Amity University

Uttar Pradesh

AMITY LAW WATCH

House Journal of

Amity Institute of Advanced Legal Studies

ISSN : 2320-2270

Issue No. 38 (2024)

Chairman's Message

The Amity Institute of Advanced Legal Studies [AIALS] had come into existence, as a centre for postgraduate studies and research in law, in June 2003. It is now in the twenty-first year of its life. In about two decades this prestigious institution of Amity University has produced twenty PhDs and well over two thousand LLM degree-holders in various branches of national, international, foreign, and comparative laws.

The *Amity Law Watch*, as the house journal of AIALS, was launched by me in September 2003. For fifteen years it was published in print issues – the last of these being Issue No. 31 of 2017. With a view to giving it a wider circulation it has thereafter been regularly brought out online.

Until 2023 I had produced thirty-seven issues of the *Amity Law Watch*, all single-handedly and published on time. Feeling that I have played my innings long enough, I have now decided to hand over the responsibility of editing and producing the journal to my senior colleagues – Professor Arun Upadhyay and Dr Ankita Shukla. The former is Deputy Director of the Institute looking after all administrative matters and managing all LLM degree programs, and the latter is Coordinator of the Institutes' PhD program. Both are highly dedicated law teachers and researchers, and I am quite confident that they will handle this priced possession of the Institute with the care and attention that it richly deserves. This issue of the *Amity Law Watch* – no. 38 of 2024 is the first to be edited by the new team of producers and editors. I wish them very well in the performance of this new responsibility.

I also extend my best wishes to all my faculty and office colleagues and my hearty blessings to all the students currently on AIALS rolls. May God bless them all.

Professor T. Mahmood

Chairman, AIALS

CONTENTS

FACULTY PAGES

Arun Upadhyay

Digital Personal Data Protection Act 2023 and National Education Policy 2020

Ankita Shukla

Spectrum of Maintenance for Women from the Lens of Personal Laws

Mishal Q Naqshbandi

Armed Conflict and Its Impact on Climate

Setu Gupta

Reconciling the Right to Self-Determination with the Ideal of Cosmopolitanism: An argument for Relaxed Entrée Policies for Refugees and Asylum-Seekers

Deepak Sharma

Plea Bargaining in India: Ways to make it More Effective

STUDENTS' PAGES

Harshita Sarin

One Nation One Law: Quest for a Uniform Civil Code in India

Kush Bhardwaj

A Critical Analysis of the Forest Conservation Act 2023

Munmun Kaur

Contours of Religious Practices in India under Articles 25-26 of the Constitution

Pallavee Prakriti

An Analytical Study of the Interpretation of the Constitution with Special Reference to the Uniformity in Interpretation of the Statute

Khushi

A Case commentary on Anoop Baranwal vs Union of India

Neerja Sharma

An Empirical Approach to the Real Estate Development Act 2016 from Home Buyers' Standpoint

Hitakshi Narang

An Insight into Mediation in Light of Key Provisions of Mediation Act 2023

Nirali Jain

Child Labour in India: Issues and Challenges Before the Nation

OBITUARY ARTICLES

Ankita Shukla

Justice Fathima Beevi: First Lady Judge of the Supreme Court

Setu Gupta

Fali S. Nariman: A Legal Legend in His Lifetime

AIALS UPDATE [2023-24]

Faculty & Staff

PhD Program

LLM Programs

The Digital Personal Data Protection Act (DPDPA) 2023 &National Education Policy (NEP) 2020

Prof. Arun Upadhyay
Deputy Director, AIALS

Data Protection Act and National Education Policy 2020

As far as the domain of education is concerned, the data protection comes into play regarding the safeguarding of sensitive information pertaining to the students. While the educational institutions are now harnessing the information technology at a faster pace, the education sector is now digitized substantially, consequently it is imperative to strictly follow the data protection regulations in the broader interests of the protection of personal details of the students. Further, the thrust on the Information and Communication Technology (ICT) also makes it imperative that data should be regulated in a foolproof manner so that the privacy of students is not compromised. The compliance with data protection laws will facilitate a reliable and conducive educational environment. Moreover, the balancing of the technological innovations with privacy concerns remains a challenge for optimization of the National Education Policy vis a vis the individual's data protection concern[i].

On 18 November 2022, the Government of India released a revised personal data protection bill after the earlier version was withdrawn by it. The revised bill was called ***The Digital Personal Data Protection Bill, 2022.*** On 3 August 2023, the Digital Personal Data Protection Bill, 2023 was introduced in Lok Sabha where it was debated and passed on 7th August and then introduced and passed by Rajya Sabha on 9th August 2023. Then on 11th August 2023, the President of India assented to the Digital Personal Data Protection Bill, 2023, making it ***The Digital Personal Data Protection Act, 2023***.

Salient Features of The Digital Personal Data Protection Act (DPDPA) 2023

a. **Data Principal and Data Fiduciary:**

Data Principal refers to the individual whose data is being collected. In the case of children less than 18 years of age, their parents/lawful guardians will be considered their Data Principals.

Data Fiduciary is the entity (individual, company, firm, state etc), which decides the purpose and means of the processing of an individual's personal data. Personal Data is any data by which an individual can be identified.

b. **Significant Data Fiduciary:**

Significant Data Fiduciaries are those who deal with a high volume of personal data. The Central government will define who is designated under this category based on number of factors. Such entities will have to appoint a 'Data protection officer' and an independent Data Auditor.[ii]

c. **Rights of Individuals:**

i. Access to Information - The Act ensures that individuals should be able to "access basic information" in languages specified in the eighth schedule of the Indian Constitution.
ii. **Right to Consent -** Individuals need to give consent before their data is processed and "every individual should know what items of personal data a Data Fiduciary wants to collect and the purpose of such collection and further processing".
iii. **Right to withdraw consent -** Individuals also have the right to withdraw consent from a Data Fiduciary.
iv. **Right to Correct and Erase -** Data principals will have the right to demand the erasure and correction of data collected by the data fiduciary.
v. **Right to Nominate -** Data principals will also have the right to nominate an individual who will exercise these rights in the event of their death or incapacity.

d. **Data Protection Board:** The Act also proposes to set up a Data Protection Board to

ensure compliance with the Act. In case of an unsatisfactory response from the Data Fiduciary, the consumers can file a complaint to the Data Protection Board.

e. **Cross-border Data Transfer:** The Act allows for cross-border storage and transfer of data to "certain notified countries and territories" provided they have a suitable data security landscape, and the Government can access data of Indians from there.

f. **Financial Penalties:**

i. **For Data Fiduciary:** The Act proposes to impose significant penalties on businesses that undergo data breaches or fail to notify users in case of breaches. The penalties will be imposed ranging from Rs. 50 crores to Rs. 500 crores.

ii. **For Data Principal:** If a user submits false documents while signing up for an online service, or files frivolous grievance complaints, the user could be fined up to Rs 10,000.

g. **Exemptions:** The government can exempt certain businesses from adhering to provisions of the Act based on the number of users and the volume of personal data processed by the entity. National security-related exemptions, like the previous 2019 version, have been kept intact. The Centre has been empowered to exempt its agencies from adhering to provisions of the Act in the interest of sovereignty and integrity of India, security of the state, friendly relations with foreign states, maintenance of public order or preventing incitement to any cognisable offence.[iii]

Intersection of DPDPA 2023 and NEP 2020

i. **Challenges and Opportunities:**
While the enhanced data protection measures ensures that the rights of the people are safeguarded, the strict compliance might necessitate significant adjustments in the data management practices used by educational institutions.

ii. **Consent and Minors:**
It shall be an enormous challenge for the educational institutions to strike a delicate balance between obtaining consent from parents or guardians and at the same time, empowering the students to exercise their rights as digital citizens.

iii. **Data Security in Digital Tools:**
The institutions while leveraging the digital tools must align their practices with the DPDPA 2023 and must also ensure the confidentiality and integrity of the huge data generated through online learning platforms.[iv]

Compliance Strategies for Educational Institutions:

i. **Holistic Data Governance:**
Educational institutions need to adopt a holistic approach to data governance, aligning their practices with the principles outlined in the DPDPA 2023. This involves conducting regular audits of data processes, implementing robust security measures, and establishing coherent policies on data retention and disposal.

ii. **Enhanced Consent Mechanisms:**
The educational institutions should revisit their consent mechanisms by developing age-appropriate consent forms, providing clear information on data processing activities, and establishing user-friendly interfaces for consent management.[v]

iii. **Collaboration with Technology Providers:**
The institutions should collaborate with technology providers to ensure that digital tools and platforms comply with the data protection standards outlined in the DPDPA 2023.

In the context of higher education institutes, personal data covers a wider protective area ranging from student personal and academic records to employee records and research data.

Data Processing and Consent

One of the key features of the Act of 2023 is the requirement for lawful and transparent data processing. The Higher Education Institutions must ensure that the processing of personal data is in perfect synchronisation with the principles enshrined in the Act. In addition to this, obtaining of informed and explicit consent from individuals remains a vital factor, more so while dealing with sensitive information. Further, the students and staff should be well informed about the purpose, scope, and duration of data processing, so as to

enable them to make informed decisions regarding their personal information.

Data Security Measures

The Data Protection Act 2023 emphasizes upon data protection and security, requiring the Higher Education Institutions to implement foolproof measures towards protection against unauthorized access, disclosure, alteration, and destruction of personal data. Towards this end, the use of encryption, access controls, and regular security audits can be used as effective tools for strengthening of institutional data.

Data Breach Notifications

Even after adopting highest grade data security measures, in case of data breach, the Higher Education Institutions must immediately notify the concerned authorities and affected individuals whether students or employees.[vi] A timely and transparent communication in case of data breach will not only limit the damage or impact but will also reaffirm the organisation's commitment towards data protection and will ensure a swift and effective response to any potential breaches.

Research Data and Ethical Considerations

The Higher Education Institutions have path – breaking and pioneering research as one of their forte, and the Data Protection Act 2023 recognizes the importance of balancing data protection with research oriented scientific endeavours. However, the Higher Educational Institutions must rely on ethical considerations while promoting research culture and ensure that the data processing for research activities is conducted with the due care and consideration for privacy.

Conclusion

The dynamic relationship between the Digital Personal Data Protection Act 2023 and the National Education Policy 2020 underscores the evolving nature of the digital landscape in India. Educational institutions must proactively adapt to these changes, recognizing the mutually beneficial relationship between data protection and technological innovation.[vii] Through strategic compliance measures, institutions can not only navigate the complexities but also contribute to a digital educational ecosystem that prioritizes privacy, security, and the holistic development of learners. If the Higher Education Institutions religiously follow the principles of ethical data processing, implement strict security measures, and promote ethical research, then these institutions will not only be able to meet the statutory requirements under The Digital Personal Data Protection Act, 2023, but also sustain an environment which upholds the privacy norms and develops confidence among students, staff, and other stakeholders.

[i] https://ncert.nic.in/pdf/publication/journalsandperiodicals/indianjournalofeducationaltechnology/IJET_July_2021_Volume3_Issue2.pdf

[ii] https://www.meity.gov.in/writereaddata/files/The%20Digital%20Personal%20Data%20Protection%20Bill%2C%202022.pdf

[iii] https://economictimes.indiatimes.com/news/how-to/data-protection-bill-what-will-it-do-penalties-for-non-compliance-who-will-implement-here-are-all-the-answers/articleshow/102413729.cms?from=mdr

[iv] https://www.education.gov.in

[v] https://www.snrlaw.in/yes-means-yes-managing-consent-under-indias-new-data-protection-law/

[vi] https://nces.ed.gov/pubs98/safetech/chapter6.asp

[vii] https://www.legal500.com/developments/thought-leadership/a-dawn-of-a-new-era-for-data-protection-in-india-an-in-depth-analysis-of-the-digital-personal-data-protection-act-2023

The spectrum of Maintenance for women from the lens of personal laws

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Personal laws in India covers an array of issues for the betterment of society and the people in it. Marriage, divorce, maintenance, custody, adoption, succession, and inheritance topics have been dealt in various ways in different personal laws. Hindus have four sets of laws which govern and are applicable to all the Hindus and sects covered within the ambit of Hindus. Muslims are largely regulated by the customary practices and usages and few of those customs have been encapsulated in the legislative fabric too.

Women in the personal laws have been discriminated more often and the legislature has time and again made efforts to bridge that gap by bringing in amendments to treat women at par with the male counterparts. Divorce has been looked down by most of the religious communities as the sufferer is often the women for, she is dependent on her husband for her mere survival and livelihood. Therefore, the provision of maintenance and alimony has been created by the Indian legal system so that the women when becomes a victim of separated marriage is not left destitute and becomes being more vulnerable and subject to exploitation.

Section 24 and 25 of Hindu Marriage Act, 1955 has made provision for interim and permanent maintenance for both spouses giving consideration to income stability and needs of the appellant. However, under Muslim law the topic of maintenance has been a bone of contention for the longest of time until the case of ***Shah Bano v Union of India***[i] reached the doors of Supreme Court of India which decided in favour of divorced Muslim women stating that they shall be entitled to maintenance till she gets remarried.

The erstwhile government being greatly affected by the protest post Shah Bano judgment enacted Muslim Women (Protection of Rights on Divorce) Act, 1986 to dilute the judgment given by supreme court and grating her maintenance only till her iddah period of 90 days. This step was perceived as discriminatory in nature and its constitutionality was once again challenged in the case of ***Daniel Latiffi and Anr. v. Union of India***[ii] and Supreme Court tried to maintain a balancing act, attempting to uphold Muslim women's rights without addressing the constitutionality of gender and religious discrimination in personal law. The court reiterated the validity of the Shah Bano judgment.

The Court concluded that the Act does not, in fact, preclude maintenance for divorced Muslim women, and that Muslim men must pay spousal support until such time as the divorced wife remarries. However, the Court held that if the Act accorded Muslim divorcees unequal rights to spousal support compared with the provisions of the secular law under section 125 of the Criminal Procedure Code, then the law would in fact, be unconstitutional.

The provision in question is Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 which states that "a reasonable and fair provision and maintenance to be made and paid to her within the iddah period by her former husband". The Court held this provision means that reasonable and fair provision and maintenance is not limited to the iddah period (as evidenced using word "within" and not "for"). It extends for the entire life of the divorced wife until she remarries.

The recent judgment given by a single bench of Nagpur Court has once again created a stir by holding that the divorced Muslim women who has remarried is entitled to claim maintenance from her first husband under Muslim Women (Protection of Rights on Divorce) Act, 1986. This judgment is at the outset only seem to be flawed as, if the women has already married then her right to seek any maintenance under any personal law or Criminal Procedure Code, 1973 (Section 125) is disabled, nevertheless the judge was quoted as observing that “the essence of the Act is that a divorced woman is entitled to a reasonable and fair provision and maintenance regardless of her remarriage.”

The case in question involved a couple who married in 2005 and had a daughter in 2006. The husband, who worked in Saudi Arabia, divorced his wife by registered post in 2008. The wife subsequently filed for maintenance for herself and her daughter under the MWPA. The magistrate court upheld her plea, ordering the husband to pay ₹4.32 lakh as maintenance. This amount was later increased to ₹9 lakh by the sessions court.

The husband challenged these orders in the high court, primarily arguing that he was not liable to pay maintenance to his ex-wife as she had remarried. However, Justice Rajesh Patil dismissed this contention, stating that accepting such an argument would be unfair and could lead to husbands deliberately waiting for their ex-wives to remarry to avoid their maintenance obligations.

This judgment is pivotal in reinforcing the rights of divorced Muslim women, ensuring that their entitlement to maintenance is not affected by their remarriage. It

underscores the court's commitment to upholding the legislative intent of the MWPA, which is to provide security and support to divorced Muslim women, thereby safeguarding their rights and dignity. The ruling serves as a significant precedent in the realm of personal law, particularly in addressing the needs and rights of divorced women in the Muslim community.[iii]

The 1986 Act was a reaction to the Shah Bano case and thereby entitling women to her right of maintenance was extended only till her single status as a divorcee, however in this judgment Justice Rajesh Patil stated that the protection under MWPA is unconditional and does not limit the rights of former wife based on her remarriage. [iv]

"The Act seeks to prevent the destitution of Muslim women and to ensure their right to lead a normal life even after divorce. Hence, the legislative intent of the Act is clear. It is to protect 'all' divorced Muslim women and safeguard their rights."[v]

The judgment needs to be overruled as it is bad in law for the provision of maintenance under Muslim law by virtue of various pronouncements dating from ***Mohd. Shah Bano*** to ***Daniel Latifi*** expressly holds that under the Muslim personal law, through the Quran, has imposed an obligation on the Muslim husband to make provision for maintenance to the divorced wife. This obligation, however, becomes ineffective post the three months of the iddah period. This period is three menstrual courses (if the wife is in that stage) or three lunar months after the date of decree of divorce. In case the divorced wife is pregnant, the maintenance period extends till delivery.[vi]

In the case of ***Kusum Sharma v. Mahinder Kumar Sharma (2020)*** it was held by the Delhi High court that maintenance is not only a constitutional right but also an element of universal human rights. The purpose of paying maintenance is twofold:

1. First, to prevent vagrancy because of strained husband-wife relationships, and

2. To guarantee that the poor litigating spouse is not crippled because of a lack of funds to defend or prosecute the case.[vii]

By virtue of judicial pronouncements and other steps, rights of women have been restored but it will become fruitful only when under lying thinking is changed, the women should emancipate themselves educationally, economically, and socially for their wellbeing only and then they can understand their rights and worth and thereafter the social upliftment of the whole community is possible. It is a historical fact that no society ever lived in peace until their women folk are at peace. Although Maintenance should be gender neutral and should be applicable both for husband and wife respectively for the greater perspective of the society but still many women are being denied claiming their rights of maintenance. Proper implementation is necessary to abide by the Law of the Land and ultimately to make it a grand success.[viii] Judgments of Nagpur Bench may not be perceived by most of the people as a good precedent as maintaining a divorced wife even after she remarries is completely out of the purview of the understanding of the connotation 'maintenance'[ix] as refereed in various laws and statutes. Hence, it is high time that a uniform understanding of the granting of maintenance, its beneficiary, quantum and period of the payment of such maintenance should be established for all beyond the religious precepts.

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[i] 1985 (2) SCC 556

[ii] (2001) 7 SCC 740

[iii] https://lawchakra.in/bombay-high-court-upholds-maintenance-rights-for-divorced-muslim-women-regardless-of-remarriage

[iv]https://timesofindia.indiatimes.com/city/mumbai/bombay-hc-divorced-muslim-woman-entitled-to-maintenance-even-if-she-remarries/articleshow/106602852.cms

[v]https://www.deccanherald.com/india/maharashtra/muslim-woman-entitled-to-maintenance-even-if-she-remarries-says-bombay-hc-2838920

[vi] Dr. Taslima Monsoor, "Maintenance to Muslim Wives: The Legal Connotations" (1998) 9 DULJ 63

[vii] https://blog.ipleaders.in/latest-supreme-court-judgments-on-granting-of-maintenance-to-wife

[viii] https://districts.ecourts.gov.in/sites/default/files/1-Maintenance%20 %20by%20Smt%20YJ%20Padmasree.pdf

[ix] S. 3(b) (i) of Hindu Adoption and Maintenance Act, 1956(herein after mentioned as HAM ACT) defines maintenance as "provision for food, clothing, residence, education, and medical attendance and treatment." In the case of unmarried daughter, it also includes her marriage expenses.

Armed Conflict and its Impact on Climate

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"If trees could speak, they would cry out that since they are not the cause of war, it is wrong for them to bear its penalties."[i]

The environment is frequently a hidden victim of war, since humanity has traditionally measured its losses in terms of dead and injured troops and citizens, damaged cities, and lost livelihoods. Beyond the immediate geopolitical arena, armed wars have permanent ramifications that are marked by bloodshed, damage, and human misery. When it comes to mortality, relocation, and destruction of infrastructure, the direct effects of war are easily seen; nevertheless, the environmental consequences are frequently disregarded.

Armed conflict sides have slaughtered animals, burned crops, destroyed forests, contaminated soils, and contaminated water in the past to obtain an edge. In addition to harming the natural world, environmental degradation and conflict-related damage worsen food and water scarcity and ruin livelihoods. The existence, well-being, and health of the local people are thus threatened by environmental deterioration, which makes them more vulnerable for years or even decades. The purpose of this piece of writing is to critically analyse the connection between armed conflicts and their effects on the environment.

Conflict has always been an undesirable but inevitable part of human history. Environmental damage, both deliberate and unintended, has always occurred during times of war. The destruction of the ecosystem allegedly began with the Romans sprinkling salt on the vanquished Carthage more than 2,000 years ago. In the recent history, the regulation of instrumentalities of war which have a potential impact on the environment dates
from at least the 1868 Declaration of St Petersburg, which stated "*the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy*".[ii]

Of course, if the goal of the attacks is to weaken the enemy's military forces rather than to harm civilians, then there remains the possibility of direct attacks on the environment, akin to the United States' use of Agent Orange to destroy forests during the Vietnam War or Iraq's release of oil into the Persian Gulf during the first Gulf War. The NATO air campaign in Kosovo brought up a few concerns about the effects of war on the environment, such as the preservation of biological diversity and natural resources, the use of weapons containing depleted uranium, and the targeting of industrial facilities like petrochemical and oil refineries that pose a threat to the region's water supplies and the Danube River.

The fact that these topics were brought up in relation to the employment of warlike tactics and strategies that were, overall, not unique is noteworthy. Both the employment of spectacular warfare techniques and the deployment of weapons of mass destruction were not problematic. The primary goal was to control hostilities to shield combatants from needless harm.

The focus of the Declaration has shifted to the defence of individual civilians and the civilian population since World War II. That does not imply that there was no protection at all for the environment. The environment was indirectly safeguarded insofar as international humanitarian law restricts the use of weapons and tactics of war. Therefore, the provisions of the Geneva or Hague Conventions provide indirect environmental protection by safeguarding civilian property and artefacts.[iii]

Thus, the importance of the environment is universally acknowledged. As the International Court of Justice (ICJ) proclaimed in 1996, in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: "*the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn*."[iv]

The Environmental Toll of Armed Conflicts:

Environmental effects of armed conflict can be profound and far-reaching, affecting biodiversity, ecosystems, natural resources, and human health.

Armed wars have wide-ranging, intricate repercussions for the environment, both directly and indirectly.

Climate change is a consequence of armed wars, both before and after they end in hostilities. First of all, producing and maintaining military hardware necessitates a large quantity of natural resources, which releases a significant amount of greenhouse gases (GHGs) into the environment. Large amounts of greenhouse gases are released by the use of weapons and military hardware, including testing it prior to hostilities. Furthermore, because military equipment is frequently outdated, it uses more fossil fuels and releases even more greenhouse gases into the sky. According to estimates, the military accounts for about 6% of all greenhouse gas emissions worldwide, making it one of the biggest emitters of greenhouse gases.

Natural Environments and Biodiversity in Armed Wars - A Battle to Survive:

In addition to harming native animals, plants, and wildlife, armed conflicts and military operations also have a detrimental effect on biodiversity and the environment, which could have a significant effect on ecosystems. Occasionally, the harm may be so severe as to have difficult-to-repair long-term effects on biodiversity and ecosystems.

Since large sums of money and resources are required to maintain and equip militaries, increased resource extraction during conflicts may result in environmental harm and deterioration. Armed conflicts have a direct impact on nature in numerous ways, in addition to over-exploitation of natural resources. By contaminating soils, farms, and streams, explosions, bombings, spent ammunition, and the movement of massive military vehicles all directly harm the environment and biodiversity.

Furthermore, radioactive pollution from the possible use of nuclear weapons poses a threat to the environment. The potential for nuclear weapons to be used in armed conflicts might wipe out the whole biosphere of the Earth.

Waste and Pollution in Armed Wars: A Hazardous Material and Substance Dumping Ground

In addition, armed wars produce massive amounts of trash and pollution, both of which have a negative impact on the environment. Because waste management is frequently disregarded during and after armed conflicts, military trash, such as detonated bombs, spent ammunition, and destroyed tanks, is left on the ground for extended periods of time. Additionally, severely damaged local infrastructure results in serious waste issues for the communities around it. Trash can also accumulate in camps for refugees. The trash has the potential to contaminate streams, harm terrestrial and marine ecosystems, and negatively impact human health. Waste can also seriously degrade the soil, threaten biodiversity, and have an adverse effect on local residents' quality of life.[v]

At the same time, a lot of military operations harm infrastructure, which can seriously pollute the air, land, and water. Furthermore, a lot of the weapons used in violent conflicts leak dangerous substances like phosphorous and uranium, as well as toxic compounds, into the environment. Attacks against industrial or energy installations can potentially result in severe pollution and waste to the environment. Large-scale hazardous pollution from particularly damaged nuclear power reactors can gravely harm the environment and its biodiversity.

Resource Exploitation and Plunder:

Illegal Resource Extraction: Since armed groups use natural resources to finance their operations, armed conflicts can lead to an increase in illegal resource extraction, including mining, poaching, and logging. Long-term environmental deterioration and biodiversity loss may result from this.

Water Contamination: Contamination of water sources through the release of chemicals and pollutants during conflict can have severe consequences for both ecosystems and human populations that rely on those water sources.

Displacement and Human Impact:

When armed war, widespread violence, human rights violations, or natural disasters compel someone to flee or leave their place of regular residence, whether by travelling across an international boundary or inside their own nation, that person is said to be displaced.

