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MESSAGE

I am extremely proud to announce Volume IX Issue II of the NLIU Law Review to the legal community. The NLIU Law Review aims to serve as a forum for promoting discourse on contemporary and pressing legal concerns at both the national and international level. Since its inception, this student helmed publication has sought to cultivate a style of scholarship that explores both the theoretical and the practical concerns of the legal world. To ensure this, it has consistently employed stringent evaluation techniques with emphasis on contemporaneity, critical thinking, originality and lucidity of prose.

This year, the NLIU Law Review, in collaboration with the India Foundation, conducted the 2nd NLIU – India Foundation Constitutional Law Symposium to provide a platform for discussing contemporaneous issues in the field of constitutional law. Volume IX Issue II emerged as a result of this, wherein authors have delved into topics of legal relevance such as the relationship of the right to privacy with personal data, gender identities and commercial surrogacy, and proposed solutions for the lacunae in the existing legal framework.

I extend my congratulations to Prof. (Dr.) V. Vijayakumar and Prof (Dr.) Ghayur Alam for another successful publication and commend the student members of the Law Review for their work and dedication. May the Editorial Committee maintain the same vigour in the coming years, and may students, academicians, lawyers and judges and all other readers find this publication stimulating and beneficial.

(Ajay Kumar Mittal)
CHIEF JUSTICE

MESSAGE FROM THE PATRON

NATIONAL LAW INSTITUTE UNIVERSITY

Ref. No. 1342/NLIUB

Prof. (Dr.) V. Vijayakumar
M.A., M.L., M.Phil., Ph.D.
Vice Chancellor

Date : 16.07.2020

MESSAGE FROM THE PATRON

I am pleased to present Volume IX Issue II of the NLIU Law Review to our readers. This Issue has emerged as a result of the 2nd NLIU – India Foundation Constitutional Law Symposium organised by the NLIU Law Review in collaboration with the India Foundation. This volume presents several papers that will undoubtedly pique the interest of all legal professionals, students and academicians. Contemporaneous issues pertaining to constitutional law, such as the link between right to privacy and personal data as well as the dilemma of the anti-defection law and the pressing issue of recusal of judges in our country are dealt with in great detail in this Issue.

The NLIU Law Review is the flagship publication of National Law Institute University, Bhopal and is a platform for students, academicians and lawyers alike, to contribute to legal discourse. The journal encourages legal research and critical thinking by rigorously evaluating the submissions on grounds such as contribution to knowledge and contemporary relevance.

Any discussion on this Issue would be remiss without mentioning the efforts of those who made this endeavour possible. To the Patron-in-Chief of the Law Review, Hon'ble Shri Justice A.K. Mittal, Chief Justice, High Court of Madhya Pradesh, I would like to express my immense gratitude for his guidance and support. I would like to congratulate Prof. (Dr.) Ghayur Alam for successfully supervising the publication of this Issue through constant inputs to the student editors. I further commend the Editorial Team for their meticulous work and hope that their enthusiasm only grows with each upcoming issue. We at NLIU look forward to the feedback from readers on the contents of this Issue and the Law Review's scholarship over the years. It is my hope that with your feedback we will be able to improve the quality of the journal.

(V. Vijayakumar)
Vice Chancellor
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MESSAGE FROM THE DIRECTOR, INDIA FOUNDATION

I am extremely pleased to present Volume IX Issue II of the NLIU Law Review to the legal fraternity. The 2nd NLIU- India Foundation Symposium on Constitutional law was organized by the NLIU Law Review, in collaboration with India Foundation in March, 2020. This Issue is a compilation of the papers presented at the symposium.

India Foundation is a research centre based in New Delhi that focuses on the issues, challenges and opportunities of the Indian polity. It aims to increase awareness and advocates its views on issues of both, national and international importance. The Centre for Constitutional Legal Studies of India Foundation specializes in the study and research of legal issues in the ever-evolving constitutional framework of India. The Centre found its vision reflected in that of NLIU Law Review, which is to inculcate a culture of research and publishing among students and promote legal awareness. This led the Foundation to collaborate with NLIU Law Review in organisation of the symposium.

The event took place over a period of two days. The first day started off with ten thought-provoking paper presentations, shortlisted out of the several papers submitted by students from law schools across the country. The submissions showcased a tremendous degree of research and creativity. The presenters spoke on several contemporary issues of Constitutional law, such as transgender rights, the right to be forgotten, the Citizenship (Amendment) Act, 2019, and put forth novel solutions to address the lacunae in the existing legal framework.

The paper presentation was followed by plenary sessions on the second day. In the first plenary session on "*Sovereignty in the Digital Age*". Eminent and notable speakers from the field of law and academics, such as Mr. Vinit Goenka, Secretary, Centre for

Knowledge Sovereignty; Ms. Anuradha Shankar, ADGP, Madhya Pradesh Police and Mr. Bharat Panchal, Chief Risk Officer, FIS Global, presented their opinions. This session was chaired by Prof. (Dr.) Ghayur Alam, Dean, Faculty Advisor of the NLIU Law Review. The panellists gave brief accounts of their own experiences to substantiate their differing perspectives, and the ensuing discussion gave the audience new insights on the issue.

The Symposium also comprised of a second plenary session on *"Rethinking Parliamentary Democracy"* where the panellists addressed the student body in order to facilitate awareness and engage in discussion on key democratic issues in the country. The panellists for the discussion were G. Raghuram, Director, NJA Bhopal and R. Venkatramani, Senior Advocate, Supreme Court of India. This session was chaired by Prof. V. Vijayakumar, Vice Chancellor, NLIU Bhopal.

I extend hearty congratulations to Prof. (Dr.) V. Vijayakumar and Prof (Dr.) Ghayur Alam for the successful publication of this Issue. The Editorial Team must also be appreciated for its efforts in conducting a rigorous review process to ensure that we shortlisted the best submissions. It is my expectation that this Issue will stimulate debate within students, academicians, lawyers and judges and all other readers.

Major General Dhruv Katoch
Director, India Foundation

NOTE FROM THE FACULTY ADVISOR

This is the Second Issue of the Ninth Volume of the NLIU Law Review. The Issue has emerged from the Second NLIU – India Foundation Constitutional Law Symposium, 2020 organised by NLIU Law Review in collaboration with India Foundation. It contains the summaries of speeches presented by the panellists at the Symposium and research papers presented at the 2nd NLIU – India Foundation Constitution Law Paper Presentation Competition, 2020.

The Symposium began with a Welcome Address by Prof. V. Vijayakumar, Vice-Chancellor, NLIU Bhopal. Inaugural Address was delivered by Mr. O.P. Rawat, former Chief Election Commissioner of India.

The First Plenary Session on *"Sovereignty in the Digital Age"* was chaired by the undersigned. The speakers were Mr. Vinit Goenka, Secretary, Centre for Knowledge Sovereignty; Anuradha Shankar, ADGP, Madhya Pradesh Police and Bharat Panchal, Chief Risk Officer, FIS Global. The Second Plenary Session on *"Rethinking Parliamentary Democracy"* was chaired by Prof. V. Vijayakumar, Vice-Chancellor, NLIU Bhopal. The speakers were Mr. G. Raghuram, Director, NJA Bhopal and Mr. R. Venkatramani, Senior Advocate, Supreme Court of India. Our heartiest thanks to all the speakers and participants for helping us promote the culture of free and meaningful dialogue.

This Issue of the NLIU Law Review includes research papers on contemporary issues of constitutional law ranging from the link between the right to privacy and personal data and the dilemma of the anti-defection law to the contested issue of recusal of judges. Our students involved in the editing and managing of the Law Review have been working tirelessly to put the research papers together for this Issue. We, at the National Law Institute University are

persistently trying to build a conducive environment to promote legal research of social value.

Our Patron-in-Chief and Chief Justice of the Madhya Pradesh High Court, Hon'ble Mr. Justice Ajay Kumar Mittal, has been a constant source of inspiration and encouragement. We most humbly express our sincere gratitude to him. Special thanks to our Patron, Prof. (Dr.) V. Vijayakumar, the Vice-Chancellor of National Law Institute University, Bhopal for his constant support and guidance. A lot of thanks to those who have contributed their work to this Law Review.

We seek the support and cooperation from the students and teachers of law in our endeavour. Support and cooperation in the form of criticism and comments on the articles published in this Issue or any prior Issue of NLIU Law Review are welcome. The aim of NLIU Law Review is to strive towards bettering itself and any comment from the legal fraternity will be a step in this direction. Please help us achieve our aim.

Prof. (Dr.) Ghayur Alam
Dean, Undergraduate Studies
Professor in Business and Intellectual Property Laws
National Law Institute University, Bhopal

EDITORIAL NOTE

The NLIU Law Review presents Volume IX, Issue II, which aims to bring to its readers a completely unique corpus of legal research exploring a variety of issues, of both international and domestic relevance. It includes in-depth analyses of contemporary legal concerns and attempts to provide realistic solutions to such issues.

In the article titled, *The Permissible Limits of Using National Symbols During Protests in India* deals with the use of national symbols in protest demonstrations, and the inevitable moral and legal questions that accompany such usage. The author carries out a comparative study with the United States to ascertain the balance between political dissent and free expression.

Unbottling Dissent: Scrapping the Anti-Defection Law examines the highly contested anti-defection law in India, and provides suggestions to improve the present lacking scenario. The paper analyses the harm caused by such practices at the federal level in the last decade, examines the novel approach in other democracies, and argues the benefits of adopting the same in India.

In the article titled, *The Citizenship (Amendment) Act, 2019 – A Constitutional Defence,* the author discusses the hotly debated Citizenship (Amendment) Act, 2019. The author attempts to build a constitutional defence of the act, based on both the threshold of constitutionality and international law, with a full understanding of its broad political objectives as well as the unique and contentious nature of its public persona.

Inseparate Powers and De Facto Offices of Profit: The Contorted Reality of Constitutional Ideals highlights the need to strike a middle ground between legislative oversight and executive autonomy at the grassroots. The paper examines the trend of subversion of constitutional ideals by analysing State hierarchy at the grassroots,

thus taking note of the derogation from these principles in administrative practice.

The paper titled, *Unattainable Balances: The Right to be Forgotten* analyses a singular aspect of the contemporary, highly criticized the Draft Personal Data Protection Bill, 2018 – the right to be forgotten. The authors argue that the protection of this right is of pertinenceespecially in the era of the internet. The paper evaluates the right to be forgotten in juxtaposition to the freedom of expression and the right to privacy.

The paper *Commercial Surrogacy: A Cluster of Issues and Complexities of Rights under the Constitution of India* proves to be thought-provoking, as the authors expresses strong dissent against the newly proposed Surrogacy (Regulation) Bill, 2019. It argues that the bill is violative of the fundamental rights of the parties involved in commercial surrogacies, and fails to recognise the nuanced socio-economic importance of commercial surrogacy.

This Issue also presents *Enumerating the Unenumerated: Recognising the 'Right to be Forgotten' in Indian Jurisprudence*, another unique take on the less frequently discussed right to be forgotten. The author comprehensively traces the history of the right to privacy and the related struggles in the domestic context. The author attempts to gauge the judicial response to this alien 'right to be forgotten' and its status in Indian jurisprudence.

Another article on the recusal of judges, *The Recusal Conundrum - Analysing the Crisis in the Indian Supreme Court*, rather proves the contemporary relevance of this legal conundrum. The authors aim to trace recusal law from its origination to the application of the doctrine in the case of the recusal of Hon'ble Justice Mishra.

In *Recusal of Judges- A Step Towards Impartial Adjudication*, the authors examine the recusal law which lies at the heart of our understanding of the role of courtrooms in a democracy. The article

discusses the link between two crucial concepts, judicial independence and judicial impartiality, in light of the legitimacy of courts.

Demosprudence and the Indian Supreme Court: Shaping the Contours of the Transformative Constitution aims to analyse India's tryst with demosprudence in a comprehensive manner. The paper states that the transformative spirit of the Indian Constitution and the Apex Court's invocation of its powers to do complete justice make demosprudence a pressing issue in the democratic setup of India.

Finally, *Transgender Rights – An Ongoing Wrangle,* the authors scrutinize the Transgender Persons (Protection of Rights) Act, 2019. They lay emphasis on the non-violability of gender identity and its manifestation as a basic human right. They additionally argue that the existing act fails to provide social and political opportunities to such persons.

The Editorial Board of Law Review sincerely hopes that the present Issue of the journal proves to be an insightful read for all its readers and marks another step forward in the journal's pursuit of excellence in legal scholarship. We would like to thank the authors for their contributions and, as always, welcome any feedback to improve the quality of our journal.

Editorial Board

THE 2nd NLIU - INDIA FOUNDATION CONSTITUTIONAL LAW SYMPOSIUM

On March 14 and 15, 2020, the NLIU Law Review, in association with India Foundation, organized the second edition of the NLIU-India Foundation Constitutional Law Symposium. The event was initiated in 2019 to contribute to the literature and enhance the discourse on contemporary issues of constitutional law. Much like the first edition of the event, the second edition saw great participation from law students, academicians, legal practitioners and professionals across the country. The Symposium saw a paper presentation competition on the first day, followed by several panel discussions engaging legal experts on the second day.

The paper presentation competition called for submissions from law students across the country. The NLIU Law Review, through its multi-tier review process, shortlisted submissions which were subsequently presented at the event. The discussions on the first day pertained to topics such as the right to be forgotten, the Citizenship (Amendment) Act, 2019 and transgender rights, with the presenters also suggesting novel solutions to address the lacunae in the existing legal framework.

The paper presentation was followed by panel discussions and plenary sessions on the second day. Mr. O.P. Rawat, Former Chief Election Commissioner of India, delivered the keynote address in which he discussed the manner in which EVMs have revolutionised elections and emphasized on the importance of constant progress and improvement. He went on state "laws are as good as the individuals who uphold the law". This statement struck a chord with the members of the legal fraternity and the student community present in the audience.

Subsequent to the keynote address, the first plenary session was held on the topic *"Sovereignty in the Digital Age"*. The panel comprised notable speakers from the field of law and academics, such as Ms. Anuradha Shankar, ADGP, Madhya Pradesh Police; Mr. Vinit Goenka, Secretary, Centre for Knowledge Sovereignty and Mr. Bharat Panchal, Chief Risk Officer, FIS Global. This session was chaired by Prof. (Dr.) Ghayur Alam, Dean of Undergraduate Studies, NLIU Bhopal.

The Symposium also saw a second plenary session on *"Rethinking Parliamentary Democracy"* where the panellists addressed the student body in order to facilitate awareness and engage in discussion on key democratic issues in the country. The panel for this session included legal luminaries such as Hon'ble Mr. Justice G. Raghuram (Retd.), Director, NJA Bhopal and Mr. R. Venkatramani, Senior Advocate, Supreme Court of India. This second session was chaired by Prof. (Dr.) V. Vijayakumar, Vice-Chancellor, NLIU Bhopal.

A concise summary of the address delivered by the panellists at the Symposium has been put together by the Editorial Board at the NLIU Law Review.

HON'BLE MR. JUSTICE G. RAGHURAM (RETD.) - RETHINKING PARLIAMENTARY DEMOCRACY

Drawing inspiration from the American, Canadian and other constitutions, the Indian Constitution was formulated over a period of three years, involving about three hundred men and women coming from various intellectual, cultural, social, economic traditions. These individuals came out with a document which had the distinction of being the longest Constitution in the world so far. We had a very complex structure for citizenship, allocation of legislative and executive powers, fundamental rights and duties, centre-state

relations, and unclear boundaries for the executive, legislature and judiciary.

There was an initial period where the judiciary romanced the legislature since there was an apparent debt from the efflorescence of the freedom movement, making the courts deferential. However, the legislative branch thought it needed to interfere with some entrenched feudal rights of property, and the tussle began between the two, leading to the first amendment to the Constitution, alongside a series of judgments striking down laws impeding the property rights of the people. Then came the formal declaration of a national emergency in 1975, another landmark era for constitutional law. There have been several seesaw moments in our judicial history henceforth, moments of extreme rectitude and adulation, judicial responsibility and subsequent judicial overreach. There have been moments where the judicial branch assumes it is necessary to right every wrong, or where the judiciary has taken it upon itself to interfere in the functioning of a legislative body.

There have been serious debates regarding whether parliamentary is the right form of democracy and whether we should try other forms of democracy. The problem lies not with the institutions we have, but with the people in them. The legislature is happy with the judiciary picking up the gauntlet to attempt to resolve disputes in its own ill-informed way, as long as they do not have any political implications, such as interstate water disputes. In India, when it touches upon core political interests, the executive wants to have a say. Power is like an aphrodisiac and the judiciary, having tasted the blood of executive functioning, is unable to let go. Though by definition, judges are wise, or at least call themselves so because the legal profession entails such an honourable virtue, sometimes people start believing it about themselves as well. Following these delusions, they start exercising power and begin to tell people what to do. This is a problematic thing but the people are just not concerned. In a democracy in which people

do not participate, law is too serious to be left only to the lawyers and individual reasoning of judges.

The people's deeper concerns remain untouched and the country has only witnessed a followership masquerading as leadership. We have political complexions of one variety where we vote the same kind of parties with different flags, and we place the same old wine in a new bottle. Contrary to current learned analysis of politics in India, in the first decade after independence when we were still romancing the great freedom movement, there was a coalition government in place. After the first decade there came a coalition of Muslims and Dalits, followed by one of the backward classes. Ever since we have had coalitions, the so-called leadership has been dividing people into more units than each group could have managed.

Political leadership of an institution must lead, mentor and transform obsolete and counter-democratic proclivities of individuals and societies for democracies to progress from a mere structural format to operational reality. There are all shades of representative arrangements in the polity and it is necessary to employ and leverage the sectarian, divisive and obsolete notions of caste, gender, religion and other insularities of the population that negate harmonious co-existence of our immense, complex and polychromatic demography. With their emphasis on the English language, the polity merely amounts to followership, in the hopes of replicating a successful past pathogen. Also, liberal rhetoric cannot substitute assiduous efforts towards eradicating from the popular sphere the toxic elements that are counter-democratic. This the urgent need of the hour but makes merely for occasional rhetoric. We have not yet graduated to the idea of nationhood, and today, sovereignty is on the verge of obsolescence.

Many red flags are clearly visible in our democracy, especially the judiciary. There are hiccups in our judicial trajectory, and judicial discourse digresses from being a symphony to a cacophony; there is no continuity or coherence. The other two branches are said to have

been compromised and imprudent. When justice is so full of scams that there is no hope that it can monitor the power, it becomes a supplicant of wealth and ceases to be an ordinary power. It is not wise to be cynical, but it is also necessary in some aspects, which I call healthy scepticism. Does the operative of Indian society correspond with what was conceived or envisioned by our founding fathers seven decades ago? Do we have an operative value? Do we have any value at all?

MR. R. VENKATRAMANI - REVISITING THE MAKING OF THE CONSTITUTION

When it comes to the rationale behind revisiting the history of the Constitution, it appears that such act is only done when there exists a flaw in the constitutional provisions and a modification is required to suit the changing times. If one happens to revisit the constitutional debates and the drafting history, one will note that every provision in the Constitution has a rationale behind its introduction, and has been made a part of the Constitution by the drafters after various debates and engagements. While interpreting a constitutional provision with the dynamics of time, one must know the rationale behind the provision and the importance that it serves for the people who are affected by it. This would make one realize the difference between the original provision and its interpretation by the judiciary, thereby amounting to a *"judiciary drafted Constitution"*. Thus, the Constitution must not only run by the judiciary; the checks and balances must be levied upon the provisions of the Constitution.

There is a need for *"rational principles"* for the understanding of the constitutional machinery. This refers to the practicality of a constitutional provision. The application of the said principles came into play in the Constituent Assembly while deciding upon the adult suffrage. Since the majority of the Indian population was not literate,

the commonality of the voting procedure seemed to be problematic. Now with diversification, one must ask several questions relevant to the endurance of the Constitution, such as those regarding the socio-cultural ethos and values of a community, which, if overlooked, affect contemporary India. In today's elections, a factor which is relevant for somebody who is being voted to a Panchayat would be hardly relevant for voting somebody to the parliament. This distance between our local interests and national interests is a matter of great importance for parliamentary function.

Further, two-fold notions concern the liberal democracy in the West. It is believed that there is minimum corruption and an accountable government in the West, as well as a widespread education; however, this is contradicted by the deep notions of reality that the voter turnout continues to fall in the US. Similarly, in other western countries, radical governments with extremist propagandas are being voted to power. This raises a question as regards the accountability of a free democracy for the betterment of the country due to "in-built-human-conditions" concerning candidature preferences. These conditions refer to the systems humans create based on their perceptions. With personal preferences in place, it is difficult to have a social order and social system, which is one of the greatest contemporary challenges at hand.

While it is understandable that the constitutional provisions are shaped by the ideas and perceptions of these representatives, it must be taken into account that ideas envisaged under the Constitution are said to be "non-negotiable" unless the systems of the state are not maintained in a healthy condition. Thus, a check must be kept on these institutions from time to time and it should be maintained that they do not exceed the jurisdiction granted to them by the virtue of the Constitution.

MS. ANURADHA SHANKAR - PRIVACY IN THE DIGITAL SPACE

It is very important to understand first that after World War II, the world decided that it is necessary to have democracies with capitalist economies. Slowly, the states which did not follow these ideals dissolved, broke up, or converted. The capitalist economy is equivalent to the free market, the actual nature of which can be debated. This established the *"corporate culture"* of today, and the market economy transformed into a surveillance economy. The big behemoths are controlling the world in an astonishing way which cannot be escaped. It is very innocent and rather gullible to think that we can make a national system whereby we can protect data within our nation. There exists a digital world called the *"deep web"*. All sorts of nefarious activities have been transferred onto the deep web, and all of one's data eventually reaches the deep web where it is being mined ambitiously. It is mined not only for illegal and harmful activities but also to undermine properly elected governments and economies of countries. Hence, it is the need of the hour to counter these activities and protect individual data.

The current law we have is nothing but a knee-jerk reaction to rising security issues, and is rather borrowed from countries like Switzerland and the UK. Similar to the physical world, the digital world in India is different due to a difference in socio-cultural norms. The precautions we take in the physical space also need to be taken in the digital space. Therefore, it is high time that good legal brains come up with an organic law to address these problems. The second thing which is really important is, and Europe has made a good start on this front, that one can only ask for a data code when it is legally required. *"Legally required"* means the state will not allow any data to be compromised unless the established law, which is the standards set by the Constitution, permits it, or an individual in their right mind gives consent, to share that information. Otherwise, things are going to be very difficult and dangerous.

The people who make the best protections are actually hackers. For example, a hacker from Indore studying in the 11th grade was caught tipping into all banks of India and siphoning off money, the amount depending on the size of the savings account. Thus, we need very well thought out laws which are targeted at the Indian reality. In modern day India, we have our democracy and our sovereignty that have not been sold to the behemoth companies, and if we want to and decide to, we can protect these ideals.

MR. VINEET GOENKA - DATA PROCESSING AND SOVEREIGNTY

How did the concept of data sovereignty come into play if a person wilfully shares their data and the data is now freely available and processed?

Let me address this with an illustration. There is a place called Chauchala in Haryana where a healthcare centre was built by a big multinational company. One day, four ladies, around the age of fifty, entered the room and there was a member of the staff assisting the medical professionals sitting there. In a very casual manner, he told them that it was a Tuesday and the doctor was running late. He went on to recommend to them a medicine to cure their stomach ailment. In shock, the ladies questioned the boy about the medicine, to which he replied that the ladies were present the previous Tuesday and had the same issue. The ladies reprimanded him in anger. However, when the ladies went inside the doctor's cabin, he prescribed the same medicine that the boy had suggested. Come next Tuesday, the ladies took the medicine directly from the boy. This practice continued for the next few weeks.

At the same time, news of medicines being stolen was received, and an investigation was conducted. The medical officers found a non-medical solution to the problem faced by the ladies every Tuesday. On Mondays, these ladies would go to Shanker Deva temple and

drink the water there. The water was contaminated, thereby causing the stomach ailment. The solution was to clean the temple such that these ladies would not face the problem. It was only because of the patient records maintained by the doctor that the medical officers were able to understand the pattern behind this problem. If a pharma mafia would have entered that system, they would not have shared the records to solve the medical issue with the non-medical solution. Hence, the data could possibly be used in both ways- the medical officers in furtherance of their duty found a non-medical solution to a medical issue but the situation could have had a different outcome in the hands of somebody else.

There is no comprehensive answer to the question asked. If data is so powerful, it can be used by anybody. The answer to this problem is very simple- for data protection, the data has to be inside the country. This is because the owner of the data knows that when their neck is in the noose, the law will take care of them someday.

This situation can be explained with another example of shopping establishments in Delhi. In two supermarkets belonging to the same chain located in different areas in Delhi, the rack of the first shop was remarkedly different in its offerings from the second. An investigation concluded that the company had data on the purchasing patterns of the people. While one area had persons predominantly from Kerala, the other had persons from the southern part of West Bengal. In this way, businesses manipulate the buying capacity of individuals. Thus, the use of data to the prejudice of its owners is a very serious issue in the modern era.

MR. BHARAT PANCHAL - EVOLUTION OF TECHNOLOGY AND ANTITRUST CONCERNS

People living in the twenty-first century are fortunate. This century has seen two of the biggest revolutions, which I consider myself lucky

to have been a part of. The first revolution began in 2002 in the telecom sector. While in the earlier days, it could take years for a mobile connection, today it only takes minutes. A new slogan was introduced in 2002 when I was the chief of the testing team of Reliance Communications – '*karlo duniya mutthi mein*'. This is a reality today; everything is truly at one's fingertips. The next revolution that ushered in was the digital age, or the age of digital transformation. When you are in the digital age, you are putting your fingerprints, your footsteps and your footprints on every activity of yours. Till the time it is used in the right manner, technology can help you, but the minute one gains control of your data, it becomes dangerous. India has 1.3 billion people, out of which one billion have mobile connections, and 450 million of them are smart phone connections. Thanks to *Jio*, data has become a commodity here. Imagine 450 million smart phones generating terabyte of data every day and night.

Hence, it is necessary to understand why data sovereignty is important for a country like ours. Any foreign investment, for example, depends on multiple factors, all of which are realized through data mining. Another example of disadvantageous data usage is Cambridge Analytica, the mastermind behind the previous US elections. They strongly influenced the mindset of the voters. When it comes to large scale cybercrimes, there exist two issues- either people are ignorant about the sharing of their data or they are aware of it and their action has backfired. In every cyberattack that has happened, we know what went wrong and how it happened but we cannot trace the culprit. This is because cybercrimes entail data flowing across the border, and thus, one does not have any control on the act.

The infrastructure needed to manage search engines as huge as Google and Yahoo is equivalent to entire budgets of states. A part of the revenue necessary for this purpose comes from selling individuals' data. Therefore, data sovereignty becomes important, and

is especially important when the issue is related to the national security. If that data is misused, our sovereignty stands threatened. Today, there is no law to protect individuals or the establishment from breaches of data security. Neither is there any law to protect data as a whole. One can no longer turn a blind eye to this issue because detachment from usage and sharing of data is impossible in this day and age. Therefore, the need of the hour is educating people on the importance of data as well as on measures to be taken to prevent its misuse.

PROF. (DR.) GHAYUR ALAM - THE CONSTITUTIONALITY OF THE AADHAAR ACT

Aadhaar or Unique Identification Number was introduced in India through an executive order without any specific statutory framework. The narrative for Aadhaar was constructed to make a point – convincing or otherwise. The Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 (*hereinafter* the Aadhaar Act) has been enacted to *"provide for, as a good governance, efficient, transparent, and targeted delivery of subsidies, benefits and services, . . ., to individuals residing in India through assigning of unique identity numbers to such individuals and for matters connected therewith or incidental thereto"*.

One of the contentious issues has been the introduction of the Aadhaar Bill as a money bill in the Lok Sabha. The constitutional validity of the Aadhar Act was challenged in the Supreme Court. The matter was heard by a bench of five judges. The judgment was not unanimous. Four judges upheld the constitutional validity of the Aadhaar Act and one judge delivered a dissenting opinion holding the process of introduction of Aadhaar Bill as a money bill a fraud on the Constitution. The history of *ADM Jabalpur v. Shivkant Shukla* was perhaps repeating itself. For all legal practical purposes, the majority

view is the law declared by the Supreme Court and has the binding effect. The minority view, however, cannot be brushed aside and thrown to the wind. It is quite possible that a later larger bench may overrule the Aadhaar judgment. In the alternative, a review bench may refer the matter to a larger bench for reconsideration. It has happened before. The majority opinion in *ADM Jabalpur v. Shivkant Shukla* held the field for more than forty years which has been overruled in the right to privacy judgment and the minority opinion of Justice H. R. Khanna was not only appreciated but has also been declared as the right opinion.

Minority opinions by and large reflect the true spirit of judicial review – a counter majoritarian device. Truth and justice are not truth and justice because they are accepted or supported by the majority or by all. Truth and justice are truth and justice because they are truth and justice – they stand on their own. It is quite possible that the Supreme Court sooner or later upholds the dissenting opinion of Justice D. Y. Chandrachud and may declare that his opinion reflected the correct position of law. Whether my personal data including my biometric data is my property or whether the state has the power to acquire my personal data and make it accessible to private players, our aim is not to support or oppose a particular view. As members of the legal community, our aim is to find and explain the truth.

THE PERMISSIBLE LIMITS OF USING NATIONAL SYMBOLS DURING PROTESTS IN INDIA

Ranu Tiwari[*]

Abstract

The present paper deals with an important aspect of protest demonstrations- the use of national symbols. The incorporation of these symbols in protest activities raises various legal and moral dilemmas. The paper has been divided into four parts. Part I starts with a brief introduction to the topic. Part II will look into the significance of these symbols to understand why these signs become a good tool for political dissent. Part III will elaborate upon various provisions relating to the protection of national symbols. Part IV looks into the fine lines between the 'respect' and 'disrespect' element in the context of the present discussion, and advocates that limiting the use of the symbolic expression is a curtailment of 'freedom of speech and expression'. Decisions of other jurisdictions have also been highlighted, especially the USA, where the Courts have very well settled the matter on these issues.

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I. INTRODUCTION

In August 2016, a National Football League ("**NFL**") player ignited a whole new debate on patriotism, nationalism, and protests in the United States of America ("**USA**"). Colin Kapernick, an American football quarterback, sat on the bench while the national anthem played during a preseason game for the San Francisco 49ers.[1] Kapernick told the media he acted so in order to protest against the oppression of people of colour in the USA and ongoing issues with police brutality.[2] Other NFL players also followed suit. This protest then also got morphed into an act of direct resistance against Donald Trump after the President weighed in on the issue.[3] While some actively supported Kapernick's acts, there also came criticism from some citing that the act espouses disrespect to the American nation.[4] This controversy has several angles to it, but one important question that arises is, what if such an act took place in India? The first question that would have to be determined therein would be concerning the legality of using national symbols in protests against actions of the Government. Unlike the USA, India has witnessed very few protests where the national flag, the national anthem or any other national symbol has been the central point. Also, no flag desecration case has been expressly dealt with by the highest Court in India. Therefore, the present paper will dwell upon the question of the

[1]Adam Stites, Everything you need to know about NFL protests during the national anthem, SB NATION (Feb. 5, 2020),https://www.sbnation.com/2017/9/29/16380080/donald-trump-nfl-colin-kaepernick-protests-national-anthem/.
[2]*Id*.
[3]Clark Mindock, Taking a knee: Why are NFL players protesting and when did they start to kneel?, INDEPENDENT(Feb. 5, 2020), https://www.independent.co.uk/news/world/americas/us-politics/taking-a-knee-national-anthem-nfl-trump-why-meaning-origins-racism-us-colin-kaepernick-a8521741.html.
[4]*Id*.

constitutionality of such protests especially those using the national flag and the national anthem.

II. THE SIGNIFICANCE OF NATIONAL SYMBOLS

National attachment, a feeling of close personal attachment to one's nation or state, is a powerful organising force that has been a facet of all successful human societies.[5] National symbols, particularly national anthems and flags provide the strongest, clearest statement of national identity.[6] In essence, they serve as modem totems signs that bear a special relationship to the nations they represent, distinguishing them from one another and reaffirming their identity boundaries.[7] They also convey the nation's history, myths and ideals and help evoke emotional attachment to the nation, crystallise its identity and help people feel connected to something outside of their own immediate family and community.[8] These symbols have also been an important medium of patriotism training in societies through ages. A particularly explicit strategy in this connection can be found in a statement published by the Central Propaganda Department of the Chinese Communist Party in 1996 entitled 'Teach the General Public and Especially the Young to Love the National Flag and the National Anthem'. Here it is explained that '*the national flag and national anthem are symbols of a nation's sovereignty and dignity and concentrated expressions of its patriotic spirit*'.[9] Another vivid

[5]David A. Butz, National Symbols as Agents of Psychological and Social Change, 30 POLITICAL PSYCHOLOGY 779 (2009).
[6]Karen A. Cerulo, Symbols and the World System: National Anthems and Flags, 8 SOCIOLOGICAL FORUM, 2 243 (1993).
[7]*Id*.
[8]Cynthia Miller-Idriss, The Emotional Attachment of National Symbols, NY TIMES (Feb. 5, 2020), https://www.nytimes.com/roomfordebate/2016/09/01/americans-and-their-flag/the-emotional-attachment-of-national-symbols.
[9]Pal Kolst, National symbols as signs of unity and division, 29:4 Ethnic and Racial Studies, 676, 677 (2006).

example of such identity learning is the Pledge of Allegiance to the Flag that is carried out in schools all over the USA every morning throughout the entire school year.[10]

In *Halter v. Nebraska*,[11] Supreme Court of the USA eloquently expressed the importance of the national flag- "*to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression.*"

To an American, it is the single embodiment of all the dreams, ideals and goals of the American people.[12]

"*If the flag says anything at all, . . . we think it says everything and is big enough to symbolize the variant viewpoints of a Doctor Spock and a General Westmoreland. With fine impartiality the flag may head up a peace parade and at the same time and place fly over a platoon of soldiers assigned to guard it ... Sometimes the flag represents government. Sometimes it may represent opposition to government. Always it represents America in all its marvelous diversity*."[13]

The Indian nationalism too, witnesses something similar. The attachment with national symbols is deeply enrooted in the Indian psyche.[14] The Courts, in few instances, have been confronted with the

[10]*Id.*
[11]Halter v. Nebraska, 205 U.S. 34, 43 (1907).
[12]Marilyn Archbold Young, Flag Desecration: A Constitutionally Protected Activity, 7 U.S.F. L. REV. 149, 153 (1972).
[13]Parker v. Morgan, 322 F. Supp. 585, 588 (D. N.C. 1971).
[14]Naveen Jindal, A symbol of unity in diversity, it's time India has a National Flag Day, THE INDIAN EXPRESS(Feb. 5, 2020), https://indianexpress.com/article/opinion/a-symbol-of-unity-in-diversity-its-time-india-has-a-national-flag-day-5035190/; https://indianexpress.com/article/express-sunday-eye/the-symbol-of-freedom-indian-flag-emoji-6233551/ Nishant Shah, Indian flag emoji as an icon of resistance, THE INDIAN EXPRESS (Feb. 5, 2020),

issues of nationalism, national symbols, etc. and have upheld the importance of veneration of national symbols.

In *Karan Singh v. Jamuna Singh*,[15] while deciding upon the question of whether the portrait of Gandhi would qualify as a national symbol, the Supreme Court of India distinguished between a symbol and an emblem.

"*An emblem has some natural fitness to suggest that for which it stands; a symbol has been chosen or agreed upon to suggest something also, with or without natural fitness…. This explanation of the distinction between the words 'emblem' and 'symbol' would indicate that an emblem will always be a symbol. In the case of a symbol, it may represent or suggest something else with or without natural fitness.*"[16]

The question was answered in the negative by the Court. But the Court made certain pertinent observations which are important in light of the present discussion. The Court envisaged four possibilities by which a symbol may become a national symbol.

"*They are (1) by law passed by the Parliament, (2) a declaration by the Government of India either, under the powers granted by law or in exercise of their executive powers, (3) by international recognition and (4) by recognition by the nation as a whole, the recognition being either express or implied. No law of the Parliament has been brought to our notice under which any symbol has been given to the Government of India to declare a symbol as a national symbol. The only law, which was brought to our notice, was the Emblems and Names (Prevention of Improper Use) Act, 1950*."[17]

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https://indianexpress.com/article/express-sunday-eye/the-symbol-of-freedom-indian-flag-emoji-6233551/.

[15]AIR 1959 All 427.

[16]*Id.*

[17]*Id.*

It was also said here that the character of being the national symbol has been acquired only by the national flag and the national anthem by way of resolutions of the Constituent Assembly. Since the judgment, the Parliament has passed certain acts which have recognised certain other symbols of national significance, which will be dealt with below.

In *Naveen Jindal v. Union of India,*[18] the Court inquired into whether the right to fly the national flag by an Indian citizen is a fundamental right within the meaning of Article 19(1)(a) of the Constitution of India. The Court here made certain observations regarding the symbolic significance of the national flag- "*national anthem, national flag and national song are secular symbols of the nationhood. They represent the supreme collective expression of commitment and loyalty to the nation as well as patriotism for the country. They are necessary adjunct of sovereignty being symbols and actions associated therewith*."[19]

Similarly, in *Surendra Khandelwal v. State of Rajasthan,*[20] the Rajasthan High Court observed:

"*There is no doubt that the national flag, the Constitution and the national map are the matters of great sanctity and any act of any individual whosoever - citizen or non-citizen - ought not to cause any type of injury or any kind of negative imports towards these symbols of the country's honour, so as to maintain the sovereignty and integrity of the country*."[21]

A study analysing what individuals associate with their national flag in 11 diverse nations found positive emotions and democratic

[18]Naveen Jindal v. Union of India, (2004) 2 SCC 510.
[19]*Id.*
[20]Criminal (Misc.) Petition No. 3006/2018.
[21]*Id.*

concepts were associated with almost all examined national flags.[22] National symbols are indeed much more than symbols. In this context, it is not very hard to understand why the flag or anthem remain a very popular choice for protestors around the world.

III. THE INDIAN LEGAL FRAMEWORK

The Emblems and Names (Prevention of Improper Use) Act, 1950 prevents the improper use of certain emblems and names for professional and commercial purposes.[23] The Indian national flag is protected under the same, given in the schedule to this Act. The Prevention of Insults to National Honour Act, 1971 is the most important legislation with regard to the present topic. The Act prescribes punishment of imprisonment, which may extend to three years or with fine, or both for insulting the Indian national flag and the Constitution of India.[24] Burning, trampling upon, defacing or any other act of desecration along with the acts of condemnation of the flag and anthem by words or acts are covered under the ambit of insult. However, Explanation 1 to the section provides that comments which express criticism of the flag or the Constitution or of any measures of the Government to obtain the amendment of the Constitution or alteration of the Indian national flag by lawful means will not be an offence under the section. Prevention of singing of the Indian national anthem will also attract the same punishment as is

[22]Becker, J.C, Butz, D.A., Sibley, C.G., Barlow, F., Bitacola, L., Christ, O., Khan, S., Leong, C., Pehrson, S., Srinivasan, N., Sulz, A., Tausch, N., Urbanska, K., & Wright, S., What do national flags stand for? An exploration of associations across 11countries, 48 JOURNAL OF CROSS-CULTURAL PSYCHOLOGY 335 (2017).

[23]The Emblems and Names (Prevention of Improper Use) Act, 1950 § 3, No. 12 Acts of Parliament, 1950 (India).

[24]The Prevention of Insults to National Honour Act, 1971 § 2, No. 69, Acts of Parliament, 1971 (India).

given for the above-mentioned section.[25] Besides these Acts, the Flag Code of India, 2002 brings together the various laws, conventions, practices and instructions with regard to the national flag.[26]

The use of the national symbols in a protest activity will be guarded under Article 19 (1) of The Constitution of India, "*All citizens shall have the right: (a) to freedom of speech and expression*." This right is subject to certain 'reasonable restrictions.' There are six broad categories under which these reasonable restrictions fall- a. interests of the sovereignty and integrity of India, b. security of the State, c. friendly relations with foreign States, d. public order, decency or morality or in relation to contempt of Court, e. defamation and f. incitement to an offence.

The grounds are quite wide, which is in stark opposition to the First Amendment of the Constitution of the USA which provides for absolute right of freedom of speech and expression. Also, as per Article 13 of the Constitution of India, any law which is in contravention of Part III (Fundamental Rights including Article 19), to the extent of the contravention will be void. The right to peacefully and lawfully assemble together and to freely express oneself coupled with the right to know about such expression is guaranteed under Article 19 of the Constitution.[27] This right cannot be taken away by an arbitrary executive or legislative action.[28] It is to be kept in mind that only peaceful protests are constitutionally protected.

Besides these, the right to freedom of speech and expression find place in International Law. Article 19 of the Universal Declaration of Human Rights, 1948 ("**UDHR**") states,

[25] *Id.*
[26] National Flag, MHA (Feb. 5, 2020), http://mha.nic.in/nationalflag2002.htm.
[27] Re-Ramlila Maidan Incident v. Home Secretary, (2012) 5 SCC 1.
[28] *Id.*

"*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*"[29]

There is silence, however, on the modes of expression here. There are other instruments as well. There is Article 19 of the International Covenant on Civil and Political Rights ("**ICCPR**"): providing for the right to hold opinions without interference, through practically all modes[30]; Article 9(2) of the African (Banjul) Charter on Human and Peoples' Rights,[31] Paragraph 2 of the Sana'a Declaration by the Arab League of 2005,[32]Article 10 of the European Convention on Human Rights (Freedom of expression).[33]

It is important to observe that all these instruments do not recognise the freedom of expression as an absolute right and allow States to place restrictions, within certain parameters.[34] This is an outcome of the fact that the freedom of expression carries with it an equal responsibility; a principle embodied in the ICCPR.[35]

[29]Universal Declaration of Human Rights, UN (Feb. 5, 2020), https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf.
[30]International Covenant on Civil and Political Rights, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Feb. 5, 2020),https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.
[31]African Charter on Human and People Rights', HUMAN RIGHTS (Feb. 5, 2020), http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf.
[32]REFWORLD (Feb. 5, 2020), https://www.refworld.org/docid/530483644.html.
[33]European Convention on Human Rights, ECHR (Feb. 5, 2020), https://www.echr.coe.int/Documents/Convention_ENG.pdf.
[34]Kabir Duggal & Shreyas Sridhar, Reconciling Freedom of Expression and Flag Desecration: A Comparative Study, 2 HANSE L. REV. 141, 144 (2006).
[35]*Id.*

IV. THE UNPATRIOTIC ACTS AND FREEDOM OF SPEECH AND EXPRESSION

"*When it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme.*"- *Shreya Singhal v. Union of India*.[36]

In the United States, flag desecration as a means of protest is protected as symbolic speech. Between the two ends of the continuum- pure speech and action- is the area of symbolic speech.[37] It is the communication of an idea through the use of a symbol.[38] Mr. Justice Harlan explained the significance of this form of communication in *Cohen v. California*[39]*:*

"*[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for the emotive function, which, practically speaking, may often be the more important element of the overall message sought to be communicated*."[40]

There has been no express enunciation of the protection of symbolic expression under Article 19(1)(a) of the Constitution of India.[41] Nonetheless, there are cases which have helped in clarifying the Indian stance on the topic. The Court in *NALSA v. Union of India*

[36]Shreya Singhal v. Union of India, (2015) 5 SCC 1.
[37]Young, *supra* note 12.
[38]*Id.*
[39]Cohen v. California, 403 U.S. 15 (1971).
[40]*Id*.
[41]Tarun Krishnakumar, From flags to Facebook: Symbolic expression in the United States and India, 31 COMPUTER LAW AND SECURITY REVIEW 365 (2015).

("***NALSA***"),[42] held that a form of protected speech/ expression, namely gender identity, could be expressed both verbally and through conduct. This recognition of conduct as a means of expression would therefore extend to other forms of protected speech including political dissent.[43]

Another important enumeration of the protected status of symbolic conduct can be found in the case of *Kameshwar Prasad v. State of Bihar Ush* ("***Kameshwar Prasad***").[44] Here, the Supreme Court was confronted with a Bihar Government service rule that banned all forms of demonstrations and strikes by Government servants.

"*It might be broadly stated that a demonstration is a visible manifestation of the feelings or sentiments of an individual or group. It is thus, a communication of one's ideas to others to whom it is intended to be conveyed. It is in effect therefore a form of speech or of expression, because speech need not be vocal*."[45]

In *Usha Uthup v. State of West Bengal*,[46] the apex Court held that the act of singing and dancing, being "*an important media of expression and is an integral part of the freedom of speech and expression*",[47] would also attract protection of Article 19(1)(a). A similar protection was extended to dramatic performances, which are a combination of verbal and non-verbal forms of communication, in *Charan Singh v. Union of India.*[48]

It was in the landmark case of *Stromberg v. State of California,*[49] the Supreme Court of USA substantially widened the scope of the term

[42]NALSA v. Union of India, AIR 2014 SC 1863.
[43]*Supra* note 25.
[44]Kameshwar Prasad v. State of Bihar, AIR 1962 SC 1166.
[45]*Id*.
[46]Usha Uthup v. State of West Bengal, AIR 1984 Cal 268.
[47]*Id*.
[48]Charan Singh v. Union of India, AIR 1961 Punj 272.
[49]Stromberg v. State of California, 283 U.S. 359 (1931).

'speech' in the First Amendment and held it to include 'pure speech' as well as 'symbolic speech'.

Because of the essentially symbolic character of the flag itself to the American people, its use in protest activities is most effective in vividly conveying dissatisfaction with governmental action and policies.[50] In *West Virginia State Board of Education v. Barnette*,[51] the Court held that a state statute requiring schoolchildren to salute the flag violated their right of free expression.

The first case expressly dealing with flag desecration in the USA was that of *Street v. New York.*[52] A person was charged on the ground of publicly burning an American flag in protest against the killing of a civil rights activist. The New York legislation criminalising the act was held unconstitutional by the Supreme Court on the ground that it violated the First Amendment.[53]

After some more cases of this nature, the issue was settled in the landmark *Texas v. Johnson,*[54] in which the defendant was charged for burning a flag as part of an important demonstration against the policies of the then Reagan Government. On a conviction by the

Texas Court, the statute prohibiting flag desecration was struck down by the Supreme Court as violative of the First Amendment.[55]

Banning flag desecration or making it punishable has been argued to be unjust because it would amount to taking penal action against people for merely expressing their thoughts or ideas.[56] Further, the

[50]Young, *supra* note 12.
[51]West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
[52]Street v. New York, 394 U.S. 576 (1969).
[53]*Id*.
[54]Texas v. Johnson, 491 U.S. 397.
[55]*Id*.
[56]Dhruv Arora, Redefining Freedom of Expression vis-a-vis the National Flag, 1 NALSAR STUDENT LAW REV. 67 (2005).

fact that people resort to desecration of the national flag implies that, at some level, there is dissatisfaction with the Government, and non-allowance of such expression is undemocratic.[57]

In *United States v. O' Brien*,[58] the Supreme Court of the USA laid down four criteria in order to ascertain the situations in which the Government can regulate/suppress symbolic expression. "*It can be done when:*

i. *it is within the constitutional power of the Government;*

ii. *it furthers an important or substantial Governmental interest;*

iii. *the Governmental interest is unrelated to the suppression of free expression;*

iv. *the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.*"[59]

In *Percy v. Director of Public Prosecutions*,[60] the claimant, while protesting against American military activity, stood on an American flag and scribbled on it. The High Court accepted her submission that flag denigration was a form of protest activity renowned world over, and quashed her conviction by a Norfolk district judge.[61]

In Hong Kong, the legality of flag desecration and the validity of the anti-desecration legislation were tested in the highest Court in the case of *HKSAR v. Ng Kung Siu & Anor.*[62] Herein, the respondents, while participating in a peaceful demonstration, waved a defaced flag.

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[57]*Id.*
[58]United States v. O' Brien, 391 U.S. 367 (1968).
[59]*Id.*
[60]Percy v. Director of Public Prosecutions, (2001) EWHC 1125 (Admin).
[61]*Id.*
[62]HKSAR v. Ng Kung Siu & Anor, (2000) 1 HKC 117, Final Appeal (Criminal) No 4 of 1999, Court of Final Appeal.

The national legislations in the country prohibit flag desecration. The respondents then questioned the statutes, namely the National Flag and National Emblem Bill and the Regional Flag and Regional Emblem Bill, of violating the freedom of expression granted by various international statutes and conventions. They argued that the two statutes were a clear contravention of Article 19 of the ICCPR, along with Section 39 of the Basic Law (it talks about the application of ICCPR, international labour conditions, etc., to the special administrative region of Hong Kong). The Court of Final Appeal upheld the conviction on the ground that the two ordinances under which the respondents were convicted were justifiable restrictions placed on the freedom of speech and expression and were integral for the protection of public order.[63] The Court went on to justify that such restrictions are not disproportionate to the aims sought to be achieved.[64]

In Australia, there is no illegality imposed upon flag desecration.[65] In *Coleman v. Kinbacher,*[66] though there was successful prosecution for flag burning, the reason for the same had nothing to do with unpatriotic conduct of the accused:

"*The objectionable feature of the conduct had very little to do with its political significance. It related to the lighting of a large piece of synthetic material to which petrol had been added in close proximity to larger numbers of people including young children. The circumstances were such as to arouse the apprehension of parents for the safety of their children*."[67]

[63]*Id.*
[64]*Id.*
[65]Caroline Henckels, Dishonouring the Australian Flag, 44 MONASH U. L. REV. 384 (2018).
[66]Coleman v. Kinbacher, (2003) QCA 575.
[67]*Id.*

While the burning of flag is legal in Australia, it should be done safely, otherwise the act can be punished for 'disorderly conduct' or destruction of property.[68]

In India, it was only in the year 2004 that the national flag could be flown by private citizens while observing certain restrictions. In *Naveen Jindal*, the apex Court held that:

"*The right to fly the national flag is a fundamental right but subject to restrictions. The right is not an unfettered, unsubscribed, unrestricted and unchanneled one. Even assertion of the right to respectfully fly the flag vis- a-vis the mere right to fly the flag is regulated and controlled by two significant parliamentary enactments, namely, the Emblems and Names (Prevention of Improper Use) Act, 1950 and the Prevention of Insults to National Honour Act, 1971.*"[69]

At the same time, the Court curtailed this right by stating,

"*The right to fly the national flag is not an absolute right. The freedom of expression for the purpose of giving a feeling of nationalism and for that purpose all that is required to be done is that the duty to respect the flag must be strictly obeyed. The pride of a person involved in flying the flag is the pride to be an Indian and that, thus, in all respects to it must be shown. The State may not tolerate even the slightest disrespect. The extreme proposition of law taken in the American decisions that burning of the flag is an expression of anger cannot be accepted in India as it would amount to disrespect of the national flag.*"[70]

[68]Rhys McKay, Flag Burning Laws In Australia: When Is It Considered A Crime?, WHO (Feb. 5, 2020), https://www.who.com.au/is-it-illegal-to-burn-the-australian-flag.
[69]*Supra* note 17.
[70]*Id.*

The Rajasthan High Court in *Surendra Khandelwal*,[71] also reiterated the above proposition.

