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THE INTERTWINED TAPESTRY: BASIC STRUCTURE, CONSTITUTIONAL MORALITY, AND THE INDIAN SOCIO-POLITICAL LANDSCAPE

Arnaab Anand, Dewang Mishra, & Himanshu Khanna[*]

Abstract

Basic structure doctrine, which became a landmark movement in the history of legal jurisprudence in India, completed its 50th anniversary on 24th April 2023. Transitioning from a colonial past to become the largest democracy and sustaining through major external and internal shocks since independence, Indian judicial prowess has come a long way. It has been a cornerstone in the evolution of socio-economic and political rights in the republican realm of the country. The exceptional journey of constitutional morality, stemming from wider socio-political reforms like land, education, and a need for a prudent welfare state, mandated the judicial pronouncement of the doctrine called 'Basic Structure of the Constitution.' In this regard, the paper tries to couple the historicity and desirability of the aforesaid doctrine, understanding it through the lens of political thought, traditional values, and country's wider acceptance of both constitutional and democratic morality. Thereby, the paper also attempts to examine the crucial need of 'basic structure' to accommodate the underlying diversity of Indian society while nurturing the fundamental ethos of our democratic values to inculcate a sense of unity in diversity. Consequently, the paper shall sum up the desirability of basic structure doctrine as an Indian innovation substantiated through the socio-political experiences of people.

Keywords : *Basic Structure Doctrine, Constitutional Morality, Indian Judiciary, Socio-Political Reforms, Judicial Review*

I. Introduction

THE INDIAN Constitution, a testament to the collective wisdom of the drafters, parliamentarians, and jurists is a living document constantly adapting to the tides of social change. The article tries to explore the intertwined tapestry of India's changing polity that led to the inception of basic structure doctrine, people's growing faith in the idea of constitutional morality, and socio-political realities of people

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which became a driver for these changes. Even though constitutional morality has been a point of contention with people taking sides on the legitimacy and vagueness of the concept[1], we base our arguments on, why over the years, a thorough reading of cases shows the reflective nature of these values, and how a deeper belief in the idea of constitution that is upheld in a country are usually influenced by its socio-economic and democratic objectives.[2] Choosing constitutional morality as a broader concept that accommodates the changing socio-political realities of people, we emphasize on the dynamic nature of India's polity as well as its interpretations through the eyes of the judiciary. We intend to make arguments through a few selected cases that showcase the shifting nature of Indian jurisprudence which tries to inculcate a sense of responsibility towards the constitutional values that are imbibed in and understood through the constitution itself.[3]

Though in India, the idea of constitutional morality is still developing itself[4], a reading through the lens of political theory and philosophy gives us an interesting understanding of the 'Indian' nature of constitutional values.[5] The intricate details of cases, for instance, the *Indira Sawhney* v. *Union of India*[6] wherein the Supreme Court put a ceiling on reservation only to 50%, and the *Janhit Abhiyan* v. *Union of India*[7] in which the Court upheld the constitutional validity of 10% reservation for the Economically Weaker Sections (EWS) candidates, helps in understanding the evolution of the basic structure doctrine as resulting from the socio- political experiences of people from time- to- time. Constitutional morality manifests itself from the attitude that the citizens possess.[8] A crucial question arises: how do we define this underlying "morality"? The proponents of natural law theory of constitutional legitimacy argue for a universal, objective morality that grounds the

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1 Rohit De, *A People's Constitution: The Everyday Life of Law in the Indian Republic* (Princeton University Press, Princeton, 2018).

2 Tej Pratap Singh, "Basic Structure Under the Indian Constitution: A Critical Analysis" 5(1) *Indian Journal of Law and Legal Research* 1- 12 (2023).

3 Rohit De, "The Indian Constitution: Moments, epics and everyday lives" 18(3) *International Journal of Constitutional Law* 1022- 1030 (2020).

4 Tarunabh Khaitan, "Constitutional Directives: Morally-Committed Political Constitutionalism" 82 *Modern Law Review* 603-632 (2019).

5 Upendra Baxi, "The Judiciary as a Resource for Indian Democracy" *India- seminar*, November, 2010, *available at:* <https://www.india-seminar.com/2010/615/615_upendra_baxi.htm > (last visited on February 01, 2024).

6 AIR 1993 SC 477.

7 2022 SCC Online SC 1540.

8 Nakul Nayak, "Constitutional Morality: An Indian Framework" *American Journal of Comparative Law* (In Press, 2021); Richard H. Fallon, Jr., "Legitimacy and the Constitution" 118(6) *Harvard Law Review* 1787- 1853 (2005).

legitimacy of the Constitution.[9] However, Fabian Wendt challenges this notion, suggesting that a shared conception of justice might not exist in modern societies.[10] Respect for the constitution, he argues, may simply require citizens to accept the established procedures, not necessarily a universal moral code.[11] This can help in developing on the idea that the basic structure doctrine has evolved from the wider acceptability of the interpretations[12] and desirability[13] for constitutional values in changing lives of people, especially in places that hold sentimental importance, and marks increasing respect for the Supreme Court on its interpretation of them.[14]

In the landmark *Shankari Prasad* v. *Union of India*, the seeds of the basic structure doctrine were first sown, and it mentions the scope of amending the constitution.[15] In the *I.C. Golak Nath* v. *State of Punjab*, the Court, in a bold move, declared that Parliament's amending power under Article 368[16] did not extend to altering the Constitution's basic structure, most notably the concept of fundamental rights.[17] The 24th and 25th amendments sought to overturn it, partially clipping the wings of judicial review.[18] However, the Court, in Kesavananda *Bharati* v. *State of Kerala*, definitively held that Parliament's amending power was subject to inherent limitations, and it could not alter the Constitution's foundational principles, which led to the formulation of the concept of 'Basic Structure Doctrine.'[19]

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9 Anmol Kohli, "A Natural Law Theory of Constitutional Legitimacy: The Basic Structure Doctrine and "Good Reasons for Action" 5(2) *Comparative Constitutional Law and Administrative Law Journal* 11- 34 (2021).

10 Fabian Wendt, "Introduction: Compromising on justice" 16(4) *Critical Review of International Social and Political Philosophy* 475- 480 (2013).

11 *Ibid.*

12 Antonia Geisler, Michael Hein, et. al. (eds.), IV *Law, Politics, and the Constitution*, (PL Academic Research, Greifswald, 2014).

13 Pratap Bhanu Mehta, "What is Constitutional Morality" *India- seminar*, November 2010, *available at* <https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm#:~:text=By%20constitutional%20morality%2C%20Grote%20meant,of%20those%20very%20authorities%20as > (last visited on February 02, 2024).

14 Pranjal Kishore, "Law and Faith: Constitution as the Touchstone for Interpretation" *The Hindu Centre for Politics and Public Law*, December 12, 2019, *available at* <https://www.thehinducentre.com/the-arena/current-issues/article30275265.ece> (last visited on February 02, 2024).

15 MANU/SC/0013/1951.

16 The Constitution of India, art. 368.

17 MANU/SC/0029/1967.

18 The Constitution (Twenty-fourth Amendment) Act, 1971; The Constitution (Twenty-fifth Amendment) Act, 1971.

19 (1973) 4 SCC 225.

This paper envisages the fine relation between the constitutional morality as the value base, basic structure doctrine as the testament of those values, and the corollary advancement it achieved in broadening the scope of socio-political change. The methodological proceeding of the paper is such that it presents the democratic or constitutional or socio-political values as a part of political philosophy and theory. It connects them with their manifestation in the evolution of basic structure pronouncements by the judiciary. This becomes critical in understanding the developments that led to the formation of constitutional morality as an ideal and the judiciary's role in elaborating it with the passage of time. This explanation vests its significance over the iron fist of judicial review and judicial activism as well as the importance of the country's socio-political trajectories that have impacted the Supreme Court's take on the evolution of basic structure and the idea of constitutional morality. In conclusion, the paper will try to understand the interplay between constitutional morality, basic structure doctrine, and the social realities of people involved through judgements which help in establishing confidence in the values of the constitution and its nature.

II. Constitutional Morality: A Narration of Democratic Sentiment

Constitutional morality, a concept both distinct from and intertwined with public morality, is central to the understanding of Indian democracy. It goes beyond mere adherence to the written word of the Constitution, demanding a commitment to its core principles.[20] Dr. B.R. Ambedkar, the architect of the Indian Constitution, emphasized this distinction, arguing against a rigid adherence to the text that would stifle progress.[21] He envisioned a living document, adaptable to the evolving needs of a diverse society.[22] This commitment to constitutional principles manifests in several ways. At its core lies fidelity to procedural fairness, respect for plurality, and a commitment to open discourse.[23] The judiciary plays a crucial role in interpreting the constitution and upholding these principles.[24] In this regard, landmark cases like the *National Legal Services Authority* v. *Union of India*[25], wherein the Court held that the transgenders are entitled to all the rights guaranteed by the Indian Constitution,

20 *Supra* note 12.

21 Writing and Speeches Vol-17 Part2 - Dr. Babasaheb Ambedkar, *available at:* https://www.drambedkar.co.in/books/writing-and-speeches-vol-17-part2/ (last visited on January 28, 2024).

22 Mahendra Pal Singh, "Observing Constitutional Morality" *India- seminar*, September 2019, *available at:* <https://www.india-seminar.com/2019/721/721_mahendra_pal_singh.htm > (last visited on February 03, 2024).

23 *Supra* note 11.

24 Ornit Shani, *How India Became Democratic: Citizenship and the Making of the Universal Franchise* (Cambridge University Press, Cambridge, 2017).

demonstrate the power of judicial review in ensuring equal protection for marginalized communities.[26] Constitutional morality is not a static concept. It draws upon and is enriched by the ongoing social and political dialogue in the country.[27] The vibrant Indian democracy, with its dynamic pluralism, necessitates a nuanced understanding of constitutional morality.[28] This dynamic interplay between the text and the lived experiences of the people is what keeps the Constitution a relevant and powerful force in Indian society.

III. Basic Structure as Cornerstone or Building Block for Constitutional Morality

'Will of the people'

Alexander Hamilton, *et. al.* argued that the constitution as interpreted by courts is the 'will of the people'. Ordinary laws are that which are of the representatives of people.[29] The idea of equality before law is an integral element of rule of law and both of them are the basic structure of the constitution.[30] But the Indian idea of laws provides more than just representing people. It also tries to accommodate the diversity that our democratic values uphold.[31] For example, going beyond the first principle of equality, wherein every citizen gets an equal protection by law, the Supreme Court, in *Maneka Gandhi* v. *Union Of India*[32], interpreted that even though "procedure established by law" is important, "due process of law" is equally required and the process must be free from arbitrariness and irrationality. Similarly, in *Justice K.S. Puttaswamy* v. *Union of India*[33], right to privacy came under the purview of right to life which further reflected the changing nature of the realities of people.

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25 (2014) 5 SCC 438.

26 Kanad Bagchi, "Transformative Constitutionalism, Constitutional Morality and Equality: The Indian Supreme Court on Section 377" 51(3) *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 367- 380 (2018).

27 *Supra* note 16.

28 Upendra Baxi, "Transgressions, Demosprudence, and Justice", in Leïla Choukroune and Parul Bhandari (eds.), *Exploring Indian Modernities: Ideas and Practices* 21- 36 (Springer, Singapore, 2018).

29 Alexander Hamilton, John Jay, *et.al., The Federalist Papers* (Oxford University Press, Oxford, 2008).

30 *Minerva Mills Ltd.* v. *Union Of India*, AIR 1980 SC 1789.

31 Md Zeeshan Ahmad, "The challenge of Constitutional Morality before the Supreme Court" *The Leaflet*, March 26, 2020, *available at:* <https://theleaflet.in/the-challenge-of-constitutional-morality-before-the-supreme-court/> (last visited on February 13, 2024).

32 1978 SCR (2) 621.

33 MANU/SC/0911/2017.

Passing years have shown courts elaborating on ideas that have seemed to accommodate the changing nature of our society and its problems.[34] The idea of rule of law was elucidated by Aristotle, Montesquieu, and Dicey[35] who have mentioned the primacy of individual rights, that is, the constitution is the result of the rights of the individual, defined and enforced by the court of law. On the contrary, the Indian constitution is regarded as the source of individual rights which on corollary maintains that the constitution is supreme in India rather than the discourse of parliamentary sovereignty that is practiced in the UK.[36] In this context, the basic structure guarantees two things: minimum goodness of legislation that passes its deliberations, and second, these deliberations are themselves conducted reasonably.[37] This is fairly visible in judicial pronouncement wherein limitation on legislative power to amend the constitution was held as constituting the basic structure of the Indian Constitution.[38] The will of the people and the growing importance of constitutional values led to the idea of judicial review[39] that has always acted as a tool of socio-political reform. It is further seen as an important feature of democratic control to the extent that its justification partly derives from the right of affected citizens to effectively contest the political decisions to which they are subject.[40] This has enabled the Indian judiciary to extrapolate the capacity of judicial activism to solidify the values that it finds earthing blocks of our polity (whether somehow judicial prowess infringed the bar of judicial overarching via unbridled power it gets through a tool as vague as basic structure is another contested debate.).

Preserving separation of powers

The judiciary must be authentic in nature. It is a derivative of the changing social and democratic values.[41] This kind of authenticity is not just limited to the western

34 *Supra* note 1.

35 A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (Palgrave Macmillan, London, 1985); Cameron Stewart, "The Rule of Law and the Tinkerbell Effect: theoretical Considerations, Criticisms and Justifications For the Rule of Law" 4 *Macquarie Law Journal* 135- 164 (2004).

36 Sujit Choudhry, Madhav Khosla, *et.al.* (eds.)*, The Oxford Handbook of the Indian Constitution* (Oxford Academic, online edn, 2016).

37 *Supra* note 9.

38 *Supra* note 19.

39 Dr. Ashutosh Kumar Srivastava and Puja Srivastava, "Judicial Review in India an Analysis" *SSRN*, December 19, 2015, *available at:* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705279 > (last visited on February 13, 2024).

40 Cristina Lafont, "Philosophical Foundations of Judicial Review", in David Dyzenhaus and Malcolm Thorburn (eds.), *Philosophical Foundations of Constitutional Law* 265- 282 (Oxford University Press, 2016).

41 *Supra* note 1.

idea of separation of powers as in the views of Montesquieu who posited that one organ or one person should not discharge the functions of any other organs or persons. The reason was to safeguard and protect the freedom of the individuals and avoid tyrannical rule.[42] Or, as in Aristotle, who talks about the theory of separation of power as the heterogeneous form of government consisting of mainly three branches: the deliberative, public officials and the judiciary with their definitive role and functions.[43] The distinct character of Indian federal understanding can be seen in *S.R. Bommai* v. *Union of India*[44], wherein the Supreme Court, in its legal activism, passed a verdict to contain the arbitrary use of Article 356(1)[45], i.e., the President's rule, and held that *"the satisfaction of the president in case of imposing president's rule cannot be unquestionable and comes under the purview of judicial review."*[46] Constitutionalism, the broader concept, provides the framework for upholding this "morality". Its principles- limited government, separation of powers, independent judiciary, and fundamental rights- ensure a system where the government is accountable and individual liberties are protected.[47]

Landmark cases like *Sajjan Singh* v. *State of Rajasthan*[48], wherein the Supreme Court held that the Parliament possesses the authority to amend even the provisions related to fundamental rights through constitutional amendments, demonstrates the judiciary's role in upholding this framework, even against the legislative overreach. The legitimacy that the constitution possesses is moral, and its reliance on the basic structure is hence a very dynamic process. Therefore, constitutional legitimacy rests on the goodness of the basic structure.[49] This verdict acted as a magna carta to preserve the federal nature of Indian polity which is a part of the basic structure.[50] A unique blend of separation of powers and a contemporary addition of corrective measures when the time is required to keep a check on the increasing powers of any one institution exists in India[51]. For instance, in *IR Coelho* v. *State of Tamil Nadu*[52],

42 Anne M. Cohler, Basia Carolyn Miller, *et.al.* (eds.), *Montesquieu: The Spirit of the Laws* (Cambridge University Press, Cambridge, 1989).

43 Aristotle, *The Complete Works of Aristotle (The Revised Oxford Translation)*, (Jonathan Barnes, ed.), (Princeton University Press, Princeton, 1984).

44 MANU/SC/0444/1994.

45 The Constitution of India, art. 356.

46 *Supra* note 44.

47 Nayak, *Supra* note 8.

48 AIR 1965 SC 845.

49 *Supra* note 9.

50 *Ibid.*

51 Ruma Pal, "Separation of Powers", in Sujit Choudhry, Madhav Khosla, *et.al.* (eds), *The Oxford Handbook of the Indian Constitution* 253–269 (2016; online edn, Oxford Academic, 6 Feb. 2017).

52 MANU/SC/0595/2007.

the Supreme Court held that if any constitutional amendment violates the doctrine of basic structure, then the court has the power to strike it down depending upon its impacts and consequences which is *sine qua non* of any parliamentary democracy. This establishes the precedent of judicial review[53] as the basic structure to strengthen the system of checks and balances and to preserve the separation of power functioning in Indian polity which is *sui generis* in nature.[54] There exists no standard of reasonable non-rejectability: it doesn't come from a shared conception but a mutually acknowledged understanding whose terms of settlement should not be in response to changing nature of power.[55] Socio-political landscape of the country made it difficult to understand the exact grounding of constitutional morality in practical realities.[56] Inequalities- socio- economic and caste based- persisting in the Indian society do not let constitution and its rules alone create an egalitarian society.[57]

A constitution that is not broadly accepted, even if morally sound, may lack the legitimacy required for effective governance.[58] The basic structure doctrine is a crucial concept that helps to maintain constitutional morality and in the similar way, constitutional morality has always been the guiding force since the enactment of the constitution, which led to the evolution of a doctrine like the basic structure.[59] The constitutional values were always present since the inception of the republican journey but the voyage has been revolutionary and transformative. It posits that certain fundamental features of the Constitution, such as secularism, federalism, and parliamentary democracy, are sacrosanct and cannot be amended by the legislature.[60] This doctrine ensures that the core values of the constitution are preserved, even in the face of changing political tides.

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53 *Supra* note 30; *S.P. Sampath Kumar* v. *Union Of India*, 1987 SCR (1) 435.

54 Yaniv Roznai, *Unconstitutional constitutional amendments : the limits of amendment powers* (Oxford University Press, Oxford, 2017).

55 Fabian Wendt, "Introduction: Compromising on justice", 16(4) *International Social and Political Philosophy* 475- 480 (2013).

56 Urvika Aggarwal, "Situating Dworkin in Indian Jurisprudence: An Analysis With Respect to Constitutional Morality" *SSRN*, May 29, 2020, *available at:* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3590126 > (last visited on February 13, 2024).

57 André Béteille, *Democracy and Its Institutions* (Oxford University Press, Oxford, 2012).

58 Gautam Bhatia, "India's attorney general is wrong. Constitutional morality is not a 'dangerous weapon'" *Scroll.in*, December 21, 2018, *available at:* <https://scroll.in/article/905858/indias-attorney-general-is-wrong-constitutional-morality-is-not-a-dangerous-weapon > (last visited on February 13, 2024).

59 Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford Academic, online edn, 2012).

60 *Bhim Singh Jain* v. *Union Of India*, 19(1981)DLT446.

Equality for all

The then Supreme Court Judge D Y Chandrachud once remarked that, *"Our constitution works even for those who may not believe in it."*[61] There has been a constant demand from a section of society seeking rights of self-determination and their individual dignity as was seen in the Indira Sawhney case.[62] The Indian Constitution since the very enactment always broadened the right to equality[63] with providing affirmative actions to socially and educationally backward classes[64] as a compensation against the historical injustices faced by many and recently evolved to accept economic backwardness as a criterion in the 103rd constitutional amendment for EWS.[65] Ambedkar also maintained that ascriptive identity-based discrimination is the horrendous plight of Indian society and till it is not uprooted from the socio-political arrangement, the constitutional values of liberty, equality and fraternity cannot be established in everyday realities of the masses[66], and years later Michael Walzer also postulated to prevent dominance of one group in one domain of society or polity since it tends to transcend in others in his theory of social justice.[67] John Rawls, in his theory of justice, elucidated the 'difference principle' as one of the principles governing justice.[68] This approach was contested by Ronald Dworkin who held that only focussing to provide maximum to least advantaged without examining the value of commodity could be insensitive to the actual value.[69] While Dworkin focused on endowments i.e., what a person gets as he is raised in a society and the role of luck in analyzing the importance of justice, Rawlsian idea of justice bases itself on the fairness of the process. The courts over years have focused on the importance of social precedents that have given substantive essence to the idea of jurisprudence and law.[70] This idea supports if there has to be any discrimination, it shall be best suited to those having the least of resources which is

61 Swati Deshpande, "Constitution trusts the wisdom of people: Justice Chandrachud" *The Times of India*, December 20, 2018, *available at* <https://timesofindia.indiatimes.com/india/constitution-trusts-the-wisdom-of-people-justice-chandrachud/articleshow/67177250.cms > (last visited on February 13, 2024).

62 *Supra* note 6.

63 The Constitution of India, art. 14.

64 The Constitution of India, art. 15(4).

65 Constitution (One Hundred and Third Amendment) Act, 2019.

66 Dr. B. R. Ambedkar, *Castes in India: their mechanism, genesis and development* (Patrika Publications, Jullundur 1916).

67 Michael Walzer, *Spheres Of Justice: A Defense Of Pluralism And Equality* (Basic Books, United States of America, 1984).

68 John Rawls, *A Theory of Justice* (Harvard University Press, Cambridge, 1971).

69 Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, Cambridge, 2000).

70 *Supra* note 19.

also very evident in the idea of Antyodaya, i.e., 'the upliftment of the last man in the row' of Mahatma Gandhi and Vinoba Bhave. Through the Constitution of India, socially and educationally backward communities and EWS[71] got reservation rights in educational institutions and in public employment. The Supreme Court upheld the constitutionality of 103rd amendment of the constitution granting 10% reservation for those belonging to economically weaker sections of the society[72] hence broadening the scope of egalitarian social order which is constitutive of the basic structure as in *S.Subramaniam Balaji* v. *Govt. Of T. Nadu*[73] The substantive understanding of inequalities is important because of its wider role in polity.[74] Constitutional morality implies as a principle more than a rule, which can be seen to evolve from a wider public conscience about the importance of constitutional values.[75] The idea of 'graded inequality'[76], wherein there are some who have immense wealth as against many who live in abject poverty, was later substantiated in *Samatha* v. *State of Andhra Pradesh*[77], where the Supreme Court held that the establishment of an egalitarian social order through rule of law is the basic structure of the constitution by ruling in favor of the tribals' right to livelihood in the scheduled areas under the Constitution. This rule and non-rule standard are not distinct from each other but found within each other. Morality flows from the constitution and is paramount than any other form of morality.[78] In *M.C. Mehta And Anr* v. *Union Of India*[79], the Supreme Court pointed out that the right to a clean environment is a necessary condition to live a good life that elaborates on the existing ideas of equality and social justice. Constitutional morality, thus, can be seen as a formation of a more pragmatic Ambedkarite understanding: *"without changing the constitution there will be a threat to the constitution through the changing course of action of the administration."*[80] The idea of 'Niti' as realized justice and 'Nyaya' as behavioral correctness as proposed by Amartya Sen[81] can be seen in the light of imbibing

71 The Constitution of India, arts. 15(6), 16(6).

72 *Supra* note 7.

73 AIRONLINE 2013 SC 153

74 *Supra* note 5.

75 Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (Oxford University Press, New Delhi, 2008).

76 *Ibid.*

77 AIR 1997 SC 3297.

78 *Supra* note 38.

79 1987 SC 1086.

80 Dr. Jay Kumar Bhongale, "Dr. B. R. Ambedkar's Constitutional Morality" *SSRN*, January 04, 2023, *available at:* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4312052 > (last visited on February 13, 2024).

81 Amartya Sen, *The Idea of Justice* (Harvard University Press, Cambridge, 2009).

deeper constitutional values in the society. The Supreme Court broadened the scope of right to life and personal liberty from mere animal existence to leading a livelihood with human dignity and access to basic and fundamental resources required for overall personality development. In this context, *Maneka Gandhi v. Union of India*[82] which can be the best suited example where Niti (procedural component) is expanded to realize Nyaya (substantive values). Herein, the judiciary expanded its purview from mandated procedure established by law to due process of law wherein it can judge on fair reasoning behind executive or legislative acts.

These inspirations derive from various facets of basic structure coming to life from plethora of Indian democratic values, which make constitutionalism and constitutional morality as essential disciplinary paradigms to Indian polity.[83] Moving beyond the liberal constitutional discourse which is dominated by a proceduralist, acontextual, universalising worldview inspired by the Rawlsian vision of constitution can only be guided through a moral and substantive commitment to constitutional values.[84] Constitutional morality basically means the adherence to the core principles of the constitution in a democracy.[85] It is not restricted or confined to chase the constitutional provisions limited to its exact literal sense but is based on principles, ethics and values like individual autonomy and liberty; equality, recognition of identity with dignity; the right to privacy. It is observable in various judgements where the courts try to interpret executive directions and legislative acts leniently to foster constitutional morality by using doctrine of reading down rather than striking down the whole act as unconstitutional.[86] In the very recent case of the electoral bond scheme[87], there was a contest between the fundamental rights: right to privacy of donors and right to information of voters (as it is an integral part of free and fair election which is also a basic structure of the constitution). In such cases, adjudication according to the proportionality of constitutional morality comes into play.

IV. Constitutional Morality: Beyond the Literal

There are two main interpretations of constitutional morality.[88] The first, in contrast to popular morality, emphasizes the spirit and underlying values of the

82 *Supra* note 32.

83 *Supra* note 2.

84 *Supra* note 4.

85 *Supra* note 12.

86 David McCabe, "Joseph Raz and the Contextual Argument for Liberal Perfectionism" 111(3) *Ethics* 493- 522 (2001); Khaitan, *Supra* note 4.

87 *Association for Democratic Reforms* v. *Union of India*, (2024) 3 SCR 417.

88 Abhinav Chandrachud "The Many Meanings of Constitutional Morality" *SSRN*, February 12, 2020, *available at:* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521665 > (last visited on February 16, 2024).

Constitution.[89] This "spirit" guides the interpretation and application of the legal text to evolving social circumstances.[90] It ensures the Constitution remains not just a rulebook, but a reflection of a society's moral and ethical core. An important aspect of this "spirit" is transformative constitutionalism.[91] The approach seeks to break free from the limitations of public morality, which can be discriminatory or outdated. Instead, it strives for a transformation in societal relationships, ensuring the Constitution protects the rights of all individuals, regardless of factors like caste, gender, or sexuality. For instance, the Supreme Court, in *Navtej Singh Johar v. Union of India*[92], decriminalized consensual homosexuality.

Judges applying this concept face a challenge: balancing the text and values of the constitution with real-world complexities.[93] This may involve interpreting the text in light of changing social contexts[94] or prioritizing specific values to address pressing issues.[95] However, this interpretation can be indeterminate, requiring courts to constantly re-evaluate the "basic structure" of the constitution.[96] Evaluating the ideas of secularism and separation of power, we tend to find a better way to understand the elaborating effect of these constitutional values.

Conception of secularism lies in the dark age where religion used to control and direct the political discourse of the *polis*.[97] The trajectory of secularism changed with the age of renaissance where philosophers like Machiavelli and John Locke emphasized on the distinction between the domains of religion and politics.[98] Our constitutional fathers and mothers heavily debated on the topic of secular character of Indian polity which distinguishes Indian secularism, wherein celebrating every

89 Dr. Deepak Kumar Srivastava, "Pearls And Pitfalls of the Doctrine Of Constitutional Morality" *61*(2) *Panjab University Law Review*, 76- 88 (2023).

90 Samuel J. Levine "The Law and the 'Spirit of the Law' in Legal Ethics" *SSRN*, November 19, 2015, *available at:* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2691710> (last visited on February 21, 2024).

91 *Supra* note 54.

92 AIR 2018 SC(CRI) 1169.

93 *Supra* note 60.

94 Nayak, *Supra* note 8.

95 *Supra* note 60.

96 *Supra* note 9.

97 Doctrine of the Two Swords, *available at:* https://www.oxfordreference.com/display/10.1093/oi/authority.20110803110403409#:~:text=The%20theologico%2Dpolitical%20theory%20of,authority%20of%20the%20priesthood%20… (last visited on February 20, 2024).

98 Niccolò Machiavelli, II *The Prince,* Translated by Harvey C. Mansfield, (University of Chicago Press, 1998); John Locke, Locke: Two Treatises of Government, (Peter Laslett, ed.), (Cambridge University Press, Cambridge, 1988).

religion, freedom of conscience, profess and practice[99], and recognition of rights of even those who are not even believers are unique to the Indian constitution[100] rather than rejecting the role of religion in the public domain, as emphasized by western scholarship.[101] The constitutional framework accommodated the opinion of Gandhian cosmology based on *Sarva Dharma Sambhav* i.e., equality and coexistence for all religions, supplemented by the Nehruvian principle of *Panth-nirpekshta* that is no official religion of the state.

The Supreme Court of India in the case of *Indira Nehru Gandhi v. Shri Raj Narain*[102] held that secularism means that the State shall have no religion of its own and all persons of the country shall be equally entitled to the freedom of their conscience and have the right freely to profess, practice and propagate any religion. The practice of Talaq-e-bidat or Triple Talaq was declared illegal, holding that it is not protected under Article 25[103] of the Constitution as it is not an essential religious practice.[104] However, in 1994 the Supreme Court, in. *S.R. Bommai v. Union of India*[105] established the fact that India was secular since the formation of the republic.

V. Conclusion

The concept of constitutional morality is not without its challenges. Critics argue that its subjective nature can lead to judicial overreach.[106] Finding the right balance between fidelity to the original intent and responsiveness to the changing needs of society is a constant negotiation.[107] However, as Ambedkar himself recognized, cultivating constitutional morality is an ongoing process, one that requires the active participation of all citizens.[108] Constitutional morality serves as a crucial supplement to the formal legal framework, ensuring that the Indian Constitution remains a vibrant and dynamic force in the country's socio-political landscape. The basic structure doctrine, established through landmark judgements, acts as a safeguard against erosion of the constitution's core principles. It ensures that foundational

99 The Constitution of India, art. 25.

100 *Supra* note 51.

101 *Supra* note 13.

102 AIR 1975 SC 2299.

103 *Supra* note 97.

104 *Shayara Bano* v. *Union of India*, AIR 2017 SUPREME COURT 4609.

105 *Supra* note 44.

106 Sudarshan Satalkar, "Living Originalism and Moral Interpretation: Is it the Answer to Long-Standing Questions in the Indian Constitutional Sphere?" *SSC Times*, February 4, 2022, *available at:* <https://www.scconline.com/blog/post/2022/02/04/living-originalism-and-moral-interpretation/ > (last visited on February 27, 2024).

107 *Supra* note 21.

108 *Supra* note 16.

elements like secularism, federalism, and parliamentary democracy remain unshakeable, even in the face of amendments. This doctrine fosters stability and prevents the constitution from being reshaped for narrow political gains. Complementing the basic structure is the concept of constitutional morality. It transcends the literal interpretation of the text, delving into the enduring values and spirit of the constitution. Judges, guided by these principles, can interpret laws and executive actions in a way that fosters equality, liberty, and human dignity. Landmark cases like Navtej Singh Johar[109], recognizing LGBTQ+ rights, exemplifies this approach.

The true test of these concepts lies in their application to India's socio-political realities. The constitution, drafted by visionary minds, anticipated the need for affirmative action to address historical injustices. Reservation policies, though debated, reflect this commitment to substantive equality, going beyond mere equality of opportunity. Similarly, the right to life has been interpreted to encompass access to basic necessities, ensuring a life with dignity.[110] The Indian conception of secularism is unique. It fosters tolerance and coexistence, recognizing the right to even not believe. The judgment in *Shayara Bano v. Union of India*[111] exemplifies this approach of striking down discriminatory practices even within religious traditions. Courts, while interpreting the constitution, must be mindful of the historical context and the evolving social realities.[112] The criticism and the gray areas of both the doctrine and constitutional morality can be an important area of further study but beyond the scope of the current study.

In conclusion, the basic structure doctrine, constitutional morality, and their application to India's socio-political realities form a dynamic and ever-evolving discourse. As India navigates its future, these concepts will continue to be the guiding principles, ensuring a vibrant democracy that upholds the ideals of justice, liberty, and equality for all.

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109 *Supra* note 92.

110 *Supra* note 32.

111 *Supra* note 104.

112 *Supra* note 23.

UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS AND SUPRA-CONSTITUTIONAL LAW: ANALYZING THE ROLE OF BASIC STRUCTURE DOCTRINE

*Vikas Gahlot & Ritika Thakur**

Abstract

In this paper, the authors explore the intricate jurisprudence of transformative constitutional interpretation by investigating the evolution and impact of the basic structure doctrine in reshaping constitutional law. The authors analyze and evaluate the role of this doctrine as a conceptual tool in not only navigating the complex paradox of 'unconstitutional constitutional amendments' but also in advancing the idea of 'supra-constitutional law,' using which constitutional amendments are assessed against broader social, political and moral ideals essential to the Constitution's identity. The paper is structured as follows - *Firstly*, the authors survey the rich jurisprudential and academic history of the discourses on the ideas of 'unconstitutional constitutional amendments' and 'supra-constitutional law'. *Secondly*, the authors examine the development of the basic structure doctrine in India and other countries through an analysis of major cases that have contributed towards the recognition of this doctrine and have refined its application. *Thirdly*, the authors address the contemporary issue of judicial appointments by focusing on the *National Judicial Appointments Commission (NJAC)* case and its implications for future directions of constitutional interpretation. *Lastly*, the paper concludes by summarizing key insights of the discussion and by offering reflections on the role of basic structure doctrine in modern constitutional jurisprudence.

Keywords: *Basic Structure, Amendment Power, Judicial Review, Constitutionalism*

I. Introduction

IN THE annals of constitutional law, few doctrines have wielded as profound an influence, drawn criticism and acclaim alike, and had a transformative impact as much as the "basic structure doctrine". Emerging as a pivotal constitutional law concept in the landmark case of *Kesavananda Bharti* v. *State of Kerala,*[1] this doctrine

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1 *Kesavananda Bharti* v. *State of Kerala*, AIR 1973 SC 1461.

has contributed significantly in reshaping the landscape of constitutional interpretation and in safeguarding fundamental principles of constitutionalism not only in India, but also in numerous nations. *The Kesavananda judgement*, for the first time in history, judicially re-affirmed the idea that a constitutional amendment passed by a duly elected constitutional authority and following the constitutionally prescribed procedure can still be declared as unconstitutional.

In this regard, the basic structure doctrine is a deviation from the traditional understanding of the constitution amending power of Parliament and challenges the notion that the Constitution can be altered in any manner deemed fit by the Parliament. As an anti-thesis to the traditional view, the basic structure doctrine regards some features of the Constitution as unalterable.[2] It posits that there exists a core, immutable essence within the Constitution that is beyond the scope of amendment and constitutional amendments that seek to temper or undermine this basic structure will be struck down regardless of the procedural legitimacy through which they may be enacted. In this sense it gave judicial recognition to the concept of 'supra-constitutional' law.[3] The *Kesavananda judgment* laid down the principle that *i.e.,* after April 24, 1973, the validity of all constitutional amendments can be tested on the touchstone of basic structure of the Constitution.[4] As the doctrine is now over 5 decades old, it is an opportunity to commemorate its inception, adoption and concretization, and also to reflect upon and analyze the trajectory of this doctrine, its academic, jurisprudential and judicial evolution, and its enduring impact on constitutional jurisprudence.

In this paper the authors explore the historical and jurisprudential intricacies of the Basic Structure Doctrine, its foundational principle and its profound significance in shaping the course of constitutional history. The paper is structured as follows: In the next section, the authors elucidate the rich jurisprudential and academic history of the discourses regarding the idea of 'unconstitutional constitutional amendments' and 'supra-constitutional law'. In the third section of the paper, the authors canvass the historical evolution of the basic structure doctrine in India and internationally by examining the landmark cases which have contributed to shaping the contours of this doctrine. In the fourth section of the paper the authors focus upon the contemporary issue of judicial appointments and the future directions

2 Yash Sinha, "50 Years of the 'Basic Structure' – The Best Compliment to 'We, the People'?" 58 (27) *Economic & Political Weekly* (2024).

3 S. Arne, "Existe-t-il des normes supra-constitutionnelles?" *2 Revue Du Droit Public* 460 (1993) (wherein Arne defined 'supra constitutionality' as the "explicit or implicit superiority of certain rule or principles to the content of the constitution").

4 Virendra Kumar, "Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance" 49(3) *Journal of the Indian Law Institute* 365 (2007).

of Constitutional interpretation with reference to *National Judicial Appointments (NJAC)* Case.[5] In the last section of the paper, the authors provide concluding remarks.

But before commencing the discussion, it is pertinent to mention that no research on the topic of 'limitations on constitution amending powers' is complete without referring to and paying homage to the extensive scholarship of Prof. Yaniv Roznai[6] whose work in the field has been seminal. In this article we refer extensively to Prof. Roznai's work, whose scholarship has not only illuminated, but also provided material and valuable insights for many key aspects of jurisprudential discourse of the present paper.

II. Jurisprudential Foundations of the Basic Structure Doctrine

1. Nazi Germany and Sweeping Constitutional Amendments

No other political regime has, arguably, provided more intellectual stimulus to jurisprudential and legal theory discourses than Nazi Germany. It has occupied a central stage on several key jurisprudential debates such as on legal positivism,[7] natural law,[8] *Hart-Fuller Debate,*[9] Gunman Theory of Law,[10] the idea of *Criminal State & Non-Law State*,[11] the role of coercion and consent in law making,[12] legality

5 *Supreme Court Advocates-on-Record* v. *Union of India* (2016) 5 SCC 1.

6 Prof. Yaniv Roznai, Vice Dean and Professor of Law, Harry Radzyner Law School (he conducted his PhD Thesis on Unconstitutional Constitutional Amendments and has contributed several articles to this area).

7 Kenny Yang, "The Rise of Legal Positivism in Germany: A Prelude to Nazi Arbitrariness" 3 *The Western Australian Jurist* (2012); Herlinde Pauer-Studer, "Kelsen's Legal Positivism and the Challenge of Nazi Law" *Yearbook Vienna Circle Institute* 223 (2014).

8 Ernst von Hippel, "Role of Natural Law in the Legal Decisions of the German Federal Republic" *Natural Law Forum* 106 (1959).

9 Simon Lavis, "The Distorted Jurisprudential Discourse of Nazi Law: Uncovering the 'Rupture Thesis' in the Anglo-American Legal Academy" 31(4) *International Journal for the Semiotics of Law* 745 (2018).

10 H.L.A. Hart, *The Concept of Law* (Clarendon Law Series, 3rd edn., 2012).

11 Simon Lavis, "Nazi Law as Non-Law in Academic Discourse" in Stephen Skinner (eds), *Ideology and Criminal Law: Fascist, National Socialist and Authoritarian Regimes* 59 (2019); Augusto Zimmermann, "The Darwinian Roots of the Nazi Legal System" 22(3) *Journal of Creation* 109 (2008).

12 Richard J. Evans, "Coercion & Consent in Nazi Germany" 151 *Raleigh Lecture on History: Proceedings of the British Academy* 53 (2007).

of a Regime,[13] the concept of law,[14] and the idea of 'good' legal system.[15] The kinds of legislation and statutes that were enacted and implemented by Nazi Germany have been described by scholars as "statutory lawlessness".[16] The legal validity of these statues and legislations and the action taken under them was the very epi-center of debate during the Nuremburg Trials.[17] These trials led to the re-emergence of natural law in jurisprudential discourse after a century of denouncement,[18] instilled a new understanding of idea of inalienable human rights,[19] and the conceptualization of 'Radburch Formula'.[20] However, it is important to

13 Alan E. Steinweis and Robert D. Rachlin (eds), *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice* (Berghahn Books, 2013).

14 Simon Lavis, "Nazi Law as Non-Law in Academic Discourse" in Stephen Skinner (eds), *Ideology and Criminal Law: Fascist, National Socialist and Authoritarian Regimes* 59 (2019); E.A. Shills, "An Ethnography of Nazi Law: The Intellectual Foundations of Ernst Fraenkel's Theory of Dictatorship" in E.A. Shills (ed.), *The Dual State: A Contribution to the Theory of Dictatorship* (Oxford Academic, 2017); Mark Tebbit, *Philosophy of Law: An Introduction* 35 (Routledge, 2nd edn., 2005).

15 Herlinde Pauer-Studer, "Symposium on Justifying Injustice - Legal Theory in Nazi Germany (CUP 2020): Response to Critics" 14(2) *Jurisprudence* 291 (2023).

16 Gustav Radburch, "Statutory Lawlessness and Supra-Statutory Law (1946)" 26(1) *Oxford Journal of Legal Studies* 1 (Translated by Bonnie Litschewski Paulson and Stanley L. Paulson, 2006); Jens Meierhenrich, "The Idea of Lawlessness" in *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford Academic, 2018).

17 David Fraser, "(De)Constructing the Nazi State: Criminal Organizations and the Constitutional Theory of the International Military Tribunal" 39(117) *The Loyola of Los Angeles International and Comparative Law Review* 117 (2017); Judah Murray, *Natural Law and Legal Positivism in the Nuremberg Trials* (2014) (Senior Thesis Liberty University).

18 Christopher H. James, "Keeping Pace with the March of Progress: The Relevance of Natural Law from the Victorian Era to Today" 10 *The Western Australian Jurist* 261 (2011); Joel Feinberg, "Natural Law: The Dilemmas of Judges Who Must Interpret Immoral Laws" in Joel Feinberg, *Problems at the Roots of Law: Essays in Legal and Political Theory* (Oxford Academic, 2003).

19 Bennet Sherry, "Nuremberg Law, Nuremberg Trials" *World History Project*, *available at:* https://www.oerproject.com/-/media/WHP/PDF/Unit7/WHP-1750-7-4-8-Read—Nuremberg-Laws-Nuremberg-Trials—960L.pdf (last visited on Apr. 02, 2024); Kira Knobloch, "The Nuremberg Trials and How they influenced International Criminal Law" *Juris Magazine* (Nov. 06, 2023), *available at:* https://sites.law.duq.edu/juris/2023/11/06/the-nuremberg-trials-and-how-they-influenced-international-criminal-law/ (last visited on Apr. 02, 2024).

20 Gustav Radburch, *Supra* note 16. Radburch Formula provides a bridge between legal positivism and Natural law theory by postulating that "a judge who encounters a conflict between a statute (an instrument of positive law) and what he perceives as just (Natural law), can make a decision against applying the statutory law if -and only if – the legal concept behind the statute seems either 'unbearably unjust' or in 'deliberate disregard' of human equality before law".

note that the Nazi Germany not only enacted statutes and legislations but also made several constitutional amendments to the Weimar Constitution.[21]

The Weimar Constitution had declared Germany to be a "democratic parliamentary republic".[22] One of the many legislations that were enacted by the Nazi Germany was the Enabling Act of 1933.[23] Enacted in the wake of Reichstag Fire,[24] the Enabling Act contained several provisions which empowered the government, bypassed by legislature, allowed Hitler to consolidate power, and resulted in practical repeal of the Weimar Constitution (though on paper the Weimar Constitution remained technically in force throughout the Nazi era).[25] Some of the changes introduced by the Enabling Act included: (i) empowering government to enact laws in addition to the legislature;[26] (ii) empowering the government to enact laws which may deviate from the constitutional principles;[27] (iii) postulating that laws enacted by the government need not follow parliamentary procedure;[28] (iv) empowering government to enact legislations to implement treaties and international agreements without legislative consent.[29] Although the Enabling Act was initially adopted for a four-year emergency period but later it was extended in 1937, 1939 and 1943. It remained in operation throughout the Nazi era and was the basis of all legislative activity of the Nazi Regime.[30]

After the passage of the Enabling Act, the Reichstag (the German Parliament), and after some time the Government Cabinet also,[31] was completely bypassed by

21 The Constitution of the German Reich (German: Die Verfassung des Deutschen Reichs), usually known as the Weimar Constitution (Weimarer Verfassung) (1919-1933).

22 *Ibid.*

23 The Enabling Act of 1933 (Long Title – Law to Remedy the Distress of People and Reich), RGBI. I.S. 141.

24 "Reichstag Fire: German History" *Britannica Encyclopedia, available at:* https://www.britannica.com/event/Reichstag-fire (last visited on Feb. 20, 2024).

25 Gilbert Fergusson, "A Blueprint of Dictatorship: Hitler's Enabling Act of March 1933" 40(2) *International Affairs* 245 (1964); Sangeeta Barooah Pisharoty, "History Warns that Altering a Constitution's Basic Structure Lead Down a Dark Path" *The Wire* (Jan. 17, 2023), *available at:* https://m.thewire.in/article/rights/constitution-basic-structure-nazi-germany-jagdeep-dhankhar/amp (last visited on Apr. 02, 2024).

26 The Enabling Act, 1933, art. 1.

27 *Id.*, art. 2.

28 *Id.*, art. 3.

29 *Id.*, art. 4.

30 "The Enabling Act of 23 March 1933", *Historical Exhibition Presented by the German Bundestag, available at:* https://www.bundestag.de/resource/blob/189778/d0f948962723d454c536d24d43965f87/enabling_act-data.pdf (last visited on Apr. 02, 2024).

31 Richard J. Evans, *The Third Reich in Power* 645 (Penguin Books, 2005). After the passage of the Enabling Act serious discussions and deliberations more or less ended at cabinet meetings and the cabinet meetings were only held sporadically after 1934.

Hitler.[32] Using the power conferred the Enabling Act, 1933, a legislation called "Law on Reconstruction of the Reich"[33] was enacted which brought in sweeping constitutional changes in the Germany and centralized the Germany State. By this law, the Federal structure was abolished - state legislatures were abolished,[34] the sovereignty of the states was transferred to the center (Reich),[35] the state governors were placed under the administrative supervision of the Reich Minister of Interior,[36] who was empowered to administer the necessary legal and administrative regulations.[37] Lastly, article IV of this law empowered the Reich Government to issue new Constitutional laws.[38]

Further, after the death of Paul Von Hindenberg (President of Germany and a celebrated Field Marshal and Statesman), a legislation was passed by Hitler, merging the office of President (Head of the State) and Chancellor (Head of the Government).[39] It allowed the existing authority of the President to be transferred to the Fuhrer and Reich Chancellor Adolf Hitler.[40] It completed Hitler's consolidation of power in Germany. These steps taken during the Nazi Era have been described as "deconstruction of Weimar Constitution".[41]

2. The Concept of Unconstitutional Constitutional Amendments

Can a constitutional amendment be unconstitutional? The idea of "unconstitutional constitutional amendments" is not only an oxymoronically crafted phrase but is also an issue that *prima facie* seems like a paradox.[42] In hindsight and in Indian context post *Kesavananda Bharti case*[43] it seems easy to answer, but prior to this case

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32 Sangeeta Barooah Pisharoty, "History Warns that Altering a Constitution's Basic Structure Lead Down a Dark Path" *The Wire* (Jan. 17, 2023), *available at:* https://m.thewire.in/article/rights/constitution-basic-structure-nazi-germany-jagdeep-dhankhar/amp (last visited on Apr. 02, 2024).

33 Law on the Reconstruction of the Reich, 1934 (Gesetz über den Neuaufbau des Reichs, 1934).

34 *Id*., art. I.

35 *Id*., art. II(2).

36 *Id*., art. III.

37 *Id*., art. V.

38 *Id*., art. IV.

39 Law Concerning the Head of State of German Reich, 1934 RGBI. I.S. 747.

40 *Id*., art. 1.

41 Gerard Quinn, "Dangerous Constitutional Moments: the 'Tactic of Legality' in Nazi Germany and the Irish Free State Compared" in John Morison, *et al,* (eds), *Judges, Transition, and Human Rights* (Oxford Academic, 2007).

42 Yaniv Roznai, "Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea" 61 *The American Journal of Constitutional Law* 657 (2013).

43 *Kesavananda Bharti* v. *State of Kerala*, AIR 1973 SC 1461.

it was a million-dollar question. It continues to be so in several jurisdictions (where the basic structure doctrine has not been adopted).

However, it is important to note the idea that a constitutional amendment passed by following the proper amending procedure laid down in the Constitution itself, can still be unconstitutional, is not a new idea introduced by the *Kesavananda Bharti Case*,[44] rather it has been in academic discussion and discourses since at least 1890s in relation to the United States Constitution.[45] Scholars such as Thomas M. Cooley (Michigan Supreme Court Chief Justice),[46] Prof. Arthur Machen,[47] and Prof. Richard George Wright advocating for the idea.[48] Their theory, as elaborated by Yaniv Rozani, is based on the difference between '*Primary Constituent Power*' and '*Secondary Constituent Power*'.[49] '*Primary Constituent Power*' is Constitution making power *i.e.,* the power to make new Constitutions whereas '*Secondary Constituent Power'* is the Constitution-amending power i.e. the power to amend an existing Constitution.[50] '*Secondary Constituent Power'* is inferior to the *'Primary Constituent Power'*.[51]

Hence, using the *Secondary Constituent Power*, the amending authority cannot amend the Constitution to such an extent that it becomes a new Constitution altogether i.e. in the garb of exercising *Secondary Constituent Power,* the amending authority cannot exercise *Primary Constituent Power.*[52] According to Chief Justice Cooley, this idea and distinction prevents the amending authority from introducing radical changes that can amount to "revolutionizing a constitution".[53] For instance a constitutional amendment that converts a democratic republic into a monarchy

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44 *Ibid.*

45 Y. Rozani, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers* (Oxford University Press, 2017).

46 *Ibid.*

47 Arthur W. Machen, Jr., "Is the Fifteenth Amendment Void?', 23(3) *Harvard Law Review* 169 (1910).

48 R. George Wright, "Could a Constitutional Amendment be Unconstitutional" 22 *Loyola University Law Journal* 741 (1991).

49 Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of Nature and Limits of Constitutional Amendment Powers* 19 (2014) (PhD Thesis submitted to Department of Law of the London School of Economics). This distinction is also called as the difference between *Constituent Power & Constituted Power*; Conall Towe, *Constituent Power and Doctrines of Unconstitutional Constitutional Amendments*, *Trinity College Law Review Online*, *available at:* https://trinitycollegelawreview.org/constituent-power-and-doctrines-of-unconstitutional-constitutional-amendments/ (last visited on Apr. 02, 2024).

50 Yaniv Roznai, *Supra* note 49.

51 *Ibid.*

52 R. George Wright, "Could a Constitutional Amendment be Unconstitutional" 22 *Loyola University Law Journal* 741 (1991).

53 Yaniv Roznai, *Supra* note 49.

will not be an amendment i.e. exercise of Secondary Constituent Power but rather a revolution which would require exercise of Primary Constituent Power.[54]

This theory poses a challenge to traditional notions of parliamentary supremacy and sovereignty[55] according to which the authority of the parliament to amend the Constitution is unlimited and supreme.[56] And for much of history, the principle of parliamentary sovereignty and unlimited power to amend the Constitution remained dominant over the idea of 'unconstitutional constitutional amendments. In fact, the idea of unconstitutional constitutional amendments has remained unexplored and confined to sporadic academic discussions.[57] However, the academic debate regarding implicit limitations to the amendment power flourished during the first three decades of the 20th Century and gained further momentum in the light of laws enacted by Nazi Regime.[58]

3. The Concept of Supra-constitutional Law

The concept of *supra-constitutional law* means the principles or rules that are external to the constitutional system and above it.[59] It is often attributable to those principles that are considered unamendable.[60] Around the same period during which the idea of unconstitutional constitutional amendments was gaining momentum, French scholars developed the concept of '*supra-constitutionality*'.[61] For instance, scholars such as Pierre Guillemon, argued that 'supra-constitutional laws' exist above constitutional law and this law is beyond the scope of amendment power.[62]

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54 *Ibid.*

55 Jeffery Goldsworthly, "Challenging Parliamentary Sovereignty: Past, present and future" in *Parliamentary Sovereignty: Contemporary Debates* 267 (Cambridge University Press, 2010).

56 Ramesh D. Garg, "Phantom of Basic Structure of the Constitution" 16(2) *Journal of the Indian Law Institute* 243 (1974).

57 Richard Albert, "The Theory and Doctrine of Unconstitutional Constitutional Amendments in Canada" 41(1) *Queen's Law Journal* 143 (2015); Vernon Bogdanger, "Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty" 32(1) *Oxford Journal of Legal Studies* 179 (2012).

