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MESSAGE FROM THE PATRON-IN-CHIEF

Justice R. S. Jha
ACTING CHIEF JUSTICE

"SAI SUDHA"
913, Gole Bazar,
Pandit Lajja Shanker Jha Marg
(Behind Frontier Bajaj Show Room)
Wright Town, Jabalpur - 482 002
Phone: 0761-2401460 (R)
0761-2678312 (O)

23.09.2019

MESSAGE

I am extremely proud to announce Volume VIII 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 Law Review, in collaboration with the India Foundation, conducted a symposium on Constitutional law to provide a platform for discussing contemporaneous issues in the field. Volume VIII Issue II emerged as a result of this, wherein authors have delved into topics such as the doctrine of essential religious practices, female genital mutilation and reservation in promotions, 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 this 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.

(Justice Ravi Shankar Jha)

MESSAGE FROM THE PATRON

THE NATIONAL LAW INSTITUTE UNIVERSITY

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

Ref.No......Cl................/ NLIUB Date: 25-01-2021

Message from the Patron

I am delighted to present the Second Issue of the Volume VIII of the National Law Institute University Law Review to the readers. This Second Issue bears the fruit of the NLIU – India Foundation Symposium on Constitutional Law held late last year at the NLIU campus. Being the flagship publication of the NLIU, Bhopal, it is expected to serve the interests of different stakeholders in the field of law like the academicians, researchers, students, lawyers and judges. It is because of this, the journal would like to facilitate interdisciplinary research in an attempt to understand the Constitution of India in theory and its practices. The research papers published in this Second Issue are expected to bridge the gap between the Constitution in theory and practice.

The issue of NLIU Law Review contains a set of six well researched articles. Out of these six, two articles focus on the Sabarimala decision rendered by the Supreme Court. The third article provides insight into admissibility of evidence obtained either illegally or improperly. The fourth article deals with the issues relating to the Female Genital Mutilation. The fifth article is a critical appraisal of the decision in *Jarnail Singh v. Lachhmi Narain Gupta* relating to reservation in promotions. The sixth article analyses the Armed Forces Special Powers Act. The readers will certainly find the depth of these articles and appreciate the same.

In bringing out this Second Issue of the Law Review, the NLIU has been receiving constant appreciation and support from the Chancellor and Patron-in-Chief, Justice R.S. Jha, Acting Chief Justice, High Court of Madhya Pradesh. I would like to express my sincere thanks to the Patron-in-Chief for his constant guidance and support. I would like to place on record my sincere appreciation to Prof. (Dr) Ghayur Alam, Dean, Under Graduate Programme, NLIU, for his initiative, continued efforts as well as coordinating with the Editorial Team of the students and in bringing out this issue, amidst his academic and administrative responsibilities.

The Editorial Team of the students deserves a special appreciation for their efforts in bringing out this Second Issue of Volume VIII of the NLIU Law Review. I wish that this dedication and commitment to research and publication from the student body continues in the years to come in improving the quality of this journal and create a unique status for this journal amongst similar publications in India. In realizing this objective, the necessary feedback from the readers would certainly go a long way in improving the quality of this journal.

Prof. (Dr) V. Vijayakumar
Vice Chancellor
National Law Institute University
Bhopal

University established by Madhya Pradesh Act No. 41 of 1997 & Substituted by MP Act No. 6 of 2018
Kerwa Dam Road, Bhopal- 462044(M.P.) India
Tel: 0755-2696965, 2696970 (0) Ext. 109, Fax:0755-2696724
Email : vc@nliu.ac.in, vijayakumar@nliu.ac.in ,Visit us at : https://www.nliu.ac.in

MESSAGE FROM THE DIRECTOR OF INDIA FOUNDATION

I am extremely pleased to present Volume VIII Issue II of the NLIU Law Review to the legal fraternity. Last year, a symposium on constitutional law was organised by the NLIU Law Review, in collaboration with India Foundation. This issue of the Law Review has emerged as a result 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 and Legal Studies of India Foundation specialises 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. On the first day, papers were presented by students of law from across the country, whose submissions had been accepted after a thorough review process conducted by the NLIU Law Review. The presenters spoke on several contemporary issues of constitutional law, such as the doctrine of essential religious practices, female genital mutilation and reservation in promotions, and provided 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. In the inaugural session, the eminent panelists were Justice A.P. Misra, Former Judge, Supreme Court of India and Chairman, Legal Education Committee; Prof. N.L. Mitra, Former Director, National Law School of India, Bangalore and Founder Vice Chancellor, National Law University, Jodhpur; Prof.

(Dr.) B.N. Pandey, Dean, Adamas University; Dr. V. Vijayakumar, Vice Chancellor, NLIU and Dr. Manoj Sinha, Director, ILI Delhi. The session was themed on "The Aberrations in the Principle of Separation of Powers" and was moderated by Mr. Apurv Mishra, Senior Fellow, India Foundation.

Subsequent to this, a plenary session on "Faith and the Indian Constitution" was held where eminent legal scholars and personalities, among them being Mr. Vikramjit Banerjee, Additional Solicitor General in the Supreme Court of India, Mr. J. Sai Deepak, a distinguished lawyer in the Supreme Court of India, and Prof. V.K. Dixit, Professor of Jurisprudence at NLIU, Bhopal, presented their opinions.

The symposium also included a special plenary session on "Freedom of Speech and Expression in the Age of Social Media" wherein the panel consisted of Ms. Anuradha Shankar (ADGP, Madhya Pradesh Police), Dr. P. Puneeth (Centre for Study of Law and Governance, JNU, Delhi) and Prof. (Dr.) Ghayur Alam (Professor, NLIU, Bhopal). This session was moderated by Mr. Guru Prakash (Fellow, India Foundation). Therein, the diverse panel brought into the discussion, different stories and experiences, and left the audience with a fresh perspective on the issue.

I extend congratulations to Prof. (Dr.) V. Vijayakumar and Prof (Dr.) Ghayur Alam for the successful publication of the Issue. The efforts put in by the Editorial Team must also be lauded. I have faith they will only grow in their enthusiasm and dedication towards each upcoming issue. I am sanguine that this issue of the Law Review will stimulate debate within students, academicians, lawyers and judges and all other readers.

Major General Dhruv C. Katoch
Centre for Constitutional and Legal Studies
Director - India Foundation

NOTE FROM THE FACULTY ADVISOR

This Issue is the Second Issue of the Eighth Volume of the NLIU Law Review. The Issue has emerged from the First NLIU – India Foundation Constitutional Law Symposium, 2019 organised by NLIU Law Review in collaboration with India Foundation. It contains the summaries of speeches presented by the panelists at the Symposium and the papers presented at the 1st NLIU – India Foundation Constitution Law Paper Presentation Competition, 2019.

The Inaugural Session of the Symposium was graced by Mr. Justice A.P. Misra, Former Judge, Supreme Court of India and Chairman, Legal Education Committee; Prof. N.L. Mitra, Former Director, National Law School of India University, Bangalore and Founder Vice-Chancellor, National Law University, Jodhpur; Prof. B.N. Pandey, Dean, Adamas University; Dr. V. Vijayakumar, Vice-Chancellor, NLIU, Bhopal and Dr. Manoj Sinha, Director, ILI Delhi. The theme of the Inaugural Session was "The Aberrations in the Principle of Separation of Powers". The moderator of this Session was Mr. Apurv Mishra, Senior Fellow, India Foundation and an alumnus of NLIU, Bhopal.

The First Plenary Session was on "Faith and the Indian Constitution". The speakers in this Session were Mr. Vikramjit Banerjee, Additional Solicitor General, Supreme Court of India; Mr. J. Sai Deepak, Advocate, Supreme Court of India and Prof. V.K. Dixit, Professor of Jurisprudence, NLIU, Bhopal. The speakers in this Session stole the show; perhaps, the topic was not only legal but also emotional. All the speakers were in their element – some emotional, some lawyerly. The audience wanted to hear more but we had to conclude the Session for lunch was getting delayed.

The Second Plenary Session was on "Freedom of Speech and Expression in the Age of Social Media". Ms. Anuradha Shankar, ADGP of Madhya Pradesh Police; Dr. P. Puneeth, Centre for Study of

Law and Governance, JNU, Delhi and myself were the speakers in this session. This session was moderated by Mr. Guru Prakash, Fellow, India Foundation and an alumnus of NLIU, Bhopal.

This Issue includes papers on several contemporaneous issues of constitutional law ranging from the doctrine of essential religious practices and AFSPA to pressing humanitarian issues such as female genital mutilation. The NLIU Law Review has always provided a platform to students and teachers from all over the country to represent their scholarly opinions in the form of article, notes and case comments. We are thankful to all the persons who have contributed their work to this Issue. Needless to mention, because of their contribution this Issue is being published.

I take this opportunity to thank and express our deepest sense of gratitude to the Patron-in-Chief of the NLIU Law Review, the Chief Justice of the Madhya Pradesh High Court, Hon'ble Mr. Justice Ravi Shankar Jha for his continuous encouragement and guidance. We are immensely grateful and our Patron, Prof. (Dr.) V. Vijayakumar, the Vice-Chancellor of National Law Institute University, Bhopal for his constant support and guidance. We hope that under his academic leadership, NLIU will be scaling newer heights of excellence.

We welcome and appreciate comments, suggestions and criticism on the articles published in this Issue. 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
National Law Institute University, Bhopal

EDITORIAL NOTE

Volume VIII Issue II of the NLIU Law Review presents the readers with a new corpus of legal research which explores a variety of issues in the field of Constitutional law. The issue comprises papers presented at the symposium on Constitutional law conducted this year by the Law Review, in collaboration with the India Foundation.

The article titled *"Does Your God Satisfy the Constitutional Test? - Analysing the 'Essential Religious Practices Doctrine' in Light of the Sabarimala Verdict"* calls into question the competence of the Court to decide on matters of religion, which must be left to the discretion of man alone. In essence, it analyses and critiques the basic religious doctrines, principles and tests employed by the State, in light of the Sabarimala verdict and attempts to provide an alternative to the obsolete ways of the court.

On the other hand, in *"Essential Religious Practices in Light of the Sabarimala Judgment"*, the author has criticised the Sabarimala verdict on the grounds that the exclusion of women from the temple constitutes an 'essential religious practice' owing to the celibacy of the deity in question. Further, the author has highlighted how certain religious practices cannot be abrogated on the basis of equality as they form the core belief of the religion, and without them, the religion would stand altered.

The article *"A Relook at the Admissibility of Illegally or Improperly Obtained Evidence"*, discusses the position of law on the exclusion of evidence obtained illegally or improperly in a criminal trial. The author has looked at the recommendations of the 94th Law Commission Report, 1983 and analysed the decision of the Supreme Court in Justice K. S. Puttaswamy v. Union of India.

In *"Female Genital Mutilation: How Islam and the Fundamental Right to Religion Stamp Out and Confute it",* the authors have argued

that the practice of female genital mutilation is violative of Articles 14, 15 and 21 of the Constitution and should not get the protection of freedom of religion, as under Articles 25 and 26. They have also made recommendations to put an end to this practice and protect the rights of the victims.

The article *"Jarnail Singh v. Lachhmi Narain Gupta: The Case That Muddles the Law on Reservation in Promotions"* analyses the decision of the Supreme Court in the case of the same name and reasons that the Court wrongly refused to refer its decision in M. Nagraj v. Union of India to a larger bench for reconsideration. In the end, it suggests that a larger bench of seven judges should reconsider the decision in Nagraj and clarify the law on reservation in promotions.

The Law Review Team hopes that this Issue proves to be an insightful read for all its readers and marks another step forward in the Law Review'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 1ST NLIU - INDIA FOUNDATION CONSTITUTIONAL LAW SYMPOSIUM

On March 16 and 17, 2019, the NLIU Law Review, in collaboration with India Foundation, organised the first edition of the NLIU - India Foundation Constitutional Law Symposium. The event, which aims to provide a platform for discussions on contemporary constitutional law issues in India, saw great participation from students, researchers, faculty members, academicians and legal professionals. The event 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 covered topics such as the doctrine of essential religious practices, female genital mutilation and reservation in promotions, 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. The theme for the first session was "The Aberrations in the Principle of Separation of Powers". The eminent panellists were Justice A.P. Misra, Former Judge, Supreme Court of India and Chairman, Legal Education Committee; Prof. N.L. Mitra, Former Director, National Law School of India University, Bangalore and Founder Vice-Chancellor, National Law University, Jodhpur; Prof. (Dr.) B.N. Pandey, Dean, Adamas University; Prof. (Dr.) V. Vijayakumar, Vice-Chancellor, NLIU, Bhopal and Dr. Manoj Sinha, Director, ILI Delhi. The session was moderated by Mr. Apurv Mishra, Senior Fellow, India Foundation.

The second session for the day was a plenary session on "Faith and the Indian Constitution" where eminent legal scholars and personalities, Prof. V.K. Dixit, Professor of Jurisprudence, NLIU, Bhopal; Mr. Vikramjit Banerjee, Additional Solicitor General, Supreme Court of India and Mr. J. Sai Deepak, Advocate, Supreme Court of India, presented their opinions. Finally, a special plenary session on "Freedom of Speech and Expression in the Age of Social Media" with a panel consisting of Ms. Anuradha Shankar, ADGP of Madhya Pradesh Police; Dr. P. Puneeth, Centre for Study of Law and Governance, JNU, Delhi and Prof. (Dr.) Ghayur Alam, Dean of Undergraduate Studies, NLIU, Bhopal concluded the discussions. This session was moderated by Mr. Guru Prakash, Fellow, India Foundation.

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.

THE ABERRATIONS IN THE PRINCIPLE OF SEPARATION OF POWERS

JUSTICE A.P. MISRA

The law is required to curb the human tendencies of compromising others' rights for self-interests. In the Treta Yuga, it is said that there was no law and no one to violate it. They only imparted love, cooperation and coordination; the question of law was not necessary. Gradually, man, due to his self-interests, went on to violate rights of others and the law came into being. In any country, where there are more laws, there are more violations. In a country with minimum laws, you will find less instances of violation.

In the earlier days, justice was dispensed by calling upon the divine, that is, God. But the king was also affected by worldly life. Every king had to consult a man who would advise him with equanimity and tranquility in his behaviour, like Dashratha had Vashishtha. Similarly, if we are affected by any of our senses, we will be unable to

administer justice. As things progressed, even the highest sources of authority that dispensed justice became polluted. In a democracy, the government is the authority. The Constitution came into existence to curb and curtail the activities of the authority itself. It laid down fundamental limitations on the actions of the authorities. There are three lists within the ambit of which the government functions.

The judiciary is very important for the functioning of the democratic system; it serves to control it. It is the highest authority- not only the executive, but even if the parliament makes laws, the judiciary can declare such laws to be *ultra vires* if they transgress the ambit of the Constitution. This role is particularly important in the context of the preservation of the rights enshrined in part III of the Constitution. If we look to the Shrutis from ancient times, there were no rights, but there were obligations on the king. Today, the focus is more on rights, which leads to a conflict at times. Dr. Rajendra Prasad in his speech said that although he was responsible for making the Constitution, he was responsible for the mistakes made within it. He said that he admits to committing mistakes in this process because they "*forgot to focus on the corresponding duties which come with the fundamental rights granted by the Constitution*". People today, are demanding rights without carrying forth their duties. Order depends not only on claiming rights but performing obligations that rest on the people.

Part IV of the Constitution talks about obligations on the state, the interpretation of which is important. When you make obligations non-enforceable, they remain in cold storage. There are many provisions in the Constitution that still lie inactivate. One of such provisions is Article 343, which conceived Hindi to be the next official language of the country. It states that English will function as the official language for 15 years subsequent to which, Hindi will take its place. Commissions were to be established to periodically check the development of Hindi across the country. However, this has remained inactive.

The law is a divine profession, and one must not practice it for money. It is important to learn that ethics are the foundation of this profession. If there is no equanimity or tranquility, one can never succeed in this profession; justice cannot be imparted. I would like to quote Aristotle, "*morality strives on rationality and it is this rationality which controls the irrational part of every human being.*" Don't be in a hurry; be like a tortoise. The rabbit was a fast runner, but he lost the battle. I am reminded of what Shakespeare once said- "*a sweet flower takes time to grow, the weeds grow in haste. Do not try to be weeds.*"

PROF. N.L. MITRA

This session is about law and economics. This country needs law in economics. Oftentimes, it can be seen that lawyers are ignorant of economics and economists ignorant of law, but law and economics need to interact. The Reserve Bank of India has seen seventeen different governors, of which nine were IAS officers and three did not have any idea of economics. Such has also been elaborated upon in an article titled "Macroeconomic Management under Constitution of India and the Fiscal Responsibility" published by one of our esteemed panel members. Strangely, in India, no case has ever been filed demanding price stability. Ultimately, maintaining price stability is a state function and should be considered its responsibility. The Central Bank of India does look after price stability and inflation, as do the Banks of England, Germany and America. Yet, no lawyers have not moved the Supreme Court challenging the determination of price stability.

In the Constitution of the Reserve Bank of India, it is said that macroeconomic management is not fiscal responsibility. It is ridiculous that IAS officers who do not know anything about macroeconomic systems of management head the central bank. Our

country has two financial policies. One of them is called short-term financial policy. It is called short-term because it is operative for only five years and changes when our government changes. It is fiscal because it deals with taxation done to balance out the cost of governance. In India, people rarely question the tax whereas it is easy to recall American decisions whereby the court decided that the tax being collected is unnecessary. This is due to the constitutional mechanism of the macroeconomic system.

It is bewildering to see how the Reserve Bank does not have any constitutional role. The same question was also raised in the Narasimham Committee Report. Neither of the two, the Reserve Bank of India and the Central bank of India, have any semblance of a constitutional machinery. In contrast, the Finance Commission is a constitutional machinery. Thus, the Reserve Bank is not a constitutional organ of the State and should not be treated as such. Questions like "whose problem is fiscal responsibility anyway?" or "why are obligations not attached to such banks?" remain unanswered. On consulting the IBA guidelines on Fiscal Responsibility, the World Bank's Guidelines on Fiscal Responsibility and Australia's law on fiscal responsibility, no answer can be found because, surprisingly, this question has never been raised by lawyers. Is it because of the fact that Indians do not question? There still remains a lack of clarity on the main issue in the Indian sphere.

PROF. (DR.) B.N. PANDEY

The Bar Council has done a brilliant job when it comes to improving legal education. It is important to improve the standard of legal education for protection of the Constitution itself. The importance of law and morality cannot be understated, as explained by Justice Deepak Mishra in the *Navtej Singh Johar* case which partly struck down Section 377 of the Indian Penal Code.

National law universities and other institutions imparting legal education judiciously are pertinent for the country's development. Such education must not be confined to "held, upheld, withheld", that is, sticking to what is settled by the Supreme Court, as is the practice in constitutional law classes, but rather must go beyond that. Judges have recognised and advised for the improvement of the poor standard of legal education as the same is a necessity for safeguarding the democratic system, independence of the judiciary and the Constitution. The references made to constitutional morality by the bench in the *Navtej Singh Johar* case, even when it was not necessary for them to do so, shows the need for expanding beyond the notions of "held, upheld, withheld." As political science has the concept not just of state but also deep state, similarly we must reach for a deeper meaning of all the important judgments.

Secondly, there is a need for detailed deliberation on each issue. *State of Bihar v. Kameshwar Singh*, in my opinion, is more important than the *Kesavananda Bharati* case. The case related to land reforms and zamindars, and Dr. Ambedkar, appearing for the zamindars, had first argued that there is a spirit of the Constitution and the same should be implemented, although his submissions were rejected by the court. In cases like *I.R. Coelho v. State of Tamil Nadu*, and later in the *M. Nagraj* case, the Supreme Court has highlighted and reminded the people of India of the various values enshrined in the Constitution. The observation in the *National Judicial Commission* case, that the independence of judiciary is not only physical but meta-physical, highlights the expansive approach.

The abovementioned points do need to be considered in a larger context, especially for developing countries. The morality of the Constitution is conflicted in countries such as Brazil and Pakistan and the day might not be far off where India is at similar crossroads. Such conflict is not impossible, nine judgements of political importance have been given since September 2018 and the message in some has

been disconcerting for both legal practitioners as well as law students. There is, however, a ray of hope when it comes to protecting the values of our Constitution- our creativity. We must highlight the role of creativity in protecting these values.

PROF. (DR.) V. VIJAYAKUMAR

The very objective or the foundation of the concept of separation of powers is to see that no one branch of the state is able to become all powerful and destroy the established relations among the three branches, which in law is also known as "checks and balances". Therefore, the object of separation of powers is to create these three branches and to make them work together so that not one becomes all powerful.

India and Sri Lanka serve as important examples in understanding the concept of separation of powers. The Sri Lankan representatives said that they would like a parliamentary form of government similar to India because it provides for a check on the arbitrary use of power. However, in both these Constitutions, the concept of checks and balances did not function properly. That is the reason why the President became all powerful in Sri Lanka and in India, the Prime Minister. If only the concept of separation of powers and checks and balances would have worked together, the rights and liberties, benefits and economic complications, could have been realised. At the commencement of the Constitution, in a few decisions like the In *Re Delhi Laws Act*, a seven-judge bench of the Supreme Court held that the Indian Constitution does not provide for strict separation of powers. The Court said that India does not have a rigid separation of powers like that of the United States of America. The American Constitution is very brief and does not mention the term "separation of powers". Therefore, trying to find the meaning of that phrase in the Indian Constitution is obnoxious. In my opinion, when the said

judgment was passed, the Supreme Court was unable to appreciate the text of the Constitution.

For the first time, during the emergency, four out of the thirteen judges mentioned that separation of powers is a basic feature of the Constitution. This was the first time that the judges said anything in this regard. They were seeking to provide ways and means within the Constitution to tame political power. At the same time, they were envisaging the techniques through which power would be a check to other powers, thereby maintaining a constitutional equilibrium in between the elections.

Subsequently, *Minerva Mills* used another phrase – "the Constitution had no rigid separation of powers. But there is a broad demarcation of having reared to the complex nature of governmental functions and certain degree of overlapping is inevitable." That overlapping is what we call as checks and balances. However, the Court did not clarify the meaning of the broad demarcation and the inevitable overlap. If only they had mentioned that it would have possibly been easier for us to understand what they really meant. It can be seen over the course of many subsequent judgments like *Indira Gandhi v. Raj Narain* and *L. Chandrakumar v. Union of India*. In these decisions also, the Court acknowledged the existence of the doctrine of separation of powers in the Constitution.

The constitutional bench in the 2014 decision of *State of Tamil Nadu v State of Kerala* said that even without express provisions for separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution and an essential constituent of the rule of law. The doctrine is not express in the Constitution, but its existence is apparent from the scheme of the Constitution and how it divides the powers between the three organs of the government. The Court in this case also said that the separation of powers between the organs is nothing but a consequence of the principle of equality. Accordingly, the breach of separation of judicial powers may amount

to negation of the equality under Article 14. This case is thus an example where the Court was able to appreciate the doctrine of separation of powers beautifully, highlighting that even without express provisions, separation of powers is ingrained in the Constitution. It is, however, often said that it was ingrained by the Court to substantiate their own powers.

In *I.R. Coelho v State of Tamil Nadu*, a nine-judge bench of the Supreme Court held that the principle of constitutional information requires control over its exercise to ensure that it does not destroy the democratic principles. These principles include the protection of fundamental rights and the principle of constitutionalism. The model of separation of powers requires a diffusion of powers necessitating different independent centres of decision making. Therefore, one can appreciate the semblance of the doctrine of separation of powers that is present in our Constitution. We need to rejuvenate the concept of separation of powers and checks and balances to maintain the democratic values in the country.

DR. MANOJ SINHA

It is a matter of great delight that "separation of powers" has been chosen as one of the topics of this seminar. At the outset, it is pertinent to begin with a brief deliberation on the Universal Declaration of Human Rights (UDHR), which could also be said to have become a part of the Indian Constitution subsequently. Both President Franklin Roosevelt and his wife, Eleanor Roosevelt, played an instrumental role in its drafting. President Roosevelt focused on the four core and essential freedoms, namely, freedom of speech and expression, freedom to worship, freedom from want and freedom from fear and termed them as "fundamental" for a better world with a better future. His vision regarding these freedoms is also reflected in the debate surrounding the UDHR, particularly with respect to civil

and political rights, and economic, social and cultural rights. Various Indians also played an important role in the drafting of the UDHR, including Hansa Mehta and K.C. Neogi. Hansa Mehta was a champion of women's rights and strongly believed in gender equality. At the initial stage of drafting, Article 1 of the UDHR began with "*all men are born free*." She insisted on the word "men" being removed and got it substituted with "human beings". The significant contribution made by Hansa Mehta has also been recently acknowledged by the Secretary General of the United Nations on the occasion of the 70th anniversary of the UDHR.

As far as the concept of separation of powers in India is concerned, it is not followed here *stricto sensu.* This can be seen in case an ordinance or legislation is challenged in a court of law after it has been adopted. Another instance could be the *Vishakha* judgment wherein the Supreme Court reproved the government for not bringing in a law in line with the Convention on Elimination of Discrimination of All Forms against Women, to which India is also a party. Thereafter, both the executive and legislature acted swiftly, and the Domestic Violence and Sexual Harassment Act was thus formulated. Hence, it is clear that a rigid separation of powers is not accepted in India.

Nilabati Behera v. State of Orissa is yet another important judgment in this respect. At the time of ratification of the International Covenant on Civil and Political Rights (ICCPR) on April 10, 1979, the Government of India decided that Paragraph 5, Article 9 of the ICCPR which relates to victim compensation, shall not be applicable to India. However, in the *Nilabati* case, the Supreme Court relied on the *Vishakha* judgement and reiterated that there should be no difficulty in implementing a treaty which is consistent with the Constitution of India. The Court, thus, identified an obligation under Paragraph 5, Article 9 of the ICCPR to pay compensation to the victims.

Another relevant case to be noted in this regard is *Namgyal Dolkar v. Ministry of External Affairs*, which related to the right of a Tibetan woman born in India to claim Indian citizenship. All the Tibetans in India are provided with an identity certificate that allows them to avail various benefits and also qualifies as a travel document. While applying for a passport, Namgyal Dolkar, who was born on April 30, 1986, indicated Indian nationality instead of mentioning the identity number. The Ministry of External Affairs objected to the same and the matter went to the High Court. The Court found that, pursuant to the Citizenship (Amendment) Act of 1986, Dolkar is entitled to claim Indian citizenship by birth and cannot therefore be denied a passport. Around 30,000 Tibetans were granted Indian citizenship after this decision. Later on, the same matter came before the Karnataka High Court, post which the Tibetans were also given the right to vote in 2013.

FAITH AND THE INDIAN CONSTITUTION

PROF. V.K. DIXIT

Most scholars, premising upon religious sentiments, do not hold religion responsible for creating hurdles in women's liberation. They cite tradition, culture and interference with divine law while justifying "anti-women" practices. Religious people hide behind the facade of "respect" to cover the reality of the bias against women. Most religions originated through patriarchy. Classical Hindu law was especially harsh on women as understood from regressive practices like Sati and female infanticide. Muslim law is also unfair to women. There are discriminatory undertones present throughout the law, on spurious grounds. Whenever progressive reforms take shape, they are opposed under the guise of religion. Generally, religious practices can be saved on the grounds of religious freedom if they do not violate the Constitutional provisions. However, defenders of regressive practices

have argued for these practices on questionable grounds. They often forget that in a multi-religious society, religious practices have to be subordinate to the Constitution.

The Sabarimala temple is dedicated to Lord Ayyappa. Ayyappa is a celibate in the tantric tradition. The temple does not allow women between the ages of 10 and 50 as menstruating women may defile the celibacy of Lord Ayyappa. This restriction was challenged in the Kerala High Court in 2006. However, the court upheld it on the reasoning that the restriction did not apply to all women, but to women of a particular age group. In 2018, a five-judge bench of the Supreme Court heard the case and held that the restriction was unconstitutional in 4:1 majority. The majority opinion held that the practice violated rights to equality, liberty, and freedom of religion guaranteed by Articles 14, 15, 19(1), 21 and 25(1) of the Constitution. The minority opinion delivered by Justice Indu Malhotra reasoned that "matters of deep religious faith and sentiment" must not be interfered in by courts.

The majority held that the exclusion could not be permitted under Article 25(1) of the Constitution. It was further stated that Lord Ayyappa does not have a distinct religious identity and therefore is subject to social reforms under Article 25(2)(b) of the Constitution. Justice Chandrachud even stated that the practice is similar to untouchability. He reasoned that all women are created equal, and this exclusion would place women in a position of subordination. Consequently, Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules of 1965 was struck down. It is difficult to appreciate the logic given by Justice Indu Malhotra. This reasoning allows for the violation of fundamental rights. The patriarchal mindset of the followers may deny fundamental rights to women. She notes that using this argument may have serious consequences; therefore, she draws the line at practices like Sati. However, the distinction between the right to life under Sati, and the

right to dignity and worship in the present case does not have a legal basis. Article 21 protects both such rights. The larger ratification of the line of reasoning adopted by Justice Indu Malhotra is dangerous.

Lord Ayyappa is a celibate. A celibate does not succumb to sexual desires in the presence of women of any age. Celibacy entails the perception of every woman as his daughter, sister or mother. Lord Ayyappa does not have to avoid women's presence; consequently, Ayyapa's followers are belittling the status of the Lord. Tantric celibacy does not allow the contact of blood, semen and urine. Hence, the reasoning behind preventing only women from entering does not make sense. If anything, the authorities can restrict women during their periods; women do not menstruate all year round. Patriarchy imposes reservations on menstruation and holds that they become impure. However, all of us carry urine and excreta, but men are pure. Without menstruation, the human race would cease to exist.

There must be a separation of unholy from holy. The followers, at some point, included anti-women practices. It is the right time to make clear that distinction with reason and logic. A sex that shoulders the primary responsibility of creating the human race cannot be inferior to men.

MR. VIKRAMJIT BANERJEE

There are two broad ways in which the state has handled or conceived faith- the ways of the old pre-Judeo-Christian, followed by Judaism, Christianity and Islam with their differences. The pre-Judeo-Christian conception still prevails in places like China, India and other such countries. The old religions conceived law as natural and faith, society and law as largely inseparable. In many ways, Indian civilization today resonates more with a pre-Christian background and faith, vis-à-vis the law and the state.