"*Although, the precedent law of Texas v. Johnson has been taken into consideration, despite the fact that neither the same is an authoritative or a binding precedent, nor has any direct bearing on the case in hand, however, the same has been considered being a facet of the judicial verdict passed in respect of the progressive society. This Court is also aware of the fact that there is much difference between the maturity level and social conditions, which were prevailing there, and the one prevailing in the present society*."[72]

Reading in the light of *NALSA* and *Kameshwar Prasad*, which have recognised protection of symbolic speech along with the 1971 Act (Section 2, as amended in 2005), it has been made clear national flag can be worn as a dress above the waist.[73] Therefore, protest by wearing the national flag is permitted subject to Explanation 4 of Section 2 of the 1971 Act.[74]

In *Bijoel Emmanuel v. State of Kerala*,[75] the main issue was whether the dismissal of three children from school for their refusal to sing the national anthem of India was consistent with the constitutional rights to freedom of expression and freedom of religion. The Court answered in the affirmative and held that the fundamental rights of the appellants under Articles 19(1)(a) and 25(1) have been infringed and they are entitled to be protected. It was also a violation of the fundamental right to freedom of conscience and freely to profess,

[71]*Supra* note 19.
[72]*Id*.
[73]Aamna Nabeeha Naqvi, Freedom of Expression Through the National Flag, RMLNLU LAW REVIEW (Feb. 5, 2020), https://rmlnlulaw review.com/2019/01/30/freedom-of-expression-through-the-national-flag/.
[74]*Supra* note 23.
[75]Bijoel Emmanuel v. State of Kerala, AIR 1963 SC 1295.

practice and propagate religion (the children belonged to a religious sect which forbade the singing of national anthem).

"*There is no provision of law which obliges anyone to sing the national anthem nor is it disrespectful to the national anthem if a person who stands up respectfully when the national anthem is sung does not join the singing. Proper respect is shown to the national anthem by standing up when the national anthem is sung. It will not be right to say that disrespect is shown by not joining in the singing. Standing up respectfully when the national anthem is sung but not singing oneself clearly does not either prevent the singing of the national anthem or cause disturbance to an assembly engaged in such singing so as to constitute the offence mentioned in Section 3 of the Prevention of Insults to National Honour Act*."[76]

Additionally, Article 51-A(a) of the Constitution of India makes it every citizen's duty to "*abide by the Constitution and respect its ideals and institutions, the national flag and the national anthem*". But none of the legislations or the Constitution expressly prescribe the proper way to show such respect, nor do they talk about sitting or standing while the national anthem plays.[77]

In *Shyam Narayan Chouksey v. Union of India*,[78] the Supreme Court modified its earlier order which had made playing of the national anthem mandatory prior to the screening of a film and made it optional or directory.

"*We have no shadow of doubt that one is compelled to show respect whenever and wherever the national anthem is played. It is the elan vital of the nation and fundamental grammar of belonging to a nation*

[76]*Id*.
[77]Apoorva Mandhani, Is it a crime not to stand for the national anthem?, THE PRINT (Feb. 5, 2020), https://theprint.in/theprint-essential/is-it-a-crime-not-to-stand-for-the-national-anthem-law-is-silent-supreme-court-ambiguous/313557/.
[78]Shyam Narayan Chouksey v. Union of India,(2018) 2 SCC 574.

state. However, the prescription of the place or occasion has to be made by the executive keeping in view the concept of fundamental duties provided under the Constitution and the law."[79]

In *In Re: N.V. Natarajan v. Unknown,*[80] the Madras High Court dealt with the constitutional validity of the Prevention of Insults to National Honour Act, Madras Act XIV of 1957. The Court reasoned that the act is not in violation of Article 19(1)(f) of the Constitution. It also held the willful burning of the Constitution as not included in the fundamental right to acquire, hold and dispose of property.

Looking at the judgments recognising the right to protest and symbolic speech, it can be said that there is no bar on the use of national symbols in protest activities in India but the scope is very narrow. There is a greater duty to respect the national symbols which leads to the inference that the use of national symbols during protests in India is permitted up to the extent that there is no disrespect shown towards these symbols. Again, what acts would be deemed 'respectful' or 'disrespectful' have to be understood from the

Prevention of Insults to National Honour Act, 1971. Given the Courts' stance of supporting reverence to national symbols, the same being prescribed in the statutes, and the wide exceptions under Article 19 of the Constitution of India, it can be safely assumed that instances of burning, or, scribbling on the flag or the Constitution or not standing up for the national anthem will not be protected as acts of symbolic speech by the Courts. These actions might be an effective tool of political dissent, but this can be resorted to only when the disapproval of any act is done to seek an amendment in the Constitution or the national flag as per the Explanation to section 2 of the 1971 Act.

[79] *Id.*
[80] In Re: N.V. Natarajan v. Unknown, 1965 CriLJ 49.

V. CONCLUSION

A combined reading of the last two parts of the article suggests that protesting using national symbols by desecration is generally not permitted in the Indian scenario. In this age, where nationalism as a force, is gaining new ground, it becomes important to acquaint oneself with these issues and challenges. In the recent rounds of the protest against the Citizenship Amendment Act, 2019 ("**CAA**") and the National Register of Citizens ("**NRC**"), several protestors have started using national symbols. They are waving Indian flags, singing the national anthem and carrying placards quoting from the Constitution of India.[81] The reason cited behind this is that the CAA rejects the secular, multicultural principles upon which India was founded and which are embodied in the flag, the anthem and, most explicitly, the Constitution.[82] By invoking these symbols, the protesters in India are drawing on this historic, inclusive vision of their country.[83] This is actually a good example of innovative protests. Nonetheless, the author is of the view that with the ever-expanding realm of the freedom of speech and expression, it is necessary that certain acts, even though they might not align with the majoritarian views be protected. As Justice Robert H. Jackson pronounced in the *Barnette* case,[84] "*freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order*."

[81]Prerna Singh, In India, protesters are singing the national anthem and waving the flag. Here's why that matters, WASHINGTON POST (Feb. 5, 2020) https://www.washingtonpost.com/politics/2020/01/20/india-protesters-are-singing-national-anthem-waving-flag-heres-why-that-matters/.
[82]*Id.*
[83]*Id.*
[84]Krishnakumar, *supra* note 41.

If there is no imminent threat to public order, there seems to be no reason why certain limited conducts of improper use of national symbols cannot be incorporated in protest activities in India. This is highly unlikely, given the stringent statutes and the availability of the exceptions of reasonable restrictions under Article 19 of the Constitution of India. Until and unless the constitutionality of the acts pertaining to national symbols is challenged, the scope of desecration of national symbols in the protests will continue to be highly limited in this country.

UNBOTTLING DISSENT: SCRAPPING THE ANTI-DEFECTION LAW

Ayush Kashyap[*]

Abstract

Defection is a dirty word in Indian politics. It evokes images of bundles of cash being exchanged for cross-voting and a general decay of political morality. The spate of defections before the 1980s forced the hand of the government to enact a law against defection as shocking instances of party-hopping became commonplace. There was a lack of political consensus on the issue which led to the issue being put in cold storage for a decade and a half. The law which finally emerged, soon became more honoured in breach than in observance.

However, it survived judicial review and the Speaker of the Parliament and State Legislatures were given a free hand under the law. The real potential of this law to do long-standing damage became clear with the political consolidation at the federal level in the first half of the current decade. The Supreme Court's confidence that two-thirds threshold for validating a merger soon began

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to shatter in one state after another. The role of the Speaker has once more come under question.

The approach to defection is refreshingly different outside India. This paper argues that India too should adopt a laissez-faire attitude towards defection. It should allow the electorate to flush out instances of corrupt political behaviour while simultaneously preserving the separation of powers, and permitting the legislative branch to correct its course by allowing dissent dictated by personal convictions. This understanding is reached after analysing different forms of censure to defections and finding them wholly inadequate.

"*It ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. ... But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living.... Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion*." - Edmund Burke, Speech to the Electors of Bristol (1774).[1]

[1]Edmund Burke, *Speech to the Electors of Bristol*, (Nov. 3, 1774), MISCELLANEOUS WRITINGS (SELECT WORKS VOL. 4), http://fs2.american.edu/dfagel/www/Philosophers/Burke/SpeechToTheElectorsofBristol.pdf.

I. INTRODUCTION

Political parties are the lifeblood of the political system that India has adopted. But before the insertion of the anti-defection law, the Constitution of India contained no references to political parties. This is rather telling because, on the other hand, all other aspects of governance have found meticulous treatment. However, the very nature of government that the Constitution refers to leaves the existence of political parties as a *fait accompli*.[2] Of late, it is often remarked that democracy does not end with an election but only begins with it. The elections to state legislatures have displayed a similar pattern - hung assemblies followed by questionable decisions by constitutional functionaries. The role of the Governor in government formation has come under immense scrutiny and rightfully so. Despite clear guidelines from the Supreme Court, there has been a tendency to pander to the sensibilities of the ruling dispensation at the Centre. An important link in this chain is the Tenth Schedule of the Constitution of India.

The Tenth Schedule contains the anti-defection law which was inserted by a constitutional amendment to stem the 'evil of political defections' that had become a matter of national concern.[3] Defection was said to "*undermine the very foundations of our democracy and the principles which sustain it*".[4] These were very noble aims. But what was designed as a shield has become a sword that political parties often wield against the spirit of democracy. In this paper, I will argue that the anti-defection law is inadequate and does more harm than good. This paper is divided into five parts. In Section II, the development of the law will be discussed. Section III will elaborate

[2]Kanhaiya Lal Omar v. RK Trivedi, A.I.R. 1986 S.C. 111, ¶ 10.
[3]THE CONSTITUTION (FIFTY-SECOND AMENDMENT) ACT, 1985, Statement of Objects and Reasons, https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-fifty-second-amendment-act-1985.
[4]*Id.*

upon the reforms in the legal framework as a result of judicial pronouncements. Section IV will analyse recent government formations from a constitutional standpoint and bring out the role played by the Tenth Schedule. Section V will analyse the treatment defection receives in foreign jurisdictions. Section VI will conclude the discussion.

II. THE JUSTIFICATIONS FOR AN ANTI-DEFECTION LAW

India is a parliamentary democracy with a written constitution. Its heterogeneity led to the mushrooming of many political parties with political agendas spanning the entire breadth of the ideological spectrum. For most of its existence, India has been ruled by a strong federal government. Till the 1980s, the Indian National Congress ("**INC**") ruled at the Centre barring the brief period where it was booted out after the Emergency was lifted. From 1990s till 2010, coalition governments ruled the country. Since 2014, the Bharatiya Janata Party ("**BJP**") led National Democratic Alliance ("**NDA**") has been in power with a comfortable majority. The anti-defection law's birth can be traced to a period where the long-ruling dispensation at the Centre was beginning to lose political control.

The constitutional justification notwithstanding, it may be hypothesised that the ruling INC saw a political incentive in tabling the law. In 1967, the fourth general elections were held where the INC managed to cling to power. However, in that year, it lost control of 7 state legislatures due to its legislators crossing the floor in various state capitals.[5] It is logical to assume that this opened the eyes

[5]Chakshu Roy, *Explained: In Maharashtra Drama, the Key Legal Provision – Anti-defection Law*, INDIAN EXPRESS (Nov. 24, 2019), https://indianexpress.com/article/explained/explained-in-maharashtra-drama-the-key-legal-provision-anti-defection-law-6133417/.

of the INC to the 'evil of political defections'. A Committee on Defections was constituted under the chairmanship of the then Home Minister Y.B. Chavan. In its report, the Y.B. Chavan Committee noted 438 instances of defections in a 12-month period.[6] Out of 210 defections in 7 northern states, 116 defectors were included in the Council of Ministers in the governments propped up with their support.[7] This can be reasonably expected to have irked the ruling INC. Interestingly, the discussions in the Rajya Sabha also brought forth instances of INC engineering defections in states.[8] One Member of Parliament laconically pointed out that political parties had thus far enjoyed the 'privilege of defection' when it suited them.[9]

The discussion also captured the snapshot of the two differing philosophical viewpoints. The first viewpoint was that legislators switching political allegiances should be straightaway disqualified. This was justified on the ground that the Parliament is empowered to impose restrictions on an individual standing for elections to the Parliament or state legislatures as it is not a fundamental right but a statutory right. While the Chavan Committee could never reach a consensus on the scope of its recommendation, it clearly rejected this view. It opined that doing so would hinder the organic growth of political parties. This freezing of political parties was considered antithetical to the democratic process. During the course of this paper, I will argue that the Chavan Committee misread the tea leaves as defections allow for ideological correction, and that it is necessary in times of political flux.

[6]Motion re Report of the Committee on Defections, OFFICIAL DEBATES OF RAJYA SABHA (Aug. 12, 1969), http://rsdebate.nic.in/rsdebate56/bitstream/123456789/497265/1/PD_69_12081969_17_p3714_p3800_8.pdf.
[7]*Id.* at 3715.
[8]*Id.* at 3800.
[9]*Id.* at 3793.

It is pertinent to note that the Chavan Committee could not settle on the form of censure for defections. But the need for having such a law was impressed on the Parliament. Two attempts were made before the successful Fifty-Second Amendment Bill – in the form of the Thirty-Second Amendment Bill in 1973, and the Forty-Eighth Amendment Bill in 1978. The first of these attempts lapsed as the Lok Sabha was dissolved. Interestingly the second attempt was met with stiff opposition at its introduction and was withdrawn.[10] The second attempt was made by the Janata Party under the helm of the then Law Minister Mr. Shanti Bhushan. It appears that the INC which was then in opposition had suddenly grown disinterested in the issue of legislators crossing the floor and destabilising governments.

As the Statement of Objects and Reasons of the Fifty-Second Amendment Bill points out, legislative efforts in this direction were aimed to stabilise governments. Principally, the political class saw the need to clean its image. The image of corrupt politicians decreases public trust in the whole political system. From a financial perspective, an anti-defection law stemmed the tide of frequent elections thereby saving the exchequer money.

III. LEGISLATIVE AND JUDICIAL CHANGES

The Tenth Schedule provides that a member shall be disqualified from her membership if she voluntarily gives up her membership.[11] The phraseology used is clearly wide enough to cover the meekest dissent. Toeing the party line thus became the law of the land. Going against the party whip also attracts disqualification under the law.[12] A

[10]Law Commission of India. *Report No. 255 – Election Reforms,* March 2015, 90, http://lawcommissionofindia.nic.in/reports/Report255.pdf.
[11]Tenth Schedule of the Constitution of India, ¶ 2(1)(a).
[12]*Id.*

nominated member of a legislative body will also face the axe if she joins a political party at any time six months after taking oath.[13] The six-month window has been utilised by eight out of the twelve nominated members in the current Rajya Sabha.[14]

It is telling that there is a huge gap left open in the framework where nomination becomes futile. It only goes on to show how half-hearted the legislation was. It was intended as a stop-gap measure in a nascent parliamentary democracy. After a seven-decade experience and a turn towards a form of government that appears increasingly presidential, anti-defection law is not only unnecessary but aids in power grabs that can hardly be considered constitutionally moral.

This half-heartedness and lack of a long-term shelf-life is perhaps most clearly seen in paragraphs 3 and 4 of the Tenth Schedule. Paragraph 3 dealt with 'splits' while paragraph 4 dealt with 'mergers. A split or a merger was valid only after crossing a certain threshold in each case.

A. Splits and Mergers

The 177th Report of the Law Commission was quick to note that the experience of the country with anti-defection law had not been a happy one.[15] The cause for this worry was paragraph 3 of the Tenth Schedule which effectively allowed a wholesale defection of one-third of elected members of a party while restricting individual defections.[16] The Supreme Court tried to stem the misuse of the split

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[13]*Id.* ¶ 2(2), 2(3).
[14]Vishwa Mohan, *Only Second Time in 66 Years History of Rajya Sabha: Majority of Nominated Members Joined a Ruling Party,* THE TIMES OF INDIA(Aug. 8, 2018), https://timesofindia.indiatimes.com/india/only-second-time-in-66-yrs-history-of-rajya-sabha-majority-of-nominated-members-joined-a-ruling-party/articleshow/65316224.cms.
[15]Law Commission of India. *Report No. 177,* May 1999, ¶1.3.3.1, http://www.lawcommissionofindia.nic.in/lc170.htm.
[16]Roy, *supra* note 5.

provision in *Jagjit Singh v State of Haryana* ("***Jagjit Singh***"). It held that the Speaker needs to satisfy herself of the *prima facie* proof of split in the political party.[17] The Court opined that the split of the Republican Party of India was a mere afterthought to avoid attracting the defection law.

Paragraph 3 was deleted from the Constitution by the Constitution (Ninety-First Amendment) Act, 2003. The Supreme Court noted that defection had been made more difficult by the deletion of the third paragraph.[18] While paragraph 3 has been deleted, paragraph 4 which validates a 'merger' where two-thirds or more members defect was retained. In its 170th Report, the Law Commission of India had presciently recommended deletion of both paragraphs 3 and 4. The Parliament thought it wise to delete only paragraph 3. The 255th Report endorsed the Parliament's view that the requirement of two-thirds members has prevented the misuse of paragraph 4.[19]

In the next section, I will document instances where the Law Commission's wishful thinking has come undone. The idea here is that if mergers can be managed easily, then the law does not serve its purpose anymore. As indicated above, such a law does more harm than good as it provides a cloak of legitimacy to undemocratic and illegal practices.

B. Speaker's Role

Paragraph 6 of the Tenth Schedule has been especially contentious ever since its inception as it refers the decision on disqualification to the Speaker/Chairman of the House. While adopting the British parliamentary model, among other traditions that India has not been able to emulate is that of a fiercely non-partisan speaker. This places

[17]Jagjit Singh v State of Haryana, (2006) 11 S.C.C. 1.
[18]Rameshwar Prasad v Union of India & Anr, (2006) 2 S.C.C. 1.
[19]*Supra* note 10, at ¶ 5.17.

an enormous stress on the constitutional expectations embedded in the Speaker's office. The Speaker is tasked with making an impartial decision on the disqualification of a member who has defected.

This idealism was challenged as being blatantly unconstitutional in *Kihoto Hollohan v Zachillhu* ("***Kihoto Hollohan***") before a five-judge Constitution Bench of the Supreme Court.[20] It was contended before the Court that Paragraph 6 of the Tenth Schedule tasks a speaker with the resolution of an electoral dispute.[21] Since speakers are nominees of political parties and are not even required to resign from their parties, it was argued that independence, fairness and impartiality of the speaker would always remain shrouded in doubt, which is undeniably not consistent with the principles of a parliamentary democracy. The Supreme Court did not accept this argument.[22]

On the other hand, the Attorney General argued that the rights and duties under question are in 'political thickets' and courts should refrain from passing judgements on them.[23] The argument essentially revolved around the separation of powers and the Court was requested not to minimise the separation. Separation of powers is a critical pillar of a democracy. The late Justice Antonin Scalia of the United States Supreme Court was fond of remarking that separation of powers is much more important than the Bill of Rights enshrined under the American Constitution.[24] The Supreme Court of India has conferred upon the principle of separation of powers its highest recognition – holding it to be a part of the basic structure of the Constitution of India.

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[20]Kihoto Hollohan v Zachillhu,(1992) S.C.R. (1) 686.
[21]*Id.*
[22]*Id.*
[23]*Id.*
[24]Peter Berkowitz, *The Scalia Lecture: "Liberal Education, Law, and Liberal Democracy",* YOUTUBE, https://www.youtube.com/watch?v=xANFaqH_PYQ.

In the line of cases starting from *Kihoto Hollohan,* the Supreme Court has consistently opined that "*judicial interference in the democratic processes*" should only be a last resort. I will, in Section IV, attempt to link the need for maintaining separation of powers to striking off the entire Tenth Schedule. For the purposes of the present discussion on the historical role of the Speaker, it suffices to say that the Speakers have not covered themselves in glory while exercising powers vested in them under the Tenth Schedule.

Of late, the Supreme Court has also come to accept that "*there is a growing trend of the Speaker acting against the constitutional duty of being neutral*."[25]

IV. STRESS-TESTING THE TENTH SCHEDULE

In this section, I have attempted to trace the recent constitutional crises in states where the electorate returned a hung assembly. What followed has routinely stress-tested the Tenth Schedule.[26] The results of these stress-tests are not encouraging. Two conclusions can be drawn from this- first, that a stronger anti-defection law is the need of the hour; and second, that political defection is a way of political life and thus, should not be censured. Section VI will delve deeper into these two possibilities and show why the second conclusion is more apt. This section is descriptive and paints a picture of the ground situation.

A. Maharashtra

[25]Shrimanth Balasaheb Patil v Hon'ble Speaker, Karnataka Legislative Assembly, Writ Petition (C) No. 922 of 2019, ¶152 (i).
[26]Chakshu Roy, *Explained: The Limits of Anti-Defection*, PRS LEGISLATIVE RESEARCH (Jul. 25, 2019), https://www.prsindia.org/media/articles-by-prs-team/explained-limits-anti-defection.

The pre-poll alliance between the Bharatiya Janta Party and the Shiv Sena failed to stake claim to form the government due to differences over the post of the Chief Minister after the results of the fourteenth Maharashtra legislative assembly elections were announced.[27] Subsequently, with the alleged support of the Nationalist Congress Party ("**NCP**"), Mr. Devendra Fadnavis took oath of office. It soon emerged that the legislative party leader of the NCP, Mr. Ajit Pawar did not have the support of his party.[28] Thus the task before Mr. Ajit Pawar was cut out. He had to prove that he had a two-thirds majority of the NCP MLAs with him for his alleged revolt to be read as a merger under Paragraph 4 of the Tenth Schedule.

The opposition approached the Supreme Court for an expedited floor test. It is interesting to note here that the very applicability of the anti-defection law to the situation was called into question by some quarters.[29] It was argued that the anti-defection law is only applicable to members once they have taken oath. This was forcefully repudiated as a state assembly stand constituted as soon as the Election

[27]Gyan Varma, *Uddhav-Led Shiv Sena-NCP-Congress Govt Wins Floor Test In Maharashtra Assembly*, LIVEMINT (Nov. 30, 2019), https://www.livemint.com/politics/news/uddhav-led-shiv-sena-ncp-cong-govt-wins-floor-test-in-maharashtra-assembly-11575106900020.html.

[28]Sharad Pawar, *Tweet dated Nov. 23, 2019, 9:27 AM*, TWITTER https://twitter.com/PawarSpeaks/status/1198088033150500865; Sharad Pawar, *Tweet dated Nov. 24, 2019, 5:57 PM*, TWITTER, https://twitter.com/PawarSpeaks/status/1198578943525187585.

[29]Press Trust of India, *Maharashtra Govt Formation: Experts Differ Over Timing of Anti-Defection Law Coming Into Force*, HINDU BUSINESS LINE (Nov. 23, 2019), https://www.thehindubusinessline.com/news/maharashtra-govt-formation-experts-differ-over-timing-of-anti-defection-law-coming-into-force/article30061743.ece.

Commission of India declares the results.[30] The Supreme Court ordered a floor test with a *pro tem* Speaker.[31]

a) Role of the speaker

The Speaker has an outsized role in any deliberations regarding defection. This came to the fore in the Maharashtra episode as the Speaker, once elected would have the right to grant legitimacy to one political faction over the other. Had the Supreme Court not ordered an expeditious floor test, it was possible for Mr. Ajit Pawar to have issued a whip before his party brass completed the formalities to dethrone him as the legislature party leader. A floor test in that situation would have been preceded by the election for the Speaker's post. In such an election, the fear of defying Mr. Pawar's whip could possibly have forced the NCP MLAs to toe his line. Those MLAs who voted against the whip could be immediately disqualified by a Speaker partial to Mr. Pawar.

Once the Speaker's office is taken out of the vacuum that the *Kihoto Hollohan* majority believes it resides in, and into the real world, the paths are clear for a strategically engineered defection to work towards the numerical threshold of a merger. While the Speaker's decision will of course be subject to judicial review; by the time it comes to pass, political ground realities might change. It is a real possibility that the courts may find themselves unable to return the parties to the position they were in before the dispute. In the current

[30]Aditya Sharma, *Political Masterstroke or Risky Plunge,* NEWS18 (Nov. 25, 2019), https://www.news18.com/news/politics/political-masterstroke-or-risky-plunge-bjp-ajit-pawar-move-comes-laced-with-hurdle-of-anti-defection-test-2397577.html.
[31]Debayan Roy, *Maharashtra Floor Test Tomorrow, Appoint Pro-Tem Speaker: Supreme Court,* THE PRINT, (Nov. 26, 2019), https://theprint.in/india/governance/judiciary/maharashtra-floor-test-tomorrow-appoint-pro-tem-speaker-supreme-court/326325/.

situation, a lot hinges on the election of the Speaker turning it into a *de facto* confidence vote.[32]

b) Sentinel on the qui vive

In *Union of India v Harish Chandra Rawat*, the Supreme Court described its role as "*sentinel on the qui vive*", i.e., on alert to ensure that constitutional functionaries imbibe and display constitutional morality.[33] In its judgement on the Maharashtra issue, the Supreme Court noted the possibility of horse trading if the floor test is delayed.[34]

The Supreme Court relied on its earlier decisions in *Jagadambika Pal v Union of India*[35]and *Anil Kumar Jha v Union of India*[36]to announce an immediate floor test to be conducted by a *pro tem* speaker. The Court took care to demarcate the agenda of the session and directed the session to be live telecast with no secret ballot. An overview of these judgements of the Court indicates that the Court has had to take an increasingly assertive role to restore public confidence.

B. Goa

After the 2017 assembly elections in Goa, the INC had emerged as the single largest party, but the BJP had managed to form government with the support of independents, an ally, and two defections from the INC. The defectors were disqualified but won re-election as BJP candidates. In July 2019, ten out of the fifteen INC MLAs merged their legislature party with the BJP. The Speaker promptly green-lighted this under Paragraph 4 of the Tenth Schedule. This has led to

[32]Gaurav Vivek Bhatnagar. *Sharad Pawar's Actions, Speaker's Election Will Now Determine Maharashtra Politics*, THE WIRE (Nov. 23, 2019), https://thewire.in/politics/maharashtra-sharad-pawar-floor-test-speaker.
[33]*Supra* note 22.
[34]Shiv Sena and Ors v Union of India and Ors.,Writ Petition (C) No. 1393 of 2019.
[35]Jagadambika Pal v. Union of India, (1999) 9 S.C.C. 95.
[36]Anil Kumar Jha v. Union of India, (2005) 3 S.C.C. 150.

the curious situation where there are more ex-INC MLAs than original BJP MLAs in the BJP legislature party.[37]

The provisions of Paragraph 4 indicate that when a party A merges with a party B, the said merger will be valid in the eyes of law only if two-thirds of members of the said party A agree to the merger. What happened in Goa, and in Telangana before that, is the reverse. Two-thirds of MLAs were willing to defect and this was passed off as a merger.[38] In a way, the cart is now before the horse and the Supreme Court has washed its hands off the matter leaving it to the Speaker's wisdom.

There is however ample guidance in the Court's earlier judgements. For instance, in *Rajendra Singh Rana v Swami Prasad Maurya*, the Court was asked to adjudicate whether there had been a split. The numerical threshold had been met. The five-judge Constitution Bench held that the MLAs who claim there has been a split have to make a *prima facie* case by producing relevant materials that there had indeed been a split in the original party.[39] The Court was not saying anything radically new. It was merely endorsing its earlier judgement in *Jagjit Singh v State of Haryana* where it had categorically stated that a split in the original party was a pre-condition for recognising a split in the legislature party.[40] The *Jagjit Singh* judgement does not leave the question at that. It goes on to specify that a split in the national party will be relevant and not a split at the state level.[41] In practice, the law has been turned on its head.

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[37]Devika Sequeira, *Goa's Voters Lose as BJP Deliberately Misreads Anti-Defection Law*, THE WIRE (Jul. 13, 2019), https://thewire.in/politics/bjp-deliberate-misreading-of-anti-defection-law-goa.
[38]*Supra* note 22.
[39]Rajendra Singh Rana v Swami Prasad Maurya (2007) 4 S.C.C. 274.
[40]*Supra* note 17.
[41]PDT Achary, *India's Politicians Have Turned the Anti-Defection Law on Its Head*, THE WIRE (Jun. 13, 2019), https://thewire.in/politics/anti-defection-law-telangana-congress.

C. Karnataka

The Karnataka Assembly saw a string of defections from the INC-led coalition in 2019. However, the defecting MLAs resigned their posts before the Speaker could disqualify them under the Tenth Schedule. The Speaker belonging to the INC-led coalition pulled out every trick in the book to prevent the MLAs from resigning – at one point even not turning up at his office so he would not have to accept the resignations. In the meantime, disqualification proceedings were initiated by him.

This was prompted by the realisation that resignation of the members would not only inflict a death blow on the government but would also allow the members to immediately join a potential BJP-led government as they would not attract any disqualifications under the Tenth Schedule. A disqualified member cannot accept a ministership or any other remunerative political post during the remaining term of the legislature unless she gets re-elected.[42] By the time the Supreme Court settled the issue, the INC-led coalition had already fallen. The Court held that disqualification germinates at the earliest instance of defection and "*does not vaporise by tendering a resignation letter to the Speaker*".[43]

V. LAISSEZ-FAIRE ON FOREIGN SHORES

India is among the very few countries that have enacted a wide-ranging law to stifle dissent by an elected representative. In the Karnataka judgement, the Supreme Court has noted with satisfaction that Israel and Canada have followed India in legislating an anti-defection law. Given that the Indian law suffers from many infirmities

[42]The Constitution (Ninety-first Amendment) Act, 2003(India).
[43]*Supra* note 22.

– it is a worthy endeavour to take another look at the *laissez-faire* approach adopted by the United States and the United Kingdom. These countries are being chosen because the Indian political system is caught between the two.

A. United Kingdom

In the United Kingdom, the Amalgamated Society of Railway Servants was in the practice of colleting contributions from its members to support candidates who would lend it a sympathetic ear. Campaign finance in 1910 United Kingdom had advanced to the extent that this registered trade union required all its candidates to agree in writing to submit themselves to the Labour Party's whip. The matter reached the House of Lords which called into question the Society's competence to frame such a rule. Lord Shaw however, answered the question at the heart of the matter. He held that subjecting an elected representative to the decision of her parliamentary party was not "*compatible with the spirit of parliamentary Constitution or with the independence and freedom which…lie at the basis of representative government*."[44]

While Brexit has been a divisive issue for the British House of Commons, the House has seen multiple instances of MPs defying their party line. A MP defected to the opposition during the Prime Minister's speech and effectively rendered the government as a minority one.[45] This was despite a widely-reported directive issued a day before which warned that any MP defying the whip would be

[44]Amalgamated Society of Railway Servants v Osborne, 1910 AC 87.
[45]British Broadcasting Corporation, *Brexit: Tory MP Defects Ahead of Crucial No-Deal Vote* (Sept. 3, 2019), https://www.bbc.com/news/uk-politics-49570682.

expelled from the party and would therefore be unable to stand in the election as a candidate of the Conservative party.[46]

B. United States of America

Across the proverbial pond, in the United States of America, defection is not an extraordinary political event. The media coverage following any defection usually provides centre-stage to the defector's concerns rather than vilifying her or painting her defection as a stroke of political genius from the side of the floor that she joins. That this happens despite it being a presidential political system stands testimony to the personality cult in Indian politics that distorts our reading of a defection. The impeachment of the incumbent President Donald J. Trump was, by all means, a crucial political event. However, defections by the Democratic members of the House hardly caused a murmur.[47]

There are obviously defections that cause a political storm but these are often seen as an exercise of free choice and political independence. A case in point is the late Senator John McCain's iconic thumbs-down vote against his Republican Party's attempts to paralyse the Affordable Care Act passed by the Democratic President Barack Obama.[48] The political commentary that followed focused on

[46]British Broadcasting Corporation, *Brexit: Government Wants To Purge Tory Rebels, Says Ex-Minister Gauke*, BBC(Sept. 2, 2019), https://www.bbc.com/news/uk-politics-49543430.

[47]Dartunorro Clark and Alex Moe, *2 Democratic Defectors Join GOP In Voting Against Trump Impeachment Resolution*, NEWS BROADCASTING CORPORATION (Oct. 31, 2019), https://www.nbcnews.com/politics/trump-impeachment-inquiry/2-democratic-defectors-join-gop-voting-against-trump-impeachment-resolution-n107468.

[48]Peter W Stevenson, *The Iconic Thumbs-Down Vote That Summed Up John McCain's Career*, WASHINGTON POST (Aug. 27, 2018), https://www.washingtonpost.com/politics/2018/08/27/iconic-thumbs-down-vote-that-summed-up-john-mccains-career.

the Senator's own cancer diagnosis and his long-standing rhetorical independence from his party.[49]

VI. CONCLUSION

As discussed before, the spectacular failure of the anti-defection law in stemming horse-trading leads to one of two paths – strengthen the law, or ditch it altogether.

The law in its present form has reached its carrying capacity. Strengthening it would make sense in a political ecosystem where it is expected to withstand reasonable pressure. As recent instances have shown, the law is beyond saving. While the Karnataka judgement censures resignations made as an afterthought, it does not engage with the possibility of a resignation that is made without any murmur of defection. In such an instance, a member can resign at will and cross the floor. Nothing in the Constitution prevents her from joining the Council of Ministers on the side she has defected to. The only way of preventing this is enacting legislation to disqualify her from joining the ministership during the remaining term of that legislature. Such a move would clearly go too far as it would curtail the political freedom and the fundamental right of association granted by the Constitution. One may object to this by saying that such a move would only limit the right to association since there is no concomitant fundamental right to ministership. However, such an objection would be deeply flawed as the constitution does not envisage multiple classes of citizens with different degrees of freedom of association. Thus,

[49]Emmarie Huetteman, *McCain Hated Obamacare. He Also Saved It* (Aug. 27, 2018), NEWS BROADCASTING CORPORATION, https://www.nbcnews.com/health/obamacare/mccain-hated-obamacare-he-also-saved-it-n904106.

curtailing the exercise of the right to association of the hypothetical defector does not survive that very basic test.

It is also pertinent to point out here that while defection is embedded in the national psyche as an unpardonable offence, the disqualification incurred is washed away by re-election. This is not a far cry from the system in UK where a defector is disqualified from contesting on his old party's ticket in the next election. There is immense public interest in allowing the defector to continue in the House and wait her turn at the hustings. For one, it makes her all the more responsive to the constituency that elected her and faced her defection. In increasingly personality-centric election campaigns, it will ensure that the focus is not lost from local issues.

The American experience also holds an important lesson. In a deeply partisan political environment, cross-voting on important issues builds the public's overall trust in the system. India is witnessing a political consolidation at the federal level that has not been seen for at least three decades. This has led to an erosion of accountability and a tendency to silence all forms of criticism of the government.[50] In such a political climate, abolishing the anti-defection law will allow legislators a real voice. More importantly, it will allow for course correction from within the legislative branch. The current reliance on judiciary is a worrying trend as political reality moves faster than judicial processes leaving the courts as, more often than not, spectators in a zero-sum political game where the ultimate loss is the public trust in both legislative and judicial systems.

The Indian response to defection is warped due to horse-trading that immediately follows an election. However, the Indian electorate has also maturated since the enactment of the anti-defection law and is

[50]Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Part-State Fusion in India*, LAW AND ETHICS OF HUMAN RIGHTS (2020), https://ssrn.com/abstract=3367266.

now capable of sensing political opportunism and responding appropriately.[51] The winds of change are not going to start blowing from the government benches as the Tenth Schedule has become an important weapon in its political arsenal. It is incumbent upon the Supreme Court to constitute a seven-judge Constitution Bench at the earliest opportunity to take a fresh look at the law, keeping in mind the state of Indian democracy and the track-record of the constitutional functionaries tasked with protecting it.

[51]Karnataka Bureau, *People Pose Tough Questions to Disqualified MLAs Contesting Karnataka Bypolls*, THE HINDU (Nov. 29, 2019), https://www.thehindu.com/news/national/karnataka/people-pose-some-tough-questions-to-disqualified-mlas-contesting-bypolls/article30109998.ece.

THE CITIZENSHIP (AMENDMENT) ACT, 2019 – A CONSTITUTIONAL DEFENCE

Rahul Nair[*]

Abstract

The Citizenship (Amendment) Act, 2019 (CAA) has been the subject of tense contention in India prior to, and ever since, its enactment. The Act grants protection (and a fast-track to citizenship) to certain categories of illegal immigrants. It provides citizenship on the basis of religion, most significantly excluding Rohingya Muslims, Sri Lankan Tamils, and the Ahmadiyas in Pakistan. Fears stoked by the Act, along with proposals for a National Register of Citizens (NRC) which could allegedly lead to mass deportation and atrocity have caused widespread protests. But the protests against the CAA have a common theme: a reclamation of the Constitution and constitutional values. This reclamation is misguided. A constitutional reclamation can only take place with due respect to the provisions of the constitutional text and to the specific history of its adoption. I propose a different constitutional reclamation, involving the recovery of the text, the history, and the context of the Constitution with a full

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understanding of its broad political objectives as well as the unique and contentious nature of its public persona. I attempt a constitutional defence of the CAA, based both on the low-threshold of constitutionality and the relatively higher threshold of best practices found in international law.

I. INTRODUCTION

"*[L]aw, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law: which could make every single judge a legislator, and introduce most infinite confusion*."- William Blackstone.[1]

To say that the Citizenship (Amendment) Act, 2019[2] ("**CAA**" or "**Act**") has not been well received by a large section of people would be an understatement. The widespread protests[3] against, and after, its enactment indicates that something must be terribly wrong, either with the Act[4] or with the way the Act is perceived.[5] It is nobody's case that the intent of the government behind the CAA is

[1]WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 62 (4th ed. 1770).
[2]The Citizenship (Amendment) Act, 2019 (India).
[3]Bikash Singh, *Student unions of NE universities call for class boycott against CAA*, THE ECONOMIC TIMES, (Jan 22, 2020),https://economictimes.indiatimes.com/news/politics-and-nation/student-unions-of-ne-universities-call-for-class-boycott-against-caa/articleshow/73510535.cms.
[4]Rasia Hashmi, *What's wrong with Citizenship Amendment Act*, THE SIASAT DAILY, (Dec. 14, 2019), https://www.siasat.com/whats-wrong-citizenship-amendment-act-1762596/.
[5]Baijayant 'Jay' Panda, *The protesters have got it wrong. Understand the logic of the CAA*, HINDUSTAN TIMES, (Jan 1, 2020), https://www.hindustantimes.com/columns/the-protesters-have-got-it-wrong-understand-the-logic-of-the-caa/story-qNG3578YUm7XYNfDeYBcBO.html.

extraordinarily pious. Whether the Act is desirable, however, is a distinct question from its constitutionality. In this essay, I do not seek to analyse whether the CAA is desirable, but instead to defend its constitutionality. The Act's opponents, and those injured by it, always have the recourse of protest, of democratic debate, and resistance. Instead, I will defend the CAA's constitutionality. This is, perhaps, an unpopular position. But the defence of unpopular minority positions is the *raison d'etre* of the legal profession.

Much of the Government's position rests on the intention and the scope of the CAA. Indeed, the legislative history explains why. In 2015 and 2016 respectively, the Central Government issued notifications which exempted certain communities of illegal immigrants, namely Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, who arrived in India on or before December 31, 2014, from the provisions of the Passport (Entry into India) Act, 1920[6] and the Foreigners Act, 1946.[7] Those provisions authorised the Government to deport and imprison illegal immigrants for lacking valid documents. Under the prevailing law, an illegal immigrant is a foreigner who: (i) enters India without valid travel documents, like a passport or (ii) enters India with a valid passport or other travel documents but remains therein beyond the permitted period of time.[8]

The Citizenship (Amendment) Bill, 2016,[9] was introduced in the Lok Sabha on 19 July 2016, which sought to give citizenship to illegal immigrants belonging to the same six religions of the three countries by tweaking the Citizenship Act of 1955. However, the Bill lapsed with the dissolution of the 16th Lok Sabha.

[6]The Passport (Entry into India) Act, 1920(India).
[7]The Foreigners Act, No. 31 of 1946(India).
[8]The Citizenship Act, No. 57 of 1955(India).
[9]The Citizenship (Amendment) Bill, 2016(India).

Subsequently, the Citizenship (Amendment) Bill, 2019, was tabled in the Lok Sabha in December 2019, enacted on 12 December 2019, and came into force on January 10, 2019. The Act deviates from the original Bill in two ways. First, it excludes certain areas in the North-East. Second, it reduces the minimum threshold required to undergo the process of naturalisation, from at least 11 out of 14 years to at least 5 out of 14 years, thus, providing an accelerated path to acquire citizenship.

II. ARTICLE 14 – THE PRIMARY BONE OF CONTENTION

Since it is well established that the CAA does not violate Article 15 of the Constitution of India as it is enjoyed exclusively by the 'citizens' of this country, a term which illegal immigrants fail to qualify, the author would now analyse from the purview of the constitutionality and conformity with Article 14, and the subsequent arguments that are made out of it. Article 14 of the Constitution mandates that no person shall be denied equality before the law or the equal protection of the law within the territory of India.[10] Article 14, and the concomitant classification tests, have acquired a normative prestige.[11] This doctrine resolves the seemingly paradoxical demand of legislative right to classify and the principle of constitutional generality. The two-pronged test that has been laid down by the Supreme Court to test whether a classification is reasonable is as follows –

[10]The Constitution of India, Art. 14 (India).
[11]Makhan Lal Malhotra v. Union, (1961) 2 S.C.R 120; Bishnu Charan Mukherjee and Anr. vs. State of Orissa, AIR 1952 Ori 11.

i) The classification must be founded on an intelligible differentia that differentiates one group (that is included) from the other (that is left out).[12]

ii) Such differentia must have a nexus with the object that is sought to be achieved.[13]

Thus, what is necessary is that there must be a rational relation between the distinction that is drawn and the object under consideration.

Employing the equality before the law principle in a mechanical manner, notwithstanding the fact that not all persons are equal by nature, attainment or conditions may result in injustice.[14] The equality jurisprudence maintains that equal protection of the law could be granted to all persons who are similarly placed against each other. This form of an Aristotelian reading implies that equals should not be treated unlike and unlike should not be treated alike. Likes should be treated alike. [15]

Since a large section of people believe, however erroneously, that the CAA could not come under the wide umbrella of reasonable classification, it is imperative to list out the propositions that are established under this exception to gain clarity about the concept:

i) Reasonable classification does not necessarily require mathematical nicety and perfect equality;[16]

ii) Even a single individual may be in a class by himself on account of some special circumstances or reasons applicable

[12]The State of West Bengal vs Anwar All Sarkarhabib, 1952 SCR 284.
[13]Budhan v. State of Bihar, AIR 1955 SC 191; Harakchand v. Union of India, AIR 1970 SC 1453.
[14]Binoy Viswam Vs Union of India & Ors, AIR 2017 SC 2967.
[15]State of Karnataka v. B. Suvarna Malini, AIR 2001 SC 606 (India); Bihar Motor Transport Federation v. State of Bihar, AIR 1995 Pat 188.
[16]N.P. Basheer vs State of Kerala, (2004) 3 SCC 609.

to him and not applicable to others; a law may be constitutional even though it relates to a single individual who is in a class by himself;[17]

iii) that the legislature is free to recognize the degrees of harm and may confine the classification to where harm is the clearest.;[18]

iv) that there is always a presumption of constitutionality of an enactment and the onus is upon him who attacks it to show that there has been a clear violation of the constitutional principles;[19]

v) Geographical bases or according to objects or occupations or the like could also be reasonable ground for classification;[20] (it could also be established on the distinction between people).[21]

The intelligible differentia that the State makes under CAA is based on two distinct classification – First, the religion of the target community that has undergone religious persecution, which is a form of persecution that is internationally recognised. Second, this particular exercise limits its scope to only those neighbouring countries that have Islam as its state religion.

From the point of the nexus test, the author submits that the CAA fulfils the 'why' element, i.e., the social object, which is to protect the people who are being atrociously persecuted; it fulfils the 'what' element, i.e., the special treatment that would be provided, by granting the status of citizenship, and the 'whom' element, i.e., the criterion for identifying the class subjected to special treatment, by formally recognising religious persecution.

[17]Shri Ram Krishna Dalmia vs Shri Justice S. R. Tendolkar, AIR 1958 SC 538.
[18]*Id*.
[19]*Id*.
[20]*Id.*
[21]H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, 455 (4th ed. Vol. 1, 2013).

III. ALL PERSECUTION, ALL COUNTRIES?

Of the many reasons given as to why this particular amendment is unconstitutional, some of them are that the CAA fails to consider 'illegal migrants' who entered India after having faced non-religious persecution – e.g., persecution based on sexual orientation or political views and that it ignores those sets of illegal immigrants, who might have not necessarily come from India's neighbouring countries, but might still face some kind of persecution.[22]

This kind of distorted, unfair characterisation and misrepresentation of this particular policy is a classic example of a solution in search of a problem. This line of reasoning, for all practical purposes, suggests that for CAA to become constitutional, *inter alia*, it needs to grant citizenship to all illegal immigrants who have faced any kind of persecution coming from whichever part of the world. This conceptual utopian structure, which endorses the global citizenship model, severely limits and thereby undermines the sovereignty and integrity of India. It runs counter to the Law Commission Report, which notes that the entry of illegal immigrants and other undesirable aliens into India has aggravated the employment situation, distorted the electoral rolls and poses a grave threat not only to our democracy but also to the security of India, especially in the eastern part of the country and Jammu and Kashmir.[23] It flies squarely in the face of judicial pronouncements,[24] blatantly dilutes the intricate

[22]Abhinav Chandrachud, *Secularism and the Citizenship Amendment Act* (January 4, 2020). Available at SSRN: https://poseidon01.ssrn.com/delivery.php?ID=528094093074028102095006072093066027051081060000028091094064073023096064009064066087049101030035000120107087008006123064076076020058046015033064094003029093119093088020033042127002096078074003003100124029075002117100102102104004111094100072073077081106&EXT=pdf.

[23]B.P. Jeevan Reddy, One Hundred Seventy Fifth Report on The Foreigners (Amendment) Bill, 2000, 2, (2000).

[24]Sarbananda Sonowal v. Union of India, AIR 2005 SC 2920 (India).

jurisprudential nuances of the principle of equality, and disregards the mandate that the Constitution grants to the Parliament,[25] apart from being logically untenable.

Also, concerning the term political persecution, no administrative agency or Court has coined a uniform and coherent definition as to what could be considered as persecution based on political opinion. Thus, in the absence of such clear standards and tests, it would be difficult to discern the actual groups that are politically persecuted from those individuals who are taking advantage of this sweeping term that is an omnibus in itself.

IV. OVERLOOKING OTHER RELIGIOUS MINORITIES

Another proposition against CAA, that could be bifurcated into two parts is – Firstly, the CAA overlooks religious communities like Jews, and Muslim minorities like Shias and Ahmadiyas, who may have been persecuted in Afghanistan, Pakistan or Bangladesh.[26] Secondly, the fact that Muslim immigrants in India might not vote in favour of the Hindutva policies of the regime presently in power at the centre in India renders the CAA even more suspect.[27] In response, with regard to the exclusion of Jews, to lay bare some facts, according to a top National Database and Registration Authority ("**NADRA**") official of Pakistan, there are only about 745 registered Jew families in Pakistan[28] and Zablon Simintov is the one and only remaining Jew in

[25]The Constitution of India,Art. 11(India).
[26]*Supra* note 22.
[27]*Id.*
[28]Danish Hussain, *Pakistani man wins right to change religion from Islam to Judaism*, THE EXPRESS TRIBUNE, (March 27, 2017), https://tribune.com.pk/story/1366268/man-interfaith-parents-wins-right-religion-choice/.

Afghanistan.[29] It is judicially established that as long as the extent of over-inclusiveness or under-inclusiveness of the classification is 'marginal,' the Constitutional vice of infringement of Article 14 would not infect the legislation.[30] Such conceptually quixotic attitude of subjecting every law to the impossible perfectionist requirement has never found support from the Indian judiciary. Hence, this 'marginal' under-inclusiveness that would arise out of the absence of Jews under CAA would not vitiate the classification. Furthermore, while dealing with the case of Shias and Ahmadiyas, the distinction that is drawn is between religious persecution and sectarian violence. The Act concerns itself only with the 'religiously' persecuted minorities. While the legal drafting may sometimes be imperfect, but often the imperfection is the outcome of a compromise that is not the function of the courts to upset- or to make impossible for the future by dismissing the words used in the statutory law.[31] Deviating from the text of the act would only result in the occurrence of inconsistencies with the textually manifest object of the Act.[32] Moreover, citing Hindutva policies, political ideologies or election manifesto of a political party, when stripped of rhetoric, has no relevance and cannot be taken into account for determining the constitutional validity of any enactment, whether made by State or by Centre, as it is a purely legal issue and lies within the domain of the judiciary.[33]

[29]Aneesa Shaheed, *Afghanistan's Only Jew 'Worried' About The Country's Future*, TOLO NEWS, (30 May, 2018), https://tolonews.com/afghanistan/afghanistan%E2%80%99s-only-jew%E2%80%98worried%E2%80%99-about-country%E2%80%99s-future.
[30]*Supra* note 13.
[31]ANTONIN SCALIA & BRYAN A. GARNER, READING THE LAW: INTERPRETATION OF LEGAL TEXTS (2012).
[32]*Id.*
[33]*Supra* note 24.