58 Everett P. Wheeler, "Limit of Power to Amend Constitution" 7(2) *American Bar Association Journal* 75 (1921); Sampson R. Child, "Revolutionary Amendments to the Constitution" 10 *Constitutional Review* 27 (1926); A. M. Holding, "Perils to be Apprehended from Amending the Constitution" 57 *American Law Review* 481 (1923).

59 Yaniv Roznai, "The Theory and Practice of 'Supra-Constitutional' Limits on Constitutional Amendments" 62(3) *The International and Comparative Law Quarterly* 557 (2013).

60 S. Arne, "Existe-t-il des normes supra-constitutionnelles?" *2 Revue Du Droit Public* 460 (1993) (wherein Arne defined 'supra constitutionality' as the "explicit or implicit superiority of certain rule or principles to the content of the constitution").

61 Yaniv Roznai, *Supra* note 49.

62 Pierre Guillemon, *De la Rebellion et de la Resistance aux Actes Illegaux* (Thesis, Bordeaux, 1921).

According to Pierre Guillemon, the principles contained in the French *Declaration of Rights of Men and Citizen of 1793* is one such supra-constitutional law which cannot be amended using the amending powers.[63] This position was lend support by Leon Duguit who argued that since declarations such as *Declaration of Rights of Men and Citizen of* 1793 simply 'recognized' and 'proclaimed' 'pre-existing rights' they have a 'supra-constitutional' status which imposes limitations on constitutional amendments as well as ordinary legislations to amend them.[64]

The famous French institutionalist Maurice Hauriou added further to this development by arguing that: "*above the written Constitution there must be certain 'fundamental principles" even if these are not written in the constitutional text*",[65] and such principles are unamendable.[66] The work of Maruice Hauriou was further consolidated by the German Scholar Carl Schmitt, who stated that: [67]

> [C]ertain basic freedoms are … a "superlegalite constitutionelle", which is raised not only above the usual simple laws, but also over the written constitutional laws, and excludes their replacement through laws of constitutional revision … it is not the intent of constitutional arrangements with respect to constitutional revisions to introduce a procedure to destroy the system of order that should be constituted by the Constitution. If a constitution foresees the possibility of revisions, these revisions do not provide a legal method to destroy the legality of the Constitution, even less a legitimate means to destroy its legitimacy.

This principle is referred to as *Schmitt Doctrine*. Thus, according to Schmitt, the Constitution contains a core of implicitly unamendable principles that embody the Constitution's identity.[68] This notion of principles that certain principles of the Constitution carry a *supra-constitutional* status was revived after the World War II in the post-Nazi regime era which was, *inter alia*, characterized by a degree of rejection of pure legal positivism and an increasing advocacy and endorsement of natural law ideas especially continental meta-physical jurisprudence. The work of Carl Schmitt not only made him the most famous proponent of the doctrine of implicit

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63 *Ibid.*

64 Léon Duguit, *Traité de droit constitutionnel Tome IV* (Boccard, 2nd edn., 1924).

65 Albert Broderick (ed), *The French Institutionalists – Maurice Hauriou, Georges Renard, Joseph T. Delos* (translated by Mary Welling, Harvard University Press, 1970).

66 Maurice Hauriou, "An Interpretation of the Principles of Public Law" 31 *Harvard Law Review* 813 (1917-18).

67 Carl Schmitt, *Legality and Legitimacy* 58 (Duke University Press, 2004).

68 Carl Schmitt, *Constitutional Theory* (Duke University Press, 2008).

limitations on the amendment power but also raised the possibility that even the constitutional amendment power is limited by certain principles.[69] The work of Carl Schmitt inspired scholars such as Gustav Radburch (who developed the Radburch Formula),[70] Otto Bachof (who wrote the seminal work – *Verfassungswidrige Verfassungsnormen?* – translated as *Unconstitutional Constitutional Law* in 1951).[71] These scholars developed and incorporated the Scmitt Doctrine in their legal philosophies.

The Radburch Formula as, propounded by Gustav Radburch, states that: [72]

> (1) The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as "flawed law," must yield to justice.
>
> (2) Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law," it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice.

Whereas Otto Bachof Wrote: [73]

> Above positive law exists natural law, which limits even Constitutional legislation. A Constitutional legislation is valid only with regard to those sections within the integrative and positive legal order that do not exceed the predetermined borders of 'higher law' … An amendment that violates 'higher law' … would contradict both 'natural law' and the Constitution, and it should be in the power of the courts to declare such an amendment as unconstitutional and thus void.

It was in the backdrop, pursuance and furtherance of this academic school of thought, that Prof. Dietrich Conrad (a German professor) gave the seminal lecture

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69 Gottfried Dietze, "Unconstitutional Constitutional Norms? Constitutional Developments in Postwar Germany" 42 *Virginia Law Review* 1 (1956); Heinrich Rommen, "Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany" 4 *Natural Law Forum* 17 (1959).

70 Gustav Radburch, *Supra* note 16.

71 Otto Bachof, *Verfassungswidrige Verfassungsnormen?* (J.C.B. Mohr, 1951).

72 *See* Gustav Radburch, *Supra* note 16.

73 Otto Bachof, *Verfassungswidrige Verfassungsnormen?* 29-32, 47-57 (J.C.B. Mohr, 1951).

on "Implied Limitations of the Amending Power"[74] at the Law Faculty of Banaras Hindu University wherein he commented that the then current position of Supreme Court of India[75] on powers of the Parliament to amend the constitution was influenced by the fact that India is yet to be confronted by extreme type of constitutional amendments. And to ignite debate Prof. Conrad asked some thought-provoking questions such as: (i) Can Parliament by 2/3 Majority amend article 1 dividing India into two states? (ii) Can a constitutional amendment abolish article 21 to the effect to deprive someone of his life or personal liberty without the authorization of law? (ii) can the Indian Constitution be amended to reintroduce the rule of Mughal Empire or the Crown of England? (iv) Can a constitutional amendment amend article 368 itself to the effect that constitutional amendments can be made by the President acting on the advice of the Prime Minister?[76] It is important to note that the excerpts of this Lecture by Prof. Conrad were cited in both *Golaknath*[77] and *Kesavananda Bharti*[78] to argue in favor of implied limitations on amending power of the Parliament.

III. Historical Evolution of the Basic Structure Doctrine

The argument in favor of "implicit limitation" on amendment powers did not remain a theoretical debate in the India for long. The idea 'migrated' from Germany to India where it was not only applied practically for the first time, but was also consolidated, elaborated, refined and enshrined in the form of "basic structure doctrine" in the historic judgment of *Kesavananda Bharti* v. *State of Kerala*.[79]

However, prior to this case the Supreme Court of India had a few occasions, to examine the extent of the Constitution amending powers of the parliament, such as *Sankari Prasad Singh Deo* v. *Union of India,*[80] *Sajjan Singh* v. *State of Rajasthan,*[81] and

74 The experts of this lecture were used by M. K. Nambyar in the *Golaknath Case* and also by Nani Palkhivala in *Kesavananda Bharti Case*; See *I.C. Golaknath* v. *State of Punjab*, AIR 1967 SC 1643; *Kesavananda Bharti* v. *State of Kerala*, AIR 1973 SC 1461.

75 *Sankari Prasad Singh Deo* v. *Union of India*, AIR 1951 SC 458 (SC unanimously holding that that Art. 368 empowers parliament to amend the constitution without any exception and that the term 'law' Art. 13 does not include constitutional amendments); *Sajjan Singh* v. *State of Rajasthan*, AIR 1965 SC 845 (A similar position was re-iterated albeit this time with 3-2 majority).

76 Alok Prasanna Kumar, "The Origins of the 'basic structure' doctrine" *Deccan Herald,* March 31, 2024, *available at:* https://www.deccanherald.com/opinion/the-origins-of-the-basic-structure-doctrine-2958921 (last visited on Apr. 31, 2024).

77 *Golaknath case, Supra* note 74.

78 *Kesavananda Bharti*, *Supra* note 1.

79 *Ibid.*

80 *Sankari Prasad*, *supra* note 78.

81 *Sajjan Singh*, *supra* note 78.

I.C. Golaknath v. *State of Punjab*.[82] The first of these cases, *i.e., Sankari Prasad case,* was a unanimous decision of the Supreme Court, wherein the Apex Court upheld the principle of Parliamentary Sovereignty over constitutional amendments and even excluded constitutional amendments from purview of the term 'law' under article 13 of the Constitution.[83] It established the position that the Parliament has unlimited power with respect to amending the Constitution. However, slowly with the tide started to shift and in *I.C. Golaknath case*, the Supreme Court reversed the position it had earlier established by *Sankari Parasd*. In *Golaknath case,* the Supreme Court not only held that constitutional amendments also classify as 'law' under Art. 13 but also held that any such constitutional amendment cannot violate Fundamental Rights.[84] And since, the *Golaknath case* was decided by 11 Judge Bench (by 6:5 Majority), any reversal or conclusive determination of the position has to be by a larger constitutional bench.

1. The *Kesavananda Bharti* Judgement

In this historic case a 13-judge constitutional bench was set up which sat for a total number of 68 days and produced a judgement that ran across over hundreds of pages.[85] At the epicenter was a property dispute emerging out of the land reforms legislations introduced in the State of Kerala in the 1950s and 1960s which aimed to redistribute land from large landowners to the landless and the poor. The Kerala Land Reforms Act, 1963 as amended by the provisions of the Kerala Land Reforms (Amendment) Act, 1969 aimed to place a limit on the amount of land that a person could hold,[86] whereas by the Kerala Land Reforms (Amendment) Act, 1971 restrictions were imposed on the ownership of the land by religious institutions.[87]

The petitioner, Keshavananda Bharti, head of the Edneer Mutt, a Hindu religious institution in Kerala, filed a writ petition[88] to challenge these amendments. During the pendency of these petitions, the Constitutional 25th and 29th Amendments also came into force which place both the land reforms enactments of the Kerala in the Ninth Schedule of the Constitution. Thus, additionally, the Supreme Court

82 *Golaknath case, supra* note 77.

83 Article 13(2) prevents the State from making any 'law' which takes away of abridges the fundamental rights. Article 13(3) defines the term 'law' to include – "any ordinance, order, by-law, rule, regulation, notification, custom or usage having in the territory of India the force of law".

84 *Golaknath case, Supra* note 77.

85 *Supra* note 4.

86 The Kerala Land Reforms (Amendment) Act, 1969.

87 The Kerala Land Reforms (Amendment) Act, 1971.

88 Writ Petition (Civil) No. 135 of 1970.

was also now called upon to review the validity of 24th, 25th, 26th and 29th Constitutional Amendments.[89] The argument of the petitioner, presented by Nanabhoy 'Nani' Palkhivala, in a nutshell was, that the power of the Parliament to amend the Constitution is a limited one and not an unlimited one. Using the limited power to amend the Constitution, the Parliament cannot amend the amending provisions so as to enlarge that limited power. Further, using that limited amending power, the Parliament cannot alter or destroy all or any of the essential and fundamental features of the Constitution.[90]

The 13-judge bench issued 11 separate opinions, with each judge expressing divergent views on each issue.[91] To help simplify the judgement, the Supreme Court for the first time in its history gave a summary of its decision.[92] Four judges refused to sign the summary because they said it was inaccurate.[93] However, the most significant aspect of the judgement, which was made by a thin majority of 7:6, was that although the Parliament has wide powers to amend any part of the Constitution, including the fundament rights, however, this power is not unlimited. The Parliament using its amending power cannot alter or destroy the 'basic structure' or framework of the Constitution.[94] In essence, the Supreme Court empowered itself to adjudicate the constitutionality of constitutional amendments and declare invalid and unconstitutional any constitutional amendment that compromised the basic structure of the Constitution. Thus, all constitutional amendments enacted after April 24, 1973 (the date of *Kesavananda* judgement) would now have to pass the 'basic structure' filter created by the Supreme Court.[95]

To overturn the *Kesavananda* verdict and re-establish parliamentary supremacy, the Parliament passed the Constitution (Forty-Second Amendment), 1976 referred widely as the "mini-Constitution". The 42nd Amendment, *inter alia,* amended article 368 of the Constitution and inserted clause (5) which declared that "there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution".[96] This provision was unanimously struck down as unconstitutional in the case of *Minerva Mills* v.

89 *Ibid.*

90 *Kesavananda Bharti*, *Supra* note 1 at 421.

91 M.V. Pylee, *Emerging Trends of Indian Polity* 50 (Regency Publications, 1998) (11 different and diverge opinions imply that there is no clear indication of what the Supreme Court actually held).

92 Zia Mody, *10 Judgements that Changed India* 12 (Penguin Random House India, 2013).

93 H.M. Seervai, *Constitutional Law of India* 3112 (Universal Book Traders, 4th edn, 1999).

94 *Supra* note 90.

95 *Id.*, at 13.

96 The Constitution (Forty-Second Amendment) Act, 1976 (article 368(5)).

Union of India.[97] The Supreme Court in this also struck down article 368(4) which precluded constitutional Amendments form the purview of judicial review.[98] The *Minerva Mills Case* firmly entrenched the 'basic structure doctrine' in the annals of Constitutional law in India, and marked the beginning of the era of judicial supremacy as the final arbiter of Constitutional interpretation in India.[99]

TABLE 1. THE SWING OF JUDICIAL PENDULUM - FROM 'UNLIMITED AMENDING POWER' TO 'LIMITED AMENDING POWER'

Case	Year	Bench Ratio & Decision
Shankari Prasad Singh Deo v. Union of India	1951	3 Judge Bench – **Unanimous Decision** – Parliament has the power to amend any part of the constitution under Art. 368 without any exception. In Art. 13, the term 'law' does not include constitutional amendments and it includes rules or regulations made in exercise of ordinary legislative power.
Sajjan Singh v. State of Rajasthan	1965	5 Judge Bench – **3:2 Majority** – Exercising Amending power under Article 368 parliament can amend any part of the constitution, including fundamental rights, Constitutional amendment is not 'law' under Art. 13 and the term 'law' means ordinary legislations.
I.C. Golaknath v. State of Punjab	1967	11 Judge Bench – **6:5 Majority** – held that Constitutional Amendment is 'law' under Art. 13 and hence cannot curtail fundamental rights.
Kesavananda Bharti v. State of Kerala	1973	13 Judge Bench – **7:6 Majority** – established 'the basic structure' doctrine.
Minerva Mills v. Union of India	1980	5 Judge Bench - **Unanimous Decision** – Struck down clause 5 of Article 368 inserted through the Constitutional (Forty-Second Amendment) Act, 1976 which declared Parliament has unlimited Amending Power.

97 *Minerva Mills* v. *Union of India*, AIR 1980 SC 1789.

98 *Ibid.*

99 *Supra* note 95.

Landmark Cases Shaping the Basic Structure Doctrine

The Basic Structure Doctrine has served as crucial filter test to preserve constitutional integrity and the spirit of constitutionalism.[100] During the 50 years since the pronouncement of the basic structure doctrine, the Apex Court has invoked and applied the doctrine in several cases.[101] But often the Court had experienced difficulty in elucidating the true scope and extent of this doctrine which has on many occasions necessitated the constitution of constitutional benches.[102] Some of the landmark cases are summarized in Table 2.

TABLE 2: LANDMARK CASES SHAPING THE BASIC STRUCTURE DOCTRINE

S. No.	Case	Summary
1.	*Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299	Declared Article 329-A introduced by 39th Amendment as unconstitutional and violative of the basic structure doctrine. Rule of law, Art 14 is part of the basic structure.
2.	*Minerva Mills v. Union of India,* AIR 1980 SC 1789	Supreme Court struck down Section 45 of the Constitutional (Forty-Second Amendment) Act, 1976 as unconstitutional which has inserted clause 4 & 5 in Art. 368.
3.	*P/ Sambhamurthy v. State of Andhra Pradesh,* AIR 1987 SC 663	The Constitutional (Thirty Second Amendment) Act, 1973 introduced Article 371D that excluded the judicial review power of the High Courts was held to be unconstitutional.
4.	*S.P. Sampath Kumar v. Union of India,* 1987 AIR 386	Judicial Review is part of the basic structure

100 V. Venkatesan, "As Courts Rule on Constitution's Basic Structure, Landmark Doctrine Turns out to be Elastic" *The Wire*, October 29, 2020, *available at:* https://thewire.in/law/constitution-basic-structure-case-histories (last visited on Apr. 02, 2024).

101 *Indira Nehru Gandhi* v. *Raj Narain*, AIR 1975 SC 2299; *Minerva Mills* v. *Union of India*, AIR 1980 SC 1789; *Waman Rao* v. *Union of India*, AIR 1981 SC 271; *Maharao Sahib Shri Bhim Singh* v. *Union of India*, AIR 1981 SC 234.

102 *Supra* note 4.

5.	*Kihoto Hollohan v. Zachillhu,* 1992 SCR (1) 686	Constitution 52nd Amendment inserted paragraph 7 of the 10th Schedule which disqualified MPs & MLAs on the ground of defection. Paragraph 7 made the Speaker of Lok Sabha the final authority to decide on the issue and barred the jurisdiction of Courts from deciding the validity of Speaker's decision. Held Unconstitutional and violative of the basic structure.
6.	*L Chandra Kumar v. Union of India,* AIR 1997 SC 1125	The Supreme Court held that article 323A and 323B inserted by Section 46 of the 42nd Constitutional Amendment Act are unconstitutional. The power of judicial review of HC under article 226/227 and SC under article 32 is part of the basic structure.
7.	*Kuldip Nayar v. Union of India,* AIR 2006 SC 3127	Supreme Court held that 'basic structure doctrine' should be strictly limited to constitutional amendments and should not be applied to ordinary statutes.
8.	*M. Nagraj v. Union of India,* AIR 2007 SC 71	Not formal equality but 'egalitarian equality' i.e. proportional equality is part of basic structure
9.	*Ashok Kumar Thakur v. Union of India,* (2008) 6 SCC 1138	93rd Amendment which introduced Art. 15(5) providing reservation for SC/STs and OBCs in aided educational institution is valid and not unconstitutional
10.	*Supreme Court Advocates-on-Record v. Union of India*, (2016) 5 SCC 1.	The Constitution (Ninety-ninth Amendment) Act, 2014 which established the National Judicial Appointments Commission was held as unconstitutional. Held independence of judiciary is a basic feature of the Constitution.

3. International Recognition of Basic Structure Doctrine

The basic structure doctrine has been recognized in countries such as Bangladesh, Pakistan, Malaysia, Israel, Belize and Uganda. The Landmark cases from these jurisdictions which recognized the basic structure doctrine are summarized in Table 3.

Table 3: International Recognition of the Basic Structure Doctrine

Country	Case	Summary
Bangladesh	*Anwar Hussain Chowdhary v. Bangladesh,* 1989 BLD (Spl.) 1	The Bangladesh Supreme Court struck down the 8th Constitutional Amendment by a majority of 3:1 by expressly relying on the reasoning of *Kesavananda Bharti Case*. The 8th Constitutional Amendment has amended Art. 100 of the Bangladesh Constitution which permitted the President to establish adversary courts to the High Courts in the name of permanent benches. It also authorized the president to determine the jurisdiction of these courts.
Belize	*Browen v. Attorney General,* BZ 2009 SC 2	The Belize Supreme Court struck down the 6th Amendment Bill to the Belize Constitution 2008. It curtailed property rights of the people by vesting in the Government the exclusive ownership of Petroleum Minerals and accompanying substances, in whatever physical state located on or under the territory of Belize. The Supreme Court invoked the Basic structure doctrine and stuck down the constitutional amendment bill.
Pakistan	*District Bar Association, Rawalpindi v. Federation of Pakistan*, Constitution Petition No. 2,4, to 13, 23-24 of 2015	The full 17 judge bench of Pakistan Supreme Court (8:4:5) by a plurality gave recognition to the basic structure doctrine. 8 Members accepted, 4 rejected, 5 accepted some limitations on the

		constitution amending power of Pakistani Parliament.
Malaysia	*Sivarasa Rasiah v. Badan Peguam Malaysia*, [2010] 2 MLJ 333	There has been flip-Flop approach in Malaysia with regard to adoption to basic structure doctrine. With the Court accepting it in some cases and rejecting it other cases.[103] However, the *Sivarasa* case is the landmark case wherein the Federal Court of Malaysia recognized the basic structure doctrine. This decision has been followed in several other cases.[104]
Uganda	*Male Mabirzi v. Attorney Genral*, [2018] UGCC 4	The validity of Constitution (Amendment) Act, No. 1 of 2018, which removed the age limits of the President and local council chairperson was challenged in this case. The Court held that age limits restrictions (above 35 and below 75) are not part of the basic structure.
Israel	*Movement for Quality Government v. Knesset*, HCJ 5658/23	Isarel's parlimanet passed the "reasonableness" bill i.e. Amendment No. 3 to Basic Law, which strips the Supreme Court of the power to declare government decisions as unreasonable. The Supreme Court held that the authority of the Supreme Court to conduct judicial review of the Basic Laws is exceptional and the Amendment No.3 which takes

103 Hafidz Hakimi Haron, "The Doctrine of Basic Structure in Malaysia: Between the Protection of Fundamental Liberties, National Identity, and Islam" *ICOBAC* 307 (2021).

104 *Ibid.*

away this power is a serious deviation from the Basic and hence unconstitutional (8:7 Majority).

IV. Future Directions for Constitutional Interpretation

In early 2023, the Vice President of India ignited a fierce debate concerning the basic structure regarding as to whether the doctrine, which was developed to preserve and protect the Constitution, in essence, undermines the "peoples will".[106] The essence of the Vice President's argument was that since "Parliament represents the people", hence it encapsulates the "ultimate sovereign power" and this power cannot be curtailed or restricted by judiciary as the judiciary does not represent "the will of the people".[107] The Vice President referred to the controversial NJAC Judgement, one of the most recent notable usage of the doctrine to strike down a constitutional amendment, and asserted that the "unelected have the last say in directing vital constitutional developments". The Vice President also indicated towards formation of *Constitutional Review Committee*. However, it should be ensured that any such committee must provide the categorical assurance that the basic structure of the Constitution would not be altered.[108]

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105 The Basic Laws of Israel is a set of Fourteen (14) "quasi-constitutional" laws which were initially intended to be draft chapter for a future Israeli Constitution, which has been continuously postponed since 1950. In absence of a written codified constitution, these Basic Laws act as a "de facto Constitution". One of them is the Basic Law: The Judiciary, 1984 which was amendment in 2023. *See e.g.,* Justice Aharon Barak*,* " A Constitutional Revolution: Israel's Basic Laws" 4 *Constitutional Forum* 83 (1992-93); Daria Dorner, "Does Israel have a Constitution" 43 *Saint Louis University Law Journal* 1325 (1999); Artur Skorek, "Basic Law of Israel" in P. R. Kumaraswamy (eds), *The Palgrave International Handbook of Israel* 1 (Palgrave Macmillan, 2021).

106 Apurva Vishwanath and Khadija Khan, "V-P Jagdeep Dhankar sparks debate with remarks on Basic Structure of Constitution; what is it?" *The Indian Express*, April 26, 2023, *available at:* https://indianexpress.com/article/explained/explained-law/vp-jagdeep-dhankar-basic-structure-indian-constitution-explained-8377438/ (last visited on Apr. 30, 2024); Editorial, "Bound Supremacy: On Vice-President Jagdeep Dhankar's remarks and the basic structure doctrine" *The Hindu*, January 14, 2023, *available at:* https://www.thehindu.com/opinion/editorial/bound-supremacy-the-hindu-editorial-on-vice-president-jagdeep-dhankhars-remarks-and-the-basic-structure-doctrine/article66375024.ece (last visited on Apr. 01, 2024); Yash Sinha, "50 Years of the 'Basic Structure' – The Best Compliment to 'We, the People'?" 58 (27) *Economic & Political Weekly* (2024).

107 Yash Sinha, *Id.*

108 Aswini K. Ray, "Constitutional Reform" 35 (12) *Economic & Political Weekly* (2000).

In *Supreme Court Advocated-on-Record* v. *Union of India* (NJAC judgement)[109] the Supreme Court had struck down the Constitution (99th Amendment) Act, 2014[110] and the National Judicial Appointments Commission Act, 2014 (NJAC Act)[111] as unconstitutional and violative of the basic structure. The collective aim of these two enactments was the establishment of the National Judicial Appointment Commission (NJAC).[112] The NJAC was designed as the ultimate body responsible for the appointment of judges to the Constitutional courts (Supreme Court and High Court). Its establishment was a response to the criticisms of the existing collegium system whereby the Senior most judges of the Supreme Court recommend to the President the name of persons who should occupy constitutional judicial office.

The functioning of the collegium system has been assailed multiple times on several grounds such as nepotism, opacity and judicial hegemony. The establishment of the NJAC was indented to undo this situation.[113] It has been argued that a majority of judges did not hold judicial primacy to the part of the basic structure, as has been commonly misunderstood.[114] In this context a pertinent question arises: can the Judiciary itself violate the basic structure of the Constitution? In another words, Is the judiciary by striking down constitutional amendments which are intended to reform the judicial system is itself violating the basic structure of the Constitution?

The principles of constitutional democracy and constitutionalism both advocate that no institution should have unlimited power. The very idea of unlimited power is anti-thesis of the principle of constitutionalism. Hence, whether the Supreme Court by expressing its reluctance to accept any change in the *status quo* with regard to collegium system and judicial appointments is violating the very ideals of the Constitution that it is supposed to protect? *Prima facie*, the answer to this question seems to be in the affirmative. But before we reach such a conclusion, it must be stressed that although the collegium system is not an ideal system, but it is a *sui generis* system evolved after many years of constitutional working in India. The

109 *Supreme Court Advocates-on-Record* v. *Union of India* (2016) 5 SCC 1.

110 The Constitution (99th Amendment) Act, 2014.

111 The National Judicial Appointments Commission Act, 2014 (Act No. 40 of 2014).

112 Arghya Sengupta, "Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgement" 50(48) *Economic & Political Weekly* (2015).

113 *Ibid.*

114 *Ibid.*

argument that "no other country has such a system of judges appointing judges"[115] cannot be basis for abolishing the Collegium System which has evolved collectively through the Three Judges Cases.[116]

V. Conclusion

In this paper, the authors have attempted to canvass the transformative journey of the nuanced constitutional jurisprudence of basic structure doctrine staring from its jurisprudential roots to its international recognition, and contemporary trends. It becomes abundantly clear that the significance of basic structure transcends the confines of territorial jurisdictions, and it represents a beacon of hope for constitutional democracies worldwide and a shield that safeguards against extreme constitutional amendments that undermines the established foundational values of democracy, rule of law, human rights and Constitutional governance.

From its genesis to its consolidation as pivotal aspect of constitutional interpretation, the basic structure doctrine has traversed a path marked by judicial prudence, doctrinal refinement in relation to societal exigencies. The gradual evolution of the basic structure doctrine has mirrored the evolving aspirations of societies striving for constitutional governance in the face of political upheaval, social change, and global challenges. Moreover, the evolution of the basic structure doctrine has contributed towards underscoring and highlighting the indispensability of an independent and vigilant constitutional judiciary and the power of judicial review. With constitutional courts being now being vested with the authority to adjudicate upon the constitutionality of Constitutional amendments aids in reinforcing the vital role of the judiciary as the guardian of constitutional values and the principle of constitutionalism.

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115 TNN, "Nowhere in the world do judges appoint judges, says minister Kiren Rijiju" *The Times of India*, October 18, 2022, *available at:* https://timesofindia.indiatimes.com/city/ahmedabad/nowhere-in-the-world-do-judges-appoint-judges-says-minister-kiren-rijiju/articleshow/94928739.cms (last visited on June 23, 2024); India Today Web Desk, "Centre vs Collegium Row: How the Judges are appointed in India, US, UK and other countries" *India Today*, January 25, 2023, *available at:* https://www.indiatoday.in/law/story/centre-vs-collegium-how-judges-are-appointed-in-india-us-uk-and-other-countries-2326456-2023-01-25 (last visited on Jan. 25, 2024).

116 India Today Web Desk, *Id.*

EXPLORING THE CONCEPT OF *DHARMA* IN BHARATIYA JURISPRUDENCE: WITH SPECIAL REFERENCE TO RULE OF LAW

Seema Singh & Vinayak Sharma[*]

Abstract

The ancient Bharatiya philosophy encompasses the fundamental concept of *Dharma* in its roots, which incorporated a comprehensive framework that governed various aspects enumerated in Dharmashastras, namely, *Achara* (rules of daily routine), *Vyavahara* (legal proceeding), and *Prayaschita* (penance). However, with the Muslim invasion and British colonization in Bharat, the *Dharma*-based legal system started losing its significance and was modified, supplemented, and finally superseded by legislative enactments. The law, which was at one time revealed to have a divine origin being a part of *Dharma*, has now become "man-made" law and therefore has lost its divinity. Unfortunately, people began to view *Dharma* solely as a form of religion. Moreover, the Indian Constitution has ignored the "Rule of Law" principle already given in the Brihadaranyaka Upanishad around 750 BCE and adopted Sir Edward Coke's (1610) and Dicey's (1885) "Rule of Law." The Rule of Law/ *Dharma* that existed in the ancient Bharatiya legal system was far more superior and inclusive than what India has envisaged in the modern Constitution. Hence, this research paper seeks to delve into the fundamental concept of *Dharma* by elucidating the various *'sloka'* to provide nuanced interpretations of *Dharma* in the modern legal discourse. Also, this study symbolically relates *Dharma*, *Artha* and *Kama* with the golden triangle of Indian Constitution. Furthermore, this study seeks to interpret the modern principle of "Rule of Law" in light of the "Rule of *Dharma*" principle elucidated in ancient Bharatiya Jurisprudence.

Keywords: *Dharma, Rule of Law, Bharatiya Jurisprudence, Duty*

I. Introduction

THE PRINCIPLE of Rule of Law is followed in every democratic state of the world. In simple terms, it means that the state is governed by the law and not by the ruler. The law is supreme. To understand the Rule of Law, we need to understand

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"Law" in its true sense first. Do we really understand it in its true sense? If so, why, despite the existence of thousands of legislations and international conventions, we are still unable to deliver justice to the majority of living beings on this earth? Why are conflicts rising globally? From the global to the local level, are laws truly able to fulfill the legitimate expectations of the people? Are they free from infirmities? All these questions are addressed later in this article.

Joseph Raz, in his work, *'The authority of law: Essays on law and morality'*,[1] identifies several principles that are essential to a functioning Rule of Law system. These include: (1) All laws should be prospective, open, and clear. (2) Laws should be relatively stable. (3) The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules. (4) The independence of the judiciary must be guaranteed. (5) The principles of natural justice must be observed. (6) The courts should have review powers over the implementation of the other principles. (7) The courts should be easily accessible. (8) The discretion of the crime-preventing agencies should not be allowed to pervert the law.

Brian Tamanaha, in his work, '*A Concise Guide To The Rule Of Law',*[2] provides the modern definition of the Rule of Law. It means that both government officials and citizens must follow and act according to established laws. For this to work, certain key features are required: laws must be prospective in nature, made public, apply equally to everyone, be clear, stable, and consistent. There must be mechanisms or institutions that enforce the legal rules when they are breached.[3] Without these qualities, the Rule of Law cannot function properly.[4]

This is known as the 'formal' or 'thin' definition of the Rule of Law, which is a basic version focusing on how laws are made and applied. There are more comprehensive or 'thicker' definitions that also include concepts like human rights, democracy, and justice. The narrow definition is used here because it serves as a common starting point that different interpretations of the Rule of Law share, though many go further than this minimal version. This approach can work in a variety of societies and legal systems.[5]

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1 Joseph Raz, *The Authority of Law: Essays on Law and Morality* 215 (Clarendon Press, 1979).

2 Brian Z Tamanaha, "A Concise Guide to the Rule of Law", in Neil Walker and Gianluigi Palombella (eds.), *Florence Workshop on the Rule of Law* 3 (Hart Publishing, 2007).

3 Brian Z. Tamanaha, "The History and Elements of the Rule of Law" *Singapore Journal of Legal Studies* 232 (2012).

4 *Supra* note 2.

5 *Ibid.*

According to Upendra Baxi,[6] The Rule of Law has a long history, often viewed as an initial contribution to Euro American liberal political theory. It can be seen as a 'thin' notion involving procedural restraints on sovereign power and governmental conduct, or a 'thick' conception involving theories about the 'good', 'right', and 'just'. However, critical historians have shown that both versions have been consistent with violent social exclusion, domination by men over women, and persecution of minorities. The triumphalist celebration of Rule of Law as an "unqualified human good" reduces struggles against colonialism/imperialism to a 'whites-only' affair. The promotion of Rule of Law as a cultural export continues to perpetuate old contamination in today's globalized world.[7]

The concept of 'Rule of Law' has evolved significantly in contemporary discourse, moving from a bounded conception to a universalizing/globalizing notion. This shift is influenced by emerging global social policy and regulation, such as the war on terror and the paradigm of trade-related, market-friendly human rights. International financial institutions, such as the World Bank, now present themselves as global sovereigns, determining how the 'poor' is defined, measured, and redefined. This shift has led to a re-articulation of Rule of Law notions, with human rights and social activism practices contributing to the re-articulation of Rule of Law. The new Rule of Law discourse is untroubled by the bounded Rule of Law conceptions, which emphasized limited governance and concentration of powers. This contradiction between Rule of Law as a globalizing discourse celebrating various forms of 'free' market fundamentalisms and new forms that seek to universalize human rights fundamentalisms is at stake. This incommensurability defines the space for interpretive diversity and progress in measurement that standardizes new core meanings of the Rule of Law through human rights and development indicators.[8]

Generally, in the legal discourse, the Rule of Law owes its origin from ancient Greek law and was later developed ultimately by western jurisprudence, which all the modern democratic states envisaged in their constitutions. But the credit of origin and development of Rule of Law in the Bharatiya Jurisprudence cannot be ignored. All the sources whether Brihadaranyaka Upanishad, Manusmriti, Kautilya's Arthashastra, Rajtarangni etc. have been discussed later in this article. We also find the various instances in great epics, *i.e.,* Ramayana and Mahabharata, where the Rule of Dharma was followed, whether it was Lord Rama's acceptance of exile,

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6 Upendra Baxi, "The Rule of Law in India" 6 *SUR – International Journal on Human Rights* 7 (2007).

7 *Id.,* at 7-8.

8 *Id.,* at 9.

Bharata's refusal to rule, Lord Rama's decision to banish Goddess Sita, or the vow of Devavrata in Mahabharata to observe celibacy (*Brahmacharya*) throughout the life. We will discuss all these instances later in this article.

In Bharatiya Jurisprudence, the Rule of Law owes its origin in one of the oldest Upanishad *i.e., Brihadaranyaka Upanishad* around 7th - 6th century BCE.[9] In the *Brihadaranyaka Upanishad*, there is a sloka (*stated later in this article*) that emphasizes the importance of *Dharma*/Law which can be interpreted as an early form of the Rule of Law.

Dr. S. Radhakrishnan in his work, '*The Principal Upanishads*'[10] observes that "Even kings are subordinate to *Dharma*, to the Rule of Law." Here, Dr. S. Radhakrishnan interpreted Law into *Dharma i.e.,* It was the Rule of *Dharma* and *Dharma* was supreme to all, unlike Austin's theory of command of sovereign where king/ruler is supreme.

In the context of Bharatiya Jurisprudence, to understand the Rule of *Dharma* before, it is necessary to understand *Dharma* first.

The Bharatiya Jurisprudence, known as the Vyavahara Dharmasastra, is intricately intertwined with the concept of *Dharma* as elucidated in the Vedas, Puranas, Smritis, and other relevant literary sources. The term *'Dharma'* holds significant meaning in the Sanskrit language, including a broad range of concepts and principles. There is no equivalent term in any other linguistic system. Attempting to provide a definition for the aforementioned term would prove to be fruitless. The phenomenon can only be elucidated. The term encompasses a diverse range of interpretations. Several of them might facilitate our comprehension of the breadth of that phenomenon. The term '*Dharma'* encompasses various meanings, including justice *(Nyaya)*, what is morally right in a specific situation, religious principles, righteous conduct, acts of kindness towards living beings, acts of charity or almsgiving, inherent qualities or attributes of living beings and objects, obligations or duties, legal norms and customary practices with legal validity, as well as a legitimate royal decree *(Rajashasana)*.[11]

As stated in the *Nirukta* Vedanga, the word **'धर्म'** *(Dharma)* is derived from the '**धृ**' root, which means that which is to be held, to nourish, to uphold, to sustain, and to protect. The word **'धर्म'** acquires its grammatical form by adding the suffix **'मन्'**

9 Swami Madhavananda (ed.), *The Brihadaranyaka Upanishad: With the commentary of Shankaracharya* 1:4:14 (Advaita Ashrama, Almora, 3rd edn., 1950).

10 S Radhakrishnan, *The Principal Upanishads* 170 (George Allen and Unwin Ltd, 1953).

11 Justice M. Rama Jois, *Legal and Constitutional History of India: Ancient, Judicial and Constitutional System* 3 (LexisNexis Publication, 1st edn., 2022).

which comes from the root **'धृत्र-धारणे'** in the **अतिस्तुसुहुसृधृक्षिक्षुभायोपदियक्षिनोज़्यो मन् ॥1-127॥**[12]

According to Max Muller, *Dharma* is the Indian manifestation of natural law. In ancient times, individuals embraced *Dharma* as a guiding principle for their conduct and self-governance. Throughout the period, there has been a correlation between *Dharma* and religion. The *Dharma*, as expressed in the Sanskrit language, represents the legal and moral principles of natural law. It is more obvious and perceptible than the constrained presentation of religious principles, which occasionally has limitations due to narrow-minded perspectives. Therefore, it is not imperative for *Dharma* to be exclusively associated with or seen solely as a religious concept. It extends beyond the present time and encompasses the fulfillment of responsibilities and the transmission of knowledge to future generations. The *Dharma* is primarily linked to its literal interpretation, which pertains to righteousness.[13]

The judgment of *Shri A.S. Narayana Deekshitulu* v. *State of Andhra Pradesh*[14] stands out as a significant instance in which the Apex Court of India extensively examined the idea of *'Dharma'*. Justice K. Ramaswamy established a correlation between a "higher" or "core" religion and the notion of Dharma. As per his assertion, the Constitution of Bharat safeguards *Dharma*, contrary to conventional religious practices.

He quoted:

> Dharma is that which approves oneself or good consciousness or springs from due deliberation for one's own happiness and also for the welfare of all beings free from fear, desire, sense of brotherhood, unity, cherishing good feelings, and friendship for the integration of Bharat. This is the core religion to which the Constitution accords protection.

He further added:

> Religion is enriched by visionary methodology and theology, whereas Dharma blooms in the realm of direct experience. Religion contributes to the changing phases of a culture; Dharma enhances the beauty of spirituality. Religion may inspire one to build a fragile, mortal home

12 TR Chintamani (ed.), *The Unadi Sutra with the vriti of svetavanavasin* 1:127 (University of Madras, 1992).

13 Rajpal Leepakshi and Mayank Vats, "Dharma and the Indian Constitution" *Christ University Law Journal* 63-64 (2016).

14 *Shri A.S. Narayana Deekshitulu* v. *State of Andhra Pradesh* (1996) 9 SCC 548.

for God; Dharma helps one to recognize the immortal shrine in the heart.

It was stated that *Dharma* is distinct from religion.

Also, we find the reference in the constituent assembly debate where Shri H. V. Kamath[15] (C. P. & Berar: General) asserts "**That 'Dharma', Sir, must be our 'Religion'. 'Dharma'** of which the poet has said: **Yenedam dharyate jagat** (that by which this world is supported.)"

The meaning of *Dharma* is also expounded upon throughout the Mahabharata. When Yudhistira inquiries about the significance and extent of *Dharma*, Bhishma responds:[16]

तादृशोऽयमनुप्रश्नो यत्र धर्मः सुदुर्लभः ।
दुष्करः प्रतिसंज्यातुं तत्केनात्र व्यवस्यति ॥९

Meaning: युधिष्ठिर ! तुज़्हारा यह निश्चला प्रश्न भी ऐसा ही है। इसके अनुसार धर्म के स्वरूप का विवेचन करना या समझना बहुत कठिन है। इसीलिये उसका प्रतिपादन करना भी दुष्कर ही है। अतः धर्म के विषय में कोई किस प्रकार निश्चय करे।

प्रभवार्थाय भूतानां धर्मप्रवचनं कृतम् ।
यः स्यात्प्रभवसंयुक्तः स धर्म इति निश्चयः ॥10

Meaning: प्राणियों के अभ्युदय और कल्याण के लिये ही धर्म का प्रवचन किया गया है। अतः जो इस उद्देश्य से युक्त हो अर्थात् जिससे अज़्युदय और निःश्रेयस सिद्ध होते हो, वही धर्म है। ऐसा शास्त्रवेज़ाओं का निश्चय है।

धारणाद्धर्ममित्यादुर्धर्मेण विधृताः प्रजाः ।
यः स्याद्धारणसंयुक्तः स धर्म इति निश्चयः ॥११

Meaning: 'धर्म का नाम 'धर्म' इसलिये पड़ा है कि वह सबको धारण करता है- अधोगति में जाने से बचाता और जीवन की रक्षा करता है। धर्म ने ही सारी प्रजा को धारण कर रखा है; अतः जिससे धारण और पोषण सिद्ध होता हो, वही धर्म है। ऐसा धर्मवेज़ाओं का निश्चय है।

Bhisma has rightly said that defining *Dharma* poses considerable challenges. It is difficult to define it in a single definition because of its wide variety of meanings. *Dharma* has been expounded for the welfare and upliftment of all beings. Hence, one could assert that which leads to the upliftment and ultimate good, is *Dharma*. It upholds everything—it protects from falling into degradation and preserves

15 Constituent Assembly Debates on December 06, 1948, *available at:* http://library.bjp.org/jspui/handle/123456789/136 (last visited on August 25, 2024).

16 *Mahabharata Shanti Parva* 109:9-11 (Geeta Press, Gorakhpur, 2013).

life. *Dharma* alone has sustained all beings; therefore, that which provides sustenance and support is *Dharma*.

II. A Basic Understanding of *Dharma*

1. The Wide Variety Of Meanings Of Dharma

The various ancient Bharatiya sources define the term *Dharma* that encompasses a diverse range of meanings and prove how *Dharma* is not equivalent to any religion.

Mahanarayana Upanishad states:

धर्मो विश्वस्य जगत: प्रतिष्ठा लोके धर्मिष्ठ प्रजा
उपसर्पन्ति धर्मेण पापमपनुदति धर्मे सर्वं प्रतिष्ठितं
तस्माद्धर्मं परमं वदन्ति ॥ 7 ॥[17]

Meaning: धर्म संपूर्ण विश्व और जगत की प्रतिष्ठा है। संसार में धर्मनिष्ठ लोग धर्म के द्वारा ही उन्नति करते हैं, धर्म से पाप दूर होता है, और सब कुछ धर्म में ही प्रतिष्ठित है। इसलिए धर्म को ही सर्वोच्च कहा जाता है।

"Dharma (righteousness) is the support of the whole universe. All people draw near a person who is fully devoted to Dharma. Through Dharma a person chases away sin. All are supported by Dharma. Therefore, they say that Dharma is the supreme means of liberation."[18]

The word *Dharma* (righteousness) is extolled here as the foundation of humanity for all living beings. When the strong oppress the weak, for the latter the only protection is an appeal to *Dharma*. In a society such an appeal becomes successful only when the *Dharma* of that society is guarded by a sovereign who is himself *Dharmistha*. Again *Dharma*, in the form of *prâyaúcitta* or expiation, cleanses the transgressor of the moral law, and in the shape of *danda* or punishment, it purifies the guilty who violate the social law. So *Dharma* is praised here as the support of all. Here *Dharma* comes close to justice.

Another *sloka* in Mahanarayana Upanishad states:

'धर्म इति धर्मेण सर्वमिदं परिगृहीतं ।

धर्मान्नाति ?दुश्चर ? तस्मा ?द्धर्मे रंमन्ते ।।6 ।।[19]

Meaning: कुछ लोग मानते हैं कि शास्त्रोक्त कर्तव्य ही मोक्ष का साधन है। शास्त्रों द्वारा निर्धारित कर्तव्यों के पालन से ही समस्त संसार को एक साथ बांधे रखा जाता है। शास्त्रों द्वारा निर्धारित

17 Swami Vimalananda (ed.), *Mahanarayana Upanishad* 79:7 (Advaita Ashrama, 1968).

18 *Ibid.*

19 *Id.,* at 78:6.

कर्तव्यों का पालन करने से अधिक कठिन कुछ भी नहीं है। इसलिए, सर्वोच्च कल्याण के साधक शास्त्रोक्त कर्तव्य में आनंद पाते हैं।

"Some consider that scriptural duty is the means of liberation. By the performance of scriptural duties all the world is held together. There is nothing more difficult to practice than the duties ordained by the scriptures. Therefore seekers of the highest good find delight in the scriptural duty." [20] Here, *Dharma* is defined in terms of Duty. By fulfilling one's own duties, the rights of all may be protected and hence the world is held together.

Jaimini in his Mimamsa Sutra states:

चोदनालक्षणोऽर्थो धर्मः ॥ [21]

Meaning: धर्म वह है, जो वांछनीय होते हुए वैदिक आज्ञाओं द्वारा निर्देशित (या सिखाया) किया जाता है।

"Dharma or Duty is that which, being desirable, is indicated (or taught) by Vedic injunction." [22]

The Purva-Paksa admits that *Dharma* can be defined as that desirable thing which is mentioned or laid down by Vedic Injunctions; that is to say, that which the Vedic injunction lays down as leading to a desirable end is *Dharma*; and from this it also follows that the Vedic Injunction is the sole means of knowing *Dharma*. Thus then *Dharma* having been duly defined, and a valid and trustworthy means of knowing it being found available, it cannot be rejected as a nonentity.

In Mahabharata Karna Parva:

धारणाद्धर्ममित्याहुः धर्मो धारयत प्रजाः।
यस्याद्धारणसंयुक्तं स धर्म इति निश्चयः॥[23]

Meaning: धर्म प्रजाओं को धारण करता है, धारण करने के कारण उसे धर्म कहते हैं, जो धारण- प्राण रक्षा से युक्त हो वही धर्म कहलाता है। यही शास्त्रों का निश्चयपूर्वक कहना है। [24]

Here, the essence of *Dharma* lies in upholding the beings; it is called *Dharma* because it sustains. That which is associated with the protection of life is called *Dharma*. *Dharma* ensures the protection of the rights of beings.

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20 *Ibid.*

21 Ganganath Jha (ed.), *The Purva Mimamsa Sutra of Jaimini* 1:1:2 (The Panini office Bhuvaneswari Asrama, 1916).

22 *Ibid.*

23 Damodar Satvalekar (ed.), *Mahabharata Karna Parva* 49:50 (Swadhyaya Mandal, 1973).

24 *Ibid.*

Manu smriti states:

विद्वद्भिः सेवितः सद्भिर्नित्यमद्वेषरागिभिः ।
हृदयेनाऽभ्यनुज्ञातो यो धर्मस्तं निबोधत ॥[25]

Meaning: **रागद्वेषरहित धार्मिक पण्डितों ने जिसको सदा सेवन किया और हृदय से मुज्य जाना, उस धर्म को तुम सुनो।**

"Learn that Dharma, which has been ever followed by, and sanctioned by the heart of, the learned and the good, who are free from love and hate."[26]

Here, this *sloka* implies that one should perform own *Dharma* which is independent of any emotional outcome. A duty has to be performed by being because it has to be performed. The obligation comes from within itself rather than any coercive means.

After having a comprehensive understanding of *Dharma* through various *sloka,* it can be well said that *Dharma* is not equivalent to religion. In the words of Dr. Raghu Vira "*The fact is that Dharma never meant and can never mean religion. I think the word 'Panthe' may properly be translated as Religion but I do not think that Religion can ever be taken to connote Dharma. But the Englishmen made a deliberate use of this for their own ulterior purposes."* [27]

Therefore, *Dharma* can be embraced by any person belonging to any religion, whether Hindu, Muslim, Christian, Jew, Parsi, etc. *Dharma* is the whole basis of our social framework. *Dharma* is the law of social well-being.

2. Origin and Sources of *Dharma*

The Veda, in its entirety, serves as the fundamental origin of *Dharma*.[28] Additionally, the conscientious remembrance *(Smriti)* of virtuous individuals who possess knowledge of the Veda, the conduct of morally upright and knowledgeable individuals *(Sadachara)*, and their inner conscience.[29]

वेदोऽखिलो धर्ममूलं स्मृतिशीले च तद्विदाम् ।
आचारश्चैव साधूनामात्मनस्तुष्टिरेव च ॥ [30]

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25 Ganganath Jha (ed.), *Manusmriti: With the 'Manubhasya' of Medhatithi* 2:1 (Motilal Banarsidass, 1920).

26 *Ibid.*

27 Constituent Assembly Debates, November 19, 1949, *available at:* http://library.bjp.org/jspui/handle/123456789/136 (last visited on August 25, 2024).

28 *Supra* note 25 at 2:6.

29 *Ibid.*

30 *Ibid.*

Meaning: संपूर्ण वेद धर्म का मूल है, और स्मृति व शील (आचरण) भी उसे जानने वालों के लिए धर्म का आधार हैं। साधुओं का आचरण और अपनी आत्मा की तुष्टि भी धर्म के अंग हैं।

A. Vedas

The Vedas, specifically the Rigveda, the Yajurveda, the Samaveda, and the Atharvaveda, hold a preeminent position as the primary sources of *Dharma*.

यः कश्चित् कस्य चिद् धर्मो मनुना परिकीर्तितः ।
स सर्वोऽभिहितो वेदे सर्वज्ञानमयो हि सः ॥[31]

Meaning: जो भी किसी का धर्म मनु द्वारा वर्णित किया गया है, वह सब वेद में कहा गया है, क्योंकि वेद सर्वज्ञानमय है।

अर्थकामेष्वसक्तानां धर्मज्ञानं विधीयते ।
धर्मं जिज्ञासमानानां प्रमाणं परमं श्रुतिः ॥[32]

Meaning: अर्थ और काम में आसक्त न होने वालों के लिए धर्म का ज्ञान स्थापित किया जाता है। जो धर्म को जानने की इच्छा रखते हैं, उनके लिए श्रुति सर्वोच्च प्रमाण है।

The primary source of authority for acquiring knowledge of the *Dharma* is the revelation known as Sruti, specifically referring to the Vedas.

B. Smritis

The *'Smritis'*, authored by learned scholars of the four Vedas, serves as a significant secondary foundation of *Dharma* due to its exceptional virtues.[33] The term *'Smriti'* is synonymous with *Dharmashastra*. There are a total of eighteen primary *Smritis* or Dharmashastra.

मन्वत्रिविष्णुहारीत याज्ञवल्क्योऽङ्गिराः। यमापस्तज्बसज्वर्ताः कात्यायनबृहस्पती॥
पराशरव्यासशङ्खलिखिता दक्षगौतमो। शातातपोवशिष्ठश्च धर्मशस्त्रयोजकाः॥[34]

The most significant texts are those authored by *Manu, Yajnavalkya, and Parasara*. The remaining fifteen individuals are identified as *Vishnu, Daksha, Samvarta, Vyasa, Harita, Satatapa, Vasishtha, Yama, Apastamba, Gautama, Devala, Sankha-Likhita, Usana, Atri,* and *Saunaka*.

Manu states:

या वेदबाह्याः स्मृतयो याश्च काश्च कुदृष्टयः ।
सर्वास्ता निष्फलाः प्रेत्य तमोनिष्ठा हि ताः स्मृताः ॥[35]

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31 *Supra* note 25 at 2:7.

32 *Supra* note 25 at 2:13.

33 *Supra* note 30.

34 *Yajnavalkya Smriti* 1:4, 1:5 (Maharishi University of Management).

35 *Supra* note 25 at 12:95.

Meaning: **जो स्मृति वेदमूलक नहीं हैं, जो वैदिक देव-यज्ञ आदि को झूठा बताने वाले ग्रन्थ हैं, उन सबको निष्फल और नरक गति देने वाले मानना चाहिए ।**

The scriptures that are considered 'revealed' but are not part of the Veda, together with all the erroneous theories, are deemed to be futile, even if they are thoroughly developed, as they have been proclaimed to be based on ignorance.[36] The authenticity of smritis is dependent upon their compatibility with the Vedas, a principle that also applies to the natural world. The Smritis that are in contradiction to the Vedas are considered to be invalid.

C. Sadachara

Sadachara is identified as the third source of *Dharma*. The term pertains to the practices and traditions observed by individuals of moral excellence. Sadachara refers to the exemplary behavior exhibited by knowledgeable academics of the Vedas.