In the Indian civilization, a multiplicity of faiths continues to prevail and people follow different faiths like Buddhism, Sanatan Dharma, Jain Dharma and Charvakas. The essence of the conflict that prevails today because of the two different conceptions over how to envisage law and faith in the state can be understood by the rule of Ashoka and Constantine. Both Ashoka and Constantine, while in different parts and times of the world, were faced with the same question of how to handle an increasingly bureaucratic empire in the face of such diversity. Ashoka aimed to bind people and their varying rules through Dharma. On the other hand, Constantine wished to unite the diverse set of people while allowing diverse interpretations of that unity. While Ashoka talked about finding "unity in diversity", Constantine looked for "diversity in unity". Akbar was the first to realise the diversity among the people and lay down a common code, thereby establishing the foundation of the Mughal state. He compromised to find a balance among the diversity in the Mughal state. However, this consensus regarding a compromise soon frayed as the entire world became more invasive with every religion.

When the British came to India, their attempts to change Indian religion through conversion were met by the revolt of 1857. Subsequently, Queen Victoria declared that the British would stay out of religion and treat all faiths in a secular manner. The word "secularism" in the Indian Constitution was finally added by the 42nd Amendment. Presently, the issues being discussed explicitly in the *Triple Talaq* judgment and in the *Sabarimala* judgment have their genesis in the said amendment as, when the word "secular" was inserted, the Western conceptions of religion were brought in.

The Supreme Court has recently adopted two lines of arguments in the aforementioned judgments. In the *Triple Talaq* judgment, it was broadly accepted that faith should be treated on its own terms. Justice Kurian Joseph stated in the judgment, "*what is bad in theology cannot be good in law*" and Justice Rohinton Nariman argued that "*because*

triple talaq could be governed by the Shariat Act, that was law and therefore we could amend it". The Court in the end explicitly or implicitly stayed away from pronouncing whether tenets of faith per se went against the Constitution or not.

However, in the *Sabarimala* case, there were two conceptions of a "transformative Constitution" and "constitutional morality" which were formulated by the Supreme Court. The former signifies that the Constitution erases one's history and starts with a tabula rasa. The latter remains important because it signifies morality as an exception to the right to religion under Article 25. Morality was deemed to be constitutional rather than public morality, that is, morality as interpreted to be against the Constitution by the constitutional court. Hence, faith and culture will be attacked by people with good intentions on the ground of it being violative of constitutional morality. To view constitutional morality as a means for the state to impose its own morality through the judiciary is very oppressive. Justice Malhotra, in her dissenting opinion in the *Sabarimala* judgment, referred to "cultural constitutionalism" whereby you have multiplicity of faiths and you respect all of them.

It is finally concluded by highlighting that this conflict is likely to grow due to growing westernization and connectivity. The cultural centres such as Banaras Hindu University and the Aligarh Muslim University are shifting to Harvard and Cambridge, which are conceived in a completely different cultural background. The more one imposes values, the greater the pushback they get. In conclusion, the conflict seen in the *Sabarimala* case is only an indicator. There is a lot coming, which is not the beginning of the end, but is just, as judges have said, the end of the beginning.

MR. J. SAI DEEPAK

There is a need to emphasize on the remarkable nature of the Constitution. The Constitution is not solely legal or social but possesses a dual quality of being socio legal. This implies that it is a legal document that has social implications but has to nevertheless comply with the rules of interpretation of a legal document. In this day and age, it is so easy to skew a discussion without paying heed to distinction, nuance or logic. Every layman understands buzzwords like patriarchy, gender equality and legal connotations attached to general discussions. However, these discussions do not contribute to the substantive interpretation of the Constitution.

In terms of understanding the complex situation that is the *Sabarimala* case, juxtaposed with religious beliefs and fundamental freedoms, nuance is the name of the game. The concept of "equality" varies with the exigencies of a situation and the dynamics of time. For example, in the judgment concerning the abrogation of Section 377 of the IPC, the phrase "the doctrine of progressive realization of rights" was used. This gave a new direction to the approach of the Supreme Court and this distinction was applied to multiple cases that followed, with the *Sabarimala* judgment being one prominent example. However, despite the positives, multiple negative perceptions could also be drawn from this. The interpretation of our Constitution is vested in the hands of individuals who get to be a part of a particular collegium and the direction adopted by the collegium changes with new appointments.

Based on the principles of evidence, the contention concerning equality in the *Sabarimala* case cannot be built upon "menstruation" but rather religious beliefs. If anyone questions the observance of these rules, they forget that a temple is not their home, it is the deity's home. It is neither a place of prayer nor of congregation; at least as far as Sanatana Dharma is concerned, it is a place of worship. The deity, according to the Sanatana Dharma, is not a figment of imagination but

a living creature. The reason why a woman is not supposed to enter that particular place, especially a woman of a procreative age group, is centred around the belief in Tantrayoga and Sabarimala is a tantric temple. In Tantrayoga, three fluids, one of which is blood, plays an important role. Hence, the belief dictates any man or woman bleeding cannot enter the temple.

Further, it is believed that is that the powerful energy of a Naishtika Brahmachari is harmful to the energy of a woman of a procreative age and thus, affects her uterus and her childbearing abilities. One might claim that these are mere superstitions. However, in response to that, it can be argued that it is not fair to apply secular logic to a place of faith and worship. It is for the believers and stakeholders of the temple to decide such matters. The problem is when persons do not understand the sentiment behind the place of worship, the concept of desecration and consecration which the believer puts faith in.

As a concluding remark, it is necessary to highlight the shift in the dimensions of secularism in India. There is a difference in the secularism that was brought by the British to that of enlightenment in India. With this, one can question whether secularism even forms a part of the basic structure of the Constitution; it was not initially a part of the Preamble, rather, was introduced as part of 42nd amendment in 1976, three years after the *Kesavananda Bharati* judgment which established the basic structure doctrine. The true understanding of secularism also remains questionable because states had in the past and even now continue to exercise control over the financial and other operations of temples.

FREEDOM OF SPEECH & EXPRESSION IN THE AGE OF SOCIAL MEDIA

MS. ANURADHA SHANKAR

A young man who was born two years after the worldwide web was invented, decided that people from other countries are invading his part of the world, and his part of the world is the whole world. He was ignorant of the history and how his ancestors invaded Australia and New Zealand. Nonetheless, he entered a place of worship and killed women, children or anybody who came inside and continued to stream it live. He also posted a link on Twitter, the video on YouTube and some pictures on Instagram. Nine minutes before that, he drafted a deranged manifesto and mailed it to the Prime Minister of New Zealand. This is when freedom of speech and expression goes to its completely sick or, rather, deranged limits.

When we look at the Constitution of India, especially Article 19, we must recall that the western idea of freedom is what actually guided the framers of our Constitution, particularly Dr. Babasaheb Ambedkar. The western idea of freedom is two pronged, that is, there are two schools: the negative idea of freedom of Locke and Mill and the positive idea of freedom of Rousseau and Hegel. The negative idea of freedom of Locke does not recognize authority, and the individual has enough choice to decide their own freedom. Whereas in the positive idea of freedom, somebody else decides how free you shall be. According to Rousseau, that somebody else is the society and in Hegel's viewpoint, it is mostly the authority of the state. Between these ideas of freedom, our Constitution decided to enshrine certain fundamental rights along with reasonable restrictions, "reasonable" being the important word. In very simplistic terms, the Indian ethos was to think of rights as flowing from duties or as conjoined with duties.

The need of human beings to be connected has actually pushed our civilization to all the corners of the world. The internet has given us

the freedom to migrate without physically going anywhere, to actually connect with each other, and in fact, without any identity. The anonymity gives a lot of power within the internet. That you can sit in Bhopal and connect with someone in Venezuela while telling them that you are from Moscow. The most important idea is that social media is very different from communications, networks or the press. One of the most problematic issues within social media are issues of privacy and the algorithms that fuel the social media platform. Algorithms push the content which they think one would be interested in. That is very problematic because there is no sense of choice, there is no understanding of what you actually want to see.

Today, we have become a state which we never wanted to become. This is true for even India, which is one of the most thriving democracies in the world. We have a scenario that almost mirrors the one in 1984 by George Orwell. The book is an anthem of our times. Drawing back to our fundamental freedoms, it is necessary to note when the Constituent Assembly sent Mahatma Gandhi a draft of the Constitution, he said that they needed to include responsibility in the same. He was of the opinion that each individual has to emancipate oneself instead of taking on heavy burdens such as emancipating the country. If each one of us emancipates ourselves and puts reasonable restrictions on ourselves, this problem is going to be solved. No country is a healthy country if it has to be policed constantly. A democracy is not a democracy if it has to be restrained, restricted, regulated and policed constantly. I will end with a quote about liberty from Mahatma Gandhi-

"*Liberty cannot be secured merely by proclaiming it. An atmosphere of liberty must be created within us. Liberty is one thing, license another. Many a time we confuse license for liberty and lose the latter. License leaves one to selfishness whereas liberty guides one to supreme good. License destroys society, liberty gives it life. In license, proprietary is sacrificed, in liberty it is fully cherished. Under slavery*

we practised several virtues out of fear, when liberated we practiced them out of our own free will. Are we slaves or are we free?"

DR. P. PUNEETH

Freedom of speech and expression has been accorded the sacrosanct status of being a fundamental right by all democracies, including India. The recognition of freedom of speech in the Indian Constitution was in accord with the contemporary democratic and humanitarian temper of constitutional practices all over the world. What freedom of speech signifies can be understood from Idi Amin's quote, "*there may be freedom of speech but there may not be freedom after speech*." The real issue is the threat of possible curtailment of freedom after speech, which thereby deters free speech. Thus, the ultimate purpose is to accord protection of freedom after speech, provided your speech or any other form of expression is within the defined legal limits.

In the Indian Constitution, the framers did explicitly define such limitations under Article 19 (2). Originally, this clause had four grounds on the basis of which restrictions could be imposed, namely, defamation, libel and slander, contempt of court, decency or morality, and the security of state. This was criticized for restricting the right too much. References to the US Constitution were made and it was said that this was a deception as the exceptions had actually eaten up the right altogether. Dr. B.R. Ambedkar called this criticism misplaced as firstly, it is incorrect to say that fundamental rights are absolute while non-fundamental rights are not, and secondly, the differences between the US Constitution and the draft Constitution of India are that of form and not substance. Fundamental rights in the US are not absolute and for every limitation, a judgment of the US Supreme Court can be found wherein all of these grounds have been recognized based on "compelling state interest". Instead, by explicitly recognizing the grounds of restriction, the Indian Constitution has in

fact limited the power of the State to curtail the freedom. This logic follows the rule of *expressio unius est exclusio alterius* as now, it is impossible for the state to impose restrictions on these freedoms on any ground other than the enumerated ones. This was stated by Justice Chelameshwar in the famous *Puttuswamy* judgment.

It needs to be noted that the Constitution of India also mandates that the restrictions are reasonable and must have a direct and proximate nexus with the specified grounds. Further, these restrictions can only be imposed by a law. Soon after commencement, the restrictions were found to be inadequate and two new grounds were added as per the judgment *Romesh Thappar v. the State of Madras* and later, the 16th Amendment added another ground. There are now eight grounds on the basis of which freedom of speech and expression can be restricted. It may be noted that these are not exhaustive, and speech can be restricted if it comes in conflict with other provisions of the Constitution, for instance, breach of parliamentary privileges. Since *M.S.M. Sharma*, the Supreme Court has considered committing contempt of the Houses of Parliament as a reasonable restriction. As per Article 358 of the Constitution, Article 19 can be suspended under Article 352. But that is not the case for other fundamental rights as per the 44th Amendment, the *R.C. Cooper* case, and the *Maneka Gandhi* case. Thus, even if there is automatic suspension of Article 19 due to the proclamation of emergency, it does not stand denuded of all constitutional protection.

Though the grounds under Article 19(2) are very wide, there are certain things which cannot be regulated based on those grounds. For instance, falsehood *per se* cannot be a ground of restriction unless it has direct nexus with the grounds that are mentioned in the provision itself. Due to this, the state can neither regulate nor authorize the intermediaries or service providers to regulate. Perhaps on the basis of "compelling state interest", the state could have recognized falsehood as a ground but in India, for this, the Constitution has to be amended.

Next, regulation of this freedom is difficult. Under Article 19(2), the state has power to regulate the content of speech and expression but the volume of content that is generated by social media makes it impossible to regulate the same. That is why, in certain exigencies, the state often resorts to internet shutdowns if social media results in public disorder, riot, violence of any kind, etc.

Such shutdown, if challenged before the court, shall be judged on the basis of the proportionality test. The proportionality test requires that there be a tailor-made response to the situation at hand because shutting down of the internet may have several other consequences, thereby rendering it unjustified in some cases. Thus, the biggest challenge in regulating the freedom of speech and expression in the age of social media is to strike a proper balance between individual freedom and the legitimate interest of the state and society.

PROF. (DR.) GHAYUR ALAM

A few years ago, the Harvard Law School organised a Symposium on the "Freedom of Speech in the Age of Social Media". Two foundational decisions of the US Supreme Court - one decided in 1964, *New York Times Company v. Sullivan* and the other, *New York Times v. United States* decided in 1971 were the focus of the Symposium. *Sullivan* has been described by commentators as "an occasion for dancing in the streets". The decision of 1971 related to the leaking of the Pentagon paper and the question was whether the newspaper can claim protection of speech and expression. The US Supreme Court reaffirming the principle against prior restraint said "yes" and observed that freedom of speech and expression can be restricted only if there is an immediate and direct threat to the nation or to its people. In other words, remote or indirect threat to the nation or to its people cannot be a reasonable ground for restricting speech and expression.

It is freedom of speech and expression which is paramount and fundamental and not the restraint. A reporting in The Hindu, a leading newspaper has given birth to a political controversy. The newspaper has reported leakage of confidential papers, relating to Rafale Deal, from the Ministry of Defence, Government of India. One of the questions which should be addressed is whether the disclosure of the price of the Rafale fighter jet by a newspaper or otherwise is an immediate and direct threat to the nation or its people, especially in the age of social media. The moment something is published in a newspaper, the next moment it is on Facebook and other internet sites. More often than not, internet is the first to report a news in real time and print media publishes the same only on the next day.

Virtual world is described by the CEOs of social media corporations as global town squares where people meet, discuss, plan and execute things, both social and anti-social. When anybody opens a Twitter account, Facebook account or WhatsApp, nobody reads the terms of use before agreeing. Traditionally, the only regulator was the government, that is, the state. However, in the age of social media, it is the private companies who have and are increasingly becoming the regulators. Google is a powerful entity which decides what we read and what we access. It is deciding whether a particular content is or is not offensive. Digital world, in a sense, has minimized the control of the State. There is a shift of power. It is necessary to understand this shift when we are talking about the freedom of speech and expression in the age of social media. Every type of power including digital power cannot be allowed to be plenary, unfettered and unlimited. There has to be reasonable check in place. Law alone seems to be ill equipped to deal with all the problems of digital age. Whether we like it or not, the fact is we are not only used to it but have become dependent on the digital world. Law and digital technology, therefore, must join hands to protect and promote social good. The fact of the matter is that as a country, we are dependent on the technology produced and distributed by other countries. We are neither producers

nor distributors of new knowledge and new technology. At best, we are importers and consumers of new knowledge and new technology produced by others. As a nation we cannot be free and independent in the real sense of the term, until we become producers of new knowledge and new technology. To become producers, we must invest in education, research and development.

When we talk about speech and expression, we are also talking about the right to offend. George Orwell said, "*If liberty means anything at all, it means the right to tell people what they do not want to hear*". That, however, does not mean that one can hurl abuses because one wishes to. The Constitution of India and other constitutions of the world do recognize "reasonable" restrictions on freedom of speech and expression. A famous poem by Faiz Ahmed Faiz, "*Bol ki Lab Azaad hain Terey (Speak that your lips are free)*" beautifully captures the idea of free speech. The freedom is about speaking the truth without fear or favour even if it is against the most powerful, including the state or its functionaries. This freedom cannot be realized unless the powerful has the courage to listen the speech without any bias. If I am speaking the truth with honesty, I should have no fear whatsoever. As I understand it, as humans we all have the innate right to speak the truth, but we do not have the right, in any sense of the term, to speak lies.

A democratic and liberal country must be able to protect and promote free speech. If it cannot do so, it must consult its dignity. I do not think that there should be any type of restriction, reasonable or unreasonable, on speaking one's mind. However, law permits application of reasonable restrictions on freedom of speech. Reasonableness is more about proportionality, fairness and justice and not merely about efficiency. The question then is - how can reasonable restrictions be imposed on hate speech and other types of low speech in the age of social media?

Speech may be either low value speech (contempt of court, obscenity, etc.) or high value speech. Law seeks to protect and promote high value speech, which is necessary for the development and progress of individuals and nations. History is a witness to the fact that the higher the degree of freedom of speech and expression, the higher is the scientific and technological development. A mind which cannot think without fear is a sterile mind. A pen which cannot write without fear is useless. A nation will always remain intellectually colonized, if its laws cannot protect and promote free speech and expression. Freedom of mind to me is the most precious of the freedoms.

I will conclude by saying: when we involve ourselves in any discourse, we must keep in mind the words of Aristotle, "*It is the mark of an educated mind to entertain a thought without accepting it*". Discussion and debate are central to the existence of a free and equal society. Freedom, on the one hand, must mean absence of all restraints, if not all, then at least absence of unreasonable restraints. On the other hand, freedom must mean the capacity of each and every member of the society to fully and actually realize themselves. Equality must mean that every member of the society is equal to each other and one another. Every member has respect and dignity. As a member of a free and equal society, we, the people of India and the people of the world, must learn to respect the alternative and opposite views; as Voltaire once said, "*I may disapprove of that you say, but I will defend to death your right to say it.*

DOES YOUR GOD SATISFY THE CONSTITUTIONAL TEST? - ANALYSING THE 'ESSENTIAL RELIGIOUS PRACTICES DOCTRINE' IN LIGHT OF THE SABARIMALA VERDICT

Rajat Sinha & Stuti Bhargava***

Abstract

It is not unknown to us that deciding questions of theology has always been a brain-wracking process for the judiciary. However, are we not in the first place supposed to question the capacity and competency of the courts of law in deciding these questions of religion? Another million-dollar question that has never been sufficiently acknowledged despite its relevance in the present-day tussle involving religious liberties is - Who is the State to dictate what is religion to man? Innumerable contemporary judgments are witness to this act of State interference into a domain that should be left to the discretion of man and man alone. Issues concerning religion are not just countless but centuries old, archaic to the extent that they were in place even when the State did not exist, to begin with. Quite a few verdicts of the courts in the recent past have

*Rajat Sinha is a Second-Year Student at National Law University, Jodhpur. The Author may be reached at rajatmartlko@gmail.com.

**Stuti Bhargava is a Second-Year Student at National Law University, Jodhpur. The Author may be reached at mudrika04bhargava@gmail.com.

led us to question the foundation of the basic religious doctrines, principles and tests that the State employs to dictate and restructure religion. Assuming for the sake of argument that the State does to a large extent enjoy the power to decide the constituents of religion, the factors on the grounds of which the State does so should not take away the power of the people to decide what they want their beliefs and ideologies to be. This paper seeks to analyse and critique these religious doctrines in light of the Sabarimala verdict and attempts to provide an alternative to the obsolete and seemingly redundant ways of the court.

I. INTRODUCTION

Religion has been the ethereal bond that has tied human beings together since time immemorial. Freedom of religion has always been acknowledged as a fundamental and human right by the liberal and democratic regimes, with an intent to allow the faithful to carry out their faith. It is quite often asserted that the struggle for freedom of religion preceded all other fundamental or human rights originating during the Greek ages.[1] Whether we talk about the treaty of Westphalia, granting equal rights to Catholics and Protestants in Rome in 1648 or the mid-1770s Turkey undertaking to protect Christianity within the Russian Empire, protection of freedom of

[1]PAUL SIEGHART, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 324 (1983); Brice Dickson, *The United Nations and Freedom of Religion*, 44 INT. COMP. L. Q. 327–357 (1995) [hereinafter DICKSON].

religion has remained an issue of eminence before rulers throughout ages.[2]

In the United States, freedom of religion is every so often regarded as the 'first freedom', not because of its position in the First Amendment of the States but because it is principal to the operation of its democracy.[3] If citizens of a democracy cannot live equally, according to their deepest beliefs about what is right and good, how would they be able to contribute to the welfare of any democratic society?[4]

There have been innumerable attempts to convert religious beliefs into actions which have had consequences for the community as a whole. It is for this reason that law operates to regulate religion and prohibits unacceptable forms of behaviour such as *Sati*, human sacrifice, female foeticide, etc.[5] Nevertheless, keeping the extremes aside, there is barely any logic in restricting religious liberties.[6] Usually, no objection should be raised against the practices which only affect the voluntary adherents of that specific religion.[7] On the contrary, for the sustenance of a secular, plural and democratic society, the law ought to be more receptive towards the diversity and disagreement within the society it operates.[8] However, recent instances have proven otherwise. For example, the Supreme Court of India, in the recent Sabarimala verdict, declared the ban on the entry of women in the temple unconstitutional.[9] Similarly, in the case of *Mohammad Zubair v. Union of India*, the Supreme Court declared

[2]B. G. RAMCHARAN, THE CONCEPT AND PRESENT STATUS OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 13 (1989).
[3]Roger Trigg, *Freedom of Conscience and Freedom of Religion*, 99 AN IRISH QUARTERLY REVIEW 407-414 (Winter ed. 2010).
[4]*Id.*
[5]ROGER TRIGG, EQUALITY, FREEDOM, AND RELIGION 16 (2012).
[6]DICKSON, *supra* note 1.
[7]Satvinder S. Juss, *The Justiciability of Religion*, 32 J. L. & RELIGION 285 (2017).
[8]*Developments in the Law: Religion and the State*, 100 HARV. L. REV. 1606, 1781 (1987).
[9]Indian Young Lawyers Association and Ors. v. The State of Kerela, 2018 SCC OnLine SC 1690.

that keeping a beard is not an essential practice of the Islamic religion.[10] As far as the former case is concerned, the majority went with the so-called popular and rational belief, a belief that supports and promotes women empowerment. However, in this instance, the judiciary failed to pay due respect to our religion and cultural heritage. And instead of being a cause which helps empower women, this verdict reeks of redundant and conservative ideas and doctrines-doctrines that fail to acknowledge group reality. We understand that women's rights are necessary. However, when the society is by and large patriarchal in its mindset and practices, the reforms must take a balanced approach. Changing centuries old practices through a court order is not the right way to go about empowering women. Rather, it would make the people critical of the court's doings and the judiciary might lose its own credibility.

However, this conception, that the free exercise of religion is at odds with the idea of a pluralist state, has steadily gained prominence. It is for this reason that multiple State judiciaries are now testing the importance of religious practices within that religion rather than testing whether the practice is religious at all.[11] Therefore, in order to practice one's religion, the community must not only prove to the court that practice is religious in nature but also that such practice is indispensable as far as the existence of that religion is concerned and it conforms to the other constitutional requirements. An example of such a doctrine in India is this test which is referred to as the Essential Religious Practices Test (hereinafter, "**ERPT**"), wherein the courts, and not the religious community, undertake the task of deciding which practices are essential to the religion.

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[10]Mohd. Zubair Corporal v. Union of India, 2016 SCC OnLine SC 1472.

[11]The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Thirtha Swamiyar of Shri Shirur Mutt, 1954 AIR 282; Indian Young Lawyers Association and Ors. v. The State of Kerela, 2018 SCC OnLine SC 1690; Mohd. Zubair Corporal v. Union of India, 2016 SCC OnLine SC 1472; Syndicat Northcrest v. Amselem, (2004) 2 SCR (Canada), 576; HJ(Iran) and HT(Cameroon) v. Secretary of State of the Home Department, (2010) UKSC 31.

This paper, divided into three parts, discusses at length the validity of the ERPT in the modern Indian context. In Part I, the need for the populace to enjoy this liberty to ascertain what should constitute one's religion has been stressed upon. In Part II, the flaws in the ERPT, as applied in India, have been brought to light. Lastly, in Part III, new jurisprudence in place of the redundant ERPT has been proposed as a possible solution to this problem.

II. THE NEED TO ACKNOWLEDGE: THE SIGNIFICANCE OF PROTECTION OF RELIGIOUS FREEDOM

The introduction of the article discussed how freedom of religion has remained important over the ages. However, an important question that has remained unanswered is, why freedom is important at all. Why is it not advisable for the State to propose its own State religion, or remove it in its entirety? The answer is much more complex than this simple question. If the State tries to remove it, religion would find its own course and establish itself again as would be discussed in the course of this part.

The Sabarimala issue is an instance where the interference by the State violates religious freedom. The question that needs to be asked is, can a tradition that has lasted for centuries, a tradition that has formed roots in the heart of these people who out of nothing but pure devotion to their God have been following a practice, be done away with, in the blink of an eye? The State, in essence, is trying to mould public beliefs and ideologies to suit its own idea of morality. However, religion is not something that changes colours. It is something that asserts and re-asserts itself time and again.[12] It is impossible or at least not a suitable job for the State to step up to the

[12]Gabriel Moens, *The Action-Belief Dichotomy and Freedom of Religion*, 12 SYDNEY L. REV. 195, 217 (1989).

pedestal of the creator of this universe, as believed by many, and dictate what it wants and how it wants man to think.

In this Part, an attempt has been made towards emphasising the importance of freedom of religion and the need to allow people to decide what they want their religion to be. The very fact that religion even today is a force to be reckoned with, indicates that some protection is certainly important. It is argued that the freedom of religion must be protected on four grounds, (a) that religion is a basic human instinct, (b) that in a pluralist democracy, freedom of religion is akin to freedom of choice, (c) that freedom of religion is quintessential to the protection of the diversity of beliefs, and (d) that the freedom of religion is the right path to go about ensuring religious reforms in the long run.

A. *Religion is a basic human instinct.*

Religion can best be understood as a primary element of human nature, suppression of which would be comparable to suppression of any other need like air, water or sex. Therefore, the idea of protection of religion is akin to the protection of our natural rights. Farr, in his treatise '*World of Faith and Freedom*' mentions that the assertion of religious freedom is the affirmation of the claim of human nature on behalf of human beings.[13]

An argument in favour of the naturalness of religion emerges from the cognitive structure of the human mind. Teleology is deeply ingrained in the human mind.[14] Teleology is the explanation of phenomena in terms of the purpose they serve rather than the cause by which they arise.[15] Our 'natural' impulses may not be the best guides of truth but we are in any case most comfortable with them. Psychologists

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[13]FARR, WORLD OF FAITH AND FREEDOM 21 (2008).

[14]*Teleology*, 2 BR. MED. J. 1, 410 (1909).

[15]*Teleology Definition of teleology in English by Oxford Dictionaries*, OXFORD DICTIONARIES (Jan. 9, 2019), https://en.oxforddictionaries.com/definition/teleology.

Deborah Keleman and Evelyn Rosset state that human beings, from a very early age, start making teleological explanations of all the natural phenomena.[16] They state that "*from preschool, children attribute functions of entities like lions, mountains, and icebergs, viewing them as made for something*."[17] Thus, teleological explanations are the default settings of humans as they grow. Concepts such as an all-knowing God therefore naturally arise in a human mind. Religion is similarly formed by these basic teleological impulses.[18] Since religion is our basic impulse, it must be protected.

B. *In a pluralist democracy, freedom of religion is akin to freedom of choice.*

Individual choice is the basic tenet of liberty.[19] If a State has a duty to provide me with liberty, it must extend to all forms of liberty. Therefore, every individual, in principle, has a choice to align himself with the faith of his preference. He can even choose to opt out of it. He must have an individual choice in this regard.

Further, when every religious community would be liberated to assert and propound its beliefs in the society, there would be a broader landscape of different religious views and a wider spectrum of alternatives. As a consequence, every individual would have a greater occasion to make a choice that is best suited to his aspirations and desires.

Thus, religious choice, while being a significant end in itself, is also the cornerstone of self-determination and individual autonomy.

[16]Deborah Kelemen & Evelyn Rosset, *The Human Function Component: Teleological Explanation in Adults*, 111 COGNITION 138-143 (2009); ROGER TRIGG, EQUALITY, FREEDOM, AND RELIGION 16 (2012).
[17]*Id.*
[18]Mark Modak-Truran, *Law, Religion, and Human Rights in Global Perspective*, 22 MISS. C. L. REV. 165, 172 (2003).
[19]Fabio Macioce, *Individual Liberty and Self-Determination*, 3 LIBERTARIAN PAPERS 1, 18 (2011).

Choosing something as fundamental as religion therefore promotes greater liberty. Freedom of religion also leads to the formation of a more stable society as the freedom to choose a religion which best fits individual needs will result in a more satisfied society.

C. *Freedom of religion is quintessential to the protection of the diversity of beliefs.*

Freedom of religion, in essence, allows the diversity of faiths and differential beliefs within a faith to flourish in a conducive environment. As Heiner Bielefeldt puts it, not only in the modern world is diversity an irreversible fact, it should also be appreciated as a manifestation of the potential of human responsibility and therefore as intrinsically something positive.[20] Human diversity is itself a sign of moral earnestness.[21] The respect that we serve for the beliefs that we do not find true or reasonable is the normative denominator of our peaceful co-existence.[22]

Bielefeldt states that the respect that we are referring to here is not for the wrong or unreasonable beliefs of others but for the overarching ability of the men to have and develop deep beliefs and certitudes in the first place.[23] The practices that humans undertake in pursuance of religion are all manifestations of a responsible agency and therefore they deserve respect. This responsible agency thus forms the basis of human rights and pluralism that we experience in our everyday life, which helps us find a common ground for organizing our mutual co-existence.[24]

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[20]Heiner Bielefeldt, *Freedom of Religion or Belief: A Human Right under Pressure*, 1 OXFORD J. L. RELIG. 15 – 35 (2012) [hereinafter BIELEFELDT].

