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EXPLORING THE CONTOURS OF CONSTITUTIONAL MORALITY UNDER THE CONSTITUTION OF INDIA

Amar Pal Singh & Shivani Chauhan[*]

Abstract

Constitutional morality has been understood in a different sense in a varied context of cases. While tracing the idea of what Ambedkar implied by the term, constitutional morality to the present interpretations of judicial decisions, the scope of the term has taken a very wide sweep covering substantive as well as formal aspects of constitutional values. The present paper has briefly delved into the discussion, commencing with an attempt to decode what constitutional morality is, how it is different from public morality and the application of this doctrine in various recent judgments of the Supreme Court.

I. Introduction

THE CONCEPT of constitutional morality is an abstract concept that has been functioning as a background reinforcement of constitutional thought but has seldom been elaborately discussed. Especially in the Indian context, apart from a few scattered mentions here and there, there hasn't been a serious engagement with the idea until the recent rulings of the Supreme Court on pertinent questions of equality, freedom, liberty and administration, among others. Constitutional morality, while not explicitly enshrined in the constitutions around the world, has been a concept that has guided the evolution of constitutional interpretation through changing times, in keeping with the most basic principles and commitments of the State and

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its governing paraphernalia. Thus, like constitutionalism, constitutional morality may also be put in the realm of meta-law that guides the constitution and its interpretation like a lighthouse. Perhaps the most appropriate articulation of this idea was done by the Supreme Court in *Manoj Narula*, wherein, Dipak Misra, J. enunciated that:[1]

> The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons-in-charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality.

Constitutional laws must base themselves on the substratum of constitutional morality, in order to be effective. As Andre Béteille has noted that:[2]

> In the absence of constitutional morality, the operation of a constitution, no matter how carefully written, tends to become arbitrary, erratic and capricious. It is not possible in a democratic order to insulate completely the domain of law from that of politics. A constitution such as ours is expected to provide guidance on what should be regulated by the impersonal rule of law and what may be settled by the competition for power among parties, among factions and among political leaders.

Thus, it is essential that there is an infusion of principles of constitutional morality within all institutions and instrumentalities of the State, including legislators, judges, lawyers, ministers, civil servants, writers and public intellectuals to ensure that the Constitution doesn't become a play-thing of power brokers.[3]

The first mention of constitutional morality in Indian context goes back to the Constituent Assembly Debates, where Dr. B. R. Ambedkar went beyond the

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1 *Manoj Narula* v. *Union of India,* (2014) 9 SCC 1 at para 64, *hereinafter* referred to as *Manoj Narula*. It was a constitution bench judgment. (Elaborately discussed in the later sections).

2 Andre Béteille, "Constitutional Morality" 43(40) *Economic & Political Weekly* 36 (2008).

3 *Ibid*.

fundamental ideals of constitution and justified the inclusion of administrative details in the text. Invoking the Greek historian, George Grote, he quoted:

> The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendency for themselves.[4]

Skeptical of the sentiment of democracy in the newly independent India, he explained the context of his invocation of these words thus:[5]

> By constitutional morality Grote meant "a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own."

He emphasized on not only on the substantial but the formal requirement of constitutional morality to pervade in the structure of democracy and argued for establishment of the structural tenets in the constitution itself at the very bedrock.[6]

> While everybody recognizes the necessity of the diffusion of Constitutional morality for the peaceful working of a democratic Constitution, there are two things interconnected with it which are not, unfortunately, generally recognized. One is that the form of administration has a close connection with the form of the Constitution. The form of the administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution. It follows that it is only where people are saturated with Constitutional morality such as the one described by Grote the historian that one can take the risk of omitting from the Constitution

4 George Grote, *History of Greece* (Harper & Brothers, New York, 1880).

5 VII, *Constituent Assembly Debates*, (November 4, 1948).

6 *Ibid.*

> details of administration and leaving it for the Legislature to prescribe them. The question is, can we presume such a diffusion of Constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.

Indian society, at the inception of the new democratic order, was a society of castes and communities and thus, he felt an inherent lack of a living democratic tradition in its people. In these circumstances, he argued, it was wiser not to trust the Legislature to prescribe forms of administration and thus their incorporation in the Constitution became essential. It is true that the Constitution provided a legal framework and this legal framework was a necessary condition for the transformation of the Indian society. However, by no means was it sufficient. It could not by itself conjure into existence the attitudes, dispositions and sentiments, without which, the transformation could hardly be effective.

This absence of democratic traditions was why, unlike mature democracies which functioned on a consensus as to how institutions must operate, provisions had to be laid down in greater detail.[7] No wonder the Indian constitution is regarded as the world's bulkiest constitution. The idea was that the stronger the presence of constitutional morality, the less need there would be to put everything down in black and white. This was the first attempt at laying down a clear distinction that between a constitutional democracy and a populist democracy. The Supreme Court, in its recent judgments has taken this concept further, as is covered in the later sections.

It is notable to understand the idea of constitutional morality in the substantial sense, as distinct from its application in a formal sense. Pratap Bhanu Mehta has, in fact, argued that Ambedkar's whole emphasis on constitutional morality pertained to its formal aspect, much different from its contemporary usage. Surely, being governed by a constitutional morality entails being governed by all its substantive morals. For instance, one of the elements of modern constitutional morality is the principle of non-discrimination.

Viewed from this perspective, constitutional morality is the morality *of* the constitution. However, there was a second usage that Ambedkar was more familiar with in its 19th century provenance:[8]

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7 *Supra* note 2.

8 Pratap Bhanu Mehta, "What is Constitutional Morality?", *We The People: a symposium on the Constitution of India after 60 years, 1950-2010*, (2010), *available at*: https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm (last visited on October 24, 2019).

> In this view, constitutional morality refers to the conventions and protocols that govern decision-making where the constitution vests discretionary power or is silent…For Grote, the central elements of constitutional morality were freedom and self-restraint. Self-restraint was a precondition for maintaining freedom under properly constitutional government.

According to this second element of constitutional morality, the recognition of plurality in its deepest for was only possible if constitutional *forms* were respected, and this could happen only when a genuinely non-violent mode of political action can come into being. "What the parties have to agree to, as Ambedkar recognizes over and over, is an allegiance to a constitutional form, not an allegiance to a particular substance."

The idea was, thus, to look at Constitution not as a noun but as the adverbial practice that it entailed. For Mehta, this was the core of constitutional revolution:[9]

> …it was an association sustained not by a commonality of ends, or unanimity over substantive objectives (except at perhaps a very high level of generality). It was rather a form of political organization sustained by certain ways of doing things. It was sustained not so much by objectives as by the conditions through which they were realized. This was the core of constitutional morality.
>
> At this juncture, it is essential to make a difference between the idea of constitutional morality as being very distinct from public morality and devoid of its populist burdens.

II. Constitutional Morality v. Public Morality

The principle of constitutional morality has not much been engaged with in Indian jurisprudence until its very recent acquisition by the Courts as a device in its tool-belt of reasoning. The idea is that State cannot really enforce standards of morality according to the popular notions and infringe on the rights of individuals guaranteed by the constitution unless there is a strict necessity, based on constitutional principles alone.

Public morality, as explained in *Naz Foundation*, affirming the Wolfenden Committee's stand, "is often no more than the expression of revulsion against what is regarded as unnatural, sinful or disgusting."[10]

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9 *Ibid.*

10 *Naz Foundation* v. *Government of NCT*, 160 (2009) DLT 277 at para 86, *hereinafter* referred to as *Naz Foundation*. For brevity, the concept of constitutional morality under Indian cases has been confined to *Naz* in this section. Further case discussion is covered under section IV.

More often than not, in interpreting the constitution, judges engage in moral reasoning, and given the differing opinions prevalent amongst people on moral issues, a number of questions arise. In Common Law, Jeremy Waldron and Wilfrid J. Waluchow seem to take diametrically opposite stands. As Huscroft explains it:[11]

> Waldron notes that philosophers ascribe a wider meaning to the term moral reasoning than do legal philosophers and lawyers. Philosophers are concerned with morality as a subset of ethical reasoning, normative reasoning, or practical reasoning, whereas legal philosophers and lawyers may simply use the term to refer to anything other than black-letter legal reasoning. Waldron thinks the distinction between wider philosophical and narrower legal senses of morality may be important. Judges operate in the realm of government and in the context of political issues; they decide for society rather than simply as individuals. The question, then, is whether the philosopher's conception of moral reasoning is appropriate for the sort of practical reasoning with which judges must be concerned.

Waldron appears to believe that application of law and moral reasoning are separate and distinct realms and can be separated cleanly. It is not *pure* moral reasoning but *legal* reasoning that the judges engage in. For Waldron, everyone agrees on at least some morally important issues, and these must thus be addressed by the legislature as legislatures are not constrained by legalisms of text doctrine and precedent that "flow from authoritative legal text such as constitutions." This is, of course, subject to judicial review, but it is not apposite for the courts to discuss philosophical ideals even if certain moral components may arise in the course of legal reasoning. Thus, there are two ideals of moral reasoning in the name of society: legislative and judicial. Waldron seems to privilege the former over the latter.[12]

On the other hand, Waluchow's conception is that there exists a set of moral norms that are reflected in the community's constitutional law and institutions, and ascertaining the community's true moral commitments is not significantly different from what judges normally do in common law cases. Although an overlapping consensus in the moralities may exist in multi-cultural societies, these vague commitments, when translated into bills of rights, become controversial. To quote:[13]

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11 Grant Huscroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* 2-5 (Cambridge University Press, New York, 2008).

12 *Ibid.*

13 W.J. Waluchow, "Constitutional Morality and Bills of Rights", in Grant Huscroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* 65-92 (Cambridge University Press, New York, 2008).

> Having made commitments to constitutional morality, members of the community will, from time to time, embrace opinions that are at odds with their broader commitments, properly understood…This problem is uncontroversial when speaking of personal morality, yet it becomes controversial when moral rights acquire legal force in bills of rights. Judges are often criticized for making decisions at odds with the community's current moral views. It is forgotten that their decisions are designed to give effect not to the community's moral views or opinions, but instead to the larger commitment the community has made to its constitutional morality…

Giving the example of same-sex marriages, he illustrates that their opponents fail to understand their own constitutional commitments. Thus, Waluchow is content to have the judges "fill the gaps" while ascertaining the community's true moral commitments and regards common law methodology as superior to legislative action. It is in Waluchow's line of thought that the idea of Constitutional morality is predominant, which is to be determined through common law, while for Waldron, it is popular morality that plays a predominant role, adopted by legislative action and the role of courts is subsidiary.

The present Indian context seems to follow Waluchow insofar as the Supreme Court has come forth in upholding substantive ideals of the Constitution while arguing from the standpoint of constitutional morality and negating curtailment of these principles based on a notion of public morality.

In *Naz Foundation*, The Court relied on *Gobind* v. *State of Madhya Pradesh*[14] to find that the right to privacy under article 21 could not be curtailed except for a "compelling state interest", and that public morality did not amount to such a "compelling state interest". Comparing several international judgments on homosexuality as an offence, the court focused on the common thread that ran through them, *i.e.*, public morality cannot be a sufficient ground to restrict the rights of the individuals.[15] Thus, held that "popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21."[16]

One scholar has briefly summed up the idea thus:[17]

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14 (1975) 2 SCC 148.

15 See generally, *Lawrence* v. *Texas*, 539 US 558 (2003), *Dudgeon* v. *United Kingdom*, 45 ECHR (Ser. A) (1981), *Norris* v. *Republic of Ireland,* 142 ECHR (Ser. A) (1988).

16 *Supra* note 10 at para 79.

> Describing popular morality as based on "shifting and subjecting notions of right and wrong" and constitutional morality as derived from "constitutional values", the Court held that "if there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality."…The Court then referred to *The National Coalition for Gay and Lesbian Equality* v. *The Minister of Justice*[18] wherein it was unequivocally stated that the "dictates of the morality" that the State can enforce "are to be found in the text and spirit of the Constitution itself." This statement, coupled with the description of constitutional morality that is derived from constitutional values, indicates how one is to go about identifying this kind of morality. The emphasis on the "values" and the "spirit" of the Constitution suggests that the confines of this kind of morality are outlined by Parts III and IV of the Constitution.

Fundamental rights are often, couched in wide and abstract terms. They convey values, and do not necessarily lay down codes. Courts may often be criticised for reading into the interpretations of these abstract terms, as their own subjective moral convictions. The Indian society, being diverse and pluralistic, it is hard to conceive of one single notion of morality and justice. In such a case, subjecting fundamental rights to moral approval of a majority would entail a complete compromise with the very idea of protection of minorities by entrenching fundamental rights in the constitution. This argument is very well articulated by Andrei Marmor thus:[19]

> …the idea that constitutional interpretation should be grounded on those values which happen to be widely shared in the community would undermine one of the basic rationales for having a constitution in the first place. Values that are widely shared do not require constitutional protection…It is precisely because we fear the temptation of encroachment of certain values by popular sentiment that we remove their protection from ordinary democratic processes. After all, the democratic legislature is a kind of institution which is bound to be sensitive to popular sentiment and widely shared views in the community. We do not need the constitutional courts to do more of the same.

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17 Vikram Aditya Narayan, "Matters of Morality" 3(1) *Comparative Constitutional and Administrative Law Quarterly* 4 (2016).

18 1999 (1) SA 6 (CC).

19 Andrei Marmor, *Interpretation and Legal Theory* 161-162 (Hart Publishing, 2005).

Having discussed the idea of constitutional morality and the court's interpretation of morality in the context of the constitution, it is also necessary to review the incidence of morality in the text of the constitution and the different interpretations of morality as mentioned in the constitution as well as constitutional morality.

III. Interpretations

The term "morality" occurs in the text of the Indian constitution in four places, viz. Articles 19(2), 19(4), 25 and 26. In all these Articles, morality is used as a reasonable ground for imposing restrictions on the respective rights. On a textual reading, where the phrases used are "public order, decency or morality", "public order or morality" and "public order, morality and health", respectively, it is the understanding of the researcher that being preceded by "public order", a textual interpretation would entail reading "morality" with a preceding qualification of "public", just as "decency" would be read to be "public decency" and "health" would be read as "public health". However, it has been the argument of several authors, and rightly so, that textual and historical interpretation must give way to a structural and analytical interpretation for creative construction of constitution, to keep up with the demands of changing times.

Gautam Bhatia, for instance, in his book on freedom of speech and expression under the Indian constitution, has argued that on an analytic understanding of constitutional text and history, there is no justification for reading morality, as used in Article 19(2), as public morality.[20] Conceptualising constitutional morality, he argues, refers "to the elements of the political and moral philosophy that our Fundamental Rights chapter, taken as a whole, is committed to", Thus, for him, while construing "morality" as used in the constitution, "constitutional morality is the most justified interpretation…both in terms of constitutional law and philosophy".[21]

Bhatia goes further in trying to locate where this idea of constitutional morality can be construed from in the constitution and likens it to the enterprise of identifying Basic Structure. "Conceptually, the two are similar as both rely on the values underlying the Constitution for their substance."[22] While the basic structure doctrine has generally been invoked in resolving the question of relationship between the three organs of the State, so has the notion of constitutional morality been invoked in determining questions of fundamental rights. This is not to say, of course, that the scope of these two doctrines is limited. They pervade the whole of the constitution.

20 Gautam Bhatia, *Offend, Shock or Disturb* 107-109 (Oxford University Press, New Delhi, 2016).

21 *Id.* at 112-113.

22 *Supra* note 17.

Pratap Bhanu Mehta, while elucidating another viewpoint of constitutional morality, reaffirms its distinction from public morality by engendering constitutional morality as being suspicious of "any claims to singularly and uniquely represent the will of the people." He observed that:[23]

> The easy process of amending the constitution rests on a halfway compromise between, on the one hand, a radical Jeffersonianism that would subject the constitution to renegotiation at every generation and, on the other, a rigid constitution that would deeply entrench the present generation's preferences…In short, any appeal to popular sovereignty has to be tempered by a sense that the future may have at least as valid claims as the present. Indeed, it has to be said of the Constituent Assembly as a whole, that there is very little demagoguery in the name of popular sovereignty.

In this sense, Ambedkar's evocation of constitutional morality comes very close to Grote in holding that popular sovereignty is a threat to freedom and individuality. "Once popular sovereignty or the authority of the people had been invoked, who else would have any authority to speak?" Going back to the idea of formal constitutional morality, it must be understood that the deference is to these forms, and not to the popular sovereign. A government cannot merely claim authority on the pretext of representing majority and must be open to interrogation, censure and criticism. What Ambedkar aspired for in the Indian democracy is what Grote's Athenian democracy had already achieved: a space for "unrestrained criticism that was nevertheless 'pacific and bloodless' and not silenced by claiming the authority of the people."[24]

There is a distinction between constitutional morality as invoked by Ambedkar, which focused on the forms of the constitution, and the one enunciated in *Naz Foundation*, which talks more of the principles underlying the content of the constitution. As pointed out by Mehta:[25]

> In the final analysis, [Ambedkar] pitches for constitutional morality, an allegiance to constitutional forms, rather than collapsing the domains of constitutional and distributive justice. He doesn't cheat by giving us the (false) assurance that the forms of constitutional morality will produce deep substantive equality; nor does he cheat by saying that substantive equality simply is the same thing as constitutional morality.

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23 *Supra* note 8.

24 *Ibid.*

25 *Ibid.*

> No society has yet adequately negotiated the tension between the domain of constitutional morality and the domain of substantive justice.

The courts in India, however, have treaded the path of constitutional morality in the sense of substantive justice and not on its formal conception. The next section briefly discusses the various cases applying this idea.

IV. Judicial Engagement with Constitutional Morality

Until very recently, courts in India, and particularly the Apex Court have skirted the idea of constitutional morality and in a few scattered mentions here and there, used the concept as a window dressing, without any substantial engagement on the same. Part of the reason could be the well-defined contours of a written constitution, as could be the close link to various other construction devices such as Basic Structure, Constitutionalism, Substantive Justice, among others, used in various precedents while determining questions of constitutional interpretation. The most significant contexts of invoking constitutional morality have been decisions on criminalization of homosexuality, substantive equality of genders vis-à-vis temple entry, definition and criminalization of adultery and even administrative disputes.

Homosexuality

Naz Foundation

The High Court of Delhi invoked the concept of constitutional morality against public morality to reaffirm rights of sexual minorities in this case, most of which has already been discussed. Two noteworthy observations by A.P. Shah, J. deserve to be quoted here:[26]

> Granville Austin in his treatise "The Indian Constitution - Cornerstone of A Nation" had said that the Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. The core of the commitments to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution. The Fundamental Rights, therefore, were to foster the social revolution by creating a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the state, or by society

26 *Supra* note 10 at para 80.

> privately; liberty was no longer to be the privilege of the few. The Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals only on account of their sexual orientation would be against the constitutional morality.

Further, the court noted the decision of the Constitutional Court of South Africa (supra):[27]

> A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the State, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.

Navtej Johar[28]

In different but concurring judgements, Dipak Misra, C.J., Rohinton Fali Nariman, J. and Dr. D.Y. Chandrachud, J. explained the sweep of constitutional morality as not confined to the literal text but embodying in itself virtues of wide magnitude. "The magna cum laude and creditable principle of constitutional morality, in a constitutional democracy like ours where the Rule of law prevails, must not be allowed to be trampled by obscure notions of social morality which have no legal tenability."[29] While discussing social morality *vis-à-vis* constitutional morality, Rohinton F. Nariman, J. observed that section 377 of the IPC was a relic of Victorian morality, calling it as "puritanical moral values". Constitutional morality, being the soul of the constitution, declares its ideals and aspirations and is to be read into the Preamble as well as Part III of the constitution to assure the dignity of the individual.

Constitutional morality was held to be the guiding light behind the institutions in preserving the heterogeneous nature of the Indian society. Any attempts by the majority to usurp the rights and freedoms of minorities had to be checked by the organs of the State. Public decency and morality could not be amplified beyond a certain limit to compromise the fundamental freedoms of citizens.

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27 *Supra* note 18 at para 136.

28 *Navtej Singh Johar* v. *Union of India*, AIR 2018 SC 4321, *hereinafter* referred to as *Navtej*. Decision by Constitution Bench.

29 *Id.* at para 120.

The clearest articulation of entailments of constitutional morality was done by Dr. D.Y. Chandrachud, J., which cannot but be quoted for lack of another set of words to represent the idea:[30]

> Constitutional morality requires in a democracy the assurance of certain minimum rights, which are essential for free existence to every member of society. The Preamble to the Constitution recognises these rights as "Liberty of thought, expression, belief, faith and worship" and "Equality of status and of opportunity." Constitutional morality is the guarantee which seeks that all inequality is eliminated from the social structure and each individual is assured of the means for the enforcement of the rights guaranteed. Constitutional morality leans towards making Indian democracy vibrant by infusing a spirit of brotherhood amongst a heterogeneous population, belonging to different classes, races, religions, cultures, castes and sections. Constitutional morality cannot, however, be nurtured unless, as recognised by the Preamble, there exists fraternity, which assures and maintains the dignity of each individual.
>
> 496. Constitutional morality requires that all the citizens need to have a closer look at, understand and imbibe the broad values of the Constitution, which are based on liberty, equality and fraternity. Constitutional morality is thus the guiding spirit to achieve the transformation which, above all, the Constitution seeks to achieve. This acknowledgement carries a necessary implication: the process through which a society matures and imbibes constitutional morality is gradual, perhaps interminably so. Hence, constitutional courts are entrusted with the duty to act as external facilitators and to be a vigilant safeguard against excesses of state power and democratic concentration of power. This Court, being the highest constitutional court, has the responsibility to monitor the preservation of constitutional morality as an incident of fostering conditions for human dignity and liberty to flourish. Popular public morality cannot affect the decisions of this Court…Constitutional morality is a pursuit of this responsive participation. The Supreme Court cannot afford to denude itself of its leadership as an institution in expounding constitutional values.

30 *Id.* at para 495-496.

Sabarimala[31]

This judgment pertained to the bar on the entry of women between the ages of 10-50 from entering into the temple of Lord Ayyappa at Sabarimala (Kerala). Interestingly, the concept of constitutional morality was used by judges both in favour of and against lifting the said ban. The exclusionary practice was argued to be discriminatory and degrading to women. The question was whether "morality", as mentioned under articles 25 and 26, protected this practice or was arbitrary. Dipak Misra, C.J. noted that the constitution of India was adopted by the people of this country and not thrust upon them and hence the idea of public morality was to be appositely understood as being synonymous with constitutional morality. Thus, the notion of public morality could not be used as "colourable device to restrict the freedom to freely practise religion and discriminate against women of the age group of 10 to 50 years by denying them their legal right to enter and offer their prayers at the Sabarimala temple."[32] It was held that public morality must yield to constitutional morality.

Dr. D.Y. Chandrachud, J. further elaborated that popular notions of morality were transient and fleeting, while morality as mentioned in Articles 25 and 26 have an ephemeral existence.

> Popular notions about what is or is not moral may in fact be deeply offensive to individual dignity and human rights. Individual dignity cannot be allowed to be subordinate to the morality of the mob. Nor can the intolerance of society operate as a marauding morality to control individual self-expression in its manifest form. The Constitution would not render the existence of rights so precarious by subjecting them to passing fancies or to the aberrations of a morality of popular opinion. The draftspersons of the Constitution would not have meant that the content of morality should vary in accordance with the popular fashions of the day.[33]

Further, he laid down four precepts of the preamble which enunciate constitutional morality:[34]

> The first among them is the need to ensure justice in its social, economic and political dimensions. The second is the postulate of individual

31 *Indian Young Lawyers Association* v. *The State of Kerala*, 2018 (13) SCALE 75, *hereinafter* referred to as *Sabarimala*. Constitution Bench ruling 4:1 in favour of appellant. Indu Malhotra, J. dissenting.

32 *Id.* at para 111.

33 *Id.* at para 188.

34 *Id.* at para 189.

> liberty in matters of thought, expression, belief, faith and worship. The third is equality of status and opportunity amongst all citizens. The fourth is the sense of fraternity amongst all citizens which assures the dignity of human life. Added to these four precepts is the fundamental postulate of secularism which treats all religions on an even platform and allows to each individual the fullest liberty to believe or not to believe… These founding principles must govern our constitutional notions of morality. Constitutional morality must have a value of permanence which is not subject to the fleeting fancies of every time and age.

Thus, the majority held that there was no constitutional rationale to deny the women their right to worship, which would be denial of the very human dignity inhering in them.

On the other hand, Indu Malhotra, J. cautioned against trying to impose logic or rationality to religion and comprehended constitutional morality in a secular polity as "the freedom of every individual, group, sect, or denomination to practise their religion in accordance with their beliefs, and practises."[35] The followers of various faiths must have freedom to practice their faith in accordance with the tenets of their religions. She emphasized on a need to strike a balance between equality and protection of faith, belief and worship. All values must be qualified and balanced against each other. Thus, she held it to be an unnecessary interference with the rights guaranteed under articles 25 and 26.

Adultery[36]

The court dealt with the criminalization of adultery under section 497 of the IPC and the outdated notion of a woman committing adultery *against the consent or connivance* of the husband, which effectively implied the wife to be her husband's chattel. Dr. D.Y. Chandrachud, J. described gender as a discursive struggle and held that section 497 created a notion of marriage that subverted the equality of the spouses, submerged the identity of the woman and treated her as a possession of her spouse, which was deeply degrading to the ideals of liberty, dignity and equality enshrined in the constitution and such a view could not be accepted. It was reflective of "antiquated social and sexual mores". The constitution envisioned a just social order through substantive equality. "Justness postulates equality. In consonance with constitutional morality, substantive equality is 'directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups

35 *Id.* at para 307.2.

36 *Joseph Shine* v. *Union of India*, AIR 2018 SC 4898. Constitution Bench judgment.

which effectively undermines their full and equal social, economic, political and cultural participation in society."[37] Additionally, Indu Malhotra, J. brought the idea of autonomy and privacy as enunciated under *Puttaswamy*[38] under the sweep of constitutional morality.

Administration

Manoj Narula[39]

This was probably one of the first cases to have engaged with, however briefly, the idea of constitutional morality and has been quoted across the spectrum of cases that have later followed. The court applied the idea of constitutional morality to the standards to be conformed to by the Head of the Executive in listening to the advice of the Prime Minister while appointing ministers. The framers of the constitution have bestowed immense trust in the Prime Minister and thus constitutional morality, with special regard to the constitutional norms of a democratic polity must guide the terms of article 75(1) of the constitution. Dipak Misra, J. observed that "Democracy…expects prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance *of constitutional morality which is the pillar stone of good governance.*"[40] (Emphasis added)

NCT of Delhi[41]

The issue was in relation to interference by the Centre through Lieutenant Governor in the administration of Delhi, wherein the interpretation of proviso to article 239AA(4) to construe "any matter" as "every matter" was said to be bringing the administration to a standstill by referring all matters of import to the President. The court held that a constitutional court must be averse to accepting an interpretation which will reduce the aspirations of governance to a mere form, without the accompanying substance. The Court must take into consideration constitutional morality, which is a guiding spirit for all stakeholders in a democracy. Pertinently noted by Dipak Misra, C.J. was that:

Constitutional morality acts as a check against lapses on the part of the governmental agencies and colourable activities aimed at affecting the

37 *Id.* at para 124.

38 *K.S. Puttaswamy* v. *Union of India,* (2017) 10 SCC 1. Bench of nine judges ruling on privacy as a right under article 21.

39 *Supra* note 1.

40 *Id.* at para 1.

41 *Government of NCT of Delhi* v. *Union of India*, 2018 (8) SCALE 72, *hereinafter* referred to as *NCT of Delhi*. Constitution Bench decision.

democratic nature of polity. In *Krishnamoorthy* v. *Sivakumar and Ors.*[42], it has been explained thus:

> Democracy, which has been best defined as the government of the people, by the people and for the people, expects prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the pillar stone of good governance.
>
> 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.

The constitution of India is a living document and requires its functionaries to observe constitutional values, which constitutes constitutional morality. Concluding that constitutional morality was inherent in constitutional norms and the conscience of the constitution, C.J. emphasized on the harmony of constitutional impulse to be able to justify an act. Further, constitutional morality also negates the concentration of power in the hands of a few.

Dr. D.Y. Chandrachud, J. observed that the text of the constitution alone could not protect democratic values unless the moral values of the constitution were upheld. "Constitutional morality does not mean only allegiance to the substantive provisions and principles of the Constitution. It signifies a constitutional culture which each individual in a democracy must imbibe."[43] The ability and commitment to arrive at decisions by way of consensus is also one of the essential features of constitutional morality. Another feature is that constitutional morality lays down basic rules to prevent the institutions from turning tyrannical.[44]

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42 (2015) 3 SCC 467.

43 *Supra* note 41 at para 287.

44 *Id.* at para 290.

> Granville Austin has referred to the Indian Constitution as a "social revolutionary" document, the provisions of which are aimed at furthering the goals of social revolution…The core of the commitment to social revolution, Austin stated, lies in the Fundamental Rights and in the Directive Principles of State Policy, which are the "conscience of the Constitution" and connect India's future, present, and past.

Constitutional morality also implies the necessity of preserving the trust of the people in the institutions of democracy while at the same time filling in the silences to enhance the spirit of constitution.

> A Constitution can establish a structure of government, but how these structures work rests upon the fulcrum of constitutional values. Constitutional morality purports to stop the past from tearing the soul of the nation apart by acting as a guiding basis to settle constitutional disputes.[45]

V. Conclusion

The idea of constitutional morality is thus, ever evolving like the doctrine of Basic Structure, difficult to pin down or count as a list. It entails the most basic commitments that are implicit in the document and is the heart and soul of the democracy. While there are various interpretations as to whether constitutional morality should be looked in a formal or substantial sense, there is no doubt that it is one doctrine that, although introduced very late at the scene of democracy, is here to stay.

The Supreme Court has done a spectacular job at articulating the idea of constitutional morality to do more substantive justice in the society. Constitutional morality, applicable to different parts of the constitution is yet to create a more holistic picture but it is predictable that the court will optimally use this new weapon in its armoury to enhance its duty as the guardian of the constitution. The constitution of India is a living and evolving document, and the judicial interpretations are the life-breath of its growth. Thus, it will continue to evolve and be interpreted in creative ways to deal with the myriad constitutional questions that crop up. To conclude in the words of Dr. D.Y. Chandrachud, J.:[46]

> Constitutional morality provides a principled understanding for unfolding the work of governance. It is a compass to hold in troubled

45 *Id.* at para 293.

46 *Id.* at para 294.

> waters…Our expectations may be well ahead of reality. But a sense of constitutional morality, drawn from the values of that document, enables us to hold to account our institutions and those who preside over their destinies. Constitutional interpretation, therefore, must flow from constitutional morality.

SECULARISM, *LAÏCITÉ* AND TERRORIST VIOLENCE: UNTYING THE SOCIETAL AND LEGAL KNOTS

Shruti Bedi & Akshit Pathania[*]

"Yet what greater defeat could we suffer than to come to resemble the forces we oppose in their disrespect for human dignity?"

- Ruth Bader Ginsburg

Abstract

Terrorism has long been the anti-thesis to the struggle of Human Rights. The possible nexus between political violence and religion has been a moot question for various researchers across the globe. In this paper, we attempt to disentangle the complex and convoluted relationship between secularism, religion and terrorist violence, while trying to gauge the Indian response towards terrorism, particularly critically evaluating legislations such as AFSPA and UAPA which have multiple ramifications into the desperately guarded sphere of individual human rights. The paper also attempts to understand the origin and contemporary significance of the French principle of secularism alias *laïcité* which has recently come under attack from all directions for its intolerant and patently discriminatory nature, while distinguishing it from Indian Secularism.

I. Introduction

TERRORISM SEEKS to attack the two most significant components of a free nation – secularism and democracy. The western world is often viewed as an apostle of fundamental freedoms and democratic processes offering myriad opportunities to express and advocate the most variegated political views and to

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disseminate them without resorting to violence; to deliberate political intentions; to identify and rectify grievances.

However, not even the most perfect democracy would resolve individual or community grievance, even less would it guarantee the actualisation of every political goal. The adherents of certain specific polarising views do not necessarily accept defeat even if that is the result of a perfectly clean and fair parliamentary process. While, others feel excluded from the political processes, and through violence they attempt to capture the attention of society towards themselves and their problems. Some others see violence as a shortcut through the slow and convoluted political processes.

II. Secularism and Terrorism

Terrorism has emerged as one of the various means of waging war in the contemporary world, threatening to swallow the planet in a carnage akin to the one witnessed during the two World Wars. The recent terrorist attacks in Europe[1] brought to the forefront the alleged relationship between the conceptual understanding of secularism and terrorism. The French philosophy of liberalism and its adherence to *laïcité* or secularism seems to have come under massive ire of the Islamic world.[2] France after the recent terror attacks[3] has stressed on the need to defend *laïcité* from 'Islamist Radicalisation'. The gargantuan increase of primarily Muslim asylum seekers to the European Union from 2014 to 2016 which concurred with a massive intensification of religiously motivated terrorist infractions,[4] set out a profusion of security concerns and countless questions about exacerbated xenophobic feelings and Islamophobia in European society.

On the Indian turf, decades-long struggle to combat politicized violence coupled with its challenging geostrategic coordinates has created a "chronic crisis of national security" that has become part of the very "essence of India's being".[5] Freedom of religion as envisaged under the Indian Constitution is subject to legislative power

1 Norimitsu Onishi, "Attacks in France Point to a Threat Beyond Extremist Networks" *The New York Times,* Nov 6, 2020, *available at*: <https://www.nytimes.com/2020/11/06/world/europe/france-attacks-beheading-terrorism.html> (last visited on Dec. 3, 2020).

2 Nayanima Basu, "Not just Macron's politics, it's France's brand of secularism that always clashed with Islam" *The Print,* Oct 31, 2020, *available at*: <https://theprint.in/opinion/newsmaker-of-the-week/macron-battle-liberalism-france-secularism-clash-islam/534316/> (last visited on Dec. 7, 2020).

3 "France attack: Three killed in 'Islamist terrorist' stabbings" *BBC News,* 29 Oct. 2020, *available at*: <https://www.bbc.com/news/world-europe-54729957> (last visited on Dec. 7, 2020).

4 Peter Nesser, Anne Stenersen, *et.al.*, "Jihadi Terrorism in Europe: The IS Effect" 10(6) *Perspectives on Terrorism* 3 (2016).

5 K.P.S. Gill, "The Imperatives of National Security Legislation in India" *States of Insecurity*, (Apr. 2002), *available at*: <http://www.india-seminar.com/2002/512/512%20k.p.s.%20gill.htm> (last visited on Dec. 5, 2020)

of the State to modulate secular features relating to exercise of freedom of religion. The Constitution of India nowhere describes the State as secular except through an after-thought amendment in the Preamble.

The one instance where the word 'secular' has been used is under article 25(2)(a) wherein it has been used to distinguish the economic, financial and political activities from religious activities. The Constituent Assembly specifically rejected a motion to call the Indian State as secular.[6] The Objectives laid out in the Preamble to the Indian Constitution provide not only for non-discrimination on religious grounds and non-interference in religious affairs but also for the removal and suppression of the evils which had plagued the Indian society for centuries and which had been largely responsible for its political and social and material backwardness. The courts have sought to uphold the democratic values of secularism in the Indian multicultural society. However, terrorism continues to flourish based on a convoluted perception of secularism in India.

This paper examines the origin and contemporary understanding of the principle of French secularism alias *laïcité* as analogous to Indian secularism in an attempt to understand the correlation between religion and political violence, as a major contributor to terrorist activity. It then goes on to give a brief overview of Indian response to the surge of terrorist activities. It comprehensively examines the root cause behind the surge of terrorist activities in India in order to facilitate policymakers to make more efficient choices concerning counter-terrorism and security laws. It also aims to evaluate anti-terrorism and security laws currently in force in India, situating those laws in historical and institutional context in order to (a) evaluate the human rights concerns arising from these laws and (b) gather the ways in which Colonial-era customs and practices have evolved or have been maintained as it is after independence.

III. *Laïcité*: The French DNA of Secularism

Dozens of teens stood shivering in the dark, wet streets near their school hours after hearing what should have been unthinkable: A Chechen refugee had decapitated their teacher for showing students caricatures of the Prophet Muhammad.[7]

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6 David Pearl, *Secularism and the Constitution of India* by P. B. Gajendragadkar (Kashinath Trimbak Telang Endowment Lectures, Bombay: University of Bombay. 1971), 30 *The Cambridge Law Journal* 357 (1972).

7 The recent incident of the beheading of Samuel Paty, highlights the non-acceptance of *laïcité* by certain sections of the society in France. *See* Matt Bradley, "France has long embraced secularism: After beheading, will it be used to oppress?" *NBC News*, Oct 22, 2020 *available at*: <https://www.nbcnews.com/news/world/france-has-long-embraced-secularism-after-beheading-will-it-be-n1244159> (last visited on Dec. 7, 2020).

France has always had a difficult relationship with religion and religious bodies since 1905, when it put an end to "recognised religions". In recent years, controversies around the burqa, Islamic hijab and Sikh turbans have clashed with what many call France's forceful integration.[8] France during its Revolution in the late 18th century originated secularism as a constitutional feature in a nation-state.

The founders of the United States, Thomas Jefferson in particular, were influenced by French ideas; and US became a constitutionally secular nation in 1791. The ideas came from ground-breaking French thinkers, Voltaire prominent among them.[9] Voltaire advocated three principles for society: freedom of religion, freedom of expression and separation of church and state. Among his numerous essays was a Treatise on Tolerance,[10] in which he asked: "There are about 40 millions of inhabitants in Europe who are not members of the Church of Rome. Should we say to every one of those 'Sir, since you are infallibly damned I shall neither eat, converse, nor have any connection with you?'" *Laïcité* was born of such ideas.

The French law of 1905 which mandates for separation of Church from the affairs of the State is now over a hundred years old. Despite the term, *laïcité*, not being anywhere explicitly worded in the text, it holds a unique position *vis-à-vis* its perception qua the world and is an integral part of France's contemporary political DNA.[11]

However, this principle is guarded neither by the fact that it is legally enforceable nor by its considerably old age. Indeed, it is controversial at the national level, where it is subject to contradictory debates, as well as at the international level, where France is often accused of having an intolerant and discriminatory system. *Laïcité* gives liberal ideals like freedom of expression greater precedence than

8 *Supra* note 2.

9 Ludwig W Kahn, "Voltaire's Candide and the Problem of Secularization" 67 *PMLA* 886 (1952).

10 Voltaire, "Voltaire, 'On Universal Tolerance', 1763." in Caroline Warman (ed.), *Tolerance: The Beacon of the Enlightenment*, 93 (Open Book Publishers, Cambridge, UK, 2016).

11 Myriam Hunter-Henin, "Why the French Don't Like the Burqa: Laïcité, National Identity And Religious Freedom." 61 *The International and Comparative Law Quarterly* 613 (2012).

religious sensibilities in the public domain. Even prominent Western newspapers published articles capturing the divisions in French society.[12]

IV. Secularism: The Ethos of the Indian Constitution

The founding fathers of the Indian Constitution handed us down an enlightened, forward-looking basic law also known as the *Grundnorm*,[13] which is not just a legal document but a socio-legal one aimed at the socio-economic-political transformation in the country. Secularism is an important concept, underlying the framework of fundamental rights, which the Constitution of India so zealously guards and promises to uphold. But, as in several other areas, there is a considerable divergence between the fundamental concepts and the reality. Significantly, the Constituent Assembly failed to agree on the definition of the word "secular". It also could not agree on calling the Constitution secular.[14] K.T Shah made two attempts to get the word "secular" inserted into the Indian Constitution but failed on both accounts. He argued*:*

> as regards the Secular character of the State, we have been told time and again from every platform, that ours is a secular State. If that is true, if that holds good, I do not see why the term could not be added or inserted in the constitution itself, once again, to guard against any possibility of misunderstanding or misapprehension. The term' secular', I agree, does not find place necessarily in constitutions on which ours seems to have been modelled. But every constitution is framed in the background of the people concerned. The mere fact,

12 *The Financial Times*, for instance, published an article, "Macron's war on 'Islamic separatism' only divides France further". This article, however, was later withdrawn, citing 'factual errors'. *See* Anadolu Agency, "Financial Times removes article criticizing Macron's crackdown on Muslims" *Daily Sadah* (Nov. 4, 2020), *available at*: <https://www.dailysabah.com/world/islamophobia/financial-times-removes-article-criticizing-macrons-crackdown-on-muslims> (last visited on Dec 6, 2020). *The New York Times* published "Macron's rightward tilt, seen in new laws, sows wider alarm in France". *See* Adam Nossiter, "Macron's Rightward Tilt, Seen in New Laws, Sows Wider Alarm in France" (Nov 25, 2020) *The New York Times, available at*: <https://www.nytimes.com/2020/11/25/world/europe/france-macron-muslims-police-laws.html> (last visited on Dec 6, 2020). Macron, criticized such articles as 'legitimizing violence' and insisted that the French model was different from the European model, in that while the latter was multi-culturalist, the French model was 'universalist'. *See* Adam Gabbatt, "Macron accuses English-language media of 'legitimising' violence in France" (Nov 16, 2020) *The Guardian, available at*: <https://www.theguardian.com/world/2020/nov/16/macron-france-foreign-media-new-york-times> (last visited on Dec 6, 2020).

13 Rakesh Kumar, "Structural Analysis of the Indian Legal System Through the Normative Theory" 41 *Journal of the Indian Law Institute* 500 (1999).

14 Shefali Jha, "Secularism in the Constituent Assembly Debates, 1946-1950" 37 *Economic and Political Weekly* 3175 (2002).

> therefore, that such description is not formally or specifically adopted to distinguish one state from another, or to emphasis the character of our state is no reason, in my opinion, why we should not insert now at this hour, when we are making our constitution, this very clear and emphatic description of that State.[15] Constituent Assembly Debates on November 15, 1948
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> Dr. Sarvepalli Radhakrishnan made a pungent observation with reference to the need for uniform treatment of religions by pointing out that India is a multi-religious State and therefore we have to be impartial and give uniform treatment to the different religions, but if institutions maintained by the State, that is, administered, controlled and financed by the State, are permitted to impart religious instruction of a denominational kind, we are violating the first principle of our Constitution.[16]

However, It was only during the emergency imposed in the year 1976 that the word secular was introduced in the Preamble to the Constitution through the highly controversial 42nd amendment also dubbed as Mini Constitution in colloquial parlance.[17] Subsequently, secularism acquired a new status when the Supreme Court of India declared it to be an integral part of the basic structure of the Constitution of India.[18]

Secularism is not an isolated concept, it draws its origin from article 14 of the Constitution,[19] which guarantees equality to all persons irrespective of their religion, race, caste, sex or place of birth. This was the very intention of the founders of democracy in India, and this is what secularism should be understood as in the context of modern democracy. The hon'ble Supreme Court had held in *Bommai*'s case[20] that in matters of state, religion has no place. It said:

> No political party can simultaneously be a religious party. Politics and religion cannot be mixed. Any state government which pursues

15 Constituent Assembly Debates on November 15, 1948
available at: https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-15 (last visited on December 24, 2020).

16 Constituent Assembly Debates on August 30, 1948
available at: https://www.constitutionofindia.net/constitution_assembly_debates/volume/5/1947-08-30 (last visited on December 24, 2020).

17 V.M Tarkunde, "Secularism and the Indian Constitution." 22 *India International Centre Quarterly* 143 (1995).

18 *S.R. Bommai* v. *Union of India*, 1994 SCC (3) 1.

19 The Constitution of India, art. 14.

20 *Supra* note 18.

> unsecular policies or unsecular course of action acts contrary to the constitutional mandate and renders itself amenable to action under article 356.

However, arguments made about secularism in a democratic state must be expected to protect cultural diversity and the right of people to follow their own culture/ religion. This is precisely why the Indian Constitution allowed minorities to retain their personal laws and undertook not to change these (including the right to maintain their religious institutions and funding from the state) without their consent.[21] In fact, laws banning bigamy amongst Hindus have been passed but not for some minority communities.[22]

However, the famous British scholar on multiculturalism Bhikhu Parekh, who has appreciated the Indian Constitution for accommodating diversity and plurality asserted that the state cannot remain indifferent to the iniquities of some of these laws and needs to insist on certain basic principles of justice.[23] Indian scholar Rajiv Bhargava also justifies government intervention in religious affairs provided that it shall be guided by non-sectarian principles consistent with a set of values constituted of a life of equal dignity for all.[24]

The traction around Secularism intensified after the five-judge constitutional bench of the Supreme Court set aside by majority of 3:2 judgment in *Shayara Bano* v. *Union of India*,[25] *talaq-e-biddat* or instant triple talaq in one sitting resorted to by some Muslim men. While the *Shayara Bano* judgment is welcome, in so far as it sets aside the practice of *talaq-e-biddat*, the protection accorded to Muslim Personal Law on the grounds of freedom of religion is worrisome. The judgment has left minority citizens to either the mercy of cultural gatekeepers propagating *taqlid* or to a Parliament wherein the Hindu supremacists are in majority, that is between the devil and the deep sea.

The *Shayara Bano* judgment has drawn redlines for the judiciary. Personal laws having been declared integral part of freedom of religion, they would not be amenable to judicial scrutiny for violation of fundamental rights. Relevant extracts from the Judgement are reproduced hereunder:

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21 The Constitution of India, arts. 29, 30.

22 Narendra Subramanian, "Making Family and Nation: Hindu Marriage Law in Early Postcolonial India" 69 *The Journal of Asian Studies* 771 (2010).

23 Bhikhu Parekh, "Rethinking Multiculturalism: Cultural Diversity and Political Theory" 64 *The Journal of Politics* 272 (2002).

24 Rajeev Bhargava, "Reimagining Secularism: Respect, Domination and Principled Distance" 48 *Economic and Political Weekly* 79 (2013).

25 *Shayara Bano* v. *Union of India*, (2017) 9 SCC 1.

> 71. …Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void Under Article 13 if they violate fundamental rights.
>
> 167. 15. …Handicaps should be removed only under Rule of law to enliven the trinity of justice, equality and liberty with dignity of person. The basic structure permeates equality of status and opportunity. The personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void Under Article 13 if they violate fundamental rights. Parliament, therefore, has enacted Section 14 to remove pre-existing disabilities fastened on the Hindu female limiting her right to property without full ownership thereof. The discrimination is sought to be remedied by Section 14(1) enlarging the scope of acquisition of the property by a Hindu female appending an explanation with it.

Ironically, under article 25,[26] right to freedom of religion is not absolute. It has been subjected to six reasonable restrictions: public order; morality; health; other provisions of part III of the Constitution (fundamental rights); regulation or restriction on economic, financial, political or secular activity associated with religious practice; and providing for welfare and reforms.