Large populations are frequently forced to evacuate their homes due to armed conflicts, which puts more strain on the ecosystems in the area as refugees look for resources to survive. In every instance of displacement, a person's links to their home are severed. However, displacement brought on by major human rights violations and armed violence is especially detrimental. It puts its victims at additional risk, which includes violence. The state either causes or is unable to prevent this kind of displacement. As a result, the person loses access to support systems that might otherwise be available.

Human Health Risks:

Both military soldiers and civilians who are not in battle experience high rates of sickness and mortality as a result of war and other armed conflicts. Morbidity encompasses a broad spectrum of conditions, from debilitating trauma to detrimental impacts on mental health, some of which linger for extended periods of time and even affect subsequent generations. Due to damage to the health-supporting infrastructure of society, which includes systems for supplying clean water and food, access to healthcare and public health services, sanitation and hygiene, transportation, communication, and electricity, populations experience high rates of morbidity during and after armed conflict. Armed conflict causes a great deal of internal displacement and refugee crisis by uprooting individuals, families, and entire communities. Both humanitarian law and human rights are violated by armed warfare. Armed conflict takes resources—both financial and human—away from non-military uses. And lastly, armed conflict fuels other acts of violence.[vi]

Climate Change as a Catalyst for Conflict:

Climate change is influenced by military wars, but the opposite is also true. Conflict may be sparked by climate change as rivalry for scarce resources like productive land and water grows more intense. Competition for natural resources is a major cause of armed conflicts, which in turn causes widespread resource depletion and environmental degradation. Conflicts frequently lead to deforestation, overuse of water supplies, and soil erosion, all of which harm the ecosystem over time. There are significant repercussions from this vicious cycle that is created by the feedback loop between armed conflicts and climate change.

Food and water shortages are two examples of resource scarcity problems that climate change may make worse. Due to resource scarcity, these shortages may exacerbate social unrest and political unrest, which may result in armed conflicts. Events brought on by climate change, including droughts and floods, have the power to uproot populations, stir up social discontent, and even start wars.

The Role of International Law and Humanitarian Efforts:

International law seeks to limit environmental damage in times of armed conflict not only because it may harm human beings, but also because “dictates of public conscience” and principles of law increasingly recognize that the environment should be protected.[vii]

International Humanitarian Law:

The goal of current international humanitarian law is to lessen the negative effects of armed conflicts on the environment. To successfully handle the environmental consequences, more comprehensive measures are required, and enforcement methods and compliance monitoring remain difficult.

General Protection:

The natural environment is protected under general principles of IHL governing civilian objects, unless it becomes a military objective, as stated in Article 52(2) of the 1977 Additional Protocol I to the 1949 Geneva Conventions (Rule 9 of the ICRC's Customary IHL Study)[viii]. As a result, the natural environment is covered by all the rules governing the conduct of hostilities, including distinction, proportionality, and precautions. Furthermore, items that are a component of the natural environment, such as natural resources, are also subject to the general regulations on objects under the control of a party to an armed conflict, including enemy property in occupied territory. During armed conflicts, obligations under international environmental law, international human rights law, and other pertinent disciplines of international law remain applicable.

IHL regulations on other specifically protected objects also allow for the protection of the environment. This is especially true for items that are vital to the existence of the public and are often a component of the natural environment, making it illegal to harm, destroy, remove, or render useless these items. This rule applies to both international and non-international armed conflicts and is expressly stated in both treaty and customary law (Articles 54(2) of AP I and Article 14 of AP II; Rule 54 of the ICRC's Customary IHL Study).[ix] Food items, farming areas, crops, livestock, drinking water installations, supplies, and irrigation projects are a few examples of these items.[x]

Additionally, cultural property is protected under international humanitarian law (IHL) both during hostilities and while under the control of a conflicting party (see Article 53 AP I, Article 16 AP II; Rules 38, 39, and 40 of the ICRC's Customary IHL Study).[xi]

Other regulations, such as those pertaining to the protection of works and facilities carrying dangerous forces, also indirectly preserve the natural environment. This is because the civilian population and the surrounding natural environment may suffer greatly from the release of such harmful forces.

Specific Protection:

During an armed conflict, the environment is protected by specific treaties and customary IHL principles. They state that using tactics or weapons of war that are likely to cause serious, long-lasting harm to the environment is forbidden (Article 35(3) of the 1977 Additional Protocol I to the 1949 Geneva Conventions; Rule 45 of the ICRC's Customary IHL Study). They also stipulate that the preservation and conservation of the natural environment must be taken into consideration when fighting. The ICRC's Customary IHL Study, Rule 45, forbids employing the devastation of the natural environment as a weapon of conflict.[xii]

They also stipulate that the preservation and conservation of the natural environment must be taken into consideration when fighting. The ICRC's Customary IHL Study, Rule 45, forbids employing the devastation of the natural environment as a weapon of conflict. Furthermore, it is forbidden to retaliate by attacking the environment (Article 55 AP I). While the provisions of treaties that specifically protect the environment are intended for use in international armed conflicts, most of the rules have also been applied to non-international armed conflicts under customary international humanitarian law (IHL). However, some states dispute that certain parts of these rules are part of customary law.[xiii]

Furthermore, it is forbidden under the Convention on the Prohibition of the Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) to use environmental modification techniques with widespread, severe, or long-lasting effects as a means of causing harm, destruction, or damage to any other State Party. Instead of being cumulative, the three criteria listed in the ENMOD Convention—"widespread, long-lasting, or severe"—are alternate.[xiv]

Conclusion

The effects of armed conflicts on the environment are extensive and long-lasting, despite the common perception that they are isolated incidents with obvious immediate repercussions. The combination of climate change and armed conflict produces complicated difficulties that need for international collaboration and creative solutions. Understanding and tackling the environmental costs of armed conflicts is essential for creating a more resilient and peaceful future as the world works towards sustainable development.

The environment is severely and frequently permanently impacted by armed conflicts, with consequences for ecosystems, biodiversity, natural resources, and human welfare. A comprehensive strategy that incorporates international collaboration, adherence to legal frameworks, and initiatives to support sustainable post-conflict reconstruction is needed to address these environmental repercussions.

Armed conflicts have a profoundly detrimental impact on both the environment and society. Since significant resources are regularly taken away from addressing the current climate problem and other environmental issues to repair and rebuild infrastructure after armed conflict, there are

significant indirect environmental costs. Thus, worries about the effects of military conflicts on the environment seriously impede environmental auditing. Supreme Audit Institutions would need to consider all the effects of armed conflicts, including the environmental ones, even though the humanitarian crises brought on by armed conflicts occasionally overshadow these implications.

Most of today's violent conflicts occur in areas that are hotspots for biodiversity and other places where the challenges related to the environment and climate are concentrated. In this setting, it has become imperative to raise understanding of the ways in which the law protects the environment from the effects of conflict. Because environmental damage from armed conflict can have substantial and long-lasting impacts, all parties to an armed conflict must carefully examine the implications that their actions may have on people's lives.

It is easy to conclude that human suffering and the suffering of future generations are directly impacted by environmental distress. Therefore, to ensure a healthy planet for both the present and the future generations, it is crucial to take into account the often-forgotten environmental consequences of violent conflict.

[i]Hugo Grotius, *De Jure Belli Ac Pacis Libra Tres* (1646), reprinted in 2 Classics of International Law 747 (ed. by James Brown Scott, 1925).

[ii]*Available at:* https://www.weaponslaw.org/assets/downloads/1868_St_Petersburg_Declaration.pdf (Last Visited on 26th Jan 2024).

[iii]Roberts, A., "The law of war and environmental damage", in Austin, J. E. and C. E. Bruch, eds., *The Environmental Consequences of War*, Cambridge: Cambridge University Press, 2000, at 50.

[iv] Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. 1996, at 241.

[v]*Available at:* https://www.environmental-auditing.org/blogs/the-environmental-costs-of-armed-conflicts/ (Last Visited on 28 Jan 2024).

[vi] Levy BS, Sidel VW, eds. 2008. *War and Public Health*. New York: Oxford Univ. Press. 2nd ed.

[vii]In drafting Protocol I, some delegates believed that wartime environmental protection was "an end in itself". 15 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* 358 (1978). Others, however, thought that this protection was intended to ensure "the continued survival of the civilian population".

[viii]International Humanitarian Law Databases *available at:* https://ihl-databases.icrc.org/en/customary-ihl/v1

[ix] International Humanitarian Law Databases *available at:* https://ihl-databases.icrc.org/en/customary-ihl/v1/rule54#Fn_560A1CEA_00003.

[x] Vanessa Murphy & Helen Obregón Gieseken, "Fighting without a Planet B: how IHL protects the natural environment in armed conflict", *Humanitarian Law & Policy blog* (25 May 2021)

[xi] Ibid.

[xii] Marja Lehto, "Overcoming the disconnect: environmental protection and armed conflicts", *Humanitarian Law & Policy blog* (27 May 2021)

[xiii] The ICRC's Guidelines on the protection of the natural environment in armed conflict (2020) *Available at:* https://legal.un.org/ilc/sessions/73/pdfs/english/poe_icrc.pdf

[xiv] ICRC, 1976 Convention on the prohibition of military or any hostile use of environmental modification techniques - Factsheet (2003) *Available at:* https://www.icrc.org/en/document/1976-convention-prohibition-military-or-any-hostile-use-environmental-modification

Reconciling Right to Self-Determination with the ideal of Cosmopolitanism - An argument for Relaxed Entrée Policies for Refugees and Asylum-Seekers

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Several of the foundational international human rights instruments as well as regional instruments recognise self-determination a basic right of people.[i] (UN Charter, art.1(2); ICCPR, art. 1; ICESCR, art. 1; Helsinki Final Act, art. VIII; African Charter, art. 20; OCSCE Charter of Paris). Infact given the recent riots in France in retaliation of the killing of an adolescent boy of Algerian descent, by the French police[ii] (Indian Express 2023) has compelled people to rethink their asylum policies which some consider already on the liberal lines[iii] (Chauhan 2023). Generally, it is considered a given, that sovereign states have a right to choose who enters and settles within their territories and who should be considered as citizens, without much debate on the issue of justification of this purported right[iv] (Fine 2013, 254). However, when the argument of political self-determination is brought in as an excuse to exclude asylum-seekers, refugees and immigrants, it certainly calls for an analysis of the concept.[v] (Pevnick 2011).

Joseph Carens' famous words "Borders have guards and the guards have guns" vividly shows that entry within their territory is jealously guarded by States. Carens States that the reason why so little thought has been given to this is because the thinking is ingrained in our psyche that "the power to admit or exclude aliens" is part of sovereignty and also considered essential for a political community[vi] (Carens 1987, 251). It is argued by some that the right to allow entry of foreigners should remain a sovereign privilege of democracies within the boundaries of their international obligations and that political communities "should have a right to shape their resident population" [vii] (Walzer 1983, 52; Pevnick 2011). Others argue that right of a human being to seek and receive asylum from persecution should take precedence over the right of a population to self-determination.

The present paper deconstructs concepts such as the 'self' in self-determination, national culture, nationality, *hindutva,* ownership-based claims of self-determination, the parallel that is often drawn between freedom of international movement and freedom of movement within national borders, and, finally, the right to association. Based upon this discussion, the paper builds the argument that while the right to self-determination of a population is undeniable, it cannot take precedence over the right of a human being to be granted asylum from persecution. State entrée policies must be relaxed to the extent of securing the 'right' to asylum as opposed to grating asylum as an altruistic act.

Identifying the 'self', culture, nationality

Addressing the first question of identifying the rightful members of a political community who are entitled to the right of self-determination. From a 'nationalist' perspective the self-determining community would be the 'nation'. M.S. Golwalkar posited that the territory, race, religion, culture and language are the five elements of a 'nation'[viii] (Golwalkar 1939, 59-60). Calling race, a "hereditary society having common customs, common language, common memories of glory or disaster; in short, it is a population with a common origin under one culture" he considered race as the 'body' of a nation[ix] (Golwalkar 1939, 64). He added that, in societies where religion forms the "life-breath of a people" and being the only incentive for worldly and spiritual life governs their every action, religion and culture become the same[x] (Golwalkar 1939, 65). Golwalkar defined 'culture' as:[xi]

"[C]umulative effect of age-long customs, traditions, historical and other conditions and most particularly of religious beliefs and their attendant philosophy, (where there is such a philosophy) on the Social mind, creating the peculiar Race spirit (which it is difficult to explain) it is plainly a result mainly of that religion and philosophy, which controls the social life and shapes it, generation after generation, planting on the Race consciousness, its own particular stamp" (Golwalkar 1939, 66).

Speaking about his version of India (a Hindu nation) he added that here religion and culture are indistinguishable as the religion is "an all-

absorbing entity"[xii] (Golwalkar 1939, 67). He further added that a language becomes an "expression of the Race spirit" and is hence a crucial element of a 'nation'. Golwalkar strongly believed that those not belonging to the 'nation' organically fall out of the pale of real 'national' life'[xiii] (Golwalkar 1939, 99). This implies that membership is contingent on mutual recognition and those not recognised by other members feel left behind, deprived of opportunities. Simply put, "the tie between individual and the collective is at the heart of the case for self-determination" [xiv] (Margalit and Raz 1990, 444-445).

Echoing sentiments like Golwalkar's, David Miller identified certain features of nationality. First, that national communities are constituted by 'belief' of its members. On one hand, people may have common attributes, not share any beliefs, and thus cannot constitute a nation. On the other hand, people may not have many common attributes yet share beliefs and pass the test of mutual recognition. Such people form a nation. Second, that a national identity expresses a "historical continuity", military victories and defeats, joys and sorrows of building and defending the nation. Third, that national identity is an "active identity". By this Miller asserts that national communities do things together, take decisions together etc. Fourth, that national identity connects people of a particular geographical place. Last that people sharing a national identity share a "common public culture" which may not be monolithic and homogenous if there are overlapping characteristic[xv] (Miller 1995, 22-25). Miller further states that immigrants would not pose a threat to the nation if they share the common national identity to which they make their own distinctive contributions[xvi] (Miller 1995, 26). This proposition is a toned-down and more palatable iteration of Golwalkar's view that "foreign elements either completely merge themselves in the national race and adopt its culture or to live at its mercy so long as the national race allows them to do and quit the country at the sweet will of national race."[xvii] (Golwalkar 1939, 103-104).

In a similar vein and specifically in the Indian context, Savarkar, while explaining his version of 'nation' and who are the supposed members of a national collective, discussed the philosophy of *hindutva.* He put forth the idea that *hindutva* represents the entire history of the Indian 'nation'. In other words, it is the sum of social, religious and cultural i.e., civilizational experience shared by the people of the *Saptsindhu* region[xviii] (Savarkar 2003, 40). Savarkar chose the term *hindutva* to describe the 'quality of being a Hindu' in "ethnic, cultural and political terms"[xix] (Tharoor 2018, 144). He argued that India is the land of the Hindus because of their ethnicity and because the Hindu faith originated in India. As per Savarkar, other religions such as Buddhism, Jainism, Sikkhism were also subsumed within the larger Hindu faith while Islam and Christianity which have foreign origins could not be reconciled with the Hindu faith[xx] (Savarkar 2003, 41). Consequently, Muslim, and Christian minorities of India, even if born in the country, therefore could not be recognised as Hindus[xxi] (Tharoor 2018, 76).

Going by Savarkar's reasoning, those who do not imbibe *hindutva* or cannot be part of it for reasons beyond their control, can never be a part of the *Hindu Rashtra* and thus never be a part of what may be called the 'nation'. So, the minorities as they stand today would at best be second-rate citizens. This is precisely the problem with keeping 'nation' and 'culture' as relevant factors when trying to decipher the 'self' in self-determination. Taking India's example, it simply eliminates two most significant minorities of the country from its frame of reference[xxii] (Tharoor 2018, 145). For argument's sake, even if there were a majority culture, would the minority, who are citizens too, be excluded for the purposes of national self-determination? The answer must be an obvious no. It is also ironic because the reality is that many of the existing members who would decide on the questions of *entrée* may themselves have migrant origins[xxiii] (Benhabib 2011, 210).

Miller argues that it is one of the main roles of the nation-State to protect the distinct national culture albeit with a caution that "nations tend to attribute themselves a greater degree of homogeneity than their members actually display" and hence the need to tread carefully[xxiv] (Miller 1995, 85). However, he does believe that national cultures do exist in the form of "overlapping cultural characteristics"[xxv] (Miller 1995, 85). Walzer argues that, historically, whenever States have kept their borders porous,

neighbourhoods within such States become "parochial" and "closed"[xxvi] (Walzer 1983, 38). Hence, according to him, States should be potentially closed, permit in only those strangers whose 'loyalty', security, and welfare it can guarantee[xxvii] (Walzer 1983, 38). 'Loyalty' can be quite challenging to ascertain because it is an intangible with no way to prove it. What if the immigrant pretends to be loyal only to gain admission and later it turns out that he is either agnostic or worse 'disloyal'? Moreover, would dissent or merely being a critic or expressing an opinion against the popular sentiment, be termed as being disloyal?

Benhabib counters Walzer, and questions the significance of closure, by saying that in liberal democracies porous borders are not a threat but in fact the immigrants add value to existing cultures and cites examples of "a pro-choice Catholic", a "modern Muslim woman", a "non-orthodox Jew" etc. which wouldn't have been possible if new perspectives and challenges to status quo wouldn't have been allowed[xxviii] (Benhabib 2011, 120). Golwalkar did not celebrate these differences and the potential value addition that come along. He averred that those who fall outside the five-fold limits of the idea of a 'nation'[xxix] (Golwalkar 1939, 59-60) fail to secure a place in the 'national life' unless they abandon their differences and adopt the religion, culture and language of the nation completely merging with the national race. Till the time they do not do so, they remain foreigners[xxx] (Golwalkar 1939, 101). This idea of Golwalkar strikes at the very root of individual autonomy in favour of the collective which is unacceptable if it means that the individual will completely lose their identity just so that they could get assimilated and become members of the collective.

Carens makes an interesting argument addressing Walzer's contention that to preserve distinctiveness of culture, formal closure is necessary. Carens States that such an argument is defeated when one looks at the different sub-cultures (assuming that there is something like a 'national culture') simultaneously co-existing in different cities and provinces within a particular country despite the fact that people can freely migrate and settle in any part of the said country[xxxi] (Carens 1987, 267). Carens further avers that if freedom of movement is not restricted within a country as it is considered a basic human freedom and despite the assertions of self-determination by local communities, then by that logic, this freedom should not be restricted for movement across countries[xxxii] (Carens 1987, 267).

In a multinational State it is not necessary that all the citizens identify with the majority national group, or where national groups comprise of people from other States, it becomes extremely challenging to identify as to who is entitled to self-determine (Fine 2013, 264). If, on the other hand, one says citizens, then the above stated issue does get resolved to some extent but then new issues surface. For instance, what is the basis for this entitlement enjoyed by the citizens? Is it residence for a long term? (Fine 2013, 262) If yes then, what duration qualifies as long-term?

Ownership-based claims that the right of self-determination is due to the 'fruit of labour' of the citizens who have for long contributed towards the social, political and economic development of a State face challenges too,[xxxiii] (Pevnick 2011, 33) such as, what about children or immigrants who have been naturalised by the State and if the answer is no then this would be conflicting with the law of self-determination? What have they contributed and for how long? Also, what about those citizens who live off the land but contribute nothing in return? Will they enjoy equal rights of self-determination at par with those who actively contribute? Additionally, it is seen that often foreign States provide humanitarian, financial or military aid to other States, or there are foreign residents/citizens having a common cultural affiliation or transnational businesses[xxxiv] (Hidalgo 2014, 8) that contribute towards the development of another State, would it then automatically guarantee their candidature for self-determination even when they don't even reside or are direct participants of the latter political community? Meaning, should they also have a say in the State's immigration policies?

An answer in the affirmative would be contrary to what is understood by 'self-determination of peoples', in the current scheme of international law. Another interesting point is, who would determine the threshold of contribution, if at all arriving at a threshold is possible, that would entitle citizens to

the right of determination? If one is to assert that citizens enjoy the right to self-determine just because they are born in the State, then isn't place of birth and the right to exclude outsiders that follows self-determination, as arbitrary a factor as a person's race or sex?[xxxv] (Carens 1987, 256-257, 271).

After considering the above notions, it is observed that the attempts to understand the 'self' based on considerations such as culture, residence, the accident of birth, contributions etc. are fraught with seemingly endless complications with no satisfactory solution on the horizon. Instead, it is proposed, if States were to simply keep an open mind about the fluidity of the 'self' and admission of new members, giving the existing members the right to deliberate and devise rules regarding the conditions of entry and membership based upon cosmopolitan norms of universal hospitality, the right of self-determination could be reconciled with open borders[xxxvi] (Benhabib 2011, 177).

Freedom of international movement

Proceeding to the question of 'freedom of international movement'. Article 13 of the UDHR recognises the right to freedom of movement within the territory of a State and reside anywhere within the said territory. It also recognises the right to 'emigrate' from a State, including one's own and to return to their own country. It does not however, recognise the right to 'immigrate'. Debates have occurred around three main points under this main issue. First, whether liberal democracies which allow freedom of movement within their territories are morally justified in keeping 'outsiders' from entering their territory specially when they believe (or are theoretically supposed to) in egalitarian principles like equal moral worth of all individuals (that would be citizens on one hand and immigrants/refugees/asylum-seekers on the other) and equality of opportunity. This makes it a duty of States to keep open borders[xxxvii] (Carens 1987, 258; Cole, 2000, 2). Second, whether the right to emigrate necessarily entails a right to 'immigrate' because if one has the right to 'exit' one must have a right to 'enter' some State[xxxviii] (Cole, 2000, 56). Third, financially able liberal democracies have a moral obligation to admit needy immigrants as a response to global injustices done to them[xxxix] (Wilcox 2009, 1).

Addressing the first point where analogy is drawn between free movement within a territory and international free movement, and the same being considered a packaged deal with a State's commitments to egalitarian principles. Kieran Oberman posits that if freedom of movement is restricted then it automatically means imposition of restriction on associated freedoms which might affect an individual both, personally, and politically by denying a person access to full "life-options"[xl] (Oberman 2016, 35). Such a person would not be able to visit family and friends in that region, seek employment, seek a marriage partner etc. Politically, the impact would be on the ability to lead or participate in demonstrations, to freely associate, have a conflict resolution, collect reliable information about political affairs etc.[xli] (Oberman 2016, 35). David Miller argues that the freedom to move within a territory and freedom to move internationally cannot be on equal footing. He considers free movement within borders a "basic freedom",[xlii] that is vital and deserves to be protected by a right, and free movement across borders a "bare freedom",[xliii] legitimate but not so vital as to deserve protection. Although, for Miller, free movement across borders becomes a basic interest when it is to escape persecution, as in the case of refugees, or forced displacement due to starvation[xliv] (Miller 2005, 194).

Michael Blake contends that there is a difference in the application of morality when it comes to the two freedoms. Citizens are subject to the coercive laws of a State while foreigners are not. In return citizens enjoy certain freedoms which by implication foreigners cannot[xlv] (Blake 2005, 227-228). Additionally, the legitimacy of a liberal State depends on it guaranteeing certain civil and political rights to its citizens. As per Blake, foreigners cannot claim the same justification[xlvi] (Blake 2005, 227-228). Carens himself supports some amount of restriction on immigration when it may lead to a disturbance in public order, endanger national security or when immigration would entail entry of people who intend to overthrow "just institutions"[xlvii] (Carens 1987, 260; ICCPR, art. 12). After evaluating the above views, it is apparent that freedom of international movement cannot be put

on an equal pedestal and on the same moral standing as freedom to move within the borders of a State because, one, Blake's arguments appear sound. Equality among equals is the generally followed principle and reasonable classification for those constituting a separate class, in this case the foreigners may be done[xlviii] (Edge 2019, 199; *T. Devadasan v. Union of India,* 1964 at 179), and two, even for movement within the territory it is considered prudent for a State to apply reasonable restrictions for smooth functioning and prevention of subversion of democratic institutions (e.g., Constitution of India, art. 19(5)).

So, some form of screening must be in place to ensure that and if liberal democratic governments, in a legitimate effort to protect democratic institutions restrict free movement across borders then it may be a 'just' action. The failsafe here is the legitimacy of the action and the reason behind the restrictions on entry, such as protection of basic human rights of existing members, all of which must be evaluated by an independent agency or a or a supra-national body working in cooperation with the State, following a fair and transparent procedure. Moreover, the exception for refugees is accepted by most political theorists for whom the freedom to cross borders becomes, as Miller would put it, a "basic freedom".

Freedom of association

Whether self-determination would entail the right to exclude future prospective members based on the right to freedom of association of existing members is another question that needs some analysis. Christopher Wellman argues for a State's right to control immigration on this very basis[xlix] (Wellman 2008, 109). He posits that freedom of association includes the right not to associate as well as the right to disassociate[l] (Wellman 2008, 109). Wellman draws analogies from marriage and religion and says that freedom of association entails that one has "dominion over our self-regarding affairs", just like in marriage one has the right to choose or reject a suitor[li] (Wellman 2008, 110). A similar analogy can be seen in Walzer's work where he contends that clubs decide upon their own membership criteria and admit and exclude whomever they want albeit not without legal challenges in liberal democracies. Just like States who cannot restrict the right to emigrate, clubs cannot bar withdrawals of memberships[lii] (Walzer 1983, 40).