सरस्वतीदृशद्वत्योर्देवनद्योर्यदन्तरम् ।
तं देवनिर्मितं देशं ब्रह्मावर्तं प्रचक्षते ॥[37]

Meaning: सरस्वती और दृषद्वती इन देव नदियों के बीच जो देश है उस को %ब्रह्मावर्त% कहते हैं।

तस्मिन् देशे य आचारः पारज्पर्यफमागतः ।
वर्णानां सान्तरालानां स सदाचार उच्यते ॥[38]
Meaning: जिस देश में, परंपरा से, जो आचार चला आता है, वही वर्गों का और सङ्कीर्ण जातियों का %सदाचार% कहा जाता है ॥

Brahmavarta, as referred to by the sages, is the sacred territory situated amidst the divine rivers Sarasvati and Drishadvati, believed to have been bestowed by the gods. The practice that has been traditionally transmitted through generations among the four varnas and the mixed races of that region is referred to as the ethical behavior of individuals of high moral character (*Sadachara*).

D. Inner Conscience

Finally, the fourth source of *Dharma* pertains to an individual's intrinsic sense of contentment. The inquiry emerges as to whether the pursuit of soul-satisfaction in one's work may be seen as *Dharma* for all individuals. The response is negative.

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36 *Ibid.*

37 *Supra* note 25 at 2:17.

38 *Supra* note 25 at 2:18.

39 *Supra* note 30.

Dharma refers to the work undertaken by scholars who possess virtuous and pure souls, adhering to the principles outlined in the Vedas. Such individuals engage in activities that align with their own soul's contentment, well-being, and affection.[39]

Manu through various *sloka* explained the fourth source of *Dharma.*

विद्वद्भिः सेवितः सद्भिः - नित्यमद्वेषरागिभिः ।
हृदयेनाऽभ्यनुज्ञातो यो धर्मस्तं निबोधत ॥ [40]

Meaning*:* रागद्वेषरहित धार्मिक पण्डितों ने जिसको सदा सेवन किया और हृदय से मुज्य जाना, उस धर्म को तुम सुनो।

"Learn that Dharma, which has been ever followed by, and sanctioned by the heart of, the learned and the good, who are free from love and hate." [41] Here, this *sloka* implies that one should perform own *Dharma* which is independent of any emotional outcome. The inner conscience of being tells what is right and what is wrong. A duty has to be performed by being because it has to be performed. The obligation comes from within itself rather than any coercive means.

एकोऽपि वेदविद् धर्मं यं व्यवस्येद् द्विजोज़मः ।
स विज्ञेयः परो धर्मो नाज्ञानामुदितोऽयुतैः ॥[42]

Meaning: जो द्विजोज़म (श्रेष्ठ ब्राह्मण) वेदों को जानने वाला है, वह जिस धर्म का निर्णय करता है, वही परम धर्म समझा जाना चाहिए, न कि हजारों अज्ञानियों द्वारा कहा गया।

The authoritative pronouncements of a knowledgeable Brahmana well-versed in the Veda should be regarded as the highest legal authority, but the proclamations made by numerous ignorant people hold no such legal force.[43]

यत् सर्वेणेच्छति ज्ञातुं यन्न लज्जति चाचरन् ।
येन तुष्यति चात्मास्य तत् सज़्वगुणलक्षणम् ॥[44]

Meaning: जिससे ज्ञान प्राप्त करना चाहे, जिसको करने में लज्जा न आवे और जिस कर्म से मन प्रसन्न सन्तुष्ट रहे, उनको सज़्वगुण का लक्षण मानना चाहिए ।

When an individual desires to comprehend an action in its entirety, without experiencing any sense of shame and with a feeling of contentment within their heart, that action can be identified by the attribute of *'Sattva'*.[45]

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40 *Supra* note 25 at 2:1.

41 *Ibid.*

42 *Supra* note 25 at 12:113.

43 *Ibid.*

44 *Id.,* at 12:37.

45 *Ibid.*

तमसो लक्षणं कामो रजसस्त्वर्थ उच्यते ।
सज़्वस्य लक्षणं धर्मः श्रैष्ठ्यमेषां यथोज़रम् ॥[46]

Meaning: तम का काम, रज का अर्थ और सज़्व का धर्म ये मुज़्य लक्षण हैं। इनमें कम से अगला अगला श्रेष्ठ माना जाता है।

The characteristic that sets *'Tamas'* apart is pleasure. The concept of wealth is associated with the quality of *'Rajas'*, while Spiritual Merit is identified as the defining characteristic of *'Sattva'*. It is crucial to acknowledge that each successive attribute is seen as superior to its preceding counterpart.[47]

The analysis provides evidence supporting the notion that only *'Sattva'* acts are capable of bringing bliss or contentment to the soul. Therefore, the presence of *Dharma* can be inferred.

3. Factors Contributed to Evolution of Dharma

Manu asserts that no human action can be exempt from desire; every action undertaken by a person is driven by the impetus of desire.

अकामस्य किया काचिदृश्यते नेह कर्हिचित् ।
यद्यद्धि कुरुते किञ्चित् तज़त्कामस्य चेष्टितम् ॥[48]

Meaning: संसार में कोई कर्म बिना इच्छा के होते नही देखा गया है।

In the aforementioned *sloka*, Manu expounds upon the examination of the inherent human tendency, asserting that the impulse driving every action undertaken by an individual is rooted in his or her desire, commonly referred to as *Kama*. The inherent quality of any human being is an intrinsic characteristic. Then the next question is: What are the natural desires of man? The natural desire of individuals was discovered to be the pursuit of both sexual and emotional gratification, as well as material gain, commonly referred to as *Artha*. Vatsayana provides an elucidation of *Artha* as encompassing tangible assets such as gold, livestock, and agricultural produce, as well as intangible resources like education and wisdom that facilitate the acquisition of prosperity. Therefore, the pursuit of *Kama* is thereafter followed by the pursuit of *Artha*.

Moreover, it has been discovered that the inclination *(kama)* of individuals can also be influenced by other innate emotions, such as anger *(krodha)*, passion *(moha)*, greed *(lobha)*, infatuation *(mada)*, and hostility *(matsarya)*. The six natural impulses,

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46 *Id.,* at 12:38.

47 *Ibid.*

48 *Supra* note 25 at 2:4.

known as arishadvarga, were regarded as adversaries to human beings. If left unchecked, these impulses might incite individuals to harbor malicious thoughts in order to satisfy their personal ambitions, leading them to inflict harm on others. Manu elucidated the underlying factors contributing to all private and public harms resulting from the actions of one individual against another. The origin of all illicit activities perpetrated by individuals can be attributed to the natural instincts towards material gratification, commonly referred to as desire *(Kama)*. This pursuit of material pleasure *(Artha)* subsequently fosters a clash of interests among individuals, hence leading to conflicts.[49]

Ultimately, the *Dharma*, or ethical principles governing moral behavior, emerged as a resolution to the recurring dilemma resulting from innate human instincts.

The Trivarga, comprising the three-fold principles of *Dharma*, *Artha*, and *Kama*, was established with the intention of promoting the well-being and contentment of individuals. Additionally, a fourth ideal known as *Moksha*, which encompasses the pursuit of everlasting bliss, was also prescribed. The rationale behind the establishment of the three-fold ideals was to emphasize that the pursuit of material pleasure *(Artha)* should only be indulged in accordance with *Dharma* rather than in any other manner. Moreover, if an individual holds Moksha as an ideal, it would also exert an influence on their adherence to *Dharma* within the context of their worldly existence.

Based on extensive research and contemplation, the esteemed seers have proclaimed that the regulation of desire (referred to as *Kama*) for all worldly and material pleasures (known as *Artha*), as well as desires stemming from anger, greed, passion, infatuation, and enmity, must be governed by established principles rather than relying solely on the personal fortitude or frailty of individuals. Failure to do so will inevitably result in perpetual conflict, chaos, and the subsequent deprivation of happiness, tranquility, and even the very material pleasures sought after. The expansion of the rules of *Dharma* was undertaken with the intention of including all facets of human existence. Therefore, the whole set of regulations that delineated appropriate desires to be entertained, as well as the suitable methods and strategies for attaining desired material pleasures, became collectively referred to as *Dharma*.[50]

4. Attributes of Dharma

Dharma is difficult to explain. Many Bharatiya scholars defined the *Dharma* in their own way. However, we find different definitions depending on the context in which they are used. Scholars provide some basic attributes of *Dharma* for people's

49 *Supra* note 11 at 5.

50 *Ibid.*

convenience. Adoption of these attributes makes the person ideal and hence called *Dharmic*. He becomes righteous in his actions. Some of the attributes that are mentioned in ancient literature include:

धृतिः क्षमा दमोस्तेयं शौचमिन्द्रियनिग्रहः ।
धीर्विद्या सत्यमक्रोधो दशकं धर्मलक्षणम् ॥[51]

Meaning: धैर्य, क्षमा, आत्म-संयम, चोरी न करना, शुद्धता, इंद्रियों पर नियंत्रण, बुद्धि, ज्ञान, सत्य, और अक्रोध — ये दस धर्म के लक्षण हैं।

(1) Contentment, (2) Forgiveness, (3) Self-control, (4) Abstention from unrighteous appropriation, (5) Purity, (6) Control of the Sense-organs, (7) Wisdom, (8) Knowledge, (9) Truthfulness, and (10) Abstention of anger—these are the ten-fold forms of duty/Dharma.[52] Generally, these attributes should be observed by all the citizens of this country. But particularly, all these attributes must be observed by Judicial officers and State officials in order to establish Nyaya/Justice/Dharma.

अहिंसा सत्यमस्तेयं शौचमिन्द्रियनिग्रहः ।
एतं सामासिकं धर्मं चातुर्वर्ण्येऽब्रवीन्मनुः ॥[53]

Meaning: अहिंसा, सत्य, चोरी न करना, शुद्धता, और इंद्रियों पर नियंत्रण — मनु ने इनको चारों वर्णों के लिए संक्षिप्त रूप से धर्म बताया है।

"Ahimsa (non-violence), Satya (truthfulness), Asteya (not coveting the property of others), Shoucham (purity), and Indriyanigraha (control of the senses) are, in brief, the common Dharma for all the varnas."[54] This *sloka* implies that it is common for every citizen of this country irrespective of caste, religion, race, sex etc. to observe these attributes (*Mahavrat*) in their daily life routine to abide by *Dharma*.

अक्रोधः सत्यवचनं संविभागः क्षमा तथा ।
प्रजनः स्वेषु दारेषु शौचमद्रोह एव च ॥ 7 ॥[55]
आर्जवं भृत्यभरणं नवैते सार्ववर्णिकाः ।
ब्राह्मणस्य तु यो धर्मस्तं ते वक्ष्यामि केवलम् ॥ 8 ॥[56]

Meaning: किसी पर क्रोध न करना, सत्य बोलना, धन को बाँटकर भोगना, क्षमाभाव रखना, अपनी ही पत्नी के गर्भ से संतान पैदा करना, बाहर-भीतर से पवित्र रहना, किसी से द्रोह

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51 *Supra* note 25 at 6:92.

52 *Ibid.*

53 *Supra* note 25 at 10:63.

54 *Ibid.*

55 *Mahabharata Shanti Parva*, 60:7 (Geeta Press, Gorakhpur, 2013).

56 *Id.,* at 60:8.

न करना, सरल भाव रखना और भरण-पोषण के योग्य व्यक्तियों का पालन करना-ये नौ सभी वर्णों के लिये उपयोगी धर्म है। ॥ 7-8 ॥ [57]

"Being free from anger, Truthfulness, sharing one's wealth with others, forgiveness, procreation of children from one's wife alone (*i.e.,* maintain fidelity) Purity, Absence of enmity, Maintaining Simplicity, and take care of those who are worthy of being nourished, are the nine Dharmas of persons belonging to all the varnas." This *sloka* also implies that these attributes are common for everyone for communal harmony.

वेदाभ्यासस्तपो ज्ञानमिन्द्रियाणां च संयमः ।
अहिंसा गुरुसेवा च निःश्रेयसकरं परम् ॥ 83 ॥[58]

Meaning: वेदों का अध्ययन, तप, आत्मज्ञान, इंद्रियों का संयम, अहिंसा, और गुरु सेवा, — ये सभी परम सर्वोज़म मोक्षकारक (कल्याणकारी) हैं।

Vedic Study, Austerity, Knowledge, Control of the Senses, Harmlessness, and Service of Elders—are the best means of attaining the highest good *i.e.,* Dharma.[59]

Just as the Indian Constitution has fundamental duties for every citizen of this nation, these are the *Mahavrat* that must be observed in their daily-life routine so that the citizens do not deviate from the path of *Dharma*. Ultimately, the Rule of *Dharma* would prevail in society.

III. Artha and Kama Subject to *Dharma*: Trivarga Theory

The proponents of *Dharma* recognized the significance of fulfilling human desires as a fundamental component of existence. However, they held the belief that without the regulation of desires by legal means, unwanted consequences were likely to arise. Hence, it was universally agreed upon by proponents of *Dharma* that in order to establish a well-structured society and ensure the well-being and contentment of its members, the pursuit of material enjoyment *(Kama)* and wealth *(Artha)* must constantly align with and adhere to the principles of *Dharma* (Law), without any contradictions.[60]

तस्माच्छास्त्रं प्रमाणं ते कार्याकार्यव्यवस्थितौ ।
ज्ञात्वा शास्त्रविधानोक्तं कर्म कर्तुमिहार्हसि ।।[61]

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57 *Id.,* at 60:7, 60:8.

58 *Supra* note 25 at 12:83.

59 *Ibid.*

60 *Supra* note 11 at 5.

61 Swami Mukundananda (ed.), *Bhagavad Gita* 16:24 (Westland, 2021).

Meaning: इसलिए, शास्त्र ही प्रमाण है कार्य और अकार्य के निर्धारण में। शास्त्र के अनुसार निर्धारित कर्म को जानकर तुज्हें उसे करना चाहिए।

"Let the shastras be your authority in deciding what you should do and what you should desist from doing." [62]

It is imperative to adhere to the teachings of the shastras and subsequently align one's actions properly.

In the same way, citizens of this country adhere to the principles given in the Bharatiya Constitution. The constitution is the *shastra* here. Some individuals argue that the pursuit of *Dharma* and *Artha* can lead to the attainment of well-being and contentment. Alternative viewpoints argue that *Artha* and *Kama* possess superior qualities. Alternatively, some individuals assert that *Dharma* is the most superior. There are individuals who assert that the attainment of *Artha* is the exclusive means of achieving bliss.[63] However, it is argued that the combination of *Dharma, Artha,* and *Kama* (referred to as *Trivarga*) collectively contributes to the attainment of well-being and contentment.[64]

Similarly, the Golden Triangle of the Indian Constitution established in the *Maneka Gandhi* case[65]—comprising article 14 (Right to Equality), article 19 (Right to Freedom), and article 21 (Right to Life and Personal Liberty) —can be related symbolically to *Dharma, Artha,* and *Kama.*

Article 14 embodies the principle of *Dharma* by ensuring equality before the law and equal protection of the laws. It prohibits arbitrary state actions and ensures that every individual is treated justly, upholding the moral and ethical foundation of society. Article 19 guarantees freedom of speech, expression, movement, profession, and association, allowing individuals to pursue their *Artha* or material goals. Article 19(1)(g) allows the citizen to practice any profession, or to carry on any occupation, trade or business. This clearly shows the pursuance of *Artha.* This freedom provides individuals the space to achieve economic and social prosperity within the framework of a democratic society. Article 21, which guarantees the right to life and personal liberty, ensures that individuals have the right to live with dignity, pursue personal happiness, and enjoy the *Kama* aspect of life, provided it is in accordance with the law. It safeguards the individual's personal freedoms and protects their ability to lead a fulfilling and meaningful life. (*Authors' own interpretation*).

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62 *Ibid.*

63 *Supra* note 11 at 6-7.

64 *Ibid.*

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

Just as *Dharma*, *Artha*, and *Kama* together aim to balance different aspects of human existence, the Golden Triangle of the Constitution ensures a balance between individual freedoms, equality, and justice.

To have a deep understanding, let's have a look at what our ancient sources stated.

Manu states:

धर्मार्थावुच्यते श्रेयः कामार्थौ धर्म एव च ।
अर्थ एवैह वा श्रेयस्त्रिवर्ग इति तु स्थितिः ॥ 224 ॥[66]

Meaning: कोई अर्थ और धर्म को, कोई काम, अर्थ को, कोई अर्थ को, कोई धर्म को ही अच्छा मानते हैं। पर धर्म, अर्थ और काम इन तीनों का आचरण करने से भला होता है-यह धर्मशास्त्र की आज्ञा है।

परित्यजेदर्थकामौ यौ स्यातां धर्मवर्जितौ ।
धर्मं चाप्यसुखोदर्कं लोकसङ्कुरुष्टमेव च ॥ 176 ॥[67]

Meaning: धर्म विहीन अर्थ और काम को त्याग देना चाहिए। जिस धर्म के आचरण से लोक में निंदा हो, उसे भी त्यागना चाहिए।

Nevertheless, it is imperative to renounce the pursuit of desire *(Kama)* and material gain *(Artha)* when such pursuits are in conflict with the principles of *Dharma*.

In *Vatsayana's Kamasutra*, the author proceeds to elucidate the significance of *Dharma, Artha,* and *Kama*.

एषां समवाये पूर्वः पूर्वो गरीयान् ॥ 14 ॥[68]

Meaning: धर्म, अर्थ और काम के समुदाय में उज़र से पूर्व पूर्व श्रेष्ठ है, अर्थात् काम से अर्थ श्रेष्ठ है और अर्थ से धर्म श्रेष्ठ है ॥ 14 ॥

Out of *Dharma*, *Artha*, and *Kama*, each preceding one is superior to the following.[69]

This suggests that it is essential for the appropriate methods of attaining Artha, which refers to worldly prosperity and pleasures, to take precedence over the desire for such pursuits *(Kama)*. Additionally, *Dharma* should regulate both the desire for pleasure *(Kama)* and the methods employed to acquire material wealth *(Artha)*. Consequently, all the literary compositions concerning *Dharma* encompassed

66 *Supra* note 25 at 2:224.

67 *Id.,* at 4:176.

68 Dr. Ramananda Sharma (ed.), *Kamasutra* 1:2:14 (Krishna Das Academy, Varanasi, 2001).

69 *Ibid.*

a set of mandated principles governing moral behavior, the adherence to which was seen as essential for the well-being of both the individual and society.

In short, the successful completion of the *Dharma* test was a prerequisite for *Artha* and *Kama*. The Trivarga doctrine governed ancient Bharatiya society. Significance was attributed to the concept of *Dharma*, also known as duty, and it was voluntarily assumed by both individuals and society. As a result, individuals were adhering to the principles of *Dharma*, rendering any external authority to enforce compliance with laws unnecessary. Members of the society were obligated to demonstrate mutual respect for one another's vested rights.

The Golden Triangle forms the constitutional bedrock for the Rule of Law, just as *Dharma*, *Artha*, and *Kama* provide a philosophical framework for a balanced and harmonious life in Bharatiya thought. In this sense, both the Golden Triangle and the Trivarga of *Dharma*, *Artha*, and *Kama* seek to create a society where justice, freedom, and well-being are in harmony.

IV. Rule of Law and Rule of *Dharma*

After having a broad understanding of *Dharma* throughout this paper, now it is meaningful to discuss the Rule of Law developed by Western Jurisprudence and Rule of Law (*Dharma*) developed by Bharatiya Jurisprudence.

First, let's discuss what Greek thought and western jurisprudence contributed to the Rule of Law.

Around 350 BCE, Aristotle, the famous Greek philosopher, in his work *'Politics'*[70] asserted that laws should govern the state, rather than the whims of individual rulers. He also stressed that the law should be applied universally to all citizens, ensuring fairness and equality. In 1215, King John of England signed the Magna Carta, which limits royal authority and establishes the principle that the monarch is subject to the law. This was an early recognition of the rule of law in Western Jurisprudence.[71]

During the 17th century, Sir Edward Coke, an influential English jurist, is generally credited with developing the modern concept of the rule of law. In the case of

70 Aristotle, *Politics* (Heinemann, 1932).

71 Jesus Fernandez Villaverde, "Magna Carta, the rule of law, and the limits on government" 47 *International Review of Law and Economics* 22-28 (2016).

Prohibitions del Roy[72] (1607), he declared even the King was subject to the law. Furthermore, in 1610, In *Dr. Bonham's Case,*[73] Coke suggests that common law can void parliamentary statutes that are unjust or unreasonable, an early expression of judicial review and the supremacy of law over governmental authority. This idea laid the foundation for constitutionalism in England.

And finally, in 1885, A.V. Dicey, a British constitutional theorist, in his work *'Introduction to the Study of the Law of the Constitution',*[74] identified three key principles of the rule of law: *Supremacy of Law, Equality before the Law,* and *Predominance of Legal Spirit*. This principle became foundational to the understanding of constitutional law in Britain and had significant influence on the development of constitutional systems in democratic countries. This is how the Rule of Law was developed and adopted by most of the modern democratic States in their constitution.

In contrast, In the Bharatiya Jurisprudence, it is the Rule of *Dharma* rather than the Rule of Law developed by Western Jurisprudence. This principle owes its origin in one of the oldest Upanishad *i.e.,* Brihadaranyaka Upanishad around 7th-6th century BCE. In the Brihadaranyaka Upanishad, there is a *sloka* that emphasizes the importance of *Dharma*/Law which can be interpreted as an early form of the Rule of Law. The Upanishad states:

स नैव व्यभवज़च्छेयोरूपमत्यसृजत धर्म तदेतत्क्षत्रस्य क्षत्रं यद्धर्म- स्तस्माद्धर्मात्परं नास्त्यथो अवलीयान्वलीयांसमाशंसते धर्मेण यथा राज़ेवं यो वै स धर्मः सत्यं वै तज़स्मात्सत्यं बदन्तमाहुर्धर्म वदतीति धर्म वा बदन्तं सत्यं वदतीत्येतद्धयेवैतदुभयं भवति ।।[75]

Meaning: **वह (धर्म) कभी क्षीण नहीं हुआ और उसने उस उज़म स्वरूप को उत्पन्न किया जो श्रेयस्कर है। यह क्षत्रिय का धर्म ही उसका क्षत्रियत्व है, इसलिए धर्म से बढ़कर कुछ नहीं है। यहाँ**

72 *Prohibitions del Roy* (1607) 12 Co Rep 63.

Facts of the case: The case arose during the reign of King James I, focusing on the limits of royal power in judicial matters. A property dispute was brought before the Court of Star Chamber, which the King sought to prohibit by issuing a royal prohibition. Sir Edward Coke, Chief Justice of the King's Bench, opposed the King's intervention, arguing for judicial independence and the supremacy of the law. The court ruled in favor of Coke, stating that the King could not interfere with the jurisdiction of the common law courts.

73 *Dr. Bonham's Case* (1610) 8 Co Rep 113b.

Facts of the case: The case involved Dr. Thomas Bonham, a physician who was fined by the College of Physicians for practicing medicine without a license. Bonham challenged the legality of the fine imposed by the College, arguing that the College was acting beyond its authority and that the punishment was unjust. The Court of Common Pleas, led by Chief Justice Sir Edward Coke, heard the case. The court ruled in favor of Bonham, asserting that the College's power to impose fines was excessive.

74 A. V. Dicey, *Introduction to the Study of the Law of the Constitution,* 120-121 (Macmillan, London, 8th edn., 1915).

75 *Supra* note 9.

तक कि कमजोर व्यक्ति भी धर्म के द्वारा बलवान से जीतने की इच्छा रखता है। जो धर्म है, वही सत्य है। इसलिए सत्य बोलने वाले को कहा जाता है कि वह धर्म बोलता है, और धर्म बोलने वाले को कहा जाता है कि वह सत्य बोलता है। यह दोनों (धर्म और सत्य) एक ही हैं।

"Yet he did not flourish. He especially projected that excellent form, righteousness (Dharma). This righteousness is the controller of the Kshatriya. Therefore, there is nothing higher than that. (So) even a weak man hopes (to defeat) a stronger man through righteousness, as (one contending) with the king. That righteousness is verily truth. Therefore, they say about a person speaking of truth, 'He speaks of righteousness,' or about a person speaking of righteousness, 'He speaks of truth,' for both these are but righteousness."[76]

Interpreting the above *sloka*, The Law holds a position of utmost authority; No entity surpasses the supremacy of law; The law enforced by the king's authority facilitates the triumph of the vulnerable over the powerful. Commenting on the above provision. Dr. S. Radhakrishnan observes "Even kings are subordinate to *Dharma*, to the Rule of Law."[77]

Furthermore, Justice Markandey Katju quoted the illustration[78] of Kalhana's Rajatarangini, a historical chronicle of the kings of Kashmir in 12th Century, where we find an incident about the eviction of cobbler, a perfect illustration of arbitrary state action to conform to the Rule of Law.

Lord Tribhuvanaswamy Temple was supposed to be built on the site of cobbler. The king's officials ordered the cobbler to evict the site. When Chandrapida, a King of Kashmir, came to know about the fact, protected a charmakar (cobbler) against his own officials. The king says:

नियम्यताम् विनिर्माणं यद् अन्यत्र विधीयताम् पर्भूमि अपहृण सुकृतं कः कलंकेत ये द्रष्टारः सदसताम् ते धर्मे विनुगणा क्रियाः वयमेव विदधमश्चत यॉर्तु न्यायेण को अध्वना।[79]

Meaning: "Stop the construction, or build the temple elsewhere. Who would tarnish such a pious act by illegally depriving a man of his land ? If we, who are the

76 *Ibid.*

77 *Supra* note 10.

78 Markandey Katju, Facebook, April 26, 2021, *available at:* https://www.facebook.com/share/p/c15EBvvZ8nDiWBX2/?mibextid=oFDknk (last visited on September 05, 2024); Prof. (Dr.) Anurag Deep, 'Ancient Indian Wisdom, Rule of Law and Supreme Court', YouTube Lecture, August 31, 2024, *available at:* https://youtu.be/9Vh82T8KmVY?feature=shared (last visited on September 05, 2024).

79 M.A. Stein (ed.), *Kalhana's Rajatarangini* 59-60 (Motilal Banarsidass, 2017).

judges of what is right and what is not, act unlawfully, who would then abide by the law?"

The cobbler said:

"Just as the palace is to Your Majesty, so is the hut to me. I could not bear its demolition. However, if Your Majesty asks for it, I shall give it up, seeing your just behavior."

Then, King purchased it after paying a satisfactory price.

The cobbler said:

राजधर्म अनुरोधेन पर्वज्ञा तयोचिता, स्वस्ति तुज़्यं चिरं स्थेया धर्म्या वृज़ांत पद्धति दर्शयन् ईदृशीह श्रद्धा श्रद्धेया धर्मचारिणाम।[80]

Meaning: "Yielding to another, however low, adhering to the Rajdharma, is the appropriate course for a King. I wish you well. May you live long, upholding the supremacy of the law."

In this way, this incident about the eviction of cobbler in the Kalhana's Rajatarangini is the perfect illustration of arbitrary state action to conform to the Rule of Law.

In Mahabharata (the ancient era), we find the illustration[81] of the vow of lifelong celibacy (*Brahmacharya*) of King Shantanu's son, Dev Vrata. King Shantanu wanted to marry Satyavati, the daughter of a fisherman, but the condition of her father was that his grandson would succeed to the throne. The king couldn't decide what to do. After seeing his father's grief, Dev Vrata made the vow of celibacy and would never ascend the throne. By this illustration, we find that despite being the king, he couldn't compel her father to give his daughter without the condition. Even the sovereign was not above the law. During that time, people adhered to the Rule of Law.

The Ramayana, a Hindu epic, is a powerful example of the rule of law, highlighting the importance of adherence to Dharma (law, duty, and righteousness) over personal desires or emotions whether it was Lord Rama's acceptance of exile, Bharat's refusal to rule, or Lord Rama's decision to banish Sita. The story revolves around King Dasharatha's vow, which he fulfilled to his queen Kaikeyi, who demanded Rama be made king instead of him. Despite personal motives, Dasharatha was bound by the principle of fulfilling a vow.

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80 *Id.* at 75-77.

81 Kisari Mohan Ganguly, *The Mahabharata (English)* Section C (Wisdom Library) *available at:* https://www.wisdomlib.org/hinduism/book/the-mahabharata-mohan/d/doc4093.html (last visited on September 05, 2024).

Rama's acceptance of exile is a testament to the rule of law in action, where personal emotions and desires are secondary to the larger principle of maintaining the sanctity of promises and upholding Dharma.

एवम् अस्तु गमिष्यामि वनम् वस्तुम् अहम् तु अतः 7
जटा चीर धरः राज्ञः प्रतिज्ञाम् अनुपालयन् ॥ 2-19-2[82]

Meaning: "Let it be, as you said it. I shall fulfill the king's promise, go to the forest from here to reside there, wearing braided hair and covered with a hide."

His decision to go into exile was rooted in his belief in Raja Dharma, which dictates that a king or future king must always set an example by upholding the law, fairness, and justice. This action reinforces the concept that no one, not even a king or prince, is above the law. Bharata's refusal to rule, despite being made king by Kaikeyi's manipulations, further solidifies the rule of law. Bharata, despite being made king by Kaikeyi's manipulations, regarded Rama as the rightful ruler and placed Rama's sandals on the throne as a symbol of his rule.

ततः शिरसि कृत्वा तु पादुके भरतः तदा ।
आरुरोह रथम् हृष्टः शत्रुघ्नेन समन्वितः ॥ 2-113-1[83]

Meaning: Thereafter, keeping the sandals on his head, Bharata delightfully ascended his chariot along with Shatrughna.

This act further solidifies the concept that rightful authority cannot be usurped, even by royal decree.

Despite Sita's purity and trials, rumors and doubts began to circulate among the citizens about her time in Ravana's captivity. This public sentiment posed a significant problem for Rama, who was duty-bound to uphold the moral integrity of the kingdom and its values. Rama was bound by Raja Dharma, which required him to prioritize the welfare, trust, and perception of his subjects over his personal feelings. He believed that a ruler must ensure the faith of the people in their king's actions and decisions, and that the trust of his subjects in the moral uprightness of the royal family was crucial for the stability and reputation of the kingdom.

In one of the most difficult decisions of his life, Rama ordered Sita to be exiled to the forest despite her innocence. This action reflects the harsh reality of the rule of law in ancient times, where the ruler's personal relationships and feelings were

82 K.M.K. Murthy (tr), *Valmiki Ramayana*, Book II: Ayodhya Kanda, Chapter 19 (Sanskrit Documents), *available at:* https://sanskritdocuments.org/sites/valmikiramayan/ayodhya/sarga19/ayodhya_19_frame.htm (last visited on September 05, 2024).

83 *Ibid.*

secondary to the expectations of the kingdom. Rama's painful adherence to Dharma demonstrated that the rule of law, as interpreted through the lens of public morality and duty, had to take precedence over his personal life. Ultimately, Rama's decision to banish Sita serves as a profound example of the application of the rule of law in the Ramayana, illustrating the concept of Raja Dharma, where a ruler must prioritize the welfare, reputation, and trust of the people over personal feelings, even when it results in personal tragedy. In conclusion, the Ramayana highlights the importance of the rule of law in ancient Bharatiya society, emphasizing the importance of adherence to Dharma, justice, and fairness.

In the classical era, Kautilya, a distinguished Bharatiya scholar and thinker, highlights the importance of *Dharma* and emphasizes the ethical foundations essential for establishing the rule. These ethical principles serve as the core mechanism to safeguard the true essence of the law.

Chanakya mentions the Rule of Law in his work 'Arthashastra':

प्रजासुखे सुखं राज्ञः प्रजानाञ्च हिते हितम् ।
नात्मप्रियं हितं राज्ञः प्रजानान्तु प्रियं हितम् ।
तस्मान्नित्योत्थितो राजा कुर्यादर्थानुशासनम् ॥[84]

Meaning: **प्रजा के सुख में राजा का सुख, प्रजा के कल्याण में उसका कल्याण निहित है। राजा को केवल उसी को अच्छा नहीं मानना चाहिए जो उसे प्रसन्न रखता है लाभ पहुंचाता है। राजा को प्रजा के फायदे के अनुरूप व्यवहार करना चाहिए।**

"In the happiness of his subjects lies the king's happiness, in their welfare his welfare. He shall not consider as good only that which pleases him but treat as beneficial to him whatever pleases his subjects." [85]

This sloka underscores that the ruler is duty-bound to uphold justice and the law, reinforcing the principle of *Dharma* as the foundation of governance. Chanakya advocated that a king is not above the law and must be just and fair, ensuring that the legal system is followed by both rulers and subjects alike, establishing the early notions of the Rule of Law. Along with this, we find similar illustrations in ancient Bharatiya texts such as Mahabharata, Ramayan, Smrits, Puranas, Upanishads establishing the notions of the Rule of Law (*Dharma*). Furthermore, it is necessary to understand the term 'Law' in the Rule of Law and how this 'Law' is different from '*Dharma'*.

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84 R. P. Kangle, *The Kautilya Arthashastra* Book 1, Chapter 19, Verses 34-35 (Motilal Banarsidass, 2nd edn.,1972).

85 *Ibid.*

Let's first try to understand "Law," not through a purely jurisprudential lens, but in a popular sense. 'Law' is something codified or made by a competent body. For example, in the United Nations (UN) system, all individuals, institutions, and entities, both public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated.

In Western philosophy, from the United Nations to individual nations, and from jurists to laypeople, 'Law' primarily refers to "Man-Made Law." This "Man" could be a king, a parliament, a dictator, a democratically elected government, a president, or another authority figure. A key question is how this powerful "Man" is created. The main creator of this so-called "Man" is the "Contractarian theory," which describes a contract between the sovereign and the individual, with mutual considerations. For the king, the consideration is the acceptance of his supremacy; for the citizen, it is the security provided by the sovereign. The provider is always powerful, and thus the sovereign holds significant power. In most countries, except for a few like Bhutan, the sovereign (be it the State, Government, King, dictator, army chief, etc.) is the provider of everything, and thus, his commands matter. In Austin's words, "The command of the sovereign is the law."[86]

In contrast, the Bhartiya concept of sovereign and justice differs from that of the West. Here, the parties to the contract in the "Contractarian theory" are *Dharma* (Divine) and the individual. The consideration is simple: you save *Dharma*, and *Dharma* will save you and thus the *Dharma* is sovereign here, unlike in the western thought where the king is sovereign. Here, the king is merely a representative of *Dharma*, bound by the command of *Dharma*, which is popularly known as the *Dharma* of the King. In the words of S. Radhakrishnan: "Much has been said about the sovereignty of the people. We have held that the ultimate sovereignty rests with the moral law, with the conscience of humanity. People as well as kings are subordinate to that. Dharma, righteousness, is the king of kings."[87]

Manu's writings strongly emphasize the imperative nature of diligently adhering to the principles of *Dharma*. The *Dharma* serves as a safeguard for individuals who uphold and defend its principles. The *Dharma* provides protection to individuals who uphold and safeguard its principles. Individuals who engage in the act of dismantling or undermining the principles and teachings of *Dharma* are themselves

86 Dr. Seema Singh, "Judiciary: Rule of Dharma and Rule of Law" 45 *Manthan Journal of Social and Academic Activism* 5-10 (2024).

87 Constituent Assembly Debates, January 20, 1947, *available at:* http://library.bjp.org/jspui/handle/123456789/136 (last visited on August 25, 2024).

subjected to a process of destruction or downfall. Hence, it is imperative to preserve *Dharma* in order to avoid the ensuing destruction that may befall us.[88]

धर्म एव हतो हन्ति धर्मो रक्षति रक्षितः ।
तस्माद्धों न हन्तव्यो मा नो धर्मो हतोऽबधीत् ॥[89]

Meaning: **'धर्म का लोप कर देने से वह उस पुरुष को नष्ट कर देता है और धर्म की रक्षा करने से वह भी रक्षा करता है। इसलिए धर्म का नाश न करना चाहिए जिससे नष्ट धर्म हमारा नाश न करे।**

The notion articulated in this sloka holds great value and significance. The aforementioned concise statement encompasses the fundamental principle of the Rule of Law. The conveyed meaning posits that the setting up of a well-organized society is contingent upon individuals adhering to the principles of *Dharma*, thus safeguarding *Dharma* itself. Consequently, this orderly society, embodying the essence of *Dharma*, reciprocally upholds the rights of its constituents. The purpose of the Rules of *Dharma* was to establish guidelines for individual behavior with the aim of limiting an individual's rights, freedoms, interests, and desires to foster the well-being of other individuals within society. Simultaneously, these rules imposed an obligation on society to ensure the well-being and protection of individuals through their social and political institutions. In brief, *Dharma* served as a regulatory framework for the reciprocal commitments between individuals and society. Hence, it was emphasized that safeguarding *Dharma* was advantageous for both the individual and the broader society. Manu cautions against the destruction of *Dharma*, emphasizing that such actions may lead to one's own demise. The maintenance of a 'State of *Dharma'* is crucial for the promotion of peaceful coexistence and prosperity.[90]

Therefore, the purpose of man-made law is to ensure the protection of *Dharma.* This is why "Yato Dharmastato Jaya" was chosen as the motto of the Supreme Court.

The phrase **यतो धर्मस्ततो जयः** is a recurring expression found in the Mahabharata on fifteen occasions. It conveys the idea, "*Where there is Dharma, there will be victory.*"

In Mahabharata - Udyoga Parva, Dhritarashtra to Sanjay:

सर्वं त्वमायतीयुक्तं भाषसे प्राज्ञसंमतञ्।
न चोत्सहे सुतं त्यक्तुं यतो धर्मस्ततो जयः।।[91]

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88 *Supra* note 25 at 8:15.

89 *Ibid.*

90 *Supra* note 11 at 8.

91 *Mahabharata Udyoga Parva*, 5:39:7 (Geeta Press, Gorakhpur, 2013).

Meaning: धृतराष्ट्र संजय से कह रहे हैं कि जो कुछ तुम कह रहे हो, वह विद्वानों द्वारा मान्य है और ज्ञान से परिपूर्ण है। लेकिन मैं अपने पुत्र दुर्योधन को छोड़ने में असमर्थ हूँ, यद्यपि मैं जानता हूँ कि जहाँ धर्म है, वहीं विजय होती है।

"Dhritarashtra is replying to Sanjaya saying that whatever you say is recognized by scholars and is full of wisdom. But I am unable to leave my son Duryodhana, even though I know that where there is Dharma, That's where victory lies."

In Mahabharata - Anushasan Parva, Bhishma told Duryodhana:

उक्तवानस्मि दुर्बुद्धिं मन्दं दुर्योधनं पुरा।
यतः कृष्णस्ततो धर्मो यतो धर्मस्ततो जयः॥[92]

Meaning: .मैंने पहले ही उस दुर्बुद्धि और मंदबुद्धि दुर्योधन से कहा था, जहाँ कृष्ण हैं, वहाँ धर्म है, और जहाँ धर्म है, वहीं विजय है।

"Where there is Krishna, there is Dharma; where there is Dharma, there is victory."

This *sloka* implies the supremacy of *Dharma* over anyone. Here, Krishna in the Mahabharata has been symbolized with *Dharma*. To understand *Dharma,* it is necessary to read Krishna's principles and character first.

Recently, individuals ranging from Supreme Court judges to prominent academicians have questioned the relevance of the Supreme Court's motto, demanding its removal on the grounds that it is religious in nature. Such interpretations are deplorable and stem from a lack of understanding of our own Indic philosophy and an excessive reliance on Western philosophy. Similarly, Brian Tamanaha, in his work, '*A Concise Guide To The Rule Of Law*'[93], elaborated his concern about the potential for the Rule of Law to turn into Rule by judges or lawyers. Judges in many systems have become more assertive in their decisions, sometimes stepping into political matters, particularly when interpreting broad laws like those involving human rights. This can make judges a target for political attacks, leading to a politicized judiciary, which reduces the independence of the courts and weakens the Rule of Law. Judges need to maintain a careful balance, applying the law while recognizing the limited role that courts should play in the larger political system.[94]

To understand this conflict of law and *Dharma*, we need to turn the pages of European history, where the tension between church and king was evident and escalating, ultimately leading to the division of Christianity into Catholicism and

92 *Mahabharata Anushasan Parva*, 13:153:39 (Geeta Press, Gorakhpur, 2013).

93 *Supra* note 2.

94 *Ibid.*

Protestantism. When crimes were committed, disputes often arose over whether the perpetrator should be tried under the secular law of the state or under religious canon law. The thirst for power exacerbated the conflict. Eventually, roles were divided: In medieval Europe, laws made by secular authorities, such as kings or rulers, were considered secular law. These laws governed the affairs of the state and its subjects. Conversely, laws made by the church, particularly the Catholic Church, were known as canon law, dealing with matters concerning the church, clergy, and religious practices.[95]

Canon law is still applicable within the Catholic Church and its institutions worldwide, including Vatican City, where it serves as the legal system for church governance and matters related to faith and doctrine.[96] This separation made the king the most powerful sovereign, and his words became the rule of law. In a democracy, the king was replaced by a democratically elected government, and laws passed by the legislature became the rule of law. However, this raises a crucial question: In a modern democratic system, where numbers matter for a particular party to form the government, and most political parties are involved in appeasement to consolidate their vote bank, does the elected government truly represent the collective will of the people? Brian Tamanaha had a concern that the Rule of Law is that, by itself, it doesn't guarantee democracy, respect for human rights, or just laws. Just because a legal system follows the Rule of Law doesn't mean that the laws are good or deserving of obedience. In situations where the law supports an authoritarian regime, imposes unwanted values on the people, or is used by one group to oppress another, the Rule of Law can actually reinforce that oppression. So, while the Rule of Law is necessary for a fair legal system, it's not enough by itself.[97] Perhaps this is what compelled Rawls to imagine a 'Veil of Ignorance,' behind which lawmakers create laws that are good for all.[98]

However, we all know this is a hypothetical situation and not actually possible. This is why many new legislations, instead of resolving conflicts, create more litigation. If laws themselves are not free from the infirmities of biasness, how can they establish a true Rule of Law? Brian Tamanaha was cautious about how the Rule of Law is used in rhetoric. Many abuses have been committed by governments that claim to uphold the rule of law but don't actually follow it. The rule of law is a powerful ideal that can be used by political leaders to justify their actions, even when they are violating the very principles they claim to support. This undermines

95 *Supra* note 86.

96 *Ibid.*

97 *Supra* note 2.

98 *Supra* note 86.

trust in the rule of law, and the only solution is to hold leaders accountable to legal standards and not be deceived by empty promises.[99] The crux of the matter is, if the Rule of Law is based absolutely on man-made laws, then actually it can never be truly achieved. Rather, the Rule of Law must be based on *Dharma* which is deeply rooted in the ancient Bharatiya society.

V. Conclusion

The prevailing judiciary, along with certain intellectuals and possibly even Dicey, often emphasizes the superiority of human intellect. However, human intellect has its limitations. In contrast, it is the intellect of nature that holds ultimate supremacy. This is why courts worldwide turn to natural law to address the shortcomings of man-made laws. Concepts such as natural law, due process, and the law of good conscience are essentially various forms of *Dharma*. The Indian Supreme Court's motto, "*Yato Dharmastato Jaya*," reflects this principle, and the powers granted under articles 32, 136, and 142 are designed to uphold it. In essence, *Dharma* forms the foundation of the basic structure of any Constitution.

In Bharatiya philosophy, *Dharma* extends the role of the sovereign beyond mere written laws, assigning duties to protect not only land, animals, birds, rivers, forests, and the environment but also the entire universe. *Dharma* plays a crucial role in shaping various branches of jurisprudence, including environmental jurisprudence, restorative jurisprudence, compensatory jurisprudence, and animal rights jurisprudence, among others. Therefore, *Dharma* represents the ultimate goal, with the judiciary serving as a mechanism to realize it through the framework of laws.

99 *Supra* note 2.

THE HUMAN RIGHTS LAW AND THE INDIAN KNOWLEDGE SYSTEMS: LOCATING CONTRASTS AND PARALLELS OF A RIGHTS BASED APPROACH IN THE INDIAN TRADITION

Anita Yadav & Alankrita Jasaiwal[*]

Abstract

Human rights law is not a novel concept and has existed in various traditions and civilisations since ancient times. The Indian tradition, as part of the Indian knowledge system, encompasses vernacular and Sanskrit writings from early India. This paper seeks to identify the parallels and contrasts between the modern system of human rights – centered on a rights-based concept, and the duty-based tradition of India. Part I of the paper serves as the introduction. Part II discusses the concepts of the Indian Knowledge Systems and human rights. Part III delves into the exploration of human rights in the Indian tradition divided into - (a) basic principles of Indian traditions that correspond to the tenets of human rights, (b) The duty driven concept of *dharma,* and (c) The shift from a duty-based approach, where the anchor of law in society is 'duty', to a rights-based approach, in which individual rights form the basis of law. The paper then delves into a discussion on custodian of human rights in India: the Indian constitution and the post-colonial developments that led to its creation as a rights-based document. Part IV focusses on re-imagining the rights-based approach to address issues within the model, and Part V concludes the paper.

Key words: *dharma*, *Indian Knowledge Systems, Indian Tradition, Human Rights Law.*

I. Introduction

THE JURISPRUDENCE of the modern system of human rights as understood and perceived is largely a construction of western ideas and is based on a 'rights' model. This model evolved in the Western world owing to the historical situations

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that incorporated the need for the concept of 'rights' which are vested in an 'individual' against the 'State'. The documents that are currently considered the Magna Carta of human rights were drafted on the western perception of certain 'claims' that clothed every human being, just by the virtue of their birth as 'humans' which must be exercised and protected from the perpetrators- the State. These include the Universal Declaration of Human Rights (UDHR) and the United Nations Charter.

However, this concept of 'rights', though recognised as 'universal' today, has not been the same globally as it is seen as different in different parts of the world. The ancient Indian civilisation, for instance, evolved with distinct historical circumstances that gave rise to the concept of 'duty' or '*dharma*' which ensured that societies existed and operated based on duty-driven obligations on both the State (the rulers) and the subjects. But this does not imply that human rights were entirely absent in traditional Indian societies. It simply means that the Indian system functioned on a different model where the obligations of duty (based on morals) ensured that no 'rights' (as known today) of others were hampered or violated, and the system checked the violations through social sanctions. However, the advent of colonisation introduced the need to demand the rights of self-determination. Attempts to locate these rights in the early Indian tradition introduces analogies and disanalogies- while some modern rights can be fully accommodated, some became essential only in post-colonial India due to historical integration. This paper examines the extent to which the concept of modern human rights can be traced within the Indian model (within the defined scope). To achieve this, it discusses the contrasts and similarities between the Indian tradition, a facet of the Indian Knowledge System, and modern human rights.

II. The Indian Knowledge System and The Human Rights Law - Understanding the Concepts

2.1 The Indian Knowledge System and the Indian Tradition

"नास्ति विद्यासमं चक्षुः।" ("*Nasti vidyasamam Chakshu.*")[1]

The above mentioned '*shloka'* from the Sanskrit texts of Mahabharat summarises effectively the value of knowledge which no vision can equate. Such valuable and unparalleled knowledge was found in ancient and medieval India which were hubs of information. Thinkers and philosophers were producing creative literature, working on resolutions to old and difficult problems and expressing them in an

1 Mahabharat 12.169.33. It literally translates to "there is no vision equal to knowledge".

organised manner, thereby, contributing heavily to new bases of knowledge.[2] They possessed what we now term as Indian Knowledge Systems, which may be understood as an umbrella term for vernacular and Sanskrit writings in disciplines ranging from philosophy, linguistics, hermeneutics to sciences of mathematics, astronomy and medicine.[3] Composed in more than twenty languages that included Sanskrit, Hindi, Gujarati, Marathi, Tamil Telegu, Kannada, Assamese, Malayalam and even Persian and Arabic (and many more), these comprised of theological accounts, religious poetry and philosophy.[4] This vast knowledge system preached of the tenets of duty, peace, harmony and propagated the notion of human welfare, which was at the root of these discourses. In other words, humanity and human rights were the principles on which the Indian knowledge system was based.

The advent of colonisation, however, cultivated a decline in these knowledge systems by their destruction and slow erosion. Sheldon Pollock observes that while studying the manuscripts based on Indian Knowledge Systems, his attempts to inventory, translate and digitalise the many scholarly Sanskrit texts (including *vyakarna, nyaya, ayurveda, alankarsastra* etc) led him to discover the endpoint of this vast knowledge base with ease- the British colonial domination that set the deterioration and thereafter, altered the knowledge system to the unknowable.[5] Perhaps, Pollock's own words can describe this better-[6]

> (Tracing) The endpoint was largely unproblematic: It is set by the consolidation of English colonial domination (Thanjavur was taken by Wellesley in 1799, Varanasi was ceded to the British in 1803, and the Peshwas of Maharashtra were defeated in the course of the following decade), after which point the rules of the Indian knowledge game were unrecognizably transformed.

Nevertheless, the Indian tradition that existed prior to the colonial domination can be located in the historical and legal accounts, and with them the concept of human morals that the Indian concept has preached of, can be discovered. These human values-based concept of 'rights' (not rights as express claims but rights as values) can be traced in the Indian traditions across periods. Exploration of traditions

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2 Pollock, Sheldon "Indian knowledge System on the eve of colonialism" [2000] Intellectual History Newsletter, 22, *available at:* https://vishwavahini.wordpress.com/wp-content/uploads/2019/02/indian_knowledge_systems-1.pdf (last visited on August 29, 2024).

3 *Id.*, at 2.

4 *Ibid.*

5 Sheldon Pollock, "Introduction: Working Papers on Sanskrit Knowledge-Systems on the Eve of Colonialism" 30 *Journal of Indian Philosophy* 431, 432 (2002), *available at:* https://www.jstor.org/stable/23496915 (last visited on September 6, 2024).

6 *Ibid.*

while understanding the concept of human rights is essential as traditions bear the capacity of enhancing the realisation of these rights by providing a cultural support to the ideas that promote them.[7] The discussion starts with the question- what is the Indian tradition? Is it based on the core religious values of only Hinduism, or does it also include the developments that transpired in the later centuries that made it a poly-religious land?

The answer lies in the rich cultural history of India. But first it is necessary to understand that although today the word '*Hindu*' is associated with the followers of the sect of Hinduism,[8] India is a secular state that was carved out from its historical experiences that gave it its distinctness of character. These experiences have resulted in shaping the identity of this vast nation as a multi-religious, multi-ethnic, multi-racial and multi-cultural land that the constitution recognises as its 'rich heritage'.[9] The concept of *dharma* in the ancient Indian tradition enshrines many principles that are parallel to modern human rights and which seek the maintenance of peace in the larger cosmic order.[10] In fact even in modern India, dharma is accorded substantial value and this is why the emblem of the Supreme Court of India states: **यतो धर्मस्ततो जयः**[11] **(*Yato Dharmastato Jaya*)** which translates to "where there is righteousness, there is victory."[12] *Dharma* is not just a parallel of human rights, it is a much larger concept which encompasses all reality-known and unknown.[13] Seen this way, *dharma* is a secular and universal concept.[14]

In fact, secularism can be traced in the Indian tradition since the ancient times: the *Dharmakosha* states: **पाशण्डनिगमश्रेणिपुंगवरातगणादिषु; संरक्षेत्समयं राजा दुर्गे जनपदे तथा।**[15] **("*Pâs and anigamaœre ipungavarâtagan âdic u; Sanraks etsamayam***

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7 Mahendra P. Singh, "Human Rights in the Indian Tradition: An Alternative Model" 2(2) *NUJS Law Review* 145, 149 (2009), *available at:* http://www.commonlii.org/in/journals/NUJSLawRw/2009/9.html (last visited on September 1, 2024).

8 *Id.,* at 149.

9 *Id.,* at 150.

10 Surya Subedi, "Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian" Concept of Human Rights from the Perspectives of Hinduism" 30 *California Western International Law Journal* 54 (1999), *available at:* https://scholarlycommons.law.cwsl.edu/cwilj/vol30/iss1/3. (last visited on September 1, 2024).

11 Mahabharat 13.153.39 The verse is displayed on the emblem of the Supreme Court of India.

12 Anurag Deep, "Enforcement of Human Rights through Duty Jurisprudence: A Perspective' 22 *Journal of the National Human Rights Commission* 211, 217 (2023), *available at:* https://eoisantodomingo.gov.in/pdf/NHRC%20Journal%20__Vol.%2022,%202023%20(1-1-23).pdf. (last visited on September 1, 2024).