Freedom to profess, practice and propagate religion accrues to all persons. All persons are equally entitled to that freedom. However, if personal laws are accorded unbridled constitutional protection by article 25, the cultural gate keepers will enjoy higher degree of freedom as they can impose their understanding of religion and personal law on others. The elite cultural gatekeepers often draw lines to construct separate communal walls. These custodians of community would judge right behaviour from wrong for their entire community. Can we then say all persons equally enjoy freedom of religion? The elite would enjoy more rights to profess and practice religion than other members of a community. There would be hierarchy within each community based on gender and other birth based social status. The cultural gatekeepers defend these hierarchies as god made. India would then look more like confederation of communities rather than nation of equal citizens.

Hitherto, the courts in India have determined the scope of the freedom of religion in the country's Constitution by engaging in precise analysis of religious practices,

26 The Constitution of India, art. 25.

determining whether a practice over which protection is sought is essential to that religion or not. The courts have seen this as the only alternative they really have. However, better alternatives do exist and are far more constitutionally sustainable and tenable. One such alternative is the anti-exclusion test, which was relied upon by Justice D.Y. Chandrachud in his concurring opinion in *Indian Young Lawyers Association* v. *The State of Kerala* (Sabarimala case)[27]. This test, facilitates the courts to find a just and fair solution to difficult questions of conflict between liberty and equality, while maintaining its allegiance to the Constitution's text and history. Such an approach will uphold religious autonomy while, at the same time, would allow courts to strike down practices that impair people's access to basic civil rights. In extension of the thought of striking a just balance between religious practices and the larger constitutional scheme of fundamental rights, we must try to understand the paramount supremacy of constitutional morality over societal morality. Dr. B.R. Ambedkar, while addressing the Constituent Assembly in 1948, invoked, Grote, a Greek historian, to explain as to what constitutional morality is, and what is its significance in a nation where democracy was a top-dressing on the soil which is essentially undemocratic. Ambedkar, drawing on the work of Grotius, formulated his understanding of constitutional morality as "a paramount reverence for the forms of the Constitution".[28] More recently, in the *Navtej Singh Johar* v. *Union of India*,[29] the hon'ble Supreme Court observed in regard to social morality, that "any attempt to push and shove a homogeneous, uniform, and consistent and a standardized philosophy throughout the society would violate the principle of constitutional morality." Further, it was added, "devotion and fidelity to constitutional morality must not be equated with the popular sentiment prevalent at a particular point of time."

As discussed earlier, the principle of secularism is implanted into the very ethos of the Indian Constitution and it entitles every person in India, not only citizens, to the equal protection of the law. These are fundamental constitutional principles that any Indian law has to comply with. This brings us to the next instance pertaining to the issue of Citizenship (Amendment) Act of 2019. Massive protests and demonstrations erupted in many Indian cities primarily against the draconian nature of the new amendment to the pre-existing Citizenship Act of 1955.[30] It was

27 *Indian Young Lawyers Association* v. *The State of Kerala*, 2018 SCC OnLine SC 1690.

28 Constituent Assembly Debates on November 4, 1948
available at: https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/%C2%AD1948-11-04 (last visited on December 24, 2020).

29 AIR 2018 SC 4321.

30 Bilal Kuchay, "Fresh violence erupts in Indian capital during anti-CAA protests" *Al-Jazeera,* Feb 24, 2020, *available at*: <https://www.aljazeera.com/news/2020/2/24/fresh-violence-erupts-in-indian-capital-during-anti-caa-protests> (last visited on Dec. 6, 2020).

vehemently argued during the protests that faith cannot be made a condition of citizenship. The new amendment was criticized for plainly contradicting this important constitutional principle.

While certain groups of people (Hindus, Sikhs, Buddhists, Jains, Parsis and Christians) from three neighbouring countries are granted immunity from being deemed illegal migrants and are given a fast track to Indian citizenship, another group of individuals (Muslims) from these countries will continue to be prosecuted as illegal migrants. However, there is no endeavour to argue inclusivity in CAA with respect to current Indian citizens. The endeavour is to extend support to non-Islamic religious minorities, minorities who have been facing systematized and institutional persecution on "religious" front for not subscribing to Islam, which happens to be the official religion of the three theocratic Islamic states selected for the purpose of Citizenship Amendment Act, 2019. The objective of the Act is not to end persecution on every entity in these three Islamic theocratic states but to bring the non-Islamic minorities who were once a part of undivided India back to a safe abode. Therefore, balance between pragmatism and secularism cannot be overstated.

Similarly, critics of the Supreme Court verdict in *M Siddiq* v. *Mahant Suresh Das* (Ayodhya case)[31] argue that the verdict is a death sentence to robust secularism in India. However, the *Ayodhya* judgment went on to note that:

> The Places of Worship Act imposes a non-derogable obligation towards enforcing our commitment to secularism under Indian Constitution; this Act is thus a legislative intervention, which preserves non-retrogression as an essential feature of our secular values.

This assurance by the Supreme Court must quell all apprehensions doubting its secular credentials. Furthermore, The Supreme Court's verdict must also be interpreted in view of the special status Ayodhya enjoys as being seen as the birthplace of Lord Ram. Furthermore, the bench has conclusively dealt with section 5 of the Places of Worship (Special Provisions) Act of 1991, which had uncommonly exempted the "place of worship — commonly known as Ram Janma Bhumi-Babri Masjid" from the scope of the 1991 Act, which prohibits the conversion of any place of worship. The court opined that the express prohibition on conversion in the Places of Worship Act "speaks to the future by mandating that the character of a place of public worship shall not be altered". Naturally, seeing a mosque at such a site would certainly have sowed the seeds for strife and discord perennially.[32]

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31 *M Siddiq* v. *Mahant Suresh Das*, (2020) 5 SCC 1.

32 Rajeev Dhavan, "The Ayodhya Judgment: Encoding Secularism in the Law" 29 *Economic and Political Weekly* 3034 (1994).

Globally also, there are a many instances of sensitive sites becoming targets of running battles between Christians, Jews, Pagans and Muslims across the world. One can talk about Hagia Sophia, which went from a Greek Orthodox Christian cathedral to an Ottoman imperial mosque and now a museum.[33] Similarly the city of Jerusalem in present day Israel is sacred to many religious traditions, including the Abrahamic religions Judaism, Christianity, and Islam, which consider it a holy city.[34]

V. Contextual Interpretation of Secularism

The term "secularism" has different connotations in India and France. The concept of secularism has evolved differently in both the countries. France was a largely homogeneous Catholic country, where the clergy had an unduly high degree of influence over the state's apparatus.[35] This bred resentment in the people which manifested itself in anti-Clericalism during French Revolution.[36] Thus, secularism in France came to denote a strict division between religion and State. This was given statutory backing by a law passed in 1905.[37] Secularism in France was about conscious abolition of one model of state-religion relationship and adopting a different model, whereas, in India, secularism is about remoulding a cohesive society and not about abolishing a model. This difference becomes crucial in how people react to secularism.

India being a very diverse nation with a various of different religions, is free from perverse influence of any one religion including the majority religion on the state.[38] Thus the Indian concept of secularism evolved to denote equal respect to all religions.[39] However, it is a critical respect for all religions. The Indian constitutional secularism is not blindly, anti-religious. What follows is that the State leaves all religions alone, but intervenes whenever religious groups promote communal

33 Ken Dark, Jan Kostenec, *Hagia Sophia in Context: An Archaeological Re-Examination of the Cathedral of Byzantine Constantinople* (Oxbow Books, 2019).

34 Al-$ ût, Bayân Nuwaihe , "Jerusalem as the Key Issue" 40 *Islamic Studies* 419 (2001).

35 David Blackbourn, "The Catholic Church in Europe since the French Revolution. A Review Article" 33 *Comparative Studies in Society and History* 778 (1991).

36 Jean Réville, "Anticlericalism in France." 9 *The American Journal of Theology* 605 (1905).

37 Othlon Guerlac, "The Separation of Church and State in France" 23 *Political Science Quarterly* 259 (1908).

38 C.N. Venugopal, "Reformist Sects and the Sociology of Religion in India" 51 *Sociological Analysis* 677 (1990).

39 S.M.A.W. Chishti, "Secularism in India: An Overview" 65 *The Indian Journal of Political Science* 183 (2004).

disharmony.[40] This difference in the application of the concept of secularism has led to difference in its practices as well. France is extremely conscious of ensuring that there is no mixing of religion and state. However, this has sometimes had the deleterious effect of being discriminatory against a particular religion. Thus, in fanatically trying to avoid mixing religion with the state, France ended up doing exactly that.

On the other hand, religion has been a part of Indian polity and politics. Major issues like a Uniform Civil Code have been blocked due to religious sentiments.[41] Decisions are frequently taken or overturned due to religious pressures. Religion is a major influence on the lives of people and it cannot be completely isolated from the State. However, the Indian practice, while sounding good in theory gives undue power to a few unelected religious leaders in practice.[42] Hence, it is necessary to balance between the two extremes.

VI. Violence Against a Great Civilisation: Enactment of Stringent Laws

The Hindi poet *Sachchidanand Hiranand Vatsyayan 'Agyeya'* witnessed the enraged bloodshed in Punjab at the time of Partition. Overcome by regret and disbelief, he wrote a series of anguished poems titled *Sharanarthi* between October 12 to November 12, 1947. Languishing in waiting rooms or on benches or piles of luggage on platforms of railway stations, he wrote a heart wrenching testimony of mind-numbing violence unleashed in Punjab. He remarked that the region was caught up in an epileptic fit. He writes "*Aaj jaane kis hinshr dar ne/ desh ko bekhabri mein das liya/ sanskriti ki chetna murjha gayi/ mrigi ka daura pada/ichashakti bujh gayi.*" Its translation goes as "Who knows what violent dread has stunned the country. Awareness of our common culture and of our great civilisation has withered. An epileptic fit has extinguished autonomy of the will".[43]

Political violence and India share a rather uncanny relationship. Perhaps, India's geostrategic coordinates force it to battle difficult circumstances than to live in

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40 *See* Rajeev Bhargava, "The Future of Indian Secularism" *The Hindu* (Aug. 12, 2020), *available at*: <https://www.thehindu.com/opinion/lead/the-future-of-indian-secularism/article32329223.ece> (last visited on Dec. 25, 2020).

41 Tanja Herklotz, "Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court" 49 *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 148 (2016).

42 Jackie Assayag, "Spectral Secularism Religion, Politics and Democracy in India." 44 *European Journal of Sociology / Archives Européennes De Sociologie / Europäisches Archiv Für Soziologie* 325 (2003).

43 Sushil Kumar Phull, "Agyeya: A Moving Force of Modern Hindi Literature" 24 *Indian Literature* 164 (1981).

peace. Externally fuelled insurgencies, cross-border terrorism and armed rebellions from within pose a massive threat to India's peace and sovereignty. Beginning with Pakistan, organising an armed military invasion into the Kashmir Valley in as early as in October 1947, ultimately degenerating into a piteous relationship of collusion with savage and unabated terrorist outfits under a nuclear umbrella.[44] Every opportunity to destabilise the Indian state was sought to be exploited by its ill-wishing western neighbour: be it the 1980s Sikh militancy movement,[45] or the beginning of the rebellion in Kashmir in the late 1980s.[46] Furthermore, the radical Hindu religious perception, that the Muslim and Christian religious minorities pose serious threat to the *pitri* and *punya bhumi* and Hindu dharma, inspired Hindu fundamentalists for extreme form of religious violence to terrorise, eliminate or subjugate minority communities in India.[47]

The net result of these circumstances was the essentiality for India to progress from the Criminal Procedure Code and the Indian Penal Code inherited from the British Raj, towards something which was perceived to be more effective, and which met the exigencies of the dynamics and increasingly worsening situation. The shift from standard criminal procedure, as contained in Cr.P.C. to a more relaxed procedure in terrorism oriented legislations such as Unlawful Activities (Prevention) Act, 1967, *et. al.*, was born out of delays and high burden of proof on the prosecution which resulted in low prosecutions and failed to act as an effective deterrent. Ergo, the necessity for stringent laws to withstand those who were desperate to harm the unity, sovereignty and integrity of India was need of the hour.

VII. Deconstructing Religious Terrorism

From the dawn of the Indian independence, the fear of losing religio-cultural or ethno-religio-cultural identity became a matter of grave concern for the Hindu, Muslim, Sikh and Christian religious communities of the Indian society. However, the apprehension (that religio-cultural identity was in danger) was expressed, mostly by Hindus and Sikhs, from the latter half of the nineteenth century:

> therefore, to safeguard their religio-cultural or ethno-religio-cultural identity they started Cow Protection, Suddhi and Singh Sabha

44 Gyanendra Pandey, "India and Pakistan, 1947-2002" 37 *Economic and Political Weekly* 1027 (2002).

45 Rajshree Jetley, "The Khalistan Movement in India: The Interplay of Politics and State Power" 34 *International Review of Modern Sociology* 61 (2008).

46 Sten Widmalm, "The Rise and Fall of Democracy in Jammu and Kashmir" 37 *Asian Survey* 1005 (1997).

47 Ipsita Chatterjee, "Social Conflict and the Neoliberal City: A Case of Hindu-Muslim Violence in India" 34 *Transactions of the Institute of British Geographers* 143 (2009).

movements.[48] The aforementioned fear was, most probably, generated by both internal and external factors. The internal aspects were factionalism, passive religious teachings such as non-violence/ahimsa and tolerance,[49] and division on caste or class basis,[50] which were perceived to have emasculated or weakened as suggested by some Hindu nationalists like Vinayak Damodar Savarkar and M. S. Golwalkar and distracted the religious, mainly Hindu, Sikh and Muslim communities from a true religion revealed in the religious text/texts such as the Vedas and the Quran.

Religious terrorism in India is the by-product of deep religious antagonism on account of unfavourable socio-historical factors and political situation. The religious force, in-spite of various preventive measures employed by the Indian state, is expanding by virtue of its massive support-base by applying various religio-political tactics and communal schemes to widen relationship-gap among the conflicting communities and further distressing the already fragile relations. Moreover, religious and political environment, in the post-independent period, became a more promising ground for radical religious leaders to inspire and mobilize their religious constituencies to achieve their set religio-political goals. More than three decades of terrorist violence has made it evident that this force cannot be vanquished by military machineries or political or economic strategies. To root out this problem it is necessary to destroy its support-base, and to demolish its support-base trust between the conflicting communities needs to be re-established.[51]

VIII. Terrorism: The Indian Response

As with any nation, India has also responded to terrorism on its soil with the enactment of various statutes which it perceives would be effective in combatting the menace.

The Armed Forces Special Powers Act (AFSPA), 1958[52]

It requires to be stated at the very outset of the forthcoming discussion that the AFSPA is not an anti-terror law in the conventional sense of the term, but a law

48 Santosh C. Saha, "Religious Revivalism Among the Hindus in India : Ideologies of the Fundamentalist Movements in Recent Decades." 8(9) *Indian Journal of Asian Affairs* 35 (1995).

49 Farah Godrej, "Nonviolence and Gandhi's Truth: A Method for Moral and Political Arbitration." 68 *The Review of Politics* 287 (2006)

50 Divya Vaid, "The Caste-Class Association in India: An Empirical Analysis" 52 *Asian Survey* 395 (2012).

51 Kailash Kumar Chatry, "Understanding the religious nature of terrorism in India: four cases with an analysis for proposals and resolution" *University of Birmingham Ubira E-thesis*, 2012, *available at*: <https://etheses.bham.ac.uk//id/eprint/3889/> (last visited on Dec. 14, 2020).

52 The Armed Forces Special Powers Act, 1958 (Act 28 of 1958).

and order provision which seeks to aid the operations of the military in the areas declared as 'disturbed' through appropriate constitutional measures.[53] Based on a colonial-era law enacted to face down the Quit India movement in 1942, its immediate precedents were similar acts of 1947 implemented to control the partition related riots in Punjab and Bengal. The AFSPA in its present form was promulgated under constitutional provisions in September 1958 to control the Naga insurgency which had broken out in the mid 1950's and since then, has been invoked to contain volatile and dynamic situations in the prescribed 'disturbed areas' upon the ineffectiveness and consequent failure of the municipal law and order machinery to perform its designated tasks.[54]

Coming to the law itself, the AFSPA can be enforced only in areas designated as 'disturbed areas' through a procedure established by law and not by the arbitrary will of those in power as clearly defined under section 2(b).[55] In such areas, where law and order situation has failed completely, the deployment of security forces becomes a necessity. Once armed forces are called upon to defend the country's integrity, there is a consequent need to make exceptional provisions that assist them to discharge their responsibilities. The principal sections of the Act, namely 4(a), 4(b), 4(c) and 4(d) empower the armed forces to undertake counter-insurgent operations at the tactical level. Section 4(a) authorises any officer, commissioned and non-commissioned, for the maintenance of public order, after giving such due warning as he may consider necessary, to fire upon or otherwise use force, even to the extent of causing death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances.[56] Section 4(b) empowers the forces to destroy a fortified position, cache or an arms dump. Section 4(c) empowers the arrest, without warrant, of a person who has committed a cognisable offence; and Section 4(d) permits search, without warrant, of suspected premises to recover arms, ammunition and explosive substances.[57]

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53 *Id.*, s. 3.

54 Akhil Ranjan Dutta, "Indian State' and Colonial Apparatuses: Can Peace be Achieved in Northeast India by Violating Peoples' Rights?" 73 *The Indian Journal of Political Science* 283 (2012).

55 AFSPA, s. 2(b).

56 *Id.*, s. 4(a).

57 Mustafa Haji, "Armed Forces Special Powers Act: A Call for Repeal" 4 *Counter Terrorist Trends and Analyses* 12 (2012).

Indeed, the absence of these four legal provisions would render the security forces infructuous. As pointed above, the AFSPA comes into operation only after an area has been declared 'disturbed'. In such a scenario, its non-availability would imply that a soldier cannot fire upon a terrorist, take necessary action to destroy a hideout, arrest a suspect when in doubt, and lastly search any premises to recover arms and ammunition.

As Brig. Harinder Singh mentions, it is not at all surprising that while several activists often raise their voice against the law, the affected states are hesitant in recommending the annulment of the Act.[58] Even the mere dilution of the Act could have serious repercussions at the tactical level. It could result in loss of morale and reluctance amongst the security forces to undertake operations fearing cumbersome litigation process in the future in the form of disciplinary proceedings, thereby leading to a slow pace of operations. A frail legal standing would embolden the insurgent/terrorist organizations and their over ground workers (OGWs) to level frivolous allegations resulting in the military leadership appearing more often in courts rather than in leading counter-terror operations. The judiciary too is likely to be targeted by the insurgents/terrorists to make them pliant thereby posing an additional security burden. Also, over a period of time judicial standards and rectitude could deteriorate leading to a loss of faith in the system. In the absence of legal provisions, the state and the soldier would be vulnerable, and in turn fail to provide the security, development and governance needed to prevent the insurgency affected states from descending into greater chaos.

The Unlawful Activities Prevention Act (UAPA), 1967[59]

The decades post the independence, particularly the 1980s, witnessed a number of legislations[60] being enacted to tackle specific contingencies. While such laws were enacted to tackle specific, largely isolated instances, a vacuity was felt for a legislation which sought to deal with the menace of terrorism as a whole.

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58 Brig. Harinder Singh, "AFSPA: A Soldier's Perspective" *IDSA Comments*, 2010, *available at*: <https://idsa.in/idsacomments/AFSPAASoldiersPerspective_hsingh_060710> (last visited on Dec 4, 2020)

59 The Unlawful Activities (Prevention) Act, 1967 (Act No. 37 Of 1967).

60 The Jammu and Kashmir Public Safety Act (1978); The Assam Preventive Detention Act (1980); The National Security Act (1980, amended 1984 and 1987); The Anti-Hijacking Act (1982); The Armed Forces (Punjab and Chandigarh) Special Powers Act (1983); The Punjab Disturbed Areas Act (1983); The Chandigarh Disturbed Areas Act (1983); The Suppression of Unlawful Acts Against Safety of Civil Aviation Act (1982); The Terrorist Affected Areas (Special Courts) Act (1984); The National Security (Second Amendment) Ordinance (1984); The Terrorist and Disruptive Activities (Prevention) Act (1985, amended 1987); The National Security Guard Act (1986); The Criminal Courts and Security Guard Courts Rules (1987) and the Special Protection Group Act (1988).

Through the Constitution (Sixteenth Amendment) Act, 1963, 'reasonable restrictions in the interest of the sovereignty and integrity of India' were amended to article 19(2).[61] This amendment occurred in the immediate wake of the Indian army's defeat in the Sino-Indian War, as well as the threat posed by the Dravida Munnetra Kazhagam (DMK) contesting elections in Tamil Nadu with secession from India being part of their manifesto. It was in this background that the UAPA was enacted on December 30, 1967 to satisfy the need of the Indian state to declare associations that sought secession from India as 'unlawful'. The UAPA gave powers to the central government to impose all-India bans on associations. The process of banning associations could simply be done by the government announcing them as 'unlawful' and hence banned.[62]

Distinguishing 'terrorism' from 'ordinary crime', the Supreme Court of India in the *Hitendra Vishnu* v. *State of Maharashtra*[63] noted that:

> Terrorism' has not been defined under Terrorist and Disruptive Activities (Prevention) Act (TADA) nor is it possible to give a precise definition of 'terrorism' or lay down what constitutes 'terrorism'. It may be possible to describe it as use of violence when it's most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or 'terrorise' people and the society and not only those directly assaulted, with a view to disturb even tempo, peace and tranquillity of the society and create a sense of fear and insecurity. A terrorist activity does not merely arise by causing disturbance of law and order or of public order. The fallout of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law...What distinguishes 'terrorism' from other forms of violence therefore appears to be the deliberate and systematic use of coercive intimidation. It is therefore essential to treat such a criminal and deal

61 The Constitution of India, art. 19.

62 Anushka Singh, "Criminalising Dissent: Consequences of UAPA" 47 *Economic and Political Weekly* 14 (2012).

63 *Hitendra Vishnu* v. *State of Maharashtra*, (1994) 4 SCC 602.

> with him differently than an ordinary criminal capable of being tried by the ordinary courts under the penal law of the land…

At present, the only nationwide anti-terror law under implementation in India is the newly amended Unlawful Activities Prevention Act (UAPA), 1967. The provisions under the previously enacted laws including the Terrorist and Disruptive Activities (Prevention) Act (TADA), (1985–1995) and the Prevention of Terrorism Act (POTA), (2002–2004) have been merged under the now overarching UAPA.

The 2004 UAPA Amendment

In 2004, owing to the public outcry against the misuse of the Prevention of Terrorism Act (POTA), 2002, the government repealed it, but majorly amended the UAPA, 1967 at the same time. The repeal of POTA was an election promise of the then newly elected Congress government. The amended UAPA made substantial changes to the definition of 'unlawful activity',[64] included the definition of 'terrorist act',[65] and 'terrorist organisation',[66] from the repealed POTA, and also introduced the concept of a 'terrorist gang'.[67] These changes were necessitated on account of a substantial increase in individual cases of terrorism throughout India, therefore a greater legislative backing to the cause of preventing and eradicating terrorism from India was a pressing exigency. The only caveat in place is the constitutional obligation to balance the national interest with personal liberty of an individual, the balance often tilting in favour of the former.

The 2008 and 2012 UAPA Amendments

On December 17, 2008, another amendment of the UAPA was moved and adopted following the attack by armed gunmen in Mumbai on November 26, 2008. More provisions similar to POTA and TADA regarding maximum period of police custody, incarceration without a charge-sheet and restrictions on bail were incorporated into the UAPA. The 2012 amendments to the UAPA further expanded the already vague definition of "terrorist act" to include offences that threaten the country's economic security.

The 2019 UAPA Amendment

In 2019, the Parliament of India carried out certain amendments to the UAPA and the same were notified on 8th August, 2019. The most significant change brought about by the amendment was that it altered section 35,[68] and gave the Central

64 *Supra* note 59, s. 2 (1)(*o*).

65 *Id.*, s. 15.

66 *Id.*, s. 2 (1)(*m*).

67 *Id.*, s. 2 (1)(*l*).

68 *Id.*, s. 35.

Government the power to notify an individual as a 'terrorist' under schedule IV of the Act. Prior to the amendment, only organizations could have been designated in this manner and individuals were not covered. Detractors of the amendment argue that it gives arbitrary powers to the executive and violates an individual's right to due process of law, right to dissent, and right to reputation.

When offences and punishments, as in the UAPA, carry the scope for so much subjectivity, procedural safeguards that effectively rule out wrongdoing by law enforcers are pivotal. However, the UAPA is oppugnant to the mandate of procedural safeguards. It increases police powers of arrest, search and seizure [s. 43A, 43B], makes all offences cognizable [s. 14, 43D (1)], increases the period of detention [s. 43D(2)], whimsically changes the established norms for granting police custody [s. 43D(2)], undermines the power of the court to demand the attendance of accused in their trials [s. 43D(3)], disallows anticipatory bail [s. 43D(4)], augments the restrictions on bail [s. 43D(5)], presumes the guilt of the accused [s. 43E], permits in-camera trials and the withholding of the identity of the witness [s. 44], and finally, allows intercepted communications to be used as evidence [s. 46]. Each of these measures gives unfettered powers to law enforcers.[69]

There are a handful of judicial decisions that consider how section 43D of UAPA should work. In April 2019, a division bench of the Supreme Court in *National Investigating Agency* v. *Zahoor Ahmad Shah Watali*,[70] interpreted the phrase "prima facie true" which is at the core of section 43D(5), UAPA. The court opined as under:

> 18. A *priori*, the exercise to be undertaken by the Court at this stage of giving reasons for grant or non-grant of bail is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise.
>
> 21. ….. For, in terms of section 43D, it is the bounden duty of the Court to peruse the case diary and/or the report made under section 173 of the Code and all other relevant material/evidence produced by the Investigating Agency, for recording its opinion.

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69 Susan Abraham, "Misuse of the Unlawful Activities (Prevention) Act" *Economic and Political Weekly,* Mar. 25, 2017, *available at*: <https://www.epw.in/journal/2017/12/web-exclusives/misuse-unlawful-activities-prevention-act.html-0> (last visited on Dec 6, 2020).

70 *National Investigating Agency* v. *Zahoor Ahmad Shah Watali*, AIR 2019 SC 1734.

The Supreme Court called out the Delhi High Court for conducting a detailed inquiry at the stage of bail in spite of section 43 D(5) only requiring a "*prima facie*" examination. But, in the same breath, the court also effectively rewrote the provision, as it broadened the scope of inquiry for a court from beyond the Case Diary and Chargesheet to consider "all other relevant material/evidence produced by the Investigating Agency" for making a decision. Thus, besides giving a cursory look to the Case Diary and Chargesheet, courts are required to evaluate more material with the same benign *prima facie* gaze.

India faces multiple threats from elements which seek to destroy its unity and integrity and threaten its stability, therefore granting such exemptions in the form of such security laws comes across as rather necessary. It needs to be noted that while laws like the National Security Act, 1980 allow provisions which can, given the nature and extent of the threat, be invoked in terrorism-related cases. The model of inbuilt safeguards and the rather cautious system of checks and balances ensures their judicious application through a well-defined legal mechanism, as opposed to an arbitrary invocation. Despite that, much criticism has been levelled against the Act since its inception. As discussed earlier, the Government of India seeks to justify the July 2019 amendment consistent with its alleged desire to effectively deal with terrorists and terrorist organisations who threaten security. Unfortunately, the provisions of UAPA have, in the recent past, have been used against those known to speak up for the oppressed, those who foster the cause of civil rights, and others who oppose the government and its policies, but a balance must be restored between the rights of an individual *vis a vis* the looming concerns over national security and integrity of India.

IX. Conclusion

Terrorism represents an attack on human rights that governments have a fundamental obligation to safeguard, uphold and protect. It is a complicated, serious, and difficult problem to address. While responding to terrorism, democratic governments must fully protect human rights to advance both the rule of law and long-term security while preserving the unity and integrity of the nation, since violations of human rights often plant the seeds for future acts of terrorist violence and sans the unity, there is no ground for application of the law.

Unfortunately, in much of the former British empire, including India, post-colonial governments have too often maintained and dwelled upon the more authoritarian aspects of the colonial legacy with respect to the emergency, anti-terrorism, and other security laws albeit it comes with its own share of necessary procedural safeguards which vary on a country-to-country basis. However, in recent years, the U.N. Security Council has to some extent facilitated disregard for human rights by

failing to require states to take their international human rights obligations seriously when implementing their antiterrorism obligations under Resolution 1373.[71]

Albeit, India has taken several positive steps in the right direction such as repealing POTA and seeking to transform the police and criminal justice institutions that it inherited from the British empire. In the aftermath of the 26/11 bomb blasts in Mumbai, the Indian government wisely chose not to re-enact new draconian legislation to replace POTA. Independent India's constitutional tradition is a proud one, and in combating the persistent threat of terrorism that is among the most serious in the world, a durable, enduring, and ever improving commitment by India to protect the fundamental human rights while, at the same time advancing the rule of law without compromising the long-term security of the nation can serve as an important international model.

71 UN Security Council, SC Res 1373, SCOR, UN DOC S/Res/1373 (Sep 28, 2001).

FREEDOM OF SPEECH AND EXPRESSION IN THE AGE OF SOCIAL MEDIA: PRELIMINARY THOUGHTS ON CHALLENGES IN REGULATING 'ONLINE FALSEHOOD'

P. Puneeth[*]

Abstract

Emergence of social media platforms has turned out to be both a boon as well as a bane. It has revolutionized the way people communicate with each other so much so that the physical distances could hardly be considered as barriers for real time communications. Social media platforms literally transformed the world into a single social space. Whereas this is a boon, the baneful consequences of the online social media platforms are that they enabled subversive and anti-social elements to spread falsehood and misinformation to create hatred, incite violence, and divide societies. They even have the potential to affect the sincerity and sanctity of ballot and can weaken democratic institutions and processes. It has become increasingly necessary to regulate them, which is one of the most serious and complex tasks. Since the Constitution guarantees freedom of speech and expression to every citizen in an equal measure irrespective of the media or platform one choses to exercise the same, the regulation of social media platforms shall conform to the Constitution. The paper explores how effectively social media platforms can be regulated within the constitutional framework and, particularly, how creation and circulation of falsehood can be regulated when 'falsehood' *per se* is not recognized as a ground on which reasonable restrictions can be imposed on freedom of speech and expression. It discusses guarantee of freedom of speech and expression in USA and Singapore to draw appropriate analogies. The paper also examines whether the Constitution of India permits enactment of a Singapore like legislation *viz.*, Protection from Online Falsehoods and Manipulation Act, 2019 in India to counteract deleterious effects of online falsehood.

I. Introduction

THE CONSTITUTIONAL guarantee of freedom of speech and expression is not limited to any particular media or platform. With the evolution of technology, as the new media or platforms are created, the Supreme Court has recognized

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that the freedom of speech and expression is exercisable on all such media or platforms. Online social media platforms or sites are new additions to the list. The emergence of online social media platforms provided the greatest opportunity to people to disseminate news, views and to share all kinds of information almost instantaneously like never before. It has, in a way, empowered the people. There is also a flip side to it. The online social media also enabled subversive and anti-social elements to spread falsehood and hatred, incite violence, misinform and mislead people. The dangers of online falsehood, when widely circulated, are very many. They have the potential to create hatred, incite violence, divide society, and can even weaken democratic institutions and processes. Regulations, thus, need to be put in place. Regulating social media is, however, one of the serious and complex tasks. Since the constitutional protection to freedom of speech and expression extends to social media as well, its regulation shall conform to the constitutional limits envisaged under article 19 (2) of the Constitution of India. This paper seeks to examine whether the online social media can effectively be regulated within the existing constitutional framework.

This paper has been divided into different parts. Part II briefly explains the significance of constitutional guarantee of freedom of speech and expression and Part III outlines the grounds on which freedom of speech and expression can be subjected to restrictions as per the constitutional scheme in India. It is argued that by explicitly enumerating the grounds of restriction, the Constitution of India accords better protection to the freedom than the Constitution of the United States of America. Part IV briefly elucidates how online falsehood might prejudice or have adverse implications on various legitimate state or collective interests of the society. It focuses more on how falsehoods created and circulated online widely with political ends in mind may influence the choices of the voters and, thus, affect the "sincerity of the ballot." Falsehood has the potential to weaken democratic institutions and processes. Further, this part also explains the challenges in regulating online falsehood within the constitutional framework. The important question it examines is whether it is permissible under the constitutional scheme to impose restriction or prohibition on creation and circulation of online falsehood in the interest of holding 'free and fair elections in India' since it is not recognized as a ground under article 19 (2)? Part V contains conclusion.

II. Constitutional Guarantee of Freedom of Speech and Expression

The freedom of speech and expression is one of the most cherished human rights and it has pivotal significance in democratic polities. One cannot imagine a democracy of any form, where there is no guarantee of freedom of speech and expression. That is why freedom of speech and expression has been accorded the sacrosanct

status of fundamental rights in most of the democracies. The Constitution of India also protects, under article 19 (1)(a), freedom of speech and all other forms of expression – by words (not only spoken but also written) or by signs or by visible representations, or in any other forms, in which a person can express oneself. The exercise of freedom that is guaranteed is not limited to any particular platform or media; it extends to all including the social media platforms – the emergence of which was not even in the contemplation of framers of the Constitution at the time of its making.[1]

Under the constitutional scheme, the freedom of speech and expression, unlike certain other fundamental rights, is available only to citizens and not to others.[2] Further, it must also be noted that this right to freedom of speech and expression is available to all citizens in equal measure and, even though freedom of press is considered to be implicit in it, the journalists in print or electronic media do not have any special rights. No special privilege is accorded to them.[3] Every citizen, whether he/she is a journalist or not would have the same amount of constitutional protection and their rights to freedom of speech and expression are subject to restrictions on same grounds irrespective of the media or platform,[4] which they chose to express themselves.

The freedom of speech and expression, which is expressly recognized under article 19 (1)(a), is a composite right. It is wide enough to include within its ambit, as recognized by the Supreme Court in a number of cases, various concomitant

1 In *Anuradha Bhasin* v. *Union of India*, 2020 SCC Online SC 25, the Supreme Court itself has acknowledged that it, "in a catena of judgments, has recognized free speech as a fundamental right, and, as technology has evolved, has recognized the freedom of speech and expression over different media of expression. Expression through the internet has gained contemporary relevance and is one of the major means of information diffusion. Therefore, the freedom of speech and expression through the medium of internet is an integral part of Article 19 (1) (a)…"

2 When it comes to non – citizens, though the position with regard to aliens or foreigners that they are not entitled to freedom of speech and expression was very clear, with regard to juristic persons like incorporate companies, there was some ambiguities. No doubt that as per law, citizenship can only be conferred on natural persons and not on juristic persons. In *Bennett Coleman* v. *Union of India*, (1972) 2 SCC 788, the apex court clarified the position by holding that the citizens do not lose their fundamental rights when they associate to form a company.

3 *Express Newspaper (P) Ltd.* v. *Union of India*, AIR 1958 SC 578.

4 It may, however, be noted that the apex court has been somewhat reluctant to uphold pre-censorship of press, whereas it had no hesitation in upholding pre-censorship of motion-pictures. This indicates that the court has accorded differential treatment to freedom of speech and expression exercised on different platform or media.

rights *viz*., the right to freedom of press,[5] right to information,[6] right to interview prisoners,[7] right of broadcasting and telecasting,[8] right to exhibit films,[9] right to sing[10] or dance or write poetry or literature,[11] right to dramatic performances,[12] right to advertisement,[13] freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities,[14] right to reply,[15] etc. The right to free speech and expression also includes its negative facet *i.e.*, right to remain silent.[16]

It may be pertinent to ask oneself a question at this stage as to what does this constitutional protection of freedom of speech and expression signify?

This question often reminds the author of the statement that is attributed to the former military ruler of Uganda - Idi Amin Dada, who once said to have warned the people that, "[T]here is freedom *of* speech, but I cannot guarantee freedom *after* speech."[17]

Even the military ruler, with all his might and unfettered powers, thought that he could not possibly control, at all the times, the people from speaking whatever they wish to. But he clearly warned them that he has the means to curtail their other freedoms 'after' speech. Even under authoritarian regimes, people endowed with the natural ability to speak and express themselves in wide variety of ways can do so. But it is the threat of possible curtailment of freedom 'after' speech that has the effect of deterring the free speech and other forms of expressions. The ultimate

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5 Per B. R. Ambedkar, VII, *Constituent Assembly Debates*, 780. Also see *Romesh Thapar* v. *State of Madras*, AIR 1950 SC 124; *Brij Bhushan* v. *State of Delhi*, AIR 1950 SC 129; *Express Newspaper (P) Ltd.* v. *Union of India*, AIR 1958 SC 578; *Sakal Newspapers (P) Ltd.* v. *Union of India*, AIR 1962 SC 305; *Bennett Coleman* v. *Union of India*, AIR 1973 SC 106.

6 *State of U.P.* v. *Raj Narain*, AIR 1975 SC 865; *Secretary, Ministry of Information and Broadcasting, Government of India* v. *Cricket Association of Bengal*, AIR 1995 SC 1236.

7 *Prabha Dutt* v. *Union of India,* AIR 1982 SC 6.

8 *Odyssey Communications Pvt. Ltd.* v. *Lokvidayan Sanghatan*, AIR 1988 SC 1642; *Secretary, Ministry of Information and Broadcasting, Government of India* v. *Cricket Association of Bengal*, AIR 1995 SC 1236.

9 *K. A. Abbas* v. *Union of India*, AIR 1971 SC 481; *Bobby Art International* v. *Om Pal Singh Hoon*, AIR 1996 SC 1846.

10 *Usha Uthup* v. *State of West Bengal*, AIR 1984 Cal. 268.

11 *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

12 *State* v. *Babulal*, AIR 1956 All 471.

13 *Tata Press Ltd.* v. *Mahanagar Telephone Nigam Ltd.* AIR 1995 SC 2438.

14 *Life Insurance Corporation of India* v. *Manubhai D. Shah*, AIR 1993 SC 637.

15 *Ibid.*

16 *Bijoe Emmanuel* v. *State of Kerala* (1986) 3 SCC 615.

17 See https://quotes.thefamouspeople.com/idi-amin-1664.php (last visited on July 15, 2020).

purpose of constitutional protection to freedom *of* speech is, in effect, to accord protection to freedoms *after* speech. The constitutional guarantee of freedom *of* speech is an assurance that there will be no threat to the freedom even *after* speech, provided one's speech (or other forms of expression), is within limits that are defined in the Constitution, which guarantees such freedom.

Freedom of speech and expression is not an absolute right in any country. There are limitations imposed. In some Constitutions they are clearly and explicitly defined. In some, like the United States of America, they are recognized later on a case-to-case basis keeping in mind the "compelling state interests". So, whenever one speaks about freedom of speech and expression, one must know that what is protected is the freedom to speak 'freely' and not 'carelessly'. One must always respect the limits imposed on the freedom guaranteed.

III. Limitations on the Right to Freedom of Speech and Expression

Under the Constitution of India, like in other countries, the right to freedom of speech and expression is not an absolute right. The framers of the Constitution of India have explicitly defined the limitations on freedom of speech and expression by providing for imposition of restrictions on it under clause (2) of article 19. Originally it provided for imposition of restrictions, broadly speaking, on four grounds *viz*., (i) libel, slander, defamation, (ii) contempt of court, (iii) decency or morality, or (iv) the security of the state.[18]

All other freedoms guaranteed under various sub-clauses of clause (1) of article 19 were also subjected to (reasonable)[19] restrictions in the similar way under different clauses of the said article itself. The grounds of restrictions, however, are not exactly identical under all the clauses.

It may be interesting to note that in the Constituent Assembly, article 19 (article 13 in the draft Constitution) was criticized for hedging the rights with so many restrictions. Some have made reference to the Constitution of the United States of America, which does not explicitly provide for grounds on which restrictions can be imposed on fundamental freedoms such as freedom of speech and press, etc.

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18 The original clause (2) of article 19 read: "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."

19 The word 'reasonable' was not there in art. 19 (2) as originally enacted. All other clauses i.e., clauses (3) to (6) of article 19, had this word. Granville Austin says it was inadvertently omitted in art. 19 (2). The word came to inserted in art. 19 (2) by the Constitution (First Amendment) Act, 1951. The said Act added additional grounds of restrictions.

The American Constitution declares such freedoms in broad and general terms without expressly providing that the freedoms so guaranteed are subject to restrictions. Criticizing the draft article 13, it was said that the rights are "riddled with so many exceptions that the exceptions have eaten up the rights altogether."[20] It was even condemned as a kind of 'deception' that what was given with the one hand is taken away with the other. Replying to the critics, B. R. Ambedkar, the Chairman of the Drafting Committee of the Constituent Assembly, observed: [21]

> I am sorry to say that the whole of the criticism about fundamental rights is based upon a misconception. In the first place, the criticism in so far as it seeks to distinguish fundamental rights from non-fundamental rights is not sound. It is incorrect to say that fundamental rights are absolute while non-fundamental rights are not absolute. The real distinction between the two is that non-fundamental rights are created by agreement between parties while fundamental rights are the gift of the law. Because fundamental rights are the gift of the State it does not follow that the State cannot qualify them.
>
> In the second place, it is wrong to say that fundamental rights in America are absolute. The difference between the position under the American Constitution and the Draft Constitution is one of form and not of substance. That the fundamental rights in America are not absolute rights is beyond dispute. In support of every exception to the fundamental rights set out in the Draft Constitution one can refer to at least one judgment of the United States Supreme Court.

The fact that the fundamental rights in America are not absolute is abundantly clear from the observations made by the Federal Supreme Court of the United States of America in *Dennis* v. *United States*.[22] In this case the court observed that:

> An analysis of the leading cases in this Court which have involved direct limitations on speech, however, will demonstrate that both the majority of the Court and the dissenters in particular cases have

20 VII, *Constituent Assembly Debates*, 40.

21 *Ibid.*

22 341 US 494 (1951). It may be of further interest to note the observations of Holmes J., made even in his dissenting judgment in *Abraham* v. *United States*, 250 U.S. 616 (1919). He observed: "I do not doubt for a moment that, by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace, because war opens dangers that do not exist at other times."

> recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations.

In the United States of America, the restrictions imposed on freedoms are upheld by the courts if they, *inter alia*, serve what is known as "compelling state interests."[23] One can even argue that, by explicitly recognizing the grounds of restrictions, the Indian Constitution has, in fact, limited the power of the 'state' to curtail the freedom. The rule of construction *expressio unius est exclusio alterius* clearly leads to that Conclusion. Recently Jasti Chalameshwar J., has explicitly endorsed this view. He has observed in his separate but concurrent judgment, in *K. S. Puttaswamy* v. *Union of India*,[24] that, "[I]n my opinion, provisions purportedly conferring power on the state are in fact limitations on the state power to infringe on the liberty of the SUBJECTS."

Whereas, in the United States of America, based on the argument that the restriction in question would serve the "compelling state interest", it is possible to expand the grounds of restrictions without amending the Constitution, in India, it is not possible to do so. In order to add an additional ground, the Constitution needs to be amended. From this point of view, one can argue that the Constitution of India accords better protection to the freedom of speech and expression than the Federal Constitution of the United States of America.

Further, in India, restrictions on the specified grounds can be imposed only through a 'law' duly enacted by a competent legislature and not by executive action.[25]

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23 It is pertinent to note that in the United States of America, different levels of scrutiny are applied for examining the validity of regulations or restrictions imposed on different kinds of protected speeches. Various levels of scrutiny applied are: (i) strict scrutiny; (ii) intermediate review, and (iii) reasonableness balancing. When it comes to the content-based regulation of speech involving viewpoint discrimination, the courts apply the strict scrutiny test, which is the highest level of scrutiny, to test their validity. [For details, see R. Randall Kelso, "The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and Reasonableness Balancing" 8:291 *Elon Law Review* 291 – 405 (2016)]. The question of 'compelling state interest' i.e., whether or not such regulation advances the compelling state interest is part of the strict scrutiny test. There is no exhaustive list of what advances compelling state interest. It has to be decided on a case-to-case basis. As ordinarily understood "[A]n interest is compelling when it is essential or necessary rather than a matter of choice, preference, or discretion." See Ronald Steiner, "Compelling State Interest" *available* at: http://www.mtsu.edu/first-amendment/article/31/compelling-state-interest (last visited on July 19, 2020).

24 (2017) 10 SCC 1.

25 *Express Newspaper (P) Ltd.* v. *Union of India* (1986) 1 SCC 133; *Bijoe Emmanuel* v. *State of Kerala* (1986) 3 SCC 615.

As far as grounds of restrictions are concerned, though the specification of so many grounds for imposing restrictions on freedom of speech and expression was widely criticized in the Constituent Assembly, within a year after the commencement of the Constitution, the state power under clause (2) of article 19 to impose restrictions on freedom of speech and expression was found to be inadequate, having regard to certain rulings of the Supreme Court,[26] and thus, the first amendment was brought, *inter alia*, to replace the said clause (2).[27]

As regards article 19(2), the first amendment did two things – on the one hand, it further restricted the scope of the right to freedom of speech and expression by not only adding additional grounds of restrictions but also by empowering the state to impose restrictions "in the interest" of those stated grounds and, on the other, it strengthened the protection to freedom of speech and expression by adding the word 'reasonable', which was conspicuous by its absence only in clause (2) of article 19 as it was originally enacted, whereas other clauses (3) to (6) of article 19 have had this word from the beginning.[28]

The first amendment has recast the existing grounds and added additional grounds. The number of grounds increased from four to seven. They are: (i) the security of the State (ii) friendly relations with foreign States (iii) public order (iv) decency or morality, (v) contempt of court, (vi) defamation, (vii) incitement to an offence. It is axiomatic to state that increasing the number of grounds of restrictions resulted in reducing the scope of the right to freedom of speech and expression. Further, replacement of the words "relating to" with "in the interest of" in clause (2) of article 19 also expanded the state power to regulate or restrict freedom. The clause, as originally enacted, allowed the state to impose restrictions "relating to" those stated grounds. It meant that the restrictions should have a direct and proximate connection with the grounds that are enumerated. The words "in the interests of", on the other hand, enlarges the state power in the sense that the state can now impose restrictions not only when free speech or expression can actually lead to disturbance of public order etc., but even when it has the tendency to cause disorder.

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26 *Romesh Thapar* v. *State of Madras*, AIR 1950 SC 124; *Brij Bhushan* v. *State of Delhi*, AIR 1950 SC 129.

27 The clause substituted by the Constitution (First Amendment) Act, 1951, reads: "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevents the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub – clause in the interest of the security of the State, friendly relations with foreign States, public order, decency or morality or in relating to contempt of court, defamation or incitement to an offence."