V. A CASE OF SELECTIVE INCLUSION OF COUNTRIES

The issue of non-inclusion of, among others, Rohingyas from Myanmar and the Sri Lankan Tamils have been raised quite often, which the author believes are legitimate, yet poorly established concerns. While dealing with the Rohingyas, what needs to be taken into consideration is the imminent threat that this particular group poses to the security of the State. Bangladesh Prime Minister Sheikh Hasina stated that the over 10 lakh Rohingyas who fled from Myanmar to Bangladesh in the wake of 'persecution' are a 'threat to the security' of the entire region.[34] There have been reports that suggest that Rohingya terrorists have been fighting alongside Pakistani extremists in the Kashmir Valley.[35] In such an unsafe scenario, the Indian government has the discretion to decide on the interest of the State, protect the integrity of this land, and preserve its essence without its decision being cribbed and confined by a misplaced sense of arbitrariness, constitutional righteousness, and sanctimony.

There is no constitutional requirement that any such policy must be executed in one go. Policies are capable of being actualised in a staged way. More so, when the policies have a sweeping implementation and are dynamic in nature, their execution in a phased way is welcome, for it receives gradual and systematic willing acceptance and invites lesser resistance. The execution of such policy decisions in a phased manner is suggestive neither of arbitrariness nor

[34]PTI, *Rohingyas 'threat' to national and regional security*, says Bangladesh PM Sheikh Hasina, HINDUSTAN TIMES, (Nov 12, 2019, 06:23 IST), https://www.hindustantimes.com/world-news/rohingyas-threat-to-national-and-regional-security-says-bangladesh-pm-sheikh-hasina/story-HwYL5yrMda7yfa6IGZddRM.html.

[35]Dipanjan Roy Chaudhury, *Rohingya terrorists linked to pro-Pak terror groups in Jammu & Kashmir*, THE ECONOMIC TIMES, (Jul 12, 2018,), https://economictimes.indiatimes.com/news/defence/rohingya-terrorists-linked-to-pro-pak-terror-groups-in-jammu-kashmir/articleshow/55046910.cms?from=mdr.

of discrimination.[36] These are matters of public policy and not constitutional validity. The government might be of the view that after the end of the civil war in Sri Lanka, the situation of Sri Lankan Tamils has improved. Even if that is not the truth, there is nothing that stops the government from making a law in the future for absorbing those illegal immigrants (Sri Lankan Tamils), if the situation so warrants.

VI. THE CUT-OFF DATE – IN CONSONANCE?

The legal validity of the cut-off date is also being questioned as it appears to be discriminatory to the casual eye.[37] What needs to be taken into consideration is that any date chosen as a cut-off period does tend to be arbitrary to a certain extent, which is only inevitable.[38] Furthermore, there is no discrimination if the law applies by and large to all persons who come within its ambit as from the date on which it is made operative, regardless of it being prospective or retrospective in effect.[39] The Court should not normally interfere with the fixation of cut-off date by the executive authority as it lies within the domain of the executive unless such order appears to be on the face of it blatantly discriminatory and arbitrary.[40] There may be various considerations in the mind of the executive authorities due to which a particular cut-off date has been fixed, which could include, *inter alia*,

[36]Javed and Ors v. State of Haryana, AIR 2003 SC 3057: (2003) 8 SCC 369; Lalit Narayan Mishra Institute of Economic Development and Social Change v. State of Bihar, AIR 1988 SC 1136; Pannalal Bansilal Pitti v. State of AP, AIR 1996 SC 1023: (1996) 2 SCC 498.

[37]Varun Kannan, *The Constitutionality of the Citizenship (Amendment) Act – A Rejoinder*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY,(Jan 3, 2020), https://indconlawphil.wordpress.com/2020/01/03/guest-post-the-constitutionality-of-the-citizenship-amendment-act-a-rejoinder/.

[38]Union of India v. Parameswaran Match Works, 1975 SCR (2) 573.

[39]Hathising Mfg. Co. v. Union of India, AIR 1960 SC 923.

[40]Govt. of AP v. N. Subbarayadu (2008) 14 SCC 702.

administrative considerations. The Court cannot annul a statutory provision on the plea of unreasonableness, arbitrariness, etc. as it contains a certain level of subjectivity. Otherwise, the Court will be effectively substituting the wisdom of the legislature with its own, which is impermissible in our democratic constitutional framework.[41] Therefore it is expected that the Court would exercise judicial restraint and leave it to the executive authorities to fix the cut-off date. The Government must be left with some leeway and free play at the joints in this connection.[42] Also, after relaxing the naturalisation process for availing citizenship from 11 years to 5 years, it is only logical for the government to fix 31 December 2014 as the cut-off period, which effectively ensures that no targeted individual has to wait before benefitting from such a State measure, thereby making the cut-off date manifestly conjoined with the object that is sought to be achieved.

VII. THE UNKEPT PROMISE

It may not be out of place to mention here the Nehru-Liaquat agreement. This agreement, contracted between the governments of India and Pakistan in 1950, had provisions which enshrined, among other things, a full sense of security in respect of life and personal honour of the minorities of both sides.

This pact conferred a 'bill of rights' for the minorities of both countries which intended to address the following three issues,[43]

i) To alleviate the fears of the religious minorities on both sides.

[41]K.T. Plantation Pvt. Ltd. &Anr vs State of Karnataka, AIR 2011 SC 3430.
[42]*Supra* note 39.
[43]*Liaquat-Nehru Pact*, STORY OF PAKISTAN, (June 1, 2003), https://storyofpakistan.com/liaquat-nehru-pact/.

ii) To elevate communal peace.

iii) To create an atmosphere in which the two countries could resolve their other differences.

This agreement, as seen in subsequent years, was not implemented by Pakistan in its real spirit.[44] The result of the failure to honour the above bilateral commitment is the organised religious persecution taking place in Pakistan, that the world is witnessing today.[45]

In Lok Sabha, the members sat and debated at length on 13.02.1964 about the Nehru-Liaquat agreement and how it had failed to secure to the minorities of Pakistan their democratic and human rights. Our then Home Minister, Gulzari Lal Nanda voiced his concern about the status of the minority communities in Pakistan and stated that if Pakistan was failing to discharge its responsibilities, on human considerations, India will have to do something about it because India cannot take a purely legal and constitutional view.[46]

He further said that if they (the minority community) find it impossible to "*breathe the air of security in their country and they feel that they must leave it, then we cannot bar their way. We have no heart to tell them, 'You go on staying there and be butchered'. We cannot say that. We have no heart to say that. We cannot just see that they are perishing in the flames of communal fire and let them perish. No. It will be inhuman to do.*"[47]

[44]LOK SABHA DEBATES, Third Series, No. 4, (Feb 13, 1964) (speech of Gulzari Lal Nanda).
[45]PTI, *Religious persecution remains a silent feature of Pakistan: Rights activists*, THE ECONOMIC TIMES, (Oct 23, 2019), https://economictimes.indiatimes.com/news/international/world-news/religious-persecution-remains-a-silent-feature-of-pakistan-rights-activist/articleshow/71717526.cms.
[46]*Supra* note 43.
[47]*Supra* note 43.

There was thus no ambiguity about the intention of the Parliament concerning the matter of minorities in its neighbouring countries. The above debate provides an insight into the Parliament's thinking about the issue from the very beginning, which unsurprisingly culminated into a legislative bill (Citizenship Amendment Bill, 2019), that was later ratified. Thus, the CAA is, or so it seems, that alternative method that the government has adopted, which recognises and seeks to remedy the historical injustices meted against these minority communities of neighbouring countries without whittling down the rights of any other person.

VIII. OBLIGATION AND DISCRETION OF THE STATE

India has no obligation, neither constitutional nor international, to introduce an all-encompassing policy to grant the status of citizenship to any illegal immigrant, let alone a whole community of them. It is not a signatory to the Convention and the Protocol, which would have allowed for intrusive supervision of the national regime by the UNHCR.[48] It is crucial to note that the Refugee Convention recognises a well-founded fear of religious persecution as a form of persecution.[49] What the CAA has done is that it has taken this particular international principle and put it into a certain, specific context of India. Thus, the yardstick that is applied here cannot simply be disregarded as a mark of line based on whimsical grounds as it is not a generic, universalisable norm, but a specific formulation of standard. It seeks to protect a specific class of people by addressing a specific issue that is recognised by the International Convention

[48]UN High Commissioner for Refugees (UNHCR), The Refugee Convention, 1951: The *Travaux préparatoires* analysed with a Commentary by Dr. Paul Weis, art. 35, 1990, available at: https://www.refworld.org/docid/53e1dd114.html (25 January 2020).
[49]*Id.*

itself. Indeed, India does have a legal obligation to uphold the principle of non-refoulment, which plays a pivotal role in customary international law and to treat the illegal immigrants with a minimum amount of dignity and respect, while not violating any of the basic human rights at the same time. The CAA, it should be obvious, while granting citizenship to a certain set of people, violates no such international principle. By explicitly stating that the Act shall not be applicable in the tribal area of Assam, Meghalaya, Mizoram or Tripura and Manipur (later added)[50] and the area covered under *"The Inner Line"* notified under the Bengal Eastern Frontier Regulation, 1873, CAA ensures that it is not violative of the Assam Accord and also strives to preserve the indigenous cultural identity of the Northeast as a whole.

It is commonly acknowledged that issues on nationality fall within the domestic jurisdiction of States and form part of *domaine réservé*, whereby the State enjoys unfettered discretionary powers.[51] This was further reiterated in the case of *Daivid John Hopkins v. Union of India*, whereby the Court held that the Government of India enjoys unbounded power to refuse citizenship to anyone without assigning reasons whatsoever.[52] It was further of the opinion that Section 14(1) of the Citizenship Act, from which the Government derives the above powers is not ultra vires Article 14 of the Constitution of India.[53] Furthermore, if one were to peruse the Constituent Assembly Debates, it becomes quite clear as to the extent of deference that was shown by the framers of our Constitution to the Parliament in matters

[50]PTI, *Inner line permit regime extended to Manipur; President signs order*, THE ECONOMIC TIMES, (Dec 11, 2019), https://economictimes.indiatimes.com/news/politics-and-nation/inner-line-permit-regime-extended-to-manipur-president-signs-order/articleshow/72472117.cms.
[51]Mónika Ganczer, *International Law and Dual Nationality of Hungarians Living Outside the Borders*, 53 Acta Juridica Hungarica 316, 318 (2012).
[52]Daivid John Hopkins vs The Union of India and Others, AIR 1997 Mad 366.
[53]*Id.*

concerning citizenship. The relevant extract of the debate, as stated by Dr. B.R. Ambedkar is as follows–

"*The business of laying down a permanent law of citizenship has been left to Parliament, and as Members will see from the wording of Article 6 as I have moved the entire matter regarding citizenship has been left to Parliament to determine by any law that it may deem fit*." He further states, "*The effect of Article 6 is this, that Parliament may not only take away citizenship from those who are declared to be citizens on the date of the commencement of this Constitution by the provisions of Article 5 and those that follow, but Parliament may make altogether a new law embodying new principles. That is the first proposition that has to be borne in mind by who will participate in the debate on these articles. They must not understand that the provisions that we are making for citizenship on the date of the commencement of this Constitution are going to be permanent or unalterable. All that we are doing is to decide ad hoc for the time being*."[54]

It is to be noted that Article 5, which Ambedkar refers to, corresponds to the present-day Article 11 of our Constitution,[55] which authorises Parliament to 'regulate the right of citizenship by law' and enables it to make 'any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship'. The above quotation of Ambedkar serves to illustrate his view on matters pertaining to citizenship and exposes the sheer untenability of the critics' argument that questions the prerogative and discretionary power that is vested in the Parliament.

[54]Constituent Assembly Debate, Vol. IX, 177-178.
[55]The Constitution of India,Art. 11 (India).

IX. CLASSIFICATION ON HISTORICAL GROUNDS

It is well established that reasonable classification may also be based on historical reasons or events.[56] In *Mohan Lal's* case, the court said: "*It is easy to see that the ex-rulers formed a class and special legislation was based upon historical consideration applicable to them as a class. A law made as a result of these considerations must be treated as based upon a proper classification of such Rulers. It was based upon a distinction which could be described as real and substantial and it bore a just relation to the object sought to be attained*."[57]

The Statement of Objects and Reasons in the Citizenship Amendment Bill, 2019 states the following -

"*It is a historical fact that trans-border migration of population has been happening continuously between the territories of India and the areas presently comprised in Pakistan, Afghanistan and Bangladesh. Millions of citizens of undivided India belonging to various faiths were staying in the said areas of Pakistan and Bangladesh when India was partitioned in 1947. The constitutions of Pakistan, Afghanistan and Bangladesh provide for a specific state religion. As a result, many persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities have faced persecution on the grounds of religion in those countries. Some of them also have fears about such persecution in their day-to-day life where the right to practice, profess and propagate their religion has been obstructed and restricted. Many such persons have fled to India to seek shelter and*

[56]Bhaiyalal v. State of M.P., AIR 1962 SC 981; Lachman Das v. State of Punjab, AIR 1963 SC 222 (223).
[57]Mohanlal v. Man Singh, AIR 1962 SC 73.

continued to stay in India even if their travel documents have expired or they have incomplete or no documents."[58]

We can call this the truth without pausing to fight over the factual accuracy of the above section. It is precisely because of this interpretive cannon embedded in an unjust past and the historical background based on the aftermath of India's partition and the ensuing trans-border migration that continues to influence the contemporary political and regional issues, in ways of atrocious religious persecution which is still alive and kicking, that such an amendment was legislated, which has now become a law.

X. THE PROBLEM OF CONVERSION

Amongst the numerous criticisms that are being levelled against the CAA, there exists a nuanced proposition or a question of law which the author believes warrant a detailed analysis. Assume the following – a Pakistani Sikh woman, after being subjected to extreme religious persecution in Pakistan, flees that place and enters the Indian territory in the year 2012 and has been living as an illegal immigrant in India ever since. In the year 2013, she converts for reasons best known to her, to the religion of Judaism. While the Act reads –"*Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December 2014 and who has been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made thereunder, shall not be treated as illegal migrant for the purposes of this Act*";[59] the

[58] ¶2, Statement of Objects and Reasons, The Citizenship (Amendment) Bill, 2019.
[59] The Citizenship (Amendment) Act, 2019 §2(1)(b) (India).

question that needs to be answered is whether this woman in our example would be eligible to get citizenship under the Act. The author is of the opinion that a blend of textual and purposive interpretation of the Act needs to be undertaken to arrive at a decisive and informed conclusion. By adopting a strict textualist approach to the above section of the Act, it could be inferred from the *prima facie* reading that the relevant matter that should concern the executive, in this case, is whether the individual (illegal migrant) at the time of entry into India (on or before the 31st day of December 2014) belonged to any of the six communities mentioned in the Act. If that criterion is met, then the benefit of this Act must extend to that individual. Even if the textual meaning of the provision is discarded (though highly unlikely), it could be substituted with the idea of purposivism, which has been called 'the basic judicial approach these days'.[60] In such cases of ambiguity, the concerned authority must interpret the Act in such a manner that it infuses meaning into it. If an interpretation is made which effectively prohibits, say a religiously persecuted Buddhist who got converted to Judaism from obtaining citizenship, then such an interpretation, as is apparent, would have a debilitating and self-defeating effect. Thus, even a purposive approach would take us down a similar road of concluding that regardless of the act of conversion, the religion that one belonged to, at the time of entry into India, ought to be the one that needs to be the determining factor.

XI. CONCLUSION

When providing an expeditious process of availing citizenship to persecuted minorities belonging to Afghanistan, Pakistan and

[60]SUMMER R. S. ET AL., LEGAL REASONING AND STATUTORY INTERPRETATION: ROTTERDAM LECTURES IN JURISPRUDENCE, (Arnhem, Gouda Quint, 1989).

Bangladesh, one has to necessarily come to the conclusion that it has to be non-Muslims, and thus, it is not the other way around. While the concept of secularism, enshrined in the Preamble, is being repeatedly invoked, one must understand that the Preamble in itself is not a legally binding document. Hence, even if CAA is found to be violative of the Preamble, it couldn't be struck down based on that ground.

To say that CAA does not hold up to the high standards of public morality and therefore, one could completely disregard it as it is not a just law is wrong. However, to argue that this is what the law is, hence it is what it ought to be is too an incorrect position to hold.

Distinguishing these glaring conceptual errors, though important, would lead us nowhere. Viewing from an objective and dispassionate standpoint, it could be said that owing to its thriving democratic framework and secular credentials, India believes that it is its obligation to share the burden of the world by assisting those set of people who have been persecuted due to their religious identity. A classification made, *inter alia*, on religious lines meets the required international standards and falls within the four corners of our constitutional framework, and hence it stands validated.

INSEPARATE POWERS & DE FACTO OFFICES OF PROFIT: THE CONTORTED REALITY OF CONSTITUTIONAL IDEALS

Sehaj Singh Cheema[*]

Abstract

The Indian Constitution's purported subscription to the 'Separation of Powers' doctrine has been amongst the most contentious of our constitutional ideals. Inextricably linked to the doctrine, is the concept of 'Office of Profit' as a ground for parliamentary disqualification. Previous analyses of the practicalities of these concepts have focused solely on their manifestation in the topmost strata of the constitutional hierarchy. India's initial choice of the Parliamentary Executive system militated against strict power separation. Yet, judicial pronouncements contrarily insisted on the doctrine as manifest in our 'Basic Structure'. Preliminarily, the paper answers the question – 'What level of power-separation does the Constitution envisage?' Subsequently, the paper analyzes the State hierarchy at the grassroots-level, highlighting derogation from these principles in administrative practice. The 'Halqa In-Charge' system in Punjab is an

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instance of the general trend towards the hijacking of local executive power by non-ministerial legislators. MLAs have been elevated to virtual heads of the ground-level executive, becoming the locus of legislative and executive power at the same time. Through this subversion of the constitutional ideal of separate powers, legislators assume de facto 'offices of profit' without any legal implications. The Punjab case study presents blatant deviation from the power-division envisaged by the Constitution. Conclusively, the paper sets the tone for striking a middle ground between legislative oversight and executive autonomy at the grassroots.

I. INTRODUCTION

During the deliberations of the Constituent Assembly, Prof. K.T. Shah, a staunch advocate of the Presidential System, moved the motion for expressly incorporating the doctrine of 'Separation of Powers' ("**the Doctrine**") into the Constitution.[1] The proposal was met with opposition, predominantly on the ground that the Doctrine was incompatible with the Parliamentary Executive system, which had already been selected over the Presidential system. The Parliamentary Executive model, by its very nature, required assimilation of legislative and executive powers in the hands of

[1] *Constituent Assembly of India Debates, Volume VII*, ¶7.71.10, CONSTITUTION OF INDIA (Feb. 3, 2020), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-10?paragraph_number=27#7.71.27.

ministers. The adoption of this system nullified any possibility of incorporating a strict separation of powers.

Therefore, when Justice Beg proclaimed the Doctrine to be part of the Basic Structure of the Constitution,[2] the statement was bound to be ridden with qualifications. The only way of reconciling these diametrically opposite notions was to infer that the Constitution accepts the Doctrine in essence, subject to the exceptions that the system of Parliamentary Executive necessitates.

The history of the Doctrine is marked with numerous instances of disparagement, at the hands of renowned scholars such as Munro, De Smith, O.H. Phillips, etc. The Doctrine, in its stricter sense, was declared a 'constitutional myth',[3] 'possible neither in theory nor in practice',[4] and was relegated, by Western scholars, to the inconsequential columns of legal history.[5] However, when ground-breaking cases such as *Keshavananda Bharati*[6] ("***Keshvananda***") shifted the focus to safeguarding, in theory and practice, the principles of constitutional law, the Doctrine rose almost like a phoenix from the ashes, securing its place within the 'Basic Structure'. Although concepts such as judicial review, delegated legislation and, administrative adjudication, which technically militate against the Doctrine, grew with considerable force, the Doctrine was, in essence, appreciated by the judiciary in numerous cases.[7]

[2]Keshavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[3]O. Hood Phillips, *A Constitutional Myth: Separation of Powers*, 93 Q. L. REV. 11 (1977).
[4]A.W. BRADLEY, CONSTITUTIONAL AND ADMINISTRATIVE LAW 8 (14th ed., 2007).
[5]A.K. Ganguly, *Separation of Powers and Judicial Activism*, 9 SCC J. 38, 40 (2013).
[6]Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr. (1973) 4 SCC 225.
[7]Indira Gandhi Nehru v. Raj Narain, (1975) 2 SCC 159; Namit Sharma v. Union of India, (2013) 1 SCC 74; State of T.N. v. State of Kerala, (2014) 12 SCC 696.

II. THE CONSTITUTIONALLY EXPECTED EXTENT OF POWER-SEPARATION

The position of the Doctrine within India's constitutional fabric is itself a point of contention. However, a fairly accurate proposition would be that the Doctrine's underlying idea- ensuring accountability by preventing power concentration- is of undeniable significance in answering questions of constitutional import.

In the succeeding sections of the paper, it will be averred that the current power arrangements, at the ground level, are tantamount to an absolute disregard of the constitutional expectation that the powers of the State vest in separate entities. However, before such a conclusion is reached, it becomes imperative to discover exactly the extent of power-separation that the Constitution envisaged. How strictly should the Doctrine be applied while analysing the present division of powers is the query that necessarily requires resolution before concluding that the said division violates the Doctrine.

Theoretically, and in a strict sense, the Doctrine requires the three branches of the government to be virtually independent of each other.[8] However, in its strictest sense, Montesquieu's formula becomes unworkable, leading to frequent constitutional deadlocks.[9] The obvious shortcomings of the strict application of this has led many a scholar to conclude that even Montesquieu himself did not advocate the complete separation of powers.[10] He roughly sought to pre-empt three possible combinations of powers – judicial and executive, legislative and judicial, legislative and executive.

[8]M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 13 (1st ed., 1967).
[9]H. BARNETT, CONSTITUTION AND ADMINISTRATIVE LAW 94 (6th ed., 2006).
[10]IVOR JENNINGS, LAW AND THE CONSTITUTION 23 (1st ed., 1933).

From the perspective of the framers of the Constitution, the Doctrine retained significance to the extent that it pre-empted the first two combinations, ensuring an independent judiciary, free from any intrusions of either the executive or the legislature.[11] However, the fear of a subjugated judiciary had already been allayed by the incorporation of Article 50 and its accompanying debates.[12] Therefore, even discounting the Doctrine's presence, the framers had already ensured, by other constitutional provisions, the insulation of the judicial wing from the other two wings.

Thus, the only doctrinal requirement which remained to be considered was that of separating the combination of legislative and executive power. However, since this combination was a sine qua non of the Parliamentary Executive system, the framers dismissed this aspect of the Doctrine as being inapplicable in India.[13] The President/Governor, the executive head, was to be a handmaid of the Council of Ministers, who introduced and voted on legislation in the Parliament/Legislative Assemblies. This fundamental arrangement was antithetical to the third separation proposed by the Doctrine. The Council of Ministers, at the top of the constitutional hierarchy, was required to be possessed with a combination of two powers- legislative and executive. Therefore, the framers' consideration of the third separation was restricted to the topmost layer of the constitutional hierarchy, in which the said separation was clearly impossible. This resulted into the framers being dismissive of the third separation.

In their zeal to reject the Doctrine's third separation, because of its incompatibility with the topmost level of power-division (between the Council of Ministers and the President/Governor), the framers overlooked the possibility of the third separation being violated at the grassroots level. Although ministers were constitutionally ordained to

[11] *Supra* note 1, at ¶7.71.45.
[12] *Supra* note 1, at ¶7.60.44.
[13] *Supra* note 1, at ¶7.71.27.

wield executive and legislative power, the possibility of non-ministerial legislators intruding into the executive's sphere was overlooked by the framers. Ignorant of such possibilities, the framers dismissed the Doctrine from our Constitution except to the extent that it called for a separation of the judicial wing from the executive.

The deficiencies of this hasty dismissal came to the fore during Indira Gandhi's era. The powers of the judicial wing were sought to be constricted by a Parliament clearly on the offensive. As the Legislature and Judiciary wrestled for authority, umpteen instances were observed where legislation was enacted specifically to override the judicial verdict. It was then, firstly, that scholars and judges employed the Doctrine to bolster the cause of the judiciary, that has the final say in constitutional interpretation, unimpeded by Legislative counterattacks.[14] As the fog of the constitutional conflict cleared, it became clear that the Doctrine was of much greater import than was initially acceded by the framers. This realization culminated into the Doctrine's inclusion in the 'Basic Structure', per the *Keshavananda* ruling.

Affronts to the finality of judicial verdicts by legislative nullification have been recurrent in recent times. As recently as 2014, Kerala's state legislature sought to nullify the Supreme Court's verdict respecting the prescribed water storage level in the Mullaperiyar Dam.[15] When a legislation was passed, substantially aimed at nullifying the Court's earlier verdict, the Court aptly highlighted the instance as a blatant violation of the Doctrine (and therefore, the Basic Structure). The legislation was equated to an attempt by the Legislature to assume judicial power, a phenomenon which is constitutionally proscribed.

[14]V.G. Ramachandran, *The Reshaping of the Supreme Court*, 1 SCC J. 79 (1970).
[15]State of T.N. v. State of Kerala, (2014) 12 SCC 696.

As the Doctrine presently stands within India's constitutional ethos, it mainly serves as a bulwark against non-accountability. This stance is best captured in the Supreme Court's own words in various rulings - "*The Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity*",[16] but has done so "*in a broad sense*",[17] with the aim to "*achieve the maximum extent of accountability of each branch of the Government*."[18] Thus, "*till this principle of accountability is preserved, there is no violation of separation of powers*."[19]

In short, the Constitution broadly demarcates the remit of the three branches, allowing minor overlaps where accountability is not compromised. The unexceptionable expectation of the Constitution is that the three powers vest in distinct entities, and neither transgress into another's sphere, barring emergent situations, so as to affect a strict regime of accountability of all entities.

The Doctrine, in its modern sense, has become the 'doctrine of functional separation', explicated in 'The New Separation of Powers - A Theory for the Modern State' by Eoin Carolan,[20] and by P.A. Gerangelos in 'The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations'.[21] The modern Doctrine also, essentially, aims at preventing the concentration of power.[22] Therefore, a combination of the quintessential functions of any of the legislative, executive or judicial

[16]Ram Jawaya Kapur v. State of Punjab, (1955) 2 SCR 225.
[17]Indira Gandhi Nehru v. Raj Narain, (1975) 2 SCC 159.
[18]Bhim Singh v. Union of India, (2010) 5 SCC 538.
[19]Bhim Singh v. Union of India, (2010) 5 SCC 538.
[20]EOIN CAROLAN, THE NEW SEPARATION OF POWERS - A THEORY FOR THE MODERN STATE (2009).
[21]PETER A. GERANGELOS, THE SEPARATION OF POWERS AND LEGISLATIVE INTERFERENCE IN JUDICIAL PROCESS, CONSTITUTIONAL PRINCIPLES AND LIMITATIONS(2nd ed., 2009).
[22]Ashwani Kumar v. Union of India, (2019) SCC OnLine SC 1144.

branch would be inadmissible even under the modern version of the Doctrine.

III. EXECUTIVE LEGISLATORS AND THE IMPOSSIBILITY OF ACCOUNTABILITY

Under the Indian Constitution, the executive heads of the government (the ministers) are supposed to be accountable to the legislature. The ground-level executive, which comprises of the District Magistrates, the Sub-Divisional Magistrates, Municipal Authorities, etc. are answerable only to the concerned ministers which head their respective departments. The ministers have the final say in executive decisions. Their power is sufficiently checked by their answerability. However, nowhere does the Constitution envisage a delegation of executive power to non-ministerial legislators. A legislator who does not head a ministry, theoretically and ideally, must wield no direct power over the executive's functioning.

If the non-ministerial legislator was allowed the usurpation of executive power, such a phenomenon would strike at the core of the notion of parliamentary accountability. The parliamentarian, who was theoretically supposed to hold the executive to account, would be partaking in the exercise of executive power himself, thus leaving no entity for scrutiny. The legislator goes from being the sentinel to the malfeasant himself. Any possibility of accountability evaporates for the simple reason that those who partake in the exercise of a power cannot scrutinize that exercise themselves. This, in essence, is the conundrum which gives rise to the Doctrine's underlying rationale.

The conundrum also shifts the light of enquiry to a closely-linked concept of parliamentary disqualification based on the occupation of

'office of profit'. The concept owes its inception to the Act of Settlement, 1701.[23] The underlying rationale of the disqualification, firstly, is that if legislators are beholden to the executive for being conferred profitable positions, it impairs their ability to legislate without fear or favor.[24] More importantly, the disqualification aims at ensuring adherence to the Doctrine. The Doctrine and the 'Office of Profit' are interlinked concepts.[25] When a legislator is bestowed with executive power, he, by default, transgresses the demarcation of powers under the Constitution. He also, thereby, occupies an 'Office of Profit', whether de jure or de facto. Exercise of executive power necessarily implies repercussions respecting the impartiality and independence of the legislator.[26]

This phenomenon entered the limelight with the introduction of the MPLAD and MLALAD Schemes. Under these schemes, each MP/MLA has the choice to suggest developmental works of his choice to the tune of a certain pecuniary limit per annum.[27] The funds are allocated from within the State treasury.[28] The deficiencies of these schemes soon came to the fore, with Bihar becoming the first

[23]Act of Settlement (1701), 12 & 13 WILL III, C. 2.

[24]SECOND ADMINISTRATIVE REFORMS COMMISSION, FOURTH REPORT- ETHICS IN GOVERNANCE REPORT (2007), p. 37 (Feb. 3, 2020), https://darpg.gov.in/sites/default/files/ethics4.pdf.

[25]*Office of Profit under the Crown (Research Paper Series, 2017–18*), DEPARTMENT OF PARLIAMENTARY SERVICES (PARLIAMENT OF AUSTRALIA), p. 16 (Feb. 3, 2020), https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/6025866/upload_binary/6025866.pdf;fileType=application/pdf.

[26]Act of Settlement (1701), 12 & 13 WILL III, C. 2, p. 23.

[27]MEMBERS OF PARLIAMENT LOCAL AREA DEVELOPMENT SCHEME (MPLADS) (Feb. 3, 2020), https://www.mplads.gov.in/mplads/Default.aspx.

[28]Kaushiki, *Do We Need the MPLAD Scheme*, PRS INDIA (Feb. 3, 2020), https://prsindia.org/hi/theprsblog/do-we-need-mplad-scheme?page=64.

state to scrap the MLALAD Scheme.[29] The Schemes faced flak on numerous corners.

The National Commission to Review the Working of the Constitution,[30] Era Sezhiyan in her publication 'MPLADS – Concept, Confusion and Contradictions',[31] and the Second Administrative Reforms Commission's report on 'Ethics in Governance',[32] all denounced the LAD schemes. Amongst the foremost reasons behind such conclusions was the fact that these schemes conferred executive power upon legislators, thereby violating the fundamental requirement of functional differentiation under the Doctrine.

The 'Ethics in Governance' Report also equated privileges under the LAD Schemes with offices of profit. This equation was substantiated by reason of "*the conflict of interest that arises when legislators take up executive roles*."[33] Quite naturally, the partisanship that mars Indian politics, when combined with control over State resources, is bound to have undemocratic results. An MLA is, due to reasons entrenched in human nature itself, unlikely to direct resources under such schemes towards areas which do not show possibility of electoral gain. As an agent of a competing political party, he can be safely assumed to consider prime the party's best interest, which naturally lies in ensuring that the electoral strongholds of the opposite parties should be disfavoured while making developmental decisions.

[29]Santosh Singh, *Nitish scraps MLA fund, turns to engineers to implement schemes*, INDIAN EXPRESS (Feb. 3, 2020), https://indianexpress.com/article/news-archive/web/nitish-scraps-mla-fund-turns-to-engineers-to-implement-schemes/.
[30]National Commission to Review the Working of the Constitution, *Volume I, Parliament and State Legislatures (2002)* (Feb. 3, 2020), http://legalaffairs.gov.in/sites/default/files/chapter%205.pdf.
[31]ERA SEZHIYAN, MPLADS – CONCEPT, CONFUSION AND CONTRADICTIONS (2005).
[32]Act of Settlement (1701), 12 & 13 WILL III, C. 2.
[33]Act of Settlement (1701), 12 & 13 WILL III, C. 2, p. 39.

The schemes were challenged as being unconstitutional in *Bhim Singh v. Union of India*,[34] with a violation of the Doctrine being one amongst the numerous grounds presented by the petitioner. The Supreme Court ultimately ruled in favour of the scheme's constitutionality, albeit erroneously, it is submitted. While deliberating upon the scheme's status vis-à-vis the Doctrine, the Court operated on the utopian premise that "*all Members of Parliament be it a Member of Lok Sabha or Rajya Sabha or a nominated Member of Parliament are only seeking to advance public interest and public purpose*." Proceeding on this unrealistic premise, the Court applied overly relaxed standards of functional differentiation, and ruled out any possible violations of the Doctrine.

The problem of the scheme creating offices of profit occupied by the legislators was never considered by the Court, even though the Second Administrative Reforms Committee had previously highlighted the issue.[35] The Committee also recommended that the Courts expressly interpret 'office of profit' as including the privileges under such schemes, because these schemes conferred decision-making powers respecting public funds, a power which the Legislator could naturally profit from.

The ambiguity surrounding the word 'profit' has also been considered as a reason for overlooked violations of the Doctrine. It has long been suggested that 'profit' must be widely taken to include any executive influence which the legislator gains at the expense of State resources.[36] A purposive interpretation of the term 'profit' would indicate that offices 'of possible profit or influence' warrant disqualification. Although the Supreme Court has broadly interpreted the term so that even the possibility of profit has been taken to entail

[34]Bhim Singh v. Union of India, (2010) 5 SCC 538.
[35]*Supra* note 25.
[36]*Supra* note 24, at 15.

disqualification,[37] the term's meaning requires further expansion. Regard must be had to precluding such situations where no legal appointment is made, but the legislator wields *de facto* influence, at the executive government's behest, which can provide him an unfair advantage over his peers, or can compromise his impartiality and integrity as a legislator. The MPLAD and MLALAD Schemes, when seen in such light, qualify as offices of possible influence, even if a direct profit can be ruled out by procedural safeguards.[38]

The phenomenon which will be explicated in the following section is another instance of an 'off the record' arrangement between the government and non-ministerial legislators, by which the latter are accorded *de facto* influence over the executive branch.

IV. THE HALQA IN-CHARGE: THE ONE-MAN ADMINISTRATION IN PUNJAB'S DISTRICTS

A. Hijacking of Executive Power: A Pan-India Phenomenon

The idea that the MLA's seat, of course, comes with the license to partake in executive decision-making at the ground level, has crystallized into a normal proposition.[39] That such influence has no legal or constitutional backing has become an oft-ignored platitude, detached from the 'realities of governance.' Non-ministerial state legislators, as a matter of right, issue diktats to executive officials such as District Commissioners ("**DC/DM**"), Sub-Divisional Magistrates ("**SDM**"), etc., even though the Constitution from which

[37]Jaya Bachchan v. Union of India, (2006) 5 SCC 266.
[38]*Supra* note 25, at 41.
[39]F. G. Bailey, *Traditional Society and Representation; A case study in Orissa*, 1.1 EUR. J. OF SOCIOLOGY 121 (1960).

they draw their powers and privileges provides for no such interference.

Reports of such interferences have become a common occurrence, often backed by express or implied consequences for the non-conforming bureaucrat. From deciding the recipients of government grants, to choosing the beneficiaries of crop insurance schemes,[40] to picking out postings for related officials,[41] the MLA is practically empowered to do it all. To paint the MLA's bureaucratic counterparts in an entirely holy light would also be a misstatement. Executive officials, often out of choice, willingly submit to the MLA's partisan diktats, to curry favour with political overlords and secure 'better' appointments.[42]

Such political attachments find mention in the writings of reputed bureaucrats themselves. Mr. Bhaskar Ghose, a veteran civil servant, enumerated three types of bureaucrats — "*the 'wives' (those who are attached to one party), the 'nuns' (officers who remain unattached to any party), and the 'prostitutes' (who attach themselves to whichever party is in power and switch when there is a change of Government)*."[43] In his plea against 'politisation' of the executive, Mr. R.S. Agarwal, a former IAS officer, called for "*Members of the Legislative Assembly and Members of Parliament [to] not be allowed to interfere in the affairs of transfers and postings and day-to-day administration*."[44] The aforementioned author's writings also bore testimony to the existence of the apocryphal notion that the

[40]Deeksha Bharadwaj, *IAS Association hits out after viral video shows BJP MLA threatening civil servant*, THE PRINT (Feb. 3, 2020), https://theprint.in/india/governance/ias-association-hits-out-after-viral-video-shows-bjp-mla-threatening-civil-servant/165477/.
[41]*Influence Peddling*, SENTINEL ASSAM (Feb. 3, 2020), https://www.sentinelassam.com/editorial/influence-peddling/.
[42]BHASKAR GHOSE, THE SERVICE OF THE STATE: THE IAS RECONSIDERED 155 (2011).
[43]*Id.*
[44]RADHEY SHYAM AGARWAL, INSIDE STORY OF BUREAUCRACY 124 (2009).

politician's interference in the executive's functioning is legitimate.[45] Drawing on this baseless notion, Punjab's ruling elite have meticulously constructed the institution of the Halqa In-Charge.

B. The Punjabi Arrangement

The word 'Halqa' literally denotes an assembly constituency,[46] or as the word has transformed with colloquial use, the area over which the MLA or the MLA-aspirant exercises power. The roots of this system can be traced back to the second term of the Akali Dal government, after the party barely managed a majority in the State Legislative Assembly in the 2012 elections.[47] Although the MLA's influence over the local executive has grown to become a pan-India phenomenon,[48] the Akali Dal pioneered the formal institutionalization of this *de facto* control, with the succeeding (present) government building upon their predecessor's creature and further bolstering this control.

In a bid to 'accommodate' its defeated MLA candidates, the winning party conferred them with obscurely-named ranks of Halqa in-Charges, whose authority became co-extensive with the authority of Akali Dal MLAs in constituencies where they had won the elections. The motivation behind these appointments was to create a scenario where regardless of the fact that the elected MLA of a Halqa belongs to Congress, the Akali Dal's candidate (even if defeated in the Assembly Elections) wielded the actual power. As parties tussled for this *de facto* influence, hardly any thought was given to the constitutionality or the legality of this influence. The unofficial

[45]D.P. Singh, *Sovereignty, Judicial Review and Separation of Power*, 7 SCC J. 1, 12 (2012).
[46]M. Rajshekhar, *What we talk about when we talk about Punjab*, SCROLL.IN (Feb. 3, 2020), https://scroll.in/article/805883/what-we-talk-about-when-we-talk-about-punjab.
[47]*Punjab assembly elections 2012: List of winners*, INDIA TODAY (Feb. 3, 2020), https://www.indiatoday.in/assembly-elections-2012/punjab/story/punjab-assembly-eletions-2012-winners-95199-2012-03-06.
[48]*Supra* note 38.

influence, which had existed before, saw its firm entrenchment within the institution of governance, due to the Halqa system. As legislators reached out into the executive's remit, little heed was paid to the Doctrine, which calls for functional differentiation. This influence was backed not only by the threat of transfer of executive officials but even the possibility of bodily harm to the inconvenient official.[49]

The rule of the Akali Dal marked a period of great adversity for the State, whether judged by economic or social metrics.[50] Responsible, in no small part, for this adversity, was the partisan nature of the local administration which, in its bid to placate the MLAs and the Halqa in-Charges, became a proxy for effecting the legislator's machinations. To establish complete control of the MLAs and the Halqa In-Charges, jurisdictions of Police Stations were rearranged to coincide exactly with the Assembly constituencies.[51] Thus, law and order situations were expected to be handled as per the MLA's/ Halqa in-Charge's convenience.

With the coming into power of the Congress, it was expected that the deplorable practice of executive legislators and Halqa in-Charges would see its end. Adequate lip service was paid to the cause by a Congress government anxious to provide preliminary assurances to voters.[52] Even on paper, an end was put only to the system of Halqa in-Charges (defeated MLA candidates), without any mention of the issue of elected MLAs intervening in day-to-day administration. The ground reality remained that both elected and defeated MLA

[49]M. Rajshekhar, *How the Badals spread their control over Punjab (and why it is eroding)*, SCROLL.IN (Feb. 3, 2020), https://scroll.in/article/804076/how-the-badals-spread-their-control-over-punjab-and-why-it-is-eroding.

[50]Vinay Sharma, *Poor Government but Rich Punjabis*, ECONOMIC TIMES (Feb. 3, 2020), https://economictimes.indiatimes.com/news/politics-and-nation/poor-punjab-government-but-rich-punjabis/articleshow/56424577.cms?from=mdr.

[51]Bailey, *supra* note 49.

[52]*CM Amarinder Singh orders scrapping of halqa in-charge system*,INDIAN EXPRESS (Feb. 3, 2020), https://indianexpress.com/article/cities/chandigarh/cm-amarinder-singh-orders-scrapping-of-halqa-in-charge-system-4613698/.

candidates of the ruling party continued their unimpeded command over the local executive.[53]

The continuance of these practices became evident upon protests by minority party MLAs.[54] Halqa in-Charges were expressly appointed by the top brass of the Congress.[55] More recently, a defeated MLA candidate of the Congress was observed 'allocating' state grants at a private meeting.[56] The influence of MLAs and Halqa in-Charges has but grown stronger, and pervades each and every facet of administration.

C. A Thousand Possibilities of Abuse

The preceding paragraphs evince the continued presence of the system of MLAs and MLA candidates exercising executive power at the ground level. The implications of this system require to be delved deeper into, as will be done in the following paragraphs. What kinds of consequences can this system theoretically lead to? How deleterious an effect can the system have on local administration? Does the system's violation of the Doctrine have any practical bearing on the executive's functioning?

The system, as it stands today, provides the local legislator an open arena. The legislator's powers are, quite literally, limited only by his imagination. His authority coincides with the powers of the local police, the DC/SDM, and every other local authority. Of particular

[53]*Congress has taken over Akali halka in-charge system says AAP*, INDIAN EXPRESS (Feb. 3, 2020), https://indianexpress.com/article/cities/chandigarh/congress-has-taken-over-akali-halka-in-charge-system-says-aap-4659631/.
[54]*AAP stages walkout over 'halqa in charge' system run by 'defeated' candidates*, PUNJAB UPDATE (Feb. 3, 2020), https://punjabupdate.com/aap-stages-walkout-over-halqa-in-charge-system-run-by-defeated-candidates.html.
[55]Surjit Singh, *Congress appoints Ramanjit Sikki as 'halqa in-charge' of Sukhpal Khaira's home turf,* HINDUSTAN TIMES (Feb. 3, 2020), https://www.hindustantimes.com/punjab/congress-appoints-ramanjit-sikki-as-halqa-in-charge-of-sukhpal-khaira-s-home-turf/story-1AHFYLJ9YeXmokizm2T2IP.html.
[56]Bailey, *supra* note 39.

significance are the powers of the SDMs and DC/DMs, which they wield in perfect accord with the wishes of the local legislator. These two posts are the actual interface between the citizenry and State machinery. From revenue to law and order, the Magistrate presides over a vast range of functions,[57] almost any of which can now be (and have been) misappropriated with by the legislator.

Some of these powers are of particular utility for a legislator seeking to forward his personal/party agenda within his constituency. Firstly, and most importantly, the DC/SDMs directly supervise the elections to the Panchayati Raj institutions within their jurisdiction.[58] MLAs, through their *de facto* control over SDMs, tailor electoral circumstances for achieving illegitimate results. That the Panchayati Raj in Punjab has been entirely hijacked by ruling party MLAs, finds credence in the writings of Nicolas Martin.[59] The ideal of local self-governance is ridden roughshod over by compromised executive officials.[60] Inevitably, Panchayat candidates affiliated with the ruling party MLAs become the only 'real' contenders for local representation, thanks to the misappropriation of executive power by partisan legislators. The situation epitomizes the self-perpetuating power of Indian politicians.

Secondly, the magisterial powers of the SDM/DC provide ample opportunity for the legislator to execute political vendettas. In addition to the SDM's executive power, the consequential quantum of judicial powers wielded by him also become subject to the MLA's control. The Code of Criminal Procedure ("**CrPC**") contains various

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[57]*Roles of District Administration*, PUNJAB GOVERNMENT (Feb. 3, 2020), https://barnala.gov.in/about-district/organisation-chart/.
[58]The Punjab State Election Commission Act, No. 19 of 1994 (India).
[59]Nicholas Martin, *Rural Elites and the Limits of Scheduled Caste Assertiveness in Rural Malwa, Punjab*, 52 REV. OF RURAL AFFAIRS 50 (2015).
[60]Manjeet Sehgal, *Punjab panchayat polls marred by violence, booth capturing***,** INDIA TODAY (Feb. 3, 2020**),** https://www.indiatoday.in/india/story/punjab-panchayat-polls-marred-by-violence-booth-capturing-1420117-2018-12-30.

provisions conferring powers on the SDM to maintain law and order. The notoriously wide ambit of powers under Sec. 144, CrPC,[61] allows the SDM/DC, and consequently, the MLA, to prohibit nearly any assembly which he deems inconvenient. The SDM's powers of preventive detention under Sec. 107, 150 and 151, CrPC, employed with a partisan objective, are potent tools for political repression. Powers under Sec. 133, CrPC, are also subject to the Magistrate's discretion, which realistically translates into the MLA's/Halqa in-Charge's discretion. The aforesaid powers constitute the judicial authority which the MLA or the Halqa in-Charge can wield de facto, under the present system.

Thirdly, the onerous task of identifying legitimate beneficiaries of all flagship schemes/social welfare schemes also rests with the SDM. Illegitimate beneficiaries need hardly make the MLA's reference to elbow their way to subsidies and concessions. What ensues is a direct correlation between affiliation with the ruling party's MLA or Halqa in-Charge and access to state funds.

Against the core of this festering problem, stands the simple rationale of the Doctrine, which seems to have been obliviated within the shady labyrinths of administration. Montesquieu presaged, "*constant experience shows us that every man interested with power is apt to abuse it, and to carry his authority as far it will go*."[62] The modern version of the Doctrine, in order to reconcile the Doctrine's 'pure' separation with the 'institutional realities of the modern State',[63] moulded the Doctrine to connote an 'institutional division of roles'.[64]

While assessing this division, regard must be had to the characteristics of each institution to ensure its aptness for handling the

[61]Babulal Parate v. State of Maharashtra, (1961) AIR 884.
[62]*Supra* note 7, at78.
[63]M. E. Magill, *The Real Separation in the Separation of Powers*,86 VA. L. REV. 1127, 1136 (2000).
[64]J. RAZ, THE AUTHORITY OF LAW, 78 (1st ed., 1979).

specific kind of power involved.[65] Legislators, more so per contemporary standards of political behaviour, are bound to fiercely forward their partisan interests. The powers of the ground-level executive, by their very nature, require to be exercised by a neutral party, resistant to political bias. The mismatch between the natural tendencies of the Indian legislator and the nature of executive power renders the current system antithetical to the objective of the Doctrine.

Modern governance necessarily is a joint exercise.[66] This integrated operation requires an 'inter-institutional comity',[67] founded in mutual respect for each institution's jurisdiction and essential role.[68] Legislators, in as much as they represent the people's will, are competent to lay down laws and general policies. Yet, no argument invoking the rhetoric of 'participatory democracy' can justify the aggressive encroachment of MLAs and Halqa in-Charges into the executive's remit. Far from respecting the executive's jurisdiction, as inter-institutional comity requires, legislators gnaw away at the much-required boundaries between political actors and civil servants.

Critics of the Doctrine may rebut its importance in a State of combined functions,[69] where one institution may apparently exercise the power of another. However, the significance of the Doctrine becomes more appealing when it is viewed as a prescription for institutions to not "*stray beyond their proper constitutional roles*."[70]

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[65]D. Kyritsis, *Constitutional Review in a Representative Democracy*, (2012) 32 OXF. J. LEG. STUD 297 (2012).
[66]D. Kyritsis, *What is Good about Legal Conventionalism*, 14 LEGAL THEORY 135, 154 (2008).
[67]S. King, *Institutional Approaches to Judicial Restraint*, 28 OXF. J. LEG. STUD. 409, 428 (2008).
[68]A. Kavanaugh, *The Constitutional Separation of Powers*, 17OKLA. L. REV. 1223, 1278 (2014).
[69]L. Claus, *Montesquieu's Mistakes and the True Meaning of Separation of Powers*, 25 OXF. J. LEG. STUD 419, 426(2005).
[70]*Supra* note 7, at 238.

The situation highlighted in the paper showcases the institutionalization of the legislator's intrusion into the executive's sphere, in absolute non-conformity with the role that the Constitution prescribed for legislators.

V. THE DIRECTION OF REFORMS

The problem of a politicized executive has assumed such proportions as to render reforms possible only after extensive deliberation. A fine balance has to be maintained between insulating executive officials from non-ministerial legislators and appreciating the authority of ministers, who stand at the helm of the executive branch (given India's Parliamentary Executive system). Any imbalances might render the proposed reform untenable. Moreover, given the 'off-the-record' existence of the system, reforms will have to be designed to be insusceptible to negation in practice. Such comprehensive deliberation is beyond the scope of this paper's enquiry. What this section of the paper describes is a broad direction for possible reforms, the headings under which practical efforts require to be undertaken.