13 *Supra* note 7 at 157.

14 *Supra* note 10 at 54.

15 Dharmakosha 70.

râjâ durge janapade tathâ) which means that "*the king should protect associations of non-believers and believers in vedas, of traders, uncultured people in the forts and villages*"[16] Secularism was also observed during the period of Ashoka, whose ideas of '*dhamma*' and 'Buddhist Morality' (also carved on edicts)[17] were compatible with one's existing faith.[18] It was observed during the times of the Mughal ruler Akbar as well, who advocated for a liberal religious policy and is known for abolishing the "*Jaziya*" which was a tax imposed on non-Muslims.[19] Prof. M.P Singh beautifully describes this as - "*This is the tradition to which Tagore and Iqbal have paid glowing tributes and of which Akbar is as much part as Ashoka*".[20]

2.2 The conception of Human Rights

What are human rights? The simplest definition would be that human rights are rights that adorn every individual by the most basic virtue of their biologically being born as human beings. These are rights that must be realised as a fundamental claim anywhere and everywhere regardless of political, economic or social factors. The office of the High Commissioner of United Nations Human Rights Commission (UNHCR) states that "*these universal rights are inherent to us all, regardless of nationality, sex, national or ethnic origin, colour, religion, language, or any other status.*"[21] In other words, these rights are universal- but are they really? There is debate among scholars on the question of universality of the current model of human rights. Some scholars have attempted to trace the character of universality in their present form by comparing cultures but doubts are created as Asian and African conceptions of human rights do not align with that of the western world.[22] These doubts are further amplified as the present structure of human rights (termed 'universal') is based on the experiences of only the industrialised West which differs

16 B.N. Srikrishna, "Pre British Human Rights Jurisprudence" 3 *NUJS Law Review* 129, 137 (2010), *available at:* https://heinonline.org/HOL/Page?handle=hein.journals/nujslr3&id=133&div=&collection=. (last visited on April 3, 2024).

17 The VII Edict of Ashoka displays a tolerance towards all *pasandas* (religious sects) allowing them to cohabit in the kingdom. See, Rajeev Bhargava, 'Forms of Secularity Before Secularism: The Political Morality of Ashoka and Akbar' in Saïd Arjomand and Elisa Reis, *Worlds of Difference* 86 (SAGE Publications Ltd., 2013).

18 *Id.,* at 100.

19 S.N. Sabat, "Human Rights in Indian Culture: A Bird's Eye View" 12 *The International Journal of Human Rights* 143, 152 (2008), *available at:* https://doi.org/10.1080/13642980701725319 (last visited on August 31, 2024).

20 *Supra* note 7 at 152.

21 'What Are Human Rights?' (*OHCHR*), *available at:* https://www.ohchr.org/en/what-are-human-rights (last visited on May 20, 2024).

22 *Supra* note 7 at 146.

vastly from the rest of the world.[23] This underscores the need to incorporate global conceptions of human rights, as perceived by diverse cultures, into the existing jurisprudence of modern human rights - a framework many believe to be rooted in legal responses to European historical experiences.

On the other hand, those who believe that the current model of human rights is universal contend that a dominant discourse that looks at the history of only the twentieth century to study the evolution of human rights, neglects the fact that, the international law was adopted at a time when most of the non-western world was colonised.[24] And yet, people from the western lands were not the only members to contribute when the UDHR and other essential human rights instruments were being drafted.[25] The joining of Asian nations, in fact, led to signature of the most of the human rights law known today.[26] In the 1993 World Conference on Human Rights that happened in Vienna, various Asian nations (China, Indonesia and Malaysia) expressed opinions about the need to view human rights in the light of a state's cultural and historical background.[27] The Bangkok Declaration of Human Rights (paragraph eight) while recognising them as universal, highlights the requirement of associating them to regional, cultural, religious and historical peculiarities of States.[28]

Whether one believes in or expresses doubts about the 'universality of the current model of human rights', what cannot be disputed is its evolution from ideas around the world. While for some, human rights emerged from religious and philosophical discourses, for others they were born out of rationalism and intellectual reasoning.[29] Some cultures cultivated these from compassion needed to soothe sufferings and some developed these as a reaction to revolutions and upheavals. The rights were born out of 'Visions' of not one but many.[30] These visions were rarely simplistic ideas demanding claims. They were instead complex thoughts and judgments that emerged from sometimes overlapping and sometimes distinct set of circumstances and conditions that were observed over different time periods.[31] These rights

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23 *Ibid.*

24 *Supra* note 10 at 58.

25 *Id.*, at 61.

26 These include the UDHR, the International Covenants of 1966-the ICCPR and the ICESCR, CRC and other conventions. See *ibid.*

27 *Supra* note 10 at 46.

28 *Id.,* at 47.

29 Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* 2 (3rd edn., University of Pennsylvania Press, 2011) .

30 *Ibid.*

31 *Id.*, at 5.

were, in fact, never bred as 'human rights' at all, they evolved from discussions and conversations centred around the notion of 'duty', far before the term 'human rights' was ever adopted.

Therefore, it is essential to rediscover the roots of human rights as found in various civilisation and religions. For instance, the Hindu Scriptures- *Vedas* and *Upanishads* (which form a part of the Indian Knowledge System) that have existed in the Indian tradition since ancient times, talk about the universality of divine truth and the sacrosanct nature of life.[32] They preach of strict adherence to the notions of *dharma* (duty) and *sadachar* (good deeds) and highlight the importance of morals that include selflessness towards those in pain. The *Manav Dharma Shashtras* are texts that speak particularly of moral duty towards the hungry, poor, sick and those suffering.[33] Most cultures around the world, therefore, believed in human rights, only not as the modern construct that sees rights as claims but instead as duties aimed at human welfare. Paul Gorden Lauren in his book "*Visions and the Origins of Human Rights*" explains the evolution from a system of duties to a rights-based model. He states- "*ideas about human duties, or what one is due to do, led quite naturally to ideas about human rights, or what is due to one.*"[34]

The development of human rights in its present form as 'claims' against the State have been gradual in the most non-western traditions. The evolution from duty driven obligations to rights-based assertions occurred owing to the advent of colonisation and the need of self-determination that compelled people to ask for demands to self-govern their own territories.[35] As non-westerners joined troops in the two world wars, the nationalism of Asian and African colonies peaked seeking rights and freedom from their colonisers.[36] Appalling instances of violence and brutality forced people to rebel and seek rights beyond that of self-determination.[37] All these factors led to the internationalisation of the concept of rights as assertive claims. It is interesting to note that colonisation also impacted the historical discourses as post-colonial trade was different from fair pre-colonial trade which was conducted on an equal footing.[38] The European colonisers dominated not only the political independence of colonies but also the discussions surrounding trade, thereby, establishing the perception that any arrangement like international law had

32 *Supra* note 29 at 6.

33 *Id.,* at 7.

34 *Supra* note 29 at 11.

35 *Id.,* at 90.

36 *Ibid.*

37 *Ibid.*

38 *Supra* note 10 at 60.

never existed before the twentieth century.[39] Prof. Surya Subedi[40], the British-Nepalese Jurist, calls the formation of the modern international law as the "decolonisation of international law", contending that it was universal before the advent of colonisation and became universal again after the dark period ended.[41] While modern international human rights law may be understood as the expansion and codification of state practices derived from the principles and ideas of traditions around the world,[42] there is a need to reassert the narrative that at the core of human rights lies the collective philosophies and ideas of various traditions.

III. Human Rights And The Indian Tradition

3.1 Tenets of inclusiveness and tranquillity

The Indian tradition has always been inclusive and sees the entire world as a family. This is evident in the declarations of **"वसुधैव कुटुम्बकम्"** [43] **("*Vasudhaiv Kutumbkam*")** and **"सर्वे भवन्तु सुखिनः, सर्वे सन्तु निरामयाः"** [44] **("*sarve bhawantu sukhinah, sarve santu niramaya*")** which promotes global peace and harmony.[45] In fact, the exploration of the old Indian ancient and medieval texts, philosophies, ideas, literatures and political discourses makes one see how human values and duties (human rights as such) are at the core of the Indian tradition.[46] The Indian king *Ashoka* the great is known for his benevolence and the propagation of the policy of *dhamma* or non-violence.[47] To propagate *dhamma*, his reign featured edict pillars with carvings that mentioned principles such as social equality and freedom from torture, which were engraved as political directives.[48] These were later invoked by philosophers like *Chaitanya*[49] to preach equality and fight the distinction caused

39 *Ibid.*

40 Surya Prakash Subedi is a Professor of International Law at the University of Leeds. He is also a member of Institut de Droit International and the visiting faculty of the human rights law programme at the University of Oxford.

41 *Supra* note 10 at 60.

42 *Id.,* at 58.

43 Maha Upanishad Chapter 6, 71-75. Vasudhaiv Kutumbkam means that everyone on earth is part of the same family and creations of the almighty.

44 The literal translation of the phrase is that everyone should live in happiness and be free from grief and illnesses. Though the exact source is not clear, the shloka appears with some variations in Garuda Purana 2.35.51.

45 *Supra* note 19 at 146.

46 *Id.,* at 144.

47 *Supra* note 29 at 13.

48 *Ibid.*

49 Chaitanya Mahaprabhu was a Vaishnava Hindu Saint and a devotee of Lord Krishna.

by the varnashrama system, teaching the followers that 'humanity' is the one and only caste.[50]

The medieval period in India saw reformist movements that aimed to cleanse the contaminated ideologies of religious differences and brahmanical orthodoxy- the Bhakti movement preached that '*Brahm*' or soul alone is the supreme power and all else is '*mithya*' or myth and any barriers of caste and religion are unjust as for supreme power, everyone is equal.[51] In the twentieth century India, champions of truth and non-violence like Mahatma Gandhi talked about the religion of humanity being the supreme religion.[52] His views stressed on border-lessness of humanity- he stressed upon internationalism where people were equal regardless of national boundaries.[53] These instances show that the India throughout history has been a proponent of the ideology of human rights. India's glorious past of *dharma* has not just propagated the ideals of equality and tranquillity but also inspired states by preaching duty. Prof. Subedi describes how *Kautilya's*[54] writings in *Arthashastra,* attribute the welfare of the king in the welfare of his people and thereby, direct him to live a life of *dharma*.[55] It is interesting to note that the European historian Alexandrowicz in his book '*Law of the nations*' claims that *Arthashatra* had an influence on the European civilisation and western rules of international law.[56] He states, as quoted by Prof. Subedi, that "*Kautilyan principles, whether in their original formulation or reproduced in the later classic works, exercised a definite influence on our [Western] system of the law of nations*…."[57] According to him, the trend of 'secularisation' was introduced by Kautilya as, (Alexandrowicz quoted) "…*the remarkable feature of this system is the separation of the religious function from political power*".[58] In fact, the idea of 'the modern form of 'constitutional monarchy' can be traced from *Arthashastra*, where *Kautilya*

50 *Supra* note 29.

51 *Supra* note 19 at 154.

52 *Ibid.*

53 *Ibid.*

54 Chanakya (c. 300 BC) also known as Kautilya was a prominent minister and a political consultant in the court of the great Indian king Ashoka. He is famous for his Arthashatra which was an organized treatise on administration. See 'Kautilya' (*Oxford Reference*), available at: https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100031459 (last visited on September 5, 2024).

55 *Supra* note 10 at 51.

56 *Id.,* at 50.

57 *Ibid.* (See also C.H Alexandrowicz. Kautilyan Principles and the Law of Nations (1965-66)301, 312).

58 *Id.,* at 56. (See also Alexandrowicz 304).

states- "*[the king] shall not consider as good only what pleases him but treat as beneficial to him whatever pleases his subjects.*"[59]

3.2 The duty driven concept of obligations in the Indian Tradition- "*Dharma*"

From the above-mentioned paragraphs, it is evident that human rights have evolved from 'visions' of not one but many civilisations, their thoughts, beliefs and actions. This paper would now delve into the jurisprudence of *dharma* in the Indian tradition and explain how it has always encompassed the treasure of world peace and human rights.

Human rights in the Indian tradition find their roots in the duty-driven concept. While there is no equivalent translation of 'human rights' available in Sanskrit, it is such owing to the emphasises on *dharma* and *karma i.e.,* duty and actions.[60] The term '*adhikar*' which is a literal translation of the word 'right' makes an appearance in the *dharmashastra*[61] less frequently when compared to the word *dharma* which appears many times.[62] The expression "*dharma*", scholars argue, is wider, as it denotes both "justice" and "propriety" against than the expression "rights" which is only "claim".[63] Perhaps a historical account would best describe how important duty was in the Indian tradition,[64]-

An incident from the *Rajatarangini of Kalhana*, describes how essential duty was considered by King *Chandrapida*, when a cobbler, whose land was acquired by the government for temple construction, appealed to him to restore the acquired land and let the cobbler live in peace. While appealing for justice the cobbler states-

नियम्यताम् विनिर्माणं यद् अन्यत्र विधीयताम् परभूमि अपहरण सुकृतं कः कलंकेत ये द्रष्टारः सदसताम् ते धर्म विनुगणा क्रियाः वयमेव विदधमश्नेत यातु न्यायेण को अघ्वना[65] **("Niyamatam Winirmanam Yadhyanyatra Vidhiyataam; Parabhumyapaharen Sukritam Yah Kalankayet; Yeh Drashtarah Sadasatam Teh Dharmawigunaah Kriyaah; Wayameb Widadhmaschet Yatu Nyaayen Kotdhwana")** which means "Stop the construction or move it elsewhere. Who wants to incur the blot of grabbing someone's land on one's merits! If we, the

59 Arthashastra 1.19.34. See, *id.,* at 51.

60 *Supra* note 7 at 152.

61 *Dharmashastras* are a collection of scriptures that include the texts of *Upanishads, Puranas, up-puranas and Smritis.* See *supra* note 10 at 51.

62 *Id.,* at 155.

63 *Ibid.*

64 Narrated by Justice B.N Srikrishnan at a lecture delivered at West Bengal University of Juridical Sciences. See *supra* note 16 at 137-138.

65 Kalhana Rajatarangini Chapter 4, 59-60.

overseers of good and bad deeds, indulge in acts opposed to Dharma, then who will follow the path of justice?"[66]

When the king rebuked his officers and told them that his *dharma* is to ensure that his subjects are happy and grabbing the land of someone is taking the path opposite to that of justice, the cobbler says- **राजधर्म अनुरोधेन पर्वज़ा तयोचिता, स्वस्ति तुज़्यं चिरं स्थेया धर्म्या वृज़ांत पद्धति दर्शयन् ईदृशीह श्रद्धा श्रद्धेया धर्मचारिणाम**[67] (Rajdharmanusaaren Parvatta Tabochita; Swasti Tubhyam Chiram Stheya Dharmya Brwittant paddhatih; Darshayattridrushishraddhah Shradhdheya Dharmachaa rinam") which means- "it was appropriate for you to yield to another in accordance with Rajdharma. May you prosper and live long establishing the path of dharma. Seeing such a faith in dharma of yours, others would follow dharma."[68]

The Indian tradition does not see State as the sole institution that can transgress human rights.[69] In fact, it does not see the concept of human rights as claims or freedoms against the State at all.[70] Human Rights in the Indian tradition, are instead a concept in which individuals are empowered enough to attain their best life possible.[71] A question that arises is- Can '*Dharma*' be considered as the modern equivalent of law? It is not easy to answer this question as *dharma* takes many forms. Some scholars argue that *dharma* is "law as such" as it contains most discourses around law.[72]

Others contend that it contains elements that can classify it as law, but it is larger in ambit than positive law as it is above the king and the State.[73] *Kautilya's Arthashatra* mentions guaranteed protection to the people by vesting a duty in the ruler to perform his obligations in accordance with the *Rajadharma* which many considered the ancient form of constitutional law.[74] The following *Shloka* mentioned in the Arthashastra places an obligation on the king to 'rule on the masses (prajah) in accordance with dharma (righteousness)'.

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66 As quoted by Justice Srikrishna. See, *supra* note 16 at 136.

67 Kalhana Rajatarangini Chapter 4, 75-77. See also *ibid.*

68 *Ibid.*

69 *Supra* note 7.

70 *Ibid.*

71 *Ibid.*

72 Edited by Patrick Olivelle (tr), *A Dharma Reader: Classical Indian Law* (Columbia University Press 2016) at 4.

73 *Supra* note 7 at 157.

74 *Supra* note 16 at 135.

स धर्मेण पालयेत् प्रजाः।[75] (**"*Sa dharmaen pâlayet prajâh*"**)

As discussed above, the evolution of human rights happened around the notion of not rights but duties. This is to say human rights is a far recent term, but much before it was used, rights were not considered as entitlements, instead they became assertions after their development from the crystallisation of visions of various civilisations as an off-shoot of human duties.[76] The society in the Indian tradition was governed entirely by dharmic principles.[77] Everyone in the society was bound by their respective dharma- the duty of an individual which when done properly gave rise to the 'right' in another individual, and this is how the collective social life of individuals was governed i.e. instead of rights, duties were the foundation.[78] Hohfeld, a German jurist of the twentieth century introduced a chart of jural relations in which rights and duties are seen as jural correlatives i.e. if A has a right against B, then B is under a corresponding duty to A.[79] Theoretically speaking, according to Hohfeld, a right in one imposes a duty on another to not disturb that claim. Now, if this was to be considered in an opposite situation, it would go like this- if A has a duty towards B, B will have a corresponding right against A to fulfil that duty.

However, as Prof. Singh rightly points out, an argument that may counter this is- what measures apply when due to the non-fulfilment of duty, the right too is not realised?[80] Undoubtedly, in today's world attributing duties to the State against express rights in individuals and simultaneously attributing individual duties in persons against rem to grant everyone the rights is a model that is difficult to function, unless all individuals are taught to do their duty as assigned to them.[81] This is where the State has to monopolise the rights to distribute them and this, as prof. Singh observes, is why the western civilisation developed a rights based model.[82] However, this is where a sharp contrast can be drawn between the concept of rights in the Indian traditions and the western traditions- the Indian model functioned on a duty-based approach because in the Indian tradition, the concept of dharma bound even the king. It was the king's *dharma* to protect his people. The "*Kamandakiya*

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75 Arthashastra, Book 1. It literally translates to 'the king must rule over his people with righteousness'.

76 *Supra* note 29 at 6.

77 *Supra* note 16 at 132.

78 *Ibid.*

79 Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" 26 *The Yale Law Journal* 710 (1917), *available at:* https://www.jstor.org/stable/786270. (last visited on Apr. 24, 2024).

80 *Supra* note 7.

81 *Ibid.*

82 *Ibid.*

Nitisara" a treatise on *Rajdharma* (duty of the ruler) authored by a *Kamandaka*, a disciple of *Kautilya* states:

आयुक्तकेज़्यश्चोरेज़्यः परेज़्यो राजबलाद्भयात्; पृथ्विपतिलोभाच्च प्रजानां पक्धाऽभयम्ज़्; पक्प्रकारमप्येतद्पोयाम नृपतिभिर्भृशम्ज़्।[83] ("Aayuktakebhyaschorebhyah ParebhyohRajballatbhaat; Prithwipatilobhachch Prajanam Panchadhavayam; Panchprakarmapyetadpohyam Nripatebharyam")

which means that "*subjects require protection against wicked officers, thieves, enemies of the king, Royal Favourites and more than all against the greed of the king himself. The king should insure the people against these fears*"[84] In fact, the *Brihadaranyaka Upanishad* describes *dharma* as the "protector of the weak", and thereby, people were within rights to challenge the powers of an unjust king.[85] Centuries before jurists like Duguit asserted that the 'only right one has is to do his duty'[86], the *Bhagavad-Gita*[87] had declared (as is believed to have been said by Lord *Sri Krishna*)- **कर्मण्येवाधिकारस्ते मा फलेषु कदाचन**[88] **("*Karmanyewashikaratse Ma Phaleshu Kadachan*")** which translates to "do your duty without seeking the reward."[89] In line with this principle of the Bhagavad Gita, Mahatma Gandhi called India, "*Karma-Bhoomi*" i.e. "land of duty" where duty is preached first and foremost as opposed to "*Bhog-bhoomi*" or land of "enjoyment."[90] All this is not to say that in the Indian tradition no one ever contravened from their duty and a just society existed. The *Varnashrama* system existed under the garb of *dharma*, despite surprisingly being most contrary to its principles, subjecting a large population of the followers of Hinduism to unfortunate discriminatory practices.[91] Even though many reformation measures of bhakti movement, the ideologies of Buddhism, and Sikhism rose to combat it, a denial of its existence even today cannot be made. While acknowledging this, it is also important to state that every model will have its demerits. Violations occur in a rights-based system despite the various safeguards to prevent them. It is important

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83 Kamadaka V. 82-83. See also *Supra* note 16 at 135).

84 *Supra* note 16 at 135.

85 *Ibid.*

86 Harold J Laski, "A Note on M. Duguit" 31 *Harvard Law Review* 186 (1917), *available at:* https://www.jstor.org/stable/1327672(last visited on October 23, 2024).

87 The Bhagavad-Gita is an ancient Hindu scripture that is considered the holy book in Hinduism. See 'Bhagavadgita' (*Oxford Reference*), *available at:* https://www.oxfordreference.com/display/10.1093/acref/9780191826719.001.0001/q-oro-ed4-00000997 (last visited on September 6, 2024).

88 Bhagavad-Gita, Chapter II Verse 47.

89 *Supra* note 16 at 133.

90 *Id.,* at 133.

91 *Supra* note 7 at 159.

to condemn the demerits of the system rather than criticising the system as a whole, because owing to these blots the traditions like that of India have lacked proper exploration. The Indian tradition is inclusive, peace promoting and while its demerits deserve all the criticism they are subjected to, the tradition needs to outgrow, evolve and shed them.

3.3 The shift to a rights-based approach: the Indian constitution and the international human rights law

A question that arises in locating different approaches to law in the two systems *i.e.,* the Indian and the western traditions is- why did different models develop in these civilisations? Prof. M.P Singh makes an interesting argument here. He states that since India did not have rulers who bore absolute power to the detriment of the subjects, and therefore an episode on the need to revolt and seek preservation of rights as claims, did not arise.[92] Justice Radhabinod Pal[93], has observed the reason for the difference in the evolution of these models. Justice Pal says that the assertion of rights as claims becomes necessary in a society where "*the realisation of one's desire comes in conflict with the interest of others*".[94] He further observes that in a society driven by *dharma* where every individual is bound by their duty and no one's dharma conflicts with that of another, such possibilities do not appear true because such a social order bars the individual from trespassing upon the will of others and expects them to abstain from doing evil.[95] And it is therefore that India never developed the rights-based approach as in the duty-based model even the king was below dharma. The *Brihadaranyaka Upanishad* describes "Dharma as the King of Kings" in the shloka-

तदेतत् क्षत्रस्य क्षत्रं यद्धर्मस्तस्माद्धर्मात्परं नास्त्यथो अबल्यान्बलियान्समाशास्ते ।[96] ("Tadetat Kshatrasya Kshatram Yaddharmastasmaddharmatparam nastyatho Abaliyaanbaliyansamashanshte) which means *"this dharma is the king of kings and there is nothing beyond it as it enables the weak to prevail upon the mighty."*[97] Therefore, in the Indian dharmic system, *dharma* was above all.

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92 *Id.,* at 165.

93 Radhabinod Pal was an Indian Jurist who was a member of the International Law Commission and is famous for his dissenting opinion in the International Military Tribunal for far east.

94 *Supra* note 7 at 166. See also, RADHABINOD PAL, THE HISTORY OF HINDU LAW 180 (1958).

95 *Ibid.*

96 Brihadaranyaka Upanishad, 1.4.14. It literally translates to -that is the Kshatriya's Kshatriya Dharma, and there is nothing superior to Dharma, for the weak and the strong.

97 As quoted by Justice B.N Srikrishna. See, *Supra* note 16 at 133.

In the dark age of colonialism, however, a conflict of interests arose as the British imperialist lords, with their lust for India's wealth, deteriorated it part by part and revolutions and uprisings seeking rights arose in most provinces. While the colonial masters, by forcing the people to revolt and ask for express rights (including that of self-determination), did get the people to invoke the European ideology of 'rights against the state', many authors have observed that the British were not the inspiration behind the idea. For instance, in his work on the economic and human rights on India's past titled "*Human Rights and Economic Development: The Indian Tradition*", Satish Kumar states that "*If any Western Nation is to be credited with any bearing on the Indian conception of human rights, it is France and the French Revolution. The concepts of liberty, equality and fraternity attracted the attention of even the far-off Indians.*"[98] The western influence in demanding rights was not brought in India by the British, but it was rather the French revolution, the ideas of which were distributed to the masses by Indian freedom fighters, thus, compelling them to revolt.[99]

After independence, India was set to repair the damage of 200 years of subjugation and plunder and thus, required a framework where the state could play an active role in granting and fulfilling rights. The objective resolution moved by Pandit Jawahar Lal Nehru on September 13, 1946, aimed to draw a constitution that incorporated the principles of the international law and human rights documents. It stated that "*this ancient land attains its rightful and honoured placed in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind.*"[100]

These resolutions were shown support in the Constituent Assembly Debates,[101] and therefore, the fundamental rights and the directive principles of State policy were adopted encompassing these principles.[102] Dr. B.R Ambedkar offered a Constitution with a "Rights with Restrictions" model where fundamental rights were guaranteed, subject to the imposition of 'reasonable restrictions',[103] which the citizens were duty-bound to follow.[104] Even though fundamental duties were added

98 *Supra* note 16 at 130. See also Satish Kumar, "Human Rights and Economic Development: The Indian Tradition" 3(3) *Human Rights Quarterly* 47-55, 48 (1981).

99 *Ibid.*

100 '13 Dec 1946 Archives' (*Constitution of India*), available at: https://www.constitutionofindia.net/debates/13-dec-1946/(last visited on Apr. 8, 2024); Constituent Assembly Debates Vol 1, 1.5.4 Objective Resolutions Point 8.

101 *Id.,* at 1.5.21.

102 Das Saumendra and N Saibabu, 'Indian Constitution: An Analysis of the Fundamental Rights and the Directive Principles' (2014), *available at:* https://papers.ssrn.com/abstract=2592382 (last visited on September 6, 2024).

103 Art. 19(2)- 19(6) discuss the reasonable restrictions on the rights guaranteed under art. 19(1) and art. 25 too contains reasonable restrictions.

104 *Supra* note 12 at 218.

in 1976 to the Constitution as Part IV-A, the Constitution has the notion of duties on citizens in Part III as well, through its horizontal effect.[105] Duties are inherent on both States and individuals in article 14: equality before law encompasses educational rights of socially and educationally backward citizens, SCs, STs and EWS sections of citizens against the private sectors; article 15: imposes a duty on everyone to not discriminate on grounds of race, caste, sex, place of birth or religion; article 18: prohibits practice of untouchability in any form; and articles 23-24: prohibit and criminalise human trafficking, forced and child labour.[106] In fact, even the Preamble to the Constitution, is a document in which "we the people of India" have "solemnly resolved" and made to ourselves certain promises, which are implied duties on each and every citizen.[107] Thus it cannot be disputed that despite choosing a rights based developmental approach, our Constitution makers did not shun the historically rich ideology of duty.

As the human rights jurisprudence widened with the adoption of the international covenants, judicial activism and open interpretations of the provisions of rights in the constitution extended them to include the new civil and political and economic and social rights. Landmark judgments that expanded these rights include *Maneka Gandhi* v. *Union of India*[108] (right to life and personal liberty), *Olga Tellis* v. *Bombay Municipal Corporation*[109] (economic rights like the right to livelihood) and various others. Inspired by the adoption and the endorsement of the Paris Principles at the United Nations, India enacted its Protection of the Human Rights Act, 1993, soon after pledging its allegiance to human rights in the World Vienna Conference.[110] Under the act, the National Human Rights Commissions were formed as bodies that work in tandem with the rights vested in the constitution to further the human rights. In fact, the definition of "human rights" under the Act is wide enough to encompass all constitutional guarantees and rights in the international covenants relating to life, liberty and equality.[111]

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105 The Apex Court had in the case of *Kaushal Kishore* v. *State of UP* discussed the horizontal presence of duty on individuals when Constitutional rights influence private relations.

106 *Id.*, at 220-222.

107 *Id.,* at 223.

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

109 *Olga Tellis* v. *Bombay Municipal Corporation,* AIR 1986 SC 180.

110 Arpita Sinha, "Human Rights Regulatory Regime in India: After Three Decades" 6 *NUJS Journal of Regulatory Studies* 40, 41 (2021), *available at:* https://heinonline.org/HOL/Page?handle=hein.journals/nujsjlry6&id=191&div=&collection=. (last visited on Apr. 2, 2024)

111 The Protection of Human Rights Act, 1993, s. 2(1)(d) states, "human rights mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by constitution or embodied in the International Covenants enforceable by courts in India"

Despite having a different cultural approach to the concept of rights in its history, India as a nation has not only incorporated the notion of rights in its modern legal system imaginatively, but also cultivated a rich jurisprudence of human rights through its court's decisions. Though the traditional backing of the values preaching humanity and individual dignity have contributed vastly to the widening respect for rights, however, in the modern day, a lot of traditional knowledge seems to have been forgotten and seeks revival.

IV. Reimagining The Rights Based Approach on The Duty Driven Concept Of The Indian Knowledge Systems-Looking For Solutions

While almost all nations around the world now operate on the 'rights' model, this approach has not eliminated human rights violations. On the contrary, the rights-based approach is a pit of ever rising need to expand and create new rights. At the core of the duty-based model lies the element of 'morality' which compels the bearer of the duty to perform it, without pushing the burden of enforcement on the opposite party. Consider this, If A and B are individuals bound by *dharmic* approach to human rights then A is under a duty to not cause harm to B, and B is under no burden to compel A to not cause harm. If A does his duty, no liability arises.

The rights-based approach goes against the tenets of compassion and righteousness.[112] It removes the essential of 'doing a positive act because it adds the value of satisfaction in the doer'. Instead, it makes the act done an object of force *i.e.,* it is done because it must be done, or else it would be a violation of rights. But this is not the main problem pertaining to this approach, the bigger issue is, would an individual do a positive act against which another has no express right? Peter Singer's psychological experiment "The drowning child" will help explain this better. The experiment states that if we happen to pass a pond on our way to work and see a child drowning, we will ask ourselves whether to save the child or let him/her drown? While saving a life would give us satisfaction, walking inside the pool will ruin our clothes and make us late for work, and we may even get stuck in that pool. Since we are under no obligation to save the child and the child has no right to be saved, do we stay, or do we just walk by? Now, if we see others walking past the drowning child ignoring him, do we also do the same?[113] The dilemma this experiment presents is to most, no dilemma at all.

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112 Rajesh Kapoor, "What Is Wrong with a Rights-Based Approach to Morality?" 6 *Journal of National Law University Delhi* 1 (2019), *available at:* https://doi.org/10.1177/2277401719870004 (last visited on September 6, 2024).

113 Philo, 'Peter Singer's Drowning Child' (November 24, 2020), *available at:* https://daily-philosophy.com/peter-singers-drowning-child/= (last visited on September 6, 2024).

Consider an alternative situation- this time it is not the drowning child but a beautiful t-shirt we want to purchase, but we are aware that its owing to its production methods, it is a product of environmental harm and child labour.[114] Do we still buy it? Most people in situations like these feign ignorance because even though we have a right to environment, the environment does not have a right to be safeguarded and even though the children have a right to be free from exploitation, their rights are enforceable against the state or non-state actors but not against the consumers who purchase goods produced through child labour. What do these instances tell us about the reason behind these injustices? It happens because rights vest in human beings as a 'claim', whereas a duty raises the questions of morality. Kant's categorical imperative of universal law, "*act in such a manner that the maxim of your conduct becomes the maxim of universal conduct*"[115] becomes redundant in such a system where no one is willing do their duty. On this, the critics may raise a question- in a duty-based world, what happens when the duty-bearer refrains from doing it? It is interesting to note that the modern domination of the rights-based approach has made us forget that most non-western civilisations and traditions have existed without them.[116] In fact, the pre-rights societies were shaped out of their own historical experiences. The British Parliamentarian Bhiku Parekh explains their historical existence by saying: [117]

> Not all of them (the duty driven societies) were despotic or autocratic. …They did not murder each other at will, nor did their rulers deprive them of their lives except according to established procedures and for commonly agreed purposes. They also had possessions which they used as they pleased and bequeathed to their children…….Even as they had eyes and ears, they had certain freedoms of which they did not feel the need to remind themselves or others.

The glorious past of India, as discussed extensively in this paper, functioned on the principles of *dharma* which steered the society as its anchor. The period is being recognised as golden for its production of the knowledge systems encompassing a variety of disciplines. This is not to say that no abuses were perpetrated in the name of *dharma;* it is essential that these abuses must be acknowledged, but it must not be forgotten that demerits exist in every system. The current model of rights is also not free from demerits. It witnesses many violations, because it would be

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114 *Ibid.*

115 Kant's categorical imperative of Universal law.

116 *Supra* note 112.

117 Bhiku Parekh as quoted by Rajesh Kapoor. See, *id.*, at 8.

virtually impossible for any model to have no transgressions at all. This brings us to the need to improvise, which has no limits. And therefore, it is of utmost importance to encourage additional research on the Indian Knowledge Systems to discover and consequently, implement the methods and strategies of a functional duty-based society, as found in the Indian traditions. Perhaps, what the modern world needs is the amalgamation of the two models where rights vest in individuals who are taught to be duty driven. In such a scenario, both rights and duties will be equally enforceable and therefore, a violation of a given duty would not be a matter between the citizens and their conscience but instead, one between the citizens and the law enforcement.[118] Therefore, an integration of these approaches will contribute to a better system of governance based on both rights and duties, and hopefully, one day lead to the actual realisation of human rights.

V. Conclusion

India is a rich land in terms of human values, morals and principles. The knowledge of the values of human dignity, compassion towards all beings, peace & tranquillity and many more have been passed down from generations to generations preaching morality and duty. Human welfare is at the root of all ancient Indian knowledge. Since human rights are hard to define, questions about their universality are often raised and different approaches see them differently. However, no approach denies that, in whatever form, human rights have existed in the ancient and medieval cultures of various civilisations and are not concepts that evolved from purely European experiences. The concept of human rights is present in the Indian traditions in a duty-based approach i.e. based on the principles of *dharma* and duty, mostly born out of religious preachings. However, making the concept of rights entirely a religious notion can be detrimental as in the name of religion, the self-interests of powerful people have always perpetrated abuses.

Therefore, it is essential to see traditions as encompassing the goods of religious practices, while at the same time acknowledging the wrongs and ensuring that further inquiries made do not support the abuses of the past, masking them as religious. The Indian tradition is secular in nature and includes the developments that India witnessed in the medieval period when intermingling of cultures made it a poly-religious land. The beauty of the Indian traditions and the vast knowledge of the Indian system saw a decline with the advent of British colonialism. In the post-colonial period, the Constitution of India took a rights-based approach to become an instrument which vested twofold rights in its citizens- a positive or affirmative right to ensure that equity and equality are realised and negative rights

118 *Id.,* at 10. Kapoor uses the words "a matter between you and the hangman".

that could curtail and limit the interference of the State in the affairs of an individual. Judicial activism enlarged the rights enshrined in the constitution in consonance with the modern human rights law.

However, despite all this the rights-based model is imperfect- like any model. Its basis were historical experiences but in today's period, devoid of those tyrannical episodes, rights have a risk of corrupting the bearers into exercising them selfishly, without being aware of the motives of why they were vested in them. Therefore, a reimagination is necessary that integrates the two models of rights and duties for the actual realisation of human rights on a large scale.

भारतीय ज्ञान परंपरा में वाल्मीकि रामायण में वर्णित न्याय व्यवस्थाः एक विश्लेषण

डॉ. शिखा सिंह एवं डॉ. प्रदीप कुमार

सार संक्षेप

प्राचीन भारत की न्याय व्यवस्था के वास्तविक स्वरूप को समझने के लिए हमें मूल ग्रंथों का अध्ययन करना होगा। भारतीय न्यायशास्त्र विधि के शासन पर आधारित था। राजा भी विधि के अधीन था। भारतीय राजनीतिक सिद्धांत और न्यायशास्त्र में स्वेच्छाचारिता का कोई स्थान न था और राजा का शासनाधिकार कर्ज़व्यपालन के अधीन था, जिसके उल्लंघन का परिणाम राजपद की समाप्ति होता था। न्यायाधीश स्वतंत्र थे और केवल विधि के अधीन थे। प्राचीन भारत में किसी भी पुरातन राष्ट्र की तुलना में न्यायपालिका की क्षमता, ज्ञान, निष्ठा, निष्पक्षता और स्वतंत्रता के मानक उच्चतम थे और उन्हें आज तक पार नहीं किया जा सका। भारतीय न्यायपालिका में शीर्ष पर मुख्य न्यायाधीश के न्यायालय के साथ न्यायाधीशों का एक ऐसा पदानुक्रम था, जिसमें प्रत्येक उच्चतर न्यायालय को निचले न्यायालयों के निर्णय की समीक्षा करने की शक्ति प्राप्त थी। विवादों को अनिवार्य रूप से प्राकृतिक न्याय के उन्हीं सिद्धांतों के अनुसार तय किया जाता था जो आजकल आधुनिक राज्य में न्यायिक प्रक्रिया को नियंत्रित करते हैं। प्रक्रिया और साक्ष्य के नियम आज के समान थे। प्रमाण हेतु कठिन परीक्षा के प्रकृतिविरुद्ध तरीकों को हतोत्साहित किया जाता था। आपराधिक वादों में अभियुक्त का अपराध विधि-अनुसार सिद्ध न होने तक उसको दंडित नहीं किया जा सकता था। दीवानी मामलों के वादों में किसी भी आधुनिक वाद की तरह चार चरण थे- भारतीय न्यायशास्त्र रेस ज्यूडिकेटा (प्राङ्ग न्याय) जैसे सिद्धांत से परिचित था। दीवानी हों या आपराधिक, सभी मुकदमे कई न्यायाधीशों की पीठ द्वारा, और अपवादस्वरूप ही एकल न्यायाधीश द्वारा, सुने जाते थे। राजा के सिवाय सभी न्यायालयों के आदेश निश्चित सिद्धांतों के अनुसार अपील या समीक्षा के अधीन थे। न्यायालय का मौलिक कर्तव्य ''पक्षपात या भय के बिना'' न्याय करना था। रामायण कालीन शासन धर्म पर आधारित था और धर्म पर न्याय की प्रधानता थी। अराजक राज्यों में न्याय न होने से मत्स्य न्याय की स्थिति उत्पन्न होती थी जिससे राज्य का अस्तित्व सज़्भव नहीं होता है। अस्तु न्याय से ही राजा का और राज्य का अस्तित्व है। रामराज्य में न्याय का आधार विधि व्यवस्था थी। राजा को न्याय की प्रतिमूर्ति माना गया है। राजा स्वयं धर्मासन पर बैठकर पुरोहितों एवं मंत्रियों को आदेश देता है कि आपको न्याय निष्पक्षतापूर्वक करना चाहिए। महाभारत में कहा गया है-''प्रजा की रक्षा करने की शपथ लेने के बाद उसकी रक्षा न करने वाला राजा पागल कुज़े की तरह मारे जाने योग्य है।''

अहं वो रक्षितेत्युज़वा यो न रक्षति भूमिपः।
स संहत्य निहन्तव्यः श्वेव सोन्मादातुरः।। महाभारत शान्तिपर्व[1]

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1 अहं वो रक्षितेत्युज़वा यो न रक्षति भूमिपः।
स संहत्य निहन्तव्यः श्वेव सोन्मादातुरः।। महाभारत शान्तिपर्व, श्लोक सं. 56, 44-46

I. प्रस्तावना

भारत विश्व का सबसे प्राचीन देश है जहां न्याय व्यवस्था का एक सुविकसित एवं व्यवस्थित ढांचा दिखाई देता है जो आधुनिक न्याय प्रणाली से काफी हद तक मिलता जुलता है। भारतीय ज्ञान परंपरा में विभिन्न ग्रंथों में इसका उल्लेख मिलता है। भारतीय व्यवस्थाकारों ने समाज को व्यवस्थित और नियंत्रित करने के लिए जिन परंपराओं, प्रथाओं एवं विधानों को लिपिबद्ध किया उसे न्याय व विधि की संज्ञा दी गई। समाज कितना भी सुसंस्कृत, उन्नत और समृद्ध क्यों ना हो व्यक्तियों में विकारों की प्रधानता के कारण एवं स्वार्थ लिप्स के कारण परस्पर किसी ना किसी विषय पर विवाद हो ही जाता है। इन विवादों को निपटने के लिए और उनके अधिकारों की रक्षा के लिए न्याय की आवश्यकता होती है। न्याय से ही राज्य का अस्तित्व निर्भर है। प्राचीन भारत में न्याय व्यवस्था वैदिक युग से ही स्थापित होनी प्रारंभ हो गई थी। बाद में मनु, यज्ञवल्क्य, वृहस्पति, नारद, शुक्र आदि स्मृतिकारों एवं धर्म सूत्रों में इसे और अधिक विकसित एवं विधिवत बना दिया गया। जब राज्य की स्थापना हुई तो राजा को न्याय प्रशासन का कार्य सौंपा गया। राजा देवता (वरुण) के प्रतिनिधि के रूप में श्रुति साहित्य, वेदों, ब्राह्मणों, उपनिषदों आदि की सहायता से न्याय करता था। राजा की सहायता के लिए एक मंत्री परिषद होती थी। राज्य में अनेक न्यायालय होते थे। परंतु न्याय की अंतिम अदालत राजा की अदालत मानी जाती थी। न्याय शास्त्र कानून के शासन पर आधारित था। राजा भी स्वयं कानून के अधीन होता था। न्यायाधीश स्वतंत्र थे और केवल कानून के अधीन थे। न्याय व्यवस्था की निष्ठा और निष्पक्षता स्वतंत्र थी। ऐसा प्रतीत होता है कि भारत की न्याय व्यवस्था में किसी प्राचीन राष्ट्र की तुलना में सबसे उच्च मानक विद्यमान थे जिन्हें आज तक पार नहीं किया जा सका।

II. प्राचीन भारत में विधि व्यवस्था

''ऐसा राजा वध-योग्य है, जो प्रजा की रक्षा नहीं करता है वरन् उन्हें उनकी धन-संपज़ि से वंचित करता है और जो किसी से सलाह या मार्गदर्शन नहीं लेता है। ऐसा राजा, राजा नहीं वरन् दुर्भाग्य है।''[2] इन प्रावधानों से संकेत मिलता है कि संप्रभुता एक परोक्ष सामाजिक समझौते पर आधारित थी और यदि राजा पारंपरिक समझौते का उल्लंघन करता था तो वह अपना राजत्व खो देता था। मौर्य साम्राज्य के ऐतिहासिक कालखण्ड में कौटिल्य ने अर्थशास्त्र में एक राजा के कर्तव्यों का वर्णन

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2 अरक्षितारं हर्तारं विलोप्राय मनालयज़।

तै राजकलिं हन्यु: प्रजा सज़्यङ् निर्ग्रहणज़।। - महाभारत शान्तिपर्व, श्लोक सं. 90, 5

इस प्रकार किया है: ''प्रजा के सुख में राजा का सुख है, उसके कल्याण में उसका कल्याण; स्वयं की प्रिय वस्तु को वह हितकारी नहीं मानेगा वरन् प्रजा को प्रिय वस्तु को ही वह हितकारी मानेगा।''[3] यह श्लोक लोककल्याणकारी राजा की बात करता है। भारत के सेंविधान के अनुच्छेद 38 में भी लोककल्याण की बात कही गई है।

प्रजा सुखे सुखं राज्ञ: प्रजानां च हिते हितं।
नात्म प्रियं हितं राज्ञ: प्रज्ञानां तु प्रियं हितं।। - अर्थशास्त्र

कौटिल्य द्वारा प्रतिपादित सिद्धान्त रामायण-युग में पहले से ही स्थापित एक अति प्राचीन परंपरा पर आधारित था। अयोध्या के राजा राम अपनी प्रिय रानी, जिनकी पवित्रता का उन्हें पूर्ण विश्वास था, को निर्वासित करने हेतु केवल इसलिए विवश हो गए कि उनकी प्रजा की दृष्टि में अपहरणकर्ता के घर में एक वर्ष बिताने वाली पत्नी को पुन: स्वीकार कर लेना अनुचित था। भग्न हृदय से राजा ने लोक इच्छा के समक्ष समर्पण कर दिया।[4]

महाभारत में एक कथा है कि एक साधारण मछुआरे ने अपनी पुत्री का विवाह हस्तिनापुर नरेश से तब तक नहीं किया जब तक कि उन्होंने इस शर्त को स्वीकार नहीं कर लिया कि मछुआरे की कन्या के पुत्र ही सिंहासन के उज़राधिकारी होंगे, न कि उनकी पहली रानी के पुत्र। राजकुमार देवव्रत द्वारा सिंहासन का परित्याग और आजीवन ब्रह्मचर्य का प्रण (भीष्म प्रतिज्ञा) महाभारत के सर्वाधिक हृदयस्पर्शी प्रकरणों में से एक है।[5] किन्तु न्यायविदों की दृष्टि में इसका महत्व यह है कि शासक भी विधि से ऊपर नहीं था। यह दृष्टांत विधि की सर्वोच्चता और विधि के शासन (Rule of Law) के जैसा ही है। हस्तिनापुर के महान राजा भी अपनी प्रजा के साधारण व्यक्ति को विवश नहीं कर सके कि उनके द्वारा उसकी शर्तों को स्वीकार किए बिना वह अपनी पुत्री का विवाह उनसे कर दे। इससे इस विचार का खंडन होता है कि प्राचीन भारत में राजा ''प्राच्य निरंकुश'' थे, जो विधि या प्रजा के अधिकारों की उपेक्षा कर अपनी इच्छापूर्ति कर सकते थे।

अर्थशास्त्र के अनुसार राज्य को प्रशासनिक इकाइयों-स्थानीय, द्रोणमुख, खार्वटिक और संग्रहण (आधुनिक जिले, तहसील और परगने के प्राचीन समतुल्य) में विभाजित किया गया था। आठ सौ ग्रामों के केंद्र में स्थानीय नामक दुर्ग होता था, 300 गांवों के बीच में एक द्रोणमुख, 200 गांवों के बीच में एक खार्वटिक और दस गांवों के केंद्र में एक संग्रहण था। प्रत्येक संग्रहण में और जनपदों

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3 प्रजा सुखे सुखं राज्ञ: प्रजानां च हिते हितं।
नात्म प्रियं हितं राज्ञ: प्रज्ञानां तु प्रियं हितं।। - अर्थशास्त्र

4 ..... पतितं शोक सागरे।
न हि पश्याज्यहं भूते किंचिद् दु:ख मत: परं।। -वाल्मीकि रामायण उज़र काण्ड 45-15

5 एवमेतत्करिष्यामि यथावात्मनु भाषसे।
योऽस्य जनिष्यते पुत्र: स नो राजा भविष्यति।। - महा. आदिपर्व 100, 67
अद्य प्रभृति मे दाश! ब्रह्मचर्य भविष्यति।। महाभारत आदिपर्व 100, 85

के मिलनस्थलों (जनपदसन्धिषु) में भी न्यायालयों की स्थापना की गई थी। न्यायालय में तीन न्यायविद् (धर्मस्थ) और तीन मंत्री (अमात्य) होते थे।[6]

धर्मस्थास्त्रयस्त्रयोऽधिका जनपद सन्धि संग्रहण द्रोण मुख
स्थानीयेषु वयवहारिकानर्थान् कुर्युः। - अर्थशास्त्र 3

इससे सर्किट अदालतों के अस्तित्व का संकेत मिलता है। महान न्यायविदों मनु, याज्ञवलक्य, कात्यायन, वृहस्पति आदि तथा बाद में वाचस्पति मिश्र आदि टीकाकारों ने भारत में प्राचीन काल से मध्य युग के अंत तक प्रचलित न्यायिक प्रणाली और विधिक प्रफि या का विस्तार से वर्णन किया है।

न्यायालयों का पदानुक्रम

वृहस्पति स्मृति के अनुसार प्राचीन भारत में न्यायालयों को एक पदानुक्रम था जो कुटुंब न्यायालयों से प्रारज़्भ होकर राजा के न्यायालय तक जाता था। सबसे नीचे पारिवारिक मध्यस्थ था। इसके ऊपर न्यायाधीश का न्यायालय था; इसके ऊपर मुज़्य न्यायाधीश, जिसे अध्यक्ष कहा जाता था और सबसे ऊपर राजा का न्यायालय था।[7] प्रत्येक न्यायालय का क्षेत्राधिकार विवाद के महत्व से निर्धारित होता था, छोटे विवादों का निर्णय निम्नतम न्यायालय द्वारा और सबसे महत्वपूर्ण विवादों का निर्णय राजा द्वारा किया जाता था। प्रत्येक उच्चतर न्यायालय का निर्णय निचले न्यायालय के निर्णय का अधिक्रमण कर देता था।[8] वाचस्पति मिश्र के अनुसार, ''राजा के निर्णय से समाप्त होने वाले इन न्यायाधिकरणों के निर्णयों का बाध्यकारी प्रभाव आरोही क्रम में है और विद्वता व ज्ञान के उच्च स्तर के कारण प्रत्येक पश्चात् वर्ती निर्णय पूर्ववर्ती निर्णय पर प्रभावी होगा।''[9]

यह उल्लेखनीय है कि आज भी भारतीय न्यायपालिका में न्यायालयों का पदानुक्रम उक्त सिद्धांत पर ही गठित है- ग्राम न्यायालय, मुन्सिफ़, सिविल जज, जिला न्यायाधीश, उच्च न्यायालय और अंत में सर्वोच्च न्यायालय के स्थान पर है। हम अनजाने में एक प्राचीन परंपरा पालन कर रहे हैं। यहाँ कुटुंब न्यायाधीशों की व्यवस्था उल्लेखनीय है। समाज की इकाई संयुक्त परिवार थी, जिसमें चार पीढ़ियाँ हो सकती थीं। परिणामतः, संयुक्त परिवार के सदस्यों की संख्या कभी-कभी बहुत अधिक भी हो सकती थी और उनके विवादों का निस्तारण सहानुभूति और चातुर्य के साथ दृढ़तापूर्वक किया जाना आवश्यक था। यह भी अपेक्षित था कि प्राथमिक स्तर पर विवादों का निस्तारण परिवार के भीतर ही एक मध्यस्थ द्वारा किया जाए। आधुनिक जापान में परिवार न्यायालयों की कुछ ऐसी ही

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6 धर्मस्थास्त्रयस्त्रयोऽधिका जनपद सन्धि संग्रहण द्रोण मुख
स्थानीयेषु वयवहारिकानर्थान् कुर्युः। - अर्थशास्त्र 3

7 कुलादिज़्येऽधिका सज़्यास्तेज़्योऽध्यक्षः स्मृतोऽधिकः।
सर्वेषामधिको राज्य धर्ज़्यं यज़ेन निश्चितं।। बृहस्पति स्मृति 1, 14

8 उज़माधम मध्यानां विवादानां विचारणात्।
उपर्युपरि बुद्धीनां चरन्तीश्वर बुद्धयः।। वृहस्पति स्मृति 1, 16

9 एतेषां राजान्तानां निर्णयकरणे उज़रोज़रस्य बलवत्वे ज्ञानोत्कर्षात्। -व्यवहार चिन्तामणि 32

व्यवस्था है। कुटुंब न्यायालयों का उल्लेख करने का अभिप्राय यह है कि उक्त न्यायिक प्रणाली का मूल सामाजिक व्यवस्था में था, जो इसकी सफलता का कारण है।

न्याय का मूल स्रोत शासक था। भारतीय न्यायशास्त्र के अनुसार न्याय करना और दण्ड देना संप्रभुता के प्राथमिक लक्षण थे।[10] प्रारंभ में यह आशा की जाती थी कि न्याय का मूल स्रोत होने के कारण राजा व्यक्तिगत रूप से, परंतु पूर्णत: विधि अनुसार और विधिवेज्ञा न्यायाधीशों के मार्गदर्शन में, न्यायिक कार्य करेगा।[11]