28 According to Granville Austin, the omission of the word 'reasonable' from article 19 (2) in the original Constitution was because of inadvertence. See, Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP, 2012).

Foreseeing the possibility of disturbance to public order or threat to security of state, friendly relationships with foreign countries, etc., the state can restrict free speech.

Adding the word 'reasonable', on the other hand, had a positive effect. It mandated that the restrictions that can be imposed on it must be reasonable having proximate nexus or a rational relation with the grounds specified in clauses (2) of article 19 and further, restrictions should be proportionate to the object sought to be achieved.

In the year 1963, clause (2) of article 19 was further amended *vide* section 2 of the Constitution (Sixteenth Amendment) Act, 1963 to make one more addition to the grounds of restrictions. The amendment was based on the recommendation of the Committee on National Integration and Regionalism appointed by the National Integration Council. As the Committee recommended "that article 19 of the Constitution be so amended that adequate powers become available for the preservation and maintenance of the integrity, and sovereignty of the Union", a new ground *viz.*, "the sovereignty and integrity of India" was added.

There are now eight grounds on which freedom of speech and expression can be restricted.

It may, however, be noted that these grounds are not exhaustive. Sometimes, the freedom of speech and expression can be restricted relying on other provisions of the Constitution if the exercise of the freedom comes in conflict with them. One may note, for example, parliamentary privileges. It is not recognized as a ground under article 19(2) even though the Parliament and State Legislatures are empowered under the Constitution to punish breach of their privileges. The way the court constructed the relationship between the two – the right to freedom of speech and expression, on the one hand, and the power of the Parliament to punish for the breach of its privileges, on the other – completely leverages the latter at the cost of the former.[29] It cannot be said to be a harmonious construction. What is more pertinent to be noted, in this context, is that the judiciary can identify, through the process of construction of the Constitution, additional grounds for imposition of restrictions on freedom of speech and expression. But, unlike in the United States of America, it is not open for the court in India to recognize a ground, which has no textual basis in the Constitution.

IV. Regulation of 'Online Falsehood' in the Age of Social Media

As stated earlier, the freedom of speech and expression, which is a composite right, can be exercised on any platforms or media including online social media.

29 *Pandit M.S.M. Sharma* v. *Sri Krishna Sinha*, AIR 1959 SC 395; *In Powers, Privileges and Immunities of the State Legislatures, Re*, AIR 1965 SC 745.

Irrespective of the platform or the media, the extent of the freedom remains the same as well as the state power to restrict it even though the challenges thrown up by different media are different.

Information and communication technology (ICT), which is the defining feature of the contemporary age, has redefined the way people interact and the speed with which they communicate with each other like never before. Distances do not matter at all. The 'internet' and 'social media' platforms have provided greater opportunities for the people to pass on news or information and more publicly and openly express their views, ideas, opinions, beliefs etc., One does not have to rely on conventional print or electronic media like televisions and radios to disseminate information to wider section of the population. One can even open his/her own YouTube channel without any cost and keep disseminating information to the world at large. With Internet enabled handhelds like mobile phones and iPads one can make videos and share it with others on various social media platforms within seconds.

These innovations and developments have both positive and negative dimensions. It is not only possible for people to exchange news and views, ideas and opinions, but also to spread falsehood and hatred, incite violence, misinform and mislead people. It is because of this potential and possibility, these social media platforms might as well be described as 'anti – social media'[30] platforms. The statements that are false, when widely circulated online, have the potential to spread hate, incite violence, divide society, and can even weaken democratic institutions and processes.

Having regard to its negative potentials, which could have far reaching consequences, the legal regulation has become imperative. World over increasingly the need is felt to regulate social media platforms. Some countries like Singapore have taken a lead and enacted a statute *viz*., Protection from Online Falsehoods and Manipulation Act, 2019 (hereinafter "POFMA").

The POFMA is a comprehensive legislation, which primarily aims at preventing electronic "communication of false statements of fact in Singapore".[31] It contains host of provisions to enable authorities to take appropriate measures to counteract the effects of communication of false statements of fact. The phrase 'statement of fact', as defined under the Act, refers to "a statement which a reasonable person seeing, hearing or otherwise perceiving it would consider to be a representation of fact".[32] It is amply clear from the definition that it does not include views, opinions,

30 Shiv Vaidhyanathan, *Anti – social Media: How Facebook Disconnects Us and Undermines Democracy* (OUP, 2018).

31 The Protection from Online Falsehoods and Manipulation Act, 2019, s. 5(a).

32 The Protection from Online Falsehoods and Manipulation Act, 2019, s. 2(2)(a).

criticisms, satire, or parody. The Act further seeks to suppress financing, promoting or supporting those involved in repeatedly communicating false statements of facts and also seeks to enhance transparency in political advertisements made online. It enables the competent authority to issue 'Codes of Practice' to be followed by 'digital advertising intermediaries' or 'internet intermediaries' for the purpose of enhancing "disclosure of information concerning paid content directed towards a political end".[33]

Section 7 is one of the key provisions of the POFMA that criminalizes communication of false statement of facts in Singapore. Clause (1) of section 7 prohibits a person from communicating in Singapore a statement, which he/she knows or believes to be false if such communication is likely to -

(i) be prejudicial to the security of Singapore or any part of Singapore

(ii) be prejudicial to public health, public safety, public tranquility or public finances;

(iii) be prejudicial to the friendly relations of Singapore with other countries;

(iv) influence the outcome of an election to the office of President, a general election of Members of Parliament, a by-election of a Member of Parliament, or a referendum;

(v) incite feelings of enmity, hatred or ill-will between different groups of persons; or

(vi) diminish public confidence in the performance of any duty or function of, or in the exercise of any power by, the Government, an Organ of State, a statutory board, or a part of the Government, an Organ of State or a statutory board.

As is evident, the provision does not criminalize mere communication of false statement. It penalizes such communication only when it leads to or likely to lead to any of the stated consequences.

POFMA has been subjected to criticism on several counts in Singapore. Moreover, it is also not clear as to whether section 7, which covers wide areas, falls strictly within the purview of clause (2)(a) of article 14 of the Constitution of the Republic of Singapore. Article 14(1)(a) confers on the citizens of Singapore "the right to freedom of speech and expression" subject to the provisions contained in clause (2) (a), which reads as follows:

33 See the Protection from Online Falsehoods and Manipulation Act, 2019, s. 5 (a), for explicit statement of purpose of the Act.

> (2) Parliament may by law impose –
>
> (a) on the right conferred by clause (1) (a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence.

It is evident that above clause does not recognize prohibition of spreading of 'falsehood' *per se* as a ground for imposing restriction on freedom of speech and expression. Since the clause provides for imposition of restrictions "in the interest of" specifically stated grounds, the false statements that have reasonable and proximate nexus to any of them can be restricted and not otherwise. Thus, on plain reading of various sub-clauses of clause (1) of section 7 of the POFMA in the light of article 14(2)(a) of the Constitution of the Republic of Singapore, it seems that the above stated sub-clauses (i), (iii) and (v) of clause (1) of section 7 of the POFMA clearly falls within the purview of article 14(2)(a) whereas the sub-clauses (ii), (iv) and (vi) of clause (1) of said section 7 appears to be *ultra virus*.

In this time and age online falsehood might prejudice various other legitimate state or collective interests of the society, most particularly, holding of free and fair elections, which is a foundation of democracy. 'Misinformation'[34] and 'disinformation'[35] spread online through various social media platforms might influence the political choices of voters and that threatens the very foundation of the democracy. The possibility of online misinformation and disinformation influencing the voter choices is not a figment of imagination of scaremongers. It is no longer a mere hypothetical possibility. Many democracies across the world have already experienced it and are seriously enquiring into and exploring the possibility of enacting stringent laws, like Singapore, to deal with the problem. International Grand Committee on Disinformation and Fake News had formally declared that "[T]he deliberate spreading of disinformation and division is a credible

34 'Misinformation' refers to "inadvertent sharing of false information". See "Disinformation and 'fake news': Final Report", *Infra* note 36.

35 'Disinformation' means "the deliberate creation and sharing of false and/or manipulated information that is intended to deceive and mislead audiences, either for the purpose of causing harm, or for political, personal or financial gain." See "Disinformation and 'fake news': Final Report", *Infra* note 36.

threat to the continuation and growth of democracy and a civilizing global dialogue".[36]

The political parties, the candidates or any of their supporters can use various social media platforms to either create a distrust towards the other political parties or candidates or to create and circulate false positive narratives about themselves. Such practices are likely to affect the "sincerity of the ballot". In the larger interest of democracy, spreading of misinformation and disinformation to influence the voter choices or for any other political gains, thus, needs to be dealt with. The important question, however, is can that be done within the existing constitutional framework.

The Constitution of the Republic of Singapore does not explicitly permit imposition of restrictions on freedom of speech and expression either for preventing the circulation of 'falsehood' or in the interest of 'free and fair elections'. Nevertheless, section 7(1)(iv) of the POFMA seeks to punish those who influence, by making false statement of facts, the outcome of an election to the office of President, a general or by-election to the Parliament or referendums contemplated for various purposes under the Constitution. If ever challenged in the court, the said provision in the POFMA may not possibly survive the constitutional scrutiny. The answer, of course, depends on the intricate nuances of the Singapore Constitution as interpreted and developed by the Supreme Court of Singapore.

In India, like in the case of Singapore and unlike the USA, the freedom of speech and expression guaranteed under article 19(1)(a) has been explicitly made subject to reasonable restrictions that may be imposed by the state. The grounds in the interest of which such restrictions can be imposed have been specifically enumerated in article 19(2) of the Constitution. Though the grounds that are enumerated are very wide and are sufficient to tackle most of the problems even in this age of social media, every legitimate state or collective interests that are likely to be affected by online falsehood cannot be safeguarded by relying on those grounds. Creation

36 Principle (ii) of the International Principles on the Regulation of the Tech Platforms declared by the International Grand Committee on Disinformation and Fake News. The meeting of the said International Grand Committee was convened by the UK House of Commons' Digital, Culture, Media and Sport Committee in November 2018. In addition to the parliamentarian of UK, the Grand Committee consisted of parliamentarians invited from eight other countries: Argentina, Belgium, Brazil, Canada, France, Ireland, Latvia, and Singapore. The International Principles on the Regulation of the Tech Platforms declared by the Grand Committee is annexed to the "*Disinformation and 'fake news': Final Report*" submitted by the Digital, Culture, Media and Sport Committee, on February 18, 2019, HC 1791. *available at*: https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1791/1791.pdf (last visited on June 15, 2020).

and circulation of false statements of facts, which are likely to affect those enumerated state or collective interests *viz*., the sovereignty and integrity of India; the security of the State; friendly relations with foreign States; public order; decency or morality; contempt of court; defamation; or incitement to an offence can be restricted or prohibited but not the falsehood *per se*. It is because article 19(2) does not specifically recognize 'falsehood' as one of the grounds for regulating freedom of speech and expression. Further, it is very pertinent to note that when it comes to imposing restrictions on the freedom in the interest of enumerated grounds, the constitution makes no distinction between 'true speech' and 'false speech'. It appears that both can be restricted in the interest of those enumerated state or collective interests of the society.

However, in case of 'defamation' and 'contempt of court', laws governing those subjects allow 'truth' as defense. But in other cases, like disturbance to public order, threat to security of state or friendly relationship with foreign states, etc., no distinction is made between 'truth' and 'falsehood'. Even if the circulation of true statements of fact is likely to lead to, for example, public disorder, the same can also be prohibited just as false statements of fact.

It is not even desirable to incorporate 'falsehood' simpliciter as a ground under article 19(2). Making 'falsehood' *per se* an autonomous ground may have a chilling effect on freedom of speech and expression as the state, then, may not make distinction between 'honest factual errors' and 'deliberate lies'. Denying constitutional protection to the former would have a deterrent effect on free speech. Further, sometimes falsehood may be so innocuous which may not affect/prejudice any of the legitimate state or collective interests, in which case there is no justification for the state to intervene. More importantly, "[A]s a general rule… the government does not stand as the definer of truth, which is designed to emerge from the clash of opinions rather than from government fiat."[37] It may be worthwhile to note that even in the United States of America, where false statement of facts is denied the constitutional protection in certain cases, mainly in cases relating to defamation and commercial speech, the Supreme Court made it clear that the protection is accorded to false statements as well in cases where denial would have chilling effect on true speech.[38]

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37 John R. Vile, "False Speech", *available at*: https://mtsu.edu/first-amendment/article/1506/false-speech (last visited on July 31, 2020).

38 For details of the legal position in USA and its critique, see Mark Spottswood, "Falsity, Insincerity, and the Freedom of Expression", 16(4) *William & Mary Bill of Rights Journal* 1203 (2008).

The pertinent question, however, is can creation and circulation of falsehood be restricted in India when it is likely to affect the "sincerity of the ballot" and weaken the democratic processes and institutions? Article 19(2) of the Constitution of India does not explicitly empower the state to impose restrictions on freedom of speech and expression in the interest of holding 'free and fair elections'.

India is the world's largest democracy and is a federal country with parliamentary form of governments at both the union and the states. In addition, there are three tiers *Panchayati Raj* institutions, which are also representative bodies, established for the purpose of local self-governance. Periodic elections are held to the Parliament, State Legislative Assemblies and also the *Panchayati Raj* institutions. It is axiomatic to state that maintaining the sanctity, integrity and purity of elections held to all those representative bodies is not just important; it is the foundational requirement for the survival of democracy. Deliberate and politically motivated creation and circulation of false narratives either in favour of or against any political party or candidate in an election may influence the voter choices and, thus, affect the sanctity of the ballot. This is undoubtedly a serious concern that needs to be addressed. The question is how can that be addressed. No doubt, the Representation of People Act, 1951 (hereinafter "RP Act") treats, under section 123(4), creation and circulation of falsehood "in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal of any candidate, being a statement reasonably calculated to prejudice the prospectus of that candidate's election" as 'corrupt practice'. But it does so only if the falsehood is published "by a candidate or his agent or by any other person with the consent of a candidate or his election agent" and not otherwise. The provision does not cover the cases of creation and circulation of false positive narrative about the candidate's own personal character, conduct or accomplishments nor does it cover cases, where falsehood is created and circulated by some supporter of a candidate or his/her political party without the 'consent' of the candidate or his election agent. The RP Act has its limitations in tackling the falsehood and counteracting its influence on voter choices. There is a need to explore other ways of tackling it.

Further, influence on voter choices is just one of the many problems the falsehood has potential to generate. As stated before, creation and wide circulation of falsehoods have the potential to create hatred, incite violence, and divide society, apart from weakening democratic institutions and processes. The focus on the latter, in this paper, is only for the purpose of illustration.

In India, since grounds on which restrictions can be imposed on freedom of speech and expression are explicitly enumerated, the 'state' can neither regulate nor authorize or require the social media platforms or service providers to regulate

freedom of speech and expression on any ground other than the once recognized under the Constitution. In the circumstances, it may not be possible to have a 'law' to prevent creation and circulation of false narratives on various social media platforms with political ends in mind. Is it, then, desirable to add a new ground to empower the state to illegalize creation and circulation of such false narratives? Some may readily expect the answer to be in the affirmative but great amount of circumspection is needed whenever a decision has to be taken to further circumscribe fundamental freedoms. Inclusion of 'free and fair election' as an additional ground for imposing restrictions on freedom of speech and expression may have unintended consequences. There is a need to have a holistic understanding of the possible implications of such inclusion. No hasty decision shall be made.

Another important challenge in regulating the online falsehood is the sheer amount of contents created and circulated online. To a great extent, by relying on article 19(2), even online contents can be regulated but it may be impracticable to do so owing to the humongous amount of content that is being created and shared online every day. According to Eric Schmidt, the Executive Chairperson of Google, "we are creating the equivalent amount of information every other day as all of humanity created from the beginning of recorded history to the year 2003, and this is in large part enabled by the World Wide Web."[39] Further, as noted by House of Commons' DCMS Committee in its report, "[I]t is hard to differentiate on social media between content that is true, that is misleading, or that is false, especially when those messages are targeted at an individual level."[40]

Having regard to the difficulty in regulating online contents, the state governments, in certain exigencies, often resort to internet shutdowns in India. Such measures may have far reaching consequences. If the proportionality test is adopted to determine the constitutional validity of internet shutdowns, such measures at times may seem to be excessive and, thus, impermissible to resort to. Ordering complete shutdown of Internet even in particular areas for any number of days may amount to infringement of freedoms guaranteed under article 19(1)(a) and (g) of the Constitution of India as the Supreme Court had unequivocally declared that "the right to freedom of speech and expression under article 19 (1) (a), and the right to carry on any trade or business under 19 (1) (g), using the medium of internet in constitutionally protected."[41]

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39 As cited in Michael L. Rustad and Sanna Kulevska, "Reconceptualizing the Right to be Forgotten to Enable Transatlantic Data Flow" 28(2) *Harvard Journal of Law & Technology* 349 (Spring 2015).

40 DCMS, "Disinformation and 'fake news': Final Report", *supra* note 36 at 85.

41 *Anuradha Bhasin* v. *Union of India*, *supra* note 1.

These are the broad and primary issues that need to be paid attention to while formulating laws or policies for regulating free speech in the age of social media.

V. Conclusion

Striking a harmonious balance between individual liberties and the legitimate state or collective interests of the society is one of the perennial problems of statecraft. Even if the balance is ever struck, the boundary line drawn between 'liberties' and 'restraint' at any point in time hardly remains apposite for long. Maintaining proper balance between the two requires boundary line to be drawn and re-drawn as per the needs of time and circumstances.

The constitutional history reveals that the boundary line between freedom of speech and expression and the state's power to impose restrictions on them has been re-drawn twice after the adoption of the Constitution of India and both the times state power to impose restrictions has been enlarged, which resulted in narrowing the scope of freedom. If more and more grounds of restrictions are added, the constitutionally guaranteed freedom of speech and expression stands bereft of much of its substance. Thus, no overtly broad additional ground shall be inserted into article 19(2) as a knee-jerk reaction to deal with the problem of online falsehood. Prior to formulating appropriate state responses, it is important to understand the extent to which online falsehood prejudices the other legitimate state or collective interests, more particularly, the degree to which it influences voter choices and affects the sincerity of the ballot. Inadequacies of the existing constitutional and legal framework, if any, shall be ascertained in the light of that and the least restrictive alternative shall be adopted to deal with the problem of online falsehood.

PRE-INSTITUTION MEDIATION IN COMMERCIAL CASES: WELL-BEGUN IS HALF DONE

Uday Shankar[*]

Abstract

Alternate dispute resolution promises quicker resolution of the litigation and reduces the huge pendency of the cases before the court. These attributes are making the alternate dispute measures a popular choice on the issues of commercial interest due to the high economic value of litigation. In 2015, the Commercial Courts Act has obligated the parties to attempt to mediate the dispute before knocking at the door of the judiciary. Pre-institution mediation promises to present an opportunity to settle the disputes without getting entangled in the procedural complexities of civil litigation. Notwithstanding the benefits of mediation to resolve the dispute, there is an exception carved out to approach the civil court when the litigating parties are in the need of 'urgent interim relief'. However, the law is silent on the conditions to avail the benefit of the exception provided therein.

The paper details out the rationale of the amendment related to pre-institution mediation in the Commercial Courts Act. Further, it attempts to unravel the complexities behind the functioning of the pre-institution mediation. It elaborates upon the purpose of the establishment of specialised court to deal with commercial matters. It explains the nuances ingrained in the applicability of the pre-institution and the advantages attached thereto. Finally, it discusses the shortcomings of the scheme as suggested under the new law.

I. Introduction

HUGE PENDENCY of litigations in India has caused mistrust in the judicial system amongst the people of the country. The pendency of cases is at every level of judiciary.[1] Several reasons are advanced for this such as insufficient physical

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1 See generally, Law commission of India, "245th Report on Arrears and Backlog: Creating Additional Judicial (wo)manpower 2014" (July, 2014).

infrastructure, inadequate strength of judges and deficiency of funds.[2] Amidst a wide of range of the subject matters which are awaiting its finality, the commercial issues stand differently on account of involvement of economic interest of our country. A globalised world has brought opportunity for the countries to attract investments to generate employment and to guarantee better standard of living to the people. If the investment hits roadblock, then it creates environment of mistrust amongst the stakeholders. One of the prominent barriers is in the form of undue delay in resolving the dispute between the parties having commercial interests.

Acknowledging the damage caused by incremental trends of impending legal disputes, the judiciary and the government have undertaken score of the initiatives to expedite the disposal of suits. This includes enactment of legislation with an aim to establish a specialised judicial forum to accelerate the disposal of legal disputes. The Commercial Courts Act, 2015 has been enacted to provide dedicated institutional arrangements for settling the commercial disputes at the lower and the appellate levels. The new legislation innovates on the dispute resolution mechanism by introducing pre-institution mediation so that the litigating parties make an attempt to settle their differences before instituting formal process of dispute resolution. This paper attempts to unravel the complexities behind functioning of the pre-institution mediation. It elaborates upon the purpose of the establishment of the specialised court to deal with commercial matters. It explains the nuances ingrained in the applicability of the pre-institution and the advantages attached thereto. Finally, it discusses the shortcomings of the scheme as suggested under the new law.

II. Pre-Institution Mediation: A Step introduced through an amendment in the Commercial Courts Act

The Commercial Courts Act was introduced in 2015 to establish a specialised forum at the district and appellate level for adjudication of "commercial disputes". Except where High Courts have ordinary original civil jurisdiction the State Governments are to set-up Commercial Courts at the District level; and wherever the High Courts have ordinary original civil jurisdiction, the Chief Justice is to set-up a Commercial Division bench presided by a single Judge. The Commercial Appellate Division presided by bench of two Judges is to be constituted by the Chief Justice of each of the High Courts, to hear appeals from decisions of the Commercial Court or Commercial Division.

The law has realised the need of a streamlined procedure for effective, efficient and expeditious resolution of high value disputes of a commercial nature with a

2 *Id.*; See, Dushyant Mahadik, "Analysis of Causes for Pendency in High Courts and Subordinate Courts in Maharashtra" (Department of Justice, Government of India, 2018).

set timeline for filing of pleadings, discovery and procedure for grant of summary judgments.[3] The focus of the paper is on Pre-institution mediation, thus the author has not dwelled into the discussion of the framework as stipulated under the law and its functioning thereof.

The definition of "commercial disputes" under Sec 2(c) of the Act is broad and generally covers commercial transactions and includes disputes arising out of intellectual property rights. In 2018, the Act has been, further, amended to bring in some clarity of procedure and also to introduce the mandatory pre-institution mediation provision.

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Court Act[4], which has amended the Section 12A of Act reads as:

> a suit which does not contemplate any urgent relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation and settlement in accordance with such manner and procedure as may be prescribed by rules made by the central government.

The salient features of the amendment are:

1. It reduced the minimum value of commercial dispute to three lakhs (earlier it was one crore).[5]
2. It allows the creation of Commercial Courts at the district level in the areas where all the High Courts have jurisdiction.[6]
3. The state governments shall notify the pecuniary jurisdiction (not lower than three lakhs) for district courts where high courts do not have original jurisdiction.[7]
4. The state governments shall constitute commercial courts below the level of district courts, in areas where High Courts do not have original jurisdiction.[8]

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3 Necessary amendments are being done in the Code of Civil Procedure, 1908 with an aim to attain the objectives of the Act. Some prominent provisions are, s. 35(2), Order VIII Rule 3A, order XI rules (3)(1) and (4) (1), order XIII A rule 2, order XV A rules 1, 3 and 4.

4 The Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts (Amendment) Act, 2018 (Act 28 of 2018).

5 *Id.*, s. 4.

6 *Id.*, s. 6.

7 *Ibid.*

8 *Ibid.*

5. The state governments shall set up commercial appellate courts at district level provided High Courts do not have original jurisdiction.[9]

6. The mandate to undertake mandatory pre-institution mediation with a time to complete the process within three months. [10]

Section 12A of the Act has mandated that every suit before being filled at any commercial court should necessarily go through mediation. This section mandates the pre-institution mediation simultaneously providing an exception from this clause in matters where the parties seek an urgent interim relief. The Act does not elaborate on the meaning of 'urgent interim relief'. The Act also empowers the Central Government to authorize authority constituted under Legal Services Authority Act, 1987.[11] The provision of the Act places a time limit of three months (parties may extend this period for a further two months) to finish the mediation process. These three months (or maybe five months if extended) shall not be computed for the purpose of the Limitation Act 1963.[12] This Amendment and the subsequent notification of the Rules are welcome steps since they are in accordance with the original aim of the Act i.e., to bring about reduction in delay of cases. These steps will also encourage parties to stop depending on external agencies such as Courts for resolving commercial disputes and take the matter into their own hands. The parties if come to a settlement, the same agreement shall have the force of an arbitral award.[13]

In pursuant to the Act, the central government has framed rules under this Act called as the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018.[14] The rules provide for filing the application for initiating the mediation before the District Legal Services Authority established under the Legal Services Authority Act, 1987 (hereinafter "LSA"). The LSA is a designated authority, any party seeking the resolution of the commercial dispute shall apply to authority either through online mode or by post or by hand to the competent authority,[15] on receiving of such request the authority will issue notice to opposite party,[16] which is

9 *Id.*, s. 7.

10 *Id.*, s. 11.

11 The Legal Services Authority Act, 1987, (Act 39 of 1987).

12 The Limitation Act, 1963, (Act 36 of 1963).

13 The Commercial Courts Act, 2015, (Act No. 4 of 2016), s. 12A (5).

14 Ministry of Law and Justice (Department of Legal Affairs), Notice No. G.S.R. 606(E), dated July 3, 2018, published in the Gazette of India, Extra., part II, s. 3(i), dated 3rd July, 2018.

15 Competence (to State Legal Service Authority or District Legal Service Authority) will be determined based on territorial and pecuniary jurisdiction.

16 The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, rule 3(2).

required to respond within ten days and if the party fails to respond the authority will reissue a final notice.[17]

Once both the parties appear in front of the authority and give their consent to participate in the mediation process, the authority will assign a mediator and fix a date for their appearance. Rules provide a time period of three months to finish the mediation process with the extension of two more months. During the procedure, if authority concluded, it shall be converted into a written agreement. The agreement reached between parties will be final and binding.

In cases, where opposing parties failed to give consent or appear in front of authority, the mediation will be considered as a non-starter, the authority would prepare a report to that effect.

The provision of confidentiality provided under the rules[18] is the key to prevent disclosure of important business strategies to competitors. The biggest problem with the Commercial Courts Act and the Rules is conflict between the two. Although, the Act under section 12A[19] mandates pre-institution mediation, the Rules under section 3(6)[20] says, if both parties are not agreeing, the process will be nonstarter. The Rules provide for issuance of a final notice if the Authority does not receive a response within 10 days of the initial notice, the Authority will treat the mediation process as a non-starter and prepare a report to that effect. If the opposing parties agree to participate, then the mediation process would begin. Following negotiations and meetings with the mediator, if the parties arrive at a settlement, it will be recorded in a settlement agreement.

III. Understanding "Urgent Interim Relief" – A Ground to Circumvent Pre-Institution Mediation

Section 12A carves out an exception for the parties who are seeking "urgent interim relief." The Act is silent on the definitional content of "urgent interim relief". Section 12A(1) carves out an exception to the mandatory pre-institution mediation process by allowing the parties to file an application for *'urgent interim relief'* which shall lead to the institution of the suit.

A reference of the Arbitration Act, 1996 is drawn to understand the meaning of interim relief. The Act defines the power to grant interim relief in arbitration matters.[21] The Act laid down measures like the appointment of a guardian,

17 *Id.*, rule 3(3).

18 *Id.*, rule 9.

19 The Commercial Courts Act, 2015, (Act No. 4 of 2016), s. 12A(1).

20 The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, rule 3(6).

21 The Commercial Courts Act, 2015, (Act No. 4 of 2016), s. 9.

preservation of any goods for sale which is the subject-matter of the arbitration, securing amount of dispute, the appointment of the receiver which courts can grant during arbitration proceedings.

In reference to section 12(A), there is a possibility that the lack of clarity regarding word 'urgent' might result in the filing of frivolous cases that would defeat the purpose of the law. The overall dissatisfaction with the functioning of the alternate dispute resolution mechanism or the ulterior motive to adopt dilatory tactics may encourage parties to take the undue advantage of the exception, carved out under the section.

The qualification by the word 'urgent' under section 12A signifies that understanding 'interim relief' should be read in relation to premise of the preference of mediation process to resolve the dispute. It is incumbent upon the judge to verify the emergent situation so that the party is not allowed to take advantage of the exception without any substantial basis. Legislature never uses the word in a statute without any legislative design. The idea underlying on insertion of a word or a provision can be culled out by looking at the opinion presented by the parliamentarians during the passing of the legislation. In this, the statement made by the Minister carries significant weight to construct the meaning of the word. The Hon'ble Minister of Law and Justice, made the following statement on the floor of the house, which could serve as a guiding force to understand the contours of the provision:[22]

> Sir, one thing I would like to share with this House is that *this is the most important commercial law initiative perhaps in the entire world where premeditation initiative has been given a very important focus.* Suppose one partner has run away with all the profits. Then we need interim protection from the court. Therefore, the law says, 'except in the case of *urgent interim relief,* every commercial dispute must go to the mediation first'. Three months' period has been prescribed. *First, you should use it. If you are not able to resolve, then come to the court. Therefore, pre-mediation litigation resolution is an important milestone.* (Emphasis supplied)

When a party is seeking interim measures, then it is essential to establish urgency in the matter involved. The party must exhibit the gravity of the issue to deviate from the alternate process designed under the law or else intent of the legislature to resolve the commercial matters without entanglement in the technicalities of the judicial proceedings would be defeated. If the plaintiff fails to demonstrate the extremity for taking the advantage of the exception, then the court shall refrain from issuing the summon in the suit giving the plaintiff a liberty to file the plaint

22 Lok Sabha Debates, *available at*: https://loksabhahindi.nic.in/Members/DebateResults16.aspx (last visited on May 03, 2020).

before the court in case of the failure of the mediation.[23] The frivolous attempt to take advantage of this exception of filing the plaint with an intent to delay the mediation or bypass the process needs to be dealt with strictness by the court. Imposition of a heavy cost may be a good deterrent for such flimsy and baseless plaint. It is not very difficult to contemplate a situation where a dilatory tactics may be employed by a shrewd party who sees monetary advantage in the longevity of disposal of the case.

"Doctrine of exhaustion" of remedies serves as a guide to turn down the application under "urgent interim relief".[24] The doctrine operates in a circumstance where the litigant seeks remedy from a new court without exhausting the remedial measures designed under a statute.[25] Section 12A (1) uses the expression *'…unless the plaintiff exhausts the remedy of pre-institution mediation…'* thus this doctrine, squarely applies here as well. Under the scheme of the Act, the alternate remedy in the form of mediation is to be preferred, as far as possible, over the conventional litigation process.

IV. Pre-Institution Mediation: Advantages and Disadvantages

The scheme of pre-institution mediation brings a score of the benefits to the parties involved in commercial transactions. It is evident in commercial matters that the parties prefer to stay away from any litigation to avoid the collateral costing of the project. Nevertheless, if the conflict arises between the parties then they try to settle the disputes in a speedy manner so that the transactional cost involved in litigation would not dent the profit margin of the parties. The clearly stipulated timeline of completion of the mediation process under the law certainly instils the confidence in the parties to opt for this method to settle the matter. Cost-effectiveness of the alternate dispute process is one of the advantages of the statutory design. The absence of an adversarial system allows the parties to explore workable and

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23 The Civil Procedure Code, 1908, order VII rule 11. It deals with Rejection of the Plaint.

24 The Doctrine of Exhaustion of Remedies prevents litigants from seeking remedy for higher Courts until they have exhausted the remedy available to them in the lower forum. As in *Rashid Ahmed* v. *Municipal Board, Kairana*, [1956] 1 SCR 566, the Supreme Court has observed: "the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs." But in *State of UP* v. *Mohammad Nooh,* AIR 1958 SC 86, clarified, "This rule of exhaustion is a rule of self-imposed limitation, rule of policy, convenience and discretion rather than the rule of law." Court further laid down certain exceptions in which Courts can exercise their discretion in allowing the petition these exceptions are

I. The lower courts or tribunals acted wholly out of the jurisdiction;

II. Violation of rules of natural justice; and

III. The tribunals were merely departmental, and the person hearing such petitions do not have adequate legal training and background.

25 *Mafatlal Industries Ltd.* v. *Union of India*, (1997) 5 SCC 536.

interest-based solutions, to determine the outcome of the procedure according to their business needs, and to preserve the relationship in the long term.

Section 12 A stipulates that the successful outcome of the mediation will have the finality in terms of "arbitral award" as provided under section 30(4) of the Arbitration and Conciliation Act, 1996. The reading of clause 3 clearly spells out that the substance of the dispute should be considered before it is to be settled in the award. Consequently, the award will not be open to judicial scrutiny except on the ground of public policy.[26] The courts are no longer permitted to reappraise evidence or set aside awards merely because the arbitral tribunal has made errors when dealing with it.[27] The development of law on the enforcement of an award has a tendency to encourage the parties to commit to the mediation process.

The rules notified by the government has aptly provided for non-disclosure of confidential information by the parties involved in the mediation which serves as huge incentive to opt for mediation. It enables the settlement of dispute. Success of the mediation depends on the comfort of the parties to present the information on the table, thus they are assured this by the statutory requirement of confidentiality. The parties to mediation including lawyers are bound by confidentiality clause. The Supreme Court observed:

> when successful, the mediator should send the settlement agreement signed by the parties to the Court without mentioning what transpired during the mediation proceedings. When unsuccessful, the mediator should simply state that mediation has been unsuccessful.[28]

The purpose of confidentiality of mediation process prohibits any disclosure of the proceedings. In this spirit, stenographic or audio or video recording of the mediation proceedings should not be retained beyond 6 months.

The rule[29] also provides that parties shall participate in the mediation process in good faith with an intention to settle the dispute. "Good faith"[30] warrants sincerity in the approach of the parties to find a solution in the dispute. It motivates the parties to commit to mediation so that the probability of reaching to a settlement

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26 See, for reference, Law Commission of India, "246th Report on Amendments to the Arbitration and Conciliation Act 1996" (August, 2014).

27 *Venture Global Engineering LLC* v. *Tech Mahindra Ltd., (2018) 1 SCC 656*.

28 *Moti Ram* v. *Ashok Ram,* (2011) 1 SCC 466.

29 The Commercial Courts (Pre-Institution Mediation and Settlement Rules), 2018, rule 8.

30 Black's Law dictionary defines "good faith" in several ways: A state of mind consisting in (1) honesty in belief or purpose; (2) faithfulness to one's duty or obligation; (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.

is high. The obligation to negotiate in good faith is the key for resolving commercial issues.

With our Courts and our institutions repeatedly letting us down with their continued inefficiency and delay, the *status quo* doesn't seem likely to change and people need to resort to other viable options. Quite simply, even the commitment toward mediation as a pre-litigation strategy, allows for a pause and exhale, which in itself triggers a creative process for solutions. The prevalence of section 12A is the panacea, and we will reap the benefit.

With the advantages highlighted above, it is also desirable to figure out the disadvantages it brings to the adjudication process. On one hand, the obligation to initiate the pre-institution mediation is on the plaintiff; on the other hand, the opposing party has been given option to refuse to participate in the proceedings.[31] The opposition to the proceeding need not be explicit; it can also be inferred with the non-participation of the opposing party. It would be deemed as a non-starter. It is pertinent to mention that the option provided to the other party dilutes the benefit of pre-institution mediation. There is a possibility to thwart the early resolution of the commercial dispute on conferment of the right to refuse on the opposing party. The right to refuse symbolises the independence of the party to choose the legal process for settling the dispute. But, the exercise of the right should also have required spelling out the reason for such refusal.

Under the Rules, the Legal Services Authority has been entrusted to undertake the onerous task of mediating between the disputing parties. Notably, the Authority has been established to provide free legal services to the weaker sections of the society and to conduct Lok Adalat for the amicable settlement of disputes.[32] Looking at the number of pending disputes at subordinate level, the authorities under the LSA are already burdened to ensure the access to justice to the poor people.

It is commendable that the alternate dispute mechanism has been institutionalised in the statutory scheme in India.[33] However, the possession of the necessary skill is vital to accomplish the objectives of the statute. The nature of the disputes contemplated under the Commercial Courts Act, 2015 will require a focus and skill set that is very different from that envisioned under the Authority which generally resolves disputes related to family, rent control, motor vehicles, public utility services

31 The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, rule 3(3).

32 See, The Legal Services Authority Act, 1987.

33 The Civil Procedure Code, 1908, section provides for the engagement of ADR for settlement of the disputes.

etc. Thus, it is needed to train the judges and advocates who would act as mediators/ conciliators in each judicial district.

The authorities under the LSA may not be the appropriate forum to implement pre-mediation services envisioned under the tailor-made law for expeditious settlement of the disputes. The success of the pre-institution mediation lies in building a cadre of experienced and trained mediation professionals who can understand the nuances of the commercial interest involved in the dispute. There is not much relaxation in payment when it comes to choosing mediation over court proceeding. The parties are bound to pay a bounty for choosing mediation.[34] The notified rule provides for one-time payment mediation fee, to be shared by the parties, before the commencement of the proceeding. The quantum of fee depends upon the claim. Traditional litigation has been disapproved by the litigating parties on account of the heavy cost involved in the delayed adjudication process. If the same problem plagues the mediation process then the parties would avoid taking the benefit of the institutional arrangement of the quicker relief. Strategically, the mediator should only be allowed to claim the professional fee after obtaining the assurance of the parties about their effective participation.

V. The Way Forward

Expeditious settlement of the matters where high commercial values are at stake is the need of hour. The unmanageable docket of the pending cases is shaking the confidence of the investors and adversely impacting the investment in the country. Investment is needed not only to give necessary impetus to the economic growth but also to augment resources required for improving the quality of life of the people. The prescription of a legal norm to facilitate the investment needs to be coupled with efficient justice delivery system. The Commercial Act promises a hierarchical institutional arrangement to guarantee speedier adjudication of the dispute.

The added feature of the pre-institution mediation for resolving the dispute through informal adjudication process ushers a new beginning to minimise the burden of the overloaded judicial system and to restore the faith of the investor in India. The mandate of pre-institution mediation has the potential of transforming the justice delivery system by ensuring the satisfaction of all the litigating parties. The judicial adventurism in the name of "urgent interim relief" may prove to be self-defeating goal for the commercial disputes. Thus, the court should entertain the application only after examining the genuineness of the relief sought by the applicant. The well-intentioned law will infuse the confidence in the business community as it

34 Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, rule 11.

promises cost-effective and speedier mechanism to settle the dispute. Moreover, there is a dire need to train the lawyers for bringing effective participation of them as the success lies in the whole-heartedly cooperation of the lawyers as they play vital role in justice delivery system.

ANTICIPATORY BAIL: A CRITICAL APPRAISAL OF THE APPROACH ADOPTED BY THE SUPREME COURT

Anil R. Nair[*]

Abstract

This article attempts to provide a comprehensive and critical appraisal of the various three or higher bench decisions of the Supreme Court of India in the matter of grant of anticipatory bail in an attempt to trace its evolution as a cherished right integral for preserving the right to life and right to fundamental freedoms available as basic human rights to each individual in India.

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I. Introduction

THE CONCEPT of presumption of innocence is a fundamental principle[1] of the common law[2]. Article 11 of the Universal Declaration of Human Rights (UDHR) recognises this when it provides that "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence". Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." The presumption of innocence imposes the burden of proving the charge, on the prosecution. It ensures that no guilt can be presumed until the charge is proved beyond reasonable doubt.[3]

Arrest means the "placing of a person in custody or under restraint, usually for the purpose of compelling obedience to the law."[4] Article 9 of the ICCPR recognises the right to be free from arbitrary arrest and detention. In India, article 21 of the Constitution[5] which deals with protection of life and personal liberty lays down

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1 Jeffrey Reiman and Ernest Van Den Haag, "On the Common Saying that it is Better that Ten Guilty Persons Escape than that One Innocent Suffer: *Pro* and *Con*" 7(2) *Social Philosophy and Policy* 226 (2009).

"In *Zadig*, published in 1748, Voltaire wrote of "the great principle that it is better to run the risk of sparing the guilty than to condemn the innocent." At about the same time, Blackstone noted approvingly that "the law holds that it is better that ten guilty persons escape, than that one innocent suffers." In 1824, Thomas Fielding cited the principle as an Italian proverb and a maxim of English law. John Stuart Mill endorsed it in an address to Parliament in 1868."

2 "Presumption of innocence: Public sector guidance sheet", *available at*: https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/presumption-innocence (last visited on June 12, 2020).

3 Some laws exist that allow the burden of proof to shift on to the accused. International human rights law permits it, when such laws ensure the rights of the accused and is reasonable in the given circumstances. See, International Covenant on Civil and Political Rights, art. 4. It allows countries to derogate from its obligations under it (including the right to the presumption of innocence) "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" and only "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

4 The Editors of Encyclopaedia Britannica (ed.), *Encyclopaedia Britannica* (Encyclopaedia Britannica, Inc., NY, 1998), *available at*: https://www.britannica.com/topic/arrest (last visited on June 12, 2020).

It provides for definition of arrest.

5 *Siddharam Satlingappa Mhetre* v. *The State of Maharashtra*, (2011) 1 SCC 694, para 71.

The said article has been given an exalted status through intervention of the Supreme Court. "The object of article 21 is to prevent encroachment upon personal liberty in any manner. Article 21 is repository of all human rights essentially for a person or a citizen."

that "no person shall be deprived of his life or personal liberty except according to procedure established by law." Article 22 of the Constitution which deals with protection against arrest and detention in certain cases, provides for "protection and rights granted in case of arbitrary arrest also known as punitive detention, and safeguards against preventive detention."[6]

While these provisions ensure security against arbitrary arrest thus, securing personal liberty and freedom, they do not offer complete justice to the principle of presumption of innocence since they allow for detention of the accused even before there is any finding of guilt. The arguments are many to justify such detention, like, to secure the presence of the accused for the trial, to prevent the accused from influencing witnesses, to prevent the accused from tampering with or destroying any evidence, to secure the safety of the accused, etc.

The term 'bail' is used to denote any security required by a court to release a person from custody to ensure his presence before the court in future.[7] The Code of Criminal Procedure, 1973 provides for differentiation of offences into bailable[8] and non-bailable based generally on the seriousness of the offence.[9] While the former entitles the accused to claim bail as of right, the latter only provides for bail under the discretion of the judicial authorities.

Arrest of a person is not only about curtailment of liberty and freedom; it is also about loss of face, ignominy and humiliation of the individual.[10] The Law Commission of India in its 177th Report on Law Relating to Arrest observes that:

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6 Diva Rai, "Safeguards against arbitrary arrest and detention: Article 22" *iPleaders Blog*, *available at*: https://blog.ipleaders.in/safeguards-against-arbitrary-arrest-and-detention-article-22/ (last visited on June 12, 2020).

7 *Mammunhi Thalangadi Mahamood* v. *State of Kerala*, Bail Appl. No. 8029 of 2013, para 26. "In Black's Law Dictionary, 9th Edition, the expression 'bail' is given the meaning, "A security such as cash or a bond; especially security required by a court for the release of a prisoner who must appear in court at a future time."".

8 The Code of Criminal Procedure, 1973, s. 2 (a).

9 The schedule consists of two parts. The first part relates to offences under the Indian Penal Code and the second one relates to offences under other laws. The second part provides that offences punishable with imprisonment for less than three years or fine only, shall be bailable.

10 *Siddharam Satlingappa Mhetre* v. *The State of Maharashtra*, (2011) 1 SCC 694. The Supreme Court has opined that, "A great ignominy, humiliation and disgrace is attached to arrest. In case where court is of considered view that accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided, and anticipatory bail should be granted, which after hearing public prosecutor, should ordinarily be continued till end of that. Once it is granted, it will continue till the end of trial unless it is cancelled."

> arrests under the preventive provisions were more in number than the arrests for substantive offences and further that a large number of arrests were in respect of bailable offences which more often happen to be non-cognizable offences (wherein no arrest can be made without a warrant or order from a magistrate).[11]

Following the recommendation of the Law Commission of India in its Forty First Report, the provision for anticipatory bail was introduced into the Code of Criminal Procedure, 1973.[12] It was envisaged that the provision should be made effective only when a person is arrested. The Law Commission recommended the provision for anticipatory bail to be an extraordinary power to be used sparingly and in special cases by the Courts.[13]

Since anticipatory bail enables the person to be free from custody, the police investigator finds it difficult to use coercive force to intimidate the accused as a method to gather evidence. Prosecution, hence, is less inclined to consent for grant of anticipatory bail by the Courts. The Law Commission envisaged the power to grant anticipatory bail to be exercised with notice to the prosecution. Under section 438(1A) of the Code, in the interests of justice from the perspective of the State, a final order is made only after hearing the prosecution.[14] This need to balance the interests of the prosecution with the liberty of the individual is perhaps the reason why this power is entrusted to higher judicial *fora* like the Sessions Court and the High Court.

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11 Law Commission of India, "177th Report on Law Relating to Arrest" 2 (December, 2001).

12 Law Commission of India, "41st Report on The Code of Criminal Procedure 1898" (September, 1969).

> 39.9. Though there is a conflict of judicial opinion about the power of a court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because, sometimes, influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.

13 *Ibid.*

14 "Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court."

In its Forty Eighth Report, the Law Commission stressed the need for safeguards to prevent abuse of the provision for anticipatory bail while commenting on the bail provision in the then proposed Bill for the same.[15]

The higher benches of the Supreme Court have been largely consistent in its application of this spirit behind the recommendations of the Law Commission in its judgements on anticipatory bail. The following is a compilation of judgements of the Supreme Court on the question of anticipatory bail. These cover issues concerning serious offences including those relating to atrocities against scheduled castes and tribes, dowry deaths, murder and terrorism related offences as well as less serious situations. Since, conclusiveness of the law is to be given a premium, only decisions of the Supreme Court with a higher bench strength is being considered in detail (as they lay down the correct law), though there are some very detailed judgements from lesser benches on these same issues.[16] Though liberty irrespective of the offence alleged is sacrosanct, an attempt is made here to classify the cases for discussion on the basis of the offences alleged to see whether the court perceives the right to liberty (underlying the grant of anticipatory bail), qualitatively differently, according to the offence alleged.

II. In Matters Relating to Defence of State

Balchand Jain v. *State of Madhya Pradesh*[17]

The question which arose for determination was whether an order of 'anticipatory bail' could be competently made by a Court of Session or a High Court under section 438 of the Code of Criminal Procedure, 1973 in case of offences falling

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15 Law Commission of India, "48th Report on Some questions under the code of criminal procedure Bill, 1970" (July, 1972).

