Artiole 19(1) (a) which is also subjected to the "Reasonable Restrictions" contained within Article 19(2). These "Reasonable Restrictions" cannot be arbitrarily imposed; any such restrictioo that is uot within the ambit ond grounds for restricting within Article 19(2) can be termed and struck ddwn as unconstitutional.

Justice R.F Nariman while quoting Shakespeare's immortal classic Julius Caesar[31] explains the discussion of what is the content of the expression *"freedom of speech and expression"* and further highlighted as to when the does the state intervene with its *'reasonable restrictions'*.

There are three concepts, which are fundamental In understanding the reach of this, most basic of human rights. The first is *discussion*, the second is *advocacy*, and the third is *incitement*. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when snch discussion or advocacy reaches the level of incitement that Artiele 19(2)

30 *supra.*

31 *ibid 3,8, 10 and 11.*

kicks in[32]. It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty & integrity of India, the security of the State, friendly relations with foreign States, etc. and the importance to have these three concepts in mind is because most of the arguments either side veered around the expression *"public order"*.

Justice S K Kaul, while deciding a similar matter[33] pertaining to a Tamil novel *"Madhorubagan"*/ *"One Part Woman"*, a novel and the author recipient of various awards explaining the folklore of a childless couple and a particular festival in a particular district, which upon its English translation became a controversy, while referring to various decisions of the apex court, the recent

32 A good example of the difference between advocacy and incitement is Mark Antony's speech in Shakespeare's immortal classic Julius Caesar. Mark Antony begins cautiously. Brutus is chastised for calling Julius Caesar ambitious and is repeatedly said to be an *"honourable man"*. He then shows the crowd Caesar's mantle and describes who struck Caesar where. It is at this point, after the interjection of two citizens from the crowd, that Antony says-
"ANTONY- Good friends, sweet friends, let me not stir you up
To such a sudden flood of toutiny.
They that have done this deed are honourable:
What private griefs they have, alas, I know not,
That made them do it: they are wise and honourable,
And will, no doubt, with reasons answer you.
I come not, friends, to steal away your hearts:
I am no orator, as Brutus is;
But, as you know me all, a plain blunt man,
That love my friend; and that they know full well
That gave me public leave to speak of him:
For I have neither wit, nor words, nor worth,
Action, nor utterance, nor the power of speech,
To stir men's blood: I only speak right on;
I tell you that which you yourselves do know;
Show you sweat Caesar's wounds, poor poor dumb mouths,
And bid them speak for me: but were I Brutus,
And Brutus Antony, there were an Antouy
Would ruffle up your spirits and put a tongue
In every wound of Caesar that should move
The stones of Rome to rise and mutiny.
ALL- We'll mutiny."
Perumal Murugan v. the Government of Tamilnadu; Madras High Court, W.P (C) 1215 and 20372 of 2015, available at https://www.scribd.com/document/317574828/Perumal-Judgment#from_embed (Last visited on August 11, 2016.)
Bombay High Court, W.P (L) No. 1529 of 2016 dated 13.06.2016, Phantom Films Pvt. Ltd. vs. The Central Board of Film Certification (Last visited on August 11, 2016.)

33 (2008) Cri. L.J. 4107)

controversy of 'Udta Punjab'[34], simplified the test to *'WHAT IMPRESSION YOU CARRY?'*. The Division Bench herein considered many international and national judgments namely *M.F. Hussain vs. Raj Kumar Pandey*[35]relying on *S. Rangarajan vs. Jagjivan Ram*[36]. However, a special mention is required to be given to the judgment of *Özgür Gündem vs. Turkey*[37], wherein the office and personnel of a daily newspaper named *Özgür Gündem* in Turkey were being attacked, and they requested the State to provide adequate protection to its people and premises, which the State failed to do. It was alleged that the State had failed to provide protection and had directly or indirectly helped the attacks against them. In that case, a seven Judge Bench of the European Court of Human Rights held that the failure of the State to provide adequate protection to the magazine was a violation of its freedom of expression.

A reference to similar context may be made of ***Pepsi Foods Ltd. v. Special Judicial Magistrate***[38],that setting into motion criminal law even for non-cognizable offences is a serious matter and cannot be done as a matter of course when a magistrate acts under § 156 (3) and 157 of the Cr. P.C as follows, "28. *Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.*"

Such is the high bar to set the criminal law into motion, then offences involving the freedom of speech and expression and its curtailment most certainly deserve the same high bar whether or not it is a cognizable offence. In the matter of

34 (1989) 2 SCC 574

35 *Case No.23144/93 (42 - 46 ECHR 2000 – III)*

36 (1998) 5 SCC 749

37 *AIR 1950 SC 124*

Romesh Thappar v. State of Madras[38], the Chief Justice held, *"Freedom of Speech and of the press lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the process of popular government, is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected with Madison, who was the leading spirit in the preparation of the First Amendment of the federal Constitution, that it is better to leave a few of its noxious branches to their luxuriant growth than by pruning them away, to injure the vigour of those yielding the proper fruits."*

IV Conclusion

As a concluding remark the author would like to state that with changing times such outdated colonial law either be revised or removed from the existing legal framework, so the same does not become a weapon of mass destruction against the crucial democratic foundations of our country and the three pillars of our country namely, the legislature, judiciary and the executive need to reinforce these aspects of freedom of speech and expression.

The government should introspect and realize that if there is no immediate harm to public order or the state, the state should refrain from intervening especially when people express or highlight their views, as explained by Justice R. F Nariman in the matter of *Shreya Singhal v. Union of India*[40], that the curbing of freedom of speech and expression in terms of Reasonable Restrictions should only come to play when any speech, action, discussion or advocacy reaches the level of incitement, which might need to be covered under the garb of Article 19(2) of the Constitution, the concept of reasonable restrictions.

The problem according to the author is primarily that in this day and time, there is a clear disconnect between the people and the government and there is a variation of thought, which can be termed as conflict of the old and the new generation views *vis a vis* the old laws. It is submitted that with the increase of awareness of the masses to the entire global scenario it is important to understand that India is not restricted to the conservative and archaic views of its ancestors anymore since its people are evolving, adapting, appreciating, knowingly or unknowingly, the trends and precedents set internationally and therefore the need of the hour is to iron out the kinks in our conservative armor and increase the democratic horizon, so we can start spending this wasted time on the actual problems in the country.

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38 *supra.*

Appointment of Justice Sathasivam as Governor of Kerala : Ethical, Constitutional and Issues of Legitimacy

Adwiteeya Sharma*

I Introduction

In a democratic country like India, all the three organs of the state, the executive, the legislature and the judiciary command a huge amount of power. Though people have selected their own representatives in the executive and the legislature but when it comes to uphold the value of the Constitution or to act as its guardian, citizens look up to the judiciary.[1] The Supreme Court is not only responsible to guard the Constitution but also to maintain its sanctity and provide justice to each and every one who knocks at its door, irrespective of who the wrongdoer is. The founding fathers of our constitution also had seen the judiciary as *"an arm of social revolution"*.[2] In order to make the rule of law prevail in the nation, a system of checks and balances, separation of powers between the three organs of the state was and is required.

The independence of judiciary has a symbiotic relationship with separation of powers. But, the appointment of former Chief Justice of India, Justice P. Sathsivam as the Governor of Kerala, has the probability of eroding this independence of judiciary. The Governor, though constitutionally is considered to be the executive head of the State, but the actual executive power vests in the Council of Ministers.[3] Though he is appointed by the President theoretically, in practical terms he is appointed by the Prime Minister.[4] Hence by appointment of the retired Chief Justice of India to the gubernatorial post, which is considered to be the post at the mercy of the executive, the separation of power in the democratic state has been drastically affected. It is not ethical for a former head of the Supreme Court of

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1 Sriha Nupur, *Judicial Review and its Success in India*, 35(1-4) Indian Bar Review 351, 351 (Jan-Dec, 2008).

2 Justice Gulab Gupta, *Judicial Activism- A National necessity*, 12(1) Central India Law Quarterly 1, 1 (Jan-March, 1995).

3 *U.N. Rao v. Indira Gandhi*, AIR 1971 SC 1002. *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192.

4 Dr. K.C. Joshi, *A Royal Office On Sandy Foundation: The office of Governor under the Constitution*, 32(4) Indian Bar Review 367, 368 (2005).

the nation to accept such a political post, as it will make the people of the nation to loose confidence in the judiciary.

The researcher in this research paper has elaborately looked into the ethical, constitutional and legitimacy issues involved with this appointment. The first chapter of the paper deals with the factual situations involved. The second chapter looks into the different aspects, because of which the appointment sets a bad precedent. The third chapter deals with what the drafters of the Constituent Assembly intended and how the counter-arguments, given in the favor of the appointment and suggestions proposed are not acceptable.

a. Why the appointment of retired Chief Justice P. Sathasivam as the Governor of Kerala, is called a *"quid pro quo"*?

The retired Chief Justice of India, Justice P. Sathasivam, was the 40th Chief Justice of India. He was appointed as the CJI in July 2013 and got retired in April, 2014.[5] Justice Sathasivam was on the Supreme Court bench which quashed the second FIR against Mr. Amit Shah, (who is alleged to be the right hand of Prime Minister of India, Mr. Narendra Modi), in a fake encounter case, saying it was linked to the bigger Sohrabuddin Sheikh killing case and did not need to be taken as a separate case all together.[6] His decision is alleged by the opposition parties as an instance which must have pleased Mr. Modi and hence as a reward he was given the position of Govereor of Kerala.[7] It is for the first time in the Indian history, that a Chief Justice of India has been appointed as a Governor of a state.[8] It is also for the first time in the government of Narendra Modi, that a non-political person has been appointed to the post of Governor.[9]

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5 Former Chief Justice if India swom in as Kerala Governor, THE ECONOMIC TIMES, September 5, 2014, *available at* http://art.iclos.economictiutes.iudiatiutes.com/2014-09-05/news/53602012_1_justice-sathasivam-india-p-sathasivam-opposition-leader (Last visited on October 19, 2015).

6 Ex- CJI as Governor, OUTLOOK INDIA, October 9, 2014, *availahle at* http://www.outlookindia.com/surveyvote.aspx?survey=54 (Last visited on October 19, 2015).

7 Congress slams former CJI Sathsivams appointment as Kerala governor, THE TIMES OF INDIA, September 3, 2014, *available at* http://timesofindia.indiatimes.com/india/Congress-slams-former-CJI-Sathasivams-appointment-as-Kerala-governor/art.icleshow/41562134.cms (Last visited on October 19, 2015).

8 Saubhadra Chatterji, Ex-CJI P. Sathasivam appointed Kerala Governor, HINDUSTAN TIMES, Septemher 3, 2014, *availahle at* http://www.hindustantimes.com/iodia-news/ex-cji-p-sathasivam-appointed-kerala-governor/art.iclc1-1259592.aspx (Last visited on October 19, 2015).

9 Ex CJI-Sathsivam Appointed Governor of Kerala, OUTLOOK INDIA, September 7, 2014, *available at* http://www.outlookindia.com/news/art.icle/ExCJI-Sathasivam-Appointed-Governor-of-Kerala/ (Last visited on October 19, 2015).

Though the opposition alleges it to be an appointment based on *quid pro quo*, the argument taken by Justice Sathsivam is that the decision was given by him long back in 2013, when it was NDA's government. So, the question of impressing the UPA government and then further getting rewarded for it do not arise. The other point also raised is that at that time Mr. Amit Shah was not the president of Bhartiya Janta Party, so pleasing BJP by pleasing Amit Shah do not arise. The third argument which is taken in defence is that he never gave clean chit to Amit Shah, what the alleged decision said was that there was no requirement of a separate hearing.

These arguments though may all stand factually true and with the addition of certain facts, may reach a different conclusion. But, from 2013 onwards only, the BJP government was in its full swing, as the Modi wave was all which was making everyone an addict to BJP's far-fetched policies. So, there was a huge probability of BJP coming in power. And, Mr. Shah has always been like a right hand for Mr. Modi, hence the second defence falls on its own feet. Therefore, how much it may be negated, a certain amount of suspicion cannot be done away with. Even if we do not consider it quid pro quo *per se,* it would still form a bad precedent, as have been stated in the subsequent sections.

b. Why does the appointment set a bad precedent?

All the arguments stated below illustrates that how this appointment set a bad precedent not only for the judiciary, but also for the public of the nation.

c. Independence of Judiciary will be affected:

Judiciary as the third pillar of democracy is the most respected institution especially in India.[10] Independence of the judiciary is considered to be the basic tenet of a democratic nation, and India being the largest democracy in the world, needs to ensure that the independence of its judiciary is not affected. The post of governor has always been used by the executive to fulfill its political goals and has therefore been adjudged as *"executive patronage"*.[11] In most of the cases someone who sympathizes with the ideology of the government in power, or has aided it through some or the other way, is given the gubernatorial post. The best example of it would be, the act of the UPA government, to ask governors of various states to resign, who were appointed during the regime of Congress government.[12] At the

10 Nupur, *supra* note 1, at 351.

11 Sudhanshu Tripathi, Indian Federalism at Work: Role of Governor, 54(1) INDIAN JOURNAL OF PUBLIC ADMINISTRATION 61, 61 (Jan-March, 2008).

12 After Governors, Modi government asks NDMA, NCW, SC/ST panel heads to resign, INDIA TODAY June 19, 2014, *available at* http://indiatoday.intoday.in/story/modi-government-asks-ndma-ncw-sc-st-panel-heads-to-resign/1/367612.html (Last visited on October 19, 2015).

place of these governors, the pro-BJP people were appointed as the Governor. It has not happened for the first time, whenever there is change in government at the Centre the same act is repeated.[13]

As, it is proven that governor in India are appointed at the mercy of the executive (the government in power), the appointment of a former CJI, will affect the independence of the judiciary, as it will lare the Supreme Court judges to decide in the favour of the executive, every time a case involving Union of India appears before their beneh. The impartiality of the judges will be drastically affected, the scales of justice with a large probability will weigh heavier on tho side of the executive, irrespective of what rule of law says. The impartiality of judges will lead to loss of publie eonfidence in the judiciary and hence again a cycle wil) go on and will lead to destruetion of pillars of democracy. The rule of law is the foundation of democratic society. Judiciary is the guardian of the rule of law.[14] Hence, judiciary is not only the third pillar but the foundation of democracy and its essenee need to be preserved.

Prior to the National Jndicial Appointments Commission act (whieh is now stuck down),[15] as per the Constitution of India, Article 124(2),[16] and its interpretation as taken up in the SCORA judgment,[17] and the third judge case,[18] thc Chief Justiee of India and four other senior Supreme Court judges were to hold almost the wholesome anthority in appointment of Supreme Court judges. Therefore, in order to impress and please the executive for future benefits, they would recommend the name of those judges, whose appointment will be favorable for the executive. The chances of appointment of an impartial and henest judge will decrease exponentially. It is not only that the independenee and impartiality of the supreme judieiary will be only affected.

Aecording to Article 217(1) of the Constitution,[19] the Chief Justice of India plays big role in appointment of High Court and the Chief Justice of the High Court. Hence at the level of High Court also the prevalence of justice will be highly scaled down, as for the justice to prevail, honest and impartial forbearers are required, which would not be there. In eonslusion, the whole judieiary of India,

13 Joshi, *supra* note 4, at 376.

14 *T.N. Godavarman Thirumulpad v. Ashok Khot and Anr.*, AIR 2006 SC 2007.

15 Krishnadas Rajagopal, SC Bench strikes down NJAC Act as 'unconstitutional and void', THE HINDU, October 17, 2015 *available at* http://www.thehindu.com/news/national/supreme-court-verdict-on-njac-and-collegium-system/article7769266.ece (Last visited on October 19, 2015).

16 The Constitution of India, 1950, Article 124(2).

17 Supreme Court Advocates-On-Record Association v. Union of India, (1993) 4 SCC 441.

18 *In re: presidential Reference*, AIR 1999 SC 1: (1998) 7 SCC 739.

19 The Constitution of India, 1950, ARTICLE 217(1).

would be standing on very low grounds, rather will be kneeling down in front of the executive. In order to save the judiciary from the termites, all these sort of executive baits should not be allowed to exist.

If the NJAC act[20] would not have been stuck down, it would have been the one governing the appointment of judges. If the composition of the commission which would have been responsible for the appointment of the judges is analyzed, it would have had more detrimental effect than the one which in the earlier situation might have had. The commission was supposed to comprise of the Chief Justice of India, two senior jndges of Supreme Court, the Union Minister of Law and Justice and two eminent persons who were to be appointed by a committee comprising of CJI, the Prime Minister and leader of Opposition in Lok Sabha.[21] It can be very well inferred that the influence of the executive would have multiplied under this situation. Hence, the mélange of judiciary and exeentive should not have been allowed, by appointing an ex-CJI at a gubernatorial post.

d. Judicial Review: How will they be able to make a cost-benefit analysis?

Laski has very appropriately illustrated that,[22] "*The intention of parliament is to be discovered by a body of independent persons, free from any direct interest in the result, and trained by long years of practice to standards of judgment by which that intention may be tested*". The Constitutional law being fundamental law of the land,[23] and Supreme Court being the guard of the constitution, Judicial Review has been the principle which alds the apex court in doing so.

Judicial Review which is a part of the basic structure of the Indian Constitution will be drastically affected, due to such kind of appointment.

The apex court by using its power of Judicial Review, under Artiele 32 of the Constitutien,[24] has adjudged many amendments and many provisions of the legislations passed by the parllament as onconstitutional. It coald have only been done, when there was no pressure of any sort, physical, mental of its own desires on the supreme judiciary. Many cases were brought up against the executive, regarding custodial deaths, fake encounters, natural resources allocation, but the court never hesitated to dceide against the executive, when the executive was at fault. Ail these decisions not only widened the scope of fundamental rights given

20 The National Judicial Appointments Commission Act, Act No. 40 of 2014.

21 The National Jodicial Appointments Commission Act, Act No. 40 of 2014.

22 Harold L Laski, Parliamentary Government in England 360 (1952).

23 Prof. Chakradhar Jha, Judicial Review of Legislative Acts 25 (1974).

24 The Constitution of India, 1950, Art. 32.

to the citizens by the Constitution, but also made the executive more accountable for its decisions and actions. If Supreme Court judges will be given the bait of being appointed at a gubernatorial post, post-retirement, they will obviously get trapped in the trap set by the executive. Hence, for them the benefit accrued to them will appear any day more than the cost which will have to be bear by the citizens at large and the democracy in specific. Hence, Art. 32 of the Constitution may become sort of redundant.

H Separation of Powers: Appointment of governor on mercy of the executive

Our constitution contains checks and balances, which require all the three wings, the judiciary, executive and the legislature to work harmoniously,[25] but that does not mean to further each other's personal interests. As have already stated that, the post of governor has become a post at the mercy of the executive and by appointment of retired Chief Justice of India, the two separate branches of the state, the executive and judiciary are getting embroiled with each other, and somewhere down the line judiciary will get dominated by the executive. The separation of power, which is the basic tenet of appropriate functioning of a state, so that a system of checks and balances can be maintained, would not survive. For, this instance, history support the argument with wholesome rigor, that how for the benefit which the judges were going to get through the executive, they gave decisions, keeping justice and rule of law at abeyance.

In *Golak Nath* v. *State of Punjab*,[26] the court held that Parliament could not amend the Constitution in a manner that infringes the fundamental right of any citizen of India. In the landmark decision judgment of *Kesavananda Bharati* v. *State of Kerala*,[27] a 13-judge bench overruled the court's decision given in *Golak Nath*. But through a majority of seven-to-six, it held that Parliament did not have the power to make any structural changes to the basic features of the Constitution.

The government instantaneously struck back and displayed its power on 25 April 1973, on the very day next day to the day on which *Kesavananda* decision was given, the central government announced that the next Chief Justice of India would be AN Ray, who was the fourth most senior judge on the court at that time. Until then, the constitutional convention of appointing the senior most judge of the Supreme Court as Chief Justice was followed.[28] Each of those, whom

25 Suraj Narain Prasad Sinha, Efficacy of Judicial Accountability, 35(1-4) INDIAN BAR REVIEW 1, 1 (Jan-Dec, 2008).

26 *Golak Nath v. State of Punjab*, 1967 AIR 1643.

27 *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

28 Justice denied to the Judge, SUNDAYTIMES, February 10, 2010, *available at* http://www.sundaytimes.lk/100221/International/int_01.html (Last visited on October 19, 2015).

Justice Ray superseded, had held against the government in key cases, including *Kesavananda Bharati.*[29]

One of the very influential ministers at that time, Mohan Kumaramangalam claimed "*that the government had a duty to consider the philosophy and outlook of a judge in deciding whether he or she ought to lead the Supreme Court.*"[30] Though this claim of his may sound reasonable enough, but it would be really hard to identify, whether the outlook and philosophy need to be that of the leader of the Supreme Court or the one which would align with the philosophy and outlook of the government in power. The reasoning behind the convention of elevation by seniority was that, it safeguarded the judicial independence; otherwise in order to satisfy their greed for more power, judges in order to be elevated to the post of Chief Justice, would make conscious effort to align their ideology with that of the government.

In one of the most pusillanimous decision, given by the Supreme Court, through a majority of four-to-one, the apex court proved in the *habeas corpus* case,[31] that "*it was powerless in the wake of the Emergency to question executive actions of preventive detention.*" The only judge who didn't get deterred by the executive was Justice HR Khanna, who wrote a historic and infamous dissenting opinion, and also paid a huge amount by exhibiting bravery by performing his duty to the mark. When Justice Ray retired as the Chief Justice of India, the Indira Gandhi government appointed MH Beg as his successor; though according to the convention of seniority it must have been Justice Khanna, who should have been appointed as the Chief Justice. He got rewarded very well for performing his duty.

These two examples clearly show if being the judge one favor's the executive, he will be well rewarded by the executive. Hence, history proves that if, the CJI would be appointed as Governor post-retirement, separation of power would remain in theory only, not in practice, and all the principle of justice and accountability of the government will be flouted. The constitutional assembly debates and the various suggestions it sought, show that the drafters intended, as can be inferred from the speech of the Editor of the Indian Law Review and the many other members of the Calcutta Bar, (at the time of drafting of the

29 Ashok H. Desai and S. Muralidhar, Public Interest Litigation: Potential and Problems in SUPREME BUT NOT INFALLIBLE 158, 172 (B.N. Kirpal eds. *et al*, 2000).

30 Surith Parasarathy, By Appointment Only, THE CARAVAN, August 1, 2014, *available at http://* www.caravanmagazine.in/books/appointment-only?page=0,1 (Last visited on October 19, 2015).

31 *ADM Jabalpur v. Shivkant Shukla,* AIR 1976 SC 1207.

Constitution) that it is desirable that in a federal constitution there should be separation of the executive and the judiciary as far as practicable and that the possibility of judges being executive-minded should be guarded against as far as possible. [32]

III Discrediting the office of Governor: Federalism affected

Though the Governor holds immense power according to the Constitution, but as per the practices followed, he enjoys little discretion in certain cases[33] and has to act according to the Council of Ministers of the State, which in tandem means of the Chief Minister. Hence in one single stroke the distance between the Judiciary and the Executive is heavily eroded. But, still fact cannot be left, that a governor holds much more discretionary power in comparison to the President.

The President cannot function without the Council of Ministers, but in case of Governor, when the administration of a State is taken over by president under Art. 356, the Governor with the assistance of his advisors assumes the real executive power of the state. The best example of it is, in Bihar in 2005, when no party got majority, President Rule was imposed and immediately Governor Buta Singh took the reins of the administration, as the advisors were not immediately appointed.[34]

As the office of Governor has become the issue of executive patronage, the governors are usually the puppets in the hand of the central government. Hence, the Governors themselves sold to the wishes of political masters at the Centre causing abysmal fall of their constitutional authority. The existence of numerous groups, with diverse socio-cultural as well as legitimate interests within the political system, was the central reason for the drafters of the constitution to opt for a federal structure.[35] But, the partisan and selfish acts of the central government as well as the Governor chosen under their regime have reduced the Indian federalism into a mockery of state autonomy.[36]

When there is hung assembly and the situation is quiet uncertain, the discretionary role of the Governor in the appointment of Chief Minister becomes important.[37]

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32 D. Shiva Rao, THE FRAMING OF INDIA'S CONSTITUTION, SELECTED DOCUMENTS (Vol. 2) 145 (2004).

33 P. Leelakrishnan, Judicial Review of Governor's Discretion, 23 COCHIN UNIVERSITY LAW REVIEW 1, 2 (2009).

34 Joshi, *supra* note 4, at 369.

35 S.L. Sikri, "THE INDIAN FEDERAL SYSTEM", INDIAN GOVT AND POLITICS 265 (1989).

36 Sudhanshu Tripathi, Indian Federalism at Work: Role of Governor, 54(1) INDIAN JOURNAL OF PUBLIC ADMINISTRATION 61, 61 (Jan-March, 2008).

37 Sikri, *supra* note 32, at 230.

Here the Governor may exercise his unlimited discretion in appointing the Chief Minister either by inviting the leader of single largest party or alliance in the Assembly closest to majority or may choose the favourite of the Centre and give him enough time to muster a visible majority,[38] as the Governor of Jharkhand did at the behest of the Centre.

It also becomes a way for the Centre to control the State Government. The presidential assent on Bills reserved by Governors for his consideration Under Article 200 and 201 of Constitution, the Governor is empowered to give his assent to a bill, to withhold it or to reserve it for consideration of the President. This way the Centre exercises enough leverage by procuring, through the Governors the Bills passed by State assemblies and adopt delaying tactics,[39] with respect to opposition led government. Hence, the unitary form of government is more and more strengthened and federalism is eroded.

a. The order of protocol is breached:

Many scholars have argued that by accepting the post of Governor, the former CJI P. Sathsivam, has diminished the stature of the post of CJI. This argument is backed by several reasons. Firstly, according to the order of precedence, the order goes like President, Vice- President, on sixth number it is the Chief Justice of India and on eighth position it is the Governor of a state.[40] Hence according to the order, the former CJI has accepted a post which is below in order on which he was earher. Hence, is diminishing the stature of the esteemed position of the Chief Justice of India.

Secondly, Section 3 of The President (Discharge of Functions Act, 1969),[41] provides that the Chief Justice of India shall act as the President of India if both President and Vice President are not available due to certain reasons to fill the vacancy. When President Zakir Hussain died in his office, V.V. Giri, who was the Vice-President at that time, acted as the President of India, following Article 65 of the Constitution. But, later Mr. Giri resigned from the post of Vice President. [42] At that time Justice Hidayatullah was the Chief Justice of India, in absence of both the president and the vice-president, he became the acting president of

38 V. N. Narayan, Puppet shows in Raj Bahwan, The Tribune, December 18, 1988.

39 Veto or Assent, The Statesman, (September 7, 1988).

40 Order of Precedence, July 26, 1979, *available at* http://rajyasabha.nic.in/rsnew/guidline_govt_mp/chap11.pdf.

41 The President (Discharge of Functions Act), Act No 16 of 1969, § 3.

42 T. Ramakrishnan, The wice acting President, The Hindu, July 24, 2012, *available at* http://www.thehiudu.com/todays-paper/tp-in-school/the-twice-actingpresident/article3676405.ece (Last visited on October 19, 2015).

India. Hence, a person who had the probability of reaching the peak of order will now be serving ander the pleasure of the President, as Art. 156(1) of the (ndian Constitution elearly states.

Thirdly, as per Article 159 of the Constitution, the Governor takes oath in the presence of the Chief Justice of the High Court of that respective state. According to Articie 60 of the Cunstitution of India, the Chief Justice of India is the one in whose presence, the President, the *executive head of India*,[43] takes the oath. It is not only this aspect, but the Chief Justice of India, holds a much esteemed authority, he holds a major power in appointing the Chief Justice of all the High Courts, as per Artiele 217(1) and alse the appointment of the Supreme Court Judges, as per Art. 124(2) (prior to NJAC act and even after the NJAC act). Therefore, the person, who could have been appointed at the recommendation of the Chief Justice of India, now his/her presence is necessary for the former CJI to take the oath for his new post, which is the Governor.

Fourthly, as already mentioned the Governor is appointed uecording to the whims and fancies of the executive, the government in power and also a Governor holds office *"during the pleasure of the President"*. Now a former CJI who earlier had the power to summon them to the court, now will bave to resign on the directions of the executivc. Hence, will be serious injury to the post of Chief Justice of India.

b. Constitutional Convention:

Justice P.B. Mukherjee in his book says that the preamble of the Constitution of India, make the people sovereign and the next sovereign in the Indian Constitutional law is Coostitution itself. And, the constitutional conventious may grow to make this sovureignty more effective and elear.[44] Dicey also said, that the objectives of the conventions as *"intended to secure the ultimate supremacy of the electorate as the true political sovereign of the State"*.[45] Hence in otder to build up those conventions which maintains and strengthen the political sovereignty of the people and the legal sovereignty of the constitution, decisions like appointment of a Chief Justice of India, as the Governor should not have taken place. A convention should build up, that a person from such high a post in judiciary should not be appointed to such a political post like Governor.

A convention should develop to bring up certain qualification like this to restrict the executive from taking such steps, which not only undermines the independence

43 The Constitution of India, 1950, Article 53.

44 P.B. Mukherjee, THE CRITICAL PROBLEMS OF THE INDIAN CONSTITUTION 151 (1967).

45 *Id, at* 159.

of judiciary, but also the gubernatorial post. This convention should also develop, so that one of the basic tenets of the Constitution, which is "*justice*", could be ensured in the country.[46] The framers of our constitution while agreeing to an appointed Governor expressed the hope that in normal working of the Constitution, the convention will grow up of the Government of India consulting the provincial cabinet, in the appointment of Governor.[47] However, this hope has been belied and the governors are appointed on party affiliations. Hence, going by the intention of the drafters, a constitutional convention of consulting the chief minister and his cabinet, for appointment of the Governor should develop.

c. Administrative Reforms Commission:

The ARC recommended that,[48]

"*A person to be appointed as Governor should be one who has had long experience in public life and administration and can be trusted to rise above party prejudices and predilections. He should not be eligible for further appointment as Governor after the completion of his term.* ***Judges on retirement should not be appointed as Governors.*** *However, a Judge who enters public life on retirement and becomes a legislator or hold an elective office may not be considered ineligible for appointment as Governor.*"

In 1969, itself the commission recommended not to appoint a retired judge as the Governor Hence, they must have taken in consideration the basic tenets, which have been discussed above.

Other reasons:

The Comptroller and Auditor General, though ranked ninth in the order, is still barred to take up a any post under government of India or the Government of any state, as Art. 148(4) states[49] "*The Comptroller and Auditor-General shall not be eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office.*" His process of removal is at par with that of a Supreme Court Judge, according to Art. 148(1) and his work involve that of to check and expose any sort of discrepancy in the accounts of the government.

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46 *Id*, at 145.

47 Statement of Alladi Krishnaswami Ayyer, CONSTITUENT ASSEMBLY DEBATE (Vol VIII) 432-433 (1949).

48 Administrative Reforms Commission, Report on Centre-State Relations:Recommendations 7, 24 (June 1969).

49 The Constitution of India, 1950, Article 148(4).

If a CAG is lured by given the bait of post-retirement political posts, he would not expose the government for its wrong deeds and corruption, the same way as judges would not give judgment against the executive. When a person at a post of CAG, is not allowed to be influenced and hence lured by the post-retirement political benefits, it would be really appropriate to take up the intention behind this provision, and apply the same to the CJI as well.

IV The Counter-arguments and the Suggestions, can they be accepted?

What did the drafters intended: the Constituent Assembly Debates.

In a meeting of the Constituent Assembly, on 7th June 1949, Professor KT Shah, moved a motion, which, if would have passed, would have prohibited judges not only of the Supreme Court but also of any of the high courts, who would have served for five consecutive years on the bench, "from being appointed to any executive office, including the office of an ambassador, minister, plenipotentiary, or high commissioner, as well as of a minister in the government of India or under the government" of any state in the union.[50]

Another member of the Constituent Assembly Professor Shibban Lal Saksena, also supported Professor Shah's motion, and explained the need for such a prohibition and said, "*if the temptation of being appointed to other high positions after retirement is not removed, it will also be liable to be abused by the Executive or by any party in power and they may hold out such temptations which might affect the independence of the judiciary. I personally feel that the amendment is very salutary and healthy ... I hope that somewhere in our Constitution the principle enunciated here will be embodied so that the judiciary may be above temptation and nobody may be able to influence it.*"

Thought Dr. BR Ambedkar, however, refuted Professor Shah's suggestion, and eventually the constituent assembly voted against such prohibition, Dr. Ambedkar commented "*The judiciary to a very large extent is not concerned with the executive: it is concerned with the adjudication of the right of the people and to some extent of the rights of the Government of India and the Units as such*".[51] He argued that "*To a large extent [the judiciary] would be concerned in my judgment with the rights of the people themselves in which the*

50 Suhrith Parthasarathy, Why B.R. Ambedkar insisted judges should not be barred cushy post-retirement jobs, THE CARAVAN, September 10, 2014, *available at* http://www.caravanmagazine.in/vantage/why-br-ambedkar-insisted-judges-should-not-be-barred-cushy-post-retirement-jobs (Last visited on October 19, 2015).

51 Statement of Dr. B.R. Ambedkar, CONSTITUENT ASSEMBLY DEBATES (Vol. 8), 17 (June 7, 1949).

government of the day can hardly have any interest at all. Consequently the opportunity for the executive to influence the judiciary is very small and it seems to me that purely for a theoretical reason to disqualify people from holding other offices is to carry the thing too far."

Ambedkar, as now can be probably inferred, has surprisingly mistaken on this issue of utter importance. "As the history of independent India has shown us, the Supreme Court and the High Courts often sit on judgment over executive action. "The courts under Article 32 and Article 226 are vested with the power to issue writs quashing executive decisions, and the government of the day, therefore, has a fundamental interest in how the judiciary functions." "It was this enormous power wielded by the courts, that prompted the Indira Gandhi-led government to launch a program in the 1970s aimed at creating a judiciary committed to" government" agenda. [52]

In today's scenario Dr. Ambedkar's argument cannot hold any ground, as today executive is the biggest litigant in the High Courts and the Supreme Courts. The power vested in the Supreme Court and the High Court's under Article 32 and Article 226 respectively must have been given to them to act as a check upon the executive and that today the major portion of the work in every High Court and the Supreme Court is under these provisions.

a. Restatement of Values of Judicial Life, 1999:

Though it has been contended that even Restatement of values of Judicial Life do not bar the CJI from accepting the post of Governor. This contention is true, but at the same time, the very first value among these values is, *"The behavior and conduct of members of the higher judiciary must reaffirm the people's faith in the impartiality of the judiciary"*.[53] Hence, by accepting the post of Governor, post retirement would not strengthen the belief of the public in the judiciary, but will in all capacity erode it.

b. Commission on Centre-State Relations (Sarkaria Commission):

It has been contended by the supporters of this appointment, that the Sarkaria Commission recommended,[54] that, *"only imminent persons in some walk of life*

52 Subrith Parthasarthy, Why B.R. Ambedkar insisted judges should not be barred cushy post-retirement jobs, THE CARAVAN, September 10, 2014, *available at* http://www.caravanmagazine.in/vantage/why-br-ambedkar-insisted-judges-should-not-be-barred-cushy-post-retirement-jobs (Last visited on October 19, 2015).