राजा के लिए निर्धारित न्यायिक आचार संहिता बहुत कठोर थी। यह अपेक्षित था कि वह मामलों का निस्तारण न्यायालय में खुले रूप से सुनवाई करते हुए करे और उसकी वेशभूषा और व्यवहार से वादकारी भयभीत न हों। यह आवश्यक था कि वह निष्पक्षता की शपथ ले और बिना राग-द्वेष के मामलों का निस्तारण करे। कात्यायन कहते हैं, ''राजा को शालीन वस्त्रों में न्यायकक्ष में आकर पूर्वाभिमुख आसन ग्रहण करके वादकारियों के वादों को ध्यानपूर्वक सुनना चाहिए।[12] उसे अपने मुख्य न्यायाधीश, न्यायाधीशों, मन्त्रियों और अपनी परिषद के ब्राह्मण सदस्यों के मार्गदर्शन में कार्य करना चाहिए। इस प्रकार विधि अनुसार न्याय करने वाला राजा स्वर्ग में रहता है।''[13]

ये प्रावधान महत्वपूर्ण हैं। राजा के लिए विनीत-वेश होना आवश्यक था ताकि वादकारी भयभीत न हों। राजा के न्यायाधीश के रूप में कार्य करने हेतु निर्धारित आचार संहिता बहुत कठोर थी और उसके लिए समस्त राग-द्वेष से मुक्त रहना आवश्यक था।[14] नारद कहते हैं: ''यदि कोई राजा विधि अनुसार मुकदमों (व्यवहारान्) का निस्तारण करता है और (न्यायालय में) आत्म-संयम बरतता है तो उसमें अग्नि की सात ज्वालाओं की तरह सात गुण मिलते हैं।''[15] नारद ने आदेश दिया है कि

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10 स्वास्य ममात्य जनपद दुर्ग कोश दण्ड मित्राणि प्रकृतय:। -अर्थशास्त्र 1, 259

11 यो दंडयान् दण्डयेद् राजा सज्यरवध्यांश्च चातयेत्।
इष्टं स्वात्फ्तुभिस्तेन सहस्र शत दक्षिणै:।। -याज्ञवल्क्य स्मृति 1, 359
इति संचित्य नृपति: फ्ततुल्य फ्लं पृथक्।
व्यवहारान् स्वयं पश्येत् सज्यै: परिवृज्ञोऽन्वहं।। उपरोक्त, 1, 360

12 विनीत वेशो नृपति: सभां गत्व समाहित:।
आसीन: प्राङ्मुखो भूत्वा पश्येत्कार्याणि कार्यिणां।। - कात्यायनी स्मृति 55

13 स तु सज्यै: स्थितैर्युक्त: प्रज्ञामन्तैर्द्विजोज्ञमै:।
धर्मशास्तार्थ कुशलैरर्थशास्त्र विषारदै:।। - कात्यायनी स्मृति 57
सप्राड्विवाक: सामात्य: सब्राह्मण पुरोहित:।।
स सज्य: प्रेक्ष्यको राजा स्वर्गे तिष्ठति धर्मत:।। - कात्यायनी स्मृति 56

14 राजा धर्म सहायस्तु द्वयोर्विवद मानयो:।
सज्यक् कार्याण्य वेखेत राग-द्वेष विवर्जित:।। - नारद स्मृति 1, 4

15 धर्मेणोद्धरतो राज्ञो व्यवहारान् कृतात्मन:।
सज्भवन्ति गुण: सप्तवह्नेरिवार्चिष:।। नारद स्मृति 1, 32

धर्मासन पर आसीन राजा को विवस्वान (सूर्य) के पुत्र की शपथ लेने के कारण सभी प्राणियों के लिए निष्पक्ष होना चाहिए। विवस्वान के पुत्र की शपथ निष्पक्षता की शपथ है: विवस्वान के पुत्र मृत्यु के देवता यम हैं, जो सभी जीवों के लिए निष्पक्ष हैं)[16]

न्यायाधीश

बुद्धिमान न्यायाधीश गंगा की तरह स्वर्ग से अवतरित नहीं होते; वे समाज से ही निकलते हैं और सामाजिक वातावरण से पोषित होते हैं। महान न्यायाधीश जन्मजात नहीं होते वरन् उचित शिक्षा और महान कानूनों, परंज़्पराओं द्वारा उनका निर्माण होता है, जैसे प्राचीन भारत में मनु, कौटिल्य, कात्यायन, वृहस्पति, नारद, पाराशर और याज्ञवल्क्य आदि जैसे विधि के दिग्गज हुए हैं। इस सन्दर्भ में हम देखें तो किसी मामले की सुनवाई के दौरान राजा के मार्गदर्शक न्यायाधीशों और सलाहकारों से अपेक्षित था कि वे स्वतंत्र और निर्भीक हों और उसे कोई त्रुटि या अन्याय करने से रोकें। कात्यायन कहते हैं: ''यदि राजा वादकरियों (विवादीनां) पर विधिविरुद्ध या धर्मविरुद्ध निर्णय थोपना चाहता है, तो न्यायाधीश का यह कर्तव्य है कि वह राजा को चेतावनी दे और उसे रोके।''[17] ''राजा का मार्गदशक न्यायाधीश उसे ऐसी राय दे जिसे वह विधिसज़्मत समझता है; यदि राजा नहीं भी सुनता है तो न्यायाधीश ने कम से कम अपना कर्तव्य तो निभाया।''[18] जब न्यायाधीश को यह अनुभव हो कि राजा साज़्य और न्याय के पथ से भटक गया है तो उसका कर्तव्य राजा को प्रसन्न करना नहीं है क्योंकि यह अवसर मृदुभाषिता का नहीं है (वक्तव्यं तु प्रियं नात्र); यदि न्यायाधीश अपने कर्तव्य के पालन में विफल रहता है तो वह दोषी है।''[19]

न्यायमार्गाद्पेतं तु ज्ञात्वा चिज़े महीपतेः।
वक्तव्यं तु प्रियं नात्र स सज़्यः क्लिवषी भवेत्।। – क्रात्यायनी स्मृति 76

राजा द्वारा न्यायिक शक्ति का विभाजन

सज़्यता के विकास के साथ-साथ राजा के कार्यों में वृद्धि होती गई और उसके पास व्यक्तिगत रूप से मुकदमे सुनने के लिए समय की कमी हो गई और वह अपना अधिकाधिक न्यायिक कार्य अनुभवी न्यायाधीशों की प्रत्यायोजित करने हेतु विवश हो गया। कात्यायन कहते हैं: ''यदि काम के दबाव के कारण राजा व्यक्तिगत रूप से मुकदमों की सुनवाई नहीं कर सकता है, तो उसे वेदज्ञ

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16 तस्माद्धर्मासनं प्राप्य राजा विगत मत्सरः।
समः स्वाद् सर्वभूतेषु विभ्रद वैवस्वतं व्रते।। – नारद स्मृति 1, 34

17 अधर्माज्ञां यदा राजा नियुंचीतं विवादीनां।
विज्ञाप्य नृपतिं सज़्यस्तदा सज़्यङ् निवर्तयेत्।। – कात्यायनी स्मृति 74

18 सम्येनावश्य वक्तव्यं धर्मार्थ सहिते वचः।
श्रृणोति यदि नो राजा स्वाज़ं समयस्तदानृणः।। कात्यायनी स्मृति 77

19 न्यायमार्गाद्पेतं तु ज्ञात्वा चिज़े महीपतेः।
वक्तव्यं तु प्रियं नात्र स सज़्यः क्लिवषी भवेत।। – कात्यायनी स्मृति 76

ब्राह्मण को न्यायाधीश के रूप में नियुक्त करना चाहिए।''[20] न्यायाधीश होने के लिए अत्यंत उच्च कोटि की योग्यताएँ निर्धारित की गई थी। कात्यायन के अनुसार: ''न्यायाधीश को कठोर व संयमी, निष्पक्ष, दृढ़निश्चयी, ईश्वरभीरु, कर्तव्यपरायण, क्रोध से मुक्त, धर्मिष्ठ और कुलीन होना चाहिए।[21]

न्यायपालिका की सत्यनिष्ठा

समय के साथ-साथ एक न्यायिक पदानुक्रम विकसित हुआ जिससे राजा, सर्वोच्च अपीलीय न्यायालय की शक्तियों को छोड़कर, अधिकांश न्यायिक कार्यों से मुक्त हो गया। जैसा कि ऊपर वर्णित है, मौर्य साम्राज्य में एक नियमित न्यायिक सेवा अस्तित्व में थी। न्यायाधीश का सर्वोपरि कर्तव्य सत्यनिष्ठ होना था, जिसमें निष्पक्षता व राग-द्वेष का पूर्ण अभाव सज़्मिलित थे। सत्यनिष्ठा की अवधारणा अत्यंत व्यापक थी और सत्यनिष्ठा संबन्धी न्यायिक संहिता बहुत कठोर थी। वृहस्पति कहते हैं: ''एक न्यायाधीश को व्यक्तिगत लाभ की इच्छा या किसी पूर्वाग्रह के बिना शास्त्रसज़्मत प्रक्रिया के अनुसार मामलों का निर्णय करना चाहिए। इस प्रकार अपने न्यायिक कर्तव्यों का पालन करने वाला न्यायाधीश यज्ञ के फल का अधिकारी होता है।''[22]

लोभ द्वेषाधिकं त्यज़वा य: कुर्वात्कार्य निर्णयं।
शास्त्रोदितेन विधिना तस्य यज्ञ फलं भवेत्।। बृहस्पति स्मृति 1, 18

न्यायाधीशों की निष्पक्षता सुनिश्चित करने के लिए कठोरतम सावधानियाँ बरती गई थीं। विचारण खुले न्यायालय में होना आवश्यक था और वाद लंबित रहते हुए न्यायाधीशों का पक्षकारों से व्यक्तिगरूपेण बात करना निषिद्ध था क्योंकि यह माना जाता था कि अकेले में सुनवाई करने से पक्षपात हो सकता है। शुफ नीतिसार के अनुसार: ''पांच कारणों से निष्पक्षता नष्ट होती है और न्यायाधीश विवादों में पक्षपात करते हैं। ये कारण हैं- राग, लोभ, भय, द्वेष और एक पक्ष को अकेले में सुनना।''[23] न्यायिक सत्यनिष्ठा बनाए रखने का एक अन्य उपाय यह था कि वादों की सुनवाई एकल न्यायाधीश द्वारा नहीं की जा सकती थी, भले ही वह राजा ही क्यों न हो। हमारे पूर्वजों ने यह अनुभव किया कि जब दो मस्तिष्क मिलते हैं तो भ्रष्टाचार या त्रुटि की संभावना कम होती है, और उन्होंने यह प्रावधान किया कि मामले निर्णीत करते समय राजा को अपने सलाहकारों के साथ बैठना चाहिए और न्यायाधीशों को विषम संज़्या वाली न्यायपीठ में बैठना चाहिए। शुक्र -

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20 यदा कार्यवशाद्राजा न पश्येत्कार्य निर्णयं।
तदा नियुज़्याद्विद्वांसं ब्राह्मणं वेदपरागं।। - कात्यायनी स्मृति 63

21 दान्ते कुलीने मध्यस्थमनुद्वेग करं स्थिरं,
परत्र भीरुं धर्मिष्ठमुद्युक्तं फोध वर्जिते।। - कात्यायनी स्मृति 64

22 लोभ द्वेषाधिकं त्यज़वा य: कुर्वात्कार्य निर्णयं।
शास्त्रोदितेन विधिना तस्य यज्ञ फलं भवेत्।। बृहस्पति स्मृति 1, 18

23 पक्षपाताधिरोपस्य कारणानि च पंज़्च वै।
राग लोभ भय द्वेषा वादिनोश्चरह: श्रुति।। - शुफ नीति 4, 530

नीतिसार के अनुसार ''न्यायिक कर्तव्यों का निर्वहन करने वाले व्यक्ति वेदज्ञ एवं सांसारिक अनुभव से युक्त होने चाहिए और उन्हें तीन, पांच, या सात के समूहों में कार्य करना चाहिए।''[24]

कौटिल्य ने भी यह कहा है कि वादों की सुनवाई तीन न्यायाधीशों (धर्मस्थस्त्रय:) द्वारा की जानी चाहिए। अंग्रेजों द्वारा स्थापित हमारी वर्तमान न्यायिक व्यवस्था में इस उत्कृष्ट सुरक्षा-उपाय को नहीं अपनाया गया है। बचत के उद्देश्य से आज हर मुकदमे की सुनवाई एक मुन्सिफ़ या सिविल जज या जिला जज द्वारा की जाती है। परन्तु प्राचीन भारत में राज्य की रुचि बचत की अपेक्षा न्याय की गुणवज़ा में अधिक थी।

प्रत्येक स्मृति न्यायिक सत्यनिष्ठा के सर्वोच्च महत्व पर बल देती है। शुक्र-नीतिसार के अनुसार: ''राजा द्वारा नियुक्त न्यायाधीश प्रक्रिया के अच्छे जानकार, बुद्धिमान, चरित्रवान, उज़म स्वभाव के, वाणी में मृदु, मित्र या शत्रु के लिए निष्पक्ष, सत्यवादी, विधिवेज़ा, सपि य (आलसी नहीं), क्रोध, लोभ या इच्छा (व्यक्तिगत लाभार्थ) से मुक्त और सत्यवादी होने चाहिए।''[25]

भ्रष्टाचार के लिए सजा का प्रावधान

भ्रष्टाचार एक जघन्य अपराध माना जाता था और सभी विशेषज्ञ बेईमान न्यायाधीश को कठोरतम दण्ड देने के विषय में एकमत हैं। वृहस्पति कहते हैं: ''यदि एक न्यायाधीश रिश्वत लेकर अन्याय करता है और जनता के विश्वास को तोड़ता है तो उसे राज्य से निर्वासित कर देना चाहिए।''[26]

अन्यायवादिन: सज़्यास्तथैवोत्कोच जीविन:।
विश्वस्तवृंचकाश्चैव निर्वास्या सर्व एव ते।। वृहस्पति स्मृति 1, 107

भ्रष्ट न्यायाधीश, झूठा गवाह, और ब्राह्मण का हत्यारा अपराधियों के एक ही वर्ग में आते हैं।[27] विष्णु कहते हैं: ''राज्य को एक भ्रष्ट न्यायाधीश की पूरी संपज़ि जज़्त कर लेनी चाहिए।''[28] वाद लंबित रहते हुए वादकारियों से अकेले में बात करना भी न्यायिक कदाचार की श्रेणी में आता था। बृहस्पति कहते हैं: ''वाद के निर्णय से पूर्व (निर्णीते) किसी पक्षकार के साथ व्यक्तिगतरूपेण

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24 व्यवहारमधुरं वोदुं ये सक्ता: पुङ्गवा इव।
लोक वेदज्ञ धर्मज्ञा सप्त पंच त्रयोऽपि।। - शुफ्नीति 548

25 व्यवहारविद: प्राज्ञा वृज़िशीला गुणान्वित:।
रिपौ मित्रे समय ये च धर्मज्ञा: सत्यवादिन:।।
निरालसा जितक्रोध काम लोभा: प्रियं वद:।
राज्ञा नियोजितव्यासते सज़्या सर्वासु जातिषु।। - शुफ्नीति 538-539

26 अन्यायवादिन: सज़्यास्तथैवोत्कोच जीविन:।
विश्वस्तञ्चकाश्चैव निर्वास्या सर्व एव ते।। वृहस्पति स्मृति 1, 107

27 कूट सम्य: कूट साक्षी ब्रह्महा च समय स्मृता:। वृहस्पति स्मृति 5

28 कूट साक्षीगणां सर्वस्यापहार: कार्य:। उत्कोच जीविनां सज़्यानां च। वृहस्पति स्मृति 1, 179

बातचीत करने वाले न्यायाधीश या मुज्य न्यायाधीश को एक भ्रष्ट न्यायाधीश की तरह दंडित किया जाना चाहिए।''[29]

जूरी के सदस्यों की टोली

न्यायिक प्रणाली की सर्वाधिक उल्लेखनीय विशेषता सभासदों या पार्षदों की व्यवस्था थी जो राजा के मूल्यांकनकर्ता या सलाहकार के रूप में कार्य करते थे। एक महत्वपूर्ण अंतर के साथ, वे आधुनिक जूरी के समकक्ष थे। आज की जूरी में आम आदमी - ''बारह दुकानदार'' होते हैं जबकि शासक के साथ बैठने वाले पार्षदों का विधिवेज्ञा होना आवश्यक था। याज्ञवल्क्य कहते हैं: ''शासक को अपने न्यायालय के सभासदों के रूप में विधि विशेषज्ञ, सत्यवादी और शत्रु-मित्र हेतु निष्पक्ष व्यक्तियों को नियुक्त करना चाहिए।''[30]

इन सभासदों या ज्यूरर्स से इस सीमा तक निर्भीकतापूर्वक राय व्यक्त करने की आशा की जाती थी कि वे शासक से असहमत होकर उसे आगाह कर सके कि उसकी राय विधि एवं साज्या के विपरीत है। कात्यायन कहते हैं: ''यदि सभासद यह अनुभव करते हैं कि शासक किसी विवाद का निर्णय विधि के विरुद्ध करने हेतु प्रवृज्ञ है तो उनको मूकदर्शक नहीं रहना चाहिए; यदि वे चुप रहे तो वे राजा सहित नरक जाएंगे।''[31] शुक्र -नीतिसार में भी इसी प्रकार के एक श्लोक में यह आदेश दोहराया गया है।[32] शासक या उसकी अनुपस्थिति में पीठासीन न्यायाधीश से यह अपेक्षित नहीं था कि वह जूरी सदस्यों के निर्णय के विपरीत निर्णय देगा वरन उसे उनके परामर्शानुसार ही डिक्री (जय-पत्र) पारित करनी होती थी। शुक्र नीतिसार के अनुसार: ''यह देखने के बाद कि सभासदों ने अपना निर्णय दे दिया है, राजा द्वारा सफल पक्षकार को एक डिक्री (जय-पत्र) देना चाहिए।''[33] सभासदों की तुलना प्रिवी काउंसिल की न्यायिक समिति से की जा सकती है, जो शासक को ''विनम्रतापूर्वक सलाह' देती है किन्तु यह सलाह बाध्यकारी है। इसकी तुलना सोवियत न्यायिक प्रणाली के तहत पीपुल्स असेसर्स (People's Assessors) से भी की जा सकती है, जो पीपुल्स् कोर्ट में अनुभवी न्यायाधीश के साथ बैठते हैं लेकिन उनकी हैसियत उसके बराबर होती है और वे उसके विरुद्ध व्यवस्था दे सकते हैं।

लेकिन एक अपवाद था। यदि किसी कठिन मामले में जूरी सदस्य किसी निष्कर्ष पर पहुंचने में असमर्थ होते थे तो शासक मामले को स्वयं निर्णीत कर सकता था। शुक्र-नीतिसार कहते हैं, ''यदि

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29 अनिर्णीते तु यद्यर्थे सज्भाषते रहोऽर्थिन:। वृहस्पति स्मृति 1, 102

30 सुताध्ययन सज्पन्ना धर्मज्ञा सत्यवादिन:।
राज्ञा सभासदा कार्यां रिपौ मित्रे च ये समा:।। -याज्ञवल्क्य स्मृति 2, 2

31 अधर्मत: प्रवृज्ञं हि नोपेक्षरन सभासद:।
उपेक्षमाणा: सनृ नरकं यान्त्यधोमुखा:।। कात्यायनी स्मृति 74

32 शुक्रनीति, IV, 5475

33 सम्पादिभिर्निर्मितं विद्धृतं प्रतिवादिन:।
द्रष्ट्वा राजानुजयिने प्रदद्याद् जय पत्रकज्।। शुक्र नीति 4, 53

वे (निर्धारक) किसी कठिन या सन्दिग्ध मुद्दों वाले (सन्दिग्ध्रूपिण:) विवाद का निर्णय करने में असमर्थ हैं तो ऐसे मामले में शासक अपने विशेषाधिकार का उपयोग करते हुए निर्णय दे सकता है।[34]

ऐसा प्रतीत होता है कि अपराधिक परीक्षणों में अभियुक्त के दोषी या निर्दोष होने के प्रश्न पर न्यायाधीश या जूरी सदस्यों द्वारा निर्णय किया जाता था किन्तु दण्ड की मात्रा का निर्धारण राजा पर छोड़ दिया जाता था। मृच्छकटिकम्, द लिटिल क्ले कोर्ट, में मुकदमे के दृश्य में, चारुदज़ को वसंतसेना की हत्या का दोषी घोषित करने के बाद न्यायाधीश ने दण्ड के प्रश्न को इस टिप्पणी के साथ राजा को संदर्भित किया कि ''चारूदज़ के दोषी या निर्दोष होने के संबंध में निर्णय करने का अधिकार हमारा है और हमारा निर्णय बाध्यकारी (प्रमाण) है, किन्तु शेष राजा पर है।''[35]

आर्य चारुदज़् निर्णयं वयं प्रमाणं शेषे तु राजा।'' मृच्छकटिकम् 9

रामायणकालीन न्याय व्यवस्था

इस संदर्भ में यदि हम रामायण कालीन न्याय व्यवस्था का अध्ययन करते हैं तो हम पाते हैं कि न्याय व्यवस्था का जो स्वरूप हमें अपने प्राचीन ग्रंथों में मिला है उसका दर्शन हमें हजारों वर्ष पहले ही रामायण कालीन न्याय व्यवस्था में मिलता है। रामायण जो केवल एक महाकाव्य ही नहीं अपितु भारतीय सांस्कृतिक चेतना का प्रकाश स्तंभ भी है में हमें भारतीय संस्कृति के विषद पक्षों के दर्शन होते हैं। इसी क्रम में रामायण कालीन न्याय व्यवस्था पर दृष्टिपात करते हैं तो हमारे समक्ष एक विस्तृत न्याय प्रणाली प्रस्तुत होती है जो राम राज्य की कल्पना का आधार थी। रामायण कालीन शासन धर्म पर आधारित था और धर्म में न्याय की प्रधानता थी।[36] रामायण के अनुसार राज्यों में न्याय न होने से मत्स्य न्याय की स्थिति उत्पन्न होती थी। जिससे राज्य का अस्तित्व संभव नहीं होता है।[37] अस्तु न्याय से ही राजा का और राज्य का अस्तित्व है। राम राज्य में न्याय का आधार विधि व्यवस्था थी। राजा को न्याय की प्रतिमूर्ति माना गया है। राजा स्वयं धर्मासन पर बैठकर पुरोहितों एवं मंत्रियों को आदेश देता है कि आपको न्याय निष्पक्षता पूर्वक करना चाहिए। यदि राजा न्याय नहीं करता है तो वह स्वयं पाप का भाग होता है। जिन व्यक्तियों को राजा न्याय पूर्वक दंडित करता है वह पाप से मुक्त हो जाते हैं। राम का जन्म ही सज्जनों की रक्षा एवं दुष्ट के संहार के लिए हुआ था। रामायण के अंतर्गत अनेक प्रसंगों में न्याय व्यवस्था का उल्लेख है। उदाहरण के लिए बालकांड में राजा सागर का प्रसंग है। राजा सागर को ज्येष्ठ पुत्र असमंज बड़ा ही दुष्ट प्रकृति का था। वह नगर के बालकों को पकड़ कर सरयू नदी में फेंक देता था। जब बच्चे डूबने लगते थे तब उनको देख करके हंसा करता था। वाल्मीकि जी कहते हैं कि इस प्रकार पापाचार में प्रार्वत होकर जब वह सत्पुरुषों को

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34 निश्चेतं ये न शक्या स्यु: वादा: सन्दिग्धरूपिण:
सीमाद्यस्तत्र नृपति: प्रमाणं स्यात् प्रभुर्यत:।। -शुफ्नीति

35 आर्य चारुदज़् निर्णयं वयं प्रमाणं शेषे तु राजा।'' मृच्छकटिकम् 9

36 वाल्मीकि रामायण 7/59 के पश्चात अधिक सर्ग 1 श्लोक 13

37 वाल्मीकि रामायण 2/67/31

पीड़ा देने और नगरवासियों का अहित करने लगा तब पिता ने उसे नगर के बाहर निकाल दिया।[38]

कुशल व्यवहारेषु सौहृदेषु परीक्षितः।

प्राप्तकालं यथादण्डं धारयेषुः सुतेश्वति।। वा. रामायण 1-7-10

यदि आवश्यक हो तो मंत्री भी अपने पुत्रों को दंड दे ऐसा प्रावधान मिलता है। रामायण कालीन न्याय और दंड व्यवस्था का मुख्य आधार धर्म था और राजा धर्म के अधीन रहकर दंड का प्रयोग करता था। विष्णु पुराण में उल्लेख है कि ''दंड का उद्देश्य धर्म की रक्षा और न्याय की स्थापना करना था।''

समानता मानवीय व्यवहार की व्यवस्था विधि या नियम अथवा कानून के द्वारा होती है। रामायण में विधि के लिए धर्म का प्रयोग है। राजा धर्म के द्वारा अपनी प्रजा पर शासन करता था।[39]

ऋत्विजौ द्वावभिमतौ तस्यस्तामृषिसज़मौ।
बैश्यो वामदेवश्च मन्त्रिनश्च तथापेरे।।

महर्षि वशिष्ट और वामदेव वैदिक अनुष्ठानों के विशेषज्ञ होने के कारण धार्मिक मंत्री हैं जो धार्मिक मामलों के ज्ञाता हैं इसके अलावा कुछ और भी धार्मिक मंत्री हैं जो धार्मिक मामलों को देखते थे तथा राजा को धर्म पर शासन करने की दिशा देने का कार्य करते थे।

III. रामायणकालीन न्याय व्यवस्था एवं वर्तमान भारतीय दण्ड संहिता: एक तुलना

वर्तमान समय में यदि हम रामायण कालीन व्यवस्था की प्रासंगिकता का अध्ययन करते हैं तो हम पाते हैं कि आज भी हमारी न्याय व्यवस्था में बहुत सारे ऐसे प्रावधान हैं जो उस समय रामायण व्यवस्था में दिखाई देते हैं। अनेकों ऐसे उदाहरण हैं। राम रावण के बीच युद्ध का मुख्य कारण रावण द्वारा सीता का अपहरण है। रावण द्वारा सीता को सुरक्षा घेरे से बाहर निकलने के लिए छल किया गया और उनकी इच्छा के विरूद्ध उन्हें लंका ले जाया गया। आज ऐसा कृत्य भारतीय दंड संहिता की धारा 363 और 366ज़137(2) और 87 भारतीय न्याय संहिता 2023, के अंतर्गत आता है। धारा 363 अपहरण से संबंधित है और इसमें 7 साल की जेल की सजा का प्रावधान है। इसके अलावा, धारा 366 में विवाह के लिए मजबूर करने के लिए किसी महिला का अपहरण करने की बात कही गई है और इसमें 10 साल तक की सजा का प्रावधान है।

रामायण के सबसे प्रसिद्ध प्रसंगों में से एक हनुमान द्वारा लंका दहन है। किंवदंती के अनुसार, रावण हनुमान को अपने दरबार में आसन न देकर उनका अपमान करने की कोशिश करता है। हालांकि, हनुमान बस अपनी पूंछ बढ़ाकर एक आसन बनाते हैं, जो रावण के सिंहासन से भी ऊंचा होता है। क्रोधित होकर रावण हनुमान की पूंछ में आग लगाने का आदेश देता है। हालांकि, यह उल्टा होता

38 कुशल व्यवहारेषु सौहृदेषु परीक्षितः।
प्राप्तकालं यथादण्डं धारयेषुः सुतेश्वति।। वा. रामायण 1-7-10

39 वाल्मीकि रामायण 1/7/19/3/6/14

है क्योंकि हनुमान को दर्द महसूस नहीं होता है और वे पूरी लंका में आग लगाते हुए इधर-उधर भागते हैं। आज हनुमान जैसा कृत्य सार्वजनिक संपज़ि क्षति निवारण अधिनियम, 1984 की धारा 4 को आकर्षित कर सकता है, जो आग या विस्फोटक पदार्थों द्वारा सार्वजनिक संपज़ि को नुकसान पहुँचाने की बात करता है और एक से 10 साल की जेल की सजा को आकर्षित करता है। यह भारतीय दंड संहिता की 436 धारा **(326 भारतीय न्याय संहिता 2023)**, को भी आकर्षित करेगा। राम द्वारा दिए गए आदेश की अवहेलना करने के बाद लक्ष्मण ने सरयू नदी में अपना जीवन समाप्त करने का विकल्प चुना। इससे पहले, भारतीय दंड संहिता की धारा 309 के अनुसार, आत्महत्या करने का प्रयास करने वाले किसी भी व्यक्ति को एक वर्ष तक कारावास और जुर्माने की सजा हो सकती थी। हालाँकि, मानसिक स्वास्थ्य देखभाल अधिनियम, 2017 की धारा 115 धारा 309 को अमान्य करती है और कहती है कि धारा 309 के बावजूद, आत्महत्या करने का प्रयास करने वाले किसी भी व्यक्ति को गंभीर तनाव में माना जाता है, और उस पर मुकदमा नहीं चलाया जाएगा और उसे दंडित नहीं किया जाएगा। **(धारा 309 को नई भारतीय न्याय संहिता 2023 से पूरी तरह हटा दिया गया है।)** सरकार का कर्तव्य है कि वह गंभीर तनाव से पीड़ित व्यक्ति की देखभाल, उपचार और पुनर्वास प्रदान करे, जिसने आत्महत्या करने का प्रयास किया है, ताकि उस व्यक्ति द्वारा आत्महत्या के दूसरे प्रयास के जोखिम को कम किया जा सके।

रावण की बहन शूर्पणखा, राम के मिलने उनके आश्रम गई थी, जहाँ उसने लाल बालों वाली राक्षसी से एक सुंदर स्त्री का रूप धारण कर लिया था, ताकि वह उनसे बात कर सके। राम ने उससे बात कर उसने अपने भाई लक्ष्मण से संपर्क करने का फैसला दिया। लक्ष्मण द्वारा अपमान पाने के बाद, शूर्पणखा ने गुस्से में सीता पर हमला करने की कोशिश की, जो राम की पत्नी थी। इस बिंदु पर, लक्ष्मण ने तुरंत अपनी तलवार निकाली और शूर्पणखा के नाक और कान काट दिए। अगर आज लक्ष्मण ने ऐसा कुछ किया होता, तो पुलिस ने शूर्पणखा को गंभीर चोट पहुँचाने के लिए लक्ष्मण को गिरज़्तार कर लिया होता। यह भारतीय दंड संहिता 1860 के तहत एक अपराध है। **धारा 320 जिसका दंड 322 में है, अब भारतीय न्याय संहिता की धारा 116 और 117(1)**, किसी व्यक्ति को गंभीर चोट पहुंचाने के अपराध के लिए दंडित किया जाता है यदि वे निम्न में से कोई भी कार्य करते हैं: (ए) नपुंसकता, यानी यौन अंगों को निकालना, (बी) किसी को उनकी दृष्टि या सुनने से वंचित करना (सी) किसी शरीर के अंग या जोड़ों को चोट पहुंचाना या स्थायी रूप से क्षतिग्रस्त करना (ई) किसी के चेहरे या सिर को स्थायी रूप से विकृत करना (एफ) किसी व्यक्ति की हड्डियों या दांतों को तोड़ना या उखाड़ना।

मानवीय व्यवहार की व्यवस्था 'विधि' या 'नियम' अथवा 'कानून' के द्वारा होती है। रामायण में 'विधि' के लिये 'धर्म' का प्रयोग है। राजा धर्म के द्वारा अपनी प्रजा पर शासन करता था।[40] विधि के स्रोत कुलधर्म, जातिधर्म, वेद, शास्त्र, नीतियाँ और तत्कालीन रीति रिवाज थे। रामायण में

40 वही 1/7/19; 3/6/14

जातिधर्मों और कुलधर्मों का अनेक स्थलों पर उल्लेख है।[41] 'शास्त्र' भी विधि के स्रोत थे।[42] औचित्यपूर्ण नीतियों का उल्लेख भी कृति में स्थल स्थल पर है।[43] ये मुख्य रूप से विधि के रूप में न्याय का आधार थी।

आर्षवाक्य भी विधि का निर्माण करते थे। ब्रह्मा के वाक्य नीति या नियम के अन्तर्गत कहे गए हैं।[44] मनु के वाक्यों को भी पालनीय नियम माना गया है।[45] रामायणानुसार न्याय हेतु विधि के निर्माता शास्त्रज्ञ, वेदज्ञ, व्यवहारज्ञ और नीतिज्ञ लोग होते थे।[46] वस्तुत: आचार, धर्म, वर्णाश्रम व्यवस्था के नियम, व्यक्तिगत एवं पारिवारिक नियम, कुलधर्म, ज्ञातिधर्म, नीतिधर्म और नैतिक नियमों आदि से तत्कालीन न्यायिक विधि का निर्माण होता था। प्रमुख रूप से धार्मिक नियम ही विधि के स्रोत थे।[47]

न्यायालय सभा

तत्कालीन न्यायिक प्रशासन में न्यायालय सभा कहलाती थी।[48] 'राजा' प्रमुख न्यायाधीश था। वह 'धर्मपाल' या 'दण्डधर' कहलाता था।[49] प्रमुख न्यायाधीश का आसन न्यायसभा में धर्मासन कहलाता था।[50] अन्य न्यायाधीश धर्मपालक कहलाते थे।[51] न्यायकार्य में संलग्न अन्य सदस्य, सभासद या सभ्य कहलाते थे।[52] न्याय चाहने वाले 'कार्यार्थी' कहलाते थे।[53] न्याय के लिये व्यवहार या मामला कार्य या पौरकार्य के नाम के अभिहित था।[54] न्यायसभा राजा, पुरोहित, मन्त्रीगण, व्यवहारज्ञ, धर्मपारंग एवं नीतिज्ञ सज्यगणों तथा ब्राह्मणों, क्षत्रियों, नैगमों और अनुभवी वृद्धों से मिलकर संगठित थी।[55]

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41 वही 2/11/30; 2/7/23; 2/110/34

42 वही 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 2 श्लोक 33

43 वही 4/14/34, 35; 4/21/5 आदि; 4/3/10

44 वही 4/34/10, 11

45 वही 4/18/32

46 वही 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 1, श्लोक 2 एवं सर्ग 2 श्लोक 33

47 वही 8/3/10

48 वही 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 1-4 एवं 3-34

49 वही 3/1/17

50 वही 7/59 के पश्चात् अधिक पाठ सर्ग 1, श्लोक 1

51 वही 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 2, श्लोक 32

52 वही 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 3, श्लोक 33, 35

53 वही 7/5/3/5 एवं 7/59 के पश्चात् अधिक पाठ सर्ग 1, श्लोक 5, 9

54 वही 7/53/6

55 वही 7/53/5 एवं सर्ग 59 के पश्चात् अधिक पाठ सर्ग 1, श्लोक 2,3

राजा, जो कि प्रधान न्यायाधीश था, सत्य और धर्म में परायण[56], धर्मज्ञ, बहुश्रुत, विद्वान्[57] और स्थिरप्रज्ञ होता था।[58] प्रधान न्यायाधीश के अतिरिक्त अन्य न्यायाधीश एवं मन्त्रीगण मन्त्रज्ञ, शास्त्रज्ञ, व्यवहारकुशल, धर्मशास्त्र एवं नीतिशास्त्र के ज्ञाता,[59] ईमानदार, निर्लोभी तथा पक्षपात रहित होते थे।[60] रामायण में न्यायाधीशों की सचरित्रता पर विशेष बल दिया गया है।[61]

तत्कालीन शासन में न्यायालय राजसभा का ही एक अंग थी। न्यायालय में राजा को परामर्श देने वाली सभा ही न्याय सभा का रूप धारण करती थी। न्यायालय का न्यायसभा की बैठक राजभवन में होती थी।[62] न्यायसभा की बैठक प्रतिदिन पूर्वाह्न में होती थी।[63] 'राजा' प्रमुख न्यायाधीश के रूप में सर्वप्रथम न्यायालय में उपस्थित होकर न्यायासन ग्रहण करता था।[64] तदनन्तर पुरोहित तथा अन्य मन्त्रीगण एवं नैगम, नीतिज्ञ, व्यवहारज्ञ तथा धर्मज्ञ सदस्यगण न्यायसभा में प्रवेश करते थे।[65] न्यायसभा में न्यायाधीशों एवं सदस्यों के आसन-ग्रहण कर लेने के पश्चात् कार्यार्थियों को बुलावा जाता था।[66] कार्यार्थी के न्यायालय में प्रवेश करने पर प्रधान न्यायाधीश उससे कार्य को निर्भयतापूर्वक स्पष्ट करने के लिये आदेश देता था।[67] कार्यार्थी विनम्रता पूर्वक अपने कार्य सम्बन्धी विचार न्यायाधीशों के समक्ष प्रस्तुत करता था।[68] वादी के द्वारा मामला प्रस्तुत किये जाने पर आवश्यकता पड़ने पर प्रतिवादी को द्वारपाल द्वारा बुलवाया जाता था।[69] प्रतिवादी के न्यायालय में उपस्थित होने पर प्रधान न्यायाधिकारी उससे वादी विषयक प्रश्न करता था।[70] प्रतिवादी न्यायाधीश की आज्ञानुसार तद्विषयक अपने विचार प्रकट करता था।[71] वादी और प्रतिवादी के विचारों के प्रस्तुतीकरण के पश्चात् प्रधान न्यायाधिकारी न्याय सभा के सदस्यों से निर्णय के लिये तथा अपराधानुसार दण्ड विधान के

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56 वही 1/6/5; 2/2/29

57 वही 2/2/31, 33 आदि

58 वही 2/1/24

59 वही 1/7/5, 8, 17; 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 1, श्लोक 3

60 वही 1/7/2; 2/100/27, 58, 59

61 वही 2/100/57, 58, 59

62 वा.रा. 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 1 श्लोक 1, 2

63 वही 7/5/3/5; 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 1, श्लोक 1

64 वही 7/5/3/3; 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 1, श्लोक 1

65 वही 7/5/3/5; 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 1, श्लोक 2, 3

66 वही 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 1, श्लोक 5, 6

67 वही 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 2, श्लोक 13

68 वही 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 2, श्लोक 15, 16

69 वही 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 2, श्लोक 15, 16

70 वही 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 2, श्लोक 19

71 वही 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 2, श्लोक 27 आदि

लिये सावधानीपूर्वक परामर्श करता था।[72] न्यायाधीशों के द्वारा परस्पर तद्विषयक विचार विमर्श के पश्चात् निर्णयानुसार अपराधी को दण्ड दिया जाता था।[73] अन्त में न्यायसभा की बैठक समाप्त की जाती थी।

रामायणकालीन शासन में न्याय की सुचारु व्यवस्था

(1) तत्कालीन शासन में पौरकार्य या न्यायकार्य के लिये प्रतिदिन न्याय सभा की बैठक होती थी।[74] प्रजा के मामलों को सुनना और उनका निपटारा करना राजा का प्रधान कर्तव्य था। प्रजा के प्रति न्याय करने में विलम्ब या प्रमाद करने वाला राजा पाप का भागी एवं नरक की अधिकारी कहा गया है।[75] राजा नग और राजा निमि की प्रजा के प्रति न्याय में प्रमाद करने के कारण अभिशप्त होना पड़ा था और तदनुसार दु:ख भोगना पड़ा था।[76]

(2) उस समय न्याय अविलज़्ब होता था। न्यायालय में कार्यार्थियों को शीघ्र प्रवेश पाने का अधिकार प्राप्त था।[77]

(3) उस समय न्याय बिना खर्च के सुलभ था। न्यायालय में न्यायार्थ कार्यार्थी को शुल्क नहीं देना पड़ता था।

(4) उस समय वकीलों की आवश्यकता न थी। धर्मज्ञ एवं व्यवहारज्ञ न्यायाधीशों द्वारा सावधानी पूर्वक मामले की पूर्णत: जाँच करने के पश्चात् ही कार्य विषयक निर्णय दिया जाता था।[78]

(5) तत्कालीन न्याय प्रशासन में स्त्री और पुरुष सभी को न्याय पाने का अधिकार था।[79]

(6) उस समय न्याय की व्यवस्था धर्म, नीति और शास्त्रानुसार थी।[80] न्याय में सत्य और धर्म का विशेष ध्यान रखा जाता था।[81]

(7) शासन में न्याय के प्रति जागरूकता थी।[82] न्याय नीतिपूर्वक होता था। अन्याय पूर्वक व्यवहार ठीक नहीं समझा जाता था। रावण के गुप्तचर 'शुक' के पकड़े जाने पर उसने न्याय की अपेक्षा करते

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72 वा.रा. 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 2 श्लोक 30, 31

73 वा.रा. 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 2 श्लोक 37

74 वही 7/53/6

75 वही 7/53/25

76 वही 7/53/17, 18; 7/55/16; 17

77 वही 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 1, श्लोक 30, 31

78 वा.रा. 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 2 श्लोक 30

79 वही 7/53/5

80 वही 4/18/30; 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 2, श्लोक 33

81 वही 4/18/30; 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 3, श्लोक 34, 35

82 वही 7/53/6

हुए राम से कहा था कि यदि मैं मारा गया, तो आज तक के मेरे अशुभ कर्मों का फल आपको भोगना पड़ेगा।[83]

(8) तत्कालीन न्याय की विशेषता यह थी कि उसमें पक्षपात और लालच को किंचित् मात्र भी स्थान न था।[84] न्यायाधीश अपने अपराधी पुत्र को भी दण्डित करता था।[85] पक्षपातपूर्ण न्याय उचित न समझा जाता था। रामायण में उल्लेख है कि पक्षपातपूर्ण न्याय करने वाले राजा के पुत्र और धनधान्य का विनाश निरपराध के आँसू कर डालते हैं।[86]

(9) तत्कालीन न्याय पद्धति सरल थी।

(10) तत्कालीन न्याय में प्रजा के हित का ध्यान रखा जाता था। उस समय न्याय में धर्म और मानवता प्रधान थी एवं न्याय प्रजातान्त्रिक पद्धति पर आधारित था। उस समय शीघ्र एवं कठोर न्याय से राज्य में अपराध कम होते थे। राम के न्यायालय में बहुत कार्यार्थी नहीं आते थे।[87]

निष्कर्षत: तत्कालीन शासन में न्यायपालिका सशक्त थी।

IV. निष्कर्ष

किसी भी न्यायिक प्रणाली की वास्तविक अदालतों को सत्य का अन्वेषण करने में सक्षम बनाना है और इस कसौटी पर प्राचीन भारत की स्थिति बहुत ऊपर है। गौतम ने कहा:

विप्रतिपज्ञौ साक्षिणी मिथ्या सत्य व्यवस्था। – गौतम. 13, 1

''विवादों में न्यायालय को साक्ष्य के माध्यम से यह सुनिश्चित करना होता है कि सत्य क्या है और झूठ क्या है।''[88] सभी उपलज्ध साक्ष्य इंगित करते हैं कि प्राचीन भारत में झूठी गवाही देने को बड़ी घृणा की दृष्टि से देखा जाता था।[89] तीसरी शताज़्दी ईसा पूर्व में मेगस्थनीज से लेकर 7वीं शताज़्दी ईस्वी में ह्वेनसांग तक सभी विदेशी यात्रियों ने इस बात की पुष्टि की है कि भारतीयों द्वारा अपने लौकिक संबंधों में सत्य का अज़्यास किया जाता था। मेगास्थनीज ने लिखा, ''सत्य का वे बहुत सम्मान करते हैं।''[90] फाह्यान और ह्वेनसांग (जो हर्ष के शासनकाल के दौरान भारत आए थे) ने

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83 वही 6/20/34, 35

84 वही 1/7/13; 2/75/57; 2/100/58, 59

85 वही 1/7/8

86 वही 2/100/60

87 वही 7 सर्ग 59 के पश्चात् अधिक पाठ सर्ग 1 श्लोक 19

88 विप्रतिपज्ञौ साक्षिणी मिथ्या सत्य व्यवस्था। – गौतम. 13, 1

89 A.L. Basham, *The Wonder that was India,* 116 (Crove Press, INC Newyork, 1954).

90 McRindle, Ancient India as described by Megathenes and Arian, 6. (Munshirm Manoharlal Pub Pvt Ltd, 2000)

ऐसे ही विचार व्यक्त किए हैं। जिस सदाचार का एक हजार साल तक अभ्यास किया गया, वह एक परंपरा बन गया।

न्यायालयों की प्रक्रिया और वातावरण झूठ को हतोत्साहित करते थे। शपथ स्वयं न्यायाधीश द्वारा दिलाई जाती थी, न कि आज की तरह किसी चपरासी द्वारा। शपथ दिलाते समय न्यायाधीशों को गवाह के सामने सत्य की एक गुण के रूप में प्रशंसा और झूठी गवाही की एक भयानक पाप के रूप में निंदा करती होती थी। बृहस्पति कहते हैं, ''धर्मशास्त्र में पारंगत न्यायाधीशों को सत्य की प्रशंसा करने वाले और (साक्षी के मन से) असत्य को हटाने वाले शज्दों से उसे संबोधित करना चाहिए।''[91] न्यायाधीशों द्वारा साक्षी को संबोधित करने हेतु कोई विनिर्दिष्ट शज्द नहीं थे, वरन यह उसमें ईश्वर का भय उत्पन्न करने के उद्देश्य से दिया गया एक नैतिक उपदेश होता था। इस बिंदु पर सभी ग्रंथ एकमत हैं।[92] नारद के अनुसार, ''न्यायाधीशों को सत्य को महिमामण्डित और असत्य को निन्दित करने वाले उपदेशों के दृष्टान्त देकर साक्षी में श्रद्धायुक्त भय उत्पन्न करना चाहिए।''[93] सभी स्मृतियों ने एकमत से माना है कि न्यायालय के समक्ष मिथ्या साक्ष्य एक जघन्य पाप के साथ-साथ एक गंभीर अपराध भी है।[94] मिथ्या साक्ष्य की आशंका को कम करने हेतु अन्य प्रावधान भी थे। कात्यायन ने बहुत सामान्यबोध का प्रयोग करते हुए कहा कि साक्षियों की परीक्षा में विलम्ब नहीं करना चाहिए - प्रत्यक्षत: इसलिए कि विलम्ब से स्मृति क्षीण हो जाती है और कल्पना को बढ़ावा मिलता है। ''शासक को साक्ष्य अंकित करने में किसी विलम्ब की अनुमति नहीं देनी चाहिए, क्योंकि विलम्ब से बहुत हानि होती है और साक्षी धर्म से दूर हो जाते हैं।''[95]

प्राचीन भारत की न्यायिक प्रणाली का एक महत्वपूर्ण भाग आपराधिक क्षेत्राधिकार वाले विशेष न्यायालय-कण्टकशोधन न्यायालय थे। अर्थशास्त्र के अनुसार, ''तीन आयुक्त (प्रदेष्टारा:) या तीन मंत्री अशान्त क्षेत्र में शान्ति स्थापना के उपाय करेंगे (कण्टकशोधनं)।[96] अर्थशास्त्र के अनुसार उक्त न्यायालय न केवल राज्य के विरुद्ध अपराधों का संज्ञान लेते थे वरन् वे कर्मचारियों द्वारा अपने अधिकारित कर्तव्यों के निर्वहन में किए गए विधि के उल्लंघन का भी संज्ञान लेते थे। अत: यदि व्यापारी गलत वजन तोलते या मिलावटी माल बेचते या अत्यधिक कीमत वसूलते, यदि कारखाने में श्रमिक को उचित से कम वेतन दिया जाता या वह अपना काम ठीक से नहीं करता तो दोषियों को

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91 सत्य प्रशंसा वचनैरवृज्ञे सस्यापवर्जनै:।
सज्यै: संबोधनीयाश्च धर्मशास्त्र प्रवेदिभि:।।

92 Manu, VIII, 79-87; Narada I, 200-228, katyayana, 388-390, Yajna-II, 273-74

93 पौराणधर्म वचनै: सत्य माहात्ज्य दर्शनै:।
अनृतस्यापवादैश्च मृशमुत्रासयेदपि।। -नारद स्मृति 1, 200

94 Brihaspati V, 34; Manu VIII, 80-87, Yajna-II, 73-74; Narada I, 220-238;

95 न काल हरणं कार्यं राज्ञा साक्षि प्रभाषणे।
महान दोषो भवेत्कालाद्धर्मव्यावृति लक्षण:।। कात्या. 359

96 प्रदेष्टास्त्रयो वाऽमात्या कण्टकशोधनं कुर्यु:। - अर्थशास्त्र 4, 1

दण्डित करने के लिए कण्टकशोधन न्यायालय हस्तक्षेप करते थे। कदाचार के आरोपित अधिकारी, चोरी, डकैती और यौन अपराधों के अभियुक्त इसी न्यायालय के समक्ष प्रस्तुत होते थे।

अर्थशास्त्र में ऐसे नियम भी हैं जिनसे यह संकेत मिलता है कि राज्य के व्यापारिक नौ-बेड़े खुले सागरों में चलते थे और इसमें यह प्रावधान है-''राजकीय जहाज़ों से बंदरगाह आने वाले यात्री अपना मार्ग-व्यय (यात्रा वेतनम) अदा करेंगे।''[97]

यात्रा वेतनं राजनौभिः सज्पतन्तः। -अर्थशास्त्र

उक्त मार्ग-व्यय की दरें नवाध्यक्ष द्वारा तय की जाती थी। प्रसंगवश, इस संहिता के अस्तित्व से निःसंदेह यह सिद्ध होता है कि भारतीयों के विदेशों से व्यापक व्यापारिक संबंध थे और वे समुद्र यात्रा किया करते थे।

इसी तरह विदेशों में वस्त्र निर्यात करने वाले वस्त्र व सूती धागे बनाने के विशाल उद्योग के सार्वजनिक और निजी क्षेत्र थे। सार्वजनिक क्षेत्र वस्त्र अधीक्षक (सूत्राध्यक्ष) के अधीन था। उनके अधीन एक बड़ा संगठन था। अर्थशास्त्र में सूत्राध्यक्ष और उसके अधीनस्थ अन्य कर्मचारियों के कर्तव्य बताए गए हैं। इसमें कहा गया है: ''बुनाई के अधीक्षक धागों (सूत्र), कवच (वर्म), कपड़ों (वस्त्र), और रस्सियों के निर्माण के लिए योग्य व्यक्तियों को नियुक्त करेंगे।''[98] उनका एक कर्तव्य महिलाओं को उनके अपने घरों में रोज़गार देना था। उनको कपास दिया जाता था और वे धागे बुनती थीं, जो या तो विभाग एकत्र कर लेता था या उन्हें महिलाएं पहुंचा देती थीं। लेकिन इन महिलाओं के साथ स्वतंत्रता लेने या उनका वेतन रोकने के विरुद्ध अर्थशास्त्र में कठोर नियम हैं। इसमें कहा गया है: ''यदि अधीक्षक का कोई कर्मचारी ऐसी महिला के चेहरे को घूरता है या उससे काम के अलावा बातचीत करने की कोशिश करता है (या एक अमेरिकन के शब्दों में- makes a pass at her) तो उसे ऐसे दंडित किया जाएगा जैसे वह पहली बार हमले का दोषी हो।''[99] ''वेतन के भुगतान में देरी भी दंडनीय होगी।''[100] एक अन्य नियम के अनुसार किसी महिला कर्मचारी पर अनावश्यक कृपा दिखाना एक दंडनीय अपराध था। इस नियम के अनुसार ''यदि कोई अधिकारी किसी महिला को बिना काम के मज़दूरी देता है तो वह दण्ड का भागी होगा।''[101]

विचारण सदैव खुले रूप से - और अनेक न्यायाधीशों द्वारा सामूहिक रूप से - होता था।[102] अत्यावश्यक मामलों को छोड़कर, सब मामले क्रमानुसार सुने जाते थे।[103] सभी विद्वानों ने मामलों के

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97 यात्रा वेतनं राजनौभिः सज्पतन्तः। -अर्थशास्त्र

98 सूत्राध्यक्षः सूत्रवर्म वस्त्ररज्जू व्यवहारं तज्जात पुरुषैः कारयेत्। - अर्थशास्त्र

99 स्त्रियां मुख सन्दर्शनेऽन्य कार्यं संभाषायां वा पूर्व साहस दण्डः।

100 वेतन कलाति पातने मध्यमः।

101 अकृत कर्म वेतन प्रदाने च।

102 नैक पश्येच्च कार्याणि वादिनो शृणुवाद्वचः।

103 रहसि च नृपः प्राज्ञः सज्याश्चैव कदाचन।। - शुक्र नीति 5, 6

निस्तारण में होने वाले विलम्ब की निन्दा की है और विलम्ब हेतु दोषी न्यायाधीश दण्ड के भागी होते थे।[104] शासक न्यायपालिका के कार्य में हस्तक्षेप नहीं कर सकता था किन्तु इसके विपरीत न्यायपालिका का यह कर्तव्य था कि वह राजा द्वारा गलत (न्यायिक) निर्णय पारित किए जाने पर हस्तक्षेप करे।[105] न्यायाधीशों के लिए निष्पक्ष होना आवश्यक था; जब वाद लंबित होता था तो उनका पक्षकारों से कोई व्यक्तिगत बातचीत करना या संबंध रखना निषिद्ध था। यदि कोई न्यायाधीश पक्षपात या उत्पीड़न करने का दोषी होता या वह निर्धारित प्रक्रिया का जानबूझ कर उल्लंघन करता तो वह दण्ड का भागी होता था। न्यायाधीश द्वारा भ्रष्टाचार करना जघन्यतम अपराध था और भ्रष्ट न्यायाधीश राज्य से निष्कासित कर दिया जाता था तथा उसकी सारी संपज़ि ज़्ज़्त कर ली जाती थी। वादों की प्रक्रिया विधि द्वारा निर्धारित थी, प्रत्येक वाद विधिक अपकृत्य के निवारणार्थ प्रार्थना करने वाले पीड़ित पक्ष द्वारा दायर एक परिवाद या वादपत्र द्वारा प्रारम्भ होता था।[106] यदि नागरिक हितबद्ध न हों तो परिवाद हेतु उकसाना या विज़पोषण करना अथवा उसे दर्ज कराना निषिद्ध था और जयांशभागिता (Champerty) एक दंडनीय अपराध था। एक आधुनिक अंग्रेजी लेखक के मत को उद्धृत कर दूँ: ''सैद्धान्तिक रूप से प्राचीन भारत की न्यायिक व्यवस्था कुछ मामलों में हमारे समय से आगे थी।''[107]

वाल्मीकि रामायण में वर्णित न्याय व्यवस्था की प्रासंगिकता विश्व में पहले भी अनेकों देशों यथा इन्डोनेशिया, जावा, सुमात्रा, कम्बोडिया आदि में भी और आज भी फिजी जैसे देशों में इसकी प्रासंगिकता के उदाहरण हमारे सामने दिखते हैं। अभी हाल ही में फिजी के उप प्रधान मंत्री श्री विमान प्रसाद ने अपने एक वक्तव्य में कहा कि भगवान राम की न्यायिक और गैर भेदभाव की शिक्षाओं ने फिजी के गिरमिटिया मजदूरों को प्रेरित किया। वे अपने साथ महाकाव्य (रामायण) की प्रतियां यात्रा के समय साथ ले जाते थे। श्री प्रसाद ने कहा कि हर फिजीवासी विशेष रूप से हिंदुओं के आस्था के केन्द्र अयोध्या का सम्मान करता है और भगवान राम के जीवन में व्याप्त गैर भेदभाव और न्याय की शिक्षा को अपने जीवन में उतारता है। हमारे पूवर्जों ने न केवल रामायण गायी बल्कि रामायण मंडलियों की स्थापना भी की, जो पीढ़ी दर-पीढ़ी उनकी न्यायिक शिक्षाओं को आगे बढ़ाती हैं।[108]

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104 क्रमगतादि वादांस्तु पशयेद्वा कार्य गौरवात्। - शुक्र नीति 5, 157

105 अर्थशास्त्र

106 शुक्र नीति पूर्वोक्त।

स्मृत्याचार व्यपेतेन मार्गेण घर्षितः परैः।

आवेदयदि यद्राज्ञे व्यवहार पदं हि तत्।। - "When a person who is the victim of a wrong in violation of the smritis and the custom of therealm files a plaint (or complaint) before the sovereign, this isthe commencement of a law suit (vyavahara)."