31. The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendations made by the previous Commission (41st Report). We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the public prosecutor. The initial order should only be an interim one. Further the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the Court is satisfied that such a direction is necessary in the interests of justice.

16 For example, in *Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, (2011) 1 SCC 694, a Division Bench of the Supreme Court analysed the cases post *Sibbia* and made a strong point against the cases like *Salauddin* and *KL Verma*. The Bench even considered these cases to be *per incuriam*, but there could be closure in the matter of the law only with the decision of a Five Member Bench in *Sushila Aggarwal* v. *State (NCT of Delhi)*, 2020 SCC OnLine SC 98.

17 (1976) 4 SCC 572. Full bench judgement.

under rule 184[18] of the Defence and Internal Security of India Rules, 1971 made under the Defence and Internal Security of India Act, 1971.

The Court observed thus:

> We do not find in this section the words 'anticipatory bail'…. In fact, 'anticipatory bail' is a misnomer. It is not as if bail is presently granted by the court in anticipation of arrest. When the court grants 'anticipatory bail', what it does is to make an order that in the event of arrest, a person shall be released on bail. Manifestly there is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting 'anticipatory bail' becomes operative. Now, this power of granting 'anticipatory bail' is somewhat extraordinary in character and it is only an exceptional case where it appears that a person might be falsely implicated, or a frivolous case might be launched against him, or "there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail" that such power is to be exercised. And this power being rather of an unusual nature, it is entrusted only to the higher echelons of judicial service, namely, a Court of Session and the High Court. It is a power exercisable in case of an anticipated accusation of non-bailable offence and there is no limitation as to the category of non-bailable offence in respect of which the power can be exercised by the appropriate court.[19]
>
> The non-obstante clause at the commencement of the Rule also emphasizes that the provision in the Rule is intended to restrict the power of granting bail under the Code of Criminal Procedure and not to confer a new power exercisable only on certain conditions. It is not possible to read Rule 184 as laying down a self-contained code for granting of bail in case of a person accused or convicted of contravention of any rule or order made under the Rules so that the power to grant bail in such case must be found only in Rule 184 and

18 The Rule read thus: Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (V of 1898), no person accused convicted of a contravention of these Rules or orders made thereunder shall, if in custody, be released on bail or his own bond unless— (a) the prosecution has been given an opportunity to oppose the application for such release, and (b) where the prosecution opposes the application and the contravention is of any such provision of these Rules or orders made thereunder as the Central Government or the State Government may by notified order specify in this behalf, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention.

19 (1976) 4 SCC 572 at p.no. 576.

> not in the Code of Criminal Procedure. Rule 184 cannot be construed as displacing altogether the provisions of the Code of Criminal Procedure in regard to bail in case of a person accused or convicted of contravention of any rule or order made under the Rules.[20]
>
> If a person is not in custody but is merely under an apprehension of arrest and he applies for grant of 'anticipatory bail' under Section 438, his case would clearly be outside the mischief of Rule 184, because when the court makes an order for grant of 'anticipatory bail', it would not be directing release of a person who is in custody. It is an application for release of a person in custody that is contemplated by Rule 184 and not an application for grant of 'anticipatory bail' by a person apprehending arrest. Section 438 and Rule 184 thus operate at different stages, one prior to arrest and the other, after arrest and there is no overlapping between these two provisions so as to give rise to a conflict between them. And consequently, it must follow as a necessary corollary that Rule 184 does not stand in the way of Court of Session or a High Court granting 'anticipatory bail' under Section 438 to a person apprehending arrest on an accusation of having committed contravention of any rule or order made under the Rules.[21]

The Court deliberated on the policy behind the Rule to lay down the requisite consideration while granting anticipatory bail.

> But even if Rule 184 does not apply in such a case, the policy behind this rule would have to be borne in mind by the court while exercising its power to grant 'anticipatory bail' under Section 438. The rule-making authority obviously thought offences arising out of contravention of rules and orders made thereunder were serious offences as they might imperil the defence of India or civil defence or internal security or public safety or maintenance of public order or hamper maintenance of supplies and services to the life of the community and hence it provided in Rule 184 that no person accused or convicted of contravention of any rule or order made under the Rules, shall be released on bail unless the prosecution is given an opportunity to oppose the application for such release and in case the contravention is of a rule or order specified in this behalf in a

20 *Id.* at 577.

21 *Id.* at 578.

> notified order, there are reasonable grounds for believing that the person concerned is not guilty of such contravention. If these are the conditions provided by the rule making authority for releasing on bail a person arrested on an accusation of having committed contravention of any rule or order made under the Rules, it must follow a fortiori that the same conditions must provide the guidelines while exercising the power to grant 'anticipatory bail' to a person apprehending arrest on such accusation, though they would not be strictly applicable. When a person apprehending arrest on an accusation of having committed contravention of any rule or order made under the Rules applies to the Court for a direction under Section 438, the Court should not ordinarily grant him 'anticipatory bail' under that section unless a notice has been issued to the prosecution giving it an opportunity to oppose the application and in behalf, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention. These would be reasonably effective safeguards against improper exercise of power of granting 'anticipatory bail' which might in conceivable cases turn out detrimental against public interest. When we say this, we must, of course, make it clear that we do not intend to lay down, that in no case should an *ex parte* order of 'anticipatory bail' be made by the Court. There may be facts and circumstances in a given case, which may justify the making of an *ex parte* interim order of 'anticipatory bail', but in such an event, a short-dated notice should be issued and final order should be passed only after giving an opportunity to the prosecution to be heard in opposition.[22]

The above paragraphs are from the judgment delivered by Bhagwati, J. for himself and Gupta, J. In his concurring judgement, Fazal Ali, J., dwelt on the absence of any specific repeal of section 438 of the Code of Criminal Procedure by the impugned Act.

> Now if the intention of the legislature were that the provisions of Section 438 should not be applicable in cases falling within Rule 184, it is difficult to see why the legislature should not have expressly saved Rule 184 which was already there when the new Code of 1973 was enacted and excepted Rule 184 out of the ambit of Section 438. In other words, if the intention of provision of Rule 184 of the Rules were to override the provisions of Section 438 of the Code, then

22 *Id.* at 578-79.

> the legislature should have expressly stated in so many words that the provisions of Section 438 of the Code should not apply to offences contemplated by Rule 184 of the Rules.

After referring to *Northern India Caterers Pvt. Ltd.* v. *State of Punjab*,[23] and *Aswini Kumar Ghosh* v. *Arabinda Bose*[24] on the question of interpretation he went on to conclude that:

> 16. … we feel that there does not appear to by any direct conflict between the provisions of Rule 184 of the Rules and Section 438 of the Code. However, we hold that the conditions required by Rule 184 of the Rules must be impliedly imported in Section 438 of the Code so as to form the main guidelines, which have to be followed while the court exercises its power under Section 438 of the Code in offences contemplated by Rule 184 of the Rules. Such an interpretation would meet the ends of justice, avoid all possible anomalies and would at the same time ensure and protect the liberty of the subject which appears to be the real intention of the legislature in enshrining Section 438 of the Code and Rule 184 of the Rules and therefore, the non-obstante clause cannot be interpreted in a manner so as to repeal or override the provisions of Section 438 of the Code in respect of cases where Rule 184 of the Rule applies.

Hence, it can be seen that the Court appreciates the possibility of grant of anticipatory liberty to be circumscribed by the seriousness of the offence in special circumstances (defence of State, in this instance), but looks into the legislative wisdom to understand whether such limitation is definitively carved as an exception to section 438 of the Code. Where it does not find such an exception it is reluctant to curtail the right. It also asserted a right to grant interim anticipatory bail without hearing the prosecution in exceptional circumstances as inherent under section 438 of the Code.

III. Allegations of Political Corruption

Shri Gurbaksh Singh Sibbia v. *State of Punjab*[25]

The Court in this trendsetting five-judge bench decision tried to balance the interests of personal liberty and the investigational powers of the police while determining the scope of section 438 of the Code of Criminal Procedure, 1973. The Court observed that:

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23 AIR 1967 SC 1581.

24 AIR 1952 SC 369.

25 (1980) 2 SCC 565. (Coram: Chandrachud, Y.V., C.J., Bhagwati, P.N., Untwalia, N.L., Pathak, R.S., Reddy, O. Chinnappa, JJ.)

> …since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section.

It rejected (as an utterly unguided conferment of power to the courts), the idea that the petitioner must make out a 'special case' for the exercise of the power to grant anticipatory bail or that an F.I.R. needs to be registered for a petition to be entertained.

The Court also held that an order of bail may be passed under section 438(1) without notice to the public prosecutor, but with the caveat that such notice should be issued to the public prosecutor or the government advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. It held that *ad-interim* order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage.

The Court observes that:

> A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter of investigation because, regardless of what kind of offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public. Such an order can then become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed. Therefore, the court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective. The power should not be exercised in a vacuum.[26]

The Court also notes the distinctive language characteristic of section 438 as compared to sections 437 and 439 of the Code of Criminal Procedure and resolves to uphold and implement the legislative intent behind such distinction.[27] But the Court further states that:

> The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of

26 *Ibid.*

27 *Ibid.*

> their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code.[28]

The Court held that the operation of an order passed under section 438(1) need not necessarily be limited in point of time. If it has reasons for the same, the Court may limit the operation of the order to a short period until after the filing of an F.I.R. in respect of the matter covered by the order. In such cases, the appellant may be directed to obtain an order of bail under section 437 or 439 of the Code within a reasonably short period after the filing of the F.I.R. as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.

The Court in this case interpreted the grant of anticipatory bail liberally on the basis of *article 21 of the Constitution.*[29] *T*his decision has come to be so extensively relied on in subsequent cases on anticipatory bail that most of the major judgements reviewed here quote profusely from this decision.

The Supreme Court upheld that the discretion of the courts to decide on anticipatory bail considering all circumstances untrammelled by the gravity of the offence alleged. It rejected the notion that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the maximum punishment provided is imprisonment for life. The court also rejected the proposition that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody under section 167(2) of the Code is made out by the investigating agency. The court reasoned that anticipatory bail maybe granted subject to restrictions including that "in the event of the police making out a case of a likely discovery under section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery."[30]

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28 *Ibid.*

29 *Ibid.*The Court approvingly quotes V.R. Krishna Iyer, J., in *Gudikanti Narasimhulu* v. *Public Prosecutor, High Court of Andhra Pradesh*, 1978 AIR 429, that, "the issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law. The last four words of Article 21 are the life of that human right."

30 *Ibid.*

The Court observes that:

> It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purposes of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by the acceptance of conditions which the court may think fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail.[31]

Hence, it can be seen that the Supreme Court is not inclined to fetter the exercise of discretion by the courts in the grant of anticipatory bail and tries to promote the need to view the entirety of the circumstances (and not just the seriousness of the offence) while granting anticipatory bail.

IV. Case of Alleged Murder

Pokar Ram v. *State of Rajasthan*[32]

In this case where the petitioner was accused of murder using fire-arm in which the victim succumbed to injuries after a period of time, the Court made distinct anticipatory bail from regular bail during investigation and pending appeal.

> 5. Relevant considerations governing the court's decision in granting anticipatory bail under Section 438 are materially different from those when an application for bail by a person who is arrested in the course of investigation as also by a person who is convicted, and his appeal is pending before the higher court and bail is sought during the pendency of the appeal. Three situations in which the question of granting or refusing to grant bail would arise, materially and substantially differ from each other and the relevant considerations on which the courts would exercise its discretion, one way or the other, are substantially different from each other.
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> 6. The decision of the Constitution Bench in Gurbaksh Singh Sibbia v. State of Punjab clearly lays down that 'the distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is, therefore, effective at the very moment of arrest.' … A direction

31 *Ibid.*

32 (1985) 2 SCC 597. Coram: V.D. Tulzapurkar, D.A. Desai and A.P. Sen, JJ. Sri Desai, J. delivered the judgement of the Court.

> under section 438 is intended to confer conditional immunity from the touch as envisaged by section 46(1) or confinement. In para 31, Chandrachud, C.J., clearly demarcated the distinction between the relevant considerations while examining an application for anticipatory bail and an application for bail after arrest in the course of investigation. Says the learned Chief Justice that "… in regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for or release of the applicant on bail in the event of his arrest would generally be made. It was observed that 'it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by malafides; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond.' Some of the relevant considerations which govern the discretion, noticed therein are "the nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial a reasonable apprehension that witness will be tampered with and 'the larger interests of the public or the State', are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail".[33]
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> A caution was voiced that 'in the evaluation of the consideration whether the applicant is likely to abscond, there can be no presumption that the wealthy and the mighty humble and poor will run away from the course of justice, any more than there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it."[34]

Further, considering the facts of the case[35], the court observed at paragraph 13 of its judgement that:

> … it must be made distinctly clear that some very compelling circumstances must be made out for granting bail to a person accused

33 *Id.* at 601.

34 *Id.* at 603-604.

35 Though the F.I.R. clearly mentioned the name of the petitioner as the accused who used his fire-arm at the victim he was never arrested by the Investigating Officer till days thereafter, allowing the petitioner to move the court for anticipatory bail after the victim succumbed to his injuries.

> of committing murder and that too when the investigation is in progress. In fact, the Investigating Officer did not even attempt to arrest the appellant though the initial accusation was under Sec. 307 IPC punishable with imprisonment for life. And as soon as the victim of the assault succumbed to his injuries and an offence under Sec. 302 was registered, promptly an application for anticipatory bail was made and granted. If such an order is allowed to stand, faith of public in administration of justice is likely to be considerably shaken. Therefore, we have no option but to cancel the order granting anticipatory bail.

Here the Supreme Court can be seen to caution the courts below that in matters of granting anticipatory bail there has to be reasons cited to justify the same. The court states:

> Anticipatory bail to some extent intrudes in the sphere of investigation of crime and the court must be cautious and circumspect in exercising such power of a discretionary nature. This case amply illustrates that the power was exercised sub silentio as to reasons or on irrelevant or considerations not germane to the determination.

Though the court highlighted the issue of a non-speaking order for anticipatory bail being granted in this case which related to murder as the reason for quashing the anticipatory bail granted, the fact that the offence was murder and the person accused held a position of influence seems to have had some bearing on the adverse decision of the court.

Somunder Singh v. *State of Rajasthan*[36]

The relevant consideration before the Courts is the seriousness of the offence and not just its non-bailable nature is made crystal clear by the Supreme Court in this case based on a dowry death.

> The widespread belief that dowry deaths are even now treated with some casualness at all levels seems to be well grounded. The High Court has granted anticipatory bail in such a matter. We are of the opinion that the High Court should not have exercised its jurisdiction to release the accused on anticipatory bail in disregard of the magnitude and seriousness of the matter. The matter regarding the unnatural death of the daughter-in-law at the house of her father-in-law was

36 (1987) 1 SCC 466. Coram: M.P. Thakkar and B.C. Ray, JJ. Sri. Thakkar, J., delivered the judgement of the Court.

> still under investigation and the appropriate course to adopt was to allow the concerned magistrate to deal with the same on the basis of time of their arrest in case they were arrested. It was neither prudent nor proper for the High Court to have granted anticipatory bail which order was very likely to occasion prejudice by its very nature and timing. We therefore consider it essential to sound a serious note of caution for future. The High Court is under no compulsion to exercise its jurisdiction to grant anticipatory bail in a matter of this nature.[37]

This is another decision that places the allegation against the accused on a higher footing as compared to his right to personal liberty on the basis of the seriousness of the offence. This kind of reasoning encourages filing of false complaints alleging serious offences just to see the accused suffering the ignominy of arrest.

Dolat Ram v. *State of Haryana*[38]

Here, the court considered the question of cancellation of anticipatory bail to the parents and the brother of the husband of the deceased in a case of dowry death, a non-bailable offence.

> …The High Court also fell in error in cancelling the anticipatory bail granted to the appellants… The learned Additional Sessions Judge had noticed that even according to the statement in the FIR, the appellants were living separately from the deceased and her husband and that the factum of separate residence was also supported by the ration card. These considerations were relevant considerations for dealing with an application for grant of anticipatory bail.
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> 4. Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should

37 *Id.* at 467.

38 (1995) 1 SCC 349. Coram: Dr. A.S. Anand and M.K. Mukherjee, JJ.

> not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. These principles, it appears, were lost sight of by the High Court when it decided to cancel the bail, already granted. The High Court it appears to us overlooked the distinction of the factors relevant for rejecting bail in a non bailable case in the first instance and the cancellation of bail already granted.[39]

Kiran Devi v. *State of Rajasthan*[40]

That the seriousness of the offence and not just its non-bailable nature is always a relevant consideration before the Courts is evident from the following observations of the Court at paragraph two of the judgement.

> We are of the opinion that anticipatory bail should not have been granted in the murder case when the investigation was still incomplete. The proper course to adopt was to leave it to the trial court to do the needful if and when the person concerned was arrested in the light of the record available at that point of time.

Raghuvir Saran Agarwal v. *State of U.P.*[41]

This was a case involving the grant of anticipatory bail where dowry death was alleged. In its one paragraph judgment the Supreme Court observed thus:

> If the provision in regard to grant of anticipatory bail is invoked at a stage when the investigation is in progress and the court is unaware of the seriousness of the matter, it would hamper the investigation itself. In any case, if the High Court felt inclined to grant anticipatory bail, it should have stated the reasons for exercising that jurisdiction. Otherwise, every person against whom a first information report is lodged alleging a serious crime will rush to the High Court or the Sessions Court that the case may be considered and obtain anticipatory bail rendering the provisions of the Criminal Procedure Code in the matter of arrest, etc. redundant. If the High Court is inclined to grant anticipatory bail, it should indicate the reasons why it is has exercised power in cases where if the allegations are true, some serious crime could be stated to have been committed.[42]

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39 *Id.* at 350-51.

40 1987 (Supp) SCC 549. Coram: M.P. Thakkar and B.C. Ray, JJ.

41 (1998) 8 SCC 617. Coram: A.M. Ahmadi, C.J., and M.K. Mukherjee and K. Venkataswami, JJ.

42 *Id.* at 618.

While it is welcome that the Court has called for reasons to be cited while granting anticipatory bail, the tenor of the judgement indicates its disinclination for prioritising liberty over custody in the case of serious offences contrary to the spirit of treating the accused as innocent till proven guilty.

V. Terrorism Offences

Kartar Singh v. *State of Punjab*[43]

This case involved the question of constitutionality of certain provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1985 (hereinafter "TADA") as it then stood which removed the concept of anticipatory bail in TADA cases. The court upheld the TADA provision. Among the reasons adduced for its decision was the rather tenuous claim that section 438 of the Code of Criminal Procedure being a new provision, introduced a new right and hence its removal would not violate article 21 of the Constitution of India. The court does not consider section 438 of the Code an inherent right available to all human beings but a mere creation of the Code[44]. The operative paragraphs of the judgement are reproduced herein.

> 324. Sub-section (7) reads thus: Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under this Act or any rule made thereunder.[45]
>
> 327. It is needless to emphasise that both the Parliament as well as the State Legislatures have got legislative competence to enact any law relating to the Code of Criminal Procedure. No provision relating to anticipatory bail was in the old Code and it was introduced for the first time in the present Code of 1973 on the suggestion made of the Forty-first Report of the Law Commission and the Joint Committee Report. It may be noted that this section is completely omitted in the State of Uttar Pradesh by Section 9 of the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No. 16 of 1976) w.e.f. 28-11-1975. In the State of West Bengal, proviso is inserted to Section 438(1) of the Code w.e.f. 24-12-1988 to the effect that no final order shall be made on an application filed

43 (1994) 3 SCC 569. Coram: S. Ratnavel Pandian, M.M. Punchi, K. Ramaswamy, S.C. Agarwal, R.M. Sahai, JJ. Decision by leading judgement: Pandian, J. Two separate judgements by: K. Ramaswamy and Sahai, JJ.

44 In which case, it is highly regrettable. For *innocent, till proven guilty* to have meaning, anticipatory bail is an inherent human right. Its presence under Part III of the Constitution of India would be only a recognition of the same and not conferment of a new right.

45 *Id.* at 698.

> by the accused praying for anticipatory bail in relation to an offence punishable with death, imprisonment for life or imprisonment for a term not less than seven years, without giving the State not less than seven days notice to present its case. In the State of Orissa, by Section 2 of Orissa Act 11 of 1988 w.e.f. 28-6-1988, a proviso is added to Section 438 stating that no final order shall be made on an application for anticipatory bail without giving the State notice to present its case for offence punishable with death imprisonment for life or imprisonment for a term of not less than seven years.
>
> 328. It is relevant to note one of the reasons given by the Law Commission for its suggestions to introduce the provision for anticipatory bail, that reason being "…where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail". To put it differently, it can be deduced from the reasoning of the Report of the Law Commission that where a person accused of non-bailable offence is likely to abscond or otherwise misuse his liberty while on bail, will have no justification to claim the benefit for anticipatory bail. Can it be said with certainty that terrorists and disruption and inject sense of insecurity, are not likely to abscond or misuse their liberty if released on anticipatory bail. Evidently, the Parliament has thought it fit not to extend the benefit of Section 438 to such offenders.[46]
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> 329. Further, at the risk of repetition, we may add that Section 438 is a new provision incorporated in the present Code creating a new right. If that new right is taken away, can it be said that the removal of Section 438 is violative of Article 21. In *Gurubaksh Singh*, there is no specific statement that the removal of Section 438 at any time will amount to violation of Article 21 of the Constitution.
>
> 330. Hence for the aforementioned reasons, the attack made on the validity of sub-section (7) of Section has to fail.[47]

The nature of the offence of terrorism and the real possibility of the accused absconding or misusing liberty while on bail weighs heavily in the judgement of the Court. It can be seen here that the Court delinks section 438 from any protection under article 21 of the Constitution.

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46 *Id.* at 699.

47 *Id.* at 700.

VI. Offences against the Scheduled Castes and Scheduled Tribes

State of M.P. v. *Ram Krishna Balathia*[48]

In this case the court considered whether the denial of the right to apply for anticipatory bail in respect of offences committed under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was violative of articles 14 and 21 of the Constitution.[49] In relation to the challenge based on article 14, the court finds an intelligible differentia in relation to the non-availability of a right to anticipatory bail thus:

> **5. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the said Act) was enacted in order to prevent the commission of atrocities against members of Scheduled Castes and Scheduled Tribes and to provide for special courts for the trial of offence under the said Act as also to provide for the relief and rehabilitation of victims of such offences.**
>
> It is pointed out in the above statement of objects and reasons that when members of the Scheduled Castes and Scheduled Tribes assert their rights and demand statutory protection, vested interest try to cow them down and terrorise them. In these circumstances, if anticipatory bail is not made available to persons who commit such offences, such a denial cannot be considered as unreasonable or violative of Article 14, as these offences form a distinct class by themselves and cannot be compared with other offences.[50]

The court dismisses the idea that section 438 of the Code of Criminal Procedure is protected by article 21 of the Constitution of India. It observes that:

> 7. We have next to examine whether Section 18 of the said Act violates in any manner, Article 21 of the Constitution which protects the life and personal liberty of every person in this country. Article 21 enshrines the right to live with human dignity, a precious right to which every human being is entitled, those who have been, for centuries, denied this right more so. We find it difficult to accept the contention that section 438 of the Code of Criminal Procedure is an integral part of

48 (1995) 3 SCC 221. Coram: B.P. Jeevan Reddy and Sujata V. Manohar, JJ. Judgement of Court by: Sujata V Manohar, J.

49 The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, s. 18.

50 *Id.* at 225.

> Article 21. In the first place, there was no provision similar to section 438 in the old Criminal Procedure Code. The Law Commission in its 41st report recommended introduction of a provision for grant of anticipatory bail. It observed:
>
> We agree that this would be a useful advantage. Though, we must add that it is in very exceptional cases that such power should be exercised.
>
> In the light of this recommendation, section 438 was incorporated, for the first time, in the Criminal Procedure Code of 1973. Looking to the cautious recommendation of the Law commission, the power to grant anticipatory bail is conferred only on a Court of Session or the High Court. Also, anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of offences cannot be considered as violative of Article 21.[51]
>
> The Court then referred to its decision in *Kartar Singh* v. *State of Punjab*[52],
>
> In the case of terrorists and disruptionists, there was every likelihood of their absconding and misusing their liberty if released on anticipatory bail and, therefore, there was nothing wrong in not extending the benefit of Section 438 to them. …Further at the risk of repetition, we may add that Section 438 is a new provision incorporated in the present Code creating a new right. If that new right is taken away, can it be said that the removal of Section 438 is violative of Article 21,

and went on to hold that "Its answer was in the negative, Section 20(7) of the TADA, 1987 was upheld."

The Court then reasoned thus:

> 9. Of course, the offences enumerated under the present case are very different from those under the TADA 1987. However, looking to the historical background relating to the practice of 'untouchability' and the social attitudes which lead to the commission of such offences

51 *Id.* at 226.

52 (1994) 3 SCC 569.

> against Scheduled Castes and Scheduled Tribes, there is justification for an apprehension that if the benefit of anticipatory bail is made available to the person who are alleged to have committed such offences, there is every likelihood of their misusing their liberty while on anticipatory bail to terrorize their victims and to prevent a proper investigation. It is in this context that Section 18 has been incorporated in the said Act. It cannot be considered as in any manner violative of Article 21.
>
> 10. It was submitted before us that while Section 438 is available for graver offences under the Penal Code, it is not available for even "minor offences" under the said Act. This grievance also cannot be justified. The offence which are enumerated under Section 3 are offences which, to say the least, denigrate members of Scheduled Castes and Scheduled Tribes in the eyes of society and prevent them from leading a life of dignity and self-respect. Such offences are committed to humiliate and subjugate members of Scheduled Castes and Scheduled Tribes with a view to keeping them in a state of servitude. These offences constitute a separate class and cannot be compared with offences under the Penal Code.
>
> 11. A similar view of Section 18 of the said Act has been taken by the Full Bench of Rajasthan High Court in the case of *Jai Singh* v. *Union of India* and we respectfully agree with its findings.

Hence, it can be seen that the court has found substance in the argument that an offence made out under the legislation for protection of civil rights of the scheduled castes and tribes is indeed serious enough to justify the legislative denial of a right to anticipatory bail.

Dr. Subhash Kashinath Mahajan v. *The State of Maharashtra*[53]

In this case the Supreme Court revisited the issue of preventing the grant of anticipatory bail to persons accused of committing offences against the scheduled castes and scheduled tribes under section 18[54] of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. It found the proceedings in the case before it to be a clear abuse of process of court and quashed the same. The court then observed about section 18, thus:

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53 (2018) 6 SCC 454.

54 The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, s. 18. The provision states: Section 438 of the Code not to apply to persons committing an offence under the Act —Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.

> There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no *prima facie* case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. We approve the view taken and approach of the Gujarat High Court in *Pankaj D. Suthar* and *Dr. N.T. Desai* and clarify the judgments of this Court in *Balothia* (supra) and *Manju Devi*.[55]

The court then went on to provide certain steps to be taken in cases registered under the 1989 statute which provisions were subsequently set aside by the court on review. Meanwhile the Parliament introduced section 18A to the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The constitutionality of the newly introduced provision was upheld in the case of *Prathvi Raj Chauhan* v. *Union of India*[56]. But the Court reiterated its consistent position that "if the complaint does not make out a prima facie case for applicability of the provisions of the Act of 1989, the bar created by section 18 and 18A (i) shall not apply."[57]

Thus, the non-availability of a right to anticipatory bail in consideration of offences against the scheduled castes and tribes and in relation to terrorism related offences gives context for the Supreme Court to justify the denial of the protective umbrella of article 21 to section 438.

VII. Cases of Corruption

State v. *Anil Sharma*[58]

In this case where the accused was charged of offence under section 13 of the Prevention of Corruption Act, 1998, while extolling the virtues of placing an accused under mental pressure[59] for exacting information from him, we find the court placing a tremendous amount of faith in the responsible nature of police officers in their respect for human rights and the rule of law.

> We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well seconded with a favourable order under Section 438 of

55 (2018) 6 SCC 454 at para 82.

56 2020 SCC OnLine SC 159.

57 (2018) 6 SCC 454 at para 10.

58 (1997) 7 SCC 187. Coram: M.K. Mukherjee and K.T. Thomas, JJ. Sri K.T. Thomas, J. delivered the judgement of the Court.

59 Which is contrary to the principles accepted under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 that requires countries to take effective measures to prevent torture in any territory under their jurisdiction.

> the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring much useful information, which would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders.

The faith in the police is belied by the fact that though custodial deaths abound in India, hardly any policeman ever gets punished.[60] The overwhelming majority of the persons who are killed in police custody are not convicted prisoners, but undertrials or persons granted police custody or those who were picked up by the police but never brought before any magistrate. This makes a mockery of the principle of presumption of innocence.

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 (UN Convention on Torture) prohibits torture and defines psychological torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[61]

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60 Debayan Roy, "There were 300 custodial deaths from 2008 to 2016, but zero convictions" *The Print*, *available at*: https://theprint.in/india/there-were-300-custodial-deaths-from-2008-to-2016-but-zero-convictions/254450/ (last visited on June 21, 2020).

61 The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, art. 1.

Though India had signed the Convention in 1997 and it has not yet ratified this instrument, the logic of the court is suspect and shows scant regard to the ground realities facing persons in police custody.

In this case, the Court also distinguished between the qualitatively different nature of regular bail and anticipatory bail.

The High Court has approached the issue as though it was considering a prayer for granting regular bail after arrest…

> …The consideration which should weigh with the court while dealing with a request for anticipatory bail need not be the same as for an application to release on bail after arrest. At any rate the learned Single Judge ought not to have sidestepped the apprehension expressed by the CBI (That the respondent would influence the witnesses) as one, which can be made against all accused person in all cases. The apprehension was quite reasonable when considering the high position which the respondent held and in the nature of accusation relating to a period during which he held such office.[62]

State of A.P. v. *Bimal Krishna Kundu*[63]

The court stressed the relevant considerations for the grant of anticipatory bail distinguishing serious nature of the offence with non-bailability criteria demanded in section 438 of the Criminal Procedure Code.

> … It is apparent that learned Single Judge has chosen to exercise the discretion envisaged in Section 438 of the Code on the ground that the offences involved are not punishable with death or imprisonment for life. It must be remembered that Section 438 of the Code applies to all non-bailable offences and not merely to offences punishable with death or imprisonment for life. It is also to be remembered that applicability of the section is not confined to offences triable exclusively by the Court of Session.
>
> … There is no indication in Section 438 of the Code for justifying a hiatus to be made among non-bailable offences vivisecting those punishable with death or imprisonment for life and those others punishable with less than life imprisonment. No doubt such a classification is indicated in Section 437(1) of the Code, but that section

62 *Supra* note 58 at 189-190.

63 (1997) 8 SCC 104. Coram: M.K. Mukherjee and K.T. Thomas, JJ. Sri. K.T. Thomas, J, delivered the judgement of the Court.

> is concerned only with post-arrest bail and not pre-arrest bail. Learned Single Judge seems to have telescoped considerations contemplated in Section 437 into the amplitude of the discretion envisaged in Section 438 of the Code.
>
> … A three-judge bench of this Court has stated in *Pokar Ram* v. *State of Rajasthan* that "5. Relevant considerations governing the court's decision in granting anticipatory bail under Section 438 are materially different from those when an application for bail by a person who is arrested in the course of investigation as also by a person who is convicted and his appeal is pending before the higher court and bail is sought during the pendency of the appeal.
>
> … Similar observations have been made by us in a recent judgment in *State* v. *Anil Sharma* that "The consideration which should weigh with the Court while dealing with a request for anticipatory bail need not be the same as for an application to release on bail after arrest."[64]

VIII. Jurisdiction of Courts

A. High Courts for Offences Committed Outside the State

R.K. Krishna Kumar v. *State of Assam*[65]

In this case which also involved the question of jurisdiction of High Courts in granting anticipatory bail to the accused for offences committed outside the State, the court did not go into that question at all. On the facts of the case, the court found that:

> When the materials collected during investigation are judged in the light of the above provisions of the Indian Penal Code[66] and the Act[67] it is apparent that they make out a prima facie case under Section 10 of the Act against the appellants, in that, they have assisted the operation of ULFA (which has been declared as an unlawful association under Section 3 of the Act) through contributions and also in other ways. However, when those material allegations levelled against the appellants are considered *vis-à-vis* the "unlawful activities" envisaged under the Act it cannot be said that they are liable for an offence under Section 13 of the Act, much less under the aforesaid offences under the Indian Penal Code. Resultantly, the question of

64 *Id.* at 106-107.

65 (1998) 1 SCC 474. Coram: M.K. Mukherjee and K.T. Thomas, JJ. M.K. Mukherjee, J, delivered judgement of the Court.

66 The Indian Penal Code, 1860, ss. 120B, 121, 121A and 122.

> granting anticipatory bail to the appellants under Section 438 of the Code of Criminal Procedure cannot and does not arise for an offence under Section 10 of the Act which is bailable; and a direction under the former can be issued only in respect of a non bailable offence.[68]

An opportunity to clearly demarcate the jurisdiction of the High Courts in favour of grant of anticipatory bail for persons from other jurisdictions would have certainly upheld the progressive notion that widest possible protection for personal liberty is to be granted as compared to the narrowest view of linking jurisdiction in matters of liberty to the offence-based conception that governs treatment of offences under the Cr.P.C. The Supreme Court could have lost a chance to settle this matter in the face of divergent decisions from different High Courts some of which favour a liberal approach, while others favour the narrow construction and yet others plod the middle path.[69]

B. Anticipatory Bail from Sessions Court after High Court rejects Petition

***Enforcement Officer, TED, Bombay* v. *Bher Chand Tikaji Bora*[70]**

In this case involving a white-collar crime, the court took a rather rigid stance. Perhaps, as is discernible from the following lines, the court felt justified to consider the accused in an allegation of a white-collar crime, *prima facie* guilty?

> From a bare reading of the impugned order it appears that the learned Single Judge is of the view that because the respondent was available for interrogation and the prosecution did not avail of that opportunity there should not be any justification for not granting anticipatory bail sought for. We have no hesitation to hold that the learned Judge had misread the decision of this Court referred to in the impugned order. The criteria and questions to be considered for exercising power under Section 438 of Cr.P.C. has been recently dealt with in *Dukhishyam Benupani, Asst. Director, Enforcement Directorate (FERA)* v. *Arun Kumar Bajoria*. The white-collar criminal like the respondent against whom the allegation is that he has violated the provisions of the Foreign Exchange Regulation Act is a menace to the society and therefore unless he alleges and establishes in the materials that he is

67 The Terrorist and Disruptive Activities (Prevention) Act, 1985, ss. 10 and 13.

68 *Supra* note 65 at 479.

69 See also, Abhinav Sekhri, "Anticipatory Bail and Jurisdiction" *The Criminal Law Blog, National Law University, Jodhpur* (July 31, 2019), *available at*: https://criminallawstudies nluj.wordpress.com/2019/07/31/anticipatory-bail-and-jurisdiction/ (last visited on June 21, 2020).

70 (1995) 5 SCC 720. Coram: G.B. Pattanaik and Umesh C Banerjee, JJ.

> being unnecessarily harassed by the investigating agency, the court would not be justified in invoking jurisdiction under Section 438 Cr.P.C. and granting anticipatory bail.[71]

C. Summary Refusal to Exercise Discretion under Article 136

Jagdish v. *Harendrajit Singh*[72]

In this case, in a two-paragraph judgement, the Supreme Court expressed its unwillingness (without giving any substantial reason) to entertain Special Leave Petitions against routine orders in the realm of anticipatory bail.

> 2. This Court does not ordinarily, in the exercise of its discretion under Article 136, entertain petitions for special leave to appeal against orders granting or refusing or cancelling bail or anticipatory bail. These are matters where the High Court should become final and this Court should not entertain petitions for special leave. The special leave petition is dismissed with these observations.[73]

While on one hand this approach for finality at the level of the High Courts' itself appears to be commendable, from the perspective of preserving the liberty of individuals, all Constitutional and statutory options available are a safeguard against encroachment of liberty by the State and should not be foreclosed citing technicalities. Any such foreclosure amounts to an abdication of the Supreme Court's role as the guardian of fundamental rights.

IX. Anticipatory Bail as an Extension of Personal Liberty

Siddharam Satlingappa Mhetre v. *State of Maharashtra*[74]

In this case there is a very detailed discussion on the relevance and importance of personal liberty in the context of anticipatory bail. The Court provides a liberal approach to personal liberty and identifies that the law on bails:

> …dovetails two conflicting interests namely, on the one hand, the requirements of shielding the society from the hazards of those committing crimes and potentiality of repeating the same crime while on bail and on the other hand absolute adherence of the fundamental principle of criminal jurisprudence regarding presumption of

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71 *Id.* at 720-721.

72 (1985) 4 SCC 508. Coram: P.N. Bhagwati, C.J. and Ranganath Misra, J.

73 *Id.* at 509.

74 (2011) 1 SCC 694. Coram: Dalveer Bhandari and K.S. Panicker Radhakrishnan, JJ.

> innocence of an accused until he is found guilty and the sanctity of individual liberty.[75]
>
> Further the Court relies extensively on *Sibbia's* case and states thus:
>
> 101. The proper course of action ought to be that after evaluating the averments and accusation available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the public prosecutor. After hearing the public prosecutor, the court may either reject the bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of bail. The public prosecutor or complainant would be at liberty to move the same court for cancellation or modifying the conditions of bail any time if liberty granted by the court is misused. The bail granted by the court should ordinarily be continued till the trial of the case.
>
> 102. The order granting anticipatory bail for a limited duration and thereafter directing the accused to surrender and apply before a regular bail is contrary to the legislative intention and the judgment of the Constitution Bench in *Sibbia's* case (supra).
>
> 103. It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the public prosecutor or the complainant on finding new material or circumstances at any point of time.

The court frowns on the previous judgements brought to its notice that allowed placing fetters on the grant of anticipatory bail subjecting it to limited time and other similar conditions. It observes such conditionalities to be beyond the statutory mandate and such decisions to be made *per incurium*.[76]

Subsequently, in the case of *Sushila Aggarwal* v. *State (NCT of Delhi)*[77], this reasoning of the court is affirmed by a larger bench and the matters are now made clear.

X. Some Major Cases on Anticipatory Bail Which Were Subsequently Held *Per Incuriam*

It is interesting to take note of some major cases that were subsequently held *per incuriam* to understand the confused state of affairs in relation to the law on anticipatory bail.

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75 *Id.* at para 3.

76 *Id.* at paras 135, 136 and 149.

77 (2020) 5 SCC 1. Coram: Arun Mishra, Indira Banerjee, Vineet Sharan, M.R. Shah and S. Ravindra Bhat, JJ.

Salauddin Abdulsamad Shaikh v. *State of Maharashtra*[78]

This case took a deviation from the liberal interpretation of the provision for anticipatory bail in non-bailable offences by limiting its period of operation at the discretion of the High Court and linked it to the grant of regular bail by the regular court. Though subsequently set aside in *Sushila Aggarwal* v. *State (NCT of Delhi)*, the logic of the court is worth a consideration in so far as it tries to link the enlargement of the accused on anticipatory bail to the regular court which, due to its unique position, has the ability to consider all the peculiar facts and circumstances of the case.

The Court had commented on the nature of anticipatory bail and why Courts attach conditions to an order granting anticipatory bail.

> Under Section 438 of the Code of Criminal Procedure when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, the High Court or the Court of Sessions may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail and in passing that order, it may include such conditions having regard to the facts of the particular case, as it may deem appropriate. Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the order date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular court for bail. That is the correct procedure to follow because it must be realized that when the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offence. It is, therefore, necessary …(to) leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge sheet is submitted.
>
> 3. It should be realized that an order of anticipatory bail could even be obtained in cases of serious nature as for example murder and, therefore, it is essential that the duration of that order should be limited and ordinarily the court granting anticipatory bail should not substitute itself for the original court which is expected to deal with

78 (1996) 1 SCC 667. Coram: A.M. Ahmadi, CJ. and S.C. Sen and K.S. Paripoornan, JJ.

> the offence. It is that court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail.[79]

The net result of this judgement is that at least in some cases, the order of anticipatory bail becomes meaningless when it compels the accused to surrender before the court seized of the matter and to seek regular bail. By limiting the time for operation of the anticipatory bail, the essence of the legislative provision is lost since it imposes the condition of arrest and detention at the discretion of the trial court. It is as if the order granting the anticipatory bail has in fact rejected the petition for anticipatory bail.

K.L. Verma v. *State*[80]

In this case which has been set aside subsequently in *Sushila Aggarwal* v. *State (NCT of Delhi),* the Supreme Court clarified its position on the limited duration of and the conditions attached to an order granting anticipatory bail.

> The High Court placed reliance on this court's decision in *Salauddin Abdulsamad Shaikh* v. *State of Maharashtra*, which was a case in which the High Court, while granting interim anticipatory bail, imposed certain conditions, one of which was that the accused should move for regular bail before the Court which was in seisin of the case pending against him. The High Court also observed that the application should be disposed of uninfluenced by the observations made in the earlier order. The special leave petition was directed against that order of the High Court. While dealing with that order, this court observed that under Section 438 of the Code, when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, the High Court or Court of Session may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail and in passing that order, it may include such conditions as it may deem appropriate. This Court further observed that anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be by-passed. It was, therefore, pointed out that it was necessary that such anticipatory bail orders should be of limited duration only and ordinarily on the expiry of that duration or extended duration the Court granting anticipatory

79 *Id.* at 668.

80 (1998) 9 SCC 348. Coram: A.M. Ahmadi, CJ. and J.S. Verma, J.

> bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge sheet is submitted. By this, what the court desired to convey was that an order of anticipatory bail does not enure till the end of trial, but it must be of limited duration, as the regular court cannot be by-passed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration, which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher court, if they so desire. This decision was not intended to convey that as soon as the accused persons are produced before the regular court the anticipatory bail ends even if the court is yet to decide the question of bail on merits. The decision in *Salauddin* case has to be so understood.[81]

This case provides an insight into the tussle between the prosecution's case for custodial integration as early as possible and that of the accused to remain free as long as possible. The clash between the old school of thought that treats the liberty of an accused till conviction as an aberration and the overarching reliance of the police on custodial interrogation before grant of regular bail is a probable cause for decisions like this.

XI. The Current Law

Sushila Aggarwal v. *State (NCT of Delhi)*[82]

A lack of uniformity in the grant of anticipatory bail by various Benches of the Supreme Court led the matter to be thoroughly discussed and settled for the time being by a Constitution Bench of the court in this case. The larger bench considered the questions of:

> (1) Whether the protection granted to a person under Section 438 Cr.P.C. should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail, and (2)

81 *Id.* at 350.

82 (2020) 5 SCC 1. Coram: Arun Mishra, Indira Banerjee, Vineet Sharan, M.R. Shah and S. Ravindra Bhat, JJ.

> Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court.[83]

On the first question the Court held that:

> the protection granted to a person under Section 438 Cr.P.C. should not invariably be limited to a fixed period; it should inure in favour of the accused without any restriction on time. Normal conditions under Section 437 (3) read with Section 438 (2) should be imposed; if there are specific facts or features in regard to any offence, it is open for the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event) etc.

On the second question it was held that:

> the life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial. Again, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

The Court went onto overrule the principle earlier laid down in the case of *Siddharam Satlingappa Mhetre* v. *State of Maharashtra*[84] (and other similar judgments) that no restrictive conditions at all can be imposed, while granting anticipatory bail.

It also overruled the decision in *Salauddin Abdulsamad Shaikh* v. *State of Maharashtra*[85] and subsequent decisions including *K.L. Verma* v. *State*[86], *Sunita Devi* v. *State of Bihar*[87], *Adri Dharan Das* v. *State of West Bengal*[88], *Nirmal Jeet Kaur* v. *State of M.P.*[89], *HDFC Bank Limited* v. *J.J. Mannan*[90]; *Satpal Singh* v. *State of Punjab*[91] and *Naresh Kumar Yadav* v. *Ravindra Kumar*[92] which laid down such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time.

Further, in this case, the Supreme Court consolidated the principles to be followed and laid down the latest position of law on anticipatory bail in relation to various aspects.

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83 *Id.* at para 1.

84 (2011) 1 SCC 694.

85 (1996) 1 SCC 667.

86 (1998) 9 SCC 348.

87 (2005) 1 SCC 608.

88 (2005) 4 SCC 303.

89 (2004) 7 SCC 558.

90 (2010) 1 SCC 679.

91 (2018) SCC Online SC 415.

In relation to the essential content of an anticipatory bail application and whether to move it before or after the filing of an FIR, the Court held thus:

> Consistent with the judgment in *Shri Gurbaksh Singh Sibbia* v. *State of Punjab*, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.[93]

On the question of notice to the public prosecutor and the concept of a limited interim anticipatory bail, the Court held that, "It may be advisable for the court, which is approached with an application under section 438, depending on the seriousness of the threat (of arrest) to issue notice to the public prosecutor and obtain facts, even while granting limited interim anticipatory bail."[94]

With respect to mandatory imposition of conditions on the grant of anticipatory bail the court found no provision for the same under section 438, Cr.P.C. and held that conditions cannot be imposed in a routine manner and any condition that is imposed should be in consideration of the entirety of the matter before the court. It held that:

> Nothing in Section 438 Cr.P.C., compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified – and ought to impose conditions

92 (2008) 1 SCC 632.

93 (2020) 5 SCC 1 at 127.

94 *Id.* at 128.

> spelt out in Section 437 (3), Cr.P.C. [by virtue of Section 438 (2)]. The need to impose other restrictive conditions, would have to be judged on a case-by-case basis, and depending upon the materials produced by the state or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.[95]

The court had reiterated that the grant of anticipatory bail and whether any kind of special conditions are to be imposed or not, is a matter of discretion of the Court dependent on facts of the case. The anticipatory bail so granted can continue after filing of the charge sheet, till end of trial, depending on the conduct[96] and behaviour of the accused.[97] The court further noted that grant of anticipatory bail is to be confined to the offence/incident, for which apprehension of arrest is there, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence nor should it enable the accused to commit further offences and claim relief of indefinite protection from arrest.[98]

With respect to the continuation of investigation, the Court observed that an order of anticipatory bail "does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person"[99] who seeks and is granted such bail. The Court directed that:

> the observations in *Sibbia* regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e., deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail.[100]

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95 *Id.* at 128-129.

96 *Id.* at 131. The Court left it open to the investigating agency to move the court which granted the anticipatory bail in the first instance, for a direction under s. 439 (2) to arrest the accused, "in the event of violation of any term, such as absconding, noncooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc.".

97 *Id.* at 130.

98 *Ibid.*

99 *Ibid.*

100 *Id.* at 130-131.