53 Restatement of Values of Judicial Life, 1997, § 1.

54 Sarkaria Commission, Commission on Centre-State Relations, Government of India Publication 121 (1987).

with proven ability and integrity as against the normal practice of appointing discarded and disgruntled politicians from ruling party having fixed mindset or such person whose rising stature may become a cause of worry for central authorities." While, emphasizing on this recommendation, which is supportive of Justice Sathsivam's appointment, they forgot to take in consideration other factors like, firstly, the practice of appointment of Governor should no longer be left to the discretion of the Centre and secondly, Governors ought not to be replaced or removed from their office with the change of government at Centre, which is particularly not the case with the present Modi government. Hence, to take up one recommendation in isolation cannot form a good defense.

c. No Constitutional Bar on the Appointment of a retired Chief Justice of India as Governor:

Justice Sathsivam has argued that there is no constitutional bar on his appointment as Governor of Kerala, as the Constitution nowhere prohibits a CJI from taking up the post of Governor, post-retirement. [55] This point is very well argued by many scholars and Justice Sathasiwam, that there is no constitutional bar, but there are some ethical values which should be embodied by a man of such stature. Though Constitution may not prohibit him, but his ethics and the consequences of his action, that is destruction of separation of powers and independence of judiciary, should have barred him from accepting such a position.

Justice Michael Kirby said,[56] "*In a pluralist society judges are the essential equalisers. They serve no majority; nor any minority either. Their duty is the law and to justice. They do not bend the knee to governments, to particular religions, to the military, to money, to tabloid media or the screaming mob. In upholding law and justice, judges have a vital function in a plaralist society to make sure that diversity is respected and the rights of all protected.*"

Hence, when a judge of that stature even has slightest of the hint, that his action would adversely affect deliver of justice and prevalence of rule of law, though Constitution may not, his ethics shouldn't have allowed him to accept the gubernatorial post.

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55 No controversy in my appointment as new Governor of Kerala: P. Sathasivam, ECONOMIC TIMES, September 4, 2014, *available at* http://art.icles.economictimes.indiatimes.com/2014-09-04/news/53563617_1_kerala-governor-appointment-sheila-dikshit (Last visited on October 19, 2015).

56 Justice Michael Kirby, The Challenges to Justice io u Plural Society, Judicial Confrence, KulaLampur, Malaysia (April 4, 2002), http://www.hcourt.gov.au/assets/publieations/speeches/former-justices/kirbyj/kirbyj_plural.htm (Last visited ou October 19, 2015).

d. Cooling off period:

It has been suggested by many that, a cooling off period of two years should be kept between the retirement and appointment to any new politieal post.[57] If this argument is aceepted here for the CJI also, the whnle gamut of arguments made in the above sections will becomc worthless, as what is intended to be preserved is the independenco of the judiciary, as it will be still largely affected, if in any case a CJI is given a political post after retirement. And while in office they may support the executive, whether there is a bar on them for two years or not.

V Conclusion

The researcher through ber research has reacbed the eonclusion thai, the appointment of the former Chief Justice of India, Justiee P. Sathsivam as the Governor of Kerala, was not an appropriate appointment. It was not an appropriate appointment, as it was on the basis of *"quid pro quo"*. Justice Sathasivam did a favor by ruling in favor of the party member of the ruling government and got rewarded for it in return by being appointed as the Governor of Kerala. Even if the argument of no return of favor can be accepted, this appointment has set a bad precedent.

This appointment will erode the independence of judiciary, as the judges will try to align their ideology with that of the Government in power, in order to fulfill their post-retirement interests. The political post of Governor being the one in the hand of the executive, the whole concept of separation of power will get adversely affected, as the judiciary won't function to check the discrepancies in the actions and decisious of the Government and hence, injustice and no rule of law will prevail. Due to this inter-mingling of judiciary and the executive, the publie will also loosc faith in the judiciary, one which is considered to be the custodian of thc Constitution. If the judieiary won't have the courage to go against thc executive, the history of 1970s would be repeated and inferring from that no scope of Judicial Review will be left.

This appointment has also breached the order of protocol, as the person who was *earlier at the number sixth position, has now gone down to number eighth. The* Administrative reforms Commission has also suggested to not allow retired judges

57 Can't fix cooling-off period for judges-SC, THE HINDU, October 8, 2014, *available at* http://www.thehindu.com/news/national/cant-fix-cooling-off-period-for-judges-sc/art.icle6481718.ece (Last visited on October 19, 2015).

to take up the post of Governor. The Sarkaria Commission recommendations taken collectively also suggest the same. Though Dr. Ambedkar was not in the favor of barring retired judges from taking up political posts, but at that time circumstances were different. Now, his opinion won't gather much ground, as the executive is the major litigant.

Therefore, the researcher concludes on the basis of above reasons that a retired Chief Justice of India in specific and the retired Supreme Court judges in general should not be appointed on any political post like that of a Governor. This should be taken in practice and a constitutional convention of consulting Chief Minister and his cabinet in appointment of Governor should be adopted.

The NJAC Judgement: A Case of Constitutional Misconstruction

Madhavi Singh*

I Introduction

The manner of appointment of judges to the higher judiciary has always been a controversial issue and this question has been brought before the Supreme Court of India several times. In *Shamsher Singh* v. *State of Punjab*[1], the Court held that in all conceivable cases recommendation of the Chief Justice of India (hereinafter 'CJI') would be accepted by the President. This conclusion was reiterated in *Union of India* v. *Sankalchand Himatlal Sheth*.[2] The first deviation from this conclusion was seen in *S.P.Gupta* v. *Union of India* [3](the *First Judges'* case), in which it was held that the executive has the last say in appointment of judges. In *Supreme Court Advocates on Record Association* v. *Union of India*[4] (the *Second Judges'* case) and thereafter in *In re: Special Reference*[5] (the *Third Judges'* case) it was held that judiciary must be given primacy in the matters of appointment in order to maintain independence of the judiciary. The *Second* and the *Third Judges'* case resulted in creation of the collegium system of appointment.

The Government of India notified the Constitution (Ninety Ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 on December 31, 2014.[6] These legislations aimed to establish a National Judicial Appointments Commission which would consist of the CJI, as the Chairperson, two senior judges of the Supreme Court, the Union Minister of Law and Justice and two eminent persons (to be nominated by the committee consisting of the Prime Minister, CJI and the Leader of Opposition).[7] The constitutionality of these

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1 Shamsher Singh v. State of Punjab, 1975 SCR (1) S14 (Supreme Court of India, 1975).

2 Union of India v. Sankalchand Himatlal Sheth, 1978 SCR (1) 423 (Supreme Court of India, 1978).

3 S.P.Gupta v. Union of India, AIR (1982) SC 149 (Supreme Court of India, 1982).

4 Supreme Court Advocates on Record Association v. Union of India, AIR (1994) SC 268 (Supreme Court of India, 1994).

5 In re: Special Reference, AIR 1999 SC 1(Supreme Court of India, 1991).

6 The Constitution (Ninety Ninth Amendment) Act, 2014, *available at* http://indiacode.nic.in/coiweb/amend/99th.pdf (Last visited on November 25, 2015).

7 Art 124A, Constitution of India, 1950 (Inserted by Constitution (Ninety Ninth Amendment) Act, 2014 and later declared unconstitutional by the Court).

two legislations was challenged in the case of *Supreme Court Advocates on Record Association & Anr* v. *Union of India*[8] (hereinafter 'NJAC judgement') in which a five judge bench consisting of Justice J.S. Khehar, J. Chelameshwar, M. Lokur, K. Joseph and A.K. Goel by a 4:1 majority struck down the two impugned legislations as being unconstitutional. This was a landmark judgement for more than one reason, the most important being that it purports to bring closure to one of the most widely debated and uncertain questions of Constitutional law. While each of the five judges on the bench wrote a separate judgement, for the purpose of this paper only the judgement given by Justice Khehar who was the presiding judge (and part of the majority opinion) has been dealt with.

The judgement that the Court delivered on merits can be broadly classified into two parts depending on the scope of its inquiry. The first deals with the *Second Judges'* case and attempts to answer the question whether the Court in that case had concluded that the manner of judicial appointments affects judicial independence and if yes, whether judicial primacy in judicial appointment is necessary to ensure such independence. If it was found that the *Second Judges'* case answered both the questions in affirmative then it can be concluded that the *Second Judges'* case had found judicial primacy in judicial appointment by virtue of its necessity to maintain judicial independence to be part of the Basic Structure of the Constitution.

The second part of the judgement deals with the question of whether the Constitution (Ninety Ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 (hereinafter, "NJAC Act") violated the basic structure of the Constitution by compromising judicial primacy in judicial appointments.

II Principles of Natural Justice

The Principles of Natural Justice have been held by the Supreme Court to form a part of Art 14 of the Constitution and Government actions have been struck down on grounds of violation of principles of natural justice.[9] Two important principles of natural justice are *nemo judex causa sua* (nobody shall be judge in their own cause) and the principle that "justice must not only be done but must

8 Supreme Court Advocates on Record Association & Anr v. Union of India, 2015 (11) SCALE 1(Supreme Court of India, 2015).

9 Tulsiram v. Union of India, AIR 1985 SC 1416 (Supreme Court of India, 1985); Maneka Gandhi v. Union of India, AIR 1978 SC 597 (Supreme Court of India, 1978); Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly; AIR 1986 SC 1571 (Supreme Court of India, 1986).

manifestly and undoubtedly be seen to be done."[10] The NJAC judgement violates both these principles of natural justice by allowing interested individuals (judges) to decide a case in which their own interests were involved. If the proposition that the judiciary is 'State' is accepted then the petitioners can claim that the judiciary by being "a judge in its own cause" has violated their rights under Art 14. This argument is based on the presumption that the judiciary as an institution is a party whose autonomy is at stake and hence, it is an interested party who should not be given the power of adjudication. The Supreme Court however, in its defence is the authority which decides any substantial question of law and is entrusted with interpretation of the Constitution.[11]

A suggestion which was advanced by one of the petitioners was that of holding a referendum to decide the matter.[12] However, the problem with allowing the general public to decide such an important constitutional questions is that they might not have requisite understanding of the matter and their opinion may be largely influenced by popular media impressions and not by actual legal/ Constitutional arguments.

The question of conflict of interests was raised in the petitions not so much at the level of the institution of the judiciary but at the level of individual judges who had very specific interests involved. Justice Dave who was the Presiding judge of the three judge bench which was initially hearing the matter and later of the five judge bench before which the matter was brought was part of the collegium as well as the NJAC. On these grounds it was sought by Mr Nariman that Justice Dave should not participate in the NJAC whereas Mr Mathew Nedompara sought his recusal. Following these requests Justice Dave recused himself. Justice Khehar in his recusal order pointed out that Justice Dave was not an interested party because he would be involved in the appointing procedure irrespective of whether the collegium system is enforced or the NJAC Commission is used for appointment. Hence, the outcome of the judgement would make no difference to his position. What Justice Khehar however failed to note was that the kind of power which Justice Dave would enjoy as part of the collegium or the NJAC would be vastly different and because of the difference in the weight that his opinion would carry under the different systems, he would be an interested party.

Justice Khehar's recusal was requested on similar grounds as Justice Dave's as he was a member of the collegium but not of the NJAC and hence his own

10 Ashish Makhija, *Principles of Natural Justice, available at* http://www.lawpact.org/uploads/PRINCIPLES%20OF%20NATURAL%20JUSTICE.pdf (Last visited on November 8, 2015).

11 Art. 145, Constitution of India, 1950.

12 This was suggested by one of the petitioners, Mr Mathews Nedumpara. Reference was made to the matter of retirement age of judges in Australia which was decided through a referendum.

interests were at stake in the matter. Justice Khehar expressed doubt about the prayer for recusal as the same grounds applied equally to J. Dave but a similar request was never made when he presided over the matter for a long time (He took into account only Mr Nariman's submission that he had never requested Justice Dave's recusal whereas Mr Nedumpara's request for recusal of Justice Dave was ignored). According to Justice Khehar he would be part of the NJAC Commission shortly and so irrespective of the decision he would be part of the appointment procedure. Similarly all his brother judges would also eventually be part of either the collegium or the NJAC commission so raising such an objection specifically against him was not justified. According to him, the prayer for recusal should be accepted only if it is justified. Since the prayer in this case was not justified according to him, recusing himself from presiding over the judgement would amount to dereliction of duty which he was sworn to discharge. He thus decided to continue on the Bench. Considering that almost all of the judges (and in fact, the judiciary as an institution) was an interested party, the failure to find a more suitable and seemingly less unfair way of adjudicating the matter casts aspersions on the merits of the judgement itself.

III Judicial Precedents and their Treatment

Respondents placed reliance on the *First Judges'* case whereas petitioners relied on *Second* and *Third Judges'* case. It was the contention of the respondents that the *Second* and *Third Judges'* case be overruled since important aspects of the matter were not raised before the Court in these judgements. Since, a bench with lower strength cannot under normal circumstances overrule the judgement given by a bench with higher strength, the issue was contentious. However, according to Justice Khehar, the Court was looking into the question of whether there was a need for review of the older judgements. Hence, the question was not whether a five judge bench could overrule the decision of a nine judge bench but whether a five judge bench could decide whether the older decision needs to be looked into again.

The onus of proving that the *Second* and *Third* judges' deserve a review was on the respondents. However, in Justice Khehar's opinion enough material had not been produced before the Court to discharge this burden. The Court was especially apprehensive about looking again into the Second and Third judges' cases since the Union itself in the Third Judges' case had said that it had accepted the decision of the Second Judges' case as binding and was simply seeking a clarification on it.

While the need to protect judicial appointments from political influence is not being questioned what is doubtful is whether the Constituent Assembly intended

Art 124 to be interpreted in the way it was interpreted in the *Second Judges'* case. The criticism of the *Second Judges'* case is not so much on the grounds that it takes away the role of the executive in appointment but in the manner in which it interpreted Art 124 so as to change its scope and literal meaning. *First*, the Constituent Assembly was very clear on the fact that there could be no judicial independence in the presence of political influence in appointment procedure. However, it did not recognise judicial primacy in judicial appointment as a necessary component of judicial independence. Hence, the contentious issue was not rejection of a system which allowed for political influence in appointments but adoption of a system which gave the judiciary primacy in appointments. *Second*, the Constituent Assembly debates clearly indicate that the reason for inclusion of the judiciary in the appointment procedure was the assumption that judicial officers were best placed to assess the merits of each candidate and not because their participation is necessary to ensure judicial independence. *Third*, the Constituent Assembly Debates suggest that appointments shouldn't be done at the sole discretion of the executive or the legislature but they do not suggest that it be done at the sole discretion of the judiciary (which is what the collegium system at present does). *Fourth*, there seems to be no justification for the interpretation given to Art 124 by the Court in the *Third Judges'* case. Some of the contentious propositions laid down in the *Third Judges'* case were:

a. The Court held that the term "consultation" in Art 124 requires consultation not just with the CJI but a plurality of judges and accordingly, the CJI ought to consult four senior-most puisne judges of the SC (also called "the collegium") before making recommendations for appointment of judges to the SC.

   Criticism: This is not in line with the plain meaning of Art 124 which allows the President to consult "such of the judges of the Supreme Court and the High Courts as he may deem necessary."[13] There is no prescription as to the number of judges the President can or must consult and such a decision has been left to the discretion of the President. Thus, there seems to be no explanation behind adoption of the collegium system.

b. The opinion of the CJI is not merely his individual opinion but the collective opinion of all the concerned judicial functionaries who have the same information about the candidate at their disposal.

   Criticism: Such consultation amongst judges themselves to form a collective opinion and the CJI's opinion not being his personal opinion but the collective

13 Art 124, CONSTITUTION OF INDIA, 1950.

opinion of judicial officers cannot be read into the Constitutional provisions or inferred from the existing law read in the context of Constituent Assembly Debates.

e. The President must make an appointment in accordance with the recommendatioo of the collegiom. If however, the recommendation has not been made in accordanee with tbe prescribed proeedure; such recommendation is not binding on the Government.

Criticism: The Constitution itself does not make the recommendation of the CJI binding. Moreover, the decision to use the term 'consultation' and not 'concurrence' in Art 124 must be onderstood to be deliberate.

d. The opimon (in writing) of the senior-most SC judge who is from the same HC as the recommended candidate must also be taken into consideration.

Criticism: This was also a new condition that the Court laid down in the *Second Judges'* case.

These propositions which were advanced by the Court in the *Third Judges'* case when seen against the backdrop of Art 124 indicate that the Court did not interpret the law but created new law. The Constitution itself prescribes no such procedure in the form of a collegiom system for appointment of judges neither does it authorise the Supreme Court to formulate such rules or come up with its own procedure. The Court in the NJAC judgement perpetuated this mistake by merely looking at the conclusions that had been reached by the Court earlier without deliberating upon whether these conclusions were in line with the Constitutional provisions.

Another contention of the respondents was that giving sole powers to the judiciary in the matter of judicial appointment would result in *Imperium In Imperio* (or creation of a "state within a state") and the previous collegium system by allowing judiciary to play a decisive role in its own appointment created such an institution which had its own conception of sovereignty quite independent of the State's notion of sovereignty. Dr Ambedkar in the Constituent Assembly was quoted as saying:

"*We do not want to create an Imperium in Imperio, and at the same time we want to give the Judiciary ample independence so that it can act without fear or favour of the Executive.*"

Thus, dual objectives of avoiding creation of *Imperium In Imperio* and protection from political influence were recognised by the Constituent Assembly and it then sought to strike a balance between the two which it did by adopting the system

provided for in Art 124. The Court countered this argument by referring to the Memorandum of Procedure for Appointment of High Court judges and Supreme Court judges. According to the Court the Memorandum provides a participatory role to the judiciary as well as to the political- executive. Specific practices enumerated in the Memorandum were enlisted to show the important role played by the executive under the collegium system with the Court calling the appointment procedure as a 'joint exercise' of the judiciary and political-executive. In terms of the role of the executive in the appointment procedure, the Memorandum makes the following provision:

"*After receipt of the final recommendation of the Chief Justice of India, the Union Minister of Law, Justice and Company Affairs will put up the recommendations to the Prime Minister who will advise [emphasis my own] the President in the matter of appointment.*"[14]

Thus, the Memorandum also makes provision for the executive's role in the appointment procedure through the advice that the Prime Minister provides. According to the Memorandum for appointment of High Court judges, the Prime Minister advises the President on the matter of appointment after obtaining the State government's view. The Memorandum does not provide clarity as to whose recommendation whether that of the judiciary or the executive is to be considered binding and nothing in the memorandum itself would require greater weightage being accorded to the opinion of the judiciary. Moreover, the provision requiring the Prime Minister to advise the President in the matter of appointment is not provided for in the Constitution and given the distinction between the powers and functions of the President (discussed later) making a requirement that the advice of the Prime Minister must be obtained is not justified.

In practise the role of the executive in the collegium system is nominal and adoption of the collegium system as opposed to the system provided for in the Constitution has created an imbalance between the dual objectives in a way which has made the judiciary *Imperium In Imperio*.

IV Intention as reflected in the Constituent Assembly Debates

The Court then dealt with the intention of the Constituent Assembly and the type of procedure for appointment that had been envisaged by them. It referred to the

14 *Memorandum Showing the Procedure for Appointment of the Chief Justice of India and Judges of the Supreme Court of India, available at* http://doj.gov.in/sites/default/files/memosc.pdf (Last visited on November 25, 2015); *Memorandum Showing the Procedure for Appointment of Chief Justice and Judges of High Court; available at* http://doj.gov.in/sites/default/files/memohc.pdf (Last visited on November 25, 2015).

Constituent Assembly Debate and primarily to Dr. B.R. Ambedkar's speech. Foliowing is un excerpt of the speech whieli was reproduced in the judgement:

"There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. . . . . it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the Legislature is also not a very suitable provision. Apart from its being cumbrous, it also involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are ex hypothesi, well qualified to give proper advice in matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment. With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personolly feel no doubt that the Chief Justice is a very eminent, person But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that that is also a dangerous proposition."

Few things stand ont very clearly in this speech. *First*, the ideals which the Consliluent Assembly had in mind at the time of devising a method of appointment were:

a. To ensure that enly competent candidates are elected to the higher judieiary.

b. To ensure that the procedure for appointment does not become cumbersome.

c. To insulate the appointment procedure from political influence (In this regard it is important to note that political influence in appointment was a coneern raised wlien the involvumem of the legislature and not the exeentive was being discussed. Thus, it would seem that the Constituent Assembly was fearful of the legislature and not the exeentive being the source of political influence).

d. To not give one individual (whether it be the President or CJI) effective veto power.

It must also be noted that a proposal had been made in the Constituent Assembly to change the requirement of 'consultation with the CJI' to 'concurrence of the CJI' in Art 124. However, the proposal was not accepted by the Constituent Assembly. This indicates that the Constituent Assembly deliberately and consciously made a distinction between 'concurrence' and 'consultation'. Thus, the conclusion of the Court in *Second Judges'* case to interpret 'consultation' to mean 'concurrence' was clearly erroneous. This erroneous interpretation of the Constitutional provision was again reiterated in the NJAC judgement which accepted that judicial appointments must be made according to the recommendations of the collegium.

It would seem that in their present forms, neither the collegium system nor the NJAC are suited to implement the scheme that the Constituent Assembly or the Constitution had in mind for appointment of judges.

V Powers versus Functions

The Court referred again to the Constituent Assembly Debates to show that separation of powers was an important ideal that the Constitution-makers had in mind at the time of framing the Constitution. This is also reflected in the inclusion of Article 50 in the Constitution. While the Constitution provides for separation of powers it also includes a system of checks and balances to ensure that no organ of the government becomes pre-dominant. According to the respondents, separation of powers will only be violated where one organ of the government takes over an essential function of another branch. The Court, however came to the conclusion that 'separation of powers' requires that the "*executive be removed from any role in the judiciary.*"[15] The Court in reaching this conclusion failed to appreciate that 'separation of powers' cannot be absolute and must always accommodate a system of checks and balances. Accountability becomes an elusive concept in a system where the executive and the legislature under the garb of 'separation of powers' are denied "any role" in the judiciary.

Justice Khehar also explained why the CJI's recommendation should be binding on the President. He referred to Art. 148, 155 and 250, under which the President makes important constitutional appointments. However, while making such appointments the President must seek the 'aid and advice' of the executive and

15 *Per* Justice Khehar, Supreme Court Advocates on Record Association & Anr v. Union of India, 2015 (11) SCALE 1 (Supreme Court of India, 2015).

must act in accordance with such adviee as per the provisions of Art 74 of the Constitution. He then drew the following analogy hetween the coneept of "aid and advice" and that of "eonsultation."

"In comman parlance, a process of "consultation" is really the process of "aid and advice". The only distinction being, that "consultation" is obtained, whereas "aid and advice" may be tendered . . . . Since, both the expressions ("ald and advice" and "consultation"), deserve the same interpretation, if any one of them is considered to be mandatory and binding, the same import with reference to the other must follow."[16]

While Justiee Khehar is right to note that ueither "aid and advice" nor "consoltation" can in common parlance be considered to mean a "binding direction" yet the Constitution treats "aid and advice" to be binding. However, what lie failed to note was that sach diversiun from common understanding is because of an express provision in the Constitution in the form of Art 74. However, a similar guideline for construing "consultation" in Art 124 to be hinding does uot exist. In the absence of such a guideline, the Court must provide clear and colierent reasons as to why it is deviating from the common understanding of the term.

One possible reason why the President need not seek the adviee of the Conneil of Ministers in the appointment of judges is because "appointment of judges" is a "power of the President" as opposed to a "function of the President" which ean only be discharged in accordance with the "aid and advice" tendered by the Council of Ministers.

Justice Khehar later distinguishes Art 124 and Art 217 from Art 148 (appointment of Comptroller and Auditor General), 155 (appointment of Governor), etc on the ground that the latter provisions do not contain the word 'consultation' and if the argument of the respondents that Art 124 and 217 like the other articles vests the power of appointment with executive is accepted, then the inclusion of the word 'consultation' in Art 124 and 217 would be meaningiess. Thus, the funetions under Art 148, 155, etc are discharged by the President on the advice of the Council of Ministers whereas the same advice by the Council of Ministers is neither sought uor hinding under Art 124 and Art 217 (appointment of judges).

While Justiee Khehar is right to make this observation, this observatioo does not explain why the executive should be denied a role in the appointment procedure.

16 *Per* Justico Khehar, Supreme Court Advocates on Record Association & Anr v. Union of India, 2015 (11) SCALE 1 (Supreme Court of India, 2015).

It is unclear how "consultation witli the judiciary" results in automatie exelusion of "consultatiun with the executive". Adopting the Court's reasoning and reading Art 74 along with Art 124 and 217, it would seem that the President ueeds to "consult" the CJI and at the same time receive "aid and advice" of the Counеil of Ministers which is binding on liim.

This however, is uot the case. While the conelasion whieli the Court reached that the President in the discharge of his powers under Art 124 is uot bound by the Coancil of Ministers seems to he eorrect, the reasoning adopted to reacli this conelusion is flawed. The real reason is the distinction between 'powers' and 'functions' of the President. 'Power' is a legally autliorized action whieh is not in the nature of un obligation whereas 'funetion' is a duty that mnst be discharged and is in the nature of an obligation whicli an official position entails. The Constitution also endorses such a distinction and Art 74 makes the advice given by the Council of Ministers to the President binding only in ease of "exerciso of his functions."[17] Thus, the President appoints judges in the exercise of powers eonferred upon him and uot in the exercise of his functions and lionce, he is not bonnd by the advice givon by the Council of Ministers.

VI Jndicial Primacy as Part of Basic Structure of the Constitution

The diseussion surrounding jadicial primacy in judieial appointment was two pronged. The first prong dealt with the reasons which indicated that the Constitation mandated judicial primacy in jndicial appointments. The second prong dealt with 'judieial primacy in judieial appointment' as a component of independence of the judieiary and lionce a part of the Basie Structure of the Constitution.

In the first prong of discussion, Justie Khehar gave the following primary reasons why the term 'consultation' in Art 124, 217 and 222 should be read as vesting primacy in the judieiary:

a. *Shamsher Singh's* casc and *Sankalchand Himatlal's* ease were the first two cases to upliold the position that primacy should be given to the judieiary in the matters of jndicial appointment. Thereafter, the *Second* and *Third Judges'* case flrmly eemented that position.

b. According to Justice Khehar, the Coostituent Assembly Debates indieate that the Constituent Assembly rejected the system of appointment whieh is nsod in UK and USA because they wanted to protect the appoiutment procedure frum subjugation at the hands of the executive and the legislature respectively.

17 Art 74, Constitution of India, 1950.

c. He also pointed to the fact that in actual practice the appointment of judges after the Constitution had come into force had been done as per the advice tendered by the CJI and hence, it can be inferred that the political-executive since 1950 would have been aware of the practice that the Constitution mandated and accordingly, such practice is indicative of the Constitutional intention.

Justice Khehar had already reached the conclusion that the *Second* and *Third Judges'* case did not need a relook. Hence, the Court was bound by the decision that had been reached in these judgements and accordingly it was decided that primacy must be accorded to the judiciary in the matters of judicial appointment.

However, the NJAC judgement will be regarded as a landmark judgement not because of the first prong of this discussion but because it marked a departure from the other judgements of the apex Court in that the earlier judgements recognised 'independence of the judiciary' as forming part of the Basic Structure of the Constitution whereas the NJAC judgement regarded 'judicial primacy in judicial appointment' as forming part of the Basic Structure. While independence of the judiciary as part of the Basic Structure of the Constitution was not being challenged; the question before the Court was whether judicial primacy in judicial appointment was necessary to ensure judicial independence. Justice Khehar while dealing with this question made the following observation:

"Therefore, when a question with reference to the selection and appointment (as also, transfer) of Judges to the higher judiciary is raised, alleging that the "independence of the judiciary" as a "basic feature/structure" of the Constitution has been violated, it would have to be ascertained whether the primacy of the judiciary exercised through the Chief Justice of India (based on a collective wisdom of a collegium of Judges), had been breached. Then alone, would it be possible to conclude, whether or not, the "independence of the judiciary" as an essential "basic feature" of the Coustitution, had been preserved (-and had uot been breached)."

The Court thus, recognised not just "judicial independence" but also "judicial primacy in judicial appoinrment" as a part of the Basic Structure of the Constitution.

Although Justice Khehar does not elaborate on the reason which made him conelude that 'the appointment procedure' affects 'judicial independence' he made it abundantly clear that 'judicial primacy in judicial appointment' is no longer one of the alternative approaches available but is the only one whose adoption would be constitutional. Interpreting something to form a part of the

'Basic Structure' of the Constitution has wide and often irreversible ramifications. The Court by declaring a certain type of procedure to be part of the 'basic structure' has ensured that it can never be amended. Moreover, it seems that the Court is endorsing only a particular type of appointment procedure (the collegiom system) as being the only one which could protect independence of the judiciary. By doing so, the Court is inadvertently and unconsciously making a procedure a part of the 'basic structure' of the Constitution. Not only is the idea of a procedure being part of the Basic Structure unheard of but it is also extremely problematic since, this particular procedure (collegium system) does not find any mention anywhere in the Constitution. The problem gets aggravated by the fact that there seems to be no consensas on the merits of the procedure.

It is important to note that judicial primacy does not exist as an absolute coacept but is present in the form of a variable whose conception would depend on its extent. Thus, the Court was faced with the task of not just identifying what 'judicial primacy' means hut also defining the extent of control which the judiciary was supposed to exercise in order to ensure 'judicial primacy' in the procedure. Although the respondents had centended thar the primacy of the judiciary was retained even under the NJAC system as three out of the six mombers were members of the judiciary and hence, they had veto power and could ensure that an appointment which is considered unacceptable by the judiciary doesn't go through, yet the Court did not find such powers to be sufficient to safeguard the primacy that the judiciary should be accorded. According to Justice Khehar the primacy that the judiciary enjoys should not be limited to only the power to prevent appointments which it does not deem suitable but should also include the power to proactively ensure that the candidates who it considers suitable are appointed. It can be stalled in its latter endeavours by the other members of the NJAC since, according to the NJAC Act an appointment cannot be made if two or more members are opposed to such appointment. The following observation made by Justice Khehar shows why the Court foond the NJAC to be stifling of 'judicial primacy' and 'obnoxious'.

"*The reason to describe it as being obnoxious is this – according to the learned Attorney General, "eminent persons" had to be lay persons having no connection with the judiciary, or even to the profession of advocacy, perhaps individuals who may not have any law related academic qualification, such lay persons would have the collective authority, to override the collective wisdom of the Chief Justice of India and two Judges of the Supreme Court of India*".[18]

18 *Per* Justice Khehar, Supreme Court Advocates on Record Association & Anr v. Union of India, 2015 (11) SCALE 1 (Supreme Court of India, 2015).

The NJAC Act unsurprisingly did not meet the high bar of 'judicial primacy' that had been set by the Court and consequentially was found to be violative of the Basic Structure of the Constitution on the groands that it compromised the independence of the judiciary by denying judicial primacy in judicial appointments and by violating the principle of 'separation of powers.'

VII Conclosion

The NJAC judgement was supposed to provide unswers to some of the toughest problems of Constitutional law. It is disappointing to see that such a landmark judgement is riddled with so many flaws in reasoning. Unsurprisingly, the judgement has drawn flak from scveral quarters. Unfortunately, most of the criticism of the judgement (even those given by lawyers) condemns the conclusion reached and not the legal reasoning adopted.

Moreover, one of the biggest challeoges to the impugned legislation was on the grounds of separation of powers. This challenge was upheld without the Court providing any reason as to why it considered the impugned legislatiou to have violated the coacept of separation of power. The importance of the judgement is because of the fact that it is one of the few judgements in which a legislation has been struck down for reason of being violative of the Basic Structure of the Constitution. 'Basic Structure' as a coneept is not at all determinate and heoce, must be dealt with very carefully. The NJAC judgement has held that 'judicial primacy in judieial appointments' is necessary to malntain judicial independence and hence has ended up making a particular type of procedure a part of the Basie Structure of the Constitution. Reaching such a conelusion when there seems to be nothing in the Coustitution to provide for it seems to be an egregiouc mistake on the part of the Court.

White my submission is not that the NJAC as a system shoutd have continued, however, what cannot be denied (und the Supreme Court itself has accepted this) is that there is seope for a lot of improvement in the eollegium system. Good governence of a country requires the three pillars of the State, the executive, legislature and judieiary to work together harmoniously yet independently. The Constitution of India in Art 50 recognises separation of powers of the eaecutive and judiciary as an ideal that the State should strive to achievc. Independencc of judiciary is oue facet of the idea of 'separation of powers' that bas been declared by the Supreme Court to form part of the Basie Structure of the Constitution.[19] What is bowever, contentious is the issue of what constitutes 'judicial independence' and whether judicial independence mandates absolute autonomy. The boundaries of judicial independencc need to be explored carefully to ensure that in its garb, judicial accountability and the system of checks and balances is not cempromised.

19 All India Jndges' Association v. Union of India, AIR 1992 SC 165 (Sopreme Court of India, 1992).

Santhara: a Religious Process

Somya Jain*

ABSTRACT

This article provides a detail description about the process of Santhara ,how this process is actually conducted and how it is clearly different from the suicide. Article 25 of Indian Constitution governs the religious ceremonies and ritual and their morality and validity. So, this article explain the why Santhara is important for jainsim or any follower of jainsim . The necessity of this practised is tracked in this articles.

Initially this articles gives details review about the process of Santhara and detail description of procedure of conducting Santhara Gradually the article proceeds towards knowing the importance of Santhara and legal validity of the process.

Articles also throws light on the implications of Article 306 and 309 which states abetment and attempt to suicide. Article 25 which talks about the right to freedom of religion.

Lastly article provides with the analysis of the case against Santhara in rajasthan High court , which claims it to be against public order and morality provides arguments in contrary and also gives reference of certain practise which are similar to that of Santhara.

I "Humau budy is a prison of soul."