107 John W. Spellman, *Political Theory of Ancient India* 128 (Clarendon Press, Oxford).

108 The Hindu, 5 February, 2024

NOTES FROM FOREIGN JURISDICTION: THE KENYAN SUPREME COURT'S BBI JUDGMENT

Gautam Bhatia[*]

On 5th April 2022, a seven-judge bench of the Kenyan Supreme Court delivered judgment in *The Hon. Attorney General and Ors v David Ndii and Ors* ["the BBI Appeal"][1]. The judgment marked the judicial culmination of the constitutional challenge to the BBI Bill, which had proposed seventy-four amendments to the 2010 Constitution of Kenya.[2] Recall that the case came up in appeal from the judgments of – first – the High Court of Kenya[3], and then the Kenyan Court of Appeal[4], both of which had found the Bill unconstitutional for a variety of reasons. The Supreme Court, thus, was the third Court to hear and decide the issue; and over a period of one year, as many as nineteen judges heard and decided this case. The Supreme Court framed seven issues for judgment, which can be found in Martha Koome CJ's lead judgment (paragraph 35), and the seven judges wrote individual opinions.[5]

In this paper, I propose to analyse the judgments in the following manner. In the first section, I will consider the issue of the basic structure. In the second section, I will consider the issue of the popular initiative to amend the Kenyan Constitution under Article 257, and some of the remaining points in the judgment(s). In the final section, I will examine some of the potential implications of the judgment(s), going forward (for example, on the issue of whether referendum questions for constitutional amendment must be distinct and separate). It is safe to say that, as with the judgments of the two other superior courts, the range and novelty of the issues before the Court mean that its verdict will be studied across the world for a long time to come.

I: On the Basic Structure

Introduction

Hyper- Amendments and Tired Constitutional Amendment Process

Amendment, Repeal and the Basic Structure

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1 Petition No. 12 of 2021 (consolidated with Petitions 11 & 13 of 2021 – Building Bridges Initiative –Supreme Court of Kenya, available on: https://www.judiciary.go.ke/download/petition-no-12-of-2021-consolidated-with-petitions-11-13-of-2021-building-bridges-initiative-bbi-full-supreme-court-judgement/.

2 The Constitution of Kenya (Amendment) Bill, 2020.

3 Petition No. E282 of 2020 (Consolidated with Petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 and 2 of 2021) David Ndii & Ors. v. Attorney General & Ors.

4 [2021] KEHC 9746 (KLR), available on: http://kenyalaw.org/caselaw/cases/view/212141.

5 *Supra* note 1, para 35.

Part I: On the Basic Structure

On the Basic Structure: Introduction

Recall that the High Court (5-0)[6] and the Court of Appeal (6-1)[7] had both held that the basic structure doctrine was applicable in Kenya. In addition, both Courts (5-0 and 4-3) had also held that in concrete terms, this meant that any alteration to the basic structure of the Kenyan Constitution could take place only through an exercise of the People's primary constituent power, which existed outside of the Constitution. The primary constituent power was essentially the power to *make* or *remake* a Constitution, and would therefore could only be done under the framework within which the 2010 Constitution had originally been drafted. This – according to both Courts – required a four-step sequential process: civic education, public participation, a Constituent Assembly, and a referendum. The correctness of these findings was at issue before the Supreme Court.

The formal disposition of the Court indicates that on this point, the judgments of the High Court and Court of Appeal were set aside by a 6-1 majority (Ibrahim J the sole dissent); that is, the Supreme Court rejected the applicability of the basic structure doctrine and of the four-step sequential process in Kenya, by a 6-1 majority. I believe, however, that a close reading of the seven opinions reveals a somewhat more complex picture, which I will now attempt to demonstrate.

Hyper-Amendments and Tiered Constitutional Amendment Processes

In addressing the question of the basic structure, several judgments of the Supreme Court begin at a common starting point: what was the specific historical mischief that the Kenyan Constitution's amendment procedures (set out under Chapter XVI) were attempting to address?[8] The answer: a culture of "hyper-amendments" to Kenya's Independence Constitution. In the years after Independence, the old Constitution was often seen as an impediment by the Presidency, and as a result, a

6 *Supra* note 3.

7 *Supra* note 4.

8 Constitution of Kenya, 2010 Chapter 16: Amendment to the Constitution.

series of far-reaching amendments were passed that more or less entirely devalued its status as a founding charter (and invariably concentrated power in the office of the Presidency, at the cost of other State organs and the People (Ouko J, paragraph 1918, quoting Ghai/McAuslan).[9] Upon Kenya's return to multi-party democracy in the 1990s, and the eventual constitutional reform process, this culture of hyper-amendments was prominently in the minds of the People and of the drafters (see Koome CJ, paragraph 189 – 191[10]; Mwilu DCJ, paragraph 521[11]; Lenaola J, paragraphs 1415 – 1417[12]; Oukuo J, paragraph 1802[13]).

Up to this point, the opinions of the Supreme Court are in agreement with those of the High Court and the Court of Appeal. Drawing upon the historical record, the Supreme Court opinions then go on to argue that the Kenyan People therefore devised a solution to the problem of hyper-amendments, and *constitutionalised* it; in other words, the hyper-amendments were to be addressed by a solution *internal* to the 2010 Kenyan Constitution. This solution is to be found in Chapter XVI of the Constitution, and – in particular – in the *tiered amendment process* that it sets up. Article 255(1) of the Constitution "entrenches" certain provisions of the document.[14] For these "entrenched" provisions, the amendment procedure is far more onerous than for un-entrenched provisions, requiring a referendum with certain conditions (Article 255(2))[15], in addition to (or complementing) the Parliamentary amendment route (under Article 256)[16] or the popular initiative route (in Article 257)[17]. This tiered amendment process, according to the judges, thus creates a balance between constitutional flexibility and constitutional rigidity, and also "tames" the mischief of hyper-amendments (see Koome CJ, paragraphs 192 – 197[18]; Ndungu J, paragraphs 1161 – 1162[19]; Lenaola J, paragraph 1418[20]; Ouko J, paragraph 1803[21]).

Two conclusions follow from this, according to the Supreme Court. The first is that this history – and structure – of the 2010 Kenyan Constitution therefore distinguishes it from jurisdictions such as India (where the basic structure doctrine

9 *Supra* note 1, para 1918.
10 *Supra* note 1, para 189-191.
11 *Supra* note 1, para 521.
12 *Supra* note 1, para 1415-1417.
13 *Supra* note 1, para 1802.
14 *Supra* note 8, art. 255 (1).
15 *Supra* note 8, art. 255 (2).
16 *Supra* note 8, art. 256.
17 *Supra* note 8, art. 257.
18 *Supra* note 1, para 192-197.
19 *Supra* note 1, para 1161-1162.
20 *Supra* note 1, para 1148.
21 *Supra* note 1, para 1803.

first gained judicial acceptance). In India, where Parliament possesses the plenary power to amend the Constitution, the basic structure doctrine arises as a judicial response in order to protect the Constitution from parliamentary abuse. However, what in India requires the basic structure doctrine, is already provided for in Kenya through the tiered amendment process; in other words, *the tiered amendment process does the job that the basic structure doctrine is supposed to do* (Koome CJ, paragraphs 217[22]; Mwilu J, 401-402[23]; Lenaola J, paragraphs 1439 – 1442[24], 1451 – 1453[25]; Ouko J, paragraphs 1763 – 1781[26], 1811[27]). And secondly, the tiered amendment process – and its history – demonstrates that the People – in their capacity as framers of the Constitution – intended to make the amendment process *gapless*. The three pathways provided for under Articles 255 – 257[28] are exhaustive, and for this reason, the High Court and the Court of Appeal were incorrect to introduce a "judicially-created fourth pathway" to amendment (Koome CJ, paragraph 200).[29] Koome CJ also frames this another way, noting that the High Court and the Courts of Appeal failed to demonstrate what the *lacuna* was in Chapter XVI that necessitated the judicial creation of the four-step process (Koome CJ, paragraphs 200[30]; Mwilu J, 406).[31]

This snapshot, I believe, is an accurate summary of the reasoning of a majority of the judges in this case. To my mind, however, it also raises two interlinked issues, which– when scrutinised closely – somewhat complicate the final holding of the Court.

Amendment, Repeal, and the Basic Structure

It is, of course, entirely correct to say that the plenary power of parliament to amend the Constitution (as in India) is significantly distinct from the tiered amendment process under Articles 255 – 257; and, further, that this distinction is relevant when considering the question of the basic structure. However, it is equally important not to overstate the *sequitur*: it does follow from this – as I have argued previously[32]– that the *version* of the basic structure doctrine as developed in India

22 *Supra* note 1, para 217.

23 *Supra* note 1, para 401-402.

24 *Supra* note 1, para 1439-1442.

25 *Supra* note 1, para 1451-1453.

26 *Supra* note 1, para 1763-1781.

27 *Supra* note 1, para 1811.

28 *Supra* note 8, arts. 255-257.

29 *Supra* note 1, para 200.

30 *Ibid.*

31 *Supra* note 1, para 406.

32 Gautam Bhatia, *Notes From a Foreign Field: Some Thoughts on the Kenyan Court of Appeal Proceedings in the BBI Case*, Constitutional Law and Philosophy, available on: https://indconlawphil.wordpress.com/2021/07/25/notes-from-a-foreign-field-some-thoughts-on-the-kenyan-court-of-appeal-proceedings-in-the-bbi-case/ (last visited on January 22, 2024).

(i.e., a judicial veto over amendments) cannot be transplanted into the Kenyan context. However, this was not what the High Court and Court of Appeal did. Precisely because of the tiered structure of amendments under the Kenyan Constitution, the High Court and the Court of Appeal articulated a much more reduced role for judicial review: not a substantive veto over amendments (thus making every provision potentially amendable), but a *procedural role* to ensure that alterations to the basic structure could be done only through the primary constituent power.

Secondly – and connectedly – this flows from a conceptual point that is left unaddressed by the summary of the Supreme Court's argument that I have provided above: the distinction between *amendment* and *repeal* (express or implied). The tiered amendment process, the onerous requirements under Article 257 to prevent hyper-amendments, and the balance between flexibility and rigidity ensure that as a practical matter, in most circumstances, the basic structure doctrine will not *need* to be invoked, because the Constitution's internal mechanisms are far more effective for dealing with potential constitutional destruction (as opposed to, say, the Indian Constitution). The fact that the basic structure doctrine will almost never *need* to be imposed does not, however, address the point that it *exists* because of the conceptual distinction between amendment and repeal, and the fact that the Constitution – as conceded by Ouko J – "does not provide for its own replacement". [33]

Now, how do the judges of the Supreme Court deal with this point? Let us first consider the judgments of Ibrahim J (formally in dissent) and Dr Smokin Wanjala J (formally in the majority). Ibrahim J's judgment is straightforward: he agrees with the High Court and the Court of Appeal on the distinction between amend and repeal, the primary constituent power, and the four-step sequential process (see, in particular, paragraphs 724 – 725[34]). Let us now come to Smokin Wanjala J, because this is where things start to get interesting. Wanjala J objects to the abstract nature of the enquiry that has been framed before – and addressed by – the superior courts below (paragraph 1000)[35]. He notes:

> *Speaking for myself from where I sit as a Judge, and deprived of the romanticism of academic theorizing, it is my view that what has been articulated as "the basic structure doctrine", is no doctrine, but a notion, a reasoning, a school of thought, or at best, a heuristic device, to which a court of law may turn, within the framework of Article 259(1) of the Constitution, in determining whether, a proposed constitutional amendment, has the potential to destabilize, distort, or even destroy the constitutional equilibrium.* (emphasis supplied)

But when you think about it, this is – essentially – the basic structure "doctrine" (or the "basic structure heuristic device" if you want to call it that), without being

33 *Supra* note 1, para 1847.

34 *Supra* note 1, para 724-725.

35 *Supra* note 1, para 1000.

explicitly named as such: it is an interpretive method whose purpose is to prevent amendments that "destabilise, distort, or destroy the constitutional equilibrium." Importantly, both here – and in his disposition – Wanjala J explicitly considers Article 259(1)[36], which requires the Constitution to be interpreted in a manner that promotes its values and principles – as a *substantive* limitation upon constitutional amendments, in addition to the requirements of Chapter XVI. This is particularly clear from paragraph 1026:

> In this regard, I am in agreement with the observations by Okwengu and Gatembu, JJ.A to the effect that a proposed amendment must pass both the procedural and substantive test. Where I part ways with my two colleagues is at the point at which they base their substantive test not on the constitutional equilibrium in Article 259, but on a basic structure (Gatembu, J.A–Article 255(1) and Okwengu, J.A–the Preamble). By the same token, I do not agree with the submission by the Attorney General to the effect that any and every proposed constitutional amendment would be valid as long as it goes through the procedural requirements stipulated in Articles 255, 256 and 257 of the Constitution. Courts of law cannot shut their eyes to a proposed constitutional amendment, if its content has the potential of subverting the Constitution. (emphasis supplied)[37]

Now, with great respect, one may choose not to call something "the basic structure doctrine", but the statement that a Court of law can subject constitutional amendments to judicial review on the question of whether its "content has the potential of subverting the Constitution", one is doing what is generally understood to be basic structure review. It might be the case that its long association with the specific form taken in India has turned the basic structure doctrine into a bit of a poisoned chalice: in that case, there should of course be no problem in dropping the term, and simply stating that "constitutional amendments that subvert the Constitution are subject to judicial review." And in his disposition at paragraph 1122, Wanjala J agrees that while the four-step sequential process will not apply to constitutional amendments, it would nonetheless apply to "seismic constitutional moments" when the People are exercising their primary constituent power.[38]

We therefore already have a more complicated situation than what the final disposition of the Court suggests. That disposition suggests that a 6-1 majority rejected the basic structure doctrine. That is true, because Wanjala J does not believe

36 *Supra* note 8, art. 259(1).

37 *Supra* note 1, para 1026.

38 *Supra* note 1, para 1122.

that the basic structure doctrine is a "doctrine". But we already have two judges who accept the distinction between constitutional amendments and constitutional repeal (or subversion), and accept that in the latter case, the primary constituent power (with its four-step process) will apply.

I now want to consider the opinions of Lenaola J and Ouko J. To their credit, both judges recognise – and address – the issue of constitutional amendment *versus* constitutional repeal. In paragraph 1464, Lenaola J states:

> My point of departure with my learned colleagues is that the process presently in dispute was squarely anchored on Article 257 as read with Articles 255 and 256. I shall return to the question whether the Amendment Bill was in fact a complete overhaul of the present constitutional order or whether it was an amendment as envisaged by these Articles. Suffice it to say that, should the Kenyan people, in their sovereign will choose to do away with the Constitution 2010 and create another, then the sequential steps above are mandatory and our constitutional history will be the reference point (emphasis supplied).[39]

Thus, in paragraph 1464, Lenaola J explicitly recognises the distinction between "a complete overhaul" and "amendment", and also recognises that the 255 – 257 procedure only deals with the latter category.[40] Indeed, his primary point is that the BBI Bill was not, as a matter of *fact*, a "complete overhaul": in paragraph 1472, he asks "*why would dismemberment take centre stage when the issue before the courts below was amendment?*"[41] And most definitively, in paragraph 1473[42], he quotes Richard Albert's distinction between "amendment" and "dismemberment", with approval (paragraphs 1474 – 1475)[43]; indeed, in the paragraph he quotes, Albert specifically notes that "a dismemberment is incompatible with the existing framework of the Constitution because it seeks to achieve a conflicting purpose" – lines very similar to Wanjala J's articulation of constitutional "subversion." There is, admittedly, something of an internal tension in Lenaola J's opinion here: he appears, for example, to suggest later on that dismemberment necessarily requires *formally* enacting a new Constitution (see paragraph 1485)[44]. It is crucial to note, however, that this need not be the case: a Constitution's structure and identity (the language used by Richard

39 *Supra* note 1, para 1464.

40 *Ibid.*

41 *Supra* note 1, para 1472.

42 *Supra* note 1, para 1473.

43 *Supra* note 1, para 1474-1475.

44 *Supra* note 1, para 1485.

Albert, which Lenaola J cites with approval) can be "overhauled" by something as technically innocuous as changing a single sentence – or even a single word – in a single constitutional provision. For example, an amendment changing a polity from a multi-party democracy to a single-party State can be accomplished through a single sentence, but it is undoubtedly a constitutional dismemberment; another historical example is the Indian Supreme Court judgment in *Minerva Mills*[45], where the Constitutional amendment at issue had essentially made the Indian Constitution's bill of rights non-justiciable, as long as the government stated that it was carrying out a social policy goal. This had been accomplished by amending a part of a sentence in a sub-clause of one provision of the Indian Constitution.

A very similar tension is present in Ouko J's opinion. In paragraph 1838, he notes:

> Therefore, it is true to say that it is the prerogative of the people to change their system of government, but only by the people's exercise of their constituent power and not through the amendment procedure. And that is the difference between primary and secondary constituent powers, the former is the power to build a new structure by the people themselves and the latter, the power to amend an existing constitution. Today, under Chapter Sixteen, this power is exercised by the people and their elected representatives.[46]

Once again, we see the distinction between "amendment" and – in this case – "building a new structure" or "changing the system of government." This comes to a head in paragraph 1846, where she notes:

> It ought to be apparent from the foregoing that, I must come to the conclusion that a constituent assembly is an organ for constitution-making. An amendment of the Constitution under Chapter Sixteen does not recognize constituent assembly as one of the organs for the process. This Constitution, like the former Constitution does not contemplate its replacement.[47]

And in paragraph 1849:

> Therefore, the question to be determined here is whether the proposed amendments would lead to such egregious outcome. That they had the effect of repudiating essential elements of the Constitution—concerning its structure, identity, or core fundamental rights—and

45 *Minerva Mills* v. *Union of India*, AIR 1980 SC 1789.

46 *Supra* note 1, para 1838.

47 *Supra* note 1, para 1846.

> replacing them with the opposite features; a momentous constitutional change.[48]

Once again, with respect, one may choose not to call this "basic structure review", but what is happening here seems awfully close to "basic structure review" when courts or scholars *do* call it that. As with Lenaola J, Ouko J's primary discomfort appears to be with the Courts below having labeled the BBI Bill as akin to constitutional dismemberment. In paragraph 1858, he labels this as "overkill"; the point, however, is that this admits the principle: if indeed *any* kind of formal "amendment" was possible under Articles 255 – 257, then the question of substantively assessing the amendments themselves wouldn't even arise; indeed, it *doesn't* arise in Ndungu J's opinion, which is very clear on the point that there is no constitutional alteration that is outside the scope of Chapter XVI.[49]

Thus, we now have an even more complicated picture. Two judges out of seven (Ibrahim and Wanjala JJ) accept, in substance, the proposition that the four-step process applies to radical constitutional alteration that cannot properly be called an amendment. Two other judges (Lenaola and Ouko JJ) accept the principled distinction between constitutional "dismemberment" and "amendment"; Lenaola J appears to suggest that in the former case, you *would* need the four-step process, as it is akin to making a new Constitution, while Ouko J accepts Professor Akech's amicus brief on the point that the four-step process was not, historically, how the 2010 Constitution was framed; it is only an "approximation." Thus, we now have a situation where, in the disposition, six out of seven judges have rejected the applicability of "the basic structure doctrine", but (at least) four out of seven judges have accepted that there is a conceptual distinction between constitutional "amendment" and "dismemberment", the latter of which is outside the scope of Chapter XVI amendment processes (with three out of those four seeing space for the four-step process, and the fourth holding that it is an "approximation" of the founding moment).

What of the opinion of Mwilu DCJ? In paragraph 407, Mwilu J notes that:

> In my view, whether a Constitution is amendable or not, whether any amendment initiative amounts to an alteration or dismemberment and the procedure to be followed is a matter that would be determined on a case to case basis depending on the circumstances.[50]

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48 *Supra* note 1, para 1849.

49 *Supra* note 1, para 1858.

50 *Supra* note 1, para 407.

After then noting the distinction between "amendment" and "alteration" (paragraphs 418 – 419)[51], she then notes, at paragraph 421:

> The court always reserves the constitutional obligation to intervene provided that a party seeking relief proves to the court's satisfaction that there are clear and unambiguous threats such as to the design and architecture of the Constitution. (emphasis supplied)[52]

While this is also redolent of basic structure language, Mwilu J later goes on to note that while constitutional alteration must necessarily be an "extra-constitutional process" outside the scope of Articles 255 – 257, the exact form it might take need not replicate the manner of the constitutional founding: it may be through the "primary constituent power" *or* through "any of the other mechanisms necessary to overhaul the constitutional dispensation." (paragraph 437)[53] It is not immediately clear what these other mechanisms might be. Mwilu J's basic point appears to be that the mechanism by way fundamental constitutional alteration takes place cannot be *judicially determined*, as it is basically extra-constitutional. The corollary of this surely is, though, that to the extent that these fundamental alterations are sought to be brought in *through* the amendment process, they are open to substantive judicial review, as Mwilu J explicitly notes that those kinds of alterations "are not subject to referendum" under Article 255. In other words, Mwilu J's problem appears to be not with judicial review of formal constitutional amendments in order to decide whether or not they are fundamental alterations, but with what follows: i.e., the judiciary deciding that, in case it *is* a fundamental alteration, that it must be done through the four-step test. But the only other alternative that then reconciles all these positions is for the judiciary to *invalidate* radical constitutional alteration that is disguised as an amendment via the 255 – 257 route; in no other interpretation does paragraph 421, which calls for judicial intervention when the threat is to "the design and architecture of the Constitution", make sense.[54]

Finally, what of Koome CJ's opinion? While Koome CJ is clearest on the point of the tiered amendment process achieving the balance between rigidity and flexibility, her judgment does not address the distinction between "amendment" and "repeal." In paragraph 226, Koome CJ notes that any *amendment* to the Constitution must be carried out in conformity with the procedures set out under Chapter XVI; but that leaves the question unaddressed – what if it is alleged that the impugned amendment

51 *Supra* note 1, para 418-419.

52 *Supra* note 1, para 421.

53 *Id.* 1 Para 437.

54 *Id.* 1 Para 421.

is not an amendment, but an implied repeal?[55] In her summary of findings, Koome CJ notes further that the basic structure doctrine and the four step process are not applicable under the Constitution (paragraph 360)[56]; this is true, but also in substantial agreement with the case of the BBI challengers: the basic structure doctrine does not kick in as long as the formal amendment is actually an amendment, and as long as we are within the existing constitutional framework. It only applies when we are no longer under the Constitution.

Conclusion

Formally, by a majority of six to one, the Supreme Court rejected "the applicability of the basic structure doctrine" in Kenya. However, as I have attempted to show, a close reading of the seven judgments reveals a more complex picture. Consider a hypothetical future situation where a proposed amendment to the Constitution is once again challenged before the High Court, on the basis that it is not an amendment at all, but implied repeal, or repeal by stealth, or constitutional dismemberment. When the High Court looks to the Supreme Court for guidance, it will find the following:

1. A majority of six rejecting the applicability of the basic structure doctrine (from the disposition)
2. A majority of five accepting the distinction between "amendment" and "repeal" or "dismemberment".
3. A plurality of three explicitly noting that this distinction is subject to judicial review (with two others not taking an explicit position on this).
4. A plurality of three holding that in case an "amendment" is actually a disguised "repeal", the four-step test will apply (with an equal plurality of three against it, and one – Koome CJ – silent, as she does not draw a distinction between amendment and repeal).

In such a situation, how will the High Court proceed? That, I think, is something that time will tell.

Two final remarks. I think that a close reading of Koome CJ's judgment came close to resolving the bind outlined above, without explicitly saying so. In paragraph 205, she notes:

> The jurisprudential underpinning of this view is that in a case where the amendment process is multi-staged; involve multiple institutions;

55 *Id.* 1 Para 226.

56 *Id.* 1 Para 360.

> is time-consuming; engenders inclusivity and participation by the people in deliberations over the merits of the proposed amendments; and has down-stream veto by the people in the form of a referendum, there is no need for judicially-created implied limitations to amendment power through importation of the basic structure doctrine into a constitutional system before exhausting home grown mechanisms.[57]

Koome CJ dwells at length upon the extent and depth of public participation required under Articles 256 and 257, and effectively equated the process with the four step test, *sans* the constituent assembly: running through her judgment is a strong endorsement of the civic education, public participation, and referendum (after adequate voter education) prongs of the test. What this suggests is that it might be open to argue that the procedures for participation under Articles 256 and 257 do not *codify* the primary constituent power (because that is a conceptual impossibility), but *reflect* it. In other words, if you are following the procedures under Articles 256 and 257 (in the sense of deep and inclusive public participation, as set out in Koome CJ's judgment, and we will discuss some of that in the next post), you *are* exercising primary constituent power, and therefore, fundamental constitutional alterations are also possible as long as public participation happens in all its depth. This, I would suggest, might reconcile some of the potential internal tensions within some of the judgments, and also essentially keep the High Court and Court of Appeal's judgments intact, just without the Constituent Assembly.

Secondly, one thing that appeared to weigh with the Court was the fact that in the twelve years since 2010, there has been no successful attempt to amend the Kenyan Constitution, and all attempts – whether under Article 256 or Article 257 – have failed. This is true; however, what is equally true is that were the BBI Bill to succeed, we would go from no amendments in twelve years to seventy-four amendments in twelve years, making the Kenyan Constitution one of the most swiftly-amended in the world. If it is true, therefore, that the purpose of the tiered amendment structure is to find a balance between flexibility and rigidity, while also ring-fencing entrenched provisions, then this has certain inescapable conclusions for the interpretation of Article 257 – including the question of single or multiple-issue referenda. This will be the subject of the next two posts.

Part II: Understanding the Popular Initiative

The discussion above provides an ideal segue into the second major issue before the Court: the interpretation of Article 257 of the Kenyan Constitution[58], which

57 *Supra* note 1, para 205.

58 *Supra* note 17.

provides for constitutional change through the "popular initiative." Recall that other than the substantive challenge to the contents of the BBI Bill, another ground of challenge was that on a perusal of the record, His Excellency the President was the driving force behind the Bill (the High Court called him the "initiator"), going back to the time that he engaged in a "handshake" with his primary political rival at the time, the Hon. Raila Odinga. It was argued that Article 257's "popular initiative route" was not meant for State actors to use – and definitely not for the head of the executive to use. It was meant to be used by ordinary people, as a method for bringing them into the conversation about constitutional reform and change. The High Court (5-0) and the Court of Appeal (7-0) (see here) agreed with this argument; the Supreme Court (6-1) did so as well, although it split (5-2) on the question of whether the President had, actually, been impermissibly involved with the popular initiative in this case.

The Long Shadow of the Imperial Presidency

At the outset, it is important to note that Article 257 does not explicitly bar the President from being a promoter (the technical term) or an "initiator" of a popular initiative (Ibrahim J, paragraph 784).[59] Any restriction upon the President, in this regard, would therefore have to flow from an interpretation of the constitutional silences in Article 257.

How does the Supreme Court fill the silence? As with its analysis of the basic structure, the Court turns to history. Where the point of Chapter XVI was to provide internal safeguards against hyper-amendments, more specifically, Article 257 – as gleaned from the founding documents – came about as a response to the "Imperial Presidency": i.e., the period of time under Kenya's Independence Constitution, where power was increasingly concentrated in the hands of the President, and where the President was in the habit of simply amending the Constitution in order to remove impediments to the manner in which he wished to rule (Koome CJ, paragraph 243[60]; Mwilu DCJ, paragraphs 463, 472[61]; Wanjala J, paragraph 1046[62]; Ouko J, paragraph 1917-1918[63]).

This being the case, the Supreme Court holds, it would defeat the purpose of the popular initiative to let the President back in. The purpose of Article 257, according to the Court, is to provide an avenue for constitutional change to the People, as

59 *Supra* note 1, para 784.

60 *Supra* note 1, para 243.

61 *Supra* note 1, para 463, 472.

62 *Supra* note 1, para 1046.

63 *Supra* note 1, para 1917-1918.

distinct from State organs (Mwilu DCJ, paragraph 491[64]; Ibrahim J, paragraph 789[65]; Lenaola J, paragraph 1537[66]). In other words, the scheme of Chapter XVI – with its twin parliamentary (Article 256) and popular initiative (Article 257) routes – is to balance representative and direct democracy when it comes to constitutional change (Koome CJ, paragraphs 237 – 242[67]; Mwilu DCJ, paragraph 480[68]; Wanjala J, paragraph 1042[69]; Lenaola J, paragraph 1535[70]; Ouko J, paragraph 1900[71]). That balance would be wrecked if Article 257 was to be converted from a bottoms-up procedure for constitutional change to a top-down procedure, driven by the President.

This is a particularly important finding, whose implications extend beyond the immediate case. Recall that the contest over the interpretation of Article 257 was – as so much else in this case – a contest over legal and constitutional history. While the challengers to the BBI Bill told the story of the imperial Presidency, its defenders told a different story entirely: for them, Article 257 was not about constraining the President, but about enabling them. The situation that Article 257 envisaged was one where a recalcitrant Parliament was stymying the President's reform agenda; in such a situation, Article 257 allowed the President to bypass Parliament, and take their proposals directly to the People.

The contest, thus, was fundamentally about the relationship between power, Presidentialism, and the 2010 Constitution. Was the 2010 Constitution about constraining the imperial Presidency – or was it about further entrenching the power of the President vis-a-vis other representative organs? And thus, in answering the question the way it did, the Supreme Court not only settled the fact that the President could not initiate a popular initiative, but also laid out an interpretive roadmap for the future: constitutional silences and ambiguities would therefore be required to be interpreted against the President – and in favour of checks or constraints upon their power – rather than enabling their power. This is summed up in paragraph 243 of Koome CJ's opinion, which demonstrates the reach of the reasoning beyond its immediate context:

> In its architecture and design, the Constitution strives to provide explicit powers to the institution of the presidency and at the same time limit

64 *Supra* note 1, para 491.
65 *Supra* note 1, para 789.
66 *Supra* note 1, para 1537.
67 *Supra* note 1, para 237-242.
68 *Supra* note 1, para 480.
69 *Supra* note 1, para 1042.
70 *Supra* note 1, para 1535.
71 *Supra* note 1, para 1900.

> the exercise of that power. This approach of explicit and limited powers can be understood in light of the legacy of domination of the constitutional system by imperial Presidents in the pre-2010 dispensation. As a result, Chapter Nine of the Constitution lays out in great detail the powers and authority of the President and how such power is to be exercised. In light of the concerns over the concentration of powers in an imperial President that animate the Constitution, I find that implying and extending the reach of the powers of the President where they are not explicitly granted would be contrary to the overall tenor and ideology of the Constitution and its purposes.[72]

Furthermore, in this context, Koome CJ's endorsement of Tuiyott J's opinion in the Court of Appeal (Koome CJ, paragraph 256) becomes particularly important.[73] As Tuiyott J had noted, simply stating that the President is not allowed to initiate a popular initiative will not solve the issue; there are many ways to do an end-run around such proscriptions – for example, by putting up proxies (as arguably did happen in this case). What is thus required is close judicial scrutiny, and the need for a factual analysis that goes behind a proposed PI, in order to ensure that it is genuinely citizen-driven, and not a front for State actors (especially the President) (see also Mwilu J, paragraph 509, for some of the indicators, which she suggests ought to be addressed legislatively).[74] Indeed, a somewhat more formal reading of the process (with respect) led to Lenaola J dissenting on this point, and finding that the President was not involved, as it was not he who had gone around gathering the one million signatures for the popular initiative). Thus, how well the judiciary can police the bounds of Article 257 is something only time will tell; in the judgments of the High Court, Court of Appeal, and now the Supreme Court, the legal standards – at least – are in place.

Public Participation

The Supreme Court unanimously found that the Second Schedule to the BBI Bill – which sought to re-apportion constituencies – was unconstitutional. Their reasons for doing so differed: a majority holds that there was no public participation; Mwilu J also holds that the amendment was not in harmony with the rest of the Constitution (paragraph 533)[75] and Wanjala J says that it amounted to constitutional

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72 *Supra* note 60.

73 *Supra* note 1, para 256.

74 *Supra* note 1, para 509.

75 *Supra* note 1, para 533.

"subversion" (paragraph 1063)[76], on the basis that it amounted to a direct takeover of the functioning of the Independent Electoral and Boundaries Commission – raising some of the basic structure issues discussed in the previous post. On public participation with respect to the rest of the BBI Bill, the Court split 4 – 3, with a wafer-thin majority holding that – on facts – there had been adequate public participation in the process thus far. In this context, it is important to note that CJ Koome – one of the majority of four – notes elsewhere that the most intense public participation – that is, voter education etc – occurs at the time of the referendum (which had not yet happened in the present case).

A couple of other points arise for consideration on the point of public participation. The first is that in a dispute about whether or not there was adequate public participation, who bears the burden of proof? On my reading, a majority of the Court holds that it is the State organs who bear the burden of demonstrating that there was adequate public participation (Koome CJ, paragraph 270, 311[77]; Mwilu J, paragraphs 599, 604[78]; Ibrahim J, paragraph 849[79]; Wanjala J, paragraphs 1096 – 1097[80]). The rationale for this is set out by Ibrahim J at paragraph 849:

> With profound respect, as stated by Musinga, (P), the amendment of a country's constitution, more so our Constitution, should be a sacrosanct public undertaking and its processes must be undertaken very transparently and in strict compliance with the country's law.[81]

This chimes in with the Court's finding that the tiered amendment process under Articles 255 – 257 is an internal safeguard against abusive amendment; needless to say, if that interpretation is indeed correct, then within the scheme of Articles 255 – 257, constitutional silences should be interpreted in a manner that protects the citizenry from abusive amendments; one of the most important safeguards is public participation, and it there stands to reason that the burden of establishing it – especially where State organs are concerned within the scheme of Article 257 – should be on the State. In this context, it is interesting that other than repeatedly emphasising that Article 257 was an onerous, multi-step procedure whose very onerousness was designed to protect the basic features of the Constitution, Koome CJ is the only judge to both hold that the burden lay upon State organs, and to hold that the burden was discharged in this case.

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76 *Supra* note 1, para 1063.

77 *Supra* note 1, para 270,311.

78 *Supra* note 1, para 599, 604.

79 *Supra* note 1, para 849.

80 *Supra* note 1, para 1096-1097.

81 *Supra* note 1, para 849.

The second point about public participation is the Court's finding that it flows throughout the scheme of Article 257, with its specific character depending upon what stage the amendment process was at: at the promoters' stage, at the stage of the county assemblies, at the stage of the legislature, and at the stage of the referendum. A majority holds – and I think correctly – that at the initial stage – the promoters' stage – the burden is somewhat, especially given that this is the only stage where State institutions are not involved, and the burden falls upon the promoters, who are meant to be ordinary citizens. Given the contested facts in this case – which are discussed at some length in the separate opinions – it will be interesting to see how future judgments deal with the issue of public participation under Article 257, especially given the Court's finding that it is this tiered amendment process that is meant to protect against abusive amendments.

The Quorum of the IEBC

Recall that a key question before the High Court and the Court of Appeal was whether the IEBC, working with three commissioners, had adequate quorum, notwithstanding the fact that the Schedule to the IEBC Act fixed the quorum at five. The High Court and the Court of Appeal held that it did not have quorum; the Supreme Court overturned this finding.

The reasoning of the judges on this point overlaps, and can be summed up as follows: Article 250(1) of the 2010 Constitution states that "each commission shall consist of at least three, but not more than nine, members." This means that, constitutionally, a commission is properly constituted with three members. Any legislation to the contrary, therefore, must be interpreted to be "constitution-conforming" (in Koome CJ's words), and read down accordingly (Koome CJ, paragraph 325 – 326[82], 336 – 337[83]; Mwilu J, paragraph 661[84]; Wanjala J, paragraph 1113[85]; Ouko J, paragraphs 2060, 2070[86]).

With the greatest of respect, textually, this is not entirely convincing. If I say to you that "you may have at least three but not more than nine mangoes", I am leaving the decision of how many mangoes you want to have up to you; I am only setting a lower and an upper bound, but the space for decision within that bound is entirely yours. Similarly, what Article 250(1) does is set a lower and upper bound for Commissions and quorum, with the decision of where to operate in that space being left up to legislation (see Ibrahim J, paragraph 892). This point is

82 *Supra* note 1, para 325-326.

83 *Supra* note 1, para 336-337.

84 *Supra* note 1, para 661.

85 *Supra* note 1, para 1113.

86 *Supra* note 1, para 2060, 2070.

buttressed by the fact that under the Transitional Provisions of the Constitution, it is stated that "Until the legislation anticipated in Article 250 is in force the persons appointed as members or as chairperson of the Salaries and Remuneration Commission shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly." I would suggest that this indicates that the appropriate body for implementing Article 250 is the legislature, and consequently, questions about quorum and strength ought to be left to the legislature (subject to general principles of constitutional statutes and non-retrogression, discussed here).

Conclusion

There were, of course, other issues in the judgment that I have not dealt with here: the question of Presidential immunity, for example. In this post, however, we have seen that the overarching finding of the Court – that the tiered amendment procedure under Articles 255 – 257 is meant to provide an internal safeguard against abusive constitutional amendments and hyper-amendments – necessarily informed its interpretation of Article 257 itself; in particular, in holding that the President cannot initiate a popular initiative, that the burden of demonstrating public participation lies upon the State, and that public participation is continuing process flowing through the several steps of Article 257. In the final – and concluding – blog post, we shall examine some of the other implications of this logic, in particular upon issues such as distinct and separate referendum questions.

Part III: The Fourth Part/IEBC

Distinct and Separate Referendum Questions

Recall that one of the grounds on which the High Court had invalidated the BBI Bill was that all seventy-four amendments had been lumped together as a "package". The High Court had held that under Article 257, potential amendments would have to be placed before the People as *distinct* and *separate* referendum questions. The Court of Appeal was split on the point, but arguably, a majority of the bench held that at the very least, a "unity of theme" approach would have to be followed: that is, potential amendments that were thematically unrelated could not be lumped together in a package. The one exception was Tuiyott J, who held that the issue was not yet ripe for adjudication, as the IEBC was yet to frame the referendum question – or questions.

A majority of the Supreme Court agreed with Tuiyott J on this point. Thus, while the judgments of the High Court and Court of Appeal were set aside, the question still remains open for adjudication.

In my submission, however, while the Supreme Court did not explicitly decide the question, the overarching logic of its judgment(s) *strongly implies* that when the question does become ripe at some point in the future, the unity of content approach is to be followed.

The reason for this brings us back to our discussion in the previous post: going forward, any interpretation of Article 257 of the Kenyan Constitution must be informed by the Supreme Court's finding that the purpose of the tiered amendment process is to provide internal constitutional safeguards against abusive amendments, and – specifically – against the culture of hyper-amendment. Indeed, it is particularly interesting to note that for more than one judge, the fact that no constitutional amendment had been successfully pushed through in the twelve years of the existence of the 2010 Constitution was evidence that the internal safeguards were *working*.

But now consider the consequences had the High Court's judgment in May 2021 not stopped the (somewhat advanced) Article 257 in its tracks. Had the process been completed successfully, in one fell swoop, the Kenyan Constitution would have gone from having never been amended in twelve years, to having been amended seventy-four times in twelve years – and if anything can be called a "culture of hyper-amendment", seventy-four amendments in twelve years would surely fit the bill!

It is therefore not enough to say that the tiered amendment process provides an adequate internal safeguard against hyper-amendments. The tiered amendment process – as set out under Articles 255 – 257 – still leaves a range of interpretive questions open; and precisely how effective it is against hyper-amendments depends on how the courts answer those questions. It is easy to see that lumping all potential amendments into one referendum question is an enabler of hyper-amendments: as Musinga (P) rightly pointed out in the Court of Appeal, this enabled a culture where, in order to push through a potentially unpopular amendment, its proponents will include a range of "sweeteners" to make the Bill as a whole palatable – or, alternatively, raise the cost of not voting for it. One can see a direct link between this kind of constitutional jockeying and the culture of hyper-amendment. It is therefore my submission that the constitutional silence in Article 257 on the question of distinct and separate referendum questions ought to be resolved in favour of the unity of content approach, as that is the interpretation that would further the purposes of Article 257 in checking hyper-amendments. Indeed, this interpretive approach matches precisely the Supreme Court's approach to the popular initiative question. Article 257 was silent on whether the President could or could not initiate a PI. The Supreme Court engaged in a purpose interpretation of Article 257 to hold that he could not, because the contrary interpretation would defeat the objective

of the PI. The same considerations apply to the issue of distinct and separate referendum questions.

Constitutional Gaps

On at least two crucial issues, the Supreme Court's judgment was informed by a gap in the Constitution that was meant to be filled in by statute but hadn't yet been. The first was the issue of public participation. The second was the issue of the initiation of a popular initiative.

The first issue had also been discussed by the judges in the superior courts below: in the absence of a statute setting out the scope and content of public participation under the Article 257 process, the Courts were forced to stumble around a bit and search for the light, although the judges did eventually – relying upon the constitutional standard of public participation – return findings either way on the subject. Assuming, however, that at some point a law is passed that sets out its details, it will be interesting to see how the courts scrutinise its adequacy; any such scrutiny will now need to be judged against the standard of whether or not the statute can serve as a strong enough bulwark against abusive amendments and hyper-amendments; thus, issues such as time to scrutinise bills, language, accessibility, and so on, will need to be considered from this rubric.

The second issue finds mention in Mwilu DCJ's judgment, although its echoes are present from the High Court, to the Court of Appeal, and to the Supreme Court. This is the issue of the popular initiative: eighteen out of nineteen judges who heard this case agreed that the President cannot initiate a popular initiative under Article 257. The devil, however, is in the detail: in the present case, the President's involvement – through proxies – was too overt and too categorical for most of the judges to ignore. One can easily imagine, however, that stung by this reversal in all the Courts, a future President might just decide to be a lot more subtle about this, and put in substantially greater distance between themselves and their proxies. At the Court of Appeal, Tuiyott J, and at the Supreme Court, Koome CJ, both exhibited a keen awareness of this problem, but at the end of the day, beyond applying good judicial common sense, there is only so much that Courts can *directly* do to prevent executive "hardball". This is why Mwilu DCJ probably had it right when she listed out a range of issues – such as, for example, whether promoters could be members of political parties, or political parties themselves – that might arise in the future; and the fine-grained character of these issues indicates that they are better off addressed by the legislative scalpel rather than the judicial sledgehammer. Of course, the risk here is, given that Article 257 is meant to be a constitutional amendment route that serves as an *alternative* to Parliament, Parliament itself legislating on the scope of who can activate Article 257 will raise potential conflicts of interest. That is perhaps inevitable, and once again, it might just be the

case that the issue will ultimately find its way back to the judiciary, and that the courts will need to consider at what point the indirect involvement of State actors reaches a threshold where it starts to threaten the fundamental purpose of Article 257.

Indeed, there is good reason to think that the BBI litigation marks the beginning and not the end of the story. Coming away from the judgment, we find that there is a window open for judicial intervention to stop constitutionally destructive "amendments" (although it is no longer being called "the basic structure doctrine"), but the length, breadth, and design of this window is also … open (pardon the pun). We also find that it has now been firmly established that the purpose of Chapter XVI – and, specifically Article 257 – is to constrain the imperial Presidency, check abusive amendments, and safeguard against hyper-amendments. But as history shows, the imperial Presidency is not so easy to contain: its "taming" will need more than one set of judgments, but rather, it is a constitutional commitment that will need to be renewed and renewed again. Stopping subtle and indirect hijackings of Article 257, package deal referendums, and inadequate public participation (to name just a few threats) will all be part of that renewal.

Conclusion: Shadow and Light

It remains to end with a disclaimer (or two). As one of the *amici* before the Supreme Court of Kenya in the present appeal, my analysis is naturally situated within that broader context, and the arguments I have made in these three blog posts reflect some of the arguments in my *amicus* brief (I am particularly grateful to the Court for having admitted the brief, and then – across multiple judgments – engaged with the arguments closely and in depth). Indeed, these arguments reflect a broader set of intellectual commitments I bring to interpreting Constitutions: I believe that Constitutions are fundamentally about power relations, about deciding who has power and who doesn't, who gets to wield power and upon whom it is wielded, and how power (State power, in particular) is to be confronted, mitigated, and contained. Our task as interpreters is to try and ensure that Constitutions live up to their own goal (often stated in the Preamble) of democratising power, and of checking abuse and impunity.

Having had the opportunity to engage so deeply with these questions in the context of the Kenyan Constitution over the last one year has been a privilege. As an outsider who has tried to approach the subject with respect and humility, but who – no doubt – has often put his foot in it, it has been particularly wonderful to experience the openness and generosity with which the Kenyan interpretive community has treated me; for that, I am deeply grateful. After all, as Yvonne Owuor once wrote, there is a "*cartography not of possession, but of – how odd – belonging.*"

CONSTITUTIONAL VALIDITY OF THE CONSTITUTION (ONE-HUNDRED AND THIRD) AMENDMENT ACT, 2019: A COMMENT ON *JANHIT ABHIYAN* V. *UNION OF INDIA,* 2022

Shreyaman Bhargava & Rushank Kumar[*]

I. Introduction

INDIA IS a country with an extremely heterogeneous demography, both in terms of caste and class operating in its Society. The Constitution of India came into force in 1950 with an objective to undo all the inequalities that existed in a vastly diverse society. The apex court of the country has time and again reminded us that Indian Constitution is a living tree[1] and its Preamble "is the key to open the minds of the Constitution makers."[2] It talks about the obligation upon the state to ensure *Justice*- Social, economic, and political, and *Equality* of status & opportunity for all.[3] The Constitution of India talks about substantive equality. The constitution makers realized the need for affirmative action to address the history of injustices and systemic oppression faced by certain classes of the society and those found a place under article 15 and 16 of the Indian Constitution.

Article 15 clause 5 and clause 6 of the Indian Constitution, talks specifically about equality of opportunity in education while article 16 talks about equality of

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1 Yaniv Roznai (2014), "Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers", Thesis submitted to the Department of Law, London School of Economics and Political Sciences.

2 *In Re: The Berubari Union* [Berubari Case], AIR 1960 SC 845.

3 The Constitution of India, 1950, Preamble.

opportunity in matters of employment. Various clauses of these articles allow the state to make special provisions for women, children and persons belonging to socially and educationally backward classes of citizens including Scheduled Casters or the Scheduled Tribes in the matters of education and employment.[4]

In pursuance of this constitutional scheme of affirmative action, the Indian government at various instances has introduced reservations for these classes of citizens in the matters of employment. India's reservation policy, established in the early 1950s, is one of the world's oldest affirmative action programmes. Until 2019, 49.5 percent of seats in education and public appointments were reserved, with 15 percent, 7.5 percent and 27 percent quotas for Scheduled Castes, Scheduled Tribes and Other Backward Classes respectively.

II. Facts of the Case

On January 9, 2019, the parliament enacted the Constitution (One Hundred and Third Amendment) Act, 2019, which inserted clause 6 under the articles 15 and 16 of the Constitution of India respectively, allowing the state to make reservations in the unreserved category based on economic criteria, marking a shift from the earlier position where reservations were being made on the basis of social and educational backwardness.

The provisions read as-

> **Article 15[6]**- Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—(a)any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and(b)any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.
>
> Explanation —For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by

4 See The Constitution of India,1950, art. 15 (3), (4) and (5) and art. 16 (3), (4) and (5).

the State from time to time on the basis of family income and other indicators of economic disadvantage.[5]

Article 16(6) - Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten percent of the posts in each category.[6]

Thus, these provisions allowed the state to make reservations for the unreserved category based on economic criteria to the exclusion of the groups mentioned in clauses 4 and 5 of article 15 and clause 4 of article 16. Moreover, the term "economically weaker section" or EWS has not been defined neither in the Constitution at any point nor in the said amendment Act, leaving it open to the state to define it periodically. Following the amendment, the government introduced 10 percent reservation in addition to and exclusion of the existing reservation for the "Economically Weaker Section [EWS]". The requirements for being classed as EWS were independently declared by the government, and they presently comprise those having a household income of less than 8 lakhs per year and certain other criteria were also mentioned.[7]

The amendment came to be challenged in the case of *Janhit Abhiyan* v. *Union of India* (2019).[8] The matter was decided by a constitutional bench of then Chief Justice of India, U.U. Lalit and Justices Dinesh Maheshwari, S. Ravindra Bhat, B.M. Trivedi and J.B. Pardiwala.

III. Issues Raised

The bench considered the following issues[9]-

1. Whether the Constitution (One-Hundred and Third) Amendment Act, 2019 infringes the basic structure of the Constitution by providing reservation solely on economic criteria ?

2. Whether the Constitution (One-Hundred and Third) Amendment Act, 2019 infringes the basic structure of the Constitution by excluding SCs, STs and non-creamy layer of SEBCs from the benefits of 10% reservation for EWS category?

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5 The Constitution (One Hundred and Third Amendment) Act 2019, s 2.

6 *Id.*, s 3.

7 *Ministry of Social Justice & Empowerment O.M. No. F. No. 20013/01/2018-BC-II dated 17.1.2019* for the full notification.

8 *Janhit Abhiyan* v. *Union of India* (2023) 5 SCC 1.