The Court had also stated that the grant of anticipatory bail maybe challenged by the state or investigating agency before the appellate or superior court, which may set it aside on the ground that material facts or crucial circumstances were not considered by the court granting bail.[101] It observed that such setting aside of anticipatory bail does not amount to "cancellation" in terms of section 439 (2) of the Cr. P.C.[102]

XII. Conclusion

It is seen that the Supreme Court has now decisively leaned in favour of giving the maximum benefit to favour the anticipatory bail seeker by a liberal interpretation of section 438, Cr.P.C. This is in consonance with its stated position of the jail being an exception and grant of bail being the rule. Despite, during the course of time, some benches of the court, perhaps due to the nature of cases coming before it or because of the passing fads of the particular times or because of their own personal prejudices (further research is required in this matter to ascertain the exact cause), brought in terms limiting the freedom and liberty of the individual to erode the true intent of the legislative provision by adding content into the section creating restriction not originally present. The latest decision of the constitutional bench of the court in *Sushila Aggarwal* tries to correct the imbalances that had gradually crept in and give a renewed vigour to the provision.

Even while the court restates the law, it has been reluctant to lay down any hard and fast rule in relation to grant of anticipatory bail and has left it largely to the courts concerned to use their discretion depending on the circumstances.

A major area of the cause for concern is the presence of statutory provisions which takes away the right of anticipatory bail. Court has interpreted with extreme confidence the law relating to anticipatory bail to deal with the major challenge of terrorism facing the country so much so that in terrorist offences there is no provision[103] for anticipatory bail at all.

Similarly, in the case of offences alleged to have been committed against the scheduled castes and scheduled tribes, the blanket denial of anticipatory bail is a cause for concern. This is particularly so since even the latest available statistics

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101 *Id.* at 132.

102 *Id.* at 133.

103 The Terrorist and Disruptive Activities (Prevention) Act, 1987, s. 20(7). (in force during the period 1985–1995 first as Ordinance and then as statute); The Prevention of Terrorism Act, 2002, s. 49(5) (in force during the period 2002–2004); and The Unlawful Activities (Prevention) Act, 1967, s. 43(d)(4) (in force, presently with amendments to include terrorist activities introduced in 2019) prohibits the grant of bail in terrorist acts.

from the National Crimes Records Bureau, published in December 2019 for the year 2018 shows that the conviction rate in such cases to be low[104] raising the serious probability that the provision is more misused than used.[105]

Maybe a little rethinking is needed in this field of legislations that provides for denial of anticipatory bail without allowing for any discretion at all to be exercised by the courts. Our aim should not be to imprison people stealing their liberty from them on the basis of mere allegations. The presumption of innocence until proven guilty shall have no meaning at all in such situations. We must never forget that when the State becomes a bulldozer against the liberty of the individual, it is human rights that get buried.

104 National Crime Record Bureau, "Crime in India 2018, Statistics" Vol. II (Ministry of Home Affairs, 2019), *available at*: https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%202.pdf (last visited on June 14, 2020). In the case of crimes/atrocities against scheduled castes (crime head wise), the all-India conviction rate was 28.5% (page 546) and in the case of crimes/atrocities against scheduled tribes (crime head wise), the all-India conviction rate was 23.5% (page 642).

105 *Prathvi Raj Chauhan* v. *Union of India*, 2020 SCC OnLine SC 159, para 49. The court has also observed that "In case it is found to be false/unsubstantiated, it may be due to the faulty investigation or for other various reasons including human failings irrespective of caste."

LEGISLATIVE DRAFTING IN INDIA: A COMPREHENSIVE EXERCISE

Anup Kumar Varshney[*]

Abstract

The task of the draftsman is definitely difficult as he should be aware the pulse of the legislation, adequately adept in the skills of linguistics and capable of predicting the impact of the laws he drafts.

Legislative drafting is, therefore, the art of putting the intention of the legislature in a proper form for the purpose of administration. To be able to discharge this responsibility adequately, a drafter must possess certain qualities. For instance, the drafter must have a basic knowledge of the law, language, constitution, parliamentary procedure and have a genuine interest in drafting. The drafter must possess an analytical mind, pay meticulous attention to details and be open to constructive criticism.

In the present article the basic principles of legislative drafting have been narrated in detail and relevant information has been provided regarding the exercise of legislative drafting in India.

I. Introduction

IN INDIA, legislative drafting is entrusted to the Legislative Department of the Ministry of Law & Justice. The bills, prior to being tabled in the Parliament are drafted by the officers of the Legislative Department. Generally administrative ministries send their proposals for consideration and deliberation with ministry officials, post which a draft of the bill is prepared. It is a lengthy process and requires expertise in language, law and subject matter of the legislative draft and thus, several meetings are held with officials of the ministries whose proposals came up for drafting of bills.

The legislative draftsman should ideally have thorough knowledge of parliamentary procedure and the Constitution of India. Since legislative drafting is an art, a drafting

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official has to be vigilant and cautious to the fact that what he is drafting will be subject to public and judicial scrutiny.

Legislative drafting is a specialized field, which requires expertise in language, law, knowledge of the Constitution of India and the parliamentary procedure along with grammatical skills, clear vision and practical approach thus, requiring patience and hard work. The draftsman should possess an ability to foresee the consequences of his drafting and should be aware that once a bill is drafted and passed by houses of parliament it becomes the subject matter of public and judicial scrutiny. He should be confident that the desired result would be achieved when bill is passed by Parliament and assented to by the President of India.

There is hierarchy of officers in the Legislative Department, Ministry of Law & Justice and when first draft of a Bill is prepared by the officers, it is vetted and given final shape after holding several meetings, deliberations with concerned ministry officials.

The organization structure of officers in Legislative Department is as follows:

- Secretary
- Additional Secretary
- Joint Secretary & Legislative Counsel
- Additional Legislative Counsel
- Deputy Legislative Counsel
- Assistant Legislative Counsel

The Government of India has set up the Institute of Legislative Drafting and Research (hereinafter "ILDR") as a Wing of the Legislative Department of the Ministry of Law and Justice in January 1989. The objective of the same is to provide training to the central/state government officers so as to build capacity in the field of legislative drafting and to meet the shortage of trained draftspersons in the country. Since then, the ILDR has been imparting training courses in legislative drafting to such officers.

The course is of three months and covers both, theoretical aspects of legislative drafting as well as on-the-job practical training. The course is aimed at training the junior/middle-level officers of the states/union territory administration, state government undertakings, statutory authorities attached and subordinate offices of the State government, whose services are being utilized or likely to be utilized in drafting of laws, rules, regulations, bye-laws, etc.

Legislative Drafting is a difficult art. It is the art of expressing ideas of other people in concise and clear language. Legislative Proposal is first conceived in the Administrative ministry. The proposal is further examined in the administrative ministry to rectify any errors and make rectifications, if needed.

A draftsman must have a clear idea of what he is required to draft but sometimes he may lack clarity of thought or usage of accurate language. In order to clarify his ideas and sometimes those of the policy-makers, a draftsman should discuss the legislative proposal with officers of the administrative ministry and clear up any points which are important and the discussion should be recorded for further assistance.

Having mastered the subject, a draftsman should search for a precedent. Sometimes a draftsman's familiarity with the statute law at once suggests a precedent. The subject noted index of Indian and English statutes is helpful in finding a precedent. If a draftsman is lucky to find a precedent, his task is considerably facilitated. But a precedent should always be used cautiously.

There is often too great a temptation to borrow verbatim from a precedent. This temptation should be resisted because wholesale borrowing without appreciating the points of difference between the precedent and the proposed law, may prove dangerous and lead to disastrous results. Several Indian statutes are based upon the corresponding English laws and have given difficulties in interpretation in the light of the different conditions prevailing in India.

Prior to drafting a bill, it is always advisable to prepare a rough "scheme" of the bill. If the bill is to be divided into chapters, the heading of each chapter and the subject matter of each clause under the chapter should be noted. At this stage it is, therefore, not necessary to draft the clauses.

A draftsman should use simple language. A draftsman should bear in mind the maxim laid down by Lord Thring, "the same thing should invariably be said in the same words."[1]

Generally, several drafts are prepared, and all these drafts should be preserved as they indicate the working of the mind of the draftsman and are useful when any question arises in the final draft.

When a draft bill is ready, it should not be given a second reading immediately. There should be an interval of a few days between the preparation of the first

1 S. K. Hirandanani, "Legislative Drafting: An Indian View" 27(1) *The Modern Law Review* 1-2 (1964); T.K. Vishwanathan, *Legislative Drafting –Shaping the Law for the New Millennium* 86-87 (Indian Law Institute, New Delhi, 2007).

draft and its revision. If a draft bill is revised immediately, the mind of the draftsman is likely to move in the same groove with the result that he may not notice any mistake. But if the draft bill is revised after an interval of a few days, the draftsman will be able to bring a fresh mind to bear upon the draft and will thus, be in a better position to detect any mistakes.

As has been said, "What appeared to the tired eye in the watches of the night to be without blemish, may be full of errors and inconsistencies under the cold light of morning." Time permitting, a draft bill should be given as many readings as possible and it will be found that with each reading new mistakes are discovered.

Wherever possible, a draft bill prepared by one draftsman should be examined by another. This is a very healthy practice which is followed in England; every draft bill is scrutinized by at least two draftsmen resulting in fewer errors. Particular care should be taken in drafting financial statutes. Any mistake in such statutes may involve the government in a loss of considerable revenue.

A draftsman must have ample time to prepare a bill and should not be hustled. The dangers of hasty drafting are too patent to need emphasis. There is the classic instance of a law adopted by one of the states after a serious railway accident at a junction. It provided that when two trains approach an intersection, each must wait until the other had passed. There can be no doubt that all these instances are the result of hasty drafting. Without being offensive, a draftsman should always insist upon sufficient time being given to him. The importance of time to a draftsman is well illustrated by the following story:

> A friend of a draftsman walked into his office late one evening and inquired, "Done any useful work today?" The draftsman replied, "Well, to be frank, I inserted a comma before a particular word this morning, I took it off in the afternoon and just as you were entering my room, I was thinking of putting it back. That is all the work I have done today."

Lord Macaulay took ten years to draft the Indian Penal Code.[2] He was a master of language and had a prodigious memory. He could recite Paradise Lost[3] backwards. None of the draftsmen of today can claim his virtues and thus, they certainly need more time.

As per Hiranandani**,** legislative drafting is a thankless task. A draftsman rarely gets credit for a good draft but is often blamed for a bad one. The reason perhaps is

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2 The Indian Penal Code, 1860 (45 of 1960).

3 An epic poem in blank verse by English poet John Milton (17th Century).

that a good draft never comes up before a court. A draftsman should, therefore, be thick-skinned and should always be unruffled. He should never get excited.[4]

As per Government of India (Allocation of Business) Rules of 1961,[5] the Ministry of Law & Justice is the highest ministry of the Government of India which deals with the management of the legal affairs, legislative activities and administration of justice in India through its three departments namely the legislative department, department of legal affairs and the department of justice respectively.

The department of legal affairs is concerned with advising various other ministries of the central govt., while legislative department is concerned with drafting of all principal legislation for the central govt. i.e., bills to be introduced in parliament, ordinances etc. to be promulgated by the President of India, rules and regulation to be made by the President for union territories.

It is also concerned with election laws namely Representation of People Act, 1950 and of 1951. In addition, it is also entrusted with task of dealing with certain measures relating to concurrent list[6] like personal law, Contract, Evidence Act etc. The responsibility of maintaining up-to-date statutes enacted by parliament is also with this department.

Shri T.K. Vishwanathan, former Law Secretary, has written a book on "Legislative Drafting – Shaping the Law for The New Millennium."[7] In this book he has highlighted the complexity of legislation and has emphasized on plain language drafting. The book makes a strong case for adopting the worldwide demand for plain language drafting and for reducing complexity in the legislation in India. The book also reveals the democratic deficit in the current process of preparing legislation in India.

Certainly, the most fertile single source of confused, difficult-to-read, over lapping and conflicting statutes is the lack of uniformity in approach, terminology and style.

Legal draftsman though occupies the rear seat, or they may be called the pillion-riders, being in the background. Yet they are the real persons who propel the machinery by preparing a legislation to meet a required need to combat any social

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4 S.K. Hiranandani, "Legislative Drafting – An Indian View" 27(1) *The Modern Law Review* 1 (1964).

5 The Government of India (Allocation of Business) Rules, 1961.

6 The Constitution of India, list III, sch. VII.

7 T.K. Vishwanathan, *Legislative Drafting –Shaping the Law for the New Millennium* 70-71 (Indian Law Institute, New Delhi, 2007).

evil or may be for social welfare or to meet any challenge or menace posing threat to the society.

As per Justice Brijesh Kumar**,** in a society governed by rule of law, the only method to meet any kind of problem and odds or to achieve any social goal is only through law, the law which is essentially framed by the legislative draftsmen.[8] Thus, it is said that legislative drafting is both, science as well as art. The job is undoubtedly creative in nature. An architect is provided with a site and the requirements. He prepares the whole project, even the minutest details right from foundation designing to front elevation. Similar is the situation with a legislative draftsman. Social requirement to have a law, to meet any given situation is indeed reflected in the legislature.

The legislature indicates the purpose of the legislation to the draftsmen and the draftsmen are set at work doing the whole exercise of drafting the legislation. Any defect in designing, foundation or other important arches etc. may result in crumbling of the structure; similarly, any serious loophole or defect in the legislation may render it *ultra virus*, ineffective and void legislation.

These are the days of statutory laws. In past, unwritten laws held more and more of the field. In England, the common law and in India, ancient scriptures, schools of thoughts, usages and customs and unwritten laws generally governed the conduct of the society. The codification of laws started in England a few centuries ago. The laws initially were drafted by the judges and subsequently the job was taken over by the legislature. However, what was felt was that the laws drafted by the judges did suffer fewer drawbacks, with which the laws drafted by the legislature suffered. The emphasis is that legislature needs expertise and specialized skill in drafting.

The present-day situation is that there is an over-burden of written laws all around. With increasing complexities of day-to-day life, each activity is governed by one or the other legislation. Different states and the center have their own enactments which must be several thousands in number, if put together.

In these circumstances, it becomes all the more necessary that due attention is given to proper drafting of laws and also for the reason that a common man now comes in direct touch with the statutes which are no more a matter confined to Courts of Law alone.

A legislative draftsman has to be a very knowledgeable person and must have a grip over the Constitutional provisions. He must have good knowledge of substantive

8 Justice Brijesh Kumar, "Legislative Drafting" 2(5) *JTRI Journal* 1(1996).

laws as well, previous legislations and current pronouncements of the courts of law. He must also have in mind the likely needs of the future and how to provide some play in the provisions to cover such future exigencies without impairing the present purpose for the legislation.

It is true that it would be ideal to have legislation with simple language and short sentences providing clarity, but it is not so simple afterall. Different situations are to be met, making it necessary to make use of ifs and buts, exceptions, explanations and provisos etc. One would often find that a provision is so lengthy that by the time one reaches the last line or clause, he would forget how it had started. In the legal world, the words acquire special meaning. Their use becomes technical. Choice of words is thus a very important matter.

II. The Structure of an Act, the Form of a Law and its Constituent Parts

Structure of Acts Generally

Short Title

First, the title of the bill (which is subsequently to become an Act) is printed at the top. This is for purposes of reference and is short and catches the eye quickly. It is known as the short title. Example, the Transfer of Property Act, the Wealth-Tax Act, the States (Reorganization) Act.

Long Title

Then follows the long title. This gives an idea of what the Act proposes to deal with in a nutshell. It can be short or long depending upon matters which should be briefly referred in order to explain the main purport of the Act. For instance, the long title to the Transfer of Property Act, 1882 (4 of 1882) states simply that it is "An act to amend the law relating to transfer of property by act of parties."

First Section

The first section in all Indian enactments usually states:

(a) the short title,

(b) the extent of operation of the enactment, and

(c) its commencement.

Short Title Clause

The short title clause generally runs as follows – "This Act may be called the Transfer of Property Act, 1882."

Extent Clause

This generally deals with the territorial extent of operation of the Act. It may be couched in different forms – "This Act extends to the whole of India" or "This Act extends to the whole of India except the State of Jammu and Kashmir".

Commencement Clause

The Interpretation or General Clauses Act usually provides that an Act of Parliament shall commence (unless otherwise stated) on the day the Act is assented to by the authority specified for the purpose under the Constitution of the country or on the day on which such assent is first published in the official gazette. In this context a commencement clause becomes necessary only where the Act is to come into force on a later date or on different dates in different States or with respect to different provisions or retrospectively and so on.

An Ordinance which is an emergency measure, has to come into effect immediately on its promulgation and it is therefore customary for the Indian draftsman to say in respect of an Ordinance that it shall come into force at once.

Application Section

There are cases where an Act may have to be given extra-territorial application, that is to say, a law may have to be made applicable to citizens of India even when outside India, or to ships and aircraft registered in India wherever they may be or to territorial waters. In all such cases the practice is to have a separate section spelling out the application of the Act. The Penal Code of India, 1860, for instance, provides that its provisions apply also to any offence committed by "any citizen of India in any place without and beyond India, any person on any ship or aircraft registered in India, wherever it may be."[9]

Definition Section

The definition generally finds a place after the short title, extent and commencement section or when there is a special application section, after the application section. A draftsman would be well advised to have a glossary of terms, including words defined in the General Clauses Act, words which have received judicial interpretation and words which have been used in a certain sense in other Acts. This will enable him to decide whether the words he uses will be taken in the sense which he means or whether a special definition is necessary.

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9 The Indian Penal Code, 1860 (Act 45 of 1860), s. 4.

Numbering of sections, etc.

The sections of an Act are generally numbered by Arabic numerals. A section should be subdivided into sub-sections where they would otherwise be lengthy or complex.

Seven Practical Rules for Drafting Definitions

1. A definition should not include substantive matter.
2. Any reference in a definition to legislation should be precise and specific.
3. A word that is not used in an enactment should not be defined in it.
4. A definition should not be included if the word is already defined in the interpretation legislation.
5. A definition should not confuse or mislead the reader by stipulating outrageous or extravagant significations such as defining land to include a ship or table to include a chair.
6. A definition section should not indulge in avoidable and unjustifiable referential legislation.
7. Specific mention need not be made that the definition of a word is to apply to grammatical variations and cognate expressions.

Index

Salmond recommends that every Act of any length should be accompanied by an index, as well as by an analysis.[10] The latter would give an outline of the Act in the order of its clauses, but the index would be fuller, and, in consequence, would be most useful to our hurried legislators.

Marginal Notes

To every section, a marginal note or caption is generally attached. Such marginal notes are convenient for purposes of reference and when read together give a fair idea of the contents of an Act. They can also serve as tests to determine whether a given subject should be dealt with in one or more sections. For instance, if the marginal note becomes long or cannot be made distinctive without being long, the presumption would be that the subject matter should be dealt with in more sections than one.

10 T.K. Vishwanathan, *supra* note 7 at 172.

Attention should be paid to the framing of marginal notes. A marginal note should be short and distinctive. It should be general and usually in a substantial form, and should describe, but not attempt to summarize, the contents of the clause to which it relates. The marginal note often supplies a useful test of the question whether a subject should be dealt with in one or more clauses.

Amending Acts

A word may be said here about certain special types of legislation where an Act merely seeks to amend one or more laws already in force. The Indian practice is to draft the amendments in such a way as to get them incorporated into the principal Acts, and some such from as the following is used for the purpose – "For section 10 of the … Act, the following section shall be substituted," or "after section 10 of the … Act, the following section shall be inserted," and so on.

Proviso

A Proviso is used chiefly to express that something is not within the Act, or the clause, which, by possibility, might be supposed to be within it form its kindred nature; while an exception is employed to save from the operation of the law an object of the same species, which is included in terms in the same enactment.

III. Recommendations of Ilbert

Other important recommendations of Ilbert on drafting are as follows namely:[11]

(a) A long and complex clause should be cut up into sub-sections.

(b) When a Bill has passed into law it becomes an Act, and its clauses become sections. They should be referred to as sections in the Bill.

(c) Reference to another clause of the same Bill by its number should, if possible, be avoided.

(d) Each sentence should be as short and simple as possible.

(e) Where a rule is to apply only to a particular case or set of circumstances, it is usually most convenient to state the case or set of circumstances first and let the rule follow.

(f) Enumeration of particulars should be avoided.

(g) The language of a Bill should be precise, but not too technical.

(h) More words should not be used than are necessary to make the meaning clear.

11 Courtenay Ilbert, *Legislative Methods and Forms* 24 (Lawbook Exchange Ltd, USA, 2008); T.K. Vishwanathan, *supra* note 7 at 174-175.

(i) Different words should not be used to express the same thing.

(j) The same words should not be used with different meanings.

(k) The future conditional ("if he shall") should be avoided. The future 'shall' is apt to be confused with the imperative.

(l) The words 'herein', 'herein-before', and 'herein-after', are ambiguous. They may mean in this Act, or in this section, or in this group of sections.

(m) It is also common to use the expression 'the same' when referring to an antecedent or to antecedents.

An Act of parliament is intended to confer rights and impose duties and thus, it should be made clear on whom the rights are conferred, and the duties are imposed.

While drafting legislation, a draftsman has to be vigilant about whatever is connected with the matter, he is dealing with. This is a job which requires carefulness, awareness, thorough knowledge of law, procedural as well as substantive, the latest trend in the matter of interpretation of the statutes by the courts etc. He cannot have the liberty to be even slightly loose in use of words and language. Sometimes it happens that when we are drafting a legislation and are exhausted due to whole day of hard work, chances are there of some mistakes and lapses, that may be corrected when the matter is again taken for second and third reading. So, in a nutshell, legislative drafting is time taking and needs hard work on the part of the officer drafting the bill.

Lastly, following basic principles of legislative drafting should be kept in mind while drafting a bill:

- Shorter and small sentences should be preferred instead of long sentences.
- Words used should convey the same and one meaning.
- Simple and plain language should be preferred.
- Words should be used precisely and accurately in concise manner.
- Same words with same meaning must be used even in Amending Acts, for words already used for something.
- Repetition of words be avoided.
- Grammar used in sentences should be proper.
- Tense of the sentence should be taken care of.
- Complex words should be avoided.

Over-simplification of things may not be advisable, but simplicity and clarity of language are essential. Long sentences should therefore be split in to shorter and couched in simpler language.

The author feels that there is more requirement of organized and long-duration training course in legislative drafting on regular basis. Legislative drafting should be introduced as a subject of study in law universities in India. It will be highly beneficial and possibly it may lead to enactment of enhanced legislations.

HUMAN RIGHTS AND THE PRACTICE OF CROSS-REFERENCING BY DOMESTIC COURTS

Deepa Kansra[*]

Abstract

Domestic courts often quote foreign case law on human rights. The conversation pursued across jurisdictions through cross-referencing has added to globalization of international human rights standards. As the practice of cross-referencing is gaining ground and becoming a more permanent feature of domestic judgments, its relevance needs to be examined . A closer look at the practice will bring forth a more realistic understanding of the approaches of domestic courts and the advantages which they offer to the judicial institution.

This paper raises few questions on the value and influence of cross-referencing in the area of human rights. The questions posed are (a) whether cross-referencing is reflective of an emerging consensus on the subject matter? (b) Is it strategic for domestic courts to quote foreign case law? (c) Is the practice of cross-referencing simply a trend or an urge to belong to a community of courts? (d) Is the practice of relevance towards the implementation and advancement of international human rights standards?

The topic can shed light on broader themes including the *universality* of human rights, *contestations/disagreements* over human rights standards, and the measure of *acceptability* of international human rights standards within domestic settings. This paper discusses the practice in light of three judgments [of the courts of Nepal, India and Singapore] addressing the *human rights and homosexuality* agenda.

I. Introduction

HUMAN RIGHTS have acquired considerable strength since 1948. With the adoption of the Universal Declaration of Human Rights in 1948, the process of juridification in particular has contributed to the popularity of human rights, the

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process leading to the adoption of authoritative instruments like constitutions, constitutional amendments and human rights multilateral treaties.

Human rights as *standards* are placed in domestic, regional and international instruments. And human rights as *frameworks* can include a larger field of mechanisms and practices which further produce, monitor and enforce the standards adopted. Thus, the frameworks and specific standards can be international, regional or domestic. The application of the standards and the vibrancy of their use comes from the sites invested in the human rights cause. These sites, including social movements, organizations or courts, consistently facilitate the application as well as union of the international, regional and domestic human rights standards.[1] The sites involving multiple actors endorse and utilize available standards to attain human rights claims and objectives. Occasionally, it becomes a researcher's quest to ascertain *who is producing* or what is *the source* of the human rights standards?

The paper in particular views *domestic courts* as an active field wherein the creation, interaction and integration occurs. While pursuing their adjudicatory and interpretive functions, courts through the practice of cross-referencing facilitate the infusion of foreign standards [international– regional–domestic] into domestic situations.

II. Why Look at Cross-referencing?

Cross-referencing involves the practice of referring to global–regional–domestic human rights standards while deciding a matter. It is also referred to as the movement of legal norms and interpretations between different legal systems or a *global conversation* on human rights between courts across borders.[2] The practice can be viewed as giving *universal appeal* to domestic court judgments, making them an indispensable part of the common pool of jurisprudence on human rights.

While looking at the large field of case law on human rights, cross- referencing can be seen to occurs as follows:

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1 In this paper, the expression cross-referencing is being used to refer to the practice of referring to foreign case law while deciding a matter. The expression *global, regional & domestic standards* is being used to categorise human rights norms as adopted within (a) UN human rights instruments and the decisions of international bodies while interpreting and enforcing the instrument, (b) norms as provided under the regional human rights instruments and decisions of the regional human rights courts while interpreting the same, and (c) the judicial decisions of domestic courts while interpreting domestic laws. The interface and relationship between the three categories is complex and the subject matter of many debates and theories. In the paper, cross-referencing is being referred to as the practice of a domestic court referring to the decision of a foreign court (international, regional and domestic).

2 See Antje Wiener and Philip Liste, "Lost Without Translation?: Cross-referencing and a New Global Community of Courts", 21(1) *Indiana Journal of Global Legal Studies*, 263–296 (2014).

Situation 1: Domestic case/court: *Cross-referencing*—case decided by foreign domestic court.

Situation 2: Domestic case/court: *Cross-referencing*—case decided by regional human rights court.

Situation 3: Domestic case/court: *Cross-referencing*—decisions of international human rights treaty bodies.

Situation 4: All of the above, situations 1,2, 3.[3]

Any study on the practice and its influence, necessarily requires an in-depth analysis based on certain factors including (a) the stature of the deciding court (lower or higher court), (b) nature of the legal system (monist or dualist), (c) available precedents on the issue being decided by the court referring to foreign case law,[4] (d) the nature of obligations under human rights treaties of the state in whose jurisdiction the deciding court is situated, and (e) the human rights standard/s being referred to in the case. However, at this juncture, this paper makes a plain reference to three domestic cases to engage with the topic.

The paper, in the sections that follow, discusses three cases from different domestic courts.[5] The cases include *Sunil Babu Pant* v. *Nepal Govt.*[6] (Nepal), *Navtej Singh* v. *Union of India*[7] (India), and *Ong Ming Johnson* v. *Attorney-General*[8] (Singapore). The three cases have been selected because they cover (a) the agenda of human rights and homosexuality (*Sunil Babu Pant* covers homosexuals and the third gender), and (b) the use of international–regional–domestic human rights standards. The three judgments also expressly discuss the influence foreign decisions have had on the final outcome of the case.

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3 *Situation 5* can further be contemplated including non-judicial forums. For example, Investment Arbitration Tribunals and the practice of referencing regional human rights courts decisions. See Luis Gonzalez Garcia, "The Role of Human Rights in International Investment Law" (2013, *available at*: https://www.matrixlaw.co.uk/wp-content/uploads/2016/05/The-role-of-human-rights-in-international-investment-law.pdf (last visited on May 7, 2020).

4 Occasionally domestic courts decline to agree to the decision of a foreign court, if the latter conflicts with a precedent available on the matter. See *Kavanagh* v. *Governor of Mountjoy Prison* (Irish Supreme Court, 2002). The views of the Human Rights Committee were not adopted, against the decision of a domestic court. [2002] 3 IR 97.

5 Caveat- the cases are being referred to only for academic purposes and to the extent needed for the paper. They are amenable to review and being overruled in accordance with the laws and processes of the state of origin.

6 Writ No. 917, 2007.

7 (2018) 10 SCC 1.

8 [2020] SGHC 63.

III. Selected Cases

Sunil Babu Pant v. *Nepal Govt.*

In the case of *Sunil Babu* v. *Nepal Govt.*, a writ petition was filed under article 32 and article 107(2) of the Interim Constitution of Nepal 2063 v. (2007 AD).[9] The petitioners alleged violence and humiliation at the hands of society, state and organizations faced by LGBT persons.

The petitioners sought (a) issuance of an order directing the state for granting the citizenship certificate and to make the laws based on the principle of *equality of all persons*, (b) repeal of discriminatory laws, (c) provision for necessary legal and institutional arrangements immediately by drafting new laws with the appropriate participation of concerned people to protect the rights of those people who have suffered due to discrimination and violence, (d) appropriate compensation for those who suffer as a result of discriminatory activities and violence, and (e) the issuance of an order of mandamus and other appropriate order for the protection and acquisition of rights on the basis of the *constitution and laws, international law, precedents propounded by the Supreme Court in regard to the right to life of every person and other precedents, principles and values established by the United Nations in regard to human rights.*[10]

The present case is a detailed representation of the core issues pertaining to the *homosexuality and human rights agenda.* The court in clear and express terms cast a *duty*

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9 In the words of the court; article 107(2) has also granted the extraordinary power to this Court. Under this article, this Court imparts full justice by exercising its extraordinary power in situations given below: for the enforcement of rights conferred by the Constitution; or for the enforcement of any other legal right for which no other remedies have been provided or such remedies appeared inadequate or ineffective; or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern. Under the provision of article 107 (2)… this court may issue the appropriate orders and writs including habeas corpus, mandamus, certiorari, prohibition and quo warranto for the enforcement of the rights infringed. [See judgment]

10 On the applicability of international human rights law, the court responded as, "Nepal has shown its commitment towards the universal norms of the human rights by ratifying a significant number of international conventions for the protection of human rights. Nepal has already ratified the International Convention on Elimination of All Forms of Racial Discrimination, 1965, the International Covenant on Civil and Political Rights, 1966, the International Covenant on Economic, Social and Cultural Rights, 1966, the Convention on Elimination on all Forms of Discrimination against Women, 1979 and the Convention on the Rights of the Child, 1989. The provisions such as protection and promotion of human rights of the individual and elimination of all forms of discriminations have been accepted in these conventions. Being a party to these international treaties and conventions, the responsibility to implement the obligations created by instruments to which state is a party rests on the Government of Nepal according to the Vienna Convention on International Treaties, 1969 and the Nepal Treaty Act, 2047 (1991 AD)."

on the state as emanating from both international human rights law and the developments in other state jurisdictions. The court writes:

> …international practices should be gradually internalized in regard to the enjoyment of the right of an individual in the context of changing global society and practices of respecting the rights of minority. If we continue to ignore the rights of such people only on the ground that it...might cause social pollution, our commitment towards respecting human rights will be questioned internationally.

The court refers to several foreign courts and studies. On the question of discrimination based on sexual orientation, the Nepal court refers to the South African Constitutional Court, stating:

> the interpretation made by the South African Constitutional Court ensuring such human rights to the third sexes also may be taken into consideration in our context. The Constitutional Court has construed that no person can be subjected to discrimination on the ground of sexual orientation which includes the third genders as well. Further, in the judgment, the court writes: the interpretation made by the Constitutional Court of South Africa on equal protection of the homosexuals and the people of third gender seems significant in this regard [on the issue being decided by the Nepal court].

Also, on the discussion on gender identity, reference is made to the High Court of the United Kingdom, Supreme Court of the United States and the regional European Court of Human Rights.

On the issue, whether the petition before the court falls in the category of Public Interest Litigation, the Nepal court refers to the Indian Supreme Court case of *S.P. Gupta* v. *Union of India*. The Nepal court writes:

> *SP Gupta* is significant in regard to the issue of public interest litigation where the constitutional or legal questions are involved for settlement. The judgment in this case should be considered as a model for the concept of public interest litigation.[11]

11 The following paragraph from *SP Gupta Case* is cited "...where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction or order."

In reference to the *S.P. Gupta* case, the Nepal Court writes:

> this writ petition, which is filed for the rights and interest of their group which represents the homosexuals and third genders on the issues of gender identity and sexual orientation by protesting the behavior of the state and the society towards them, seems within the scope of public interest litigation. [12]

Other references include the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity; the Report of the High Commissioner for Human Rights on Gender Minorities in Colombia; and the Report on Sexual Orientation and Gender Identity in Human Rights Law, published by the International Commission of Jurists.

In its decision, the court set up a Committee to study the legal provisions and practices of other countries regarding gay and lesbian marriage. The committee's mandate was to propose recommendations to the Government of Nepal to make appropriate legal provisions on the matter.[13]

Navtej Singh v. *Union of India*

In the case of *Navtej Singh* v. *Union of India*[14] the question before the Indian Supreme Court was the constitutionality of section 377 of the Indian Penal Code (IPC). The constitutional validity of a part of the provision due to which consensual sex among adult homosexuals in private was also penalized was subject to challenge. Section 377 criminalised carnal intercourse against the order of nature with any man, woman or animal, irrespective of the conduct being voluntary or involuntary.

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12 In addition to the *locus standi* issue, other issues before the court included;

a. What is the basis of identification of homosexual or third gender people?

b. Whether it happens because of the mental perversion of an individual or such characteristic appears naturally.

c. Whether or not the state has meted out discriminatory treatment to the citizens whose sexual orientation is homosexual and gender identity is third gender

13 On the developments since *Sunil Babu case* provisions under the new Constitution can be seen. Also see AJ Agrawal, "Trans Rights in Nepal: Progress and Pitfalls", *Centre for Law and Policy Research* (July 2020), *available at*: https://clpr.org.in/blog/trans-rights-in-nepal-progress-pitfalls/ . (last visited on May 7, 2020).

The author maps the progress made on the LGBTQI agenda since the *Sunil Babu Pant Case* under the New Nepal Constitution, 2015. Emphasis on the amendments been made to various forms including immigration forms, census data collection forms, passports and citizenship certificates. Also, pending legislative and other reforms.

14 (2018) 10 SCC 1

The Indian court in its decision concluded that alleged unnatural sex between two male, two female and male and female has been *decriminalized*, provided the conduct qualifies three elements; it is between adults; it is voluntary and it is in private. In other words, *actus reus* of unnatural sex is recognised as criminal in three situations, (i) any sexual conduct described under section 377 between non-adults (below the age of 18 years) even if it is voluntary and consensual [maturity rule]; (ii) If such conducts are forceful, non-consensual, or involuntary; they are still penal [harm rule]; and (iii) Any sexual conduct with animal is still penal even if an adult is involved in it [lack of consent rule and manifest morality rule].

The Indian court in reaching the above conclusion made reference to the decisions of foreign domestic courts, regional courts,[15] and international treaty bodies.[16] The domestic courts whose decisions were referred to included that of the United Kingdom, the Supreme Court at the Philippines,[17] the Constitutional Court of South Africa,[18] the United States Supreme Court,[19] Canadian courts,[20] etc. The case of *Navtej Singh* has been widely quoted as being a landmark on the agenda of *decriminalization of homosexuality*. The case relies on foreign material, i.e., existing human rights jurisprudence on the de-criminalization of homosexual conduct between consenting adults based on human rights principles and rights including privacy, freedom and non-discrimination. *Navtej Singh* sheds light on the consistent

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15 The European Court of Human Rights was quoted as follows; "…although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved…"

16 In particular, the Indian court refers to the international treaty body- Human Rights Committee under the International Covenant on Civil and Political Rights [*Toonen Case*- HRC- "laws used to criminalize private, adult, consensual same-sex sexual relations violate the right to privacy and the right to non-discrimination".]

Further, Indian court refers to the *Yogyakarta Principles* on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. On the Yogyakarta Principles the court writes; "these principles give further content to the fundamental rights contained in Articles 14, 15, 19 and 21, and viewed in the light of these principles also, Section 377 will have to be declared to be unconstitutional."

17 The Philippines Court is referred to in the context *freedom of expression*, interpreted to be inclusive of *freedom of expressing one's homosexuality* and the *activity of forming political associations* that support LGBT individuals.

18 The South African Constitutional Court's theory in *National Coalition for Gay and Lesbian Equality and another* v. *Minister of Justice* [1998].

19 US cases are quoted in light of issues including the *freedom of choice for homosexuals* as protected under the US Constitution, and *practices of discrimination* at the workplace based on their sexual orientation.

20 Cases from Canada are discussed to highlight that an act of *discrimination includes harm and potential harm to the dignity of gay and lesbian individuals.*

efforts made across jurisdictions to revisit colonial laws/provisions under the *homosexuality and human rights agenda*.[21]

IV. Universality of Human Rights

The above two decisions [*Sunil Babu Pant* and *Navtej Singh*] shed light on few merits of the practice of cross-referencing:

1. *On the universality of human rights*: Cross-referencing by the courts can be viewed as cutting across historic, regional and cultural affiliations; the same reflecting and advancing the *universalistic characteristics* of human rights standards.
2. *On the inclusiveness in decisions*: The practice is making the approach of domestic courts suitably *inclusive* and much *informed* about the available cross jurisdictional interpretations.
3. *On common jurisprudence*: Cross-referencing is creating a pool of common jurisprudence on human rights standards.
4. *On consensus across jurisdictions*: Cross-referencing involves the inclusion of specific human rights standards in the decisions of many courts of different jurisdiction, elevating those standards to a position of being backed by consensus and also influential in decision making.[22]

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21 De-criminalization of certain kind of conduct has been an important domestic reforms agenda, also widely discussed by courts. The universal appeal of the agenda is paving way for a more concrete understanding of an emerged *human right against criminal sanctions*.

For a discussion on the pursuit of domestic legal reforms towards de-criminalization, see Agnes Binagwaho, Richard Freeman, *et.al*.,"The Persistence of Colonial Laws: Why Rwanda is Ready to Remove Outdated Legal Barriers to Health, Human Rights, and Development", 59 *Harvard International Law Journal* (Spring 2018). In the paper, the authors in context of reforms in Rwanda write, "a post-colonial nation can only restore its full sovereignty once it frees its legal system from undemocratic colonial remnants, now outdated, that hinder progress." Also, every colonial law, no matter the content, is in conflict with certain provisions of Rwanda's Constitution, just by virtue of its ignoble provenance. They offer four reasons why colonial laws conflict with the constitution. Two can be cited here for relevance, first, "laws imposed by foreign sovereigns, which were designed to promote oppressive policy objectives, and which are not the product of the Rwandan democratic process, reflect an unconstitutional infringement on the Republic's sovereignty by a past colonial power. Second, even if a law is not unconstitutional on its face, because it was designed to advance a discriminatory colonial scheme, its underlying public policy is tainted by an unconstitutional objective…"

22 Mallika Ramachandran, "Indian Courts' Reference to the Work of the Committee on Economic, Social and Cultural Rights", *Classroom Series: Reading Human Rights* (November, 2020). The author looks at the use of the *minimum core standard* as defined by the Committee on Economic, Social and Cultural Rights in many of its decisions under the ICESCR. The author cites domestic cases using the *minimum core standard* including *Mohd. Ahmed* (Minor) v. *Union of India* [decided 17 April 2014, Delhi High Court], and *Ajay Maken* v. *Union of India* [decided 18 March 2019, Delhi High Court], *available at*: https://www.betheclassroomseries.com/post/indian-courts-reference-to-the-work-of-the-committee-on-economic-social-and-cultural-rights (last visited on May 7, 2020).

5. *On new standards*: Cross-referencing can be seen as introducing a field of new rights e.g. the right against *criminal sanctions* or criminalization, as seen in the *Navtej Singh* case. [23]

Taking into consideration the above points, it can be argued that cross-referencing by domestic courts is *sustaining* and advancing the *universalization of human rights* standards and interpretations. While the task of generalization is easier, the complexities and uncertainties in the process of adjudication and interpretation by domestic courts cannot be ignored. Awareness of the same may assist in understanding the true import of cross-referencing in context of human rights. Many questions become important, including whether there are different approaches coming from different courts while citing foreign cases? Is the practice of cross-referencing sufficient to argue that there exists an *emerged consensus* on the subject

23 The de-criminalization agenda within the international human rights framework is not limited to only homosexuality or LGBT claims. Other claims including women's right to abortion, de-criminalization of adultery etc. In particular, the de-criminalization of adultery agenda has been an equally important human rights agenda at the domestic, regional and international platforms. At the international level, the de-criminalization of adultery agenda has been advanced by UN treaty bodies including the Human Rights Committee under the International Covenant on Civil and Political Rights. Under the United Nations Special Procedures (Special Rapporteurs, Independent Experts, Working Groups) the Working Group on the issue of Discrimination against Women in Law and in Practice in 2012 issued a Statement titled *adultery as a criminal offence violates women's human rights* [Frances Raday, Chair of the WG on Discrimination against Women]. The above statement highlighted the works of the Human Rights Committee—ICCPR, the Committee under the ICESCR and the CEDAW Committee indicating that laws criminalizing adultery as obsolete and discriminatory legislations. Quoting from the Statement, "the experts on the Working Group emphasized that the criminalisation of sexual relations between consenting adults is a violation of their right to privacy, infringing the International Covenant on Civil and Political Rights, as established almost two decades ago by international human rights jurisprudence… Maintaining adultery as a criminal offence—even when, on the face of it, it applies to both women and men— means in practice that women will continue to face extreme vulnerabilities, and violation of their human rights to dignity, privacy and equality, given continuing discrimination and inequalities faced by women". The de-criminalization agenda is still active and influential at both international and domestic platforms. Several domestic courts have responded and advanced the agenda. In context of reforms in Indonesia, Panjaitan writes; "there has been continuous trend throughout the world of countries reforming and abolishing often archaic laws criminalizing adultery. In 2018, India made the move of abolishing its colonial-era adultery law. The Philippines is now currently revising its Penal Code and one of the key considerations in the discussions is the abolition of the provisions on adultery. Indonesia now has the opportunity to step up and assert itself as a progressive leader in Asia in eliminating discrimination against women by removing the provision criminalizing adultery in its draft Penal Code." See Ruth Panjaitan, "On decriminalizing adultery in Indonesia" International Commission of Jurists- Advocates for Justice and Human Rights", *available at*: https://www.icj.org/on-decriminalizing-adultery-in-indonesia/ (last visited on May 7, 2020).

matter? Is it strategic for domestic courts to quote foreign case law or are they bound to do so? Are all human rights received equal attention?

While all of the above is not discussed in this paper, a few arguments can be made to identify gaps in accepting the *universalization of human rights* role of cross-referencing. Continuing on the homosexuality and human rights agenda (*Sunil Babu case* and *Navtej Singh Case*), the following case of *Ong Ming* (2020) adds further to the discussion on cross-referencing.

V. Contesting the Universality

The practice of cross-referencing highlights the human rights standards on which domestic courts across jurisdictions agree. At the same time, the position of *disagreement* or *contestation* with foreign court decisions cannot be overlooked. Greater evidence on *disagreement* with foreign court decisions (international–regional–domestic) potentially opens for further discussion, yet again, the *role* and *influence* of domestic courts in the application and promotion of human rights standards.[24] The point can is illustrated in the case of *Ong Ming Johnson* v. *Attorney-General*.[25] The *Ong Ming* case was decided by the Supreme Court of Singapore. In that case, in question was the *constitutionality* of section 377A of the Penal Code. Section 377A provides, any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years. The section includes all forms of male homosexual activity including penetrative and non-penetrative sex, whether in public or in private and with or without consent. In the words of the Singapore court, the section was intended to "safeguard public morals generally and enable enforcement and prosecution of all forms of gross indecency between males."

The petitioner in the case argued that section 377A is inconsistent with the provisions of the Constitution (Article 9(1), 12(1), 14(1)(a)), and that the criminalisation of sex between men limited the ability of homosexual men to freely express their sexual orientation and exchange ideas pertaining to sexuality and sexual orientation. The petitioners also sought the re-consideration of a previously decided case of *Lim Meng Suang CA* (on the purpose and objective of 377A), in light of recent international judicial developments. While addressing the various arguments raised, the court upheld the validity of the said provision, stating that "the provision continues to

24 See Raffaela Kunz, "Judging International Judgments Anew? The Human Rights Courts before Domestic Courts", 30(4) *The European Journal of International Law* 1129–1163 (2019).

25 [2020] SGHC 63.

serve its purpose of safeguarding public morality by showing societal moral disapproval of male homosexual acts."[26]

The case can be seen to expressly illustrate the position of contestation over the *human rights and homosexuality agenda*, as has been previously discussed in the paper in light of the *Sunil Babu Pant* and *Navtej Singh* cases. The case highlights the *contested universality* aspect of cross-referencing for two reasons;

a. Disagreement with foreign case law is central to the *Ong Ming* decision

The court in *Ong Ming* refers to the Indian case of *Navtej Singh* v. *Union of India*[27], which involved the same subject matter of *de-criminalization of homosexuality*. O*ng Ming* refers to *Navtej Singh* and expressly disagrees with the decision of the Indian court.

The disagreement is expressed in the following words;

> a similar point may be made in addressing Navtej, where the Supreme Court of India ruled that the criminalization of male homosexual conduct violates, among other rights, the right to freedom of expression. I am unable to agree with the reasoning of the Indian Supreme Court given that the court appeared to have accepted a wider meaning of what constitutes "expression", extending beyond verbal communication of ideas, opinions or beliefs … An expansive interpretation can potentially lead to absurd outcomes.

b. Challenge to the validity and binding nature of international human rights standards is central to the *Ong Ming* decision[28]

Although outside the scope of this paper, the case also expresses disagreement over the widely cited principles called the *Yogyakarta Principles on Sexual Orientation and Gender Identity* [also referred to in the *Navtej Singh* and *Sunil Babu* cases, discussed earlier]. The *Yogyakarta Principles* have been quoted, referred to and relied on by domestic courts world over. The judgment of the court in *Ong Ming* puts into perspective the questions related to the validity and applicability of the principles. On this point the court writes;

> reference was also made [by the Indian Supreme Court] to the Yogyakarta Principles in arguing that the right to freedom of

26 The court considered the points raised by the petitioners including the non-enforcement of the said provision and the redundancy of section 377A.

27 (2018) 10 SCC 1.

28 The case also involves a discussion on the validity of decisions of the Human Rights Committee under the ICCPR and the European Court of Human Rights on the *proportionality test*.