The obvious problem with this analogy is that the areas of influence of private spheres and public spheres are different and while one may choose to associate or not with someone in their private life based on their personal whims and fancies, a State, which epitomises public sphere is expected to have appropriate admission standards and to act not whimsically but reasonably, fairly and justly[liii] (Carens 1987, 261). Additionally, Cole argues that one might exercise a right not to marry at all or the right not to practice any religion and this would not affect anyone else, but if a State choose not to associate then some might become 'Stateless', which is a predicament that deprives a person of basic human rights including a right to live life with human dignity[liv] (Wellman and Cole 2011, 203-204). Thus, the analogy is problematic to begin with.

Another objection to Wellman's arguments, and one that he addresses himself, is that while individuals have the freedom to associate as per their choice, this does not necessarily mean that groups can be said to possess the same freedom. He contends that if the right to freedom of association of countries is denied, it would lead to unpleasant implications. Citing the example of North American Free Trade Agreement (NAFTA) and the European Union (EU), Wellman says that in such a scenario the choice of countries to decline invitations, accept or reject the terms of agreement, of such regional associations would go away. He adds that in the absence of right to freedom of association, one would also not be able to explain what is wrong with one country annexing another. He concedes that freedom of association in individual relationships is more important than of groups of citizens because of the intimacy factor in the prior but says that he never set out to argue that both are equally important, just that for groups too, including States, this right exists[lv] (Wellman 2008, 112-113). Another argument that goes in favour of giving citizens the right to choose who they may or may not want to share a morally significant political relationship put forward by Wellman is that despite the States being large, anonymous and multi-

cultural groups, people care deeply about rules for gaining membership in these States, for the same reason why they "jealously guard" their State's sovereignty[lvi] (Wellman 2008, 114-115). From a cost-benefit perspective too people might want to restrict their sphere of association. Interestingly, Wellman too accepts that his arguments in favour of State's right to exclude would be "outweighed by sufficiently compelling considerations" but does not elaborate upon them[lvii] (Wellman 2008, 114).

After considering the above arguments it is concluded that it is true that groups can also have right to freedom of association as part of their right to self-determination., however, such a right cannot be absolute. It comes with a duty to accept new members in the political community after careful considerations in a democratic fashion, have transparent rules of admittance and exclusion based on cosmopolitan principles. While liberal democracies might choose not to associate with non-liberal people who might be subversives or have the potential to undermine democratic institutions, they may not exercise this right in an unbridled fashion, excluding anyone arbitrarily without showing cause. It is well-accepted that freedoms come with reasonable restrictions and freedom of association is no different.

Refugees and asylum-seekers as exceptions to the right to self-determination

Coming to the question of whether there can be any exceptions to the assertion of right to self-determination. Michael Walzer believes that refugees are one group of "needy outsiders" whose claims cannot be met by yielding some territory to them or by simply providing them financial assistance. He recognises that refugees need "membership" which is a "non-exportable good." He acknowledges that the goods that refugees need can be shared only within the protection afforded by a State, and that allowing refugees in wouldn't necessarily mean that the liberty that existing members of the State enjoy would be diminished[lviii] (Walzer 1983, 48). He avers on one hand that the refugees need a place to live and on the other hand refuses to recognise this as a right that can be enforced against host States stating that there is no enforcing authority in the international sphere, and even if there were, it would have better served by intervening against State oppression that forced the refugees to flee in the first place. While it is true that there may not be an enforcement authority in the conventional sense and it would be great if oppressive State practices could be nipped in the bud, it is also true that the even without a supreme international enforcement authority States may be convinced or coaxed into taking in refugees by incentivising the move for them or making the act of rejection disincentivised.

However, Walzer is of the view that the obligations of States towards refugees are limited only to those refugees who were created because of the actions of such States because of injury related affinity. He adds that States may also help other refugees if some ideological or ethnic affinity is shared between them. Moreover, if the number of victims is large then assisting States will rightfully look to find a direct connection with their own way of life. If there is no connection then there would be no need in giving preferential treatment to one group of victims over another[lix] (Walzer 1983, 49-50). It is observed that while there be some merit in this line of reasoning advanced by Walzer especially when one thinks of the assimilation prospects of refugees in that they will be more readily accepted and would be able to mix well with societies with whom they share some commonalities, it is still a very slippery slope. Cherry-picking victims and aiding based on ideological affinity creates a hierarchy of lives within the victims group. States already enforce hierarchies in terms of citizens and immigrants, insiders, and outsiders, creating further sub-orders of lives may not be a wise choice.

Diverging from Michael Walzer, Wellman contends that even in the case of asylum-seekers, States need not take them in. Instead, justice may be exported in the form of military interventions to ensure that people are safe in their homelands. States who fail to provide protection, secure basic human rights of their citizens, have, as per Wellman, no claim to self-determination[lx] (Walzer 1983, 48; Wellman 2008, 128-129).

This argument is untenable since it is well-known that repatriation of refugees is sometimes not possible for years together due to unstable political environment in their countries of origin. Wellman

himself admits that the asylum-seekers may not be refouled until military interventions have been successfully completed[lxi] (Wellman 2008, 129). In such a scenario, refugee families start rebuilding their lives in their countries of asylum. It would be cruel to uproot such families and send them back to their countries of origin when they finally move past the atrocities and build a decent life for themselves. Keeping them deprived of assimilation and political membership for years together would negatively affect their human rights. Though his compelling considerations have been left unexplained by Wellman and though he might disagree, it is further submitted that if at all there could be any legitimate contenders to defeat the right to freedom of association of States and their existing political members, they would be refugees.

Ryan Pevnick opines that ownership claims do not entail unlimited discretion on citizens to decide on future memberships and that sometimes, granting membership is the only way to treat them as equals. Asylum seekers, children of illegal immigrants fall into the category of people who life chances are contingent on the status granted and treatment meted out to them. In such cases, Pevnick States, the needs of such vulnerable groups supersede the ownership claims of the existing members[lxii] (Pevnick 2011, 39-40).

Miller is of the opinion that States have an obligation to admit refugees, them being not just the way the 1951 Convention defines but the broader interpretation that includes people deprived of basic human rights and subsistence[lxiii] (Miller 2005, 202). However, once the threat that they were facing has passed, they may be asked to return, indicating Miller's preference for temporary sanctuary rather than permanent settlement[lxiv] (Miller 2005, 202). He advocates for greater autonomy of States in deciding asylum applications implying that States may admit asylum-seekers based on the overall number of applications they receive, the strain that accommodating refugees will put on citizens, cultural linkage, guilty conscience (if they are contributors to the predicament of refugees) etc. Additionally, States may be permitted to show compassion fatigue and close the door on entry at some point[lxv] (Miller 2005, 203).

Conclusion

After examining different views on this topic, it is submitted that while advocating for State autonomy in decisions on asylum applications is one thing, making allowances such as strain on economy, factoring in causality and looking for cultural commonalties while justifying non-entrée policies, is another. Economic justifications for denial of asylum applications appear superficial with no empirical evidence that asylum-seekers are a burden on the economy.

On the contrary immigrants may aid in the economic growth of the host country by being job-creators and providing gainful employment to natives[lxvi] (Bahar 2018). Cultural commonalities may be considered important to the extent of evaluating the chances of successful assimilation in neighbourhoods but should not have an overall impact on the fate of the applications. Miller himself agrees that immigrants can contribute to "distinct public cultures"[lxvii] (Miller 2005, 204). Finally, at any point whatsoever, the tendency of States to feel 'compassion fatigue' or rejecting the obligation of providing temporary first asylum, should not be normalised. Right to self-determination is and always has been a sovereign right, however, refugees and asylum-seekers must be considered as exceptions to this right.

[i] See article 1(2) of the UN Charter, common article 1 of ICCPR and ICESCR. Regional instruments such as article VIII of the Helsinki Final Act, 1975, article 20 of the African Charter, 1981, OSCE Charter of Paris, 1990.

[ii] The Indian Express. 2023. "Why has France been engulfed by protests – again?" Published July 4, 2023. https://indianexpress.com/article/explained/explained-global/france-protests-8695575/.

[iii] Alind Chauhan. 2023. "The complex history of French immigration — seen in a police killing and retaliatory street violence". Published July 3, 2023. https://indianexpress.com/article/explained/explained-global/history-france-immigration-8699397/

[iv] See Sarah Fine, "The Ethics of Immigration: Self-Determination and the Right to Exclude" 8(3) *Phil. Comp.* 254 (2013).

[v] Ryan Pevnick, *Immigration and the Constraints of Justice* 19 (Cambridge University Press, 2011).

[vi] Joseph Carens, "Aliens and Citizens: The Case for Open Borders" 49(2) *The Rev. of Pol.* 251 (1987).

[vii] Michael Walzer, *Spheres of Justice – A Defense of Pluralism and Equality* 52 (Basic Books Inc., 1983). See also Pevnick, *supra* note 5 at 19.
[viii] M.S. Golwalkar, *We or Our Nationhood defined* 59, 60 (Bharat Publications, Nagpur, 1939).
[ix] *Id.* at 64.
[x] *Id.* at 65.
[xi] *Id.* at 66.
[xii] Golwalkar, *supra* note 8 at 67.
[xiii] *Id.* at 99.
[xiv] Avishai Margalit and Joseph Raz, "National Self-Determination" 87(9) *The J. of Philosophy* 444-445 (1990).
[xv] See David Miller, *On Nationality* 22-25 (Clarendon Press, 1995).
[xvi] Miller, *id* at 26.

[xvii] Golwalkar, *supra* note 8 at 103-104.
[xviii] V.D. Savarkar in *Hindutva: Who is a Hindu?* 40 (Hindi Sahitya Sadan, 2003).
[xix] Shashi Tharoor, Why I am a Hindu? 144 (Aleph Book Company, 2018)
[xx] V.D. Savarkar *supra* note 18 at 41.
[xxi] *Supra* note 19.
[xxii] *Id.* at 145.
[xxiii] Seyla Benhabib, *The Rights of Others. Aliens, Residents and Citizens* 210 (Cambridge University Press, Cambridge, 2011).
[xxiv] Miller, *supra* note 15 at 85.
[xxv] *Ibid.*
[xxvi] Michael Walzer, *supra* note 7 at 38.
[xxvii] *Ibid.*
[xxviii] See Benhabib, *supra* note 73 at 120.
[xxix] Golwalkar *supra* note 8 at 59, 60.
[xxx] *Id.* at 101.
[xxxi] Joseph Carens, "Aliens and Citizens: The Case for Open Borders" 49(2) *The Rev. of Pol.* 267 (1987).
[xxxii] *Ibid.*
[xxxiii] See Pevnick, s*upra* note 106 at 33.
[xxxiv] See Javier Hidalgo, "Self-determination, immigration restrictions, and the problem of compatriot deportation" *JIPT* 8 (2014).
[xxxv] Carens, *supra* note 31 at 256-257, 271.
[xxxvi] Seyla Benhabib, *The Rights of Others. Aliens, Residents and Citizens* 177 (Cambridge University Press, Cambridge, 2011).
[xxxvii] Carens, *supra* note 31 at 258. Also see Phillip Cole, *The Philosophies of Exclusion: Liberal Political Theory and Immigration,* 2 (Edinburgh University Press, 2000).
[xxxviii] Phillip Cole, *The Philosophies of Exclusion: Liberal Political Theory and Immigration,* 56 (Edinburgh University Press, 2000).
[xxxix] Shelly Wilcox, "The Open Borders Debate on Immigration" 4(1) *Phil. Compass* 1 (2009).
[xl] Kieran Oberman, "Immigration as a Human Right" in Sarah Fine and Lea Ypi (eds.), *Migration in Political Theory: The Ethics of Movement and Membership* 35 (Oxford University Press, 2016).
[xli] *Ibid.*

[xlii] One that is vital and deserves to be protected by a right.
[xliii] Legitimate but not so vital as to deserve protection.

[xliv] David Miller, "Immigration: The Case for Limits" Andrew Cohen and Christopher Wellman (eds.) *Contemporary Debates in Applied Ethics* 194 (Blackwell Publishing, 2005).

[xlv] Michael Blake, "Immigration" in R.G. Frey, Christopher Wellman (eds.), *A Companion to Applied Ethics* 227-228 (Blackwell, 2005).
[xlvi] *Ibid.*
[xlvii] Joseph Carens, "Aliens and Citizens: The Case for Open Borders" 49(2) *The Rev. of Pol.* 260 (1987). See also article 12 of ICCPR which lists similar grounds for refusal of entry.
[xlviii] See for example, article 19(5) of the Constitution of India, 1949.
[xlix] Christopher Wellman, "Immigration and Freedom of Association" 119 *Ethics* 109 (2008).
[l] *Ibid.*
[li] Wellman, *supra* note 49 at 110.
[lii] Michael Walzer, *Spheres of Justice – A Defense of Pluralism and Equality* 40 (Basic Books Inc., 1983). Also argued by Wellman in *supra* note 49 at 111.
[liii] Joseph Carens, "Aliens and Citizens: The Case for Open Borders" 49(2) *The Rev. of Pol.* 267 (1987).
[liv] Christopher Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude* 203-204 (Oxford University Press, 2011).
[lv] *Supra* note 49 at 113.
[lvi] *Id.* at 115.

[lvii] *Id.* at 114
[lviii] Michael Walzer, *Spheres of Justice – A Defense of Pluralism and Equality* 48 (Basic Books Inc., 1983).

[lix] *Id.* at 49-50.
[lx] *Id.* at 48. See also Wellman, *supra* note 49 at 128-129.
[lxi] See footnote number 26 on page 129 of Wellman, *supra* note 49 at 129.

[lxii] Ryan Pevnick, *Immigrations and the Constraints of Justice: Between Open Borders and Absolute Sovereignty* 39-40 (Cambridge University Press, 2011).
[lxiii] David Miller, "Immigration: The Case for Limits" in Andrew Cohen and Christopher Wellman (eds.) *Contemporary Debates in Applied Ethics* 202 (Blackwell Publishing Ltd., 2005).

[lxiv] *Ibid.*
[lxv] *Id.* at 203.
[lxvi] Bahar Dany. 2018. "Why accepting refugees is a win-win formula". Published June 19, 2018. https://www.brookings.edu/blog/up-front/2018/06/19/refugees-are-a-win-win-win-formula-for-economic-development/.
[lxvii] *Supra* note 63 at 204.

Plea Bargaining in India: Ways to make it More Effective

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Plea bargaining is a process in which a defendant in a criminal case agrees to plead guilty to a lesser charge or receive a lighter sentence in exchange for cooperating with the prosecution or providing information. Plea bargaining is a legal mechanism in India, and it was introduced by the "Criminal Law (Amendment) Act, 2005." The provisions of plea bargaining are contained in Chapter XXIA of the Code of Criminal Procedure, 1973, which deals with the plea-bargaining process. According to this "chapter, a person accused of an offence may file an application for plea bargaining in the court where the case is pending." In the plea-bargaining process established, if the court is satisfied that the accused is willing to plea bargain voluntarily and has understood the implications of plea bargaining, the court may allow the plea-bargaining process to proceed. "The prosecutor and the accused then enter a plea - bargaining agreement, which is presented to the court. If the court is satisfied that the plea-bargaining agreement is voluntary and genuine, it may pass a sentence of imprisonment for a term which is less than the maximum sentence for the offence committed by the accused. However, if the court is not satisfied with the plea-bargaining agreement, it may reject the agreement and proceed with the trial."

It is important to note that not all offences are eligible for plea bargaining in India. Only certain offences, which are punishable with imprisonment for a term of seven years or less, are eligible for plea bargaining. Offences which are "punishable with death, life imprisonment for a term exceeding seven years are not eligible for plea bargaining." The state introduced the provision of plea bargaining in India to resolve the issue of long pendency of cases in the Indian courts. The Law "Commission of India had recommended the introduction of plea bargaining in its 142nd, 154th and 177th report." The provision of plea bargaining was looked upon favourably due to its prevalence in the United States of America and England. Almost 90% of cases in America are settled through plea bargaining. However, the provision of plea bargaining has not become prevalent in India. Although there is no official data available as to the percentage of total cases that have been settled by plea bargaining in India, it is expected to be extremely low.

Reasons for the less usage of the provision of plea bargaining in India.

Firstly, there seems to be a severe lack of awareness among the prisoners, the lawyers, and the judicial officers about the provision "of plea bargaining in India.[i]" Since it is not widely used in India, exercising the provisions of plea bargaining is not usually the first option of the accused or his counsel[ii]. Owing to its meagre prevalence, the method of approaching a plea-bargaining negotiation is also widely unknown by the lawyers[iii]. Due to lack of experience and practice, the lawyers and judicial officers are not willing to give the provision of plea bargaining an attempt, lest the attempt turns out to be unfavourable[iv].

There is also an element of cultural and social stigma attached to the concept of plea bargaining in India[v]. People do not want to admit their guilt or wrongdoing in front of a court due to this stigma. The people are concerned with the outlook of the society towards them if they plead guilty to their wrongdoings voluntarily. Instead, they are comfortable with the pendency of the trial for several years since in that period of time, they are not held to be guilty. This social stigma poses a big hindrance to the exercise of the provisions of plea bargaining among the accused (Gormley, 2022)[vi].

Secondly, the scope of the usage of the provision of plea bargaining is limited in India[vii]. As per the provisions, plea bargaining can only be used in "offences which are punishable with imprisonment under seven years[viii]." It does not extend to offences against women or minors[ix]. Further, the provision of plea bargaining can only be used by first time offenders. These provisions of plea bargaining make it excessively strict and rigid. Also, the basic provision of plea bargaining recommends a negotiation with the victims[x]. However, according to data by the National Crime Records Bureau (NCRB), the most reported crime in India in 2019 was theft, which accounted for 27.7% of all reported crimes[xi]. In the crime of theft, the accused is usually unable to compensate for the loss suffered by the victim, and in many cases, the victim of the

crime is also not identified[xii]. In such cases, even when the criminal is apprehended, there exists no possibility of plea bargaining, and the accused still must be remanded in prison since he awaits trial. This seems to be a glitch in the provision "of plea bargaining." Also, "the provision restricting the use of plea bargaining" by repeat offenders is a regressive step. Even for minor crimes, such as theft, the right to negotiate through a procedure of plea bargaining should not be taken away from the accused. Even if such a provision was incorporated to prevent repeat offenders from becoming habitual criminals, this provision places burden on the judiciary itself for the conducting of long, full-length trials of such offenders, and keeping them in prison until the trial is completed. Thirdly, there seems to be a great degree of judicial involvement "in the process of plea bargaining[xiii]." According "to the" provisions established for plea bargaining, the plea-bargaining negotiation should be just and reasonable in the eyes of the judge. Also, the judge should be satisfied that the plea-bargaining provision has been entered into by the accused voluntarily and under no sort of pressure or influence[xiv]. However, these provisions in certain ways hamper the acceptance of a plea bargain by the accused. To begin with, bargaining under the constant scrutiny of a judge instils a sense of discomfort in the accused since there is a stigma attached to the admission of guilt in front of the judge, as mentioned before. Further, there always remains an incentive for the accused to plea bargain, since "the accused is" aware that he will "receive a" lesser punishment once the plea bargain is accepted by the judge (PLEA BARGAINING: A SUSTAINABLE MEANS TO JUSTICE?[xv]. Hence, the voluntariness of the plea bargain is not necessarily a determinative factor for the authenticity of the plea bargain. Lastly, the negotiation in plea bargaining should ideally be taking place behind closed doors, so that the accused and the prosecutor can freely discuss the conditions for the bargain[xvi]. However, if it is to be mandatorily done in the presence of a judge, then the parties to the bargain are unable to negotiate the terms of the bargain in a free manner.

Extent of Judicial Scrutiny and discretion in plea bargaining

Although plea bargaining allows for a more efficient resolution of criminal cases, some have criticized it for potentially limiting judicial discretion and scrutiny. However, the CrPC lays down specific procedures and safeguards to ensure "that the plea-bargaining process" does "not violate the rights of the accused and that the" judge still has discretion to accept or reject the plea bargain[xvii]. Under Section 265B of the CrPC, the judge must satisfy himself that the accused has voluntarily and with full understanding of the consequences agreed to plead guilty[xviii]. The judge must also ensure that the plea bargain is not based on any promises or inducements, that the accused has not been subjected to any coercion or undue influence, and that the bargain is in the interest of justice (Helm, 2019)[xix].

Furthermore, under Section 265C of the CrPC, the judge may, after considering "the facts and circumstances of the case and the interests of" justice, either accept or reject the plea bargain[xx]. The judge may also ask for a report from the probation officer or conduct an inquiry before accepting or rejecting the plea bargain[xxi]. Thus, the CrPC provides for sufficient judicial scrutiny and discretion "in the plea-bargaining process to ensure that the accused's" rights are protected, and justice is served.

Conclusion & Suggestions

The provision of "plea bargaining has been introduced in India with the hope of" reducing the pendency of cases in the Indian Judiciary "(Plea Bargaining - A Practical Solution - The Salient Features of Plea Bargaining, n.d.)[xxii]." It was looked upon favorably after taking note of the massive success it achieved in the United States. Post its enforcement in 2005, now is a good time to study its drawbacks, the feasibility of the recommended ways to make it more effective and find ways to implement new changes.

The suggested ways to make plea bargaining more effective in India through this research paper have been widely based upon drawing comparisons between the provisions "of plea bargaining in India and the United States." However, to better understand the feasibility of the implementation of the suggested ways to make plea bargaining more effective in India, more research should be

conducted in certain key areas. To begin with, there is a dearth of empirical studies on the "plea bargaining process in India." Most of the literature on this topic is based on case studies, anecdotal evidence, and expert opinions. More empirical research is needed to understand the effectiveness of plea bargaining in India and to identify areas for improvement.

Secondly, there is limited research on the impact of plea bargaining on marginalized groups such as women, minorities, and the poor. These groups may be more vulnerable to coercion, abuse, and discrimination "in the plea-bargaining process." Further research is needed to understand the experiences of marginalized groups "in the plea-bargaining process" and "to identify" ways to address their specific needs. Thirdly, there is limited research on the impact of plea bargaining on the "criminal justice system" in India. "Plea bargaining" may have unintended consequences such as increased "pressure on accused" individuals "to plead guilty," reduced incentives for prosecutors to build strong cases, and a shift away from trials. Further research is needed to understand the broader impact "of plea bargaining on the criminal justice system in India."

Besides determining the feasibility of the ways provided to increase the effectiveness "of plea bargaining in India," addressing the above-mentioned research gaps would also facilitate the designing of tailor-made policies pushing the prevalence of the provision of plea bargaining among the masses.

Suggested ways to make plea bargaining more effective in India

The first step should be to raise awareness about plea bargaining in India. As has been stated above, lawyers and judicial officers are unwilling to exercise the option of plea bargaining since they have no experience of dealing with the provisions of plea bargaining. Hence, they are afraid to venture into this field, lest it might be against their interests.

The State must take various steps in increasing the awareness of the plea-bargaining provision among the lawyers and judicial officers. One of the steps is to make the procedure of plea bargaining available in simple, clear, and in a step - by - step procedure so that it can be easily understood by the lawyers and the judicial officers. These steps of the procedure of plea bargaining should also be easily accessible to the lawyers and judicial officers publicly so that they can refer to it anytime needed. Another step the state should take to increase awareness is to conduct some mock procedures of plea bargaining for a real-world understanding of the process among the lawyers and the judicial officers. These mock procedures should also be conducted in prisons, so that the prisoners (especially the ones awaiting trial) are made to clearly understand the provisions of plea bargaining.

The second step to make plea bargaining more effective in India is to facilitate the negotiation of the plea bargaining behind closed doors. The current provision of plea bargaining makes it mandatory for it to be conducted under the judicial scrutiny of a judge, and only "if the judge is satisfied that the terms of the plea bargain" is just and reasonable, a decree of plea bargain is accepted by the court[xxiii]. This provision should be relaxed to an extent. The parties to a plea-bargaining negotiation should be granted more freedom and relaxation so that they do not have any restrictions while negotiating. The constant scrutiny of the judge in every stage of the negotiation marks a thought of unnecessarily strict monitoring of the parties by the court. A review of the plea-bargaining system in the United States would be helpful here, which shows that the United States has a no-holes barred system of plea bargaining. If "the plea bargain" is voluntary, the victim "is satisfied with the terms of the bargain," and if it is legal, the plea bargain is accepted. This is "one of the" principal "reasons for the" massive success "of plea bargaining" in the United States.

The third step that the state should take is to encourage the prosecutors and lawyers to advocate the use of plea bargains. The prosecutors and lawyers may not be incentivised for the use of plea bargain since it may be seen as a weakness in their case, and plea bargains facilitate early disposal of cases. The prosecutors and lawyers believe the advocacy of plea bargaining against their interests, since in that case, their income largely decreases due to the early disposition of cases. However, the lawyers should be made to understand that "there is

a huge pendency of cases in India, and early disposition of a case" would just mean the lawyer dealing with another case. In effect, the lawyers would always have their hands full of cases, which would be a source of constant income. It would not eat away the income the lawyer is afraid of losing due to the early disposition of cases because of resorting to the provision of plea bargains. The advocacy of the provision of plea bargain in the trial stages of cases by all the prosecutors and advocates would result in "a win - win situation for both the Indian judiciary, as well as the parties to the case."