Where is other religion human body is considered to "a temple of soul" in Jainism with a straight contradiction human body a is considered to a prison of soul, a prison from which any disciple of jain religion want to eseape. Way to escape this prison is attainment of niravna and SANLEKHANA OR SANTHARA is a process of attaining nirvana. Basieally Santhara is a process of last vow prescribed by the Jain ethical code of conduct. The vow of sallekhanâ is observed by the Jain ascetics and lay votaries at the end of their life by gradually reducing the intake of food and liquids.[1] Santhara is not a proeess of modern era, but it date

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1. wikipedia, https://en.wikipedia.org/wiki/Sallekhna

back to ancient times of lord mahavira who have lead the path of Santhara. According to jain text the great king Chandragupta mourya attain the process of Santhara at the Sravanbelgola .This process can only be adapted by the people who are having the capacity and will to give away all its possessions, family, partner , friends, and all the worldly pleasure . When a monk or any householder adapt the process of Santhara one need to stop thinking about the death, the way of death or even time of death. This process of death is a way to attain freedom from the cycle of birth and death ,according to jain religion. Santhara is a art of dying.

Basic principle of Jainism is "Ahimsa" which means non violence, Jainism being a very peace loving religion one could not expect thom to support such anti peace activity. Ideology of jainsim revolvas around the concept of moksha and attainment of moksha .According to the Jainism ,one in the life of human should get rid of the cycle of rebirth or "punar janam". If one need to get through this cycle one should leave all the worldly pleasure and get on the path of "tap" but for any ascetic and house bolder path of Santhara is the way to attain moksha or salvation. Santhara is not a way to die but this is to control the urge of any individual to live or die. In the Ratna-Karanda Sravakacara for Sallekhna it is stated as under:-

"The holy men say that sallckhna is giving up the body (by fasting) when there is an unavoidable calamity, severe draught, old age or incurable diseasc, in order to observe the discipline of rctigien"[2] .

II Procedure of Santhara

Sallekhanâ is made up from two words sal (meaning 'properly') and lekhana, which means to thin out. Santhara is a not a activity that a person can attempt in a day but it a series of activity, basically a complete proccdure of day in which one need to chanalise there mind and seul on the path of salvation. Santhara in its self is a vow "vrat" . Person who is going for Santhara needs to adopt this vrat wbicb include reduction of needs of body and increase in the religious training and hearing of scared text. No person can take vows of Santhara by their own , for following this path individual needs to take permission of jain saint if they permit the person after looking at the health issue of the person and finds out that the person in now not going to recover the health even after proper medication then only they permit the person for this. Even after this one could not conduct further steps en their own one saint should be present at the time of this process being conducted.

2. Nikhil Soni vs Union Of India & Ors (civil writ petetion no. 7414/2006)

Since this process is not confined to jain saints but extended to normal householder there are large set of rules and regulation one need to follow for ending their life by Santhara . Starting from giving away all the possessions, leaving their house and loved one , needs to cut all tics with kith and kins , once u start walking on the path of Santhara you could not take a step back. Even in the process of Santhara persou is not supposed to think about their death. Neither they are allowed to have affection with body nor allowed to think about their death. During Santhara one doesn't pray for rapid death or long life.

Procedure of Santhara starts with leaving house and all tics with people. Gradually start giving up on body's requirements for food like initially they take food one time in a day then gradually shifts on food and then liquid diet and when its quite visible then body is weakened even liquid diet is stopped and only water is given to the person and at last ever thing is stopped. While in amidst of this process of fasting one is constantly practise meditation. this fasting and giving up on food is just to the reducc nourishment of the body .Ultimately soul leaves the human body. Process doesn't ends here after death of the person, people pray that person and pray to have same way of death because this proeess is not only respected but sacred too for Jainism. The basic idea of Santhara is to know when to die and how to die.

There are complete set of 12 vows to be followed by any person who is going for the process of Santhara these are [3]

1.	AhiCsâ	Not to hurt any living being by actions and thoughts
2.	Satya	Not to lie or speak what is not commendable
3.	Asteya	Not to take anything if not given
4.	Brahmacharya	Chastity / Cclibacy in action, words & thoughts
5.	Aparigriaha (Non-possessiou)	Detachment from material property
6.	Digvrata	Restriction on movement with regard to directions
7.	Bhogopabhogaparimana	Vow of limiting consumable and non-consumahle things
8.	Anartha-dandaviramana	Refraining from harmful oecupations and activities (purposeless sins)

3. Aruna Ramchandra Shanbaug V/s Union of India & ors. ((2011) 4 SCC 454)

9.	Samayika	Vow to meditate and concentrate periodically
10.	Desavrata	Limiting movement to certain places for a fixed period of time
11.	Prosadhopavâsa	Fasting at regular intervals
12.	Atibti samvibhag	Vow of offering food to the ascetic and needy people

a. The above five vows are the basic principle or ethics of jainsim

As far as this practice of taking once own life with the performance of any rellgious process is net new and not confined to Jainism . Even in Hinduism we find many spiritual leader who took "Samadhi" or took a vow to forbid intake of food in order to die. People like Shri Vinoba Bhave met his end by undertaking fast., similarly in case of Ram Krishna Param Hans. Ma-Anandmai. The folk deity of Rajasthan 'RAMDEOJI has taken hving Samadhi. India Saints every year willingly relinquish the body which is called 'Samadhi Maran'. Instances are there where Jain munis have terminated their lives by going on fast that is, by adopting the practice of Santhara. Shri Raichand Bhai, religious guru of Mahatma Gandhi took Samadhimaran at the age of 33 years.

India is a secular coontry. this word secular was not eternal in Indian Constitution. In Indian Constitution the word "secular" was added with the 42nd amendment in 1976 and after iuclusion of this in preamble of Iodian Constitution it appears to be a basio feature of the country hence no amendment eould change the status of India from a secular country to an sole religion country. In India all the rellgious matters are dealt under the Constitution of India artiele 25- 28 which is right to freedom of religion. Article 25 clause (1) states "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of eonscience and the right freely to profess, practise and propagate rellgion" this implles that any person inside the territory of India can freely profess, propagate, practise any rellgion they wish ot any religious practise attached to that religion. Rituals and observances, ceremonies and modes of worship considered by a religion to be an integral and essential part are also secured.[2] But what are are the essential practiee of the religiou are decided by the eourts on the basis of customs of that religion .

III Recent Court Case on Santhara

In 2006 a social activist Nikhil Soui with his advocate Madhav mishra filed a PIL in Rajasthan high court claiming the process of Santhara to be immoral and is eqnivalent to snieide. It also argued that that practising Santhara is mereiy a way

for coercing widow and elderly relatives to take their own llves. Recently in august 2015 Rajasthan high court stated that the practice is not an essential tenet of Jainism and banned the practice making it punishablc under section 306 and 309 of the Indian Penal Code. This implies that any person who commit or does any practisc that conld lead to take one's life or any person who abet the process shall be held liable for suicide.

Suicidc is outcome of rage or anger. It is a step took for self destruction out of emotionai trauma . Busically suicide is a very negative term and it constitute a offence against the society and its citizen. Whereas the process of Santhara is a planned religious process owns a bistorical religious importance . Major difference am0ong both the process is tbat in suicide one takes their own life in an instant whereas in Santhara there is a large transition timc so that if any person wants to back out with the process one can do that.

When we relate the process of Santhara and suicide, the outcome is very clear that both the process is nowhere hold any similarities other than the fact that end result of both the process is death of the individual who practise it but, aim or motive of both is very different. Snicide is a negative process done in mcntal distress with the aim of taking one's life. Peoplc take impulsive decision of attempting suicide to end their hfe. Whereas practise of Santhara is fairly different from suicide because this a very holy process in jain religion. Penple prepare for this process complete their life. This is not possible with an impnlsive decision even then complete community start admiring the person who take the step of sathara.

Articlc 25 of Indian Constitution state that if any religions activity , ritual ,ceremony is against public order ot morality then state owns every power to confine that activity and put reasonable restriction to protect further usage of such ritual. Aecording to recent case practise of Santhara is against the pnblic morality and public order. Jainism is very much bold on the fact that Santhara is art of dying, it is surly not against public morality because the one who does this practise is very much snre about the procedure also not every citizen or follower of jainsim can adapt this proccss of Santhara beeause the vows of Santhara is very mnch difficult. Santhara is a retreat to peane in true sense, to he yourself entirely free from ail distractions for pure contemplation and introspection. Performanee of Santhara is protected by tight to privacy, any individual could perform any activity of their choice in their life without any interruption of other person. Since this is essential for attainment of the basic principle and ideology of Jainism we can not for go tbis activity and see jainsim .

a. Similar Practices as Santhara:

Santhara is not an only practise prevailing in India. There are several different religious practise prevalling in India of its kind. Diffrent religion have their own different sets of rituals . One such ritual is in Buddhism Sokushinbutsu .Sokushinbutsn refers to a practice of Buddhist monks observing austerity to the point of death and entering mummification wbile alive. The practitioners of sokushinbutsu did not view this practice as an act of suicide, bnt rather as a form of further enlightenment. Similarly in Jainism people consider Santhara as process of enlightenment. Though due to lack of Buddhist community in India we do not find many cases of this practise yet in literary work of Buddhism we find this practise and There is the existence of at least one "self-mummified" 550 years old corpse of a Buddhist monk named Sangha Tenzin in northern Himalayan region of India, visible in a temple in Gue village, Spiti, Himachal Pradesh.

Other similar process is prevailing in Hinduism also known as Prayopavesa (resolving to die through fasting) denotes the suicide by fasting of a person, who has no desire or ambition left, and no responsibilities remaining in life. It is also ailowed in cases of terminal disease or great disabllity.

b. Related Cases:

1) In ease oI Bijeo Emmannal v State oI Kcrela

In this case people belonging to Jennovah witness claim that giving respect to nationai anthem is against their religious practice. Three children of jehovah witnesses were expelled from sehool because they refused to sing national anthem "jana gan mana" instead they stood silently during moruing prayer. Their parents filed a case to get th students admitted back in sehool again. Court upheld that people belonging to jenovah wimess are not required to sing national anthem also their this belief is protected under article 25 clause 1 .

If court for protection of ones religions beliefs can give decision which allow the eommunity to disobey uational anthem then why not Santhara is given clean cbannel, when Santhara is a peaceful proeess which is essential for condnct of religion.

2) In case of in Aruna Ramchandra Shanbaug V/s Union of India & ors.

In this case victim of a rape was in vegetative condition from 1973 till her death. In 2010 a Social activist and friend of victim Pinki Virani admitted a plea to end victims life and asked for enthanasia since her medicai condition was recovering. The supreme court after examining Aruna 's case with the help of three member

medical panel, the eourt laid out the guidelines for passive euthanasia. The guidelino enumerate that passivc enthanansia iuclude withdrawing of treatment or food that would allow patient to continue living.

In this case court held guideline whieh inclnde withdrawal of food, and in process of Santhara too there is withdrawal of food. Even in Santhara there is no active step taken to kill an individual through a establish process.

IV Conelosion

hi my views Jainism is a religion which snpports "ahimsa" or nou-violence. The slogan itselfstates "Ahimsa parmo dharma". Looking into procedure of Santhara you will find a procedure through which a devotee of Jaioism ,by following certain vows and process, try to attain salvation. Aecording to article 25 of Indian constirution, every rellgion is free to profess or propagate any rehgious process, ritual or practise. Alse if any religious practise comes under the ambit of restriction then oourt will decide whether that practisc is essentiai for the commnoity or not. The basic motive of Jainism is to get rid of the cycle of rebirth and to get out of this cycle one mnst attain saivatien "moksha" and Santhara leads the way to moksha . Hence, Santhara help individual to attain basic idealogy of Jainism therefore one cannot separate Santhara from Jainism. As far as the resemblance of Santhara with suicide is considered , suicide is a negative approacb a persun uses to end ones hfe due to nervous breakdown whereas, Santhara is positive thiough which a person attain the honourablc position as per religion and also after Santhara death of that individual is eelebrated ceremoniously, Moreover in case of Aruna Shanabaug even the supreme eourt has permitted passive euthanasia which means if a person is in vegetative state than doctors can end the patients life by cutting off food and drug with some precaution(as restricted by court). Finally I could conclude that thongh Santhara appears to bc a attempt to suicide but it is "art of dying" which is not contrary to law but a religious practiee.

4. Bijeo Emmanual v State of Kerela (1996) 3SCC 615 :AIR 1987 SC 784
5. V.N. Shukla , Constitution of india, 12th edition by Mahendra Pal Jain, Eastern Book Company
6. Milind Ghatwai ,The jain religion and the right to die by Santhara, The Indian Express , September 2 2015,
7. Sekhar Hathangadi ,Santhara in eyes of law, The hindu, August 15 2015
8. Dr. J. N. Pandey , Constitutional law of India, Fifty edition by S.S. Shrivastava , Central law agency

Institution of Governor: Its Falling Sanctity and its Revival

Pratyush Khanna and Shreesha K.S**

ABSTRACT

A Governor, being a representative head of a State, commands a number of powers, be it executive or administrative. The term 'Federalism' essentially connotes decentralization of power; the existence of two separate governing bodies – The Center and the State in the body politic. It is the Governor who acts as an intermediary between the Center and the State resulting in proper functioning of the Government.

The Appointment of a Governor, a process backed by Constitutional mandates, is held with much regard because of its Constitutional sanctity. In reality, the post of Governor has not enjoyed due reverence for quite some time now. Academicians have gone to the extent of suggesting to do away with this position. More or less, it appears as if the Governor's post is a way of rewarding party loyalists regardless of their merits. This paper attempts to look into this "Spoil System", a very popular trend nowadays.

The Gavernor in many instances is a puppet of the Center in return to the gift of Governorship that is conferred upon him. He ends up being a 'tool of politicization' at the hands of the politicians. In this age where parties of different ideologies and ideas are at power in the Center and the State, the idea that a Governor who is 'in tune' with the ideology of the party at the Center is no longer valid. So, this cannot be a basis for his removal. The paper will alsa focus on these matters.

In conclusion, the paper will elucidate upon the suggestions made by different Commissions, and the 'Doctrine of Pleasure' evolved by the Court on the matter of appointment and removal of Governors. Taking support from these, the authors will suggest a few recommendations on the changes needful to restore the sanctity of this Constitutional institution.

I Introduction

The office of the Governor, as envisaged by the framers of the Constitution has a lot of important functions to perform and is of paramount importance. In a

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Federal setup like India, Centre-State relations carry a lot of importance and weightage in governance. A carry-forward of the British era, the institution of the Governor is not merely a figurehead, but performs the important function of being an intermediary between the Centre and the State. Unfortunately, the post has lost much respect and consideration nowadays. Sarojini Naidu, the first woman Governor of India once famously remarked that she felt like "a bird in a golden cage"[1]. It has become a resting place for old politicians. The Governors are appointed by the President under Article 156, based on recommendations of the Council of Ministers at the Centre, effectively giving a lot of power to the Centre in matters of gubernatorial appointments, which allows the Centre to operate a free will in a capricious manner in appointment and removal of Governors. The recommendations of Commissions constituted for the purpose of suggesting alternatives to the already existing situation were seldom incorporated. The above problems pose a critical situation not only for the Federal system of India, but also attack at the very root of fair and democratic procedure. The paper aims to look at these problems of appointment of Governors, and come up with recommendations in order to tackle this falling sanctity in hope of revival of the significance of this Constitutional post.

II Federalism and Governors in India

Federalism is a system of Governance based on the concept of sharing of power between the Centre and the States/Provinces. It means that the authority to govern is not concentrated at a focal point, rather is decentralised amongst various States. The concept of Federalism has been widely expounded upon by many learned political scientists. The concept was first given by the framers of the U.S Constitution, in Philadelphia, in 1787.[2] There are many classical definitions of Federalism. We consider two of them here:

K.C.Wheare, the eminent Australian academic, defines Federalism as "the method of dividing powers so that the general and regional governments are each within a sphere, coordinate and independent."[3]

However, this definition was criticized because Wheare's definition of Federalism was too restrictive and could not bring within its sphere, the governments of Canada and India, which are nonetheless Federal.

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1 B.C.Rout, *The Gubernatorial Office in India – A Devalued One*, 29 Indian Journal of Political Science, 45 (1968).

2 Douglas V. Verney, *Federalism, Federative Systems, and Federations: The United States, Canada, and India*, 25 Publius 81 (1995).

3 K C Wheare, Federal Government (4th ed. 1963).

A broader definition was given by **Riker** who said "Federalism is a political organization in which the activities of the Government are divided between regional governments and a Central government in such a way that each kind of government has some activities on which it makes final decisions."[4]

India is a Federal nation with a strong Central tendency. In a country as diverse as India, a harmonious relation between the Centre and the State is imperative for growth and development to take pince. Even though India is known to have strong Central tendencies when it comes to governance, the fact that the states have a lot of say in their individual governance can hardly be overlooked. Therefore, we can conclude that there must exist a link or a conduit between the Centre and the respective states for the purpose of effective governance and maintenance of order between the two bodies. The office of the Governor has the job of maintaining this link between these two bodies of the State. In fact, **K.M.Munshi,** a prominent momber of the Constituent Assembly has said that the Governor is "the Watch-dog nf the Constitutional propriety and the link which binds the Centre to the States, thus securing the Constitutional Unity of India".[5]

Article 154(1) of the Constitution of India vests in the Governor the Executive power of the State. The article reads thus:

"The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution..."[6]

The Governor can act on his own volition in many instances without seeking the advice of the Council of Ministers, like selecting the Chief Minster prior to the formation of a Cotncil of Ministers, dismiss a Ministry, dissolve the Legislative Assembly, reserving bills for the consideration of the President, sending back a State Assembly bill for reconsideration etc. Hence, it can be said that the office of the Governor is very important. In fact, it has been held in *Hargovind Pant v. Raghukul Tilak*[7] that the Governor's office cannot be held accountable to the Central Government in any manner as he is a Constitutional Authority not subservient to any authority.

Even so, there is an argument which considers Governor to be of not much use when it comes to matters of administration. He has been called a mere figurehead, who conveys messages to the Centre and siniply accepts the recommendations

4 RIKER, FEDERALISM: IN HANDBOOK OF POLITICAL SCIENCE 93-172, (Vol. 5, 1975)

5 *Supra* note 1, at 46.

6 CONSTITUTION OF INDIA, Art. 154(1).

7 AIR 1979 SC 1109.

of the Chief Minister. **Brajeshwar Prasad** felt that the office of Governor was merely being carried forward from the British era. He went on to say that "Provincial autonomy means distrust of the Centre...(Governor has) practically no power(?) He is a mere puppet"[8]

In fact, most of the functions of the Governor can be performed by other authorities, most notably the Chief Justices of the High Courts of respective states. Hence, there has been a strong argument for doing away with the post of Governors in order to save a lot of Government money.[9]

This argument is flawed in the sense that it does not consider the important place occupied by the post of the Governor in the Constitutional machinery. This point was greatly stressed by **D.D.Basu**. He said "A person appointed as a Governor should add glory to the post and not be a symbolic figure oblivious of his duties and functions he has and is expected to carry out. The office of the Governor is intended to ensure protection of the constitutional process"[10]. In the Constituent Assembly Debates, this point was reiterated: "...Like the President of India he (Governor) will be a "**safety valve**" of the Constitution and his function is to lubricate the machine of the Government and to see that its wheels are going well by reason not of his interference but of friendly action..."[11]. **Yuvraj Karan Singh** rightly observes that it is possible, for the Governor, because of his non-party position, to take more detached and impartial view of affairs in the State. His advice can be a considerable value to the Ministry. Not being saddled with detailed day to day administration, he can take a long range view of problems.[12]

III Appointment of Governors and the "Spoils system"

Article 155 of the Constitution mandates for the appointment of Governor by the President under his hand and seal.[13] Even though the President usually consults the Chief Minister of the State in the matters of the Governor's appointment, in reality, the selection is done by the Prime Minister and the Council of Ministers at the Centre, while the President is elected by the Members of Parliament and the Members of the State Legislatures. If we look at the historical background regarding the appointment of Governors, we will arrive at the August 1947

8 Constituent Assembly Debates, Vol.8, pg. 11.

9 Rajesh Ramachandran, *Why the post of Governor should be abolished*, The Economic Times, http://articles.economictimes.indiatimes.com/2014-06-19/news/50711020_1_governors-raj-bhawans-upa-government, (last updated Oct. 12, 2014).

10 5 D.D.Basu, Commentary on the Constitution of India, 6097 (8th ed. 2009).

11 Constituent Assembly Debates, Vol.8, pg. 446.

12 *Supra* note 1, at 48.

13 Art. 155, The Constitution of India, 1950

session of the Constitutional Assembly Debates. The Assembly had adopted an article to the effect that for each Province there shall be a Governor to be elected directly by the people on the basis of adult suffrage. Further, in the 1949 debates, various proposals were placed before the Constituent Assembly regarding the appointment of Governor. These were - (1) of a choice of the Governor on the basis of universal suffrage, (2) of election of the Governor by a majority of the Lower House or of both Houses whether on the principle of proportional representation or otherwise, (3) of a selection of a panel by the Lower House in the State from which the choice is to be made by the President of the Union or (4) of appointment by the President in consultation with the Cabinet.[14]

It was decided by the Assembly finally that the Governor shall be appointed by the President in consultation with the Cabinet. There were various reasons put forth for this decision, the main one being that the costs involved in conducting an election far outweighed the responsibilities shouldered by the Governor. Moreover, as **H V Kamath** pointed out in the debates, if the Governor was to be selected by direct election, then it was highly possible that he would be a party man with his own biased views and opinions. He would think that he is a far superior man and a far more powerful man than the Chief Minister of the state, which would defeat the basic purpose of having a Governor-that of him being a conduit between the Centre and State[15].

Under article 74 of the Constitution of India, it is imperative for the President of India to heed to the advice given to him by the Council of Ministers headed by the Prime Minister. It has been a tradition in the process of appointing Governors that the President will appoint those persons who have been suggested by the Prime Minister and his Council of Ministers. It is unfortunate to note that the parties at power in the Centre have almost always appointed either old party loyalists or failed politicians as Governors of various states. Parties have come to consider this post of Governor as a means of rewarding people who have served the party's or the person's interest, in some cases. This leads to a situation wherein the Governor feels obliged and remains loyal to the party at the Centre when in reality, he is a Constitutional figure who is supposed to remain aloof of all political considerations. The issue becomes clear when we look at a few instances. In Kerala during the Elections of 1965, the Communist party headed by M.S.Namboodripad was not invited by the incumbent Governor to form the Government. Rather, President's rule was declared because the party at the Centre, Congress did not prescribe to the Communist Party's policies. Many

14 Constituent Assembly Debates, Vol.8, pg. 11

15 *Supra* at 7

more such instances arose over the decades to come, like in Jammu and Kashmir in 1977, Meghalaya in 1988, Nagaland in 1990, Uttar Pradesh in 1998 and so on.[16] It is snbmitted here that thc Governors are reluctant to act based on the Constitutional principles and shirk from their duties of being intermediaries because they feel that they are obliged to obey the will ef the Contre.

Moreover, under Article 74(2) of the Constitution, The question whether any, and if so what, advice was tendered by Ministers to thc President shall not he inquired into in any court. This gives a free teash to parties at the Centre to choose whomever they please as Governors. This has resulted in the office of Governor being converted to an "Old age home". Old aged seasoned politicians who cannot work in politics anymore, are rewarded with Governorship for their party loyalty. This is nothing but a manifestatiun of the "Spoils System". In fact, if we take the example of Orissa, all its previous Governors during the rule of Congress at the Centre were Congressmen who were at least 70 years old, or above.[17] This fact of age will evoke more interest when one comes to know that in fact, the Governors during the British perind were are young men, between the age bracket of 53 to 58.[18]

This fact has been prominently nbserved in the Administrativc Reforms Commission Report on Centre-State Relations in 1969. The ARC observed that there was a wide-spread feeling that, in some cases, Governors were appointed on considerations extraneous to merit. The dignity of the nffice snffered when persons defeated in elections were appointed. It recommended that the person to be appointed as Governor should be one who has had long experiencc in pnblic life and administration and can be trusted to rise above party prejudices and predileetions. The Government of India accepted this recotumendation.[19] Nevertheless, nothing was done in this regard and the Spoils System continucd.

Thc present NDA Gnvernmont is also not free of this vice. Almost all of the new Governors appointed by it, for Uttar Pradesh (Ram Naik), Gujarat (O.P. Kohli), West Bengal (Keshari Nath Tripathi), Chhattisgarh (Balramji Dass Tandon), Karnataka (Vajubhai Vala) and Nagaland (Padmanabha Acharya), were actively

16 Laj Pat Rai, *A politico legal study of appointment and removal of Governors in India*, SHODH GANGA, 40-47 (Oct. 17, 2014), http://shodhganga.inflibnet.ac.in/handle/10603/10661.

17 Digambar Mishra, *How they became Governor: Portrait of a State Elite*, 41 INDIAN POLITICAL SCIENCE ASSOCIATION, 206 (1980).

18 Id. at 208.

19 SARKARIA COMMISSION REPORT ON CENTRE-STATE AFFAIRS, 1983, Chapter IV, 4.06.09.

associated with the BJP. The youngest of them is 78 and the oldest 87, making a mockery of retirement imperatives.[20]

IV The "Doctrine of Pleasure" in relation to Governors

Artiele 156(1) of the Constitution of India states that the Govarnor shall hold office during the pleasure of the President.[21] The "pleasure" of the President signifies that the Governor shall cease to hold his office if he loses the confidence nf the President. This makes the term of the Governor, i.e. 5 years less relevant under Article 156(3) of the Constitution[22]. Since the President has to compulsorily go in accordance with what the Council of Ministers have to say, this gives mere power to the Centre in the matters of removal of Governars. It is snbmitted that arbitrary and capricious power would be imparted to the Centre in this instance. **Prof Shiban Lal Saksena** voiced the same opinion when he remarked that the Governor would be redneed to be a Creature of the President, in other words, the Prime Minister and the party in power at the Centre.[23]**Prof K T Shah** said "he (Governor) sbonld not be at the mercy of the President who is away from the Province and who is a national and not a local anthority"[24]. **H M Seervai** in his *magnum opus* comments on Article 156(1) ond says that the Governor risks his position wheo he goes contrary to the intentions of the Centre, because the Presidont acts on orders from the Centre. Artielc 156(I) is designed to secure that if the Governor is pursuing courses which are detrimental to the State or to India, the President con remove the Governor from his office and appoint another Governor. This power takes the placc of an impeachmerit which clearly is a power to be exereised in rare and exceptional circumstances.[25] **Khanna, J.** observed in *B.P.Singhal v. Union of India*[26] that serious allegations, not without substance, have been made about ntilizing the services of the Governor for the imposition of the President's rule with a view to further the interests of the political party in power at the Contre.

Appointment and removal of Governors are two sides of the same eoin. They are concomitant to each other.[27] It has become almost a custom nowadays to replace

20 The Editor, *Continuing with the spoils system*, The Hindu, (Jul. 16, 2014), http://www.thehindu.com/todays-paper/tp-opinion/continuing-with-the-spoils-system/article6214888.ece (last updated Oct. 13, 2014 at 11:34 AM).

21 Artiele 156(1), The Constitution of India, 1950.

22 Article 156(3), The Constitution of India, 1950.

23 Constituent assembly debates, Vol.8, Pg. 12.

24 Ibid.

25 2 H M Seervai, Constitutional Law of India 2066, (4th ed. 2011).

26 (2010) 6 Scc 331

27 Laj Pat Rai, *A politico legal study of appointment and removal of Governors in India*, Shodh Ganga, 22 (Oct. 17, 2014), http://shodhganga.inflibnet.ac.in/handle/10603/10661.

Governors with changing parties at the Centre, for the sole reason that the Governors are not 'in tune' with the policies of the Government at the Centre. Sarkaria Commission, in its recommendations states that "It is desirable that a politician from the ruling party at the Union is not appointed as Governor of a State which is being run by some other party or a combination of other parties."[28]There is a reason as to why this was suggested. Governors, rather than being Constitutional conduits between the Centre and State, turn into "tools of politicization" of the Centre and have, more often than once, helped further the political interests of the party at the Centre, the party that gave them the position. In *S.R.Chaudhari v. State of Punjab*[29], it was stated by the Hon'ble Court that "Chief Ministers or the Governors, as the case may be, must forever remain conscious of their constitutional obligations and not sacrifice either political responsibility or parliamentary conventions at the altar of political expediency"

This policy of appointing party favouritos of the Central Government was questioned in *B.P.Singhal v. UOI*[30]. Here a writ petition was filed under Public Interest Litigation in the wake of the removal of the Governors of the States of Uttar Pradesh, Gujarat, Haryana and Goa on 2.7.2004 by the President of India on the advice of the Union Council of Ministers. It was contended by the petitioner that the withdrawal of presidential pleasure under Article 156, cannot be an unfettered discretion, nor can it be arbitrary, capricious, unreasonable er *mala fide*. The Conrt held that though no reason need be assigned for discontinuance of the pleasure resnlting in removal, the power under Article 156(1) cannot be exereised in an atbitrary, capricions or unreasonable manner. The power will have to be exercised in rare and exceptional eireumstances for valid and compelling reasons.[31] Therefore, an arbitrary reason like the Governor is not 'in sync' with the ideolegies of the Centre cannot be employed in dismissing a Governor, and a decision like this by the Centre can be subjected to judicial inquiry.

The Rajamannar Committee Report in 1964, in this context, had recommended that "He (the Govarnor) should not be liable to be removed except under proved misbehavioor or incapacity after inquiry by the Snpreme Court."[32] This has not been properly implemented by the Centre.

Further, Sarkaria Commission said that the capricious power accorded to the Centre under Artiele 156(1) creates considerable insecurity in the mind of the

28 Sarkaria Commission Report on Centre State Affairs, 1983, 4.6.19.

29 AIR 2001 Sc 2707.

30 *Supra* at 26.

31 Ibid.

32 Rajamannar Committee on Centre State Relations Inquiry, 1969.

Governor, and would impair his ability to withstand pressures, resist extraneous influences and act impartially in the discharge of his discretionary functious. Repeated shifting of Governors from one State to another can lower the prestige of this office to the detriment of both the Union and the State concerned.[33]

The National Commission to Review the Working of the Constitution [34] headed by Justice Venkatachalaiah and The Punchhi Commission[35], established on similar lines as Sarkaria Commission voiced the same sentiment whon they both recommended the removal of the words "During the pleasare" of the President from the Constitution. NCRWC[36] also asked for the establishment of a Committee comprising the Prime Minister of India, Union Minister for Home Affairs, Speaker of the Lok Sabha and the Chief Minister of the cencerned State in retation with appointmonts. Punchhi Commission said that "This Commission is of the view that politicization of the office of Governor to an extent where his appointment is based on whims ond fancies ef the Central Government is not in keeping with the spirit of the Constitution."[37]

V A few rocommendations and conclosion

It has hitherto been stated and proved that even though the post of the Governor is a sacrosanct one, it has been losing its shine dne to various reasons, most notably politicization of the post. In furtherance of the same, the authors have come np with a few recommondations based on the research done on the subject. The few changes that nced to be adopted are:

- Effective implementatiun of the snggestions of Sarkaria Commission, Venkatachalaiah Commission and Punebhi Commission with regard to appointment of Governors
- Eminent personalities and tigures from all walks of life to be considered for the post to depoliticize the Office in lieu of the principles of the Constitution. The appointment of Governors to be purely based on merits and capabilities of individuals.
- Amendments to be introdnced with regard to the "Doctrine of Pleasure". Pleasure of the President needs to be retainod but illustrations as to when the pleasure is withdrawn needs to be mentioned.

33 Sarkaria Commission Report on Centre State Relations, 1983, 4.7.08.
34 National Committee to Review the Working of the Constitution, 2000, Book 3, 26
35 Punchhi Commission on Centre State Relations, 2010, 4.4.17.
36 *Supra* at 31.
37 *Supra* at 32.

- A thorough impeachment process needs to be introduced for the post when the pleasure of the President is withdrawn, so as to make the process of removal more transparent. This would also instill a sense of responsibility in the Governors to function in a non-partisan and honest manner.
- Right of representation in Courts to be given to the Governor in case of arbitrary removal.
- Political career of the Governor must come to an end once he is appointed as a Governor. This will prevent the Governor from working like an 'agent' of the party at the Centre and enhance the dignity of the office.
- The Chief Minister to be consulted during the appointment of the Governor to make the process more non-Centric.

It has been stated and established in many sections above that the sanctity of the Governor's post has taken a beating over the many years of independence of India. The appointment procedure of the Governor is not very federal due to the dominance of the Centre in the said process. Rather than being a lubricant for the efficient working of the Constitutional machinery, the post of Governor has become a political tool for the Centre, and a gift for old and harangued politicians. The doctrine of pleasure has given a lot of free leash to the Centre. In order to change this situation, a lot of Commissions were constituted, but the recommendations were not implemented. The authors have provided suggestions as to what has to be done to change and clean the office of the Governor and restore its dignity and importance. It is the belief of the authors that the said recommendations, an outcome of the research the authors have done, will do its part to change the office of the Governor, as the Governor is the most important cog in the wheel of the cart that is Centre-State relations.

Law of Sedition : A Death of Free Speech

Sumit Gehlot*

ABSTRACT

The recent controversies on the law of sedition which have arose in light of the incidents in JNU and Gujarat enticed me to choose this particular topic. The main object of this paper is to determine the constitutional validity of oppressive laws like sedition in a democratic country like India. It has been found that in the pre-independence era, when the government was the absolute ruler and people, the subjects, any opposition (however peaceful) was considered a challenge to political authority and, as such, was punishable as sedition. In pre-independence era it has been also seen that the law of sedition has been applied very frequently and in a very sporadic manner. The courts of India gave very wide interpretation and interpreted the law literally, which lead to the misuse of the law.

But with the arrival of democratic governments, upholding the same sense of sedition became more controversial. Its validity has been challenged thrice and ultimately it was rendered as a constitutionally valid law. But still the courts of India have been unable to chart a clear course regarding this law. In India the charges of sedition is levied very frequently and its sporadic uses has, debatably, a "chilling effect" on free speech.

It is notably important that in a present time, the importance of laws like sedition has almost become redundant in a democratic country like India. This research paper tries to explain the interpretation of the law of sedition given by various courts of India (both in pre-independence era and post-independence era). Further, it elaborates its necessitates and its rampant misuse. In the later part of the research paper, the author has tried to explain that how this law has become irrelevant and the government of India should consider about its abolishment.