9 *Id.,* Para 5.

3. Whether the Constitution (One-Hundred and Third) Amendment Act, 2019 infringes the basic structure of the Constitution by exceeding the 50% reservation cap determined by the Court in Indira Sawhney case?

4. Whether the Constitution (One-Hundred and Third) Amendment Act, 2019 infringes the basic structure of the Constitution by imposing EWS category to unaided private educational institutions?

The petitioners also argued that the amendment runs counter to the previous decisions of the Supreme Court in *Indra Sawhney* v. *Union of India*[10] which held that "a backward class cannot be determined only and exclusively with reference to economic criterion" and put a ceiling of 50 percent on the total reservations, and *Janki Prasad Parimoo* v. *State of JK*[11] which considered income levels to be incapable in constituting a homogenous class eligible for reservations. *Dayaram Verma* v. *State of Gujarat*[12] struck down income-based reservations on the same grounds.

The crux of the challenge to the amendment came from the following grounds-

1. Basic Structure Doctrine

The "Basic Structure Doctrine" is the judicial restraint on the amending power of the Parliament. It proposes that the parliament can amend the Constitution only to the extent that it does not violate the basic structure of the Constitution. It evolved through a history of challenges to the amendments made by the parliament to the Constitution post-independence.[13] The petitioners in this case argued that the Amendment Act in question violated the Constitution's 'fundamental structure' by seeking to unjustly benefit privileged segments of society that were neither socially and educationally backward nor poorly represented.

2. Purpose of Affirmative action

The petitioners argued that the concept of reservation envisaged by the constitutional makers was specifically designed for social and cultural reasons, and the addition of economic criteria would devalue their vision because the primary reason for the concept of reservation was to uplift and recognize historical injustices meted out to people belonging to backward groups and not to apply reservation

10 *Indra Sawhney* v. *Union of India*, AIR 1993 SC 477.

11 *Janki Prasad Parimoo* v. *State of JK,* 1973 AIR SC 930.

12 *Dayaram Verma* v. *State of Gujarat,* 2016 SCC OnLine Guj 1821.

13 *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461, which propounded the Basic Structure Doctrine. It emerged through a string of decisions in *Sankari Prasad Singh Deo* v. *Union of India*, AIR 1951 SC 458, *Sajjan Singh* v. *State of Rajasthan*, AIR 1965 SC 845, *I.C. Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643, and later clarified by *I.R. Coelho* v. *State of State of Tamil Nadu* (2007) 2 SCC 1.

as a welfare measure. The petitioners argued that affirmative action should not form a part of the "poverty alleviation" scheme.

3. Violation of equality provisions

Regarding the exclusion of Scheduled Castes (SCs), Scheduled Tribes (STs), and Other Backward Classes (OBCs), it was argued before the Court that the Amendment Act violated the fundamental Right to Equality because it did not apply to all persons, *i.e.,* it excluded certain sections from the scope of reservation. Essentially, economically disadvantaged groups that also belonged to the SCs, STs, or OBCs were unable to benefit from the EWS reservation. Thus, it was violative of equality provisions of the constitution.

4. Breach of 50 percent ceiling

The Amendment breached the Supreme Court's 50 percent reservation restriction laid out in *Indra Sawhney*. It was argued that such a ceiling restriction could only be exceeded in extraordinary circumstances, and that there was no reason to consider the current situation to be such an unusual condition.

IV. Decision and Observations

On November 7, 2022, the Bench rendered the Judgement in a 3:2 split, declaring the Amendment and EWS Reservations as valid. Justices Maheshwari, Trivedi, and Pardiwala wrote separate concurring opinions for the majority, while Justice Bhat dissented on behalf of himself and then Chief Justice U.U. Lalit.

Majority verdict

J. Maheshwari emphasised the significance of reservation as a 'tool of affirmative action' by the state. He demonstrated that it was not just a tool for integrating socially disadvantaged and backward groups, but also for any other disadvantaged sector or class. Using this reasoning, he concluded that reservation based merely on economic position was not legally unconstitutional. Furthermore, the exclusion of SCs, STs, and OBCs from economic benefits did not violate the right to equality and fair treatment. He determined that the maximum limit of 50 percent imposed by the Court in past rulings was not rigid, and hence breaching it did not violate any Constitutional principles. Maheshwari J. proposes that articles 15(6) and 16(6) create a new class altogether, one that isn't subject to that doctrine in the first place.

J. Pardiwala observed that in a society where only a tiny fraction of the population lives over the poverty line, individuals who are economically disadvantaged must have access to higher education and work prospects. He observed that in India, which has a population of over 1.4 billion, economic backwardness was not

restricted to those covered by articles 15(4) and 16(4).[14] As per him, with a rising number of members of disadvantaged classes achieving quality education and work, they must be removed from backward category quotas so that more attention may be given to others. J. Pardiwala emphasized the significance of developing a technique for identifying and distinguishing distinct members of the backward classes, as well as determining whether the standards used to classify disadvantaged sections are still valid today. J. Pardiwala maintained that reservations for the EWS group are also consistent with the identification principles outlined in article 16 and cites *Chitralekha*[15] to support his observation. *Chitralekha* was regarding the legitimacy of a quota plan that assessed eligibility based on income level and work type rather than caste. The overall premise of Chitralekha was that a backward class may be created using non-caste criteria as long as the other criteria can be used to form a homogeneous class. The Court affirmed the adoption of these criteria, stating that the challenged method was successful in creating a class that was completely backward and homogeneous.

J. Pardiwala defines the idea of an amendment, and how the foundational structure is to be looked upon while examining the validity of any amendment. Any amendment shall further strengthen the Constitution and align it with the requirements of the ever-evolving society by correcting or modifying the existing structure, but without endangering the whole identity of the Constitution when read in its entirety or as one single whole. Any amendment that shakes the core philosophies or central theme of the Constitution shall not be considered as an amendment but an attempt to re-create or re-do the will of the people of India, *i.e.,* The Constitution.

J. Pardiwala goes on to further explain the reasons about the apprehension surrounding the amending powers conferred to the Legislature that can possibly lead to a collapse of the constitutional machinery. This could also be very clearly observed by the fact that there was no consensus on what shall constitute as a "***Basic Structure***" by the judges who gave the majority judgment in the case of *Kesavananda Bharati* v. *Union of India*, which in turn complicated things further and presently act as a main impediment in the way keeping the tree alive. He further adds, if the powers and procedure to amend the Constitution could never have been the motto of the Constitution Makers, as we have taken the idea of amendment from other countries which themselves have used the term in the widest possible sense, so as to allow the future generation to make amendment as per the needs of the ever evolving society and to avoid the chance of revolutions due to lack of flexibility.

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14 Janhit Abhiyan, Para 281.

15 *R. Chitralekha* v. *State of Mysore*, 1964 AIR SC 1823.

J. Bela M. Trivedi, in her concurring opinion, observed that "equality of opportunity would also mean fair opportunity not only to one section or the other but to all sections by removing handicaps if a particular section of the society suffers from them." She stressed the 'Statements of Arguments and Justifications for the Constitution's (One Hundred and Third Amendment) Bill' and highlighted the fact that a substantial portion of the economically disadvantaged were unable to acquire a proper education owing to financial restrictions. They lacked the funds and resources to pay for their education, and they were ineligible for reserve benefits. As a result, the government enacted the currently controversial Amendment Act. She observed that the legislature's laws were enacted to address the needs of its constituents, which became obvious through experience. As a result, any such modification could not be ruled arbitrary or discriminatory provided the state of facts were fairly constructed to support it. This Act was a type of affirmative action established by Parliament for the advancement of economically disadvantaged groups. She also saw the economic criteria as inextricably linked to the notion of 'distributive justice' outlined in the Preamble and articles 38 and 46. Trivedi J. concurred with Maheshwari J., stating that EWS is a distinct class to whom former articles 15/16 do not apply and thus basic structure doctrine cannot be imported on them.

Thus, the majority opinion of the bench answered to the issues in the following manner-

1. The Constitution (One Hundred and Third Amendment) Act, 2019 does not infringe on the basic structure of the Indian constitution by providing reservations on the grounds of economic criteria and was thus upheld as constitutional.

2. The Constitution (One Hundred and Third Amendment) Act, 2019 does not infringe on the basic structure of the Indian constitution by removing SCs, STs, OBCs, and SEBCs, from the reservation made for EWS.

3. The Constitution (One Hundred and Third Amendment) Act, 2019 does not infringe the 50% cap determined by the court in its previous decisions.

4. The Constitution (One Hundred and Third Amendment) Act, 2019 does not infringe on the basic structure of the Indian constitution by imposing EWS reservations to unaided private institutions.

V. Dissenting Opinion

J. Bhat for himself and CJI, Justice U.U. Lalit, in their dissent, agrees to the idea to insert an "economic criteria" so as to facilitate the process of upliftment of the poverty-stricken section of the society, but expresses his disagreement towards the

amendment as it violates and attempts to violate the basic structure of the Constitution. He specifically mentions the shift for the historic basis for grant or continuation of the reservation, *i.e.,* social and educational background, to purely economics is a violation of the fundamental principles, thereby also excluding the poorest strata of the society which falls prey to both social and economic backwardness.

It was not only J. Bhat but also J. UU Lalit who agreed with the majority opinion insofar as it talked about the use of economic criteria to frame an affirmative action scheme to uplift persons who are economically backwards, they did not agree to the exclusion of the class of persons mentioned in clause [4] in the amendment act.

In para 60 of the judgement while starting with his dissent with the majority opinion, J. Bhat observed that constituent drafters:

> … went to great lengths to carefully articulate provisions, such that all forms of discrimination were eliminated … to ensure that there was no scope for discrimination of the kind that the society had caused in its most virulent form in the past, before the dawn of the republic. These, together with the affirmative action provisions … was to guarantee that not only facial discrimination was outlawed but also that the existing inequalities were ultimately eliminated.

In the next line of argument in his dissent, J. Bhat observed that this vision of equality as given in the Constitution of India is part of its basic structure and no amendment can change it. [16]

> [T]he irresistible conclusion is that non-discrimination—especially the importance of the injunction not to exclude or discriminate against SC/ST communities [by reason of the express provision in articles 17 and 15] constitutes the essence of equality: that principle is the core value that transcends the provisions themselves; this can be said to be part of the basic structure.

J, Bhat also observed that the amendment fails to make a reasonable classification and thus fails the test of art. 14 of the Constitution.[17] Moreover, J. Bhatt observed that poverty is an *individual* disadvantage, in the sense that it is not reducible to ascriptive identity—for example, caste—even though it is the result of structural features in the economy. As he avers: [18]

16 Janhit Abhiyan, Para 77.

17 The Constitution of India, 1950, art 14.

18 Janhit Abhiyan, Para 97.

> [The] goal of empowerment through 'representation', is not applicable in the case of reservations on the basis of economic criteria—which as the petitioners laboriously contended, is transient, temporary, and rather than a discernible 'group', is an individualistic characteristic.

The Constitution attempted to eliminate disparities caused by caste hierarchies, which limit an individual's potential based on an accident of birth. Ambedkar famously characterized caste as a 'contained class', and it cannot be fleeting or temporary. Poverty's transience is vital to remember since reservations are largely a strategy for achieving representation in institutions for populations who have historically been denied this privilege. J. Bhat ruled that the Amendment broke the basic framework, thus he did not need to determine if violating the 50 percent cap also violated it.

Thus, his dissent criticizes the majority decision's weakening of reservations, which was initially intended to correct decades of prejudice. Bhat J's dissent articulates a transformational vision of our constitutional identity, one rooted in a history of fighting to guarantee oppressive systems and achieving substantive equality rather than formal equality.

VI. Basic Structure Doctrine Test v. Article 14 Test

Article 14 along with article 19 and article 21, also known as the golden triangle, in several judicial precedents have been established as an inseparable part of the Constitutions. Article 14 lays down the very basis and sets boundaries for any legislative action taken by the Parliament or the Executive to be reasonable and non-arbitrary, to make available to all its citizens. Equality Before Law and Equal Protection of Law. The test entails two basic ingredients, test of non-arbitrariness and test of reasonability of the legislation. Based on these two parameters or tests the courts look into the validity of the legislation.

The "basic structure" of the Constitution of India, as laid down by the Hon'ble Supreme Court of Indian, in the case of *Kesavananda Bharati*. However, the Supreme Court time and again has repeated that it would be very difficult to establish a straight jacket formula to define "basic structure", but in the case of *Minerva Mills* v. *Union of India,*[19] the Apex Court laid down a test to check whether any actions (law or enactment) of the Legislature or the Executive is violative of the "basic structure" or not. The test of Basic Structure is not supposed to be a very tricky one but a very simple one that just require the courts to carefully examine the impact of the legislative action on the Constitution as a whole. If it appears that the legislative action impacts the meaning or essence of the Constitution when

19 *Minerva Mills* v. *Union of India,* AIR 1980 SC 1789.

read as one whole and is not in line with what was desired by our Constitution Makers, then the action *ultra vires* to the basic structure.[20]

In this particular judgment, it is very difficult to find a clear distinction between article 14 test and Basic Structure Doctrine test, as both of them seem to be one and the same and at many places overlapping, as no clear distinction has been laid which has been critiqued by many after the judgment came in, as it may open the floodgates for several challenges to the tests and their accuracy in the future through various cases.

VII. Sphere of Action: Limitations

The judgment has been criticized for pitting caste against class. On a closer look, this judgment marks a clear and authoritative shift in the scheme of affirmative action and discrimination law of the country. The five-judge bench unanimously upheld that economic backwardness is a legitimate marker of discrimination and can be used as a basis to offer affirmative action for individuals belonging to such classes. Thus, this ruling may have repercussions beyond just preserving the constitutional validity of the Amendment. It may open the way for the identification of a new form of prejudice altogether and increases the scope of constitutional interpretation.

The judgment also offers a discordant picture on the meaning and interpretation of article 15(1).[21] As per J. Pardiwala the exclusion of groups covered by articles 15(4), (5), and 16(4) was not violative of article 15(1) as there was no reason to extend a second benefit to those classes who were already provided with affirmative action. He argued that compensatory discrimination could not be enacted in favour of the EWS without excluding groups already protected. Based on these reasons, J. Maheshwari opined that there was no violation of the basic structure. However, J. Bhat observed that article 15(1) of the Constitution prohibits discrimination based on race, caste, gender, religion, or place of birth. These grounds cannot serve as intelligible differentia. The State cannot exclude someone based on these grounds.[22] The correct position is to be decided by future benches. It also needs to be seen whether the state can increase the 10 percent reservation and if the 50 percent ceiling exclusively applies to reservations established under article 16(4) or

20 Samanta, N., Basu, S., W.B. National University of Juridical Sciences, Prof. Mahendra P. Singh, Ms. Jasmine Joseph, and Ms. Payel Roy Chowdhury. (2008). TEST OF BASIC STRUCTURE: AN ANALYSIS. In NUJS LAW REVIEW (Vol. 1, p. 500), *available at:* https://docs.manupatra.in/newsline/articles/Upload/EC5E2ACD-7E92-4FBD-A268-E518A555D83A.pdf (last visited on July 23, 2024).

21 The Constitution of India 1950, art 15.

22 *Janhit Abhiyan*, *supra* note 1, para 504.

to all reservations. On December 6, 2022, the *Society for the Rights of Backward Communities* filed a review petition disputing the decision to enable EWS reservations. On May 9, 2023, a five-judge panel led by Chief Justice of India D.Y. Chandrachud rejected the plea.[23]

23 Service, E. N. (2023, May 17). "SC junks pleas challenging 10 per cent EWS quota ruling", *The Indian Express*, May 17, 2023, *available at:* https://indianexpress.com/article/india/sc-junks-10-per-cent-ews-quota-8613682/ (last visited on September 25, 2024).

KESAVANANDA BHARATI CASE - THE UNTOLD STORY OF STRUGGLE FOR SUPREMACY BY SUPREME COURT AND PARLIAMENT (2014) by T R Andhyarujina. Published by Lexis Nexis. Pp. 300. Price 400/- ISBN: 978-9389991031

*Anuj Aggarwal**

In Review: The Kesavanada Bharti Case

Almost 50 years ago, the *Kesavananda Bharati*[1] case marked the climax of a protracted struggle between the judiciary and the executive over the ultimate authority regarding the permanence of constitutional provisions as they were originally adopted in 1950. The Constitution of 1950 was markedly different from the one in force today. It included an additional fundamental right under Article 19 (f), granting every citizen the right to acquire, hold, and dispose of property. Corresponding to Article 19 was Article 31, which provided protection against the state's arbitrary acquisition of property without the payment of reasonable compensation.

Today, both these Articles have been omitted from the constitution. The discussion on the right to property has largely subsided. The executive now holds supreme authority over the country's economic policy. However, amidst these changes, the *Kesavananda Bharati* case preserved something invaluable. It gave rise to a doctrine that has become ubiquitous in the legal realm: the basic structure doctrine. In essence, this doctrine stipulates that while Parliament can amend all parts of the constitution, it cannot alter its basic structure.

'The Kesavananda Bharati Case' by the Late T.R. Andhyarujina is a brisk recounting of how this doctrine came about, the events leading up to the case, the hearing, and its immediate aftermath. A junior lawyer to Mr. H.M Seervai at the time, Late Mr. Andhyarujina maintained a day-to-day diary of the longest hearing ever before the Supreme Court.

At the time when the case reached the Supreme Court, the country was undergoing intense political upheaval. About six years earlier, in the *Golak Nath*[2] case, the Supreme Court had ruled that Parliament had no authority to amend the Fundamental Rights enshrined in the constitution. This decision marked a significant departure from its previous rulings in the *Shankari Prasad*[3] case and the *Sajjan*

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1 AIR 1973 SC 1461.

2 AIR 1967 SC 1643.

3 AIR 1951 SC 458.

Singh[4] case, where it had upheld constitutional amendments altering the fundamental right to property.

In response to the *Golak Nath* ruling, the government retaliated by introducing the 24th amendment to the constitution, granting it full authority to amend the constitution. Subsequently, after losing the *Bank Nationalization*[5] case and the *Privy Purses*[6] case before the Supreme Court, the government introduced the 25th and 26th constitutional amendments. These amendments effectively overturned the rulings in these cases. The 25th amendment, in particular, further diluted the fundamental right to property by replacing the word 'compensation' in Article 31(2) of the Constitution with the word 'amount.' This change aimed to prevent the courts from invalidating government acquisitions on the grounds of inadequate compensation. The 24th and the 25th amendments were under challenge before the Supreme Court when it sat to decide the *Kesavananda Bharati* case.

The book recounts how, for the first time in the 1970s, the government began to interfere in judicial appointments following successive losses before the Supreme Court. It appointed a committee comprising the then Law Minister, Mr. H.R. Gokhale, the Minister for Steel, Mr. Mohan Kumarmangalam, a lawyer and former communist who had served as an advocate-general of Madras in the Golak Nath case, and the Minister for Education, Mr. S.S Ray, who was also a lawyer.

As a result, when the *Kesavananda Bharati* case came up for hearing before a 13-judge bench, it was populated with judges predisposed to the government's perspective. These included Justices Palekar, Mathew, Beg, and Dwivedi. Justice A.N. Ray, who dissented in the *Bank Nationalization* case, had already demonstrated a pro-government stance on matters relating to constitutional limitations. Justice Y.V. Chandrachud, then a recently appointed junior judge, initially remained undecided but eventually aligned with the government's position at the eleventh hour.

The book vividly depicts the division among the bench during the hearing. The Petitioner, represented by the formidable lawyer Nani Palkhivala, answered all the questions raised by the judges who displayed a pro-petitioner stance namely Justices Shelat, Hedge, and Grover, as well as Chief Justice Sikri. However, he often ignored Justices Ray, Mathew, and Palekar. Equally antagonistic was the then Attorney General, Niren De, who engaged in many sharp exchanges with Chief Justice Sikri and Justices Shelat and Hedge.

When the judgment was delivered, this division was apparent. The judges siding with the Petitioner included Chief Justice Sikri, along with Justices Shelat, Grover,

4 AIR 1965 SC 845.
5 AIR 1970 SC 564 .
6 AIR 1971 SC 530.

Hedge, Mukherjea, and Reddy. Justice Mukherjea, who also ruled in favor of the Petitioner, was the only newly appointed judge to do so. Conversely, Justices Ray, Palekar, Mathew, Beg, Dwivedi, and Chandrachud sided with the government's stance. Who then tipped the scales? It was Justice H.R Khanna, whose opinion also imposed limitations on the amending power of the government.

Interestingly, the book presents the radical notion that there is no clear majority opinion expressed in the *Kesavananda Bharati* case, a view that was widely held in the immediate aftermath of the judgment. This ambiguity arises from the fact that Justice Khanna's decisive opinion offered a distinct rationale for his belief in limitations to parliamentary amending power. According to him, such limitations were implicit in the term "amendment," which implied the retention of the Constitution's basic structure and framework even after an amendment.

Curiously, shortly after the verdict was delivered, Chief Justice Sikri circulated a document titled "*The View by the Majority*," signed by nine out of the thirteen judges on the bench. Point number 2 of this document asserts that Parliament cannot alter the basic structure of the Constitution under Article 368 of the Constitution of India. However, this document was circulated at the eleventh hour and cannot strictly be considered as a true majority view, as the opinions of the judges were sharply divided.

The late T.R. Andhyarujina, in his book, recounts Seervai's perspective, who, as a renowned constitutional jurist, believed that only a subsequent constitution bench analyzing the *Kesavananda Bharati* judgment could determine the true majority opinion in the matter. However, subsequent judgments avoided this task of discerning the majority opinion in Kesavananda Bharati case. Even in the *Minerva Mills*[7] case, Justice Bhagwati expressed the opinion that the "View by the Majority," signed by nine judges, held no legal weight, as the bench had become functus officio after delivering the judgment and lacked the authority to extract the ratio of the judgment.

Meanwhile, in response to the Kesavananda Bharati judgment, the government took drastic action by superseding the next three most senior judges of the Supreme Court and appointing Justice Ray as the Chief Justice. Justices Shelat, Grover, and Hedge resigned in protest soon after. The legal community erupted in widespread protests against this appointment, with former Chief Justice Hidayatullah criticizing it and remarking that it was not an appointment aimed at fostering forward-looking judges, but rather judges angling for the office of Chief Justice

At the helm, Chief Justice Ray attempted to overturn the *Kesavananda Bharati* case through a *suo moto* review. However, Nani Palkhivala returned to court to vehemently

7 AIR 1980 SC 1789.

defend the attempt to overturn the judgment. The book recalls how Justice H.R Khanna termed Palkhivala's advocacy as the height of eloquence which will never be surpassed in the Supreme Court. Palkhivala's forceful argumentation swayed many judges on the bench, leading to the dissolution of the review within three days of its convening.

The basic structure doctrine, as explored in the book, has undeniably endured the test of time, firmly embedded itself in the Indian jurisprudence. Illustrated in cases like the *I.R. Coelho*[8] case, where the Supreme Court applied the doctrine, it stands as a powerful tool to strike down amendments that threaten the fundamental framework of the constitution, a principle established post the *Kesavananda Bharati* Judgment.

The book offers a lucid commentary on the tumultuous events that shaped the formulation of this doctrine, including the hurdles such as Justice Beg's illness towards the end of the hearing in the case and Justice Chandrachud's last-minute alignment with the government's position. It delves into the inner workings of judicial decision-making, shedding light on the factors influencing appointments and opinions on the bench.

Andhyiarujina's book displays an overview on the critical history of judgements which has highlighted the structural matter of constitutional doctrine in a linear progression. His "speculative" criticism on the judgements itself presents a further challenge to a cognate reader. Many of his selective examples to prove his postulates are factually compromised lacking a coherent analysis, which rather seems like a wool-gathering on his biased fervours. In his criticism on the "basic structure of the doctrine", he leads an argument overseeing the composite purpose and nature of the doctrine itself. His structural analysis, based on the judgments, foregrounds the principal flaw in the contention of its validation towards safeguarding the "constitutional democracy", although his own intentions towards examining the legal growth of the doctrine are potentially questionable to a reader, already aware of history of political development around the making of the doctrine and his own critical deafness rooted in current political positions.

With its succinct yet informative narrative spanning just 130 pages, this book is a valuable resource for anyone interested in constitutional law and the evolution of the basic structure doctrine. I highly recommend it for its comprehensive insights and clear exposition of lengthy judgments and complex legal concepts.

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8 AIR 2007 SC 861.

भारतीय संविधान के अंतर्गत बुनियादी संरचना का सिद्धांत

माननीय न्यायमूर्ति रोहिंटन नरीमन[1]

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1 मद्रास उच्च न्यायालय बार एसोसिएशन, मदुरै, में न्यायमूर्ति रोहिंटन नरीमन का संबोधन यहाँ देखें. https://www.youtube.com/watch?v=cvUf9ZeEeY यह संबोधन 2015 का है. सम्पादकीय टोली ने कुछ गिने चुने स्थानों पर इसे अद्यतन किया है और अपनी टिपण्णी भी यदा कदा दी है.

अनुवादक और समीक्षकः अविनाश कुमार, असिस्टेंट प्रोफ़ेसर, वीप्स, नई दिल्ली; हिमांशु दीक्षित, एलएल एम [भारतीय विधि संस्थान; नई दिल्ली] चंद्रशेखर मिश्र, शोध छात्र-विधि, दिल्ली विश्वविद्यालय और जर्नल की संपादन टोली.

इंदिरा गांधी मामला और आपातकाल के प्रभाव [*Indira Gandhi* case and Impact of Emergency]

VI. निष्कर्ष [Conclusion]

I. परिचय [Introduction]

'बुनियादी संरचना के सिद्धांत की अवधारणा' को 'निहित सीमाओं की अवधारणा' [concept of implied limitation] के माध्यम से प्रस्तुत करने का काम संविधान विधि के मूर्धन्य मर्मज्ञ विद्वान अधिवक्ता एम् के नाम्बियार (विद्वान अधिवक्ता पूर्व महान्यायवादी के. के. वेणुगोपाल के पिताश्री) ने किया. सर्व श्री नाम्बियार जी ने एके गोपालन[2] और गोलोकनाथ[3] में निहित सीमाओं का तर्क किया था जिसे उच्चतम न्यायालय ने अस्वीकार कर दिया था.[4] हमें भारत के संविधान में बुनियादी संरचना और निहित सीमा जैसे शब्दों को भली भांति समझने के लिए, थोड़ा पीछे जाने और विषयांतर करने की आवश्यकता है। हमारे संविधान सभा में ऐसे कई सदस्य थे जिनके सामने दुनिया के अनेक संविधान थे जिनके अध्ययन के बाद अनुच्छेद 368 तैयार हुआ. चूंकि बुनियादी ढांचा अनुच्छेद 368 से ही जुड़ा है इसलिए पहले यह जानना आवश्यक है कि अनुच्छेद 368 क्या है? इसके बाद हम देखेंगे कि संविधान सभा के समक्ष किस-किस प्रकार के मॉडल थे जिसके आधार पर अनुच्छेद 368 जैसा प्रावधान बन कर तैयार हुआ।

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2 *AK Gopalan* v. *State of Madras*, AIR 1950 SC 27.

3 *I.C. Golaknath* v. *State of Punjab*, AIR 1967 SC 1643.

4 Soli J. Sorabjee, "From *Gopalan* To *Golaknath,* And Beyond: A Tribute To Mr. M K Nambyar," "It is remarkable that the very arguments advanced by Nambyar in *Gopalan's* case in 1950 as well as in *Golaknath's* case in 1967 regarding implied limitations were subsequently accepted by the Apex Court. *Indian Journal of Constitutional Law*, 2007, vol 1, issue 1, pg 19 at 22. "http://www.commonlii.org/in/journals/INJlConLaw/2007/2.pdf Also https://nalsar.ac.in/sites/default/files/IJCL%20Volume-1.pdf

II. अनुच्छेद 368 मूल संरचना सिद्धांत के प्रारंभिक बिंदु के रूप में [Article 368 as Beginning Point of Basic Structure Theory]

'मूल संरचना के सिद्धांत' का श्री गणेश अनुच्छेद 368[5] से होना चाहिए. ऐसा करने के दो महत्वपूर्ण कारण हैं। पहला कारण यह है कि संविधान जैसे लचीले दस्तावेज़ में संशोधन करने जैसी महत्वपूर्ण शक्ति होनी ही चाहिए, ताकि समय की ज़रूरतों को पूरा करने में यह सक्षम हो। दूसरा कारण यह है कि अनुच्छेद 368 की भाषा महत्वपूर्ण है, क्योंकि मूल संविधान का अनुच्छेद 368 [1973 के पूर्व][6] दो शब्दों का इस्तेमाल करती थी, इसमें पहले भाग में 'संशोधन' [amend]

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5 PART XX AMENDMENT OF THE CONSTITUTION

article 368. Power of Parliament to amend the Constitution and procedure therefor.—

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon] the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

(a) article 54, article 55, article 73, article 162, article 241 or article 279A; or (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI; or (c) any of the Lists in the Seventh Schedule; or (d) the representation of States in Parliament; or (e) the provisions of this article,

6 The original title " Procedure for amendment of the Constitution " of Article 368 was later renamed "Power of Parliament to amend the Constitution and procedure therefore" by the 24th Amendment Act, 1971 with a view to reverse the *Golaknath* Judgement. The amendment further added two new clauses: 368(1) & 368(3).

शब्द का इस्तेमाल किया गया था[7] और दूसरे भाग में 'परिवर्तन' [change] शब्द का प्रयोग हुआ था।[8] अब महत्वपूर्ण बात यह है कि 'संशोधन' शब्द का इस्तेमाल बिना किसी अतिरिक्त शब्दों के किया गया था, जैसे बदलाव, निरसन [by way of variation or repeal]आदि के माध्यम से और 'परिवर्तन' शब्द का इस्तेमाल परंतुक में किया गया। इस अनुच्छेद को पढ़ते समय सबसे पहली बात जो आपको प्रभावित करती है, वह यह है कि यदि इस प्रावधान का उपयोग करके कोई संशोधन या परिवर्तन किया जाता है, तो संविधान संशोधित माना जाएगा। [the Constitution shall stand amended]. ऐसे में यदि संविधान संशोधित माना जाता है तो जाहिर है कि संविधान को संविधान के रूप में बने रहना चाहिए। *केशवानंद भारती*[9] के मामले में सरकार के वकील से बार-बार यह प्रश्न पूछा गया कि क्या संविधान को बिना किसी भी नए दस्तावेज की प्रतिस्थापना [substitution] के निरस्त किया जा सकता है? इसका जवाब है, 'नहीं'। क्योंकि, आप संविधान के हर अनुच्छेद तक पहुंचें या हर अनुच्छेद को बदलें, परन्तु कुछ-न-कुछ जरूर छोड़ दिया जाना चाहिए; क्योंकि, संविधान का संविधान के तौर पर कायम रहना आवश्यक है।

दूसरी महत्वपूर्ण बात यह है कि जहां तक अनुच्छेद 368 के परंतुक [proviso] का संबंध है, 'परिवर्तन' शब्द का प्रयोग किया गया है, यह फिर से प्रतिस्थापन तक जाता है लेकिन इससे आगे नहीं जाता है। आप बदलाव के लिए संशोधित कर सकते हैं, आप बदलाव के लिए प्रतिस्थापित भी कर सकते हैं, लेकिन बड़ा सवाल यह है कि क्या आप इस संविधान को रद्द कर सकते हैं। जैसा कि हमने कहा कि अनुच्छेद 368 का पहला भाग आपको संविधान के हर हिस्से को बदलने या संशोधित करने की अनुमति देता है; हालांकि दूसरा भाग एक रहस्यपूर्ण हिस्सा है, यह एक परंतुक है, और पाँच अलग-अलग निर्दिष्ट विषयों से संबंधित है। यदि आप इनमें से किसी भी विषय में

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7 Article **368** [as originally in 1949-] **Procedure for amendment of the Constitutio**n:

An ***amendment*** of the Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

8 Provided that if such amendment seeks to make any ***change*** in: (a) article 54, article 55, article 73, article 162, or article 241, or (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of the Part XI, or (c) Any of the Lists in the Seventh Schedule, or (d) The representation of States in Parliament, or (e) The provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one-half of the States by resolution to that effect passed by these Legislatures before the Bill making provision for such amendment is presented to the President for assent.

9 *Kesavananda Bharati* v. *State of Kerala*, AIR 973 SC 1461.

परिवर्तन करना चाहते हैं, तो न केवल इसे संसद से पारित होना होगा, बल्कि इसे कम से कम आधे राज्यों के अनुसमर्थन (ratification) की आवश्यकता होगी।

इसलिए अनुच्छेद 368 से शुरू करते हुए हमें दो महत्वपूर्ण बातों को ध्यान में रखना चाहिए. सबसे पहले, संविधान को पूरी तरह से निरस्त नहीं किया जा सकता । कुछ तो 'शेष' रहना ही चाहिए। अब तत्काल प्रश्न यह है कि वह 'कुछ' क्या है? दूसरा, यदि अनुच्छेद 368 के प्रावधान में परिवर्तन (change) शब्द का अर्थ प्रतिस्थापन (substitution) हो सकता है, लेकिन निरस्तीकरण [repeal] नहीं, तो यह किसी खास बात की ओर इशारा करता है। यह संकेत है कि संविधान निर्माताओं को यह अहसास था कि वे वास्तव में भारत के सभी लोगों का प्रतिनिधित्व नहीं करते थे. आपको याद होगा कि भारत सरकार अधिनियम, 1935 के अंतर्गत यह देश कई प्रांतों में विभाजित था[10], और उन प्रांतों के विभिन्न सदनों या विधानसभाओं के लिए चुनाव होते थे। इस अधिनियम की अनुसूचियों के अनुसार चुनाव में वयस्क मतदाताओं के लिए न केवल आयु की पात्रता थी, बल्कि इसके अतिरिक्त मैट्रिक पास होना या आयकर दाता या कोई अन्य अर्हता [qualification] होना भी आवश्यक था। बड़ी संख्या ऐसी थी जो व्यस्क तो थी लेकिन वोटर नहीं थे. इसलिए ध्यान रहे कि इस भारत सरकार अधिनियम, 1935 के अंतर्गत लोगों के चुने हुए प्रतिनिधि केवल प्रांतों से संबंधित थे और ना कि रियासतों से [princely States]। ज्ञात हो उस समय भारत ब्रिटिश सर्वोच्चता के सिद्धांत [British paramountcy] द्वारा शासित था जिसके अनुसार प्रान्तों पर ब्रिटेन का शासन था लेकिन रियासतों पर नहीं था. निर्वाचित प्रतिनिधि केवल प्रांतों के निर्वाचित प्रतिनिधि थे, जो अंततः अपने निर्वाचित प्रतिनिधि के बीच से चुनते थे कि कौन इस संविधान सभा का सदस्य होना चाहिए। और वे मतदाता आबादी का लगभग 28 प्रतिशत ही थे क्योंकि अधिकांश मतदाता आबादी, भले ही वयस्क थी, वह अनुसूचियों[11] के कारण मतदाता सूची से बाहर रह गई थी। इसलिए मुझे लगता है कि वे इससे चिंतित थे कि वे वास्तव में इस देश की वयस्क आबादी का प्रतिनिधित्व नहीं करते हैं। उन्हें यह भी लगा कि पूरे संविधान को बदलने जैसी बात पहली संसद के लिए छोड़ना बेहतर होगा, जो वास्तव में इस देश के वयस्क मताधिकार द्वारा चुनी जाएगी, ताकि संविधान को सही तरीके से लागू किया जा सके।

III. वैश्विक संदर्भः [Global Perspective]

1. अमेरिकी और ऑस्ट्रेलियाई मॉडलः [American and Australian Model]

एक और बात जो शायद हमारे संविधान शिल्पियों के दिमाग में थी, वह यह थी कि वास्तव में एक विदेशी क़ानून ने उन्हें स्थापित किया था, क्योंकि आप जानते हैं कि संविधान सभा की स्थापना

10 Under the Government of Indian Act, 1935, Part II had provisions pertaining to the "Federation of India" and Part III and IV had provisions pertaining to the "Governors Provinces" and "Chief Commissioners Provinces" respectively.

11 The Government of India Act, 1935-Sixth Schedule- Provisions As To Franchise contained various additional qualifications for voters.

भारत स्वतंत्रता अधिनियम, 1947 की धारा 8 द्वारा की गई थी[12], जिसे ब्रिटिश संसद ने पारित किया था। इन सभी बातों को ध्यान में रखते हुए वे अनुच्छेद 368 के समझौता सूत्र [फार्मूले] पर पहुंचे। मैं आपको बताता हूँ कि यह समझौता सूत्र [compromise formula] क्यों है? उनके सामने दुनिया के विभिन्न संविधान थे[13], उनके पास दुनिया का सबसे पुराना जीवित संविधान था अमेरिका का संविधान। अमेरिकी संविधान, 1787 के अनुच्छेद 5 में दो-स्तरीय प्रक्रिया है.[14] इसकी शुरुआत कांग्रेस [अमेरिकी संसद] के दो-तिहाई सदस्यों से होती है, जो दो सदनों द्वारा संविधान संशोधन का प्रस्ताव करते हैं, जिसके बाद तीन चौथाई राज्यों द्वारा पुष्टी करनी होती है। अब यह दो तरीकों से किया जा सकता है; एक सांविधानिक सम्मेलन [constitutional convention] है दूसरा अन्यथा है। लेकिन महत्वपूर्ण यह है कि अमेरिका में संसद के केवल दो-तिहाई सदस्य, राज्यों से पुष्टि के बिना अपने संविधान के किसी भी हिस्से को छूने में सक्षम नहीं होंगे। दूसरा, अनुच्छेद 5 में वास्तव में दो चीजें थीं, जिसमें संशोधन नहीं किया जा सकता था, जिन्हें संशोधन की शक्ति के दायरे से बाहर रखा गया था; एक, सीनेट [अमेरिका का उच्च सदन] में राज्यों का प्रतिनिधित्व, जो कि हमारी राज्य सभा के जैसा है। राज्यों द्वारा इसकी पुष्टी कर दिए जाने के बाद भी इसमें संशोधन नहीं किया जा सकता। दूसरा, वर्ष 1808 तक (इस संविधान को 1789

12 Cabinet Mission Plan of May 1946 proposed constituent assembly. It was constituted in Sept 1946. First meeting held on Dec 9, 1946. Then it was recognised statutorily through the Indian Independence Act, 1947, s. 8(1). 8.-(1) In the case of each of the new Dominions, the powers of the Legislature of the Dominion shall, for the purpose of making provision as to the constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of that Dominion, and references in this Act to the Legislature of the Dominion shall be construed accordingly.

13 Constituent Assembly Debates on September 17, 1949 *available at:* https://www.constitutionofindia.net/debates/17-sep-1949/#123176 (last visited on November 19, 2024).

14 Article. V. - Amendment : The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

में बैस्टिल के वर्ष में अनुमोदित किया गया था) अनुच्छेद 1 की धारा 9 के दो प्रावधानों को संशोधन नहीं किया जा सकता था, जिनमें से एक राज्यों में आव्रजन [Migration] से संबंधित था और दूसरा प्रतिनिधि कराधान से संबंधित था। अनुच्छेद 5 में दो स्पष्ट सीमाएँ थीं, जो संशोधन के अधिकार के दायरे से परे थीं। उनके सामने यह मॉडल था।

उनके पास ऑस्ट्रेलिया के राष्ट्रमंडल के संविधान का मॉडल भी था, जो वर्ष 1900 में ब्रिटिश संसद के एक अधिनियम द्वारा पारित किया गया था, जहाँ यदि आप संविधान के साथ छेड़छाड़ करना चाहते हैं तो आपको लोगों के पास जाना होगा। केवल जनमत संग्रह द्वारा ही संविधान में संशोधन किया जा सकता है। इन प्रक्रियाओं की कठोरता और दृढ़ता के कारण 235 वर्षों में यू.एस. संविधान, 1789 से केवल 28 बार ही संशोधित किया गया है। इसके अतिरिक्त ऑस्ट्रेलिया के राष्ट्रमंडल के संविधान में केवल 8 बार संशोधन किया गया है। आप कल्पना कर सकते हैं कि यह वर्ष 1900 का संविधान है, हम 2024 में हैं; 124 वर्षों में इसे केवल 8 बार संशोधित किया गया है।

2. आयरलैंड[Ireland]

भारत के संविधान निर्माताओं के पास 1922 के आयरिश संविधान का एक बहुत ही दिलचस्प मॉडल भी था, जो कि स्वतंत्र आयरिश राज्य के अस्तित्व में आने से ठीक पहले का संविधान है,[बाद में 1937 में Bunreacht na hÉireann-constitution of Ireland आया], लेकिन 1922 के संविधान में कुछ उल्लेखनीय था। इसके अनुसार संविधान का संशोधन केवल जनमत संग्रह के माध्यम से ही किया जा सकता है। लेकिन पहले 8 वर्षों के लिए इसे आयरिश संसद पर छोड़ना ही उचित होगा (जिसे आयरलैंड में संसद को 'ओइर केटस' कहा जाता है)। इस अवधि में संसद संविधान में साधारण बहुमत से संशोधन कर सकती थी। हमारे संविधान निर्माताओं की तरह उनके संविधान के निर्माताओं को एहसास था कि वे सभी का प्रतिनिधित्व नहीं करते हैं। इसी कारण उन्होंने संसद के लिए 8 साल तक का ही समय रखा जो साधारण बहुमत से आरंभिक कठिनाइयों को आसानी से संशोधित करेगी लेकिन 8 साल बाद अंतत: जनमत ही संविधान का संशोधन करेगा.

1931 में आयरलैंड ने यह महसूस किया कि 8 साल का समय कम है और संसद के पास 16 साल का समय होना चाहिए जिससे साधारण बहुमत से वे काम कर सकें (संविधान में बदलाव) जो केवल लोग ही जनमत से कर सकते हैं। इस सम्बन्ध में *रयान* के मामले का निर्णय है,[15] यह 1935 का निर्णय है जहाँ न्यायालय में न्यायाधीशों में असहमति थी. दो अन्य न्यायाधीशों की तुलना में मुख्य न्यायाधीश ने असहमति जताई। 'ओइरेकैटास' (Oireachtas-आयरलैंड की संसद) ने उस प्रावधान [अनुच्छेद 50] में संशोधन किया जिसमें कहा गया था कि इसे 16 साल के बदले में, केवल 8 साल मिले हैं; आयरिश संसद को यह एहसास हुआ कि 8 साल पर्याप्त नहीं हैं, इसलिए

15 *The State (Ryan and others)* v. *Lennon* , [1935] I. R. 170.

हम खुद को 8 साल और दें, *रयान* के मामले में आयरिश सुप्रीम कोर्ट ने माना कि 'ओइरेकैटास' जब संविधान में संशोधन करता है, तब वह एक संघटक या संविधायी निकाय (constituent body) के रूप में कार्य कर रहा होता है और यदि वह एक संविधायी निकाय के रूप में कार्य कर रहा है, तो अदालत किसी भी सांविधानिक संशोधन पर सवाल नहीं उठा सकती, भले ही वे अपनी शक्ति को बढ़ाना चाहते हों। वर्ष 1935 का आयरलैंड का यह मामला, *केशवानंद भारती* मामले के विपरीत था क्योंकि इसमें बहुमत ने कहा था कि भारत की संसद अपनी संविधायी शक्ति का प्रयोग कर संशोधन कर तो सकती है लेकिन न्यायालय ऐसे संशोधन पर सवाल कर सकती है कि यह संशोधन संविधान के बुनियादी ढांचे के विरुद्ध है.

IV. लचीला संविधान- पर्याप्त प्रतिनिधित्व का अभाव [Flexible Constitution: Lack of Sufficient Representation]

संविधान के संस्थापकों के सामने ये सभी फॉर्मूले या विभिन्न देशों के माडल उपलब्ध थे। फिर भी उन्होंने अनुच्छेद 368 को वर्तमान स्वरूप में क्यों चुना? अनुच्छेद 368 के अनुसार (यदि हम परंतुक को अनदेखा करें, जो कुछ निर्दिष्ट विषयों से संबंधित है), संविधान के किसी भी भाग में संशोधन करने के लिए लोकसभा और राज्यसभा में केवल दो-तिहाई बहुमत की आवश्यकता है। यह दो-तिहाई बहुमत सदन की कुल का दो-तिहाई नहीं है, बल्की सदन में उपस्थित और मतदान करने वालों में से दो-तिहाई हैं, इसलिए यह आसान प्रक्रिया है. ज़ाहिर तौर पे, हर सरकार के पास एक साधारण बहुमत होगा। दूसरी ओर, अनुच्छेद 61 के अंतर्गत जब राष्ट्रपति पर महाभियोग लगाने की बात आई,[16] तो उसी संविधान सभा ने कहा कि आपको दोनों सदनों की पूरी ताकत के दो-

16 article 61. Procedure for impeachment of the President.—(1) When a President is to be impeached for violation of the Constitution, the charge shall be preferred by either House of Parliament. (2) No such charge shall be preferred unless— (a) the proposal to prefer such charge is contained in a resolution which has been moved after at least fourteen days' notice in writing signed by not less than one-fourth of the total number of members of the House has been given of their intention to move the resolution, and (b) such resolution has been passed by a majority of not less than two-thirds of the total membership of the House. (3) When a charge has been so preferred by either House of Parliament, the other House shall investigate the charge or cause the charge to be investigated and the President shall have the right to appear and to be represented at such investigation. (4) If as a result of the investigation a resolution is passed by a majority of not less than two-thirds of the total membership of the House by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed.

तिहाई सदस्यों की आवश्यकता है। अब उन्होंने ऐसा क्यों किया, इसका जवाब स्पष्ट है कि वे अपनी खुद की अपर्याप्तता की भावना से ग्रसित महसूस कर रहे थे क्योंकि जैसा कि पहले निवेदित है वे केवल 28% जनता का प्रनिधित्व कर रहे थे. उनके सामने *रयान* का निर्णय था और उन्हें लगा कि देखो हमारे लिए खुद को स्थगन अवधि देना [temporary ban on amendment] और यह कहना संभव नहीं हो सकता है कि पहली संसद को पहले पाँच वर्षों के लिए जो करना है, करने दें।

इसलिए नया फार्मूला बनाया गया। एक प्रस्तावित मसौदा 1948 में था जिसमें संविधान संशोधन का प्रावधान भाग 16 में अनुच्छेद 304-305 के अंतर्गत था. प्रावधान संख्या 304 संशोधन की प्रक्रिया आदि बताता था. संयोग से 305 का प्रावधान जो अल्पसंख्यकों आदि के प्रतिनिधित्व से संबंधित था[17], उसमें यह प्रावधान किया गया था कि 10 वर्ष की अवधि तक वह संशोधित नहीं किया जा सकता है, जैसा कि अमेरिकी संविधान के अनुच्छेद 5 में भी है. हालांकि संविधान सभा का वह प्रस्ताव[304] छोड़ दिया गया। इसलिए यह सूत्र बनाया गया कि उपस्थित और मतदान कर रहे सांसद दो तिहाई बहुमत से संविधान में संशोधन कर सकते हैं भले ही तीन चौथाई राज्यों द्वारा अनुसमर्थन नहीं है। उन्होंने अमेरिकी संविधान के अनुच्छेद 5 के एक भाग को उठाया और दूसरे भाग को छोड़ दिया।

जहाँ तक परंतुक का संबंध है[18], यह जानना थोड़ा दिलचस्प है कि यह वे प्रावधान हैं जहाँ राज्य हितधारक हैं जिसके कारण उनका हस्तक्षेप भी उचित और जरूरी है। प्रावधान [अनुच्छेद 368(2 परंतुक)] का पहला खंड कार्यपालिका शक्ति से जुड़ा है. जैसे यह राष्ट्रपति पद के चुनावों से संबंधित है, जहाँ राज्यों की महत्वपूर्ण भूमिका है, इसलिए यदि आप राष्ट्रपति पद के चुनावों में संशोधन करना चाहते हैं तो आपको राज्यों के पास जाना होगा। इसी प्रकार यदि आप कार्यकारी शक्ति को छूना चाहते हैं जो अनुच्छेद 73 में निहित है, जहाँ तक संघ का संबंध है, और अनुच्छेद 162 में है, जहाँ तक राज्यों का संबंध है, तो आपको राज्यों के पास जाना होगा। यदि आप एक की शक्ति को दूसरे की कीमत पर बढ़ाना या घटाना चाहते हैं, तो राज्य चिंतित होंगे। दूसरा, यदि आप न्यायपालिका के साथ छेड़छाड़ करना चाहते हैं, चाहे वह सर्वोच्च न्यायालय, उच्च न्यायालय, या अधीनस्थ न्यायालय हो, फिर से आपको अनुसमर्थन के लिए राज्यों के पास जाना होगा। तीसरा, यदि आप विधायी सूचियों में संशोधन करना चाहते हैं (हमारे संविधान में एक अनुसूची 7 है;

17 Draft Constitution of India 1948, 21 February:

305. Notwithstanding anything contained in article 304 of this Constitution, the provisions of this Constitution relating to the reservation of seats for the Muslims, the Scheduled Castes, the scheduled tribes or the Indian Christians either in Parliament or in the Legislature of any State for the time being specified in Part I of the First Schedule shall not be amended during a period of ten years from the commencement of this Constitution and shall cease to have effect on the expiration of that period unless continued in operation by an amendment of the Constitution.