[21]Heiner Bielefeldt, *Misperceptions of Freedom of Religion or Belief*, 35 HUM. RTS. Q. 33, 68 (2013).

[22]*Id.*

[23]BIELEFELDT, *supra* note 20.

[24]HEINER BIELEFELDT, SYMBOLIC REPRESENTATION IN KANT'S PRACTICAL PHILOSOPHY 101-04 (2003).

D. *The freedom of religion is the right path to go about ensuring religious reforms in the long run.*

In order to attain progress in the society, one needs to be free to interact and interpret one's own religious sources and change one's beliefs in light of the changing social reality.[25] Therefore, religious freedom is indispensable to society.[26] It is only through the organic process that religion can be reformed without which its growth would remain stunted.[27]

As Jay Newman puts it, while we may be tempted to assume various possibilities and ways of religious reforms, it is only religion which can generate values to alter itself.[28] It is only through the medium of thought and consciousness that natural events happening around us affect us, and it is this experience that is significant in generating and shaping our values.[29] Even politics and economics are a product of some form of values generated within us through experience. Then what are the forms of experience and culture which can change religion? According to Newman, it is philosophy, as it is the epiphenomenon of religion growing out of religion itself and has attained some level of independence from its source.[30] He thus concludes that in a sense, the impetus to reform religion comes from

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[25] Faizan Mustafa & Jagteshwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, 2017 BYU L. REV. 915, 956 (2017) [hereinafter FAIZAN].

[26] DAVID SLOAN WILSON, DARWIN'S CATHEDRAL: EVOLUTION, RELIGION, AND THE NATURE OF SOCIETY (2002) [hereinafter WILSON]; Michael W. McConnell, *Why Is Religious Liberty the First Freedom*, 21 CARDOZO L. REV. 1243, 1266 (2000) [hereinafter MCCONNELL].

[27] FAIZAN, *supra* note 25.

[28] JAY NEWMAN, ON RELIGIOUS FREEDOM 159–60 (1991).

[29] *Id.*

[30] *Id.*

religion itself.[31] Only greater religious autonomy will lead to religious reform[32] while repression may lead to violence.[33]

Therefore, protection of religion is akin to the protection of democracy and liberty in the world. Liberty, in the true sense of its meaning, would only be protected when individuals are allowed to decide their own beliefs rather than being dictated upon. When we are capable of establishing a society where each individual is free to choose his or her beliefs and basic instincts, we would be making a more satisfied and a tolerant society, which is a hallmark of democracy.

III. THE PROBLEM

As discussed previously, religion has been an indispensable part of our lives.[34] It is more so in the case of Indians,[35] who are referred to as '*essentially religious*' by some scholars.[36] Despite religion being of such importance, India has successfully been able to retain its secular character.[37] However, a trend has gained prominence wherein, though India appears to be secular from the outside where all religions are freely practised, it is upon the courts of law to decide what practices constitute religion, and consequently, what is protected. The courts have named this weapon the ERPT where they interpret the religious texts to decide which part of religion is essential to the religion and which is not. It is the best example of how archaic our beliefs and

[31] *Id.*; FAIZAN, *supra* note 25.
[32] BRIAN J. GRIM & ROGER FINKE, THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY 2–4, 212–13 (2011).
[33] *Id.*
[34] WILSON, *supra* note 26; MCCONNELL, *supra* note 26.
[35] T.N. Madan, *Religion in India*, 118 DAEDALUS 114, 115–17 (1989).
[36] RAJENDRA K. SHARMA, INDIAN SOCIETY, INSTITUTIONS AND CHANGE 186 (2004).
[37] Ranbir Singh & Karamvir Singh, *Secularism in India: Challenges and Its Future*, 69 INDIAN J. POL. SCI. 597, 603 (2008).

ideologies are. A recent example of the application of this test was seen in the Sabarimala verdict, as has already been discussed. Therein, the court went on to apply not just this test, but also set an example for the State to avail future opportunities of such impingement on religious liberties.

The test was coined by the Supreme Court in the *Shirur Mutt* case way back in 1954.[38] The court held that only those beliefs and practices which are integral to the religion would be protected by Article 25 of the Constitution.[39] It would be upon the judiciary to decide what is integral and what is not. B. Parmeshwara Rao, in his paper gives the procedure that the courts use in the application of the essentiality test.[40] First, the matters of religion would be distinguished from the secular matters, second, the court would decide whether the practice is integral to the religion or not, third, the court would see that the practice must not have sprung from a superstitious belief and last, the Court would scrutinize the claims of religious practices for the protection of Article 26(b) of the Constitution.[41]

Derrett, while discussing relationship of courts and religion in India in his treatise, states that, "*the courts can discard as non-essentials anything which is not proved to their satisfaction… and they are not religious leaders or in any relevant fashion qualified in such matters…to be essential, with the result that it would have no constitutional protection*."[42]

Similarly, Dhavan and Fali S. Nariman, in their work, give an even more critical reckoning, stating, "*with a power greater than that of a high priest, Molvi or Dharma-Shastri, judges have virtually assumed*

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[38]Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005, 1021.
[39]INDIA CONST. art. 25.
[40]B.P. Rao, *Matters of Religion*, 5 JOURNAL OF INDIAN LAW INSTITUTE 509, 512 (1963).
[41]*Id.*
[42]J. DUNCAN M. DERRETT, RELIGION, LAW AND THE STATE IN INDIA 447 (1999).

the theological authority to determine which tenets of a faith are 'essential' to any faith and emphatically underscored their constitutional power to strike down those essential tenets of a faith that conflict with the dispensation of the Constitution. Few religious pontiffs possess this kind of power and authority."[43]

The courts hold a significant authority as far as the dispensation of justice is concerned. The importance of this role increases manifold when something as integral as religion is in question. In this part of the Article, the fundamental flaws in the Essential Religious Practices Doctrine employed by the judiciary are pointed out. It is argued that the ERPT cannot be an appropriate test for deciding religious matters on the grounds (a) that the courts of law are incapable of deciding matters of theology, (b) that religion, in essence, is relative in nature and therefore, one definition of religion is not possible, (c) that the ERPT limits the scope of natural reformation of religion, and (d) that the ERPT attempts to rationalize religion and mould it to the court's liking.

A. *The courts of law are incapable of deciding matters of theology.*

"*The power of civil government relates only to ... civil interests are confined to the care of the things of this world, and hath nothing to do with the world to come.*"[44]

Justice Iacobucci of the Canadian Supreme Court while pronouncing his judgment in *Syndicat Northcrest v. Amselem*, observed that "*the State is no position to be, nor should it become, the arbiter of religious dogma*."[45] The basic premise of this idea is that it would be very dangerous for the State to start telling a religious community what their main beliefs are as per their religion or whether their entire

[43]R. DHAWAN & FALI S. NARIMAN, SUPREME BUT NOT INFALLIBLE 257, 259 (2000).
[44]PHILIP B. KURLAND & R. LERNER, THE FOUNDERS' CONSTITUTION 52 (1987).
[45]Syndicat Northcrest v. Amselem, (2004) 2 SCR (Canada) 576.

faith is correct at all. This may lead to a secular ideology dictating terms to religious one. It would become quite simple for the State to dismiss various beliefs by putting them through strict constitutional tests of equality and liberty. However, what must be understood is that religion does not function like any other law where strict constitutional standards can be applied.

Our point of concern here is that we have quite conveniently assigned the right to the State to determine and decide which action is to be accorded protection under Article 25 of the Indian Constitution. However, the scholars of law who sit on the bench are completely incapable of deciding the intricate religious issues. After all, the texts and manuscripts of religion do not function like the ordinary statutes and constitutions. The liberal ideology of the judges is often inconsistent with the orthodox religious practices, and therefore, one might witness decisions where radical reforms are attempted. Moving forward on this line of thought, this test essentially attempts to re-shape and re-structure the foundation of a religion. By dictating what is and what is not essential to the religion, this test is controlling the beliefs of an individual.

Lord Hope of the United Kingdom's Supreme Court, while dealing with the issue of asylum for homosexuals in Africa started condemning the beliefs of the community when found disagreeable with his liberal ideology.[46] He claimed that such an action *was* "*fanned by misguided but vigorous religious doctrine*".[47] He stated that this was because of "*ultra-conservative interpretation of the Islamic law*" and also because of the rampant "*homophobic teaching that the right-wing evangelical Christians churches indulge in Africa*".[48] Now, where did Lord Hope go wrong? It was when he

[46]HJ(Iran) and HT(Cameroon) v. Secretary of State of the Home Department, (2010) UKSC 31.
[47]*Id.*
[48]*Id.*

started an attack on the religious beliefs and held that they were wrong interpretations of the religion itself. Recognizing the plight of homosexuals can be understood, but it goes way beyond the authority of any court to start deciding how misguided peoples' beliefs are, which must rather be left to theological examination.

In India, on multiple occasions, the courts have tried to interpret religions to suit their own whims. In *Shastri Yagnapurushdasji v. Muldas*,[49] a group claimed recognition as an independent denomination following the teachings of Swaminarayan. The court, in this case, stated that this claim was "*founded on superstition, ignorance and a complete misunderstanding of the true teachings of the Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself.*"[50] No matter how misguided the followers were, it is not within the scope of the court's authority to grant or restrict any person's beliefs unless it contradicts the requirements of Article 25. There have been numerous instances where the courts have decided matters in a similar fashion, whether it be the essential practice of keeping the beard for a Muslim man[51] or whether the *Tandava* dance merits protection.[52] The court in such cases attempts to dictate to a group of people what their religion in reality propagates. The real problem is with the courts explaining whether one should believe in something or not, rather than protecting those beliefs, thus defeating the entire purpose of incorporating Article 25 in the Constitution of India.

B. Religion, in essence, is relative in nature and therefore, one definition of religion is not possible.

For the sake of argument, accepting the idea that courts have and would continue to hold the authority to discuss religion, ERPT still

[49]Shastri Yagnapurushdasji v. Muldas, 1966 SCR (3) 242.
[50]*Id.*
[51]Mohd. Zubair Corporal v. Union of India, 2016 SCC OnLine SC 1472.
[52]SP Mittal v. Union of India, 983 SCR (1) 729.

cannot be considered to be a good test for legal scrutiny of religion. An argument in favour of this idea is that religion is a relative concept. Thus, what might be essential to the religion in one place may be completely irrelevant in another. For instance, during Dussehra, an effigy of *Ravana* is burnt across India, and this act is considered to be a symbol of victory of '*Dharma*' over '*Adharma*'. However, there are certain places such as Mandore in Jodhpur, where doing so is prohibited by the natives. According to the legends, Mandore is where *Mandodari* married *Ravana* and therefore the natives of the place believe *Ravana* to be their son-in-law. It is because of this reason that instead of burning the effigy, '*Shraadh*' and '*Pind Daan*' are performed as per the Hindu customs for the demon-king *Ravana*.[53] Applying the ERPT in such a scenario, we would find that the burning of this effigy of *Ravana* is an essential practice in the rest of India, while in Mandore, the same cannot be thought of in the worst of nightmares.

One example is the *Gram Sabha case,*[54] where members of a particular sect claimed that capturing and worshipping a live cobra during the festival of *Nagpanchami* was an essential religious practice of their religion. The plaintiffs relied on the local text, *Shrinath Lilamrat* in making their claim, while the court, on the contrary, relied on the *Dharam shastras* (general Hindu text) in holding that the act was not an essential religious practice and thus cannot be protected. Again, the fact is that India is a land of diversity and therefore no religion, Hinduism in the present case, can be fitted into a single compartment.

As far as the Sabarimala issue is concerned, women of menstruating age are not allowed to enter the residing place of Lord Ayappa and

[53] *8 places in India where Ravana will not be set on fire*, THE STATESMAN (Jan. 9, 2019), https://www.thestatesman.com/india/8-places-in-india-where-ravana-will-not-be-set-on-fire-1502698429.html.

[54] Gram Sabha of Village Battis Shirala v. Union of India, 2014 SCC OnLine Bom 1395.

such belief of the people should be respected. It is said that Ayappa resides in the Sabarimala temple in the form of *Naishtik Brahamchari*, that is, the eternal celibate. The God's vow of celibacy demands him to refrain from any menstruating woman, meaning, neither can he touch nor see a woman of such age. If a woman is allowed to enter the temple, his vow would be broken and his unique form of *Naishtik Brahamcharya* would be disturbed.[55] For the members of the community who believe in this idea of Ayappa's celibacy, the application of the ERPT would be demeaning their beliefs. What is more concerning is the assumption of absolute power by the State. Such concentration of power does not and should not have any place in a democracy.

The reason behind stating the above situation is that what may be construed as essential to one place need not be necessarily essential in another. The Sabarimala case is a unique one. The practices of one temple in Kerala are different from practices in others. There are temples where entry of men is not allowed, temples where the God is offered the lamb in *prasadam,* but do these unique practices make such temples anti-Hindu? Certainly not, these practices are respected despite being relative in nature and so must be the issue in Sabarimala. It is simply a temple with unique and relative practices.

There is no straight jacket formula to ascertain what is essential to religion. The judiciary cannot turn a blind eye to the relativity and subjectivity that comes along with religion. Scrutinizing the minuscule details of religion from a cold, calculated and objective approach is not the right way to go about protecting this natural and fundamental right of the citizens of our country. As soon as we start attempting to categorize beliefs into compartments of right and wrong, we start to ignore the grey areas and the possibilities that

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[55] *Here's why women are barred from Sabarimala; It is not because they are 'unclean'*, FIRST POST (Jan. 9, 2019), https://www.firstpost.com/india/why-women-are-barred-from-sabarimala-its-not-because-they-are-unclean-2583694.html.

come with the diversity that exists in India. The assortment of beliefs, values and cultures is what makes India a country of such uniqueness. Simply because there is a group of people who dissent and disagree with such a belief, the court cannot test specific practices on a general understanding of religious norms. On the contrary, there would definitely be a large fraction of people who would be invested in such a practice for years. The purpose of law is finding equilibrium between dissent and acceptance and we cannot go on measuring and testing customs and values by blatantly applying the principles of equality or fairness in every situation. Thus, everything boils down to the bottom line that religion is relative. The words, right and wrong, fair and unfair, have no place where religion is concerned.

C. The ERPT limits the scope of natural reformation of religion.

One of the features of the ERPT is that only those religious practices are considered to be essential to a religion which have been in existence since the time of birth of that religion. In the case of *Commissioner of Police v. Avadhut,*[56] the Calcutta High Court had held that the *Tandava* dance was an essential practice of the *Ananda Margi* faith. This decision was overturned on appeal, by the Supreme Court on the pretext that the *Ananda Margi* faith had come into existence in the year 1955 while *Tandava* dance was introduced only in 1966.[57] Therefore, the religion did exist without that practice, and as such, it cannot be referred to as an essential practice of the religion. Though the court in the aforementioned case ignored an important fact that Shri. Anant Murthiji, the head of that faith had provided for the incorporation of the *Tandava* dance in the revised version of *Karya*, the only religious text on *Ananda Margi.* The dissenting

[56]Commissioner of Police and Ors. v. Acharya Jagadishwarananda Avadhuta and Anr., (2004) 12 SCC 770.
[57]*Id.*

opinion, in this case, did rely on the *Karya*, to give protection to the practice under Article 25.[58]

This case sets a precedent that religious practice can only be considered integral if it had existed since the foundation of religion. This regressive logic thus freezes religious growth as any reform in the religion would never be considered essential to it.[59] Extending this to major religions such as Islam and Christianity would result in any practice evolved after the death of Prophet Mohammed and Jesus Christ respectively to be considered unimportant. Thus, this absurd reasoning prevents the natural growth of a religion, which is an important feature of the freedom of religion.

D. The ERPT attempts to rationalize religion and mould it to the court's liking.

One of the significant drawbacks of the ERPT is that it attempts to rationalize religion rather than accepting the belief or practice in its original form. Consequently, it also leads to the suppression of popular religion in favour of the elite religion, as the texts and religious literature on which the court mostly relies is often supportive of the latter. One such case is the *Gram Sabha*[60] case, where feeding snakes by a specific sect was held to be non-essential as it was not supported by the general Hindu text of *Dharamshastras*.

Justice Gajendragadkar in the *Durgah Committee case*[61] stated that "*even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself*." Consequently, the court differentiated between the real religion and the superstition. What the

[58]*Id.*
[59]FAIZAN, *supra* note 25.
[60]Gram Sabha of Village Battis Shirala v. Union of India, 2014 SCC OnLine Bom 1395.
[61]Durgah Committee v. Hussain Ali, AIR 1961 SC 1402.

court failed to understand was a much-accepted proposition in the realm of law, as pointed out by Chief Justice Latham in the *Jehovah's witnesses'* case- "*What is a religion to one is superstition to another.*"[62]

In the case of *Shastri Yagnapurushdasji v. Muldas,* a group of *Satsangis* were claiming protection under the Bombay Harijan Temple Entry Act.[63] Justice Gajendragadkar in his judgment stated that "*it may be conceded that the genesis of the suit is… founded on superstition, ignorance and complete misunderstanding of the true teachings of Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself.*"[64]

On analysing the texts and the teachings, it appears that the courts have relied upon a much reformed and elite form of religion rather than the popular one. One must understand that religion is a popular phenomenon and may often derive its sanction not from any virtuous texts, but from popular practices going on since time immemorial. Had the religion been all virtuous in itself, a need to protect it would not have ever arisen in the first place.

Justice Ramaswamy, in the case of *A.S. Narayana Deekshitulu v. the State of A.P.*,[65] stated that the idea of *Dharma,* or the core religion is what is protected by the Constitution, rather than the conventional religion. According to him, "*Dharma is that which approves oneself or good consciousness or springs from due deliberation for one's own happiness and also for the welfare of all beings free from fear, desire, cherishing good feelings and sense of brotherhood, unity and friendship for integration of Bharat. This is the core religion which the Constitution accords protection…The religious freedom guaranteed by Articles 25 and 26, therefore, is intended to be a guide*

[62]Adelaide Co of Jehovah's Witnesses Inc v. Commonwealth, (1943) 67 CLR 116.
[63]Shastri Yagnapurushdasji v. Muldas, 1966 SCR (3) 242.
[64]*Id.*
[65]A.S. Narayana Deekshitulu v. State of Andhra Pradesh, AIR 1996 SC 1765.

to a community-life and ordain every religion to act according to its cultural and social demands to establish an egalitarian social order." Justice Ramaswamy, in essence, stated that the ultimate aim of religious freedom is not to protect beliefs and practices but rather to establish a utopian world where religion is brought in consonance with social and cultural demands. This was certainly not in the minds of Constitution framers when they inserted a clause for religious protection.

Further, most of the judges in India are often influenced by the rationalist Hinduism, as propounded by the Vedic scholars.[66] Most of the time, reformists such as Vivekananda or Radhakrishna are cited as authoritative scholars of Hindu religion, whereas in reality, their works propound a much reformed idea of it.[67] The courts have methodically been tempted to give rationalist Vedic scholars legitimacy in the Indian religious discourse.[68] In doing so, the courts having contracted the '*institutional space for personal faith*', and have also side-lined popular religion by, as Ashis Nandy states, treating it as "*parts of an enormous structure of irrationality and self-deceit, and assure markers of an atavistic, regressive way of life*".[69]

Justice Indu Malhotra rightly points out in her opinion –

"*Constitutional morality in a pluralistic society and secular polity would reflect that the followers of various sects have the freedom to practise their faith in accordance with the tenets of their religion. It is*

[66] Ronojoy Sen, *The Indian Supreme Court and the quest for a 'rational' Hinduism*, 1 SOUTH ASIAN HISTORY AND CULTURE 86–104 (2009).
[67] *Id.*
[68] *Id.*
[69] Ashis Nandy, *The Twilight of Certitudes: Secularism, Hindu Nationalism, and other Masks of Deculturation*, 22 ALTERNATIVES: GLOBAL, LOCAL, POLITICAL 157–176 (1997).

irrelevant whether the practice is rational or logical. Notions of rationality cannot be invoked in matters of religion by courts."[70]

It can therefore be inferred that the ERPT is laden with some fundamental flaws that are not in consonance with the idea of religious liberty. Therefore, there is a need to find an alternative to this doctrine to ensure that a pluralist democracy such India does not fall prey to the luring trap of impractical and a far-fetched reality of radical religious reformation, especially by those who do not understand it in its entirety.

IV. CONCLUSION: DEVELOPING A NEW RELIGIOUS JURISPRUDENCE

This article has tried to examine the ERPT through a new prism. The importance of religious freedom and the problems deep-seated in the given test are seemingly clear now. However, having grasped the flaws in the stand of the judiciary, it is important that we provide an alternative to the ways adopted by the courts.

Moving forward, the court must reorient its jurisprudence in the following manner- Firstly, the courts in usual circumstances should refrain from deciding religious questions. At most, the courts may decide whether a practice is religious or not, rather than how religious the practice is. As Dr. B.R. Ambedkar had put it, the practices which are '*essentially religious*' must be protected, not the '*essential practices of a religion*'.[71] The courts must look to the precedent set by another South-East Asian country, Sri Lanka, where the Supreme Court held in the case of *Premalal Perera* v. *Weerasuriya*, "*the Court*

[70] Indian Young Lawyers Association and Ors. v. The State of Kerela, 2018 SCC OnLine SC 1690.

[71] Constitutional Assembly Debates, Dec. 2, 1946 speech by Dr. B.R. Ambedkar, http://parliamentofindia.nic.in/ls/debates/vol1p5.htm.

would consider only whether the professed belief is rooted in religion and whether the claimant honestly and sincerely entertained and held such belief."[72]

Secondly, whenever there lies a confusion between the religious protection and government regulation, the benefit of doubt should always be given to religious protection. In *Ananda Margi,* the court did the opposite. It observed that "*Ananda Margi as a religious order is of recent origin and the tandava dance as a part of the religious rites of that order is still more recent. It is doubtful as to whether in such circumstances the tandava dance can be taken as an essential religious rite of the Ananda Margi.*" This implies that whenever there has been a doubt with regard to the essentiality of the practice, the benefit of doubt has been given to the regulation. We propose that the opposite is what should be followed. Obviously, it is more useful to grant freedom than take it away in case of doubt.

Thirdly, we propose that the State should be able to regulate religion only when there exists a legitimate aim, the non-achievement of which would compromise the State's security or character to an intolerable degree. Applying the formula given by the jurist Gustav Radbruch, also known as the Radbruch's formula, where a statutory law is disregarded only when requirements of justice are compromised to an intolerable degree,[73] freedom of religion must also be compromised only when the State's security or character is threatened to an intolerable degree. What would constitute 'intolerable degree' is a matter of fact. However, cases where a temple for its own distinct reasons does not allow entry of females within its premises, or a man because of his religious reasons keeps on his beard, certainly do not breach this threshold. On the contrary, cases where a certain section of the society are called 'untouchables'

[72]Peremal Perera v. Weerasuriya, (1956) 2 Sri LR 177.
[73]Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law (1946)*, 26 OXF. J. LEG. STUD. 1–11 (2006).

throughout the nation and are treated as second class citizens would be an area where the national character is compromised to an intolerable degree.

Lastly, we propose that in cases of necessity, the State should be allowed to regulate religion. For example, in a situation where goats have become an endangered species or their numbers are seriously threatened, the State should have the right to prohibit goat sacrifice on Bakr-id till the required population is restored. Similarly, if the milk production has seriously taken a setback in the nation, the State should have the authority to prohibit the presentation of milk to Lord Shiva on Nagpanchami for a temporary period or allow for a compulsory milk collection mechanism in all such temples.

While we do not claim that the above suggestions are conclusive in nature, we have proposed them as the first step towards the making of a more inclusive religious doctrine. The doctrine that we follow presently neglects sections and subsections of society whose practices are not as popular as those of others. While giving importance to the ideals of the reformists is a positive step taken by the court, neglecting religious understanding of others places a serious doubt on the way we see freedom of religion in our pluralist democracy.

GULPING THE SPIKE: RATIONALISING AFSPA

Deepanshu Poddar[*] and Vrinda Aggarwal[**]

Abstract

The scope of enquiry in this article is confined to the possibility of judicial review of actions undertaken by the armed forces under the aegis of the Armed Forces (Special Powers) Act, 1958 (AFSPA or Act). Ideologically, the article poses to be a liberal reading of the law since it suggests taming the Act by introducing judicial review as a safeguard against any action undertaken by the armed forces under Section.4 of the Act. Consequently, it presumes the constitutional validity of the Act. The word 'rationalising' is therefore aptly employed to describe the methodology of this article.

The article would commence with deconstructing the nature of the role played by the armed forces as defined under AFSPA, which is "to act in aid of civil authorities". Based upon this, it would be argued that the courts possess the jurisdiction to review the actions undertaken under Articles 32 and 226 of the Constitution. Lastly, the article would discuss a cogent standard of review which

[*]Deepanshu Poddar is a Fourth-Year Student at Jindal Global Law School, Sonipat. The Author may be reached at 15jgls-dpoddar@jgu.edu.in.
[**]Vrinda Aggarwal is a Fourth-Year Student at Jindal Global Law School, Sonipat. The Author may be reached at 15jgls-vaggarwal@jgu.edu.in.

could be effectively employed by the courts to review violations of a fundamental right.

I. INTRODUCTION

In an age which is increasingly fixated upon security, it has become exigent for the courts to adequately posture themselves in a manner which pre-empts it from bending its knees. Recently with the Supreme Court limiting its jurisdiction in the *Rafael Deal* case, its review power seems to be circumscribed, specifically in questions pertaining to 'national security'.[1] The article situates this concern in the context of internal security legislations, specifically, the Armed Forces (Special Powers) Acts, 1958 (hereinafter, "**AFSPA**" or "**Act**").[2]

At the very outset, it is essential to clarify that the article takes a rather benign view towards the law by ignoring a number of readings, which declare its invalidity with respect to international humanitarian law[3] as well as the Constitution.[4] Therefore, it merely 'gulps the spike'. Akin to most internal security regimes in India, AFSPA too

[1]Manohar Lal Sharma v. Narendra Damodardas Modi, 2018 (15) SCALE 956 ¶11.

[2]Collectively referring to Armed Forces Special Powers Acts (Manipur and Assam) 1958, Armed Forces Special Powers Act (Punjab and Chandigarh), 1983 and Armed Forces Special Powers Act (Jammu and Kashmir), 1990 [hereinafter AFSPA].

[3]Amnesty Int'l, *Denied' Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir*, ASA 20/1874/2015 (2015) [hereinafter Amnesty Report]; Human Rights Committee, Concluding Observations of India's Report, U.N. Doc No. CCPR/C/79/Add.81 (1997); Christof Heyns, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, U.N. Doc. No. A/HRC/29/37/Add.3 (2015).

[4]A. G. Noorani, *Draconian Statute - Armed Forces (Special Powers) Act, 1958*, 32 ECON. & POL. WKLY. 1578, 1578 (1997); A. G. Noorani, *Supreme Court on Armed Forces Act*, 33 ECON. & POL. WKLY. 1682, (1998); A. G. Noorani, *Armed Forces (Special Powers) Act: Urgency of Review*, 44 ECON. & POL. WKLY. 8, 9 (2009).

draws its legal form from a pre-independence statute, the Armed Forces Special Power Ordinance, 1942, which was promulgated only to suppress the Quit India Movement.[5] Post-independence, the said bill was passed to contain the insurgency in Assam and Manipur. Later, by way of executive action, the scope of the Act was expanded to include Punjab and Chandigarh (from 1983 to 1997), and then Jammu and Kashmir (from 1990 till date).

The text of AFSPA is fairly succinct. The definition provision has been kept neat with clarifications only on two terms, 'disturbed area' and 'armed forces'. Section 3 vests the power to territorially extend the application of the Act solely in the hands of the executive, allowing no scope for parliamentary or judicial review, or in-built provisions such as sunset clauses. Interestingly, such checks find a place even in the emergency provisions of the Constitution. Therefore, AFSPA poses a more lethal threat to democracy than the proclamation of emergency itself.

The powers of the armed forces, under Section 4 are far-reaching and extraordinary. It allows armed personnel to use force (up to the extent of causing death), on the basis of personal satisfaction as to its necessity with regards to the maintenance of public order. The armed personnel have also been empowered to destroy property,[6] search and make arrests without any warrant.[7]

The only safeguard provided is the 'handing over' provision[8] which requires that a person, once arrested, ought to be handed over to the police at the 'earliest possible time'. The Honourable High Court of

[5]Mustafa Haji, *Killing One Colonial Law at a Time – After Section 377, It's Time to Repeal AFSPA,* THE WIRE (Apr. 2, 2019), https://thewire.in/law/repealing-afspa-colonial-law-northeast-jammu-kashmir.
[6]§ 4(b), AFSPA.
[7]§ 4(c), AFSPA.
[8]§ 5, AFSPA.

Gauhati has only vaguely clarified the meaning of 'earliest possible time' to mean 'least possible delay'.[9]
Having laid out the broad contours of the powers enjoyed by the armed forces, the article aims to ideate certain checks and balances which could inform the personal satisfaction of the members of armed forces while they exercise such powers. However, a nasty impediment to this comes by way of Section 6, which bars courts to exercise jurisdiction to entertain any "*suit or other legal proceeding*" against or for prosecuting any member of the armed forces while they are acting under the guise of AFSPA without the sanction of the executive.

There are a few traditional procedures which may be adopted to address this stipulation. The first is a tenuous strategy which involves knocking the doors of the executive to seek government sanction. However, the executive discretion to grant sanctions often discounts principles of natural justice as it is marred by biases.

A more judicious tactic could be approaching the court for issuance of appropriate writs ordering the executive to grant sanctions to prosecute members of the armed forces. Recently, the Extra Judicial Execution Victim's Families Association adopted a similar tactic in order to move a CBI enquiry against members of the armed forces for alleged disappearances of thousands that were caused by them.[10] The matter is currently sub-judice and is being vehemently contested by the members of the armed forces.