> expression extends to one's expression of sexual identity. The Yogyakarta Principles are, however, of limited assistance or relevance in the present case. With only 29 signatories to date, less than one-sixth of the 193 current member states of the United Nations have subscribed to them. Singapore is not one of the 29 signatories. The plaintiffs are attempting to establish a rule of customary international law that the right to freedom of expression necessarily encompasses one's expression of sexual identity. However, the requirement of widespread state practice is plainly not met. Such a rule must first be clearly and firmly established before its adoption by the courts.[29]

The *Ong Ming* Case illustrates and opens for discussion the sphere of *disagreements* with foreign case law within domestic court judgments. The disagreements within judgments necessitate a re-visit to the perceived *universal acceptance or consensus-based quality of* human rights standards.

V. Final Points

It is undisputed that cross-referencing enhances the position of the interpreter by opening up a wide range of arguments and legal possibilities. Also, cross-referencing of international–regional–domestic standards has become an indispensable part of the process of deliberation, engagement, and conflict resolution in the field of human rights.

In this paper, a few selected cases were discussed in order to make broader generalization about cross-referencing and human rights. However, a more detailed appraisal of the general trends and variations in cross-referencing is *much needed* for a more constructive understanding of (a) the *extent* to which domestic courts are contributing towards the *universality* and *consensus quotient* of human rights standards, (b) what practices advance and promote the international human rights agenda.

In conclusion, while viewing domestic courts as an active site involved in the use and application of human rights standards, one may consider and also test the following;

- First, a single domestic case can be representative of a certain reality about human rights;

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29 The validity and applicability of the Yogyakarta Principles has been open to question in many contexts. See Piero A. Tozzi, Report-*Six Problems with the "Yogyakarta Principles*", Catholic Family and Human Rights Institute, Washington-New York, 2007. In the brief, Tozzi posed a challenge to the universality and normative character of the Principles. The report stated that the principles endorse the views of *narrow group of self-identified "experts"* and are *not binding in international law* for they have not been negotiated nor agreed to by member states of the United Nations.

- Second, a single case can be determinative of the consensus or contestations on human rights standards;
- Third, interpretations handed out by domestic courts are a resultant of several complex factors. These factors may influence the court directly or indirectly. The factors may include international events or formal political commitments that lie outside the jurisdiction of the court;
- Fourth, the practice of cross-referencing is more closely tied to the adjudication and interpretation of domestic laws/situations than to external situations;
- Fifth, disagreements within foreign case law cast a shadow on the perceived *universal acceptance and application of* human rights; and
- Sixth, *domestic courts* are active contributors to the pool of international and regional human rights standards.

LITIGATING FOR FUTURE: CLIMATE CHANGE LITIGATION

Arindam Basu & and Sharda Mandal[*]

Abstract

Climate change, being a complex problem cuts across several stages of governance, laws and areas of economy. It has developed its identity from focused approaches that precisely cover issues directly linked to the effects of greenhouse gases. Today, climate victims all over the world continue to approach judiciary in search of viable solutions and as of now, United States has remained a hotspot for such litigation. However, climate claims have grown significantly in Asia, the Pacific and Europe too over the last decade. As a vigilante, Indian judiciary is in constant process of improving the environmental laws and policymaking of the country by expanding the horizon of environmental rights. In 2017, *Ridhima Pandey* v. *Union of India*, filed before the National Green Tribunal (NGT), the Green Court of the country, was presented with an opportunity to look into governmental actions that supposedly are to be designed for the improvement of the climate and in general for environment of the country. When NGT dismissed the petition quickly, the petitioner preferred an appeal before the Supreme Court where is awaiting its hearing. There are reasons to believe that NGT has erred in its finding and failed to appreciate the rapid evolution of climate change movement all over the world. Additionally, the decision has provided blanket sanctity to the decision-making processes of the government and its environmental wings that historically are marred by significant criticism for not doing enough to protect country's environment. Keeping NGT's decision in *Ridhima Pandey* at the central point, this paper aims to evaluate the role of Indian judiciary in addressing climate change litigation while tracking the development of climate claims across the nations.

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I. Introduction

AMIDST THE unprecedented bedlam produced by Coronavirus epidemic, the battle against climate change is lumbering ahead. For instance, when in Canada, hit by dwindling demand for fuel, oil and gas companies started to push the government for less stringent environmental regulation,[1] one can assume that the time is rife for a new kind of debate – a debate that will surely shape over novel climate related claims and anti-claims in days to come. This is not purely a conjecture, that environment is going to receive maximum amount of paybacks when entire human race has been fighting for survival. Currently, with global industrial and economic lockdown the emission of anthropogenic gases is at all-time low. How far such restriction will heal the century old rapture that we have caused to the natural environment, at least to certain extent, after offsetting the colossal anthropogenic momentum, is yet to be assessed. But surely, far from any prophetic aspiration, the courts all over the world will be called upon to consider new evidence in already pending and future climate change litigations.

Thus, by far, the history of climate change litigation reveals before us a fluctuating jurisprudence. Traditionally, climate claims are aimed to test the fairness and validity of the decisions taken by the government agencies. Activities of the private entities are also frequently challenged before the court. Though, the outcomes are not easily comparable in all countries where these claims are preferred, these lawsuits are undoubtedly leaving profound marks on environmental regulations in those countries through judicial directives and indirectly by persuading corporations to alter their behavior.[2] Up till now, the number of climate change lawsuits is on the rise, covering almost 25 countries across the globe and at the first half of 2020 the litigation trend is slightly tilted towards the rights-based approach.[3]

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1 The full story is available at Damian Carrington, "Polluter bailouts and lobbying during Covid-19 pandemic" *The Guardian*, *available at*: https://www.theguardian.com/environment/2020/apr/17/polluter-bailouts-and-lobbying-during-covid-19-pandemic (last visited on May 8, 2020).

2 *See* Jacqueline Peel and Hari M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* 2 (Cambridge University Press, New York, 2015).

3 *See* Major Daniel Metzger and Hillary Aidun, "Major Developments in International Climate Litigation in Early 2020" *Climate Law Blog*, *available at*: http://blogs.law.columbia.edu/climatechange/2020/03/12/major-developments-in-international-climate-litigation-in-early-2020/ (last visited on April 26, 2020).

India's experience with climate change litigation is still fresh, when in January, 2019, National Green Tribunal (hereinafter "NGT"), the green court of the country, dismissed the petition filed by Ridhima Pandey, a teenager, seeking judgment against the government for not taking sufficient steps to control the menaces of climate change. NGT dismissed the petition by stating that "there is no reason to presume that Paris Agreement and other international protocols are not reflected in the policies of the Government of India or are not taken into consideration in granting environment clearances".[4] The case has been appealed and currently pending before the Supreme Court for further hearing. The decision of the NGT, standing at the vanguard to protect India's environment, is far from satisfactory. There are reasons to believe that NGT has erred in its finding and failed to appreciate the rapid evolution of climate change movement all over the world. Additionally, the decision has provided blanket sanctity to the decision-making processes of the government and its environmental wings that historically are marred by significant criticism for not doing enough to protect country's environment.

While, climate change litigation is a convenient name given to the already existing adversarial legal proceedings, in India the vocabulary creates a prospect for pluralist dialogue among various stakeholders.[5] Its central doctrines, hence, may be realized noticeably without losing or moving away from dominant approaches. This paper explores such spontaneous dialect in the backdrop of NGT's decision in *Ridhima Pandey*.

The paper is divided into two parts. The first part introduces the topic with necessary information to create pertinent backdrop for discussion. This covers a short description of various types of climate claims, the requisites to bring such claims before the adjudicating authorities and synopses of few important cases. The second part discusses the Indian position in the chart of climate change litigation with the comments on NGT's dismissal of *Ridhima Pandey*. The discussion proceeds to analyze India's climate obligation under international law to understand the future of climate change litigation in the country. The last segment concludes the paper.

II. The Short History Climate Change Litigation History

This part provides the necessary motivation to the main discussion. The discussion is mainly focused upon the variety of climate claims and their legal requirements. The international aspects of climate change litigation are also briefly touched upon.

4 *Ridhima Pandey* v. *Union of India*, Original Application No. 187/2017 (date of hearing: 15.01.2019).

5 In India such possibility exists already on paper through different policies and laws.

A. Varieties of Climate Change Litigation

There may be two general categories of climate change litigation, *i.e.,* strategic cases and routine cases. Strategic cases cover those cases where petitioners try to bring accountability in public and private actions that supposedly have negative ecological consequences. These conflicts usually are well covered by media and typically are high profile in nature because of the direct involvement of development-conservation controversy. The other category is comparatively delicate as cases cover a more long-term and transnational plea for greenhouse gas regulations.[6]

There may also be claims that are mainly brought to extend the purview of human rights, property rights or civil rights to offer protection to individual or public against the negative impacts of climate change. Additionally, some claims may be brought against the governments requiring publishing and disseminate scientific data and to generate awareness.[7] But strictly speaking these cases are the subset of the larger categories and only add more complexities in the proceedings.

We may further sub-divide the claims into two additional categories - specific claims against corporations and against individuals. Claims against corporations comprise liability claims while asserting that GHGs emissions or insufficient measure taken by a corporation resulted in property damage or economic loss or personal injury. Claims against corporations may also include enforcement actions against 'green-washing' and flouting with regulatory norms. The claims against individuals mostly include either an individual's involvement in climate change protests or alleged noncompliance with climate-related regulations.[8]

B. The Identity and Existence

As a complex problem, climate change cuts across several stages of governance, laws and areas of the economy.[9] According to Chris Hilton, an expansive approach would force us to consider nearly all litigation as climate change litigation, given that climate change is the consequence of billions of everyday human actions, personal, commercial and industrial.[10] Yet it has developed its identity from more

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6 *See* Joana Setzer and Rebecca Byrnes, *Global trends in climate change litigation: 2019 snapshot,* London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science (2019).

7 *See* Meredith Wilensky, "Climate Change in The Courts: An Assessment of Non-U.S. Climate Litigation" 26 *Duke Environmental Law & Policy Forum* 136-142 (2015).

8 *Ibid.*

9 *See* Peel and Osofsky, *supra* note 2.

10 *See* Chris Hilson, Climate Change Litigation in the UK: An Explanatory Approach (Or Bringing Grievance Back In), *available at*: http://www.venuereading.com/web/FILES/law/Milan_Climate_Change_Litigation_in_the_UK_v2.pdf (last visited on May 8, 2020).

focused approaches that specifically encompassed issues directly linked with the effects of greenhouse gases. Looking from the other angle, it stands on a convenient expression either 'influencing of be influenced' by already tried and tested methods. It certainly depends on how litigants decide to take up the matter to the court.

According to Justice Brian Preston, as climate change litigation is becoming frequent phenomenon across many varied categories of law, it is likely that the avenues used to litigate climate change related issues will continue to rise. Yet because of the sensitive precedent-bound nature of judge-made law it runs the risk of becoming unsuccessful more often than not.[11] This has long been a problem area for litigants. Their efforts to shift the burden on major GHGs emitters are regularly questioned on the ground of proper standing.

For instance, in *Comer* v. *Murphy Oil USA Inc.*[12] residents of the Mississippi Gulf Coast alleged that many companies operating with fossil fuel, energy, chemical products added to strength of Hurricane Katrina by indiscriminate emission of GHGs. They demanded damages for their losses along with claims for unjust enrichment, nuisance and negligence. But it did not appeal the court and it rejected the claims on the political question doctrine. Similarly, in *Kivalina* v. *Exxon Mobil Corp.*[13] residents of the city of Kivalina brought allegation against some oil, energy, and utility companies for contributing to the cause of global warming through their intensive operations. The Ninth Circuit affirmed the decision of the district court that initially dismissed the suit on the ground of political question.

Within such undesired results, at least one early case demonstrates optimism. *Massachusetts* v. *EPA* has in every sense a milestone. In 1999, some private organizations[14] approached the court with a request that it should direct EPA to issue rules for regulating harmful greenhouse gases emitted by new motor vehicles. The EPA's response was typical as it said that it did not have authority to do so and greenhouse gases were not "air pollutants" classified under the Clean Air Act. Additionally, it contended that there was lack of causal link between greenhouse gasses and global working and scientific evidences were unsatisfactory. So, it would be unwise to embark on regulation. After the denial of D.C. Circuit to assess of EPA's action the case landed in the Supreme Court for review. The Court first held that Massachusetts had standing to seek review of EPA's denial of the rulemaking petition in light of the harms global warming could cause that State, including

11 *See* Nicole Rogers, "Climate Change Litigation and the Awfulness of Lawfulness" 38 *Alternative Law Journal* 23-24 (2013).

12 *Comer* v. *Murphy Oil USA*, *Inc.*, 718 F.3d 460 (5th Cir. 2013).

13 *Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012).

14 *Massachusetts* v. *EPA*, 549 U.S. 497 (2007).

submersion of State-owned property on the coast due to increase in ocean levels. The Court then held that under the language of the Clean Air Act, EPA has the authority to regulate greenhouse gases as "air pollutants."[15]

C. Claims and Standing

'Legal standing' simply denotes that one must convince the adjudicating forum to hear his case. In other words, the benchmarks, typically differ from country to country, are set to assess whether the parties are having enough interest in the case and the matter is likely to be justiciable. Standing at it is sometimes called *locus standi* may pose substantial challenge to climate change litigation. For example, it is fairly common in climate change lawsuit that plaintiff finds it difficult to establish causal link between the cause and the effect.[16]

In the United States, where standing requirement, play vital role in climate change lawsuit, defendants successfully thwart number of lawsuits from proceeding to the merits stage.[17] Also, for many years, the lack of scientific consensus in support of climate change or global worming actually served the defendants well in dismissing climate suits on the ground of scientific uncertainty. They just successfully established that the possibility of harm was too remote and perhaps non-attributable to the cause. But such uncertainty has given away for a more pragmatic approach over the period of time and the scientists in general now accept the truth of climate change. Hence, the new strategic litigations rely mostly upon the latest scientific study such as IPCC's Assessment Report.[18]

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15 A summary of the case is *available at*: https://www.justice.gov/enrd/massachusetts-v-epa (last visited on May 10, 2020); The story behind the case was of Joe Mendelson's, an uncompromising lawyer, who boldly took the matter before EPA in October 1999. Despite pressure to stand down, he kept on and convinced organizations like Sierra Club and Greenpeace to join on board with him. The group challenged Bush administration and EPA to court. For further discussion on thus beautiful story. *See* generally Richard Lazarus, *The Rule of Five: Making Climate History at the Supreme Court* (Belknap Press: Harvard, 2020).

16 *See* UN Environment, *The Status of Climate Change Litigation: A Global Review* 28 (United Nations Environment Programme, Kenya, 2017).

17 The most common defense in US has been to challenge the court's jurisdiction by raising standing and political question doctrines. To maintain checks and balances, many safety measures were incorporated in the United States Constitution by its framers. One such measure article III's case or controversy requirement. For further discussion *see* Geetanjali Ganguly, Joana Setzer, *et.al.*, "If at First You Don't Succeed: Suing Corporations for Climate Change" 38(4) *Oxford Journal of Legal Studies* 847 (2018); *See* also Ian R. Curry, "Establishing Climate Change Standing: A New Approach" 36 *Pace Environmental Law Review* 299-300 (2019).

18 There are quite a few IPCC Reports that have painted grim reports. Latest one is Fifth Assessment Report. Other special reports are also published periodically to take stock of the situation in short term basis. *Urgenda Foundation* v. *the State of the Netherlands* (discussed in the next section) is a good example where court, even is a domestic arena, showed reliance on the IPCC reports as undeniable evidence of climate change.

Legal standing in other parts of the world is adequately nuanced to include the claims of downtrodden people who often rely on their constitutional entitlements, especially fundamental rights. Therefore, the parallel is not obvious. In US, the birthplace of climate change litigation, constitutional provisions are often used to frustrate the litigation and in 'so called' developing world the constitutional provisions are considered as the cornerstones to support the claims of the victims. *Leghari* v. *Federation of Pakistan* (discussed in the next section) amply demonstrates the point. The standing issue, however, does not present the same procedural challenge when statutes contain specific standing provisions. For example, in India, most of the major environmental statutes contain citizen's suit provision that allows the victim to file a suit directly to the appropriate judicial forum.[19]

D. Expansion and Prospecting

The uncertainty over legal standing, however, failed to dampen the spirits of the litigants. The growing number of cases is the clear proof of that. Particularly, the courts outside the United States have been more sympathetic to this type of claims. The list is growing rapidly, and some are worth mentioning.

On June 24, 2015, the Hague District Court gave a historic judgment in *Urgenda Foundation* v. *the State of the Netherlands*,[20] scripting the first successful climate change litigation in the country. The District court of Hague had to think out of the box and before them there was a question that they never faced before – the Dutch government was not doing enough for tackling problems of climate change. A declaratory judgment and injunction were sought for to compel the Dutch government to reduce GHG emissions. The Court nodded affirmatively by ordering the Dutch state to limit GHG emissions to 25% below 1990 levels by 2020.[21] The Dutch government went to appeal. On October 2018, the District Court's decision was upheld by the Hague Court of Appeal and the matter went bad to worse for the government as the Court settled that government's failure to reduce GHG emissions was in breach of its duty of care under articles 2 and 8 of the ECHR.[22] Subsequently, in December 2019, drawing the last line against the Dutch Government, the Supreme Court of the Netherlands upheld the Appeal Court's decision.

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19 For Example, Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1974 and the Environment (Protection) Act, 1986.

20 *Urgenda Foundation* v. *The State of the Netherlands (Ministry of Infrastructure and the Environment*), C/09/456689/HA ZA 13-1396 (2015).

21 The Court found that government's existing pledge to reduce emissions by 17% insufficient to meet the state's fair contribution toward the UN goal of keeping global temperature increases within two degrees Celsius of pre-industrial conditions. *Ibid.*

22 The European Convention on Human Rights, arts. 2 and 8. Simultaneously deal with right to life and right to respect for private and family life.

On the other side of the world, a farmer in Pakistan had courage to challenge the Pakistan government for not implementing country's National Climate Change Policies. Not much hyped as *Urgenda*, the *Leghari* v. *Federation of Pakistan*[23] marked the new era in Pakistan's environmental law. Though, the core issue in *Leghari* was the governmental failure, the claim was compellingly coupled with the violation of claimant's fundamental rights under the Pakistan Constitution.[24] The two orders of the Court made it clear that the fundamental rights of the people of Pakistan was undeniably violated because of lethargic attitude of the State towards its climate change policies. The Court ordered to create a climate change commission to look after the issue and when it was done, kept a tight leash on its activities. The battle ended in 2018 when the Court felt satisfied with the work of commission.[25]

Today, though more and more domestic courts are called upon to adjudicate on climate related issues, often outcomes are less than desirable for many claimants. Even so, the enthusiasm is spiked significantly in last few years. For example, in United States *Juliana* v. *United States*[26] was started in 2015. The case over the time, gained prominence and became the point of global attention. *En route* to meet the hostility from 9th Circuit, the case to the surprise of many, survived several motions for dismissal initially. The plaintiff, a teenager, represented by the non-profit public interest law firm Our Children's Trust, asserted that the government violated the principle of public trust doctrine and failed to respect constitutional rights to life, liberty, and property by showing inaction towards the regulation of GHGs and hence had failed protect the climate for the present and future generation. Sending back the trend to the era of *Comer* and *Kivalina*, the 9th Circuit in January, 2020, dismissed the petition by saying that the question could be best answered by the executive and legislative branches of the government. It was a setback to a case that inspired many young litigants not only in the United States but worldwide to nudge the motivated private and government actions little far for the benefits of the planet. It is still possible that *Juliana* may survive in days to come as petition for *en banc* hearing is already filed by the plaintiff with the 9th Circuit Court of Appeals.[27]

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23 *Leghari* v. *Federation of Pakistan*, Lahore High Court, WP No 25501/2015, (2015).

24 The Constitution of Pakistan, art. 9. Namely the right to life.

25 The Court, however, made it clear that in future it may again re-open the debate if any claim like *Leghari*, more specifically related to climate change, comes before it.

26 *Juliana* v. *United States*, 947 F.3d 1159 (9th Cir. 2020).

27 But it is also conceivable that post-COVID 19 world may see significant drop in environmental pollution in the entire world. Hence, the further debate may never ensue at all, at least for some time. A summery and orders of the case can be traced at http://climatecasechart.com/case/juliana-v-united-states/ (last visited on May 8, 2020).

The influence of *Juliana* was quite visible when in September, 2019, sixteen children from various countries, including Greta Thunberg and Alexandria Villaseñor who have already become international celebrity representing an energetic group of climate crusaders, filed an official complaint to the United Nations Committee on the Rights of the Child. The complaint was specifically against five member states - Brazil, Argentina, France, Turkey and Germany - that are yet to ratify the UN Convention of the Rights of the Child (hereinafter "CRC"). According to the plaintiffs, by not ratifying and taking appropriate actions to control climate change these five countries have dishonored their rights protected under CRC. The case stands on the delicate question of balancing member states' obligation and implicit need to protect human rights, irrespective of the general rules pertaining to international treaty interpretation. There are procedural standing obstacles for the litigants to overcome before the case moves any far, such as exhaustion of domestic remedies.

The list of litigation can go on and thus far, claims ranging from constitutional and human rights, administrative inactions, questionable planning of mega projects and liability of large corporations are more familiar. Some other notable cases that have made headlines in recent time include *Ioane Teitiota* v. *New Zealand,*[28] *Family Farmers and Greenpeace Germany* v. *Germany,*[29] *Friends of the Irish Environment CLG* v. *Fingal County Council.*[30] Despite political and legal complications the spirit is maintained steadily and surely is emerging as a phenomenon that cannot be discarded by whims.

E. Influencing Environmental Law Worldwide

A number of measures to curb the threats of climate change have been topping the 'to-do' list of the nations since the negotiation of Kyoto Protocol in 1997 which was convened under the umbrella of United Nation Framework Convention on Climate Change (UNFCCC). Yet, the subsequent progress was agonizingly slow, both domestically and internationally. While internally the states largely had allowed market to define the boundary of climate change adaptation and mitigation

28 *Ioane Teitiota* v. *New Zealand*, CCPR/C/127/D/2728/2016 (Responding to a claim of Ioane Teitiota, originally a citizen from the Island of Kiribati that is currently facing the imminent threat of extinction because of rising sea level, for asylum, the UN Human Rights Committee said that "[a] state will be in breach of its human rights obligations if it returns someone to a country where – due to the climate crisis – their life is at risk, or in danger of cruel, inhuman or degrading treatment.").

29 *Family Farmers and Greenpeace Germany* v. *Germany*, VG Berlin file no. 10 K 412/18, (2019) (Where Berlin's administrative court dismissed the petition against German Federal Government or violating plaintiff's constitutional rights and EU law for not taking enough steps to meet its GHGs reduction target).

process, internationally disagreements were still raging over the modalities of actual measures the states were required to take collectively or individually. After Kyoto Protocol lived its life, the controversy over meaningful participation by the nations to curb climate change took a new turn as flaws in Kyoto negotiation process became evident. When stalemate was broken at Paris, the parties were seemingly happy as they believed that the meaningful solutions were just around the corner.

The principal goal of Paris Agreement is to fortify the global response by keeping a global temperature increase in this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius. Apart from this, it also targets to strengthen the capacity of countries to deal with the impacts of climate change. The bright line is its Preamble that clearly notes the "importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth, and noting the importance for some of the concept of "climate justice", when taking action to address climate change."[31]

At present, the splitting up and in-depth analysis of key provisions of Paris Agreement are being done by the scholars. In reference to climate change litigation, the pressing question is whether Paris Agreement can facilitate climate change litigation or not. There are quite a few oblique answers that fail to clarify the doubt with clear language. However, the insight is not too convoluted as it seems. There is hardly any uncertainty about the usefulness of Paris Agreement in domestic litigations as individual state obligations under Paris can offer the petitioners an option to question inadequate state actions. On the other side of the spectrum, the reality is different and thus far, opening up public international law forums on the strength of Paris commitment has not been possible for the litigants. This is mainly because of the tailor-made individual flexibilities available to individual states that share ideological diversities towards the problems of climate change.[32]

Historically, public international law poses significant challenge when it comes to impose any sort of liability over member states for violation of their international

30 Friends of the Irish Environment CLG v. Fingal County Council, IEHC 695 (2017), (The Ireland High Court while stopping the unplanned expansion of Dublin Airport runway held that 'Right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights.').

31 The Paris Agreement, 2015, *available at*: http://unfccc.int/sites/default/files/english_paris_agreement.pdf (last visited on May 9, 2020).

32 Some states (EU countries mainly) look at the problem as environmental. Some states (US, for example) believe that climate change is purely an economical problem and some (India, representing the developing nations and small island developing states) even try to bring the ethical dimension of it.

climate change obligations. Few years before, in an intriguing paper, renowned international scholar Philippe Sands pointed few difficulties for opening up an international forum for climate change litigation. Other than exhaustion of domestic remedy problem, one potential barbwire is how should the responsibilities among states are to be attributed or divided.[33] This is equally challenging irrespective of whether a treaty is having almost global participation or merely regional in scope. For a problem like climate change that necessitates the application of law not to be thwarted by narrow state-specific itinerary, this question is important. Prof. Sands also evaluated the potential role of the International Court of Justice (ICJ) or International Tribunal for the Law of the Sea (ITLOS) in entertaining climate claims in future. His findings were reserved to a point of future prospecting such claims to invoke the advisory jurisdiction of international courts and tribunals and much will depend on the evolution of the climate treaty mandate which is essentially the Paris Agreement at present.[34]

On the other hand, some argue that the ICJ has significant role to play now. A campaign was founded in 2011 to bring the issue of climate change before the ICJ. The Ambassadors for Responsibility on Climate Change (ARC) have sought the support of the United Nations General Assembly (UNGA) to request an advisory opinion from the ICJ on states' obligations to prevent the harmful consequences of anthropogenic climate change. The Court's jurisdiction to give an advisory opinion if requested to do so by the General Assembly[35] is pretty much clear as article 65(1) of its Statute provides that "the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." An advisory opinion from the ICJ might be a good alternative because, in addition of historic value, it would have the influence to redesign the international approach to curb greenhouse gas emissions. For the first time, it would define states' obligations and responsibilities with respect to emissions under international law.[36]

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33 *See* Philippe Sands, "Climate Change and the Rule of Law: Adjudicating the Future in International Law" The lecture is a special event in a three-day symposium on climate change and the rule of law hosted by The Dickson Poon School of Law, King's College London, The Supreme Court and HM Government 9 (September 17, 2015), *available at*: https://www.supremecourt.uk/docs/professor-sands-lecture-on-climate-change-and-the-rule-of-law.pdf (last visited on May 8, 2020).

34 *Id.* at 19-20.

35 Article 96 of the UN Charter authorizes the General Assembly to request the ICJ to "give an advisory opinion on any legal question."

III. Where India Stands?

This part demonstrates India's predicament. The country brims with vibrant environmental jurisprudence and much of it has been contributed by its judiciary. Yet, climate change litigation by far has not found any place in the long list of country's successful environmental adjudications.

A. A Quick Look at the Soul of India's Environmental Jurisprudence

Environment as a subject in India had started to draw attention only during mid-80s. It is a much younger, hence an excessively impulsive filed even today comparing to other areas of law that mostly trace their ancestry to the common law traditions. However, in spite of the enactment of plethora of laws and regulations, environment was getting degraded during the 1990s. This is when judiciary stepped in and started plugging the loopholes created by executive inactions or non-actions. Supreme Court particularly came up with some stunning judgments that shaped Indian environmental law more positively.

This task performed by the court gradually has become polemic as new forms of rights have emerged. People of India, empowered by the regime of rights and the demand for implementation of such rights, frequently seek judicial intervention that only establishes the fact that people of India want more than just rights now. Evidently and markedly, the higher courts of the country, especially the Supreme Court have carried the mantle well to champion the rights of those who are prevented from claiming the privileges of social and economic disability. This effort of the Court enhances public accountability and produced a new kind of cognizance about problems and struggle for survival of the poor. With defined boldness, judiciary now restates the constitutional mandate by transferring non-justiciable Part IV rights to part III enforceable rights,[37] the most notable examples being the rights to livelihood, shelter, literacy, education and environment as integral aspects of the article 21 rights to life and liberty. The climate change litigations, hence, are surely to be examined in the backdrop of this flamboyant outfit.

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36 *See* Climate Change and the International Court of Justice, [A research conducted by Yale Law School and Yale School of Forestry and Environmental Studies Graduate Students, (2012)], *available at*: https://nebula.wsimg.com/7736f80754c3c52f386ae68c5edd8aa6? AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1 (last visited on May 9, 2020).

37 Indian Constitution part IV contains Directive Principles of State Policies covering articles 36 to 51. It includes necessary instructions or guidelines for the government to create a Welfare State. Whereas, part III, article 12 to 35 of the Constitution contains provisions that safeguard fundamental rights of the Indian citizens.

B. A Reflection on India's Own Climate Claims

Let us now turn our attention to India's own climate change litigations. The scenario is not by far very inspiring. As we have already understood that climate change litigations are in many respects distinct, Indian courts are rarely called upon to adjudicate on the litigations where climate change is the foremost concern. Even with that rarity, few cases draw our attention.

For example, in *Court on its own Motion* v. *State of Himachal Pradesh*,[38] the Principal Bench of NGT, New Delhi, tried to address the issue of pollution due to heavy traffic in Manali and Rohtang Pass area of Himachal Pradesh. The application was filed regarding the emissions of un-burnt hydrocarbon and carbon soot which resulting in blackening and browning of snow cover in mountains. The court deliberated upon the problems of climate change by saying that, "[t]he causes having a direct impact on Himachal Pradesh's environment are deforestation, uncontrolled and unsustainable grazing, soil erosion, siltation of dams and reservoirs, industrial and human wastes, forest fires and other effects of climate change".[39] This, arguably, was the first case in India where judiciary addressed climate change in clear, unequivocal language. The directions from the Court were many, including reminding the government its duty to protect the environment at any cost. The power, of course, flowed from the steady 'right to environment' jurisprudence cemented by the Supreme Court through many of its ground-breaking decisions early.

NGT in *Gaurav Kumar Bansal* v. *Union of India*,[40] asked the Central and state governments about the steps taken by them to implement the National Action Plan on Climate Change (NAPCC). When the case was pending, the Ministry of Environment, Forest and Climate Change (MoEF& CC) intervened and filed an affidavit to assert that NGT did not have jurisdiction to such matter. This sparked a new controversy regarding the over-exercise of jurisdiction by NGT as it normally has the jurisdiction over all civil cases where a substantial question relating to environment is involved.[41] NGT, however, dismissed the petition on the ground of specificity. In terms of covering complex aspects of climate change, NGT's order in *Indian Council for Enviro-legal Action* v. *MoEFCC*,[42] was even more contemporary. Indian Council for Enviro-legal Action, a famous voluntary

38 Application No. 237 (THC)/2013.

39 *Ibid.*

40 Original Application No. 498 of 2014.

41 The National Green Tribunal Act, 2010, s. 14. These cases may arise out of various environmental statutes.

42 Original Application No. 170 of 2014.

organization sought direction from NGT to stop production of HCFC- 22. It also requested NGT to pass an order to stop smuggling and illegal export and import of HCFC-22 and other GHGs. The NGT directed MoEF & CC and Central Pollution Control Board (CPCB) to examine the entire regulatory regime in relation to harmful HFC-23, a by-product of HCFC-22 and issue appropriate guidelines in all aspects thereof.[43] Additionally, the Court pointed out the perils of climate change by observing that the "[c]ontents of the application are a matter of global policy and therefore there would be a very little role for the statutory authorities within the country to take appropriate measures. The international convention and treaties have to provide a path for domestic legislation."[44] This, no doubt, draws parallel with *Urgenda* decided by the Dutch court.

Even in limited number of cases the approach of country's principle green court was amply evident. It is a fact that NGT usually count on already established jurisprudence by the Supreme Court and the high courts and it carefully refrain itself from making any extravagant observations or directions. However, whether it has been able to do justice to diverse rights available (other than constitutional entailments) under various environmental statutes, is a matter of dispute.[45] This lack of precision perhaps was the reason of inhibition of NGT when *Ridhima Pandey* placed before it a whole new set of questions. For the first time, it was dealing with a case where climate change was the central theme. Petitioner cleverly used public trust doctrine as a tool to quench the anti-environmental attitude of the government. The connection with *Juliana* was clear. But the use of public trust doctrine to combat climate change problem in India was entirely new as *Ridhima Pandey* aimed to re-state the viability of that old common law doctrine, already enmeshed in country's environmental jurisprudence. The doctrine was successfully used by the country's Supreme Court, first time, in *M.C. Mehta* v. *Kamalnath*[46] and after *Kamalnath*, in good number of cases courts in India relied on the doctrine to resolve the environmental issues.[47]

In point of fact, *Ridhima Pandey*, just raised an important question - being the third largest emitter of GHGs how Indian government was planning to comply with its

43 *Ibid.*

44 *Ibid.*

45 We do believe that all environmental legislations are socially beneficent legislations, hence, are required to be interpreted purposively.

46 *M.C. Mehta* v. *Kamalnath*, (1997)1 SCC 388.

47 Some of the older cases are *Th. Majra Singh* v. *Indian Oil Corporation*, AIR 1999 J&K 81; *M.I. Builders* v. *Radhey Shyam Sahu,* AIR 1999 SC 2468*; K. M. Chinnappa* v. *Union of India,* AIR 2003 SC 724; *State of West Bengal* v. *Kesoram Industries Ltd.*, (2004) 10 SCC 201; *Intellectual Forum* v. *State of A.P,* (2006) 3 SCC 549; *Fomento Resorts and hotels Ltd.* v. *Minguel Martins,* (2009) 3 SCC 571.

obligations under the Paris Agreement. The petitioner clearly was of the opinion that there were ambiguities in government actions and hence required to be clarified. Relying of specific statutory provisions, environmental principles and emphasizing once again on the need for sustainable development, already highlighted by the judiciary in numerous important cases, the petitioner presented before the court a new stage where the alertness and honesty of the government were supposed to be examined.

The NGT's Order of January 15, 2019 was appalling. It contained only three paragraphs with a quick observation in the second para that "[t]he authorities acting under the Environment (Protection) Act, 1986, perform their obligation of impact assessment as per statutory scheme which is not under challenge. The issue of climate change is certainly a matter covered in the process of environment impact assessment."[48] What follows next? Just a swift statement, shrugging off all duties of an adjudicating forum, that "[t]here is no reason to presume that Paris Agreement and other international protocols are not reflected in the policies of the Government of India or are not taken into consideration in granting environment clearances." The implicit approval of the role played by the government agencies in carrying and endorsing the process of environment impact assessment was clear even in those limited vocabularies.

The Order is a sheer insult to country's rich environmental jurisprudence in which judiciary contributed opulently. Also, an opaque political inspiration is hardly to be missed. This draws support from the fact that in numerous cases judiciary reprimanded government and its agencies for faltering in carrying out environment impact assessment only. The fact is so established that in almost all major disputes on large projects one question is always to be asked - whether clearance is given on right parameter or not. It can be argued that technically NGT was right by saying that *Ridhima Pandey* failed to connect the petition with any specific statutory claim, thereby, could not possibly invite NGT's jurisdiction. However, this is far from convincing because NGT certainly has power to deal with matters that precisely not covered by any statute mentioned in the schedule of the National Green Tribunal Act, 2010.[49]

There is also no shortage of evidence suggesting sluggish progress made by the several governmental projects that are envisaged under National Action Plan on

48 *Ridhima Pandey* v. *Union of India, supra* note 4.

49 This is clear from the language of section 19 (4) (k) under which the Tribunal has, for the purposes of discharging its functions under NGT Act, the same powers similar to a civil court, in respect of the specific mattes covered by cl. (a) to (j) of the section, along with any other matter which may be prescribed to it.

Climate Change (hereinafter "NAPCC"). Even though government routinely outlines and proclaims new policies to combat climate change, the effective alignment of such polies with NAPCC remain questionable. Because of this over the period of time NAPCC has lost its efficacy. In addition, the poor monitoring system and limited budgetary support provided by the government to support its climate related projects indicate towards lack of government intention.[50] From India's standpoint the outcome of Paris negotiation is satisfactory because India has received significant opportunity to strengthen its domestic climate policies and measures under the flexible text of the Agreement.

But this does not give India a free hand. Under article 4.9 of the Paris Agreement each state party is required to plan and communicate their post-2020 climate activities. This will be the party's Nationally Determined Contribution (NDC). NDC simply represents the efforts made by the parties to the Agreement to reduce national emissions and adapt to the impacts of climate change. Under article 4.9 of the Paris Agreement this is a legal requirement.[51] This clearly envisages the idea that parties must keep on augmenting their domestic efforts to mitigate climate change. This is a strong procedural requirement.

Therefore, India does not have complete freedom over its activities. Under article 4.9 of the Paris Agreement each state party is required to plan and communicate their post-2020 climate activities. This will be the party's Nationally Determined Contribution (NDC). NDC simply represents the efforts made by the parties to the Agreement to reduce national emissions and adapt to the impacts of climate change. Under article 4.9 of the Paris Agreement this is a legal requirement.[52] This clearly envisages the idea that parties must keep on augmenting their domestic efforts to mitigate climate change. This is a strong procedural requirement. However, claims are already being made that India may face difficulty to fulfil its interim commitment.[53]

Thus far, NDC has been viewed by majority of the countries realistically and so far, seven countries, Marshall Islands, Norway, Suriname, Moldova, Japan, Singapore, and Chile have already submitted or going to submit their updated

50 *See* Vijeta Rattani, *et.al.*, "India's National Action Plan on Climate Change needs desperate repair"*, available at*: https://www.downtoearth.org.in/news/climate-change/india-s-national-action-plan-on-climate-change-needs-desperate-repair-61884 (last visited on May 8, 2020).

51 This art. must be read with art. 4.2 which embodies obligation of conduct.

52 This art. must be read with art. 4.2 which embodies obligation of conduct.

53 A report published by CRISIL, global analytics company, hinted that the shortage of India's interim target may be at least 42 per cent. *See* Return to Uncertainty, *available at*: https://www.crisil.com/en/home/our-analysis/reports/2019/10/return-to-uncertainty.html (last visited on May 11, 2020)

NDC. For India revisiting of its NDC is important because its climate policies are likely to be altered due to coronavirus pandemic and it will not be a good justification, in the absence of international consensus, that slowdown in polluting activities should allow India more space to dilute its already existing policies, laws and regulations as that may intensify the resource distribution conflicts in days to come.

The success of achieving sustainable development in today's world rests on becoming practical about governance and its forward-looking understanding of interrelations between complex economic and ecological systems. The challenge of judiciary will be to ensure accountability in that system. Therefore, it has to be constantly vigilant over governmental policies and long-term agendas. It has to be remembered that such system is organic in nature. Corruption and malpractices also organically develop in tandem to adjust with judicial vigil. Thus, the Court should have an open-ended and even-handed attitude to negate any such possibilities. In such discourse, the decision like *Ridhima Pandey* will only allow the narrow and short-sighted policies to thrive, favoring only handful of people in the society.

Therefore, India's tryst with climate change litigation is still a distant dream. But, notwithstanding the anticipated opinion of the highest Court of the country on the matter, the door is already open, and it is just the matter of time when right to 'sustainable' climate finds its place alongside other speaking environmental rights already recognized by the judiciary.

IV. Conclusion

Any reformist agenda to improve the general acceptability of climate claims must depend on the pragmatism of national and international framework. It is by far, amply clear that judicial opinion will vary on the issue that itself is a combination of assorted claims, touching upon almost every aspect of life and governance of our society. Therefore, there may not be 'one size fits all' kind of solution.

At the same time, in a country like India, the judiciary must not adopt a strategy that is too technical and rigid for those who like to address evolving issue like climate change. This is particularly important because unlike some western countries, where post-materialism casts a shadow over ligation efforts, Indian environmental claims customarily originate form constant struggle for justifiable existence of people. Such claims should be dealt with compassion within the aspirational right-framework of the Constitution. Indian experience is certainly remarkable in this matter as judiciary has already used many important international principles to good advantages and the process of such incorporation was relatively less conflict-ridden. While in other countries litigants are now waking up to the possibilities of

using untried principle like public trust doctrine to add more teeth to their climate claims, in India such prospect is brighter because of the history and the environment-friendly attitude of judiciary.

Undeniably, there are tough challenges ahead for victims, as perpetrators would constantly seek for loopholes in laws. Let us just hope that the problem of climate change with its frightening presence would itself pave the way for a brighter future as rationality will prevail through the prospective treatment of rule of law.

धर्म की स्वतंत्रता के अधिकार और मानव अधिकार का सापेक्ष संबंध : नागरिकता (संशोधन) अधिनियम, 2019 (सी.ए.ए.) के विशेष संदर्भ में

*मिथिलेश चंद्र पांडेय**

भारत प्राचीन समय से विविधताओं का देश रहा है। विश्व के विभिन्न देशों से विभिन्न जाति, धर्म और संप्रदाय के लोग यहां आए। भारत ने सभी लोगों का स्वागत किया और ये सभी लोग आपस में एक साथ रच-बस गए और व्यावहारिक और सांस्कृतिक रूप से एक दूसरे से मिश्रित हो गए। भारत की परम्परा सभी लोगों को एक साथ मिलाकर ''वसुधैव कुटम्बकम'' की धारणा को अपनाने की रही है। भारत सभी धर्मों, जातियों, पंथों और संप्रदायों के लोगों से एक जैसा व्यवहार करता है और इस प्रकार देश के सभी लोगों के अधिकार और कर्तव्य लगभग एकसमान है। भारत विभिन्न समुदाय, वर्ग, जाति, धर्म और संस्कृति के लोगों को एक सूत्र में बांधकर सद्भावना और समरसता का विश्व समुदाय को संदेश देता है। यह भारत की अनेकता में एकता की भावना को प्रतिबिम्बित करता है।

यह प्रतीत होता है कि धर्म की स्वतंत्रता के अधिकार और मानव अधिकार के बीच सापेक्ष संबंध है। संविधान के अंतर्गत मूल अधिकार का उपबंध किया गया है और धर्म की स्वतंत्रता का अधिकार मूल अधिकार का एक अंग है। संविधान के अंतर्गत मूल अधिकार ऐसे अधिकार हैं जो सभी व्यक्तियों को उपलब्ध हैं। संविधान ने सभी व्यक्तियों को मूल अधिकार इसलिए प्रदान किए हैं जिससे कि सभी व्यक्तियों को अपना सर्वांगीण विकास करने का अवसर मिल सके। मानव अधिकार की संकल्पना की व्यक्तियों के सर्वांगीण विकास की ओर प्रेरित करती है। आइए, अब हम धर्म की स्वतंत्रता के अधिकार और मानव अधिकार विषय पर पृथक् रूप से चर्चा करें।

I. धर्म की स्वतंत्रता का अधिकार

भारत के संविधान के अनुच्छेद 25 से 28 तक में धर्म की स्वतंत्रता से संबंधित उपबंधों का उल्लेख किया गया है। भारत के संविधान के अनुच्छेद 25 में उपबंध किया गया है कि लोक व्यवस्था, सदाचार और स्वास्थ्य तथा इस भाग के अन्य उपबंधों के अधीन रहते हुए, सभी व्यक्तियों को अंत:करण की स्वतंत्रता का और धर्म के अबाध रूप से मानने, आचरण करने और प्रचार करने का समान हक होगा। धर्म की स्वतंत्रता लोक व्यवस्था, सदाचार और स्वास्थ्य की सीमाओं के अंतर्गत सभी व्यक्तियों को प्राप्त है। ये स्वतंत्रताएं धार्मिक कार्यों के प्रबंधन, धर्म की अभिवृद्धि के लिए करों के संदाय के बारे में स्वतंत्रता, शिक्षा संस्थाओं में धार्मिक शिक्षा या धार्मिक उपासना में उपस्थित होने के संबंध में हैं। इस संबंध में आवश्यक और महत्वपूर्ण सांविधानिक उपबंध यह है कि ये अधिकार भारत के लोगों को प्राप्त हैं, लेकिन भारत एक पंथनिरपेक्ष राज्य है। इसका स्पष्ट तात्पर्य यह है कि राज्य का अपना कोई धर्म नहीं है। राज्य सभी धर्मों, धार्मिक समुदाय तथा धार्मिक संस्थाओं के साथ समान व्यवहार करेगा। राज्य द्वारा धर्म तथा धर्मों के प्रति सहनशीलता उसे धार्मिक राज्य नहीं बनाती है।

माननीय उच्चतम न्यायालय ने *एस.आर. बोम्मई* बनाम *भारत संघ*[1] वाले मामले में यह अभिव्यक्त किया कि पंथनिरपेक्षता मूल विधि का भाग है और संविधान का आधारभूत ढ़ांचा है तथा सभी लोगों

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1 (1994) 3 एस. सी. सी 545.