Firstly, a solution, which serves as a panacea for all problems which stem from political intrusion into the executive sphere, is to ensure the security of tenure for executive officials. The most potent threat that forces bureaucrats to be cowed down to unscrupulous politicians is the possibility of an inconvenient and premature transfer, at the local MLA's behest. In October 2013, the Supreme Court, in a PIL,[71] directed the Union and State governments to enact rules ensuring minimum tenure for bureaucrats. Although some states have enacted

[71]T.S.R. Subramanian v. Union of India, (2013) 15 SCC 732.

such rules/notifications on paper,[72] compliance with them is a rarity. Research pits the average tenure of an Indian IAS officer at 15 months in one post.[73] Instances of bulk transfers upon political realignments are common,[74] and evidence political parties' dependence on executive power to better their political standing.

Existing laws respecting minimum tenure require enforcement via the judicial channel, since political will to enforce the laws can be practically ruled out. Officers are unlikely to approach the Court against illegal transfers, anxious not to irk ruling politicians. The Court must adopt, as it aptly has in appropriate situations, a hands-on approach and take cognizance whenever *ex facie* indications exist of politically-motivated transfers effected before the minimum tenure period.

Secondly, the direction in which reform must be focused is towards the establishment of state-level Civil Service Boards, a proposal set out in the Subramaniam case,[75] previously endorsed by the 2nd Administrative Reforms Commission,[76] and the Hota Committee.[77] The Boards must act as sentinels against political intrusion and have a certain level of independence. Transfers must be effected only at the Boards' recommendations. The Boards must be headed by non-political actors. The intricacies of the establishment of such Boards are numerous, with the overarching concern of balancing between

[72]Personnel Policy (2nd Division), dated April 23, 2018, Personnel Branch, Punjab Government, 7/1/2014-3 P.P. 2 (1216986/1-2).
[73]Priyanka Prashar, *The good and bad news in bureaucrat transfers*, LIVE MINT (Feb. 3, 2020), https://www.livemint.com/news/india/the-good-and-bad-news-in-bureaucrat-transfers-1555928850522.html.
[74]*After Gorakhpur Bypoll loss, Yogi Adityanath-led UP govt transfers 37 IAS officers*, INDIA TODAY (Feb. 3, 2020), https://www.indiatoday.in/india/story/rejig-in-uttar-pradesh-37-ias-officers-transferred-1191502-2018-03-17.
[75]*Supra* note 70.
[76]*Supra* note 23, at 170.
[77]COMMITTEE ON CIVIL SERVICE REFORMS, REFORM REPORT (2004), p. 100 (Feb. 3, 2020), https://darpg.gov.in/sites/default/files/Hota_Commitee_Report.pdf.

depoliticizing the bureaucracy and maintaining the ruling government's due authority.

Thirdly, a proposal which hits the mark is to broaden the 'office of profit' disqualification to instances where the non-ministerial legislator is proved to wield *de facto* influence over executive decision-making.[78] Partaking in executive function, on or off the record, must warrant judicial interference. Such a tactic would effectively deter legislators from seeking to hijack executive power for fear of disqualification. Thus, the office of 'profit' must be translated to an office of 'profit or influence'.

Conclusively, the Doctrine, despite its superficial shortcomings, has been accepted as a quintessential feature of democracies.[79] A top-down scrutiny of the governmental structure is not the apt strategy for detecting violations of the Doctrine. The real affronts to constitutional ideals, such as the Doctrine, take effect at the grass-roots, away from the limelight. A bottom-up approach is bound to produce better results when it comes to safeguarding and effecting any constitutional principle. As the reality goes on to prove, the local MLA is much more likely than the President to become the *locus* of inseparate powers. The Doctrine, essentially and originally, sought to restrict the Executive from usurping excessive power. Quite paradoxically, the Doctrine today stands as the last defence of an enfeebled executive functioning at the whims of overbearing legislators.

[78] *Supra* note 23, at 40.
[79] COMMONWEALTH SECRETARIAT, THE COMMONWEALTH LATIMER HOUSE PRINCIPLES: PRACTITIONER'S HANDBOOK 1 (Jon Franksson ed., 2017).

UNATTAINABLE BALANCES: THE RIGHT TO BE FORGOTTEN

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Abstract

Recently, adopting the recommendation of the Sri Krishna Committee Report, the Draft Data Protection Bill, 2018 incorporated a provision for the 'right to be forgotten' under Section 27 (Section 20 in the 2019 Draft). The right to be forgotten refers to the right a person holds against data fiduciaries such as Google and others, to delete, mask, or hide information pertaining to the person which is incorrect, irrelevant and defamatory in nature. This right has been of much interest especially in the age of the internet, where internet users leave a massive digital footprint behind every time they access the internet. This means that a person can now create a comprehensive profile about another individual within seconds by using the information which exists on social media and other platforms. Some of this information available online could be extremely personal with the potential of damaging a person's reputation. It is, therefore, essential to examine the

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applicability and suitability of such a right in the Indian context.

The right to be forgotten, by its very nature, falls in the crossroads between the right of speech and expression and the right to privacy. It is therefore essential for these two rights to be balanced for the operation of the right to be forgotten. This paper shall discuss the balancing of the two rights, i.e., the right of speech and expression and the right to privacy and will demonstrate how such a balancing would not fit into India's constitutional scheme and free speech jurisprudence. Given that India takes inspiration for the implementation of this right from Europe, the paper will also highlight the difference in constitutional approaches in Europe and India to demonstrate that the suitability of the right in Europe does not necessarily imply that its operation in India would be suitable.

I. INTRODUCTION TO THE RIGHT TO BE FORGOTTEN

The right to be forgotten, as it exists at present after its evolution over the years, seeks to mitigate against the seemingly permanent nature of information on the internet. Individuals were suffering from outdated and irrelevant information still existing on the internet. The easy accessibility of such information caused severe damage to a person's

reputation and right to privacy.[1]The right to be forgotten effectively causes information to be more difficult to find and it is, therefore, a form of forced omission. It allows for individuals to control and determine the extent of the information about them that is communicated to others and available for the public's perusal.[2]

Most famously, under the French Law, there existed an analogous right known as the 'Right to Oblivion' which allowed for criminals to expunge their past criminal record. In Germany there was an analogous law regarding previous criminal convictions. This right afforded a much larger protection and German courts even asked Wikipedia to take down information regarding the prior criminal record of the appellants as it was detrimental to their right to reputation.[3]

The European Union Data Protection Directive 95/46[4] and the 2000/31/EC Directive on E-Commerce in the Common Market[5] together created an obligation upon intermediaries to ensure that the rights of individuals were not infringed and domestic jurisdictions were given the power to ensure that intermediaries fulfilled this obligation. These directives were the bedrock upon which the landmark judgement of *Google Spain v. AEPD* (**"*Google Spain*"**) was delivered.[6]

[1]Michael J Kelly & David Sataola, The Right to be Forgotten 1 UNIV. OF ILL. L. REV. 3 (2017).
[2]ARTICLE 19, THE RIGHT TO BE FORGOTTEN: REMEMBERING FREEDOM OF EXPRESSION 1 (2016), https://www.article19.org/data/files/The_right_to_be_forgotten_A5_EHH_HYPERLINKS.pdf.
[3]Jeffrey Rosen, *The Right to be Forgotten*, 64 STAN. L. REV. 88 (2012).
[4]Council Directive 95/46, art 55 1995 OJ (L281) 36 (European Council).
[5]Council Directive 2001/31, art 9 2000 OJ (L178) 2 (European Council).
[6]Case C-131/12, Google Spain v AEPD, 2014, ECLI:EU:C:2014:317 [hereinafter *Google Spain*].

Mario Costejas raised a complaint to the Spanish Data Protection Agency ("**AEPD**") regarding an article published in *La Vanguardia*, a newspaper, relating to an attachment proceeding in a real-estate auction against him and recovery of social-security debts. Costejas requested that the newspaper either remove and alter the pages or that Google Spain alter the pages to conceal the personal data in search results. The AEPD refused to the former request but agreed to the latter. Google objected to the decision and the case landed up in the European Court of Justice ("**ECJ**").[7]

The Court held that the right to be forgotten could be found within the Directives, in particular, Article 12(b) and Article 14(a) which provides for data controllers to rectify, erase and block data which did not comply with the Directive.[8] The Court also held that Google satisfied the requirements of a 'data controller' as the search results are not automatic, i.e., Google delivers the information and sculpts the results.[9] Thus, it is not just a mere conduit with information passing through, rather the algorithm and data have a much deeper level of interaction. The Court also recognised that when search engines processed personal data, the right to privacy is attracted since several aspects of a person's private life can be revealed with a simple name search, without search engines having to piece together the data.[10]

This case became the holding judgement regarding the right to be forgotten. In the revised General Data Protection Resolution ("**GDPR**"), the EU has explicitly included a right to be forgotten within its ambit,[11] which is a clear approval and effect of the *Google Spain* judgement of the ECJ.

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[7] *Id.* at ¶ 14-20;Kelly, *supra* note 1.
[8] *Id.* at ¶88.
[9] *Id.* at ¶41.
[10] *Id.* at ¶81.
[11] Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the

The judgement was deeply divisive. While several countries welcomed the uncovering of the right to be forgotten, the House of Lords was deeply apprehensive about the judgement. The House described the right to be forgotten as unworkable, unreasonable and wrong.[12] They were worried about the impracticability of the judgement given the sheer volume of requests to correct information that would arise, which a search engine operator like Google would have to individually analyse on merits.[13] They estimated that it would have an economic cost of 360 million Pounds and were, therefore, worried about the implementation of the right.[14]

Despite the divisive nature of the judgement, several countries have begun to enact legislations with reference to the right to be forgotten in an effort to follow suit of the European Union and better protect the rights of their citizens.[15] India, too, is one of these jurisdictions attempting to incorporate this right. The discussion around this right was sparked following Justice Kaul's opinion in the landmark *Puttuswamy judgement*[16] on privacy and the report of the Sri Krishna Committee[17] which recommended the incorporation of statutory provision regarding this right within the Draft Data Protection Bill 2018,[18] and was reproduced similarly in the bill introduced in Lok

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Free Movement of Such Data (General Data Protection Regulation) art. 17, COM (2012) 11 final (Jan. 25, 2012).

[12]EUROPEAN UNION COMMITTEE: HOUSE OF LORDS, EU DATA PROTECTION LAW: A RIGHT TO BE FORGOTTEN? at 22, ¶62.

[13]*Id*.

[14]*Id.* at 17.

[15]Fardhad Manjoo, *'Right to Be Forgotten' Online could Spread*, N.Y. TIMES, Aug. 5, 2015, https://www.nytimes.com/2015/08/06/technology/personaltech/right-to-be-forgotten-online-is-poised-to-spread.html.

[16]Justice K.S. Puttuswamy (Retd.) v Union of India, (2017) 10 SCC 1.

[17]COMMITTEE OF EXPERTS UNDER THE CHAIRMANSHIP OF JUSTICE BN SRIKRISHNA, A FREE AND FAIR DIGITAL ECONOMY, PROTECTING PRIVACY, EMPOWERING INDIANS, at 75(2018) [hereinafter Srikrishna Committee Report].

[18]The Personal Data Protection Bill, 2018, § 27 (India).

Sabha in 2019.[19] However, as will be discussed in the subsequent sections of this paper, the incorporation of such a right will be contentious due to Indian jurisprudence on balancing of rights.

II. BALANCING THE RIGHTS

The right to be forgotten is of such nature that it necessarily sits at the cross roads of the freedom of speech and expression and right to privacy or/and reputation.[20] In the EU, the balancing of these two rights is possible as Article 11 of the Charter of the European Union, which is analogous to Article 10 of the European Convention on Human Rights,[21] notes that 'rights of others' is a valid ground of restriction of expression. However, this is to be distinguished from the Indian Constitution where Article 19(2), that provides for reasonable restriction on the freedom of speech and expression, does not list the 'rights of others' as a reasonable restriction. Due to the manner in which fundamental rights are structured in Part III of the Indian Constitution (especially the freedom of speech and expression), there are several problems that arise with the implementation of the right to be forgotten in the Indian jurisdiction.

Section 20 (2) of the 2019 Draft Protection Bill reads

"*(2) The rights under sub-section (1) may be enforced only on an order of the Adjudicating Officer made on an application filed by the data principal, in such form and manner as may be prescribed, on*

[19]The Personal Data Protection Bill, 2019, § 20 (India).
[20]Shaniqua Singleton, *Balancing A Right to be Forgotten with Freedom of Expression in the Wake of Google Spain v AEPD*, 44 GA. J. OF INT'L & COMP. L. 165,179 (2015).
[21]EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Charterpedia- Article 11 Explanation*, https://fra.europa.eu/en/charterpedia/article/11-freedom-expression-and-information (last visited Dec. 2, 2019).

any of the grounds specified under clauses (a), (b) or clause (c) of that sub-section:

Provided that no order shall be made under this sub-section unless it is shown by the data principal that his right or interest in preventing or restricting the continued disclosure of his personal data overrides the right to freedom of speech and expression and the right to information of any other citizen."[22]

The provision clearly states that the interests of person aggrieved can override the freedom of speech and expression as well as the right to information of other citizens. This clearly highlights the fact that the framers of the Bill believe that the freedom of speech and expression can be balanced with the rights of another person. However, as will be explained in this section of the article, this would be constitutionally untenable due to the doctrinal inconsistency resulting from such a reading and engaging in the same would go against the very basic norms of Indian free speech jurisprudence.

A. Textual Case against Balancing Freedom of Speech and Expression with other Fundamental Rights

Part III of the Indian Constitution does not explicitly prescribe a hierarchy of rights. Rather, on face value, all the rights are considered to be equal and a conflict between any two fundamental rights is meant to be resolved by way of harmonious interpretation.[23] This would appear to support the case for balancing of freedom of speech and expression with the right to reputation and privacy. However, a closer examination of the proposition reveals that it would be fallacious to assume that Article 19(1)(a) can be balanced with other provisions of the Constitution.

[22]The Personal Data Protection Bill 2019, § 20(2) (India).
[23]Sri Venkatramana Devaru v Mysore, (1958) SCR 895, 918.

The Constitution does not prescribe any guide regarding balancing of rights and only some of the rights prescribed in Part III are limited by other provisions of the Constitution. For instance, Article 25 which provides for the freedom of religion is "*subject to public order, morality and health and to the other provisions of this Part*." Simply put, an individual's use of their freedom under Article 25 cannot violate the rights of another person, for example their right to equality under Article 14 and prohibition of 'untouchability' under Article 17.[24]

This is not as obvious and simple with the other fundamental rights. For instance, for the purpose of the question at hand, Article 19(2) does not use the phrase "*subject to other provisions of this part.*" Therefore, as per textual reading of the Constitution, another person's rights under Article 21 (such as a right to privacy), cannot be the reason for restricting an individual's freedom of speech and expression under Article 19.

The fact that Article 25 specifically uses the phrase "*subject to… other provisions of this Part*" shows that where the framers wished to communicate a right being subject to other fundamental rights, they have explicitly mentioned the same. This shows that the right provided under Article 19(1)(a) was not supposed to be subjected to balancing tests and was to be upheld even if it affected another's fundamental rights. Therefore, the right of others cannot be the basis for the restriction of a person's fundamental right to speech and expression.[25]

[24]Gilles Tarabout, *Ruling on Rituals: Courts of Law and Religious Practices in Contemporary Hinduism* 17 S. ASIAN MULTIDISC. J. 1, 3 (2018).
[25]Gautam Bhatia, *The 'Balancing' Test and its Discontents*, INDIAN CONST. L. & PHIL.BLOG (May 20, 2016), https://indconlawphil.wordpress.com/2016/05/20/the-balancing-test-and-its-discontents/ [hereinafter *Balancing Test*].

B. The Judiciary on Balancing of Rights

The right under Article 19(1)(a) is subject to reasonable restrictions under Article 19(2). Under 19(2), the framers of the Constitution have specifically enumerated definite heads for the restriction of the right to free speech and expression. As these heads are within a closed list, there is no space for interpreting other provisions of the Constitution as another limiting factor on the exercise of this right.[26] However, the Indian judiciary has failed to be consistent regarding balancing of the freedom of speech and expression with other rights and has been unable to arrive at a final concrete decision so far.

The first important case where the court said that the right to freedom of speech and expression could not be balanced against any interests that have been not enumerated in Article 19(2) was the landmark case of *Sakal Papers v. Union of India* ("***Sakal Papers***").[27] Here, the court invalidated the Newspaper (Price and Page) Act, 1956 and the Daily Newspapers (Price and Page) Order, 1960 which regulated the prices publishers could charge for newspapers based on page count and the amount of content. The government justified the Act and Order on the grounds of it being in the interest of smaller paper publishers by encouraging them to compete with the large publications. It also contended that this would curtail unfair competition which would in turn further public interest. The Supreme Court clearly ruled that the government could not suppress speech even if it was on grounds of 'public interest.'[28]

This was reiterated by the Supreme Court in *Indian Express v. Union of India*,[29] where it was once again noted that the framers of the

[26]DR. DURGA DAS BASU, COMMENTARY ON THE INDIAN CONSTITUTION 3136 (9th ed. 2014).
[27]Sakal Papers v Union of India, (1962) 3 SCR 842.
[28]*Id.* at ¶46.
[29]Indian Express v Union of India, (1985) 2 SCR 287.

Constitution had made a conscious choice to exclude 'public interest' from the list of reasonable restrictions under Article 19(2) and to read 'public interest' into the article would defeat the choice made by framers.

With respect to public interest, the court regularly and consistently has held that public interest cannot be the basis of suppression due to it not being mentioned as a ground under Article 19(2) of the Constitution. However, the moment that the freedom of speech and expression is set up against another fundamental right, in this instance, the right to privacy and reputation, the court is unable to follow its own doctrine. In such cases, it adopts balancing as its preferred method despite there being no textual basis in the Constitution for the same, as shown above.[30]

There are two cases in particular where the Supreme Court failed to follow its own reasoning regarding Article 19(2) being a closed list. These two cases are the judgements of the Supreme Court in *In Re: Noise Pollution* and *Subramaniam Swamy v. Union of India* (**"*In Re: Noise Pollution*"**).

In Re: Noise Pollution[31] the Supreme Court was hearing a PIL regarding implementation of laws regulating loudspeakers, firecrackers and playing loud music, etc. and ruled that post 10 p.m., without permit, nobody would be allowed to engage in these activities. The route it took to reach this conclusion was that Article 19(2) was not absolute and could not override the right to life under Article 21, which included the right to be in a peaceful, comfortable, pollution free environment. The court on engaging a vague balancing test ruled that they were giving more weight to Article 21. This reasoning was surprising as the question in front of the court did not require the court to resort to Article 19(2) at all. This is because the

[30] *Balancing Test* at 24.
[31] In Re: Noise Pollution, (2005) 5 SCC 733.

list under Article 19(2) contains content-based restrictions while what was being challenged in front of the court in this case was a content-neutral restriction which was along the lines of a time, place and manner restriction (where the restriction was based on procedure of expression rather than the content of expression). There was thus no reason for the court to conjure up a balancing test for which it gave no explanation as to why the test was adopted in the first place. Therefore, this case does not prove that the balancing test is doctrinally sound.[32]

The second important case is the infamous judgement of *Subramaniam Swamy v. Union of India.*[33] While upholding the constitutionality of criminal defamation, the court showed that there was a right to reputation under Article 21 and that Article 19(1)(a)'s freedom of speech and expression had to be balanced with the said right because to do otherwise would be to 'sacrifice reputation at the altar of free speech.' It further explained how freedom of speech and expression was not absolute. Here, the court, while citing *In Re: Noise Pollution* again carried out a vague balancing exercise, which as explained previously was flawed. The court once again utilised the balancing test without having provided any doctrinal justification for doing so.[34]

It is observed that the court reiterates the principle of freedom of speech and expression not being absolute even when it is not relevant

[32]Gautam Bhatia, *Summary and Addendum to the Delhi High Court on free speech: When Time/Place/Manner Restrictions become Problematic*INDIAN CONST. L. & PHIL. BLOG (Feb. 21, 2015), https://indconlawphil.wordpress.com/2015/02/21/summary-and-addendum-to-the-delhi-high-court-on-free-speech-when-timeplacemanner-restrictions-become-problematic/.

[33]Subramaniam Swamy v Union of India, (2016) 7 SCC 221.

[34]Gautam Bhatia, *Judicial censorship: A dangerous, emerging trend* INDIAN CONST. L. & PHIL BLOG (May 02, 2016), https://indconlawphil.wordpress.com/2016/05/02/judicial-censorship-a-dangerous-emerging-trend/.

to the contention before them. The court had proceeded with formulating new restrictions to the freedom of speech and expression, while ignoring the closed list under Article 19(2). They failed to note that they did not have to involve Article 19(2) at all, like in the *Noise Pollution* case and that the framers intentionally left out such a restriction because they did not wish to subject this freedom to societal values and will.[35] The Court should have noted its reasoning in *Sakal Papers* and immediately avoid such balancing the moment Article 19(2) is considered to be a closed and exhaustive list.

At this point it should be noted that opponents to the premise that balancing of rights is not contemplated by Article 19(1)(a) may argue that the Supreme Court had subjected Article 19(1)(a) to other provisions of the constitution in the past, in particular, in the judgement of *Sharma v. Sri Krishna*.[36] The case dealt with a MLA making an offensive speech in parliament which was expunged from the record by the speaker. However, a newspaper published the speech in its entirety including the derogatory and offensive parts of the speech. The speaker, exercising powers under Article 194(3) of the Constitution, which protected privileges of parliament, served a show cause notice against the publisher with regard to the breach of parliamentary privilege. The Supreme Court when deciding the case held that the privilege of the house to prevent publication under Article 194(3) would override Article 19(1)(a), despite privileges not being mentioned as a ground of restriction.[37] However, this case has no relevance as in reaching the verdict, the majority had held Article 194(3) to be a special provision which would prevail over the general provision of Article 19(1)(a). In the instance of the right to be forgotten, the other general provisions of Part III of the Constitution are pitted against each other. Further, scholars have criticised this

[35] *Balancing Test* at 24.
[36] Sharma v Sri Krishna, AIR 1959 SC 395.
[37] DR. DURGA DAS BASUat 2145-2147.

judgement for its holding and argued that the privileges allowed by Article 194(3) should have been subject to limitations of Article 19(2).[38]

Once it is correctly understood that the balancing test is doctrinally and textually unsound with respect to Article 19(1)(a) and Article 19(2), it becomes difficult to justify the existence of the right to be forgotten, given that this right, as stated earlier, necessitates a balancing act between freedom of speech and expression and right to privacy/reputation of the individual.

Therefore, Clause 20(2) of the Draft Protection Bill would have to specifically note or courts will have to interpret Clause 20(2) as meaning only those rights that the data principal seeks to claim that can be related back to any of the heads of restriction prescribed by Article 19(2). This would severely limit the scope of the right to be forgotten and is not how the framers of the Bill have envisioned it. This is evident from the comparisons made to the extensive and vast nature of this right provided by the European Union which demonstrates a clear intention to emulate those protections.

Therefore, if the framers wish to justify the *status-quo*, they would have to prove that the right to be forgotten in its current state would fit within the reasonable restrictions laid down in Article 19(2). The next part of the paper shall demonstrate that such an argument is fallacious and not grounded in sound constitutional interpretation.

C. Incompatibility of the Right to be Forgotten within Defamation

Article 19(2), the limiting clause of article 19(1)(a) reads-

"*Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the*

[38] *Id.*

right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

As discussed in the previous sections, the important part of jurisprudence of this Article is that the list of heads that it provides to restrict the freedom of speech and expression is exhaustive and the same does not allow for a general public interest justification.[39] Therefore, any restriction on the freedom must squarely fall under at least one of the heads provided in this Article.

The right to be forgotten as described in the draft Data Protection Bill poses a problem as it is difficult to fit the right to be forgotten neatly within any of the heads given in Article 19(2). The head that comes the closest to justifying the right to be forgotten is defamation, as both of these concepts have a link to the idea of the right to reputation.

However, there is a problem with justifying the right to be forgotten using the head of defamation because the right to be forgotten far exceeds what has always been understood as defamatory content. This is clear from a reading of Section 20 of the Draft Data Protection Bill, which includes information which is deemed to have 'served the purpose for which it was made and is no longer necessary' under its ambit.[40] There is no mention of the requirement of the information being inaccurate which is *sine qua non* for defamation.[41] The common connection between all definitions of defamation is that the information is false, therefore leading to a loss of reputation. From what can be seen, in the right to be forgotten even accurate information, which has merely been rendered irrelevant by the

[39]*Sakal Papers v Union of India*, (1962) 3 SCR 842.
[40]The Personal Data Protection Bill 2019, § 20(1)(a) (India).
[41]David Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 278 (2010).

passage of time may be prevented from being disclosed. Therefore, the ambit of defamation is not large enough to be stretched to include the right to be forgotten as well.

An argument that may be made in defence of the right to be forgotten is that the term defamation should be interpreted to mean the right to reputation, therefore, the right to be forgotten would be covered by the term defamation due to their shared concept of right to reputation. This would be untenable as defamation has a very specific meaning, which as stated above, is intrinsically connected with the concept of falsity of information and this cannot be stretched in meaning to be synonymous with the right to reputation. Even if we keep the intention of the framers to one side and wish to interpret the word, there are limits to which we can remove the meaning of defamation from its original mooring, as the ingredients of defamation will have to be preserved. Seervai noted that it would not be within the power of the legislature to make a law of defamation providing that truth would not be a defence.[42] Therefore even if we were to ignore the intention of framers, the essential ingredients of defamation would constrain us from including the right to be forgotten within its ambit.

The key difficulty is that if the right to reputation was a reasonable restriction, then a person accurately reporting a story which negatively affected another's reputation could also have their freedom of speech and expression interfered with. The Supreme Court in *Subramaniam Swamy v. Union of India*[43] also noted that a reading of the constituent assembly debates and previous court decisions showed that the meaning of defamation in the constitution should be understood as the common law understanding of defamation.[44]

[42]HM SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY 714, ¶10.31(4th ed. Reprint, 2008).
[43]Subramaniam Swamy v Union of India, (2016) 7 SCC 221.
[44]*Id.*

Therefore, the right to be forgotten would not survive a test of constitutionality since the right to be forgotten does not fit within any of the heads prescribed by Article 19(2).

III. THE SRI KRISHNA COMMITTEE REPORT AND WHITE PAPER

This section shall discuss the failings of the Sri Krishna Committee and the Indian judiciary to provide doctrinal soundness to the balancing of the right to free speech and expression with the right to privacy.

Given the difficulties regarding the constitutionality of the scheme of the right to be forgotten as highlighted previously, both the White Paper on Data Protection and the Sri Krishna Committee Report should have addressed these issues within their policy documents.

The two documents, especially the White Paper on Data Protection hint that the inspiration behind the inclusion of the right to be forgotten was the GDPR. The White Paper discusses the right to be forgotten in the European Union and in its Provisional Views and also specifically discusses the judgement in *Google Spain.* The White Paper also looks at the examples of Canada and South Africa and their legislations regarding personal data protection.[45] These international practices were highlighted to demonstrate the need for the right to be forgotten.

The Sri Krishna Committee Report lays down the guidelines, which are mentioned in the Draft Bill, for the adjudicatory body to follow

[45]COMMITTEE OF EXPERTS UNDER THE CHAIRMANSHIP OF JUSTICE BN SRIKRISHNA, WHITE PAPER OF THE COMMITTEE OF EXPERTS ON A DATA PROTECTION FRAMEWORK FOR INDIA141 (2017) [hereinafter SRIKRISHNA WHITE PAPER].

when it seeks to balance the two rights. These guidelines have been lifted from European Court of Human Rights decisions and reports by Google in the aftermath of the *Google Spain* decision.[46]

Both these documents heavily stress on the need for balancing of rights when dealing with the right to be forgotten. In the White Paper, the Committee notes that "*[T]he right to be forgotten should be designed in such a manner that it adequately balances the right to freedom of speech and expression with the right to privacy*."[47] While in the final report the Committee dedicates an entire section to the balancing of rights involved and notes that the freedom of speech and expression should be considered when discussing right to be forgotten, the solution they provided was by inserting a statutory balancing test.[48] The Committee justifies this balancing test by stating that "*[T]he Supreme Court of India, when faced with a question of competing rights, has laid down a well-established test on how to adjudicate such a question on its merit*", while citing the case of *Mr X. v. Hospital Z.*[49] The facts of this case are that a person who was diagnosed of HIV had his HIV positive status revealed to his fiancé by his doctor, without his consent. The Supreme Court had noted that as the fiancé was at a risk of contracting the disease through sexual contact with the husband, the doctor was not wrong in disclosing the condition of the husband to her. The citing of this case is not very helpful as the case can be easily distinguished from situations where the right to be forgotten is in question. In this case, the rights which ostensibly were being balanced were the right to marriage of the appellant and the right to health of the fiancé and Article 19 of the Constitution was not attracted at all. Further, in this judgement, the Supreme Court did not discuss balancing of rights in any manner whatsoever.

[46]SRIKRISHNA COMMITTEE REPORTat 78.
[47]SRIKRISHNA WHITE PAPER at 141.
[48]SRIKRISHNA COMMITTEE REPORT at 78.
[49]Mr X. v Hospital Z, 1998 (8) SCC 296.

The two reports have not clearly justified the presence of the balancing test in the face of the concerns regarding the constitutional invalidity of the doctrine in Indian jurisprudence. The Committee has erred by using European jurisprudence and directly applying it to the Indian scenario. This is because under the Convention of European Human Rights, the possible limitations of the freedom of expression under Article 10 include 'the right of others', meaning thereby that there is no justification required for the very use of the balancing test in those jurisdictions. This is unlike the aforementioned closed box nature of limitations in Article 19(2) of the Indian Constitution. Therefore, these two policy documents are wholly unsatisfactory in their design of the right to be forgotten as they have not clearly answered the preliminary questions posed against the implementation of the right to be forgotten in India.

IV. INDIAN JUDICIARY ON THE RIGHT TO BE FORGOTTEN

It has been argued that the right to be forgotten was embodied in the spirit of Indian law even though it was not explicitly stated as such.[50] The Supreme Court in the past has stressed on the need for the name of the victim to not be published in order for their anonymity to be preserved. In these cases, the courts were focussing specifically on rape victims.[51] The court's reasoning was based on the fact that Section 228-A of the Indian Penal Code 1860 criminalised the disclosing and publishing of the identity of a rape-victims to prevent

[50]Kavita Shanmugam, *A series of right to be forgotten cases in courts highlight how India doesn't have a privacy law,* THE SCROLL, Mar. 13, 2017, https://scroll.in/article/831258/a-series-of-right-to-forgotten-cases-in-courts-highlight-how-india-still-doesnt-have-a-privacy-law.

[51]State of Karnataka v Putta RajaAppeal (Crl.) (2004) 10 SCC 300. See also State of Punjab v Gurmit Singh,1996 AIR SC 1393.

the ostracization faced by the survivor and their families. These judgements make no reference to a right to be forgotten as the courts were urging other judicial bodies to deter from naming the victims in the first place.

The right to be forgotten was affirmed as not merely a common law right but as a part and parcel of the right to life under Article 21, as per Justice Kaul's concurring opinion in the *K. S. Puttuswamy*[52]judgement. Justice Kaul noted that the right to be forgotten is an integral facet of the right to privacy in the modern age and drew upon European Union jurisprudence on the subject. Justice Kaul noted that the right to be forgotten is required in the modern age of the internet, where data mining is a budding industry, as it is a method by which individuals can regain control of the information they have put out into the public sphere. As per the learned judge, the right to control one's life would also extend to controlling one's internet existence.[53]

A trend which we shall notice with the judiciary can be seen in the learned judge's opinion, as at no point was the balancing of rights which is essential for the operation of the right to be forgotten noted. The right is spoken of in isolation without recognising that citing European jurisprudence would be inappropriate in the Indian scenario as noted in this paper previously.

There have been a handful of High Court judgements which have reached contradictory opinions with respect to the existence of the right to be forgotten before the Draft Data Protection Bill was enacted.

[52]Justice K.S. Puttuswamy (Retd.) v Union of India, (2017) 10 SCC 1.
[53]*Id.* at ¶636; Sohini Chatterjee, *In India's Right to Privacy, a glimpse of a Right to be Forgotten*THE WIRE, Aug. 28, 2017, https://thewire.in/law/right-to-privacy-a-glimpse-of-a-right-to-be-forgotten.

One of the first cases to crop up with regard to the right to be forgotten was the case of *Dhamraj Bhanushankar Dave v. State of Gujrat*[54] where a man who had been charged with murder was subsequently acquitted by the Sessions and High Court. However, despite being listed as an unreportable judgement, India Kanoon received access to the judgement resulting in it being indexed in Google. The man pleaded for the taking down of the links and limiting the access to the judgement. Since the case arose back in 2015, much before the Data Protection Bill Draft was circulated or the *Puttuswamy* judgement had arrived, Gujarat High Court noted that there was no statutory provisions or law available on the matter. There was no scope or guidance available to the High Court to grant the request as at the time, the status of privacy as a fundamental right was itself under doubt, and added to that, data privacy was not discussed in any manner. Thus, the High Court noted that Article 21 would not be attracted and refused to compel Google to remove the search results. In contrast, the Kerala High Court used the right to order India Kanoon to remove the name of a victim of rape from their search engine in order to protect her right to privacy.[55] However, it should be noted that in this instance, there is a law punishing the publishing of the name of a victim of rape under 228A of the Indian Penal Code.

In *Vasunathan v. Registrar General*,[56] the petitioner's daughter had filed civil and criminal cases against a person and later withdrew the case as the parties to the cases reached a compromise. However, when using the daughter's name as the keyword for a search on a search engine, the complaints were available. The petitioner, therefore,

[54]Dharamraj Bhanushankar Dave v State of Gujrat, (2017) 20 SCC 2019.
[55]T Sredharan v State of Kerala (1969) KLT 472; Sowjanya S, *Right to be Forgotten: A Forgotten Part of the Right to Privacy*THE L. BLOG (Nov. 07, 2018), https://thelawblog.in/2018/11/07/right-to-be-forgotten-a-forgotten-part-of-right-to-privacy/.
[56]Vasunathan v Registrar General, (2017) SCC (Kar) 524.

requested the search engine operators to remove the links to these complaints as it could cause problems to the daughter. The court agreed to do so and stated that in western countries, in cases where a women's modesty was involved, the application of the right to be forgotten would be allowed. However, this is problematic as it did not locate the right to be forgotten in privacy but rather within the concept of woman's modesty which has been challenged by many, including the Justice Verma Committee, as the incorrect way to approach questions of violation of dignity of women.[57] If the court had to pass such an order, it should have located the right squarely within privacy and not the ambiguous and problematic notion of modesty.

Recently, in the Delhi High Court, in the context of the #MeToo movement, the plaintiff requested the defendant to take down articles where the plaintiff was alleged to have committed sexual harassment. While the suit was in pendency regarding the mental torture caused to the plaintiff by publishing of the articles, the plaintiff requested that the articles be pulled down in the interim period from all platforms. The Court agreed to the request of the plaintiff and allowed the plaintiff to compel search engine operators to delink the articles about the allegations present on other platforms.[58] It is not clear as to why the court did not use existing defamation law parameters while dealing with the issue, as the basis of the claim was that of a falsity which caused injury to reputation. There was no balancing of rights done by the court as the defendants had already agreed to taking down the articles.

[57]JUSTICE VERMA COMMITTEE, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW 437 (2013); Vikram Raghavan, *Verma Committee Report: A Two Part Note* L. & OTHER THINGS (Feb. 01, 2013) https://lawandotherthings.com/2013/02/verma-committee-report-two-part-note/.
[58]Zulfiqar Ahman Khan v Quintillion Business Media Ltd. (2019) SCC OnLine (Del) 8494.

In *Subodh Gupta v. HerdScene and Ors*,[59] the artist Subodh Gupta had filed a defamation suit against an anonymous Instagram account for making certain sexual harassment allegations against him and in the interim wished for search engine operators to delink the search results regarding the sexual harassment charges. The Delhi High Court agreed to the request noting that since none of the survivors of the alleged harassment had taken legal recourse, making allegations of such nature would lead to mischief. Similarly, as in the previous cases, the court failed to balance rights in this instance. If the court proceeded to balance rights it could have noted that allegations of sexual harassment made anonymously occur due to a of fear of retribution. Anonymous allegations are often the only recourse for survivors, due to the judicial system's harshness and the discomfort and harm caused to their lives by deciding to opt for a legal recourse.[60] If the court had considered these factors, it perhaps would not have so readily granted the request for delinking. The court, here, failed to take note of the right to impart knowledge which is central to the freedom of speech and expression.

It is clear from a perusal of the above judgements that the cardinal mistake being committed in these cases is that privacy is being looked at in isolation without reviewing the freedom to speech and expression aspect. The right to be forgotten is conceptualised as a test of balancing, if one entire side of the balancing is ignored, the results shall be lopsided. Therefore, the right to be forgotten cannot be applied without balancing. Even if such balancing has been done, the court will have to give a doctrinal base to the balancing given that as

[59]Subodh Gupta v HerdScene and Ors, CS (OS) 483/2019.
[60]Gopal Sathe, Nehmat Kaur, *Facebook's Actions In Subodh Gupta's Defamation Case Have Global Implications For #MeToo Movement*, THE HUFFINGTON POST, Oct. 6, 2019, https://www.huffingtonpost.in/entry/facebook-could-endanger-metoo-movement-subodh-gupta-herd-scene-and-delhi-high court_in_5d9616dae4b02911e11738aa.

it currently stands, it does not fit within the Indian free speech jurisprudence.

In the cases regarding the removal of judgements, the High Courts have failed to take note of the right to receive information, which the Supreme Court has held is part of the scheme of rights guaranteed by Article 19(2).[61] The courts must take note of the competing right as without it, the right to be forgotten can become a powerful tool for judicially compelled censorship.

V. CONCLUSION

The right to be forgotten, in theory, may seem to be an attractive avenue to expand the rights of people by giving internet users a modicum of control over the information they impart on the internet. However, before implementing the right in the Indian context, the framers of the Draft Protection Bill and the judges of various High Courts should have taken note of the difference between free speech jurisprudence in Europe and India as they are not truly analogous.

The Supreme Court must also show clarity with respect to the doctrine of balancing of rights as it cannot contend that while Article 19(2) is a closed list, the right of other can be read into the provision. Balancing a right with others without grounding such balancing within one of the listed grounds in the Article is therefore impossible. The Supreme Court may no longer have to strictly abide by the framer's intent; however, they cannot completely read into the provision a completely new ground for restricting expression. If it wishes to do so, it cannot hold onto the notion that Article 19(2) is a closed list, but the court has in no way changed its interpretation of

[61]RP Ltd v Indian Express,AIR 1989 SC 190; Gupta v President,AIR 1982 SC 149; DR. DURGA DAS BASU at 2397, 2398.

the Article. It truly is a case of the court wishing to eat its cake and have it too.

It is admirable that the policy makers of the country wish to take a step forward with regard to data rights. However, before taking this step, they must ensure that they remain on firm ground, otherwise, they run the risk of being caught in a quicksand of confusion and litigation which will only serve to detract away from the evolution in rights which was envisioned.

THE RECUSAL CONUNDRUM- ANALYZING THE CRISIS IN THE INDIAN SUPREME COURT

Raghav Pandey[*] *& Neelabh Kumar Bist*[**]

Abstract

The recent hue and cry in the Supreme Court regarding the non-recusal of Justice Arun Mishra has captured the attention of the legal academia all over the country. While there have been opinions written about the situation on different news portals, there hasn't been much engagement around the entire concept of recusal as is followed in our country. This paper is a novel attempt to address the same. The authors have analysed the conundrum pertaining to recusal from the lens of its origination and the application of the doctrine to the case of Justice Mishra's recusal. Through the means of examining the case of recusals as understood in the United States and the United Kingdom, the authors have highlighted the points that could be take-aways for a country like India which is in urgent need of a clear procedure with respect to judicial recusals.

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I. INTRODUCTION

"*The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?"; but to look at the mind of the party before him.*"

These wise words find their place in the case of *Ranjit Thakur v. Union of India,*[1] where Justice Venkatachaliah had succinctly described the concept of judicial bias as applicable in a particular case. In a country like India where the litigious culture in an adversarial setting leaves at least one party discontented, this natural law principle is one that judges need to tread carefully. Recently, the Supreme Court of India was transfixed with the same problem[2] when Justice Arun Mishra had refused to recuse himself in the appeal of a case over which he had initially presided. By means of this paper, the authors will stand to clarify the judicial convention of recusal in a case. First, the authors will lay down the history of the recusal in the judicial system. Thereafter, the controversy that surrounded the bench formation including Justice Mishra will be discussed. This will entail the analysis of the decision of his non-recusal, its criticisms and the Indian law on practice of recusal and judicial bias in a case. This will be followed by analysis of the judicial recusals in the United States and the United Kingdom and the paper will then be concluded with the measures that the Court should adopt to hold good the maxim "*justice should not only be done, but should be seen to be done*".[3]

[1]1988 SCR (1) 512.
[2]Suhrith Parthasarathy, *Upholding the ideals of fairness and rectitude*, THE HINDU, October, 2019 (June 8, 2020, 18:49AM), https://www.thehindu.com/opinion/lead/upholding-the-ideals-of-fairness-and-rectitude/article29835290.ece.
[3]Lord Hewitt in R v. Sussex Justices; Ex partes McCarthy [1924] 1 KB 256, 259.

II. INTRODUCTION TO JUDICIAL RECUSAL

The etymology of the word 'recusal' finds its place in the concept used by the English Roman Catholic Church of 'recusant'[4] which meant "*Catholics who refused to attend church as required by law*".[5]However, the necessity for the recusal of judges was developed due to the underlying principles of rules of natural justice and due process. This entailed principles of impartiality, fairness and independence of judges. As has been observed, justice involves the imposition of procedural fairness as a fundamental tenant to the maintenance of the rule of law by allowing the parties to present their case in a fair manner by answering the allegations that are raised.[6] Further, judicial recusal has been held to form the foundation of the twin pillar of independence and impartiality without which justice cannot stand tall.[7]

While much ink has not been spilt on this contentious topic, Grant Hammond[8] (former Law Professor, and judge of the New Zealand Court of Appeal) in his book *Judicial Recusals: Principles, Process and Problems* ("***Judicial Recusals***") has tried formulating three primary questions around which the entire controversy of recusal is centred:

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[4]Arvind P Datar, Rahul Unnikrishnan, *To recuse or not to recuse?*, BAR AND BENCH, October, 2019 (June 10, 2020, 12:14PM), https://barandbench.com/column-to-recuse-or-not-to-recuse/.

[5]Oxford Reference Dictionary online (June 12, 2020, 16:50PM), https://www.oxfordreference.com/view/10.1093/acref/9780199567638.001.0001/acref-9780199567638-e-3554.

[6]Alan Rose, *The Model Judiciary - Fitting in with Modern Government*, 4 THE JUD. REV. 323, 326 (1999) referring to Sir Stephen Sedley, a former Judge of the Court of Appeal of England and Wales.

[7]GRANT HAMMOND, JUDICIAL RECUSAL – PRINCIPLES, PROCESS AND PROBLEMS 183 (Hart Publishing Oxford 2009).

[8]*Id.*

1. When should a judge withdraw from a given case which he or she has been allocated?
2. Who decides when that judge should withdraw?
3. What process or procedures should be utilized by the decision maker?

The answers to these questions are laid down by referring to judicial doctrines, practices, procedures, etc. However, Sir Hammond broadly answers these questions on the principle of constitutionalism and by declaring that the answers depend on the particular circumstances of each jurisdiction and on the applicable '*grund norm'* which is the Constitution.[9] Therefore, the case of India is specific to its democratic setup. However, the common law doctrines would still be applicable owing to the courtroom system that we have adopted from the British.

III. THE GREAT CONTROVERSY: TO JUDGE OR NOT JUDGE

The recent controversy in the Supreme Court has a long history to it. It started in 2014, when in the case of *Pune Municipal Corporation v. Harakchand Misirmal Solanki* ("***Pune Municipal Corporation***"),[10] involving the interpretation of Section 24(2) of the Land Acquisition Act, 2013, where a bench headed by Justice Lokur held that if compensation is not adequately deposited with the Court or in the bank accounts of the landowners, then the land acquisition would be void. This stood in conflict with a judgment that was decreed subsequently in February, 2018, when in *Indore Development*

[9]Micheal Kirby, *Judicial Recusal: Differentiating Judicial Impartiality and Judicial Independence*, 4 BRIT. J. AM. LEGAL STUD. 1(2015).
[10](2014) 3 SCC 183.

Authority v. Shailendra (Dead),[11] the judgment in *Pune Municipal Corporation* was held to be per incuriam by a 2:1 majority headed by Justice Mishra. This resulted in the creation of an inconsistent jurisprudence in the legal system as the judgment in Indore Development then became the law of the land.[12] It was so because this judgment had by implication resulted in the review of the various decisions of different High Courts that had settled the case going by the dictum given in the Pune Municipal Corporation case. Thereafter, when a similar case came up incidentally in the courtroom of Justice Lokur on 21 February, 2018 in *Haryana v. GD Goenka Tourism Corporation,*[13] he referred the matter to the Chief Justice of India for the constitution of a larger bench to decide the dispute in law.

Subsequently, controversy arose when the Chief Justice constituted a five-judge bench with Justice Mishra as one of the judges. Due to his predisposed opinion, there was a strong case of judicial bias and therefore, there was a demand for the recusal of the judge from the aforesaid bench. In a judgment[14] penned by Justice Mishra himself and concurred by four other judges, the Court rejected the plea for his recusal and directed the matter to proceed to the stage of adjudication on merits. However, the judgment has been the subject of much debate.[15]

To understand the error in the reasoning of the judgment, one needs to understand the differentiation of the situations that arise when a judge might be asked to recuse from a particular case. As pointed out by

[11](2018) 3 SCC 412.
[12]Indian Const. art 141.
[13]SLP(C) No. 5550/2018 (IV-B).
[14]Special Leave Petition (C) Nos. 90369038 of 2016.
[15]*To Recuse or Not To Recuse: Controversy About Land Acquisition Bench*, LIVE LAW, October, 2019 (June 15, 2020, 13:05), https://www.livelaw.in/videos/justice-arun-mishra-controversy-about-land-acquisition-bench--149073; Dr. Faizan Mustafa, *Recusal Refusals Determining Bias and Impartiality*, ECO.& POL.WEEKLY, Vol. 54, Issue No. 45 (June 25, 2020, 19:18PM),https://www.epw.in/journal/2019/45/commentary/recusal-refusals.html.

Mr. Gautam Bhatia,[16] there are three different situations where the Court is asked to decide such matters. In the first situation, a case might develop wherein the Court is asked to reconsider the judgment that it has delivered in the past. Examples of these cases are landmark constitutional cases like the decriminalisation of Section 377 of the India Penal Code. [17] The second situation is the usual trend of *"referral to a larger bench"* of a case. The third and the one which was under consideration in the present case, is when there are two contrary judgments of the same Court which necessitate the formation of a larger bench to decide and settle the jurisprudence over the particular legal issue.

Borrowing again from Mr. Bhatia, the conceptual error attached to the reasoning of Justice Mishra's judgment on recusal is that whereas the situation at hand pertained to the last one described in the aforementioned paragraph, the judgment of the Court deals with the first two situations that do not form the part for consideration. The real issue at hand was whether a judge who has decreed a judgment on the point of law under consideration before the Court, be allowed to be a part of the bench deciding the same issue? However, the observations of the Court mis- characterised this issue and gave justifications on the first and the second situations. This is evident from the elucidation in paragraph 14 of the judgment in *State of Bombay v. United Motors India Ltd.*[18] and paragraph 15 dealing with the judgment of *Bengal Immunity Co. Ltd. v. State of Bihar*.[19] In both these examples, the Court was asked to decide upon a judgment which it had delivered a few years ago. What is all the more

[16]Gautam Bhatia, *The Supreme Court's Recusal Order: Glaring Conceptual Flaws*, ICLP, October 2019 (June 13, 2020, 15:15PM), https://indconlawphil.wordpress.com/2019/10/24/the-supreme-courts-recusal-order-glaring-conceptual-flaws/.
[17]Navtej Singh Johar v. Union of India, 2018 (10) SCALE 386.
[18]1953 SCR 1069.
[19]1955 (2) SCR 603.

interesting is that both these cases were adjudicated during the early years of the Court with only eight appointed judges who sat in full bench and therefore there the case was about the institution itself changing its mind over a legal issue without a conflict of two distinct judgments. Further, there are other instances that fall in the second situation of referral to a larger bench namely, *M/s. Ujagar Prints & Ors. (II) v. Union of India & Ors.*,[20] *Empire Industries Ltd. v. Union of India*,[21] *Gyan Devi Anand v. Jeevan Kumar & Ors.*,[22] *Ganpat Ladha v. Sashikant Vishnu Shinde*[23] *and Damadilal v. Parashram*,[24]which still do not provide the answer to the question that formed the focal point of discussion of the particular case about a conflict of judgments with one judge presiding over the larger bench which is to decide the issue. Therefore, the Court failed to provide cogent reasons to address the heart of the recusal conundrum, pertaining to the same judge presiding in different benches.