This article suggests a third strategy which may prove useful to beat violations of human rights at the behest of the security of the State by allowing the constitutional courts of the country a leg in the matter. To substantiate the same, the article delves into the capacity in which the members of the armed forces act while they exercise power under

[9] Horendi Gogoi v. Union of India, (1991) Gau Cr 3081.
[10] Extra Judicial Execution Victim Families Association & Anr. v. Union of India And Anr., AIR 2016 SC 3400.

the aegis of AFSPA. In doing so, the article aims to discuss the meaning of "*acting in aid of civil authorities*", by employing external aids to statutory interpretation. Next, the article examines the powers of the constitutional courts in India under Articles 226 and 32 to review actions of the armed forces. Lastly, it suggests a standard of review which could be adopted to efficiently review violations of fundamental rights.

II. DETERMINING THE ROLE OF THE ARMED FORCES: AIDING CIVIL AUTHORITIES

The Constitution of India envisages the proclamation of martial law under Article 34 of Part III. The said provision provides for indemnification of servicemen for "*any act done...in connection with the maintenance or restoration of order in any area*" where martial law has been proclaimed. Yet, the Constitution omits using the term 'martial law' in Part XVIII (Emergency Provisions), where it truly belongs. The closest it comes to describing it, in Part XVIII, is in Article 355, while ascribing the Union the duty "*to protect the states from external aggression or internal disturbances*". Pursuant to this, the Union secures for itself, in Item 2 of List I, the power to deploy armed forces subject to the control of the Union, "*in any state in aid of civil power*". Therefore, the Constitution leaves us to wonder the true parentage of AFSPA– is it a proclamation of martial law or rather a mere deployment of military to act in aid of civil authority?

Legal scholarship suggests that there exists a stark difference between the two phenomena.[11] A condition precedent for the proclamation of martial law is the inability of the civilian authorities and the courts to maintain law and order.[12] Therefore, martial law necessarily replaces

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[11]Frederick Pollock, *What is Martial Law?*, 18 L. Q. REV. 152 (1902); W. S. Holdsworth, *Martial Law Historically Considered*, 18 L. Q. REV. 117 (1902).
[12]*Id.*

civilian law, leaving no room for the courts to uphold rights.[13] Contrary to this, the phenomena of 'military acting in aid' recognises the supremacy of civilian authority over the military, where the military is called in for a pre-defined minimalistic intervention.[14]

AFSPA seems to be a 'hard case' in the Dworkinian sense. Section 3 defines the manner in which power is to be balanced between civilian authorities and the military forces in a disturbed area, requiring the later to 'act in aid' of the former. While upholding its constitutional validity, the Supreme Court held:[15]

"*In our opinion, what is contemplated by Entry 2-A of the Union List and Entry 1 of the State List is that in the event of deployment of the Armed Forces of the Union in aid of the civil power in a State, the said forces shall operate in the State concerned* ***in cooperation*** *with the civil administration so that the situation which has necessitated the deployment of the Armed Forces is effectively dealt with and normalcy is restored*."

However, contrary to this, scholars suggest that AFSPA is rather a *de facto* proclamation of martial law.[16] Khagesh Gautam explains that "*when the Supreme Court upheld the constitutionality of the AFSPA, it failed to realize the disturbed area notification for what it truly was–a de facto proclamation of martial law*".[17] The text of AFSPA indicates an altogether different possibility – military acting in aid of civil authority.

[13]Wing Commander U. Ch. Jha, *Military Justice in Difficult Circumstances: The South Asian Countries*, 54 MIL. L. & L. WAR REV. 301 (2015).
[14]Khagesh Gautam, *Martial Law In India: The Deployment Of Military Under The Armed Forces Special Powers Act, 1958,* 24 S.W. J. INT. L. 177 (2018).
[15]Naga People's Movement of Human Rights v. Union of India, (1998) 2 SCC 109 ¶ 28.
[16]Khagesh Gautam, *supra* note 10.
[17]*Id.*

Owing to this lack of understanding, the armed forces have been left with a *carte blanch*, subject only to the vague language of AFSPA. Where on the one hand the courts suggest a sense of parallelism between military and civilian authority, and on the other the possibility of the former displacing the latter has not been ruled out by scholarly readings on AFSPA, the statute itself has another story to tell.

To make some sense of this legalistic chaos, there is a need to delve deeper into the meaning of "*military acting in aid of civil authorities*", as used in the context of AFSPA itself. Only then will it be possible to determine the circumstances in which the court may intervene as harbingers of democracy and protectors of rule of law.

A. *Instances of usage of the term "in aid of"*

The phrase "in aid of" is not entirely new to the Indian legal system. Article 144 of the Constitution reads as, "*all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court*."[18] Owing to the inability of the court to enforce its own orders, this provision lends teeth to the decisions of the Supreme Court. In *M.C. Mehta v. Union of India*, it held that the executive had acted in contravention to Article 144 by not complying with the court's order to develop a policy for minimising vehicular pollution.[19] Therefore, just like the civil authorities, under AFPSA, the courts, too, seek assistance. If such an interpretation is to be borrowed, then there is a tilt in the balance of power in favour of the authority being aided.

Numerous other miscellaneous legislations adopt a similar phraseology:

1. Section 38 of the Code of Criminal Procedure, 1973 (hereinafter, "**CrPC**") provides, "*when a warrant is directed to a person other*

[18]INDIA CONST. art. 144.
[19]M.C. Mehta v. Union of India and Ors., (1998) 6 SCC 60.

than a police officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant."[20] Therefore individuals, who are not ordinarily vested with the rights or the duties of a police officer, may act in their capacities only to aid him or her. However, interpretation of this provision remains *res integra*.

2. Section 6(4) of the Bhopal Gas Leak Disaster (Process of Claims) Act envisages that "*all officers and authorities of the Government shall act in aid of the Commissioner.*"

3. Sections 74 and 97 of the Delhi Cooperatives Society Act, 1972 and Multi State Cooperative Society Act, 2002 respectively, vest the authority in the central registrar (or a person authorised by him) to act as a civil court for certain purposes. Other authorities are required to act *in aid of* the central registrar taking on such a role.

Apart from AFSPA, the term "*in aid of*" has been used in several instances specifically in the context of armed forces.[21]

1. Section 14 of the Special Protection Group Act, 1988 reads as "*it shall be the duty of ... military authority to act in aid of the Director or any member of the Group whenever called upon to do so in furtherance of the duties and responsibilities assigned to such Director or member*."

2. Section 25(b) of the Reserve and Auxiliary Air Forces Act, 1952 states that "*every member of an Air Force Reserve or the Auxiliary Air Force shall, during the period of his service, be liable to be called up for service in aid of the civil power.*" Interestingly, such requirement entails a duty that is distinct from

[20] § 38, Criminal Procedure Code, 1973.
[21] For e.g., Assam Rifles Act, 2006.

his or her duty to be called up for military operations and for training and medical examination.

Two inferences could legitimately be drawn from the aforementioned illustrations – first, the authority aiding always does so at the behest of that getting aided and second, the authority aiding is being vested with certain special powers which it does not ordinarily possess in its truest institutional capacity (for instance, a person aiding the police in executing a warrant may even apprehend the said accused, which in normal circumstances would constitute wrongful confinement). However, these observations are only preliminary as they do not provide a conclusive explanation of the role played by the armed forces. Therefore, there is a need to delve deeper into this subject.

B. *"In aid of" as "to aid and advise"?*

Article 74(1) of the Constitution reads as "*there shall be a Council of Ministers to aid and advise the President*".[22] Interpretation of this phrase is settled by a myriad rich jurisprudence which concludes the existence of a cabinet form of government where the President exists only as a figurative head, acting in accordance with the decisions of the Cabinet.[23] The rationale behind such a determination was that the President will does not represent the people's mandate and therefore, the post lacks the democratic competence to call the shots. Therefore, owing to the element of unaccountability attached to the post of the President, it ought to be circumscribed with the aid and advice of the Cabinet. This was further clarified by a subsequent amendment to the Constitution.[24]

[22]INDIA CONST. art. 74(1).

[23]Rai Sahib Ram Jawaya Kapur And Ors. v. The State Of Punjab, AIR 1955 SC 549; U.N.R. Rao v. Smt. Indira Gandhi, AIR 1971 SC 1002; Shamsher Singh and Anr. v. State of Punjab and Ors., AIR 1974 SC 2192.

[24]Subs. by the Constitution (Forty-second Amendment) Act, 1976, § 13, for cl. (1) (w.e.f. 3-1-1977).

It would be absurd to borrow the meaning of "*in aid of*" from this settled understanding of "*in aid and advice*". It structurally conflicts with the position of the military in a democracy, which is to remain subservient to the civil and democratic authorities:

1. Article 53(2) of the Constitution clarifies that the President, who heads the executive, is also the supreme command of the defence forces.
2. Article 33(b) of the Constitution vests the right with the Parliament to limit the application of fundamental rights over armed personnel.
3. Article 72(1)(a) read with Article 72(2) of the Constitution allows the President to suspend, remit or commute any punishment or sentence by a court martial.
4. Pursuant to List I of the Constitution, the deployment of armed forces for any purpose is solely vested in the hands of the Union.[25]

Therefore, the Constitution clearly demarcates that the members of the armed forces ought to act within the confines of the democratic will.

However, the *Naga People's* case clarifies that the deployment of armed forces to aid the civil authorities does not amount to the complete absence of civilian authority, indicating some sense of parallelism between the two authorities.[26]

The distinction between "*in aid of*" and "*to aid and advise*" is intelligible. In the former, the authority aiding is subservient to that being aided, while in the latter, the authority aided is bound to follow the aid. If such an understanding were to be borrowed, the civil authorities during the course of a Section 3 proclamation under

[25]INDIA CONST. Entry 2A, List I.
[26]Naga People's case, *supra* note 11.

AFSPA, would be rendered to a position of ceremonial existence and would be bound to act solely in accordance with the aid of the military. Hence, it is clear from our discussion that an attempt to equate "*to aid and advise*" with "*in aid of*" can be immensely problematic.

C. *"Acting in aid" as 'stepping into the shoes'*

In the previous section, the possibility of military taking supremacy over the civilian authority was ruled out. However, would it also be incorrect to argue that the armed forces 'step into the shoes' of civilian authority, while acting in aid? A somewhat similar principle appears in common law – the '*de-facto officers*' doctrine. According to this, in the presence of a statutory stipulation, a person may act in the colour of another authority. However, while acting in the colour of another authority, the said person exercises the same rights and is bound by the same duties as that authority is. The said person cannot overstep the stipulated zone of authority.

The court has used this principle time and again to approve actions of people who are acting in the garb of official authority.[27] The court invoked this rational while upholding the validity of arrests made by private persons[28] under the guise of Section 43 of the CrPC, which allows private persons to arrest an individual who has committed a non-bailable and cognizable offence in his or her presence.

Having established this, a further question arises – whether such persons, who while acting in *de-facto* capacity, would incur liability if they exceed the mandate of their authority? The Supreme Court of Louisiana applied a public law doctrine (abuse of power) to nullify the actions undertaken by *de-facto* persons, which was beyond the

[27]P.S Menon v. State of Kerala, AIR 1970 Ker 165; Gokuraju Rangraju v. State of A.P., AIR 1981 SC 1473.

[28]K.K. Mohandas v. State of Kerala, (2006) 3 KLT 173.

scope of their mandate.[29] However, the court did not impose any personal tortious liability or criminal liability upon the individuals acting in *de-facto* authority. The actions of a *de-facto* official are therefore given the same force as the acts of a person acting in *de jure* authority.

Members of the armed forces have been authorised to act in such *de-facto* capacity in ordinary instances. A leading example could be Section 129(2) of the CrPC, which requires only a civil force to disperse an assembly which has been declared to be unlawful.[30] However, under Section 130 of the CrPC, an executive magistrate could call upon armed forces to disperse such an assembly only "*if any such assembly cannot be otherwise dispersed*".[31] Therefore, the duty of dispersing an unlawful meeting, which ordinarily vests with the civil authority and the armed forces merely facilitate or aid such a duty.

AFSPA co-exists with the procedures laid down in the CrPC. For instance, Section 4(b) of AFSPA enables the armed forces to destroy property if it is believed to be a structure being utilised as a "*…training camp for armed volunteers or utilized as a hide-out by armed gangs...*" These exist parallel to the procedures laid down in the CrPC to tackle offences mentioned under Sections 121, 121A and 122 of the Indian Penal Code, 1860 (hereinafter, "**IPC**"). Therefore, AFSPA exists as a parallel statute, which vests the power in the armed forces to deal with such offences in 'aggravated circumstances'. A theoretical understanding of these parallel procedures (one utilised during normalcy, the other in times of exception) lends evidence to the thesis that the army acts in *de-facto*

[29]THIBODEAUX et. Al. v. P. Frank COMEAUX et al, [145 So. 2d 1 (1962)] 243 La. 468.
[30]§ 129(2) CrPC [Dispersal of Assembly by Civil Force].
[31]§ 130, CrPC [Use of armed forces to disperse assembly].

authority under the aegis of AFSPA. Hence, the actions of the members of the armed forces must be amenable to review.

III. JURISDICTION OF THE COURTS TO REVIEW MILITARY ACTIONS

The next question which emerges is with respect to the plausibility for the courts to exercise jurisdiction over actions of the Armed Forces in the disturbed area. In order to establish the same, two questions need to be answered: first, whether the courts are institutionally competent to review actions which are informed by concerns of "national security" and, second, whether there exists a constitutional basis for exercising review jurisdiction over military actions.

A. *Institutional competence of the court to delve into matters of national security and internal disturbance*

The exercise of jurisdiction is meaningful only if the court has the institutional competence to delve into the merits of what informs the opinion of the members of the armed forces under Section 4 of AFSPA. Courts are very sceptical to adjudicate on matters which pertain to national security and unity of the country since they lack institutional competence.[32] Any attempt by the court to stifle the powers of the executive during security concern flies in the face of separation of powers. A closer look at the existing jurisprudence surrounding internal security laws will allow a peep into the court's position in this regard.

Immediately after independence, the court placed an undeniable trust in the powers of the executive. In *A.K. Gopalan v. State of Madras,*

[32]Manohar Lal Sharma v. Narendra Damodardas Modi, 2018 (15) SCALE 956 ¶33,34; GRAHAME ALDOUS & JOHN ALDER, APPLICATIONS FOR JUDICIAL REVIEW: LAW AND PRACTICE (Butterworths, 1985).

the court, while upholding the validity of preventive detention laws, held that it was incapable of entering into the question of what constituted the discretion of the detention authority.[33] Today this decision is bad in law and has been overruled by *R.C. Cooper v. Union of India*[34] and eventually by *Maneka Gandhi v. Union of India*.[35] In the latter, it was held that a violation of the right to life under Article 21 ought to be informed by a procedure established by law, which necessarily follows the tenants of due process.

Such checks and balances do not find adequate space when concerns of national security and internal peace kick in. The Supreme Court has lamented on this judicial void while discussing a need for a mechanism to review decisions of the armed forces tribunal and stated that, "*judicial approach by people well-versed in objective analysis of evidence trained by experience to look at facts and law objectively, fair play and justice cannot always be sacrificed at the altar of military discipline. The unjust decision would be subversive of discipline. There must be a judicious admixture of both*."[36] While observing this, the court placed reliance upon the United Kingdom's Court Martial (Appeals) Act, 1968 which has developed procedures to appeal court martial orders in front of an appellate body consisting of ordinary judges such as the judges of the Queen's Bench Division.[37]

In view of this, our justice delivery system in the context of a security concern does appear antiquated when juxtaposed with comparative jurisprudence. Consider the following examples:

1. The Israeli Supreme Court has established an advisory dialogue with the military in order to expeditiously review the validity of

[33]A.K. Gopalan v. Union of India, AIR 1950 SC 27.
[34]R.C. Cooper v. Union of India, (1970) 1 SCC 248.
[35]Maneka Gandhi v. Union of India, (1978) 2 SCC 52.
[36]Prithi Pal Singh Bedi and Ors. v. Union of India (UOI) and Ors., AIR 1982 SC 1413.
[37]Courts-Martial (Appeals) Act, 1968 (United Kingdom).

military actions in domains of counterterrorism campaigns as well as imminent targeted killing operations to ensure that rule of law prevails in all contexts.[38] Such a review is also well accepted within the Israeli armed forces.[39]

2. In the case of *Leghaei v Director General of Security,*[40] the Australian courts reviewed a decision of the immigration minister under the Australian Security and Intelligence Organisation Act of 1979. It was argued by the State that principles of natural justice get trumped in the face of a national security concern. However, the court, disregarding the said argument, rejected the cancellation of the petitioner's visa on the grounds that he was a threat to the national security of the country.

3. In a case involving deportation of an American reporter on the grounds of being involved in spying and publishing sensitive information concerning national security, the courts of United Kingdom did not shy away from reviewing executive action. Lord Denning observed that, "*there is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task. In some parts of the world, national security has on occasions been used as an excuse for all sorts of infringements of individual liberty. But not in England.*"[41] It is now fathomable for courts to stretch its zone of checks into areas which have traditionally been out of its reach. Courts in other jurisdictions have made attempts at ideating innovative strategies to tackle human rights violations even when they occur in the garb of national security. Contrary to this, our Apex Court

[38] DAVID SCHARIA, JUDICIAL REVIEW OF NATIONAL SECURITY 296 (Oxford University Press, 2015).
[39] *Id*.
[40] Leghaei v Director General of Security, (2005) FCA 1576.
[41] R. v. Secretary of State, ex parte Hosenball, (1977) 1 W.L.R. 766, 783 (C.A.).

prefers to quietly step aside. It is time that the court now looks beyond the veil of separation of powers and restores the rule of law in 'disturbed areas'.

B. *Constitutional basis for exercising review jurisdiction over military actions*

Discretion of the executive is neither unfettered nor absolute. Judicial mechanisms ought to be in place to check the abuse of such power and prevent it from being used unconstitutionally.[42] Administrative discretion constitutes two elements – objective and subjective.[43] The courts have always tried to minimise subjective discretion by balancing administrative convenience with the principle of fairness. The reigns of administrative discretion lie in the hands of the courts. Both the High Courts and the Supreme Court exercise the power to review the legality of any administrative action. However, Section 6 of AFSPA states that "*no prosecution, suit or other legal proceeding shall be instituted*" against any member of the armed forces without prior permission of the Central Government. The question now arises whether this provision bars the right of individuals to seek judicial review against the actions of armed forces to secure their fundamental rights.

Article 226 of the Constitution lends sweeping powers to all the High Courts to review the legality of administrative actions. Under Article 227, the High Court has superintendence over all the tribunals in India, except those set up by the armed forces. However, no such bar exists in the language of Article 226 itself. The ability of the legislature to limit the scope of review jurisdiction of the High Court under Article 226 was discussed in *L. Chandra Kumar v. Union of India*.[44] The seven-judge bench of the Supreme Court unanimously

[42]Suman Gupta And Ors v. State of J & K, (1983) 4 SCC 339.
[43]State of Gujrat v. Jamnadas, AIR 1974 SC 2233.
[44]L. Chandra Kumar v. Union of India, AIR 1995 SC 1151.

held that the right to judicial review forms part of the basic structure of the Constitution and such powers cannot be taken in any circumstance from the High Court.

The Supreme Court, under Article 32 of the Constitution, enjoys similar powers. While exercising its jurisdiction under Article 32, it has gone to the extent of awarding extraordinary compensation as a constitutional remedy for a proven violation of a fundamental right. This is especially true in cases where custodial deaths and torture are involved.[45]

Article 33(b) stands to limit the scope of review under Article 32 in its "*application to members of the armed forces charged with the maintenance of public order...*" However, as stated earlier, the court has construed this bar strictly in order to balance the rights of armed personnel with the need for discipline in the army. It held that there should be an overt provision by the Parliament preventing such an exercise of the rights render Article 32 as inoperative.[46] Further, restrictions on jurisdiction should have a direct nexus with ensuring the proper discharge of duties by members of the armed forces.[47]

The constitutional courts of India have carved for themselves an untrammelled zone for review, the scope for which is ever expanding. This zone can certainly not be obstructed by a mere statutory impediment such as Section 6 of the AFSPA. In any case, the said bar is imposed upon implicating members of the armed forces in their personal capacity by way of civil or criminal charges (the usage of the terms 'suit' or 'proceedings' are illustrative to that regard). However, distinct from this is the power of review, which checks their discretion in an official capacity without holding them personally

[45]Nilabati Behra v. State of Orissa, AIR 1993 SC 1960; D.K. Basu v. State of West Bengal, AIR 2015 SC 2887.
[46]Prithi Pal Singh Bedi and Ors. v. Union of India, (1982) 3 SCC 140.
[47]R Vishwan and Ors. v. Union of India and Ors, (1983) 3 SCC 401.

liable. Hence, the said bar has no bearing on the court's constitutionally stipulated power of review.

IV. STANDARD OF REVIEW

In a democratic setup, the executive is bound to exercise discretion within the four confines of law.[48] Recognising this principle, it has been observed that "*there are no unreviewable discretions under the constitutional dispensation*."[49] In order to ensure this, the court while checking the legality of discretion, delves into its reasonableness. *Om Kumar v. Union of India*[50] is a landmark decision in this regard. The primary question facing the court was in respect of the standard of review, which is to be employed to check the legality of an administrative order. The court was mindful that such a standard ought not to stifle the executive's functioning by subjecting each and every action to strict scrutiny, while following basic tenants of fairness. In doing so, the court devised a twin strategy; it held that when a violation of a fundamental right is alleged, the test of proportionality is to be employed. However, in the rest of the cases, the principles of 'Wednesbury unreasonableness' would be sufficient to toe the line of the State. The issue at hand involves the question of national safety and unity. The circumstances call for the court to trudge carefully and diligently. Therefore, a closer look at both the tests is essential to propose a standard for review.

A. *Wednesbury unreasonableness*

The Wednesbury principles of reasonability originate from a United Kingdom case *Provincial Picture Houses v. Wednesbury*

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[48]Ajay Hasia Etc v. Khalid Mujib Sehravardi & Ors., AIR 1981 SC 487.
[49]Election Commission of India v. Union of India and Ors, 1995 Supp (3) SCC 643 ¶8.
[50]Om Kumar v. Union of India, (2001) 2 SCC 386.

Corporation, where the court held that its scope for review is limited to the question of whether relevant facts were considered in reaching the decision.[51] While reviewing executive actions, the courts ought to sit in secondary review. According to *Om Kumar*, this test is to apply in circumstances when there is no violation of fundamental rights.[52]

Wednesbury principles were judiciously employed in *S.R. Bommai v. Union of India* to review the satisfaction of the President while proclaiming breakdown of constitutional machinery under Article 356. The court held that the power of review exists, but is limited to examining the existence and relevance of material which led to a particular proclamation. Furthermore, such a decision should also not be vitiated by *mala fide*, perverse or irrational exercise of power.[53] In *Bommai*, the countervailing public interest was federalism. Even though federalism forms part of the basic structure of the Constitution, it is not part of the fundamental rights under the Constitution. Therefore, the court gracefully toed the line for the State to act by employing the *Wednesbury* principles.

However, unlike *Bommai*, the enquiry at hand involves the pervading question of fundamental rights. Any stint of abuse of power may lead to the gross violation of such rights. Despite the fear of repetition, the provisions of AFSPA are herein produced only to make the obviousness of such violation more lucid.

According to Section 4 of AFSPA, a member of the armed forces, for the purposes of maintaining public order, could kill any person;[54] could arrest without a warrant only on suspicion of causing a cognizable offence;[55] and enter and search any premises on suspicion without any warrant.[56] Therefore, on the face of it, Section 4 of

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[51]Provincial Picture Houses v. Wednesbury Corporation, (1948) 1 KB 223.
[52]Om Kumar, *supra* note 45, at ¶25.
[53]S.R. Bommai v. Union of India, AIR 1994 SCC 1918.
[54] § 4(a) AFSPA.
[55] § 4(c) AFSPA.
[56] § 4(d) AFSPA.

AFSPA takes away life and liberty as guaranteed in Article 21 of the Constitution.

In view of this, the application of Wednesbury principles to check the legality of such actions is thoroughly inconsistent with the existing jurisprudence. Such an application should, therefore, be negated.

B. *Test of proportionality*

The proportionality test subjects government actions to the rigorousness of a three-layered enquiry –

1. if the measure inflicted in achieving the objective is in nexus with the objective itself (the suitability test);
2. if the violation of a fundamental right was the only way in achieving the objective (the necessity test);
3. if the executive action was in proportion with the object ought to be achieved (proportionality test).

Combined, these three constitute the 'strict scrutiny' test, which the court may employ while sitting in primary review. The court has employed the proportionality test to check reasonability of actions undertaken in the name of public order and even security.

Section 144 of the CrPC empowers the executive to direct any person "*to abstain from a certain act or to take certain orders with respect to certain property*". According to Section 144(2), "*in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed ex parte*."

The Supreme Court reviewed the exercise of executive discretion under Section 144 in *Re Ramlila Maidan Incident*.[57] The court held that an order under Section 144 violates both Articles 19 and 21 and

[57]Ramlila Maidan Incident, In re., (2012) 5 SCC 1.

is therefore meant to be utilised in the most extraneous circumstances. It held that not only were the police orders *ultra vires* but also disproportionate. According to the facts of the case, the orders to disperse the assembly in Ramlila Maidan were passed in the midnight, when all the protesters were sleeping. The police used tear gas to evacuate protesters, who were caught by surprise. The court held that such actions had no reasonable nexus with the object of maintaining public order (suitability test failed),[58] there were alternative means of dealing with the same (necessity test failed)[59] and the actions were blown out of proportion (proportionality test failed).[60]

Section 41 of the CrPC vests the power in the police to arrest without a warrant when there is 'reasonable suspicion' of the commission of a cognisable offence. While interpreting the term 'reasonable suspicion', the court has held that it does not mean mere inclination or prima facie belief. Rather, the suspicion ought to be based upon material evidence and reasonableness. [61] Since Article 21 of the Constitution stands to be prejudiced in the exercise of such discretion as stipulated under Section 41, it ought to be utilised in the most heinous circumstances. Thereby, the proportionality test is applied to check the legality of the arrest. Post *A.K. Gopalan*, proportionality has also been applied liberally in cases concerning preventive detention.[62] The court has also delved into the question of the legality of a

[58]*Id.* at ¶177 [reads as, "provisions of Section 144 CrPC cannot be resorted to merely on imaginary or likely possibility or likelihood or tendency of a threat"].
[59]*Id.* at ¶179 [reads as "…I am also unable to understand as to why this enforcement could not even wait till early next morning"].
[60]*Id.* at ¶179 [reads as "another important facet of exercise of such power is that such restriction has to be enforced with least invasion."].
[61]Joginder Kumar v. State of Uttar Pradesh and Ors., (1994) 4 SCC 260.
[62]A.K. Roy v. Union of India, AIR 1982 SC 710; State of Gujarat v. Adam Kasam Bhaya, AIR 1981 SC 2005.

particular detention and eventually held such detention invalid in law, having no connection with questions of national security.[63]

A question now arises – is the proportionality test amenable to review military actions under AFSPA? The Gauhati High Court answered this question in the affirmative, when it courageously reviewed the validity of the disturbed area proclamation in the region and held that there existed no material to justify application of AFSPA in the concerned states (rendering the suitability test failed).[64]

The test of proportionality fits best for reviewing the discretion of the armed forces while they act in aid of the civil powers. As noted earlier, the forces are themselves vested with the rights to arrest and detain without a warrant, shoot to kill, etc. These powers are aggravated in nature, when compared with the powers which already subside with the civil authorities, owing to the countervailing public interest, which involves security and unity of the State. However, such powers are ought to be used only when there is an absolute necessity to do so, for reasons which are well founded in objective evidence. These measures ought to be used as a last resort. When these powers are used as shortcuts to justify a larger security interest, there occur gross violations of human rights. Therefore, the extension of the review power of the court over armed forces is necessary to check any abuse of power.

V. CONCLUSION

On August 20, 2018, more than 300 serving members of the armed forces petitioned in the Supreme Court to put an end to prosecution of

[63]G.M. Shah v. State of Jammu Kashmir, AIR 1980 SC 494, ¶9.
[64]Peoples Union for Human Rights v. Union of India and Ors., AIR 1992 Gau 23, ¶61.

armed personnel in fake encounters case.[65] This legal battle is replete with propaganda and symbolic nationalism. On one hand are those who are fiercely jolting against impunity and denial of basic human rights, whereas on the other hand are those who, in their maudlin stupor of jingoism, place blind faith in the judgment of the armed forces.

The approach of this article is to mollify this very acerbic debate by shifting its axis from the question on personal criminal liability to the liability of the State itself. It recognises the existence of two countervailing duties – ensuring security of the State as well as recognising fundamental rights of its citizens. The approach undertaken by the government to indicate its commitment towards both is to create laws which bind the armed forces by a strict code of conduct. In doing so, it vindicates itself from accountability.

This article argues that High Courts and the Apex Court possess the jurisdiction to review these by-laws along with the actions undertaken within such regimes. While acting in aid of civil authorities, the armed forces act in *de-facto* authority and are liable to the same checks and balances which all governmental authorities are subjected to. Since a breach of duty by armed personnel could lead to a gross violation of human rights, the standard of such review ought to be kept high. By doing so, the courts will be able to bring the disturbed areas within the fold of constitutionality.

This excerpt is an arduous plea for the restoration of rule of law in disturbed areas. The existence of AFSPA is a debauchment in its name. When questions of national security and human rights stand face to face, the principle of rule of law always trumps the debate

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[65] Ankit Prasad, *UNPRECEDENTED: Over 300 Serving Army men, In Personal Capacity, To Ask Supreme Court If Soldier's Discretion Can Be Put Under Legal Scrutiny,* REPUBLIC TV (Aug. 14, 2018 10:48 AM), https://www.republicworld.com/india-news/general-news/unprecedented-over-300-serving-armymen-in-personal-capacity-to-ask-supreme-court-if-soldiers-discretion-can-be-put-under-legal-scrutiny.

trying to strike the perfect balance. This discussion can now be called off, but in the words of Justice H.R. Khanna – "*A state of negation of rule of law would not cease to be such a state because of the fact that such a state of negation of rule of law has been brought about by a statute. Absence of rule of law would nevertheless be absence of rule of law even though it is brought about by a law to repeal all laws*."