I Background

Sedition was not the part of the original Indian Penal Code (IPC), it was first introduced in colonial India through Clause 113 of the Draft Indian Penal Code ('Draft Penal Code'), proposed by Thomas Babington Macaulay in 1837.[1] With

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1 Arvind Ganachari, Evolution of the law of 'sedition' in the context of the Indian freedom struggle in nationalism and social reform in a colonial situation (2005) 54.

the increasing incident of mutinous activity against the British government, the need of law of sedition was widely acknowledged. It was the recognition of the rising wave of nationalism at the turn of the 20th century which led to bill containing the law of sedition was finally being passed. It was introduced in 1870. After the initiation of the law of sedition in 1870, it was allowed to remain in force, unaltered, for a period of 27 years. It was amended in 1898. Since it came into operation in 1870, the law of sedition has continued to be used to stifle voices of protest, dissent or criticism of the government. . *Queen Empress v Bal Gangadhar Tilak* (1897) was the first case wherein the law on sedition under Section 124A in the IPC was explained. In the pre-Independence era, a number of landmark cases on sedition were decided by the Federal Court as well as the Privy Council. These two high judicial bodies had taken diametrically opposite positions on the meaning and scope of sedition as a penal offence. Post independence it was firstly challenged in *Tara Singh Gopi Chand v. The State*[2] and then in Allahabad High Court in the case of *Ram Nandan v. State of U.P.*[3] it was declared as unconstitutional and then, it was overruled in the case of *Kedarnath Das v State of Bihar*[4] by the Supreme Court. At, presently, it is constitutionally valid inscribed under section 124A of the IPC.

II Introduction

One of the strongest weapons in the hands of any government is the laying of a charge of sedition.[5] The dictionary meaning of sedition is conduct or speech inciting people to rebel against the authority of state or monarch.[6] It is a draconian law from the colonial era making such an act punishable with imprisonment of life.[7] Under Macaulay's penal code, "sedition" was declared, way back in the year 1898, as meaning: The bringing or attempting to bring into hatred or contempt (by words spoken or written or by visible representation, or otherwise) "disaffection towards the government established by law".[8] It is an outstanding feature of every sedition act that the way it is enforced differs from the way it looks in print as much as a gypsy moth differs from which it has grown.[9] The law of sedition as stated above has been chiefly an adaptation of the English law of sedition to Indian condition.[10] Sedition in English law has been defined as "a crime against

2 Tara Singh Gopi Chand v. The State, (1951) Crim. L. J. 449.

3 Ram Nandan v. State of U.P., A.I.R. 1959 All. 101.

4 Kedarnath Das v. State of Bihar, A.I.R. 1962 S.C. 955.

5 W.P.M.K., Sedition, 6 The University of Toronto Law Journal 468, 469 (1946).

6 *Sedition*, The Oxford English Dictionary(5th edn. 2002)

7 Deepak Nayyar, Two tales of sedition, The Indian Express, 20 feb, 2016 at 11.

8 Section 124A, Indian Penal Code, 1860.

9 Laurence W. Maher, The Use and Abuse of Sedition, 14 Sydney L. Rev. 287, 287 (1992).

10 A. K. Mukherjee, The Federal Court and the law of Sedition in India, 5 The Indian Journal Of political science 94, 104 (1943)

society, nearly allied to that of treasen, and freqnently precedes treason by a short iuterval. Sedition itself is a comprehensive term, and it embraces all those practiees, whether by word, deed, or writiog which are calcnlated to disturb thc tranquility of the State, and lead ignorant persons to endeavor to snbvert thc Government and laws of Empire".[11] HALSBURY lay down: "thc essence of the offence of treason lics in the violation of the allegiance owed to thc sovereign." Mahatma Gandhi called it the "prince among the political sections of the Indian Penal Code designed to snppress the liberty of the citizen." Sedition iu India is an offence only if the words, spoken or written, are accumpanied by disorder and violence and/or incitement to disorder and violence.[12] Mere hooliganism, disorder and other forms of violenee, though punishable under the other provisions of the penal code and under other laws are not punishable under section 124A of the penal code.[13] The decisive ingredient for establishing the offence of sedition under section 124A is the doing of certain acts which would bring to the Government established by law in India hatred or eontempt etc.[14] The object of the sedition generally are to induce discontent and insurrection, to stir up oppositien to the government, and to bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and the rebeflion.[15] The judieial interpretation of sedition must vary with the political temper of the times. Time, place and the habits of mind of people should be reflected in the decisions.[16]

III Sedition is an Offence Against "Public Tranqulity" or "A Security of The State"?

It was proposed that term "sedition" should be mentioned under articlc 19(2) of the constitutien in the "saving elause". But, it was dropped by the initiative which was taken by K.M. Munshi, a lawyer and an active participant in the Indian independence movement as, he and othcr members of the constituent assembly ware aware of the biased nature of judicial pronoancements pertaining to cases of sedition in India, along with a precipitous rise in the abuse of sedition law to

11 Reg v. Alexander Martin Sullian, (1868)11 Cox's Criminal Cases 44.

12 Niharendu Datt Majumdar v. King emperor, A.I.R. 1942 F.C. 22.

13 Eali S. Nariman, A test of Freedom, The Indian Express, 17 feb, 2016 at 10.

14 Bilal Ahmed Kaloo v. State of A.P., (1997) 7 S.C.C. 430.

15 Niharendu Dutt Majumdar v. King Emperor, A.I.R. 1942 F.C. 22.

16 J. Duncan M. Derrett, Law of Sedition in India, 14 The International and Comparative Law Quarterly 339, 340 (1965).

17 CONSTITUTIONAL ASSEMBLY DEBATES, December 7, 1948, speech by S.H. SINGH 16 available at http://164.100.47.132/LssNew/constituent/vol7p21.pdf (Last visited on March 16, 2016).

incarcerate nationalists[17] and, then J. Fazan Ali in the *Brij Bhushan and Anr. v. The State of Delhi*[18] gave his opinion that, "The constitution framer must have had before their mind the very widely accepted view supported by numerous authorities that sedition was essentially an offence against public tranquillity and was connected in some way or other with public disorder.....That sedition does undermine the security of the State is a matter which cannot admit of much denbt. That it undermines the "security of the state" usually through the medium of "public disorder" is also a matter on which eminent Judges and jurists are agreed." Thus, it was dropped from the article 19(2) i.e. exceptions to the freedom of speech and expressions.

Bul, it was a confusion that whether it would be covered under the clause "security of the state" or "public disorder". The confusion was eleared by the decision of the apex court in *The Superintendent, Central prison v Ram Manohar Lohia*[19], where it was held that the wide concept of "public order" is split up under different heads (security of the state, friendly relations with foreign states, pubhc order, deceney or morality em) and it observed that while all the grounds mentioned ean he brought under the general head "public order" in its most comprehensive sense, it was important that "public order" be demarcated from the others and also, the opinion of J. Fazan Ali in *Brij Bhushan and Anr. v. The State of Delhi*[20] snhstantiates the aforesaid view. Thus, it could be said that the term public disorder and the security of the state are differentiated only by degree. Henee, lhe offence of sedition in general affects, the public tranquiflity but it could undermine the security of the state, if it is grave in nature.

IV "Government established by Law" and "The Person Time being engaged for carrying on The Administration"

The term "government established by law in India" includes the executive power in action and it does not mean merely the constitutional framework. It includes state government as well as a central governmenl.[21] Further the apex court in *Kedarnath Das v State of Bihar*[22] case has distinguished "the term 'Government established by law' and 'the person time being engaged for carrying on the administratien', the former is a visiblc symbol of the state. The very existence of the state wifl he in jeopardy if the Government established by law is subverted. It

18 Brij Bhushan and Anr. v. The State of Delhi, A.I.R. 1950 S.C. 129.
19 The Superintendent, Central prison v. Ram Manohar Lohia, A.I.R. 1960 S.C. 633.
20 Brij Bhushan and Anr. v. The State of Delhi, A.I.R. 1950 S.C. 129.
21 Kshiteesh Chandra Roy v. Emperor, 1932 I.L.R. 59 (Cal.) 1197.
22 Kedarnath Das v. State of Bihar, A.I.R. 1962 S.C. 955.

means persons or persons collectively, in succession, whieh are authorized to administer government for the lime being."[23] It means the person or persons collectively, in succession, who are authorized to administer Government for the time being.[24] But, this distinction makes situation more complex as, it is very difficult to praclically implement. It suggests that the persons who ere being engaged in carrying on the administration are not the part of the government established by law. However, apparently they are also the visible symbol of the state.

V Punishment for Law of The Sedition

It is very important to note that the punishment prescribed for an offence of sedition under section 124A of the IPC is a surprising one ns the punishment may be imposed in an arbitrary manner; for instance a person ongaging in an act whieh brings or attempt to bring into hatred or contempt, or excite or attempt to excite disaffection towards, the government of India may be imposed the minimum imprisonment i.e. 3 years whereas a person engaging in an act which merely strongly eondemn the policy of the government may be charged with this offence and punished by maximam punishment of life imprisonment. The disparity continues; if we further compare the punishment for thc other offences which are against the public tranquility under chapter VIII of an IPC with an offence of sedition (necessarily an offence against pnblie tranquility), it can clearly be secn that Scction 153A IPC (promoting enmity between religions groups) and section 153B IPC (impulations prejudicial to national integration) havc a maximum of three years and in certain eases maximam of 5 years whereas, seditien has the maximum punishment prescribed as life imprisoament. Thus, it could be said that unlike the other offences in the IPC against public tranquility, sedition has harsh and arhitrary punishment.

VI Judicial Interpretation of The Law of Sedition

a. "DISAFFECTION" AND "DISAPPROBATION"

The flrst recorded state trial for sedilion is that of *Queen empress v. Jogendra Chunder Bose*[25] ('Jogendra Bose'). The Court. in its mnch debated judgment, laid down the distinction between "disaffection" and "disapprobation". Disaffection means a feeling contrary to affection, in other words, dislike or hatred. Disapprobation means simply disapproval. It is quite possible to disapprove of a

23 Ratanlal and Dhirajlal, The Indian Penal Code 632 (31st ed. 2006)

24 Surya Narayan Mishra and Sanjay Kumar Misra, The Indian Penal Code 289 (15th ed. Central Law Publication 2007).

25 Queen smpress v. Jogendra Chunder Bose, 1870 I.L.R. 19 (Cal.) 35.

man's sentiments or action and yet to like him. Further in *Queen Empress v Ramchandra Narayan*[26], The Court did not agree with the notion that "disaffection" was necessarily the opposite of affection, but it advocated that an attempt to excite disaffection amongst the masses was to be construed as an attempt to "excite political discontent and alienation from their allegiance to a foreign sovereign." In *Queen Empress v Bal Gangadhar Tilak*[27], J. Strachey in his opinion has held that, "it is not material that whether disturbance or any outbreak is caused or not by such articles. If the accused is intended to cause rebellion or disturbance, his act would doubtless fall within section 124A". It means simply having hatred or enmity against the government would bring charges at the home under section 124A. Whereas, in *Queen empress v. Amba Prasad*[28], the Court, however, held that even in cases of "disapprobation' of the measures of the government, if it can be deduced from a "fair and impartial consideration of what was spoken or written", that the intention of the accused was to excite feelings of disaffection towards the government and therefore it could be considered a seditious act. Thus "disaffection" would include the "absence" or "negation" of affection as well as a "positive feeling of aversion" towards the government. Hence, it could be deduced from the aforementioned judicial pronouncements the word "disaffection" has been interpreted very widely, it has been given a very wide scope.

b. FEDERAL COURT AND PRIVY COUNCIL

In *Niharendu Datt Majumdar v King emperor*[29], the question before the federal court was, whether the delivered speech by an appellant was "prejudicial act" which is made an offence under section 34(6) of Defence of India rules (mutatis mutandi to the law of sedition). Sir Maurice Gwyer, Chief Justice of the Federal Court at the time, held that the mere presence of violent words does not make a speech or publication seditious. Instead, he was of the belief that in order to be brought under the ambit of sedition, "the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency. Thus, public disorder or the reasonable anticipation or likelihood of public disorder is the gist of the offence."

But soon after this decision Privy Council in *The King Emperor v Sadashiv Narayan Bhalerao*[30] overruled the Federal Court decision and held that "They

26 Queen Empress v. Ramchandra Narayan, 1897 I.L.R. 22 (Bom.) 152.
27 Queen Empress v Bal Gangadhar Tilak, 1897 I.L.R 22 (Bom.) 112.
28 Queen empress v. Amba Prasad, 1898 I.L.R. 20 (All) 55.
29 Niharendu Datt Majumdar v. King emperor, A.I.R. 1942 F.C. 22.
30 The King Emperor v. Sadashiv Narayan Bhalerao, A.I.R. 1947 P.C. 82.

beld that the expression "excite disaffectien" did not include "excite disorder" and it is not an essential ingredient of a prejudicial act as defined in rule 34(6) of the defenee of India Rules (or of the offence under section 124A, Penal Code) that it should be an act which is intended or is likely to incite to public disorder. There is nothing in the languagc either section 124A Penal Code or Defence rule 34(6)(e) which eould suggest that "the acts or words eomplained of must either inclte to disorder or must be such as to satisfy reasonable men that that is their intention or tendency." Thus, former view suggests that there must be a public disorder or reasonable anticipation or likelihood of public disorder followed by the act whereas, later view suggests the speech itself, and whether or not it leads to any publlc disorder eould be an offence. If we go by the Privy Council decision the offence of sedition should be rendered as uncoustitutional. While going with decision of Federal Court, sectien 124A ean very well be continucd.

e. QUESTION OF CONSTITUTIONALITY

The way back in 1950, in case of *Tara Singh Gopi Chand v. The State*[31] Punjab and Haryana high court held that, "A law of sedition thought necessary during a period of foreign rule has become inappropriate by the very nature of the change which has come about..... It is enough if one instance (unsuccessful attempt to exeite bad feelings is an offence under section 124A) appears of the possible applieatian of the section to curtailment of the freedom of speech and expression in a manner not permitted by the constitution. The section then must be held to bave become void." And to avoid this constitutional difficulty the 1st constitutional amendment was brenght and the words "in the interest of" "publie order" were added.

After 8 years, again the question of constitutionality of the law of sedition brought before the court in the euse of *Ram Nandan v. State of UP.*[32], where the Hon'ble Allahabad High Court held that the said section inhibits the freedom of speech and expression mentioned ander article 19(1) and the restrictions imposed under article 19(2) of the constitution do nor pass the test of reasonability benec ultra-vires. But soon after 5 years the decision got overruled in the ease of *Kedarnath Das v. State of Bihar*[33].

In *Kedarnath Das v State of Bihar*[34], eourt held that "To protect the freedom of speech and expression, which is sin qua non of a democratie form of government

31 Tara Singh Gopi Chand v. The State 1951 Cr.L.J. 449.

32 Ram Nandan v. State of U.P. A.I.R. 1959 Alld. 101.

33 Kedarnath Das v. State of Bihar, A.I.R. 1962 S.C. 955.

34 Kedarnath Das v. State of Bihar, A.I.R. 1960 S.C. 955.

that our constitution has established. This Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression. But the freedom has to be guarded against becoming a license for vilification and condemnation of the Government established by law, in words which incite violence or have the tendency to create public disorder." Thus, it was held that any law which is enacted in the interest of public order may be saved from the vice of constitutional invalidity.

Thus, it has been seen that the desirability of having a law of sedition in our statute book may be examined and its proper meaning and scope determined so that a law of sedition, if it is necessary must fit in not only within the four corners of the constitutional provisions but must also be in consonance with the democratic spirit and traditions which pervade our Constitution.

d. OTHER CASES RELATED TO THE LAW OF SEDITION

The law of sedition has been invoked very frequently and in a very sporadic manner in recent past history. These are the few instances where the Supreme Court gave its opinion about the law of sedition.

In *Balwant Singh v. State of Punjab*[35], where it was held that "an application of sedition would be attracted only when the accused brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law in India, by words either written or spoken or visible signs or representations etc." The mere casual raising of slogans a couple of times without the intention to incite people to create disorder would not constitute a threat to the Government of India.

In *Sanskar Marathe vs The State Of Maharashtra And Anr*[36] the Court has taken a very liberal view and provided a guideline for implementation of the charge of an offence of sedition. The court has held that "Obscenity or vulgarity by itself should not be taken into account as a factor or consideration for deciding whether a case falls within the purview of Section 124A of IPC, for they are covered under other sections of law. The section aims at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence." Thus, the court has ruled out

Then in recent case of *Hardik Bharat bhai Patel vs. State of Gujarat & Ors*[37]

35 Balwant Singh v. State of Punjab, (1995) 3 S.C.C. 214.

36 Sanskar Marathe v. The State Of Maharashtra And Anr., (2015) S.C.C. Online Bom. 587.

37 Hardik Bharat bhai Patel v. State of Gujarat & Ors., (2016) 1 R.C.R. (Cr.) 542.

Gujarat High Court has again considered that what actually constitutes sedition. It was held that, "a speech or a statement, in which the speaker exhorts the persons, who are listening to him, to resort to violence, prima facie, could be said to be intended to excite disaffection towards the established Government and amounts to an offence under Section 124A of the Indian Penal Code".

The Supreme Court initially applied an older and weaker American standard, which required merely the "bad tendency"[38] or "likelihood" of violence as a consequence of speech. Then in middle era cases i.e. after 1962-2000 the restriction in question must have a proximate relation with the object sought to be achieved, must be proportionate and must not be "remote, arbitrary or fanciful". And finally, in *Arup Bhuyan v State of Assam*[39], and *Shreya Singhal v. Union of India*[40] where the Supreme Court has applied the modern American test of a "clear and present danger". Laid down most prominently in the decision of the Supreme Court of the United States in *Brandenburg v. Ohio*[41], the test requires that restrictions cannot be placed on speech unless it is directed to inciting, and is likely to incite "imminent lawless action".

e. RECENT INVOCATION OF LAW OF SEDITION

The recent data released by the National Crime Records Bureau in the August 2016 for the crimes in year of 2015 manifests that how the law of sedition has been rampantly misused as there were total 30 incidences have been recorded for the offence of sedition and total 73 persons have been arrested.[42] These are the few instances where the law has been abused by the state authorities:

JNU INCIDENT: The students from JNU organized an event on 9 Feb, 2016 on campus against the capital punishment to the 2001 Indian Parliament attack convict Afzal Guru. In the event Anti-India slogans were raised from the members of the Democratic Students Union. Students in the video are heard saying slogans like: "Kashmir ki azadi tak bharat ki barbadi tak, jangh rahegi jari", which led to arrest JNU Students Union's president Kanhaiya Kumar and Umar Khalid on the charges of sedition. Here, it can be seen though the anti-indian slogans were raised but there was *no public disorder or the reasonable anticipation or likelihood of public disorder* was caused which has been held as the gist of the offence of sedition by the federal court and upheld by the apex

38 Schenck v. United States, 249 U.S. 47, 47 (1919).

39 Arup Bhuyan v. State of Assam, (2011) 3 S.C.C. 377.

40 Shreya Singhal v. Union of India, (2013) 12 S.C.C. 73.

41 Brandeoburg v. Ohio 395 U.S. 444, 444 (1969).

42 http://ncrb.gov.in/StatPnbbcations/CII/CII2015/FILES/Table%2021.1.pdf

43 Kedarnath Das v. State of Bihar, A.I.R. 1960 S.C. 955.

court in *Kedarnath Das v State of Bihar*[43] case.

AMNESTY INTERNATIONAL: An event was organized by Amnesty International India in Bengaluru as a part of campaign to seek justice for human rights violation in Jammu and Kashmir. Certain slogans insulting to India were uttered in the event. The Beogaluru police filed an FIR under section 124A for the said incidence though later it was withdrawn, but this is an ample proof of abuse of law of sedition. One can very well criticize and condemn the alleged anti-india slogans. But mere utterance of slogans by itself does not constitute sedition unless there is an exhortation to overthrow the day of the government by recourse to violence.[44]

DIVYA SPANDANA ALIAS RAMAYA CASE: This incident is the perfect example of abuse of law of seditlon in India. An actress turned politician Ramaya in response to defence minister Manohar Parikkar's statement that "Pakistan is hell" expressed her views after visiting Pakistan for a SAARC event that "Pakistan is not hell. People there are just like us. They treated us well" has been slapped with a sedition case. Now, the picture is quite clear that it is a high time to reconsider this particular provision of IPC otherwise it will be repeatedly used as the tool of harassment.

VII Law of Sedition in India vis-à-vis Freedom of Speech and Expression

a. LAW OF SEDITION : A NECESSARY EVIL?

It has been held by the Supreme Court that in order to protect the state against subversion and threats to lawfully constituted authority, retentiou of law of the sedition seems necessity. Auy law which is enacted in the interest of public order may be saved from the vice of constitutional iuvalidity.[45] Thus, sedition is not a legislation meant to suppress the voice of Indian people. If we interpret the said section as the Supreme Court did in 1962, the retention of this particular section seems important, as there may be cases in which the section ean be legitimately invoked. Therefore, the rule may be adopted i.e. retaiu the section but strike down the sectiou which are not in conformity with the section.[46] Retaining the law of sedition never implies that "to silence or discipline erities". Right to Dissent doesn't authorize people to demanding that India be broken into pieces. It

44 Soli J. Sorabjee, Sedition law cannot be used against honest view, expressed peacefully, The Indian Express, 25 Aug, 2016 at 10.

45 Kedarnath Das v State of Bihar, A.I.R. 1962 S.C. 955.

46 Soli J. Sorabjee, Sedition law cannot be used against honest view, expressed peacefully, The Indian Express, 25 Aug, 2016 at 10.

was clearly held way back in 1962 by the apex court "comments, disapprobation of the measures of government without exciting those feelings which generate the inclination to eause pubic disorder by acts of violence, would not be penal". There is no obligatien mentioned under the section 124A to show the affection towards any government. The wise men and women who made the constitution placed some restriction on freedom of speech and expression. The 1st constitutional amendment was done in the article 19(2) and the restriction in "the interest of...public order" was added. The Constitution, CrPC and IPC do not treat freedom of speech as absolute and subject it to various restrictions. Article 19(2) provides for reasonable restrictions. The CrPC provides for preventive arrest when a breach of peace is apprehended, whereas the IPC contains several sections that provide for punishment for different types of offensive speeeh.[47] The Supreme Court not only eircumscribed section 124A, it also held it to be constitutionally valid.[48] It is evident that the succcssive governments haven't repealed it from the statute books, and have invoked it. This says something about its eontinuanee importanee. Hence, the law of sedition may be sustainable under the democratic government like India.

When it comes to an offence of "criminal intimidation" no one talks about freedom of speecb. If the law of sedition inhibits the freedom of speech and expression, then why not criminal intimidatien? In eriminal intimidation individual's safety is involved whereas the law of sedition is all about the "security of the state". Ilowever it is interesting to note that ultimately state itself is made up of group of individnals. Thus, any threat to state ultimately leads to threat to an individual. Hence, the law of sedition somehow subsiantiates its neeessity.

b. SEDITION : A DEATH OF FREE SPEECH ?

Our written eonstitution guarantees freedom of speech, but it does not guarantee freedom after speech. Speeeh is really free enly when it hurts.[49] There ean be indeed no real freedom unless thought is free and unchecked, not free thought who agrees with us but freedom for the thoughts we hate.[50] And, Sedition is a remnant of that part of the criminal law which inhibits freedom of speech.[51] Under the garb of "scditiou" government always tries nationalism to crush constitutional patriotism, legal tyranny to erush dissent, political power to settle pretty scores, and administrative power to destroy institutions.[52] If we go by the decision of Privy Counell in *The King Emperor v Sadashiv Narayan Bhalerao*[53] Section 124A of IPC should be struck down as a unconstitutional as it clearly

47 Abhinav Kumar, Freedom of Screech, The Indian Express, 18 feb, 2016 at 10.

48 Kedarnath Das v State of Bihar, A.I.R. 1962 S.C. 955.

49 Fali S Nariman, A Test of Freedom, The Indian Express, 17 feb, 2016 at 10.

50 Manubhai Patel v State of Gujarat and Anr., 1972 Cr. L. J. 388.

51 Fali S Nariman, A Test of Freedom, The Indian Express, 17 feb, 2016 at 10.

52 Pratap Bhanu Mehta, An Act of Tyranny, The Indian Express, 16 feb , [2016] at 11.

53 King Emperor v. Sadashiv Narayan Bhalerao, A.I.R. 1947 P.C. 82.

violates the freedom of speech and expression. As we saw above that the term "Sedition" had been intentionsly dropped by the framers of the Constitution from Article 19(2), the exception clause to free speech, only because, the founding fathers had said, "a line must be drawn hetween criticism of Government whieh should be welcome and incitement whieh would undermine the security or order on which civilized life is based, or which is calculated to overthrow tbe State. Therefore, the word 'sedition' has been omitted."[54]

It is an offenee incorporated into the Indian Ponal Code (IPC) which the governments have found handy to silence or discipline erities.[55] If there is to be a public order incitement offence, the scope of the offence should be very narrowly eonfined so that incitement operates to catch only those forms of behavior which, "eome dangerously close to the security of state". It is elearly being used against that specifie class of person who raises voice against the polieies and activities of government. Citizens in a democratic country should be free to criticize their governments, i.e. what a participatory government is all about. Bnt, Sedition has been provided as a tool iu the hand of the government to suppress the voiee of people. The retentiun of sedition laws in India's statute books and the resulting arbitrary implementations of the said laws to criminalize the 'disaffection' towards the state are undesirable in a democratic suciety. It is alse being used to suppress any sort of disapproval of the views of the government, and also any other political thinking whieh goes against the government of the day. Mahatma Gandhi has termed it as a "prince among the pohtical sections of the IPC designed to suppress the liberty of the citizen".

In India, the law in the statute is written in such a way that it would suffiee to make a surprising number of persons guilty of sedition; no one, however, supposes that it is to be read in this literal sense once tbe apex court has very rightly interpreted it in 1962 and stayed firm in its opinion. But, the trial courts are applying it in very broader sense (as Privy Council applied in 1947). Therefore, the law in the statute book has lost its potency. Every organized soeiety has right to protect itselfagainst any attempt which subverts it, cannot be denied; but the attempts whieh have seemed grave to one age may be the snbject of ridicule in another. Hence jndicial decisions must vary with the time, political temper and decisions given in particular period of time whicb were no doubt appropriate at the time when they were given may well be unacceptable to the eircumstances of today. It is also very well recognized that the right to utter honest and reasonable criticism is a source of strength to a eommunity rather than a weakness.

54 Constituent Assembly of India Part I Vol. VII, 1-2 December 1948, available at http://parliamentofindia.nic.in/ls/debates/vol7p16b.htm accessed on 23 March, 2016.

55 P. D. T. Achary , Render Sedition Unconstitutional, The Hmdu, 14 oct, 2015, at 10.

VIII Conclusion

The courts of India have been unable to give a clear direction to the law. While the final position on the law in India was laid down as early as 1960, the law of sedition is characterized by its incorrect application and often, arguably, used as a tool for harassment. The judicial interpretation of sedition must vary with the political temper of the times. Time, place and the habits of minds of people should be reflected in the decisions. By keeping its scope deliberately vague, generations of members of the ruling political class have ensured that they have a tool to censor any speech that goes against their interests. But as we saw above that sedition is necessarily an offence against "public tranquility" and, chapter VIII of the IPC contains the offences which are against the said "public tranquility". Thus, any such act that is 'prejudicial to the public tranquility' would be covered under this particular chapter. Therefore, the law of sedition to an extent has become redundant; it may also be argued that the law of sedition has become obsolete. It has got no place in a democratic country like India.

The rampant misuse of the sedition law despite the judicial pronouncement in *Kedar Nath's* case circumscribing the scope of the law has meant that there is a serious case for repealing this law. Notably, the Nation of England which effected this sedition law in the IPC has itself repealed seditious libel through the Coroners and Justice Act, 2009 as the language in which the offence was framed was archaic and did not reflect the values of present day constitutional democracies. However, even in India the 42nd law commission report in 1972, also suggested that the government should revisit the definition provided under section 124A of IPC.

In India the charges of sedition is levied very frequently and its sporadic uses had a "chilling effect" on free speech. However, it is interesting to note that the offence of sedition in England has not been invoked since 1909 while, on the contrary, cases of sedition under section 124A are rampantly used almost every day. The existence of sedition laws in India's statute books and the resulting criminalization of 'disaffection' towards the state are ideologically unacceptable in a democratic society. Hence, the government of India should consider its abolishment.

Economics of Eminent Domain in India : A Battle for Efficiency

Tarika Jain and Komal Jatav**

ABSTRACT

The exercise of power under the doctrine of eminent domain has been a contentious issue in India since decades. The debate over land acquisition by the government for public use has only intensified recently with the introduction of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Bill, 2015 in the Parliament. This paper seeks to undertake an analysis of the process involved in eminent domain, especially in case of the 2015 Bill, through an economic lens. Part I of the paper gives a brief background on the evolution of law on eminent domain in India, tracing its roots from the colonial rule to the present Part II attempts to examine this doctrine using basic economic tools to arrive at an understanding of the efficiency, if any, involved in the process. The Part III of the discussion is an examination of this process as specifically provided under the 2015 Bill. The proposed changes to the Right to Fair Compensation and Transpareney in Land Acquisition, Rehabilitation and Resettlement Act, 2013 are then discussed in the light of these economic concepts in order to assess the positions of the stakeholders in the wake of the proposed amendments and the overall social and economic impact this new law will possibly have. Under Part IV, we juxtapose the position upheld by the Supreme Court under LARR Act 2013 against LARR (Amendment) Bill, 2015.

I Introduction

It has been a rampant practice especially in India by the State to acquire private property in the "larger interest of the public". The basis of this can be found in the doctrine of eminent domain which entails that any act of the sovereign State is justified so long as it serves a public interest. The doctrine imbibes two Latin maxims - *Salus populi suprema lex* which means 'Welfare of the People is the Paramount Law' and *Necessitas pubbico major est quam privata* which

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translates to 'Public Neeessity Is Greater Than Private Necessity.'[1] Under this doctrine the government has indulged in rampant taking especially of agricultural land from rural areas and has often been brought under scrutiny for providing inadequate compensatiun to the landowners.

Background

For over a eentury the colonial government conducted its land grabbing activities under the Land Acqulsition Act 1894. This draconian law, which permitted the governmcnt to acquire land which was needed for public purposes and for Companies, was subjected to wide criticism and protest for being regressive for landowners, especially those in rural areas. The primary reasons for this were the provisions for adequate compensation, or rather, their lack thereof. Another issue being faced because of the letter of that law was that even though states acquired land elaiming that it was noeded for the use of a government department hut eventually it got transferred it to private companies.[2] Finally, the wording of the Act and its provisions remained completely silent on the issue of rehabililation and resettlement (R&R) to displaced families.

Ultimately, in 2013 the UPA government passed The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, (hereinafter LARR Act, 2013) replacing the nineteenth century Act. As the name indicates, the objcctive of the Act was to make the entire process under eminent domain more pro-landowners by improving the provisions for compensation and R&R thereby severely decreasing the arbitrary exereise of power by the State in acquiring land indiscriminately.

This was accomplished firstly by increasing the compensation provided to land owners, from 1.3 times the price of land to 2 times the price of land in urban areas, and 2-4 times the price of land in rural areas. Secondly, as the name suggests, the LARR Act, 2013 provided R&R to both – the land owners as well as those families which did not own land, but were dependent on the land for their livelihood. Thirdly, the practice of Social Impact Assessment (SIA) was introduced whereby it was made mandatory to assess whether a projeet serves the stated publie purpose, the benefits outweigh the costs and adverse impact, is in larger public interest, whether the minimum area that is required is being acquired, and the social impact of the acquisition. Fourthly, it also mandated that the consent of 80% of land owners be obtained for private projects, and the

1 *Chiranjit Lal Sahu v Union of India*, AIR 1951 SC 419

2 Vikas Nandat, *Land Acquisition Law in India: A Historical Perspective*, 3 IJIRS. 465, 466 (2014) http://www.ijirs.com/vol3_issue-5/33.pdf

consent of 70% of land owners be obtained for public-private partnership projects (PPP). However, the requirement of consent of land owners can be foregone for government projects. Additionally, other changes like prohibiting the acquisition of irrigated multi-cropped land, except in certain cases where the limit may be specified by the government were made by the LARR Act, 2013 in the process of land acquisition.[3]

Another requirement of the LARR Act, 2013 was to bring 13 other laws, which pertain to the acquisition of law, within the ambit of Act in order to ensure adequate compensation and R&R under these laws as well. A deadline of January 1, 2015 was set for this purpose, failing which the government issued an Ordinance to extend the compensation and R&R provisions of the LARR Act, 2013 to these 13 laws. The Ordinance was promulgated on December 31, 2014 and will lapse on April 5, 2015 if not passed as a law by Parliament. Thus, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Bill, 2015 (hereinafter LARR (Amendment) Bill, 2015) was introduced in Parliament by the NDA government to replace the Ordinance. Amidst opposition from opposition parties, media and social activists alike because of the certain controversial changes in the Act of 2013, which ostensibly take an approach which is detrimental for the farmers' rights, vesting the government and private entities which indiscriminate power, the Bill was passed by the Lok Sabha on March 10, 2015 with certain changes and awaited its final verdict in the Upper House only to be lapsed in August 2015. Since then the Bill has been referred to a Joint Parliamentary Committee which has asked for an extension to submit its report till the end of the first part of the Budget Session.

II Eminent Domain: Are Takings Economically Efficient?

a. *Takings*

There are primarily two kinds of transfer of agricultural lands for non-agricultural purposes – the first being voluntary and the second being involuntary. A third kind of transfer is also possible which would see a combination of the first two kinds of transfers, that is, transfers which are partially voluntary.[4] In the first case, the

3 *See also* PRS LEGISLATIVE RESEARCH, *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Bill, 2015* January 20, 2016, 6:42 PM), http://www.prsindia.org/billtrack/the-right-to-fair-compensation-and-transparency-in-land-acquisition-rehabilitation-and-resettlement-amendment-bill-2015-3649/

4 Ram Singh, *Inefficiency And Abuse Of Compulsory Land Acquisition: An Enquiry Into The Way Forward*, (Centre for Development Economics, Delhi School of Economics, Working Paper No. 209), http://www.cdedse.org/pdf/work209.pdf

buyer and the selier engage in bargaining and arrive at an efficient solution wherein the cooperative surplus is maximized and both the parties are abic to gain at least their threat values from the property. This is called as Coasian bargaining[5].

Therefore, in a voluntary sale the owner is able to bargain to gain the subjective price of tbe property, that is, the price at which s/he values the property. This subjective price need not be the market price of the property.[6]

Clearly, eminent domain is a form of involuntary transfer. Here it is not possible for the landowner and the government to engage in bargaining whicli more often than uot proves to he an impediment for the landowner as he or she is not be able receive his or her threat value for the land. In this situation, the duty lies on the government to provide the landowner with 'just' compensation so as to ensure that s/he is not left worse-off by the transaction.