को सारवान् और नैतिक समृद्धि तथा राजनैतिक न्याय देने के लिए भारतीय राजनैतिक पद्धति है। न्यायमूर्ति बी. पी. जीवनरेड्डी ने अपने तथा न्यायमूर्ति एस. सी. अग्रवाल की ओर से तथा न्यायमूर्ति पांडियन की सहमति के आधार पर कहा पंथनिरपेक्ष संविधान का मूलभूत ढांचा है। जब धर्म की स्वतंत्रता की प्रत्याभूति भारत में सभी लोगों को दी गई है तो राज्य के उद्देश्य से व्यक्ति का धर्म, विश्वास या निष्ठा प्रभावकारी है। राज्य के लिए सभी समान हैं और समस्त समान व्यवहार के हकदार हैं। राज्य के मामलों में धर्म का कोई स्थान नहीं है। कोई भी राजनैतिक दल धार्मिक दल नहीं हो सकता है। राजनीति तथा धर्म का मिश्रण नहीं किया जा सकता है। यदि कोई दल अपंथनिरपेक्ष नीति अपनाता है और अपंथनिरपेक्ष कार्यवाही करता है तो ऐसी कार्यवाही सांविधानिक समादेश के विपरीत होगी।

आज से 5000 वर्ष पूर्व भारतीय दार्शनिकों ने अधिरचित विधि में सर्वोच्च नैतिक विधि के ऐसे सिद्धांतों को प्रतिपादित किया था जो शाश्वत रूप से वैध थे। ये सिद्धान्त धर्म, अर्थ, काम और मोक्ष के सिद्धांत थे। इनके द्वारा व्यक्ति आन्तरिक और बाह्य आध्यात्म और तात्विक जीवन के संतुलन के साथ ही सामाजिक व्यवस्था में सुसंगतता स्थापित कर सकता था। ''धर्म'' के द्वारा सभी व्यक्तियों (राजा अथवा आम व्यक्ति) को समान रूप से शासित किया जाता था। ''धर्म'' की धारणा वर्तमान समय के मानवाधिकार के ''विधि के समक्ष समता और विधि का समान संरक्षण'' की धारणा को परिलक्षित करती है। उस समय ''धारणात् धर्मार्थ त्याह धर्मों धारति प्रजा'' की उक्ति से राज धर्म के आधार पर नैतिकता के सिद्धांतों को आधार बनाकर जनता में शासन चलाया जाता था। धर्म के आधार पर उचित और अनुचित का निर्णय किया जाता था। प्राकृतिक विधि के सिद्धांत वेद, पुराण, महाभारत और भागवतगीता में विद्यमान थे।[2]

भारत के उच्चतम न्यायालय ने धर्म की स्वतंत्रता के संदर्भ में अपने अनेक निर्णयों में धर्म, धार्मिक आचरण, धर्म के विषय और धर्म के आवश्यक अंग के संबंध में अनेक निर्णय दिए। उच्चतम न्यायालय ने *ए. एस. नारायणा दीक्षितुलु* बनाम *आंध्र प्रदेश राज्य*[3] वाले मामले में यह स्पष्ट किया कि धर्म और धार्मिक प्रथाओं के बीच एक सीमा रेखा खींची जानी चाहिए। न्यायालय ने निर्णय के पैरा 86 और 87 में यह स्पष्ट किया कि किस प्रकार धर्म, धर्म के विषय और धार्मिक आचरण के आवश्यक भाग का निर्धारण किया जाए :-

86. निस्संदेह, धर्म का आधार ऐसे विश्वासों और सिद्धांतों की पद्धति में (निहित) होता है, जो उन लोगों द्वारा, जो उस धर्म को मानते हैं, अपने आध्यात्मिक कल्याण के लिए सहायक माने जाते हैं। धर्म केवल मत, सिद्धांत या विश्वास मात्र नहीं है। उसकी कार्यों में बाह्य अभिव्यक्ति भी होती है। अनुच्छेद 25 और 26 द्वारा धर्म के प्रत्येक पहलू को रक्षोपाय प्रदान नहीं किया गया है और न संविधान में यह उपबंध ही किया गया है कि किसी भी प्रकार के धार्मिक कार्यकलाप में हस्तक्षेप नहीं किया जा सकता है। अत:, धर्म का, अनुच्छेद 25 और 26 के संदर्भ में, उसके कठोर और व्युत्पत्तिपरक अर्थ में अर्थान्वयन किया जाना चाहिए। प्रत्येक धर्म की अंतरात्मा (अंत:करण) और नैतिक तथा नीतिपरक

2 डा. शिवदत्त शर्मा, मानव अधिकार, प्रथम संस्करण, 2006, वि. सा. प्र., भारत सरकार, पृ.13

3 (1996) 9 एस. सी. सी. 548

उपदेशों में विश्वास होना चाहिए। अत:, जो कोई चीज मनुष्य को स्वयं उसके अंत:करण से जोड़ती है और जो कोई भी नैतिक या नीतिपरक सिद्धांत उन मनुष्यों के जीवन को विनियमित करता है, जो इस ईश्वरवादी, अंत:करणपरक या धार्मिक विश्वास में निष्ठा रखते हैं – केवल उसी तत्व (चीज) को संविधान में यथा-मान्य 'धर्म' गठित करने वाले तत्व के रूप में समझा जा सकता है, जो बंधुत्व, सौहार्द, भाईचारे और सभी व्यक्तियों की समता की भावना की पोषक है, जिनका आधार संविधान के लौकिक (धर्मनिरपेक्ष) आयाम (पहलू) में निहित (मौजूद) है। अनुच्छेद 25 और 26 द्वारा गारंटीकृत 'धर्म' या 'धर्म के विषय' या धार्मिक आचरण के संरक्षण का अर्थान्वयन करने के दृष्टिकोण को व्यावहारिकता की दृष्टि से देखा जाना चाहिए, क्योंकि, वस्तुओं की प्रकृति को देखते हुए, 'धर्म' या 'धर्म के विषय' या 'धार्मिक विश्वास या आचरण' पद को परिभाषित करना, असंभव नहीं तो, अत्यधिक कठिन अवश्य होगा।

87. .... अत: धर्म की ऐसी परिभाषा करना कठिन होगा, जो सभी धर्मों या धार्मिक आचरणों (पद्धतियों) के विषयों को लागू की जा सके। व्यक्तियों के एक वर्ग के लिए मात्र एक सिद्धांत या उपदेश धर्म के विषय में प्रमुख हो सकता है ; जबकि अन्य वर्गों के लिए, कर्मकाण्ड या अनुष्ठान धर्म के प्रमुख पक्ष हो सकते हैं ; तथा व्यक्तियों के एक अन्य वर्ग के लिए आचरण की संहिता या जीवन की पद्धति (रीति) धर्म गठित कर सकती है। अत:, अनुच्छेद 25 और 26 के अधीन गारंटीकृत धर्म का अधिकार, धर्म का प्रचार व प्रसार करने का आत्यांतिक या अनियंत्रित अधिकार नहीं है और वह ऐसे किसी कार्यकलाप ? आर्थिक, वित्तीय, राजनैतिक या लौकिक कार्यकलाप – को सीमित या विनियमित करते हुए राज्य द्वारा विधान (बनाए जाने) के अध्यधीन है, जो कार्यकलाप धार्मिक विश्वास, निष्ठा आचरण या प्रथा से जुड़े हुए हैं। वे राज्य द्वारा समुचित विधान द्वारा सामाजिक कल्याण पर सुधार के अध्यधीन हैं। यद्यपि धार्मिक विश्वास के अनुसरण में किए जाने वाले कार्यों का निष्पादन और धार्मिक आचरण किसी विशेष सिद्धांत में निष्ठा या विश्वास के समान ही धर्म का भाग है, तथापि, स्वत: यह बात निश्चायक तथा विनिश्चायक नहीं है। यह प्रश्न कि धर्म या धार्मिक विश्वास के आवश्यक भाग क्या हैं या धर्म के विषय और धार्मिक आचरण क्या हैं ङ्क अनिवार्यत: तथ्य का प्रश्न है, जिस पर उस संदर्भ में विचार किया जाना है, जिसमें यह प्रश्न उद्भूत होता है कि उस संदर्भ में उपस्थापित साक्ष्य पर, ताथ्यिक या विधायी या ऐतिहासिक-विचार किया जाना आवश्यक होता है और उसके पश्चात् विनिश्चय किया जाना होता है।

हिन्दू रिलीजियस इन्डाउमेंट्स, मद्रास बनाम *श्री लक्ष्मीन्द्र तीर्थ स्वामियार आफ शिरूर मठ*[4] वाले मामले में उच्चतम न्यायालय ने यह स्पष्ट किया कि किसी धर्म के सिद्धांतों के संदर्भ में प्राथमिक रूप से अभिविनिश्चित किया जाना चाहिए कि कौन सी बातें किसी धर्म के किसी आवश्यक भाग को घटित करती हैं। यदि हिन्दुओं के किसी धार्मिक संप्रदाय के सिद्धांतों में यह विहित है कि ईश्वर की मूर्ति को भोजन का अर्पण दिन के किसी विशेष पहर में किया जाना चाहिए, तो उन आवधिक धर्मानुष्ठानों का निर्वाह वर्ष की कतिपय अवधि के दौरान कतिपय तरीके से किया जाना चाहिए या धार्मिक पाठ का नियमित रूप से सस्वर पाठ होना चाहिए या पवित्र आग में आहुतियों का अर्पण होना

4 ए. आई. आर. 1954 एस. सी. 282

चाहिए, तो ये सभी बातें धर्म का भाग मानी जाएंगी और मात्र यह तथ्य कि इन बातों में किसी राशि का व्यय या पुजारियों और सेवकों की नियुक्ति अंतर्वलित है या विपणन योग्य वस्तु का प्रयोग अंतर्वलित है, तो इसमें वे क्रियाकलाप किसी वाणिज्यिक या आर्थिक प्रगति के क्रियाकलाप के भाग होने के कारण पंथ निरपेक्ष क्रियाकलाप नहीं हो जाएंगे ; ये सभी धार्मिक प्रथाएं हैं और इन्हें अनुच्छेद 26(ख) के अर्थान्तर्गत धार्मिक विषय माना जाना चाहिए।

पंडित लक्ष्मी कांत मित्रा (पश्चिमी बंगाल : सामान्य सदस्य) ने संविधान सभा में भारत के संविधान के वर्तमान अनुच्छेद 25 के सामान्य आशय को स्पष्ट करने के लिए कुछ स्पष्टीकरण दिए जो इस प्रकार है :-

प्रारूपित संविधान का अनुच्छेद 19 सभी व्यक्तियों को उनकी पसंद के किसी भी धर्म का पालन करने, उसके अनुरूप आचरण करने और उसका प्रचार करने का अधिकार प्रदत्त करता है किन्तु ये अधिकार कतिपय शर्तों, जिनको राज्य लोक नैतिकता, लोक व्यवस्था और लोक स्वास्थ्य के हित में अधिरोपित कर सकता है, द्वारा सीमाबद्ध कर दिया गया है और यह भी कि इस अनुच्छेद द्वारा प्रदत्त अधिकार संविधान के इस भाग के अंतर्गत उल्लिखित किसी भी उपबंध के टकराव में नहीं है। मेरे कुछ मित्रों ने दलील दी कि इस अधिकार को प्रारूपित संविधान में रखे जाने की अनुज्ञा इस साधारण कारणवश प्रदान नहीं की जानी चाहिए कि हमने बार-बार घोषित किया है कि हमारा देश एक पंथनिरपेक्ष राष्ट्र बनने जा रहा है और इसलिए धर्म की प्रथा को मूल अधिकार के रूप में स्थान दिए जाने की अनुज्ञा प्रदान नहीं की जानी चाहिए। आगे यह दलील दी गई कि किसी विशिष्ट आस्था या धर्म का प्रचार करने का अतिरिक्त अधिकार प्रदत्त करके कठिनाइयों और टकराव के सभी द्वार खुल जाएंगे जो कभी न कभी राष्ट्र के सामान्य जीवन को अपंग बना देंगे। मैं यहां पर तुंत कहना चाहता हूं कि पंथनिरपेक्ष राष्ट्र की यह संकल्पना पूर्णतया गलत है। (पंथनिरपेक्ष राष्ट्र द्वारा, जैसाकि मैं इसे समझता हूं, यह आशय है कि राज्य धर्म या समुदाय के आधार पर किसी विशिष्ट प्रकार की धार्मिक आस्था का पालन करने वाले किसी व्यक्ति के विरुद्ध किसी भी प्रकार का कोई पक्षपात नहीं करेगा। संक्षेप में इसका अर्थ यह है कि राज्य में कोई भी विशिष्ट धर्म किसी भी प्रकार का राज्य-संरक्षण प्राप्त नहीं करेगा। राज्य अन्य धर्मों के बहिष्करण में या उनके अधिमान में किसी विशिष्ट धर्म को स्थापित या संरक्षित नहीं करेगा या धन प्रदान नहीं करेगा और राज्य में किसी भी नागरिक के साथ अधिमानिक बर्ताव या उसके साथ पक्षपात मात्र इस आधार पर नहीं किया जाएगा कि वह किसी विशेष धर्म को मानने वाला है। अन्य शब्दों में राज्य के मामलों में किसी विशेष धर्म को मानना विचार की विषयवस्तु नहीं होगा।) मैं इसे किसी पंथनिरपेक्ष राष्ट्र की सर्वाधिक महत्वपूर्ण बात मानता हूं। इसके साथ-साथ, हमें इस बात पर विचार करते हुए अत्यधिक सावधान रहना होगा कि हमारा देश किसी को भी किसी विशिष्ट धर्म को मानने और उसका पालन करने बल्कि उसका प्रचार करने से भी नहीं रोकता है। श्रीमान उपाध्यक्ष महोदय, हमारा यह गौरवशाली देश कुछ भी नहीं होगा यदि यह उच्च धार्मिक और अध्यात्मिक संकल्पनाओं और आदर्शों का पालन नहीं करेगा। भारत विश्व में सम्मान का स्थान प्राप्त नहीं कर सकेगा यदि वह उस अध्यात्मिक उंचाई को प्राप्त नहीं कर सकेगा जो उसने अपने गौरवशाली अतीत में प्राप्त कर ली थी। अत:, मैं महसूस करता हूं कि संविधान ने इसके लिए न केवल एक अधिकार के रूप में बल्कि मूल अधिकार के रूप में न्यायत: उपबंधित किया है। इस मूल अधिकार

का प्रयोग करके इस राज्य में निवास करने वाले प्रत्येक समुदाय को उनके धर्म के अनुसार उनकी पसंद का कुछ भी करने के समान अधिकार और सुविधाएं होंगी परंतु यह तब जबकि इस अधिकार का टकराव यहां अधिकथित शर्तों के साथ न हो।[5]

II. मानव अधिकार

प्राचीन भारत के दार्शनिक मानवाधिकार विधि के सिद्धांतों से अनभिज्ञ नहीं थे। वैदिक काल में मानवाधिकारों की नींव को धर्म, मानवीय परिपाटी और स्वतंत्रता और समता के रूप में देखा जा सकता है। वैदिक युग के दार्शनिकों ने मानवाधिकारों को परिभाषित करते हुए कहा है कि मानवाधिकार स्वभावत: अन्तर्निहित अधिकार हैं, इनके बिना हम मानव प्राणी के रूप में जीवित नहीं रह सकते हैं। मानवाधिकार और मानव स्वतंत्रताएं हमारे संपूर्ण विकास, मानव गुणों के प्रयोग, बुद्धि, योग्यता, अन्त:करण तथा आध्यात्मिक और अन्य आवश्यकताओं की पूर्ति करती हैं। मानवाधिकार मानव पर आधारित होते हैं और यह अपेक्षित होता है कि इन अधिकारों के द्वारा व्यक्ति की अन्तर्निहित गरिमा, सम्मान और संरक्षा की जा सके।

भारतीय प्राचीन दर्शन में ''सर्वे भवंतु सुखिन: सर्व संतु निरामया:'' की उक्ति मानवीय दृष्टिकोण से राजा पर प्रजा को सुखी रखने का दायित्व आरोपित करती है। राजा के द्वारा सर्व हिताय से किए जाने वाले कार्यों के मापदंड को ''वसुधैव कुटुम्बकम'' नियत किया गया था। पाणिनी ने (5वीं शताब्दी ई. पूर्व) ''धर्म'' का निर्वचन करते हुए कहा था कि धर्म, गुणवत्ता, रूढ़ि और प्रथाओं का स्वरूप अथवा कार्य है। महाभारत में ''धर्म'' का वर्णन करते हुए उल्लेख किया गया है कि धर्म एक दूसरे के विरुद्ध आक्रमण को प्रतिषिद्ध करता है तथा सबको समानता का अवसर प्रदान करता है। इस प्रकार प्राचीन भारत में ''धर्म'' के द्वारा मानव के अधिकारों की संरक्षा की जाती थी। कौटिल्य ने मनु के द्वारा बताए गए अधिकारों के साथ ही साथ कई आर्थिक अधिकारों का भी उल्लेख किया है। अशोक ने युद्ध बंदियों के साथ अमानवीय व्यवहार को प्रतिबंधित किया था। हर्षवर्द्धन, जो अंतिम हिन्दू राजा था, का यह मत था कि राजा जनता के कल्याण के लिए कार्य करने के लिए आबद्ध होता है। प्राचीन भारत के समृद्धशाली इतिहास को मध्यकाल में क्षत-विक्षत किया गया। इसीलिए आज मानवाधिकारों के लिए लोग भारतीय सभ्यता की अपेक्षा पाश्चात्य सभ्यता को महत्व दे रहे हैं।[6]

संयुक्त राष्ट्र संघ के तत्वावधान में अन्तरराष्ट्रीय स्तर पर 10 दिसंबर, 1948 को मानवाधिकारों की सार्वभौम घोषणा में मानवाधिकारों के शंखनाद को निनादित किया। मानव की गरिमा एवं वास्तविक अस्तित्व तथा समता के मापदंड को मानवाधिकारों की नींव माना जाने लगा। इस मंतव्य को प्रजातत्रात्मक शासन व्यवस्था में विश्व के अधिकतर राष्ट्रों ने निर्वाचन की पद्धति से विकसित किया। सप्रति मूल मानवाधिकारों को सुरक्षित, संरक्षित रखने और उनमें बढ़ौतरी करने का संघर्ष प्रत्येक समाज में गति बनाए हुए है।

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6 डा. शिवदत्त शर्मा, *मानव अधिकार,* प्रथम संस्करण, 2006, वि. सा. प्र., भारत सरकार, पृ. 14

अतीत की गोद से प्रस्फुटित हुआ मानवाधिकार अन्तरराष्ट्रीय प्रसंविदाओं, अभिसमयों, घोषणाओं तथा संधियों में प्रतिबिम्बित होता है और राष्ट्रीय स्तर पर राष्ट्रों के संविधानों, अधिनियमों और न्यायपालिका के न्याय के विनिश्चयों में समाहित है। मानवाधिकार स्वतत्र समाज में मानव के गरिमायुक्त जीवन को संचालित करने के मापदंडों को सरकार के माध्यम से प्रवर्तित कराने के सिद्धान्तों को प्रतिपादित करते हैं। ये अधिकार मानव के जीवन, स्वतत्रता, समता, गरिमा, सौहार्द और न्यायिक अभिधारणाओं को उजागर करने के साधन हैं। इनके स्वाभाविक और सम्यक् प्रवर्तन के लिए प्रजातत्र के स्तम्भों के रूप में कार्यपालिका, विधायिका, न्यायपालिका तथा प्रचार साधनों को साध्य हेतु कार्य करना मानवाधिकारों की सहज एवं समुचित मांग है। इस मांग की प्रतिपूर्ति के लिए संविधान एक यत्र के रूप में कार्य करता है। स्वाभाविक प्रकृति की दृष्टि से मानवाधिकार प्रत्येक व्यक्ति के लिए आवश्यक है। ये अधिकार व्यक्तियों के उपभोग के साधन हैं।

'मानव अधिकार' पद को मानव अधिकार संरक्षण अधिनियम, 1993 की धारा 2(1)(घ) में परिभाषित किया गया है जिसके अनुसार मानव अधिकार से प्राण, स्वतंत्रता, समानता और व्यक्ति गरिमा से संबंधित ऐसे अधिकार अभिप्रेत हैं जो संविधान द्वारा प्रत्याभूत किए गए हैं और अंतरराष्ट्रीय प्रसंविदाओं में सन्निविष्ट और भारत में न्यायालयों द्वारा प्रवर्तनीय हैं।

मानवाधिकार मानव की स्वतत्रता के पुनीत अधिकार हैं। इनको विधि की अनुमति के बिना प्रतिबन्धित नहीं किया जा सकता है। आज के दर्शन में उपयोगी, सफल, गरिमायुक्त, सम्मानजनक, स्वास्थ्यपूर्ण और कल्याणकारी जीवन आवश्यक है। इस प्रकार के दैहिक दर्शन को संरक्षित करने के लिए मानव यातना और मनमानीपूर्ण कार्यवाही को समाप्त किया जाना चाहिए। इस प्रकार की कार्यवाही मानवाधिकारों को सुरक्षित और संरक्षित रखने का सार्थक उपादान है।

III. नागरिकता (संशोधन) अधिनियम, 2019 की विवेचना

भारत सरकार के गृह मंत्री श्री अमीत शाह द्वारा 4 दिसंबर, 2019 को संसद के समक्ष नागरिकता (संशोधन) विधेयक, 2019 पेश किया गया। उपरोक्त विधेयक के उद्देश्यों और कारणों के कथन से इस विधेयक की प्रासंगिकता को समझा जा सकता है। उक्त विधेयक के उद्देश्यों और कारणों का कथन इस प्रकार है :

नागरिकता अधिनियम, 1955 (1955 का 57), भारतीय नागरिकता के अर्जन और अवधारण का उपबंध करने के लिए अधिनियमित किया गया था।

2. यह ऐतिहासिक सत्य है कि जनसंख्या का सीमापार प्रर्वजन भारत के राज्य क्षेत्रों और वर्तमान में पाकिस्तान, अफगानिस्तान और बंगलादेश में समावीष्ट क्षेत्रों के बीच निरंतर होता रहा है। वर्ष 1947 में भारत का विभाजन होने के समय विभिन्न धर्मों से संबंध रखने वाले अविभाजित भारत के लाखों नागरिक पाकिस्तान और बंगालादेश के उक्त क्षेत्रों में ठहरे हुए थे। पाकिस्तान, अफगानिस्तान और बंगालादेश के संविधान में विनिर्दिष्ट राज्य धर्म का उपबंध किया गया है। परिणामस्वरूप, हिंदू, सिक्ख, बौद्ध, जैन, पारसी और इसाई समुदायों के बहुत से व्यक्तियों ने इन देशों में धर्म के आधार पर अत्याचारों का सामना किया है। उनमें से कुछ व्यक्तियों को उनके दिन-प्रति-दिन के जीवन में ऐसे

अत्याचार के बारे में भय भी है कि वहां उनके धर्म का आचरण करने, उसे मानने या प्रचार करने का अधिकार अवरुद्ध और प्रतिबंधित हो गया है। बहुत से ऐसे व्यक्ति भारत में शरण लेने के लिए घुसे और भारत में ठहरते रहे हैं, भले ही उनके यात्रा दस्तावेज समाप्त हो गए हों या उनके पास अपूर्ण दस्तावेज हों या कोई दस्तावेज न भी हों।

3. अधिनियम के विद्यमान उपबंधों के अधीन, अफगानिस्तान, पाकिस्तान या बंगलादेश से हिंदू, सिक्ख, बौद्ध, जैन, पारसी और ईसाई समुदायों के ऐसे प्रवासी, जो वैध यात्रा दस्तावेजों बिना भारत में प्रवेश कर गए थे या यदि उनके दस्तावेजों की वैधता समाप्त हो गई है, तो उन्हें अवैध प्रवासी के रूप में समझा जाता है और वे अधिनियम की धारा 5 या धारा 6 के अधीन भारतीय नागरिकता के लिए आवेदन करने के लिए अपात्र हैं।

4. केंद्रीय सरकार ने, उक्त प्रवासियों को पासपोर्ट (भारत में प्रवेश) अधिनियम, 1920 और विदेशियों विषयक अधिनियम, 1946 तथा अधिसूचना तारीख 07 सितंबर, 2015 और तारीख 18 जुलाई, 2016 के द्वारा तद्धीन बनाए गए नियमों या किए गए आदेशों द्वारा प्रतिकूल दांडिक परिणामों में छूट दे दी थी। तत्पश्चात् केंद्रीय सरकार ने, आदेश तारीख 08 जनवरी, 2016 तथा 14 सितंबर, 2016 द्वारा उन्हें भारत में ठहरने के लिए दीर्घकालिक वीसा के लिए भी पात्र बनाया था। अब, यह प्रस्ताव है कि उक्त प्रवासियों को भारतीय नागरिकता के लिए पात्र बनाया जाए।

5. ऐसे अवैध प्रवासियों को, जिन्होंने 31 दिसंबर, 2014 की निर्णायक तारीख तक भारत में प्रवेश कर लिया है, अपनी नागरिकता संबंधी विषयों को शासित करने के लिए एक विशेष शासन व्यवस्था की आवश्यकता है। इस प्रयोजन के लिए, केंद्रीय सरकार या उसके द्वारा विनिर्दिष्ट प्राधिकारी ऐसी शर्तों, निर्बंधनों और रीति, जो विहित की जाए, के अधीन रहते हुए, रजिस्ट्रीकरण प्रमाणपत्र या देशीयकरण प्रमाणपत्र प्रदान करेगा। क्योंकि उनमें से बहुत से प्रवासी भारत में बहुत पहले प्रवेश कर चुके हैं, उन्हें भारत में उनके प्रवेश की तारीख से भारत की नागरिकता प्रदान की जाए, यदि वे धारा 5 में विनिर्दिष्ट भारतीय नागरिकता की शर्तों या अधिनियम की तीसरी अनुसूची के उपबंधों के अधीन देशीयकरण के लिए अर्हताओं को पूरा करते हैं।

6. विधेयक, पूर्वोक्त हिंदू, सिक्ख, बौद्ध, जैन, पारसी और ईसाई समुदायों के प्रवासी को उन्मुक्ति प्रदान करने के लिए भी है, जिससे प्रवजन या नागरिकता की उनकी प्रास्थिति के संबंध में उनके विरुद्ध कोई कार्यवाहियां उन्हें भारतीय नागरिकता के लिए आवेदन करने से वर्जित न करे। अधिनियम के अधीन विहित किए जाने वाला सक्षम प्राधिकारी, अधिनियम की धारा 5 या धारा 6 के अधीन ऐसे व्यक्तियों के आवेदन पर विचार करते समय उनके विरुद्ध अवैध प्रवासी के रूप में उनकी प्रास्थिति या उनकी नागरिकता संबंधी विषय के बारे में आरंभ की गई किन्हीं कार्यवाहियों पर विचार नहीं करेगा, यदि वे नागरिकता प्रदान करने के लिए सभी शर्तों को पूरा करते हैं।

7. भारतीय मूल के बहुत से व्यक्ति, जिनमें पूर्वोक्त देशों से उक्त अल्पसंख्यक समुदायों के व्यक्ति भी हैं, नागरिकता अधिनियम, 1955 की धारा 5 के अधीन नागरिकता के लिए आवेदन करते रहे हैं, किंतु वे अपने भारतीय मूल का सबूत प्रस्तुत करने में असमर्थ हैं। इसलिए, उन्हें उक्त् अधिनियम की

धारा 6, जो, अन्य बातों के साथ-साथ, अधिनियम की तीसरी अनुसूची के निबंधनानुसार देशीकरण के लिए बारह वर्ष की निवास की अवधि को एक अर्हता के रूप में विहित करती है, के अधीन देशीयकरण द्वारा नागरिकता के लिए आवेदन करने के लिए विवश किया जाता है। यह उनको ऐसे बहुत से अवसरों और लाभों से वंचित करता है, जो भारत के नागरिकों को ही प्रोद्भूत हो सकेंगे, भले ही उनकी भारत में स्थायी रूप से ठहरने की संभावना हो। अत:, अधिनियम की तीसरी अनुसूची का संशोधन करने का प्रस्ताव है, जिससे पूर्वोक्त देशों से उक्त समुदायों के आवेदकों को देशीयकरण द्वारा नागरिकता के लिए पात्र बनाया जा सके, यदि वे विद्यमान ग्यारह वर्षों के स्थान पर पांच वर्षों के लिए अपनी निवास की अवधि को साबित कर सके।

8. वर्तमान में, ऐस भारत के कार्डधारक विदेशी नागरिक, जो इस अधिनियम या तत्समय प्रवृत्त किसी अन्य विधि के किसी उपबंध का उल्लंघन करते हैं, के रजिस्ट्रीकरण को रद्द करने के लिए अधिनियम की धारा 7घ में कोई विनिर्दिष्ट उपबंध नहीं है। उक्त धारा 7घ का संशोधन करने का भी प्रस्ताव है जिससे केंद्रीय सरकार को अधिनियम के या तत्समय प्रवृत्त किसी अन्य विधि के किन्हीं उपबंधों का उल्लंघन करने की दशा में, भारत के कार्डधारक विदेशी नागरिक के रूप में रजिस्ट्रीकरण को रद्द करने के लिए सशक्त किया जा सके।

9. क्योंकि, वर्तमान में, धारा 7घ के धीन भारत के विदेशी नागरिक कार्ड के रद्दकरण से पूर्व भारत के कार्डधारक विदेशी नागरिक को सुनवाई का अवसर प्रदान करने के लिए अधिनियम में कोई विनिर्दिष्ट उपबंध नहीं है, इसलिए भारत के विदेशी नागरिक कार्ड के रद्दकरण से पूर्व भारत के कार्डधारक विदेशी नागरिक को सुनवाई का अवसर प्रदान करने का प्रस्ताव है।

10. विधेयक, संविधान की छठी अनुसूची के अंतर्गत आने वाले पूर्वोक्त राज्यों की देशज जनसंख्या को प्रदान की गई सांविधानिक गारंटी की संरक्षा करने के लिए और बंगाल पूवी सीमांत विनियम, 1973 की ''आंतरिक रेखा'' प्रणाली के अंतर्गत आने वाले क्षेत्रों को प्रदान किए गए कानूनी संरक्षण के लिए भी है।

11. विधेयक, उपरोक्त उद्देश्यों की पूर्ति के लिए हैं।

नागरिकता (संशोधन) विधेयक, 2019 के उद्देश्यों और कारणों के कथन के विवेचन से यह स्पष्ट होता है कि नागरिकता अधिनियम, 1955, भारतीय नागरिकता के अर्जन और अवधारण का उपबंध करने के लिए अधिनियमित किया गया था। यह सर्वविदित है कि स्वतंत्रता के पश्चात् अखंड भारत का विभाजन वर्तमान भारत और पाकिस्तान के रूप में किया गया। भारत में हिंदू समुदाय के लोगों को रहने की स्वतंत्रता मिली जबकि मुस्लिम समुदाय को पाकिस्तान में जाकर रहने के लिए कहा गया। किंतु स्वतंत्रता के पश्चात् हिंदू समुदाय के अधिकांश लोगों को वर्तमान पाकिस्तान से निष्कासित होकर भारत आना पड़ा जबकि अधिकांश मुस्लिम समुदाय के लोग भारत से पाकिस्तान नहीं गए। विभाजन के पश्चात् हिंदू, सिख, बौद्ध, जैन, पारसी और ईसाई समुदाय के लोगों को अफगानिस्तान और पाकिस्तान में अत्याचार का सामना करना पड़ा। यह संशोधन अधिनियम ऐसे अवैध प्रवासियों को जिन्होंने 31 दिसंबर, 2014 की निर्णायक तारीख तक भारत में प्रवेश कर लिया है, ऐसी शर्तों, निबंधनों और रीति जो विहित की जाए, के अधीन रहते हुए रजिस्ट्रीकरण प्रमाण-पत्र या देशीकरण

प्रमाण–पत्र प्रदान करेगा। यह संशोधन अधिनियम अन्य कई नागरिकता संबंधी समस्याओं के निराकरण के लिए भी उपादेय है।

कुछ बुद्धिजीवियों विशेषकर मुस्लिमों का यह आक्षेप है कि वर्तमान सरकार भारत को नागरिकता (संशोधन) अधिनियम, 2019 के माध्यम से एक हिंदू राष्ट्र बनाना चाहती है। यदि वर्तमान सरकार भारत को हिंदू राष्ट्र बनाना चाहती है तो इसमें क्या समस्या है। हिंदू धर्म जनसंख्या की दृष्टि से ईसाई और इस्लाम धर्म के बाद विश्व का तीसरा सबसे बड़ा धर्म है। परंतु भौगोलिक विस्तार की दृष्टि से इसका क्षेत्र काफी सीमित रहा है। विश्व के लगभग 95 प्रतिशत हिंदू भारत में रहते हैं जबकि इस्लाम की जन्मभूमि सऊदी अरब में विश्व के केवल 1.6 प्रतिशत मुस्लाम रहते हैं। विश्व के विशाल बहुमत वाले लगभग 53 देशों में से 27 देशों ने इस्लाम को शासकीय धर्म घोषित किया है। 100 से अधिक ईसाई बहुमत वाले देशों के बीच ब्रिटेन, ग्रीस, नार्वे, हंगड़ी, डेनमार्क जैसे देशों ने ईसाई धर्म को अपना शासकीय धर्म घोषित कर चुके हैं। वाममार्गी और तथाकथित उदारवादी चिंतक भारत को हिंदू राष्ट्र की संकल्पना से क्यों विक्षिप्त हो रहे हैं।

यह मानने का कोई औचित्य नहीं है कि भारत के हिंदू राष्ट्र हो जाने से पंथनिरपेक्षता खतरे मंष पड़ जाएगा। पारसी, जैन, सिख, इस्लाम और बौद्ध – सभी धर्मानुआयी भारत में फलफूल रहे हैं। इससे यह बात सिद्ध होती है कि अन्य मतावलंबी सैकड़ों वर्षों से भारत में सहिषुणता के साथ निवास कर रहे हैं।

भारत में अन्य धर्मों के पूजा स्थलों में हिंदू भी पूजा करते देखे जा सकते हैं जबकि अन्य मतावलंबी मंदिरों में बहुत कम पूजा करते हुए दिखाई पड़ते हैं। हिंदू धर्म में धर्मांतरण के लिए कोई स्थान ही नहीं है। अनेक मुस्लिम और ईसाई देश जैसे म्यामार, फिलिस्तीन, यमन आदि इन धर्मों के मानने वालों के धार्मिक उत्पीड़न पर मानवाधिकार हनन का शोर माचाते रहते हैं। किंतु पाकिस्तान, बंगलादेश और अफगानीस्तान में हिंदुओं और सिखों पर हुए अमानवीय अत्याचारों पर मुंह खोलना आवश्यक नहीं समझते। वर्ष 1989 के आसपास जम्मू–कश्मीर में कश्मीरी पंडितों के साथ अमानवीय अत्याचार किया गया और उन्हें रातोंरात कश्मीर छोड़कर भागना पड़ा, यह एक मानवीय त्रासदी ही थी। क्या आज कोई यह बता सकता है कि वर्ष 1971 में पाकिस्तान की फौजों ने बंगलादेश के निरीह हिंदुओं के साथ किस तरह का नरसंहार किया। भारतीय शासन तंत्र ने विशाल हिंदू बहुमत के प्रति भेदभाव करती आ रही थी। भारतीय उच्चतम न्यायालय को भारत सरकार को यह निर्देश देना पड़ा कि मुस्लिमों को दी जाने वाली हज सब्सीडी अगले दस सालों में क्रमशः समाप्त की जाए। विश्व का कोई अन्य पंथनिरपेक्ष देश किसी विशेष मत के अनुयायियों को धार्मिक पर्यटन के लिए इस प्रकार की छूट शायद ही देता हो।

किसी भी पंथनिरपेक्ष राष्ट्र में सभी नागरिकों के लिए एक समान कानून होते हैं पर भारत में भिन्न–भिन्न मतावलंबियों के लिए भिन्न–भिन्न व्यक्तिक कानून हैं जो प्रायः भारतीय संविधान के विरुद्ध प्रतीत होते हैं। सरकार मंदिरों को अपने अधीन कर लेती है जबकि मस्जिदें और चर्च पूर्णतः स्वायत हैं। हज यात्रा पर छूट है पर अमरनाथ या कुंभ की यात्रा पर इस तरह की छूट क्यों नहीं ? भारत जैसे इस प्रकार के पंथनिरपेक्ष राष्ट्र को किसी विशेष प्रकार के मतावलंबियों के लिए इस प्रकार की विशेष

छूट नहीं देनी चाहिए।

भारत के हिंदुओं ने हमेशा अल्पमत को आदर किया है और उन्हें सुरक्षा प्रदान की है। उनकी सहिष्णुता स्वागतयोग्य है। पारसी लोग जब हर जगह उत्पीड़ित होते रहे, भारत ने उन्हें शरण दी। विश्व भर में प्रताड़ित होने वाले यहूदियों को 2000 वर्ष पहले और सीरियाई ईसाईयों को 1800 साल पहले भारत में ही शरण मिली। जैन, बौद्ध, सिख धर्म तो हिंदू धर्म की ही प्रशाखाएं हैं और इनके अनुयायी बिना किसी समस्या के हिंदुओं के साथ शांतिपूर्ण सहस्तित्व में रहते आए हैं। भारत आज एक पंथनिरपेक्ष राज्य है। यह पंथनिरपेक्षता संविधान के 1976 के संविधान संशोधन के कारण नहीं बल्कि विशाल हिंदू बहुमत के कारण है जो स्वभाव से ही पंथनिरपेक्ष हैं। भारत को हिंदू राष्ट्र घोषित करने में किसी को भी कोई शिकायत नहीं होनी चाहिए। भारत एक प्रगतिशील और विकासोनमुख राष्ट्र तभी तक रहेगा जब तक वह पंथनिरपेक्ष है और देश की जनसांख्यिकीय हैशियत में हिंदुओं का वर्चस्व बना रहता है। पंथनिरपेक्षता और हिंदू धर्म एक ही सिक्के के दो पहलू हैं।

नागरिकता (संशोधन) अधिनियम, 2019 का उद्देश्य देश में और देश के बाहर के हिंदू, सिख, बौद्ध, जैन, पारसी और ईसाई समुदाय के सभी लोगों को भारत की नागरिकता प्रदान करना है। इस उद्देश्य की प्राप्ति से भारत के मुस्लिमों को कोई नुकसान नहीं होने वाला। भारत के मुस्लमान लगभग 500 वर्षों से भारत में रह रहे हैं और वे वर्तमान भारत में अन्य मतावलंबियों के साथ रच-बस गए हैं। उपरोक्त अधिनियम भारत के सर्वांगीण विकास के लिए बहुत आवश्यक है और यह अधिनियम भारतीय संविधान की मूल अवधारणा के अनुकूल है अत: हमारा यह मत है कि उक्त अधिनियम को बिना किसी छेड़छाड़ के लागू किया जाना चाहिए।

अंतत:, विश्व का, और विशेष रूप से हमारा, इतिहास यह बताता है कि धर्म के नाम पर अज्ञान से अथवा दुष्टता से अनेक जघन्य और समाजविरोधी कार्यों को भी संरक्षण देने का प्रयत्न किया जा सकता है। एक ओर तो एक धर्म के अनुयायी दूसरे धर्मों के अनुयायियों पर अत्याचार करने का आतुर हो सकते हैं जिससे धर्म के नाम पर सामाजिक शांति, सुरक्षा और प्रगति का अंत हो सकता है, तथा दूसरी ओर धर्म के नाम पर अनेक प्रकार की कुरीतियां और नृशंसताएं भी पनप सकती हैं जिससे मानव की गरिमा और उसके कल्याण दोनों का ही नाश हो सकता है। हाल ही की उत्तर-पूर्व दिल्ली की दंगा और आगजनी एक ऐसी घटना है जो उपरोक्त विचार को रूपायित करती है। तारीख 24 फरवरी से 26 फरवरी, 2020 तक के दौरान उत्तरी-पूर्व दिल्ली के कई क्षेत्रों में आगजनी और दंगा की घटना हुई जिसमें लगभग 52 व्यक्तियों की मृत्यु हुई और करोड़ों रुपयों की संपत्ति आगजनी में जलकर स्वाहा हो गई। ऐसा प्रतीत होता है कि यह घटना नागरिकता संशोधन अधिनियम, 2019 (सी.ए.ए.) के विरोध में दो समुदायों (हिंदू-मुस्लिम) के बीच आपसी उन्माद का परिणाम थी। इस घटना में मुस्लिम और हिंदू दोनों समुदायों के लोगों ने एक दूसरे पर घोर प्रहार किए और एक दूसरे की व्यक्ति संपत्ति को क्षति पहुंचाई तथा मानव की हत्या की। समाज में नर बलि, अस्पृश्यता और सती इनके अतिमय उदाहरण हैं।

हमारे समाज में 'धर्म की स्वतंत्रता' के साथ-साथ कई परिस्थितियों में मनुष्य को 'धर्म से स्वतंत्रता' दिलाना भी आवश्यक है, वर्तमान सामाजिक भूमंडलीकरण के परिप्रेक्ष्य में यह देखने में आता है कि

अब लोग जाति, धर्म और संप्रदाय के बंधन में नहीं बंधकर नहीं रहना चाहते बल्कि वे इन बंधनों से मुक्त होकर एक स्वच्छंद समाज में विचरण करना चाहते हैं। हमारे संविधान निर्माताओं ने अनुच्छेद 25 और 26 में धर्म की स्वतंत्रता तथा धार्मिक कार्यों के प्रबंध की स्वतंत्रता से संबंधित उपबंधों को बड़े सोच विचार से गढ़ा है और उनके द्वारा ऐसी व्यवस्था करने का प्रयत्न किया गया है जिससे एक ओर तो धर्म के स्वरूप पालन और प्रचार में किसी प्रकार की बाधा न पड़े और दूसरी ओर धर्म के नाम पर मानव मानव का शत्रु न बनाया जा सके, मानव मानव पर अत्याचार न कर सके, मानव मानव की श्रद्धा, भोलेपन या अज्ञान का लाभ उठा कर उसका शोषण न कर सके और मानवता की गरिमा को चोट न पहुंचाई जा सके।

अंत में, यह कहना बहुत प्रासंगिक है कि धर्म की स्वतंत्रता की अधिकार और मानव अधिकार के बीच सापेक्ष संबंध हैं। दोनों अधिकारों की मूल प्रवृत्ति समाज के सभी व्यक्तियों के सर्वांगीण विकास के लिए उपजाऊ पृष्ठभूमि तैयार करने की है। जहां धर्म की स्वतंत्रता के अधिकार की स्वतंत्रता व्यक्तियों के सामाजिक, धार्मिक, भौतिक और आध्यात्मिक जीवन को सफल बनाने की है वहीं मानव अधिकार की भी आवश्यकता व्यक्ति के प्राण, स्वतंत्रता, समानता और उसकी गरिमा की संरक्षा के लिए है। इस प्रकार यह कहना समीचीन है है कि दोनों प्रकार के अधिकार मानवों के सामाजिक, आर्थिक और आध्यात्मिक पहलुओं पर उनके सर्वोत्तम मानवी लक्ष्यों को प्राप्त करने के लिए बहुत आवश्यक है।

न्यायसंगत है दुर्लभ से दुर्लभतम मामलों में मृत्युदंड की सजा

डॉ. कविता सुरभि*

I. परिचय

सभी दंड एक ही सिद्धांत पर आधारित होते हैं कि गलत काम का अंजाम दोषी को भुगतना ही चाहिए। सजा देने के दो मुख्य कारण हैं। एक विश्वास कि एक व्यक्ति जिसने गलत किया है, इसके लिए वो दण्डित होगा ही; दूसरा यह कि गलत काम करने वालों को सजा देना दूसरों को गलत काम करने से रोकता है। मृत्युदंड भी अन्य दंड के समान ही इसी आधार पर टिका हुआ है।

आज तक जो स्थिति सामने आई है, उसे ध्यान में रखते हुए, मृत्युदंड की बहस आम तौर पर प्रासंगिक बहस है। मृत्युदंड भारतीय आपराधिक न्याय प्रणाली का एक अभिन्न अंग है। भारत में मानवाधिकार आंदोलन की बढ़ती ताकत ने मृत्युदंड के अस्तित्व पर सवाल उठाते हुए, उसे अनैतिक माना है। हालाँकि एक तर्क यह भी है कि समाज में कई सदस्यों या संभावित पीड़ितों के जीवन की कीमत पर एक व्यक्ति को जीवित रखना नैतिक रूप से गलत है।[1]

II. एतिहसिक पृष्ठभूमि

मृत्युदंड मानव समाज में आदिम काल से लेकर आज तक विद्यमान है। व्यावहारिक रूप से दुनिया में ऐसा कोई देश नहीं है जहाँ मृत्युदंड का अस्तित्व कभी नहीं रहा हो, लेकिन इसके पीछे के कारणों और इसके निष्पादन के तरीकों में निरंतर बदलाव आया है। सातवीं शताब्दी ई.पू. में एथेंस के ड्रेकोनियन कोड में हत्या, राजद्रोह, आगजनी और बलात्कार आदि सभी अपराधों के लिये मृत्युदंड की ही व्यवस्था थी। तथापि प्लेटो ने यह तर्क दिया कि इसका उपयोग केवल उन अपराधों के लिए ही किया जाना चाहिए, जहाँ सुधार की संभावना न हो। पाँचवीं सदी के रोमन कानून में भी मृत्युदंड का विधान था, हालांकि नागरिकों को गणतंत्र के दौरान थोड़े समय के लिए छूट दी गई थी।[2] प्राचीन भारत में भी मृत्युदंड का प्रावधान था। कौटिल्य के अर्थशास्त्र का एक पूरा अध्याय उन सभी अपराधों की फेहरिस्त को समर्पित है जिनके लिये प्राणदंड दिया जाना नियत था। मौर्य सम्राट अशोक ने पशुवध को तो तिरस्कृत किया, परंतु मृत्युदंड पर रोक नहीं लगाई। विदेशी यात्रियों के संस्मरणों से भी प्राचीन भारत में मृत्युदंड की उपस्थिति का पता चलता है।

भारत में मृत्युदंड

ब्रिटिश भारत की विधान सभा में 1931 तक मृत्युदंड के बारे में कोई मुद्दा तब तक नहीं उठाया गया

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1 Yashveer Singh, "Death penalty: Need to exist or not in India" 2(4) *International Journal of Multidisciplinary Research and Development* 528 (2015).

2 Definition of Capital Punishment, *available at*: http://www.britannica.com/topic/capital-punishment (last visited on May 7, 2020).