FEMALE GENITAL MUTILATION: HOW ISLAM AND FUNDAMENTAL RIGHT TO RELIGION STAMP OUT AND CONFUTE IT

Deeksha Sharma[*] *& Kratika Indurkhya*[**]

Abstract

Is the abolition of female genital mutilation (FGM) another textbook feminist issue or does it merit a human rights violation perspective? Do religious crudeness and ignorance act as barriers to stamp out this practice in India? Should we continue to avoid doing anything about it on the grounds that it is a sensitive, religious issue beyond the realm of the judiciary and the Parliament? This article attempts to deal with all such questions about FGM. In India it is practiced by the Dawoodi Bohra community and according to them, FGM is a prerequisite for a woman to be truly female. But there is no valid basis for the belief that the procedure was advocated or approved by Mohammed, nor can it be considered as an essential part of the Islamic faith to that end. Hence, the research analyses the sources of Islam and substantiates that a barbaric cultural practice

[*] Deeksha Sharma is a Second-Year Student at Dr. Ram Manohar Lohia National Law University, Lucknow. The Author may be reached at deeksha.9814@gmail.com.

[**] Kratika Indurkhya is a Second-Year Student at Dr. Ram Manohar Lohia National Law University, Lucknow. The Author may be reached at kratika.ind@gmail.com.

with a religious mask should not get protection under Article 25 of the Constitution. FGM causes bodily degradation, violating Article 21 of the Constitution. Additionally, FGM is classified as a "usage", and should be held void under Article 13 to the extent it violates the fundamental rights. However, whilst there is a violation of a number of human and gender rights, both in international and national legal framework, in reality, there has been no comprehensive study of the epidemiology of FGM in India, and thus no reliable statistics is available on the number of girls mutilated. Keeping in mind the "protective discrimination" under Article 15(3), "reasonable classification" under Article 14 and the Apex Court's discretionary power under Article 142, some propositions have been recommended.

I. INTRODUCTION

"*Three women were holding down my arms and legs, and another was sitting right on my chest, covering my mouth. They try to put pressure on you, so you don't cry for the next girl to hear…, and the emotions that they had — so empty, like they didn't see me as a human being.*"[1]

[1]Tatenda Gwaambuka, *Stop Butchering our Girls, Genital Mutilation is Torture,* (Jan. 10, 2019), https://www.africanexponent.com/post/8907-ending-female-genital-mutilation.

The label 'mutilation' tends to rule out communication and disregards and fails to respect the shocking experiences of girls as above.[2] It robs girls and women of their decision-making power, leaves an everlasting effect on them, transgresses their autonomy and controls their lives.[3] This practice of circumcising a girl which affects her womanhood is a serious concern and ought to be condemned by all. The World Health Organization (hereinafter, "**WHO**") defines female genital mutilation/ cutting (hereinafter, "**FGM**" or "**FGM/C**") as "*any procedure that involves partial or total removal of the external female genitalia or other injury to the female genital organs for cultural or non-therapeutic reasons*."[4] This practice is segregated into four main categories:

(i) "*partial or total removal of the clitoris and/or the prepuce (clitoridectomy);*

(ii) *partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision);*

(iii) *narrowing of the vaginal orifice with creation of a covering seal by cutting and positioning the labia minora and/or the labia majora (infibulation);*

(iv) *Other harmful procedures to the female genitalia for non-medical purposes, for example pricking, piercing, incising, scraping and cauterization*."[5]

[2]Lane SD & Rubinstein RA, *Judging the other: responding to traditional Female Genital Surgeries*, 26(3) HASTINGS CENT REP. 31–40 (1996).

[3]Sorcha Pollak, *End FGM website launched to warn of dangers of practice*, (Sept. 7, 2018), https://www.irishtimes.com/news/health/end-fgm-website-launched-to-warn-of-dangers-of-practice-1.2965865.

[4]World Health Organization, Department of Reproductive Health and Research, *Eliminating Female Genital MutilationAn interagency statement*, (July 20, 2018), https://www.irishtimes.com/news/health/end-fgm-website-launched-to-warn-of-dangers-of-practice-1.2965865.

[5]*Id.*

Rationalizations given by the proponents for the continuation of FGM/C include preservation of ethnic identity, femininity, female purity/virginity and family honour, maintenance of cleanliness and health, assurance of women's marriage ability,[6] and preventing the clitoris growing long like the penis.[7] FGM/C is regarded as making females 'clean and beautiful'.[8] By removing genital parts, it is considered that 'masculine' parts such as the clitoris,[9] or as also in the case of infibulations, the 'smoothness' achieved is equivalent to being beautiful. On the contrary, organizations such as the WHO have recognized FGM as a human rights violation.[10] It is a violation of the rights of the child as it is also carried out on minors, and a violation of the right to the 'highest attainable standard of health'[11] and 'bodily integrity of a female'.[12] It is an expression of gender inequality and discrimination, "*related to the historical suppression and subjugation of women*".[13]

In India, advocate Sunita Tiwari began the fight against FGM/C in 2017 and filed a public interest litigation (hereinafter, "**PIL**") seeking

[6]Gage A.J. & Van Rossem R., *Attitudes toward the discontinuation of female genital cutting among men and women in Guinea,* 92(1) INT. J. GYNECOL. OBSTET. 92–96 (2006).

[7]Eke & Nkanginieme, Female Genital Mutilation: A global bug that should not cross the millennium bridge, 23 WORLD J. SURG. 1082-1086 (1999).

[8]World Health Organisation, *Female Genital Mutilation*, (Oct. 19, 2018), https://www.who.int/en/news-room/fact-sheets/detail/female-genital-mutilation.

[9]Talle A., *Transforming Women into Pure Agnates: Aspects of Female Infibulation in Somalia,* CARVED FLESH/CAST SELVES: GENDERED SYMBOLS AND SOCIAL PRACTICES 88(1993).

[10]World Health Organization, UNICEF & United Nations Population Fund, *Female genital mutilation: a joint WHO/UNICEF/UNFPA statement*, (July 5, 2018) http://www.who.int/iris/handle/10665/41903.

[11]Convention on the Rights of the Child,1989, art. 24.

[12]World Health Organization, UNICEF & United Nations Population Fund, *Female genital mutilation: a joint WHO/UNICEF/UNFPA statement*, (July 5, 2018), http://www.who.int/iris/handle/10665/41903.

[13]Ontario Human Rights Commission, *Policy on Female Genital Mutilation (FGM)*, OHRC 7(2000).

a ban on this practice,[14] after which a three-judge bench referred it to a five-judge bench. In India, FGM is practiced by the *Dawoodi Bohras*, the largest sect in the Bohra community, which is in turn a Shia sect of Islam. Being practiced by this community specifically, the Apex Court in its first proceeding earlier this year asked for responses from the ministry, as well as governments in the states of Gujarat, Maharashtra, Rajasthan and Madhya Pradesh, where the community is largely based.

II. FEMALE GENITAL MUTILATION: THE LEGAL PERSPECTIVE

One of the biggest misconceptions about FGM/C is that it is sanctioned by Islam. However, "*there can be no link between FGM/C and Islam, as FGM predates it*."[15] In fact, Islam contradicts it as Quran says, "*touch her not with harm, lest the penalty of a great day seize you*."[16]

Regardless, FGM is a deeply imbedded cultural practice. Culture is defined as "*the body of learned beliefs, customs, traditions, values, preferences, and codes of behaviour commonly shared among members of a particular community*".[17] Sometimes cultural practices, like FGM may acquire Islamic justification overtime. It was the Supreme Council of Al-Azhar, Cairo that ruled that FGM had "*no*

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[14]Debayan Roy, With no Laws, India a Hub of Female Genital Mutilation for Expats, Foreigners: Report, News 18 (Feb. 5, 2018) ,https://www.news18.com/news/india/with-no-laws-india-a-hub-for-female-genital-mutilation-on-expats-foreigners-report-1651551.html.

[15]Barstow DG., *Female genital mutilation: the penultimate gender abuse*, 23(5) CHILD ABUSE NEGL. 501-510 (1999).

[16]*The Qur'an* 26:156 Translated by Abdullah Yusuf Ali, (King Fahd Holy Quran Printing Complex), (1987).

[17]WHO, *FGM programmes to date: what works and what doesn't, a review*, WHO/CHS/ WMH 99 (1999).

basis in core Islamic law or any of its partial provisions, it is harmful and should not be practiced,"[18] when a teenage Egyptian girl died during the procedure. Besides this, for an action to be religious under Islam, it needs to have a basis in the fundamental sources of Islamic guidance[19] that are, the Quran, *Sunnah*, *Ijmah* and *Qiyas*. It is thus discussed herein that due to the lack of mention of FGM in these sources, it fails to be a religiously sanctioned practice and is hence void of protection provided under Article 25 of the Constitution.

A. *No protection under Article 25 and 26 of the Indian Constitution*

Although *Dawoodi Bohra* is a religious denomination,[20] it has to pass the subjections of "public order, morality and health"[21] or get protection of "essential religious practice" under Article 25 and "religious denomination" under Article 26 under the Constitution. Besides this, Article 25 is explicitly subjected to other provisions of Part III. Although Article 26 is not, it does not lead to the conclusion that the freedom of a religious denomination exists as a discrete element, divorced from the others.[22] It was held in the *R.C. Cooper*[23] and *A.K. Gopalan*[24] cases that fundamental rights do not exist in water tight compartments but are open textured and fluid in nature.

The Law Commission in its report of August, 2018 has stated that "*at the same time, while freedom of religion must be protected in a*

[18] *Fresh progress toward the elimination of female genital mutilation and cutting in Egypt*, UNICEF (June 11, 2018), https://www.unicef.org/media/media40168.html.

[19] AYATULLAH MURTADHA MUTAHHARI, JURISPRUDENCE AND ITS PRINCIPLES 11-14 (2014).

[20] Sardar Syedna Taher Saifuddin v. The State of Bombay, (1962) Suppl. 2 SCR 496.

[21] INDIA CONST. art. 25; INDIA CONST. art. 26.

[22] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC 1690.

[23] R.C. Cooper v. Union of India, (1970) 1 SCC 248.

[24] A.K. Gopalan v. State of Madras, 1950 SCR 88.

secular democracy, it is important to bear in mind that a number of social evils take refuge as religious customs. To seek their protection under law as religion would be a grave folly. For these practices do not conform to the basic tenets of human rights nor are they essential to religion. While even being essential to religion should not be a reason for a practice to continue if it is discriminatory."[25]

Although under Article 25(1) of the Indian Constitution, every person has the right to free exercise of religion, it will be subjected to any law made by the State in furtherance of social welfare and reform of all, under clause (2)(b) of the same article.[26] Articles 25 and 26 do not give the absolute or unfettered right to religion, but are subject to reform or social welfare by appropriate legislation of the State.[27]

No fundamental right can exist in isolation.[28] One fundamental right of a person may have to coexist in harmony with the "reasonable and valid" exercise of power by the State with respect to the directive principles, in the interests of social welfare as a whole.[29] Herein, the practice of FGM in fact conflicts with Article 47[30] of the Constitution that speaks of the "*duty of the State to raise the level of nutrition and the standard of living and to improve public health*" and Article 39[31] that speaks of certain policies to be followed by the State. Therefore, it is clear that the directive principles mandate the State to do away

[25]Law Commission of India, *Consultation Paper on reform of family law,* 6 (31 Aug. 2018).

[26]State of Bombay v. Narasu Appa Mali, AIR 1952 Bom. 84.; Sanjib Kumar v. Saint Paul's College, AIR 1957 Cal. 524.

[27]A.S. Narayana Deekshitulu v. State of A.P., (1996) 9 SCC 548.; Sri Venkataramana Devaru of Venkataramana Temple v. State of Madras, 1956 SC OnLine Mad. 137.

[28]Acharya Maharajshri Narendra Prasadji Anand Prasadji Maharaj v. The State of Gujarat, 1975 SCR 317.

[29]Church of God in India v. K.K.R. Majestic Colony Welfare Association, AIR 2000 SC 2773.

[30]INDIA CONST. art. 47.

[31]INDIA CONST. art. 39.

with FGM. Additionally, Article 25(2)(b) allows the State to enact social welfare legislation to the derogation of religious freedoms.

The paper further discusses how the aforementioned conditions are not met by FGM and thus, the practice cannot be protected under the Constitution.

B. *The essential religious practices (hereinafter, "**ERP**") test*

To be treated as a part of the right to religion, the pre-requisite is that it should be regarded as an essential and integral part by the said religion.[32] The Supreme Court, in answering what constitutes as an ERP of a religion in the case of *Commissioner vs. Acharya Avadhuta*[33] held that "*essential parts of religion means the core beliefs upon which a religion is founded. Essential religions practices mean those practices that are fundamental to follow in a religious belief. It is such permanent essential parts which are protected by the Constitution.*" "*Any religious practice which is not an integral part of the religion is not protected under Art. 25.*"[34] In order for an activity or practice to be deemed an ERP, it must be treated by the particular religion as an essential or integral part of its profession or practice.

The Supreme Court in the *Sri Shirur Mutt*[35] judgment held that an "*essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.*" To determine this, the court takes into consideration the conscience of the community and the tenets of the religion concerned. "*In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by*

[32]M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1431 (2015).
[33]Commissioner of Police v. Acharya Jagdishwarananda Avadhuta, (2004) 12 SCC 770.
[34]Javed v. State of Haryana, AIR 2003 SC 3057.
[35]Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005.

a blind application of the formula that the community decides which practice in an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion."[36]

Lastly, it is the court's duty as the final arbiter of the Constitution to uphold the cherished principles of the Constitution and not to be remotely guided by the majoritarian view or popular perception.[37] It must do so keeping in mind the principle stated in the *Sabarimala* judgment, "*the Constitution is not merely a static document containing a set of rules or laws through which the state governs its people, it is much more. The Constitution is a phenomenon, dynamic and ever evolving in its contours. The Constitution was born with a task of radical transformation of the position of an individual as the focal point of a just society, a task of protecting individuals who have been subordinated by the society in innumerable ways, be it by patriarchy, casteism, communalism or classism. It tends to raise them to an equal pedestal so as to ensure an egalitarian society governed by rule of law*."[38] It is only through a transformative vision that the cherished principles of the Constitution are sustained.

C. *FGM cannot be an ERP*

[36]*Id.*; Durgah Committee Ajmer v. Syed Husaain Ali & Attorney- General for India, (1962) 1 SCR 383.
[37]Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[38]*Supra* note 22.

The Quran is the "*religious text of Islam, which Muslims believe to be a revelation from God*"[39] and it was "*verbally revealed by God to Muhammad through the angel Gabriel*".[40] FGM is not mentioned in the Quran.[41] There are many verses that strongly criticize an act that affects the human body in a negative way, and hinders this creation without validation. For example, verse 16:64 says "*and We sent down the Book to thee for the express purpose, that thou should make clear to them those things in which they differ, and that it should be a guide and a mercy to those who believe*."[42]

Sunnah refers to "*the traditions and way of life of Prophet Muhammad which are obligatory for Muslims*" which are of high importance, as Allah himself ordered Muslims to follow him. It has three categories[43] consisting of his approvals, deeds and words. The first two categories find no evidence of FGM/C; rather, they talk about male circumcision. For example, "*there is proof, that his two grandsons, Al-Hassan and Al-Hussein, were circumcised when they were 7 days old.*"[44] It is the *Hadiths*, which fall under the third category of *Sunnah*, that have a mention of FGM.

Although *Hadiths* are a part of *Sunnah*, they lack authenticity. Not everything attached to the Prophet should be considered at face value, but must be first confirmed to ascertain their authenticity. Scholars

[39] NASR SEYYED HOSSEIN "QUR'ĀN", ENCYCLOPÆDIA BRITANNICA ONLINE, (2007).
[40] GRAY LAMBERT, THE LEADERS ARE COMING! 287 (WESTBOW PRESS, 2013).
[41] BARBARA CRANDALL, GENDER AND RELIGION: THE DARK SIDE OF SCRIPTURE (2012); Abdulrahim A. Rouzi, *Facts and controversies on female genital mutilation and Islam*, 18(1) EUR. J. CONTRACEP. REPR. 10-14 (2013).
[42] *The Qur'an* 16:64 Translated by Abdullah Yusuf Ali, (King Fahd Holy Quran Printing Complex), (1987).
[43] Ibrahim Lethome Asmani Maryam Sheikh Abdi, *De-linking Fe male Genital Mutilation/Cutting from Islam*, *Frontiers in Reproductive Health*, USAID 7 (2008).
[44] AL-BAIHAQQY & SUNAN-AL-KUBRA, THE MAJOR TRADITIONS (9th ed.).

with proficiency look at the content and chain of transmitters[45] to ascertain the authenticity. The Grand Mufti of Egypt (who holds the title for the highest religious legal figure in a country practicing Sunni Islam) Muhammad Sayyid Tantawi declared that *Hadith*s on FGM were unreliable,[46] and the same was held by a foremost expert in Islamic jurisprudence (*fiqhi*), Ash-Shaukany, in his book, *Nail-al-autwar*.

Hadiths, like *Hadith of Ummu-Attiya* and *Hadith of Al-Hajjaj ibnu Arta* have been declared weak as their chain of transmitters (*sanad*)[47] is weak and there are conflicts in their meaning. According to the science and history of a *Hadith*, the Prophet does not use unclear words on any sensitive matter.[48] In the first aforementioned *Hadith*, the Prophet told Madina, a woman called Ummu-Attiyah, "*O Umm Attiyyah, ashimmi and do not exaggerate; as doing so will preserve the fairness of the woman's face and satisfy the husband.*"[49] The term "ashimmi" has multiple meanings. However, proponents of FGM take it to mean cutting a small part of the clitoris, although no such meaning is attached to it.[50] In the second one, the Prophet said, "*alkhitaanu ('circumcision') is sunnah for men and an honour (makrumah) for women.*"[51] Here, regardless of its authenticity, the *Hadith* has dual interpretations for the word "*makrumah*"– the first being of the supporters of FGM who consider female circumcision an honour for women and the second meaning adopted by scholars who

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[45]Those who received from the Prophet (PBUH) and transmitted the Hadith to the recorder.

[46]SHEHABUDDIN, ELORA (ED.), "FATWA", IN SUAD, JOSEPH AND AFSANEH, NAJMABADI: ENCYCLOPEDIA OF WOMEN AND ISLAMIC CULTURES: FAMILY, LAW AND POLITICS, VOL. II, (2005).

[47]*Id.*

[48]Abdi MS, *A religious oriented approach to addressing FGM/C among the Somali community of Wajir*, NAIROBI POPULATION COUNCIL 24 (2007).

[49]Ibrahim Lethome Asmani Maryam Sheikh Abdi, *De-linking Fe male Genital Mutilation/Cutting from Islam, Frontiers in Reproductive Health*, USAID 7 (2008).

[50]*Supra* note 43.

[51]Sunan Abu Dawud, Adab 167 (translated by Yaser Qadhi) (2014).

are against this practice, that circumcision is sunnah for men, and when a woman is married to a circumcised man, it is an honour for her. Hence, the meaning of the word "*makrumah*" is not clear.[52] Therefore, risking fundamental human rights of an individual, that too a class provided with protective discrimination under Article 15(3) of the Constitution, on such basis does not stand.

Another *Hadith* which talks about circumcision uses the words "*al-khitaan*" and "*al-khifaad*". There is no mention of female circumcision in this *Hadith*[53] as "*al-khitaan*" is not the term used for female circumcision. Moreover, it also states some things apply to only men. *Hadith* of *Sunan Abu Dawud* which mentions FGM,[54] lacks authenticity as Abu Dawood, the compiler himself, has commented that its chain of transmitters is not strong.[55]

The *Hadith* of *Ibn Qudamah* said, in the book *al-Mughni*:[56] "*Circumcision is obligatory for men, and it is an honour for women, but it is not obligatory for them.*" This is the opinion of many scholars. For example, (Imam) Ahmad said, "*for men it is more strictly required, but for women it is less strictly required*", thereby stating that it is not mandatory. Further, it has been held by the Indian Supreme Court that in order to get the protection of Article 25(1), the 'practice' in question must be *essential*,[57] or mandatory as distinguished from *optional religious practice*.[58]

In Islam, the expression "*ijma'a*" refers to the "*consensus of the views of scholars of the time*". It is only when this consensus is achieved or harmony obtained on a particular religious issue, and there is no

[52]FIQH AL-ISLAM WA ADILLATIHI 3/741.
[53]Sahih Muslim 3:684 (translated by Hafiz Abu Tahir Zubair Ali Zai).
[54]5 Sunan Abu Dawud, Book 41, Number 5251 (translated by Yaser Qadhi) (2014).
[55]*Id.*
[56]Ibn Qudamah, Al-Mughani.
[57]Quareshi v. State of Bihar, AIR 1958 SC 731.
[58]State of W.B. v. Ashutosh, AIR 1995 SC 464.

conflict with the holy book Quran, that it becomes a foundation for backing the issue. Some scholars have forbidden it.[59] But some have supported it.[60] Also, many Muslim scholars believe that FGM is non-Islamic.[61] Therefore, a consensus cannot be formed and FGM cannot be read within this source of Islam.

Lastly, *Qiyas* references "*analogical reasoning as applied to the deduction of juridical principles from the Quran and the Sunnah.*"[62] However in the present scenario, no analogy can be accepted as the Quran and *Sunnah* do not provide for the same.[63]

Hence, it is concluded that FGM cannot be protected under Article 25 of the Indian Constitution as mere fact of its association with the practice of a religion, even if honoured since time immemorial, is not conclusive test of its essential character.

Islamic law prohibits clitoridectomy, infibulations and any genital mutilation which ruins the woman's sexual relations. All the verses strongly support the contention that the Quran condemns any harm done to Allah's creation. The practice of FGM is very harmful to the female body and mind.[64]

Since the following subjections are fulfilled, FGM/C fails to get protection under Article 25 and 26 of the Constitution.

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[59] *In Mauritania, progress made in ending female genital mutilation/cutting*, MIRIAM AZAR (Aug. 19, 2018), https://www.unicef.org/infobycountry/mauritania_66159.html; Bob Trevelyan, *Mauritania fatwa bans female genital mutilation*, B.B.C. NEWS (Jan. 18, 2010), http://news.bbc.co.uk/2/mobile/africa/8464671.stm.

[60] Mordechai Kedar, *Islam and 'Female Circumcision: The Dispute over FGM in the Egyptian Press*, MED. LAW 403–418(2002).

[61] El-Damanhoury, *Editorial: The Jewish and Christian View on Female Genital Mutilation*, AFJU127–129 (2013).

[62] MORLEY, DIGEST OF INDIAN CASES 217 (1850).

[63] Dr. Mohamed Selim Al-Awa, *FGM in the context of Islam,* International Federation of Islamic Chambers 2.

[64] WHO, *Sexual and Reproductive Health*, (July 16, 2018), http://www.who.int/reproductivehealth/topics/fgm/health_consequences_fgm/en/.

D. *Violation of other provisions of Part III*

FGM violates Article 14, 15 and 21 of the Indian Constitution, along with various international conventions. It violates Article 14 and 15 as the United Nations High Commissioner for Refugees (hereinafter, "**UNHCR**") considers FGM to be "*a form of gender-based violence that inflicts severe harm, both mental and physical, and amounts to persecution*".[65] Article 21 being the most fundamental of all rights, is discussed herein in detail.

a) *Right to life*

In *Venkataramana Devaru*,[66] Venkatarama Aiyar J. observed that the meaning of the phrase "*subject to the provisions of this Part*" in Article 25(1) and concluded that the other provisions of the Part would "prevail over" and would "control the right conferred" by Article 25(1).

"*It is the fundamental right of everyone in this country… to live with human dignity free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life and breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the*

[65] UNHCR, *Guidelines on International Protection No. 1: Gender-related persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, (July 18, 2018), http://www.unhcr.org/refworld/docid/3d36f1c64.html.

[66] Sri Venkataramana Devaru v. State of Madras, 1958 SCR 895.

Central Government nor any State Government-has the right to take any action which will deprive a person of the enjoyment of these basic essentials."[67]

Article 21 of the Constitution provides that, "*no person shall be deprived of his life or personal liberty, except according to procedure established by law.*" The Supreme Court in *State of Punjab v Ram Lubhaya Bagga*,[68] observed "*the right of one person correlates to a duty upon another, individual, employer, government or authority. Hence, the right of a citizen to live under Article 21 casts an obligation on the state.*" "*The sanctity of human life is probably the most fundamental of the human social values. It is recognized in all civilized societies and their legal system and by the internationally recognized statements of human rights.*"[69]

The right to life includes the right to live with human dignity.[70] Although no exact definition of dignity exists, it refers to the inherent and inseparable value of every individual, which is to be duly appreciated. It cannot be taken away. "*Every human being has dignity by virtue of his existence.*"[71] Moreover, a "*hygienic environment is an integral part or facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment.*"[72]

The duty of the State does not only extend to protecting human dignity, but also in facilitating it by taking positive steps in that direction, and securing the welfare of the people.[73]

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[67]Bandhua Mukti Morcha v. Union of India, 1984 AIR 802.
[68]State of Punjab v. Ram Lubhaya Bagga, AIR 1998 SC 1703.
[69]R(Pretty) v. DPP, (2002) 1 All ER 1.
[70]Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[71]M. Nagaraj v. Union of India, (2006) 8 SCC 212.
[72]Virendra Gaur and Ors v. State of Haryana And Ors., (1995) 2 SCC 577.
[73]Paschim Banga Khetmazdoor Samity v. State of West Bengal, (1996) 4 SCC37.

In Article 21, the term "life" means something more than mere animal existence.[74] The provision "*prohibits the mutilation of the body by amputation of leg or the pulling out of eye, or the destruction of any other part of the body by which the soul communicates with the outer world.*"[75] But in order to constitute "deprivation of life", there must be some "direct, overt and tangible" act that threatens the life of members of a community, as against "vague or remote acts" that threaten the quality of life of people at large. This requirement is satisfied in the present case.[76]

The Supreme Court in a landmark judgment[77] held that the "*right to life included the right to lead a healthy life so as to enjoy all the abilities of the human body in their prime conditions.*" According to WHO, "*health is a state of complete physical, mental and social wellbeing and not merely the absence of disease*."[78]

Articles 2, 3 and 5 of the Universal Declaration of Human Rights, 1948 (hereinafter, "**UDHR**") and Articles 6 and 9(1) of the International Covenant on Civil and Political Rights, 1966 (hereinafter, "**ICCPR**") state that everyone has a right to life, liberty and security. UDHR, under Article 25(1) also ensures a standard of living, adequate health, including medical care, and notes that persons shall not be discriminated or subjected to torture or to cruel, inhuman or degrading treatment or punishment.

b) *Right against discrimination*

[74]Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295.
[75]*Id.*
[76]DR. DD BASU, COMMENTARY ON THE CONSTITUTION OF INDIA (LexisNexis, 9th ed. 2016.)
[77]Sunil Batra v. Delhi Administration, AIR 1980 SC 1579.
[78]Preamble to the Constitution,1948 of the World Health Organization as adopted by the International Health Conference, New York.

FGM violates Article 14 and 15 of the Indian Constitution which provide for equality before law and prohibition of discrimination on the basis of sex, respectively. "*FGM/C, ranging from Type 1 to infibulations, i.e., Type 4 results in violence against women and is a form of gender-based discrimination.*"[79] Equality before law declares everyone to be equal before law, and no one can claim special privileges.[80] This is violated as there exists a marked differentiation between males and females. FGM/C is done to prevent women from having sexual pleasure[81] and women not performing FGM/C, are perceived as not worth being married to.[82] Further, men have preferred chaste women in order to ensure their paternity.[83] The UNHCR considers "*FGM to be a form of gender-based violence that inflicts severe harm, both mental and physical, and amounts to persecution.*"[84]

The Convention on the Elimination of All Forms of Discrimination against Women, 1979 defines discrimination as -

"*Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their*

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[79]Shweta Sengar, *With no Laws, Extensive Female Genital Mutilation Among Muslim Bohra Community in India is Scarring Women for Life*, (Sept. 15, 2018), https://www.indiatimes.com/news/india/with-no-laws-extensive-female-genital-mutilation-among-muslim-bohra-community-in-india-is-scarring-women-for-life-339205.html.

[80]State of U.P. v. Deoman Upadhyaya, AIR 1960 SC 1125.

[81]Michael Owojuyigbe, *Female genital mutilation as sexual disability: perceptions of women and their spouses in Akure, Ondo State, Nigeria*, (Sept. 15, 2018), https://www.tandfonline.com/doi/full/10.1080/09688080.2017.1331685.

[82]Omer-Hashi, Kowser, H. &Entwistle, *Female Genital Mutilation; Cultural and Health issues, and their implications for Sexuality counseling in Canada*, CJHS 137-147 (1995).

[83]DALY & WILSON, SEX, EVOLUTION &BEHAVIOUR (1978).

[84]UNHCR, *Guidelines on International Protection No. 1: Gender-related persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, (July 12, 2018), http://www.unhcr.org/refworld/docid/3d36f1c64.html.

marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." It calls on countries to "embody the principle of equality", to adopt appropriate legislation "prohibiting all discrimination against women" and for the modification of social and cultural patterns to attain this view.

1. Other legal rights available to the victims

(a) Torture and inhuman, degrading and cruel treatment and punishment grossly violate human dignity and under Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, each state party shall undertake to prevent such acts in its jurisdiction. The UDHR (although not justiciable) and the ICCPR prohibit such acts in Articles 5 and 7 respectively.

(b) The state party under the Convention on the Rights of the Child, 1989 (hereinafter, "**CRC**") is not only obliged to respect the rights of a child under this convention but also take "*appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse.*" Moreover, in all of a state party's actions, the best interests of a child should be its primary concern. Furthermore, Article 16 of the CRC provides for the right to privacy and right to protection of law against arbitrary interference with such right. The Quran clearly states that Allah favours children over many of the creations[85] and thereby children of the Bohra community must be granted protection.

(c) Besides this, Sections 320 (causing grievous hurt), 323 (punishment for voluntarily causing hurt), 324 (voluntarily

[85]*The Qur'an* 2:122 Translated by Abdullah Yusuf Ali, (King Fahd Holy Quran Printing Complex), (1987).

causing hurt by dangerous weapons or means) and 325 (punishment for voluntarily causing grievous hurt) of the Indian Penal Code, 1860 (hereinafter, "**IPC**") are also violated by the practice of FGM.