[i] plea-bargaining-in-india-a-ship-with-holes.html
[ii] concept-of-plea-bargaining-under-criminal-procedure-code.
[iii] concept-of-plea-bargaining-under-criminal-procedure-code.
[iv] concept-of-plea-bargaining-under-criminal-procedure-code.
[v] tripakshalitigation.com/Indian-context-of-plea-bargaining/
[vi]onlinelibrary.wiley.com/doi/epdf/10.1111/jols.12360.
[vii] /www.livelaw.in/columns/concept-of-plea-bargaining-supreme-court-offence-criminal-justice-system-218842#:~:text=Under%20the%20CrPC%2C%20plea%20bargaining,below%2014%20years%20of%20age.
[viii] Sec 265A CrPC.
[ix] Sec 265A CrPC.
[x] PLEA BARGAINING.pdf (ijtr.nic.in).
[xi] CII 2019 Volume 1.pdf (ncrb.gov.in).
[xii] Compensation to the Victim of Crime: Assessing Legislative Framework and Role of Indian Courts.
[xiii] Plea Bargaining - an overview | ScienceDirect Topics.
[xiv] Plea Bargaining (bbau.ac.in)
[xv] PLEA BARGAINING: A SUSTAINABLE MEANS TO JUSTICE? (manupatra.com)
[xvi] Plea Bargaining and the Court of Appeal on JSTOR
[xvii] Satender Kumar Antil vs CBI - SPECIAL LEAVE PETITION (CRL.) NO.5191 OF 2021.
[xviii] Section 265B CrPC.
[xix] 2 Constrained Waiver of Trial Rights? Incentives to Plead Guilty and the Right to a Fair Trial - Helm - 2019 - Journal of Law and Society - Wiley Online Library.
[xx] Section 265C of the CrPC.
[xxi]How Judges Review Plea Bargains | Justia.
[xxii] https://www.legalserviceindia.com/article/l87-Plea-Bargaining.html.
[xxiii] Section 265E CrPC, 1973.

One Nation One Law: The Quest for Uniform Civil Code in the Indian Legal Landscape

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The constant impact of personal laws on women's lives and rights, across all communities, persists, despite ongoing efforts to reform national laws and changing judicial trends. Discrimination against women, particularly in the realms of marriage, divorce, maintenance, and inheritance, is evident. In this context, the significance of a Gender-just Uniform Civil Code (UCC) becomes crucial to deliver justice and equality for oppressed women. The UCC is important not only for safeguarding their rights but also for eliminating biases based on religion and community. It aligns national laws with international standards and human rights conventions, which India has sanctioned and ratified. Therefore, the UCC is viewed as a solution to combat gender injustice. While the specific details of the uniform code are yet to be fully defined, it should ideally incorporate the progressive and contemporary aspects of all personal laws while discarding regressive and conservative elements. This uniform legal framework is intended to address human relationships and needs, which do not vary based on individuals' religious affiliations. Its primary objective is the empowerment of women and their upliftment. To comprehend the relevance of the UCC and its role in achieving gender justice and women's empowerment, this chapter explores the potential of the UCC in empowering women, ensuring their freedom and choices, which have often been undervalued under personal laws. It also raises questions about the role of legislative, judicial, and constitutional mechanisms in safeguarding the rights of women across diverse religious communities in India.

Uniform civil code

The term "Uniform" refers to a form that differs from the common. It implies "sameness" in similar conditions, with "sameness" relating to equality and gender justice, rather than an identical law for all. The term "Code" or "Act" is used to denote a law established by the legislature, with the choice of term depending on the legislative process employed. A "Code" is typically created by consolidating various subject matters into a single legal compendium, while an "Act" is usually formed through codification on a single subject. Civil law, under which family matters, contracts, property, and torts fall, addresses individual private rights and benefits in contrast to criminal or political laws.

In India, civil laws such as the Indian Contract Act, 1872, and the Indian Penal Code, 1860, have already been enacted, but there is no uniform law governing personal matters such as marriage, divorce, maintenance, adoption, succession, and inheritance. These areas are currently subject to different personal laws based on religion. The UCC aims to amalgamate these various personal laws into a single set of secular laws applicable to all Indian citizens, irrespective of their caste, community, or religion. This unified code should encompass modern and progressive elements while eliminating discriminatory features and should align with the constitutional mandates of equality, gender justice, individual dignity, and a welfare state. Article 44 of the Indian Constitution under the Directive Principles of State Policy emphasizes the state's effort to secure a Uniform Civil Code for its citizens. This provision aims to ensure uniformity of law, promote secularism, and establish justice and non-discrimination.

Justice P. B. Sawant emphasizes that a UCC does not mean applying Hindu personal law to all religious communities but rather creating a just and equitable law applicable to both men and women. The objective is to incorporate the positive aspects of all personal laws while discarding the unfavourable elements. This would eliminate unjust and irrational practices prevalent across religion-based personal laws and strengthen the unity and integrity of the country.

Need and Urgency of Implementing A Uniform Civil Code

During the process of framing the constitution, it was recognized that not all of the ideals from the freedom movement could be realized immediately. Some ideals were prioritized as fundamental rights, while others became part of directive principles of state policy. This section focuses on the necessity of a uniform civil code.

In India, different personal laws are applied to people of different religious backgrounds. Article 14[i] of the Indian constitution guarantees the right to equality, ensuring that all individuals are equal before the law and receive equal protection. However, personal laws currently lead to differential treatment based on religion, prescribing varying rights and responsibilities.

The implementation of a uniform civil code can play a pivotal role in establishing a universal civil law that promotes equality among all individuals. Of particular concern is the discrimination against women in personal laws, where they lack equal status and are deprived of various personal and property rights. Therefore, the uniform civil code has the potential to empower women under personal laws.

The primary objectives of the uniform civil code are , which can be categorized as follows:

1. Promoting Gender Equality and Justice: The uniform civil code serves as a means to achieve gender equality and justice within society.

2. Fostering Social Unity and Integrity: It acts as a tool to promote unity and integrity in the diverse Indian society.

3. Preserving India's Secularism: The uniform civil code contributes to upholding India's secular principles.

4. Enhancing Clarity and Simplicity: It is designed to bring clarity, simplicity, and comprehensibility to personal laws.

Throughout its history, India has faced foreign aggression, enduring two centuries of British rule. There are several compelling reasons why India requires a Uniform Civil Code:

Role of Indian Judiciary

Several milestone legal cases have played a significant role in addressing gender equality and women's rights in the context of personal laws and the Uniform Civil Code (UCC) debate in India. These cases have highlighted the challenges women face within different religious communities and the need for legal reforms to promote gender equality.

1. **Mohammad Ahmed Khan v. Shah Bano Begum[ii] :** In this significant case, a 38-year-old Muslim woman approached the Supreme Court after being denied maintenance by her husband, as mandated by Section 125 of the Code of Criminal Procedure. The Supreme Court upheld her right to maintenance and emphasized that this provision was applicable to all Indian citizens, irrespective of the personal laws they followed. *Former Chief Justice Y.V. Chandrachud* noted in the judgment that a UCC is a path to national integration and the removal of disparities in the loyalty to laws. The Court reiterated the need for the Parliament to enact the UCC. However, due to widespread protests and political pressure, the government reversed the Court's judgment and enacted the *Muslim Women (Protection of Rights) on Divorce Act, 1986*, which altered the maintenance provisions for women.

2. **Danial Latifi v. Union of India[iii]** : This case challenged the constitutional validity of the *Muslim Women (Right to Protection on Divorce) Act 1986*. It established that Muslim husbands are liable to provide maintenance to their divorced wives beyond the iddat period, balancing Muslim law with the Criminal Procedure Code. This decision ensured that Muslim women enjoy the same rights as Hindu and Christian women, promoting gender equality.

3. **Sarla Mudgal v. Union of India**[iv]: This case involved four Hindu men who had converted to Islam to remarry. The Supreme Court regarded such conversions to be an "abuse of personal laws" and held that mere conversion does not dissolve a marriage under the Hindu Marriage Act, 1955. The Court also underlined the importance of a UCC in simplifying these complexities. This case dealt with the issue of second marriages being invalid. It clarified that the practice of polygamy, even after conversion to another religion, is invalid. This ruling promotes gender equality by preventing bigamy and protecting the rights of women in marriages.

4. **John Vallamattom v. Union of India**[v]: John Vallamattam, a Priest from Kerala, filed a writ petition challenging the constitutional validity of "Section 118 of the Indian Succession Act," arguing that it discriminated against Christians by imposing unreasonable restrictions on their property donations for religious or charitable purposes by will. The Supreme Court, comprising *Chief Justice of India V.V. Khare*, *Justice S.B Sinha, and Justice A.R. Lakshmanan*, struck down the provision as

unconstitutional. *Chief Justice Khare* pointed out that Article 44 of the Indian Constitution places a duty on the government to establish a UCC for its citizens and lamented that this mandate had not yet been realized by the Parliament.

Ms. Jorden Diengdeh v. S.S. Chopra[vi]: In this case, the Supreme Court contemplated the urgent need for legislation related to the Uniform Civil Code, emphasizing that the time had come for a uniformly applicable law on marriage.

Conclusion

Article 44 of the Indian Constitution mentions the Uniform Civil Code, signifying its desirability, but it remains undefined by political leaders and individuals. While the directive principles of state policy, like Article 44, are not enforceable by courts, they hold significance in guiding the governance of the country.

The UCC is seen as an ideal instrument for promoting national unity, integrity, gender justice, and simplifying the Indian legal system. It would bring uniformity to matrimonial laws, separate law from religion, and promote a secular and socialist pattern in society. This code would be founded on the principles of social justice and gender equality, ensuring fair and equitable treatment for all members of society.

The preamble of the Constitution of India emphasizes a secular nation and society, underscoring the undeniable value and importance of the UCC. By eliminating the diversity resulting from different personal laws and simplifying legal proceedings, the UCC would lead to a more homogeneous and inclusive society. This transformative step would significantly benefit women by removing discriminatory practices, contributing to gender equality, and fostering social harmony.

Back in 2017, the Chairman of the Law Commission made a rather infamous statement[vii] that dismissed the idea of a Uniform Civil Code as a viable option. Perhaps it's high time to revisit that stance. India's rich political and cultural pluralism initially posed challenges to the immediate implementation of such a policy during the Constitution's framing. However, even after more than seven decades of Independence, India's legislative body has yet to fulfill this promise.

On the matter of implementing a Uniform Civil Code, *Supreme Court Justice Y.V. Chandrachud*, in a case[viii], noted, "We understand the complexities involved in uniting people from different faiths and beliefs. Nevertheless, a beginning had to be made to give the Constitution meaning." It's crucial to acknowledge that secularism is one of the Constitution's foundational principles, and the introduction of a Uniform Civil Code would undoubtedly align with the spirit of secularism. To disregard the constitutional goal outlined in Article 44 would be a disrespect to the Constitution.

It's imperative for the legislature to institute a Uniform Civil Code that places individual rights above community rights. This is vital for safeguarding the oppressed, irrespective of their religious affiliation, and for promoting national unity and cohesion. With the rise of Judicial Activism, the time seems ripe for India to embrace this constitutional ideal, regardless of the challenges it may entail. There's no legal, moral, or constitutional justification for shelving the enactment of the Uniform Civil Code any longer.

However, in the pursuit of a Uniform Civil Code, it's essential to be mindful of the cultural and linguistic diversity within India's various communities. Such a Code should aim to eliminate the negatives and suppressions present in these religious systems while preserving their essential characteristics. The Uniform Civil Code should strive to harmonize and assimilate the positive aspects of these religious communities to strike that delicate balance that upholds Fundamental Rights and Religious Rights concurrently.

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[i] The Constitution of India, Art. 14
[ii] AIR 1985 SC 945
[iii] AIR 2001 SC 3958
[iv] AIR 1995 SCC (3) 635
[v] (Writ Petition (civil) 242 of 1997
[vi] AIR 1985 SC 935
[vii] "Uniform civil code is not even an option now "
[viii] Mohd. Ahmad Khan v. Shah Bano Begum ,1985 AIR 945

Critical analysis of Forest Conservation Act, 2023

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As a country, India is blessed with various physical features which makes our country unique as compared to the rest of the world. The geographical features of India include mountains, plains, forests, plateaus, deserts, rivers and coastal plains. Various climates are experienced in India due to its diverse physical features[i]. The diverse land of India is also home to the majestic flora and fauna which are indigenous, *for instance* the Asiatic Elephant, Asiatic Lion and the Royal Bengal Tiger. The survival of these species solely depends upon the forests which are equally significant for the survival of humans.

Over the years, mankind has exploited the environment in the name of development. Before modernisation, activities like hunting and growing timber were practiced which did affected the environment. However, after modernisation, rapid Deforestation was to establish industries have created an eco-logical imbalance. The adverse consequences of the same is global warming and climate change.

In India during the Mughal Era and in the first half of the British period *(1757-1857)* a large amount of forest were destroyed to produce timber as well as cultivated land[ii]. The significance of the forests was recognised by the Brits as certain rules and regulations were implemented. However, the intent behind introduction those rules and regulations till date is debatable[iii] as the temperament of the coloniser is somewhat similar to a parasite.

Fast forward to relatively modern times, wherein, the need of environment protection laws was recognised and certain legislations were incorporated, *for instance*- The Indian Forest Act, 1927[iv] (IFC,1927) and The Forest (Conservation) Act, 1980[v] (FCA,1980). Further, on the international forum, India is a member of certain organisation and signatory to convention, declarations and protocols w.r.t environment protection *for instance*- ITTO[vi] , established by ITTA[vii],1983; The CBD[viii], Kyoto Protocol, 1997, among others. The credit for the development/evolution of the environmental laws goes to the aforementioned municipal statutes and international agreements. Yet, the development done was not in a sustainable manner which had depleted the forests and the wildlife residing there.

In simple terms, 'Forests' function as the lungs of any nation by reducing the Carbon Dioxide(Co_2) levels in the atmosphere which further play a crucial role to combat global warming and climate change. Further, forests also provide various resources like clean air, water etc. It is also a scientifically proven fact that forests prevent soil erosion and desertification[ix], which further prevents the unfortunate incidents of land-slides.

The Indian Forest Act, 1927 classifies forests into three categories, *namely;* Reserved Forests, Village Forests and Protected Forests. However, as per decision 19 of Conference of Parties 9-Kyoto Protocol, the Forest can be defined by any country depending upon the capacities and capabilities of the country as follows:-

- Crown cover percentage: Tree crown cover- 10 to 30 percent (%) (India 10%)
- Minimum area of stand: area between 0.05 and 1 hectare[x] (ha.) (India 1.0 ha.) and
- Minimum height of trees: Potential to reach a minimum height at maturity in situ of 2 to 5 m (India 2m)[xi].

Further, the definition of forests in India has been formulated on the basis of the decision 19 of Conference of Parties 9- Kyoto Protocol and is accepted by the United Nations Framework Convention on Climate Change (UNFCCC) and the Food and Agriculture Organization (FAO)[xii]. The term '*Forest Cover'* is defined as 'all land, more than one hectare (ha.) in area, with a tree canopy density of more than 10% irrespective of ownership and legal status. Such land may not necessarily be a recorded forest area. It also includes orchards, bamboo and palm'[xiii]. Speaking of forest cover, India ranked the second highest for the rate of deforestation after losing 668,400 ha. of forest cover in the last 30 years.[xiv] (from 1990-2020). The Forest (Conservation) Act, 1980 provided for the restriction on the de-reservation of forest or use of forest land for non-forest purpose[xv] . The aforementioned provision of the Act of 1980, vests

power with the Central Government (CG) w.r.t approving the State Government to de-reserve the forest land to be used for non-forest purposes[xvi]. However, the validity of the aforementioned provision was challenged before the Supreme Court of India (SC) by a Writ Petition[xvii] filed by ***T.N Godavarman Thirumulpad***,[xviii] popularly known as ***'the Green Man'*** for his litigation efforts for environment conservation. The precedent evolved by this environmental activism prohibited deforestation and a significant decline and closure of numerous timber industries was also witnessed. The Amendment Act of 2023 inserts the words ***"Van (Sanrakshan Evam Samvardhan) Adhiniyam"*** via *section 1* of the amendment. This is also controversial as the non-Hindi speaking states have raised objection. Further, the Amendment somewhat concentrate the power with the CG to issue directions to any authority under them, or Union Territory Administration (UT) or to any organisation, entity or body recognised by the CG, State Government or UT Administration for the implementation of the Act[xix]. The Amendment of 2023 also inserts a preamble which mentions the national target of ***'Net Zero Emission'*** by the year 2070 to reduce the carbon emissions along with other objectives afforestation, preservation of biodiversity and improving the livelihood of the communities dependent on the forests. The target of ***'Net Zero Emissions***[xx]' by 2070 was announced by Hon'ble Prime Minister of India at the COP[xxi]26 summit held in Glasgow (November 2021).

(i) Whether the Forest Conservation Act of 2023 will reduce the rapid deforestation in India, replenishing the forest cover of the country?

During the last four decades, after the enactment of FCA, 1980 the annual rate of diversion of forest land has been reduced to approximately 22,000 ha. Further, in the last 43 years, approximately 9.83 lakh ha of forest land was diverted for non-forest purposes with adequate mitigating measures[xxii]. Currently in the year 2023 the total forest cover of the country is 7,13,789 square kilometre (km^2) which is 21.72% of the geographical area of the country.

The current assessment shows that the total forest cover of the country has increased by 1540 km^2, tree cover has increased by 721 km^2, and total forest and tree cover has increased by 2261 km^2 at the national level as compared to the previous assessment[xxiii]. Earlier for the use of forest land for non-forest activities by the State Government was permissible after the prior approval of the CG.

In contrast to the preceding Act, this the Amendment of 2023, limits the area/land which can be protected under the act. The Amendment Act 2023, exempts the "land which has been changed from forest use to use for non-forest purpose on or before the 12th December, 1996 in pursuance of an order, issued by any authority authorised by a State Government or a UT Administration in that behalf[xxiv]". Further the amendment categorically excluded the forest land of 0.10 ha. situated along side railway tracks, public roads[xxv]. Even the forest land "situated within a distance of 100 kilo meters (km) along international borders or Line of Control (LoC) or Line of Actual Control (LAC). The CG have the power to construct projects of strategic importance for national security"[xxvi]. For the purpose of strategic construction up-to 10 ha of forest land can be used. The Amendment Act of 2023 categorically mentions the forest area which is exempted from the purview of the Act and the forest area in ha. which can be used by CG or non-forest purposes. But when it comes to the replenishment of forest it merely suggests that the "*CG may by guidelines specify*[xxvii]". Hereby, after merely reading the provisions one can easily comprehend that the effect of this amendment in the longer run will adversely affect the forest cover of the country. While compensatory afforestation may seek to undo this loss in forest cover, it fails to replace the loss of biodiversity that can result from the destruction of forest habitats[xxviii]. Further, linear projects can reduce biodiversity in an area greater than their own footprint[xxix]. Each kilometre of road can have a detrimental effect on up to 10 ha of habitat[xxx].

With the provision to allow felling of trees and the guideline for replenishment of forest, the Question (i) is answered negatively as the act will lead to further deforestation which shall reduce the forest cover of the country.

(ii) Whether the Forest (Conservation)Amendment Act, 2023, will not contradict/will contradict the judgment

delivered by the Supreme Court in the case of T.N Godavarman Thirumulpad Vs. Union of India and Others?(also known as the forest case)

In ***T.N Godavarman Thirumulpad Vs. Union of India and Others***[xxxi] a writ petition was filed before the Hon'ble SC to halt the illegal deforestation in the name of timber operations and protect the Nilgiris forests. The intensity of damage was so adverse that the Sandalwood Forest and the Sandalwood was on the verge of being endangered. One of the key issues was that the timber operations violated *section 2* of the Forest (Conservation) Act, 1980 which says no state government or any other authority can make use of land of the forest for any non-forestry activities through the prior permission of the CG[xxxii]. The court also examined the issue of whether sandalwood could be stated to be an endangered species and declared as a "specified plant". The same was affirmed by the court, and all licenses with wood-based industries were cancelled and also directed that all ongoing non-forest activities in forests must be stopped if they have only received approval from the state government and not the central government. It was noted that all such activities would violate the FCA, 1980[xxxiii] .

The judgment was passed in the favour of the petitioner, further, directing sustainable use of the forest. The following principles were also laid down by the SC;

- "All forest activities throughout the country, without the specific approval of the Central Government must cease forthwith. Therefore, running of saw mills, plywood mills and mining are all non-forest purposes and they cannot carry on with the Central approval".
- "The felling of all trees in all forest is to remain suspended except in accordance with the working plan approved by the Central Government".
- "Complete ban on the movement of cut trees and timber from any seven north eastern states of the country either by rail, road or water ways. The Indian railways and state governments were directed to take all measures necessary to ensure strict compliance of this directions. Railways were asked to shift immediate to concert tracks than to using wooden sleepers. Defence establishments were also asked to find alternatives to consumption of wood-based products".
- "A High-power Committee was to be constituted to oversee the implementation of the judgment and to guide the Court in making further orders, especially in the North East. The Committee was directed to prepare an inventory of timber and timber products lying in the forest, transport depots and mills in the region. The HPC was empowered to permit the use or sale of timber products if it considered appropriate through the State Forest Corporation".
- "Licenses given to all wood-based industries shall stand suspended".
- "An action plan shall be prepared by the Principal Chief Conservator of Forest for intensive patrolling and other necessary protective measures to be undertaken in identified vulnerable areas and quarterly report shall be submitted to the Central Government for approval".

The Amendment Act of 2023 clearly states that land which changed from forest to non-forest use before the date of the judgement will be exempted from the purview of the Act of 1980[xxxiv]. This also implies that any forest land upon which a non-forest activity was approved between October 25, 1980 and December 12, 1996 (under the 1980 Act) would not be covered by the Act. For instance, if a mining lease was approved on a forest land within this period, the land would be outside the purview of the Act (even if such lease has expired). Therefore, non-forest activities can be undertaken on such land without requiring any approval under the Act[xxxv]. Here the Forest (Conservation) Amendment Act, 2023 may be going against the judgement. Therefore, the Research Question No. (ii) is answered, that yes the amendment will contradict the judgement.

(iii) Does the exemption on Forest land in the regions of North-Eastern state hamper the ecological balance of that area?

Northeast India comprises of seven states commonly known as the *"Seven Sisters"*. They are Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura. These states are also the biodiversity hotspots of the country. The geographical location of the North-East is of strategic importance as it shares over 2000 km of

border with Bhutan, China, Myanmar and Bangladesh and is connected to the rest of India by a narrow 20 km wide corridor of land. North East India is the home for more than 166 separate tribes speaking a wide range of languages making it one of the most ethically and linguistically diverse regions in Asia, each state has its distinct cultures and traditions[xxxvi].

The total forest cover in northeastern states is 1,69,521 km^2 which is 64.66% of the total geographical area of the northeast. The Northeast had lost 1,020 km^2 of forest cover from 2019 to 2021. (as per the ISFR report of 2021[xxxvii]) . Mizoram has 85% forest cover, followed by Arunachal Pradesh (79%), Meghalaya (76%), Manipur (74%), Nagaland (74%), and Tripura (74%)[xxxviii]. Over the years forest cover in the north-eastern states has declined due to activities like shifting cultivation, felling of trees, natural calamities, anthropogenic pressure, and developmental activities[xxxix].

The Amendment of 2023 allows the construction of security-related projects and within 100 km[xl] of the international border/LoC/LAC[xli] on forest land. This will lead to rapid deforestation and decline in forest cover of these states. The tribal communities and the wildlife indigenous to the region will be severely impacted. NPF[xlii] has rejected outright The Forest Conservation Amendment Act, 2023, which it termed as "anti-tribal and anti-constitutional[xliii]".

Similar to the aforementioned objection, the people of the other North Eastern states have expressed their concern towards the amendment as forest conservation falls under the Concurrent List, which means both the CG and State Government have a role in the matter. But the Forest (Conservation) Amendment Act,2023 through its provisions concentrate power to issue directions[xliv] with the CG which will impact the rights and authority of the State government in matters pertaining to forest conservation[xlv].

Therefore, Research Question (iii) is answered, that after considering all factors, and the geopolitical position of India with China, one can fairly speculate that in order to gain strategic advantage India might construct certain assets which will irreparably damage the eco-logical system of the North-Eastern States.

Conclusion

Environmental Protection is the fundamental duty of every Indian citizen. Sadly, people these days proactively demand their rights and have almost forgotten about their duties. The Forest (Conservation) Amendment Act, 2023 undoubtedly has incorporated a beautiful preamble where it aims to fulfil the target of 'Net Zero Carbon Emissions' by the year 2070. However, given the provisions incorporated in the amendment might contradict its preamble. Forests naturally combat the carbon emissions by simply producing oxygen and keeping the environment cooler. Mere, adopting of Electric Vehicles (EVs) and other temporary measures will not reduce the carbon emissions. Without a sufficient Forest-Cover it is difficult for the country to achieve the net zero target. As it has been mentioned earlier, the provisions of the Amendment Act of 2023, concentrate a lot of power with the CG when it comes to issuing directions w.r.t implementation of the act. This is in contrast with the previous FCA 1980 as the State Government was required to take prior approval from the CG when it was desirous to de-reserve any forest land. Concentration of power will lead to arbitrariness. Further, more than 100 former civil servants, members of the Constitutional Conduct Group (CCG), have written to all members of parliament in India expressing their concern with the Forest Conservation (Amendment) Bill, 2023. The group has said they are worried both by the contents of the Bill and the process being followed in passing it[xlvi].