था, जब तक बिहार के सदस्यों में से एक, श्री गया प्रसाद सिंह ने भारतीय दंड संहिता के तहत अपराध के लिए मौत की सजा को समाप्त करने के लिए एक विधेयक लाने की मांग नहीं की। हालाँकि, तत्कालीन गृह मंत्री द्वारा प्रस्ताव का जवाब दिए जाने के बाद इस प्रस्ताव को नकार दिया गया।

स्वतंत्रता से पहले 1946 में ब्रिटिश भारत में मृत्युदंड पर सरकार की नीति के बारे में तत्कालीन गृह मंत्री, सर जॉन थॉर्न ने विधान सभा की बहसों में दो बार स्पष्ट रूप से कहा था, ''सरकार नहीं समझती कि जिन अपराधों के लिए मृत्युदंड की सजा दी जाती है, उनमें से किसी भी प्रकार के अपराध के लिए मृत्युदंड को समाप्त किया जाये।''

स्वतंत्रता के समय, भारत ने ब्रिटिश औपनिवेशिक सरकार द्वारा लागू किए गए कई कानूनों को बरकरार रखा, जिसमें आपराधिक प्रक्रिया संहिता, 1898, और भारतीय दंड संहिता, 1860 शामिल थी।

आपराधिक प्रक्रिया संहिता,1898 की धारा 367 (5) में न्यायालय के लिए उन कारणों को दर्ज करना आवश्यक था, जहां अदालत ने मौत की सजा नहीं देने का फैसला किया था, ''अगर अभियुक्त को मौत की सजा के लिए दोषी ठहराया जाता है, और अदालत उसे मौत के अलावा किसी भी सजा के लिए सजा सुनाती है, तो अदालत अपने फैसले में बताएगी कि मौत की सजा क्यों पारित नहीं की गई।''

सन 1955 में, संसद ने आपराधिक प्रक्रिया संहिता,1898 की धारा 367 (5) को निरस्त कर दिया, और मौत की सजा की स्थिति में काफी फेरबदल किया। मौत की सजा अब मानदंड नहीं था, और अदालतों को यह बताने के लिए विशेष कारणों की आवश्यकता नहीं थी कि वे उन मामलों में मौत की सजा क्यों नहीं दे रहे थे, जहां यह एक निर्धारित सजा थी।

दंड प्रक्रिया संहिता, 1973 के अंतर्गत मृत्युदंड के सम्बन्ध में धारा 354 (3) एवं (5) में प्रावधान किया गया है कि –

''जब दोष सिद्ध, मृत्यु से अथवा अनुकल्पत: आजीवन कारावास से या कई वर्षों की अवधि के कारावास से दंडनीय किसी अपराध के लिए है, तब निर्णय में दिये गए दंडादेश के कारणों का और मृत्यु के दंडादेश की दशा में ऐसे दंडादेश के लिए विशेष कारणों का कथन होगा।''[3] जब किसी व्यक्ति को मृत्यु का दंडादेश दिया जाता है, तो वह दंडादेश यह निर्देश देगा कि उसे गर्दन में फाँसी लगाकर तब तक लटकाया जाएगा, जब तक उसकी मृत्यु न हो जाये।

भारतीय दंड संहिता, 1860 में आपराधिक षड्यंत्र, हत्या, राष्ट्र के खिलाफ युद्ध छेड़ने, डकैती जैसे विभिन्न अपराधों के लिये मौत की सज़ा का प्रावधान है। दंड प्रक्रिया संहिता की उपर्युक्त धाराओं एवं भारतीय दंड संहिता की धारा 53(1) का संयुक्त प्रभाव यह है कि भारत में मृत्युदंड को वैधानिक स्थिति प्राप्त है।[4]

3 भारतीय दंड संहिता, धारा 307

4 भारतीय दंड संहिता, धारा 364 (ए)

उच्चतम न्यायालय ने भी उपर्युक्त मानदंडों का न केवल समर्थन किया, अपितु न्यायिक व्यवस्था में भी उसे लागू किया है। आपराधिक न्यायशास्त्र के एक विश्लेषण के अनुसार, मृत्युदंड को दुर्लभों में दुर्लभतम (रेयरेस्ट ऑफ़ रेयर) मामलों में ही लागू करने के लिये कहा; जिससे केवल अतिक्रूर वीभत्स मामलों में ही मृत्युदंड दिया जा सके।

भारतीय दंड संहिता में मृत्युदंडनीय अपराधः

क्रम संख्या	धारा संख्या	विवरण
1	121	भारत सरकार के विरूद्ध युद्ध करना या युद्ध करने का प्रयत्न करना या युद्ध करने का दुष्प्रेरण करना
2	132	विद्रोह का दुष्प्रेरण, यदि उसके परिणामस्वरूप विद्रोह हो जाए
3	194	मत्यु से दण्डनीय अपराध के लिए दोषसिद्धि कराने के आशय से झूठा साक्ष्य देना या गढ़ना
4	195क	आजीवन कारावास या कारावास से दण्डनीय अपराध के लिए दोषसिद्धि प्राप्त करने के आशय से झूठा साक्ष्य देना या गढ़ना
5	302	हत्या के लिए दण्ड
6	305	शिशु या उन्मत्त व्यक्ति की आत्महत्या का दुष्प्रेरण
7	307 (2)	गैर इरादतन हत्या करने का प्रयास
8	364क	फिरौती, आदि के लिए व्यपहरण
9	376क	पृथक कर दिए जाने के दौरान किसी पुरुष द्वारा अपनी पत्नी के साथ संभोग्र
10	376ई	बार बार बलात्कार का अपराध दोहराना
11	396	हत्या सहित डकैती

अन्य कानूनों में मृत्युदंडनीय अपराध

क्रम संख्या	धारा संख्या	विवरण
1	121	भारत
1	धारा 34, 37, और 38 (1)	वायु सेना अधिनियम, 1950
2	धारा 3(1)(i)	आंध्र प्रदेश संगठित अपराध नियंत्रण अधिनियम, 2001
3	धारा27(3)	आयुध अधिनियम 1959 (निरस्त)

4	धारा34, 37, और 38(1)	सेना अधिनियम, 1950
5	धारा21, 24, 25(1)(a), और 55	असम राइफल्स अधिनियम, 2006
6	धारा65A(2)	बॉम्बे निषेध (गुजरात संशोधन) अधिनियम, 2009
7	धारा14, 17, 18(1)(a), और 46	सीमा सुरक्षा बल अधिनियम, 1968
8	धारा17 और 49	तटरक्षक अधिनियम, 1978
9	धारा4(1)	सती (रोकथाम) अधिनियम, 1987
10	धारा 5	भारत रक्षा अधिनियम, 1971
11	धारा 3	जिनेवा कन्वेंशन अधिनियम, 1960
12	धारा3 (b)	विस्फोटक पदार्थ अधिनियम, 1908
13	धारा16, 19, 20(1)(a), और 49	भारत-तिब्बत सीमा पुलिस बल अधिनियम, 1992
14	धारा 3(1)(i)	कर्नाटक संगठित अपराध नियंत्रण अधिनियम, 2000
15	धारा3(1)(i)	महाराष्ट्रसंगठित अपराध नियंत्रण अधिनियम, 1999
16	धारा 31(1)	स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (नारकोटिक ड्रग्स एंड साइकोट्रॉपिक सब्स्टांसेस एक्ट), 1985
17	धारा 34, 35, 36, 37, 38, 39, 43, 44, 49(2)(a), 56(2), और 59	नौसेना अधिनियम, 1957
18	धारा 15(4)	पेट्रोलियम और खनिज पाइपलाइन (भूमि में उपयोग के अधिकार का अर्जन) अधिनियम 1962
19	धारा 16, 19, 20(1)(a), और 49	सशस्त्र सीमा बल अधिनियम, 2007
20	धारा 3(2)(i)	अधिनियम अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम,1989
21	धारा10(b)(i) और धारा 16(1)(a)	गैरकानूनी गतिविधियाँ रोकथाम अधिनियम, 1967

स्रोत: *भारत का विधि आयोग, मृत्युदंड पर रिपोर्ट 262, अगस्त 2015, पृष्ठ संख्या 31-32*

मृत्युदंड की आवश्यकता पर बहसः वैश्विक परिदृश्य

मृत्युदंड की आवश्यकता पर एक बहस पूरे विश्व में दशकों से चल रही है। 18वीं शताब्दी में मानवतावादियों ने जान लेने के शासन के अधिकार को चुनौती दी। 1989 में एक प्रोटोकॉल पारित किया गया, जिसमें सदस्य देशों से मृत्युदंड को समाप्त करने के लिये जरूरी कदम उठाने की बात की गई। इस प्रस्ताव के पक्ष में 110 राष्ट्र थे। विरोध में भारत सहित 39 राष्ट्र थे। यह प्रस्ताव स्वीकार किया गया; किंतु इसे मानना बाध्यकारी नहीं था। विश्व के मात्र 58 देशों में फाँसी का प्रावधान है। संयुक्त राष्ट्र द्वारा मान्यता प्राप्त 192 देशों में से 140 ने अपने यहाँ से मृत्युदंड के प्रावधान हटा दिये हैं। यूरोपीय संघ में तो अपनी सदस्यता के लिये उस देश में मृत्युदंड का न होना एक अनिवार्य शर्त है। यूरोप में बेलारूस को छोड़कर अन्य किसी भी देश में मृत्युदंड का प्रावधान नहीं है।

18 दिसम्बर 2007 को संयुक्त राष्ट्र महासभा ने उन देशों का आह्वान करते हुए, जिन्होंने मृत्युदंड को बनाए रखा है, मृत्युदंड समाप्त करने की दृष्टि से उसके निष्पादनों पर सम्पूर्ण विश्वव्यापी अधिस्थगन स्थापित करने के लिए संकल्प 62/149 को अंगीकार किया था। तथापि भारत उन राष्ट्रों में से एक है, जिन्होंने मृत्युदंड को बनाए रखा है।[5]

भारत के विधि आयोग ने मृत्युदंड सम्बन्धी अपनी 35वीं रिपोर्ट दिसम्बर 1967 में प्रस्तुत की थी, तब केवल 12 देशों ने सभी परिस्थितियों में सभी अपराधों के लिए मृत्युदंड को समाप्त किया था।[6] आज 140 देशों ने विधि के अनुसार या व्यवहार में मृत्युदंड को समाप्त कर दिया है। जिन देशों ने पिछले दस वर्षों में कम से कम एक व्यक्ति को फाँसी दी, उनकी संख्या 51 से घटकर 39 हो गई। कुछ देशों ने हत्या के लिए भी मृत्युदंड को समाप्त कर दिया है और इसे अपवादात्मक अपराधों, जैसे सैनिक विधि के अधीन अपराध या अपवादात्मक परिस्थितियों में अपराध के लिए बनाए रखा है।[7] मृत्युदंड का सबसे अधिक प्रयोग प्रकट रूप से ईरान, चीन, पाकिस्तान, सऊदी अरब और संयुक्त राज्य अमेरिका में किया जाता है। एमनेस्टी इंटरनेशनल ने 2013 में 22 देशों की सूची जारी की, जहाँ मौत की सज़ा दी गई। इनमें चीन की संख्या सबसे ऊपर है। चीन में 2013 में जहां चौबीस सौ लोगों को फाँसी की सज़ा दी गई, वहां भारत में उस वर्ष सिर्फ एक व्यक्ति अफजल गुरु को मृत्युदंड दिया गया।

III. मृत्युदंड पर भारतीय विधि आयोग की रिपोर्ट

भारत के विधि आयोग ने अपनी 262 वीं रिपोर्ट (अगस्त 2015) में सिफारिश की है कि आतंकवाद से जुड़े अपराधों और युद्ध छेड़ने को छोड़ बाकी सभी अपराध के लिए मौत की सजा ख़त्म हो। 1967 में विधि आयोग ने अपनी 35वीं रिपोर्ट में मृत्यु-दण्ड को कायम रखने की सिफारिश की थी।

उल्लेखनीय है कि सर्वोच्च न्यायालय ने बच्चन सिंह बनाम भारत संघ[8] के मामले में मृत्यु दण्ड की

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5 *संतोष कुमार सतीष भूषण बरियार* बनाम *महाराष्ट्र राज्य* (2009), 6 एस सी सी 498 पैरा 112

6 भारत का विधि आयोग, 35 वीं रिपोर्ट, 1967

7 रोजरहुड, केरोलिनहोएल, *मृत्यु दंडः एक विश्वव्यापी दृष्टिकोण* 5 (5वां संस्करण, 2015)

8 ए आई आर 1980, एस सी 898

संवैधानिकता स्थापित करते हुए कहा कि यह केवल 'विरलतम से विरलतम मामलों' (rarest of rare cases) में ही दिया जाएगा। इस रिपोर्ट में आयोग ने पुलिस सुधार, गवाह सुरक्षा और पीड़ितों को मुआवजा देने की योजनाओं के त्वरित क्रियान्वयन के लिए उपाय भी सुझाए हैं और सरकार से इन पर यथाशीघ्र अमल किए जाने की अपील की है।[9]

देश का संविधान बनाने वाली संविधान सभा में जब मुत्युदंड की सजा पर बहस हुई थी, तब सभा के अध्यक्ष बाबासाहब भीमराव सहित अनेक वरिष्ठ सदस्यों ने इसे हटाने की बात की थी। हत्या के मामले में भारतीय दंड संहिता (आईपीसी) की धारा 302 के तहत, न्यायाधीश मौत की सजा और आजीवन कारावास के बीच चयन कर सकते हैं। 1980 में बच्चनसिंह बनाम पंजाब[10] में उच्चतम न्यायालय के ग्यारह न्यायाधीशों की पीठ ने मृत्यदंड की वैधानिकता को सही ठहराया तथा इसे दुर्लभों में दुर्लभतम (रेयरेस्ट ऑफ़ रेयर) मामलों में ही लागू करने के लिये कहा; जिससे केवल अतिक्रूर वीभत्स मामलों में ही मृत्युदंड दिया जा सके। इस मामले में अपने निर्णय पर पहुंचने के लिये न्यायालय ने विधि आयोग की 35वीं रिपोर्ट तथा भारत और विदेशों में दिए गए पूर्व फैसलों पर भरोसा किया था। हालाँकि इसमें न्यायाधीश पी0 एन0 भगवती ने अपनी असहमति दिखाई और मृत्युदंड के प्रावधान को संविधान के अनुच्छेद 14 (समानता का अधिकार) तथा अनुच्छेद 21 (जीवन एवं व्यक्तिगत स्वतंत्रता का अधिकार) का उल्लंघन माना और कहा, न्यायाधीश के हाथों में इतना विवेकाधिकार नहीं दिया जा सकता।

IV. मृत्युदंड पर बहस

मृत्युदंड से जुड़े मामले हमेशा चर्चा का विषय रहे हैं। कुछ मामलों की चर्चा करते हैं ... ईरान की छब्बीस वर्षीय रेहना जब्बारी को अपने बलात्कारी की हत्या करने के मामले में फाँसी दे दी गई थी। अंतर्राष्ट्रीय अपील के बावजूद ईरानी अधिकारियों ने उसे माफ़ी नहीं दी।[11] दूसरा मामला भारत में बहुचर्चित निठारी हत्याकांड के मुख्य आरोपी सुरेन्द्र कोली की दया याचिका खारिज किये जाने की है।[12] तीसरा – पांच भारतीय मछुवारों को श्रीलंका में मादक द्रव्य तस्करी के आरोप में फाँसी की सज़ा सुनाई जाना। अभी कुछ समय पहले ही, उच्चतम न्यायालय ने घुमंतू जनजाति के तीन लोगों को मिली मृत्युदंड की सजा को, उनके खिलाफ पर्याप्त सबूत न होने के कारण रद्द[13] कर दिया।

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9 Law Commission of India, "262nd Report on Death Penalty" 217-218 (August, 2015).

10 *बच्चन सिंह* बनाम *पंजाब राज्य,* ए. आई. आर. 1980, एस. सी. 636

11 अंतरराष्ट्रीय तमाम प्रयासो के बावजूद 26 वर्षीय इरानी महिला रेहाना जब्बारी को नहीं बचाया जा सका। अपना साथ जबरदस्ती सेक्स करने की कोशिश करने वाले शख्श को जान से मार देने के आरोप में करीब 7 साल से जेल की सजा काट रही रेहाना को फांसी दे दी गई

12 *सुरेन्द्र कोली* बनाम *उत्तर प्रदेश राज्य,* 15 फरवरी 2011

13 सन 2003 में महाराष्ट्र के बोखरधन कस्बे में एक परिवार के पांच लोगों तथा परिवार की 15 साल की लड़की का बलात्कार कर सबकी हत्या कर दी गई। सत्र न्यायालय ने इन सभी 6 लोगों को मृत्युदंड (आई पी सी की धारा 302/34 और 376-2 जी के तहत) दिया। उच्च न्यायालय ने इनमें से तीन लोगों की मृत्युदंड की सजा को बरकरार रखा और बाकी तीन लोगों की सजा को उम्र कैद की सजा में बदल दिया और 2009 में इस फैसले का समर्थन उच्चतम न्यायालय ने भी किया। किन्तु इस निर्णय के संबंध में जब पुनर्विचार याचिका दायर की गई तो उच्चतम न्यायालय ने घुमंतु जनजाति के सभी लोगों को बेकसूर साबित कर बरी कर दिया

भारत में कलकत्ता में कुछ वर्ष पहले बलात्कारी हत्यारे धनंजय चटर्जी[14] को फाँसी दी गई, तब इस विषय पर बहस छिड़ी थी कि क्या बदलते आधुनिक समाज में मृत्युदंड देना सही है! अजमल कसाब की फाँसी[15] ने इस बहस को फिर सुलगाया था। दिल्ली गैंग रेप निर्भया के मामले में सज़ा निर्धारित होने से पहले गृहमंत्री से लेकर नेताप्रतिपक्ष ने तथा लोकसभा के विपक्ष की नेता सुषमा स्वराज ने फाँसी की मांग की, तो बहस का मुद्दा गर्माहट लेने लगा कि बलात्कार के आरोपियों को फाँसी की सज़ा होनी चाहिए या नहीं। पूर्व प्रधानमंत्री राजीव गांधी के हत्यारे सहित 19 दोषियों को मृत्युदंड की सज़ा से मुक्त किये जाने पर, संसद पर हमले के षड्यंत्रकारी अफजल गुरु को फाँसी पर लटकाये जाने पर तथा याकूब मेनन की फाँसी को लेकर यह विवाद काफी गहराया। 2009 में संतोष कुमार सतीश भूषण बरियार बनाम महाराष्ट्र राज्य के मामले में उच्चतम न्यायालय ने पाया कि कम से कम 15 व्यक्तियों को गलत तरीके से दंड दिया गया है तथा 2013 में शंकर किशन राव खाड़े बनाम महाराष्ट्र राज्य के मामले में न्यायालय ने माना कि 5 मामलों में गलत सज़ा लागू की गई थी। सर्वोच्च न्यायालय ने पाया कि मृत्युदंड की संवैधानिकता और वांछनीयता पर पुन: विचार करने की जरूरत है। सुझाव दिया कि विधि आयोग को भारत में मृत्युदंड का अध्ययन करना चाहिए और इस विषय पर नवीनतम और सुविज्ञ वार्ता आयोजित करनी चाहिए।

दुर्लभतम मामलों में सजा देने का सिद्धान्त

सर्वेक्षण

भारत में हाल के मामलों में उच्चतम न्यायालय ने पाया कि दुर्लभतम मामलों में सजा देने के सिद्धान्त के बावजूद मृत्युदंड की सजा मनमाने ढंग से दी जारी है। विधि आयोग एवं नेशनल लॉ यूनिवर्सिटी, दिल्ली द्वारा कराये एक सर्वेक्षण से पता चला कि मृत्युदंड पाने वाले अधिकतर कमजोर, गरीब व दलित वर्गों के लोगों के पास अच्छे वकील की सेवा लेने का सामर्थ्य भी नहीं है। पूर्व राष्ट्रपति डॉ0 ए0 पी0 जे0 अब्दुल कलाम के अनुसार, ''किसी भी राष्ट्र के अध्यक्ष के रूप में सबसे मुश्किल काम किसी की फाँसी की सजा पर निर्णय लेना होता है। सभी लंबित मौत की सजा के मामलों में अधिकतर सामाजिक–आर्थिक बेस होते हैं।''[16] 31 मार्च, 2012 को सी0 बी0 आई0 की विशेष अदालत द्वारा बेअंत सिंह के हत्यारे बलवंत सिंह[17] को दिये गए मृत्युदंड को शिरोमणि गुरुद्वारा

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14 *धनंजय चटर्जी* बनाम *पश्चिम बंगाल राज्य,* 11 जनवरी, 1994

15 *मोहम्मद अजमल अमीर कसाब* बनाम महाराष्ट्र राज्य 29 अगस्त, 2019। 26 नवंबर 2008 को मुंबई में 10 आतंकियों ने मुंबई की सड़कें और वीटी स्टेशन, ताज होटल समेत दूसरी जगहों पर हमला करके 166 लोगों की हत्या कर दी थी। इस हमले में पुलिस की टीम ने एक आतंकी को जिंदा पकड़ा था बाकी गोलियों का शिकार हो गए थे। इस आतंकी का नाम अजमल कसाब था। हमले के बाद इस आतंकी पर मुकदमा चला, 4 साल के बाद इस आतंकी अजमल कसाब को 21 नवंबर 2012 को पुणे की यरवडा जेल में 7.30 बजे फांसी की सजा दे दी गई थी।

16 अपनी किताब 'टर्निंग पॉइंटस में' डा. कलाम ने यह कहा था

17 *बलवंत सिंह* बनाम *पंजाब राज्य,* (1995) 3 एस सी सी 214

प्रबंधक कमेटी ने आजीवन कारावास में बदलने की अपील की। याकूब मेनन[18] को फाँसी के फंदे से बचाने के कानूनी प्रयास अंतिम समय तक हुए। अमरीका सहित संसार के विभिन्न देशों में बहुत से ऐसे उदाहरण हैं, जिनमें मृत्युदंड पाए व्यक्ति को बाद में निर्दोष पाया गया। भारत के उच्चतम न्यायालय ने वर्ष 2008 में स्वामी श्रद्धानंद[19] मामले के निर्णय में माना कि अपराध इतना दुर्लभतम नहीं है कि दोषी को मृत्युदंड दिया जाए; इसलिये आजीवन कारावास की सजा दी गई। दिल्ली उच्च न्यायालय के पूर्व न्यायाधीश न्यायमूर्ति शाह ने कहा,''व्यवस्था में विसंगतियां हैं और भारत में मृत्युदंड पर गंभीरता से पुनर्विचार करने की तथा अपराध के लिये दंडित करने के वैकल्पिक मॉडल की आवश्यकता है।''[20]

मृत्युदंड के मामलों में फास्ट ट्रैक कोर्ट की व्यवस्था

क्रूर हत्याओं की सुनवाई के लिये हमारे यहाँ फास्ट ट्रैक कोर्ट की व्यवस्था है। गाँधी जी की हत्या 30 जनवरी 1948 को हुई थी। गाँधी जी की हत्या के दोषी नाथूराम गोडसे तथा नारायण दत्तात्रोय आप्टे को 15 नवंबर 1949 को फाँसी पर लटका दिया गया था। इसके ठीक विपरीत दिल्ली की अदालत द्वारा रेल मंत्री ललित नारायण मिश्रा के हत्यारों को आजीवन कारावास की सजा सुनाने में चालीस साल लग गए। राजीव गाँधी के हत्यारों को मौत की सजा होनी चाहिए या नहीं, ये निश्चित करने में न्यायालय को चौबीस वर्ष लग गए। इंदिरा गाँधी के हत्यारों को पाँच वर्ष में मृत्युदंड दे दिया गया। प्रश्न है कि इस तरह के सभी मामले क्या रेयरेस्ट ऑफ़ रेयर की श्रेणी में आते हैं! चौरासी के दंगों तथा बाबरी मस्जिद विध्वंस के बाद दिसंबर 1992 से जनवरी 1993 तक मुंबई दंगों में मारे गए 900 लोगों के दोषियों में से कितने लोगों को सजा हुई?

भारतीय विधि आयोग का मानना है कि फाँसी की सजा होने के बावजूद अपराधों पर रोक नहीं लगा और न ही अपराधियों में डर है। इससे ज्यादा डर तो आजीवन कारावास की सजा के लिए है। आयोग ने परामर्श जारी कर फाँसी समाप्त करने के मुद्दे पर लोगों से राय चाही। आयोग ने यह भी पूछा कि क्या माफी देने के मामले में राष्ट्रपति और राज्यपाल के लिये भी दिशानिर्देश निश्चित होने चाहिए।

विधि आयोग की सिफारिश पर कमीशन के नौ में से छह सदस्य सहमत हैं। तीन सदस्य इस बात से असहमत हैं कि सिर्फ आतंकवाद और राष्ट्रद्रोह के मामलों में ही मृत्युदंड दिया जाए। असहमत सदस्यों में से दो सरकार के प्रतिनिधि हैं।

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18 *याकूब अब्दूल रजाक मेमन* बनाम *महाराष्ट्र राज्य,* (2010) 13 एस सी सी 1

19 स्वामी श्रद्धानंद बनाम कर्नाटक राज्य, (2008) 13 एस. सी. सी. 767

20 गरीब और दलितों को ही मिलता है मृत्युदंड:विधि आयोग प्रमुख, *available at*: https://navbharattimes.indiatimes.com/india/death-penalty-is-privilege-of-poor-says-law-commission-head/championstrophy_articleshow/48037704.cms (last visited on June 8, 2020).

फाँसी की सजा को लेकर दो परस्पर विरोधी दृष्टिकोण

समाजिक व मानवीय मुद्दों पर विचार करने वाली संयुक्त राष्ट्र आमसभा की तीसरी कमेटी ने विश्व को मृत्युदंड निरस्त करने की दिशा में बढ़ना प्रगतिशील माना है। भारतीय विधि आयोग ने माना है कि कुछ विशेष किस्म के अपराधों में इंसाफ सिर्फ मृत्युदंड से ही मिल सकता है तथा इन अपराधों पर विराम भी इस प्रकार के कठोर दंड से ही लगाया जा सकता है।

गृह मंत्रालय के अधीन कार्यरत राष्ट्रीय अपराध रिकार्ड ब्यूरो के अनुसार, इस समय भारत में चार सौ दो लोग विभिन्न अदालतों द्वारा मृत्युदंड की सजा के तहत जेलों में बंद हैं, जिनमें दस महिलाएं हैं। भारत में 31 दिसंबर, 2013 तक राष्ट्रपति भवन में क्षमादान के 382 आवेदन लंबित थे। उच्चतम न्यायालय ने विरल से विरलतम मामलों में मृत्युदंड देने की बात कर आयोग की बात का समर्थन किया है।

फाँसी की सजा को लेकर हमेशा से दो परस्पर विरोधी दृष्टिकोण रहे हैं।

मृत्युदंड के विपक्ष में तर्क

पहला दृष्टिकोण यह है कि क्या मृत्युदंड किसी में इतना भय उत्पन्न कर सकता है कि वह पराधया आतंक में शामिल होने से स्वयं को रोकले ! दिल्ली में16 दिसंबर को हुए गैंगरेप के बाद दोषियों को दंड मिला, नए कानून बने; पर क्या बलात्कार की घटनाएं थम गईं ! मृत्युदंड के बदले अपराधी अगर बिना पेरोल के अपने जीवन के बाकी दिन सलाखों के पीछे काटे और अर्थ का कोई साधन न हो तो अपने किये पर पछताएगा। इससे दूसरों को भीअपराध न करने की प्रेरणा मिलेगी। यह सजा मानवाधिकारों और मौलिक अधिकारों की व्यवस्था के विपरीत है। इस दृष्टिकोण के अनुसार, अपराधी को समाप्त करने की अपेक्षा अपराध को मिटा देने पर विचार करना चाहिए।

अंतरराष्ट्रीय मानव अधिकार संगठन एमेनस्टी इंटरनेशनल की मृत्युदण्ड दिए जाने के खिलाफ मुहिम[21]

1. मौत की सजा वापस नहीं ली जा सकती[22]

मौत की सजा दिए जाने के ख़िलाफ़ सबसे पहला तर्क यह है कि इस सजा को एक बार दे दिए जाने के बाद वापस नहीं लिया जा सकता। कई ऐसे मामले सामने आये हैं, जिनमें मौत की सज़ा दिए जाने के बाद दोषी को निर्दोष पाया गया। एमनेस्टी के अनुसार साल 2004 में अमेरिका के टेक्सास में

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21 "Reasons to abolish the death penalty", *available at*: https://www.amnesty.org.au/5-reasons-abolish-death-penalty/- (last visited on June 8, 2020).

22 *Ibid,* "You can't take it back".

The death penalty is irreversible. Absolute judgments may lead to people paying for crimes they did not commit. Texas man **Cameron Todd Willingham** was executed in Texas in 2004 for allegedly setting a fire that killed his three daughters. Following his execution, further evidence revealed that Willingham did not set the fire that caused their deaths. But it came too late.

कैमरन टॉड विलिंघम नामक व्यक्ति को तीन बच्चियों को जलाकर मार देने का दोषी ठहराए जाने के बाद मृत्युदण्ड दे दिया गया। बाद में पता चला कि विलिंघम ने वह आग नहीं लगायी थी, जिसमें बच्चियों की जान गयी थी।

2. मृत्युदण्ड से अपराध में कमी नहीं आती[23]

माना जाता है कि जिन अपराधों के लिए मृत्युदण्ड दिया जाता है, उन्हें करने से लोग डरेंगे लेकिन आंकड़े इसकी गवाही नहीं देते। अभी तक ऐसा कोई ठोस अध्ययन सामने नहीं आया है कि मौत की सजा देने से सचमुच गम्भीर अपराधों में कमी आती है। कई बार इसके उलट मौत की सजा हटाए जाने के बाद हत्या जैसे अपराधों में कमी आयी। कनाडा में 1976 में मृत्युदण्ड पर रोक लगायी गयी। साल 2016 में कनाडा में पिछले 50 सालों में सबसे कम हत्या के मामले दर्ज हुए।

3. मौत की सज़ा देने के अमानवीय तरीके[24]

2006 में एंजेल निस डियाज को तथाकथित 'ह्यूमेन' घातक इंजेक्शन दिया गया, जिसमें 2 खुराक दी गई और उसके क्रियान्वयन में 34 मिनट लगे। डॉक्टर ने डियाज की मौत को बहुत दर्दनाक बताया। मृत्युदण्ड का विरोध करने वाले मानते हैं कि मौत की सजा देने के सारे तरीके अमानवीय होते हैं। ज़हरीले इंजेक्शन, फाँसी और गोली मारकर हत्या किये जाने के तरीकों से हिंसा को बढ़ावा ही मिलता है। पीड़ित का परिवार, जो पहले से ही बहुत आहत है, के दर्द को मौत का यह अमानवीय तरीका कम नहीं करता है, जबकि सभ्य समाज का मकसद हिंसा को कम करना होता है।

4. एक व्यक्ति की मौत का सार्वजनिक तमाशा बनाना[25]

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23 *Ibid,* "It doesn't deter criminals - There is no credible evidence that the death penalty deters crime more effectively than a prison term. In fact, evidence reveals the opposite. Since abolishing the death penalty in 1976, Canada's murder rate has steadily declined and as of 2016 was at its lowest since 1966."

24 *Ibid,* "There's no 'humane' way to kill -

The 2006 execution of Angel Nieves Diaz, by a so-called 'humane' lethal injection, took 34 minutes and required two doses. Doctors have said that it is likely Diaz' death was painful. Other brutal methods of execution used around the world include hanging, shooting and beheading. The nature of these deaths only continues to perpetuate the cycle of violence and may not alleviate the pain already suffered by the victims' family."

25 *Ibid,* "It makes a public spectacle of an individual's death

Executions are often undertaken in an extremely public manner, with public hangings in Iran or live broadcasts of lethal injections in the US. According to UN human rights experts, executions in public serve no legitimate purpose and only increase the cruel, inhuman and degrading nature of this punishment. "All executions violate the right to life. Those carried out publicly are a gross affront to human dignity which cannot be tolerated," said Hassiba Hadj Sahraoui, Amnesty International's Deputy Director for the Middle East and North Africa."

ईरान में सार्वजनिक रूप से फांसी या अमेरिका में घातक इंजेक्शन के लाइव प्रसारण का प्रदर्शन अक्सर किया जाता है। संयुक्त राष्ट्र के मानवाधिकार विशेषज्ञों के अनुसार, सरेआम तमाशा बनाकर फांसी दिए जाने का कोई कानूनी औचित्य नहीं होता और इससे केवल इस दंड की क्रूर, अमानवीय और अपमानजनक प्रकृति को बढ़ाता है। मौत की सज़ा से जीवन के अधिकार का उल्लंघन होता है। कई बार ऐसा भी होता है कि जिन्हें मौत की सज़ा दी जाती है, उन अपराधियों को ग़ैर-जरूरी शोहरत हासिल होती है।

5. मृत्युदण्ड के मामलों में आ रही कमी[26]

मौत की सज़ा ख़त्म करने के लिए एक तर्क यह भी है कि दुनिया के सभी देशों में मृत्युदण्ड की सज़ा में कमी आ रही है। 2017 में दो देशों – गिनी और मंगोलिया – ने सभी अपराधों के लिए मौत की सजा को समाप्त कर दिया। आज दुनिया के 106 देशों में मौत की सज़ा पर पूरी तरह प्रतिबंध है। 28 देशों में व्यावहारिक तौर पर मृत्युदण्ड नहीं दिया जाता। आठ देशों में सामान्य अपराधों के लिए मृत्युदण्ड नहीं दिया जाता। वहीं 56 देशों में अब भी मौत की सज़ा दी जाती है। यानी कुल 142 देशों में मृत्युदण्ड पर कानूनी या अमली रोक है। केवल 56 देशों में ही मौत की सजा प्रचलित है। भारत में भी यह सज़ा रेयरस्ट ऑफ दि रेयर मामलों में दी जाती है।

मृत्युदंड के पक्ष में तर्क

दूसरे दृष्टिकोण के अनुसार

- आंख के बदले आंख की सजा देने का जो ढंग है, वह सही है; क्योंकि इससे पीड़ित को इंसाफ मिलता है तथा साथ ही समाज में यह कठोर संदेश जाता है कि अपराध करके कोई बच नहीं सकेगा।
- दिल्ली गैंगरेप पीड़िता निर्भया की माँ का कहना है, बलात्कारियों को फाँसी की सज़ा मिलनी चाहिए।
- कंधार विमान अपहरण उदाहरण है कि खतरनाक अपराधियों को जेल में रखना उनके सहयोगियों को अधिक हिंसा और आतंक करने के लिये प्रोत्साहित कर सकता है।
- किसी भी आतंकवादी या पेशेवर हत्यारे को मृत्युदंड देने में कोई बुराई नहीं है, यदि इन आतंकवादियों को मृत्युदंड नहीं मिलता तो यह समाज के साथ अन्याय होगा।

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26 *Ibid,* "The death penalty is disappearing

In 2017 two countries – Guinea and Mongolia – abolished the death penalty for all crimes. Today, 106 countries (the majority of the world's states) have turned their backs on the death penalty for good. Those that continue to execute are a tiny minority standing against a wave of opposition. There are countless arguments for and against the death penalty. In an imperfect world where we can never be sure we have ever got the "worst of the worst" is it ever justified to take a life?"

- दंडनीति की आवश्यकता समाज में व्यवस्था बनाए रखने के लिये है। व्यापक हित किसी एक व्यक्ति की जान से अधिक महत्वपूर्ण हो सकता है इसलिये भावनाओं में बहकर मृत्युदंड को खारिज नहीं किया जा सकता।
- अदालत में मृत्युदंड के बाद न्यायाधीश द्वारा कलम की निब तोड़ने की प्रथा से समाज में यह संकेत दिया जाता है कि कोई और ऐसा अपराध करने की कोशिश न करे।[27]

क्या मौत की सजा का विकल्प संभव है ?

1. फाँसी की सजा के विरोधियों ने जीवन के अधिकार को मौलिक अधिकारों में से एक मानकर मानव जीवन को अनमोल माना है। यह तर्क खारिज नहीं किया जा सकता; किंतु प्रश्न यह है कि सीरियल हत्यारे, बलात्कारी, जानबूझकर लोगों की हत्याएं करने वाले अथवा देश में प्रधानमंत्री की हत्या करने वाले, संसद पर हमला करने वाले, उग्रवादी घटनाओं में सैकड़ों लोगों की हत्या में शामिल आदि लोगों के लिये क्या मौत की सजा के स्थान पर आजीवन कारावास का विकल्प अधिक मानवीय माना जा सकता है!

2. स्वतंत्रता दिवस, गणतंत्र दिवस या गाँधी जयंती पर बहुत से अपराधियों को सरकार द्वारा समूह में आम माफी दे दी जाती थी। इस संदर्भ में उच्चतम न्यायालय ने कहा,''क्षमा करने के अधिकार को लागू करने से पहले संबंधित सरकार को दंड देने वाले या उसकी पुष्टि करने वाले न्यायालय में प्रीजाइड करने वाले न्यायाधीश की अनुमति लेनी होगी। क्षमा केवल व्यक्तिगत आधार पर दी जा सकती है, थोक के भाव में नहीं।'' उच्चतम न्यायालय के इस प्रतिबंध का स्वागत हुआ क्योंकि पीड़ित पक्ष बहुत मुश्किल से न्यायालय के माध्यम से दोषी को दंड दिलाता है।

3. **मौत की सजा के मामलों में सुनवाई की गाइडलाइन तय** – निर्भया के दोषियों की फांसी में हो रही देरी को देखते हुए उच्चतम न्यायालय ने मौत की सजा से जुड़े आपराधिक मामलों की सुनवाई में तेजी लाने के लिए नई गाइडलाइन तय की है। न्यायालय ने ऐसे मामलों की सुनवाई के लिए 6 महीने की समय सीमा निर्धारित की है। यानी जिस दिन उच्च न्यायालय (हाईकोर्ट) मौत की सजा के मामले में फैसला सुनाएगा, उस दिन से अगले 6 महीने के अंदर उच्चतम न्यायालय (सुप्रीम

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27 फांसी की सजा दुनिया की सभी सजाओं में सबसे बड़ी सजा होती है। कानून में ऐसा कोई प्रावधान या नियम नहीं है, जिसमें न्यायाधीश का निब तोड़ना जरुरी हो; लेकिनइस प्रथा का एक सांकेतिक महत्व है। अदालत में मृत्युदंड के बाद कलम के तोड़ देने की प्रथा ब्रिटिश काल से चलती आ रही है, जिसका भारतीय न्यायाधीश अभी भी अनुकरण करते हैं। निब तोड़कर यह भी सुनिश्चित किया जाता है कि एक बार निर्णय देने के बाद न्यायाधीश अपने फैसले पर दोबारा विचार न करे। यह न्यायाधीश की विवशता दिखाता है कि किस तरह मजबूरन उसे न चाहते हुए भी ऐसा कड़ा फैसला करना पड़ा, जिससे समाज में संकेत जा सके तथा कोई और ऐसा अपराध करने की कोशिश न करे।

पहले स्याही वाले निब के पैन उपयोग किए जाते थे। इनके निब तोड़ने के बाद नई निब लगाकर उस क ल म को उपयोग किया जा सकता था। अब जैल या दूसरे पैन उपयोग में आने लगे हैं, अत: निब को तोड़ने की जगह नए पैन का उपयोग किया जाने लगा है।

कोर्ट) की तीन जजों की बेंच उस मामले की सुनवाई कर लेगी, फिर चाहे उस मामले में दोषियों ने अपील दायर की हो या नहीं।[28]

क्या मृत्युदंड को दंडसंहिता से हटा देना उपाय है?

मृत्युदंड के पक्ष या विपक्ष में बहुत से मत हो सकते हैं, परन्तु एक बात स्पष्ट है कि मृत्युदंड को दंडसंहिता से हटा देना ही एकमात्र उपाय नहीं है। समाज में आपराधिक प्रवृत्तियों के कारणों पर गौर किए बिना इसे हटाना हानिकारक हो सकता है। रेयरेस्ट ऑफ़ रेयर मामलों में बलात्कार, जघन्य हत्याओं (एवं हत्याकाण्डों) तथा आतंकी गतिविधियों को रखने की आवश्यकता है।

मृत्युदण्ड के विपक्ष में बोलकर हम सभ्य होने का दावा तभी तक कर सकते हैं, जब तक हम अपने घर एवं परिवेश में सुरक्षित हैं। चौमुखी प्रणाली को क्रियाशील किये बिना यह लक्ष्य प्राप्य नहीं होगा। एक अच्छा नागरिक बनना होगा। अपने कर्तव्यों के प्रति जागरूक रहकर ही अधिकार माँगे जा सकते हैं। शुचिता जैसी साधारण सी दिखने वाली परन्तु अत्यन्त महत्वपूर्ण बात तक हमें समझ नहीं आयी है आज तक। हम नॉर्वे और स्वीडन जैसी सामाजिक सुरक्षा की योजनाएँ चाहते हैं, पाँच सितारा होटलों जैसी जेलें चाहते हैं, चमकती सड़कें और गलियाँ चाहते हैं लेकिन यह सब इस शर्त पर कि हमें कुछ न करना पड़े; हमसे कोई योगदान न माँगे! दो परस्पर विरोधी ताकतों के बीच कैसे संभव होगा यह, जबतक हम यह निश्चय न कर लें कि हमें सही ताक़त को जीताना है।

V. निष्कर्ष

मौत की सजा को मानवाधिकारों या मौलिक अधिकारों का हनन नहीं माना जा सकता। दंड का प्रावधान न होने से समाज में अव्यवस्था और अराजकता फैलेगी। 2018 में जम्मू-कश्मीर के कठुआ जिले में एक आठ वर्षीय बच्ची के अपहरण, बंदी बनाए जाने, बलात्कार और हत्या के लिए जून

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28 केंद्र सरकार ने उच्चतम न्यायालय (सुप्रीम कोर्ट) से गाइडलाइन तय करने की अपील की। निर्भया केस में दोषियों की फांसी में देरी से देश में उपजी नाराजगी के बीच 22 जनवरी, 2020 को केंद्र सरकार उच्चतम न्यायालय पहुंची थी। गृह मंत्रालय ने शीर्ष अदालत में दायर याचिका में कहा- मौत की सजा पर क्यूरेटिव पिटीशन दाखिल करने के लिए समय सीमा तय की जाए। डेथ वॉरंट मिलने के बाद 7 दिन में ही दया याचिका लगाने का नियम रहे। दया याचिका खारिज होने के बाद 7 दिन में डेथ वॉरंट और अगले 7 दिन में फांसी हो, भले ही बाकी दोषियों की कोई भी याचिका लंबित हो। मौजूदा गाइडलाइंस के मुताबिक, किसी भी दोषी की कोई भी याचिका लंबित होने पर उस केस से जुड़े बाकी दोषियों को भी फांसी नहीं दी जा सकती। पीड़ित को ध्यान में रखकर प्रक्रिया में बदलाव करने की मांग की जनवरी, 2014 में उच्चतम न्यायालय ने अपने फैसले में कहा था- मौत की सजा पाए दोषी के भी कुछ अधिकार होते हैं और उसकी दया याचिका खारिज होने के 14 दिन बाद ही उसे फांसी दी जाए। गृह मंत्रालय ने अपनी याचिका में मौत की सजा के मामलों में कानूनी प्रावधानों को दोषी केंद्रित के बजाए पीड़ित केंद्रित करने की अपील की थी। इसका मतलब यह है कि मौत की सजा के मामलों में तय गाइडलाइंस को दोषी की जगह पीड़ित को ध्यान में रखते हुए बदला जाए। याचिका में कहा गया- वर्तमान कानून के गाइडलाइंस दोषी को ध्यान में रखकर बनाए गए हैं। इसके चलते वे सजा टालने के लिए कानूनी प्रावधानों से खिलवाड़ करते हैं।

2019 में छह लोगों को दोषी ठहराया गया था। साल 2012 में दिल्ली में एक चलती बस में पैरामेडिकल छात्रा निर्भया के साथ हुए सामूहिक बलात्कार के चार दोषियों को मृत्युदंड की सजा दे दी गई। कठुआ मामले और दिसम्बर 2012 के सामूहिक बलात्कार मामले ने इस धारणा को और अधिक मजबूत किया कि यौन हिंसा का सबसे कारगर जबाव कठोर सजा है। अजमल कसाब जैसे दुर्दांत आतंकी को यदि आजीवन कारावास दिया जाता, तो जीवन भर उसकी चौकसी के लिये सरकारी मशीनरी लगी रहती, करदाताओं के करोड़ों रुपये खर्च होते! अफजल गुरु को गुपचुप तरीके से फाँसी न दी जाती, तो शायद उसकी लाश पर घाटी में अशांति फैल सकती थी। भारतीय दंड संहिता और पोक्सो कानून में 2019 में संशोधन कर मृत्युदंड का विधायी विस्तार किया गया।

किसी निर्दोष को मौत की सजा देना घोर अन्याय है, इसीलिए लोकतान्त्रिक व्यवस्था में कानून अभियुक्त को अपना पक्ष रखने और खुद को निर्दोष साबित करने का पूरा अवसर देता है। आवश्यक होने पर न्यायालय अभियुक्त को कानूनी सहायता उपलब्ध कराता है।

भारत का संविधान बनाते समय भारतीय न्याय व्यवस्था को बहुत पारदर्शी बनाया गया, जिससे सबको न्याय मिल सके। भारत में फाँसी की सजा न के बराबर है। अमरीका में पिछले चौबीस सालों में (1995 से अब तक) लगभग 1155 अपराधियों को जहरीले इंजेक्शन से मृत्युदंड दिया जा चुका है। भारत में 1995 में सर्वाधिक 13 व्यक्तियों को फाँसी हुई। उसके बाद नौ व्यक्तियों को मृत्युदंड मिला। 1999 से 2003 तक एक भी फाँसी नहीं हुई। 2004 में धनंजय चटर्जी को फाँसी हुई। 2005 से 2011 तक किसी को मृत्युदंड नहीं मिला। 2012, 2013 और 2015 में एक-एक व्यक्ति को फाँसी की सजा मिली।

दुर्भाग्य से अगर मृत्युदंड प्राप्त दोषी कमजोर और गरीब तबके से है, तो उसमें वकील के सहयोग लेने का सामर्थ्य नहीं होता। मध्यप्रदेश के सीहोर जिले के इछावर ब्लॉक के कनेरिया गाँव के मगनलाल ने 11 जून, 2010 को अपनी पाँच बेटियों को मौत के घाट उतारा था। उसे विधिक सहायता तो मिली, लेकिन उसका पक्ष कहीं भी ठीक से नहीं रखा गया और सीहोर अदालत ने 3 फरवरी, 2011 को उसे फाँसी की सजा सुनाई तथा तुरत फुरत 8 अगस्त, 2013 को फाँसी का दिन निश्चित कर दिया गया। त्वरित मामले में यह देखना बहुत महत्वपूर्ण है कि जो व्यक्ति आर्थिक रूप से कमजोर है तथा जिसके पास अच्छे वकील का सहयोग लेने की सामर्थ्य नहीं है, उसे कहीं पर्याप्त साक्ष्यों के अभाव में तो फाँसी के तख्ते तक नहीं पहुंचाया गया। मगनलाल के प्रकरण में 7 अगस्त, 2013 को फाँसी की सजा पर दिल्ली के कुछ प्रगतिशील वकीलों ने रात 11 बजे इस पर स्थगन लिया।

कभी-कभार हुई गलती के कारण मृत्युदंड के प्रावधान को खारिज नहीं किया जा सकता। आवश्कता कानून में सुधार की है, ताकि गरीबों को भी कानूनी सहायता मिल सके और कमजोर सबूतों के आधार पर किसी को मृत्युदंड न दिया जा सके। भले ही कानून की प्रक्रिया से दस अपराधी बच जाएं; किंतु किसी निर्दोष को दंड नहीं मिले। नवम्बर 2018 में न्यायाधीश कुरियन जोसेफ, न्यायाधीश दीपक गुप्ता और न्यायाधीश हेमंत गुप्ता की बेंच के समक्ष छत्तीसगढ़ में ट्रिपल हत्या के आरोप में सज़ा पा चुके आरोपी के मामले की सुनवाई हुई। उच्चतम न्यायालय ने स्पष्ट कर दिया कि भारत में मृत्युदंड की सजा जारी रहेगी। तीन न्यायाधीशों की इस बेंच ने 2-1 के बहुमत से अपना फैसला दिया।

आवश्यकता इस बात की है कि दुर्लभ से दुर्लभतम मामलों में सजा सिद्धांत के अनुसार लागू की जाए, जिससे संविधान का लक्ष्य पूरा हो सके।

Notes on Contributors

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