Thus, violation of Part III of the Indian Constitution results in the law in force being void under Article 13 of the Constitution. Herein, FGM is a "usage". As according to the Black's Law dictionary, a "usage" is merely a habitual practice. "Usage" denotes something that people are accustomed to do. A particular usage may be more or less widespread. It may prevail throughout an area, and the area may be small or large – a city, a state or a larger region. A usage may prevail among all people in the area, or only in a special trade or other group."[86] It is a practice long continued.[87] Therefore, FGM being a practice accustomed amongst the *Dawoodi Bohras*, in continuation before the advent of Islam very well classifies as a usage. Lastly, FGM as a usage falls within the ambit of "laws in force" as was held in *Narasa Appa Mali*[88] that the definition of "laws in force" in Article 13(1) also includes within its ambit customs and usages.

Hence by virtue of Article 13(1) of the Constitution, FGM would stand void as it violates Part III of the Indian Constitution.

E. *It is inconsistent with public order, morality and health*

The practice of FGM is a very barbaric and derogatory practice against the women. Not only does FGM have no health benefits but also there can be detrimental long-term and short-term physical, sexual and psychological ramifications as a result of removing and damaging, or interfering with the healthy and normal female genital

[86]BRYAN A. GARNER, BLACK'S LAW DICTIONARY 1680 (2004).

[87]Commr., Hindu Religious & Charitable Endowments (Admn.) v. Vedantha Sthapna Sabha, (2004) 6 SCC 497.

[88]State of Bombay v. NarasaAppa Mali, AIR 1952 Bom 84.

tissue.[89] Traditional doers, with slight to no medical training use a variety of tools like "*blades and knives, and do not use anesthesia. An estimated 18% of all FGM is done by health-care providers, who use surgical scissors and anesthesia*."[90] Studies show that FGM is carried out without anesthesia, antiseptics or antibiotics[91] and surgery is carried out using sharp rocks, razor blades, broken glass.[92] We also need to realize that male circumcision does not negatively affect the human body, unlike female circumcision[93] and is also religiously justified.[94]

In December, 2012, the UN General Assembly unanimously banned the customary female mutilation which is now dubbed a "harmful traditional practice" rather than a "heathen custom".[95] The American College of Obstetricians and Gynaecologists[96] and the College of Physicians and Surgeons of Ontario, Canada,[97] after opposing FGM, instructed their members to refrain from performing the procedure of mutilation. In 2006, the Council on Scientific Affairs of the American

[89] *Sexual And Reproductive Health*, WHO (May 7, 2018), http://www.who.int/reproductivehealth/topics/fgm/health_consequences_fgm/en/.
[90] *Global strategy to stop health-care providers from performing female genital mutilation*, UNFPA, UNHCR, UNICEF, UNIFEM, WHO, FIGO, ICN, IOM, MWIA, WCPT, WMA, (Sept. 15, 2018), http://apps.who.int/iris/bitstream/handle/10665/70264/WHO_RHR_10.9_eng.pdf; sequence=1.
[91] James Whitehorn et al., *Female genital mutilation: cultural and psychological implications*, (Aug. 25, 2010), https://www.tandfonline.com/doi/abs/10.1080/14681990220121275
[92] *Id.*
[93] *Technical Report: Male Circumcision,* PEDIATRICS (Sept. 10, 2018), http://pediatrics.aappublications.org/content/pediatrics/130/3/e756.full.pdf.
[94] *Id.* at 9.
[95] Richard A. Shweder, THE GOOSE AND THE GANDER: THE GENITAL WARS (Routledge, 2013).
[96] American College of Obstetricians and Gynaecologists, *Committee Opinion: Female Genital Mutilation*, DC ACOG (1995).
[97] College of Physicians and Surgeons of Ontario, *New Policy: Female Circumcision, Excision and Infibulation*, CPSO (1992).

Medical Association reaffirmed that "*all physicians in the United States strongly denounce all medically unnecessary procedures to alter female genitalia and promote culturally sensitive education about the physical consequences of FGC.*"[98]

The "medicalization" of FGM may mitigate a number of the instantaneous outcomes in certain circumstances, though there may be no proof that the obstetric or other long term headaches associated with the practice are averted or appreciably decreased.[99] As Baasher noted, "*it is quite obvious that the mere notion of surgical interference in highly sensitive genital organs constitutes a serious threat to the child and that the painful operation is a source of major physical as well as psychological trauma.*"[100]

F. *Physical consequences*

Although instant bleeding and pain are common consequences of all types of FGM, the risk and gravity of the consequences rises when the extent of cutting increases.

a) Long-term consequences

The long-term consequences of FGM include infections such as HIV[101] or Hepatitis B, which in young girls can also lead to infertility and recurrent miscarriage**.** Studies indicate "*the risks of the possibility of losing the child during or immediately after birth increases with more extensive type of FGM*."[102] There are prenatal risks to infants

[98] Council on Scientific Affairs, *Female genital mutilation,* 274(21) JAMA 1714–1716 (1995).

[99] *Supra* note 3.

[100] Baasher T., *Psychological aspects of female circumcision in traditional practice affecting the health of woman 1979*, 2 PAUSA 75 (1979).

[101] Margaret Brady, *Female Genital Mutilation: Complications and Risks of HIV Transmission*, 13(12) AIDS PATIENT CARE ST 710 (2000).

[102] *Management of pregnancy, childbirth and the postpartum period in the presence of female genital mutilation*, WHO (July 11, 2018), http://www.who.int/gender/other_health/ en/manageofpregnan.pdf.

born to ladies who have undergone female genital mutilation, that is, they suffer higher rate of neonatal death when compared with ladies who have not undergone this practice.[103] Besides this, long-term medical complications also include infertility, urinary retention, hematocolpos, and the formation of stulae.[104] Legs of infibulated women are bound together for several days or weeks subsequently.[105]

"*Depending on the type and severity of the procedure performed, women may experience long-term consequences such as chronic infections, tumors, abscesses, cysts, infertility, and excessive growth of scar tissue, increased risk of HIV/AIDS infection, hepatitis and other blood-borne diseases, damage to the urethra resulting in urinary incontinence, [fistula], painful menstruation, painful sexual intercourse and other sexual dysfunctions*."[106] According to the WHO,[107] "*an increased risk for repeated UTIs is well documented in both girls and adult women who have been a victim of FGM/C*."

b) *Short-term consequences*

Short-term consequences include haemorrhage and infection.[108] However, instant outcomes, including infections, are generally only reported while women seek hospital treatment. Therefore, the true extent of immediate complications is unknown.[109] Nearly all individuals who are subjected to FGM experience extreme pain,

[103] *Supra* note 3.
[104] *Supra* note 30.
[105] *Supra* note 35.
[106] *Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment*, HUMAN RIGHTS COUNCIL (Oct. 9, 2018), http://www.unhcr.org/refworld/docid/ 47c2c5452.html.
[107] World Health Organisation, *Health Risks of Female Genital Mutilation (FGM)*, (Nov. 15, 2018), https://www.who.int/reproductivehealth/topics/fgm/health_consequences_fgm/en.
[108] *Id.* at 61
[109] Carla Makhlouf Obermeyer, *The Consequences of Female Circumscion for Health and Sexuality: An update on the evidence*, (Sept. 27, 2018), https://doi.org/10.1080/14789940500181495.

amongst which many are tormented by persistent ache syndrome and mobility impairment.[110]

G. *Sexual consequences*

Removing or harming such a sensitive tissue, namely the clitoris, may have dire effects including "*sexual issues, along with reduced sexual choice and satisfaction, ache in the course of intercourse, difficulty in the course of penetration, decreased lubrication during sex, reduced frequency, absence of orgasm, dyspareunia, orgasmic delay and an orgasmi*".[111] Orgasmic difficulties are more likely to be reported in groups that undergo the process after adolescence and get involved in sexual activities or before childbirth.[112]

H. *Psychological consequences*

Among the mental effects of FGM/C, many contributors in the study mentioned emotions of anger, guilt, shame or inadequacy,[113] incompleteness, helplessness, inferiority and suppression, which have an effect on the rest of their live. They reflect signs of post-traumatic stress disorder[114] and report, persistent irritability, problems trusting humans[115] and nightmares and fear of reliving the process. The psychological complications because of FGM "may be submerged

[110]Lightfoot-Klein, *Disablity in Female Immigrants with ritually inflicted Genital Mutilation*, 14 WOMEN THER.187-194 (1993).
[111]*Sexual And Reproductive Health*, WHO (July 6, 2018), http://www.who.int/reproductivehealth/topics/fgm/health_consequences_fgm/en/.
[112]Uriel Elchalal et al., Ritualistic Female Genital Mutilation: Current Status and Future Outlook, 52 OBSTET. GYNECOL. SURV. 643-651 (1997).
[113]Bo mills & Gordon Turnbull, *Broken hearts and mending bodies: the impact of trauma on intimacy!*, 19 UK Sexual and Relationship Therapy 266 (2004).
[114]Steffen Moritz & Alice Behrendt, *Posttraumatic Stress Disorder and Memory Problems after Female Genital Mutilation*, (Aug. 8, 2018), https://doi.org/10.1176/appi.ajp.162.5.1000.
[115]*Supra* note 9.

deep in the infant's subconscious and may trigger behavioural disturbances."[116]

Besides this, Verse 3:182 of the Quran mentions, "*Allah never harms those who serve Him*."[117] FGM/C is in contradiction with the teachings of Prophet Mohammad concerning the welfare of the human body, whereas male circumcision is in total compliance with religious teachings.[118] Thereby, the practice of FGM goes against the Quran and the teachings of Prophet Mohammad.

III. RECOMMENDATIONS

At present, India has no law recognizing female genital mutilation. This is in contrast to other countries like the USA, the United Kingdom, Australia and around 27 African countries which have banned this practice. Hence, the authors, by the medium of this article want to provide some recommendations which can help protect the legal and human rights of the victims and also solve their psychological and social problems.

A. *Psychological recommendations*

Since FGM has a number of psychological consequences, comprehensive therapies of human behaviour such as Cognitive

[116] R. Abdelhady & A. Elnashar, *The impact of female genital cutting on health of newly married women*, (July 10, 2018), https://doi.org/10.1016/j.ijgo.2007.03.008.
[117] *The Qur'an* 3:182 Translated by Abdullah Yusuf Ali, (King Fhd Holy Quran Printing Complex), (1987).
[118] *Id.*

Behavioral Therapy[119] and Rational Emotive Behavioral Therapy[120] can be provided to victims.

B. *Social recommendations*

Public bodies and the central statistical organisation can help in implementing government policies on gender equality at the regional level. Hospitals can help in the promotion of reproductive health in India, and both private and public hospitals can assist the victims of FGM.

C. *Legal Recommendations*

The law in Africa penalizes the causing of harm to the physical integrity of the female genital organ, provides for a punishment of life imprisonment in case of death due to FGM. Australia[121] has delved into the concept of a model law, in case of an unavailability of a law on FGM. USA[122] categorises FGM as a criminal offence. In light of this, recently, a 44-year-old Indian-origin woman doctor has been arrested and convicted for performing FGM on girls aged 6 to 8.[123] France[124] also takes torture as well as barbarity into consideration.

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[119] AARON BECK et al., ANXIETY DISORDERS AND PHOBIAS: A COGNITIVE PERSPECTIVE (Basic books, 2005).

[120] WAYNE FROGGATT, A BRIEF INTRODUCTION TO RATIONAL EMOTIVE BEHAVIOURAL THERAPY (5th ed. 2005).

[121] *Review of Australia's Female Genital Mutilation Legal Framework*, AUSTRALIAN GOVERNMENT (Oct. 17, 2018), https://www.ag.gov.au/publications/documents/reviewofaustraliasfemalegenitalmutilationlegalframework/review%20of%20australias%20female%20genital%20mutilation%20legal%20framework.pdf.

[122] 18 U.S. Code § 116.

[123] *Indian Doctor charged with Genital Mutilation on females in the US*, (Dec. 20, 2018), https://www.thehindu.com/news/international/indian-origin-doctor-in-us-arrested-for-performing-genital-mutilation-on-girls/article18013877.ece.

[124] Prohibition of Female Circumcision Act, 1985.

Furthermore, countries like the United Kingdom[125]and Kenya[126] also provide for a special legislation on the subject.

Ms. Maneka Gandhi, Minister of Women and Child Development, stated that it is a crime under Sections 320 and 324 of the IPC and Sections 3, 9, 13 and 19 of the Protection of Children from Sexual Offenses Act, 2012 (hereinafter, "**POCSO**"). Sections 3, 6 and 9 of the POCSO Act, 2012 talk about "sexual assault.[127] FGM is not committed with a 'sexual intent' but for other cultural and non-therapeutic reasons.[128] Hence making FGM illegal under POCSO is erroneous.

1. A separate legislation is duly required as it will not only streamline the law on the matter but also deal with various ways in which FGM is performed, for example, aid and abetment of a third person, commission by a foreign national in the territory of India, the types of FGM and their gravity. Referring to legislations passed by various countries, India also needs to deal with specifics such as definitions, exceptions, abuse of females not undergoing the process, non-reporting of the crime, etc. The need of the hour is to provide for a legislation which classifies offences and provide punishment for the various types thereof, as done under POCSO for sexual assault, aggravated sexual assault, non-reporting of the crime, etc. The formulation of a separate legislation would not be arbitrary as the conditions for reasonable classification, namely, *"(1) that the classification must be founded on an intelligible differentia which distinguishes those that are*

[125]Female Genital Mutilation Act, 2003 (U.K.).
[126]Prohibition of Female Genital Mutilation Act, 2012 (Kenya).
[127]§ 7, POCSO Act, 2012. " 'Sexual Assault' :Whoever with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other Act with Sexual intent which involves physical contact without penetration is said to commit Sexual Assault."
[128]*Supra* note 8.

grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act"[129] are fulfilled as the females have to suffer from as the consequences of their genital mutilation, unlike the males and the object of the act would be to provide a safeguard against this harm. Thus, there is a rational nexus between the proposed legislation and object to be achieved.

2. Secondly, while considering the punishment to be provided for FGM, it was held by the Apex Court that, "*the rationale for advocating the award of punishment commensurate with the gravity of the offence and its impact on society is to ensure that a civilised society does not revert to the days of 'eye for an eye and tooth for tooth'. Not awarding a just punishment might provoke the victim or its relatives to retaliate in kind and that is what exactly is sought to be prevented by the criminal justice system we have adopted.*"[130] In another judgment of the Supreme Court, [131] it was held that "*it will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts.*"

3. The Supreme Court should invoke Article 142 of the Constitution. "*The phrase 'complete justice' engrafted in Article 142(1) is the word of width couched with elasticity to meet myriad situations created by human ingenuity or cause or result of operation of statute law or law declared under Articles 32, 136 and 141 of the Constitution and cannot be cribbed or cabined within any limitations or phraseology.*"[132] The Court is expected to provide alternative legal protection till a legislation is passed. The same had happened in the *Vishaka* matter.[133] Based on such precedent,

[129]R.K. Garg v. Union of India, (1981) 4 SCC 675, ¶ 17.
[130]State of Madhya Pradesh v. Bala alias Balram, (2005) 8 SCC 1, ¶13.
[131]Mahesh v. State of Madhya Pradesh, (1987) 3 SCC 80, ¶ 6.
[132]Ashok Kumar Gupta v. State of U.P, (1997) 5 SCC 201.
[133]Vishaka v. State of Rajasthan, (1997) 6 SCC 241, ¶ 2.

the Supreme Court has the power to make laws in situations when there is either a lacuna left by the Parliament or justice has not rightfully delivered.

4. Physicians and non-physicians should bear criminal and civil responsibility for any transgression from the rule against FGM. They should realize that the female genitals are not a disease and no tampering by way of surgical intervention is required.

5. Apart from scholars, physicians and other persons in authority, the prime duty to stop this dreadful deed lies with individuals. Parents should realize that their obligation is to save their daughters from any harm and their actions should be governed by this fundamental principle. Besides this every person must make the responsible decision to prevent FGM/C in their families, in their neighbourhood and society. With collective cooperation, we can help eradicate this atrocious crime.

A RELOOK AT THE ADMISSIBILITY OF ILLEGALLY OR IMPROPERLY OBTAINED EVIDENCE

Paras Marya[*]

Abstract

This paper deals with the position of law regarding the exclusion of evidence that has been obtained illegally or improperly in a criminal trial. The right to privacy having been declared a fundamental right by the Supreme Court comes in direct conflict with the admissibility of illegally obtained evidence in India. In fact, Indian courts have consistently admitted illegally obtained evidence in criminal trials, unlike other jurisdictions where such evidence is excluded. The approach of Indian courts so far has been, that in the absence of a specific statutory or constitutional provision which provides for such exclusion, the fact that the evidence was obtained illegally is of no consequence to its admissibility in a criminal trial. This paper proposes to revisit the recommendations of the 94th Law Commission Report, 1983, in light of the right to privacy being recognised as a fundamental right under Article 21 of the Constitution. In order to do so, this paper will first analyse the

[*]Paras Marya is a Third-Year Student at National Law University, Jodhpur. The Author may be reached at parasmarya57@gmail.com.

current position of law as propounded by the judiciary, and delve into the rationale for such pronouncements. Then the author shall examine the analysis of the Report of 1983, and also determine whether or not the recommendations given at that time can be the solution required today. To conclude, the paper shall analyse the judgment in Justice K. S. Puttaswamy v. Union of India and the impact of the right to privacy on this aspect of evidence law.

I. INTRODUCTION

The development in the scope of the right to privacy has been very intriguing. As humanity leaps forward and individualism thrives in society, the concept of privacy as a legal right emerges to have a strong presence. This can be seen through the struggle for this right. The United States was early to lay down the right as a spatial concept under the Fourth Amendment. Soon this concept broadened to include other aspects of human life apart from the human body, such as the family, marriage and personal property. Protection from interference into these aspects became more and more important. The right to privacy is the backbone of multiple freedoms enjoyed by citizens around the world today and has been the foundational argument for decriminalisation of homosexuality, giving women the right to abort a foetus, and regulating mass surveillance programs. Therefore, it becomes equally important to draw the line on the operation of the right, as no right is ever absolute. This delineation becomes especially arduous when discussing the admissibility of illegally obtained evidence in a criminal trial. The basic question that emerges is whether law enforcement should be allowed to violate the privacy of

citizens to obtain evidence that may convict them of criminal activity, as their wrongfulness would not affect the admissibility of the evidence. This question becomes complicated as individual answers to the question are subjective and vary according to the degree of the crime involved. Therefore, it is important that every country clearly lays down the position of law in this aspect.

The position of law with respect to the admissibility of illegally and improperly obtained evidence in a criminal trial in common law countries can be divided into four main categories.[1] First, the strictest approach is adopted by certain countries, where the illegality in the collection of evidence does not, in the absence of any specific statutory or constitutional provision, render the evidence legally inadmissible. Second, where the use of illegally or improperly obtained evidence is regarded as relevant, and the court, in its discretion, may regard itself as justified in rejecting such evidence. Third, wherein due to a specific statutory provision, evidence that is obtained in violation of such substantive norm is excluded. The fourth category comprises of countries wherein a constitutional guarantee excludes certain evidence from use at the trial (for example the Fourth and Fourteenth Amendment in the case of the United States).

II. POSITION OF LAW IN INDIA

India falls within the first category of common law nations mentioned above; that have adopted the strictest approach in taking of evidence, and with an absence of any statutory or constitutional provision that would exclude illegally obtained evidence, the impropriety of the evidence does not render it inadmissible.

[1]Law Commission, Evidence Obtained Illegally or Improperly, (Law Com No 94, 1983).

The same is evident from a catena of judicial pronouncements by the Supreme Court. *Pooran Mal v. Director of Inspection of Income Tax*[2] elucidates this position perfectly. The Supreme Court declined to issue a writ of prohibition in restraint of the use of evidence gathered during search and seizure by the Authorities in contravention to Section 132 of the Income Tax Act, 1961. The Court held that the Indian Evidence Act, 1872 permits 'relevancy' as the only test of admissibility as per Section 5 of the Act, and secondly, no other provision of any law excludes evidence on the ground that it was obtained illegally.[3] Further, the Court refused to accept any constitutional protections that would exclude such evidence, stating as follows:

"*A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy analogous to the American Fourth Amendment we have no justification to import it into a totally different fundamental right by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches.*

It, therefore, follows that neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search."[4]

While dealing with the question of admissibility of an illegally intercepted telephone conversation, the Supreme Court in *State (NCT*

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[2]Pooran Mal v. Director of Inspection of Income Tax, (1974) 93 ITR 505 (SC).
[3]*Id*. at 24.
[4]*Id.*

of Delhi) v. Navjot Sandhu @ Afzal Guru[5] stated that the question was no longer *res integra,* observing that a tape-record of a relevant conversation is a relevant fact and therefore is admissible under Section 7 of the Indian Evidence Act.[6] In this case, the Court relied on its own previous decision in *R.M. Malkani v. State of Maharashtra*[7] wherein it held that evidence in the form of tape recorded evidence of a telephonic conversation without the consent of the accused, was admissible and that illegality in gathering such evidence did not affect its admissibility. The Court rejected the argument that it was illegal to tamper with a telephonic conversation, as even if it was illegal, the admission of the evidence did not become impressible, as long as it was relevant.[8] At the time, an attempt to challenge the evidence under Article 21 of the Constitution did not succeed, in fact, the Court stated:

"*Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephonic conversation of an innocent citizen will be protected by Courts against wrongful or high handed interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants.*"[9]

The rationale of the Court is therefore clear, the sole criterion for admissibility of evidence is its relevance and not the procedure or means through which it was obtained. In the case of *R.M. Malkani* however, the Court is unable to identify the logical leap of faith in not providing the protection to the "guilty", for how is a public servant or investigator able to determine the "guilt" of a person and deny him the personal liberty under Article 21? It would, however, be pertinent to mention that, the Supreme Court, in *People' Union for Civil*

[5]State v. Navjot Sandhu @ Afzal Guru, [2005] Cri LJ 3950.
[6]*Id*. at 16.
[7]R.M. Malkani v. State of Maharashtra, AIR [1973] SC 157.
[8]*Id*. at 29.
[9]*Id*. at 31.

Liberties (PUCL) v. Union of India[10] held that telephone tapping infringed the right to privacy, and laid down guidelines to be followed in the exercise of state surveillance. Even so, the Court did not decide on the exclusionary rule in evidence based on the legality of the methods used to obtain it.

The reasons for the current position of law decided by the Indian courts are clear. First and foremost, the fact that the Indian law of evidence is almost entirely codified and categorisation of admissible and inadmissible evidence is laid down by statute, the courts have not been inclined to go outside the legislation to determine the question of admissibility.[11] Secondly, the courts have recognised safeguards required to be carried during investigations under the Code of Criminal Procedure, 1973.[12] Therefore, when questioned on the admissibility of evidence in breach of such safeguards, the courts are willing to reprimand the police; however, the admissibility of the evidence remains unaffected.[13] Further, courts have also relied on the interpretation and pronouncements of English law since the law of evidence in India is modelled on the rules of evidence present in English law.[14] In *R.M. Malkani's* case,[15] the Court gave the same reasoning and relied on multiple English judgments[16] to observe that evidence would be admissible even if it is stolen.[17] However, the English law on evidence is now codified under the Police and Criminal Evidence Act, 1984, under which the court may refuse to allow evidence if it appears to the court that the admission of the

[10]People' Union for Civil Liberties (PUCL) v. Union of India, (1997) 1 SCC 301.
[11]Pooran Mal v. Director of Inspection of Income Tax, (1974) 93 ITR 505 (SC), 24.
[12]§ 100, Code of Criminal Procedure, 1974.
[13]Kochan Velayudhan v. State of Kerala, AIR (1961) Ker. 8, 21, 22; Ramrao Ekoba v. The Crown, AIR (1951) Nag. 237; Lalbahadur Keshi v. State, AIR (1957) Assam 74.
[14]Pooran Mal v. Director of Inspection of Income Tax, (1974) 93 ITR 505 (SC), 25.
[15]R.M. Malkani v. State of Maharashtra, AIR (1973) SC 157.
[16]Kuruma, Son of Kanju v. R., (1955) AC 197; R. v. Maqsud Ali, (1965) 2 All ER 464; Jones v. Owens, (1870) 34 JP 759; R. v. Leatham, (1861) 8 Cox CC 498.
[17]R.M. Malkani v. State of Maharashtra, AIR (1973) SC 157, 30.

evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.[18] In light of the above analysis, it is pertinent to note the recommendations of the Law Commission in its 94th Report of 1983.

III. RECOMMENDATIONS OF THE 94TH LAW COMMISSION REPORT

The importance of the subject matter from a human rights perspective and the expanding scope of Article 21 of the Constitution of India were the underlying reasons for the Commission's effort to examine legal theory and present its recommendations.[19]

The Report clearly rejects the consideration that alternative remedies present to an accused against illegal search and seizure are adequate; it regards that the practical difficulties for a victim of such search to pursue sanctions effectively and the tardy process of disciplinary actions cannot be overlooked.[20] Further, the Report states that one of the arguments in favour of the exclusionary rule is that of deterrence.[21] The argument of deterrence is essentially that the exclusion of evidence adequately deters illegal conduct in the collection of evidence. However, the Commission rightly points out that such a conclusion will always remain a matter of opinion; nonetheless, there should be a presumption in favour of the effectiveness of judicially enforceable sanctions against attempts to procure evidence illegally. Another argument analysed by the Report is that of the purity of the judicial process; there is a need to ensure that there is a deprivation to the wrongdoer of the benefit of his

[18] § 78(1), Police and Evidence Act 1984.
[19] Law Commission, Evidence Obtained Illegally or Improperly, (Law Com No 94, 1983) ¶1.4.
[20] *Id*. at 10.4.
[21] *Id*. at 10.5.

wrongdoing. With respect to Wigmore's contrary view on the matter,[22] that is, that the court does not condone the illegality but merely ignores it, the Report criticizes that when the court admits such evidence it does not merely ignore the illegality of the search and of such evidence, but also indirectly implicates itself in the illegality. It is to such a degree, that the court becomes a party to the procedure which shows disrespect for the judicial process.

In order to arrive at a recommendation, the Commission analysed the arguments against the exclusionary rule.[23] These are predominantly the concern of the court to arrive at the truth and that the illegal acquisition of evidence is a collateral inquiry and does not affect the logical relevancy of the evidence. Further, there are arguments that there are other sanctions and remedies that exist against a person's illegal acts and would be a reasonable deterrent. Lastly, the report also states that it would be a grave injustice to a party to be denied the use of such evidence when they were not involved in the illegality. These arguments are competing at a principle level with the arguments in favour of the rule. While the arguments in favour of the exclusionary rule put weight on the rights of the victim of such search and the holistic view of justice, the arguments against such rule put weight on the purpose of the court to arrive at the truth and the rights of the victim of the alleged crime. If we are to put the two arguments in a supremely rudimentary form, it can be said that the arguments in favour of the exclusionary rule are those where the end does not justify the means and those against such rule are where the ends justify the means.

At the time of the Report, the Commission found that excluding the admission of illegal evidence on a constitutional ground based in

[22]8 WIGMORE, EVIDENCE 2176 (McNaughten Revision 1961) *as cited in* Law Commission, Evidence Obtained Illegally or Improperly, (94th Report, 1983) ¶ 10.8.

[23]Law Commission, Evidence Obtained Illegally or Improperly, (Law Com No 94, 1983) ¶10.10.

Article 21 was a question which could not be answered due to the lack of direct authority on the subject.[24] Therefore, the recommendations have to be understood with the judicial pronouncements of that time, namely, *M.P. Sharma* and *Kharak Singh*,[25] that there was no fundamental right to privacy under the Constitution of India, and therefore, a corresponding provision as that of the Fourth Amendment of the U.S. Constitution could not be read into it. With respect to Article 21 creating an exclusionary rule of evidence, the Commission said:

"*There is no doubt that this question will arise in courts someday. When it arises, the courts will be called upon to make a difficult choice, but they will have a number of models available for concrete study.*"[26]

The Commission in its Report concluded that there is a need to reform the current position of law. This was because it felt that the major deficiency in the present Indian position is that it reflects a legalistic approach, which would completely shut out any consideration for *deeper human values.* Therefore, there ought to be recognised a power in the court to take into account all these aspects which are of basic relevance to the administration of justice.[27] Thus the Report recommended that Section 166A should be inserted to the Indian Evidence Act.

Section 166A[28] provides the court with the power to refuse to admit anything in evidence that was obtained illegally or by improper means if the court is of the opinion that because of the nature of the means by which it was obtained, the admission would tend to bring the

[24]*Id*. at 10.17.

[25]M.P. Sharma v. Satish Chandra, (1954) AIR 300; Kharak Singh v. State of U.P., AIR (1963) SC 1295.

[26]Law Commission, Evidence Obtained Illegally or Improperly, (Law Com No 94, 1983) ¶10.17.

[27]*Id.* at 11.3.

[28]*Id*. at Ch.10A.

administration of justice into disrepute. Further, the Section suggests that the court shall look into the circumstances surrounding the proceeding while admitting such evidence or refusing to admit the same. These circumstances would include whether human dignity was violated during the procurement of evidence, the seriousness of the case, importance of the evidence, whether there were circumstances justifying such action, etc. Therefore, through this section, the Commission attempted at providing discretion to the courts in order to prevent cases wherein the illegality is so shocking and outrageous that the judiciary would rather exclude the evidence. However, as explained above, this analysis of the Indian position and an attempt at reformation is in the background of judicial decisions denying the right to privacy and any constitutional safeguard to such search or seizure. Therefore, the application of the doctrine with respect to the recent constitutional bench decision of *Justice K.S. Puttaswamy v. Union of India* must be examined.