The other provisions of the amendment definitely give a scope for development but such development will not be sustainable. *Section 1A (2)(c)(i)* poses a direct threat to the forests of the North Eastern States and to the rights of the tribals residing there. Moreover, a shadow ban on the ecotourism activities is an indirect way of disturbing the ecological balance And Wildlife of the country. It can be fairly speculated that the impact of the Amendment shall be visible in the longer run, exposing the true intention of the amendment. However, the Hon'ble Supreme Court of India will act as a guardian of the fundamental rights of the people and forests of India by keeping a check on the laws ultra vires to the Constitution. As responsible citizens of India, it is one's duty to

protect the environment, and the same can also be done by critically analyzing the laws made by the government.

Way Forward

There is a need to conduct a thorough and comprehensive assessment of the proposed amendments and their potential impacts on forests, biodiversity, and tribal/local communities. It is essential to study the target audience of the legislation before drafting laws for them. In the present case, it is opined by many experts that the Bill should have been referred to the Parliamentary Committee on science, technology, environment and forests, instead of being referred to a to a Select Committee[xlvii].

This assessment should consider ecological, social, and environmental factors and involve input from diverse stakeholders, including experts, NGOs, tribal communities, and State Governments. Along with these aspects, while proposing amendments the landmark judgements related to the subject must be referred to avoid future conflict with the judiciary. A continuous engagement in meaningful consultation and dialogue with all stakeholders should be done with an attempt to understand their perspectives and address their concerns. This will promote transparency, inclusivity, and better decision making.

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[i] "What is Geographical Diversity?" *Geeks for Geeks, available at:* https://www.geeksforgeeks.org/what-is-geographical-diversity/ (last visited on October 8, 2023).

[ii] Somnath Ghosal, "Pre-Colonial and Colonial Forest Culture in the Presidency of Bengal" *Human Geographies Journal of Studies and Research in Human Geography*, 115 (2011).

[iii] (*Note-" the primary objective of the British was to demark the resources of the forest for the wellbeing of the Colonial Empire.)*

[iv] *Objective*- "An Act to consolidate the law relating to the forests, the transit of forest-produce and the duty leviable on timber and other forest produce" .

[v] *Objective*- "An Act to provide for the conservation of forest and for matters connected therewith or ancillary or incidental thereto".

[vi] International Tropical Timber Organisation, 1983.

[vii] International Tropical Timber Agreement, 1983.

[viii] Convention on Biological Diversity, adopted during the Earth Summit held in Rio de Janeiro in 1992.

[ix] The Process by which fertile land becomes desert due to deforestation.

[x] (Note- *A hectare refers to an area of a square comprising 10,000 units of square meters, with each side measuring 100 meters.)*

[xi] This information was given by Shri Ashwini Kumar Choubey, Minister of State, Ministry of Environment, Forest & Climate Change in Rajya Sabha on 03 February 2022.

[xii] *Supra* Note 11.

[xiii] Forest Survey of India, "India State of Forest Report"(Ministry of Environment, Forest and Climate Change). *Notification available at:* https://pib.gov.in/PressReleasePage.aspx?PRID=1795070 (Last visited on October 8,2023).

[xiv] "Why It Matters? India lost 668,400 ha of forest cover in the last 30 years" *The Hindu, available at : https://www.thehindu.com/sci-tech/energy-and-environment/why-it-matter-india-has-lost-668400-ha-of-forest-cover-in-the-last-30-years/article66645294.ece* (last visited on October 8,2023).

[xv] The Forest (Conservation) Act, 1980 (Act 69 of 1980) s.2.

[xvi] *Explanation*.—For the purposes of this section "non-forest purpose" means the breaking up or clearing of any forest land or portion thereof for— (a) the cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, horticultural crops or medicinal plants; (b) any purpose other than reafforestation, but does not include any work relating or ancillary to conservation, development and management of forests and wild life, namely, the establishment of check-posts, fire lines, wireless communications and construction of fencing, bridges and culverts, dams waterholes, trench marks, boundary marks, pipelines or other like purposes.

[xvii] W.P (Civil) No. 202 of 1995.

[xviii] (1997) 2 SCC 267.

[xix] The Forest (Conservation) Amendment Act, 2023 (Act 15 of 2023) s.3C.

[xx] "CoP26 summit India will achieve net zero emissions by 2070, says PM Modi", *The Hindu, available at:* https://www.thehindu.com/sci-tech/energy-and-environment/prime-minister-narendra-modi-addresses-cop26-un-climate-summit-in-glasgow/article37292550.ece (last visited on October 8,2023).

[xxi] Conference of the Parties 26th summit.

[xxii] Lok Sabha Secretariat, "Report of the Joint Committee on the Forest (Conservation) Amendment Bill,2023" 2 (2023).

[xxiii] Forest Survey of India, "India State of Forest Report" (Ministry of Environment, Forest and Climate Change, 2021).

[xxiv] *Supra* note 18, s.1A.

[xxv] *Supra* note 18, s.1A(2)(a).

[xxvi] *Supra* note 18, s.1A(2)(c).

[xxvii] *Supra* Note 18, s.1A(3).

[xxviii] The Institute of Economic Growth, Delhi,"Report of the Expert Committee on Net Present Value" (2006).
[xxix] T. R. Shankar Raman, "Framing Ecologically Sound Policy on Linear Intrusions Affecting Wildlife Habitats: Background Paper for the National Board for Wildlife",(2011).
[xxx] Forest Clearance Dashboard, *Parivesh, available at:* https://parivesh.nic.in (last visited on October 8,2023).
[xxxi] *T.N Godavarman Thirumulpad Vs. Union of India* (1997) 2 SCC 267.
[xxxii] Eco Jurisprudence Monitor, *available at:* https://ecojurisprudence.org/initiatives/t-n-godavarman-thirumulpad-vs-union-of-india-ors/ (last visited on October 8, 2023).
[xxxiii] PRS Legislative Research *available at:* https://prsindia.org/billtrack/the-forest-conservation-amendment-bill-2023 (last visited on October 8 2023).
[xxxiv] *Supra* note 18, s.1A(1)(b).
[xxxv] *Supra* note 32.
[xxxvi]About North- East India: An Introduction *available at:* https://ignca.gov.in/divisionss/janapada-sampada/northeastern-regional-centre/about-north-east-india-an-introduction/ (Last visited on October 08,2023).
[xxxvii] *Supra* Note 22.
[xxxviii] *Supra* Note 22.
[xxxix] *Supra* note 29.
[xl]*Note-" The 100 km distance from international borders would cover most of North-Eastern States as well as Sikkim, with 47% forest cover, and Uttarakhand, with 45% forest cover".*
[xli] *Supra* note 18, s.1A(2)(c).
[xlii] Naga People's Front Legislative Party.
[xliii]"Reject Forest Conservation Amendment Act 2023: NPF" *Nagaland Post, available at: https://nagalandpost.com/index.php/reject-forest-conservation-amendment-act-2023-npf/ (*Last visited on October 8,2023).
[xliv] *Supra* Note 18.
[xlv]"The Forest (Conservation) Amendment Bill 2023", *The Daily Guardian available at: https://thedailyguardian.com/the-forest-conservation-amendment-bill-2023/* (Last visited on October 8, 2023).
[xlvi]"More than 100 ex Civil servants question the new forest amendment bill", *The Wire* July 13, 2023, *available at:*https://thewire.in/government/more-than-100-ex-civil-servants-question-new-forest-conservation-amendment-bill) (Last visited on October 8, 2023).
[xlvii] *Supra* Note 52.

Contours of Religious Practices in India- Articles 25 and 26

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Articles 25 and 26 provide for freedom of religion to an individual and autonomy to religious communities. Article 25[i] entitles every person to freedom of conscience and the right to profess, practice, and propagate religion. *Freedom of conscience* means that everyone has the freedom to mold his relations with God in whichever way he likes. The *right to profess* means the right to declare one's religious faith or beliefs freely. The *right to practice* means to carry out religious worship, rituals, etc., and exhibition of religious faith and ideas freely. The *right to propagate* religion gives the person the right to disseminate one's religious beliefs to others. The Apex Court has held that the right to propagate does not include the fundamental right to proselytize i.e. convert another person to one's religion.[ii] Forcible conversion violates the right of freedom of conscience of an individual. Article 25 is subject to limitations outlined in public order, health, morality, and other provisions of Part III. Additionally, the right to religion can be regulated by the State concerning economic, financial, political, or secular activities associated with religious practices.

Article 26[iii] gives every religious denomination or any section thereof the right to establish and maintain institutions for religious and charitable purposes; to manage its affairs in matters of religion; to own and acquire movable and immovable property; and to administer such property by the law. Article 26(a) stipulates that religious denominations can only claim to maintain institutions they have established. Clause (b) allows the court to determine the essentiality of religious ceremonies/practices. Clauses (c) and (d) pertaining to property ownership and administration are subject to legislative regulation, placing them on a distinct legal footing.

What constitutes a *'religious denomination"*? Although the meaning of this phrase is not provided in the, the Supreme Court in *Commissioner, Hindu Religious endowment Madras v. Shri Laxmindra Thirtha Swamiar of Shri Shirur Mutt*[iv] defined 'religious denomination' to mean *"A collection of individuals classed together under the same name, a religious sect or body having a common faith and organization designated by a distinctive name"*. While the right under Article 25 is an individual right, the one provided under Article 26 is the right provided to an 'organized body' i.e., religious denomination. A series of Judgments led to an understanding that for an organized body to take the color of religious denomination, it must satisfy 3 conditions, i.e. it must be a collection of individuals with a common faith, must have a common organization, must be designated by a distinctive name. For instance, Hindus, Muslims, and Christians are religious denominations. If you dissect them further Hanafi, Shia, and Chisti sects are separate denominations.

The Aurobindo Society, established with substantial government and organizational grants, faced mismanagement complaints, leading to the enactment of an Act for improved governance. The takeover was deemed permissible under Article 26, as the society, centred on Sri Aurobindo's teachings, was not a religious institution but a reflection of his ideologies, distinct from a religious denomination.[v]

The right to religion under Article 26 is not absolute and is subject to public order, health, and morality.

Essential religious practices doctrine

The Constitution allows restrictions on religious freedom for health, morality, public order, and Part III provisions. The state is vested with the authority to make laws for social welfare, reform, and regulating economic, political, and secular activities linked to religion. Over time, with the increasing State intervention, Supreme Court judgments established the doctrine of essential religious practices which was seen by some as a 'Gatekeeping function' to prevent misuse. Justice Alam argues that in India, where religion significantly influences public life, it is easier to deem a practice not essentially religious than to call it contrary to public order and morality.[vi]

The doctrine of essential religious practices restricts freedom of religion under the Fundamental rights only to practices that are deemed essential for the religion and other non-essential ones allowing state intervention. On a bare reading of the Indian

Constitution, one might not find any mention of the word 'essential' when we talk about the freedom of religion. Hence, it is interesting to see how this doctrine evolved in the first place. One of the first mentions of the phrase *'essentially religious*' was made by Dr. B.R. Ambedkar in one of his Constituent Assembly speeches where he said that in India, religion covers every aspect of life from birth till death and that if personal law was to be saved the country in social matters will come to a standstill. Thus, requiring the definition of 'religion' to be limited to the point of those beliefs and rituals that are *essentially religious*.[vii]

The test of essential religious practices was laid down by the Supreme Court in the judgment of ***Commissioner, Hindu Religious Endowments, Madras v Lakshmindra Thirtha Swamiar of Sri Shirur Mutt***[viii] wherein it was held by the 7-Judge Bench of Supreme Court that "What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself". The Supreme Court observed that while determining whether a practice is essentially religious or not, due respect must be given to the internal doctrines of the religion. This ensured that the relative autonomy of the religion was well respected.

Although the understanding of the phrase 'essential practices' underwent a severe change. In ***Sri Venkataramana Devaruand v. The State of Mysore***[ix], the question dealt with by the Supreme Court was whether restricting the entry of certain sections of people in the temple is part of an essential practice or not to override the right to freedom of religion under Article 25? It was held that such practices were void and unconstitutional and that a complete exclusion of the general public would amount to a violation of Article 25.

In ***Sardar Sarup Singh v. State of Punjab,***[x] section 148-B of the Sikh Gurdwara Act was challenged as violative of Article 26(b) of the Constitution. Petitioners pleaded that the said section did not provide for the election of members to the committee by the Sikhs themselves. On the other hand, it was argued by the State that the right of religious denominations to manage their affairs in matters of religion does not include choosing representatives to administer the Gurdwara property. The Supreme Court held that since no material was presented before the Court stating the said practice of choosing representatives for the Committee by the Sikh community themselves, the section was upheld.

In the ***Cow slaughter case***,[xi] the shift in the Supreme Court's approach was evident. It could be said that the apex Court took up the **role of 'theologian'** while determining the validity of legislation banning cow slaughter. It was submitted that the slaughter of cows for Bakrid was required by the tenets of Islam. The apex Court based on the interpretation of Islamic texts, upheld the validity of the said legislation on the grounds that sacrificing cows was optional for Muslims and hence does not come under the ambit of essential religious practice.

This shift from analysing whether something was essentially religious to whether it was essential to religion, was followed in a series of cases.

In the ***Durgah Committee case***[xii], the Supreme Court took a step forward to **rationalize religion and liberate it from its superstition** as the Court observed that even religious practices might have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Therefore, the protection must only be confined to those which are essential and an integral part of the religion.

ERP doctrine and the progressive route

Despite the rather debatable existence of the ERP doctrine, it cannot be denied that it has facilitated the remedying of many social evils over the years, thus taking the progressive road for the nation. In ***Shah Bano*** Judgment[xiii], with the application of the ERP doctrine, the Supreme Court while relying on the interpretation of the holy Quran held that there was nothing in Muslim personal laws that conflicted with the statutory provisions of maintenance.

In ***Haji Ali Dargah Trust v. Noorjehan Safia Niaz***[xiv], The Supreme Court while upholding the Bombay High Court's decision in appeal ensured the right of women pilgrims to enter the sanctum sanctorum of Haji Ali Dargah. The apex Court observed that the exclusion of women from the

inner sanctum of Dargah was not an essential practice.

Further, in ***Dilawar v. State of Haryana***[xv], the Punjab and Haryana High Court on the legal issue of whether a Sikh could appear in Court wearing a Kirpan, held that wearing a Kirpan is essential for an amritdhaari Sikh as one of the 5 kakars. The High Court relied on the Supreme Court's Judgment in the *Shirur Mutt* case.

Shayara Bano v. UOI[xvi] in 3:5 Judgment, the majority held that Tripple Talaq i.e. Talaq-e-Biddat was manifestly arbitrary and unconstitutional. Justice Kurien Joseph in his concurring opinion observed that the said practice was against the holy Quran and, therefore lacked legal sanction. "*What is held to be bad in the Holy Quran cannot be good in Shariat and, what is bad in theology is bad in law as well".*

Later, in July 2019, the Parliament enacted the **Muslim Women (Protection of Rights on Marriage) Act, 2019** which criminalized talaq-e-biddat.

Sabarimala Judgment[xvii] The facts of this case were that in the Sabarimala Temple, there was a customary prohibition on the entry of women belonging to the menstruating age. The temple which is the abode of Lord Ayyappa was a Naisthik Brahmachari. Thus, the reason for the customary prohibition. The religious injunction was challenged and the Supreme Court with a 4:1 majority held that the exclusion of women was unconstitutional. The dissenting opinion of Justice Indu Malhotra, the only female Judge on the Bench was that the Court must respect the right of religious denominations to manage their internal affairs irrespective of the fact if the said practices are rational or logical. Further, she observed that constitutional morality must be understood in the context of India being a pluralistic society and that the State must respect the freedom of various individuals and sects to practice their faith.

Although the Judgment was progressive on the face of it, in scrutinizing the Judgment given by the majority, the following points are raised:

1. Justice Mishra and Khanwilkar observed that there was no scriptural evidence as to the essentiality of the practice in question. I humbly submit that not all faiths have textual visions, some are kept alive by oral means too. For example: religious groups that identify as animists mostly keep their faiths alive through story-telling or other oral traditions.

2. The majority Judgment also spoke about there being no continuity in the exclusionary practice thus making it unessential. By emphasizing the continuous nature of the practice, the Court assumed that religious beliefs and practices are static although anthropology has taught us that such things are dynamic in nature.

3. Requiring a prolonged continuity to be 'the' criteria, puts relatively new religions/practices under threat of not being recognized. A classic example of this would be the *Tandav Case*.

In ***Church Of God (Full Gospel) In. vs K.K.R. Majestic Colony Welfare***[xviii] The Supreme Court observed that no religion prescribed that prayers should be offered by disturbing the peace of others or mandatorily use of amplifiers, speakers, etc. Thus, the contention of violation of rights under Articles 25 and 26 was rejected.

Conclusion and suggestions

Secularism in today's world has led to the formation of a new relationship between private and public spheres that cannot be reduced to a status of state neutrality or church-state separation. In a diverse country like India where religion rules almost every aspect of public life, Articles 25 and 26 serve the intended purpose of guiding the community life and embodying the quintessence of a democratic society's commitment to pluralism. Although the role of ERP doctrine has always been debatable and controversial, in some instances it has gone on to lead the path to progress be it related to environmental concerns or women's rights. However, the critics say that one of the effects of the application of the ERP doctrine has been that of undermining the internal autonomy and normative pluralism of religions. Further, from the Judgments discussed above, it is easy to conclude that there were times when the Court was seen taking up the role of an interventionist and even a theologian. Thus, raising concerns over the legitimacy of the ERP doctrine. Another criticism has been that the doctrine goes against the tenets of constitutional

morality and that a balance must be achieved through the reading of religious rights and freedoms in the separation of State from religion. The interpretation of the ERP doctrine is very subjective with no straitjacket formula.

Therefore, it is suggested that the Court choose the approach of horizontal application of Fundamental rights instead of relying on a rather subjective with no straitjacket formula for the interpretation approach of ERP doctrine. For instance, in the ***Danial Latifi case***[xix], the Supreme Court put the Muslim Women (Protection of Rights on Divorce) Act, 1986 to the test of Articles 14, 15, and 21 and upheld its validity. Thus, setting a progressive tone. This highlights the change of approach in bringing about social reform rather than adopting a subjective doctrine. Further from a series of Judgments, it has been observed that the operation of ERP has extended over the years. From determining the practices that are essentially religious in nature to extending them to determine essential religious practices, the evolution did not just stop there. It reached the point of questioning whether a religion is even
an established religion or not.

[i] The Constitution of India, 1950.
[ii] Rev. Stanislaus vs. State of Madhya Pradesh and Others (1977).
[iii] *Supra*, n 1.
[iv] [1954] AIR 282.
[v] S.P. Mittal v. Union of India AIR 1983 SC 1.
[vi] Aftab Alam, 'The Idea of Secularism and the Supreme Court of India' (2010) Pluralism Working Paper Series No. 5, 21-22 <https://knowledge.hivos.org/sites/default/files/publications/pwpno5theideaofsecularism.pdf> accessed 11 February 2020.
[vii] Constituent Assembly Debates, 2 December 1948, vol 7 doc 65 (emphasis added).
[viii] *Supra*, n 4.
[ix] [1958] SCR 895.
[x] [1959] AIR 860.
[xi] Hanif Quareshi v. State of Bihar AIR 1958 SC 731.
[xii] The Durgah Committee, Ajmer v. Syed Hussain Ali and Others 1961 AIR 1402.
[xiii] Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556.
[xiv] (2016) 16 SCC 788.
[xv] AIR 2016 P&H 149.
[xvi] WP (C) 118/2016.
[xvii] Indian Young Lawyers Association vs The State Of Kerala ((2019) 11 SCC 1.
[xviii] AIR 2000 SC 2773.
[xix] Danial Latifi v. Union of India, (2001) 7 SCC 740.

An Analytical Study of the interpretation of the Constitution: With Special Reference to the Uniformity in interpretation of the Statute

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Introduction

A Constitution is an organic instrument. It is a fundamental law of the land. It being in the form of a statute the general principles of interpretation are applicable to the interpretation of the Constitution also. As is the case with ordinary statutes, the court attempts to find out the real intention of the framers of the Constitution from the words used by them. Where more than one reasonable interpretation of a constitutional provision is possible, that which would ensure a smooth and harmonious working of the Constitution shall be accepted rather than the one that would lead to absurdity or give rise to practical inconvenience or make well-existing provisions of law nugatory. The Constitution must be interpreted in a broad and liberal manner giving effect to all its parts and the presumption should be that no conflict or repugnancy was intended by its framers. It cannot be interpreted in a narrow sense and the court should be guided with a broad and liberal spirit.

In *Padma Sundara Rao v. State of T. N*[i] ,While interpreting a provision the court interprets the law and cannot legislate it. If a provision of law is misused and subjected to abuse the process of law ,it is for the legislature to amend ,modify, or repeal it ,if it deemed necessary. The legislative casus omissus cannot be supplied by judicial interpretive process.

Principle of Pith and Substance:

The principle means that if an enactment substantially falls within the powers conferred by the Constitution upon the legislature by which it was enacted, it does not become invalid merely because it incidentally touches upon subjects within the domain of another legislature as designated by the Constitution. Consequently, this principle is invoked to judge the legislative competence of a legislature about a particular enactment on the question as to whether that legislature was empowered to make law on that subject as per the entry in the list. *In Subrahmanyan Chettiar v. Muthuswamy Goundan 2*[ii], the Privy Council had evolved the rule of pith and substance with respect to the Constitution of Canada when similar questions under Sections 9l and 92 of the British North America Act, it 1867 had arisen, Chief Justice Sir Maurice Gwyer observed: "I must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely 'inter-twined that blind observance a strictly verbal interpretation would result in many statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence, the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain is 'pith and substance', or its true nature and character. for the purpose of determining for whether it is legislation with respect to matters this list or that.''

Principle of territorial nexus:

Whereas Articles 245 (1) of the Constitution says that subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

According to Article 245 (2) "no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation". Thus, the Constitution confers the power to enact laws having extra territorial operation only to the Union Parliament and not to the State Legislature, and consequently and extra-territorial law enacted by any State is changeable unless the same is protected on the ground of territorial nexus. If a state law has sufficient nexus or connection with the Subject- matter of that law, the State law is valid even when it has extra-territorial operation. It could, therefore, be said that a State Legislature is to enact a law having extra- territorial operation subject to the condition that even though the subject-matter of that law is not located within the territorial limits of the State, there exists as sufficient nexus of connection between the two. The area in which the principle of territorial nexus has been applied most in India is taxation.

In State of Bombay v. R.M.D. Chamarbangwala[iii] a newspaper printed and published at Bangalore had wide circulation in the State of Bombay. Through this newspaper the respondent conducted and ran prize competitions for which the entries were received from the State of Bombay through agents and depots

established in the State to collect entry forms and fees for being forwarded to the head office at Bangalore. The Bombay Legislature imposed a tax on the business of prize competitions in the State by enacting the Act of 1952 and amending the Bombay Lotteries and Prize Competitions and Tax Act, 1948. The respondent contended that he was not bound to pay the (Res said tax on the ground of extraterritoriality. The Supreme Court ruled that when the validity of an Act is called in question the first thing for the court to do is to examine as to whether the Act is a law will respect to a topic assigned to the particular legislature which enacted it because under the provisions conferring legislative powers on it such legislature can only make a law for its territory or any part thereof and its laws cannot, in the absence of a territorial nexus, have any extra-territorial operation. For sufficiency of territorial connection, two elements were considered by the court, namely, (1) the connection must be real and not illusory, and (2) the liability sought to be imposed must be pertinent to that connection. It was held that all the activities which the competitor was ordinarily expected to undertake took place in the State of Bombay and there existed a sufficient territorial nexus to enable the Bombay Legislature to tax the respondent who was residing outside the State.

Principle of severability:

It is well-established principle that when the constitutionality of an enactment is in question and it is found that part of the enactment which is held to be invalid can be severed from the rest of the enactment, the part so severed alone shall be declared unconstitutional while the rest of the enactment shall remain constitutional. Naturally, where such severance is not possible, the whole enactment shall have to be held unconstitutional. *In A.K. Gopalan State of Madras*[iv], the Supreme Court said that in case of repugnancy to the Constitution, only the repugnant provision of the impugned Act will be void and not the whole of it, and every attempt should be made to save as much as possible of the Act. If the omission of the invalid part will not change the nature or the structure of the object of the legislature; it is severable. It was held that except Section 14, all other sections of the Preventive Detention Act 1950 were valid, and since Section 14 could be severed from the rest of the Act, the detention of the petitioner was not illegal.

Principle of prospective overruling:

IC Golak Nath v. State of Punjab[v], five of the eleven judges of the Supreme Court laid down the principle of prospective overruling. They were of the view that the Parliament had no authority to amend the fundamental rights. Chief Justice Subba Rao speaking for himself and four of his companion judges posed the questions as to when Parliament could not affect fundamental rights by enacting a bill under its ordinary legislative process even unanimously, how could it then abrogate a fundamental right with only a two third majority and while amendment of less significant Articles of the Constitution require ratification by a majority of States of the Union, how could a fundamental right be amended without this requirement being fulfilled. The learned judge was of the view that Article 368 laid down only the procedure to amend the Constitution and bestowed no power of amendment which could be found only in the residuary legislative power of Parliament contained in Article 248. He also felt that the word 'law' in Article 13 (2) means ordinary law and constitutional law both and consequently the State was not empowered to make any constitutional amendment which takes away or abridges fundamental rights as law' includes 'amendment as well. Thus, while holding that the Parliament was not authorised to amend fundamental rights, these five learned judges jointly declared that the principle would operate only in future, and it had no retrospective effect.