It has been proven by the works of various scholars that consensnal exchange is almost always beneficial to both parties in a transaction, while coerced exchange may or may not be, depending on whether the compensation is sufficient to make the coerced party indifferent to the loss.[7]

However, takings by government lielps to overcome the issues created by the fact that land markets are imperfect, suffering from high transaction costs and adverse selection, and there exists the problem of holdouts whicli often prove to be a major impediment in development projects.[8]

b. Public Use

In order for the State to exercise its power of eminant domain it is imperative that is established that the acquisition is most definitely being done in furtherance of a public-use. This is so becausc in case of takings, thc government is in a position to derive unilateral gain as the landowner loses his/her capacity to negotiate for a price.[9] Suppose that the government acquires property under the exercise

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5 The theorem is discussed by the celebrated Nobel Prize in Economics winner Professor Ronald H. Coase in his work *The Problem of Social Cost*, 3 L LAW & ECON. I(1960).

6 ROBERT COOTER & THOMAS ULLEN, LAW & ECONOMICS 176 (The Pearson Series in Economics, 6th ed. 2012)

7 Thomas W. Merriil, *Economics of Public Use*, 72 CORNELL L. REV. 61, 64 (1986) http://scholarship.law.comell.edu/cgi/viewcontent.cgi?article=3296&context=clr

8 Sebastian Morris & Ajay Pandey, *Towards Reform of Land Acquisition Framework in India*, (Indian Institute of Management, W.P. No. 2007-05-04), http://www.ilmahd.ernet.in/publieations/data/2007-05-04_Morris.pdf.

9 *Supra* note 6

of its power under eminant domain in lieu of compensation whicli is computed at the market price while the subjective price of the property for the owner was higher than the marker value of the property. This property is then sold to another private ontity at a price whicli is less than what that private ontity was wiliing to pay. This means that is possible that the property is transferred from a liigher valuing owner to a lower valuing owner. Such a situation would not have occurred in case of a free market exchange. This entails that eveu payment of compensation cannot alone prevont the possibility of abusc of the property by the government.[10]

Therefore, the public-use requirement prevonts this situation by prohibiting the ase of takings to bypass markets and transfer private property from one private person to another thereby benefiting one private party at the eost of the other. Instead, property must be taken for a public use.

It must be understood that while identifying what "public use" ontails, scholars have evolved a narrow and a broad conception of the term. The prior requires that the taking, in literal sense, is pliysically used by a segmont of the public. On the other hand, the latter merely requires that the taking produces a public benefit or advantage. The broader test has come to beeomc the generally accepted prineiple.[11] It is for this broader understanding of the term "pubtic use" that the government has heen justifying its land acquisition activities. In Part III of the paper we shall discuss why the LARR (Amendmont) Bill, 2015 has come under scrutiny for its wider understanding of the term as compared to the LARR Act, 2013.

c. 'Just' Compensation

What Is Efficient Compensation?

As has been mentioned above. it is imperativc for any process of land transfer to compensate the adversely affected parties so that they are not left worse off. This is the idea behind the concept of Pareto Efficiency. Pareto efficiency, which is also somerimes referred to as allocative efficiency, talks of the satisfaction of individual preferences. A particular situation is said to be Pareto or alloeatively efficient if it is impossible to change it so as to make at least one person better off (in his own estimation) without making another person worse off (again, in his own estimation).[12] For a potential Pareto improvement[13] to occur, it is required

10 *Supra* note 6

11 Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REv. 205, 225 (1978)

12 Vilfredo Pareto was Italian economist who used the concept in his studies of economic efficiency and income distribution

that a change in allocation should be such that the gainers iu the transaction gain more than the losers lose. If this condition is satisfied, the gainers can, in principle, compensate the losers and still have a surplus left for them.

Therefore, for a taking to be Pareto efficient, it is required that the owners should get compensation which does not put them in a worse situation. This means that an efficient compensation would be that which is at ieast equal to their individual valuation of their respective properties. Also taking can he said to be efficient if and only if the total benefits which are derived from it, that, is the public interest that is served by the land, exceeds the total of the resulting costs.

The benefits and the costs can be private as well as public. The costs whicli are incurred in tbe cuse of taking can be divided into three bioad categories[14]: First, the costs to the owners of the land in question for his ontitlemeut as the owner of the property. These costs include the som of estimation of the land by the owners along with the cost of litigation whieh may fall on the owners in case of a dispute. Second, costs to those wlio are not the owners of the land but have certaiu interest in the land, for example tbose wliose livelihood is dependont on the land. Third, is the cost of the externalities which may arise ont of the transfer such the environmental damage caused by the alternative use of the land.

The process of emiuent transfer can said to be Pareto efficient only if the abovc mentioned costs are internalised by either by the State itself or by compelling the buyer. Once this is done, the process may actually prove to be a better option as compared to voluntary transfer as the problem of holdouts will not arise in such situations. It is rather beneficial for immediate devclopment projects since the properties are compulsorily acquired, regardless of the intensity of unwillingness of the owners to part with their property.

However, for an eminent domain based process to be efficient and fair the state must be able to get information about the benefits as well as all of the costs of the land transfer. The problem is that the state lacks the televant information on the costs as well as thc benefits.

d. Problem of Overinvestment

However, many economists point out the fallout of providing compensation in the form of overinvestment in the land by the landowner. Overinvestment occurs wlien individnals perceive a socially undesirable and excessive incentive to invest in improving their property when there is a high probability that their property is

13 Also referred to as Kaldor-Hicks efficiency

14 *Supra* note 4

going to be acquired by the state. This is done with a view to increase the market price of the property so that the compensation which is received by the owner of the property is more than what it would have been initially. The problem with this is that the excessive investment which was made by the owner of the property would ultimately prove to be merely a social waste.[15] Therefore, before becoming complacent in the idea of providing just compensation to the owner, it is imperative that the government remains weary of the possibility of this overinvestment.

e. Circumventing Opposition to Eminent Domain

Let us for a minute recall the concept of Pareto efficiency which was discussed above. To further elaborate on the application of this economic tool, let us assume a situation where the takings benefits all the parties involved, that is, the public use is satisfied and nobody is the loser, not even the land owners. This is a situation of "Pareto gain". On the other hand, where there is a potential Pareto improvement, there is a "net gain" as the benefit of the few outstrips the harm of the losers. In contrast, a situation of "ner loss" occurs when the sum costs exceeds the sum benefits because of the acquisition.

A government reform which affects the larger society elicits a reaction from the stakeholders. In case of a Pareto gain, since there are no losers, there is no opposition to the land acquisition. However, in case of net gains, the majority consisting of the winners favours the acquisition. Finally, in case of net loss, the winners are in a minority and it is only this minority that favours the acquisition. This model has been proposed by Prof. Cooter and Prof. Schäfer in their work titled "Solomon's Knot: How Law Can End the Poverty of Nations"[16]

Technical Term	Welfare Effects	Political Support
Pareto gain	All win	Consensus
Net gain	More win than lose	Majority
Net loss	More lose than win	Minority

Three Types of Reforms[17]

It is common knowledge that in a democracy very often the power does not vest with those who enjoy a majority, but rather it remains with those who have the capacity to influence the decision makers. Therefore, it is likely that government

15 Steven Shavell, *Economic Analysis of Property Law*, (Harvard Law and Economics Discussion Paper No. 399) h http://www.law.harvard.edu/programs/olin_center/papers/pdf/399.pdf

16 Robert D. Cooter & Hans Bernd-Schäfer, Solomon's Knot: How Law Can End the Poverty of Nations (Princeton University Press, 2011)

17 *Ibid*

may, under pressure from these influential stakeholders, undertake a developmental or industrial project that benefits these private companies at the cost of the farmers. Quite naturally, this will elicit protests from the large number of farmers and other land owners as has been witnessed in cases of various developmental projects such as the Singur Tata Nano controversy, the POSCO controversy and the Gujarat Narmada Dam controversy.[18] In fact, this is precisely the reason why the LARR (Amendment) Bill, 2015 is facing such strong opposition.

In order to resolve the impasse the may be created due to the opposition and also the mitigate the harm that may be caused due to such delay in development, Prof. Cooter and Prof. Schäfer suggest that the opposition to such development can be overcome in three ways. First, they suggest that the losers can be bought off by a more inclusive political bargain that gives them a share of the surplus from growth. Giving everyone a share of the surplus transforms net gains into Pareto gains. In the context of LARR this can take form of 'just' compensation made by the government to the landowners so that they are not made worse off. Secondly they suggest that a veil of ignorance should be created. This means that an uncertainty should be maintained with regard to the outcome of the change which the government is going to undertake. If that happens then in the wake of a possibility of a gain, that the party may in fact turn out be the winner, the opposition will die out. Finally, it is suggested that the cost of growth must be diffused out and each party must bear a certain share of the cost. This will render the oppression passive.

Policy	Consequence
buy-off / Pareto gain	convert opponents to supporters
randomize /expected Pareto gain	convert opponents to supporters
concentrate benefits & diffuse costs	activate supporters & pacify opponents

f. Circumventing Opposition to Growth-Promoting Reforms[19]

Therefore, this model recommends an economic solution to a political impasse such as the one which often arises in case of land acquisition thereby impeding the growth of developmental projects and decreasing the net gain as the cost of litigation due to opposition also increases.

18 *Supra* note 9

19 *Supra* note 15

III LARR (Amendment) Bill, 2015: An Economic Analysis

In this Part, we shall attempt a detailed assessment of the amendments proposed in LARR Act, 2013 by LARR (Amendment) Bill, 2015 in the light of the general economic analysis of the eminent domain undertaken in the preceding section.

a. Landowners as Stakeholders

Emerging As Losers

The first major change that has been brought about in LARR Act, 2013 is also the most controversial one. As per the new proposed law, the five categories of (i) defense, (ii) rural infrastructure, (iii) affordable housing, (iv) industrial corridors (set up by the government/government undertakings, up to 1 km on either side of the road/railway), and (v) infrastructure projects are exempted from the requirement of consent of 80% landowners in case of private projects and 70% landowners in case of Public-Private Partnership Projects (PPPs). It must be noted here that these five categories are very broad in nature and cover more or less a large number of projects for which land may be acquired for public use. The natural implication of this is that the entire process of land acquisition becomes less consultative and the situation reverts back to a pre 2013 scenario. Quite understandably this gives rise to opposition on behalf of the landowners against the taking which may sometimes impede the developmental projects as we have seen in Part II.

Additionally, the requirement of a Social Impact Assessment (SIA) is also lifted for the above 5 categories. The object of conducting SIA is to alert the planners as to the likely benefits and costs of a proposed project, which may be social and/ or economic so that an informed decision can be made with regard to the project. The most useful outcome of a SIA is to develop mitigation plans to overcome the potential negative impacts on individuals and communities.[20] The most significant use of conducting SIA was that it estimated information on not the only the owners of the land, but also took into account the effect of acquisition on those who were dependant on the land. As a result of scrapping SIA, this segment of people remain unidentifled because of which the information on the cost of taking remains incomplete and therefore the total compensation provided remains inefficient. This situation is a failure to provide "just" compensation as was discussed in Part II of the paper.

20 Social Impact Assessment, Report of a Research Project on Social Impact Assessment of R&R Policies and Packages in India, Council for Social Development, 2010

Thirdly, an additional criterion for determining the time period after which unutilized acquired land must be returned has been added. The Bili states that unutilized land mnst be returned to the owner at the expiry of (i) fivc years, or (ii) any period specified at the time of setting up the project. While the government justifies the need by pointing out that projects sucb as creation of smart cities, industrial corridors, business centers, defense projects, highways, irrigation projects, dams have a long gestation period which require a time period of more than 5 years, it arguable that the addition of the ambiguoas clause may in fact be an aid for the land to go unutilized for a long period of time.

Fourthly, the term 'private company' has been replaced with 'private entity' implying that the scope for acquisition has bcen broadenecl to include a propriemrship, partnership, corporation, non-profit organization, or other entity, in addition to a private company, if the project serves a public purpose. Therefore, the distinetion between publie versns private purpose becomcs clouded as the scope for acquisition for private purposes becomes wider.[21] Thcsc purposcs may include health, tourism, cold storage sectors and SEZs and however in cffect many of the PPPs are used simply for the object of transferring land to private entitics. This takcs up back to the problam involved in involuntary exchange whcrein cven compensation falls short ensuring efficiency as the government is able to bypass the market and the lendowners are not ablc to gain the subjective price for their land from the private entitics.

Finally, requirement for holding government officials guilty for offences has been liberalized as a provision has been added to state that in such situations a government employee can be prosecuted only with the prior sanction of the government.

In the light of the abovc, it becomcs quite clear why farmer right activists and landowners themsclvcs had vigorously opposed the new Bill thus creating a political impasse in the Rajya Sabha.

Moreover, we have already seen wliy it is essential for the government to pay compensation and furthennore we have examined what would amount to an efficient sompensatien. In the following section we see whether the LARR (Amendment) Bill, 2015 envisages this 'just' compensation.

As have been mentioned earlier, LARR Act, 2013 provides for compensation which equals 2-4 times the market value of the property being acquired, an

21 Ram Singh, *Land acquisition ordinance: Important to ensure that those who sacrifice their land are not shortchanged*, THE ECONOMIC TIMES, (January 20, 2016, 7:52 PM), http://blogs.economictimes.indiatimes.com/et-commentary/land-acquisition-ordinance-important-to-ensure-that-those-who-sacrifice-their-land-are-not-shortchanged/

evaluation which has been continued under the Bill. It has been argued that is estimation is exaggerated.[22] The 'market value' is estimated on the basis of sale deeds of similar properties. This evalnation remains faulty as many a times sales deeds are undervalned. This is becausc firstly thcy provide for pact prices. Secondly, at the time of the transfer, parties often quotc a priee much lower than the actual value of the transaction in the hopes of fooling the system and saving the stamp duty. Consequently, it is argued that even if the compensation is several times the sale-deed rates, it will, at best, be comparable to the actual market value.[23] In fact, a study was undertaken the findings of whicb indicated that the average government compensation is just about one-fourth of the market value of land.[24] It flows from this that even though the government gives the condolence of an increused rate of compensation, in reality, the sompensation received by the landowner wili be less than the actual valuc.

A Small Win

The existing Act of the UPA kept 13 most frequently ased eentral laws for Land Acquisition for Central Government Projects out of the purview of compensation under LARR Act, 2013. Therefore, there were discrepancies with regard to compensation in different cases of land acquisition. Thesc acts are applicablc for national highways, metro rail, atomic energy projects, electricity related projects, etc. The present amendments bring all those exempted fiom the 13 acts under the purview of this Act for the purpose of compensation, rehabilitation and resettlement. Therefore, the amcodment benefits farmers and affected families. Government has included these to enhance value of land, create jobs and improve infrastructure.

b. Government as Stakeholder

Towards Rapid Bevclopment

The reason for the government to bring about the above amendments appears to bc simply one – to ensure uninhibited growth in development projects by way of takings. Tbe proposed ehanges in the Land Acquisition Act would allow a fast track process for defence and dcfence production, rural infrastructure including electrification, affordable housing, indnstrial corridors and infrastructure projects including projects taken up ueder Public Private Partnership mode where ownership

22 *Ibid*

23 *Ibid*

24 Ram Singh, *Litigation over Eminent Domain Compensation*, (International Growth Center, Working paper) http://www.theigc.org/wp-content/uploads/2014/09/Singh-2013-Working-Paoer.pdf

of the land continues to be vested with the government. As per the changes brought in the Ordinance, multi-crop irrigated land can also be acquired for purposes like national security, defence, rural infrastructure including electrification, industrial corridors and building social infrastructure. Therefore, if the claims of the government are to believed, their argument in favour of the Bill seems to imply that these amendments are needed in order to increase the net benefit from the developmental projects and the spill over of this would io turn benefit the farmers and the landowners.

A Lost Cause?

Had the Bill passed in the Parliament in its current state then there were certain factors which would have made the government lose out on what could have been an efficient outcome. The reason for this is that with the requirement of SIA gone in major sectors of developmental projects there will be a situation of information asymmetry. This means that the possibility of the actual net loss exceeding the actual net benefit will be high as the government will continue to function on the basis of a faulty calculation of benefits and losses. This may in turn lead to reduction in aggregate welfare of the society.

In addition to this, with such flagrant opposition coupled with the issues of providing just compensation latent in the Bill, a future where courts find themselves flooded with litigation involving the Bili appears to be inevitable. This would mean en added cost of litigation on the state, let alone the crisis situation it would create for the poor farmers.[25]

IV Bhargava & Associates Pvt. Ltd. & Ors. vs Union Of India & Ors[26]: A Case Analysis

a. Background

Since its enactment, a handful of cases have been decided by the Apex Court pertaining primarily to one of its provisions, that is Section 24(2) which provides for the time period of the retrospective effect of the LARR Act, 2013. As per this Section, the Land Acquisition Act, 1894 will continne to apply in certain cases, where an award has been made under the 1894 Act. However, if such an award was made five years or mom before the enactment of the LARR Act, 2013, and the physical possession of land has not been taken or compensation has not been paid, the LARR Act, 2013 will apply.

25 *Ibid*

26 CIVIL APPEAL NO. 5099 of 2008

b. Decision

One of the most recent decisions on this section has been delivered in the case of *Bhargava & Associates Pvt. Ltd. & Ors. vs Union Of India & Ors*[27] where the relief was sought by land losers by continuing proceedings under Section 24(2) of the 2013 Act, seeking lapse of the acquisition proceedings initiated under the Land Acquisition Act, 1894

Court gave the benefit of this Section to the land losers. The Division Bench while arriving at its decision placed reliance on the interpretation made by a three judge bench in the case of *Pune Municipal Corporation vs. Harakchand Misirimal Solanki*[28] along with *Union of India vs. Shiv Raj*[29] and *Bimla Devi vs. State of Haryana*.[30]

Furthermore, it relied on the following clarification arrived at in *Radiance Fincap (P) Ltd. v. Union of India & Ors.*[31] with regard to the prospective operation of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Settlement Ordinance, 2014:

"The right conferred to the land holders/owners of the acquired land under Section 24(2) of the Act is the statutory right and, therefore, the said right cannot be taken away by an Ordinance by inserting proviso to the abovesaid sub-Section without giving retrospective effect to the same."

It must be noted that the above has been reiterated in the cases of *Arvind Bansal v. State of Haryana*[32] and *Karnail Kaur v. State of Punjab*.[33]

c. Observation of the Court

"*In the event that there is no ambiguity that (a) the Award is over five years old and (b) that compensation has not been paid or (c) that possession of the land has not been taken, the acquisition is liable to be quashed. In Rajiv Chowdhrie HUF v. Union of India [Civil Appeal No.8786 of 2013, decided on 06.02.2015], noting that the physical possession of the land had not been taken by the Respondents, nor compensation paid by the Respondents to the Appellant in respect whereof the Award was passed on 6.08.2007, the acquisition proceedings had been declared as having lapsed. The same position was arrived at in Rajiv Chowdhrie HUF v. Union of India in Civil Appeal No.8785 of 2013 decided on 10.12.2014 by a different Bench of this Court.*"

27 CIVIL APPEAL NO. 5099 of 2008
28 (2014) 3 SCC 183
29 (2014) 6 SCC 564
30 (2014) 6 SCC 583
31 Civil Appeal No. 4283 of 2011
32 Civil Appeal Nos.417-418 of 2015 decided on 13.01.2015
33 Civil Appeal No. 7424 of 2013 decided on 22.01.2015

d. Jnxtaposition witb tbe LARR (Amendment) Bill, 2015

Thus it becomes clear tbe Apex Court has, in a number of cases, reiterated the position held in *Punc Municipal case*[34] that '*the deposit of compensation amount in the Government treasury is of no avail and cannot be held to be equivalent to compensation paid to the landowners/persons interested.*' Furthermore, in the case of *Sree Balaji Nagar Residential Association v. State of Tamil Nadu & Ors.*[35] it has be held that Section 24(2) of the Act of 2013 does not exolude any period during whioh the land acquisition proceeding might have remained stayed on account of stay or injunction granted by any court. It was conclusively held that the Legislature has consciously emitted to extend the period of five years indicated in Section 24(2) of the Act of 2013 for grant of relief in favour of land owners even if the proceedings had been delayed on account of an order of stay or injunction granted by a court of law or for any reason. The Court observed that '*clearly the Legislature has, in its wisdom, made the period of five years under Section 24(2) of the 2013 Act absolute and unaffected by any delay in the proceedings on account of any order of stay by a court.*

On the other hand, when the Bill was introduced in the Lok Sabha, it stated that in calculatiug this time period, any period during which the proceedings of acquisition were held up: (i) due to a stay order of a eourt, or (ii) a period speeified in the award of a Tribunal for taking possession, or (iii) any period where possession has been taken bnt the compensation is lying deposited in a court or any account, will not be connted. However, at the Bill as passed by the Lok Sabha, stated 'designated account' in place of 'aecount' in Section 24(2). This means that the Bill states that in calculating the five year time period, any period where possession of land was taken but the compensation is lying deposited in a eourt or any aceount, will not be counted.

This is in direct contradiction the interpretation which the Apex Court had given while deciphering the original intention of the legislature, the intention to protect the interest of landowners. In this proposed amendment, the intention of the legislature elearly seems to be the reverse of what was initially stipulated in the 2013 Act.

Given these circumstanees, it would be advisable for the drafters of the Bill to understand the repercussion of these 'reforms' in the manner explained Prof. Cooter and Prof. Sehäfer[36] and eonsider putting in place meehanisms for eircumventing opposition which they themselves have invited by introducing such a change.

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34 (2014) 3 SCC 183

35 CIVIL APPEAL NO.8700 OF 2013

36 *Supra* note 17

V Conclusion

The need for introducing the LARR (Amendment) Bill, 2015 merely 2 years after the enactment of the LARR Act, 2013 was felt by the government on the grounds that the Act significantly slowed down the development process as the procedure for acquiring land had become excessively complex and time consuming. The government has argued that the LARR Act, 2013 did not cater to the developmental needs of a 21st century India as it rendered it difficult or almost impossible to acquire land.[37] On the other hand it has been argued that the delays cannot be blamed upon LARR Act solely. Statistics indicate that as on March 3, 2015, of the 436 approved SEZs over 53,236 hectares, only 199 SEZs were operational even after several years of land acquisition.[38] Moreover, empirical studies show that more than 80% of projects suffered delays even under the Land Acquisition Act (LAA), 1894.[39] This was the situation despite the fact that the Act gave unbridled power the government to acquire land. The situation of conflict that such contradictory claims had created deadlock in the Parliament which led to the Bill getting lapsed in the Rajya Sabha where NDA government does not enjoy a majority. The report of the Joint Committee of Parliament is being awaited to predict the future course of action.

We have already seen in this paper that involuntary transfer of property most often does not yield beneficial outcomes for the landowners. However, such transfer is in many cases unavoidable in order to maximise social welfare. It is absolutely essential that in such cases the law under which the acquisition is being made does not contain provisions which leave scope for reduction in net benefit.

In view of the above discussion, it becomes clear that the LARR (Amendment) Bill, 2015 makes the acquisition process hassle-free for the government at the face of it. However, in this exercise embedded are costs which remain unaccounted for. This was not the situation with LARR Act, 2013. Therefore, in order to resolve the situation the need of the hour is a law which expands the power of eminent domain of the government with certain restrains so that its exercise does not surpass a point beyond which it becomes inefficient.

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37 Arun Jaitley, *Amendments To The Land Acquisition Law – The Real Picture*, Bharatiya Janata Party (January 20, 2016, 8:02 PM), http://www.bjp.org/en/media-resources/press-releases/article-shri-arun-jaitley-on-amendments-to-the-land-acquisition-law-the-real-picture

38 Fact Sheet on Special Economic Zones, Ministry of Commerce & Industry, Department of Commerce, 2015 (January 20, 2016, 7:30 PM), http://sezindia.nic.in/writereaddata/pdf/factsheet.pdf

39 *Supra* note 20

"Is the Right to Privacy a Fundamental Right nnder the Indian Constitutional Scheme and is the UIDAI Violative of Individnal's Right to Privacy?"

Apurva Singh and Rajat Dutta**

I Introduction

The law on privacy ean be traced back as far as 1361, when the Justices of the Peace Act in England provided for the arrest of *peeping Toms* and *eavesdroppers*[1]. In 1765, British Lord Camden, in case of *Entick v Carrington*[2], defended the right to privacy of the plaintiff and struck down a warrant to enter a house and seize papers. He notably mentioned, *"We can safely say there is no law In this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society, for papers are often the dearest property any man can have."*

Privacy is a fundamental human right recognized in the United Nations Declaration of Human Rights, tbe International Covenant on Civil and Politieal Rights and in many other international and regional treaties[3]. The contemporary privacy paradigm at worldwide echelon can be traced iu the 1948 Universal Declaration of Hnman Rights, which protects territorial and commnnications privacy. Article 12 ef Universal Declaration of Human Rights states that, *"No one should be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks on his honor or reputation. Everyone has the right to the protection of the law against such interferences or attacks"*[4].

Similarly, several international law covenants recognize the Right to Privacy as an absolute right. The International Covenant on Civil and Political Rights (ICCPR)[5], the UN Cenvention on Migrant Workers[6], and the UN Convention on Protection

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1 Gregory D. Abowd, Barry Brumitt, Steven Shafer, *Ubicomp 2001: Ubiquitous Computing Internotional Conference Atlanta, Georgia, U.S.A., September 2001 Proceedings*, 274 (Springer-Verlag Berlin Heidelberg, 2001).

2 *Entick v. Carrington*, 1558-1774 All E.R. Rep. 45.

3 David Banisar, *Privacy and Human Rights: An Internatianal Survey of Privacy Laws and Practice*, (Global Internet Liberty Campaign).

4 *Universal Declaration of Human Rights*, http://www.hrweb.org/legal/udhr.html.

5 *Imernational Covenant on Civil and Political Rights*, http://www.hrweb.org/legal/cpr.html.

6 Article 14, *The United Nations Convention on Migrant Workers*, U.N.G.A. Doc A/RES/45/158 (25 February 1991).

of the Child[7] also adopt the same language[8]. India has not, however, signed the Optional Protocol-I to the ICCPR, as a result of which it is not possible for Indian citizens to make a complaint concerning failures to faily implement its Article 17[9].

Amongst all the human rights in the international and municipal law listings, the right to privacy is one of the most strenuous rights to expound and circumscribe. The definition of privacy varies from one legal system to another. The right to privacy is deeply pervasive in history as well, The Bible has numerous instances of privacy[10]. Similarly, there was also substantive protection of privacy in early Hebrew culture, Classical Greece and ancient China[11]. Lexically, *'privacy'* has been described in the Black's Law Dictionary[12] as *"the right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned". The* New Oxford English Dictionary[13] explains it as the *'absence or avoidance of publicity or display; the state or condition from being withdrawn from the society of others, or from public interest; seclusion.'*

The right to privacy in layman terms connotes that an individual's personal space and life shall be safeguarded from State's scrutiny or for any kind of trade without that individual's consent. Of late, the right to privacy has become a *controversial issue in contemporary India.* The right to privacy as a fundamental right in India has ventured itself as an instance of interpretative capabilities[14] of the judiciary as well as a right emanating as a conseqnence of the iarger process of widening the ambit of specifically enumerated fundamental rights[15] such as Article 21 and Article 14 of the Indian Constitution.

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7 Article 16, *The United Nations Convention on Protection of Children,* U.N.G.A. Doc A/RES/44/25 (12 December 1989).

8 *Supra* at 3.

9 Graham Greenleaf, *Promises and Illusions of Data Protection in Indian Law: 1(1),* (INTERNATIONAL DATA PRIVACY LAW, 2011).

10 Richard Hixson, *Privacy in a Public Society: Human Rights in Conflict 3* (1987); Barrington Moore, *Privacy: Studies in Social and Cultural History* (1984); *Supra* at 3.

11 Project no. IV/STOA/RSCH/LP/politicon.t, (Science and Technology Options Assessment (S.T.O.A). Ref).

12 Black's Law Dictionary, (6th ed., 1990).

13 The New Oxford Dictionary, (Vol. 2, 1993).

14 Namit Oberoi, *The The Right to Privacy: Tracking the Judicial Approach following the Kharak Singh Case,*. http://nalsarijcl.ln/wp-content/optoads/2012/06/12.-The-Right-To-Privacy-Tracing-The-Judicial-Approach-Following-The-Kharak-Singh-Case-.pdf.

15 *Id.*

II Jurisprudeutial Aualysis on Privacy

In 1890, an article authored by *Warren and Brandis,*[16] published in the Harvard Law Iournal, thrivcd upon thc contemporary contours of privacy as a tort and later as a fundamental right in various legal systems. The article sparked a renaissance of legal scholarship and subseqnently neighbouring theorics were devised to defend the right to privacy[17]. Recently, the Hon'ble Snpreme Court and High Courts of India, by way of judicial exposition in cases such as *Kharak Singh v State of India*[18], *Govind v State of Madhya Pradesh*[19] *and Maneka Gandhi v Union of India*[20] etc. have blurred the distinction between Part III i.e. Fundamental Rights and Part IV i.e. Directive Principles of State Policy of the Indian Constitution[21].

Fundamental Rights in a common law system are inherent rights of an individual [22] and can only be taken away by procedures established by law[23]. The right to privacy has not been explicitly referred in the Constitution. Therefore, the right to privacy is considered a *'penumbral right*[24]' i.e. a right guaranteed by implication in the censtitution or the implied powers of a rule. The interest of an individual's right to privacy and government's constant efforts to ensure security of state can lead to conflict between the two interests. The courts try to balance such conflicting interests by applying the theory of social engineering so that there is minimum waste and friction of rights[25].

However, right to privacy as a penumbral right shall have no value in India if privacy as a fundamental right is analyzed by way of *Hohfeldian Analysis*. Then

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16 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 197 (1890).

17 Roscoe Pound, *Interests in Personality*, 28 Harv. L. Rev. 343 (1915); Erwin N. Griswold, *The Right to Be Let Alone*, 55 N.W. U. L. REV. 216 (1960).

18 *Kharak Singh v State of U.P. & Ors.*, A.I.R. 1963 S.C. 1295.

19 *Govind v. State of Madhya Pradesh*, (1975) 2 S.C.C. 148.

20 *Maneka Gandhi v. Union of India*, (1978) 2 S.C.R. 621.

21 Gautam Bhatia , *Directive Principles of State Policy* in The Oxford Handbook of the Indian Constitutioo (edited by Pratap Bhanu Mehta), 660 (1st ed., Oxford University Press , 2016).

22 T.R.S. Alian. *The Sovereignty of Law: Freedom, Constitution and Common Law*, 287 (1st ed., Oxford University Press, 2013).

23 Indian Constitution, 195. Article 21.

24 The original and literal meaning of penumbra is *"a space of partial illumination between the perfect shadow on all sides and the full light". (Merriam Webster's Collegiate Dictionary*, 10th ed., 1996).

25 Karandeep Makkar, *Law as a Tool for Social Engineering in India*, 2, http://manupatra.com/roundup/331/Articles/law%20as%20tool.pdf.

it shall not be considered a fundamental right for not having an explicit existence in the Constitution. For Hohfeld, if privacy is not a categorically defined right in a legal system, then privacy is a social and moral norm. Therefore, there should not be mixing np of value driven ideals such as privacy as a fundamental right that has confused the meaning of rights; instead, the clarificatioo of rights slioulcl aid the judiciary to balance interests without letting a possible bias intrude[26].Similarly, John Stuart Mill, in his impassioned argument for the restriction of governmental authority from particular domains which may (if at all) be subject only to informal self-regulation, espoused the notion of a protected private domain[27].

III Evolution/ Darwinism of the right to privacy as a fundamental right in India

The 'Right to Privacy' has been canvassed by litigants before the higher judieiary in India by including it within the fold of right to life and persenal liberty under Artiele 21[28]. Article 21 of the Indian Constitution reads that, *"No person shall be deprived of his life or personal liberty except according to procedure established by law[29]."* Article 21 is suceinctly eouched by thc framers of the Constitution and provides for *'procedure established by law'* as a prerequisite for depriving of life and liberty. However, the Supreme Court has beld in the celebrated case of *Maneka Gandhi vs. Union of India*[30] that any procedure *"which deals with the modalities of regulating, restricting or even rejection of a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself. Thus, understood, 'procedure' must rule out anything arbitrary, freakish or bizarre[31]."*

Therefore, judiciary has umeliorated the scope ef the right to privucy as a fundamental right by way of judicial interpretation. There are several dccisions by the Supreme Coart whicb have established the right to privacy in India flowing from Article 21 and Artiele 19. Though the Supreme Court entertained the

26 Nikolai Lazarev, *Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights*,. [2005] Mur U.E.J.L. 9, Murdocb University Electronic Law Journai. http://www.austlii.edu.au/au/journais/MurdJEJL/2005/9.btmi.

27 John Stuart Mill, *ON LIBERTY,* 74-75, (1859); tIjwala Uppulari & Varsha Shivanagowda, *Preserving Constitutive Values in the Modern Panopticon: The Case for Legislating Toward A Privacy Right in India*, 5 N.U.J.S. L. Rev. 21 (2012).

28 Prashant Iyengar . *Limits to Privacy*, 5, (Centre for Internet and Society, 12 Aprii, 2011) http://cis-india.org/internet-governance/pubhcations/limits-privacy.pdf.

29 Constitution of India, 1950, Article 21.

30 *Maneka Gandhi v. Union of India,* (1978) 2 S.C.R. 621.

31 *Supra* at 21.

question of the right to privacy as a fundamental right, as early as in 1958 in *M.P. Sharma v. Satish Chandra*[32], the case of *Kharak Singh v. State of Uttar Pradesh*[33] was the first influential articulation of the right[34]. In 1964, the Hon'ble Supreme Court in *Kharak Singh v. State of Uttar Pradesh*[35] considered if 'surveillance' under Chapter XX of the U.P. Police Regulations constituted an infringement of any of the fundamental rights guaranteed by Part III of the Constitution[36]. One of the regulations of the U.P. Police Regulations i.e. 236(b) permitted police officials *'domiciliary visits at night'* was held contravening Article 21 of the Constitution[37]. The Hon'ble Supreme Court elucidated the terms *'life'* and *'personal liberty'* in Article 21. Albeit the majority observed that the Constitution does not explicitly safeguards the 'right to privacy', it read the right to personal liberty expansively to include right to privacy[38]. It held that *"an unauthorized intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man —an ultimate essential of ordered liberty, if not of the very concept of civilization[39]"*.

Subbarao, J., in his dissenting judgment opined that *"the right to personal liberty takes is not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare The Right to Privacy as a fundamental right but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his '"castle" it is his rampart against encroachment on his personal liberty."*[40] Kharak Singh's case, since then, has remained a landmark case with regards to the right to privacy as a fundamental right.

The Supreme Court in 1972 in *R. M. Malkani v State of Maharashtra*[41] reaffirmed its reasoning in Kharak Singh's case and observed that the telephonic

32 *M.P. Sharma v. Satish Chandra*, A.I.R. 1954 S.C. 300.