IV. IMPACT OF JUSTICE K.S. PUTTUSWAMY V. UNION OF INDIA

In the operative order of the judgment in *Justice K.S. Puttaswamy v. Union of India*, the Supreme Court held that the right to privacy forms an intrinsic part of the right to life under Article 21 of the Constitution, and is hence a guaranteed freedom. All the separate opinions in the case have unequivocally concluded that privacy forms a core constitutional freedom and is the structural foundation to other core freedoms. What has also been rightfully pedestalized is the concept of consent, and not only in relation to the physical body but also in relation to personal data and property.[29] In order for the right to privacy to have any impact on the question of the applicability of

[29]Justice K.S. Puttaswamy v. Union of India, AIR (2017) SC 4161, 489.

the "exclusionary rule", we would have to look into the scope of the right to privacy laid down in the judgment.

This scope is anything but narrow, as the right has not been limited to just dignity or as a derivative right under Article 21. This can be seen as the right has been extended from person to personal property and further to personal information voluntarily given to a third party.[30] This means that information given for a specific purpose to the State can only be used for that purpose and not extend to other areas. When examining the scope of the right with respect to evidence collection, multiple case laws from foreign jurisdictions were analysed throughout in the judgment.

Section 8 of the Canadian Charter of Rights and Freedoms, 1982 states that "*everyone has a right to be secure against unreasonable search and seizure.*" While understanding the section, J. Chandrachud referred[31] to *Hunter v. Southam Inc.*,[32] wherein the Supreme Court of Canada held that the purpose of the section was to protect an individual's reasonable expectation of privacy but the same must be balanced against a "reasonable" search in public interest. While understanding the United States Fourth Amendment, J. Chandrachud analysed the "reasonable expectation of privacy" test, wherein, if a person has exhibited an expectation of privacy, and that such expectation is "reasonable" according to society, then such an expectation is protected under the right of privacy.[33] Further J. Chelameswar stated that there are three aspects of privacy: 'repose' or freedom from unwarranted stimuli, 'sanctuary' or protection against intrusive observation, and 'intimate decision' or autonomy with respect to the most personal life choices.[34] While illustrating examples of violations of the right in order to establish the scope of

[30] *Id*. at 330.
[31] *Id*. at 99.
[32] Hunter v. Southam Inc., (1984) 2 SCR 145.
[33] Katz v. United States, 389 US 347 (1967).
[34] Justice K.S. Puttaswamy v. Union of India, AIR (2017) SC 4161, 227.

the right to privacy, stress was laid on the right to privacy with respect to the State and its intrusion into the body of subjects.[35] Under this, he mentions "telephone tapping" and "internet hacking" by the State in order to obtain personal data as violating the privacy of the body of its subjects. Similarly, J. Nariman in his judgment noted that one of the main aspects of the right to privacy is that of informational privacy which does not deal with a person's body but deals with a person's mind.[36] This therefore recognizes that an individual may have control over the dissemination of material that is personal to him. It also follows that unauthorised use of such information may lead to infringement of this right. As such, the decision of the Supreme Court in *M.P. Sharma*,[37] wherein it was held that the United States Fourth Amendment could not be incorporated into the guarantee against self-incrimination in the Constitution, was overruled. It is pertinent to mention this analysis by J. Bobde:

"*M.P. Sharma is unconvincing not only because it arrived at its conclusion without enquiry into whether a privacy right could exist in our Constitution on an independent footing or not, but because it wrongly took the United States Fourth Amendment – which in itself is no more than a limited protection against unlawful surveillance – to be a comprehensive constitutional guarantee of privacy in that jurisdiction.*"[38]

With such an expansive scope of the right to privacy and multiple references to the United States Fourth Amendment, it would be correct to assume that within the right to privacy there exists an "expectation against unreasonable search and seizure". However, this would mean that evidence that is improperly obtained, through an illegal search, would be tainted, as it would violate a fundamental

[35]*Id*. at 229.
[36]*Id*. at 472.
[37]M.P. Sharma v. Satish Chandra, (1954) AIR 300.
[38]Justice K.S. Puttaswamy v. Union of India, AIR (2017) SC 4161, 241.

right guaranteed under Part III of the Constitution. While adjudicating on the legality of such infringements, the court will rely on the standard of justness, fairness and reasonability.[39] Accordingly, the law would have to have a rational purpose, procedural guarantees against abuse, be proportionate, necessary and infringe the right minimally. Therefore, at the present stage in order for the State to continue with relevancy being the only criteria for admissibility, the above-mentioned test would have to be satisfied.

This judgment, in the absence of further legislation, would leave it to the courts to balance a well-settled question of law with a violation of a fundamental right without any "procedure established by law". Therefore, the declaration of the right to privacy leaves a gaping hole in evidence and constitutional law, which requires the attention of the legislature as well as the judiciary.

V. CONCLUSION

The basis of the present position under Indian jurisprudence is a legalistic one. Indian courts have continuously rejected arguments with respect to Article 21 of the Constitution that favour an exclusionary rule, based on the premise that the right to privacy is not envisaged in the Constitution and there is no analogous provision of the United States Fourth Amendment in it. However, with the recent pronouncement on the right to privacy, this premise is questioned. The scope of the right to privacy being overarching would mean that the 'fruit of the poisonous tree' doctrine will be applicable to India as it is in the United States. At the same time, we also have to keep in mind the provision of restricting the right to privacy under the concept of "procedure established by law". However, in the absence

[39]Maneka Gandhi v. Union of India, (1978) AIR 597.

of any established law, there would be a direct application of the doctrine.

With respect to the recommendation of the Law Commission in the form of Section 166A,[40] it is clear that there is a need for change in the position of Indian law on this subject, and the recommendations of the Commission are also well-founded. Section 166A states that in order to determine the admissibility of evidence, the court shall consider all circumstances, including the importance of the evidence, the extent to which human dignity and values were violated in obtaining it and the question whether there were circumstances justifying the same action. Such a recommendation strikes balance between the objective of evidence and the current position of law along with the changes in the law of privacy. This would also mean that judges would be the sole authority on the admissibility of evidence guided by the Section. Such an amendment in the law would have a tremendous impact not only on the position of privacy law *vis-à-vis* the Constitution but also on the practical lives of law enforcement. This is because such a change in the law, which is inevitable, will open a pandora's box given the array of cyber-crime investigations taking place today. As of now, for law enforcement, there is only one test of evidence, the test of relevancy. After the declaration of the law of privacy, the "relevancy" of the evidence will have to weigh against the violations of privacy needed to obtain it.

There is, therefore, a need to fill the gaping hole that is present today in the Indian law of evidence. This is also evident from the fact that the Law Commission itself envisaged the problem at hand when the scope of Article 21 of the Constitution would expand to include privacy.[41] The legislature must now strike a balance between the fundamental right to privacy and the conflicting principles of the

[40]Law Commission, Evidence Obtained Illegally or Improperly, (Law Com No 94, 1983) Ch.10A.

[41]*Id.* at 1.4.

admissibility of tainted evidence. The test for this, however, will now have to take into account Article 21, as illegally obtained evidence will now be in direct conflict with this fundamental right.

ESSENTIAL RELIGIOUS PRACTICES IN LIGHT OF THE SABARIMALA JUDGMENT

Kanika Sharma[*]

Abstract

The work focuses on the validity of 'essential religious practices' in light of the Sabarimala judgment. It examines the unrighteousness of the judgment in light of the test of 'essential religious practices´. It critically analyses whether the practice of excluding women between the age of 10-50 years into the temple of Lord Ayyappa constitutes an essential religious practice, contrary to the finding in the judgment. The judges have construed and interpreted 'essential religious practices' in their own ways. Justice Indu Malhotra, who has given the dissenting opinion in the Sabarimala verdict, has put forth a completely different view upholding the exclusion of women between the ages of 10-50 years as an essential religious practice. She has upheld that the celibacy practiced by the deity, that is, Lord Ayyappa, who is in the form of 'Naisthik Brahmachari', does not permit the women to enter into the specific temple where the deity is in his celibate form. She upheld the same on the basis of the history of the temple and the ritual practiced by the

[*]Kanika Sharma is a Second-Year Student at Maharashtra National Law University, Nagpur. The Author may be reached at ks54.sharma@gmail.com.

devotees of the temple, that is, the 41-day ritual known as Vratham, where the devotees strictly renounce all materialistic pleasures and refrain from interacting with young women. The other judges have decided otherwise, on the basis of equality. The paper aims to criticise the new judgment and uphold that the exclusion of women from the temple is an 'essential religious practice' to the celibacy of the deity. The paper highlights how certain religious practices cannot on the basis of equality be abrogated since they form the core belief of the religion and without the practice of which, the religion could be altered, as they are integral to the very essence of the religion.

I. INTRODUCTION

Contemporary India is overwhelmed with the battle of religious freedom. Discourse, between people's religious practices and democratic thoughts, has been a long-drawn battle. In recent times, such discords have been in controversy and have led to new interpretations as their ramifications. The idea of democracy stresses upon the equality of individuals, equality in managing their own religious affairs and so on. In the constitutions of all democratic countries, the right to freedom of conscience and religion has been expressly recognized.[1] Equal liberty's anti-discrimination principle demands that the people should not be treated with hostility or neglect because of the religious or non-religious character of their

[1]J. M.N. Rao, *Freedom of Religion and Right to Conversion*, 2003 PL WEB JOUR 19.

convictions.[2] It is the duty of the State to uphold the Constitution of India, so far as it extends to upholding the citizens' fundamental right to equality under Articles 14 and 15 and the right to practice religion under Article 25 of the Constitution.[3] However, absolutism is abhorred by modern democracy. Every right comes with certain limitations. 'Religion' is squaring human life with superhuman life. Belief in a superhuman power and such an adjustment of human activities to the requirements of that power as may enable the individual believer to exist more happily is common to all religions. The term 'religion' has reference to one's views on their relations to their creator, and to the obligations they impose of reverence for their being and character and obedience to their will.[4] All religions are simply different paths to reach the Universal One. Religion is basically a way of life to realize one's identity with the Divinity.[5] Under paragraphs (a) and (b) of Article 26 of the Constitution, what is protected is only the 'essential part' of religion or, in other words, the essence of 'practice' practised by a religious denomination. Therefore, before any religious practice is examined on the touchstone of constitutional principles, it has to be ascertained positively whether the said practice is, in pith and substance, really the essence of the said religion.[6] The judiciary has, from time to time, demarcated the limits within which the freedom to profess religion can be exercised and up to what extent the religious affairs can be independently managed. The present paper attempts to draw the meaning of "essential religious practices" and how far the meaning of

[2]CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 112 (2007).
[3]Haji Ali Dargah Trust v. Noorjehan Safia Niaz, (2016) 16 SCC 788.
[4]Gurleen Kaur v. State of Punjab, 2009 SCC OnLine P&H 6132.
[5]Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors., 2018 SCC OnLine SC 1690.
[6]The Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thritha Swaminar of Sri Shirur Mutt, 1954 SCR 1005.

this phrase has been correctly drawn by the judiciary in the famous Sabarimala temple case.

II. RELIGION

There is no consensus as to the definition of religion. Religion is derived from '*religare*', which means to bind. Etymologically, every bond between two people is a religion, but that is not true. To say so is only to indulge in etymological deception. Quite obviously, religion is much more than a mere bond uniting people.[7] All religions are simply different paths to reach the Universal One. Religion is basically a way of life to realize one's identity with the Divinity.[8] It is propounded that for the purpose of constituting a religious denomination, not only should the practices followed by that denomination be different but also its administration should be distinct and separate. In legal and constitutional parlance, for the purpose of constituting a religious denomination, there has to be strong bondage among the members of its denomination. Such denomination must be clearly distinct, and follow a particular set of rituals/practices/usages having their own religious institutions, including managing their properties in accordance with law.[9] The Constitution is not, as it could not have been, oblivious to religion. Religiosity has moved hearts and minds in the history of modern India.[10] According to sage Aurobindo, the quest of man for God is the foundation for religion and its essential function is "*the search for God and the finding of God*".[11]

[7]S.P. Mittal v. Raghubir, (1983) 1 SCC 51.
[8]The Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thritha Swaminar of Sri Shirur Mutt, 1954 SCR 1005.
[9]Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors., 2018 SCC OnLine SC 1690.
[10]*Id.*
[11]SRI AUROBINDO, THE LIFE DIVINE 699 (1919).

In *Davie v. Benson,*[12] the court defined religion as follows:

"*A religion has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress. But it would not be correct to say that religion is nothing else but a doctrine or belief.*"

In *A.S. Narayana Deekshitulu v. State of A.P.*,[13] the court observed as under –

"*In pluralistic society like India, as stated earlier, there are numerous religious groups who practise diverse forms of worship or practise religions, rituals, rites etc.; even among Hindus, different denominants and sects residing within the country or abroad profess different religious faiths, beliefs, practices. They seek to identify religion with what may in substance be mere facets of religion. It would, therefore, be difficult to devise a definition of religion which would be regarded as applicable to all religions or matters of religious practices. To one class of persons a mere dogma or precept or a doctrine may be predominant in the matter of religion; to others, rituals or ceremonies may be predominant facets of religion; and to yet another class of persons a code of conduct or a mode of life may constitute religion. Even to different persons professing the same religious faith some of the facets of religion may have varying significance. It may not be possible, therefore, to devise a precise definition of universal application as to what is religion and what are matters of religious belief or religious practice.*"

[12]Davie v. Benson, 133 US 333, at 342.
[13]A.S. Narayana Deekshitulu v. State of A.P., (1996) 9 SCC 548.

III. ESSENTIAL RELIGIOUS PRACTICES

The test of essential religious practices is applied in almost every case where the court is to decide between the interests of the society and the freedom of religion. The fundamental problem is that religious beliefs involve comprehensive conceptions of the world, and the premises that underlie governmental action can conflict in complex ways with religious commitments.[14] The essential practices doctrine was a derivative discourse of the colonial-era doctrine of 'justice, equity and good conscience'.[15]

In *The Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thritha Swaminar of Sri Shirur Mutt*,[16] the court outlined for the first time the scope of essential religious practices. The petitioner, the superior or *mathadhipati* of Shirur Mutt, challenged the Madras Hindu Religious and Charitable Endowments (hereinafter, "**HRCE**") Act, 1951. Before dealing with the provisions of the Act, the court asked a central question – "*Where is the line to be drawn between what are matters of religion and what are not?*" The court outlined essential religious practices as under –

"*The contention formulated in such broad terms cannot, we think, be supported. In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or ablations to the sacred fire,*

[14]Jeremy Webber, *A Two Level Justification For Religious Toleration*, 4 JILS 25 (2012-13).

[15]Ronojoy Sen, *The Indian Supreme Court And The Quest For A "Rational" Hinduism*, 1 SAHC, 86, 88 (2009).

[16]The Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thritha Swaminar of Sri Shirur Mutt, 1954 SCR 1005.

all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b)."

When providing the religious freedoms, the Indian Constitution under Article 25 guarantees the individual the freedom of conscience and the right to profess, practice and propagate the religion of one's choice. It however also allows the State to make legislation regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.[17] Paragraph (2)(a) of Article 25 reserves the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by paragraph 2(b) under which the State can legislate for social welfare and reform even though by so doing it might interfere with religious practices.[18] The essential part of religion test finds no mention under the Indian Constitution. The test in fact adopts a very narrow approach of protecting only those practices that constitute an essential part of the religion. The Supreme Court has over time acknowledged that, subject to the restrictions imposed under Article 25 of the Indian Constitution, it is the fundamental right of every person to adopt religious beliefs as may be approved by their conscience. The test thus proves to be irreconcilable with and antithetical to the concept of right to freedom of religion envisaged under the Constitution. The test severely curtails the right to freedom of religion by categorizing religious practices into two groups, that is, those which constitute an essential part of

[17]Arpan Banerjee, *Reviving the Essential Practices Debate*, 1 HNLU SBJ 55, 57 (2016).

[18]The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005.

religion and those which do not. Only those practices which come under the former category are awarded constitutional protection. Added to this is the fact that in each of the cases in which the test was applied, there were alternative means available, rooted in the constitutional text itself.[19]

In *Sona Krishnamoorthy v. Govt. of Tamil Nadu (Hindu Religious & Charitable Endowment Deptt.)*,[20] the court noted –

"*If a custom or practice followed for several years, is altered or deviated from, and such deviation has the sanction of some ancient religious texts, it cannot be said to be an infringement of Articles 25 and 26 of the Constitution.*"

The Constitution has accepted one citizenship for every Indian regardless of their religion, culture or faith. The constitutional goal is to develop citizenship in which everyone enjoys full fundamental freedom of religion, faith or worship and no one is apprehensive of encroachment of their right by others in minority or majority. Whilst the Constitution is neutral in religion, it is, at the same time, benign and sympathetic to religious creeds however unacceptable they may be in the eyes of the non-believers. Articles 25 and 26 embody tolerance for all religions. Subject to consideration of public order, health and morality, it is not open for anybody to question the tenets and practices of religion, however irrational they may appear to an outsider.[21]

The religious freedom guaranteed by Articles 25 and 26, therefore, is intended to be a guide to a community life and ordain every religion to act according to its cultural and social demands to establish an egalitarian social order. Articles 25 and 26, therefore, strike a balance

[19]Vipula Bhatt, *Rise of Religious Unfreedom in India: Inception and Exigency of the Essential Religious Practices Test*, 3 RSRR 126 (2016).
[20]Sona Krishnamoorthy v. Govt. of Tamil Nadu (Hindu Religious & Charitable Endowment Deptt.), (2009) 4 CTC 20.
[21]Bal Patil v. Union of India, (2005) 6 SCC 690.

between the rigidity of a person's right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs and religious practices and their guaranteed freedom of conscience to commune with their Cosmos, Creator and realise their spiritual self.[22]

Law is a form of social engineering and an instrument of social change evolved by a gradual and continuous process. As Benjamin Cardozo wrote in *The Nature of the Judicial Process*, life is not a logic but experience. History and customs, utility and the accepted standards of right conduct are the forms which singly or in combination shall be the progress of law. Which of these forces shall dominate in any case depends largely upon the comparative importance or value of the social interest that will be, thereby, impaired.[23]

Justice Dipak Misra, in the present judgment of Sabarimala opined as follows –

"*The Amicus has also cited the judgments of this Court in Acharya Jagadishwarananda Avadhuta (supra) to submit that in order to claim protection of the doctrine of essential religious practices, the practice to exclude women from entry to the Sabarimala temple must be shown by the respondents to be so fundamental to the religious belief without which the religion will not survive. On the contrary, no scriptural evidence has been led by the respondents herein to demonstrate that the exclusion of women is an essential part of their religion.*"[24]

However, this argument casts doubts on the sustainability of the doctrine since the practice of not allowing women in the temple of the deity who is a *Naisthik Brahmachari* is the prerequisite of practising

[22] A.S. Narayana Deekshitulu v. State of A.P., (1996) 9 SCC 548.
[23] *Id.*
[24] Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors., 75 2018 SCC OnLine SC 1690.

the *Brahmacharya Aashram*. The need for scriptural evidence is in itself void since it would amount to the questioning of the status of Lord Ayyappa as *Brahmachari*. The exclusion of women from the specific temple of Lord Ayyappa does not in any way tantamount to the infringement of equality nor any public disorder since it does not lead to any harm to the women. There are a thousand temples of Lord Ayyappa where the deity is not in the form of *Naisthik Brahmachari* and the women between the ages of 10-50 can go and worship.

In *N. Adithayan v. Travancore Devaswom Board and Ors.*,[25] the court held that "*the legal position that the protection under Article 25 and 26 extend a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion or practices regarded as parts of religion.*"

In *Haji Ali Dargah Trust v. Noorjehan Safia Niaz*,[26] the Supreme Court while dealing with the issue of allowing women into the sanctum sanctorum of Haji Ali Dargha, denied that the exclusion of women from the sanctum sanctorum was an essential religious practice and defined the phrase "essential religious practice" as follows –

"*Essential part of a religion means the core beliefs upon which a religion is founded and essential practice means those practices that are fundamental to follow a religious belief. According to the 'essential functions test', the test to determine whether a part or a practice is essential to the religion, in this case, Islam, to find out whether the nature of religion will change, without that part or practice; and whether the alteration, will change the very essence of Islam and its fundamental character. As is noted in the judgments referred hereinabove, what is protected by the Constitution are only*

[25] N. Adithayan v. Travancore Devaswom Board and Ors., (2002) 8 SCC 106.
[26] Haji Ali Dargah Trust v. Noorjehan Safia Niaz, (2016) 16 SCC 788.

such permanent essential parts, where the very essence of the religion is altered."

Thus, the test is that the practice, if not followed, should alter the very essence of religion. The protection must be confined to such religious practices as are an essential and an integral part of the religion and no other.[27] The exclusion of women is the essence of the *Brahmacharya Aashram* followed by Lord Ayyappa and is thus integral to the religion. If women were allowed, it would definitely lead to the disturbance in the continuance of the *Brahmacharya Aashram*.

Justice Indu Malhotra in her dissenting opinion mentioned the 41-day ritual known as *Vratham* and featured the essential prerequisites of the ritual as follows –

"*It is believed that Lord Ayyappa himself undertook the 41-day 'Vratham' before he went to Sabarimala Temple to merge with the deity......When a pilgrim undertakes the 'Vratham', the pilgrim separates himself from the women-folk in the house, including his wife, daughter, or other female members in the family. He refrains from interacting with young women in daily life, including one's daughter, sister, or other young women relatives......This custom or usage is understood to have been prevalent since the inception of this Temple, which is since the past several centuries.*"

The essential part of a religion means the core beliefs upon which a religion is founded and essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of religion is built.[28] The essential practice in the 41-day *Vratham* is the renouncement of all the worldly affairs including the renouncement of women and refrainment of interaction with young women. Lord Ayyappa himself undertook the 41-day *Vratham* before he went to

[27]N. Adithayan v. Travancore Devaswom Board and Ors., (2002) 8 SCC 106.
[28]Haji Ali Dargah Trust v. Noorjehan Safia Niaz, (2016) 16 SCC 788.

Sabarimala Temple to merge with the deity. Thus, the core belief is turning into a *Brahmachari* with the prerequisite of refraining from interacting with women.

In *Acharya Jagdishwaranand Avadhuta v. Commissioner of Police*,[29] the Supreme Court, while deciding whether the *Tandav* dance performed by a religious denomination was essential or not, held that:

"*Tandava dance cannot be accepted as an essential religious rite of Ananda Margis when in 1955 the Ananda Marga order was first established. It is the specific case of the petitioner that Shri Ananda Murti introduced tandava as a part of religious rites of Ananda Margis later in 1966. Ananda Marga as a religious order is of recent origin and tandava dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances tandava dance can be taken as an essential religious rite of the Ananda Margis.*" In this case, the judgment given by the Supreme Court denying *Tandav* dance as an essential religious practice of the *Anand Margis* was on the basis of the stand that the said religious practice was not performed by the religious denomination since its inception. However, in the present case, the same is not so. The exclusion of women between the ages of 10-50 has been a practice since the inception of the temple, and, therefore, constitutes as an essential religious practice.

In *C.N. Eswara Iyer v. Commissioner, Hindu Religious and Charitable Endowment Board*,[30] the court held that –

"*There is no dispute that the Constitution protects such practices which are essentially in the nature of religious practices. In case those practices are found to be essential and integral parts of their religion, the Constitutional protection would extend even to those*

[29]Acharya Jagdishwaranand Avadhuta v. Commissioner of Police, AIR 1984 SC 512.

[30]C.N. Eswara Iyer v. Commissioner, Hindu Religious and Charitable Endowment Board, 2011 SCC OnLine Mad 157.

practices. Therefore, the term "integral part of the religion" assumes significance. There should be materials placed before the Court to demonstrate that a particular practice has attained the character of an essential religious practice."

In *Acharya Jagdishwaranand Avadhuta v. Commissioner of Police*,[31] it was held that *"there cannot be additions or subtractions to integral part of a religion because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential part what is protected by the Constitution.*" Thus, the essential and integral part in the present case, that is, the exclusion of women between the ages of 10-50 years, cannot be altered to any extent. There can be no addition to this, women of all ages cannot be allowed as it would alter the very nature of *Brahmacharya Aashram*, which is refusal of interaction with young women.

What Article 25(2)(a) of the Constitution contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution, but only when they run counter to public order, health or morality.[32] In *Superintendent, Central Prison v. Ram Manohar Lohia*,[33] the court famously propounded its concentric circles theory – 'security of the State' belonged within the genus of 'public order', which, in turn, belonged within the genus of 'law and order' and made it clear that 'public order' is a term related to preventing public disturbances and maintaining public peace.

The diffusion of constitutional morality, not merely among the majority of any community but on a whole, is the indispensable condition of a Government at once free and peaceable; since even any

[31] Acharya Jagdishwaranand Avadhuta v. Commissioner of Police, AIR 1984 SC 512.

[32] The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005.

[33] Superintendent, Central Prison v. Ram Manohar Lohia, 1960 SCR (2) 821.

powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendency for themselves.[34] Constitutional morality in its strictest sense of the term implies strict and complete adherence to the constitutional principles as enshrined in various segments of the document. Constitutional morality is that fulcrum which acts as an essential check upon the high functionaries and citizens alike, as experience has shown that unbridled power without any checks and balances would result in a despotic and tyrannical situation which is antithetical to the very idea of democracy.[35]

In *State (NCT of Delhi) v. Union of India*,[36] the court held that "*constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse. We may give an example. When one is expressing an idea of generosity, he may not be meeting the standard of justness. There may be an element of condescension. But when one shows justness in action, there is no feeling of any grant or generosity. That will come within the normative value. That is the test of constitutional justness which falls within the sweep of constitutional morality. It advocates the principle of constitutional justness without subjective exposition of generosity.*"

Thus, what constitutional morality demands is the prerequisite necessity of constitutional norms. Freedom to practice religion is inclusive in constitutional norms. The exclusion of women between the ages 10-50 years does not in any of the ways breach public order, constitutional morality or health, subject to which, restrictions by the

[34]Constituent Assembly of India Debates (Proceedings), Vol. 7, 37 http://164.100.47.132.LssNew/cadebatefiles/C04111948. (Jan. 31, 2019, 7:50 P.M.).
[35]State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501.
[36]*Id.*

State are legitimate. Public order, which is subject to public peace, remains unaffected by the exclusion of women since there are other temples of Lord Ayyappa where there exist no such restrictions.

IV. CONCLUSION

The effort to treat religion better or worse than other interests has generated indefensibly inequitable results and has created intractable problems for the courts.[37] The 'no interference' doctrine has led judges to invent arbitrary ways to settle disputes. The essential religious practices test that has crystallized through the judicial pronouncements over the past 60 years has been the biggest deterrent to the right to freedom of religion. The test, in fact, is a diversion from the principles laid down in the Constitution. It is not only unconstitutional but is also based on flawed reasoning. It assumes that certain religious practices are central to religion while the others are merely incidental, but this indeed is a mistaken assumption and an incorrect understanding of religion as religion consists of all these practices put together.[38] The judgment set out by the court in the Sabarimala temple case does not set out the right proposition of what is an essential religious practice.

The essential part of a religion means the core beliefs upon which a religion is founded and essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of religion is built.[39] The test is that the practice, if not followed, should alter the very essence of religion. The practice, if not followed, would render

[37]CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 29 (2007).

[38]Vipula Bhatt, *Rise of Religious Unfreedom in India: Inception and Exigency of the Essential Religious Practices Test*, 3 RSRR 126 (2016).

[39]Haji Ali Dargah Trust v. Noorjehan Safia Niaz, (2016) 16 SCC 788.

the religion meaningless. The protection must be confined to such religious practices as are an essential and an integral part of the religion and no other.[40] Constitutional protection extends to those practices that are found to be essential and integral parts of their religion. Therefore, the term 'integral part of the religion' assumes significance. The core belief is turning into *Brahmachari* with the prerequisite of refraining from interacting with women. The essential and integral part in the present case, that is, the exclusion of women between the ages of 10-50 years, cannot be altered to any extent. This is because allowing women of all ages would alter the very nature of *Brahmacharya Aashram*, which is refusal to interact with young women. The exclusion of women between the ages of 10-50 has been in place since the inception of the temple, and, therefore, constitutes an essential religious practice.

[40]N. Adithayan v. Travancore Devaswom Board and Ors., (2002) 8 SCC 106.

JARNAIL SINGH v. LACHHMI NARAIN GUPTA: THE CASE THAT MUDDLES THE LAW ON RESERVATION IN PROMOTIONS

Aparna Singh[*]

Abstract

In contemporary times, the debate on reservation in promotions has once again gained momentum. This article analyses the recent judgment of Jarnail Singh v. Lachhmi Narain Gupta wherein the five-judge bench of the Supreme Court refused to refer the decision of M. Nagraj v. Union of India to a larger bench for a decision on its correctness. The article argues that the Court has incorrectly declined the reference of Nagraj to a bench of seven judges and further provides the grounds for reconsideration of Nagraj. In Nagraj, the Supreme Court imposed three conditions on the power of the State under Article 16(4A) to grant reservation in promotions in favour of SC/STs. These conditions have stirred controversy on the correctness of Nagraj. In Jarnail Singh, the five-judge bench has invalidated the condition of demonstrating backwardness of SC/STs as mandated by Nagraj. The decision of Jarnail Singh has raised critical questions of judicial propriety. The article has criticized the

[*]Aparna Singh is a Fifth-Year Student at National Law University, Jodhpur. The Author may be reached at aparna.singh0001@gmail.com.

finding of the Court on the issue of creamy layer as vague and unwarranted. The article also provides a detailed account of subsequent cases that interpreted Nagraj. In Suresh Chand Gautam v. Union of India, the Supreme Court held that the State has no constitutional duty under Article 16(4A) to collect quantifiable date to determine inadequacy of representation of SC/STs in the services. The article criticizes the aforementioned case and argues that Article 16(4A) confers a power on the State coupled with duty to collect quantifiable data. The article concludes that a larger bench of seven judges should reconsider Nagraj and clarify the law on reservation in promotions.

I. INTRODUCTION

The issue of reservation has always been a field of fierce disagreement between the judiciary and the Parliament. The development of Indian jurisprudence on reservations has been fraught with many political controversies that finally reach the Supreme Court. The usual response of the Parliament is to amend the Constitution in order to nullify the effect of any judicial decision which comes in the way of the State's policy on reservation. The provision for "reservation in promotions" follows the same pattern. Article 16(4A)[1] which allows the State to grant reservation in promotions in favour of Scheduled Castes (hereinafter, "**SC**") and Scheduled Tribes (hereinafter, "**ST**") was inserted by the Parliament by the Constitution (Seventy-Seventh Amendment) Act, 1995.