18 The Constitution of India, art. 368(2).

विधायी सूची, जो केंद्र और राज्यों के बीच विषयों को तीन सूचियों में वितरित करती है ; संघ के लिए एक विशेष सूची है, राज्य के लिए विशेष और एक समवर्ती सूची है) तो अनुसमर्थन के लिए राज्यों के पास जाना होगा। चौथा, संसद में राज्यों का प्रतिनिधित्व, फिर से राज्य सीधे संबंधित हैं, यदि आप इसके साथ छेड़छाड़ करना चाहते हैं तो फिर से आपका राज्यों के पास जाना अनिवार्य होगा और पाँचवाँ, जोकि बहुत दिलचस्प है वह ये की यदि आप अनुच्छेद 368 में संशोधन करना चाहते हैं, तो ऐसे में राज्यों का अनुसमर्थन अनिवार्य होगा।

अनुच्छेद 368 के विशेष प्रावधान और सीमाएँ [Article 368 and Limitations]

अब इस छोटी सी पृष्ठभूमि के साथ हम अपने सांविधानिक इतिहास पर वापस आते हैं। जब हमने शुरुआत की थी तो हमारे पास अनुच्छेद 368 में यह समझौता सूत्र था जिसके द्वारा अब 75 वर्षों के अंतराल में 2024 तक 106 संशोधन पारित किए जा चुके हैं, क्योंकि हम चाहते थे कि यह संविधान अधिक लचीला हो, हम नहीं चाहते थे कि यह पुराने संविधानों की तरह कठोर हो। इसके लिए दो बहुत अच्छे कारण हैं जो मैंने आपको हमारे इतिहास में बहुत पहले बताए थे। सबसे महत्वपूर्ण चीजों में से एक जिसे आगे बढ़ाने की कोशिश की गई और यह वास्तव में हमें पाकिस्तान से अलग करती है, वह थी भूमि सुधार कानून और इन भूमि सुधार कानूनों को शुरुआती चुनौतियां तीन उच्च न्यायालयों में दी गईं, एक थी पटना उच्च न्यायालय, जिसने बिहार भूमि सुधार अधिनियम के बड़े हिस्से को खारिज कर दिया था, और दो अन्य उच्च न्यायालय इलाहाबाद और नागपुर, जिन्होंने संबंधित भूमि सुधार कानूनों को बरकरार रखा। नई संसद बहुत जल्दी में थी और वह तब तक इंतजार नहीं कर सकती थी जब तक कि सर्वोच्च न्यायालय इन निर्णयों के बारे में कुछ कहे। इसलिए संसद ने प्रथम संशोधन को आगे बढ़ाया और अन्य चीजों के अतिरिक्त, पहली बार अनुच्छेद 31A और अनुच्छेद 31B पेश किया (वह कई विषयों से निपटने वाला एक बहुत बड़ा संशोधन था)। अब अनुच्छेद 31A, मूल रूप से एक ऐसा फॉर्मूला था जिससे कि संपज़ि के अधिकार कृषि सुधार कार्यक्रम के रास्ते में बाधा न बने. अनुच्छेद 31B पूरी तरह से अनावश्यक था और इसे केवल इसलिए जोड़ा गया था क्योंकि मद्रास के तत्कालीन महाधिवक्ता ने एक पत्र लिखा था जिसमें उन्होंने महसूस किया था, कि यह बेहतर होगा कि कुछ कानूनों को मूल अधिकारों से परे रखा जाए।

नौवीं अनुसूची और न्यायिक समीक्षा [Ninth Schedule and Judicial Review]

अनुच्छेद 31B की दो विशेषताएँ हैं जोकि अनुच्छेद 31A से बहुत भिन्न हैं। अनुच्छेद 31A केवल कृषि सुधार से संबंधित था और यह केवल संपज़ि के अधिकारों से संबंधित था। अनुच्छेद 31B एक ऐसा प्रावधान है जिसके अंतर्गत हम नौवीं अनुसूची में कुछ डालते हैं जो केंद्रीय विधानमंडल या राज्य विधानमंडल ने पारित किया है, जिस क्षण हम इसे उस 9वीं अनुसूची में डालते हैं यह कानूनी चुनौतियों से साधारणत: मुक्त हो जाता है और किसी भी मूल अधिकार द्वारा छुआ नहीं जा सकता है।[यद्यपि कि अब इन्हें बुनियादी ढांचा सिद्धांत के आधार पर चुनौती दी जा सकती है]. इसलिए पहला महत्वपूर्ण अंतर यह है कि जहाँ अनुच्छेद 31A केवल संपज़ि अधिकारों से संबंधित था,

अनुच्छेद 31B मूल अधिकारों की पूरी श्रृंखला से संबंधित था। दूसरा जो उससे भी अधिक परेशान करने वाला तथ्य था वह यह कि यदि कोई उच्च न्यायालय या सर्वोच्च न्यायालय किसी भी विधि या प्रावधान को खारिज कर देता और आप उस अधिनियम को 9वीं अनुसूची में डाल देते हैं तो वह खारिज किया गया प्रावधान फिर से अपने आप पुनर्जीवित [revive] हो जाता है। *श्री शंकरी प्रसाद सिंह* के मामले[19] में अनुच्छेद 31B को चुनौती दी गई थी। कई बिंदुओं पर विचार किया गया, हालांकि हमारे चिंतन का विषय वास्तव में केवल एक ही बिंदु है और वह एक बिंदु यह है कि क्या अनुच्छेद 13[20] में एक साधारण कानून [ordinary law] के अतिरिक्त एक सांविधानिक कानून [constitutional law] भी शामिल हो सकता है. अमेरिकी संविधान से भिन्न, अनुच्छेद 13 को हमारे संविधान में इसलिए शामिल किया गया था कि अमेरिका में हुए विवाद को हमेशा के लिए हल किया जाये. अमेरिका में *मार्बरी* के मामले[21] में यह विवाद हुआ था कि 'क्या कानूनों की न्यायिक समीक्षा हो सकती है?' [judicial review of legislation]. अनुच्छेद 13 (2) कहता है कि कोई भी राज्य मूल अधिकार का उल्लंघन करते हुए कानून नहीं बनाएगा. यदि कोई कानून मूल अधिकार का उल्लंघन करता है तो उसे न्यायालय द्वारा अमान्य घोषित कर दिया जाएगा जब तक कि वह कानून मूल अधिकार में दिए गए अपवादों में न आ जाये.[22] अनुच्छेद 13 हमारे संविधान में एक स्पष्ट प्रावधान था, जिसमें राज्य द्वारा कानून बनाने की बात कही गई थी। क्योंकि यह आपको सीधे अनुच्छेद 245[23] पर ले जाता है, जिसमें फिर से संसद द्वारा कानून बनाने की बात कही गई है (उसी शब्दावली का उपयोग किया गया है)। लेकिन न्यायमूर्ति पतंजलि शास्त्री के समक्ष प्रस्तुत *श्री शंकरी प्रसाद सिंह* के मामले में निर्णय सुनाया गया था कि इसे शाब्दिक रूप से देखा जाना उचित नहीं है। अनुच्छेद 13 को इस तरह से पढ़ा जाना चाहिए कि इसमें संविधान में

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19 *Shankari Prasad* v. *Union of India,* AIR 1951 SC 458.

20 The Constitution of India, art. 13. (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. [whether law also includes amendment? The answer is NO, it does not.]

21 *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803).

22 article 13. Laws inconsistent with or in derogation of the fundamental rights.—(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

23 The Constitution of India, art. 245: Extent of laws made by Parliament and by the Legislatures of States.—(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

संशोधन करने वाले कानून भी शामिल हों। मूल अधिकार अविभाज्य अधिकार हैं। हमारे समक्ष द्वितीय विश्व युद्ध हुआ, हमने हिटलर द्वारा कुचला हुआ संविधान देखा, और वहां नया जर्मन संविधान आया, जो उसे कुछ ऐसा बनाता है जिसे अब विधानमंडल छू नहीं सकता। लेकिन इस तर्क को खारिज कर दिया गया कि मूल अधिकार कोई ऐसी बात है कि वह संशोधन से परे होगी. और अनुच्छेद 13 के शाब्दिक निर्वचन [literal interpretation] पर पांच न्यायाधीशों की संविधान पीठ ने माना कि अनुच्छेद 13 केवल साधारण कानूनों पर लागू होगा, अर्थात विधानमंडल द्वारा बनाए गए कानून और ना कि संविधान संशोधन करने वाले कानून। इस तरह अनुच्छेद 31B ने इस बाधा को पार किया। चीजें अगले 15 वर्षों तक इसी तरह चलती रहीं, जब तक कि बड़ी संख्या में कृषि सुधार कानून नौवीं अनुसूची में शामिल नहीं हो गए और 17वें संशोधन ने कुछ और कानून जोड़े, जो तब *सज्जन सिंह* मामले[24] में चुनौती का विषय बन गए।

सज्जन सिंह और गोलोकनाथ [Sajjan Singh and Golaknath]

वर्ष 1965 में 14 साल की अवधि बीत चुकी थी और फिर से इसी आधार पर इस बार एक और संविधान पीठ ने पुनर्विचार किया। पिछले निर्णय [*संकरी प्रसाद*] का पालन करते हुए *सज्जन सिंह* मामले में यह माना गया कि अनुच्छेद 13 में सांविधानिक संशोधन शामिल नहीं है, लेकिन एक अंतर के साथ। अंतर केवल इतना था कि दो विद्वान न्यायाधीश, न्यायमूर्ति हिदायतुल्लाह और न्यायमूर्ति जे.आर मुधोलकर ने पहली बार संदेह व्यक्त किया और उन्होंने कहा कि हमें इस पर विचार करने के लिए एक बड़ी पीठ की आवश्यकता होगी क्योंकि यह अनिश्चित है कि सांविधानिक कानून अनुच्छेद 13 के अंतर्गत 'विधि' हैं या नहीं।[25] न्यायमूर्ति मुधोलकर ने एक कदम आगे बढ़कर एक दूरदर्शी की तरह अपने फैसले में पहली बार 'मूल संरचना शब्द' का इस्तेमाल किया। एक बहुत ही दिलचस्प पैराग्राफ में वे हमें पहली बार बताते हैं कि क्या इस संविधान में मूल संरचना जैसी कोई चीज है जिसे बिल्कुल भी संशोधन नहीं किया जा सकता?[26]

इसके पश्चात 1967 में *गोलकनाथ* मामले[27] की 11 न्यायाधीशों की पीठ सामने आती है जिसका नेतृत्व मुख्य न्यायाधीश सुब्बा राव द्वारा किया गया। फिर से एक खंडित बहुमत (6-5 के बीच बंटी हुई बेंच) आया, जिसमें न्यायाधीश हिदायतुल्ला निर्णायक थे। मुखय न्यायाधीश सुब्बा राव ने दो बातें कही, एक यह कि संशोधन करने की शक्ति अनुच्छेद 368 में नहीं है क्योंकि अनुच्छेद 368 में सीमांत नोट [marginal note] में संशोधन की प्रक्रिया मौजूद है और हमे उस सीमांत नोट को देखना होगा। संशोधन करने की शक्ति कहीं और स्थित है। मुख्य न्यायाधीश सुब्बा राव और अन्य विद्वान न्यायाधीशों के अनुसार, संशोधन करने की शक्ति, क्योंकि यह स्पष्ट रूप से कहीं भी स्थित

24 *Sajjan Singh* v. *State of Rajasthan*, AIR 1965 SC 845.

25 (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

26 न्यायमूर्ति हिदायतुल्लाह का विसम्मत *गोलोकनाथ* मामले का आधार बना जबकि न्यायमूर्ति मुधोलकर का विसम्मत *केशवानंद भारती* का रास्ता बनाया.

27 *Golaknath* v. *State of Punjab*, AIR 1967 SC 1643.

नहीं थी, इसलिए यह अवशिष्ट अनुच्छेद (residuary article-148) के अंतर्गत आती है। इसलिए संसद अवशिष्ट अनुच्छेद के अंतर्गत संशोधन कर सकती है। पांच अन्य विद्वान न्यायाधीशों ने असहमति ज़ाहिर करते हुए कहा कि संशोधन के लिए एक अलग भाग मौजूद है, भाग 20, अत: अनुच्छेद 368 में ही संशोधन के सारे नियम व्याप्त हैं।

न्यायमूर्ति हिदायतुल्लाह ने कहा कि संशोधन की शक्ति *'sui generis'* है। इसलिए हम इसे वहीं छोड़ देते हैं, हम यह नहीं कहते कि यह या तो अनुच्छेद 245 में है या संविधान में कहीं हैं। इसका कारण यह है कि अंतत: यह एक संविधान है जिसमें बदलाव के लिए लचीलापन होना चाहिए। दूसरा बिंदु, जिस पर बहुत बहस हुई और इस बार न्यायमूर्ति हिदायतुल्लाह ने मुख्य न्यायाधीश सुब्बा राव से सहमति ज़ाहिर करते हुए यह कहा कि अनुच्छेद 13 में ना केवल साधारण बल्कि संशोधन कानून भी आते हैं। अत: आप अनुच्छेद 368 का उपयोग कर संविधान के किसी भी प्रावधान में संशोधन कर सकते हैं, लेकिन आप मूल अधिकारों को नहीं छू सकते। क्योंकि मौलिक अधिकार अविभाज्य हैं, वे मानव अधिकार हैं जिसका संशोधन नहीं कर सकते।

24वां-25वां संशोधन [24-25th Amendments]

संसद ने अब कार्रवाई करने में तेजी दिखाई। संसद ने 1971 में 24वां संशोधन लागू किया। 24वें संशोधन ने दोनों ही आधारों को खत्म करने की सफल कोशिश की जिस पर *गोलकनाथ* मामला [1967]आधारित था। एक, यह कि संशोधन करने की शक्ति सीधे अनुच्छेद 368 में है, कहीं और नहीं, और दूसरा यह कि अनुच्छेद 13 के अंतर्गत केवल साधारण कानून आते हैं और सांविधानिक कानून नहीं।

उसी वर्ष 25वां संशोधन पारित किया गया जो संपत्ति अधिकारों से जुड़ा था और अनुच्छेद 31C को जोड़ा गया। जब प्रथम संशोधन द्वारा 31A जोड़ा गया था तो कृषि संबंधी कानूनों को मूल अधिकारों के प्रभाव से सुरक्षित रखने के लिए प्रावधान किया गया था लेकिन संपत्ति के अधिकारों को उनसे अलग रखा गया था. अर्थात यदि कोई कानून संपत्ति के अधिकारों के बारे में है और मूल अधिकारों के विरुद्ध है तो उसे अवैध घोषित किया जा सकता था। अनुच्छेद 31C को किसी और के दृष्टिकोण को ध्यान में रखते हुए पेश किया गया। श्री बी एन राउ (पहले न्यायाधीश जो अंतरराष्ट्रीय न्यायालय गए; संविधान सभा के सांविधानिक सलाहकार थे और एक मसौदा संविधान (draft constitution) के साथ आए थे) यह हमेशा उनका विचार था कि निदेशक सिद्धांतों [directive principles] को मूल अधिकारों [fundamental rights] पर वरीयता मिलनी चाहिए। अब निदेशक सिद्धांत एक अलग भाग में हैं, जिसे आयरलैंड के 1937 के नए संविधान से लिया गया है. (आयरिश संविधान कैथोलिक संविधान था, यह धर्मनिरपेक्ष संविधान नहीं था.)। निदेशक सिद्धांत जो हमारे अनुच्छेद 39(b) और अनुच्छेद 39(c) में थे[28],

28 The Constitution of India, art. 39.

29 papal bull, in Roman Catholicism, an official papal letter or document. By the 13th century the term papal bull was being used only for the most important documents issued by the pope. https://www.britannica.com/topic/bull-papal

पुपल बुल्स'[29] की अवधारणा पर आधारित हैं, जो रोम में बैठे पोप द्वारा जारी किए गए आदेश की तरह हैं। अनुच्छेद 39(b) और अनुच्छेद 39(c) हमें पोप इनोसटें तृतीय पर वापस ले जाते हैं, जो एक कार्य के लिए बहुत प्रसिद्ध थे- उन्होंने मैग्ना कार्टा [1215] को उसके निर्माण के तुरंत बाद ही निरस्त कर दिया। अब हम, मैग्ना कार्टा के 810वें वर्ष में हैं, इंग्लैंड के राजा जॉन को इस पर हस्ताक्षर करने के लिए उस समय के विद्रोहियों ने मजबूर किया और पोप ने इसे तुरंत ही निरस्त कर दिया था। अब यही पोप हमारे अनुच्छेद 39(b) और अनुच्छेद 39(c) जैसे प्रावधान के लिए प्रेरक बने. यह कहा जा सकता है कि इसे आयरलैंड के कैथोलिक संविधान से उधार लिया गया और भारत के पंथनिरपेक्ष संविधान में डाला गया।

अनुच्छेद 39(b) और अनुच्छेद 39(c) हमें बताते हैं कि समुदाय के भौतिक संसाधनों को इस तरह वितरित किया जाना चाहिए कि वे आम हित में हों, समाजवाद अपने उच्चतम स्तर पर हो, सब कुछ लोगों के लिए हो, और धन का संकेन्द्रण कुछ लोगों के हाथों में नहीं होना चाहिए जिससे बहुतों को नुकसान हो। इन दो उप-अनुच्छेद को, जो 810 साल पुराने पोप के आदेश से आते हैं, मूल अधिकारों के ऊपर (संपत्ति के अधिकारों पर) अध्यारोपित किया गया। यही बात जस्टिस खन्ना को प्रेरित करती है (*केशवानंद भारती* मामले में वह एक निर्णायक व्यक्ति थे, जैसे *गोलकनाथ* मामले में न्यायमूर्ति हिदायतुल्ला थे) जिन्होंने कहा कि वे इस अनुच्छेद को केवल इसलिए बरकरार रखते हैं, क्योंकि यह संपत्ति के अधिकारों से संबंधित है और उनके अनुसार संपत्ति के अधिकार मौलिक हो सकते हैं लेकिन वे मूल संरचना से संबंधित नहीं हैं।

एक विशेष न्यायाधीश की दृष्टि के आधार पर अंततः अनुच्छेद 31C ने सांविधानिकता की पात्रता पास कर ली। यह *केशवानंद भारती* के लिए भूमिका तैयार करता है। *केशवानंद भारती* में चार संशोधन (24वां संशोधन, 25वां संशोधन, 26वां संशोधन, 29वां संशोधन) चुनौती का विषय थे। 26वें संशोधन ने प्रिवी पर्स छीन लिया, जिसे 13 न्यायाधीशों द्वारा भविष्य के लिए तय किया जाना था। 24वें, 25वें तथा 29वें संशोधन पर विचार-विमर्श किया गया। 24वां संशोधन गोलकनाथ मामले को पलटने से संबंधित था। किसी को भी, यहां तक कि बहुमत को भी गंभीरता से नहीं लगता था कि *गोलकनाथ* मामले का निर्णय सही था, इसलिए *गोलकनाथ* मामले को खत्म करना आसान काम था। अनुच्छेद 31C विवाद का विषय था और फिर से यह तीखी दरार थी। इस बार छह के खिलाफ छह थे। न्यायमूर्ति खन्ना अलग व्यक्ति थे, और उनका का एक विशेष दृष्टिकोण था कि संपत्ति के अधिकार किसी भी मूल संरचना का हिस्सा नहीं हैं। संपत्ति के अधिकार यू.एस. संविधान के अनुच्छेद 5 में जीवन और स्वतंत्रता के साथ हो सकते हैं, लेकिन इस देश में हमें संपत्ति के अधिकारों को अलग करना चाहिए। चूंकि संपत्ति के अधिकार मूल संरचना का हिस्सा नहीं हैं, और वे मूल संरचना में विश्वास रखते थे, उन्होंने अनुच्छेद 31C को रद्द नही किया। इसलिए अनुच्छेद 31C को इस संकीर्ण एक वोट से पारित कर दिया गया। दूसरा भाग जिसमें कहा गया था कि कोई भी अदालत इस पर विचार नहीं करेगी, उसे रद्द कर दिया गया।

V. मूल संरचना की पहचान- सिद्धांत या प्रावधान [Identifying Basic Structure- Principle or provision]

इसलिए अब हम मूल संरचना क्या है, इस पर वापस आते हैं। विद्वान अधिवक्ता श्री नंबियार हमेशा अपने समय से आगे थे, क्योंकि जब भी उन्होंने कुछ तर्क दिया, तो वह आमतौर पर भले ही हार गए हों, लेकिन उस तर्क को अंततः बाद में स्वीकार किया गया। इस बार *केसवानंद भारती* [1973] के सात न्यायाधीश 1965 के *सज्जन सिंह* के निर्णय देने वाले एक न्यायाधीश न्यायमूर्ति मुधोलकर के पास वापस गए और पाया कि हां, मूल संरचना जैसी कोई चीज है। विभिन्न निर्णयों में विभिन्न विशेषताओं को आवश्यक मूल संरचना आदि के रूप में बताया गया है, इसलिए अब हम वापस आते हैं कि मूल संरचना वास्तव में क्या है।

दो दिलचस्प दृष्टिकोण हैं जो एक दूसरे से प्रतिस्पर्धा करते हैं। एक *इंदिरा गांधी के मामले*[30] में न्यायमूर्ति मैथ्यू का दृष्टिकोण है, और एक न्यायमूर्ति कृष्णा अय्यर का *भीम सिंह जी के मामले*[31] (नौवीं अनुसूची की चुनौती संदर्भ के) का दृष्टिकोण है। न्यायमूर्ति मैथ्यू ने महसूस किया कि आपको संविधान के कुछ प्रावधानों में मूल संरचना को खोजना होगा. जैसे संविधान की सर्वोच्चता एक सिद्धांत है लेकिन यह स्वयं में आधारभूत ढांचे का भाग नहीं हो सकता. संविधान का कोई प्रावधान जो सर्वोच्चता को स्वयं में समाहित करता हो वह बुनियादी ढांचा है. न्यायमूर्ति कृष्णा अय्यर ने कहा कि जब हम महान समतावादी सिद्धांत (Egalitarian Principles) की बात करते हैं, तो हम अनुच्छेद 14 की बात नहीं कर रहे होते, हम एक सिद्धांत की बात कर रहे होते हैं

30 *Indira Gandhi* v. *Raj Narain,* AIR 1975 SC 2299.

31 *Bhim Singhji* v. *Union of India,* 1985 SCR SUPL. (1) 862.

जो मूल संरचना का हिस्सा होता है। अनुच्छेद 14 ऐसा नहीं करता।[32] यह बहस आज तक बिना किसी स्पष्टता के जारी रही है। इसलिए मूल संरचना की वास्तव स्थिति के बारे में मुझे लगता है कि हमें प्रस्तावना और अनुच्छेद 368 से संकेत मिलते हैं। भले ही यह एक प्रस्तावना है, यह संविधान की शुरुआत है, वास्तव में इसका मसौदा संविधान के अंत में तैयार किया गया था। निर्माताओं ने वास्तव में संक्षेप में बताया कि उनके विचार से वे सिद्धांत क्या थे। इसमें से आप लगभग छह सिद्धांत निकाल सकते हैं, जिन्हें कोई सिद्धांत कह सकता है, जो वास्तव में बुनियादी ढांचे से संबंधित है।

32 The question of basic structure being breached cannot arise when we examine vires of an ordinary legislation as distinguished from a constitutional amendment. *Kesavananda Bharati* cannot be the last refuge of the proprietaire when being legislation takes away their 'excess' for societal weal. Nor, indeed, can every breach of equality spell disaster as a lethal violation of the basic structure. Peripheral inequality is inevitable when large-scale equalisation processes are put into action. If all the judges of the Supreme Court in solemn session sit and deliberate for half a year to produce a legislation for reducing glaring economic inequality their genius will let them down if the essay is to avoid even peripheral inequalities Every large cause claims some martyr, as sociologists will know. Therefore, what is a betrayal of the basic feature is not a mere violation of Art. 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice. If a legislation does go that far it shakes the democratic foundation and must suffer the death penalty. But to permit the *Bharati* ghost to haunt the corridors of the court brandishing fatal writs for every feature of inequality is judicial paralysation of parliamentary function. Nor can the constitutional fascination for the basic structure doctrine be made a Trojan horse to penetrate the entire legislative camp fighting for a new social order and to overpower the battle for abolition of basic poverty by the 'basic structure' missile. Which is more basic? Eradication of die-hard, deadly and pervasive penury degrading all human rights or upholding of the legal luxury of perfect symmetry and absolute equality attractively presented to preserve the status quo ante? To use the Constitution to defeat the Constitution cannot find favour with the judiciary. I have no doubt that the strategy of using the missile of 'equality' to preserve die-hard, dreadful societal inequality is a stratagem which must be given short shrift by this court. The imperatives of equality and development are impatient for implementation and judicial scapegoats must never be offered so that those responsible for stalling economic transformation with a social justice slant may be identified and exposed of. Part IV is a basic goal of the nation and now that the court upholds the urban ceiling law, a social audit of the Executive's implementation a year or two later will bring to light the gaping gap between verbal valour of the statute book and the executive slumber of law-in-action. The court is not the anti-hero in the tragedy of land reform urban and agrarian. (*Bhim Sing* case, Krishna Iyer, J.)

1. प्रस्तावना और मूल अधिकारों की भूमिका [Preamble and Role of Fundamental Rights]

आपके पास यह तथ्य है कि भारत एक संप्रभु लोकतांत्रिक गणराज्य है। प्रत्येक शब्द में एक विशेषता है। यह संप्रभु है, इस तथ्य के साथ कि देश में एकता और अखंडता है, जो प्रस्तावना का अंतिम भाग है, दोनों को एक साथ रखें, तो यह तथ्य है कि भारत आज खुद को नियंत्रित करता है और वह विदेशी शासन से मुक्त है। दूसरा, इसने सरकार के लोकतांत्रिक स्वरूप को चुना है, सरकार का लोकतांत्रिक स्वरूप सार्वभौमिक वयस्क मताधिकार में विश्वास करता है, ताकि आपके प्रतिनिधि जो शासन करते हैं वे ऐसे व्यक्ति हों जो वास्तव में राष्ट्र की वयस्क आबादी का प्रतिनिधित्व करते हैं। यह तथ्य कि हम वयस्क भारतीय खुद पर शासन करते हैं, एक और आवश्यक विशेषता है। तीसरा, हम एक गणतंत्र हैं। फिर से यह कहना है कि हम एक तानाशाही नहीं हैं, हम एक राजशाही नहीं हैं, इसलिए हम उन सिद्धांतों द्वारा शासित हैं जिन्हें गणतंत्रीय सिद्धांत कहा जा सकता है जो लोकतांत्रिक सिद्धांतों से निकटता से जुड़े हुए हैं, बेशक हमारे पास एक राष्ट्रपति है। *शमशेर सिंह* बनाम *पंजाब राज्य*[33] के मामले के बाद राष्ट्रपति के पास मूल रूप से अंग्रेजी राजा की तरह बहुत सीमित शक्तियाँ हैं, हम वास्तव में एक कैबिनेट द्वारा शासित हैं, जिसे अंतत: निर्वाचित प्रतिनिधियों द्वारा चुना जाता है जिन्हें हम वयस्क भारतीयों ने वोट दिया है। श्रीमती इंदिरा गांधी के 42वें संशोधन द्वारा जोड़ी गई दो अन्य अवधारणाएँ हैं, समाजवादी और पंथनिरपेक्ष[34] [socialist and secular]। मेरे अनुसार वे पूरी तरह से अनावश्यक थे, वे पहले से ही वहाँ थे। क्योंकि अगला खंड न्याय की बात करता है, सामाजिक, आर्थिक, राजनीतिक [justice, social, economic and political]। सामाजिक न्याय एक संकेत देता है कि हम एक समाजवादी राज्य हैं और इसलिए हर बार जब विधायिकाएँ कानून बनाती हैं वे आम तौर पर लोगों के कल्याण को देखेंगे। वे निदेशक सिद्धांतों को देखेंगे और फिर उन कानूनों को बनाएंगे। इसलिए समाजवाद सामाजिक न्याय का हिस्सा है। पंथनिरपक्षता समान रूप से अगले खंड का हिस्सा है।

अब अगला खंड फ्रांसीसी क्रांति की पुकार से ज़्यादा और कम कुछ नहीं है, स्वतंत्रता, समानता, भ्रातृत्व [*Liberté, égalité, fraternite*] और इन तीनों का उल्लेख प्रस्तावना में किया गया है । इसलिए आपके पास स्वतंत्रता है जो अपनी इच्छा के अनुसार सोचने खुद को अभिव्यक्त करने की स्वतंत्रता की बात करती है और सबसे बढ़कर विश्वास, धर्म और उपासना की स्वतंत्रता की बात करती है। अगर आपके पास पहले से ही विश्वास और उपासना की स्वतंत्रता है तो आप एक पंथनिरपेक्ष राज्य हैं। जिसका उल्टा यह है कि राज्य इसमें हस्तक्षेप नहीं करेगा और न ही राज्य एक पंथ के विरुद्ध दूसरे पंथ की मदद करेगा। तो आपके पास पहले से ही समाजवादी पंथनिरपेक्षता अतंर्निहित है। इसलिए यह 42वा संशोधन जो उद्देशिका में दोनों शब्द जोड़ता है, अनावश्यक था,

33 *Shamsher Singh* v. *State of Punjab,* AIR 1974 SC 2192.

34 Substituted by 42nd Amendment Act, 1976, s. 2(a).

[socialist and secular words were unnecessary] जैसा कि मैंने पहले कहा था। स्वतंत्रता [liberty] बहुत महत्वपूर्ण है क्योंकि यह व्यक्तिगत अधिकारों को लाती है यह न केवल विश्वास, धर्म और उपासना आदि की स्वतंत्रता है बल्कि सबसे मौलिक अर्थों में विचार की अभिव्यक्ति की भी है.

हमने संपत्ति के बारे में कुछ नहीं सुना है। जस्टिस हिदायतुल्लाह ने *गोलकनाथ* [1967]के मामले में बताया कि उनके अनुसार मूल अधिकारों के भाग में संपत्ति को शामिल करना एक गलती थी। यह उनकी दृष्टि थी. 11 साल बाद 1978 में जनता पार्टी की सरकार ने इसे 44 वें संशोधन से हटाकर एक अलग अनुच्छेद [300] में डाल दिया। फिर हमारे पास भाईचारे की एक बहुत ही महत्वपूर्ण अवधारणा है इसलिए हम अनेकता में एकता [unity in diversity] में विश्वास करते हैं। विविधता बहुत महत्वपूर्ण है। यह सांस्कृतिक अधिकारों को संरक्षित करता है। हमारे संविधान का अनुच्छेद 29, उन कुछ अनुच्छेदों में से एक है जो दुनिया के अधिकांश संविधानों में जगह नहीं पाते हैं। न केवल भाषा को संरक्षित करने का अधिकार, बल्कि संस्कृति को संरक्षित करने का अधिकार, और यह एक पूर्ण अधिकार है। राज्य इसे नहीं छीन सकता है। इस तरह, विविधता में एकता समान रूप से संविधान की एक आवश्यक विशेषता या मूल संरचना का एक हिस्सा है। और अंततः आप व्यक्ति की गरिमा [dignity] पर आकर ठहरते हैं, जो स्वतंत्रता के साथ पढ़ने पर फिर से मूल अधिकारों के भाग में लेकर जाता है। इस प्रकार संविधान की उद्देशिका या प्रस्तावना को देखें तो इसमें ही 6 या 7 मूलभूत ढांचा है.

2. अनुच्छेद 368 [article 368]

अगर हम अनुच्छेद 368 परंतुक पर जाते हैं, तीन-चार मूल संरचना फिर से आती है। कार्यकारी शक्ति, विधायी शक्ति से अलग, न्यायपालिका से अलग है और यदि आप इनमें से किसी को छूना चाहते हैं तो 368 परंतुक के अनुसार कृपया राज्यों से अनुसमर्थन [ratification] के लिए जाएं। आपके पास 'शक्ति का पृथक्करण' [separation of power] है जो तीन उप-अनुच्छेदों से आता है। न्यायपालिका की स्वतंत्रता [independence of judiciary] है जो उनमें से एक से आती है क्योंकि यदि आप न्यायपालिका के किसी भी हिस्से को छूना चाहते हैं, आपको राज्यों से अनुसमर्थन के लिए फिर से जाना होगा। आपके पास परिसंघवाद [federalism] है, क्योंकि जिस क्षण संसद में राज्यों के प्रतिनिधित्व की बात की जाती है, या किसी भी तरह से विधायी सूचियों में संशोधन किया जाता है जो या तो राज्य की शक्तियों को कम करता है या बढ़ाता है, आप एक परिसंघवादी मुद्दे को छू रहे हैं। अंत में, आप संविधान में संशोधन कर सकते हैं, लेकिन यदि आप संशोधन के तरीके को बदलना चाहते हैं तो आपको राज्यों के पास जाना होगा।[35]

35 न्यायमूर्ति रोहिंग्टन नरीमन के अनुसार राज्यों के पास अनुसमर्थन के लिए जाना बुनियादी ढांचे सिद्धांत का उदाहरण है. यह बात कुछ संदिग्ध है. ऐसा लगता है कि रोहिंग्टन नरीमन यह प्रस्तावित कर रहे है कि 368 परंतुक बुनियादी ढांचा के दृष्टान्त हैं क्योंकि वनको बदलने के लिए कम से कम आधे राज्यों का अनुसमर्थन चाहिए. क्या राज्यों के अनुसमर्थन के बाद इन बुनियादी ढाचों को बदल सकता हैं? अनुच्छेद 368 का परंतुक कुछ अतिरिक्त बचाव देता है कि संविधान संशोधन के लिए ज्यादा भागीदारी चाहिए. लेकिन यह बुनियादी ढांचे को कैसे इंगित करता है क्योंकि मूलभूत संरचना तो किसी बदलाव से परे है.

हम उसी पहेली पर वापस आ जाते हैं, एक तरफ जस्टिस मैथ्यू की अवधारणा और दूसरी तरफ जस्टिस कृष्णा अय्यर की अवधारणा। क्या ये सभी अवधारणाएँ कहीं हवा में हैं या ये सभी संविधान में निहित [grounded] हैं। मेरे अनुसार वे संविधान में निहित हैं। हमें याद रखना चाहिए कि यह एक संविधान है, जिसकी हम व्याज़्या कर रहे हैं, मुख्य न्यायाधीश मार्शल के महत्वपूर्ण शब्दों के अनुसार (मकालक और मैरीलैंड में[36]), वह मौलिक दस्तावेज़ हमारे जीवन में अहम मायने रखती है। इसलिए इस दस्तावेज (संविधान) पर लागू होने वाले व्याख्या के सिद्धांत, वैधानिक व्याख्या के सामान्य सिद्धांतों से पूरी तरह से अलग होंगे। अगर हम इसे ध्यान में रखते हैं, और अगर हम महसूस करते हैं कि हमें शब्दों के पीछे नहीं रहना है, बल्कि शब्दों से ही सिद्धांत निकलते हैं, तो मुझे नहीं लगता कि हमें इन दो दृष्टिकोणों [grounded in the constitutional provisions or found in constitutional principles] को समेटने [reconcile] में कोई कठिनाई होनी चाहिए। बुनियादी ढ़ांचे को किसी एक प्रावधान या अनुच्छेद में ढूँढने की आवश्यकता नहीं है, इसे उप-अनुच्छेद में भी खोजने की आवश्यकता नहीं है, यह अनुच्छेदों के समूह में हो सकता है। लेकिन अंततः आप शब्दों से जो पाते हैं, वह सिद्धांत है। आइये एक उदाहरण लेते हैं, यदि आप न्यायपालिका की स्वतंत्रता [independence of judiciary] के सिद्धांत के साथ छेड़छाड़ करना चाहते हैं आप इसे भाग पाँच के अध्याय चार में पाएंगे जो उच्च न्यायपालिका से संबंधित है, आप इसे अनुच्छेद 235 व अनुच्छेद 235 से आगे पा सकते हैं जो उच्च न्यायालयों और अधीनस्थ न्यायपालिका से संबंधित है। अंततः आपको अपने आप को किसी अनुच्छेद या अनुच्छेदों के समूह में स्थापित करना होगा और यदि आप ऐसा करते हैं तो सिद्धांतों से विशेषता उभरती है और यदि आप उस आवश्यक विशेषता के किसी भी भाग के साथ छेड़छाड़ करना चाहते हैं, तो कृपया सावधान रहें।

दूसरी समस्या यह है कि कुछ ऐसी आधारभूत अवधारना है जो किसी अनुच्छेद में नहीं है, जैसे संविधान की सर्वोच्चता [supremacy of constitution] हमें कहाँ मिली, संविधान के किसी प्रावधान में इसे नहीं लिखा है। हम इसे इस तथ्य से प्राप्त करते हैं कि यह एक 'मूल मानक' (Grundnorm) है, यह एक बुनियादी विचार है, जो सभी कानूनों से ऊपर है। अमेरिकी संविधान में यह निहित [grounded] है, अनुच्छेद VI, जो कहता है कि संविधान और इसके अंतर्गत बनाए गए कानून देश के सर्वोच्च कानून होंगे। भारत के संविधान में ऐसा कोई अनुच्छेद नहीं है। संभवतः मूल संरचना केवल अनुच्छेद के समूहों में ही नहीं, बल्कि सिद्धांतों में भी पाई जा सकती है।

इंदिरा गांधी मामला और आपातकाल के प्रभाव [*Indira Gandhi* case and Impact of Emergency]

केशवानंद मामला के बाद जो पहला मामला आया वह *इंदिरा गांधी* मामला[37] है। नए अनुच्छेद

36 *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819).

37 *Indira Nehru Gandhi* v *Shri Raj Narain*, AIR 1975 SC 2299, 1976 (2) SCR 347.

329A[38] को 39वें संशोधन से जोड़कर कुछ उल्लेखनीय किया गया था। प्रधानमंत्री और स्पीकर को कानून से ऊपर रखा गया। अगर प्रधानमंत्री या स्पीकर का चुनाव होता है, तो अदालत इसमें दखलंदाजी [हस्तक्षेप] नहीं कर सकती थी, बल्कि अगर कोई अदालत इसमें दखलंदाजी करती, तो कोई भी कानून अब अपील में लागू नहीं होता। इस मामले में पाँचों न्यायाधीश एकमत थे कि यह 39वाँ संशोधन गलत है. मूल संरचना का उपयोग करके इसे अलग-अलग दृष्टिकोणों पर खारिज करने में मुख्य न्यायाधीश रे का दृष्टिकोण शायद सबसे व्यापक दृष्टिकोण था। जहाँ तक संविधान निकाय [constituent body] का संबंध है, उन्होंने कहा कि हाँ संविधान निकाय संसद से ऊपर है, सर्वोच्च न्यायालय से ऊपर है, राज्य के सभी अंगों से ऊपर है और वह जो चाहे कर सकता है, लेकिन अंततः यदि वह किसी निर्णय को रद्द करने जा रहा है, जो वह कर सकता है, तो उसे कानून लागू करना होगा। और यहाँ वह कुछ भी लागू नहीं कर रहा था, इसलिए मुख्य न्यायाधीश के अनुसार यहाँ 'कानून के शासन' [rule of law] की अवधारणा सामने आती है। संशोधन लागू करने के लिए कोई कानून नहीं था, अतः यह असांविधानिक था। न्यायाधीश न्यायमूर्ति हंसराज खन्ना ने पाया कि यह लोकतंत्र [democracy] के मूल सिद्धांत पर हमला करता है क्योंकि स्वतंत्र और निष्पक्ष चुनावों [free and fair elections] की अवधारणा पर आक्रमण किया गया था, दो व्यक्तियों को कानून से ऊपर रखा गया था चाहे वह चुनाव परिणाम कितना भी अनुचित क्यों न हो। इसलिए उन्होंने लोकतांत्रिक सिद्धांत का आधार बनाया। न्यायमूर्ति मैथ्यू का आधार था कि संघटक निकाय [constituent body] इतना *'sui generis'* है कि वह मामलों का निर्णय करने में सक्षम नहीं है। इसके साथ ही एक बहुत ही दिलचस्प फुटनोट दिया गया है, जिसे आप सभी को पढ़ना चाहिए, जहाँ एक बिल ऑफ अटेंडर का वर्णन किया गया है, जो 1696 में फेनविक नामक एक व्यक्ति के खिलाफ पारित किए गए और उनके अनुसार यह बिल ऑफ अटेंडर एक विधायी निर्णय की तरह है। सभी विधायक न्यायाधीश के रूप में बैठते हैं, आरोपी को कटघरे में खड़ा किया जाता है, आरोप उसके सामने रखे जाते हैं और फिर वह उनके सामने अपना बचाव रखता है। वह उस दृश्य का वर्णन करते हैं, जो फेनविक ट्रायल में हुआ; बेचारा फेनविक कुछ बात रख रहा था, लोग आपस में बातें कर रहे थे, उसे नहीं सुन रहे थे। विधायक अंदर-बाहर चले जाते हैं, संक्षेप में कहें तो उनके न्यायाधीशों ने उनकी परवाह नहीं की और बेचारे को मौत की सज़ा दी गई, और यह शायद आखिरी बिल ऑफ अटेंडर में से एक था। यही वजह है कि 100 साल बाद लागू हुए अमेरिकी संविधान में स्पष्ट रूप से कहा गया था कि कोई भी बिल ऑफ अटेंडर या *ex post facto* कानून कांग्रेस द्वारा पारित नहीं किया जाएगा। इसलिए, जस्टिस मैथ्यू इस सिद्धांत पर चले गए कि एक घटक निकाय राज्य के अंगों से ऊपर होने के बावजूद, व्यक्तियों के साथ व्यवहार करना तथा निर्णय पारित करने के लिए सुसज्जित नहीं है। यह शक्तियों

38 Article 329A. [Special provision as to elections to Parliament in the case of Prime Minister and Speaker.].

It was omitted by the Constitution (Forty-fourth Amendment) Act, 1978, s. 36 (w.e.f. 20-6-1979).

के पृथक्करण [separation of power] का सिद्धांत था, जिसका इस्तेमाल उन्होंने 39वें संशोधन को खत्म करने के लिए किया। जस्टिस यशवंत चंद्रचूड़ ने अनुच्छेद 14 को उठाया और कहा कि समता के सिद्धांत [principle of equality] का उल्लंघन किया गया है। आपने दो व्यक्तियों को उठाया है और उन्हें कानून से ऊपर रखा है। प्रधानमंत्री, स्पीकर और किसी अन्य निर्वाचित व्यक्ति के बीच कोई समझदारी भरा अंतर नहीं है। 39 वें संशोधन के अनुसार जहाँ तक प्रधानमंत्री और स्पीकर का प्रश्न है, वहाँ की समस्या नहीं है क्योंकि उनके ऊपर निर्वाचन संहिता लागू नहीं होगी. जहां तक दूसरों का संबंध है, आपके पास एक चुनाव संहिता है जिसका पालन किया जाना चाहिए। यह अंतर समता के मौलिक सिद्धांतों के विरुद्ध है. जस्टिस बेग ने बुनियादी ढांचे के बारे में बहुत कुछ नहीं कहा, लेकिन यह भी महसूस किया कि अगर वह संशोधन को विशेष तरीके से पढ़ते हैं तो प्रधानमंत्री और स्पीकर को उचित सुनवाई का सामना करना पड़ेगा और अंतत: कानून के अनुसार अपील का निर्णय लेना होगा। इसलिए *केशवानंद* के बाद इस फैसले ने कुछ बहुत ही उल्लेखनीय परिणाम दिए। आपके पास पहले से ही पाँच अलग-अलग दृष्टिकोण और पाँच अलग-अलग विशेषताएँ थीं जिन्हें बुनियादी कहा जाता है। इसके बाद *मिनर्वा मिल* का निर्णय[39] [Minerva Mills] आया। 44वें संशोधन द्वारा जनता पार्टी की सरकार के माध्यम से अनेक चीज बदली गई लेकिन उनके द्वारा जो नहीं बदला गया, वह सांविधानिक रूप से दो बहुत महत्वपूर्ण पहलू थे,[40] पहला, अनुच्छेद 368 (5) के अनुसार मूल संरचना सिद्धांत को खारिज करना, जिसमें मूल रूप से कहा गया था कि मूल संरचना जैसी कोई चीज नहीं है, और संसद की संविधान संशोधन की शक्ति में कोई निर्बन्धन नहीं है, और अनुच्छेद 368 (4) के अनुसार अदालत सांविधानिक संशोधन को छू नहीं सकती, संसद ने जो कुछ भी कहा, वह अंतिम है। दूसरा, अनुच्छेद 31C, फिर दो भाग में विभाजित हो गया, न केवल संपत्ति के अधिकार जो अनुच्छेद 39(b) और अनुच्छेद 39(c) में निहित थे, बल्कि सभी निदेशक सिद्धांत, ताकि अब जब कोई ऐसा कानून हो जिसे आप किसी तरह निदेशक सिद्धांत से जोड़ सकें, तो वह अनुच्छेद 14, 19 और 31 से ऊपर हो।

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39 *Minerva Mills* v. *Union of India*, AIR 1980 SC 1789. 8G इसे नानी पालकीवाला देख रहे थे. उनके जूनियर में केवल रोहिंगटन नरीमन को ही मिनेर्वा मिल्स की ब्रीफ दी गई थी क्योंकि इसमें कोई पेमेंट नहीं था.

40 article 368

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article [whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976] shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.]

इसलिए नानी पालखीवाला 42वें संशोधन के बचे हुए हिस्से को चुनौती देने के लिए *मिनर्वा मिल्स*[41] के मामले में अदालत में आए और वह उस चुनौती में सफल रहे। सभी पांच न्यायाधीशों ने अनुच्छेद 368 (4) और (5) को खारिज कर दिया। हालांकि आपको न्याय के तर्क में थोड़ा अलग अंतर मिलेगा। जस्टिस भगवती का तर्क था कि अनुच्छेद 368 (4) और (5) न्यायालय को यह देखने से रोकते हैं कि संशोधन प्रक्रियात्मक [procedural] रूप से खराब है या नहीं। उन्होंने जो कहा वह यह था कि मान लीजिए अनुच्छेद 53[42] में संशोधन किया जाना था, अनुच्छेद 53 सीधे-सीधे अनुच्छेद 368 के परंतुक के अंतर्गत आता है और इसके लिए आधे राज्यों के अनुसमर्थन की आवश्यकता होगी। मान लीजिए राष्ट्रपति बिना अनुसमर्थन के विधेयक पर हस्ताक्षर करते हैं तो क्या होगा? अस्तु, यह प्रावधान असांविधानिक है। मुख्य न्यायाधीश चंद्रचूड़ ने कहा कि *केशवानंद* ने एक सिद्धांत के रूप में निर्धारित किया है कि एक बुनियादी संरचना है उस सिद्धांत का पालन किया जाना चाहिए। यह उस सिद्धांत का उल्लंघन करता है। अनुच्छेद 31C में फिर से दरार पड़ गई। न्यायमूर्ति भगवती वहां अल्पमत में थे, क्योंकि उन्हें लगा कि यदि अनुच्छेद 31A वैध है और अनुच्छेद 31C, जैसा की वह मूल रूप से अधिनियमित था, वैध था। लेकिन सौभाग्य से हमारे लिए मुख्य न्यायाधीश चंद्रचूड़ और तीन अन्य विद्वान न्यायाधीश इस बिंदु पर रुके और उन्होंने कहा कि अनुच्छेद 14, 19, और 21 तीनों मिलकर एक स्वर्णिम त्रिभुज (Golden Triangle) बनाते हैं। उन्होंने कहा कि यदि इस स्वर्णिम त्रिभुज के दो पक्षों को उनकी प्रभावशीलता से वंचित करने की कोशिश की गई, तो जहां तक बड़ी संख्या में कानूनों का संबंध है, संविधान प्रभावित होगा और अनुच्छेद 31C जिसे उन्होंने संशोधित किया है, वह पारित नहीं होगा। एक और बहुत महत्वपूर्ण बात यह है कि मुख्य न्यायाधीश चंद्रचूड़, जैसा कि वह उस समय *मिनर्वा मिल्स* में थे, ने न केवल बुनियादी ढांचे को बनाए रखा गया था, बल्कि मूल अधिकार के बारे में घोषित किया कि वे उन उद्देश्यों [end] को प्राप्त करने का एक साधन [means] थे जो नीति निदेशक तत्वों में बताए गए थे. दोनों मूल अधिकार और नीति निदेशक सिद्धांत समान महत्व के थे। उनका समन्वयकारी निर्वचन [harmonious construction] करना ही होगा. और यह बुनियादी ढांचे का भाग है जिसे संशोधन करके बदला नहीं जा सकता.

VI. निष्कर्ष [Conclusion]

मिनर्वा मिल के निर्णय के बाद हमारे पास फिर से कई फ़ैसले आए हैं. सबसे पहला *वामन राव*[43] [Waman Rao]का निर्णय था, जिसे फिर से मुख्य न्यायाधीश चंद्रचूड़ ने निर्धारित किया था, जिसमें मूल रूप से तैयार किए गए अनुच्छेद 31A, 31B, 31C को चुनौती दी गई थी. उन सभी को केवल एक शर्त के अधीन वैध और सांविधानिक बरकरार रखा गया था, कि 24 अप्रैल 1973 के बाद संसद नौवीं अनुसूची में कानूनों को डालना जारी रखती है, तो हर ऐसा संशोधन अब इस

41 *Minerva Mills v. Union of India*, AIR 1980 SC 1789.

42 Art. 53-Executive power of the Union.

43 *Waman Rao v Union of India*, (1981) 2 SCC 362.

आधार पर परीक्षण के लिए उत्तरदायी होगा कि यह मूल संरचना का उल्लंघन करता है।

तीसरा मामला जो एक त्रिवेणी [trilogy] को पूरा करता है [*मिनर्वा मिल, वामन राव* के साथ] वह एक बहुत ही दिलचस्प फ़ैसला, भीम सिंहजी[44] के नाम से जाना जाता है, जहाँ शहरी भूमि सीलिंग अधिनियम, 1976 [Urban Land (Ceiling and Regulation) Act, 1976] को चालीसवें संविधान संशोधन द्वारा नौवीं अनुसूची में डाले जाने से एक चुनौती खड़ी हो गई थी। बहुमत ने निर्णीत किया कि यह कानून वैध है और बुनियादी ढांचे का उल्लंघन नहीं करती. यह अनुच्छेद 39(b and c) को आगे बढाने में सहयोगी है. लेकिन सभी पाँच न्यायाधीश इस बात पर सहमत थे कि शहरी भूमि सीलिंग अधिनियम कि धारा 27 (1)असांविधानिक थी. इस धारा में बस इतना ही कहा गया था कि यदि आप 10 वर्ष की अवधि के भीतर शहरी भूमि को हस्तांतरित करना चाहते हैं तो आपको ऐसा करने के लिए सक्षम प्राधिकारी की अनुमति लेनी होगी। सभी पांचों ने इसे गलत माना और दुर्भाग्य से इस मुद्दे पर उनमें से तीन ने कोई कारण नहीं दिया है। मुख्य न्यायाधीश चंद्रचूड़ अपने निर्णय के अंत में न्यायमूर्ति कृष्णाअय्यर से सहमत थे और न्यायमूर्ति कृष्णाअय्यर ने अपने निर्णय के अंत में एक संक्षिप्त निर्णय पर हस्ताक्षर किए जिसमें वे मुख्य न्यायाधीश चंद्रचूड़ से सहमत थे और दोनों सहमत थे कि धारा 27 (1) को रद्द कर दिया जाएगा लेकिन कोई कारण नहीं दिया। इसलिए कारणों के लिए हमें अल्पसंख्यक न्यायाधीशों के पास जाना होगा। [जो धारा 27 (1) को लेकर बहुमत के साथ थे]। न्यायमूर्ति ए पी सेन ने संपत्ति के तर्क का उपयोग मूल संरचना के हिस्से के रूप में किया। न्यायमूर्ति खन्ना इससे सहमत नहीं थे और न्यायमूर्ति तुलजापुरकर ने अनुच्छेद 14 का संदर्भ किया। इसलिए हम फिर से पहले स्थान पर आ गए हैं, कोई नहीं जानता कि उस धारा को वास्तव में कैसे रद्द किया गया। उस निर्णय के बाद हमारे पास कुछ निर्णय भी आए, जिसमें न्यायिक समीक्षा की अवधारणा उभर कर आई है।

विभिन्न संशोधनों में से एक *सांबा मूर्ति* मामला[45] [Sambamurthy] महत्वपूर्ण है. (अनुच्छेद 371ख[46]) और 1997 में *चंद्र कुमार* मामला[47] भी है जहाँ 42वें संशोधन का एक हिस्सा यह कहते

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44 *Maharao Sahib Shri Bhim Singhji* v. *Union of India* 1981 (1) SCC 166.

45 *Sambamurthy v. State of Andhra Pradesh,* AIR 1967 SC 663.

46 The Constitution of India, art. 371B.

47 *L. Chandrakumar v. Union of India*, AIR 1997 SC 1125. (1) Article 323A(2)(d) or Article 323A(3)(d) of the Constitution of India, totally exclude the jurisdiction of 'all courts', except that of the Supreme Court under Article 136. It runs counter to the power of judicial review under Articles 226/227 and Article 32 of the Constitution because article 226, 227 are part of basic structure theory.

(2) The Tribunals, constituted under Article 323A or 323B possess the competence to test the constitutional validity of a statutory provision/rule.

हुए खारिज कर दिया गया कि अनुच्छेद 323B [48] जो अब अनुच्छेद 226 और 227[49] के अंतर्गत उच्च न्यायालयों को प्रतिस्थापित करने वाले न्यायाधिकरणों की बात करता है, वह सांविधानिक रूप से खराब है। यह हमारे लिए एक नवीन और महत्वपूर्ण सिद्धांत है। इस प्रकार एक और संकल्पना अर्थात न्यायिक समीक्षा [judicial review] अब हमारे संविधान की मूल संरचना का भी हिस्सा है। अंत में *आई आर कोएल्हो* मामला[50] है, इसे उस त्रिवेणी [trilogy of Minerva Mills, Wamon Rao and Bhim Singh ji] को आगे बढ़ाना था. लेकिन वह अन्य समस्याएं पैदा करता है। हालांकि इसने इस तथ्य को मान्यता दी थी कि मूल अधिकार मूल संरचना का हिस्सा हैं,[51] इसने दो-स्तरीय परीक्षण प्रस्तावित किया और कहा कि पहली बात जो आपको पूछनी चाहिए वह यह है कि क्या कोई विशेष क़ानून किसी विशेष मूल अधिकार का उल्लंघन करता है, अगर जवाब हाँ है, तो आप दूसरे परीक्षण पर जाएँ, कि क्या यह अब मूल संरचना का उल्लंघन करता है। यदि मूल अधिकार पहले से ही मूल संरचना का हिस्सा हैं तो दूसरे परीक्षण का सवाल ही कहाँ है। हम विभिन्न अवधारणाओं में खोकर रह गए हैं। यदि आप मुझसे पूछें, तो मैं उत्तर दूंगा कि मान लीजिए कि हाथी को 6 नेत्रहीनों के साथ छोड़ दिया गया है तो हर कोई अपनी-अपनी दृष्टि से उसकी व्यवस्था करेगा। आधारभूत संरचना [बुनियादी ढांचा]कुछ वैसा ही है। आशा है कि आने वाले दिनों में कुछ प्रकाश और दृष्टि बुनियादी ढांचे की पहचान के लिए मिलेगी.

48 The Constitution of India, art. 323B.

49 The Constitution of India. arts. 226, 227.

50 *I. R. Coelho* v. *State of Tamil Nadu*, AIR 1999 SC 3179.

51 This sentence of Justice Nariman needs greater attention because the first point of conclusion of *IR Coelho* case states that"(i) A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not." This seems inconsistent.

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