33 *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 S.C. 1295.

34 Ujwala Uppaluri & Varsha Shivanagowda. *Preserving Constitutive Values in the Modern Panopticon: The Case for Legislating Toward A Privacy Right in India*, 3-4, (National University of Judicial Sciences, 5 N.U.J.S. L. Rev. 21 2012).

35 *Supra* at 33.

36 *Supra* at 21.

37 *Supra* at 33.

38 *Supra* at 21.

39 *Supra* at 27.

40 *Supra* at 27.

41 *R.M. Malkani v. State of Maharashtra*, 1973 (2) S.C.R. 417.

conversation of an innocent citizen shall be protected by courts against wrongful or high handed interference by tapping conversation. However, the courts shall not hold this protection for a guilty citizen against the efforts of police to vindicate the law and prevent corruption of public servants[42].

Nonetheless, the Supreme Court adopted a regressive approach in *Govind v. State of Madhya Pradesh*[43] with regards to the right to privacy. The court was evaluating the constitutional validity of regulations 855 and 856 of the Madhya Pradesh Police Regulation which provided for police surveillance of habitual offenders including domiciliary visits and picketing. The Supreme Court desisted from striking down these invasive provisions holding that *"It cannot be said that surveillance by domiciliary visit, would always be an unreasonable restriction upon the right of privacy. It is only persons who are suspected to be habitual criminals and those who are determined to lead criminal lives that are subjected to surveillance"*[44]. Thereby, *Govind's case* was a major setback in privacy jurisprudence.

Subsequently in *R. Rajagopal v. State of Tamil Nadu*[45], the court ventured to deal with the right to privacy and the press's right to comment on conduct of public officials. Court advanced that privacy is latent in Article 21. It is a *"right to be let alone"*[46].

In 1997, in *PUCL v. Union of India*[47], the Court observed that the right to privacy, by itself has not been identified under the Constitution. As a concept it is too broad and moralistic to define it judicially. Whether the right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case[48].

After *PUCL v. Union of India*[49], the Supreme Court in *Collector v. Canara Bank*[50], the court relied on *Govind*[51] and observed that *"the right to privacy deals with 'persons and not places', the documents or copies of documents*

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42 Gautam Bhatia, *Surveillance and the Indian Constitution- Part 2: Gobind and the Compelling State Interest State*, (Centre for Internet and Society, 27 Jan, 2014) http://cis-india.org/internet-governance/blog/surveillance-and-the-indian-consitution-part-2.

43 *Govind v. State of Madhya Pradesh.* (1975) 2 S.C.C. 148.

44 *Supra* at 21.

45 *R Rajagopal v State of Tamil Nadu*, (1994) 6 S.C.C. 632.

46 *Id.*

47 *PUCL v. Union of India* A.I.R. 1997 S.C. 568.

48 *Id.*

49 *Id.*

50 *Collector v. Canara Bank*, (2005) 1 S.C.C. 496.

51 *Supra* at 41.

of the customer which are in [sic] Bank, must continue to remain confidential vis-a-vis the person... The above safeguards must necessarily be read into the provision relating to seareh ond inspection and seizure so as to save it from any unconstitutionality[52]." Later in *Selvi v State of Karnataka*[53], a case involving the constitutionality of narco-analysis and polygraph tests during police investigarions, and the testimonial statements obtained therefrom, the Supreme Court held that these techniques interfered with a person's uiontal processes in order to elicit information from him, they infringed his the Right to Privacy[54].

Thereby, it can he concluded that the Right to Privacy in India is, at its footings, is a restricted and narrow right rather than an unlimited one. From the above mentioncd case laws it become apparent that this limited nature of right to privacy provides somewhat unstable assurance of privacy since it is frequently made to yield to all manners of eompeting interests which happen to have a more pronounced legal standing.

IV Unique Identification Authority of India

The UIDAI is an administrative body created by a notification[55] issned by the Planning Commission of India on 28th January, 2009[56]. Its objective is to collect the biometric ond demographie data of residents, store them in a centralized database alse known as Central Data Repositories (CDR), and issne a I2-digit unique idenrity number called Aadhaar to each resident of ludia[57]. The Aadhaar namber is linked to the resident's basic demographic ond biometric information such as photograph, ten fingerprints and two iris scans, which are stored in centralized databases[58]. Aadhaar is the world's largest National Identification

52 Gautam Bhatia, *State Surveillance and the Right to Privacy in India: A Constitutional Biography*, 20, 26 , (National Law School of India Review. Nat'i L. Sch. India Rev. 127 2014).

53 *Selvi v. State of Karnataka* , (2010) 7 S.C.C. 263, 380.

54 *Supra* at 49.

55 *"Notification No.-A-43011/02/2009-Admn.I, (28 January 2009), Planning Commission, Government of India"*(P.O.F). (U.I.D.A.I., 28 January 2009), http://www.uidai.gov.in/images/notification_28_jan_2009.pdf.

56 Shyam Divan, *The Prime Minister's Fingerprints: Aadhaar and the Garroting of Civil Liberties*, 3, (National Law School of India Review. 26 Nat'i L. Sch. India Rev. 159 2014).

57 Chin, Roger, *"India's Aadhaar Project: The Unprecedented and Unique Partnership for Inclusion"*. Journal of Administrative Science. (January 2015), http://www.rmc.uitm.edu.my/images/stories/JAS/vol12-no1/1.pdf.

58 Times News Network, *"Learning with the Times: What is Aadhaar?"*. The Times of India. (4 October, 2010), http://timesofindia.indiatimes.com/india/Learning-with-the-Times-What-is-Aadhaar/articleshow/6680601.cms.

Number project[59]. Though, the original legislation of UIDAI lapsed in the Parliament of India[60], in March 2016, a new money bill was introduced by NDA government in the Parliament for this purpose. The Bill named as *Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016* was passed in the Lok Sabha on March 11th, 2016[61]. However, Aadhaar does not aim to replace any existing identity cards and neither is it a proof of citizenship[62]. According to the UIDAI website, any Aadhaar holder or service provider can verify an Aadhaar number for its genuineness through a user-friendly service of UIDAI called Aadhaar Verification Serviee (AVS) available on its website[63].

Aadhaar project has been linked to public subsidy schemes and unemployment benefit schemes such as LPG sclieme and MGNREGA by which the subsidy money is directly transferred to tho bank account of beneficiary which is linked to Aadhaar[64]. Aadhaar lias been made necessary by sevetal governmcnt departments to avail benefit of government schemes etc. Ministry of Extemal Affairs in 2015 announced that it was testing the linking of passports to the Aadhaar database[65]. Similarly, the Department of Electronics and Information Technology asked all telecom operators to collect Aadhaar from all new applicants of SIM cards[66].

However, despite being termed as a landmark scheme, there has been criticism attached to it. *R. Ramakumar*[67] in his article *'What UID conceals?'* in *The*

59 Mitu Jayashankar & N.S. Ramnath, *"UIDAI: Inside the World's Largest Data Management Project"*, (Forbes India, 29 November 2010), http://forbesindia.com/article/big-bet/uidai-inside-the-worlds-largest-data-management-project/19632/1.

60 *"National Identification Authority of India Bill, 2010"*, (P.R.S. Legislative Research), http://www.prsindia.org/billtrack/the-national-identification-authority-of-india-bill-2010-1196/.

61 *"Aadhaar bill passed in Lok Sabha"*. (Live Mint, 11 March 2016), http://www.livemint.com/Politics/UgblAmPPHetk71sjQUqcvN/Aadhaar-bill-passed-in-Lok-Sabha-the-story-so-far.html.

62 E.T. Bureau, *"Nilekani to give numbers, ministries to issue cards"*, (The Economic Times. 16 July 2009), http://articles.ecouomictimes.indiatimes.com/2009-07-16/news/28448725_1_ration-cards-pan-cards-biometrie).

63 *"Verify Aadhaar"*. U.I.D.A.I. (Retrieved from https://resident.uidai.net.in/aadhaarverification.

64 Devika Eanerjee, *"In convergence push, N.R.E.G.A. card to carry Aadhaar number"*. (The Economic Times, 2 May 2012), http://articles.economictimes.indiatimes.com/2012-05-02/news/31538629_1_uidai-aadhar-number-uid-number.

65 Tarini Puri, *"Soon, passport authorities to verify applicant identity with Aadhaar database"*, (The Times of India. 1 May 2015), http://timesofindia.indiatimes.com/india/Soon-passport-authorities-to-verify-applicant-identity-with-Aadhaar-database/articleshow/47115181.cms.

66 Press Trust of India, *"Dot Tells Operators to Collect Aadhaar Numbers for Issuing New SIM Cards"*. (NDTV. 3 November 2014), http://gadgets.ndtv.com/telecom/news/dot-tells-operators-m-collect-aadhaar-numbers-for-issoing-new-sim-cards-615444.

67 An Economist at the Tata Institute of Social Sciences. https://www.tiss.edu/view/9/employee/ramakumar-r/.

Hindu has pointed out that the Aadhaar project is administered without cost-benefit analysis or feasibility studies to ensure whether it shall meet its stipulated goals and that the government is obscuring the security aspects of Aadhaar and focusing on the social benefit schemes[68]. In fact, schemes like the National Food Security Act, 2013 are being linked to UIDAI thereby making voluntary enrollment mandatory by indirect means[69]. Though Aadhaar is regarded as a watershed programme, there are also several security related concerns attached to the Aadhaar scheme and that how access to the biometric database by police and security forces could lead to a number of human rights violations and an individual's privacy which are discussed subsequently.

V UIDAI as a violative of Right to Privacy

There are several criticisms attached to the UIDAI project, *'Aadhaar'*. According to *Prof. K. Ramaswamy*, the project necessarily entails the violation of privacy and civil liberties of people[70]. Also, if the biometric technology is capable of the gigantic task of de-duplication still remains obscure[71]. Furthermore, the benefits of the scheme in relation to the social sector such as Public Distribution System are exaggerated and hazy. To add to the list, the security related concerns emerging from the Aadhaar scheme because of its data collection repositories are largely looked over. Amartya Sen has argued that the security forces, if allowed access to the biometrie database could use it for regular surveillance and investigative purposes, leading to a number of human rights violations[72].

There is also a major flaw in the system of linking Aadhaar with the Public Distribution System. The rationale behind linking Aadhaar with Public Distribution System is to evolve a system where a migrant worker could access his PDS quota from anywhere in the country. Though the idea of linking PDS with UID is intriguing but fallacious. Every Fair Price Shop (FPS) has specified number of households registered to it and stores grains only for those households. A FPS shop owner shall not know how many migrants, for what period and with what demands of quota would come. Hence, for lack of stock, he would turn away

68 R Ramakumar, *"What the U.I.D. conceals"*, (The Hindu, 21 October 2010), http://www.thehindu.com/opinion/lead/what-the-uid-conceals/article839590.ece.

69 Prof Rajanish Dass, *"Unique Identification for Indians: A Divine Dream or a Miscalculated Heroism?"* (IIM Ahmedabad), http://www.iimahd.ernet.in/assets/snippets/workingpaperpdf/17212155992011-03-04.pdf.

70 *Supra* at 65.

71 *Supra* at 65.

72 Rebecca Bowe, *Growing Mistrust of India's Biometric I.D. Scheme.* (Electronic Frontier Foundation: Defending Your Rights In The Digital World, May 4, 2012), https://www.eff.org/deeplinks/2012/05/growing-mistrust-india-biometric-id-scheme.

migrant workers who demand grains. Hence, the FPS system is *incompatible* with the UID-linked portability of PDS[73].

Adding to the misery, the procedure adopted by the UIDAI to enroll people is awfully nonchalant. Briefly, the entire process at the field level is in the hands of private enterprises known as enrollers who operate freely without any government supervision. The threshold qualification for an enrolment agency is so low that not one of them is a recognizable name[74]. These private entities get access to the bio-metric information of each enrollee before they are transmitted to the UIDAI CIDR (Central ID Repository) by courier or via memory stick or by direct uploading[75]. The UIDAI has no privacy contract with these enrolling agencies. This can very patently lead to trading of biometric data by these private entities to big corporate houses in lieu of money. The loose framework of relationships linking UIDAI to the collection of biometrie data is through MOUs with state governments or departments known as registrars[76]. Moreover, the process of de-duplication i.e. the process undertaken to ensure thal the samc individual is not issued two Aadhaar number, is handled by Accenture, Mahindra Satyam & Morpho's joint venture and L1-identity solntions[77]. These entities happen to be private entities handling an Aadhaar holders' biometrics with no remarkable endearment for Constitutional values. Thus, this blatant no check mechanism is a potential threat to an individual's privacy and in a generic sense, a largely pertinent threat to the security of the nation.

Justice K.S. Puttaswamy (Retd.) & Another v. *Union of India & Others*[78]

The Aadhaar was vituperated on several grounds in the Supreme Court. The petitions cited several flaws in the Aadhaar sclieme. The project was deemed to be fallacioas as the procedure adopted by the Government was arbitrary and violative of Article 21. There is no informed consent of an individual, the private entities collect data without safeguards, the enrolment is based on a flawed

73 Madhura Swaminathan, *Targeted Food Stamps*, (The Hindo, 3 Augost, 2004), http://www.thehinda.com/2004/08/03/stories/2004080300331000.htm: as cited in *"What the U.I.D. conceals"*, (The Hindu, 21 Octoher 2010), http://www.thehindu.com/opinion/lead/what-the-uid-conceals/article839590.ece.

74 *Supra* at 56.

75 *Supra* at 56.

76 *Supra* at 56.

77 Abhay N, *JDAI selects Accenture, Mahindra Satyam to Implement Biometrle Solution for Aadhaar*, (India Microfinance, 2 August 2012), http://indiamicrofinance.com/uidai-selects-accenture-mahindra-biometric.html.

78 Writ Petition (CIVIL) No. 494 OF 2012, http://supremecourtofindia.nic.in/FileServer/2015-10-16_1444976434.pdf.

introducer and verifier system, and there is no government security of stored data[79]. The main argument of the petitioners was that it violated the right to privacy of an individual and that the project is arbitrary and illegal inasmuch as it allows private dominion over biometrics without governmental control thereby compromising personal security and national security[80]. Moreover, the failure to 'opt out' option from the UID scheme violates an individual's autonomy and dignity guaranteed under Article 21.

In 2012 a writ petition was filed by retired *Justice K.S. Puttaswamy* in the Supreme Court of India challenging the government for making Aadhaar card for every person in India[81] and its later plans to link various benefit schemes to the UID. There were a number of other petitions filed in the Supreme Court which were clubbed together to the main petition filed by Puttaswamy, J. The Hon'ble Supreme Court passed an interim order September 23rd, 2013 ordering that *"No person should suffer for not getting the Aadhaar card in spite of the fact that some authority had issued a circular making it mandatory and when any person applies to get the Aadhaar card voluntarily, it may be checked whether that person is entitled for it under the law and it should not be given to any illegal immigrant[82]."*

In a petition filed by the UIDAI in 2014 in the Supreme Court, the Supreme Court relied and reiterated its interim order in Justice Puttaswamy (Retd.) and held that person shall be deprived of any service just because such person lacked an Aadhaar number if he/she was otherwise eligible for the service[83].

The Hon'ble Supreme Court in 2015 while deciding the Puttaswamy, J. petition on Aadhaar, opined that apart from PDS scheme and the LPG distribution scheme, the schemes like Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS), National Social Assistance Programme, Prime Minister's Jan Dhan Yojna and Employees' Provident Fund Organization for the present can be attached to the Aadhaar[84]. However this shall not dilute the interim order passed by the court that Aadhaar is not mandatory for an individual to avail benefits of government schemes.

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79 *Supra* at 53.

80 *Supra* at 53.

81 Vipul Kharbanda, *The Aadhaar Case*, (The Centre for Internet & Society), http://cis-india.org/internet-governance/blog/the-aadhaar-case.

82 *Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India*. 2012. http://judis.nic.in/temp/494201232392013p.txt.

83 *Supra* at 76.

84 *Justice K.S. Puttaswamy vs. Union of India*. Writ Petition (CIVIL) No. 494 of 2012, http://supremecourtofindia.nic.in/FileServer/2015-10-16_1444976434.pdf.

VI Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016

The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 was introduced by Minister of Finance, Mi. Arun Jaitley, in Lok Sabha on Maroli 3, 2016. The Bill intends to provide for targeted delivery of subsidies and services to individuals residing in India by assigning them unique identity numbers, called Aadhaar numbers[85]. The passage of the Aadhaar Bill ended the criticism that the UIDAI was operating without any statutory backing. The bill was first tabled in the house as the National Identification Authority of India Biil, 2010[86]; however, it lapsed as it did not gather enough support in the Parliament.

The Aadhaar Bill, 2016 is a commendable effort oo the part of Government as it has given statutory backing to the brand Aadhaar as well as aims to protect the privacy of the Aadhaar card holders. The Section 3(2) of the act makes it mandatory npon the enrolling agencies to inform the individual undergoing enrollment about the manner in which information shall be used, the existence of right to access the information and the nature of reeipients with whum the information is intended to be shared during authentieatioo[87]. Chapter VI of the act deals with protection of information. Section 29 of the Act prohibits sharing of core biumetrics generated for Aadhaar for any reason whatsoever to anyone[88]. However, tho Section also mandates that information other than the core biometric information coilected under this act may be shared in accordance with the provisions of this act and in the manner specified only.

The Aadhaar Act io Section 30 has also acknowledged biometric information to be a sensitive personal information, thereby tacitly recognizing one's right to privacy and to be let alone. However, Section 33 of the Aet makes an exception to the Section 30. Section 33 stipalates that with respect to any disclosure of information, including identity information or authentication records, made pursuant to an order of a court not inferior to that of a District Judge. Ilowever, no order made by the court under Section 30 shal) be made without giving an opportunity of hearing to the Authority[89]. Chapter VII of the act provides for offences and

85 The Aadhaar (Targeted Deiivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016, *PRS Legislative Research*, http://www.prsIndia.org/billtrack/thc-aadhaar-targeted-delivery-of-financial-and-other-subsidies-benefits-and-services-bill-2016-4202/.

86 The National Identification Authority of India Bill, 2010. *PRS Legislative Research*, http://www.prsindia.org/billtrack/the-national-ideotification-authority-of-india-hiil-2010-1196/.

87 *Supra* at 83.

88 *Supra* at 83.

89 *Supra* at 83.

penalties for violation of any provision of the act. Out of these penal provisions in Chapter VII, Section 37 and 38 penalize disclosure of identity information in contravention of law and unauthorized access to the Central Identities Data Repositories. Aadhaar act has taken a leap by introducing a provision which shall penalize companies in case of contravention of provisions of this act in its section 43.

VII Critical Evaluation of the Aadhaar Bill

Though after much controversy, Aadhaar Bill was finally passed by Loksabha as money bill in March, 2016. Be that as it may, there was no public consultation to assess the provisions therein even though there are exceptionally severe ramifioations for the Right to Privacy[90]. The Rajya Sahha's speeific recommendatory amendments were also disregarded completely.

The definition of *'biometric information'* is expansivc and vague. Instead of an inclusive definition, there should have been an exhaustive definition of 'biometric information' as precise definition would constrain the abuse of the information by UIDAI, government entities or private entities.

Also, Section 7 of the Bill makes it mandatory to have an Aadhaar number to acccss services, subsidies and benefits[91]. Section 7 reads as *'those without a number must apply for one'* and it allows using an alternate identifieation for that period. This is contrary to the Hon'ble Supremo Court's decision in *Justice K.S. Puttaswamy (Retd.) v Union of India*[92]. Addltionally, the government repeatedly claimed Aadhaar scheme to be completely veluntary. However, Section 7 of the act is in contravention to the claims made by government and the decision of Supreme Court.

Subsequently, there is a line of contention between the objects and the actual scope of the bill[93]. The object of the bill expresses that Aadhaar is for identification of individuals for targeted delivery of entitlements. Nonetheless, Section 57 permits all entities, publie or private, to utilise the Aadhaar namber for anthentication.

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90 Sinha Amber, Hickok Elonnai, Chattapadhyay Sumandro, Rakesh Vanya & Kharbanda Vipul. *Critique of the Aadhaar Bill 2016*, The Centre for Internet & Society, (March 16, 2016), http://cis-india.org/aadhaar-bill-2016.

91 Sinha, Amber & Elonnai Hickok, *Salient Points in the Aadhaar Bill and Concerns*, The Centre for Internet & Society, (March 21, 2016), http://cis-india.org/internet-governance/salient-points-in-the-aadhaar-bill-and-concerns.

92 *Supra* at 82.

93 *Supra* at 82.

Furthermore, there are apprehensions related to the authentieation of Aadhaar. Though the act mandates that consent of an individual shall be takon before collectiug Aadhaar information and that information shall be used only for authentication with the CIDR. Moreover, Section 8 of the act says that the entity authenticating information shalt also inform thc individual about the type of information required for authentication, what it shall be used for and if there shall be any alternativc to submit the Aadhaar information to the requesting entity. Whilc the Biil does provide for seeking consent for collecting and using an Aadhaar for authentication, thc Bill docs not specify that this must be informed consent with an 'opt ont' mechanism and does not speeify the manner in which such consent should be sought[94]. This leaves it in the hands of the UIDAI and possibly the third requesting enfity to determiue the form of consent that is to be taken. This could result in amhiguous, mislcading, or inconsistent consent mechanisms beiug used[95].

The act makes unclear efforts with regards to security concerns. Though Section 28 and Section 54 of the act talk about the security measures for information with UIDAI however, the act fails to elaborate upon the measures that shall be taken to ensure safety[96].

There has been over delegation of powers to thc UIDAI. Ideally, there should have been a grievance redressal cell created under thc Aet. However, this has been dclegated to UIDAI under Section 23(2) of the act. This entire scheme severely comprises thc independence of the grievance redressal body[97].

Furthermore, the government did not incorporate suggestions by the A.P. Shah Committee. The Blometries Standards Committee of UIDAI bas acknowlcdged the issue caused due to high number of manual labourers in India, whioh leads to substandard optimal fingerprints scan[98]. A report by 4G Identity Solutions estimates that while in any population approximately 5% of the people havc unreadable fingerprints, in India it could lead to a failure to enroll up to 15% of the population. Thus, the project could actually end up excluding more people[99]. This, iu turn,

94 *Supra* at 82.

95 *Supra* at 82.

96 Nair Remya, Khanna Pretika and Sen Shreeja. *NDA tables Aadhaar Bill in bid to reset subsidy regime*, Livemint, (March 4, 2016), http://www.livemint.eom/Politics/77djKIxnDrQ9HVz2mxBGMI/Aadhar-Bill-introduced-as-a-money-bill-in-Lok-Sabha.html.

97 *Supra* at 82.

98 Sinha, Amber. *Aadhaar Bill fails to Incorporate Standing Committee's Suggestions*, The Wire, (March 3, 2016). http://thewire.in/24433/aadhaar-bill-fails-to-incorporate-standing-committees-suggestions/.

99 *Id.*

would massively compromise the entire planning and the very structure of the entire system.

VIII Conclusion

The impunity with which the previous and the current union government has gone abont humongous Aadhaar project without parliamentary approval, apart from the brazen disregard for constitutional provisions, nothing else can be inferred[100]. Moreover, in this oceasion, the Lok Sabha Speaker's choice of permitting the Aadhaar Bill, 2016 as money bill by virtue of Articlo 110(3) of the constitution is flawed[101]. The provision provides that simply because a bill accommodates for revenue collection or disbursal of money, it shall uot be deemed as a money bill[102]. Aadhaar, after being introduced as money biil was uot debated in the Parliament even when political unanimity on Aadhaar was largely fragmented.

Though thc bill has tried to address thc privacy concerns arising oul of it, however, it still has left scope for governmental and private entities to infringe an individual's privacy. The Aadhaar soheme is uot only about encouraging cash transfer but rather has imphcations for the constitutional guarantees of life and liberty, including the right to privacy[103]. There has to be a harmonious interpretation of law for which the arguments for, and against, imposing such a restriction will have to be deliberated upon more meticulonsly. Though the right to privacy is not an absolutely recognized right, however, the essential rulemaking of the UIDAI cannot be done by derogating the security concerns arising out of it. The non-seriousness of thc Act, and the refusal to confront the hard issues, are a shght to democracy which must be remedied before the project accomplishes absolute *feat accompli*[104].

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100 *Aadhaar as a Money Bill*, Economic and Political Weekly. Vol. 51, Issue No. 11, (12 March, 2016). http://www.epw.in/journal/2016/11/editorials/andhaar-money-hill.html#sthash.GE32Skwn. dpuf.

101 Radhakrishnan Sruthi. *Is the Aadhaar Bill a Money Bill?*, The Hindu, (May 10, 2016), http://www.thehindu.com/news/national/is-the-aadhaar-bill-a-money-bill/article8579711.ece.

102 The Indion Constitution, Article 110(2).

103 *Supra* at 101.

104 Ramanathan Usha. *A Unique Identity Bill*. Economic and Political Weekly, Vol. 45 No. 30, 10-14 (JULY 24-30, 2010), http://www.jstor.org/stable/20764328?seq=1#page_scan_tab_contents.

"Legal Contours of Freedom of Expression and Cyberspace"

Ritika Vohra*

I Introduction

"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."

-John Milton

It is the freedom of expression that empowers. It is the sole armor against tyrannical structures. It infuses a spirit of liberation in an individual. And more recently, it sparks debate on our device screens. Cyberspace has emerged as platform for disoussion, debate and advocacy of a plethora of ideas. For any society to grow, it is essential that there is debate about the existing norms and perceptions. The social media provides that essential medium for the free flow of myriad of uotions, each widely commented upon, with perspectives from all the stakeholders.

a. What is Cyberspace?

"Cyberspace. A consensual hallucination experienced daily by billions of legitimate operators, in every nation, by children being taught mathematical eoncepts... A graphic representation of data abstracted from banks of every computer in the human system. Unthinkable complexity. Lines of light ranged in the non-space of the mind, elusters and eonstellations of data. Like city lights, receding..."

-William Gibson, *Neuromancer*

The term 'Cyberspace' was first used in a science fiction novel and later on developed to describe a place where people interacted using the internet. In the 21st century, the use of cyberspace has grown manifold. The number of people having access to the internet is above three billion, with India placed third[1] *in the list of internet usage worldwide. The early debate on the use of Cyberspace was marked by two opposite ideologies, namely, Cyberlibertarianism and Cyberpaternalism. The first raised doubts whether*

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1 List of Countries by Internet Usage, *Internet Live Stats* at www.InternetLiveStats.com, last accessed on 5/5/2015 at 1:24am.

national laws could in practice be enforced in Cyberspace' while the latter believes that it is perfectly possible and appropriate for national laws to govern the cyberspace, that the internet is 'evolving from an unregulable space to one that is highly regulable'[2]. This debate has taken center stage in the discussion on free speech on the Internet.

b. Freedom of Speech and Expression

The issue of free speech is a contentious one in liberal societies. Speech is mightier than the sword and it becomes a volatile issue when limitations are imposed on this freedom. It is so because free speech always exists with competing values such as right to privacy, public order, security, etc. It is in this context of speech with constraints that Stanley Fish points out that "free speech in short, is not an independent value but a political prize"[3]. No society has yet existed that guaranteed limitless freedom of speech. The real question is how far can we place the limits? It is important to understand that free speech is different from other types of free action. For example, if the government wants to discourage the consumption of alcohol, it can levy heavy taxes and ensure it is otherwise unavailable. Freedom of speech is a different ball game. We are in fact free to speak as we like. The government cannot restrain people from saying certain things. It can only punish for such comments after they have been said or written.

Some supporters of free speech argue that it's a "slippery slope"[4], meaning thereby that the consequence of limiting free speech will inevitably lead to consorship and tyranny. But it is worth noting that the slippery slope argument can be used to make the opposite point: one could argue that if we do not place restrictions on free speech, we'd be on a slippery slope to anarchy or what Hobbes described in Leviathan[5] as "solitary, poor, nasty, brutish and short".

What then are the proper limits or restrictions that can be placed on free speech? Two approaches are critical to this discussion, one is John Stuart Mill's Harm Principle and the other is Joel Fienberg's Offense Principle. Mill claims that the fullest liberty of expression is required to push arguments to their logical limits,

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2 Lawerence Lessig, Code and Other Laws of Cyberspace, p. 25, Basic Books, New York, 1999.

3 Stanley Pish, There's No Such Thing as Free Speech: And It's a Good Thing, Too, p. 102, Oxford University Press, USA, 1993

4 Joshua Muravchik, Free Speech and the Myth of the Slippery Slope, (30th May 2015, 6pm) http://www.worldaffairsjournal.org/blog/joshua-muravchik/free-speech-and-myth-slippery-stope.

5 Thomas Hobbes, ed. C.B. Macpherson, Leviathan ,p. 186, Penguin Books, London, 1968

rather than the limits of social embarrassment. The only limitation he places on free expression is now nsually referred to as the Harm Principle, which states that 'the only purpose for which power can rightfully be exercised over any member of a eivilized community, against his will, is to prevent harm to others'[6].

c. The Balancing Act

lf we go by these two principles as the basis to restrict free speech then we find that the offense principle is wider than the harm principle but it is still a soft rule. lt is so beeause all offensive forms of expression that can be escaped or easily avoided are not included, for example, pnblie nudity can be avoided by the mere turn of the head. lt is also essential that when speeeh is not in eonflict with other fundamental principles, it should not be mechanically placed on a higher pedestal.

d. India's Take on Freedom of Speech and Expression

Right is the most used and confused notion. In India, the right to freedom of speech and expression is guaranteed under Artiele 19(1) of the Constitution of India and there are reasonable restrictions enumerated in Artiele 19(2) such as security of the state, sovereignty and integrity of the state, public order, friendly relations with other eountries, decency or morality, contempt of eourt, defamation incitement to an offence and others. Such restrictions on free speech are exhaustive and no other groands can be reasoned to impose a restriction on this freedom anless it falls under one of these broad heads. The Supreme Court has clearly interpreted this balance between the freedom and restrietions in *Re Ramlila Maidan Incident* v. *Home Secretary, Union of Indian & Ors*[7] wherein the eourt emphasis on the right duty corrolativity und the reasonableness of a restriction, the validity of the same falling under judicial review. The Supreme Court through its judgments has expanded the scope and ambit of the freedom of expression. In thc landmark case *S. Khusboo* v. *Kanniammal*[8] on Right to Freedom of Speech & defamation, the eourt observed:

"...Even though the constitutional freedom of speech and expression is not absolute and ean be snbjeeted to reasonable restrictions on grounds such as 'decency and morality' umong others, we must lay stress on the need to tolerate onpopular views in the socio-cultural space. The framers of om Constitution recognized the importance of safeguarding this right since the free flow of opinions and ideas is essential to sustain the collective life of the citizenry. While an informed citizenry

6 J S Mill, On Liberty, p. 9, Hackett Publishing, Indianapolis, 1978.

7 Re Ramlila Maidan Incident v. Home Secretary, Union of Indian & Ors , (2012) 5 SCC 1.

8 S. Khusboo v. Kanniammal AIR 2010 SC 3196

is a pre-condition for meaningful governance in the politieal sense, we must also promote a culture of open dialogue when it eomes to societal attitudes..."

The law should not be esed in a mannor that has chilling effects on the 'freedom of speech and expression'. It would be apt to refer to the following observations made by this Court in *S. Rangarajan* v. *P. Jagjivan Ram*[9], which spell ont the appropriate approach for examining the scope of 'reasonablc restrictions' under Art. 19(2) of the Constitution that ean be placed on the freedom of speech and expression:

"Our commitment of freedom of expression demands that it eannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjcctural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsicaliy dangerous to the public interest. In other words, the expression should be inseparably locked up with the action eontemplated like the equivalant of a 'spark in a powder keg'..."

The Court farther held: "The different views are aliowed to be expressed by proponents and opponents not because they are correct or valid but beeause there is freedom in this country for expressing even differing views on any issue. ... Freedom of expression which is legitimate and constitutionally protected cannot be held to ransom by an intolerant group of people. The fundamental freedom under Article 19(1) (a) can be reasonably restricted only for the purposes mentioned in Article 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency. Open criticism of government policies and operations is not a ground for restricting expression. We must practice tolerance of the views of others. Intoleranee is as much dangerous to democracy as to the person himself."

e. Internet's Impact on Society

A society progresses by the birth of new ideologies. As has been pointed ont in the previous sections, Internet has had a massive impact on the freedom of speech. The Internet has let the Netizens explom ucwer ideas which were inaccessihle previously and has contributed to the global village phenomenon. There exist numerons examples where the Internet has acted as a catalyst in protests and made these from mere local protests to global demonstrations. There are also instances where a website may be banned under the local regime

9 Rangarajan v. P. Jagjivan Ram (1989) 2 SCC 574

of a eountry but the same is allowed ander other jurisdictions and in such eases, the websites are simple exported to those coantries with relaxed norms. Chinose human rights activists use the World Wide Web to advocate for their cause[10], and Tibetan women in exile castigate the Chinese government for the ill treatment of its sisters still in Tibet.[11] CAPA, an organization that supports Cubans fleeing their country and delivers accounts on their rescue and survival ean be found on the wob, as weil as sohdarity pages of the Tupac Amaru hostages takers in Peru[12], while German Nazi use American and Canadian websites to discuss fascism and to issue denials of the Holocaust, a erime ander the German Penal Code.

II Freedom of Expression in Cyberspace

a. An Unparalleled 'Free' Space for Discussion: Cyberspace/ fs Cyberspace speciaf?

"Exploring and understanding the Net is an ongoing process. Cyberspace never sits still; it evolves as fast as soeiety itself. Only if we fight to preserve our freedom of speech on the Net we ensare our ahility to keep up with both thc Net und society"[13]

-Mike Godwin

The cyberspace is unlike the conventional mediums of information such as the television, radio or print media. It provides two way transactions in information rather than making people passive recipients. It allows people to take active part in accessing data which was previously ont of their reach, particularly in developing countries with totalitarian regimes. It is easier to eonnect with people with matching wavelengths and provides a unique platform for discussion and debate. With the dawn of Web 2.0 serviees or the interactive forums, individuals who were previously uncertain or wary of expressing their opinions have found a voice. It provides a level playing field, if one may say so. Why would a person feel nervous about standing up and speaking to an audience of more than a thousand when he can get the same sitting home behind a screen, sans the headache? Social media and social networks are a splendid medium to express. It is an unparalleled 'free' 'space because the conventional norms that guide the freedom

10 Support Democracy in China, <christusrex.org/wwwl/sdc/sdchome.html>

11 Statement of Tibetan Women's Delegation Fourth World Conference on women, NGO Forum 95 Huairou, China, September 2, 1995, <www.grannyg.bc.ca/tibet/tibetpr3.html>

12 Tupac Amaru, <www.cybercity.dk/users/ccc17427>

13 Mike Godwin, Cyber Rights: Defending Free Speech in the Digital Age, p. 19, Massachusetts Institute of Technology, 2003.

of speech and expression have become redundant in coping with the speed of the flow of information. Any comment by a prominent figure is closely monitored and widely dissected. For example, when Narendra Modi, in his address in Bangladesh said 'Sheikh Hasina has zero tolerance for terrorism, despite being a woman', it created a massive uproar on Twitter. Thus, it is in this manner and there are umpteen examples which point to the fact that the social media has become a new forum to pressurize the governments. And the Indian government has woken up this challenge.