[1]INDIA CONST. art. 16, cl. 4A.

In 2006, a five-judge bench of the Supreme Court in *M. Nagraj v. Union of India* ("**Nagraj**"),[2] upheld the constitutional validity of Article 16(4A) with certain riders to the exercise of power under it. Following this decision, courts have struck down service rules of different Indian states on the ground that the State has failed to comply with the conditions mandated in *Nagraj.* Thus, a State approached the Supreme Court seeking a prayer for reconsideration of *Nagraj* by a larger bench of seven judges. Recently, a five-judge bench of the Supreme Court, in *Jarnail Singh v. Lachhmi Narain Gupta* ("**Jarnail Singh**"),[3] decided that *Nagraj* need not be reconsidered by a seven-judge bench. The Court struck down one of the requirements imposed by *Nagraj* as bad in law. This decision raises concerns about judicial propriety as the five-judge bench ruled that a coordinate bench incorrectly interpreted the law. Moreover, the Supreme Court has further muddled the law on reservation in promotions with its ambiguous ruling in *Jarnail Singh*.

This article argues that *Nagraj* requires reconsideration by a larger bench as it has created confusion regarding conditions to be fulfilled by the State while providing reservation in promotions to SC/STs. The article analyses the law enunciated by the Supreme Court in *Nagraj* and highlights the grounds for reconsideration of *Nagraj.* Further, it discusses the errors committed in *Jarnail Singh* and how it has 'unsettled' the law. The article is divided into three parts – Part I describes theoretical underpinnings of the policy of reservation, the historical background of reservation in promotions and finally discusses the ratio laid down in *Nagraj*. Part II identifies the grounds for reconsideration of *Nagraj* and how the courts have interpreted *Nagraj* in subsequent cases. Part III contains analysis of the recent decision in *Jarnail Singh*, and finally, the conclusion where the author has criticized the current position.

[2]M. Nagaraj v. Union of India, (2006) 8 SCC 212.
[3]Jarnail Singh v. Union of India, (2018) 10 SCC 396.

II. THEORETICAL UNDERPINNINGS OF RESERVATION

Article 16(1) guarantees equality of opportunity for all citizens in matters relating to employment to any office under the State.[4] To fortify this guarantee, Article 16(2) prohibits discrimination against citizens in public employment on grounds only of religion, race, caste, sex, descent, place of birth or any of them.[5] Article 16(1) speaks of formal equality, that is, equality under law. Equality in law, or formal equality, advocates that equality of opportunity only requires elimination of legal obstacles towards ensuring a level-playing field.[6] This is also called the colour-blind vision of equality.[7] This vision treats citizens as individuals and not as members of groups.[8] This theory is averse to any classification of citizens on the basis of their affiliation to any group. It argues that reservations to social groups will result in further permeating divisions in the society instead of eliminating them. Accordingly, the identification of any individual as member of a particular social group is totally irrelevant.

In contrast to the colour blind theory of equality, the anti-subordination theory recognizes historical injustice meted out to individuals by virtue of their membership to a particular group.[9] It considers groups as the target of historical discrimination and argues that equality can only be achieved by granting special rights to these

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[4] INDIA CONST. art. 16, cl. 1.
[5] INDIA CONST. art. 16, cl. 2.
[6] Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CAL. L. REV. 1687 (1986).
[7] Gautam Bhatia, *Reservations, Equality and the Constitution – I: Origins*, (Jan. 19, 2014), https://indconlawphil.wordpress.com/2014/01/19/reservations-equality-and-the-constitution-i-origins/.
[8] *Id.*
[9] *Id*.

historically disadvantaged groups.[10] This is called substantive equality or equality in fact.[11] Thus, Article 16(4), 16(4A) and 16(4B), that allow the State to make provision for reservation in public employment in favour of backward classes, spell out the anti-subordination vision of equality.

It is relevant to determine which conception of equality is espoused by the Indian Constitution. In *Indra Sawhney v. Union of India* (**"Indra Swahney**"),[12] the Supreme Court ruled that Article 16(4) is not an exception to Article 16(1). The provision under Article 16(4) is conceived in the interest of certain *sections* of society which should be balanced against the guarantee of equality held out to every *citizen* enshrined in Article 16(1).[13] This was reiterated in *Nagraj* where the Supreme Court held that the conflicting claims of individual right under Article 16(1) and preferential treatment in the matter of promotion to SC/STs under Article 16(4A) must be balanced. The Court achieved this balance by providing three conditions which the State must fulfil before providing reservation in promotions under Article 16(4A). Thus, the Supreme Court has interpreted Article 16 as subscribing to both visions of equality *viz.* colour blind and anti-subordination, which need to be balanced against each other.

A. *Tracing the history of reservations in promotions*

The debate on reservation in promotions is not something that has come to the forefront of legal discourse in the contemporary times. The issue has been debated even before the addition of Article 16(4A) in 1995.[14] Initially, the question was whether Article 16(4) that allows

[10]Owen Fiss, *Groups and the Equal Protection Clause*, 5(2) PHILOS. PUBLIC AFF. 107 (1976).
[11]M. Nagaraj v. Union of India, (2006) 8 SCC 212.
[12]Indra Sawhney v. Union of India, AIR 1993 SC 477.
[13]*Id.*
[14]Ira Chadha-Sridhar & Sachi Shah, *Caste and Justice in the Rawlsian Theoretical Framework: Dilemmas on the Creamy Layer and Reservations in Promotions,* 10 NUJS L. REV. 171 (2017).

the State to provide reservations in matter of employment extends to promotions as well. This was answered in affirmative in *General Manager, Southern Railway v. Rangachari*[15] where the Supreme Court held that the advancement of Socially and Educationally Backward Classes requires adequate representation in both lower as well as higher cadre of services. Thus, the Court allowed reservations in promotions in favour of Backward Classes under Article 16(4).[16]

In *State of Punjab v. Hira Lal*,[17] the Supreme Court rejected a plea for reconsideration of *Rangachari.* The Court emphasized that the efficiency of services under Article 335[18] shall not be compromised provided that reservation in promotions is allowed keeping in the mind the minimum efficiency required.[19] This position was overturned by *Indra Sawhney*.

In *Indra Sawhney*, the Court held that reservation under Article 16(4) is limited only to initial appointments and does not extend to reservation in promotions.[20] It held that reservation in promotions would have a deleterious effect on the efficiency of services for two reasons – *firstly*, it would kill the spirit to work among the reserved candidates and would amount to creation of a permanent separate category. *Secondly*, it would generate a feeling of despondence and heart burn among general category candidates. Finally, the Court held that allowing reservation in promotion would amount to violation of the rule of equality.[21]

In response to the decision of *Indra Sawhney*, the Parliament added Article 16(4A) to the Constitution. The constitutional validity of this

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[15]General Manager, Southern Railway v. Rangachari, AIR 1962 SC 36.
[16]*Id.*
[17]State of Punjab v. Hira Lal, (1970) 3 SCC 567.
[18]INDIA CONST. art. 335.
[19]*Id.*
[20]Indra Sawhney v. Union of India, AIR 1993 SC 477.
[21]*Id.*

amendment was challenged in *Nagraj*, which is discussed in detail in the next section.

B. *Analysis of M. Nagraj v. Union of India*

As discussed above, in *Indra Sawhney*, the Supreme Court extended reservation to only initial appointments and not to promotions. In response to this, the Parliament inserted Article 16(4A)[22] allowing the State to provide reservation in promotions in favour of SC/STs. Article 16(4B)[23] was also added enabling the State to carry forward the vacancies of previous years without violating the fifty percent ceiling limit on total reservations in a year. In addition, a proviso[24] was added to Article 335 which allows the State to relax qualifying marks in any examination for providing reservation in promotion in favour of SC/STs. In *Nagraj*, the petitioners challenged Article 16(4A), Article 16(4B) and Article 335 on the ground that these amendments violate the guarantee of equality which forms the part of the basic structure of the Constitution.

The Court began by recognizing that equality forms part of the basic structure of the Constitution. Thus, the issue was whether the impugned amendments destroy the basic structure of the Constitution. It was held that Article 16(4A) and Article 16(4B) are only enabling provisions. The exercise of power under both these articles is limited by parameters mentioned in Article 16(4). Thus, the Court held –

"*The object in enacting the enabling provisions like Articles 16(4), 16(4A) and 16(4B) is that the State is empowered to identify and recognize the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency*

[22]Inserted by Constitution (Seventy-Seventh Amendment) Act, 1995.
[23]Inserted by Constitution (Eighty-First Amendment) Act, 2000.
[24]Inserted by Constitution (Eighty-Second Amendment) Act, 2000.

which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335."[25]

Therefore, the Court laid down three limitations on the power of the State to grant reservation in promotions under Article 16(4A). *Firstly*, the State has to satisfy on the basis of quantifiable data that the class is not adequately represented in the services. *Secondly*, the State has to show on the basis of quantifiable data that the class benefitting from reservation is backward. And *lastly*, the State has to ensure that the efficiency of services is not compromised. However, the Court did not clarify the nature and method of collection of this quantifiable data by the State.

The Court finally noted that Article 16(4A) has retained the controlling factors mentioned in Article 16(4) which put a check on the power of State to grant reservation. Thus, Article 16(4A) was upheld subject to the aforementioned three riders on the power of the State to provide reservation in promotions to SC/STs.

III. GROUNDS FOR RECONSIDERATION OF *NAGRAJ*

In *Jarnail Singh*, the Supreme Court declined a plea for reconsideration of *Nagraj* by a larger bench. The Court however struck down one of the conditions mandated in *Nagraj* as being contrary to *Indra Sawhney*. The author is of the opinion that the decision of *Nagraj* suffers from ambiguity as the Court has left many critical questions unanswered and there is no clarity on the precise content of the conditions imposed by the Court. Thus, it requires reconsideration by a larger bench on two counts:

[25] M. Nagaraj v. Union of India, (2006) 8 SCC 212.

A. *Quantifiable data showing backwardness of SC/STs*

The requirement of demonstrating backwardness of SC/STs by way of quantifiable data under Article 16(4A) has raised serious questions. Article 16(4A) speaks of reservation in promotions to only SC/ST and not Backward Classes. However, Article 16(4) deals with reservation in favour of Backward Classes. In *Indra Sawhney*, the Supreme Court held that there is no requirement of identifying backwardness of SC/STs as they are admittedly included within Backward Classes.[26]

Furthermore, in *E.V. Chinnaiah v. State of Andhra Pradesh*,[27] a five-judge bench of the Supreme Court ruled that SCs form a class by themselves and there cannot be any further sub-classification within SCs. The Court reasoned that by virtue of the presidential list released under Article 341(1), certain castes, races and tribes are classified as "Scheduled Caste".[28] Under Article 341(2), only the Parliament has the power to include or exclude a class from the list of SCs by enacting a law.[29] Thus, the Court held that any sub-classification within SCs would amount to tinkering with the presidential list which otherwise is not permitted under Article 341(2). It was further observed that SC/STs are presumed to be the most backward amongst the Backward Classes and thus they must be granted reservation as a class and not as a group within that class.[30] In *State of Kerala v. N.M. Thomas*,[31] Justice Krishna Iyer observed that SC/STs are not castes as understood under Hindu religion. They are an amalgamation of castes, races and tribes which acquire the status of SC/STs by way of presidential notifications as they are found to be the lowliest and in need of state aid.

[26]Indra Sawhney v. Union of India, AIR 1993 SC 477.
[27]E.V. Chinnaiah v. State of Andhra Pradesh, AIR 2005 SC 162.
[28]INDIA CONST. art. 341, cl. 1.
[29]INDIA CONST. art. 342, cl. 2.
[30]E.V. Chinnaiah v. State of Andhra Pradesh, AIR 2005 SC 162.
[31]State of Kerala v. N.M. Thomas, (1976) ILLJ 376 SC.

Therefore, the condition of proving backwardness of SC/STs under Article 16(4A) imposed in *Nagraj* deviates from the previous cases of the Supreme Court which held that SC/STs are presumed to be backward. The Court did not provide any justification for imposing this additional requirement of demonstrating backwardness of SC/STs while granting them reservation in promotions. Thus, *Nagraj* needs reconsideration by a larger bench to evaluate and justify this anomaly.

B. *Nature of quantifiable data*

According to Article 16(4A), the State can grant reservation in promotion to any class or classes of posts in services in favour of SC/STs, if "in the opinion of the State", they are not adequately represented in services. Article 16(4A) flows from Article 16(4) under which provision also the State can provide reservation to Backward Classes if in its opinion they are not adequately represented in services. In *Indra Sawhney*, the Court while interpreting Article 16(4) held that the question of inadequacy of representation is a matter within the subjective satisfaction of the State. The Court further ruled that there must be "some material" on the basis of which the State must form its opinion and the courts are expected to show due deference to the opinion of the State.[32]

In *Nagraj*, the Court qualified the requirement of "some material" with "quantifiable data". Moreover, the Court has not specified the content and the methodology of collecting quantifiable data. It has not clarified the unit of determination of inadequacy, that is, whether inadequacy is to be judged on the basis of the entire population of SC/STs or it has to be seen cadre wise or with respect to entire services or groups of certain services under the State. The period over which inadequacy should be ascertained has also not been defined by the Court. The Court observed that there is no fixed yardstick to

[32]Indra Sawhney v. Union of India, AIR 1993 SC 477.

measure these factors and thus it has to be decided by the courts according to the facts of each case.[33]

Thus, the State is required to prove to the satisfaction of the Court that there was requisite quantifiable data demonstrating inadequacy of representation of SC/STs. This amounts to strict scrutiny by the Court of the opinion formed by the State which is against the law laid down in *Indra Sawhney*. The Courts have applied *Nagraj* and quashed the reservation policy of various states on the ground that the quantifiable data is not collected in terms of the law laid down in *Nagraj.* However, *Nagraj* itself does not speak of the terms and content of the quantifiable data leaving the State in uncertainty. This ambiguity regarding the terms and methodology of collection of data has left the reservation policies of states to the mercy of courts. This has led to a paralysis in governance as the uncertainty over reservation policies of the State is looming large with no specific guidelines to the State.

Therefore, *Nagraj* requires reconsideration by a larger bench so that the Court may prescribe standards on which the State has to form its opinion regarding inadequacy of representation of SC/STs in services.

C. *The Aftermath of M. Nagraj*

The constitutionality of Article 16(4A) was for the first time upheld in *Nagraj* wherein the Court laid down the law on reservation in promotions. However, as argued above, the grounds on which it was allowed are vague and this leaves a room for interpretation of *Nagraj* by courts in subsequent cases. The courts have strictly construed the conditions of *Nagraj* by demanding quantifiable data with respect to the particular cadre in which the reservation is made.

[33]M. Nagaraj v. Union of India, (2006) 8 SCC 212.

D. *Defining the nature of quantifiable data required to determine inadequacy of representation of SC/STs*

As discussed before, *Nagraj* did not specify the specific nature and content of the quantifiable data required by the State under Article 16(4A). Therefore, the Supreme Court sought to define the same in subsequent cases.

In *U.P. Power Corporation Ltd. v. Rajesh Kumar*,[34] the Supreme Court examined the constitutional validity of the U.P Public Services Rules that made a provision for reservation in promotions in favour of SC/STs. In this case, the government relied on a Social Justice Committee Report that examined the representation of SC/STs in all the services under the State or other corporations. The Court rejected the said report on the ground that it examined the entire population and vacancies in all the services under the State and not the particular cadre in which the promotion is proposed. The Court while applying the parameters of *Nagraj* held that "*the Government has to apply cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service.*"[35] This means that the State has to collect quantifiable data with respect to the particular cadre to which the promotion is proposed in order to determine inadequacy of representation of SC/STs. Thus, the Court struck down the Service Rules on the ground that they are *ultra vires* the dictum of *Nagraj*. It ordered a fresh exercise of collection of quantifiable data in the light of the decision in *Nagraj*.

This runs counter to the law laid down in *Indra Sawhney* where the Court ruled that as long as there is some material on the basis of which the State has formed its opinion, the courts will not interfere with the policy decisions of the State. Moreover, the Court did not

[34]U.P. Power Corporation Ltd. v. Rajesh Kumar, (2012) 7 SCC 1.
[35]*Id.*

provide any justification for using cadre as a unit for determining inadequacy of representation. In another decision, the Supreme Court applying *Nagraj* upheld the decision of the Rajasthan High Court that quashed notifications issued by the State granting reservation in promotions to SC/STs on the ground that the State has failed to collect quantifiable data.[36] *Nagraj* has been followed by the Supreme Court[37] and High Courts[38] in various cases to quash policy decisions of the State granting reservation in promotions to SC/STs. Aggrieved by these decisions, the State filed for reconsideration of *Nagraj* by a larger bench.

E. *Article 16(4A) confers power on the State coupled with duty to take steps to form its opinion*

After the *Rajesh Kumar* case, the U.P. Government, instead of collecting quantifiable data as per the order of the Court, reverted SC/ST employees to the post they held previously before the promotions were made.[39] This led to filing of another batch of petitions in the Supreme Court wherein the petitioners prayed for issue of writ of mandamus directing the U.P Government to collect quantifiable data in terms of decision of *Nagraj*. In *Suresh Chand Gautam v. State of Uttar Pradesh*,[40] the Supreme Court relying on *Nagraj* ruled that Article 16(4A) is only an enabling provision, which means that the power to grant reservation is only discretionary. Thus, the Court held that a writ of mandamus cannot be issued to the State

[36]Suraj Bhan Meena v. State of Rajasthan, (2011) 1 SCC 467.
[37]B.K Pavitra v. Union of India, AIR 2017 SC 820.
[38]Jayanta Chakraborty v. The State of Tripura, AIR 2015 Tripura 43; Union of India v. Pal Singh, W.P. (C) No. 1303/2015; R.B. Rai vs. State of Madhya Pradesh, W.P. No.1942/2011; Lachhmi Narain Gupta v. Jarnail Singh, (2012) ILR 1 P&H 838.
[39]U.P. Power Corporation Ltd. v. Rajesh Kumar, Contempt Petition (C) No. 214/2013, 13.10.2015.
[40]Suresh Chand Gautam v. State of Uttar Pradesh, (2016) 11 SCC 113.

as there is no constitutional obligation on the State to provide reservation in promotion under Article 16(4A).[41]

The author is of the opinion that the Supreme Court incorrectly rejected the argument that Article 16(4A) confers a power coupled with duty on the State to take steps to form its "opinion" regarding the inadequacy of representation of SC/STs. Article 16(4A), though couched in a permissive language, confers a "power coupled with duty" on the State to take steps towards formation of its opinion. In *Ambica Quarry Works v. State of Gujarat*, the Supreme Court ruled that "*when a public authority is vested with power, the expression "may" has been construed as "shall" because power, if the conditions for the exercise are fulfilled, is coupled with duty. Though the language of the provision may be permissive but there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.*"[42] This principle was also applied in *Madhav Rao Jivaji Rao Scindia v. Union of India*,[43] where the Court held that the power of the President under Articles 341 and 342 to specify SC and STs is coupled with the constitutional duty upon them to act.

Article 16(4A) furthers the avowed objective of removing social disabilities suffered by marginalized groups. This is also reflected by Article 46 which casts a duty on the State to promote educational and economic interests of SCs and STs.[44] In *Indra Sawhney*, Justice Pandian in his concurring opinion observed that the power conferred

[41]*Id*.
[42]Ambica Quarry Works v. State of Gujarat, (1987) SCC 213.
[43]Madhav Rao Jivaji Rao Scindia v. Union of India, (1971) 1 SCC 85.
[44]INDIA CONST. art. 46.

on the State under Article 16(4) is coupled with duty.[45] Article 16(4A) uses similar language as that of Article 16(4) and therefore, considering its remedial purpose, must be interpreted as conferring power coupled with duty on the State.[46]

Thus, Article 16(4A) should be interpreted as imposing a positive duty on the State to collect quantifiable data and apply its mind to determine inadequacy of representation of SC/STs. After this exercise is undertaken, it is then the discretion of the State to determine whether any ameliorative measure is required in favour of SC/STs under Article 16(4A). The decision whether to grant reservation or not would fall within the discretion of the State. This interpretation would eliminate the choice of the State to turn a blind eye towards the plight of SC/STs by not acting at all. On the other hand, the interpretation proposed by the author would prevent Article 16(4A) from being rendered nugatory.

According to the author, the subsequent cases applying *Nagraj* have further obscured the interpretation of Article 16(4A) and left the aggrieved SC/STs helpless in the face of inaction on part of the State.

IV. JARNAIL SINGH AND ITS DISCONTENTS

Recently, in *Jarnail Singh*, the five-judge bench of the Supreme Court, in a unanimous opinion authored by Justice Nariman, held that *Nagraj* need not be reconsidered by a larger bench of seven judges. The Court made certain observations that have further skewed the interpretation of Article 16(4A). The Court discussed the following two points –

[45]Indra Sawhney v. Union of India, AIR 1993 SC 477.

[46]Karan Lahiri, *Guest Post: Does Article 16 Impose a "Power Coupled with a Duty" upon the State? – I*, (Nov. 13, 2015), https://indconlawphil.wordpress.com/2015/11/13/guest-post-does-article-16-impose-a-power-coupled-with-a-duty-upon-the-state-i/.

A. *Requirement of showing backwardness held to be invalid*

The Court relying on *Indra Sawhney* held that the condition imposed by *Nagraj* which requires proof of backwardness of SC/STs is invalid. The Court reasoned that the nine-judge bench of the Supreme Court in *Indra Sawhney* has held that the test of backwardness does not apply to SC/STs as they are presumed to be backward.[47] Thus, the requirement of proving backwardness of SC/STs was struck down being directly contrary to *Indra Sawhney*.

It must be noted that the five-judge bench of the Supreme Court in *Jarnail Singh* invalidated one of the conditions laid down by a coordinate bench in *Nagraj*. The basic rule of judicial propriety demands that where the Court does not agree with the findings of a bench of co-equal strength, it must refer the same to a larger bench.[48] Thus, the proper course would have been to refer *Nagraj* to a larger bench to decide upon its correctness.

B. *Application of the test of creamy layer to SC/STs*

In *Jarnail Singh*, the Court proceeded on a premise that *Nagraj* has applied the test of creamy layer to SC/STs in the matter of reservation in promotions under Article 16(4A). Accordingly, the Court held that the creamy layer principle is a facet of equality embedded in Article 14 and 16 and thus, the courts have jurisdiction to exclude creamy layer from SC/STs when applying the principle of equality. It observed that the purpose of reservation would be defeated if the creamy layer within the class secures all the jobs leaving the truly backward class as they were.[49] The Court disagreed with the views of Balakrishnan, C.J., in *Ashok Kumar Thakur v. Union of India*[50] that

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[47]Jarnail Singh v. Union of India, (2018) 10 SCC 396, 23.
[48]Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694.
[49]Jarnail Singh v. Union of India, (2018) 10 SCC 396, 26.
[50]Ashok Kumar Thakur v. Union of India, (2008) 6 SCC 1.

the creamy layer principle is only a test of identification and not a principle of equality.[51]

The author is of the view that the Court has committed certain errors that have further muddled the law on reservations in promotions. These are discussed below:

Firstly, the Court has misconstrued *Nagraj* as applying the creamy layer principle to SC/STs. *Nagraj* did not expressly apply the test of creamy layer to SC/STs under Article 16(4A). In *Nagraj*, Article 16(4A) and Article 16(4B) were challenged and in that context the Court held that "*the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.*"[52] This statement of the Court only signifies that the principle of creamy layer is a facet of equality under Article 16. It does not indicate that the State has to apply creamy layer principle to SC/STs under Article 16(4A). Furthermore, the Court was also judging the validity of Article 16(4B) which is not restricted to SC/STs alone, unlike Article 16(4A).

Secondly, the ruling that the creamy layer principle applies to SC/STs is contrary to the preliminary holding of the Court that SC/STs are presumed to be backward. In *Indra Sawhney,* the Court observed that the discussion on creamy layer has no relevance to SC/STs and it is confined only to Other Backward Classes (hereinafter, "**OBC**").[53] This is because the social disadvantage suffered by SC/STs is much graver than the one faced by OBCs. In the case of OBCs, it can be argued that the presumption of backwardness can be displaced with economic upliftment as their backwardness is largely political, economic or educational. However, in case of SC/STs where

[51]Jarnail Singh v. Union of India, (2018) 10 SCC 396, 27.
[52]M. Nagaraj v. Union of India, (2006) 8 SCC 212, 122.
[53]Indra Sawhney v. Union of India, AIR 1993 SC 477, 792.

backwardness is mainly social and their group identity itself is the locus of their social subordination, it is difficult to claim that with their economic or educational upliftment, they also break free of the social backwardness. Thus, the creamy layer principle which takes into account the economic advancement is not sufficient to displace the presumption of backwardness of SC/STs who are victims of historical injustice by virtue of their membership to a particular group. The gravity of the social injustice suffered by SC/STs is evident from the specific provision in the Constitution that prohibits the abominable practice of untouchability.[54] The Court's justification for extending the test of creamy layer does not take into account the peculiar disadvantage suffered by SC/STs. Instead, the Court has equated the magnitude of backwardness suffered by SC/STs to that of OBCs. In *Indra Sawhney*, the Court was cognizant of the severe social disadvantage suffered by SC/STs and therefore it restricted the application of the test of creamy layer to only OBCs.

Moreover, in *Indra Sawhney*, the test of creamy layer was applied by the Supreme Court to determine OBCs. On the other hand, in the case of SC/STs, they are specified by the presidential list under Article 341 and Article 342 which list can be modified only by the Parliament through a law. In *Chinnaiah*, the Court recognized this and held that SC/STs cannot be subdivided into forwards and backwards as the whole class by virtue of the presidential list is presumed to be backward.[55]

Therefore, in *Jarnail Singh*, the Court marked a major shift in the reservation jurisprudence by extending the applicability of creamy

[54]INDIA CONST. art. 17.
[55]E.V. Chinnaiah v. State of Andhra Pradesh, AIR 2005 SC 162, 39.

layer principle to SC/STs. The analysis of the Court lacks the depth required to justify this shift.[56]

Thirdly, the observation that the constitutional courts when applying Article 14 and 16 can exclude the creamy layer from SC/STs is vague. The Court did not lay down that the State has to exclude creamy layer from SC/STs; it only stated that the courts can apply the test of creamy layer as a principle of equality. Thus, it is not clear whether the State is required to mandatorily apply the test of creamy layer to SC/STs under Article 16(4A). It is not known how the constitutional courts will apply the test of creamy layer to SC/STs in cases that are not litigated before it. This ambiguity has led to a hiatus in the policy matters of the State regarding reservation in promotions. Furthermore, the reasoning of the Court can equally be applied to reservation in initial appointments in favour of SC/STs under Article 16(4). The Court was silent on whether the creamy layer test is applicable only in case of reservation in promotions under Article 16(4A) or it can be extended even to reservation in initial appointments under Article 16(4).

Thus, it can be asserted that the decision of the Court on both the issues, namely proof of backwardness of SC/STs and application of the test of creamy layer to SC/STs is unfounded.

V. CONCLUSION

In *Jarnail Singh*, the Constitution bench of five judges was called upon to decide whether *Nagraj* needs to be referred to a bench of seven judges to decide upon its correctness. The Court instead of referring the matter to a larger bench, took upon itself to strike down

[56]Gautam Bhatia, *The Nagraj/Creamy Layer Judgement and its Discontents*, (Sept. 30, 2018) https://indconlawphil.wordpress.com/2018/09/30/the-nagaraj-creamy-layer-judgment-and-its-discontents/.

one of the conditions laid down by a coordinate bench in *Nagraj*. It is respectfully submitted that the five-judge bench in *Jarnail Singh* lacked the requisite jurisdiction to invalidate one of the conditions laid down by a coordinate bench in *Nagraj.* The Court, thus, erred when it declined to refer *Nagraj* to a bench of seven judges for reconsideration.

The ruling that the Courts can exclude creamy layer from SC/STs while applying the principle of equality lacks sufficient clarity. The decision by the Constitution Bench in *Jarnail Singh* was supposed to clearly lay down the law and put an end to the paralysis in governance. However, it has failed on both these counts as it aggravates the ambiguity and confusion already surrounding the matter of reservation in promotions. Consequently, the rights of thousands of SC/ST employees are kept in abeyance as the law on reservation in promotions is still unsettled.

It must be noted that the issue of reconsideration of *Nagraj* has overarching political consequences. The debate on reservations has always created a politically charged environment resulting into a confrontation between the Supreme Court and the Parliament. The decision of *Nagraj* and subsequent cases that interpreted *Nagraj* were not welcomed by the State as they subjected the policy decisions of the State to strict judicial scrutiny. The Court's emphasis on collection of quantifiable data in order to satisfy conditions of *Nagraj* has created difficulties for the State. Thus, to nullify the decision of *Nagraj*, the Parliament introduced a bill to amend Article 16(4A).[57] The amendment purports to circumvent the condition of proving backwardness of SC/STs and inadequacy of representation of SC/STs through quantifiable data as mandated by *Nagraj*. Such a move would

[57]The Constitution (One Hundred Seventeenth Constitutional Amendment) Bill, 2012; See http://www.prsindia.org/uploads/media/117%20Amendment/Bill%20Text%20Const%20117th%20Amendment%20Bill%202012.pdf.

again result in challenging the amended Article 16(4A) on the ground of abrogation of basic structure of the Constitution.

Thus, the solution is not to amend Article 16(4A) but for the Supreme Court to reconsider *Nagraj* and authoritatively specify the conditions on which the State can provide reservation in promotions. The Court must clearly lay down the unit of determination of inadequate representation of SC/STs in the services and the nature of quantifiable data. The Court must interpret Article 16(4A) as conferring power coupled with duty on the State to collect quantifiable data so that the provision is not rendered otiose. Finally, the Court must end the ambiguity on the issue of application of creamy layer to SC/STs. The Court is required to address these significant questions that were left unanswered in *Nagraj* and which are further muddled in *Jarnail Singh*. While doing so, the Court must acknowledge that there are conflicting claims at stake that must be balanced against each other.