IV. THE DOCTRINE OF JUDICIAL RECUSAL

What merits consideration, therefore, is what should have been the approach of the Court and the doctrines and legal fictions that the Court should have used to discuss the issue which it was to confront. In India, there is no statute that lays down the minimum requirement or procedure for the determination of impartiality. Therefore, the decision whether there exists a case of partiality is left to the sole discretion of the judge without any form of guidelines or parameters by which his impartiality can be judged. Ironically, the Arbitration and Conciliation Act, 1996 under which the arbitration tribunal forms

[20](1989) 3 SCC 488.
[21](1985) 3 SCC 314.
[22](1985) 2 SCC 683.
[23](1978) 2 SCC 573.
[24](1976) 4 SCC 855.

which in most cases forms a precursor forum for adjudication provides for grounds of disqualification if such circumstances exist which may give rise to justifiable doubts as to the independence and impartiality of the arbitrator. The circumstances are provided under Schedule V and VI of the Act.

Hence, due to unavailability of any statutory mandate, the Supreme Court has by self-determination decided to impose judicial discipline in various cases by outlining the laws guiding the factors to be taken into consideration for deciding the impartiality of a judge. The most significant of these is *Ashok Kumar Yadav v. State of Haryana*,[25]where the Court had held, "*the mere likelihood of bias in India is considered sufficient to warrant a recusal*". There might be arguments raised against the application of this rationale of the judgment as it is prone to exploitation and can lead to bench hunting and forum shopping but the threshold of recusal does not stand for a mere allegation of bias but has to be backed by strong cogent logic and evidence of its likelihood. This is so because as pointed out by Justice Hammond, "*the real sting of the criticism of the present apparent bias test is that it is too concerned with formality and appearance, and less concerned with actualities.*"[26]

Further, Justice Hammond in his book has deployed two mechanisms to determine judicial bias in each case - automatic disqualification and bias. The automatic disqualification rule or the off-limits rule or per se rule is one in which there is a direct and clear manifestation of bias. Cases like this include the relationships in terms of personal or financial bond. The landmark case in this is *R v. Bow Street Metropolitan Stipendiary Magistrate & Ors, ex parte Pinochet Ugarte*,[27] where the association of the third-party intervener -

[25]1985 SCR Supl. (1) 657.
[26]GRANT HAMMOND, JUDICIAL RECUSAL PRINCIPLES, PROCESS AND PROBLEMS 52 (Mohan Law House New Delhi 2010).
[27][2000] 1 AC 119 (HL).

Amnesty International, of which the judge was a director and chairman (although receiving no remuneration for the same) made a justifiable case for judicial recusal. The House of Lords held that bias is not always manifested in terms of monetary or proprietary gain and therefore a case of bias did arise even with a small causation link. Another circumstance that attracts a case of automatic disqualification is one where there is a pecuniary interest involved. In *London and North-Western Railway Co. v. Lindsay*,[28] the Court held that as a shareholder of a party to the case, the judge has to recuse himself from the case. The Court held that judges are not allowed to appear biased even when there is no suggestion of the decision being influenced by the pecuniary interest. It was stated that public interest in the fair administration of justice required the judge to recuse himself from the case to uphold the integrity of the institution.

The condition of bias warranting recusals follows the 'real danger' test. The test was provided first in *Regina v. Gough*[29] where the Court had to decide whether considering the totality of the circumstances, there arises a real danger of bias on the part of the judge. This takes into consideration his previous relations with both the parties,[30] his direct interest in the dispute,[31] his previous views on the legal issues involved and the merits of the case[32] and thereafter a kaleidoscopic scope of all these surrounding circumstances is considered. This was also discussed in *AWG Group Ltd v. Morrison*,[33] where the Court opined that to ascertain bias, the circumstances should be viewed from the lens of a fair-minded and informed observer.

It is the argument of the authors that the present case of Justice Mishra ordering his non-recusal, was a case of apparent bias as there

[28](1858) 3 Macq. 99.
[29](1992) 4 All ER 481.
[30]Re Cement Antitrust Litig., 688 F.2d 1297 (9th Cir.).
[31]Arizona v. United States Dist. Court, 459 U.S. 1191 (1982).
[32]Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948).
[33][2006] 1 WLR 1163.

was a predisposed opinion of the judge which was reflected in the reasoning provided by him in one of the two contested judgments. Having sufficiently disclosed his line of thinking, it is but natural for him to stick to the same without any grave change in circumstances. As a neutral observer would note, a case can be made of the existence of an apparent bias and therefore, Justice Mishra should have recused himself as a matter of judicial propriety.

Another important facet of the determination of bias, as has been observed by Mr. Arvind Datar,[34] is to check whether there was an extra judicial comment made by any judge outside the Court which can present a prejudiced opinion towards a line of thought. In the United States ("**US**"), the great judge, Justice Scalia had once expressed his views on the expression *"under God"* which forms part of the First Amendment's Establishment Clause and further had also criticized the view of a lower Court.[35] When the matter came to appeal,[36] Justice Scalia had to necessarily recuse himself.

This becomes very important in the Indian setting where judges have in the past expressed their opinions on different questions on different platforms. Recently, the current Chief Justice of India, Justice S.A. Bobde, in an interview given to NDTV[37] and Indian Express[38] expressed his opinions on matters relating to artificial intelligence,

[34]*Supra* note 4.
[35]James Allan, *One of my favourite judges: Constitutional Interpretation, Democracy and Antonin Scalia*, BR. J. AM. LEG. STUDIES 6(1) (2017).
[36]Elk Grove Unified School District v. Newdow, (2004) 124 S Ct. 2301.
[37]*"Took Oath To Uphold Law, Law Prescribes Death Penalty": Chief Justice-Designate SA Bobde*, NDTV, October 30, 2019 (June 19, 2020, 09:12PM), https://www.ndtv.com/india-news/justice-sa-bobde-interview-took-oath-to-uphold-law-law-prescribes-death-penalty-says-next-top-judge-2124801.
[38]Seema Chishti, *Next CJI Bobde: 'Privileged to be hearing (Ayodhya case)… opportunity of a lifetime*, THE INDIAN EXPRESS, October 30, 2019 (June 16, 2020, 17:18PM), https://indianexpress.com/article/india/new-cji-chief-justice-sa-bobde-privileged-hearing-ayodhya-case-opportunity-of-lifetime-interview-ranjan-gogoi-retires-6095412/.

death penalty and the limitations on various freedoms including freedom of speech, economic issues, social justice and so on. Considering a hypothetical situation wherein a case relating to what he has stated in the interview comes up before the Court, the interview would be the leading cause of casting aspersions to his impartiality. This doesn't necessarily mean that a strong case would be developed leading to his recusal but it only points out to the fact that it might lead to a situation where there can be eyebrows raised. In the past, this has resulted in recusal when a trial judge's order[39] was set aside by the Appellate Court despite the judge maintaining his non-biased opinion as he had earlier expressed his views in a press interview on the merits of the case.

It is worth mentioning here that it has also been a practice of the Court that if there is no objection raised by any parties to the dispute, then the case doesn't warrant recusal. This is well demonstrated in two different cases[40] where Justice Kapadia was the owner of shares in the company which was litigating, at the outset, he offered the parties to have himself recused if they were not agreeable to his impartiality. Only after getting the consent from both the parties, did the Court start with the proceedings. This was even demonstrated by Justice R. V. Raveendran when in a case, he recused himself as his daughter was working at one of the law firms that was advising the party in the dispute.[41]

A. Judicial Recusal in the US

[39]US v. Microsoft Corporation, (2001) 253 F 3d 34.

[40]Preeya Sehgal, Bhavna Vij-Aurora, *No one is spared in CJI Sarosh Homi Kapadia's court*, TODAY, November 26, 2019 (June 18, 2020, 17:18PM), https://www.indiatoday.in/magazine/india/north/story/20101206-no-one-is-spared-in-cji-sarosh-homi-kapadias-court-744933-2010-11-26.

[41]*Judges Recusal Triggers a Fresh Ambani Spat*, ECONOMIC TIMES, November 5, 2009 (June 19, 2020, 16:17PM), https://economictimes.indiatimes.com/industry/energy/oil-gas/judges-recusal-triggers-fresh-ambani-spat/articleshow/5198075.cms.

It has been widely understood that the issue of recusal stems from the adversarial form of judicial system. The judge in this system is supposed to act in a neutral and impartial manner. However, this neutrality is very contentious and a judge being a human being has vested interests either at a personal level or at an ideological level and with reference to particular issues. This obviously can give rise to inadvertent bias in the discharge of the judicial function of the judge.

In the US, the most recent debate was regarding a bias on a personal level with reference to Justice Scalia, when he went duck hunting with Vice President Dick Cheney. This was when a lawsuit against Cheney was pending before the US Supreme Court. As opposed to issue-based bias, which has been mentioned previously, this was a case of personal bias. Justice Scalia, however, still participated in the case, and his decision was not reviewable.

As opposed to India, the US has a well-defined law on recusals. It is contained in Title 28 of the US Code (**"USC"**). Section 455 of the 28 USC is captioned as "*Disqualification of justice, judge, or magistrate judge*". This provision lays down that a federal judge should disqualify himself from any case where his impartiality might be reasonably questioned. This is a very broad disqualification and includes bias on both personal and at an issue level. It is natural to earn a bias if one feels strongly for an issue, before it has come up for adjudication in the court and also if one has some interest in the matter before the court. Both of these situations will be hit by Section 455. However, this provision is attracted primarily in the cases of issue-based biases.

Section 144 of the 28 USC is particularly against personal bias. It is captioned "*Bias or prejudice of judge*" and is attracted when one of the parties alleges through a motion that the judge in a particular case has a personal bias towards the other party or is prejudiced against him. In such cases, the case is transferred to another judge.

The general rule remains that the alleged connection of the judge with the parties or the issue of the case has to originate outside the case and not during the proceeding of the litigation, which of course is a reasonable understanding for the functioning of the judicial process. The US Supreme Court in the case of *Liteky v. United States*[42] has crystallised the above rule as the 'extra-judicial source rule'.

That said, on a large number of occasions, judges recuse themselves on their own, as is also the case in India and is known as *sua sponte* recusals. This is more common in the higher courts, where it is difficult to challenge the refusal to recuse by an individual judge. In most cases, the judge is himself the authority to rule on a suggestion of recusal and may or may not act on it. The decision of a lower court's judge to refuse to recuse can still be reviewed on appeal to a higher court. The US law also provides that, in certain situations, a writ of prohibition can also be used to this effect by a higher court, to force recusal.[43]

In the US Supreme Court, the judges have largely recused themselves if financial interests are involved. However, the reasons for individual recusals remain varied and are subjectively assessed by the individual justices in the instant cases. These decisions too, therefore, lead to an unsettled position of law in this respect. Individual justices have behaved differently themselves in different cases. For instance, in probably the most famous case of US Constitutional History – *Marbury v. Madison*,[44] Chief Justice Marshall did not recuse himself, even though his erstwhile role as Secretary of State could have served as a reasonable cause for his recusal. However, in *Martin v. Hunter's Lessee*,[45] he did recuse himself, on grounds of a personal bias due to a

[42]510 U.S. 540 (1994).
[43]Osborne v. Chinn, 146 W. Va. 610, 121 S.E.2d 610 (1968).
[44]5 U.S. 137.
[45]14 U.S. (1 Wheat.) 304 (1816).

previous business relationship with Martin. This goes on to show the determination of each case on its merits.

B. Position in the UK: House of Lords

It can be argued with some conviction that the entire law on recusal globally has stemmed from the maxim *nemo judex in sua causa* (no person shall be a judge in his own case), which has its genesis in the common law of the UK itself. This maxim, though initially only applied to cases in which an individual judge is actually a party to the case itself, has been expanded by the House of Lords to situations where it can be reasonably assumed that the judge might not be impartial while coming out with the decision.[46]

This was accomplished by the House of Lords through a series of cases, the first of which is *The Queen v. Gough.*[47]The debate in the case revolved around application of two different tests, when deciding on a question of bias. The tests were 'reasonable suspicion' and 'real likelihood'. The former of course, was a broader test than the latter one. Lord Goff, while deciding the case, dismissed the reasonable suspicion test for the risk of unnecessary disqualification. He went on to add that recusal has to be enforced in cases only where there is a 'real danger of bias' on part of the judge.

This remained the law for a decade, but was met with widespread criticism. This position was also directly in conflict with the position of the European Court of Human Rights. Hence, the House of Lords overturned this position in *Magill v. Porter*[48] in 2002 and incorporated the 'real suspicion' test, which was rejected in *Gough*. That said, both tests will give the same result in most of the cases. The House of Lords however, reasoned that the apparent objectivity

[46]C.Nicholls, *Reflections on Pinochet*, 140 VA. J. INT'L L., 41 (2000).
[47][1993] 2 All ER 724.
[48][2001] UKHL 67.

of the 'real suspicion' test is more and hence should be prioritised. In the words of the Court, this test manifested itself as:

"*Whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*"[49]

However, still in most of the cases the decisions of recusals are *sua sponte.* It can still be argued with certainty, that such decisions are amenable to review. As in the case of *In re Pinochet Ugarte (No. 2),*[50] there was a post facto claim of bias against one of the members of the tribunal. Lord Browne-Wilkinson held that the House of Lords has inherent jurisdiction to correct injustice, even if it has resulted from the order of that Court itself. Hence, a decision on recusal by an individual justice is reviewable by the House of Lords.

V. CONCLUSION

As has been argued before, the law on recusal stems from the common law principle of *nemo judex in sua causa.* The genesis of the rule is also an indicator of its importance. That is because an allegation of a bias – issue based or personal, is actually an indicator of the involvement of the individual judge in the instant case. Thus, this establishes that the common law recognises it as a serious violation of the judicial process and hence the rule gave way to the larger rule of bias, across jurisdictions, in cases of recusals too.

Through an analysis of different jurisdictions and best judicial practices, it can be argued with certainty that best practices relating to judicial recusals need to be firmly established in the judicial process

[49] *Id* at 102.
[50] [2000] 1 AC 147.

of the country, so as to establish unwavering institutional integrity of the judiciary.

As we have seen, especially in the case of the UK, even if there is a case of alleged bias, then it has to be dealt with a broader test of a bias and ideally the judge should recuse himself. This is necessary because otherwise people will lose hope in the judiciary as an impartial arbiter. The test of a fair-minded observer seems very practicable to be incorporated into Indian law. As has been mentioned earlier, the judicial process should also seem to be fair, apart from being objectively and actually fair. It is important that judicial practices are so strong, as to not let any fingers be raised in the first place, rather than addressing the individual instances.

As is the practice in the higher judiciary, in most of the cases, that of *sua sponte* recusals, in India and elsewhere, it is easy to establish this in the entire judicial wing. These *sua sponte* recusals happen, mostly after an appeal by one of the parties to the case. These appeals are based on equity and conscience of the judge. Hence, if the judge is not moved but still the general opinion remains against him, as was the case with Justice Scalia and Cheney, then that naturally means that the judge's conscience did not move in the right direction or it did not reconcile with the conscience of the society. In such cases, it is important for the justices to understand themselves as very important pillars of the justice system of the country, and that the entire trust of the nation in judicial organ is vested on the basis of the general conscience of the people, and they should not hesitate to abide by it, with of course, upholding the basic tenets of rule of law.

It is important to note that keeping up to its image as a body that exemplifies impartiality and that nothing should come in the way to taint the same is of quintessential importance to the institution of judiciary. In fact, this even forms the logic behind having the law on the contempt of court, as the judiciary can punish anyone who tends to diminish the authority of the Court.

The comparative jurisprudence has made clear that there is a need for formal rules and norms on recusal in India. One method of doing this is through a legislation, but then the concerns of the judiciary on judicial independence can't be allayed. Therefore, the way forward is through self-discipline by the judiciary. As has been done previously on various other fronts, for example in case of judicial appointments, a Constitutional bench ruling has to settle the law on the recusal conundrum.

COMMERCIAL SURROGACY: A CLUSTER OF ISSUES AND COMPLEXITIES OF RIGHTS UNDER THE CONSTITUTION OF INDIA

Shefali Kolhe[*] *&Anuj Kumar Gupta*[**]

Abstract

Morality is a term which has no definite meaning. It is as fluid as liquid. It will be in one shape at one point of time and in another shape at another point of time. Thus, it changes from time to time. This paper expresses views against the newly proposed Surrogacy (Regulation) Bill, 2019. The exponents who support ban on commercial surrogacy equate it with baby selling. But a major question that arises here is whether undergoing pregnancy for some other couple can be termed baby selling or in reality, is it only a case of advancing gestational services and earning a reward as a result of rendering services as is the case of any other employment? Is it not high time to give legal recognition to this invaluable service and consider it at par with other forms of employment? The Bill, through its numerous provisions, violates various fundamental

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rights of the parties involved in the process of commercial surrogacy. Some of the most important fundamental rights which have been violated are Articles 14, 19 and 21 of the Indian Constitution. There are countries where commercial surrogacy is legal and well regulated. Certain internal conventions also support this view. India is witnessing an upsurge to grant legal recognition to the commercial aspect of surrogacy. In such a situation, a change in the interpretation of the guaranteed rights is required. There has been a shift in the last few years where judiciary has come forward to protect the rights of individual keeping in mind the present socio-economic scenario of the society. There is again a need to change the concept of commercial surrogacy from one of baby selling to that of a form of dignified employment. Here, the researchers in this paper have tried to justify commercial surrogacy in light of the changing interpretation of the most basic fundamental rights under the Indian Constitution.

I. INTRODUCTION

Today, a lot of people are unable to bear a child due to infertility of either of the partners owing to many reasons like an increase in the marriageable age, mental stress etc. or other reasons like the person being homosexual or single. But a rapid advance in science has made it possible to have a genetically identical child even when one of the

parents is infertile, through procedures like the In- Vitro Fertility Technique ("**IVF**"). Under this technique, a mature egg is fertilized by a sperm outside the body, in a laboratory. Once fertilized, it is implanted in the uterus of the same or in a different woman's body leading to a successful pregnancy. One of the types of IVF is surrogacy.

In the last few years, India has witnessed a remarkable shift in the way its Constitution and the rights of its people are interpreted. The need to adopt a different perspective arises due to the change in the mindset of the people. Society is neither static nor is the mentality of the people. It changes from generation to generation. Even the age-old thinking has yielded to its modern counterpart. In such a changing scenario, it becomes necessary to also change the law governing people with that mindset. Change in the perspective of morality and public policy gives way to explore new avenues in interpreting laws. If this parallel shift in interpreting laws does not take place with the change in prevailing sociological structure of the society, then these laws remain static in contrast to the changing nature of society and therefore, contribute to confusion and chaos. Hence, it becomes the need of the hour to interpret laws in a way, which is best suited to the present society. Commercial surrogacy is a heated topic all around the world today. This can be attributed to the fact that it leads to exploitation and commoditization of women at times. It has come to be popularly known as a 'baby selling' business. However, the question that arises here is whether this society is not yet receptive enough to accept commercial surrogacy as a dignified employment whereby, like in any other employment, a woman rents her womb in return of remuneration for the services provided. There is exploitation in the name of commercial surrogacy because of the lack of regulations at the international and domestic levels. However, does that, justify the ban without giving any heed to the rights of the concerned parties?

A market reproductive exchange such as commercial surrogacy is profoundly unfair, but a blanket ban on the same is even worse. At face value, the Indian government's ban on commercial surrogacy may seem like a good idea, bolstered by the state's belief that reproductive exchanges must not be corrupted by money. However, its replacement with altruistic surrogacy is dangerous for women as well.

II. SURROGACY

Surrogacy is an arrangement in which a person or a couple agrees to have a child through the womb of another woman. Such a woman undergoes pregnancy for intended parents, who then become the legal parents of the new-born child. Surrogacy can be categorized on the basis of embryos and on the basis of monetary compensation. Differentiating on the basis of embryos, there are two types of surrogacies: traditional and gestational surrogacy.[1] In traditional surrogacy, the surrogate mother's own egg is fertilized with the sperm of either the intended father or an anonymous donor. After fertilization, it is artificially inseminated in the womb of the surrogate mother and she carries the child for the duration of pregnancy. Therefore, genetically, the child is related to the anonymous donor or the intended father as well as to the surrogate mother.

In gestational surrogacy, sperm of the intended father or an anonymous donor fertilizes the egg of the intended mother which is then fertilized in the laboratory and transferred to the womb of a surrogate mother who then carries the baby.[2] So, the child is

[1]Dr J Srinivas Rao & Dr Matin Ahmad Khan, *Surrogacy in India: Current Perspectives* 3 IJMHR 85, 85-88 (2017).

[2]Diane S. Hinson, Esq. & Linda C. ReVeal, *Overview of the Surrogacy Process*, HUMAN RIGHTS CAMPAIGN, (January 27, 2019), https://www.hrc.org/resources/overview-of-the-surrogacy-process.

genetically related to the woman who has donated the egg and the man whose sperm fertilised the egg. In gestation surrogacy, the child is not genetically related to the surrogate mother.

Traditional surrogacy is generally avoided because of the presence of a biological tie between the child and the surrogate mother which makes it challenging for the surrogate mother to give away the child. That is why most of the countries like Russia and Ukraine do not allow traditional surrogacy agreement.

Based on monetary compensation, surrogacy can be divided into altruistic and commercial surrogacy. In altruistic surrogacy, the surrogate does not get any monetary compensation for her pregnancy over and above the medical expenses incurred. Altruistic surrogacy usually takes place when there is some relationship between surrogate and the intended parents. A surrogate in exchange of monetary compensation undertakes commercial surrogacy, which is over and above the medical expenses. It is a service undertaken by the surrogate in which she helps the intended parents to get a genetically related child while she also earns for all the labour that she has undergone during pregnancy. Commercial surrogacy is more of a concept related to employment and has now become a worldwide business.

Due to the absence of any regulation on commercial surrogacy, India is a great destination for the same. However, this will not be the case anymore due to the ban imposed on commercial surrogacy through The Surrogacy (Regulation) Bill, 2019 which was passed in Lok Sabha on 19th December, 2018. The Bill aims at banning commercial surrogacy in order to protect women from exploitation.[3] It has a number of lacunas, which form the subject matter of this paper. It includes prohibiting unmarried, single and foreign couples from

[3]Sushmi Dey, *Lok Sabha Clears Bill Banning Commercial Surrogacy*, TOI, December 20, 2018.

undertaking surrogacy and furthermore, imposes a blanket ban on commercial surrogacy. The Bill is inefficient because it does not give effect to the concept of social engineering.[4] In addition to this, the Bill has also violated a number of rights of both the parties involved in commercial surrogacy by banning it completely. The major violation of surrogate's rights to compensation for the services provided is one of the results of this Bill. On the other hand, reproductive autonomy of the parents and right to have a child of homosexuals and single parents has been violated through this Bill. All this goes on to show the inability of the Bill to achieve the objective and ideal of social engineering and failure to maintain the balance between the conflicting interests of people. Another lacuna of the proposed Bill is that it allows altruistic surrogacy only by a 'close relative' of the couple. The Bill, however, has not defined this 'close relative'[5]. Any woman from the family can become a surrogate mother. But a major drawback of this is that it can lead to a number of genetical problems. For example, if the sister of the husband acts as a surrogate mother where she donates her own egg, which is then fertilized with the sperm of her brother, it could lead to congenital disorder in the child so born.

III. CONSTITUTIONAL OVERVIEW OF THE GOLDEN TRIANGLE: ARTICLES 14,19 AND 21

India, being the largest democracy of the world, has entrusted its people with a number of fundamental rights under Part III of the Indian Constitution. These rights protect the interest of the people

[4]The rationale behind social engineering is that the conflicting interests of the persons must be resolved by taking a middle path through which both sides of interests could be satisfied to some extent.

[5]The Surrogacy (Regulation) Bill, 2019, PRS LEGISLATIVE RESEARCH (January 25, 2019, 11.22 PM), http://www.prsindia.org/billtrack/surrogacy-regulation-bill-2019.

against state actions, and ensure development of a person's individuality. In the recent past, there has been a tremendous shift in the interpretation of these Articles to ensure that they fulfil the needs of the society to the maximum extent. The change in the interpretation of laws is important so as to be in pace with the changing needs of society and to leave no room where individual rights could be hampered due to state actions. The advent of shift in the interpretation of Constitutional Articles was in the landmark case of *Maneka Gandhi v Union of India*, (***"Maneka Gandhi"***)[6] whereby the concept of golden triangle was laid down. Golden triangle is formed by the interplay of Articles 14, 19 and 21.[7]

The rationale behind the golden triangle is that any law which deprives a person's right to life and personal liberty under Article 21 must qualify the test laid down under Articles 14 and 19 also. This means that a law not only needs to be formal but also reasonable under Articles 14 and 19 of the Indian Constitution. The Bill in question violates various aspects of Articles 14, 19 and 21 of the Indian Constitution. The purpose of discussing commercial surrogacy in light of these Articles is to highlight the need of extending interpretation of these Articles to include legalized commercial surrogacy in India with better regulations.

A. Violation of the Right to Equality by the Bill: Article 14

The proposed law, which imposes a complete ban on commercial surrogacy and a partial ban on altruistic surrogacy by allowing it only to legally married infertile Indian couple, is an infringement of Article

[6]Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[7]Simran Aggarwal and Lovish Garg, *The New Surrogacy Law in India Fails to Balance Regulation and Rights*, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (January 28, 2019, 03.35 AM), http://blogs.lse.ac.uk/humanrights/2019/11/23/the-new-surrogacy-law-in-india-fails-to-balance-regulation-and-rights/.

14 of the Indian Constitution which guarantees "*equality before the law and equal protection of the law*" to all the persons. By permitting altruistic surrogacy only to married and infertile Indian couples and disqualifying all the others on grounds of marital status, sexual orientation and nationality, the Bill infringes the right to equality because this is not a reasonable classification and there is no intelligible differentia.

The object sought to be achieved by the Bill is to protect women from exploitation, to prevent commoditisation of the birth process and to stop trafficking in the market of surrogacy. However, there seems to be no nexus between the object sought and the classification made as by completely banning commercial surrogacy and restricting altruistic surrogacy only to married and infertile Indian couples, the Bill has failed to provide any option of surrogacy, whether altruistic or commercial, to homosexual couples, single persons, and foreigners. This certainly cannot be deemed as a solution to check exploitation and trafficking in the market of surrogacy. In fact, such provisions infringe the right to equality of the homosexuals, single intended parents and foreigners.

By restricting surrogacy only to married couples, the Bill reinforces the majoritarian Indian morality that condemns the idea of live-in relationship and homosexuality. It suppresses the rights and freedom of these sections of society. Here, it is important to note that in India, live-in relationships and homosexuality are not illegal anymore and limiting the access of altruistic surrogacy is a clear indication of discrimination against these sections of society.

The ban runs counter to the idea of Hindu Marriage Act, 1955 and Juvenile Justice Act, 2015 that allow a single person to adopt a child while this Bill bans surrogacy for the singles. On one hand, the law is permitting single persons to adopt a child while on the other, it is restricting the single persons from adopting the method of surrogacy. In addition, under Central Adoption Resource Authority ("**CARA**"),

the foreigners are allowed to adopt a child while this Bill bans the foreigners from employing the means of surrogacy.

Protection under Article 14 is available to all the persons including foreigners. There is no reason for prohibiting them from adopting the mode of surrogacy. The only rationale behind this could be the exploitation of the Indian surrogate mother due to unequal bargaining power.

However, this reason alone cannot be the ground for prohibiting foreigners from having a child from an Indian surrogate mother. The only possible solution for this is to enact a well-knit legislation to regulate the surrogacy market in India instead of banning it altogether. The previously mentioned contradictions make the restrictions under the Bill illogical and vague.

B. Infringement of Freedom of Trade and Commerce of the Surrogate Mother: Article 19(1)(g)

Article 19 of the Constitution of India protects various freedoms of the citizens. These rights as provided under Article 19 are subject to certain restrictions as provided under Article 19(2) to Article 19(6).

Article 19(1)(g) provides freedom to practise any profession, or to carry on any occupation, trade or business. Restriction on clause (g) of Article 19(1) is provided in Article 19(6). Article 19(1)(g) protects the interests of a surrogate mother who wants to earn money through surrogacy and also of the doctor who practices in Assisted Reproductive Technology ("**ART**") for procreating a child through a surrogate mother. The State cannot impose an absolute restriction on the practice of surrogacy or ART procedure.[8] In place of imposing absolute restriction on surrogacy, State can bring such laws, rules and

[8]Har Shankar & Ors. Etc. v The Dy. Excise & Taxation Commr., AIR 1974 SC 1121.

regulations, which can protect the surrogate mother from exploitation and at the same time, regulate the practice of commercial surrogacy.

Imposing an absolute ban on surrogacy in order to prevent exploitation of women is not a solution. This restriction also does not come under the ambit of public interest, a ground given in Article 19(6). The expression 'interest of the general public' comprises of any matter, which affects the public order, morality, health etc. It is an unclear expression and gives wide powers to the executive for curtailing the rights given under Article 19(1)(g). The court has to see whether any restriction on Article 19(1)(g) is in the interest of general public or not. Banning commercial surrogacy only on the ground of morality does not seem to be correct in law because the concept of morality is dynamic and changes with time. What was considered immoral earlier, in those prevailing circumstances, might not be immoral in the current socio-economic structure. This is best evidenced by the recent judgement of the Supreme Court, which decriminalized section 377 of the Indian Penal Code.[9] If something which was considered a crime could be accepted by the society due to a change in the view of the society towards its people, then why can commercial surrogacy not be accepted as a reality in the 21st century? It is bread and butter for not only surrogate mothers but also for numerous clinics and doctors who are involved in surrogacy. In *Chintaman Rao v. State of M.P.*,[10] the court held that the restriction imposed on a person's enjoyment of the right should not be of excessive nature beyond what is required in the interest of the public. A blanket ban on commercial surrogacy, which harms the interests of numerous stakeholders of this multibillion-dollar industry, cannot be justified and is excessive of what is required.

C. Right to Life and Reproductive Autonomy: Article 21

[9]Navtej Singh Johar v. Union of India, Petition (Criminal) No. 76 OF 2019.
[10]Chintaman Rao v. State of Madhya Pradesh, AIR 1951 SC 118.

One of the major aims of all the rights ascribed to an individual is to protect her life while also giving most of the opportunities to enhance the quality of life and to develop the individual's personality. In India, this is ensured through Article 21 of the Indian Constitution, which states, "the State shall not deprive any person of his life and personal liberty without the procedure established by law". The changing interpretation of this Article over a period of time has led to how it stands today. After *Maneka Gandhi* case, it was very clear that any law not only needs to be enacted through a proper procedure but it also needs to be reasonable and rational.

a) Right to privacy

In India every person here has the right to make choices concerning their personal space and thus, does not appreciate any interference in that particular space which we call privacy. Privacy is that private space of a person where any interference is unacceptable, especially when the interference is by the State in the personal matters of a person. Until the passing of *Justice K.S. Puttaswamy (Retd) v. Union of India*[11] judgment, right to privacy was not formally considered the part of Article 21. After this judgment, right to privacy has become a part and parcel of Article 21. The most intimate matters of privacy are marriage, family, procreation motherhood etc. In *B.K. Parsarthi v. Government of Andhra Pradesh*[12], it was held that reproductive rights or right to reproductive autonomy form a part of right to privacy. Any encroachment on right to reproduction or procreation is an encroachment on privacy. Procreation is a matter out of the ambit of State control or interference. A couple has an absolute right to decide the mode of conceiving a child, whether natural, adopted, through surrogacy or any other method. The Bill bans the fertile parents from

[11]Justice K.S.Puttaswamy(Retd.) v. Union of India, Writ Petition (Civil) No 494 OF 2012.
[12]B.K. Parthasarathi v. Government of A.P. and Others, AIR 2000 AP 156.

receiving the service of surrogacy, whether through altruistic or commercial means. There is no rational basis for the provision to prohibit fertile couples from adopting surrogacy. This is purely the choice of the couple, whether fertile or infertile. We cannot ignore the fact that in this rapidly changing and competitive era, many women do not want to undergo labour pain but at the same time, desire to have a biological child. In such a situation, they may find surrogacy as the best option whereby a woman voluntarily wants to undergo pregnancy for someone else and expects some compensation in return for the services provided by her. This is the reproductive autonomy of a woman whether to undergo pregnancy or not, even when she is fertile. Not allowing fertile couples to get the services of surrogacy is in a way forcing a fertile woman to undergo pregnancy to have a biological child, even when she is not willing to do so. In *Suchitra Srivastava v. Chandigarh Administration*[13], it was held that 'reproductive choices can be exercised to procreate as well as to abstain from procreation.' This is a major encroachment on the choice of procreation, which in turn violates the right to privacy under Article 21 of the Indian constitution. In addition to this, infertility has to be proved to get the service of surrogacy. Proven infertility, according to the Bill, means inability to conceive a child even after 5 years of unprotected coitus preventing a couple from conception. No concern is given to the fact that there might be a medical condition whereby a woman can conceive or is fertile but cannot carry a child for the gestational period.

b) Right to livelihood

The blanket ban on commercial surrogacy also violates the right of a surrogate woman to use her body in the way that she wants to. In this rapidly changing era, people are venturing into new avenues of

[13]Suchitra Srivastava v. Chandigarh Administration, Civil Appeal No. 5845 of 2009.

employment and moneymaking. Right to life is hampered not only by taking away a life without the procedure established by law but also by taking away the means to sustain life, which is in the form of livelihood and ensures decent living. The easiest way to deprive a person of her right to life is to deprive her of her livelihood. Livelihood can be earned in any manner whatsoever as the right under 19(g) gives its citizens the right to freedom of trade and commerce subject to few restrictions. The Bill in question violates the right to livelihood of a surrogate mother by not allowing her to get the compensation for the services provided by her.[14] This makes the surrogate woman vulnerable as gestational services are also extracted out of her but she is not fairly paid for it. Like any other employment, the interpretation of surrogacy should be changed to consider it as a pure and dignified employment. This is because a surrogate woman undergoes all the labour and pain to provide a child to the intended couple, there is no reason why such a woman should not be compensated for her services like any other employment, over and above the medical expenses. There is no question of immorality involved here because womb renting is technically not baby selling but only a sale of gestational service, like any other service, to the people who desire to have a child through surrogacy. Instead, not providing a fair compensation to a surrogate would in fact amount to her exploitation, whereby, she has provided all her labour and services but is not being given anything in return. Thus, a ban on commercial surrogacy will deprive a large number of women of the livelihood they could have earned by this very concept of womb renting.

c) Right to human dignity

The Bill also violates the right to life of people who have been debarred from hiring the services of surrogate under the Bill. Right to

[14] *Supra* note 8.

dignity is a major aspect of right to life. Right to dignity ensures that right to life is not a mere animal existence but is much more than that. It includes everything which is important to sustain an accomplished life. One of the major aims of marriage under Indian philosophy is to have a child. One of the major breakthroughs in the last few months has been the decriminalization of gay sex. After almost 158 years of treating it as a crime, the Indian Supreme Court finally decriminalized it and has taken a tremendous shift in recognizing the change in interpreting morality and held that "*societal morality cannot trump constitutional morality. Societal morality cannot overturn the fundamental rights of even a single person*."[15] Since gay sex has been allowed, soon gay marriages will also get legal recognition. Thus, a very important issue arises pertaining to the parenting rights of this section of the society? Other than surrogacy, these people will have no option to have their own biological child. Once gay marriage gets legal recognition, it will be paradoxical to ban these people from availing surrogacy services. Because, on one hand, they will be given right to get married but on the other hand, they will not be able to have their own biological child. This section of society is in the most urgent requirement of availing service of surrogacy because they cannot have a biological child unlike their heterosexual counterparts. This is a grey area where eventually questions are going to arise and it is high time to think on these lines.

Another grey area of this Bill is where it prohibits single people from availing surrogacy services. There seems no logical nexus between the object of the Bill, which is to check exploitation of women due to commercialization of surrogacy, with banning single people from availing surrogacy. There is no rationale in prohibiting a single person from having her biological child by way of surrogacy in a case where she does not have her other counterpart. Surrogacy is the best suited option for such sections of society and by prohibiting it for them, this

[15] *Supra* note 10.

Bill has, in numerous ways, violated their right to life under Article 21.

IV. COMPARATIVE ANALYSIS OF COMMERCIAL SURROGACY IN DIFFERENT COUNTRIES

The concept of smooth regulation of commercial surrogacy is not as utopian as it might seem. There are a number of countries where commercial surrogacy is legal and is very well regulated. There is no exploitation of surrogate mothers or intended parents in the name of commercial surrogacy in these countries on account of the comprehensive regulations. Such laws could very well be borrowed and could be effectively applied in India in order to legalize commercial surrogacy and to prevent the parties from exploitation at the same time. Following are the countries where commercial surrogacy is legal.

A. Russia

Commercial surrogacy is legal in Russia. The arrangement is governed by a contract. It is regarded as a job or work. There surrogate mothers are financially motivated. Altruistic surrogacy is also rejected. The major reason to consider surrogacy as a work is that only gestational surrogacy is allowed and traditional surrogacy is illegal. Gestational surrogacy means where the gamete is not that of a surrogate woman but is either of the intended mother or of any other donor. Russia allows only gestational surrogacy and does not allow traditional surrogacy in contrast to India where traditional surrogacy is allowed. The genetic relatedness to the child makes the woman emotionally attached to the child. Gestational surrogacy makes sure that the surrogate mother is not genetically related to the child and considers surrogacy as care work rather than as mothering. This

makes it easier for the surrogate woman to take surrogacy as purely a form of work and prevents her from cultivating any maternal feelings for the child but at the same time, she is also not indifferent to the life growing inside her due to the compensation paid for carrying the child. This attitude of surrogate women and other people make surrogacy purely a business where a woman earns by renting her womb to the couple desiring a baby. It also allows foreign couples, unmarried couples and single persons to enter into surrogacy arrangements. Any woman aged between 20-35 years, whether married or unmarried, can become a surrogate. She should already have a child of her own to maintain her mental status with the surrogate child. She can be a surrogate any number of times depending upon her physical and mental fitness. Proper screening of both the parties is mandatory before entering into the contract.

B. Israel

Surrogacy arrangement is governed by a contract between both the parties. The agreement contains the payment details, which are to be made to the surrogate mother for her gestational services. Surrogacy arrangements with family members are prohibited. Only gestational surrogacy is allowed. Only an unmarried, single, divorcee woman who already has a child of her own can become a surrogate. State controlled surrogacy is practiced in Israel.[16] The surrogacy contract is not valid unless it is affirmed by the Approvals Committee, which comprises of a group of legal and medical professionals and clergy tasked with ensuring that all surrogacy agreements are in the best interests of the parties, including the society at large. The committee ensures that the agreement is fair. There is no inclusion of third party, which prevents exploitation of both the parties.

[16]Victoria R. Guzman, *A Comparison of Surrogacy Laws of the U.S. to Other Countries: Should There Be a Uniform Federal Law Permitting Commercial Surrogacy*, 38 HOUS. J. INT'L L. 619 (2019).

C. Ukraine

Ukraine allows commercial surrogacy. Married couples, whether foreigners or local, can enter into surrogacy arrangements. Written consent of both the parties is required before entering into the surrogacy arrangement. Gestational surrogacy is preferred over traditional surrogacy. Ukrainian law also treats intended parents who are genetically related to the resulting children and those that use donor eggs and sperm in the same manner.[17]

D. United States of America

Some states of USA allow the practice of commercial surrogacy. California has the world's best surrogacy laws and is known as a 'surrogacy friendly' state. Surrogacy arrangements here are governed by the surrogacy agreements. California allows intending parents, regardless of their marital status or even sexual orientation, to enter into the contract of surrogacy. Commercial surrogacy is legal in California. Contracts for gestational surrogacy are reinforced on a regular basis here. It is important that the parties involved in the contract have their advocate's advice before entering into the contract to make sure that all the parties involved have a clear understating of their rights and duties. The gestational surrogacy contracts are notarized so as to make them valid. Intending parents, in case of gestational surrogacy, are the natural and legal parents of the child. The contract strictly establishes the parenting rights of the intending parents and that the surrogate mother has no legal parenting right over the child. This ensures that conflicts regarding parentage do not arise in future. In *Johnsen v. Calvert*,[18] the California court held that surrogacy contract is not barred by public policy.

[17] *Id.*
[18] Johnson v. Calvert, 5 Cal. 4th 84, (1993).

The right to procreation is recognised to be implicit in the right to privacy. The legendary American case of *Roe v. Wade*[19] has been alluded to by the Supreme Court of India in a number of decisions dealing with the subject matter. In the instant case, the US Supreme Court held that a citizen has the "*right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other*."[20]

V. INTERNATIONAL INSTRUMENTS ON SURROGACY RIGHTS

At present, there is no single or specific international document or instrument, which specifically talks about surrogacy rights.

Article 1 of the UN Charter states its purpose as, "*to achieve international cooperation…., to promote and encourage the respect for human rights and for fundamental freedoms of all*."[21] So, the question that arises is whether surrogacy can be claimed as a human right. Every person has the right to become a parent, which is one of the most basic human rights. Surrogacy can also be claimed under reproductive rights, which includes diverse fields of rights like civil, political, economic, social and cultural rights, which affects reproductive rights of an individual and of couples.

There are various international conventions, which put obligation on States to uphold the individual's reproductive rights.

A. Reproductive Rights

[19]Roe v. Wade, 410 U.S. 113 (1973).
[20]Diksha Munjal-Shankar, *Medical Tourism, Surrogacy & The Legal Overtones - The Indian Tale*, Vol. 56 No.1 JILI 62, 62-77 (2014).
[21]Charter I, *Article 1 Purposes and Principles of the United Nations*, (20/01/2019, 2.00.PM) C.f. http://www.un.org/en/sections/un-charter/chapter-i/.

a) Universal Declaration of Human Rights, 1948

Article 16 (1) of the Universal Declaration of Human Rights, 1948 (UDHR) asserts, *"Men and women of competent age without any limitation due to nationality, race or religion, have the right to marry and the right to start a family."*[22]

The expression 'to start a family' denotes the reproductive rights of an individual. Thus, procreation of a child can be done through normal conception or ART or adoption. However, the above-mentioned right is available only to men and women.

b) Teheran Conference on Human Rights in 1968

The reproductive rights to a certain extent are new in the international law. The reproductive right for the first time was recognized in the Teheran Conference on Human Rights in 1968, which provides that the "*rights to decide freely and responsibly on the number and spacing of children and to have the access to the information, education and means to enable them to exercise these rights.*"

c) International Conference on Population and Development, 1994

The International Conference on Population and Development ("**ICPD**") or popularly known as *Cairo Conference* has specifically talked about the reproductive rights of the individuals in its Para 7.3.[23] The aim of the conference is to provide an opportunity to individual and couples to exercise the rights like right to have a child in the way

[22]Universal Declaration of Human Rights, 1948, Article 16(1), (Oct. 10, 2019, 3:00 PM) C.f. http://www.un.org/en/universal-declaration-human-rights/.
[23]*United Nations Population Information Network*, 1.12, U.N. Doc. A/Conf.171/13, Report of the ICPD, (Oct. 18, 1994), UNITED NATIONS, (Jan. 23, 2019, 3:45PM) http://www.un.org/popin/icpd/conference/offeng/poa.html.

they want, the number of children, spacing and timing between them etc.

d) Beijing Conference, 1995

The Fourth World Conference on Women (1995) in Beijing has sustained the reproductive rights. It states that the human rights of women also include the right to control over her body. She is free to decide the matters relating to her body including reproductive health, violence and discrimination.[24]

As provided by the above rights of the international conventions and instruments, we can conclude that reproductive right is a broadly recognized right.

B. Reproductive Rights of Women

A woman's life, liberty and security, health, autonomy, privacy, equality and non-discrimination and education cannot be protected without ensuring her right to determine when, how and whether to bear children, to have a complete control over her body and reproductive health, information and services. Women's human rights cannot be realized without promoting women's reproductive rights.[25] Therefore, it is very important to protect the reproductive rights of the women.

There are two major international instruments, which protect the reproductive rights of the women.

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[24]*Report of the Fourth World Conference on Women*, Beijing, China, Sept. 4, 1995, 96, U.N. Doc. A/Conf.177/20/Rev.1 (1996), UNITED NATIONS, (Jan. 24 2019, 2.00 AM) http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf.

[25]*Reproductive Rights are Human Rights* '2009' C.f. CENTER FOR REPRODUCTIVE RIGHTS (Jan. 25, 2019, 3:00 PM), http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/rrarehr_final.pdf.

a) The Convention on the Rights of Persons with Disabilities (Disability Rights Convention), 2006

It is the first international human rights instrument, which expressly and specifically recognized the women's reproductive right as a human right under Article 23.

b) Convention on the Elimination of All Forms of Discrimination against Women, 1979

Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women ("**CEDAW**") has defined its purpose as prevention of 'discrimination against women' in all its forms and manifestations.[26] In addition to the civil rights issues of the women, the Convention also protects the reproductive rights of women.

Article 4 of CEDAW confirms the reproductive rights of women; it states "*role of women in procreation should not be a basis for discrimination."* [27]The States also have *"to adopt special measures with the aim to protect the maternity without any discrimination."*

Article 11.1.(c) states that "*the women's right to free choice of profession and employment and State should not make any discrimination in the area of employment*."[28] So, under the umbrella of this Article, commercial surrogacy can be legalized and justified**.**

Article 12 protects the right to health of the surrogate mother. It states "*State Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period,*

[26]*The convention on the Elimination of All Forms of Discrimination against Women 'CEDAW' (1979),* UNITED NATION, C.f. (Jan. 25, 2017 7.00AM), http://www.un.org/womenwatch/daw/cedaw/text/econvention.html.
[27]CEDAW. art. 4.
[28]CEDAW. art. 11.1.(c).

granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."[29]

Some institutions and organizations like The UN International Research and Training Institute for the Advancement of Women ("**UN-INSTRAW**"), The United Nations Population Fund ("**UNFPA**") and the World Health Organization ("**WHO**") are also working to improve the lives of the women. They also support the reproductive rights of the women.

The right to procreate is a very basic right of any person. Therefore, it should not change with sexuality or gender orientation of the person. However, declining the right to have children to the childless people which is possible through surrogacy is nothing but refusing equal treatment to them, which clearly amounts to adverse distinction.[30]

Sadly, even today, there is no international instrument which specifically talks about or protects the practice of surrogacy as a human right. However, when reproductive rights were protected, then surrogacy automatically got protected because surrogacy is one of the most important shades of the reproductive rights.

In India, under the National Commission for Women Act, 1990, the human rights of women are protected. A National Commission to addresses their grievances ("**NCW**") was also established by the Act. In addition to this, the Government has also enacted the Protection of Human Rights Act, 1994 for protection of the human rights of people and established Human Right Commission at the national, state and district levels.

[29]CEDAW, art. 12. (2).
[30]K. Svitnev, *Legal control of surrogacy – International perspectives*, (Jan 26, 2019, 11:48 PM) http://www.jurconsult.ru/publications/ethical_dillemas/13_Legal%20control%20of%20surrogacy%20%20international%20perspectives.pdf.

VI. A SOCIOLOGICAL PERSPECTIVE ON COMMERCIAL SURROGACY

The only reason that the human species have survived the attack of time is because of its ability to adapt to the changing social structure. Society is not the same as it was two hundred years ago. This is because of the change in the thought process or mentality of the people living in that society. India in these cases lags far behind the western countries when it comes to adaptation. People here still adhere to the age-old futile principles which do nothing more than create an impediment in development of the society. People here are still stuck with their patriarchal notions. This is the major reason because of which commercial surrogacy is considered as exploitative and altruistic surrogacy is supported. The basic reason behind this is that the society still lives under the mind-set that motherhood is the prerogative of a woman and she should do it if she wishes to live with dignity in the society. She is expected to give birth to a child not because she wants to but because she is expected to do this by the society. She is expected to do this out of altruism even if she undergoes pounds of labour pain, which is beyond the imagination of any human who has not experienced it. Any reward in return of undergoing such labour pain is vehemently opposed by the agents of patriarchal notions because they see it as something that a woman should do and can do and there is no requirement of a reward for it. But isn't this very contradictory in the 21st century where we reward even a casual worker for his services but can't accept that surrogacy is also a gestational service for which the woman is rightly entitled to be rewarded or compensated over and above her medical expenses? The very basic question arises that why can a woman not use her body in the way she wants to. If she is willing to rent her womb for a good cause by which she can help others and also earn a living for herself, then why does society create obstacles for her? Morality should not be the ground here because morality is not static. It changes with

time. There is no precise definition of morality, it is subjective and varies from person to person. For a narrow-minded person, some act might be immoral but for an open-minded person, the act might be moral and normal. It is indeed paradoxical that gay sex, which was a crime earlier and considered to be immoral, has now been accepted by the society but the same society refuses a to accept the reality of the commercial aspect of giving birth. No doubt there is exploitation in this business also as there is in any other business. However, if there is exploitation in any business, the entire business is not shut down, rather laws are put in place to regulate it in a proper manner so as to minimise the exploitation. In response to exploitation, the complete ban on commercial surrogacy will lead to underground business, which will still be a reality but will be out of the control of legal system. In such a case, there will be even more exploitation than it could be imagined. Exploitation is possible in both the scenarios but the only difference will be that in the case of legalized commercial surrogacy, there would be a chance to regulate such exploitation whereas in a case where it is banned, it will still find its way by becoming an underground business and will then be out of any regulating mechanism. The state cannot impose its inability to prevent exploitation by abridging the rights of the people. Commercial surrogacy is not a utopian idea. As we have seen above, there are countries where it is legal and very well regulated. Commercial surrogacy is such a concept where all the parties involved can fulfil their interest with utmost contentment, if the mechanism is regulated properly. The couple desiring a biological child can get so by gestational surrogacy and the surrogate woman can, by voluntarily renting her womb for a good cause, earn her livelihood. The only requirement to make this possible is a well-knit mechanism.