Therefore, the name 'prospective overruling". The effect of the decision was that all amendments made with respect to the fundamental rights till the day of the decision in the case would continue to remain valid and effective, and after the date the Parliament would have no authority to amend any of the fundamental rights. The learned judges imposed three restrictions too on the application of the principle - first, that the principle of prospective overruling would for the time being be used in constitutional matters only; second, that the Supreme Court alone, and no other court, would have the authority to apply the principle; and third, the scope of the prospectively to be imposed is a matter of discretion for the Supreme Court which is to be moulded in accordance with the justice of the cause or matter before it. It is clear from the above discussion that the principle of prospective overruling recognises the role of the Supreme Court with respect to both law and policy making.

There seem to be at least two valid reasons for the birth of the principle of prospective over-ruling in India. First, the power of Parliament to amend the fundamental rights, and the First and the Seventeenth Amendments specifically had been upheld previously by the Supreme Court in Shankari Prasad v. Union of India," and Sajan Singh v. State of Rajasthan."

Secondly, during 1950 to 1967, a large body of legislation had been enacted bringing about an agrarian revolution in India.

Principle of Eclipse:

According to Article 13(1) of the Constitution, all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. Article 13 (2) of the Constitution says that 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. *In Keshavan Madhava Menon v. State of Bombay*[vi],' the questions were as to whether a prosecution commenced under Section 18, Indian Press (Emergency Powers) Act, 1931 before the coming into existence of the Constitution, could be continued even after the presence of Article 13 (1) in the Constitution and whether the Act violated Article 19 (1) (a) and (2) The Supreme Court, by majority, held that the prosecution would continue because the Constitution could not be given a retrospective operation in the absence of an express or necessarily implied provision to that effect nor was there anything to that effect in Article 3 (1) of the Constitution.

Uniformity in the Interpretation of the Statues:

Judges have their different ideology, which is differ from judges to judge, one judge can Judge interpret the same statue in different way and other judge in different way, this creates a lot of confusion in the uniformity of law. Judiciary while interpreting the constitution accept the proposition that constitutional norms should be uniform throughout the nation. The importance of uniformity in constitutional interpretation can be assessed only against a more general understanding of the constitution system. While, In Subordinate Judiciary there is uniformity in the interpretation of the statutes because they follow the principle laid down by the Superior Court.

Conclusion:

The Constitution is the Supreme law of the land and all State organs including Parliament and State legislature are bound by it. They must act within the limits laid down by the Constitution. They owe their existence and powers to the Constitution and, therefore, their every action must have its support in the constitution. As interpreters of law and arbiters of legal disputes courts determines what the law is. In doing so they give due regard to the powers and autonomy of the other organs, particularly of the legislature. The Constitutions must be interpreted with reference to its terms alone; nothing is to read into it on grounds of supposed spirit, pervading the constitution or on the grounds of policy or even for the purpose of supplying omissions or of correcting errors. While interpreting a provision the court only interprets the law and cannot legislate it.

If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary.

[i] (1941)1MLJ267, AIR 1941 MADRAS 526

[ii] 1957 AIR 699, 1957 SCR 874, AIR 1957 SUPREME COURT 699, 1957 SCJ 607, 1957 (1) MADLJ(CRI) 558

[iii] AIR 1950 SC 27

[iv] 1967 AIR 1643, 1967 SCR (2) 762

[v] 1951 AIR 128, 1951 SCR 228, AIR 1951 SUPREME COURT 128, 1964 MADLW 382

[vi] Bench: Hiralal J. Kania, Saiyid Fazal Ali, Mehr Chand Mahajan, N. Chandrasekhara Aiyar, B.K. Mukherjea

A Case Commentary on Anoop Baranwal v. Union of India

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A constitution bench of Supreme Court in *Anoop Baranwal v Union of India* unanimously held that, the selection of Chief Election Commissioner and the Election Commissioner, as enumerated under Article 324(2) of the Constitution, shall be done by the three-member committee, comprising of The Prime Minister, the Leader of Opposition (or the Leader of the largest opposition party in Parliament), and the Chief Justice of India. The court, thus in this case, altered the present mode of selection procedure, where the Chief Election Commissioner and Such other number of Election Commissioner, is elected by the President. Under clause (2) of Article 324, acting on the advice of the Prime Minister.

Our prime focus in this case commentary would be, as to whether this decision of the Supreme Court be considered as a Judicial Overreach, with the proper functioning of the Legislative or upon the Executive Organs of the Government or this was the need of the hour.

Background:

in this case, a clutch of writ petitions was filed under Article 32 of the constitution, before two learned judges of the Supreme Court, containing the following prayers made by the petitioners.

(a). of the requirement of having a full proof and a better system of appointment of members of Election commission.

(b). issuing a writ of mandamus, or an appropriate writ, or order or direction, commanding the respondent to make a law, in order to ensure a free, fair and transparent process could be followed in the selection process of Chief Election Commissioner and an Election Commissioner, thus, prayed for constituting a neutral and an independent collegium/selection committee, which could recommend the name for the appointment of the members to the Election Commission, under Article 324(2) of the Constitution of India;

(c). that the said interim neutral and independent/collegium select committee, to recommend the names, for the appointment on the vacant post of the member to the Election Commission.

(d). issue a writ of mandamus, or an appropriate writ, or order or direction, declaring the practice of appointment of Chief Election Commissioner and the Election Commissioner, solely by the Executive as being violative of Article 324(2) and Article 14 of the Constitution; and lastly.

(e). to direct the respondent to implement an independent system for the appointment of members of the Election Commission, in the lines of the recommendation made by the Law Commission in its 255th report and in its fourth report in Second Administrative Reform Commission, respectively.

The bench of two learned judges of Supreme Court, however, while passing an order in this case were of the view that:

"Since the matter relates to what the petitioner perceives to be the requirement of having a full proof and a better system of appointment of members of the Election Commission. After hearing the learned counsel for the petitioner and the learned Attorney General of India, we are of the view that the matter requires a close look and interpretation of the provision of Article 324(2) of the Constitution, the issue which has not been debated and answered earlier by this court. Therefore, Article 145(3) of the Constitution of India, requires the court, to refer the matter to a constitution bench and accordingly, refer the question arising in the present proceeding to a constitution bench, for an authoritative pronouncement."

The matter was accordingly posted for the hearing before the Hon'ble Chief Justice of India. In this clutch of writ petitions maintained under Article 32 of the Constitution, this court was called upon to consider the true effect of Article 324 and Article 324(2) of the Constitution, which reads as follows:

"Article 324(2): The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time-to-time fix and the appointment of the Chief Election Commissioner and the other Election Commissioners shall, subject to the provision of any law made in that behalf by the Parliament, be made by the President".

Submissions:

A. Submission made before this court on behalf of the petitioners:

- In accordance with the submissions made by the petitioners learned counsel, it was submitted that, there is a lacuna in the matters of appointment, under Article 324 of the Constitution. The qualifications and the eligibility of the Election Commission is not laid down under the Constitution or the statue. It is only in the presence of this vacuum it was contended that, the court intervention becomes necessary, to secure the fundamental norm and its basic features. The independency of the Election Commission must be fearless like the Judiciary. In the absence of norms regarding the appointment, a central norm, viz., institutional integrity is adversely affected. Therefore, it was submitted that an independent appointment mechanism would guarantee an eschewing of the prospect of bias. Favouritism would be largely reduced.
- It was further argued that, since the power of appointing the Chief Election Commissioner is vested with the president, it has been observed that the successive governments select increasingly older candidate, which cast a shadow on its independency, apart from curtailing their tenure. It was pointed out by the learned counsel that, until recently, Election Commission is being indulging in the alleged misconduct and favouritism.
- The learned counsel submitted that, an independent Election Commission is necessary for a functioning democracy, as it ensures rule of law, and free and fair elections. The existing practice of appointment as to be made under Article 324(2) of the Constitution is manifestly arbitrary, as it is the Executive alone being involved in the appointment, thus ensuring the commission becomes and remains a partisan body and a branch of executive.
- It is pointed out that an adhocism is flowing from the legislative vacuum, as no regional commissioners were being appointed to the post since 1951. The role of election commissioner, in the modern election process is that it can be abused by simply playing with the election schedule. It was the main point of contention that, the appointment is reduced only to bureaucrats, that too majorly IAS officers. Thus, the appointment must be from a broad-based pool of talent, one of them being a judicial member, respectively.
- Finally, it was argued from the petitioner's side that, the parliament must have made the law on the point of independency of commission, as is explicitly stated under clause (2) of Article 324 of the Constitution. However, being an instance of glaring legislative inaction, the intervention of this court, thus becomes necessary.

Submissions made before this court on behalf of the Respondent:

- It was submitted before this court that, the acceptance of the contentions of the petitioners, would involve nothing less than an amendment to the provisions of Article 324 of the Constitution. The premise of the petitioner's complaint is the failure upon the part of the Union of India to redress the complaint.
- It was however pointed out that, in the absence of law being made by the parliament on this point, the intervention of this court on the point of the introduction of the collegium or body of persons to select the Chief Election Commissioner or the Election Commissioner, would necessitate trampling upon the constitutional process of aid and advice of Ministers, as contemplated under Article 74 of the Constitution. Thus, the judicial intervention in these matters would be at the expense of causing violence to the delicate separation of powers between the Executive, the Legislature, and the Judiciary.
- Relying upon Article 53 of the Constitution, which deals with the Executive power of the Union, it was contended that the law contemplated under Article 324(2), is in essence the law contemplated under Article 53(3)(b) of the constitution[i] and that in the absence of such law, the President has the constitutional power. It was argued that the constitutional validity of Article 324(2) of the constitution cannot be considered, as it is the part of

the original constitution, and that the original constitution provides for a complete machinery to deal with the appointments of the commission.

- any potential direction of inclusion of any non-executive member by this court, would involve a violation of the Declaration of Separation of powers. Upon this point, a reliance was placed by the learned counsel on the judgement passed by this court in ***Samsher Singh v State of Punjab and Another***[ii] . separation of power, as it was pointed out, reflects democracy itself. Therefore, the learned counsel persuaded the court to exhibit judicial restraint. A *casus omissus* may not justify judicial interference. Matters related to policy must rightfully be immune from judicial radar. What this case involves is a political question.
- It was argued that Article 324(2) of the constitution contemplates a clear procedure for the appointment of a Chief Election commissioner and the election commissioner. Our constitution of India follows a Westminster model of government, which displays that, the power of the president is well settled, which is to be exercised upon the aid and advice of the council of ministers. The president is the only formal head of the state. Thus, the power exercised by the president under Article 324(2) of the constitution is always understood to be exercised by the president, upon the aid and advice of the council of ministers. A system which has been in place for the past long seven years, leaving a no space for confusion.
- A long array of chief election commissioner and election commissioner have been appointed by restoring to the legitimate method contemplated under Article 324(2) of the constitution. Thus, there exist no identifiable wrong or trigger point in the past years since now, which would in a way warrant a judicial interference.
- In fact, it was contented that, the matters pertaining to the appointment of chief election commissioner and the election commissioner, has already been settled by this court in the case of ***T.N. Seshan, Chief Election Commissioner of India v Union of India and others***[iii]**.**
- With respect to the contention being raised by the learned counsel of the petitioner of fixed tenure. It was contented by the learned counsel of the respondent that, section 4 of the Election Commission (condition of service of Election Commissioners and Transaction of Business) Act, 1991 (hereinafter to be called as the 1991 act), contemplates a six-year tenure for both Election commissioner and the Chief Election Commissioner. However, this situation being ideal for those who would be 'ripe enough', for being inducted into the Election Commission. But strict adherence to it would introduce considerable problems. This being the position the concept of composite tenure has been arrived at. In other words, the separate term of six year, contemplated in section 4 of the act of 1991 act of six years each, has been understood as practically attained with incumbent being selected and appointed in such a manner that the person appointed as an election commissioner can look forward to an approximate tenure of six years, even though not as an election commissioner, but as an election commissioner and as a chief election commissioner, respectively.
- Thus, unless the court considers the non-adherence to section 4 of the 1991 act, as a subversion of the independence of the election commission, this court need not consider the 'aspirational propositions' as a principle to occupy an 'imagined vacuum'.
- The reports being relied upon by the learned counsel of the petitioner, including that of the Law Commission of India, are based upon the principles which are being followed or being practised in another jurisdiction. It is significant to note that the constituent assembly though conscious of other mechanisms, deliberately choose to adopt the method found under Article 324(2) of the constitution. There is no identifiable wrong. There is no continuing wrong either.
- The need for empowering this court to lay down guidelines with respect to the commission, are inapposite, as clearly no vacuum existed and that no fundamental right is involved which would necessitate an interference by this court. Article 324(2) of the constitution signals absence of any vacuum. thus, a perceived advancement in the method of appointment, particularly, based upon reports, including the Law Commission of India, would scarcely furnish the foundation for doing violence to the provision of the constitution.
- Lastly it was contended that, the efficient working of the Election Commission, unerringly points to its independence and to its efficient functioning. This commission is recognised all over the world. A utopian model cannot be the basis of inserting

guidelines when the existing provisions are working well. The extent of neutrality and transparency as contended by the petitioner, cannot be a sound basis for court interference.

Decision:

In this judgement the main point of discussion is with respect to Article 324 of the constitution. Article 324 of the constitution provides for the election commission. Article 324(1) of the constitution provides for the 'superintendence, direction and control of elections' in the election commission. Article 324(2), which is most relevant for our purpose, states that, "the appointment of the Chief Election Commissioner and the other Election commissioners, *shall subject to the provision of any law in this behalf made by the parliament,* shall be made by the President". Article 324(5) again authorises the President (by rule) to determine the conditions of service and tenure of the office of election commissioners, 'subject to the law' made by the parliament in this behalf. Thus, the Parliament for this purpose made the law, to be called as the 'Election Commission Act of 1991 (the 1991 act), that is with respect to Article 324(5). No law, however, has ever been made by the parliament, with respect to appointment, as provided under Article 324(2) of the constitution[iv].

Justice KM Joseph (writing for the majority) and Justice Ajay Rastogi (concurring), *firstly,* in this judgement, considered Article 324 in its historical context and finds that the original intention of the framers of the constitution was to keep the Election commission free from executive interference, however, they could not agree on this point, so they decided to leave this question to Parliament to resolve. *Secondly,* the justices considered the scope, powers, and the functions of the Election Commission, in the context of the role of free and fair elections, sustaining constitutional democracy. *Thirdly,* justices held that the historical argument and the structural argument, put forth by the learned counsel, indicates an existing gap in the constitutional scheme, because of which the independency of the Election Commission is insufficiently protected. As a result, the court decided to fill in the gap, until the Parliament chooses to pass a law on this point. Now let us consider this point one by one:

A). Historical Aspect:

Justice Jospeh in its judgement analysed the historical aspect in (paragraph 15). Upon closely scrutinizing the constituent assembly debates, he finds that there was a consensus, as propounded by Ambedkar that, "the Election machinery should be outside the control of the executive government" (paragraph 18). On the question of how this independency of the commission could be brought into the mainstream, the constituent assembly members differed: Professor Shibban Lal Saxena, for instance, wanted the person who is to be appointed should be such, who would enjoy the confidence of all the parties- his appointment should be confirmed not only by majority, but by two-thirds majority of both the houses.[v]

Ambedkar found the great deal of force as to what has been suggested by Professor Shibban Lal Saxena and therefore, he suggested that to enact as to what is called as the "instrument of instructions" to the President and to provide therein a machinery, which would it be obligatory upon the president to consult before making any appointment. However, no consensus could be reached upon this proposal, the majority of the members, appeared to agree on two things: *first,* the power of appointing a commissioner should not solely vest in the Prime Minister (acting through President), as there could be a risk of appointing of what is called as the 'party man', *secondly,* the fear of Executive dominance could be addressed, subject to the law made by the parliament. Ambedkar drafted an amendment to this effect, which finally became Article 324 of the Constitution (paragraph 25-26) [vi]

What follows is that Justice Joseph and Justice Rastogi propounded that, Article 324(2) ought to be interpreted in the light of the intent of the framers of the constitution: encoding constitutional expectation that parliament would pass a law, which in turn would provide a mechanism for the appointment of the Chief Election Commissioner, ensuring their independency from the executive (paragraph 32-33).

B). Structure:

Justice Jospeh's opinion in the judgement from (paragraphs 95-109) consist of two parts, the nature of right to vote and the functions of the election commission. While scrutinizing the earlier judgements, it was held that the *right to vote* is a statutory right and not a fundamental right. However, this position has been changed with judgement holding that *freedom to vote* in an election is protected under Article 19(1)(a), as part of the right to freedom of speech and expression, but *right to vote* as was held by majority in this judgement is a constitutional right (located within article 326 of the constitution, guaranteeing the elections to be conducted on the basis of universal suffrage). Justice Jospeh stated that the *constitutional right to vote* flows from Article 326 of the constitution, its restrictions, like those enshrined under Article 19 (2), shall flow from Article 326 itself (paragraphs 135-136).

Once we have right to vote, then what exactly be the function of the election commission. The judgement however on this point is not clear, however, Justice Rastogi, while delivering its concurring opinion, tried to fill in this gap and opined that, right to vote cannot come into picture until and unless, its infrastructure of implementation is not in place (paragraph 21,75).

Justice Joseph while examining the powers of the Election commissions, notes that, the powers of Election commission has expanded vastly over the years. Apart from conducting elections, it has expanded to allocating party symbols, derecognising parties, enforcing model code of conduct and penalising parties for non-compliance (paragraph 150-160, 166-185).

C). Filling of the gap:

After examining the history and the structure of the Election Commission Justice Jospeh proceeds to examine the Article 324 of the constitution. As was stated earlier that, the intention of the framers of the constitution was that the Parliament would make the law, which would guarantee the independency of the Election Commission from the executive (particularly from Prime Ministerial appointments). However, in the absence of any parliamentary legislation, coupled with the power of the President to appoint the Chief Election Commissioner and the Election commissioners, in a way hampers the independency of the Election commission, which in turn effects the constitutional right to vote and the conduct of free and fair elections. This is this last bit which in way requires the interference by this court and which also in a way triggers the jurisdiction of the court to intervene and this intervention will in turn fill this gap of ensuring the independency of the commission, until the Parliament fulfils the expectation of Article 324(2) of the constitution. As to quote, in paragraphs 215-216, justices opined:

"*We have set down the legislative history of Article 324, which includes reference to what transpired, which, in turn, includes the views formed by the members of sub-committees and members of constituent assembly. They unerringly point to one conclusion. The power of appointment of the Members of the Election Commission, which was charged with the highest duties and with nearly infinite powers, and what is more, to hold elections, not only to the central legislature but to all the state legislatures, was not to be lodges exclusively with the Executive. It is, accordingly that words 'subject to any law to be made by Parliament' were, undoubtedly, incorporated.*

No law, however, came to be enacted by the Parliament. We have elaborately referred to the noises and voices eloquently and without a discordant note being struck, which points to an overpowering symphony, which calls for the immediate need to fulfil the intention of the Founding Fathers, starting with Goswami committee in the year 1990, more than three decades ago, the Two Hundred and Fifty-Fifth Central Law Commission Report in 2015 and the Reports, both in the press and other materials". [vii]

Analysis of Judgement:

1. From the point of the need for Judicial intervention:

- In 2023, the constitutional bench of Supreme Court gave its verdict in the case of **Anoop Baranwal v Union of India.** This was in result of

numerous petitions being filed in the apex court, including the petitioner Mr Anoop Baranwal, with respect to how the Election Commissioners are being appointed, in the absence of any law made by the Parliament, under Article 324(2) of the Constitution. In the absence of any law, the Union had the power to appoint the commissioners, which basically became the main point of contention in this case.

- Two judgements were delivered in this case. One by Justice Joseph, speaking for the majority and one by Justice Rastogi, giving its concurring opinion with Justice Jospeh, but with some additional reasons and conclusions. In this judgement it was unanimously held that, upon the question of appointment of Election Commissioners, instead of Union making the appointment, a committee consisting of the Prime Minister, Leader of Opposition, and the Chief Justice of India, shall be making the appointments, until a law is made by the Parliament in this behalf.

This part of the analysis will defend the court's decision against the argument that, this judgement does not value the principle of separation of power and will also delve into other aspects, related to it, which will further justify my reasoning.

- Upon the plain reading of the judgement one thing is clear that the Union government strongly opposed the petition and did so primarily on the ground that it violates the basic principle of separation of power as enshrined in the constitution i.e., the appointment of the Election Commissioners is the sole prerogative of the Executive- unless the Parliament brings in the law to the contrary. This contention as being made by the Union becomes even more important, in the light of the rise of the fourth branch of the constitution and for its existence.
- Election Commission as the fourth branch of the Constitution: the most recent development in the Constitution could be seen in the rise of the fourth branch institution. Many scholars argues that the rise could be due to the reason of democratic distrust, conflict of interest between minorities, etc. The rise and the importance of the fourth branch institution in the constitution could be understood from the fact that, it is explicitly recognised as a distinct chapter in the constitution. For instance, chapter 9 of the South African Constitution, lays down authorities, to protect the constitutional democracy, particularly the fourth branch institution.
- While answering the question as to whether the court should have interfered in the cases of the legislative vacuum, it must be first seen as to what is the need of the Election Commission in the first place? The Election Commission has been identified as the fourth branch institution, responsible for conducting elections in a free and fair manner, throughout the country. Theoretically speaking, there are three basic objectives which makes the fourth branch institution as an ideal body, i.e., expertise, accountability, and independency. It is the independency of this institution with respect to appointments, which the court is called upon to investigate.
- Every constitution seeks to protect certain long-term values and norms. However, not all government might feel the need to preserve certain specific constitutional norms. 'Constitutional norms' are of two types; one is self-enforcing norms, and the other is non-self -enforcing. A self-enforcing norm is as the name suggests, enforce themselves and for this there is no need of fourth branch institution and for protection these norms. For instance, law and order. It is evident that state wants to have its monopoly on power, thus, the state feels the need to preserve these norms. On the other hand, the idea of democracy is a self-defeating system, that is, the parties who are in already in power or is a ruling party, wishes to remain in power, hence, they do not feel the need to preserve this norm, democracy being a non-self-enforcing norm. the state is required to authorize the norm, to recognize it and for recognizing a democratic norm an impartial and an independent authority is required, especially if it's a non-self-imposing norm.
- Thus, in the case of non-self-imposing norm one thing is certain that it cannot be maintained through a rigid separation of powers. It may be valid in other cases, but to protect the constitutional norm in the long run, that is being, the right to conduct a free and fair elections, the court should not be stopped.
- According to Justice Rastogi, right to vote is a fundamental right, and that the logic is that, if the right to vote is a fundamental right, then, it can be actualized only if there are free and fair elections-

which can be achieved only if the body which conducts the elections is impartial. He says:

"Therefore, the right to vote is not limited to only Article 326 of the Constitution, but flows through Article 15, 17,19,21. Article 326 has to be read along with these provisions. We therefore, declare the right to vote in direct elections as the fundamental right, subject to limitations laid down under Article 326 itself… now that we have held that, right to vote is not merely a constitutional right, but a component of Part III of the Constitution as well, it raises the level of scrutiny on the working of the Election Commission of India, which is responsible for conducting free and fair elections. As it is a question of constitutional as well as the fundamental rights, this court needs to ensure that the working of the election commission under Article 324, facilitates the protection of peoples voting rights". (Paragraph 68-69)

- The need for Judicial Intervention:

A). A limited judicial review and the separation of powers between the Legislature and the Judiciary is based upon the presumption that the legislature represents the will of the people. However, the rise in the election malpractices, for instance, after 2002 Gujarat program, the election commission refused to conduct early elections in the state and as a result violence broke out between the Hindu and the Muslim communities. In such cases, it became impossible to conduct free and fair elections. Ignorance of election commission in such cases raises the question upon the legitimacy of the election and inaction of the legislature on this ground, no longer supports the will of the people. Therefore, it seems no reason as to why court should not interfere. As it was rightly held in *Indira Gandhi v Raj Narain case*[viii] that in such case the election becomes, *'mere ritual calculates to generate illusion of deference to mass opinion'.*

B). A judicial non-interference as argued by the union government in this case was necessary-ultimately would have led to a situation where the government monopoly would suffice leading to the avoidance of any political change, thereby violating the rule of law and article 14 of the constitution, as recognized by this court in this judgement, when it opined that:

"*Any action or omission by the Election Commission in holding the poll which treats political parties with uneven hand, and what is more, in an unfair or arbitrary manner would be anathema to the mandate of Article 14, and therefore, cause its breach".*

C). The majority judgement also highlighted the result of the failure of political process and its role in rectifying it, when it laid down that:

"*An unfair and biased overseer of the foundational exercise of adult franchise, which lies at the heart of the democracy, who obliges the powers that be, perhaps offers the surest gateway to acquisition and retention of power".*

D). In this case, along with the infringement of Article 14 and the rule of law, the court also recognized the possible violation of Article 19 of the Constitution, in the absence of an independent Election Commission. In the line of the judgement holding that the right to freedom of speech and expression includes right to vote. The court held that independence of Election Commission or the lack of is "*also intricately interlinked with the transgression of Article 14 and 19"* and opined that:

"The right of the citizen to seek and receive information about the candidates who should be chosen by him as his representative has been recognized as a fundamental right. The Election Commissioner and the Chief Election Commissioners blessed with nearly infinite powers and who are to abide by the fundamental rights, must not be chosen by the Executive particularly and particularly without any objective yardstick".