As has been pointed out in the preceding paragraphs, cyberspace is special. It is so because from the point of view of the lawmakers, it poses new threats to their control mechanisms. For example, violation of speeding limits is a world-wide problem and the governments use speed cameras or radars and other means to control it. Even if it rises, extra enforcements ensure that it is brought within permissible limits again. This, however, seems impractical given the sheer volume of cyberspace activity. Thus, the best bet of the lawmaker to achieve lawful behavior in this scenario is to develop such mechanisms that have gained respect of cyberspace users like the Savigny'sVolksgeist which meant law as the expression of the will of the people.

b. "Bits without Borders"

In a borderless Internet, there is free flow of information. The Internet architecture is such that it brings people with similar opinions closer and develops a camaraderie unshaken by the law of the land. In this section, we shall discuss how, due to the free access of information across jurisdictions, it is difficult to develop effective mechanisms without a certain degree of extraterritoriality.

The answer to complications brought about by a lack of borders seems, quite obviously, to be the imposition of borders. That might seem problematic in the virtual world of the Internet, since information posted in one place is available everywhere. But it is not as difficult as it sounds. Individual content providers and Web hosts are located in the physical world. As such, they are subject to the laws of the countries in which they are located. The key is to provide a way to link websites to countries. For example, each website has a Universal Resource Locator (URL) and each web address has a suffix like ".com", ".ac", ".org" and the like. The upgrade suggested is that the Internet Corporation for Assigned Names and Numbers (ICANN) change the way these URLs are assigned. Adding such suffixes that indicate the country in which the website originates is a significant step towards determining that if a website hosts such material that falls under hate speech or any other violation, that country's laws will govern it.

A classic example of a country exporting its norms and values to another jurisdiction is in *Yahoo! Inc* v. *La Ligue Contra Le Racisme et L' Antisemitisme*[14]. In this case, Yahoo! had a subsidiary called Yahoo! France which operated a French website. Yahoo! held an auction which includes Nazi goods and artifacts. A local court found that approximately 1000 such items available for auction were in violation of the French law prohibiting exhibiting and selling of Nazi artifacts and goods. The court directed Yahoo! to deny French residents access to such material. In its response, Yahoo! said that it could do it in respect of its French site but could not restrict the content according to the same norms on its main website nor deny the French users access to its main site. The court was unsatisfied and ordered daily penalties for failure to comply with its order. A federal district court in US settling the matter held that France had right to enforce its laws in its own territory but concluded that the United States courts would be unable to enforce any such penalties that the French might assess. The same was held to be valid on appeal to higher courts. The important question that this case raised was if a country's efforts to regulate activities due to such technicalities were frustrated, what alternatives could it pursue?

c. "Code is Law"

"Code is Law" is the famous formula coined by Lawrence Lessig to describe that the technological architecture of the Internet functions as a regulator- in addition to state law, social norms and market.[15] Joel Reidenberg was one of the first to emphasize that the technological architecture of the network imposes rules on access and use of information.[16] He called this LexInformatica which is a rule system that is embedded in technological standards and that exists parallel to the law of the state. It is important to understand how technology regulates behavior on the Internet. What Reidenberg calls 'code' is nothing but the digital environment that is sought to be created by the various software programs which defines the architecture of the Internet and the rights and restrictions inherent in this system. This 'code' regulator is more often than not, a private body which raises serious concerns from the constitutional perspective because now the speech that had hitherto to muster pass the tests laid down the government is also challenged by this complex digital landscape which is largely guided by private regulation. This poses a question whether such private action should be subject to constitutional scrutiny.[17] The private actors control content on the

14 Yahoo! Inc v. La Ligue Contra Le Racisme et L' Antisemitisme, 169 F Supp 2d 1181 (ND Cal, 2001).

15 Lawrence Lessig, Code and Other Laws of Cyberspace, Basic Books, New York, 1999.

16 Joel R. Reidenberg, LexInformatica: The Formulation of Information Policy Rules Through Technology, pp. 553-84, at p. 568, Texas Law Review, 1998

17 Paul S. Berman, Cyberspace and State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private Regulations", University of Colarado Law Review, pp. 1263-310, at p. 1271, 2000.

pretext of copyright infringement. Sonia Katyal in her widely acclaimed article notes "an over inclusive approach to piracy surveillance risks not only chilling some forms of valuable speeeh, but also risks having a deleterious effect on the technologies to develop unless they devote substantial resources to the perfection of such strategies"[18]

d. The Renewed Rigor of a Right: Section 66A Held Unconstitutional

The recent Supreme Court ruling in the case of *Shreya Singhal* v. *Union of India*[19] reinforced the Right to Freedom of Speech and Expression. This case arose out of a series of writ petitions filed before the Supreme Court for the infringement of the right to free speech and expression as is enshrined in Article 19(1)(a) of the Constitution of India by sections 66A, 69A & 79 of the Information Technology Act, 2000, the Information Technology (Proeedure & Safeguards for Blocking for Access of Information by Public) Rules 2009, the Information Technology "Intermediary Guidelines" Rules, 2011 and Section 118(d) of the Kerela Police Act. The petitioners raised a large number of questions pertaining to the constitutionality of the aforementioned sections.

The *first* and foremost argument was that Section 66A infringes the right to free speech and expression and is not saved by any of the eight subjects covered in Article 19(2). According to the petitioners, the causing of annoyance, inconvenience, danger, obstruction, injury, insult, criminal intimidation, enmity, hatred or ill-will are all outside the purview of Article 19(2). What follows is a reply from the Additional Solicitor General Mr. Tushar Mehta defending the constitutionality of section 66A by stating that there is 'a presumption in favor of the constitutionality of an enactment'[20] and that the mere possibility of abuse of a provision cannot be a ground to declare a provision invalid. Citing famous judgments from the American Court, the learned judges refer to the concept of "market place of ideas"[21] by Justice Holmes and Justice Brandeis[22] discussing the three concepts related to the freedom of speech and expression, namely- discussion, advocacy and incitement. This notion of a "market place of ideas" is not entirely suited to the Indian jurisprudence of rights as against the US where there is

18 Sonia K. Katyal, Filtering, Piracy, Surveillance and Disobedience, The Columbia Journal of Law, pp. 401-26, at p. 412, and the Arts, 32(4).

19 AIR 2015 SC 1523

20 In Charanjit Lal Chaudhary v. Union of India, AIR 1951 SC 41 & State of Gujrat v. Ambica Mills Ltd., AIR 1974 SC 1300, this principle was discussed at length and the court suggested that where the legislation affects the interest of the community as a whole, the court will assume the existence of any state of facts which can reasonably be conceived of as existing at the date of the legislation and is capable of sustaining the classification made by it.

21 Abrams v. United States, 250 US 616 (1919)

absolute freedom of expression (except when it is opposed to general interest). The notion of "market place of ideas" implies that the citizens are allowed to state something, no matter howsoever unpopular, if it is covered under free speech. Freedom of speech and expression, as observed previously, has three components i.e. discussion, advocacy and incitement. In the Indian jurisprudence, if the contested speech is covered under discussion or advocacy, howsoever unpopular it may be, it is protected under Article 19 (1) (a). However, when this speech leads to the point of incitement, Article 19 (2) kicks in. Further, an analytical reading of the impugned section i.e. Section 66 A and the definition clause of the word "information" in the Information Technology, 2000Act highlight that firstly, the definition of "information" is an inclusive one. The inclusive definition implies that all modes of information transfer are covered and that includes the mediums that use internet. And secondly, it seeks to cover the medium through which such information is disseminated and does not refer to what the content of the information can be. Herein, lies the gap in the definition and this is exploited in Section 66 A where over broad terms are employed such as "grossly offensive", "causing annoyance" and these terms have not been defined anywhere as to what will be the extent to which they can be used.[23] It is further observed by the Court that the Section 66 A is not aimed at defamatory statements or information that incites to commit an offence, the mere causing of annoyance, inconvenience, danger, etc., or being grossly offensive is sufficient to apply it. Further, the word 'obscene' is conspicuous by its absence in Section 66 A. Therefore; the section falls foul on Article 19(1) (a).

The *next* argument by the petitioners was that the Section suffers from the vice of vagueness. The Court relied on the well-established US Supreme Court principle that where no reasonable standards of guilt are laid down in a Section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a Section must be struck down as being arbitrary and unreasonable. After a detailed dialogue on the various case laws of both India and US, the different yardsticks for measuring vagueness are discussed and it is held that Section 66A is unconstitutionally vague. Applying the tests referred to in *Chintaman Rao*[24] and *V. G. Row's case*[25], Section 66A is held to "arbitrarily, excessively and disproportionately invade the right of free speech and

22 Whitney v. California, 71 L. Ed. 1095.

23 Smarika Kumar, Governing Free Speech on the Internet: Free from the Public Marketplace Policy to a Controlled 'Public Sphere', Centre for Internet & Society Blog, (5th July 2016, 12am), http://cis-india.org/raw/blog_governing-speech-on-the-internet.

24 Chintaman Rao v. The State of Madhya Pradesh, (1950) SCR 759.

25 State of Madras v. V. G. Row, (1952) SCR 597.

upset the balance between such right and the reasonable restrictions that may be imposed on such right". As has already been pointed out, the vague language of the Section and the loose terms bring within its sweep even the innocent persons and it was for this reason that the Court struck it down on the ground of over breadth also. The Court relied on the constitutional bench judgments in *Kameshwar Prasad & Ors.* v. *The State of Bihar & Anr*[26] and *The Superintendent, Central Prison, Fategarh* v. *Ram Manohar Lohia*[27] to declare that the Section 66A is liable to be used in such a way as to have a 'chilling effect on free speech'. *Thirdly*, the proposition that the possibility of an Act being abused is not a ground to test its validity is also rejected by the Court on the ground that if a law is otherwise invalid[28], the mere assurance of the present government to not misuse the law is not sufficient and therefore it is held that section 66A must be judged on its own merits without any reference to how it will be administered. *Fourthly*, the doctrine of severability as pleaded by the government is rejected by the application of *Romesh Thappar* v. *The State of Madras*[29] in toto, holding that the possibility of the impugned section of being applied for purposes outside the subject matters sanctioned by the Constitution. *However*, the Court accepted the argument of "intelligible differentia" and held that there indeed exists a world of difference between the print and other sources of media versus the Internet. This leads us back to square one which was that the Internet as a medium is radically different from the previously used mediums of communication, if television news travels at the speed of sound, the Internet medium carries info at the speed of light. It is hard to keep a track of the activities online by the *netizens* as compared to the activities of the citizens using the conventional mediums. This rekindled the debate of the frustration of law to control a new governance problem that has emerged called the "Internet". To counter the challenges created by the Internet, the State had on many occasions argued that since Internet is a medium, unlike any other, "intelligible differentia" applies and therefore restrictions under Article 19 (2) should be seen in that context. The Court agrees the point on intelligible differentia but refuses to accept the arguments built on this premise by the government. The primary reason for the government's overstepping and hyper censorship of the Internet is the fear of the unknown; it is implausible to predict the impact of a medium that has an outreach to over trillions of people. And the issue of privacy, censorship, instant availability of even questionable data are what makes the governments world over think and re-think the law that

20 Kameshwar Prasad & Ors. v. The State of Bihar & Anr, (1962) Supp. 3 SCR 369

27 The Superintendent, Central Prison, Fategarh v. Ram Manohar Lohia, (1960) 2 SCR 821

28 The Collector of Customs, Madras v. Nathella Sampathu Chetty & Anr., (1962) 3 SCR 786.

29 Romesh Thappar v. The State of Madras, (1950) SCR 594.

governs it. The speed and the instant reproduction of the data shatter the image, logic and sovereignty of law. The polysemy of the digital content threatens the hegemonic control over singularity of meaning in law.[30]

The decision has been hailed as a landmark judgment that 'pushes the frontiers for laws envisaged for the regulation of the Internet'[31] but some concerns remain unaddressed. For example, the rule 16 under section 69A of the IT Act, 2000 provide for strict confidentiality of the complaints received and actions taken thereof. This lack of transparency denies the people the knowledge to be aware of blocks against their content and thereby prevents them from appealing against such decisions. *Nonetheless,* the judgment is a powerful blow to the draconian laws related to freedom of speech and expression and by declaring such provisions unconstitutional it continues its fight against the tyranny of absolute power.

IH Coherent Legal Framework for Cyberspace

a. International Frameworks on Freedom of Expression

Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person.[32] They constitute the foundation stone for every free and democratic society. Article 19 of the UDHR[33], Article 19 of the ICCPR[34], Article 11 of Charter of Fundamental Rights of EU[35] and Article 10 of the ECHR[36] states that everyone has the right to freedom of expression.They are vital to a democratic society and are essential for its progress and welfare and for the enjoyment of other human rights and fundamental freedoms.[37]

The European Court of Human Rights has subsequently affirmed that the right to freedom of expression "applies not only to the content of information but also to

30 Rajgopal Saikumar, Principles, anxieties and concern in the Section 66A judgment, The Hindu, April 6, 2015, New Delhi, (10th April, 2015, 9pm) http://www.thehindu.com/opinion/op-ed/principles-anxieties-and-concern-in-the-section-66a-judgment/article7074193.ece.

31 Victory for Free Speech, The Hindu, March 26, 2015 at New Delhi, (12th April, 2015, 8pm) http://www.thehindu.com/opinion/editorial/victory-for-free-speech/article7032653.ece

32 Abdelhamid Benhadj and Ali Benhadj v. Algeria No. 1173/2003, U.N. Doc. A/62/40, Vol. II, at 122 (HRC 2007).

33 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III), art 19.

34 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 19.

35 Charter of Fundamental Rights of the European Union (CFEU) art 11.

36 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10.

37 The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N.Doc. E/CN.4/1996/39 (1996).Preamble, Para 3.

the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive information." [38]

Paragraph 19(1) of the ICCPR[39] requires protection of the right to hold opinions without interference. This is a right to which the Covenant permits no exception or restriction.[40] Portraying International Law, Article 19 of UDHR[41] and Article 9 of the African Charter of Human Rights[42] gives every person the right to receive information and express and disseminate opinions.

A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.[43] All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with Paragraph 19(1) of the ICCPR to criminalize the holding of an opinion.[44] Any form of effort to coerce the holding or not holding of any opinion is prohibited.[45] The UDHR, 1948[46] and ECHR[47], provides the basic right to freedom of expression to everyone. It is for the State party to demonstrate the legal basis for any restrictions imposed on freedom of expression.[48] When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[49]

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38 Autronic AG v Switzerland, (1990) 12 EHRR 485.

39 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 19(1).

40 UN Human Rights Committee, 'General Comment 10' in 'Article 19: Compilation of General Comments and General Recommendations' (1983), U.N. Doc. HRI/GEN/1/Rev1 at 11 (1994), Para 1.

41 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III), art 19.

42 African Charter of Human Rights (adopted 27 June 1981 entered into force 21 October 1986), OAU Doc. CAB/LEG/67/3 rev 5, 21 I.L.M. 58 (1982), art 9.

43 Marques v Angola, No. 1128/2002, UN DocCCPR/C/83/D/1128/2002.

44 Robert Faurisson v France, No. 550/93, UN Doc CCPR/C/58/D/550/1903(1996).

45 Yong-Joo Kang v. Republic of Korea, No. 878/1999, UN Doc CCPR/C/78/D/878/1999 (2003).

46 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III), Art 19.

47 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 10(1).

48 Viktor Korneenko et al. v. Belarus, No. 1274/2004, U.N. Doc. CCPR/C/88/D/1274/2004 (2006).

49 Hak-Chul Shin v. Republic of Korea No. 926/2000, U.N. Doc. CCPR/C/80/D/926/2000 (2004).

In *Lion Laboratories* v. *Evans*[50], the court confirmed that it was well aceepted that there was a public interest defence to actions of breach of confidence and breach of copyright providing that it could be shown that it was in the public interest to publish confidential information.

The ease of *Leeds City Council* v. *Channel Four Television*[51] states that a story pursues a legitimate aim if it is in the pnblic interest. In *Sunday Times* v. *United Kingdom (No.2)*[52], the court said that the word 'necessary' means a 'pressing social need'.It was asserted in *Thomas* v. *NGN and Hughes*[53] that the publication must meet a pressing social need.

In *Loutchansky* v. *Times Newspapers Ltd.*,[54] it was opined that in a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press to keep the public informed.

Also, Principle 11 of the Camden Priaciples[55] provides that states should not impose any restrictions on freedom of expression '... unless these are provided by law' and 'are necessary in a democratic society to protect legitimate interests. This implies ... that restrictions must be':

a) Clearly and narrowly defined and respond to a pressing social need

b) The least intrusive measure available in the sense that there is no other measure which would be effective and yet less restrictive of freedom of expression

c) Not overbroad in the sense that they must not restrict speech in a wide or untargeted way or beyond the scope of harmful speech and rule ont legitimate speech

Right to freedom of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio

50 Lion Laboratories v Evans [1984] 2 All E.R. 417.

51 Leeds City Council v Channel Four Television [2005] EWHC 3522 (Fam.) at para 25.

52 Sunday Times v United Kingdom (No.2) (App. no. 13166/87) ECHR 26 November 1991 § 50.

53 Thomas v NGN and Hughes [2001], EWCA 1233, at Para. 21.

54 Loutchansky v Times Newspapers Ltd, [2001] EWCA 1805.

55 The Camden Principles on Freedom of Expression and Equality, (Article 19, April 2009), (3rd October, 2013, 5pm) <http://www.refworld.org/docid/4b5826fd2.html>

56 American Convention on Human Rights, "Pact of San José", November 22, 1969, art 3.

57 Declaration of Principles on Freedom of Expression in Africa, (Article 19, 22 October 2002) <http://www.refworld.org/docid/4753d3a40.html> accessed 2/6/15.

58 Dakar Declaration- Media and Good Governance (2005) UNESCO <http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/celebrations / international-days/world-press-freedom-day/previons-celebrations/worldpress freedomday200900000/dakar-declaration/>

broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communications and circulation of ideas and opiuions.[56]

Article XIII (1) of the African Principles of Freedom of Expression Declaration[57] provides that 'states shall review all criminal restrictions on eontent to ensure that they serve a legitimate interest in a democratic society'. The Dakar Declaration[58] calls upon member states to 'repeal criminal defamation laws and laws that give special protectious to officials and institutions' The Tahle Mountain Declaration[59] provides that African states must abolish 'insult and criminal defamation laws'. Further it has been held that defamation laws must be crafted with care to ensure that they comply with paragraph 19(3)[60], and that they do not serve, in practiee, to stifle freedom of expression.[61]

Thus, there have been numerous declarations that encourage best practices in enforcing mechanisms for freedom of speech and provide adequate safeguards as well.

b. Where does India Stand: The IT Act, 2000

"Bad laws are the worst sort of tyranny."

-Edmund Burke

The Information & Technology Act, 2000 forms the framework of the online communication, transactions and data exchange whieh involves the use of alternatives to paper –based means of communication and storage of information, to facilitate electronie filing of documents with the Government agencies. The Act was enacted in furtherance of giving effect to a General Assembly resolution approving the Model Law on Eleetronie Commeree[62] adopted by the United Nations Commission on Interoational Trade Law. The Act was hailed as one recognizing the needs of the citizens and moving with the wave of e-commerce that hit India, though with a large number of loopholes. The Act was amended in 2008, whieh also brought in the draconian section 66A that was recently struck

59 Declaration of Table Mountain (2007) WANIFRA<http://www.wan-ifra.org/articles/2011/02/16/the-declaration-of-table-mountain> accessed 3/6/15

60 International Covenant on Civil and Political Rights, 999 UNTS 171, art 19(3).

61 UN Human Rights Committee (HRC), Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : concluding observations of the Human Rights Committee : United Kingdom of Great Britain and Northern Ireland, UN Doc CCPR/C/GBR/CO/6, 30 July 2008, <http://www.refworld.org/docid/48a9411a2.html>

62 General Assembly of the United Nations Resolution A/RES/51/162 dated 30th January, 1997

down by the Snpreme Court as unconstitutional, having a chilling effect on freedom of expression.

The Act specifically deals with digital signatures, electronie records, e-commerce, ehild pornography, and provides a wide landscape for the online data exchange and retention.

c. The Case for Intermediary Liability

One of the unique features of the Internet is that the way in which information is transmitted largely depends on intermediaries, or private corporations which provide services and platforms that facilitate online communication or transactions between third parties, including giving access to, hosting, transmitting and indexing content.[63]

Thus, on the Net as against the offline information platforms, the right to freedom of expression is also subject to a variety of rules and regulations set in place by these private corporations such as the Interner serviee providers (ISPs), seareh engines and online community platforms etc. Since the technological infrastructure of the Internet can be easily manipnlated by private persons as by states and governments, this poses the question of whether such private actiun should be subject to constitutional scrutiny.[64]

In India, the law regarding intermediary liabihty is still in the nascent stage. The Supreme Court ruling in the Shreya Singhal case has clarified some of the basic regulations in respect of procedural safeguards, transparency and accountability. Though, the court could have dealt with these matters in depth, the judgment is still a step closer to developing an effective framework for intermediary liability in India.

Some of the major draft principles developed recentiy, known as Manila Principles on Intermediary Liabihty are enumerated below. These are a comprehensive set of guidelines based on Intermediary models in the world and their best practices.

i. Intermediaries should be shielded by law from liabihty for third party content.

ii. Order and requests for restrictions should be clear and unambiguous.

iii. Content restriction policies and praetices must be procedurally fair.

iv. The extent of content restriction must be minimized.

63 The Ecounmic and Social Rele of Internet Intermediatics, Organization for Economio Cooperation and Development (April 2010).

64 Paul S. Berman, Cyberspace and the State Action Debate: The Cultural Valne of Applying Constitutional Norms to "Private Regulation", University of Colorado Law Review, 71 p. 1263-310, at p. 1271, (2000).

v. Transparency and accountability should be built in to content restriction policies.

vi. The development of intermediary policies should be participatory and inclusive.

IV Human Rights Issues Involved in Freedom of Expression in Cyberspace

a. Public Interest v. Individual Interest

"The sound of tireless voices is the price we pay for the right to hear the music of our own opinions."

-Adlai E. Stevenson

There are two basic kinds of rights, one that promote individual's interest and the second that further the public's interests. These rights can be conflicting and they are fundamental principles in a democracy. The State ensures liberties to its citizens as individuals and to groups of citizens as a whole. In this, sometimes one right is trampled upon so that the other is not hampered. In what situations does disclosure of info in the public interest dwarf an individual's right to privacy? The term public interest however has deliberately been left anomalous by the Courts in India although it has been described as something 'more than mere idle curiosity'.[65]The fact that the term public interest has been vaguely defined is a grave threat to the right to privacy since the beast of public interest can be raised anytime to attack this right. The Courts have however tried to find an optimal balance between the two issues and by not defining the term 'public interest' and thus have eliminated the need for frequent amendments to keep it in line with the changing norms and perceptions of society.

b. Freedom of Expression v. Privacy

The right to freedom of expression and the right to privacy are inherently contradictory rights. They are at loggerheads. In the case of *Kharak Singh* v. *The State of U.P,*[66] the Supreme Court recognized that citizens of India had a fundamental right to privacy which was inherent in their right to liberty in Article 21 as well as the right to freedom of speech and expression in Article 19(1)(a), and also the right of movement in Article 19(1)(d). This line of thought has

65 Indu Jain v. Forbes Inc., Delhi High Court, (2007), http://lobis.nic.in/dhc/GM/judgement/25-01-2010/GM12102007S21722006.pdf.

66 Kharak Singh v. The State of U.P, (1964) 1 SCR 332

recentiy been approved again by the Snpreme Court in *District Registrar and Collector, Hyderabad ond Anr.* v. *Canara Bank ond Anr.*[67].

Globally the right to freedom of expression includes tbe right to anonymous speech. Added aspect of this is the right to pseudonymous speech where again the content creater does not give his correct identity. In order for a person to express his/her thoughts and ideas, political, ethical, or otberwise a person requires a safe private sphere free from State or private interference. Therefore the right to privacy which would protect one's privacy actually goes hand in hand with the right to freedom of information and transparency.[68] Thus the relationship between thc freedom of expression and privacy does not havc to be a zero sum game but rather can be a positive sum gamc where both rigbts exist not only to not diminish eacb other but actively support and cnhance each other.

It has already been stated earlier that the right to privacy is a fundamental right onder the Indian Constitution but the same can be violated in certain situations as held by the court. In *Govind* v. *State of M.P.*[69] the Supreme Court laid down the (i) superior important countervailing interest test, (ii) compelling state interest test, and (iii) compelling publie interest test. On tbe other hand, the case of *R. Rajagopal*[70] has also laid down certain tests regarding when private information can be published.

The situations in which the freedom of expression falls short of justifieation in the wake of the right to privacy of an individual include the information related to public persons. Altbough the commcreial exploitation of the images and celebrity of public persons can be protected to some extent ander the existing inteilectual property regime snch as trademark law us well as copyright law[71], tbe Dethi High Court has recognized that thc right to publicity has evolved from the right to privacy.[72] The rights of minors and vietims of sexuat violance are also ander threat when speech is umegulated. With thc advent of the pervasive social media, it is also a burning question as to wben a comment or a picture posted online can be seen as a violation of one's privacy, sinee the line between public and private spheres is inereasingly blurred. Another question regarding privacy and the virtual world is how a person can be made liabic for the harm caused to

67 District Registrar and Collector, Hyderabad and Anr. v. Canara Bank and Anr., AIR 2005 SC 186

68 Freedom of Expression, Privacy International, https://www.privacyinternational.org/issues/freedom-of-expression

69 Govind v. State of M.P, (1975) 2 SCC 148

70 R. Rajagopal & Anr. Vs. State of Tamil Nadu & Others , (1994) 6 SCC 632

71 Thomas George, Celebrity Focused Culture Highlights Need for Statutory Right to Publicity, World Trademark Review, (2010), http://www.worldtrademarkreview.com/issnes/article.ashx?g=1596958f-55a7-4b2b-a93c-66f887027801

72 ICC Development (International) Ltd v. Arvee Enterprises, [(CS) OS 1710/2002).

a person's reputation through the Internet by some forms of cyber bullying, stalking, etc. Data protection regimes will be the need of the hour to protect and immune a person from slanderous activities and also a degree of self-regulation by the media platforms will be welcome.

c. The Solace of Oblivion: The Right to be Forgotten

This issue surfaced when the European Court of Justice in a landmark judgment declared that there exist a "right to be forgotten" in the digital forums. Removing information from the search database or query is essential to ensure that the rights of the person can be protected. Article 8 of the ECHR provides that everyone had the right to respect for his private and family life, his home and his correspondence and to be left alone.[73] In the case of *Aleksey Ovchinnikov* v. *Russia*[74], the ECHR found that "*in certain circumstances a restriction on reproducing information that has already entered the public domain may be justified*" In 1998, a Spanish newspaper called *La Vanguardia* published two small notices stating that certain property owned by a lawyer named Mario Costeja González was going to be auctioned to pay off his debts. Costeja cleared up the ficancial difficulties, but the newspaper records continued to surface whenever anyone googled his name. In 2010, Costeja went to Spanish authorities to demand that the uewspaper remove the items from its Web site and that Google remove the links from searches for his name. The Spanish Data Protection Agency, which is the local representative of a Continent-wide network of computer-privaoy regulators, denied the claim against *La Vanguardia* but granted the claim against Google. The Court ruled that all entities in the nations within its jurisdiction had the right to prohibit Google from linking to items that were "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed." The right of iudividuals to have their data no longer processed and doleted when they are no longer ueeded for legitimate purposes and the duty of controller in ensuring the same was first givon by the European Commission of November 4, 2010, and iater incorporated in the GDPR.[75]Further, the Albrecht Report states that "Any person should have the right to have personal data concerning them rectified and a 'right to erasure and to be forgotten."[76]

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73 EMI Records (Ireland) Ltd and Others v. The Data Protection Commissioner, [2012] IEHC 264.

74 Alekscy Ovchinnikov v Russia, (App. no. 24061/04), ECHR 16 December 2010

75 European Union General Data Protectiou Regulation art.17.1

76 Draft Report on the proposal for a regulation of the European Parliament and of the Council on the protection of individual with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (Albrect Report), p.28–29.

V Can Cyberspace Promote Democracy as well as Freedom of Expression?

"Democracy, which is a charming form of government, full of variety and disorder, and dispensing a sort of equality to equals and unequals alike."

-Plato in The Repnblic. Book VIII. 558

Democracy is one of the most forward forms of government systems that have emerged in the 19th century. Otten called the 'popular government', it is a system that is grounded in the belief of rule by the people through a constitutional institution, chosen by a majority, one that understands the aspirations of the citizens and strives for a better society. James Madison and John Stuart Mill regarded democracy as a powerful but imperfect mechanism: something that ueeded to be designed carefully, in order to harness human creativity but also to check human perversity, and then kept in good working order, eonstantly oiled, adjusted and worked upon.[77]

Democracy and freedom of expression arc seemingly bipartisan ideologies. One stems from the rule of the majority while the other is widely recognized as an individual's right against the State Democracy pre supposes political speech and this may harm indlviduals as political speech is dominated by hyperbolo and offends the sentiments of certaiu audiences. But the democratie principle of equality that whieh glves dno weight to a variety of values is threatened by untamed fiee speech. lu a democracy, as Plato pointed out there is a sort of equality that treats unequal and equals alike.

It may be pointed out that Democracy as form of government originated in as early as the 6th Century B.C. in Athens with references to such a system in the works of Plato and his diseiple Aristotle, continuing with the works of Niccolo Macbiavelii. There were also times after the First World War when mass discontentmem led to the establishment of Nazist and Fascist governments in Germany and Italy respectively. By 1941 there were only 11 democracies left, and Franklin Roosevelt worried that it might not be possible to shield "tbe great flame of democracy from the blackout of barbarism".[78] The modern democracies have been facing their share of ups and downs. With the rise of China (based on its communist regime) and the financial crisis of 2007-08 (or the global recession), the Western democracies have been struggling to deliver on the economic front.

77 What Has Gone Wrong With Democracy, The Economist Essays, (22nd September, 2016, 4:45am), http://www.economist.com/news/essays/21596796-democracy-was-most-successful-political-idea-20th-century-why-has-it-run-trouble-and-what-can-be-do.

78 *Id.*

It is a truism that when the government struggles to meet the economic aspirations of the people, the government stares al a pitfall. Though the modern democracies bave survived on debt finaneing and meeting the short term goals of appeasing the masses during the elcctions, this system has been under fire for slow growth and widespread corruption.

One reason wliy a large uumber of democratic experiments have failed in the recent past such as in the Middle East and Latin Ameriean eountries is that the power of the State was net put ander check. For instance, the right to freedom of expression and freedom to assemble needs to be guaranteed. The evolutiou of any idea or a form requires the said notion to stand the test of time and also critioism whieh in turn leads to improvements being suggested for its growth. The cyberspace has provided a unique piatforrn for debate and mass movements against the existing totalitarian regimes such as in the Arab Spring.

It needs to be stated that freedom of expression and democracy do not exist at the expense of each other, rather they facilitate themselves. While the State is obligated to protect its sovereignty and its citizens from harmful or defamatory materials on the web, it is equally duty – bound to facilitate discussion of non – populist yer valid issues. As fieedom of priut media is being seeured by governments across the world - even at times of dissidence among factions of its people; - internet should as well be empowered following the same democratic principle. Finally, the process of democracy and freedom of expression cannot happen in separate compartments, because each is an important condition of the other.

VI Conelusion

"Freedom of speech is the great bulwark of liberty; they prosper and die together: And it is the terror of traitors and oppressors, and a barrier against them. It produces excellent writers, and encourages men of fine genius."

–Benjamin Pranklin

Freedom of speecli is a widoly reeognized liberty. It has developed since early revolutions in societies fighting the tyranny of the ruling classes. It is a right that has been gained after much struggle and it a struggle for which innumerable lives have been lost. The rise of Cyberspace as a platform of discussion has been a watershed event in the history of its growth. Cyberspace is a dimension that poses its own set of concerns ns it is considered to be a lesser known yet highly advanced medium marked with technological breakthroughs each day. A Google search of 'freedom of speech in cyberspace' onumerates various links to

declaralions and national norms governing this freedom in the virtual world and guaranteeing the same. lu this Artiele, we have touclied upon key areas in the discussion on the freedom of speecli in cyberspace sueh as what ure cyberspace, the varions laws and frameworks on freedom of speech and expression, the Indian laws and certain suggestions on liow to make better laws that could guide the government policies. After consideriug arguments from a variety of perspectives, one is convinced that the threats to freedom of speech in the wake of the Net revolution are numerous. Yet, coherent legal frameworks arc amiss. Even in the West, tbat witnessed the Internet mucb earlier, there is a world of difference in liow differont countries look at the Intornet and its hits and misses. In South Asia, where the Internct wave only hit in the 1990s, it was received with mixed emotions of both fear and euphoria. This led to cross culture mingling besides an upsurge in trade and liberalization of markets. The global nature of this revolution has pushed the boundaries of social norms and political processes. An apt example of this would be the outrage over the massacre at Charlie Hebdo in Paris whicli sparked debate on a slew of subjects such as Franee's tolerance of free speech, blasphemy laws and Islam. This took the debate on free speech on a whole new level where it tussled with the religious sentiments of the masses and the question of whether free speech could indeed be stretched to mock a religion. Censorship by the governments seems a viable option to prevent such incidents that incite. But this leads to shrinkage of publie discourse. In this eontext, one should not be swayed by sentiments; rather it is necessary to protect the right to free speech and not the content of it. The proviso—a vital one—is that not everything that is permitted is compulsory or desirable. Many words and images should be allowed that arc neither prudent nor tasteful. Editors, broadcasters, politicians and citizens sliould be mindful of those values, too. But they should be matters of conscience, not for the law.[79]

79 The Sound of Silence, Economist, 24th January 2015, Amsterdam.

Aministrative Law : Continuation of Constitution

Mihir Saraswat and Yugantar Singh Chauhan**

I Introductioo

Administrative iaw develops as a separate branch of legal discipline. It is deeply entrenchad in an individual's life and omnipresent. The phonomenal growth is construed to be a bye-product of intense governmental function. To check the reiation and powers of regolarities, and to avoid the abuse of eivil liberties, administrative law becomes a medium wbich eonduets the stability in society. It channelizes the administrative powers to achieve basie aim of a eivilized society, and ensures growth with liberty[1]. Therefore, administrative law is a body of reasonable limitations and affirmative action, devcloped by legislature, maintained by courts and sustained through rule-of-law in society. It covers all branch and working of government administrative and quasi-administrative bodies. Administrative law is considers being a product of constitutional law.