VII. CONCLUSION & SUGGESTIONS

From the above research, it can be concluded that the Surrogacy (Regulation) Bill, 2019 has failed in many aspects in maintaining the balance among various interests of different sections of the society. There is no nexus between many provisions of the Bill and the objects sought to be achieved by the Bill. Moreover, these provisions violate some of the most important Fundamental Rights of the people as enshrined under Part III of the Indian Constitution like Article 14, Article 19 and Article 21. The prevalence of exploitation due to commercial surrogacy is not denied but banning the practice altogether is not a solution to stop this exploitation. As seen above, there are many countries where the practice of commercial surrogacy is legal and is very well regulated. To stop the exploitation caused due to commercial surrogacy, the need is to enact a comprehensive legislation, which while legalizing the commercial aspect of surrogacy, also regulates the exploitation that may be the result. It must have provisions for enforceable contract, mandatory screening, only gestational surrogacy to be legal etc. Such a comprehensive legislation is required not only at the domestic level but also at the international level to check trans-boundary commercial surrogacy. Along with the regulation, a central authority is also required to act as a watchdog for keeping a check on the smooth practice of commercial surrogacy. Here are a few suggestions to regulate commercial surrogacy[31],

Enforceable contract - To leave no room for future disputes between the parties regarding parenthood rights or payment or anything that may concern, there must be an enforceable contract between the parties. Parties must enter into this contract only after consultation with their respective solicitors. This will ensure that both the parties are aware of their rights and obligations relating to surrogacy and are not short of legal advice on any matter.

[31]Mrinal Vijay, *Commercial Surrogacy Arrangements: The Unresolved Dilemmas*, 3 UCLJLJ 200, 200-236 (2014).

Mandatory screening – The practice of surrogacy can have a psychological effect on the parties. Before entering into the contract, there should be a proper screening of both the parties. This will make sure that the parties are mentally stable to enter into a surrogacy agreement. Additionally, it will help to ensure that the surrogate mother does not enter into contract unwillingly and under financial pressure. Counselling sessions must be conducted to make them aware of the risks and technicalities as well as the procedure of surrogacy, so that no party stays in abeyance or enters into surrogacy agreement with lack of knowledge.

Gestational surrogacy - Only gestational surrogacy should be allowed. In this type of surrogacy, the surrogate woman cannot donate her own egg. The egg is either of the intended mother or of any other donor. The surrogate woman is only the carrier of the child. This will ensure that surrogate woman is not emotionally attached to the child because the child is not genetically related to her. Further, this ensures that no maternal feelings are developed because since the child is not genetically related to her, she loses all the parental rights over her. She carries the child only with the intention of giving it back once it is born.

Legitimizing payments- Payment to the surrogate must gain legal backing. All the details regarding payments to the surrogate must be explicitly mentioned in the contract to avoid any future dispute in this regard. In the absence of this, there are chances of exploitation of not only the surrogate woman but also of the intended parents as the surrogate may demand a higher price than it was agreed upon in lieu of handling the child to the intended parents.

Regulatory authority and a nationwide Act - To regulate commercial surrogacy, there can be appointment of a national authority under an act, which could look after the mechanism of surrogacy. Enactment of a comprehensive act is required in this regard which could address most of the issues that arise in commercial surrogacy. A proper

procedure should be laid down to enter into a surrogacy contract. The act should also lay down the eligibility criteria to become a surrogate mother such as age of the woman. A mechanism should be put in place to determine the mental and physical health status of the woman before entering into a surrogacy contract. An estimated amount of payment should be mentioned in the act, which is to be paid to the surrogate worker for rendering her gestational services. In case of a failure to pay, the intended parent must be held liable for penalty or compensation to be paid for breach of contract. Similarly, provision for specific performance should be there in case the surrogate woman breaches the contract. The clinics must be strictly regulated so as not to leave any room where these clinics could exploit the parties.

In the present sociological scenario, we cannot turn a blind eye to the reality of commercial surrogacy. Society has changed a lot in the past few years and now, it is important to accept these changes. Motherhood is not perceived in the same way as it was perceived some years ago. It is high time we recognize the labour involved in the process of giving birth, and recognize the right of a woman to be legally compensated for the same.

ENUMERATING THE UNENUMERATED: RECOGNISING THE 'RIGHT TO BE FORGOTTEN' IN INDIAN JURISPRUDENCE

Omkar Upadhyay[*]

Abstract

"It's dangerous when people are willing to give up their privacy"[1]

The privacy advocates won their battle when the 'right to privacy' received an elevation from a human right to a constitutionally protected fundamental right. This recognition of privacy as a fundamental right opened up a plethora of deliberations such as State's power of surveillance, protection of personal data and so on. The overarching presence of technology led to privacy, as a concept, being exploited in various of ways. One such way is the creation of a new right, associated with privacy concerns in the digital era, that is, the 'right to be forgotten'. This paper is an attempt to place this right, a creation of western jurisprudence (this right emanating from the landmark 'Google' judgment), in the Indian context by analysing the efficacy of the

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[1]Noam Chomsky, *World of Surveillance is our Responsibility: Privacy should not have to be Defended*, (interview with Bangkok Post), http://chomsky.info/20140215.

deemed data protection law in protecting the said right. The researcher attempts here to gauge the judicial response to this alien 'right to be forgotten' and its status in India. The paper also discusses the possible conundrums of this right with other protected rights such as that of expression and information. Furthermore, the changing contours of the right to privacy would also be dealt with by this paper in an effort at making the study comprehensive.

I. INTRODUCTION

The world has been a witness to tectonic shifts in the way information is available and accessed; from being circulated in the newspapers, magazines and other written formats, to being available in just one click. The 'internet of things' made the boundaries of the information world virtually invisible. The web portals and search browsers such as Google and Yahoo, to name a few, have become the one-stop destination for accessing and uploading information and data. However, this reach of the internet in our daily lives has not itself been free from hitches. The internet is not subjective, it does not assess the data on subjective terms and distinguishes it as public or private. Thus, even when information may be sensitive to an individual, the internet would be nonchalant and make it accessible to the world. All sorts of information, private or public, is now open access and thus, is a direct infringement of an individual's privacy.

Privacy is an issue of serious concern. It is the foremost right of any person to live his life in any manner, free from any interference. Secrecy forms an essential part of anyone's privacy. The availability of details and data regarding a particular individual and it being

accessed by other persons infiltrates his/her privacy and secrecy. The privacy of an individual on the cyberspace is just one click away from being infringed. It is in these kinds of situations that the 'right to be forgotten' comes to the rescue of the individuals. The right to be forgotten or erasure forms an intrinsic component of the privacy right and acts as its protector in the digital world.

It is with this background that the researcher has undertaken this research. The paper will analyse the need for recognising the right to be forgotten by tracing its historical evolution. The attempt here is to argue for the cause of such recognition as to safeguard the privacy of individuals in the digital world while also presenting a picture that balances conflicting rights and interests. The paper will discuss the legal inception of the said right in the *Google* case so as to gauge the international response to its status. Primarily, the focus of the paper will be on the status or position the right holds in Indian jurisprudence. Though a seemingly new concept, it has attained great importance in India, as evinced by the recently introduced Personal Data Protection Bill, 2019 ("**Bill**"). Though not a comparative study, the researcher has taken inspiration from the European Union ("**EU**") EU Directives on Privacy as a touchstone to analyse the Bill's efficacy in protecting the right in concern.

II. TRACING THE EVOLUTION OF THE 'RIGHT TO BE FORGOTTEN'

The internet, or the World Wide Web is in many ways akin to the human mind. It has the capacity to observe, store, process and remember the data fed to it. One distinguishing aspect is the ability to forget. While it is the natural process of mind to forget things, which are less relevant or have become old, the cyberspace has an ability to remember everything almost as afresh as new. Thus, in the digital age,

"*forgetting has become the exception, and remembering the default.*"[2] The digital memory is now the storehouse of almost all the information which humans have been able to lay hands on. This cyberspace does not only store information of public importance, rather much personal or private information also finds a place in web searches. Therefore, all the awkward incidents, humiliating events, records of crimes which an individual is no longer guilty of, and such other information lies with the internet even when the owner of such information has himself forgotten or wants the world to forget them. Thus, acting as an external memory, one which humans cannot control on their own, it makes it difficult to move past incidents.[3]

The roots of the right to be forgotten go back to a concept in French law, '*le droit à l'oubli*', in other words, 'right of oblivion'. Such right of oblivion helped aid convicted criminals, after having served their time, to restrain the publication of details of their crimes and their criminal life.[4] Though recognised as a right, concretisation of its status was done by the Court of Justice of the European Union (CJEU) in 2014.

A. Delete My Name! The Google Spain Case

The 'right to be forgotten' has its foundational roots in Europe. The EU Directive 95/46/EC on personal data protection mandates that personal data of an individual be retained only for the period of time that such retention is necessary to fulfil the object of such collection.[5] Further, the data subject has been given the right to seek withdrawal of the personal information in case the guidelines of the directive are not

[2]Viktor Mayer-Schönberger, *Delete: The Virtue Of Forgetting In The Digital Age*, (1 ed. Princeton University Press 2011).
[3]Julie Juola Exline, *et al.,Forgiveness and Justice: A Research Agenda for Social and Personality Psychology*, 7PERSONALITY & SOC. PSYCHOL. REV. 337 (2003).
[4]Jeffrey Rosen, *The right to be forgotten*, 64 STAN. L. REV. ONLINE 88-89 (2012).
[5]Directive 95/46/EC, Article 6(1)(e).

followed while processing such data.[6] But it was ultimately the CJEU, which through its landmark judgment in *Google Spain et. alv. Agencia Espanola de Proteccion de Datos* ("**AEPD**")[7] or as famously known as the '*Google case*' or '*Costeja case*', deliberated at length the scope of the said right.

The case originated from a complaint lodged by Mr Costeja Gonzalez against a newspaper publisher and Google. The reason for the complaint was an article about an auction which listed all property under seizure by the Social Security Department for attachment for recovery of debts, published by *La Vanguardia*, a Spanish newspaper in 1998. This was done as per the order of the Labour Ministry.[8] This publication in itself was not the point of dispute. The issue emerged when in 2009, the newspaper publishers decided to make all the past and present copies of the newspaper (going as far back as 1881) to be available online. It thus, became searchable on the search engine Google. Therefore, when one day Mr. Costeja decided to search himself on Google, the search results showed this article of his property being auctioned due to his inability of paying social security debts. The property, mentioned in the article for auction, was owned by him and his wife. Now the circumstances had changed, he was divorced and his property was no longer attached. Therefore, he requested the newspaper publisher for its removal, but was declined as the publisher said that they published the said information under the direction of a State agency.[9] Costeja then approached Google for the removal of the search result, which was also denied.

[6]Directive 95/46/EC, Article 12(b).
[7]3 C.M.L.R. 50 (2014).
[8]*Subhasta d'Immobles*, La Vanguardia (Jan. 19, 1998) http://hemeroteca.lavanguardia.com/preview/1998/01/19/pagina-23/33842001/pdf.html.
[9]Google Spain et. al v. Agencia Espanola de Proteccion de Datos, 3 C.M.L.R. 50 (2014).

The complaint was lodged before the AEPD asking for the removal of the records of the newspaper from search results. The AEPD negatived the claims against the news publisher, because it had authorisation, but accepted the claims against Google. The AEPD said that Google is subject to the data protection laws of the Union and the information published by it was neither relevant nor timely, in contrast to the publication by *La Vanguardia*, which was both, timely and relevant.[10] The relevancy was judged on the original publication's intent, which was to bring people to auction. This object was not now to be fulfilled by any means and thus, had become irrelevant. Against the decision, claims were brought by Google before the highest court of Spain, Audiencia Nacional, which then referred the questions to the CJEU.

The CJEU held that Google, as a 'controller' under article 2(d) of the Directives, was under the obligation to process the data. It affirmed Mr. Costeja's 'right to be forgotten' and ordered for the deletion of the search results as requested by him. Though there were various other issues discussed in the judgment, but given the topic of deliberation, the analysis focuses on the consequences of the pronouncement on the right of discussion.

B. The Aftermath of the Judgment

The decision of the Court meant that the search portals were now under an obligation to process personal data while upholding the individual's newly recognised right (right to be forgotten), and on the data subject's application, remove the private information. This decision of CJEU was not free from criticisms and controversies. One of the major issues was the jurisdictional applicability of the decision, as Google was located outside of the EU.[11] To curb this fallacy, the

[10] *Id*, para. 17.
[11] Jose Manual Martinez & Juan Manuel Mecinas, *Old Wine in a New Bottle?: right of Publicity and right to be forgotten in the Internet Era*, 8JIP 362 (2018).

EU Commission came up with a new policy concerning data protection, General Data Protection Regulation ("**GDPR**"), with an extended territorial application to cover certain companies not in EU.[12] The GDPR repealed the Directives and gave an express mention to the 'right to be forgotten' under Article 17.

Though the judgment recognised such a right, it did not order the removal of the information, but a removal of the search result. That means that information would still be there, but it would not be accessible. The Court thus granted, one version of the right to be forgotten.[13] The two branches of the right; 'right of oblivion' and 'right of erasure' were thus recognised, though not explicitly.[14] It was only the latter, erasure, that was granted and not complete oblivion. Thus, though the right to be forgotten was deemed important, the judgment did not clear the intricacies attached to it.

However, in 2019, the CJEU limited the territorial applicability of the right to only member states of the EU. It held that Google was not bound by this right globally.[15] It was held that when a dereferencing request has been made by a data subject, the holder is not bound to carry out the removal on all domains. This is not the first time that the said right has been restricted by its creators itself. In another case in 2017, the European Court observed that individuals cannot resort to this right for removal of personal data from records of a company in

[12]Kunal Garg, *Right to be forgotten in India: A Hustle over Protecting Personal Data*, INDIA LAW JOURNAL, https://indialawjournal.org/a-hustle-over-protecting-personal-data.php.
[13]Meg Leta Jones, CTRL + Z: *The right to be forgotten* (New York University Press 2016).
[14]Meg Leta Ambrose & Jef Ausloos, *The right to be forgotten Across the Pond*, 3JIP14 (2013).
[15]Google LLC v. Commission Nationale de I'informatique et des libertes (CNIL), C-507/17.

the official register even if the company has dissolved. This is because even after its dissolution, some rights and legal relations remain.[16]

C. Expounding on the Right to be Forgotten: Acknowledging the Discerning Views

Though it is now settled that there exists a right to be forgotten, but there has not been much clarity on what it actually means and what its implications are. Forgetting in the digital world is of great importance. The perpetual remembering ability of the internet burdens the individuals with their past.[17] But is forgetting only restricted to mean deletion of personal information or does it go beyond? Arriving at a definitive meaning of the right has been hampered by the conflicting views on it. In certain legal systems this right is not even recognised, such as in the United States of America ("**US**"), where seeking redemption in the digital world is met by ridicule and seen as unworkable.[18] The US Constitution does not give explicit recognition to right to privacy, of which this right is a branch.

The GDPR conceptualises the right as meaning deletion of information after a certain period and delinking from information which now has become outdated.[19] Thus, the European concept of the 'right to be forgotten' related to removal of information, personal in nature, after it has served its purpose and is no longer relevant. The European law makers have made one thing clear, that this right is not absolute or free from any restriction. Article 17(3) of the GDPR protects free expression in the online world as also the collection of

[16]Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v. Salvatore Manni, C-398/15.
[17]Jeffrey Rosen, *Free Speech, Privacy, and the Web That Never Forgets*, 9 J. On Telecomm. & High Tech. L. 345 (2011).
[18]Meg Leta Jones, Ctrl + Z: *The Right to be Forgotten* 27 (New York University Press 2016).
[19]Bert-Jaap Koops, *Forgetting Footprints, Shunning Shadows: A Critical Analysis of the "right To Be forgotten" in Big Data Practice*, p. 346, (2011).

information for legitimate or legally justifiable reasons.[20] Though having laid the GDPR, there exist differences of opinion within nations of Europe itself and it becomes necessary, in this globalised and interconnected world, to have a certain level of uniformity in governing matters of this kind. Even in the Costeja ruling, Austria differed from other countries on the question of removal of information. It argued for removal only when the information is unlawful or incorrect.[21] Thus, what appears is that between the US and Europe, the differences are to the recognition of such a right and within Europe, the differences pertain to the tests to be followed while gauging the application of the right.

III. AN ALIEN CONCEPT IN THE INDIAN LAND: RECOGNIZING THE RIGHT TO BE FORGOTTEN

Privacy, in the Indian legal system has always been a debated right. The debate has always been about the status which must be accorded to right to privacy; whether a mere human right or a constitutionally protected fundamental right, as a concomitant to the right to life and personal liberty. *MP Sharma v. Satish Chandra*[22] and *Kharak Singh v. State of Uttar Pradesh*[23] were the earliest cases delving into the right to privacy and according it a status, not of a fundamental right. However, it was Justice Subba Rao, who in his minority opinion sowed the seeds of its recognition as fundamental right by stating that rights in Part III of the Constitution have an 'overlapping area'. The following sections will now discuss the Indian courts' take on the 'right to be forgotten' as an offshoot of privacy.

[20]General Data Protection Regulation, art. 17(3).
[21]Lisa Owings, *The right to be forgotten*, 9 AKRON INTELL., PROP. J. (2015).
[22]M.P. Sharma v. Satish Chandra, 1954 SCR 1077.
[23]Kharak Singh v. State of UP, 1964 1 SCR 332.

A. The Conflicting Views

Indian courts were faced with the recognition of 'right to be forgotten' even before privacy was recognised as a fundamental right. However, there exists differing views as regards the right to be forgotten. The conflicting views exists between the Karnataka High Court and the Gujarat High Court, while the Kerala High Court subtly gave it recognition.

In *Sri Vasunathan v.The Registrar General & Ors.*[24], the Karnataka High Court acknowledged the right to be forgotten when a woman approached it for masking her name from an order passed earlier by the same Court. The woman's father stated that the search engines display the order when her name is searched and that this could have devastating consequences on her marital life and her societal life. The claim was based on the right to be left alone and the demand was of erasure. Justice Anand Bypareddy, while delivering the order, observed that, "*This would be in line with the trend in Western countries where they follow this as a matter of rule 'right to be forgotten' in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned* ."[25] Here the recognition was based on the sensitivity of the information in dispute. The woman here was a party to a dispute concerning annulment of marriage and wanted to leave this image behind in order to move on with her life. Thus, the western concept was seamlessly incorporated to deal with information of personal nature.

Though the Karnataka High Court adopted a foreign concept without much hassle, the Gujarat High Court did not recognise it. In *Dharamraj Bhanushankar Dave v. State of Gujarat,*[26] the petitioner,

[24]Writ Petition Number 62038 of 2016 (GM-RES).
[25]*Id.*
[26]Special Civil Application Number 1854 of 2015.

under Article 226, approached the Court with the prayer of restricting the publication of the judgment and order concerning him. His argument centred around the fact that the said judgment was unreportable and even then, it has been made public and accessible to all. The petitioner here sought this relief because of the accusations levelled against him even though he had been acquitted of all charges. The Gujarat High Court, while declining the prayer of the petitioner observed that there exists no law in force to support the claims of the petitioner. In the absence of any law, his request could not be accepted. Also, the Court distinguished 'reporting' from 'publishing' by stating that the former only relates to law reports. Ultimately, the Court held that such publication did not lead to any violation of Article 21 of the Constitution of India as the petitioner contended.[27] This judgment, though does not acknowledge the existence of such a right to be forgotten, but it also does not, in an explicit way reject its existence.

Another High Court, the High Court of Delhi, was also faced with a similar issue. In the pending suit of *Zulfiqar Ahman Khan v. M/s Quintillion Business Media Pvt. Ltd. & Ors.*,[28] certain articles were published by the respondents against the plaintiff during the #Me Too campaign. The respondents published the article on the basis of certain allegations, whose source remains anonymous. The plaintiff, claiming that he was a well-known personality, requested the deletion of such articles as they were harming his repute and image in the market. The Court while granting a temporary restraining order observed the 'right to privacy' to include the 'right to be forgotten' as well as 'right to be left alone'.[29] The Court thus, restrained any further such publications

[27]*Id.*
[28]Zulfiqar Ahman Khan v. M/s Quintillion Business Media Pvt. Ltd. & Ors., 2019 (175) DRJ 660.
[29]Kunal Garg, *Right to be forgotten in India: A Hustle over Protecting Personal Data*, INDIA LAW JOURNAL, https://indialawjournal.org/a-hustle-over-protecting-personal-data.php.

until the matter was decided. Several other such requests have also been made to various other High Courts too to remove the display of judgments from the websites when the name of the data subject is searched on any search engine.

Thus, what is clear is that there exists some kind of ambiguity around the full-fledged recognition of this right by the High Courts.

B. The Privacy Judgment: S.N. Kaul's Observations

What is now clear is that the 'right to be forgotten' is an essential part of privacy rights of any person. Upholding such rights means protection of privacy, be it in the physical or the digital world. The Indian judicial system has a long history when it comes to privacy as a fundamental right (as has been discussed earlier), but the ultimate fate was decided in the landmark pronouncement of *Justice K.S. Puttaswamy (Retd.) v. Union of India (**"Puttaswamy"**)*.[30] The Court here elevated privacy right, from internationally being recognised as a human right, to a status of a right enjoined with protection by the provisions of the Constitution.

The aforementioned judgment is relevant for the present study because of Justice Sanjay Kishan (S.N.) Kaul's concurring but separate opinion. He, while agreeing with the majority view, delved into the linkage between privacy and technology and made it a separate heading in his opinion. He observed, and rightly so, that, "*The access to information, which an individual may not want to give, needs the protection of privacy.*"[31] Deliberating on the 'privacy concerns against non-state actors' Justice S.N. Kaul remarked on how much various online sites such as Facebook, Alibaba, Uber etc. knows about us.[32] He then went on to give his views on 'big data' and its possible

[30]K. S. Puttaswamy v. Union of India, [2012] Writ Petition (Civil) No. 494.
[31]*Id.* para 12.
[32]Michael L. Rustad & Sanna Kulevska, *Reconceptualizing The right To Be forgotten To Enable Transatlantic Data flow*, 28 HARV. J.L. & TECH. 349 (2015).

implications to present a picture showing the importance that needed to be given to privacy in the digital world. He in unequivocal terms called for protection of privacy in the World Wide Web and ensuring an individual's power to control the flow of information personal to him. Citing the European principles, he observed that,

"*If we were to recognize a similar right, it would only mean that an individual who is no longer desirous of his personal data to be processed or stored, should be able to remove it from the system where the personal data/ information is no longer necessary, relevant, or is incorrect and serves no legitimate interest.*"[33]

His conception of 'right to be forgotten' was seemingly based on French concept of 'right to oblivion'. As seen in paragraph 65 of his judgment wherein he ponders on the capacity of humans to make mistakes as well as correct them, which makes them entitled to leave behind such memories and start afresh. Thus, what was done here by Justice S.N. Kaul was a subtle use of concept of unenumerated rights, which empowers one to infer certain rights from the written text.[34] He recognised the 'right to be forgotten', an unenumerated right from 'right to privacy', another unenumerated right being derived from an enumerated right of 'life and personal liberty'.

However, he was not alone in given due recognition to privacy outside the physical realm. Justice Chandrachud, in unequivocal terms, deliberated on the importance of ensuring protection of 'informational privacy'. Similar were the contentions of Justice Nariman who was of the opinion that the control over dissemination of one's information is an important component of the right to privacy. It is only the right to be forgotten and right to erasure which could effectively ensure such control.

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[33]*Id.* at 29, para 69.
[34]Ronald Dworkin, *Unenumerated rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381 (1992).

Thus, the significance of the judgment lies in its authoritative value and explicit recognition to the 'right to be forgotten' in a time when a confusion still exists as to its scope, nature and application. Again, the judiciary has filled in the gaps left out by the legislature and has thus, come to aid to guard the privacy rights of the citizens of India in the online world or cyberspace.

C. Views of the Committee of Experts

A committee, presided by Justice B.N. Srikrishna, was set up to discuss the implications a data protection regime could have in India and give its recommendations. The Committee gave its report titled "A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians". The objective via its report was to recommend a legal framework governing personal information so as to protect privacy in the 'global digital landscape'.[35] Commenting on the 'right to be forgotten' the experts defined it to mean an individual's ability of limiting, de-linking or even deleting the personal information available on the internet if that information is against the interests of the person concerned.[36]

The Committee recognised that if an individual believes that a certain disclosure is unwanted, unlawful or in contravention of legal procedures, then that individual has a right to seek its deletion. Thus, its observations were modelled on the lines of trends in Europe. The report has given importance to the role of consent of the data principal. It states that the taking away of consent by the data principal is in itself a justification in for invoking the 'right to be forgotten'. It positioned that, "*The right to be forgotten is an idea that attempts to instil the limitations of memory into an otherwise limitless digital*

[35]Committee of Experts, *A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians*, p.3.
[36]Michael J. Kelly & David Satola, *The Right to be Forgotten*, U. ILL. L. REV. 1 (2017).

sphere."[37] These recommendations are of great value in formulating a legal framework regulating the flow of personal information.

D. Analysing the Efficacy of the Proposed Data Protection Regime

With the *Puttaswamy* verdict, one thing that became clear, was that there was now a need for a legislation by the Parliament to give effect to the judgment of the Supreme Court. The hitherto lack of stability which privacy has been subject to has resulted, to a great extent, from the absence of an express legislation dealing with the same. The first attempt at this was the introduction of the Personal Data Protection Bill, 2017, comparable to EU's GDPR. However, due to the completion of the tenure of National Democratic Alliance ("**NDA**")-I government, the aforementioned bill could not see the light of day.

However, in its second tenure, the government tabled a brand-new piece of legislation, a modification of the earlier bill in the form of the Bill of 2019.[38] The primary object of the Bill is the protection of privacy of the Indian citizens with regards to personal data while also establishing a Data Protection Authority for India. The said Bill is the first in the legislative past of India to provide an explicit acknowledgement of the 'right to be forgotten' in Section 20.[39] Under this section, the citizens are empowered, as 'data principals'[40] ("*the natural persons to whom the data concerns*"), to restrict or prevent personal data from being disclosed if it is found that the conditions of the provision have been fulfilled. One such condition, like the GDPR, is that such information has now become irrelevant and the purpose of its collection is no longer material. Thus, there is only a difference of terminology between the Bill and GDPR, which is in defining the person concerned, the latter using the term 'data subject'.

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[37] *Id.* at 33, p.77.
[38] Bill No. 373 of 2019.
[39] *Id.*, Section 20: Right to be Forgotten.
[40] *Id.*, Section 3(14).

Although having recognised the right, the procedure prescribed in the Bill almost negates the feasibility of application. As per the framework laid down by the EU, the data subject can directly approach the data controller for removing the concerned data, via an application. However, the Bill has done nothing but make the whole process time consuming and drawn-out. Moreover, whereas the *Costeja* ruling provided for deletion of information personal in nature, the Bill only restrains any further disclosure of such information. Thus, there is a different connotation given to the right here. As has been discussed, there are two components to the right to be forgotten; erasure and oblivion. It merely gives the individual concerned the right to prevent the continued disclosure of the information, neither deletion, nor obliteration. This conception of the right is quite different from the European version of the right and naming it the 'right to be forgotten' is nothing but a misnomer. The Bill thus, also deflects from the Committee's perception of this right, which based its recommendations on the European conception of the 'right to be forgotten'.

However, despite criticisms, there are certain praiseworthy additions and modifications in the Indian draft when contrasted with the European model. Instead of naming the giver of data a 'data subject' (as under GDPR) the Bill refers to them as 'data principals.' Though it may not seem to make much of difference, however, if the words are given their true meaning, it makes us the true owner of our own data, unlike the position in other legislations wherein, once data is given, the ownership is transferred to whoever the data is given. Furthermore, the data receiver has been termed as 'data fiduciary' instead of the GDPR's version of 'data controller'. By using the word 'fiduciary', it establishes a relation of trust, the basis of which is the consent of the data principal in giving his personal information for a definite purpose and period. Nonetheless, there are fallacies in the current draft of the Bill, the hope still remains that the chaos will be cleared when a final draft is presented and a legislation is enacted.

IV. THE CONUNDRUMS WITH OTHER RIGHTS

Fundamental rights as enumerated under Part IIII of our Constitution are interconnected and do overlap with each other.[41] One right has an impact on the other and the enjoyment of one right shall not hamper the enjoyment of the other. Thus, there is a need of balancing the rights in a manner that allows their coexistence and co-enjoyment.

When it comes to 'right to be forgotten', which involves deletion, removal or restricting of disclosure of information, questions are raised as to whether it hampers other rights. One view holds that such deletion of published information hampers other's right of free speech and expression, and also their right to access information.[42] Giving an absolute right of erasure of data would lead to plethora of such requests as was received by Google following the *Costeja* verdict. Similarly, there are apprehensions regarding the freedom of press should this right be granted. The gravity of the situation is presented by Justice S.N. Kaul as,

"*Whereas this right to control dissemination of personal information in the physical and virtual space should not amount to a right of total erasure of history, this right, as a part of the larger right of privacy, has to be balanced against other fundamental rights like the freedom of expression, or freedom of media, fundamental to a democratic society.*"[43]

As to the criticism, that it creates a roadblock to the exercise of freedom of press, adequate safeguards have been placed by the legislators in the form of exemptions which are allowed for journalistic purposes.[44] The other criticism which this right is subject

[41]Maneka Gandhi v. Union of India, [1978] AIR 597.
[42]Jeffrey Rosen, *The Right to be forgotten*,64 STAN. L. REV. ONLINE 88 (2012).
[43]*Id.* at 29, para 68.
[44]*Id.* at 39, Section 47.

to is that it hampers the unenumerated freedom of accessing information.[45] However, in the opinion of the author, this criticism seems baseless and frivolous. The right to information, a constitutionally and statutory protected right, is invoked when certain information which is of public utility is to be accessed. But the right to be forgotten protects is the 'personal information', a component of privacy. The right to information could not be given such an expansive ambit and scope so as to operate as an intrusion to the privacy of an individual.

Thus, there is a need to balance such conflicts. This can be done by making the right not an absolute one, but one with certain justifiable restrictions. Before accepting the data removal request, it must be tested on the touchstones of the sensitivity of the information sought to be removed. It was also recognised in the *Costeja* case that such a right of erasure is to be applied only when the information concerned is of personal nature and it cannot be frivolously applied to information concerning a public figure as that data becomes of, or acquires a public interest, removal of which would disturb that interest. However, such harmonisation of rights is not currently possible given its embryonic state.[46] Meg Leta Jones in his book, lays emphasise upon the role of data controller in balancing the competing interests. It is the flexibility on the side of the data controller that could prevent violation of expression rights.[47]

[45]Deepti Pandey, *The Right to be Forgotten: A Trail of Controversy and Conflict*, The Indian Journal of Law and Technology (2019).
[46]Meg Leta Jones, *Ctrl + Z: The Right to be Forgotten* 31 (New York University Press 2016).
[47]*Id.*

V. CONCLUSION

The recognition of the 'right to be forgotten' in India at such a nascent stage is unprecedented and shows the efforts of the lawmakers to keep pace with advancements in other legal systems. Calling such rights a foreign concept would be a misnomer given its universal applicability. The need of the hour is to come to a definite perception of the right, which can be done by, though highly unfeasible, a uniform transnational framework governing the matter. In the absence of this, even if a search result has been deleted, it can still be accessed by individuals of other nations, given the lack of extraterritorial applicability of national laws. This was also observed in *Costeja's* judgment. Furthermore, the two components of the right, the right of oblivion and right of erasure have to be balanced in order to form a skeletal structure of the said right acceptable to all. For this, the categorisation of types of data, into personal and public, has to be made clear and the permission of the data subject or data principal (and subsequent withdrawal thereof) must be accorded the highest importance. Though the *Puttaswamy* verdict cleared the air surrounding the recognition of the right, it would ultimately be the Bill, when it becomes a legislation, that a concrete form can be given to this right in India.

RECUSAL OF JUDGES - A STEP TOWARDS IMPARTIAL ADJUDICATION

Tanya Tekriwal[*] *& Shilpi*[**]

Abstract

"Judges do not stand aloof on these chill and distant heights, and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by." - Benjamin J. Cardozo, The Nature of The Judicial Process 168 (1921).

Judges deliver judgments after applying laws to the given facts. This is the common way of delivering justice. It is called legal justice. There is something called justice beyond the law, justice beside the law and justice beneath the law. Following the laws formally is called formalism in American realism. But this is not the era of formalism, and society needs the grand style of justice. It is often said that the judges decide cases while sitting in an air-conditioned room without knowing the real temperature of the outside world. But the

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moment they will start taking care of the temperature of the outside world, they will forget their legal duty. The moment they will inquire about the temperature outside, people will start questioning them.

Similar is the case of recusal of judges. When the judges start bridging the gap between the courtrooms and the outside world, everyone becomes suspicious of their relationship with the two opposite ends; and they start considering the judge as being biased in his rulings and pronouncements.

Recusal lies at the heart of our understanding of the role of the courtrooms in a democracy. It is meant to ensure judicial independence and impartiality; and to protect the legitimacy of the courts as well as the reputation of the judiciary. Without reforming the various aspects of recusal law, public confidence in the judiciary, the primary source of judicial legitimacy, will continue to wane. A judge is likely to feel a natural sense of awkwardness when asked to recuse himself on the ground of apparent risk of bias, and this may incline him to grant it.

I. INTRODUCTION

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

- Sir Stephen Sedley, Former Judge of the Court of Appeal of England and Wales.

In a classic English case, *Dimes* v. *Grand Junction Canal*,[1] a public company brought a bill in equity against a landowner in a matter involving the interest of the company. It was heard by the Vice-Chancellor who granted relief to the company. On appeal, the order was confirmed by the Lord Chancellor, Lord Cottenham, who was a shareholder in the company. The decree was impugned before the House of Lords after Lord Cottenham had retired in the House, presided over by another Lord Chancellor (Lord St. Leonards). He set aside the decree, with the following observation:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but it is of the last importance that the maxim that no man is to be held sacred… This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest but to avoid the appearance of laboring under such an influence."[2]

Alan Rose, the former President of the Australian Law Reform Commission once observed: "*Justice, and the appearance of that justice being delivered, is fundamental to the maintenance of the rule of law. Justice implies - consistency, in-process and result — that is, treating like cases alike; a process which is free from coercion or corruption; ensuring that inequality between the parties does not influence the outcome of the process; adherence to the values of procedural fairness, by allowing parties the opportunity to prevent their case and to answer contrary allegations, and unbiased neutral*

[1]Dimes v. Grand Junction Canal, (1852) 3 HLC 759.
[2]Durga Das Basu, *Administrative Law 244 (*2 ed., Kamal Law House2010).

decision making; dignified, careful and serious decision-making and an open and reviewable process."[3]

An essential element of our system of justice is an independent, impartial adjudicator.[4] Only when this element is present can we believe that decisions will be made on a fair and impartial basis, and that justice has been done.[5] The requirement of a neutral decision-maker "*helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous ordistorted conception of the facts or the law*."[6] Without this requirement, all of the other components of due process in our system, such as the right to an attorney, a hearing, a transcript, and to cross-examine witnesses, become useless and meaningless.[7] Indeed, due process of law requires not only freedom from partiality, but also the appearance of impartiality.[8] Hence, many statutes and judicial codes seek to prevent one who has a conflict of interest, is biased, or who appears to be biased, from adjudicating a case.[9]

In jurisprudence, however, a well-accepted exception exists to this standard. This exception is known as the rule of necessity and can be

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[3]Alan Rose, *The Model Judiciary - Fitting in with Modern Government*, 4 THE JUD.REV 323, 326 (1999).
[4]Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046,1046 (1993); Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 662 (1985).
[5]Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951).
[6]Marshall v. Jerrico Inc., 446 U.S. 238, 242 (1980).
[7]Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 476 (1986) [hereinafter Redish & Marshall].
[8]Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 150 (1968); In re. Murchison, 349 U.S. 133, 136 (1955); Haines v. Liggett Group Inc., 975 F.2d 81, 98 (3d Cir.:1992).
[9]Judiciary and Judicial Procedure, 28 U.S.C. § 455 (1994); MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990).

traced back to the 15th century.[10] It provides, "*if no judge can be found who possesses the requisite degree of impartiality in regard to a particular case, then the original judge assigned to the case need not be disqualified despite his or her partiality*."[11] This exception is invoked by courts today in cases concerning judicial salaries,[12] taxpayers and ratepayers of utilities,[13] and class action suits where all judges in a given court are affected by the outcome.[14] The rule of necessity is applied not only by the courts, but also by federal administrative agencies that have exclusive jurisdiction over certain matters.[15]

Nevertheless, the rule of necessity should only be invoked in cases where the adjudicators deem it necessary. Justices should refrain from invoking this rule as and when it appears too convenient. When the question of impartiality is raised in a case, justices should consider alternatives than relying on their power to invoke the rule.

The rule of necessity makes it imperative for the authorities to invoke this rule when the only alternative is to impede the course of justice by delaying the adjudication. By delaying the adjudication and refraining from invoking this doctrine, courts would be causing irreparable damage to the innocent party. The defaulting party will

[10]See Vangsness v. Superior Court, 206 Cal. Rptr. 45 (Ct. App. 1984), another rule of necessity exists in evidentiary matters where a prosecutor must demonstrate the unavailability of a declarant before a court will allow hearsay to be admitted. See Ohio v. Roberts, 448 U.S. 56, 65 (1980).
[11]*See* BLACK'S LAW DICTIONARY 1332 (6th ed. 1990).
[12]*See* United States v. Will, 449 U.S. 200, 202 (1980); Kremer v. Barbieri, 411 A.2d 558, 560 (Pa. Commw. Ct.), affid, 417 A.2d 121 (Pa. 1980).
[13]In re. New Mexico Natural Gas Antitrust Litig., 620 F.2d 794,795 (10th Cir.: 1980); In re. Virginia Elec. & Power Co., 539 F.2d 357, 360 (4th Cir.: 1976); Mountain States Tel. & Tel. Co. v. District Court, 778 P.2d 667 (Colo.), cert. denied, 493 U.S. 983 (1989).
[14]In re. City of Houston, 745 F.2d 925, 930 n.9 (5th Cir.: 1984).
[15]FTC v. Cement Inst., 333 U.S. 683 (1948); Annotation, Necessity as Justifying Action by Judicial or Administrative Officer Otherwise Disqualified to Act in Particular Case, 39 A.L.R. 1476, 1479-80 (1925) [hereinafter Annotation].

bear negligible losses. Not invoking this rule will arrest the wheels of justice.

II. THE ROOTS OF IMPARTIAL ADJUDICATION

Nemo judex in causa sua - No one can be a judge in his own case.

A. English Common Law

The use of an independent adjudicator in resolving disputes has long been the foundation of the Anglo-American system of law.[16] In common law, the doctrine *nemo judex in re sua*[17]was so central that "*Lord Coke insisted upon a court's right to invalidate acts of Parliament that ignored it*."[18]

An example of its importance was demonstrated in *Dr. Bonham's Case* ("***Bohnam Case***")[19] where a graduate of Cambridge University was imprisoned by the Board of Censors of the Royal College of Physicians ("**Board**") for refusing to yield to competency tests.[20] If the Board had found Bonham incompetent, it would have been authorized by statute to impose a fine on him, one-half of which would go to the college itself.[21] In a false imprisonment action brought against the Board, Lord Coke held that the statute in question could not grant the Board the authority to levy fines. The Board was

[16]*See* John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947).
[17]"[N]o man is to be a judge in his own cause" see In re. Murchison, 349 U.S. 133, 136 (1955); Dimes v. Grand Junction Canal, 10 Eng. Rep. 301, 305 (H.L. 1852). It is also expressed as Nemo unquam judicet in se. BLACK'S LAW DICTIONARY 1039 (6th ed. 1990). This sentiment was also shared by the Founders of the American Republic. See *infra* note 28.
[18]Redish & Marshall at 479-480.
[19]77 Eng. Rep. 646 (K.B. 1610).
[20]Redish & Marshall at 480.
[21]77 Eng. Rep. at 648.

an interested party because it would reap a financial benefit by finding the doctor guilty.[22]

The common law, however, confined disqualification of judges to cases of direct pecuniary interest.[23] Disqualification due to the bias of a judge was not permitted.[24]

B. American Law

The concept that an independent and impartial adjudicator of disputes is essential to a system of justice was instilled in the United States at the beginning of the Republic.[25] By providing for life tenure on good behavior, Article III of the Constitution provides for federal judges to be insulated from political pressures and political removal that result from partisan concerns.[26] The founders believed that only an independent and impartial judiciary could truly create a system of justice that would protect the rights of everyone.

III. CONCEPT OF RECUSAL

According to the definition provided in Black's Law Dictionary, recusal is "*removal of oneself as a judge or policymaker in a particular matter, especially because of a conflict of interest*."

When the judge has any personal interest in the case, he should recuse himself or be asked to recuse himself from the bench. Personal

[22] Redish & Marshall at 480.
[23] *See* Frank, *supra* note 17, at 609.
[24] *Id*. at 612.
[25] Redish & Marshall at 480.
[26] "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art.III, § 1.

interest in the case; may create 'bias' in the mind of the judge. Bias simply means partiality or preference. A judge can recuse himself from a litigation based upon a personal or private interest in the subject-matter of the litigation, his relationship with the parties to the litigation, his own conscience about the matter or the parties or his perception about conflict of interest in taking up the matter etc.[27]

Justice Frankfurter in the case of *Public Utilities Commission of the District of Columbia* v. *Pollak*[28] determined, "*The judicial process demands that a judge move within the framework of relevant legal rules and the court covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole Judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy with which they are interested. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment.*"

As observed by Grant Hammond, the former Judge of the Court of Appeal of New Zealand and an academician, in his book titled Judicial Recusal, about the principles on the law of recusal as developed in England:[29]

[27]Shobha Atmaram Prabhu& Ors. v. State of Maharashtra & Ors., Writ Petition No. 6344 of 2018.
[28] (1951) 343 US 451.
[29]Indore Development Authority & Ors. v. Manohar Lal& Ors., SLP No. 90369038 of 2016.

"*The central feature of the early English common law on recusal was both simple and highly constrained: a Judge could only be disqualified for a direct pecuniary interest. What would today be termed 'bias', which is easily the most controversial ground for disqualification, was entirely rejected as a ground for recusal of Judges, although it was not completely dismissed in relation to jurors.*"

It is only the judge who can recuse himself from a proceeding; neither the claimant nor the accused has the right in any law for asking the recusal of a judge.[30] The decision whether to recuse or not is purely within the domain of the judge who is dealing with the matter. Asking a judge to recuse himself by a party or a litigant is required to be viewed very seriously unless by such request certain issues are brought to the notice of the judge taking up the matter which disqualifies him from taking such matter on. For instance, personal or private interest, intimacy with the party/parties to a Lis etc.[31]

In the case of *Locabail (U.K.) Ltd.* v. *Bayfield Properties Ltd.*,[32]the House of Lords held that a judge should recuse himself from a case: before any objection is formed; if the circumstances are such that it would subject him to automatic disqualification; if he feels in person embarrassed in hearing the case. If, in the other case, the judge becomes aware of any matter which can arguably be said to give rise to a real danger of bias, it is generally desirable that it be revealed to the parties prior to the hearing. Where objection is then created, it will be as wrong for the judge to yield to a tenuous or frivolous objection as it will be to ignore an objection of substance. However, if there's real ground for doubt, that doubt must be resolved in favour of recusal. Where, following appropriate disclosure by the judge, a party

[30]Mayaben Surendrabhai Kodnani v. State Of Gujarat, Special Criminal Application No. 134 of 2013.
[31]*Supra* note 27.
[32](2000) 2 WLR 870.

raises no objection to the judge hearing or continuing to hear a case, the said party cannot subsequently complain that the matter disclosed gives way to a true danger of bias.

There is an element of bias, when the judge has an interest in the subject-matter of the litigation. In such circumstances, morally the judge should recuse himself from deciding the case. If the judge abstains from recusing himself from the litigation, then justice will not be delivered to the fullest extent. The parties have a right to a fair trial before the court. In case of a tainted judge, the trial cannot be said to be a fair one.

The term 'recusal' simply means withdrawal, and its roots are in the English Roman Catholic concept of 'recusant'. The laws which deal with judicial recusal are based on the primary idea that a court should be fair and impartial so that public confidence in the institution remains intact. Justice Hammond in his book *"Judicial Recusal"* has classified judicial recusal into two different categories:

A. Automatic Disqualification

Automatic disqualification means disqualification on the basis of pecuniary interest or any connection with the parties to the litigation. The first case of this type is the *Bonham case*.[33] In this case, Dr Bonham, a doctor at Cambridge University was fined by the College of Physicians for practicing in the city of London without any license of the college. The statute under which the college acted provided that half of the fines should go to the king and half to the college. The claim was disallowed by Coke CJ as the college had a financial interest in its own judgment and was a judge in its own cause. The first case in India was *Manak Lal v. Prem Chand Singhvi*[34], in which the Justice Gajendragadkar speaking for the Supreme Court remarked,

[33](1610) 8 Co Rep 1136; 77 ER 646.
[34]AIR 1957 SC 425.

"It is obvious that pecuniary interest, however small it may be in a subject-matter of the proceedings, would wholly disqualify a member from acting as a judge."

B. Bias

The second reason for recusal is bias which can be a personal one. A number of circumstances could lead to personal bias. In this case, the judge may be a relative, friend or business associate of a party. He could have a personal grudge, enmity, grievance or professional rivalry against such party. In view of those factors, there is likelihood that the judge may be biased towards one party or prejudiced against the other.[35]

The court in the case of *Morrison & Anr.* v. *AWG Group & Ors.*[36] observed, "*The test for apparent bias currently settled by a line of recent decisions of this court of the House of Lords is that, having ascertained all the circumstances bearing on the suggestion that the judge was (or would be) biased, the court should raise whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased*."

In several circumstances, it may happen that there exists a bias on part of an adjudicator or the position of the adjudication is such that, there is no scope to rule or pronounce a judgment without the element of bias on behalf of adjudicator. In such circumstances, if an adjudicator pronounces a judgment, no party will be invested with the power to appeal against such decision and request for it to be set aside. Some of these circumstances have come up in Indian courts. They have posed major challenges in front of adjudicators. But nevertheless, this has

[35]J.A.G. Griffith & H. Street, *Principles of Administrative Law 156* (4 ed. Pitman Publishing 1957).
[36](2006) 1 WLR 1163.

not deterred the adjudicators from pronouncing sound judgments. These cases have become instrumental as exceptions to rule against bias.

IV. DEVELOPMENT OF THE DOCTRINE OF NECESSITY

The doctrine of necessity has been used time and again to explain why the grounds on which administrative actions taken by administrative officials are deemed constitutional. This maxim found its footing in the works of Henry de Bracton, a medieval jurist. Apart from Henry de Bracton, another legal luminary, William Blackstone has also provided corresponding justifications for similar administrative actions.

In the modern context, this term was initially used by the Pakistani courts in 1954 to justify the action of Governor-General, Gulam Muhammad. He had invoked emergency powers without any inherent right to do so. Chief Justice Muhammad Munir deemed his actions valid within the realm of the Constitution. Chief Justice quoted Bracton's maxim, *"that which is otherwise not lawful is made lawful by necessity"*, thus legitimising the actions of Governor-General and establishing the doctrine for the courts to follow in succeeding years.[37]

Since the promulgation of this controversial judgment, several Commonwealth countries have witnessed its application in the respective judgments. Nearly a decade ago, this doctrine was applied by the courts to legitimize administrative actions in Nepal.

The point of contention is not whether the decision is marred by bias or not. But does it make others believe or fear that there is a possibility of bias affecting the pronouncement. The underlying principle of invoking this rule is that 'Justice must not only be done

[37]PLD 1955 FC 240.

but must also appear to be done'. The rule of necessity works as an exception to *'nemo judex in causa sua'*.

Necessity is exclusive of bias. An adjudicator who finds himself incompetent in pronouncing a judgment on account of bias may qualify for adjudication in the given circumstances:

1. When no other qualified adjudicator is available for adjudication.
2. When a quorum cannot be formed without his presence.
3. When no other qualified tribunal is set up without his presence.

In the aforementioned circumstances, necessity will overshadow the rule against bias. If ever comes a situation, where courts have to allow an adjudicator to rule with an element of bias or to have no one competent to pronounce judgment, courts must choose the former. Stifling the action altogether will be imprudent in the given circumstance. In matters where a statute or law authorizes a person to act, he will indubitably be the only one who has the power to do so. Even if that person has something to gain out of the action, he cannot be disqualified from taking the necessary action. No person can pass on his responsibilities and obligations to another. That will be in contravention to the spirit of the Constitution.

In the United States of America, adjudicators are deemed incompetent to rule if there is an element of bias involved. This springs from the due process of the American Constitution. Hence, even in countries like India and England, administrative action of the authorities can be challenged.

Nevertheless, the expression 'bias' must be viewed within the set parameters. If it is to be believed that bias stemming from prejudged notions relates to non-existence of presuppositions, then no one has

ever witnessed an impartial adjudication. And if people will continue to share this belief in the successive years, no one will ever get a chance to witness a fair trial. Hence, unless the predetermined notions in the head of the judge are to the extent to make him biased, no administrative action taken by the authorities would be declared void.

V. JUDICIAL PRONOUNCEMENTS

In the case of *Gulllapali Nageshwar Rao* v. *State of Andhra Pradesh*,[38] affected parties were asked to present their complaints with respect to the matter of nationalization policy of the bus routes. This was in lieu of the former case concerning Gullapali. The Chief Minister and Transport Minister of Andhra Pradesh heard the complaints of the affected parties. However, he paid no heed to their objections and ordered for the application of the policy. The complainants brought a cause of action against the order. They argued that the said order included elements of 'official bias' and relied on the precedent of Gullapali. The High Court rejected the motion of the parties. The Supreme Court concurred with the decision of the High Court. The statute invested the Chief Minister with the powers to address the grievances but gave him the flexibility to take actions as he deemed fit. If he could not take the necessary action, who else would? In this landmark judgment, Supreme Court thus, impliedly created the grounds for invoking doctrine of necessity.

In the case of *Institute of Chartered Accountants* v. *L.K. Ratna*,[39] the court elucidated the doctrine and stated that it cannot be invoked in matters where statutory compulsion is missing.