The majority opinion in this case held that, voting is a form of political expression involving choice. This choice can be more meaningful and effective, if the people who elects them has the full information of the candidate, upon whom this choice is to be exercised and such candidate must disclose their full information as well (*Union of India v Association for Democratic Reforms)*[ix], the voters need to have confidence in the electoral process. The Election Commission which treats different political parties unequally by omission or any other act of political monopoly, thereby hinders the basic right to choose and ultimately violating

their fundamental right to freedom of speech and expression, which as was held earlier in this case, includes right to vote. Naturally, this right to freedom cannot be exercised in totality, if the Executive exercises their full control in the appointment process, as any government intervention does not necessarily ensure the preserve the freedom of speech and expression, specifically when it might lead to a political change.

Any attempts made to change their powers, would ultimately lead to in manipulation of election mechanisms and unnecessarily targeting the candidates of the opposition. Therefore, it is submitted that, due to these malfunctions in the processes and that in order to protect the citizens freedom of speech and expression, judicial intervention was necessary, to ensure the structural, procedural and institutional independence of the commission can be upheld and that free and fair elections can be conducted in a representative democracy. By undermining the independency of the integral institution like Election Commission, Executive can limit its authority.[x]

The need for separation of power, as was held by the majority opinion is:

"*The theory of separation of powers in an ultimate analysis is meant to prevent tyranny of power flowing from the assumption of excess power in one source".*

2. From the point of Judicial overreach:

As we have discussed the need for judicial intervention in the present case. In this segment we'll point out as to how this judgement is questionable on several ground, respectively:

- Judgment being contrary to the settled principles of statutory interpretation: The court erroneously locates the constitutional intent behind Article 324(2) in the constituent Assembly debates, being contrary to its plain language and in ignorance of the settled principles of statutory interpretation, which provides that, the speech made in the course of a legislative debate, is best can be the intent of the speaker, however, it cannot prevail over the plain words of a constitutional text. One may consider the language of Article 324(2) of the constitution is self-explanatory and read thus:

Article 324: "The Election Commission shall consist of the Chief Election Commissioner and such other number of Election commissioners, if any, as the president may from time to time fix and the appointment of the Chief Election Commissioner and other election commissioners shall, subject to the provisions of any law made in this behalf by the Parliament, be made by the President…"

To read the words "subject to the provision of any to be made by Parliament" in Article 324(2), do not provide the Parliament with an option but is to be read as a constitutional command to the Parliament to enact a law, if the need arises. Indeed, the absence of special law on this behalf for the past seven decades, by the parliament does represents legislative rejection, however, judicial deference is necessary on smooth corporation between the three organs of the state, which shares a "fractured" constitutional power and responsibilities.

Not all persons who are appointed to the commission would act in an arbitral manner, rather the court must have considered some exceptions, which would have dispelled the courts apprehension to the extent that the person appointed is capable of ensuring the institutions independence. A fact which was clearly overlooked by court in this judgement.

- Refusal to grant writ of mandamus: In the present case, the courts refusal to grant writ of mandamus, does not sit well with its operative directions, indirectly serving the same purpose, as was being argued by the learned counsels of the petitioner.
- Direction of the court being unprecedented: The direction being given by the court, to enact a law on this behalf, to the Parliament, in future, is clearly a fatal jurisdictional error, as being wholly inconsistent to the theory of separation of power and with the philosophy of parliamentary democracy, which confers this exclusive domain to the legislature.

It is submitted that, the independency of the Election Commission, in a democratic system, can only be ensured within the bounds of the

constitutional power. A constitutional change or amendment is the function of the parliament. Thus, presuming an existence of a vacuum in the provision of Article 324(2), in the absence of any law or rules made on this behalf, is indeed a 'foray into dangerous territory'. It can in a way fuel, 'intra institutional conflict' and 'inter-branch equality', thereby upsetting the equilibrium of the separation of power, designated between the different organs of state, which is also being an essential feature of the constitution.

Conclusion:

The courts constitution of a committee for the appointment of Election Commissioners is no doubt an important step towards upholding its commitment towards constitutionalism, in protecting the rights of its citizen. This however, is not a regime-specific, as the selection committee is temporary, the final committee as was held by this court in the present case, would still be set up by the Parliament. It may be noted that a bill (Chief Election Commissioner and other Election Commissioners (Appointment condition of service and term of office) Bill, 2023) seeking the replacement of Chief Justice of India with that of a cabinet minister, as one of the three members of the selection panel for the appointment of the Chief Election Commissioner and other Election Commissioners, has already been introduced by the ruling government in Rajya Sabha, thereby overriding and diluting the order passed by the court in this case.

However, it will be interesting to see as to whether the members of the selection panel as being recommended by the Parliament in its bill will be able to ensure the structural independence of the institution or its validity will again be challenged before this court to set it into a cold storage. The answer of which would lie in time to come.

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[i] Article 53(3)(b) of the Indian Constitution, prevents parliament from conferring by law functions on authorities, other than the president.

[ii] (1974) 2 SCC 831, in this case, a seven-judge constitution bench, majority opinion being given by Justice A.N. Ray, held that, "the President and the Governor are the custodians of all the executive and other powers under various articles, shall exercise their constitutional powers only upon the aid and advice of their ministers, save in well-known few exceptional situations. The court in this case overruled Sardari Lal v Union of India.

[iii] (1995) 4 SCC 611

[iv] File:///C:/Users/ryzen%203/Downloads/155-anoop-baranwal-v-union-of-india-2-mar-2023-463622.pdf

[v] https://indconlawphil.wordpress.com/2023/03/03/decoding-the-supreme-courts-election-commission-judgment-

[vi] https://indconlawphil.wordpress.com/2023/03/10/decoding-the-supreme-courts-election-commission-judgment-iv-on-representation-reinforcement-guest-post/

[vii] https://indianexpress.com/article/opinion/columns/scs-election-commission-judgment-upsets-a-delicate-balance-8499694/

[viii] 1976) 2 SCR 347

ix (2002) AIR 2112

[x] https://www.hindustantimes.com/india-news/opposition-attacks-government-for-excluding-cji-from-selection-panel-for-election-commissioners-101691692777579.html

An Empirical Approach of RERA Act from Home Buyers' Standpoint

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Introduction to Real Estate (Regulation and Development) Act, 2016[xi]

Real Estate Regulatory Authority (RERA) Act, 2016 has been enacted to standardize real estate industry which was earlier an unorganized sector and with an aim to promote such sector for the purpose to increase real estate investment in India in an efficient and transparent manner and it's vital aspect is to protect the interest of consumers by selling real estate project or plot, flats, apartment or building or services by the promoters to customers and helps in establishing a proper adjudicating mechanism for speedy redressal of issues and further to establish the Appellate Tribunal to hear appeals (higher Authority in hierarchy) from the decisions, directions or orders of the Real Estate Regulatory Authority.

The Real Estate (Regulation and Development) Act (hereinafter referred as this Act or RERA Act or RERA), 2016 is an Act of the Parliament of India which seeks to protect homebuyers as well as help boost investments in the real estate industry, Real Estate Sector was an unorganized sector.

The Act establishes a Real Estate Regulatory Authority (RERA) in each state for regulation of the real estate sector and acts as an adjudicating body/Authority[*] for speedy dispute resolution[**].

Explanation:

*Adjudicating body - means authority under this Act, appointed, or authorised to pass any order or decision under this Act

**Speedy Dispute Resolution – to have expedite/speedy resolution can be called as amicable dispute settlement process by way of taking assistance of the Conciliator/Mediator, who acts a neutral Third party.

Implementation and its Establishment of Real Estate (Regulation and Development) Act, 2016

The Real Estate (Regulation and Development) bill was passed by the Rajya Sabha on 10 March 2016 and by the Lok Sabha on 15 March 2016. The Act is enacted by the Parliament in the 67th Year of Republic of India. The Act came into force on 1 May 2016 with 59 of 92 sections notified. Remaining provisions came into force on 1 May 2017

It extends to the whole of India including Union territory of Jammu and Kashmir and the Union territory of Ladakh which obtained its applicability on 30 October 2019. *(notification No. S.O. 3912(E), dated 30th October 2019)*[xii]

Purpose of Real Estate (Regulation and Development) Act, 2016 Act

- To establish Real Estate Regulatory Authority.
- To regulate (control) and Promote Real Estate Sector through such Authority.
- To ensure Registration of Real Estate Projects.
- To ensure/ validate sale of plot, apartment, or building or sale of Real estate Project in an efficient and Transparent manner.
- To regulate/take control on efficiently completing and delivering of projects to consumers/home buyers/allottees by the Promoters.
- To establish speedy dispute redressal mechanism.
- To establish an Appellate Tribunal to hear appeals from the decisions, directions, or order of the Real Estate Regulatory Authority and for matters connected as per the provisions of the said Act.

Sections, Chapters, Rules, Regulations are alienated in the Act.

- There are total 92 sections which are divided among 10 Chapters.
- Amendment(s)/Notification(s)/Removal of Difficulties Order published time to time as per the changing circumstances. (published by Ministry of Law and Justice - Legislative Department).
- The making Rules & Regulations to carry out the provisions of this Act, done by the Appropriate Government[*].

*Explanation: Appropriate Government section 2(g) of the Act, *explained in Point No. 7 below*

Difference Between Rules & Regulations

S.no	Point difference	Rules	Regulations
1.	Meaning	**Rules** can described as guidelines instructions of do something correc	**regulations** refer the directives or stat enforced by law.
•	Section	Section 2(zp) of RERA, 2016	Section 2(zo) of the RERA, 2016

		'rule" means rules made under this Act by appropriate Government	'regulations" means the regulations made by the Authority under this Act

Before the era of RERA Act

- Before RERA Real Estate matters dealt with under Consumer Protection Act, 1986.

- If there is any matter pending before the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act. (Section 71 of this Act)[xiii].

Governance of RERA

- Section 2(g) of this Act defines appropriate Government basically governs this Act.
- The appropriate Government means as follows: -

1..1 for the Union territory without Legislature, the Central Government.
1..2 for the Union territory of Puducherry, the Union territory Government.
1..3 for the Union territory of Delhi, the Central Ministry of Urban Development.
1..4 for the State, the State Government.

Involvement of Authorities in RERA Act, 2016

- The Real Estate Regulatory Authorities of the Appropriate Government.
- Real Estate Regulatory Appellate Authorities of the Appropriate Government
- There is a council namely National Real Estate Development Council (NAREDCO) whose purpose is to be the collective force influencing and shaping the real estate industry and works to create and sustain an environment conducive to the growth of real estate industry in India, partnering industry and government alike through advisory and consultative processes. Section 41 (2) of the Act.
- There is an Association namely Confederation of Real Estate Developers' Associations of India (CREDAI) was established in 1999 with a mandate to pursue the cause of housing and habitat providers. Its purpose is in the interest of buyers to maintain Transparency and to protect the interest of buyers.

The power to make changes under the RERA Act, 2016

- The Central Government has the Power to remove Difficulties under this Act, the Government may do so by-passing order and has to fulfill certain conditions (Section 91): -

1..1 By publishing in Official Gazette.
1..2 Must be consistent with the provisions of this Act.
1..3 The order must be presented before each house of parliament.
1..4 All the above can only be done within 2 years of the date of the commencement of this Act.

- The appropriate Government has the power to supersede (to surpass/to go beyond authority actions) the Authority in case any default committed by the Authority, or any directions not followed given by the appropriate government (Section 82).

Relief to Home buyers/ Consumers/ Allottees

- The relief provided to home buyers/Consumer/Allottees in form of Interest[xiv], Penalty Amount from Promoter, Compensation.
- In the case of conciliation/mediation negotiating to the level of resolving disputes between home buyers/ Consumers/ Allottees and promoters/developers/real estate agents/Development Authority/Cooperating Housing Society, as the case may be.

Difference between Penalty and Compensation

S.no	Point Difference	Penalty	Compensation
•	Meaning	Penalty is levied violation, contravention (breaching/breaking the law) or no compliance as per provisions of the act	Compensation means paym to cover losses the compensa party. remunerate to home buyers the dama caused to them
•	Section	Penalties for vari offences are lev under sect 59,60,61.	Compensation given to ho buyer levied section 14(3), (2), 18 (section,

Note: if the promoters do not pay penalty, interest, compensation the same can be recovered from arrears of land (section 40).

Process of filing of Complaint

- Any aggrieved person can file a complaint with the Authority or the Adjudicating Officer for any violation or contravention of the provisions of this Act or rules and regulations made thereunder against any promoter or real estate agent by paying fees. (Section 31, 71).
- All the states have online Portal of filing complaint along with their rules and/or regulations of filing complaint thereafter, the complaint is proceeded with legal proceedings.
- Once the order is received, the Complainant/home buyer must apply for issuance of Recovery Certificate.
- The issuance of Recovery Certificate procedure is according to the rules of appropriate government and may vary.
- After the Issuance of Recovery Certificate, the Authority will send a letter along with the order passed for recovery of money/penalty/interest amount to the Principal Civil Court* to execute the order.

* Principal Civil Court – where the Real Estate project is situated or against whom the order is passed.

- Now the channel of receiving amount to the home buyers may vary from Authorities of different states as per their local laws (section 40).
- Usually, 45 days of time is given to the Promoter to refund the money to the home buyer according to the rules and regulations of State. It is practically seen that once the complainant/home buyer communicates with the promoter against whom the order is passed, the promoter provides the awarded amount to the complainant.
- After the money is recovered the same is deposited into Consolidated Fund of India. The Complainant/home buyers receive communication from the authority to collect their amount.

Time period of receiving relief to the home buyers

- The Act mandates that the complaints should be disposed of expeditiously within sixty days (two months) from the date of filing the same. However, if the RERA authority is unable to meet the timeline, then requisite reasons should be communicated to the home buyer.
- In practicality, considering the sixty days period which gets extended in usual course of nature, it seen that home buyer gets relief/order only on bonfide grounds approx 6 to 8 months, the months may vary can be decreased or increased depending on the circumstances of the case. Thereafter, the period of recovering money by the Principal Civil Court may vary according to the circumstances as well as according to the local laws of that State.
- If the home buyer is not satisfied with the order passed the Authority can file an appeal before Appellate Tribunal within a period of sixty days by paying fees.
- If the home buyer is unable to file within 60 days sufficient reasons are to be given to the Appellate Tribunal by paying fees.

Rights of Home buyers/ Consumers/ Allottees (Section 19)

Some major rights are as follows: -

- To obtain information pertaining to sanctioned plans and layout plans along with the specifications, which are duly approved by the competent authority.
- To claim the possession of apartment, plot, or building. The building association of Allottees is entitled to claim the possession of the common areas.
- If the building or land promoter is unable to complete the handover of the apartment, plot, or building, an allottee can claim a refund of any amount paid along with the interest in the prescribed rate, as well as compensation from the promoter.
- An allottee is entitled to have the necessary documents and plans, including that of common areas, after the promoter surrenders the physical possession of the apartment, plot, or building.

Responsibilities of Home buyers/ Consumers/ Allottees (Section 19)

- Consumers have to make on-time payments.
- Must take possession on-time.
- Must actively participate in the formation of an association, a consumer federal or any cooperative society.
- If allottees fail to comply with the orders of the Appellate Tribunal, he/she may get imprisonment up to one year or fine up to 10% of the plot/apartment/unit cost for every day during which the default continues or both.
- Must take part in the registration of the conveyance deed of the apartment, plot, or building.

The Laws linked with RERA are as follows:

1..1 Code of Civil Procedure, 1908[xv].
1..2 Indian Evidence Act, 1872[xvi].
1..3 Consumer Protection Act, 1986.[xvii]

(Additional Information: RERA has an overriding effect on conflicting state laws. (section 89)

Conclusion

Promoters must keep money in separate accounts for completion of their projects. The cost of compliances (the purpose is to create transparency) which are to be completed by promoters would go high. Such stringent provisions will make the Promoters abide by the law.

The faith of home buyers would rise for speedy disposal of cases and getting relief which further helps increasing investment in this sector and helps the economy to grow.

[i] Article 53(3)(b) of the Indian Constitution, prevents parliament from conferring by law functions on authorities, other than the president.
[ii] (1974) 2 SCC 831, in this case, a seven-judge constitution bench, majority opinion being given by Justice A.N. Ray, held that, "the President and the Governor are the custodians of all the executive and other powers under various articles, shall exercise their constitutional powers only upon the aid and advice of their ministers, save in well-known few exceptional situations. The court in this case overruled Sardari Lal v Union of India.
[iii] (1995) 4 SCC 611
[iv] File:///C:/Users/ryzen%203/Downloads/155-anoop-baranwal-v-union-of-india-2-mar-2023-463622.pdf
[v] https://indconlawphil.wordpress.com/2023/03/03/decoding-the-supreme-courts-election-commission-judgment-i/
[vi] https://indconlawphil.wordpress.com/2023/03/10/decoding-the-supreme-courts-election-commission-judgment-iv-on-representation-reinforcement-guest-post/
[vii] https://indianexpress.com/article/opinion/columns/scs-election-commission-judgment-upsets-a-delicate-balance-8499694/
[viii] (1976) 2 SCR 347
[ix] (2002) AIR 2112
[x] https://www.hindustantimes.com/india-news/opposition-attacks-government-for-excluding-cji-from-selection-panel-for-election-commissioners-101691692777579.html
[xi] Real Estate (Regulation and Development) Act 2016 (India) [2016] (Available at: https://legislative.gov.in/sites/default/files/A2016-16_0.pdf)
[xii] The Central Laws (Extension to Jammu and Kashmir) Act, 1968 (India) [1968] (Available at: https://www.indiacode.nic.in/bitstream/123456789/1555/1/A1968-25.pdf) accessed 12 February 2024.
[xiii] Unnikrishnan Chandran Pillai v. Tata Realty Infrastructure Limited [2022] SCC OnLine SC 1234 (Supreme Court) https://indiankanoon.org/doc/79673160/?type=print accessed 12 February 2024.
[xiv] M/s. Newtech promoters and developers pvt. Ltd. v. State Of UP & Ors. [2021] SC, 5013 (Supreme Court) https://main.sci.gov.in/supremecourt/2021/5013/5013_2021_14_1502_31099_Judgement_11-Nov-2021.pdf
[xv] Code of Civil Procedure, 1908, Order 12, Rule 8 [https://www.indiacode.nic.in/bitstream/123456789/2191/1/A1908-05.pdf accessed on 12 February 2024]
[xvi] Indian Evidence Act, 1872 [https://www.indiacode.nic.in/bitstream/123456789/15351/1/iea_1872.pdf
[xvii] Consumer Protection Act 1986 (available at https://www.indiacode.nic.in/handle/123456789/1868?sam_handle=123456789/1362#:~:text=India%20Code%3A%20Consumer%20Protection%20Act%2C%201986&text=Long%20Title%3A,and%20for%20matters%20connected%20therewith

An Insight into Mediation in light of the key provisions of the Mediation Act, 2023

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The Mediation Bill, 2023 was passed by the Rajya Sabha on 2nd August 2023 and by the Lok Sabha on 7th August 2023. It received the President's assent on 14th September 2023 to be known as the Mediation Act, 2023("The Act"). The Act consists of 65 sections and ten schedules.

What is mediation?

'Mediation' is an alternative method of dispute resolution. Mediation as a mode of dispute resolution is not new and it has evolved through ages and every community in ancient times crafted such techniques for settlement of disputes. It refers to a process in which an impartial and neutral mediator facilitates disputing parties in reaching a settlement. Mediation, as a method, guided by joint problem solvers, is a strategic approach that seeks to enlarge the pie of possibilities for conflicting parties. Unlike the adversarial method as followed in traditional system of courts, mediation focuses on cultivating win-win solutions, fostering collaboration, and facilitating mutually beneficial outcomes. Unlike litigation and arbitration, mediation is a semi-formal negotiation aimed at allowing parties to settle disputes amicably, economically and expeditiously.[i]

Section 89(1) of the Code of Civil Procedure, 1908 in addition to arbitration, conciliation and judicial settlement recognizes mediation as an alternative method for settlement of disputes outside the Court.

Objective of the Mediation Act

Following are the objectives, which this act intends to fulfil:

a. To promote and facilitate institutional mediation for resolution of disputes.
The Mediation Act seeks to encourage and streamline the mediation process through a designated body or specific institutions to address and resolve conflicts effectively. Institutional mediation seeks to provide a fair, transparent and participatory process for resolving disputes.

b. To enforce mediated settlement agreements
By enforcing mediated settlement agreements, the Mediation Act contributes to enhancing the credibility and efficacy of the mediation process. Parties are more likely to engage in meaningful negotiations when they have confidence that the outcomes can be legally enforced.

c. To provide for a body for registration of mediators
The Act ensures that individuals offering mediation services meet specific professional standards. This may include possessing the necessary qualifications, training, and expertise to effectively facilitate the resolution of disputes through mediation.

d. To encourage community mediation
Community Mediation, as recognized by this Act serves as a tool to empower local residents in actively participating in the amicable settlement of disputes within their community. The said Act aims to create a conducive legal framework for encouragement and utilization of mediation as a preferred mechanism for addressing conflicts amongst the people of a community.

e. To make online mediation acceptable and a cost-effective process
By advocating for mediation as the primary approach to resolving disputes, the Act seeks to minimize the overall expenses and time typically linked with litigation. The encouragement is for parties to resolve their disputes efficiently and swiftly through the mediation process.

Applicability of the Act

This Act shall be applicable where mediation is conducted in India and to [ii] -

(i) all or both parties habitually reside in or are incorporated in or have their place of business in India; or
(ii) the mediation agreement provides that any dispute shall be resolved in accordance with the provisions of this Act; or

(iii) there is an international mediation; or
(iv) wherein one of the parties to the dispute is the Central Government or a State Government or agencies, public bodies, corporations, and local bodies, including entities controlled or owned by such Government and where the matter pertains to a commercial dispute; or
(v) to any other kind of dispute if deemed appropriate and notified by the Central Government or a State Government from time to time

Statutory definition of Mediation

Section 3(h) of the said Act provides an inclusive definition of mediation, covering:

(i) Pre-litigation mediation
(ii) Online mediation
(iii) Community mediation
(iv) Conciliation, or
(v) An expression of similar import whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator.

Mediated Settlement Agreement

A Mediated Settlement Agreement refers to the written understanding or accord reached between the involved parties for the resolution of some or all disputes amongst them. The key features of a Mediated Settlement Agreement are:

a. The agreement must be written, signed by parties, and authenticated by the mediator.[iii]
b. It is final and binding on the parties.
c. Registration of the agreement is not mandatory. The Parties have an option to register a Mediated Settlement Agreement (other than those arrived in a court or tribunal referred mediation or under the Legal Services Authorities Act, 1987), with the authority under the Mediation Act or as may be specified, within 180 days (subject to extension) of receiving the authenticated copy of the Agreement.

Styles of Mediation

Mediation, as an adaptive and participatory process, offers a spectrum of styles that cater to the diverse needs and dynamics of disputing parties.

Evaluative Style

An evaluative mediator offers his/her opinions on strengths and weaknesses of the parties and inform them as to what can be the decision of a judge in such cases. They are concerned with the rights of the parties and may make recommendations to the parties as to the outcome of the case. It is helpful for the parties who are unable to voice their needs and interests to the other party directly.

Transformative Style

This kind of mediation seeks to transform conflict by empowering the parties to agree, thereby aiming to preserve relationships and encouraging the parties to look past their differences and find a common ground where they can reach an agreement. This requires a lot of efforts from the part of the mediator as he must convince the parties and make them willing to give concessions to the other side.[iv]

Facilitative Style

A facilitative mediator gives the parties the space and encourages them to acknowledge the other party's position and interests. The parties are encouraged to understand each other's position and arrive at a decision for themselves. For instance, in most family disputes, an elder person of the family or an influential relative attempt to resolve the dispute amicably and peacefully. This type of mediation approach emphasizes the facilitator's role in guiding communication, fostering understanding, and promoting effective negotiation between the parties.

Embracing a facilitative mediation approach: insights from the Act

While the Act doesn't explicitly specify a mediation style by name, its provisions predominantly lean towards a facilitative approach.

Section 15 incorporates provisions governing the "Conduct of Mediation", mandating that the mediator shall assist the parties in an independent, neutral, and impartial manner in their attempt to reach an amicable settlement of their dispute [v]. Furthermore, Section 15(3) prescribes that the mediator shall always be guided by the principles of objectivity and fairness and protect the voluntariness, confidentiality and self-determination of the parties.

Section 16 while outlining the “Role of Mediator” provides that the mediator shall attempt to facilitate voluntary resolution of the dispute by the parties and communicate the view of each party to the other to the extent agreed to by them, assist them in identifying issues, advancing better understanding, clarifying priorities, exploring areas of settlement and generating options in an attempt to resolve the dispute expeditiously, emphasizing that it is the responsibility of the parties to take decision regarding their claims.

Community Mediation

Community Mediation empowers individuals within a community to collaboratively address and find solutions to their issues. The Mediation Act addresses the concept of Community Mediation under Section 43, which provides that any dispute likely to affect peace, harmony and tranquillity amongst the residents or families of any area or locality may be settled through community mediation with prior mutual consent of the parties to the dispute. It is to be conducted by a panel of three mediators.[vi]

Online Mediation

The Mediation Act establishes provisions for the conduct of online mediation. It can be conducted with the written consent of the parties including by the use of electronic form or computer networks but not limited to an encrypted electronic mail service, secure chat rooms or conferencing by video or audio mode or both.[vii] The conduct of online mediation shall be in the circumstances, which ensure that the essential elements of integrity of proceedings and confidentiality are maintained at all times[viii] and online mediation shall also ensure confidentiality of mediation.[ix]

Adoption of institutional Mediation – Mediation Institute and Mediation service provider

Institutional Mediation refers to the practice of employing mediation services within an organized and structured framework, often facilitated by an institution or a designated body. This process is conducted within a formalized structure, often established, and managed by the institution and such structure may include designated mediators, established procedure and guidelines. Reference to Institutional Mediation can be found under Section

(i) of the Act which provides the definition of a “mediator” to mean a person who is appointed to be a mediator, by the parties or by a mediation service provider, to undertake mediation, and includes a person registered as mediator with the Council.