Constitution is defined as a body of fundamental principles or established precedents according to which a state or organization is governed[2]. Constitutional law describes various organs of the State, there working, relationships and model of governance. Constitutional law briefly describes the powers and functions of administrative authorities and quasi-governmental powers. Therefore, it is uot logically possible to distinguish administrative law from constitutional law and attempts are artificial[3]. Constitution or constitutional law deals with the rights whereas administrative law with publio needs. In a country like oers there exist a close relation between the constitutional and administrative law, concerned with functions, powers and contro) of administrative authorities, Constitution imposes certain restriction over the act of the Government and if, any authority transgresses any limitation, the administrative act will be void. It brings the administrativc process in conformity with law and make sure that the principle of rule of law and natural justiee arc in consonance.

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1 I.P. Massey, Administrative Law, 1 (8th ed. 2012).

2 Elizabeth Giussani, Constitutional and Administrative Law, 2, (1st ed. 2008).

3 Durga Das Basu, Administrative Law, 1 (2010).

The slow growth and development of administrative law was mainly due to the conventional common law system. Conventional common law never differentiates administrative law as a separate branch of law in practice. Dicey repudiates the existence of administrative law in 1885. According to him 'there can be with us nothing really corresponding to the administrative law or the administrative tribunals'.[4] The rationale behind his notion that disputes of government and its servant is beyond the scope of the civil courts and mast be dealt by special courts; like in Francc (droit administratiff). The system was unknown to the Law of England, and Dicey continued to deny the existence of administrative law in England. His legacy was contioued by Lord Hewart, who too said that English common law docs not recognize droit administratiff.

In India, administrative law is rarely treated as a separate branch. In the recent development of constitutional law; certain policies underline the importance of administrative law. The Twenty-fifth[5] and Forty-second[6] amendment leads to the growth of administrative law in correct direction. The Article 13(2)[7] gives transcendental effect to Article 39(b)-(c)[8] and call forth for the greater use of administrative initiative and discretion to control various activities[9]. The Constitution of India provides establishment of some administrativc agency, like, Article 262, creation of Inter-State Water Dispute Authority; Article 280, Finance Commission; Article 263, creation of Inter- State Council; Article 315, Pnblic Service Commissien and Artiele 324, Election Commission[10]. Indian administrative law as developed so mueh that it is not possible to oust it ont of today's governance. In 1991, when India economy opens its door for the world, the administrativc law developed in international sphere. With the entry of new players in the economy, some sections of the society emphases on the development of the new norms of rule of law to apt with the social justice.

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4 *Id* at 14.

5 Constitution (Twenty-fifth Amendment) Act, 1971.

6 Constitution (Forty-second amendment) Act, 1976.

7 Article 13(2) in The Constitution Of India 1949: The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

8 Article 39 in The Constitution Of India 1949: Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing
(a) that the citizens, men and women equally, have the right to an adequate means to livelihood;
(b) that the ownership and control of the material resources of the community are so distributed as best to snb serve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

9 M.C Jain Kagzi, The Indian Administrative Law, 13 (7th ed. 2014).

10 Supra 1 at 14.

II The Rule of Law

Administrative Law in US and other common law countries has gained the dignity of a separate field of study in the last few decades. Dicey locating of right based liberalism and judicial review in the concept of rule of law is considered a major reasen for the growth of administrative law in England. The origin of the term "rule of law" is from the French phrase *la principe deceased legalite* which means that the government should be of the principles of law and not men. Rule of law is also seen to be closely related to natural law. It has been described as an animation of natural law or a modern name of natural law. In the modern day democracy, the cencept has taken a different shape and now the people who hold power must justify their holding of power. The fabric of the Constitution is drenched into the concept of Rule of law. For any civilized society, the rule of law is the basic rule of governance. Rule of law is a dynamic legal concept which does not have a definite definitien. It is a viable and influential concept which has been interpreted by varions jurists in various ways. It also sometimes acts as a principle of statutory interpretation and gives courts discretion to interpret in accordance with the rule of law unless Parliament's intention is clear.

a. The term Rule of Law is generally used in two senses:

i. Formalistic sense, and

ii. Ideological sense.

In formalistic sense, rule of law opposed the rule of one man and in ideological sense it regulates the relationship of the citizen with the government and becomes a concept of varied interests. It represents an ethical code for the exercise of power in a state. The programming of the code may be different, taking care of the social needs, but it has to cover all basic postulates of the society, which include equality, freedom and accountability.

But there are certain basic principles of rule of law to which there is agreement as to what the concept tries to express. One of the basic principles of rule of law is that there cans no arbitrary use of power. According to Dicey the rule of law has three meanings[11]:

- First, an individual would only be punished for breach of law;
- Second, equality before the law and,
- Third the principles of constitution are the result of judicial review.

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11 Supra 2 at 65.

Dicey was of the view that absolute supremacy of law opposed the influence of arbitrary power and excludes arbitrariness. The principle is divided into two parts:

- First, individual should be punished for breach of law. It summarizes the general ides of the rule of law that actions must have legal bases.
- Second, absence of arbitrary power and supremacy of law. Dicey advocates predominance of law and absence of discretionary power which led to arbitrary actions. He believes where there is discretion, there is room for arbitrariness.

Dicey implies that justice should be done through known principles. In his words "*not only with us no man is above all law, but here every man, whatever be his rank or condition, is subject to the ordinary law of the realm*"[12]. His formulation is concerned with equality, which means equality before the law and equal subjection of all classes before the law. The rule of law excludes the sense of any exemption and ponders upon the duty of obedience of law. Dicey believed that it is necessary to adhere to rule of law, and the citizens be given legal protection afforded by courts. His idea is simple and is universally applicable. Dicey also dismay the idea of 'droit administraff'. He criticized the idea of separate administrative law and biased towards Executive.

Dicey recognize the principles of constitution arises from judicial pronouncement. "The constitution is pervaded by the rule of law on the ground that the general principles of the constitution are with us the result of judicial decisions determining the rights of private person"[13]. Dicey draws a comparison with foreign constitutions. He argued that civil liberties were better protected through common law. According to him, practical approach provided a better remedy than contents. Ideally, common law is a better way to protect individual rights and courts have the power to control administrative action. The principle implies that the executive must act under the law i.e. under the rule of law, which is a cardinal principle of the common law system.

Dicey's concept of Role of Law had its advantages and disadvantages. Although, complete absence of discretionary powers, or absence of inequality, not possible in administrative age. The concept of the rule of law has been used to spell out many propositions and deductions to restrain an undue increase in administrative powers and to create controls over it. The rule of law has given following the common law system,

12 Mark Elliott, Administrative Law, 5 (13th ed. 2005).

13 Supra 2 at 67.

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11 Supra 2 at b5.

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12 Mark Elliott, Administrative Law, 5 (13th ed. 2005).

13 Supra 2 at 67.

- a philosophy to curb the government's power and to keep it within bounds;
- a sort of touchstone or standard to judge; and
- test administrative law in the country at a given time.

Similarly, rule of law is atso associated with the supremacy nf courts. Therefore, courts should have the power to control administrative action and any curtailment of rights should be criticized.

b. Indian Accords

The Supreme Court in its various judicial pronouncements has stated the importance of rule of law. lu the case of *Indira Nehru Gandhi v. Raj Narain*[14] Artiele 329-A[15] which was inserted in the Constitution by the 39th amendment was held to be invalid as it violated the principle of rule of law. In *Chief Settlement Commissioner Punjab v. Om Prakash*[16] it was observed that "In our constitutional system, the central and most characteristic feature is the concept of rule of law." [17] One of the basic priuciples of rule of law is that no one is above the law. As Justico Bhagwati said "*You may be so high, but the law is always higher than you*". Even the power of the President to grant pardon under Article 72[18] is subject to judicial review. Supreme Court in the case of *Maru Ram v. Union of India*[19] held that "*Pardon, using this expression in the amplest connotation, ordains fair exercise, as we have indicated above. Political vendetta or party favoritism cannot but be interlopers in this area*". lf pardon is givon based on party favoritism it would lead to arbitrariness. lf the action of the President is arbitrary there will be inequality. Supreme Court righty observed in the case of *Som Raj v. State of Haryana*[20] that the absence of

14 1975 AIR 865.

15 Article 329(a) in The Constitution Of India 1949: (a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court;

16 1968(3) SCR 655.

17 1969 AIR 33.

18 Article 72 in The Constitution Of India 1949: Power of President to grant pardons, etc, and to suspend, remit or commute sentences in certain cases(1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence:(a) in all cases where the punishment or sentence is by a court Martial; (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends; (c) io all cases where the sentence is a sentence of death.

19 (1981) 1 SCC 107.

20 1990 SCR (1) 535.

arbitrary power is the first postulate of rule of law. In the case of *E.P Royappa v. State of Tamil Nadu*[21] the Supreme Court held that if an act is found to be arbitrary, it is implicit that it would lead to iucquality. And if there is inequality in the society it wonld be a violation of rule of law. As equality is one of the core fundamental priuciples of rule of law[22]. Therefore, if there is a violation of equality there would be a violation of rule of law. Rule of Law was held to be a part of the basic structure in the case of *Kesavananda Bharti v. Union of India*[23]. It was said aspect of doctrine of basic structure of the Constitution, which even the plenary power of the Parliament cannot reach to amend. Also in Kesavananda Bharti's case it was held that the basie structure cannot be violated under any eireumstances[24].

Thus we ean elearly see that even if eertain power is given to the President whieh is guaranteed by the constitution it has to be in accordance with the rule of law. Iu order to ensure that the rule of law is maintained in the country we have a separate and impartial judiciary. The judiciary has the power of judicial review. Aecording to which the judiciary ean review any law in the country and strike it off if it finds reasonable grounds that law is a bad law. In the case of *Church of Scientology v. Woodward*[25] Brennan J spoke about the role played by the judiciary in securing rule of law in a eountry through its power of judicial review. "*Judicial review is neither more nor less than the enforcement of rule of law of executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by the law and the interest of the individual are protected accordingly*"[26]. Also in the case of *Minerva Mills v. Union of India*[27] the Supreme Court of India declared that for the survival of rule of law in any democratic nation the judicial review would be the soul of that system and without judicial review rule of law eannot be maintained. Therefore for rule of law is to be enforced the judieiary mast have the power of judicial review.

III Judicial review

Aecording to Black's Law Dietionary, judieial review means "*the practice in the judiciary of protecting or expanding individual rights through deeisions*

21 1974 AIR 555.

22 I.P. Massey, Administrative Law, 1 (8th ed. 2012).

23 (1973) 4 SCC 225.

24 (1973) 4 SCC 225.

25 [1982] HCA 78.

26 Charles Grove Haines and Foster H. Sherwood, The Role of the Supreme Court in America, Government and Poiitics, 288 (1957).

27 AIR 1980 SC 1789.

that depart from established precedent or are independent of or in opposition to the supposed constitutional or legislative intent"[28]. Judicial Review is not a usurped power but a part of the grand design to ensure constitutional supremacy[29]. The concept come into light for the time in Iadia in the ease of *Emperor v. Burrah*[30] where the Calcutta Iligh Court as well as the Privy Counell accepted the view that Indtan Courts also have the power of judicial review but under certain limitations. Jndieial Review is an indispensable part of our constitution. Judieial Review is also a part of the basie structure and not even an amendment by the Parliament can take away the power of judicial review form the judiciary[31]. Justiee Bhagwati said "*I am of the view that if there is one feature of our Constitution which, more than any other is basic and fundamental ta the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution*". In the case of *L.Chandra Kumar v. Union of India*[32] the definition of Judicial Review given in American Constitutien by Henry J Abraham was accepted with few modifications which would be more suitable to Indian Constitutien. It was held that judicial review in India comprises of three aspects judieial review of legislative actions, judieial review of judicial actions and judicial review of administrative actions. Aeeording to Howard Mebain an American anthor judicial review means power of the courts to declare any action of the executive or legislature uull and void if its violates the constitution[33]. The nature and purpose of judicial review is to review the decision making process and not to review the decision of administrative authorities[34] While exercising judicial review decision making proeess is the matter of more coneern for the court rather than the merit of the ease[35]. The purpose of jndicial review is to ensure the efficiency of administrative authorities. The central purpose of judicial review is to promote good administration[36]. Judieial Review also gives judieiary the power of lending a helping hand to the legislature in making better laws by rectifying the mistakes which the legislature might have made during the formation of a particular law. The framers of our Constirution very wiseiy incorporated the Constitution and tried to inelude the provisions of judicial review to the best of its use. The

28 Hlack's Law Dictionary, 925 (19th 2009).

29 Arthur Goldberg, The Defense of Freedom, 148 (1966).

30 (1878) ILR 3 Cal 64.

31 Supra 23.

32 AIR 1997 SC 1125.

33 Sanjay Satyanarayan Bang, Judicial Review of Legislative Action: a tool to balance the supremacy of the Constitution, 6-9, (onpublished manscript).

34 *Excise and Taxation Officer v. Gopi Nath* 1983 54 STC 211 F H.

35 *State of U.P v. Johri Lal* (2004) 4 SCC 714.

36 *Central Public Interest Litigation v. Union of India*. 2016.

term 'judicial review' as such is not mentioned anywhere in the Constitution but framers of our Constitution through various Articles have tried to infuse the concept of judicial review in the Legal System of our Country and the Constitution has been made a medium for it. The Constitution of India explicitly establishes the concept of judicial review through Articles such as 13, 32, 131, 136, 143, 226 and 246. But the concept of judicial review is also nor absolute and it is also subject to certain limitations. In the case of *J.A.C of Airlines Pilots Association of India v. Director-General of Civil Aviation*[37] it was held that when the public authorities are formulating a particular law they must be given full freedom and liberty, though the freedom which is granted to these authorities is not absolute. But it can be a matter of judicial review when it is proven that the law is arbitrary, unreasonable or violates the Constitution[38]. The power of judicial review should only be exercised where there is presence of any mala fide or irrationality. The Supreme Court in the case of *D.D.A, New Delhi v. Joint Action Committee Allotee*[39] of S.F.S Flats laid down four situations as to when the Court can use its power of judicial review-

1. If it is unconstitutional
2. If it is de hors the provisions of the Act and regulation.
3. If the delegate has acted beyond its powers of delegations.
4. If the exercise policy is contrary to statutory or a larger policy.[40]

Judicial Review is an important function which the judiciary performs in order to stop the legislature from making any law which is nor good for the society. But for effective performance of this function the judiciary needs to be under no undue influence or in other words there should be independence of judiciary. If the judiciary is subject to any pressure from the executive or the legislature it would be a violation of the principle of separation of powers. The separation of judiciary from the other organs of the government is very important so that the common man's liberty is not compromised and a fair remedy is available to all citizens of the nation. In order to ensure the independence of judiciary the Constitution makers tried to inculcate the principle of separation of powers. By this the government was divided into three organs namely the legislature, executive and the judiciary. Each of these organs were given certain task to perform. By doing so the Constitution makers succeeded in giving the judiciary the necessary

37 AIR 2011 SC 2220.

38 Lee Modjeska, Administrative Law: Practice and Procedure, 389 (1st 2015).

39 2007 SC 1275.

40 Dr. U.P.D Kesari, Administrative Law, 365 (19th ed. 2012).

tools it needed to perform the function of judicial review. Therefore because of virtual presence of separation of powers in our Constitution, the judiciary has the power of judicial review.

IV The Doctrine ol Separation of Power

The doctrine of separation of power was advocated by Aristotle in his work *Politics*. He identified three essentials of a constitution[41]:

- Legislature or the deliberate, which discuss everything of common practice;
- Executive or the officials; and
- Judiciary

According to Aristotle, the proper arrangement of three organs is of vital importance for the balancing the eonstitution. Though the doctrine was well propounded and developed at early stage, the modern expression was provided by Montesquieu. In his book *De L' Espirit des Lois*, a systematie account of English eonstitution was provided and ontline eharacter of doctrine of separation of power was discussed. Montesquien theory has three aspects:

i. Recognizing three broad functions of government i.e. making of laws, executing publie affairs and adjudication of cases.

ii. Establishment of three different organs i.e. legislative, executive and the judiciary.

iii. Performanee of three functions by separate branebes, to uphold liberty.

The idea was that there would be an end to everything, if same person or body, exereise all three funetions then there can be no liberty and the subject would be exposed to arbitrary actions.

The doctrine of separation has influenced the growth of administrative law up to many folds. With new increasing demands, the government tries solve many complex socio-economic problems of the modern society, new institutions have been ereated and new procedures evolved. But the character of administrative law has influenced the doctrine to some extent. The strict separation theory was dented and when the courts eonceded that legislative power could be conferred on the executive and thus introduced the system of delegated legislation.

The doctrine of separation of power is the basic structure of American Constitution. However, with the passage of time the growth of administrative law, a strict adherence to the doctrine has become impossible. The legislative power is vested with Congress and has also delegated its legislative powers to varions administrative agencies and the Supreme Court of US bas not declared the eombination of two or more funetions to be unconstitutional.

41 Mark Elbott, Administrative Law, 359 (3rd ed. 2012).

Montesquieu drew his greatest inspiration from England. England has never adopted a strict doctrine of separation of power. English system is more based on integration of powers. For instance, the Lord Chancellor is the head of the judiciary. Judges in England exercises executive functions as a matter of wards of court and trust. Similarly, the House of Commons (legislatures) exercise judicial powers in case of breach of its privileges.

A casual reading of Indian Constitution might conclude that the doctrine of separation of power has been incorporated in it. The same view was reflected in the landmark judgment of *I.C Golak Nath v. State of Punjab*[42], it was observed:

"The Constitution brings into existence different constitutioual entities, namely, the Union, the States and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them"

A close study reflects that the Indian Constitutien does not demarcate the functions of the three organs, and to some extent the strict application of the doctrine is not accepted in the Constitution. This becomes clear from some of the provision of the Constitution:

- Article 123[43] Article 123 in The Constitution Of India 194: Power of President to promulgate Ordinances during recess of Parliament: (1) If at any time, except when both Houses of Parliament are in session, the

42 AIR 1967 SC 1643.

43 Article 123 in The Constitution Of India 194: Power of President to promulgate Ordinances during recess of Parliament: (1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance

(a) shall be laid before both House of Parliament and shall cease to operate at the expiration of six weeks from the reassemble of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the President Explanation Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void CHAPTER IV THE UNION JUDICIARY

President is satisfiad that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require which provide wide legislative powers to the President and power to issue ordinance when Parliament is not in session.

- Article 72 and 161[44] provides power to President and Governor to grant pardons to persons convicted by judiciary.

Although, the constitution is broad-based on the doctrine of separation of power, the strictest and the most beneficial manifestation of this theory in India is that judieiary is totally independent, i.e. free from any interference from the executive or the legislature. Jnstice Mukherjce in *Rai Sahib Ram Jawaya Kapur And Ors. v. The State Of Punjab*[45] sum up the view as:

"The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity bur the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Consttution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another".

V Delegated Legislation

According to the strict the theory of Separation of Power, it is the funetion of the legislature to legislate; executive to administer the law made by the legislature. With the increase in multifarions functions and responsibilities of the State, it is virtually not possihle for executive to restrict themselves to the traditional executive organ of the government. Strictly adhering to the theory of Separation of Power has become impossible in the modern world and delegated legislatian has become a necessary evil.

The word delegated legislation covers a multitude of problems. It is a function of legislation entrusting to any organ of the government other than legislature. The framework of a law is constructed by the legislature, but there are several aspects which need to be taken eare and not foreseeable by legislature[46]. It is

44 Article 161 in The Constitution Of India 1949: Power of Governor to grant pardons, etc, and to suspend, remit or commute sentences in certain eases The Governor of a State shall have the power to grant pardons, repricves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relatiog to a matter to which tho executive power of the State extends

45 1955 2 SCR 225.

46 V.N Shukla, Constitution of India, 985 (12th ed, 2014)

therefore, become a mandate to delegate certain functions to the executive. Several factors have contributed in the development of the delegated legislation. The modern State is a welfare state and has multiple activities to perform. As observed by Supreme Court in *Ajay Kumar Banerjee v. Union of India*[47] that the need subordinate legislation *has evolved out of practical necessity and the pragmatic needs of a modern State.*

Delegated legislation is today accepted as a fact of political life. It has been established itself as a phenomenon which can be discussed but cannot be denied. In a strict form, it has to stay and control over it is equally important.

The judicial control over delegated legislation is an effective control. The courts have the power to strike down both legislative enactments and executive action on the groend of *ultra vires*. The expression *ultra vires* means beyond the capacity of the authority or person concern, no necessarily illegal.

"If a rule made by a rule-making authority is outside the scope of its power, it is, void and it is not at all relevant that its validity has not been questioned for a long period of time: if a rule is void, it remains void whether it has been acquiesced in or not"[48]

VI Conclusion

Concepts such as rule of law, separation of power and judicial review are very prominent concepts ef administrative law. These concepts as such are different but they are intimately connected to each other in same way or the other[49]. For example equality is one of the eardinal principles of rule of law. It is logical to follow that if there is violation of equality there will be a violation ef rule of law. But if there is no judicial revlew, then there would be no independent anthority to declare that there is violation of rule of law, which is not acceptahle. The violation of these concepts would he nothing, but a mockery in the society. The power of judicial review which has been given to the judiciary comes from the concept of separation of power. This concept grants the judiciary its independence from the legislature and the executive. Thus we can see a connection between these concepts of administrative law. We can also see that our Constitution makers have kept these concepts in mind and drafted the Constitution. Snch as

47 AIR 1984 SC 1130.

48 *Lohia Machines v. Union of India*, AIR 1985 SC 421.

49 *M.Nagaraj & Others v. Union Of India*, AIR 2007 SC 71.

Article 14[50] and 15[51] reflect the principle equality, equality tries to erase arbitrariness. And the basic idea of rule of law is that there should be equality and no arbitrariness. Article 136[52] Article 136 in The Constitution Of India 1949: Special leave to appeal by the Supreme Court gives the Judiciary the power to listen to an appeal in any matter from any tribunal even the Supreme Court of India. This is a very immense power which is been granted to the Supreme Court. In other words it just expands the scope of judicial review for the Judiciary. Thus the constitutional guarantees have given the structure of today's administrative law and continued by the administrative law.

50 Article 14 in The Constitution Of India 1949: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

51 Article 15 in The Constitution Of India 1949: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or ony of them, be subject to any disability, liability, restriction or condition with regard to-(a) access to shops, public restaurants, hotels and places of public entertainment; or
(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
(3) Nothing in this article shall prevent the State from making any special provision for women and children.
(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

52 Article 136 in The Constitution Of India 1949: Special leave to appeal by the Supreme Court
(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.
(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

Case Note: *Subramanian Swamy vs. UOI & Ors* – Right to Reputatiou vis-à-vis Freedom of Speech and Expressiou

Anuja R. Maniar*

I Introduction

In a time of eritics and activists where wo are becoming more and more aware and vocal about the issues that face ns; where people are realizing the importance of speaking out and not holding back and tolerating the policies and actions of our leaders, pohticians or other influential persons; in a time of dissent and censure, the need to draw a line between fair criticism and defamatien becomes imperative. With the advancement of technology, avenues of media too have widened. Now it's not just the press which needs to be aware of the legal implications of defamation in the country but with the advent of social media, it is an aspect that affects all of us too. In recent times, we've seen a circus of allegations and counter allegations being hurled between our leaders with defamation cases being filed against prominent political figures like Arvind Kejriwal, Rahul Gandhi, Subramanian Swamy to nome a few. In India, the problem which arises is that defamation is treated not just as a civil wrong but also as a criminal wrong by virtue of Sectian 499 and 500 of the Indian Penal Code. A civil wrong would lead to relief in the form of monetary compensation, specific performance or otherwise while a criminal wrong would be penalized with a prison term or fine or both. The abovementioned pohticians along with 21 others challenged the constitutionality of criminal defamation before the Supreme Court[1] which upheld the constitutionality of the same, citing the protection of reputation as an important facet of Article 21. This landmark decision in May, 2016 was severely criticized. Following is a brief analysis of the judgment and the arguments made therein.

Firstly, to understand the provisions under ehallenge, defamation as defined in Section 499 of the Ponal Code reads,

'Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputatien

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1 Subramanian Swamy vs. Union of India, Ministry of Law and Ors, 2016 (7) SCC 221

will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person."[2]

The definition is followed by four explanations and ten exceptions which do not amount to defamation.

Section 500 goes on to give the punishment for defamation which is imprisonment that may extend to 2 years, fine or both.[3]

The above provisions were challenged by the petitioners as being violative of the fundamental right of freedom of speech and expression as envisaged under Article 19(1)(a) of the Constitution. The said provision reads,

(1) All citizens shall have the right—

(a) to freedom of speech and expression;[4]

However, as all other rights, the freedom of speech and expression is not absolute and Article 19(2) sets out the powers of the State to impose reasonable restrictions on this freedom in 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.[5]

II Discussion

Having understood the above provisions, broadly, the following are the points of discussion in the judgment as regards to them.

a. Applicability in today's times

Article 19(2) includes defamation as a reasonable restriction on the freedom of speech and expression. On behalf of the petitioners it was contended that under Article 19(2), the word defamation was never meant to include criminal defamation. Allowing Sections 499 and 500 to be constitutionally valid in this day and age would have a chilling effect on the much cherished freedom of speech and expression. Restrictions on fundamental rights should depend on the cultural and social ethos, need and feel of the time[6] and Sections 499 and 500 being itself of 1872 vintage, having been passed in the colonial era wherein the ruler ruled over

2 Indian Penal Code, Section 499 (1872)

3 Indian Penal Code, Section 500 (1872)

4 Constitution of India, Article 19 Clause 1 Sub Clause a (1950)

5 Constitution of India, Article 19 Clause 2 (1950)

6 Subramanian Swamy vs. Union of India, Ministry of Law and Ors, 2016 (7) SCC 221, Para 1

the subjects and vanquished resistance, have lost their significance in today's era of liberalism.

However, the contention that Article 19(2) only refers to defamation as a civil wrong and not as a crime was not accepted. It had been argued by the respondents that the provisions relating to defamation in Sections 499 and 500 of the Indian Penal Code were in existence even when the Constitution was being drafted. In fact, they were the only statutory laws on defamation at the time.[7] Thus it would be incorrect to assume that the framers did not wish to include criminal defamation under the ambit of defamation in Article 19(2).

b. Private vs. Public Wrong/ Civil Wrong vs. Crime

At the heart of the reasoning of the case is the question on what constitutes a crime and what doesn't.

The Supreme Court, on the question of establishing what a crime is, has said:

"every crime is considered as an offence against the society as a whole and not only against an individual even though it is an individual who is the ultimate sufferer. It is, therefore, the duty of the State to take appropriate steps when an offence has been committed."[8]

In another case[9] the Apex Court observed,

'every criminal act is an offence against the society. The crime is a wrong done more to the society than to an individual. It involves a serious invasion of rights and liberties of some other person or persons.'

Thus we see that a crime harms a society and not merely an individual. The duty and power to prosecute a crime lies with the State. Can it then be said that defamation is correctly held to be crime?

The petitioners vehemently argued that defamation of an individual by another individual is essentially a private wrong as it does not affect the society as a whole as required by a crime. Any individual on personal whims and notions of his self worth, on the slightest pretext may institute a prosecution on defamation against another.[10] But would that really constitute an offence against society?

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7 *id.* at Para 15.i

8 State of Maharashtra v. Sujay Mangesh Poyarekar, 2008 (9) SCC 475

9 Mohd. Shahabuddin v. State of Bihar and Ors. 2010 (4) SCC 653

10 Subramanian Swamy vs. Union of India, Ministry of Law and Ors, 2016 (7) SCC 221, Para 10.v.

In reality, criminalizing defamation has led to wide scale abuse of these provisions. Dozens of cases are filed to silence journalists and political rivals. A pending criminal complaint is sometimes enough to disqualify a person from a post, position or political life, on moral if not legal grounds. Thus mere pendency of a prosecution can lead to unnecessary damage and harassment even if it is known that there will be an acquittal at the end of the dark tunnel. On the other hand, can it be said that merely because law of criminal defamation is misused or abused it would make the provisions unconstitutional if they are otherwise reasonable?

The court however affirmed the existence of defamation as a criminal offence. It reasoned that it is the individuals that make up society. They form the collective. The reputation of a person is the shared value of the collective. It is how a person is estimated in the eyes of the general public. A person's reputation is an important aspect of his personality and is his natural right, which he cherishes above all. In the words of Justice Dipak Mishra,

"A crime affects the society. It causes harm and creates a dent in social harmony. When we talk of society, it is not an abstract idea or a thought in abstraction. There is a link and connect between individual rights and the society; and this connection gives rise to community interest at large. It is a concrete and visible phenomenon. Therefore, when harm is caused to an individual, the society as a whole is affected and the danger is perceived."[11]

Thus holding that defamation is a wrong that only affects individuals and not society would be fallacious and detrimental to society.

Another argument put up by the petitioners was that defamation is simply a tort, a civil wrong for which a common law remedy in a civil court in the form of monetary compensation is available.

To this learned Attorney General of India, Mr. Mukul Rohatgi replied that merely that a civil remedy exists cannot be a valid argument as grievances can constitutionally be provided for under both laws, since criminal law and civil law operate in different spheres and have different remedies. Further monetary compensation under civil law cannot always said to be adequate in cases of injury to reputation. Reputation which encapsules self-respect, honor and dignity can never be compensated in terms of money.[12]

11 *id.* at Para 75

12 *id.* at Para 14.vi

c. Article 19(1)(a) vs. Article 21

Article 19(1)(a) ensures freedom of speech and expression while Article 21 guarantees to all the right to life and personal liberty.[13] This right has been given a wider amplitude to include right to reputation as a necessary element by the Apex Court, time and again.

It has been ruled that dignity is the quintessential quality of a personality, for it is a highly cherished value. Thus perceived, right to honor, dignity and reputation are the basic constituents of right Under Article 21.[14]

Upholding Section 499 for the protection of reputation as an important facet of Article 21 vis-à-vis freedom of speech and expression as guaranteed ander Article 19(1)(a) is primarily what this case was about.

As argued by the petitioners, Article 21 is a right vis-à-vis the State, and therefore cannot be invoked to serve the private interest of an individual. Further Article 19(2), which allows for reasonable restrictions on freedom of speech and expression and by virtue of which the right to reputation by criminalizing defamation is sought to be protected, is intended to safeguard the interests of the State and of the general public and not of any individual.[15] The purpose of any law under Article 19(2) has to be the ultimate protection of the society. Moreover, "Reasonableness" is not a static concept, and varies from time to time. What is considered reasonable at one point of time may become arbitrary and unreasonable at a subsequent point of time.[16] And if a legislation proving unnecessary in a given time, exceeds the test of reasonablaness, it should be struck down.

Noting this argument, the coart relied on the submissions of Mr. Namimha, learned Additional Solicitor General, whercin he showed certain legislations like the Child Labour (Prohibition & Regulation) Act, 1986, the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Protection of Civil Rights Act, 1955, Press Council Act, 1978, the Noise Pollution (Regulation and Control) Rules, 2000 under the Environment (Protection) Act, 1986 regulate the fundamental rights of citizens vis-à-vis other citizens. Thus there has been recognition of horizontal rights under the Constitution which empowered individuals to protect their fundamental right to dignity against other citizens.[17]

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13 Constitution of India, Article 21 (1950)

14 Charu Khurana and Ors. v. Union of India and Ors, 2015 (1) SCC (LS) 161

15 Subramanian Swamy vs. Union of India, Ministry of Law and Ors, 2016 (7) SCC 221, Para 8.i

16 *id.* at Para 8.iv

17 *id.* at Para 88

Immense stress is given to the argument that free debate and open discussion is of paramount importance in the growth of a democracy, which is the basic structure of our constitution. To ensure parliamentary democracy, citizens must be allowed to freely express their opinions, censures and criticisms without fear of criminal prosecution. On the other hand, the importance of reputation cannot be undermined. As observed in Reynolds v. Times Newspapers Ltd, once a reputation is besmirched, it can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser.[18]

Reputation being an inherent component of Article 21, the court considered it important that it should not be allowed to be sullied solely because another individual can have his freedom.[19]

To say that freedom of speech and expression is a more important right or should take precedence over right to life and liberty would have disastrous effects. One cherishes one's good reputation above all else. Article 21 is one of the most treasured rights and is placed on a higher pedestal than all or any of the fundamental rights conferred by Part III.[20] Therefore, in conclusion the court held that what is needed is a balance between the two rights and not a prevalence of one over the other, and ultimately on applying the doctrine of balancing of fundamental rights, concluded that the existence of defamation as a criminal offence is not beyond the boundary of Article 19(2) of the Constitution, especially when the word defamation has been used in the Constitution.[21]

III Conclusion

Much of the public commentary on this decision expresses a regressive approach rather than the progressive one that the Highest Judiciary was known for taking when it struck down the notorious Section 66A of the Information Technology Act. The importance given to free speech and expression has indeed become like never before. Criminal defamation as it exists today is truly used by politicians and corporate powers as weapons against each other rather than by injured persons to protect their reputation. Democratic accountability invariably suffers when a leader refrains from speech due to fear of prosecution. What is remarkable in the judgment is that the court has failed to analyze and appreciate some of the

18 Reynolds v. Times Newspapers Ltd, 1999 (3) WLR 1010

19 Subramanian Swamy vs. Union of India, Ministry of Law and Ors, 2016 (7) SCC 221, Para 140

20 *id.* at Para 18.iii

21 *id.* at Para 149

critical issues that were raised by the petitioners. It has not delved adequately into the principle of proportionality to determine whether these provisions are truly necessary. Further, many countries globally have followed the trend of decriminaliziog defamation. The United Nations Human Rights Council has also urged all State parties to consider the decriminalization of defamation and has stated that imprisonment is never an appropriate penalty.[22] The court has failed to address why the need in India is to not follow this direction. The author believes that though the mere abuse of this provision should not lead to the striking down of the legislation particularly when the question is of protection of a right under Article 21, on imminent need does exist to relook at the law and properly balance the freedom of speech and the protection of reputation. Conditions can be added to make it more fair, ensuring protection of free speech, a precious right coveted by all.

22 Anna Liz Thomas, Subramanian Swamy v. UoI: Unanswered Arguments, Legally India (September 26, 2016, 11.24 pm), http://www.legallyindia.com/blogs/subramanian-swamy-v-uoi-unanswered-arguments

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