[38]AIR 1959 SC 1376.
[39]AIR 1987 SC 71.

In the matter of *Ashok Kumar Yadav* v *State of Haryana*,[40] the Supreme Court expressly stated that doctrine of necessity works as an exception to 'official bias.'

In the case of *Election Commission of India* v. *Dr. Subramaniam*,[41] the Supreme Court differentiated between 'doctrine of necessity' and 'doctrine of absolute necessity'. The Hon'ble Court laid down that this doctrine can be invoked only in the matters where it appears absolutely necessary and when no recourse is available or foreseeable. Hence, in brief, the court restricted the full-fledged use of this principle as and when it is deemed convenient by the officials.

The Apex Court in the case of *P.K. Ghosh and Ors.* v. *JG Rajput*,[42] said, "*If there be a reasonable basis for a litigant to expect that his matter should not be heard by a particular judge and there is an alternative, it is appropriate that the learned judge should recuse himself so that people do not doubt the process.*"

In the case of *Ashok Kumar Yadav* v. *State of Haryana*,[43] the Supreme Court, while providing a cause for recusal, said that if there is a reasonable chance for the judge to be prejudiced, the judge is supposed to recuse himself.

VI. NEED FOR REGULATION

The oath as provided in the III Schedule of the Constitution of India which is administered to the judges of the Supreme Court of India states that the judges promise to perform their duties and to deliver justice, 'without fear or favour, affection or ill-will'.

[40]AIR 1987 SC 454.
[41]AIR 1996 SC 1810.
[42](1995) 6 SCC 744.
[43]AIR 1987 SC 454.

Lord Justice Sedley in his foreword to Grant Hammond's book on Judicial Recusal said, "*The ... office ... is to do justice 'without fear or favour, affection or ill-will'. Fear and favour are the enemies of independence, which is a state of being. Affection and ill-will undermine impartiality, which is a state of mind. But independence and impartiality are the twin pillars without which justice cannot stand, and the purpose of recusal is to underpin them. This makes the law relating to recusal a serious business.*"

The court of law is the last resort for justice. If there is any infringement of rights, an individual can only approach a court of law. So, it is crucial that judges act impartially and in an unbiased manner. Recusal is to remove oneself from the position of a judge in a particular proceeding due to the presence of conflict of interest. In deciding whether he should recuse himself, he should apply the same test as he would if he were ruling on whether another judge ought to have recused himself in the given circumstances. It is not a matter of discretion. It is the duty of a judge to hear cases allocated to him, unless he considers that a fair-minded and acutely informed observer would consider that there was a real risk of bias or apparent lack of independence.

Recusal, which in certain circumstances requires a judge to step aside from hearing a case, is a doctrine that protects (some would say is crucial to protecting) both judicial impartiality and the appearance of impartiality. Judges are aware of their duty to disclose circumstances that might bring their independence into question. On comparatively rare occasions, when they do not do so, experience tells us that it is through oversight or because it simply did not occur to the judge that anyone might think the matter to be relevant. They are not in general likely to be matters which would have featured in a register of interests, and it would be neither practical nor reasonable to require every judicial office holder, permanent or part-time, to compile a list

of all connections with any person or organization which might have something to do with a case in which he might become involved.[44]

When it comes to recusal, the focus is generally on the actual recusal decision – 'What did the judge decide?' and 'Was that decision correct?'.[45] There is a dire need for any written regulation which should be followed by the judges while deciding a case. The rules can be laid down relating to the following issues:

- Expecting judges to clarify recusal decisions in written orders
- Appointing another judge other than the challenged judge to hear the recusal
- Providing uniform grounds for recusal
- Providing a uniform method of recusal
- Improving the communication of common recusal practices through judicial education
- Redefining the apprehension of bias test to require a balancing of the circumstances with the impact of the recusal decision on the operation and reputation of the court.[46]

According to the NJAC judgment, a judge may be required to step down from the position of a judge in one of the two scenarios: the first scenario is the case of presumed bias, in this case the judge has a pecuniary interest in the final outcome of the case; and the second scenario is the case of apparent bias, in this case a man with an

[44]Rt. Hon. Lord Roger Toulson, *Judicial Recusal: A Need for balance and proportion*, 4 British Journal of American Legal Studies71 (2015).
[45]Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 4 Brigham Young University Law Review947 (2011).
[46]Raymond J. McKoski, *Giving up Appearances: Judicial Disqualification and the Apprehension of Bias*, 4 British Journal of American Legal Studies 64(2015).

ordinary prudence will believe that there is a real possibility that the judge is biased.[47]

In India, recusal is only followed as a part of convention by a large number of people without any written rules. There are two sets of principles, the first is written rules and the second is unwritten principles. Written rules are the laws made by parliament and the Indian Constitution and the unwritten principles are the convention and moral principles. When there is a need for a certain law which is not in the written form, the unwritten principles come into play. Sometimes it is the duty of the judges to convert those unwritten principles into written rules and fill those gaps.

Until and unless there is a certain kind of fixed regulation or a certain practice to regulate the recusal of judges, it is very difficult to presume that the judges will recuse themselves when there will be a need for recusal. This matter is related to the judiciary, so it will be well within its bound if they make a law for regulating themselves. There appears to be a continuing grey area related to the issue of recusal of judges. It is a very crucial matter, which needs to be solved without any further delay. It is very important to resolve this problem because it can arise anytime or in different instances. The judiciary should constitute a committee containing judges and advocates as its members to frame clear guidelines related to the recusal of judges.

The American Bar Association of the USA promulgated ethical code for judges, for the first time in the year 1924. That code contained several provisions regarding the judicial disqualification due to any kind of possible self-interest. These rules helped the judges to act in an impartial manner and also to not interfere with the judicial duties. In the Indian Judicial system, the people of India rely heavily upon

[47]Vanshaj Ravi Jain, *A case against judicial recusal*, THE HINDU, Oct. 24, 2019, 12.00 AM), https://www.thehindu.com/opinion/op-ed/a-case-against-judicial-recusal/article29779738.ece.

the wisdom and prudence of the respectable judges to decide a case and deliver a judgment that must be fair, just and reasonable. It is also very much desirable from the judges to give a fair result and rise above their personal interests.

However, it must also be understood that total impartiality is a myth which can never be attained. Judges are not machines, they are humans, and they have their own feelings, beliefs and knowledge. It is not possible to attain total impartiality. They may have presuppositions regarding the matters in a case.

VII. RECENT CASES OF RECUSAL

The recent case of demand for recusal is of Justice Arun Mishra from the land acquisition case. In the case of *Indore Development Authority* v. *Shailendra (Dead) through L.Rs. & Ors.*,[48] Justice Arun Mishra was one of the presiding judges. This judgement later went under scrutiny and he was also the presiding judge for the review committee. The affected parties requested him to recuse himself believing that it would hamper their interest. He did not pay heed to the request and refrained from recusing himself. He stated that, "*No litigant can choose who should be on the Bench. He cannot say that a judge who might have decided a case on a particular issue, which may go against his interest, should not hear his case as part of the larger Bench*." Even the Hon'ble Supreme Court concurred with his views.

In the case related to the appointment of M. Nageswara Rao as the Interim Director of CBI, three Supreme Court judges recused themselves. First CJI Ranjan Gogoi recused himself because he was the part of the selection committee. Later on, Justice A. K. Sikri

[48](2018) 1 SCC 733.

recused himself because he was a member of the panel which removed the previous director of CBI. Justice N. V. Ramana was the third one who recused himself based on a personal reason; he had attended the wedding ceremony of the daughter of M. Nageswara.

Justice U. U. Lalit had also recused himself from hearing the Ayodhya Mandir Land dispute based upon his previous relationship with former Uttar Pradesh Chief Minister Kalyan Singh. The Judge had appeared for Kalyan Singh government in a criminal contempt case linked to the Ramjanmbhoomi - Babri Masjid dispute in 1997.[49]

Justice P. Sathasivam and Justice AK Patnaik recused themselves from hearing the proceeding of corruption charges which were framed against the DMK member of Parliament Kanimozhi.

Recently in the case of the Swiss pharmaceutical giant, *Novartis AG v. UOI* (**"*Novartis*"**),[50] Justice Markandey Katju and later on Justice Dalveer Bhandari recused themselves. Justice Bhandari recused himself because he was attending the international conferences on Intellectual Property matters which were organized by the Intellectual Property Owners Association. Novartis was one of the members of the association.

In the Assam detention centre case, the then Chief Justice of India ("**CJI**"), Ranjan Gogoi, was approached with a request to recuse himself from the hearing of a case regarding the release of over 90 prisoners who were considered to be foreigners and who spent a lot of time in prevention detention in holding cells of the State of Assam. The CJI made certain comments during the program of the previous hearing and the petitioner felt that the CJI has some pre-conceived

[49]Krishnadas Rajagopal, *Ayodhya title suit appeals: Jusitc U.U. Lalit recuses himself, Bench to fix time of hearing on Jan. 29*, THE HINDU (Jan. 10, 2019, 11:43 AM), https://www.thehindu.com/news/national/ayodhya-title-suit-justice-uu-lalit-recuses-himself-from-hearing-case-posted-to-jan-29/article25957523.ece.
[50]Novartis AG. v. UOI, 2013 (6) SCC 1.

notions regarding the matter and had already made up his mind as to the outcome. He refused to recuse himself on the ground that he said something about the matter in course of a debate. He was just testing the water. The CJI observed: "*the inability, difficulty or handicap of a judge to hear a particular matter is to be perceived by the judge himself and no one else*."[51]

In the case of alleged sexual harassment raised against CJI Ranjan Gogoi, Justice NV Ramana of the Supreme Court has recused from hearing the case. Justice Ramana said, "*My decision to recuse is only based on an intent to avoid any suspicion that this institution will not conduct itself in keeping with the highest extraordinary nature of the complaint, and the evolving circumstances and discourse that underlie my decision to recuse and not the grounds cited by the complainant per se. Let my recusal be a clear message to the nation that there should be no fears about probity in our institution, and that we will not refrain from going to any extent to protect the trust reposed in us. That is, after all, our final source of oral strength.*"[52]

If there is no objection, then the judge can proceed. Justice S. H. Kapadia while deciding a matter disclosed the fact that he owns some shares in Vedanta, he frankly asked the lawyers appearing in the case whether he should recuse himself from hearing the case if the lawyers had any objections. Notable lawyers replied that he may proceed to hear the matter.

From the aforementioned cases, it can be deduced that judges have rescued themselves from cases whenever a reasonable objection has

[51]Faizan Mustafa, *The Morality of Recusals*, India Today (Oct. 11, 2019, 01.00 PM), https://www.indiatoday.in/magazine/up-front/story/20191021-the-morality-of-recusals-guest-column-1608242-2019-10-11.

[52]Krishnadas Rajagopal, *Justice Ramana recuses himself from judges' panel examining allegations against CJI Ranjan Gogoi*, THE HINDU (Apr. 25, 2019, 10.15 PM), https://www.thehindu.com/news/national/justice-ramana-recuses-from-judges-panel-examining-allegations-against-cji-ranjan-gogoi/article26946113.ece.

been raised against their involvement in any case. Whenever the objection has been found baseless, the judges have decided otherwise in order to protect the sanctity of the judiciary.

VIII. CONCLUSION

People must have confidence in the integrity of the judges. It is crucial that people must keep their faith in the judiciary. The integrity of judges cannot exist in a system that assumes them to be corrupted by the slightest friendship or interest in the litigation. If it is reasonable to think that a Supreme Court justice can be bought so cheap, the nation is in deeper trouble than we had imagined.

Ultimately, a mistaken case of recusal will prove as destructive to the rule of law as those cases where a judge chooses to refuse a recusal despite the existence of bias. We must not permit recusals to be used as a tool to maneuver justice, as a method to selecting benches of a party's will, and as an instrument to evade judicial work.[53] Partly as a result of a poorly functioning recusal scheme, public confidence in the legal system has waned, and people are rightly concerned about the impartiality of their courts.[54]

It is morally wrong for a judge to act in a case in which he has a personal interest because it will lead to miscarriage of justice. He has a biased perception from the initial stages of the trial and he cannot pass a judgment without thinking about his own interest. The moment he has an interest in the case, he will think about his own benefit. The duty of a judge is to grant justice and be fair without thinking about his own interest and should work in such a manner that leads to the

[53]Suhrith Parthasarathy, *Land acquisition case: Attempt for recusal of judge nothing but 'bench hunting', says Supreme Court*, THE ECONOMIC TIMES, October 16, 2019.
[54]Damon M. Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens' Diffuse Support for State Courts*, 36 AM. POL. RES. 297, 313 (2007).

delivery of justice to the masses. A judge is duty bound to fulfill his obligation to deliver justice to the parties.

When speaking about morality, it is also not morally acceptable that a judge should sit in a case in which he is interested. In cases where he has even the slightest doubt in his mind regarding his prejudice to deliver justice, he should recuse himself from that proceeding. It is for the judge to decide to recuse himself or not.

DEMOSPRUDENCE AND THE INDIAN SUPREME COURT: SHAPING THE CONTOURS OF THE TRANSFORMATIVE CONSTITUTION

Isha Rai[*] *& Janhvi Tripathi*[**]

Abstract

Demosprudence, which is a term of fairly recent origin, can be summed up as democratically-oriented judicial creativity. It uses the prudence of the demos or the people to ensure that the fundamental wrongs which they were hitherto subject to are transformed into fundamental rights. In a vibrant democracy like that of India, the practice of demosprudence embodies the transformative spirit of the Indian Constitution and translates the hopes and aspirations of people into remedies for their maladies. In the recent times, there have been increasing instances of the Apex Court invoking its power to do "complete justice." This has, in turn, paved the way for the Apex Court to ensure that the interests of the 'people', who are at the heart of the Constitution of India, are protected. As a result, the debate centred around demosprudence and its relationship with the Indian Constitution has intensified.

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This article seeks to analyse India's tryst with demosprudence in a comprehensive manner. The central theme of the article is to undertake an analysis of the contribution of the application of demosprudence by the Apex Court in shaping the ever-ephemeral contours of the Indian Constitution. For a well-rounded perspective, the problematic areas in this voyage of transformation have also been identified in this article and an attempt has been made to provide suggestions for realization of the demos-oriented prudence of the Apex Court in a better manner.

I. INTRODUCTION

In 2009, American citizenry witnessed the much-awaited Lilly Ledbetter Fair Pay Act. The legislation was a reaction to the US Supreme Court decision in *Ledbetter v. Goodyear Tyre & Rubber*,[1] denying equal work and equal pay for all sexes. The US Supreme Court nullified the verdict of the federal jury and decided on the basis of waiver of her right to sue. The decision contained a more than ordinary dissent of Justice Ginsburg. By analysing the situation of women in a male-dominated workplace, Justice Ginsburg engaged an external audience in a conversation about equal pay for equal work, which in essence amounted to *courting* the people to reverse the decision of the majority and limiting the effect thereof. Her oral dissent proved as an alarm for the social activists, legal advocacy groups, media translators and legislators. While Justice Ginsburg spoke frankly to and about the Lilly Ledbetters of the world, her real

[1]Ledbetter v. Goodyear Tyre & Rubber, 550 U.S. 618 (2007).

target was the legislature.[2] Justice Ginsburg's fervent plea thus paved the way for the Fair Pay Act. This instance was a fine expression of demosprudence, or, *democratically-oriented jurisprudence* in its germinal form. Demosprudence, a term coined by Guinier and Torres, is an idea of collaborative enterprise between institutional elites- whether judges, legislators and lawyers- and the ordinary people.[3] In the aforementioned case, Justice Ginsburg did so by creating a space for the citizens to advance an alternative argument of law.[4]

The term, though of recent origin, is in practice in the Indian Supreme Court while it marches towards the quest of transforming the society using the tool of transformative constitutionalism. Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy.[5] Transformative Constitutionalism is the ability of the Constitution to adapt and transform with the changing needs of times. It implies a departure from Victorian notions and affirms that the Constitution should be viewed as embodying hopes and aspirations of the society in which it was framed.

In this backdrop, this article presents a picture of the obvious relationship between the demosprudential exercise of power by the Apex Court and the transformative character of the Constitution. The article has been divided into VII parts. In Part II, having briefly sketched the outline of the idea, the Indian Constitution's tryst with demosprudence has been explored. Part III deals with the tools employed by the Apex Court to achieve the task of transformation through the Indian Constitution. These tools have of late played a major role in shaping the contours of current discourse in

[2]Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 127 HARVARD LAW REVIEW 437, 444 (2013).
[3]*Id.*
[4]*Id.*
[5]Navtej Singh Johar. v. Union of India, (2018) 10 S.C.C. 1 ¶ 97.

constitutional law by creative judicial intervention in the domain of the other two branches of the government. Drawing its life-breath from the preceding section, Part IV briefly enumerates the instances where the Apex Court has displayed demosprudential leadership and interpreted constitutional provisions in a new light to add the element of social significance to the task of transformation. Part V addresses the discordant notes in this demosprudential exercise of power. Part VI consists of the recommendations of the authors to minimize the friction in the aforementioned exercise of power. Ultimately, in Part VII the authors have offered concluding remarks.

II. TRANSFORMATIVE CONSTITUTION: INDIA'S TRYST WITH DEMOSPRUDENCE

The Indian Constitution is an organic document. Owing to this nature, it has now become a tool for the transformation of the social and legal structures which existed at the time when it was drafted. The notions of *"justice, liberty, and equality"* have become the touchstone on which the validity of laws is tested, and further course of action is arrived upon. In recent times, the core value of constitutionalism is in the driving seat of this wagon while demosprudence constitutes its wheels. While Guinier focuses on the rhetoric of judicial opinions and their pedagogical role while laying down the foundation for demosprudence in her writings,[6] the concept has been taken by the Indian jurists[7] to mean the creative judicial role which the Apex Court has been playing since the post-emergency era.

[6] *Supra* note 2.
[7] Upendra Baxi, *Demosprudence and Socially Responsible/Response-able Criticism: The NJAC Decision and Beyond*, 9 NUJS L. REV. 153 (2016).

Demosprudence, in contrast with legisprudence and jurisprudence, concerns courts' role of 'co-governing' the nation. Though not a super-legislator, the Court momentarily *legislates, administers and executes*.[8] Demosprudence serves to make formal institutions more democratic by looking at law-making from the perspective of informal democratic mobilizations and disruptive social movements.[9]

The democracies make and interpret the law by expanding, informing, inspiring and interacting with the community of consent. This community of consent in constitutional terms is better known as 'we, the people'.[10] The Apex Court practices demosprudence through the means of Constitutional provisions,[11] be it directing the executive to take action[12] or compelling Parliament to enact laws.[13] This has led to the reposing of faith by the middle class into the judiciary to remedy their maladies and other social evils.[14] The Apex Court, by shifting away from jurisprudence and towards demosprudence, is becoming more democracy-oriented.[15] The dynamic relationship among courts, political branches, and the public[16] is required to be maintained in order to realize the transformative spirit of the Constitution.

In the practice of courting the people, the court is guiding and is being guided by the *demos*. In the construction of *demos*, the Court prioritizes on doing justice or mitigating injustice. Shaping the

[8] *Id.*
[9] *Id.*
[10] Indian Const. Preamble.
[11] Indian Const. art 32, 141, 142 and 144.
[12] Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi), (2010) 6 S.C.C. 1.
[13] Vishakha v State of Rajasthan, A.I.R. 1997 S.C. 3001.
[14] *I'll Be Judge, I'll Be Jury*, 42 ECONOMIC AND POLITICAL WEEKLY 1315, 1316 (Apr. 14-20, 2007).
[15] Upendra Baxi, *Demosprudence versus Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies* (Annual Tony Blackshield Lecture delivered at Macquarie Law School, Macquarie University, 21 October 2014).
[16] B Ray, *Demosprudence in comparative perspective*, 47 STANFORD JOURNAL OF INTERNATIONAL LAW111 (2011).

contours of a transformative constitution becomes possible when judges move beyond the horizons of doctrines and principles.[17] This is evident from the recent examples of favouring the long-denied rights of the weaker sections of the society[18] or gender minorities,[19] and the Ayodhya verdict[20] in which the court has tried to strike a balance between the entitlement of the majority and the feelings of the minority being wronged at the hands of the former.

The Constitution's vision is about achieving a social transformation that seeks to place the individual at the forefront of its endeavors, by transforming the content of the law.[21] This conferment of rights against the State is transformative in both the senses as it brings about alteration in the content of the law and also achieves the goal of social transformation. These instances of adjudicative leadership demonstrate the manner in which the Apex Court has adopted a people-centric approach and works to realize the ideals of a transformative constitution.

Demosprudence, or 'jurisprudence of social movements',[22] therefore, aims at bringing the voices of non-elites into the discourse about emancipation through the constitution. The tools for securing this emancipation have been discussed in Part III of this article.

[17]L Guinier, *The Supreme Court 2007 term: Foreword: Demosprudence through dissent*, 122 HARVARD LAW REVIEW4 (2008).
[18]Indian Young Lawyers Association v. The State of Kerala, W.P (Civil) No. 373 of 2006; Joseph Shine v. Union of India, (2018) S.C.C. Online S.C. 1676.
[19]Navtej Johar v. Union of India, (2018) 10 S.C.C. 1.
[20]M Siddiq (D) Thr. Lrs. v. Mahant Suresh Das & Ors., (2020) 1 S.C.C. 1.
[21]Kalpana Mehta v. Union of India, (2018) 7 S.C.C. 1.
[22]*Supra* note 17.

III. TOOLS OF ADJUDICATIVE LEADERSHIP

A. Demosprudential Dissent

A 'dissenting opinion', as an expression for an intended audience, can be a powerful pedagogical tool. A democratic voice in the form of dissent re-examines the source of democratic authority of 'legal elites.' Elections, though a technique for legitimatizing law-making, are not the only way citizens should hold a relationship with the laws that they are being subjected to. An active participation in the form of deliberations is pre-requisite for a vibrant democracy. *"We, the people"* in the constitutional setup is a community of consent that should be expanded, informed and inspired to address the democratic intuition. When the backbone of social movement, i.e., non-elites and ordinary people, start flavouring interpretations of the Constitution and the statutes, democracy actually comes into life.[23]

Prof Guinier indicated three levels of demosprudential dissent.[24] On the first level, it dives into substantive concerns about democratic legitimacy, accountability, and structure. On the next level, it departs from conventional scrutiny about the fouls of majority and offers an alternative interpretation of the set of facts. On the final level, it facilitates the non-judicial actors to revisit the conclusions formed by the majority. This unconventional style of dissent not only teaches but also scouts the community to carry forward the march.[25]

What distinguishes demosprudential dissent from an ordinary one is its commitment to the 'democratic process' by attempting to disperse the governance in the hands of many than few. The aspiration to do so comes from the notion of the court's legitimacy, based on the

[23]Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 154 (2004).
[24]*Supra* note 17.
[25]Dred Scott v Standford, 60 U.S. 393 (1857).

community's faith in the institution and its judgments. This further rests upon the ability of the same to engage the non-judicial actors in the active democratic process of making, interpreting and implementing the law. A dissenting judge, from a demosprudential perspective, is rather an activist for democracy.

A demosprudential dissent, obviously lacking the force of law, is more of a democratic than judicial activism. It provides breathing space for the citizens to allow alternative interpretations of the law. The aspired effect, however, depends upon the ability of the dissenter to engage the audience. In spite of that, it still is an effective tool to broaden and limit the authority of justices along with making the law-making more transparent and democratically accountable.

In the Indian scene, although dissent is termed as the safety valve of democracy,[26]the practice of demosprudence through dissent is at a nascent stage with one-off instances like *Shayara Bano v. Union of India* ("***Triple Talaq***")[27]and *Indian Young Lawyers Association & Ors. v. State of Kerala & Ors*. ("***Sabarimala***").[28]

B. Tool of Constitutional Morality

The notion of constitutional morality in the recent past has played the role of filling the gaps - which sometimes exist, and other times are deliberately created. Constitutional morality means to bow down to constitutional norms and not act in a manner which would become violative of the rule of law or reflective of action in an arbitrary manner.[29] It plays a crucial role in countries where written

[26]Romila Thapar v. Union of India, (2018) 10 S.C.C. 753.
[27]Shayara Bano v. Union of India, (2017) 9 S.C.C. 1.
[28]Indian Young Lawyers Association & Ors. v. State of Kerala & Ors., (2019) 11 SCC 1.
[29]Manoj Narula v. Union of India, 2014 (9) S.C.C. 1, ¶ 74-76.

constitutions are based on the consent of people.[30] It significantly influences the maintenance and advancement of the rule of law.[31]

No matter how wonderfully a Constitution is written, circumscribed interpretation is needed to fulfill the ambition of subscribing to the ideal of democracy. In the absence of constitutional morality, the operation of the Constitution, no matter how carefully written, tends to become arbitrary, erratic, and capricious.[32]

Morality, generally based on the concept of popular morality, has been used as a premise of many Indian laws. Apart from subscribing to some kind of morality, this has acted as a tool to conveniently divorce itself with the other two types, whether popular or societal. For instance, in January 2019, the Apex Court rejected *"morality"* as a ground for restriction of dance by women in eating houses or permit rooms or beer bars.[33] The court emphasised that "*a practice which may be immoral by societal standards cannot be thrust upon the society as immoral by the state with its notion of morality and thereby exercise social control*." Further, in the *Naz foundation* case,[34]the Delhi High Court had declared section 377 of the Indian Penal Code as unconstitutional and did not accept the contention regarding 'popular morality.' Justice Shah put it as, "if there is any type 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality."[35] However, this

[30]Bruce P. Frohnen & George Carey, *Constitutional Morality and the Rule of Law*, 26 JL & POL 497, 498 (2010-11).
[31]Rohit Sharma, *The Public and Constitutional Morality Conundrum: A Case Note on TheNaz Foundation Judgment*, 2 NUJS L Rev 445, 450 (2009).
[32]André Béteille, *Democracy and its Institutions 1 of Constitutional Morality* (Oxford University Scholarship Online 2012).
[33]Indian Hotel and Restaurant Association (AHAR) v. The State of Maharashtra, Writ Petition (Civil) No. 576 of 2016.
[34]Naz Foundation v. Govt. of NCT of Delhi, (2009) S.C.C. Online Del 1762: (2009) 111 DRJ 1.
[35]*Id.* at 36.

was overruled by the Apex Court.[36]In 2018, the Apex Court explained the nature of constitutional morality *as a check on popular morality* and *as a principle promoting a pluralistic and inclusive society while clinging to different standards of constitutionalism*.[37] It can, therefore, be asserted that the protection of minority interests, an essence of democracy, is sailing in the lap of constitutional morality and demosprudence.

As a matter of fact, democracy rests on a delicate balance between the rule of law and rule of numbers. Populism invokes the principle of numbers; constitutionalism, of legality.[38] The Constitution is the indispensable foundational base that functions as the guiding force to protect and ensure that the democratic setup promised to citizenry remains unperturbed.[39] A legal system, as a dynamic phenomenon, works only when a balanced approach has been adopted by the legal elites. The popular notion of morality is antithetical to individual dignity and human rights.[40] Only the Constitution protects a society of plural cultures as it does not preach any religious theocracy or dormant ideology.[41]

No matter how sacred the adjective is, it still cannot change the stigma of uncertainty attached to morality. The moot question of where a line has to be drawn must be answered only by the legislature. In a written constitution, there should be a minimum dependence on constitutional morality. Invoking this principle frequently would result in the nullity of laws like obscenity and sedition. To prevent disbalance between the legislature, executive and

[36]Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1.
[37]Navtej Johar v. Union of India, (2018) 10 S.C.C. 1, ¶ 603.
[38]*Supra* note 32.
[39]Government of NCT of Delhi v. Union of Indian & Another, (2018) 8 S.C.C. 501.
[40]*Id.* at ¶188.
[41]*Id.*

judiciary, the prudence of demos should guard what the morality of 'we, the people' is.

C. Basic Structure Doctrine

'We, the people' while entrusting ourselves with the sacred document called the Constitution of India, vested in it the dreams, aspirations, and vision of the world's largest democracy. Though with the passage of time, the Constitution has gone through many changes, the guardian of the Constitution has not let the soul of the Constitution be changed. An unalterable basic structure has rescued the democracy from sabotaging the spirit of the Constitution. In adverse times, the doctrine provides a breathing space for demos to constantly struggle for the recognition of new features as the basic structure and defend the old one. In a grim prospect of democracy, the Court's push against the majoritarian excess was a break in *Kesavananda Bharati v. State of Kerala* ("***Kesavananda Bharti***")[42] and by introducing constitutional limits to the abuse of power by the state government in *S. R. Bommai v. Union of India* ("***Bommai***")[43] has done the same. Though not frequently invoked, the doctrine even today is a potent shield for the aspirations of the constitutional community.

Originally devised for checking the validity of the constitutional amendments, the basic structure doctrine now influences all matters of public decision. This, in turn, shatters the limits of judicial actions, consequently shaping the role of the executive and legislature. It is no more unethical. Demosprudence establishes a democratic communication between the judiciary and the other two wings. It has been entrusted with the responsibility of maintaining the spirit of

[42]Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461.
[43]S. R. Bommai v. Union of India, [1994] 2 S.C.R. 644.

society which will eventually perish if the society evades its responsibility by thrusting upon the courts the nurture of it.[44]

IV. RULING THROUGH PRINCIPLES

Governance, being a rule-bound affair, is limited by the text and context of the Constitution.[45] After the *Kesavanada Bharati*[46] case, a political consensus was arrived at by the court to act as a co-equal branch of the State. The journey was carried forward by the *Maneka Gandhi v. Union of India* ("***Maneka Gandhi***")[47]case by re-interpreting the right to life and liberty to include both procedural and substantive due process. Public Interest Litigation or Social Action Litigation in the late 1980s[48] emerged as a related development on the same lines.

What distinguishes political from juridical is that a judicial decision with proper cognizance and argumentation remains in public domain, open to reflection and review. In the past three decades, Demosprudence has found expression in the form of judicially invented human rights, such as the right to privacy[49] and the right to food,[50] creation of new jurisdictions like epistolary[51] and curative petition,[52] enforcement of remedies,[53] meeting exigencies of the situation by binding policies and principles until a similar law is

[44]HAND, THE CONTRIBUTION OF AN INDEPENDENT JUDICIARY TO CIVILIZATION (Irving Dilard ed.), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (New York 1960).
[45]*Supra* note 7.
[46]Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461.
[47]Maneka Gandhi v. Union of India, (1978) S.C.R. (2) 621.
[48]S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149.
[49]K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1.
[50]PUCL v. Union of India, (2007) 12 S.C.C. 135.
[51]Sunil Batra v. Delhi Administration, A.I.R. 1980 S.C. 1579; Bandhua Mukti Morcha v. Union of India, AIR 1984 S.C. 802.
[52]Rupa Ashok Hurra v. Ashok Hurra and Anr, (2002) 4 S.C.C. 388.
[53]Ujjam Bai vs State of U.P., (1963) 1 S.C.R. 778.

passed[54] and monitoring already adopted policies by Central and State government.[55] From 1950 to 1973, the Indian judiciary did not act as social entrepreneurs but only as legalists. However, after the era of substantive due process,[56] the court has rather acted as a legatee of constitutional democracy.[57]

A. Factors Contributing to the Rise of Judiciary

The approach in earlier cases was a judicial review on limited grounds of *mala fides.*[58] The following factors can be said to have contributed to the rise of judicial co-governance:

- Parliamentary inability to meet the vision envisaged by framers of the Constitution.
- Relatively shorter sessions of Parliament to consider issues of prominence
- Frequent by-passing of the Constitutional safeguards by the legislature and executive
- Splintered composition of the Parliament
- Absence of any effective opposition
- Executive pre-occupied with security and policy matters, having little time to focus on finer aspects

[54]Vishakha v State of Rajasthan, A.I.R. 1997 S.C. 3001; L.K. Pandey v. Union of India, A.I.R. 1986 S.C. 272.
[55]Samaj Parivatana Samudaya v. State of Karnataka, (2013) 8 S.C.C. 154 (A committee was constituted by Supreme Court for monitoring sale of iron ore by e-auction); *See* also, Common Cause v. Union of India, (2017) 9 S.C.C. 857.
[56]Maneka Gandhi v. Union of India, 1978 S.C.R. (2) 621.
[57]*Supra* note 11.
[58]Tata Cellular v. Union of India, A.I.R. 1996 S.C. 11.

- Absence of exogenous political forces in the rigorous judicial tests of relevance makes it more responsive than the other two branches.[59]

B. Demosprudence as Co-Governance

By issuing guidelines to the other two branches, the Apex Court has become a 'court of good governance'[60] that remedies the shortcomings of the representative institutions.

C. Demosprudence and Legislature

a) Filling the voids

In *Vishaka v. State of Rajasthan*[61] and *Lakshmikant Pandey v. Union of India*,[62] the Court issued guidelines in cases where no law existed for guiding the law enforcement agencies. Passive Euthanasia[63] met the same fate by the pronouncement regarding a *living will* and guidelines to prevent its misuse. After the genesis of Public Interest Litigation in *S.P. Gupta v. Union of India*[64] all matters are now within the protective umbrella of the Apex Court by virtue of the 'complete justice' provision.[65]

b) Carrying batons of reform

[59]Donald L. Horowitz, *The Courts and Social Policy* 22 (1977).
[60]Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1 (2009), http://openscholarship.wustl.edu/law_globalstudies/vol8/iss1/2.
[61]Vishaka v. State of Rajasthan, (1997) 6 S.C.C. 241.
[62]Lakshmikant Pandey v. Union of India, A.I.R. 1984 S.C. 469.
[63]Common Cause v. Union of India, Writ Petition (Civil) No. 215 of 2005.
[64]S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149.
[65]Indian Const. art 142.

By striking down the age-old practice of *Triple Talaq*,[66] decriminalising consensual gay sex[67] and adultery,[68] the Court has been performing the task of imparting justice, and more importantly, gender justice. The issue of mob lynching was sought to be tackled in *Tehseen Poonawalla v. Union of India*,[69]by asking the parliament to enact a law, directing preventive and remedial measures.

c) Human rights enforcement

The Court has operationalized the principles of the Preamble, Directive Principles of State Policy[70] and the right to constitutional remedies[71] in instances like directing the Municipal authorities to perform their functions,[72] issuing directions for compulsory teaching of lessons in schools for protection of natural environment[73] or furthering "constitutional patriotism" by directing singing of national anthem in cinema halls.[74]

As a result of numerous petitions and PILs on issues ranging from health hazards in an industry,[75] medical care for workmen[76] and prohibiting smoking in public places,[77] Right to Health was included in Article 21 as a necessary pre-condition for a dignified life. Reading together Articles 21, 39 (e), 47 and 48A, the substantive content of

[66]*Supra* note 27.
[67]Navtej Johar v. Union of India, (2018) 10 S.C.C. 1.
[68]Joseph Shine v. Union of India, 2018 S.C.C. OnLine S.C. 1676.
[69]Poonawalla v. Union of India, Writ Petition (Civil) 754 of 2016.
[70]Indian Const. Part IV.
[71]Indian Const. art 32.
[72]L.K. Koolwal v. State of Rajasthan, A.I.R. 1988 Raj 2.
[73]MC Mehta v. Union of India, Writ Petition (Civil) 4677 of 1985.
[74]Shyam Narayan Chouksey v. Union of India, A.I.R. 2018 S.C. 357.
[75]Consumer Education and Research Centre v. Union of India, (1995) 3 S.C.C. 42.
[76]Paschim Banga Khet Mazdoor Samity v. A.I.R. 1996 S.C. 2426.
[77]Murli Deora v Union of India, (2001) 8 S.C.C. 765.

this right has been expanded and guidelines have been issued in various cases to guarantee this right.[78]

D. Demosprudence and the Executive

a) Monitoring committees

In the construction of *demos*, the Court prioritizes doing justice or mitigating injustice rather than working on strict legal principles as professed by jurisprudence. Pragmatism and activism have been adopted to pave the way to justice.[79] Resultantly, access to the court[80] was granted as a basic human right providing epistolary jurisdiction to the Court. Fact-finding commissions[81] can now be appointed to establish facts and make recommendations,[82] so that the Court can proceed with issuing interim orders and directions in the form of continuing mandamus.[83]

b) Delivering environmental justice

For the past two decades, the Court has taken several bold steps by passing directions to prevent and control the pollution of the Ganga River,[84] implementing forest conservation laws,[85] protecting the fragile coastal regulation zone,[86] bringing quarrying operations to a halt,[87] directing the closure of polluting industries,[88] directing the

[78]Consumer Education and Research Centre v. Union of India, (1995) 3 S.C.C. 42; Noise Pollution (I), in re v. Union of India, (2005) 5 S.C.C. 727.
[79]*Supra* note 15.
[80]Indian Const. art 32.
[81]Manohar Lal Sharma vs The Principal Secretary, (2014) 9 S.C.C. 516.
[82]Paramjit Kaur v. State of Punjab, (1999) 2 S.C.C. 131.
[83]Vineet Narain v. Union of India, 1996 S.C.C. (2) 199.
[84]MC Mehta v. Union of India, (1988) 1 S.C.C. 471.
[85]T.N. Godavarman v. Union of India, (2001) 10 S.C.C. 645.
[86]S Jagannath v. Union of India, (1997) 2 S.C.C. 87.
[87]Rural Litigation Entitlement Kendra v. State of UP, (1985) 3 S.C.C. 614.
[88]MC Mehta v. Union of India, (1987) 4 S.C.C. 463.

switching of commercial vehicles from fuel to CNG in order to improve the air quality,[89] issuing a writ of mandamus to Central and State governments for complying with its directions for speedy and effective execution of the Interlinking of Rivers project[90] and stopping deforestation[91] across the country. The Court has evolved unconventional remedies, including the concepts of 'Constitutional Tort',[92] 'pollution fine',[93] and imposing exemplary damages on the polluters. The Court has also evolved a number of principles and doctrines, including the polluter pays principle,[94] the principle of *"Absolute Liability"*,[95] the principle of sustainable development, and the Public Trust Doctrine,[96] to ensure the wholesomeness of the environment.

In the *M.C. Mehta v. Union of India* ("***Taj Trapezium***")[97]case, a new 'labour environmental jurisprudence' was evolved for the protection of the ancient monument ordering closure and relocation of coal/diesel-using industries. Right from the *Municipal Council, Ratlam v. Shri Vardichand et al.* ("***Ratlam Municipality***")[98] to the recent orders to control pollution caused by stubble burning,[99] the Supreme Court has been doing its bit to maintain the ecological balance, at times even pulling up the agencies[100] responsible for

[89]M.C. Mehta vs Union of India, Writ Petition (Civil) 13029 of 1985.
[90]In Re: Networking of Rivers, Writ Petition (Civil) NO. 512 OF 2002.
[91]MC Mehta v. Kamal Nath, (2000) 6 S.C.C. 213.
[92]MC Mehta v. Union of India, A.I.R. 1987 SC 1086.
[93]*Supra* note 92.
[94]Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 S.C.C. 212.
[95]*Supra* note 93.
[96]*Supra* note 92.
[97]M.C. Mehta v. Union of India, (1997) 2 S.C.C. 353.
[98]Municipal Council, Ratlam v. Shri Vardichand et al., (1981) 1 S.C.R. 97, 100.
[99]Krishnadas Rajgopal, *SC asks Punjab, Haryana, U.P. to end stubble burning immediately*, THE HINDU (Nov. 04, 2019, 11:14 AM), https://www.thehindu.com/news/national/to-save-delhi-supreme-court-bans-stubble-burning-in-punjab-haryana-and-uttar-pradesh/article29880089.ece.
[100]Per J. Krishna Iyer, Municipal Council, Ratlam v. Shri Vardichand et al., (1981) 1 S.C.R. 97, 100.

maintaining the balance. The latest additions in this list are the moves of the blanket ban on crackers,[101] putting a stay on the cutting of trees in the Aarey colony in Maharashtra[102] and the direction of holding entire State administration, police mechanism and even the gram panchayats responsible[103] in event of even a single instance of stubble burning in order to seek an immediate halt to stubble burning in the states around Delhi to improve the worsening air quality index.

c) Recent social reforms

Firstly, the Apex Court has played a crucial role in the culmination of exercise of preparation of a National Register of Citizens in Assam by monitoring the publishing as mandated by the Assam Accord of 1985.[104] To ensure fairness, a division bench in 2018 monitored the release of a new draft.[105]

Secondly, in the recently concluded *Siddiq (D) Thr Lrs v. Mahant Suresh Das & Ors.* ("***Babri Masjid-Ram Janmabhoomi***") title suit,[106] the Supreme Court made use of the 'complete justice' provision[107] to direct the Centre to allot a suitable plot of land measuring 5 acres to the Sunni Central Waqf Board to make good its loss of the structure of a mosque. This step goes a long way in preventing the feelings of

[101]Arjun Gopal v. Union of India, Writ Petition (Civil) No. 728 OF 2015.
[102]PTI, *Don't cut anymore trees, says SC on Mumbai's Aarey*, THE ECONOMIC TIMES (Nov. 09, 2019, 10:16 AM), economictimes.indiatimes.com/articleshow/71473965.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.
[103]*Supra* note 101.
[104]Assam Sanmilita Mahasangha v. Union of India, (2015) 3 S.C.C. 1.
[105]Assam Public Works v. Union of India and others, Writ Petition (Civil) No .274 OF 2009.
[106]M Siddiq (D) Thr. Lrs. v. Mahant Suresh Das & Ors., (2020) 1 S.C.C. 1.
[107]Indian Const. art 142.

minority being wronged and maintaining the 'composite culture'[108] of India.

V. RECENT TRENDS AND PROBLEMATIC AREAS

The path of demosprudence in India has run into troubled waters in recent times. A number of problematic areas which deserve the attention of the Apex Court have been brought to light.

A. Contradictory Stances

The same court often takes contradictory stances on a similar set of facts before it. An apt example of this can be that of the ambiguity shrouding the 'Essential Religious Practices' test. The consistent application of this principle in an inconsistent manner has led to the creation of more problems than solutions. The seven-bench decision in *The Commissioner, Hindu v. Sri Lakshmindra Thirtha Swamiar* ("***Shirur Mutt***")[109] case, holding that "*what are essential religious practices should be left to be determined by religious denomination itself*"[110] is in conflict with the five-judge bench in *Durgah Committee, Ajmer vs. Syed Hussain Ali.*[111]In the latter instance, the court accorded to itself the role of distinguishing between 'religious practices' and extraneous 'superstitious beliefs.' The apparent conflict between the two decisions has prompted the suggestive reference[112] of the *Sabarimala* women entry case[113] to a larger bench for

[108]Indian Const. art 51 A (f).
[109]The Commissioner, Hindu v. Sri Lakshmindra Thirtha Swamiar, (1954) S.C.R. 1005.
[110]*Id.*
[111]Durgah Committee, Ajmer vs. Syed Hussain Ali, A.I.R. 1961 S.C. 1402.
[112]Kantaru Rajeevaru v. Indian Young Lawyers Association, 2019 S.C.C. OnLine S.C. 1461.
[113]Indian Young Lawyers' Association v. State of Kerala, Writ Petition (Civil) No. 373 of 2006.

reconsideration, which would also shape discourse regarding the entry of Muslim women in a durgah[114] and essentiality of female genital mutilation in Dawoodi Bohra community of Gujarat.[115]

B. The Gap between Theory and Practice in the Area of Co-Governance

Although *bona-fide* criticism of a judgment is permissible, but the Constitution still places a non-negotiable obligation on all the authorities to enforce the judgments of the Apex Court.[116] In the *Sabarimala* review-petition case,[117] Justice Nariman voiced his concern over this non-compliance and directed the State of Kerala to give wide publicity to the judgment and devise modalities for compliance while striking a balance between lasting peace and human dignity.

In 2014, a study was conducted in the Udaipur town of Tripura, which revealed gross violations of the Noise Pollution (Regulation and Control) Rules, 2000.[118] The Tripura High Court[119] treated a letter by some students to be a writ petition and hauled up the police and state administration for this blatant violation and non-implementation. Recently, in July 2019, the Apex Court issued notices to the Centre, National Human Rights Commission and state governments on a

[114]Kantaru Rajeevaru vs Indian Young Lawyers Association, Writ Petition (Civil) No. 472 of 2019.
[115]Sunita Tiwari vs Union of India, Writ Petition (Civil) No.286 of 2017.
[116]Justice Nariman, Kantaru Rajeevaru v. Indian Young Lawyers Association, 2019 S.C.C. OnLine S.C. 1461.
[117]Kantaru Rajeevaru v. Indian Young Lawyers Association, 2019 S.C.C. OnLine S.C. 1461.
[118]Viki Das et al., *Evaluation of Noise Pollution: A Case Study of Udaipur, Tripura, India*, 03 INTERNATIONAL JOURNAL OF ENGINEERING RESEARCH & TECHNOLOGY (2014).
[119]Court on its own motion v. State of Tripura & Ors, Writ Petition (C) (PIL) 03 of 2013.

plea[120] seeking implementation of the Apex Court's 2018 guidelines to prevent incidents of mob lynching.[121]

No matter how fascinating the concept of co-governance is, it will not be wrong to assert that there exists a substantial gap between theory and practice. However, the road of filing contempt petitions is not a viable solution as in many cases, the violation is not brought to the court's notice. The limitations of an overworked and understaffed executive in India should also not be overlooked by the judiciary.

C. Lack of Clear Norms in the Exercise of Demosprudence

The judges and their judgments are being influenced by the psychological and sociological stimulus of facts. The very essence of the creative is its novelty, and hence we have no standard by which to judge it.[122] The recent manifestation of these contradictory stances can be cited as the contradiction between the court's stance in cases where the minorities have been ensured their long-denied rights in cases such as the triple talaq case,[123] Sabarimala women entry case,[124] and the decriminalisation of Sections 377[125] and 497[126] of the Indian Penal Code on one hand, and on the other hand, the Ayodhya title dispute suit[127] which is an obscured vindication of majoritarian faith and beliefs.

The difference in the stance is plainly visible when the court on one hand remarks that, "*title cannot be established on the basis of faith*

[120]Express News Service, *Prevention of lynching: SC notice to Centre, 10 states on implementing guidelines*, INDIAN EXPRESS, (Nov. 09, 2019, 11:36 AM), https://indianexpress.com/article/india/prevention-of-lynching-sc-notice-to-centre-10-states-on-implementing-guIdelines-5855473/.
[121]Tehseen Poonawalla v. Union of India, Writ Petition (Civil) 754 of 2016.
[122]Everett Rogers, *Diffusion of Innovations*, 351 (4 ed. Free Press 1995).
[123]Shayara Bano v. Union of India, (2017) 9 S.C.C. 1.
[124]Indian Young Lawyers' Association v. State of Kerala, (2019) 11 S.C.C. 1.
[125]Navtej Johar v. Union of India, (2018) 10 S.C.C. 1.
[126]Joseph Shine v. Union of India, (2018) 2 S.C.C. 189.
[127]M Siddiq (D) Thr. Lrs. v. Mahant Suresh Das & Ors., (2020) 1 S.C.C. 1.

and belief above."[128] Yet, it proceeds to say, "*Once the witnesses have deposed to the basis of the belief and there is nothing to doubt its genuineness, it is not open to the court to question the basis of the belief...Whether a belief is justified lies beyond ken of judicial inquiry.*"[129]

D. Reluctance towards Transparency and Resultant Lack of Institutional Faith

The Apex Court's tryst with transparency has always been a troubled area. The outlook of the judiciary on the issue of transparency in its working can be gauged from the fact that an appeal from the Delhi High Court's judgment[130] on the issue of whether all information on the appointment and assets of judges can be put out in the public domain and whether Chief Justice of India was a 'public authority' under the Right to Information Act, was kept pending for almost a decade. Even after all this time, when the Apex Court finally let the disinfectant of sunshine[131] into its well-guarded premises in *CPIO v. Subhash Chandra Agarwal*,[132] by holding the Chief Justice of India to be a 'public authority', it was done with certain riders. Concerns about the right to information being used as a tool of surveillance were expressed in the judgment and the test of proportionality and legitimate State interest[133] was directed to be applied in order to adjudge whether the information could be disclosed under the Act. Further, there is no pronouncement about the working of the collegium system in an open manner. Transparency will do well to

[128]*Id.* ¶ 788.
[129]*Id.* ¶ 555.
[130]Supreme Court of India Vs. Subhash Chandra Agarwal (2009) 162 DLT 135.
[131]Swapnil Tripathi v. Supreme Court of India, (2018) 10 S.C.C. 639.
[132]CPIO, Supreme Court of India v. Subhash Chandra Agarwal, 2019 S.C.C. OnLine S.C. 1459.
[133]K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1.

enhance the faith of the public in the institution and will in turn lead to efficiency.[134]

A chink in the armor of judicial independence appeared in the recent past through the lone dissent of Justice Chelameswar in *Supreme Court Advocates-on-Record – Association v. Union of India* (***"NJAC"***),[135] where he expressed his concern over the issue whether the judiciary had really outgrown the malady of dependence or merely transferred it from the political to judicial hierarchy.[136] Recent episodes of allegations against the Chief Justice of India, the opacity in the in-house investigation[137] and the refusal to re-open the exercise of preparation of National Register of Citizens in Assam despite the patent irregularities[138] have led to the erosion of trust of the public in the revered institution of the Apex Court.

The tremors of the ill-practices prevailing in the judicial system were felt even at the institutional level when the four senior-most justices organized an 'extraordinary' press conference in January, 2018 and listed a number of problems that ailed the institution and put democracy to peril, one of them being the allocation of sensitive matters to hand-picked benches.[139]

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[134]CPIO, Supreme Court of India v. Subhash Chandra Agarwal, 2019 S.C.C. OnLine S.C. 1459 (J. Saniv Khanna).

[135]Supreme Court Advocates-on-Record – Association v. Union of India, (2016) 5 S.C.C. 1.

[136]*Id.*

[137]Japnam Bindra, *In-house probe panel clears CJI Ranjan Gogoi in sexual harassment case*, LIVEMINT (Nov. 07, 2019, 05:14 PM), https://www.livemint.com/news/india/sc-inquiry-panel-dismisses-complaint-of-sexual-harassment-against-cji-gogoi-15571443341119.html.