As per the Act, "mediation institute" means a body or organization that provides training, continuous education and certification of mediators and carries out such other functions under this Act.[x]

Further, Section 40 provides that “mediation service provider” includes-

a. A body or an organisation that provides for the conduct of mediation under the Act and the rules and regulations made thereunder and is recognised by the Council.
b. An Authority constituted under the Legal Services Authorities Act, 1987.
c. A court-annexed mediation centre; or
d. Any other body as may be notified by the Central Government

Mediation Council of India

The Mediation Act refers to establishment of a Mediation Council of India, in the form of a corporate body, tasked with duties to *inter alia* develop India to be a robust center for domestic and international mediation. The MCI is also expected to provide for the manner to conduct mediation proceedings, recognize, renew, cancel or suspend Mediation Service Providers, maintain an electronic depository of mediated settlement agreements, submit annual report on implementation of the provisions of the Mediation Act to the Central Government.[xi]

Challenges to Mediated Settlement Agreements

A mediated settlement agreement can be challenged on the following grounds[xii]:
(i) fraud;
(ii) corruption;
(iii) impersonation;
(iv) where the mediation was conducted in disputes or matters not fit for mediation under section 6.

Territorial Jurisdiction to undertake Mediation Proceedings

Mediation proceedings must be typically conducted within the jurisdiction of the competent court or tribunal responsible for deciding the disputed subject matter.[xiii] However, parties can agree to hold mediation at another location by mutual consent. Additionally, parties have the option to conduct mediation online, provided they formally agree to it in writing.

Commencement of Proceedings

The process of Mediation officially begins when a party receives notice initiating mediation, as specified in a mediation agreement.[xiv] If there is no prior agreement, mediation starts from the date of the mediator's appointment or on the date the mediator provides his consent to the appointment, whichever comes first.[xv]

Time Period for Conclusion of Mediation

Mediation conducted in accordance with this Act must be concluded within 120 days from the date fixed for first appearance before the mediator.[xvi] Such period may be extended upon mutual consent of the parties, not beyond a period of 60 days. [xvii]

Conclusion

India lacked a legislation which specifically geared towards resolving disputes through mediation. Recognising this gap, the introduction of the Mediation Act, 2023, with its provision for pre-litigation, community and online mediation is a crucial step. This move is anticipated to substantially reduce the backlog of cases in the Indian Legal system and has the potential to facilitate timely resolution of disputes. The enactment of the said Act is considered to be a highly noteworthy achievement in the Indian legal arena. It offers a comprehensive framework to structure, organise and institutionalize the mediation process. Mediation as one of the alternative methods for dispute resolution is of great significance as this approach provides a cost-effective and prompt mechanism for settlement of disputes. At the same time, preserving relationships amongst the disputing parties and empowering them to reach solutions that is tailored by them which bring mutually acceptable results.

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[i] Dr. Benny Paul, *Simplified Approach to Alternate Disputes Resolution*
[ii] The Mediation Act, 2023, Section 2
[iii] The Mediation Act, 2023, Section 19(1)
[iv] Dr. Benny Paul, *Simplified Approach to Alternate Disputes Resolution*
[v] The Mediation Act, 2023, Section 15 (2)
[vi] The Mediation Act, 2023, Section 43 (3)
[vii] The Mediation Act, 2023, Section 30 (1)
[viii] The Mediation Act, 2023, Section 30 (3)
[ix] The Mediation Act, 2023, Section 30 (4)
[x] The Mediation Act 2023, Section 3 (l)
[xi] The Mediation Act, 2023, Section 31
[xii] The Mediation Act, 2023, Section 28 (2)
[xiii] The Mediation Act, 2023, Section 13
[xiv] The Mediation Act, 2023, Section 14 (a)
[xv] The Mediation Act, 2023, Section 14 (b)(i) & Section 14 (b)(ii)
[xvi] The Mediation Act, 2023, Section 18 (1)
[xvii] The Mediation Act, 2023, Section 18 (2)

Child Labour in India: Issues and Challenges

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Children are considered as the greatest gift and Childhood is an important and impressionable stage for human development as it has a capacity to the future development of any society. Children who are brought up in a environment, which is favourable to their intellectual, physical and social health, grow up to be responsible and productive members of society. Childhood is the happiest period of the lives of every person during which one learns about the basic strategy of the life from their parents, loved ones and nature. In India Child labour has become a biggest social issue day by day which needs to be solved on regular basis. It is not only the responsibility of the government, but it must also be solved and needed to be taken care by all the parents, owners, and other social organizations. It is the issue of every person in India which should be solved personally by the people in India as it can be happened with the child of any person. Children are organized, as they are not organized and they can be easily controlled, tortured, and exploited without any fear of backfire. Moreover, children are also better suited for the jobs like brick making, carpet weaving and silk spinning etc. The importance of education of the child is neglected and replaced by the necessity of providing food and shelter i.e. children work for the family income or otherwise to help the family business. In doing so, they are being denied of basic rights such as the right to education, freedom from abuse, and proper health.

The typical meaning of Child labour is the employment of children in any type of manual work with or without payment. It is not limited to India; it happens to be a global paradox. As far as India is concerned, the issue is more dangerous. In India, children have historically been helping parents at their farms and other primitive activities. Another concept that needs an explanation is the concept of bonded labour which is one of the most common forms of exploitation in India and in the whole world. The typical meaning of Bonded labour is the children are forced to work as employees instead of payment of the debt by the parents due to unreasonable rates of repayment of interest[i]. Urban child labour is also associated with the concept of bonded labour in which the labourers are the street children who spend most of their childhood on the streets.

Causes of rising instances of Child Labour

Over population, illiteracy, poverty, debt trap in the country is some of the most common causes of rising of child labour. Overburdened, debt-trapped of the parents because of which the parents are unable to understand the importance of a normal childhood under the pressures of their problem because of which it leads to the poor emotional and mental balance of a child's brain. The child's brain which is not ready or mentally prepared to undertake rigorous field or domestic works. Some National and Multinational companies of garments industry also recruit children for more work and gave pay to them which is unethical. According to UNICEF children are employed because they can easily be exploited. By taking into consideration various causes of child labour, we can make a strategy to curb or to eliminate child labour[ii].

Causes of Child Labour

- **The curse of poverty**

The one of the main reasons for child labour in a country is poverty. Most of the country's population suffers from poverty. Due to poverty, parents cannot be able to afford the studies of their children and due to poverty, they make them earn their wages from a tender age. In fact, they are aware of the grief of losing their loved ones to poverty most of the times. They send their small children to do work in factories, homes, and shops etc. They are made children to work to increase the income of their poor families at the earliest. These types of decisions are taken only for the one purpose which is eking out a living for their family. But such decisions shatter children's physical and mental state as children lose their childhood at a very early age.

- **Lack of educational resources**

Even after so many years of independence our country's independence, there are many examples where children are deprived of their fundamental right that is right to education. There are thousands of villages in India where there are no proper facilities of education for children. And if there is any, it is miles away from their village or home. Such type of administrative laxity is also responsible, or we can say one of the main reasons of lack of education which causes child labour. The worst sufferers are the poor families for whom getting their children a good educated is a dream. Sometimes the lack of affordable school for the education of poor children leaves poor children illiterate and helpless. And because of which the Children are forced to live without studying. And sometimes such type of compulsions pushes them into the trap of child labour.

- **Social and economic backwardness**

Social and economic backwardness is also one of the main reasons for child labour. The parents who are Socially backward do not send their children to schools for education rather they engage their children in labour work. Due to illiteracy, most of the time parents are not aware of various information and schemes which are related to child education. Lack of education, illiteracy and because of the lack of awareness of their rights among them also encouraged child labour. Also, uneducated parents do not know about the impact of child labour which is happened on their children. The conditions of poverty and unemployment which leads to give rural families a compulsive basis for engaging children in various tasks.

- **Addiction, disease, or disability**

Due to addiction, disease, or disability, in many families there is no earning, and the child's wages are one of the sole means of family's sustenance. Due to Population growth which leads to increase in unemployment, which has leads to opposite impact on child labour prevention. So, because of which parents, instead of sending their children to school, are willing to send them to work to increase income of the family.

- **Poor compliance of laws**

In modern society, laws stipulate that citizens have the right to receive good education, and also avail good health services and take care of their health. Every citizen in our country has the right to play the game he enjoys, and enjoy all the means of entertainment, and when he grows, in order to obtain employment in future where he can earn well and contribute to society and nation. But due to absence of proper compliance of the laws, child labour is continuing. It can only be prohibited by strict adherence to the related laws.

- **Lure of cheap labour**

In the avarice of cheap labour, most of the shopkeepers, companies and factory owners employ children so that they must pay less wages to them and it amounts to employing cheap labour. Shopkeepers and small businessmen make children work as more as they do to the elder ones, but they pay half the wages. In the case of child labour, there is also a less chance for theft, greed or misappropriation of money too. With the development of culture of globalization, privatization, and consumerist, the need for cheap labour is also increasing and its linkage with the economic needs of poor families have encouraged child labour.

- **Family tradition**[iii]

It is the most shocking but a bitter truth of our society in which it is very easy to give child labour the name of tradition or custom in many families in our country. These types of culture and traditional family values play their role in increasing the problem of child labour at the voluntary level and Many families in our country also believe that a good life is not their destiny, and the age-old tradition of the family that is labour is the only source of their earning and livelihood. Small businessmen also waste the lives of their children in the greediness of perpetuating their family trade with the lower production costs. Some of the families in India also believe that working from childhood onwards will make their children more diligent and worldly-wise in terms of future life. They also believe that early employment will give rise to

their children's personal development, which will make it easier for them to plan their life ahead.

- **Discrimination between boys and girls**

We have been conditioned into believing that girls are weaker and there is no equal comparison between boys and girls. Even today, in our society, we will find many examples like this where girls are deprived of studies. Considering that girls are weaker than boys deprive them of school and education. In labourer families, girls are found to be more engaged in labour works along with their parents.

Possible Solutions to Child Labour

To eliminate the one of the biggest social issues like child labour, there is a need to follow some effective solutions on a very urgent basis to save the future of any developing country like India. Following are some solutions to prevent child labour:

- Creating more unions is one of the solutions which may help in preventing the child labour as it will encourage more people to stand up or help against child labour.

- All the children must be given priority by their parents to give them proper and regular education from their early childhood. This type of step needs more cooperation by the parents as well as schools to free education and take admission of children from all walks of life respectively.[iv]

- Child labour needs very high-level social awareness with the proper statistics of huge losses in the future for any developing country like India.

- Every family must earn their minimum income to survive and prevent child labour. It will reduce the level of poverty which will lead to reduce child labour.

- Family control will also lead to help in controlling the child labour by reducing the family's burden of childcare and education.

- There is a need for more effective and strict government laws against child labour to prevent children from working in their very little age.

- Child trafficking must be completely abolished by the governments of all countries immediately.

- Child workers must be replaced by the adult workers as almost 800 million adults are unemployed all over the world. In this way, adult will also get job and children will be free from child labour.

- Employment opportunities must be increased for adults to overcome these types of problems like poverty and child labour.

- Business owners of factories, industries, mines, etc must have to take the pledge of not involving children in any type of labour work.[v]

Conclusion

Child labour is one of the biggest social problems which needs to be solved on urgent basis by the support of both, people (especially parents and teachers) and the government. Children are very young however they carry a very prosperous future of any developing country especially the country like India. So, they are one of the big responsibilities of all the adult citizens of a country and they should not be used in negative ways. They must get a proper chance to develop and grow within the happy environment of family and school. They should not be restricted by the parents only to maintain the economic balance of the family and by the businesses to get labour at low cost.

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[i] https://www.indiacelebrating.com/social-issues/child-labour-in-india/.

[ii] http://unicef.in/Whatwedo/21/Child-Labour

[iii] A recent learning package to support trade unions, employment services, education and training institutions, as well as youth organizations, in their initiatives aimed at raising young people's awareness of their rights at work, see ILO: Rights@ Work 4 Youth: Decent work for young people: Facilitators' guide and toolkit (Geneva, 2014).

[iv] L. Guarcello, F. C. Rosati: Does school quality matter for working children? Understanding Children's Work Project (UCW) Working Paper Series (Rome, 2007).

[v] The worst forms of child labour other than hazardous refer to Article 3(a)—(c) of ILO Convention No. 182: "(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; and (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties".

Obituary

M Fathima Beevi (30th April 1927 - 23rd November 2023)

'If I can, so can you'

\- *Justice M Fathima Beevi* -

On 23rd November 2023, India, a country where the women have constantly fought for equality, lost its first female Judge of the Supreme Court, M. Fathima Beevi. She was born to Annaveetil Meeran Sahib and Khadeeja Beevi of Pathanamthitta in 1927 in Pathanamthitta (Kerala), she took up law as a career to fulfil her father's aspirations.

She would be remembered for breaking the glass ceiling of traditional male domination profession with utmost grace and fortitude. Her representation, contribution and dedication in legal field has been perceived as a major breakthrough for women to take up legal profession, more particularly the Muslim women in India.

She was enrolled as an Advocate in 1950, appointed as a Munsiff in Kerala Sub-Ordinate Judicial Services in 1958, because of her stellar performance and exemplary legal acumen, she was promoted as Chief Judicial Magistrate in 1972, followed by District and Sessions judge in 1974.

Her immense passion for law and probity elevated her to preside in the Income Tax Appellate Tribunal as a Judicial Member in 1980. The penultimate success ushered her way when she was elevated as a High Court Judge in 1983 and Supreme Court Judge in 1989, engraving her name in history to be the first women to be appointed as a Supreme Court Judge, First Muslim woman in Higher Judiciary and the First Woman to become a Supreme Court Justice in an Asian country.

She had been fondly remembered by former Judge of Supreme Court, Justice K.T Thomas, as a generous and fearless judge who never hesitated to call a spade a spade and was thoroughly adored by the bar for her non-patronising nature and for exhibiting her ability of judicial temperament.

She shall be remembered for her righteous interpretation on the rule of law under the Indian Constitution in the case of ***Scheduled Caste & Weaker Section Welfare Assn. v. State of Karnataka, (1991) 2 SCC 604***, wherein she, on the question of limitations on statutory power, and applicability of natural justice and rule of law, held that, *"it is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power and the rule of natural justice operates in areas not covered by any law validly made."*

In another case of ***Assam Sillimanite Ltd. v. Union of India, 1992 Supp (1) SCC 692,*** to decide the constitutionality of a state legislature, she observed that *"Notwithstanding the declaration of the legislature that any particular Act has been made to implement the directives specified in Article 39, it would be open to the Court to ignore such declaration and to examine the constitutionality of the same. The declaration cannot be relied on as a cloak to protect the law bearing no relationship with the objectives mentioned in Article 39."*

She has also been instrumental in interpretation and development of the civil laws in the country, where in the case of ***Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay, (1992) 2 SCC 524,*** she went ahead to hold and clarify the position as to who is a 'necessary party' to a suit, by opining that, *"What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."*

Her contribution to civil laws in India also got extended in the case of ***Rattan Chand Hira Chand v Askar Nawaz (1991) 3 SCC 67*****,** wherein she interpreted the validity of section 23 of Indian Contract Act 1872, that every agreement having and unlawful object and consideration is void, if it is against the public policy or contrary to public law. She held that public policy is a subject of judicial interpretation and it must change with time in order to meet the evolving demands and needs of the society or it would be declared obsolete.

After making some conspicuous contribution in legal field she retired as a Judge of the Supreme Court in 1992, post which she was appointed as a Chairman of Kerala Commission for Backward Classes and further a Member of National Human Rights Commission. After her brief stint, the then President of India appointed her

as the Governor of Tamil Nadu in 1997, hence becoming the first women to hold such position.

Besides her legal career as a Judge being an impeccable one, her political life was tumultuous as it was entangled with a lot of criticisms during her tenure as a Governor of Kerala, as first she rejected the mercy petitions filed by four convicts of Rajiv Gandhi assassination case who had approached her to exercise her clemency power under Article 161 of Indian Constitution.

Later, she yet again came under the lens of public and political subjugation when she was asked to resign after she had invited J Jayalalitha in 2001 to form government even after her dismissal for contesting elections. However, she went ahead to justify her decision of administrating oath to J Jayalalitha, for having gained simple majority in the state assembly.

The Supreme Court, at the instance of several Public Interest Litigations requesting the Court's intervention to look into the constitutional validity of the Chief Minister's appointment in Tamil Nadu made by Fathima Beevi, came heavily on her and overturned her decision, holding that the Governor must exercise their power within the contours of Constitution and not appoint any non-member to act as a Chief Minister when they are not the qualified member of the legislature.

In 2023, she was conferred with the second-highest honour award 'Kerala Prabha Award' bestowed by the Government of Kerala.

As the nation mourns the architect of women's rights in the country, her astounding legal contribution will go a long way in enlightening the path of many other women to rise and awake from the shackles of ages old bigotry tradition and tread the path set for them as she had broken many gender-related barriers.

May Justice M Fathima Beevi's soul rest in peace and her established ideas of justice and gender equality continue to guide us till eternity.

Obituary

Fali Sam Nariman (1929-2024)

"*I have lived and flourished in a secular India. In the fullness of time, if God wills, I would also like to die in a secular India.*" - Fali S. Nariman, *Before Memory Fades: An Autobiography.*

Fali S. Nariman, a jurist extraordinaire and advocate for human rights, renowned for his significant contributions to Indian jurisprudence, passed away peacefully in his sleep at his residence in New Delhi on Wednesday, February 21, 2024, shortly after midnight. Nariman's profound legal acumen and unwavering commitment to justice have left an indelible mark on the landscape of Indian law.

Born on January 10, 1929, in Rangoon, Myanmar, to Sam and Banoo Nariman, Fali embarked upon a remarkable legal career spanning over six decades, profoundly shaping the course of constitutional jurisprudence in India. He studied at St. Xavier's College, Bombay and graduated with History as his subject. He did his law at the famous Government Law College, Bombay where among his teachers were the distinguished Nani Palkhivala and Yeshwant Chandrachud, later Chief Justice of India. He passed out with distinction in the first class, securing the second rank in the University and winning the Kinloch Forbes Gold Medal in Roman Law and Jurisprudence. He also secured the first rank in the Advocates examination conducted by the Bar Council.

Nariman started the general practice of law in 1950 as a trainee in a leading solicitor's firm of Bombay-Payne & Co. He then joined the most prestigious chamber of the legendary Sir Jamshedji Kanga. Nariman, soon, built up a large and lucrative practice, particularly in commercial law and civil law performing impressively in the commercial court. He was briefed in different courts, apart from the High Court, and in the mofussil. He assisted both Asoke Sen and Nani Palkhivala in the ***Golak Nath case***.

Nariman was offered a High Court judgeship in 1966 though he was only 37-38 years old and as required in those days it had the express approval of the Chief Justice of India. He, however, declined it for personal reasons. He was designated Senior Advocate in 1971. In 1972 Nariman was appointed Additional Solicitor General of India and shifted practice to Delhi. Thereafter, for over half a century he practised continuously in the Supreme Court. He served as President of the Bar Association of India from 1991 to 2010. He also served for many years on the International Commission of Jurists and was its chairperson from 1995 to 1997.

His steadfast belief and commitment to democracy is underscored by the fact that in 1975 when the National Emergency was imposed under the Indira Gandhi Regime, Nariman then Additional Solicitor General (ASG), resigned from the position, just a day after the imposition of the Emergency, in protest the draconian measures taken by the Government.

Nariman also lauded the brave dissent of Justice HR Khanna in the case of ***ADM Jabalpur v. Shivkant Shukla***. The jurist in his book recalled that Justice Khanna while dissenting was aware that he had let go of his future Chief Justiceship. Nariman added that this was the reason why Justice Khanna's portrait still adorns the wall in Court Room No. 2 of the Supreme Court.

In his book, *Before Memory Fades: An Autobiography*, Nariman recalls his experiences while dealing with the landmark cases in the making. The many important cases that he was part of, included ***Sankari Prasad Singh Deo v. Union of India; Kesavananda Bharati v. State of Kerala; I.C. Golaknath v. State of Punjab; Minerva Mills v. Union of India and TMA Pai v. State of Karnataka.***

Nariman strongly held that the basic structure doctrine has not only received lasting constitutional acknowledgment in India but has also been recognized and adopted by six other nations globally. These countries have acknowledged the principle of imposing constraints on legislative authority concerning constitutional amendments. He emphasized how the basic structure doctrine, which imposes limitations on Article 368 of the Constitution – the sole provision addressing substantive constitutional amendments – is inherently linked to a global judicial effort to safeguard democratic institutions and effectively serve the nation.

Nariman expressed regret over his legal triumph in the landmark case of ***SCAORA v. Union of India (II)***, also recognized as the *Second Judges Case*, wherein the court removed absolute executive control over the appointment of judges in the Higher Judiciary. In this decision, the Court established the collegium system, wherein the first five senior judges of the Supreme Court would recommend appointments to both the Supreme Court and High Courts. He conveyed his dissatisfaction with the court's rationale to limit the collegium to only five judges, stating that it would have been preferable had he lost the case. He advocated for the dissolution of the "closed-circuit network of five judges", arguing that there was nothing exceptional about being among the first five senior Judges in the Supreme Court. He maintained that all judges of the Supreme Court should be involved in the process of appointing future Supreme Court Judges. He had also appeared in the *NJAC Case* arguing against the 99th Constitutional Amendment.

Nariman encountered backlash from both the legal community and the media for his defence of the Union Carbide Corporation following the infamous Bhopal Gas Tragedy. In response to severe criticism published in the media regarding his decision to represent the Corporation, Nariman argued that suggesting human rights lawyers should refuse briefs from those who have violated human rights reflects a narrow interpretation of legal principles. He penned a letter addressing the article, expressing concerns that endorsing such a notion would have serious repercussions for the legal system. Nariman emphasized that lawyers should not be compelled to pre-emptively judge guilt, a responsibility reserved for the judiciary. He stressed that even contemplating such a notion would undermine the fundamental rights of the accused.

Amidst the controversy surrounding the Narmada Dam Project in 1998 where displaced tribal communities filed a Public Interest Litigation (PIL), Nariman was faced with the task of representing the State of Gujarat. He encountered troubling reports of aggression against the Christian community in the state. Troubled by these developments, Nariman reached out to then Chief Minister of Gujarat, Keshubhai Patel, urging him to take action to halt the violence. Unfortunately, the situation deteriorated despite Nariman's efforts. Consequently, in response to the escalating

violence, he made the decision to return the case brief of the State of Gujarat.

Nariman recently expressed his critical perspective on the Article 370 judgment in various public forums. He voiced concerns about the absence of dissenting views in the judgment, highlighting the importance of diverse perspectives in legal decisions. While acknowledging the political significance of removing special status for the sake of national unity, Nariman maintained reservations regarding its legal soundness. Despite potential controversy, Nariman consistently served as a prominent advocate for ethical governance, fearlessly voicing his opinions on judicial matters and upholding principles of transparency and accountability.

Nariman was honoured with the Padma Bhushan (1991), Padma Vibhushan (2007), the Gruber Prize for Justice (2002) and a nomination to the Rajya Sabha (1999-2005) for his distinguished service to the nation.

His remarkable intellect, profound grasp of legal complexities, and steadfast commitment to upholding principles of justice have garnered him broad acclaim and acknowledgment, both domestically and abroad. As a seasoned legal advocate and esteemed authority on constitutional issues, Nariman not only demonstrated excellence in the courtroom but also made substantial contributions to legal scholarship, thus establishing a lasting legacy for future generations. Besides being a legal luminary who served as the voice of conscience for the Bar and the Bench, Nariman was a humanitarian and a philanthropist. He was a man of principles, integrity, and courage.

Fali Sam Nariman was a friend, mentor, and source of guidance to numerous individuals, whose absence will be deeply felt by all who knew him, enduringly longing for his presence and wisdom.

AIALS UPDATE [2023-24]

FACULTY & STAFF

Resignations

Raina Midha 13.06.2023

New Entrants

Dr. Setu Gupta
Joined as Assistant Professor-II: 03.07.2023.

Dr. Deepak Sharma
Joined as Assistant Professor-I: 09.08.2023.

PhD PROGRAM

Sameer Swarup
Trisha Kadyan
Charu Shahi

Degree awarded during the 19th Convocation 2023 AUUP held on 9th December 2023.

Smriti Raturi

Joined PhD in July 2016; thesis submitted & approved by examiners, ODC conducted.

Vibhor Gupta

Joined PhD in July 2016; thesis submitted & approved by examiners, ODC awaited.

Research in progress Priyanka Singh; Harish G

Joined PhD in January 2016; draft-theses ready, completion of paper-publication requirement awaited.

LLM PROGRAMS INTAKE

Criminal Law	: 63
Business Law	: 59
Constitutional Law	: 31
Human Rights	: 05
Family Law	: 11
Aggregate	: 169