[138]Assam Public Works vs Union of India, Writ Petition (Civil) No. 274 of 2009.

[139]Michael Safi, *India's top judges issue unprecedented warning over integrity of supreme court*, (Nov. 29, 2019, 10:16 PM), https://www.theguardian.com/world/2018/jan/12/india-supreme-court-judges-integrity-dipak-misra.

E. Attempt to Define 'Constitutional Morality'

The court has mounted on a wagon of transformation through adjudication and delivered a considerable number of verdicts[140] in which the discriminatory practices prevailing in the society were sought to be weeded out through the tool of constitutional morality. Constitutional morality is essentially the crux or the core principle which can, in an alternative vocabulary, be called the 'grundnorm' in Kelson's Pure Theory of Law, which too defies any straitjacketed formula for its determination.

In *Kantaru Rajeevaru v. Indian Young Lawyers Association* ("***Kantaru Rajeevaru***"),[141] one of the terms of reference is about the need to delineate the contours of the expression *"morality"*, lest it should become subjective.[142] However, if a definition is given, it will circumscribe the working of the Apex Court in this direction. The decision on this reference will also decide the fate of marital rape, women's entry in mosques[143] and the constitutionality of restitution of conjugal rights provision of the Hindu Marriage Act, 1955. These issues might take an even longer time to be decided as they will remain pending until the determination of questions referred to the larger bench. It is submitted that while there appears a need to weed out the subjectivity associated with these concepts; it is the spirit of the constitutional community that should pave the way for the Court in this endeavor.

[140]Shayara Bano v. Union of India, (2017) 9 S.C.C. 1; Navtej Johar v. Union of India (2018) 7 S.C.C. 192; Joseph Shine v. Union of India, (2018) 2 S.C.C. 189.
[141]Kantaru Rajeevaru v. Indian Young Lawyers Association, 2019 S.C.C. OnLine S.C. 1461.
[142]*Id.*
[143]Kantaru Rajeevaru v. Indian Young Lawyers Association, Writ Petition (Civil) No. 472 of 2019.

F. Pick-and-Choose Policy

Of late, the adjudicative leadership has drawn much flak from the academia on account of the over-zealousness shown by the Courts and their 'pick and choose' policy in the exercise of demosprudence. While long-forgotten rights are being ensured to the people on the one hand, the ambiguous status of personal laws[144] and their relationship with fundamental rights, the unnerving silence on the Uniform Civil Code despite the fervent pleas as to its enactment,[145] and the blurring distinction between the executive and judiciary on the other have become causes of concern. Aggravating these concerns is the judicial evasion towards deciding politically charged cases, be it declining to order probe into corruption allegations in *Manohar Lal Sharma v. Narendra Modi* ("**Rafale**")[146] citing the limited scope of judicial review or the abdication in Kashmir habeas corpus petition[147] and refusing to take into account the human rights implications of the lockdown in the valley.

G. Substantial and Technical Justice

The Apex Court on one hand is zealous to do justice in substance by innovating remedies and on the other hand, invokes technical grounds to turn a blind eye to injustices that are being perpetrated. Two instances of this practice by the Apex Court have been described below:

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[144]Krishna Singh v. Mathura Ahir, A.I.R. 1980 S.C. 707 at 712; Maharishi Avadhesh vs. Union of India, 1994 S.C.C. Supl. (1) 713; Ahmedabad Women Action Group v. Union of India, (1997) 3 S.C.C. 573.

[145]Sarla Mudgal v. Union of India, A.I.R. 1995 S.C. 1531; Lily Thomas v. Union of India, A.I.R. 2000 S.C. 1650.

[146]Manohar Lal Sharma v. Narendra Modi, (2019) 3 S.C.C. 25.

[147]ANI, *Supreme Court adjourns J&K Habeas Corpus petitions till December 6*, THE INDIAN EXPRESS (Nov. 29, 2019, 10:26 PM), newindianexpress.com/nation/2019/nov/29/supreme-court-adjourns-jk-habeas-corpus-petitions-till-december-6-2068935.html.

a) Pollution fine

Attempting to impose 'Pollution Fine'[148] instead of granting compensation or exemplary damages to the victims is a move to import a component of criminal jurisprudence into civil proceedings. The Apex Court here is trying to function as the highest criminal court it will left with little time to perform its primary function.

b) National register of citizens conundrum

The recent exercise of directing the preparation of an NRC in Assam and monitoring its preparation is an example of usurpation of executive power by the Apex Court. With its denial to re-open the exercise of preparation of National Register of Citizens in Assam despite the patent irregularities, the Apex Court has left the excluded citizens at the whims of Foreigners' Tribunals which are shockingly bereft of judicially-trained members.[149] The Apex Court is the guardian of the Constitution, and in turn, the people. Without a guided exercise of power, if the perpetrator of these wrongs is the Apex Court itself, where will the remedy to the wronged lie?

VI. SHIFT TOWARDS DEMOSPRUDENCE FROM JURISTIC PRUDENCE: GUIDING LIGHT

In this article, the authors have traced the stance of the court which has undergone a sea change in the post – *Maneka Gandhi* era. There has been a marked departure from the seemingly static notion of

[148]MC Mehta v. Kamal Nath, (2000) 6 S.C.C. 213.
[149]Faizan Mustafa, *Kangaroo tribunals: Foreigners' Tribunals almost another arm of BJP government in Assam*, THE INDIAN EXPRESS(Nov. 07, 2019, 01:46 PM), https://indianexpress.com/article/opinion/columns/supreme-court-foreigners-tribunals-assam-nrc-6058158/.

juristic prudence, which calls for adjudication through a set of concrete principles, towards a more flexible notion of demosprudence. However, this shift has revealed a few problematic areas which have been addressed in the foregoing part of the article. To address these problems, a few suggestions are being put forward by the authors.

i) The desperate attempt to impart justice has left the court with no option but to delve into matters which were out of its realm for the sake of protecting democracy. However, in the absence of any fixed judicial policy, the court is caught up between substantiality and technicality of justice. These incongruities call for a judicial policy befitting the court's plenary power to do justice-both substantial and complete. This would minimize the potential abuse of judicial discretion.

ii) Non-compliance with the orders of the court is yet another evil that plagues the judiciary. To do away with the lackadaisical attitude of the bodies entrusted with the authority to enforce these orders, courts must seek compliance reports on its own orders and penalties must be prescribed for non-filing of a compliance report or furnishing reasons for non-compliance within a stipulated timeframe. A special bench should be constituted for speedy disposal of contempt cases arising out of non-compliance.

iii) Demosprudence has the potential of being abused to become a 'democracy by elites'. The judiciary must accept and appreciate the natural limitations of the institution and exercise some modicum of self-imposed restraint on the exercise of judicial power.

iv) There is a need for structural division in the Apex Court benches for the proper division of judicial time to tackle the humongous backlog and delay in decisions. The revival of the

social justice bench of the court, which is currently defunct according to the new roster of the Apex Court, would be a welcome step.

v) As argued by Stuart Mills, the foundation of democracy is not merely about the protection of individual rights in a negative sense but includes the promotion of active participation in public life. The best antidote to judicial supremacy is an active role of the constitutional community. This would legitimize the process of judicial activism by tempering 'professional reason' with 'people-oriented prudence'. People's participation can be ensured not only by the executive, but also by the institution of judiciary by delivering laconic but well-reasoned and easily comprehensible judgments. These judgments would be available in the public domain and this would, in turn, build up a base for ensuring the participation of demos in transforming the society in the real sense.

Although the above suggestions are not conclusive in nature, they can form the first step towards ensuring an all-accommodative and balanced exercise of demosprudential leadership of the court.

VII. CONCLUSION

The point of the discourse in the article is to illustrate the importance of the practice of demosprudence in the contemporary constitutional society that has pinned its hopes on the principle of transformative constitutionalism for realizing its long-desired goals. It must be remembered that courts alone are not the voice of change. They are only an institution for the ratification of social change, which comes from within the society. Demosprudence is the driving force behind the transformation of the constitutional community through the very document that is its *raison d'être.*

The practice of demosprudential dissent enhances its authority by shifting from silent acquiescence to speech. Talking in moral terms rather than a legal analysis, it reaches a larger audience to understand the implications of the majority view. The litmus test for an institution based on consent and popular majority is how gracefully it adopts the disagreements. The practice of demosprudence is warranted especially when the hyper-active Apex Court lacks a clear judicial policy. The wisdom of people should be the guiding force of the professional reason of the judges departing from their adjudicative task and chasing justice- which is an amorphous concept in itself.

Responsibility is better understood as "response-ability." The court is responsible to the people because it has the ability to respond to their pleas. But the frequent invocation of the *parens patriae* jurisdiction of the court has bred chaos. The courts must be mindful of the fact that there is no "complete" definition of "complete justice". The need of the hour is to realize where to call a halt to the wagon of *"transformation"* lest it should not become *"annihilation."* Liberalism demands tolerance. Any approach, howsoever liberal it is, falls flat for the lack of tolerance in society. Societal change should follow the bottom-up trajectory of evolution and should not be brought about in a revolutionary top-down manner.

The possible arguments that can be contemplated against demosprudence are, in our opinion, fallacious. The exercise of adjudicative leadership circumscribed by well-defined principles, judicial accountability and the judges' sense of self-restraint tempered with judicial propriety has the capacity to make the justice delivery system even better equipped to perform the transformative task that has been entrusted on the guardian of the constitution by the greatest law of the land itself.

A transformative Constitution is a document that ignites in our hearts the hope of a society where the mind is without fear and the head is held high. It should be remembered that the achievements we

celebrate today are only the opening of avenues of greater achievements that await us. The Apex Court will have to ensure that it withstands *"the great tides and currents which engulf the rest of men",* both internally as well as externally.[150] India can ill-afford the government of judges[151] lest the ideas of transformation through demosprudential leadership should become a Frankenstein's monster that would devour the very reason for its existence- the *demos.*

[150]Kevin James, *A Year After Four SC Judges' Press Conference, Is Democracy Still in Danger?*THE WIRE (Nov. 19, 2019, 09:46 AM), https://thewire.in/law/supreme-court-judges-press-conference-one-year.
[151]Anurag K Agarwal, *Judicial Legislation and Judicial Restraint*, 46 ECONOMIC AND POLITICAL WEEKLY 22, 24 (January 1-7, 2011).

TRANSGENDER RIGHTS – AN ONGOING WRANGLE

Indra Kumar Lahoti[*] *& Nitisha Agrawal*[**]

Abstract

In the theatre of life, without possession of the attribute of identity with dignity, an entity may be allowed entry to the centre stage but would be characterised as a spineless entity or, for that matter, projected as a ruling king without the sceptre. The transgender community not only faces discrimination on the basis of gender, but also on the basis of class and social order, making it a long-spurned issue in Indian society. There has been a long ongoing battle to give transgender persons recognition and bring them at par with the society. This paper will scrutinise the Transgender Persons (Protection of Rights) Act, 2019 ("Act") and give a glimpse of the horrendous variants of violence and discrimination faced by transgender persons. This paper will further discuss how gender identity and manifestation of that identity is a basic human right and no one, neither society nor the State has any right to interfere with that identity. Recognition of one's gender

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expression lies at the core of the fundamental right to dignity. The Act has glaring contradictions with regard to the socio-political environment where the 'third gender' is situated and it blatantly violates the NALSA judgment which was a watershed moment for this marginalised community. The paper will further discuss how the Act fails in providing adequate opportunities and representation in the sphere of education and public employment. In addition, the paper also delves into the different social challenges to effective implementation of reservation from within and outside the transgender community. Lastly, the paper will scrutinise how the State has yet again escaped from its duty to provide transgender people civic rights like marriage and inheritance rights.

I. INTRODUCTION

The Ministry of Social Justice and Empowerment notified the Transgender Persons (Protection of Rights) Act, 2019 ("**Act**") on January 10, 2020 which was passed by the upper house on November 26, 2019 and given Presidential assent on Dec 5, 2019. Although the Act is a step towards safeguarding the interests of the transgender community by assuring that they are equal citizens of this country, it fails to redress many of its concerns. The *National Legal Services Authority v. Union of India*[1] ("***NALSA***") was a watershed moment as the Supreme Court recognised the right to gender identity which is

[1](2014) 5 SCC 438.

intrinsic to one's right to life, dignity and autonomy. The legal and constitutional battle from "*trauma, agony and pain*" suffered by the "*members of transgender community*", to this unscientific and regressive[2] piece of legislation is still incomplete and there exists a huge obligation on lawmakers and on society to complete this unfinished work to show what a liberal, democratic, transformative and progressive constitution stands for. The Preamble to the Constitution portrays the foundational principles: justice, liberty, equality and fraternity. While recognising and protecting individual liberty, the Preamble acknowledges the importance of equality, both in terms of status and opportunity. It mandates the promotion of fraternity among citizens without which unity will remain a distant dream.[3]

This paper will critically analyse the new legislation in the post *K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.* ("***Puttaswamy***")[4] era where the Supreme Court has elevated the right to privacy and gender identity to the zenith of individual dignity. It is divided into four parts starting with an introduction to transgender persons and the historical importance they hold in our society. Next, this paper will try to answer why we have to reconsider and rethink the binary code of gender and move towards multiple gender identity to fulfil the constitutional mandate of equality and fraternity. The second part will largely deal with autonomy of an individual and the manifestation of one's identity; why one should reject the State identification process and move towards self-identification to rectify the historic injustice that was meted out to the community. The third part will deal with affirmative action of the State and will lay out a

[2]Revathi Krishnan, *Unscientific & Regressive' — Why Transgenders Bill tabled in Rajya Sabha is contentious* THE PRINT *(Jan. 20, 2020)* https://theprint.in/theprint-essential/unscientific-regressive-why-transgenders-bill-tabled-in-rajya-sabha-is-contentious/323859/.
[3]Subramaniam Swamy v. Union of India (2016) 7 SCC 221.
[4]K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors. (2017) 10 SCC 1.

plan to provide reservation within the existing constitutional scheme which will help uplift transgender people socially, educationally, culturally and economically. Lastly, the author will discuss how different personal laws should be amended to include transgender persons, recognising the existence of their legal status and uphold the dignity of life.

II. UNDERSTANDING TRANSGENDER/THIRD GENDER

Typically, a transgender person is someone whose sense of gender is distinct from their physical characteristics or the sex assigned to him at the time of birth.[5]

The coinage and familiarisation of the term 'transgender' in the 1990s grew partly from the perception that there are multitudinous forms of gender variance, and many people may not want surgical intervention or follow linear 'male-to-female' or 'female-to-male' ambits of transition.[6] In India, the United Nations Development Programme ("**UNDP**") supported the first regional deliberation on transgender and 'Hijra' issues in 2009, and 'transgender' was defined as an 'umbrella' term that manifests the reality of various communities and identities of people who are disempowered for their gender expression and/or identity.[7]

The transgender community consists of 'Hijras', eunuchs, 'Kothis', 'Aravanis', 'Jogappas', 'Shiv-Shakthis', etc., and they, as a group,

[5]Govindasamy Agoramoorthy and Minna J. Hsu, *Living on the Societal Edge: India's Transgender Realities*, 54 JOURNAL OF RELIGION AND HEALTH1451.
[6]Aniruddha Dutta, *Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights*, 5 JOURNAL OF INDIAN LAW AND SOCIETY225.
[7]SAATHII: Bhubaneswar, SAATHII.ORG (2020), http://www.saathii.org/orissapages/tg_hijra_issues_consultation%20.html (Feb 4, 2020).

have got a strong historical presence in our country in Hindu mythology and other religious texts. We have often come across terms like 'Napunsaka' or 'Tritiya Prakriti' in our Vedic and Puranic literature and these terms have been used to denote absence of procreative capability.

According to Hindu mythology, Lord Rama, in the epic Ramayana, while going towards the forest after being exiled from the kingdom for 14 years, asked all his followers, 'men and women', to return to the city. The transgenders refused as they were not bound by this direction because they neither fell in the category of men nor women, so they decided to stay. Dazzled by their devotion, Lord Rama gave them the power to bestow their blessings on auspicious occasions. In South India, especially in Tamil Nadu, another folklore of Aravan, son of Arjuna and Nagakanya in the epic battle of Kurukshetra was supposed to be sacrificed to endure the victory of Pandavas. Since no woman was willing to marry the one who was doomed to be killed, Krishna took the form of a winsome woman named Mohini and agreed to marry him. The Hijras of Tamil Nadu consider Aravan as their progenitor.[8] Since time immemorial, this small section of people has existed and celebrated their gender identity through many ways. Therefore, it is evident that stories involving various religious deities have been accepted by millions of Hindu devotees, thus, accepting transgenderism far ahead of other world religions.

Even though transgenders had a prominent role in earlier periods, there was a change in scenario during the British rule. During this period a legislation called The Criminal Tribes Act of 1871[9] was enacted that applied specifically to Eunuchs. This Act was enacted on the assumption that some communities are more likely to commit a

[8]Naresh Kumar Vats & Megha Purohit, *Right to Education and Employment: A Step towards Empowering Transgender Community*, 5 KATHMANDU SCH. L. REV. 113 (2017).
[9]Criminal Tribes Act, 1871, Act No. XXVII of 1871 modified in 1897.

crime and transgenders were one of them. In 1951, the Nehru Government annulled this legislation and while giving a speech in Nellore, he remarked[10] - "*I am aware of the monstrous provisions of the Criminal Tribes Act which constitute a negation of civil liberty... An attempt should be made to have the Act removed from the statutebook. No tribe can be classed as criminal as such and the whole principle is out of consonance with all civilized principles of criminal justice and treatment of offenders.*"[11]

Even though the Criminal Tribes Act was repealed, the transgender continued to face social stigma and harassment in the post-colonial period and getting social recognition continued to be a challenge for them. The National AIDS Control Organization ("**NACO**") Report scrutinises the term 'trans-gender' as the symbolic representation of crossing the boundaries, that has been derived from the two different languages; the Latin word 'trans' and the English word 'gender'.[12] The NALSA Judgment contains a more liberal definition of the term 'transgender.' It states: 'transgender' is generally described as an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex. It was further observed that those who do not identify with their sex assigned at birth, or who intend to undergo sex reassignment surgery ("**SRS**") or have undergone SRS to align their biological sex with their gender identity, who are later called as transsexual persons, as well as those who tend not to identify themselves with their sex assigned at birth,

[10]Siddharth Narrain, *Crystallising Queer Politics - The Naz Foundation Case and Its Implications for India's Transgender Communities*, 2 NUJS L. REV. 455 (2009).
[11]The Hindu, *From 'perversion' to right to life with dignity*, THE HINDU (2009), https://www.thehindu.com/todays-paper/tp-opinion/From-lsquoperversionrsquo-to-right-to-life-with-dignity/article16549137.ece (Jan 29, 2020).
[12]Laxmi Bai & J Mishra, *Transgender - Hijra strategy Draft version: 1.0*, http://naco.gov.in/sites/default/files/4.%20TG_paper_NACO%20shortversion.pdf (Feb 2, 2020).

including Hijras or eunuchs shall be covered under the ambit of the said definition.

Whereas, Section 2(k) of the Transgender Persons Act 2019 defines 'Transgender Person' as, "*a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman..., person with intersex variations, genderqueer and person having such socio- cultural identities as Kinner, Hijra, Aravani, and Jogta.*"

However, the Act includes all persons with inter-sex variation within the meaning of transgender persons and impose upon them a *"process of gender identification"* which is unjust as a person with intersex variation may be content with the gender assigned at the time of the birth, or it is their discretion if they choose to be a transgender. Due to this, these people have to suffer the tedious process of gender identification as laid down in Section 7 of the Act for anyone that comes within the definition of a transgender person. According to this section, the District Magistrate will issue a certificate, which will act as evidence certifying that the concerned person belongs to the transgender community. This violates the 'right to life' under Article 21 of the Constitution of India as it takes away the right to self-gender determination of these people.

III. 'STATE IDENTIFICATION' V. 'SELF-IDENTIFICATION'

"Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or

hormonal therapy, as a requirement for legal recognition of their gender identity."[13]

Historically, the Indian state policy has constantly refused to acknowledge gender identity different from the binary code of gender which resulted in the classification of transgender individuals as legal non-persons. Article 15 of the Indian Constitution prohibits discrimination of Indian Citizens on basis of religion, race, caste, sex, or place of birth. Discrimination on the basis of sex includes not only biological sex but gender identity also which has a deeper meaning than traditionally identified sex distinction.[14] Section 4 and 5 of the Act[15] clearly discriminate against the transgender person as they prerequisite the transgender community to obtain a certificate of self-identity for legal recognition. There are many impediments in obtaining the certificate as it has many layers and procedures. The whole process of 'self-identification' has turned into 'State-identification' which grossly violates the privacy of an individual.

Section 7 of the Act states that where a transgender person undergoes a gender affirming surgery is required to be certified by a Medical Officer in addition to the District Magistrate which again violates Article 15(1) of the Indian Constitution. These criteria bring about a number of questions. To what extent is the government guardian of one's self being? On what basis will the District Magistrate give the 'transgender certificate'?[16] Also, how will the State ensure that the District Magistrate is representing the transgender people of varied castes who lives in distinct geographic locations? Such a complex self-identification procedure could mitigate the individuality of those persons who don't want to undergo a surgery but still identify as

[13]National Legal Services Authority v. Union of India, (2014) 5 SCC 438.
[14]*Id*.
[15] The Transgender Persons (Protection of Rights) Act, 2019.
[16]Sayan Bhattacharya, *The Transgender Nation and its Margins: The Many Lives of the Law*, SAMAJ (2019).

transgender or just want to be referred to as male or female. An individual born into the biological sex they comply with, need no such certification for hormonal therapy or a mastectomy. It is the transgender community alone that needs such a seal of approval from a Chief medical officer. A transgender person visiting an office are usually regarded with wariness and in some cases, this antagonism transcends into unmitigated harassment at the hands of state officers. The process of certification fails to pursue the legitimate state aim of giving effect to the right to self-identification and further contributes in making transgender persons easy targets of stigmatisation and discrimination.

There are many instances where transgender persons are denied equal rights. One such instance being the case of SabiGiri, a naval officer, who was terminated of her services due to her sex reassignment surgery.[17] Similarly in another instance, a transgender woman named Sameera, who is also a doctor, was asked to present a 'surgery certificate' by the passport authorities when she applied to the passport office to get her name and gender markers changed, which stands in clear violation of the Supreme Court's directions. The *NALSA*[18] judgement clarified that a person could have their self-identified gender identity without mandating SRS stating, *"any insistence for SRS for declaring one's gender is immoral and illegal."* In yet another case, Vihaan Peethambar, a transgender activist from Kerala was asked to strip in front of the doctor and was asked various discomfiting questions about his genitalia when he went to change his

[17]Prasad Nichenametla, *2 years after sacking transgender sailor, Navy goes back on promise to give her fresh chance*, THE PRINT Feb 2, 2020), https://theprint.in/india/2-yrs-after-sacking-transgender-sailor-navy-goes-back-on-promise-to-give-her-fresh-chance/310235/.
[18](2014) 5 SCC 438.

gender markers on his identity documents. This happened despite Vihaan having his documents and undergoing surgery.[19]

Moreover, most transgenders can't afford to pay for their sex change surgery in private hospitals and with government hospitals not providing the same, the transgender take recourse to unqualified medical practitioners for this operation. Seldom, some transgender even resort to doing the castration themselves and as a result develop postoperative complications, especially urological problems due to bad surgical procedures. These complications would have been done away with if free or affordable SRS had been offered at government hospitals.[20]

Transgender persons being subjected to both systemic and individual discrimination gives birth to transphobia. Transphobia is *"the ignorance, fear, dislike, and/or hatred of trans people, which may be expressed through name-calling, disparaging jokes, exclusion, rejection, harassment, violence, and many forms of discrimination."*[21] Article 19(1) of the Constitution of India provides for freedom of speech and expression including the right to express self-identified gender, freedom to trade and profession, freedom to move freely and reside and settle in any part of India. Self-identified gender is often expressed through dress, words, action or behavior or other forms and no restriction should be there on the same, subject to the restrictions contained in Article 19(2) of the Constitution. Thus, this violates their fundamental rights and due to social stigma, they are unable to enforce their fundamental rights. The Court in a series of judgements

[19]*Supra* note 12.
[20]Venkatesan Chakrapani, *Hijras in sex work face discrimination in the Indian health-care system*, ETHICAL ISSUES, https://www.indianlgbthealth.info/Authors/Downloads/Hijras_Discrimination_JSW_Chakrapani.pdf.
[21]Ashleigh C. Rousseau, *Transgender Beneficiaries: In Becoming Who You Are, Do You Lose the Benefits Attached to Who You Were*, 47HOFSTRA L. REV., 813 (2018).

including *S. Khushboo v. Kanniammal & Anr.*[22] held that the law should not be used in such a manner that it has a chilling effect on the freedom of speech and expression.

In one of the most important judgements of this decade, the *Puttaswamy* judgement, a nine-judge bench of the Supreme Court unanimously declared the right to privacy as a fundamental right which includes the right to make choices as well as the freedom to express oneself; the State has no right to interfere in the matter. There has been a violation of Article 21 of the Constitution of India as *"right to life with human dignity"* of the transgender community is being violated. The definition of dignity includes the freedom of identity and expression and 'expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings.'[23] Gender is an integral part of a person's identity and legal recognition of the same is ensured under our Constitution.[24]

However, the Act[25] blatantly ignores the 'right to self-determination of gender' and lays down a series of long and tedious processes for a transgender person to gain recognition. By laying down a procedure where a person first has to submit an application to the District Magistrate[26] and it shall be upon their recommendation that a certificate shall be issued as a 'proof of recognition' of the identity of the transgender person,[27] the Act makes the State as opposed to the individual, the final arbiter on an individual's gender identity. This runs against the rights of 'self-expression' and 'personal autonomy' that the Constitution confers on its citizens.

[22](2010) 5 SCC 600.
[23]Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608.
[24]*Id.* at 14.
[25]*Supra* note 16.
[26]The Transgender Persons (Protection of Rights) Act, 2019 § 5.
[27]*Id. at* § 6(3).

The 'right of privacy' is defined as 'right to be left alone; the right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned.[28] The examinations not only violate the 'right of self-determination of gender' but also put the transgender community in a place where they are further susceptible to physical as well as mental harassment. Natural rights are not bestowed by the State. They are inherent in human beings because they are human. They exist equally in the individual irrespective of class or strata, caste, gender or orientation.

The medical examinations of transgender persons for gender identity cannot be further justified by the *"intelligible differentia"* as the main aim of the State should be social inclusion of the transgender community in the smoothest manner possible rather than subjugating them to a series of medical examinations which are not applicable to any other community in society. The Supreme Court on similar grounds held that:

"*No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity.*"[29]

Thus, the procedure to get identity certificates and any 'tests' for the 'purpose of the recognition transgender persons' is violative of the 'right to privacy'. In the same judgment the Court also held that no physical/medical assessment or procedure as a prerequisite is required for transgender identification. Therefore, the clause mandating the recommendation of the District Magistrate is an intrusion of the 'right to privacy' of an individual and is discriminatory to the already marginalised community.

[28]Chinmaya Kumar Mohapatra, Hiranmaya Nanda, *Right of Privacy: Issues and Challenges*, 4 INDIAN JOURNAL OF RESEARCH 344 (2015).
[29]*Supra* note 15.

Moreover, Section 18 of the Act[30] specifies the penalties for the offences committed against transgender persons which include physical, economic, verbal, and sexual abuse and permits imprisonment for a term which is as little as six months and can be extended to two years. All these harms or abuses are not defined in the act and discriminates against transgender persons on the basis of their gender. The punishment for offences such as rape against women are punishable with life imprisonment under the Indian Penal Code but the said act prescribes a miniscule punishment of at most two years against sexual abuse. The provision violates the right to life of transgender persons by prescribing such an inadequate punishment. It differentiates the nature of offence on the basis of gender and hence does not confirm with the constitutional principles of equality.[31]

In *Maneka Gandhi v. Union of India & Anr.*,[32] the legendary Krishna Iyer, J. observed that life is a terrestrial opportunity for unfolding personality, and it has to be borne in mind that the dignity of all is a sacrosanct human right and sans dignity, human life loses its substantial meaning. Thus, in order to move towards a truly holistic model, we must ignite a new energy to the existing socio-legal framework on an all-pervasive level to weed out various criminal legislations and family laws that sustain the systemic oppression of the non-conforming gender identities.

[30]The Transgender Persons (Protection of Rights) Act, 2019 § 18.
[31]Ashleigh C. Rousseau, *Transgender Beneficiaries: In Becoming Who You Are, Do You Lose the Benefits Attached to Who You Were*, 47HOFSTRA L. REV., 813 (2018).
[32](1978) 1 SCC 248.

IV. DETERMINING BACKWARDNESS - GENDER V. CLASS DEBATE

India is a complex society having a number of groups and sub-groups based on religion, race, language, caste, ethnicity, backwardness such as Scheduled Castes ("**SC**"), Scheduled Tribes ("**ST**"), religious and linguistic minorities, and Other Backward Classes ("**OBC**"). The makers of the Constitution of India envisaged an inclusive nation built on tolerance, acceptance and mutual respect among its people. Immediately after the Constitution came into force, the first amendment in 1951 inserted Article 15(4) which provided for a positive obligation on the State to make special provisions for advancement of socially and educationally backward class (**"SEBCs"**) to bring the marginalised and vulnerable people into mainstream society. While gender has stirred its share of controversy and conflict in India, the nation has failed to discuss how best to tackle those people that fall victim to both gender and class issues. The transgender community serves a peculiar aspect of society because they not only face discrimination on the basis of gender, but also on the basis of class and social order, making it a long- spurned issue in Indian society.

The patriarchal nature of Indian society has made life difficult for women, but more so for those that push the conventional definition of being a man or a woman, or, identify as neither. Falling into that category, transgenders/ hijras are often victim to discrimination on the basis of gender, which further stratifies their place in society.[33] In the battle against caste, class, gender and heterosexuality and further due to lack of resources, political disorganisation and blatant exclusion in the existing societal structure, the transgender community face

[33]Gee Imaan Semmalar, *Unpacking Solidarities of the Oppressed. Notes on Trans Struggles in India*, 42 WOMEN'S STUD. Q. 286 (2014).

exclusion of such enormous proportions that most of them agonise for a decent living. The constant harassment in public toilets, buses, railway stations, community gatherings makes their life miserable. The only distinction between Hijras and the untouchables is that there exists neither the reservation system to benefit Hijras nor any affirmative action scheme promoting the inclusion of Hijras.[34] The primary reason, among many, for this exclusion is, the political ignorance from the nation's political and administrative landscape. Instead of being invited into the folds of major society, transgender individuals are viewed as a genesis of bad luck who are "*ignored by most, tolerated by some, and misunderstood by all.*"

In the 21st century the welfare state cannot turn a blind eye to the existence of other forms and instances of backwardness. The State has to use all its resources and instrumentalities to find backwardness in all aspects of life which may include gender identity, religious and linguistic minorities, orphans, daily wage workers etc.[35] Their rights are not 'so-called' as stated in *Suresh Kumar Koushal v. Naz Foundation*[36] but are real rights founded on the sound constitutional doctrine of equality. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. In view of the systematic and institutional injustice that prevent this minority community from realising equal rights, they are forced to live as second-class citizens in their own countries. Further they also face socio-economic disadvantages due to low level of education and miniscule access to employment opportunities. To rectify this situation while delivering the *NALSA* judgement the highest court of the land made the landmark ruling that –

[34]Sapna Khatri, *Hijras: The 21st Century Untouchables*, 16WASH. U. GLOBAL STUD. L. REV., 387 (2017).
[35]National Commission for Backward Class, Report 2014-15.
[36](2014) 1 SCC 1.

"*We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.*"[37]

The present legislation has no statutory provision for advancement of the transgender community in educational institutions or public employment. Although after the much-celebrated verdict, different state governments[38] made various changes in their transgender policy recognising their freedom of expression and providing a more dignified life. But due to the apathy of a central legislation, their constitutional right of equality and freedom of gender expression are still lacking. As reservation is a facet of equality, the State has a constitutional obligation to ensure their social, economic and educational upliftment in the societal fabric of the country.

Even after the historic *NALSA* judgement, almost every state failed in adopting a holistic approach to extend the benefits to such people who were considered as 'inappropriate' by society.[39] The Madras High Court[40] directed the state of Tamil Nadu to provide post based reservation to transgender persons in public employment and educational institutions.[41] The state of Kerala issued an order directing two additional seats to be reserved in various courses in universities and affiliated arts and science colleges for the transgender

[37](2014) 5 SCC 438.
[38]Aslam Pasha Urf Chandini v. State of Karnataka, Writ Petition No. 11610 of 2013.
[39]Dipika Jain, Gauri Pillai, Surabhi Shukla & Justin Jos, *Bureaucratization of Transgender Rights: Perspective from the Ground*, 14SOCIO-LEGAL REV. 98 (2018).
[40]Swapna & Ors. v. The Chief *Secretary*, W.P. No. 31091 of 2013.
[41]S. Tharika Banu (Transwomen) v. The Secretary to Government Writ Petition. No. 26628 of 2017.

community.[42] The Uttarakhand High Court[43] acknowledged the transgender persons' right to work and ordered the government to make a comprehensive policy on transgender persons regarding their inclusion in the reservation system within the constitutional framework. The Calcutta High Court ordered a public sector bank to include members of the transgender community in its selection procedure.[44] In *Shivani Bhat v State of NCT of Delhi*,[45] the High Court recognised the rights of a 19-year-old transgender man facing illegal confinement and continuous harassment by his family.

According to Article 14 of the Constitution of India, the State cannot deny *"any person"* equality before the law or the equal protection of the laws within the territory of India. The basis for providing affirmative actions like reservation lies in Article 15 and Article 16 of the Constitution. These provisions help the State to prohibit discrimination on the basis on religion, race, caste, sex and place of birth. Unlike sexuality, which is a private affair that an individual chooses to reveal as per their willingness, gender is a public concept. The gender identity is the outward manifestation of a person's physical appearance of their body. Radhakrishna J. while delivering the landmark judgment in *NALSA v. Union of India*[46] held that –

"*Articles 15 and 16 sought to prohibit discrimination on the basis of 'sex', recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to*

[42]HT Correspondent, *Kerala announces reservation for transgender students in colleges Hindustan Times, HINDUSTAN TIMES (Jan 22, 2020)*, https://www.hindustantimes.com/education/kerala-announces-reservation-for-transgender-students-in-colleges/story-qHixW6XIPTEXuXkCrrv45K.html.
[43]Rano & Ors. v. State of Uttarakhand and Ors., W.P. Criminal Nos. 1794 and 1785 of 2018.
[44]Atrikar v. Union of India, 2017 SCC OnLine Cal 3196.
[45](2015) 223 DLT 391.
[46](2014) 5 SCC 438.

prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression 'sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male nor female."

Transgender persons in India are forced to rely on many wrongful activities like sex and drug trafficking which contributes further to the social ostracism that they face. The lack of education and job opportunities compel many transgender individuals to enter into sex work in their day-to-day life for survival. In the public sphere, the Hijra community is only visible either in the act of begging or doing menial jobs as a result of which they have to face discrimination on the basis of physical and sexual abuse. Society treats them as secondary citizens whose influence will bring bad luck and misfortune in their lives. Therefore, in securing rights, one needs to begin with economic rights, which can ensure that transgender persons are able to live a life of dignity even when abandoned by their own.[47]

Further, Article 15(2) extends this prohibition to non-State actors in places of public accommodation, forbidding denial of access to shops, public restaurants, wells, tanks, bathing ghats, roads, hotels and places

[47]Mousumi Padhi and Purnima Anjali Mohanty, *Securing Transgender Rights through Capability Development*, 54 ECONOMIC AND POLITICAL WEEKLY (2019).

of public entertainment dedicated to the use of the general public. Article 15 thus, has not just a vertical effect (protecting the citizens from discrimination by the State) but also to a limited extent a horizontal effect (protecting against private discrimination).

Article 15(4) and Article 16(4) lay the foundation of this acquiescence to include the people who are most deserving and require the attention of the society which has been prejudiced on different lines. The court while quashing the order of including the Jat community in the Other Backward Class ("**OBC**") list observed that – "*new practices, methods and yardsticks have to be continuously evolved moving away from caste centric definitions of backwardness. This alone can enable recognition of newly emerging groups in society which would require palliative action*."[48]

V. RESERVATION - HORIZONTAL OR VERTICAL

The jurisprudential development of Article 15(4) dates back to *M.R. Balaji v. State of Mysore*[49] where the Supreme Court of India categorically stated that, determination of backwardness is the function of the State as there are many sociological and economic considerations that come into play in solving this complex problem.[50] After the ruling of the famous *Mandal Commission case*,[51] the Supreme Court directed to setup a permanent body which will determine backwardness, advising the respective governments on the requests for inclusion and complaints of over inclusion or under inclusion in the lists of Backward Classes. It also directed that the advice tendered by such body shall ordinarily be binding[52] upon the

[48]Ram Singh v. Union of India, (2015) 4 SCC 697.
[49]1963 AIR SC 649.
[50]*Id.*
[51]Indra Sawhneyv. Union of India, 1992 (3) SCC 217.
[52]National Commission for Backward Classes Act, 1993 § 9(2).

concerned government. The National Commission for Backward Classes ("**NCBC**") after a comprehensive study on the issue and in tune with the above-mentioned statutory powers tendered its advice to consider 'transgender' as socially and educationally backward class (SEBCs) in 2014.[53]

Article 15(4) and Article 16(4) are provisions which are gender neutral and reservation on the basis of gender will be constitutionally questionable. These provisions presuppose a class of people who have historically been discriminated against by caste centric dynamics in the society. Black's Law Dictionary defines class as, 'a group of persons or things, taken collectively, having certain qualities in common.' Gender and class are two similar but yet overlapping concepts. The Supreme Court through its various judgements recognised that a social class is "*an identifiable section of society which may be internally homogeneous (based on caste, occupation or residence).*"[54] Hence, homogeneity is a prerequisite for a class and their social and educational backwardness is essential while declaring them as SEBCs.[55] A significant question which lies here is, can a heterogeneous group of individuals (transgender/third gender) constitute a class? Of course, an individual of a certain gender will definitely belong to some class, however it would be incorrect to say that all individuals of a certain gender would belong to the same class.[56] The concept of constitutional morality[57] urges the organs of the State, including the Judiciary, to preserve the heterogeneous

[53]National Backward Class Commission, NCBC Advice No.1/All India/2014 dated May 15, 2014.
[54]*Supra* note 49.
[55]Triloki Nath v. State of Jammu & Kashmir, (1969) 1 SCR 103, State of Uttar Pradesh v. Pradip Tandon, 1975 SCR (2) 761.
[56]Sakshi Parashar, Inclusion *of Transgender Community within Socially and Educationally Backward Classes: Examining the Deeper Concerns*, 2 Indian Law Institute Law Review (2017).
[57]Naz Foundation v. State (NCT of Delhi), (2016) 15 SCC 619.

nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule section of the populace.[58] The Hon'ble Court noted that the term 'sex' in Articles 15 and 16 of the Constitution includes gender as a distinct component.

In *Indra Sawhney*,[59] the Supreme Court dealt the whole reservation policy at length. It stated that reservation can be granted under two categories, i.e., horizontal reservation and vertical reservation. The vertical reservation flows from Article 16(4) in favour of ST, SC and OBCs. This pool of reservation is also known as social reservation as it comes from the discrimination faced by a homogenous class due to social backwardness in the society. Educational and economic backwardness may contribute to social backwardness. But social backwardness is a distinct concept having its own connotations.[60] Whereas horizontal reservation flows from Article 16(1) in favour of women, persons with disabilities, freedom fighters, project displaced persons etc. This reservation is considered as a special reservation which cuts across the category of vertical reservation resulting in inter-locking reservation. In simple words, under the existing category of social reservation (vertical reservation), a special reservation (horizontal reservation) is provided to recognise the intersection of multiple identities and resulting vulnerabilities.

Even within the horizontal category, there are two methods by which seats can be distributed, i.e., compartmentalised or overall reservation. This can be understood with an example. If there is a transgender person selected under the SC category, then she will be adjusted to the SC reserved seat. This is known as compartmentalised reservation. In overall reservation, the total seats for special category are met irrespective of its distribution across vertical reservation. Thus, if there are not enough transgender candidates belonging in SC

[58]Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[59]1992 Supp (3) SCC 217.
[60]*Supra* note 49.

and ST categories then those seats will be transferred to open category.

The benefit of having horizontal reservations is that it allows reservation not merely on the basis of one identity, i.e., gender or disability but enables the State to identify multiple identities like gender and caste, disability and caste at the same time, within the contours of the equality principle and include them in the reservation policy. Backwardness is a manifestation caused by the presence of several independent circumstances which may be social, cultural, economic, educational or even political.[61] The Supreme Court in *Rajesh Kumar Daria v. Rajasthan Public Service Commission*,[62] stated that "*special provision for women made under Article 15(3), in respect of employment, is a special reservation as contrasted from the social reservation under Article 16(4)*." Another problem which may arise is that while granting reservation under Article 15(4) it will be necessary to apply the creamy layer concept, which will again be problematic and will negate the object of granting reservation. Further, Dalit transgender individuals will lose out again on the benefits of the SC/ST category if they come under the OBC category. Similarly, upper caste transgenders will not wish to be recognised under the OBC reservation.[63]

Although the Supreme Court did recognise the discrimination in the *NALSA* judgement and directed the State to treat them as SEBCs, but it erred in making them a separate class. Unlike vertical reservations that are implemented in the form of a "set aside," horizontal reservations are implemented in the form of a "minimum guarantee." If reservation is provided to such individuals as social reservation in

[61]*Supra* note 61
[62](2007) 8 SCC 785.
[63]Aniruddha Dutta, *Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights*, 5 JOURNAL OF INDIAN LAW AND SOCIETY225 (2014).

the vertical category, it will negate the gender discrimination which is one of the fundamental causes of harassment to this community. The vertical reservation contemplated in Articles 15(4) and 16(4) is broadly based on historical discrimination faced by a class of people that too majorly on the basis of caste, but the transgender community consists of a heterogeneous class which faced gender discrimination due to their gender identity and hence they should be provided horizontal reservation within Article 15(1), Article 16(1) and Article 15(3).

Our Constitution is a social, organic and living document which has revolutionary characteristics to reform a hierarchical society into a modern, egalitarian society.[64] Its aim is to develop a constitutional culture and to protect the fundamental rights of every individual. The transgender has long lived on the fringes of society and suffered violence and harassment not just by the police but also by educated people of society.[65]

VI. A LONG BATTLE AHEAD - INHERITANCE AND MARRIAGE RIGHTS

Transgender persons had a prominent role in the history of our nation until the arrival of Britishers and enactment of the Criminal Tribes Act, 1871 which severely brought them under the ambit of criminals. This worsened their status not just in society but their own families too. The *NALSA* judgement recognised the gender expression of a transgender person and gave them legal status. The current Act gives the above- mentioned status but it lacks in giving them further rights

[64]State of Kerala and Anr. v. N.M. Thomas and Ors., AIR 1976 SC 490.
[65]Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

which arise as a consequence of this legal status, i.e., marriage and inheritance of property.

Inheritance laws are basically governed by personal laws of every religion in India. Their laws only recognise binary codes of gender i.e., male and female.[66] A transgender person has to choose between these two categories in order to come within the framework of the inheritance laws. The Hindu Succession Act, 1956 governs the inheritance of separate and joint property and recognises only male and female as the subject-matter of property rights. The terms used in the provisions are male, female, son and daughter. The right of inheritance under Hindu law is based on the coparcenary model of succession and inheritance where the right of the child starts once they are born. In addition, the Hindu Succession Act, 1956 even lays down the procedure as to how the law will be applied differently in respect of a male and female coparcener.[67] The current position for a transgender person is that they recognise themselves as male or female according to the gender assigned to them in their birth certificate. As the *NALSA* judgement clearly established, 'sex' include multiple gender identities and discrimination on the basis of sex is violative of constitutional rights.[68]

Muslims are governed by their personal law namely Sharia law for the purpose of succession. Muslim law also only recognises binary gender which is clearly inferred from the list of sharers and residuary in Shia and Sunni law of inheritance. The Christian inheritance of property is governed by the India Succession Act, 1925. In 2014, the Christian community has approved the amendment of Section 44 of the said act to include transgender persons within the framework for inheritance rights over ancestral property. The Delhi Minority

[66]Rupal Sharma, *Inheritance Rights of Transgender-A Cry of Humanity*, 1 INTERNATIONAL JOURNAL OF LAW MANAGEMENT AND HUMANITIES (2018).
[67]Hindu Succession Act, 1956 § 10, 16.
[68]*Supra* note 14.

Commission recommended this proposal to the Law Commission of India to implement this provision across all personal laws.[69] This act was considered as one of the progressive moves made to enable transgender persons to live and earn a livelihood without depending on others.

The right to marry is a constitutional right within the right to life and personal liberty which permits persons to make the choice of spouse according to their own free will, and this right cannot be infringed by the State.[70] The right to choose a partner is a feature of dignity and is therefore protected under Articles 19 and 21 of the Constitution.[71] In Hindu customary law, marriage being of a divine origin is perceived as a sacred union between two individuals. One of the forms of marriage in the Vedic scriptures was the Gandharva marriage, the only stipulation of which was the mutual love and attraction between the two individuals. This marriage supports the queer marriage as love and affection sees no gender. In earlier Vedic society, transgender people were given all those rights and liberties which were assured to non-trans people and this included marriage too. One of the most eminent examples[72] of queer marriage in Hindu literature is the instance of Princess Sikhandini that was written into the epic Mahabharata where Princess Sikhandini married her lady love, and subsequently she was transformed into the physical sex of a man and the validity of marriage was not affected.

If we talk about the Hindu Marriage, the customary Hindu laws were codified in the mid-20th century which governed the Hindu marriages. In 1955, The Hindu Marriage Act was enacted which was

[69]Maria Akram, *Christian Transgender to have Equal Right on Ancestral Property,* THE HINDU (Jan 27, 2020), https://www.thehindu.com/news/cities/Delhi/christian-transgenders-to-have-equal-right-on-ancestral property/article8592360.ece.
[70]Shakti Vahini v. Union of India and others, (2018) 7 SCC 192.
[71]Shafin Jahan v. Asokan K.M., AIR 2018 SC 1933.
[72]Dipayan Chowdhury, *Recognizing the Right of the Third gender to Marriage and Inheritance under Hindu Personal Law in India*, 3 BRICS LAW JOURNAL(2016).

to be the parent legislation in governing such marriages. Surprisingly, the requisite conditions as required for a valid Hindu marriage under Section 5 of the Hindu Marriage Act[73] have by no means restricted the meaning as being that which is made only between a man and a woman. Section 2(1) (a),[74] instead, defines marriage as being applicable "*to 'any person' who is a Hindu by religion in any of its forms or developments*." The General Clauses Act, 1897 defines 'person' as any company or association or body of individuals, whether incorporated or not. Thus, transgenders can be included under this definition of 'person'. On similar grounds, recently, the Madras High Court in the case of *Arunkumar and Anr. v. The Inspector General of Registration and Ors.*[75] affirmed the right to marry of trans persons to individuals of their own choice and held that "*a marriage solemnized between a male and a transwoman, both professing Hindu religion, is a valid marriage in terms of Section 5 of the Hindu Marriage Act, 1955*." This shows that any marriage ceremony, when performed with customary rites and rituals where either of the parties belongs to a non-binary gender sphere or both, will still have its sanctity or force by law. Thereby, laying down a base for third gender marriages in India.

VII. CONCLUSION

India has, evidently, taken a step forward to recognise the transgender rights. This recognition, however, is not enough to improve the present situation of the community and the ongoing centuries old social stigma. The Transgender Persons (Protection of Rights) Act 2019, which was ostensibly drafted to finally bring about an end to

[73]The Hindu Marriage Act, 1955 § 5.
[74]*Id. at* § 2(1)a.
[75]WP (MD) No. 4125 of 2019 and WMP (MD) No. 3220 of 2019.

this tragic status quo, brought more criticism than acceptance. The transgender community itself termed the Act as draconian and murder of gender justice. The definition of transgender provided in the Act is problematic as it includes intersex persons within the ambit of transgender as they have a distinct meaning and bringing them under this definition will only limit the scope of their rights. Further, the act lays down a typical procedure for a transgender person to get an identification certificate. This would mean that one's gender expression is dependent on the watchful eye of the bureaucracy which never misses a chance to dehumanise members of the transgender community.

The provision of giving only two years of maximum punishment in case of any type of abuse again violates the equality principle enshrined in the constitution. Sexual abuse and rape of a woman are punishable with imprisonment of at least seven years of punishment. The inadequate amount of punishment is a sign that the State classifies the offence not on the basis of severity of the crime but on the basis of the person who is being subjected to such crime. The purpose of reservation is not merely to correct historic injustice and discriminatory treatment but to ensure that transgender persons are provided with the means to actively participate in the social life in the future and further that there is greater diversity and representation in our educational institution and public employment.

Moreover, the inheritance and marriage rights, as explained earlier, are based more on personal laws of different religions in India and thus, demands more flexibility in such laws to bring the transgender individuals at par with the non-trans individual who enjoy such rights. Inheritance and marriage rights are more of a natural right, the enjoyment of which should not be subject to the gender of a person. India being a secular country should chalk out a better way of giving recognition to the transgender community.

Our Constitution has often been described as a transformative document. One of the most important purposes of this transformation is to ensure the fundamental socio-economic rights of the disadvantaged. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future. In its transformational role, the Constitution directs our attention to resolving the polarities of sex and binaries of gender. It accepts myriad views, plurality of identities, multitude of cultures and a scientific temperament among its people. Our ability to survive as a free society will depend upon whether constitutional values can prevail over the impulses of the time.