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About India Foundation

India Foundation is an independent research centre focussed on the issues, challenges and opportunities of the Indian polity. The Foundation believes in understanding contemporary India and its global context through a civilizational lens of a society on the forward move. Based on the principles of independence, objectivity and academic rigour, the Foundation aims at increasing awareness and advocating its views on issues of both national and international importance.

With a team of dedicated professionals based at its office in New Delhi, the Foundation works with partners and associates both in India and overseas to further its stated objectives.

About India Foundation Journal

The India Foundation Journal, India Foundation's flagship publication has been in circulation since 2013. The journal is led by an Editorial Board of eminent scholars and leaders from various spheres of Indian public life. The bi-monthly journal covers a wide range of issues pertinent to the national interest, mainly focusing on international relations, national security, legal and constitutional issues, Indian polity, and articles of social, religious and political significance. Over the past few years, the journal has cultivated an expansive readership creating awareness on issues impacting Indian society and has contributed towards policy formulation. The journal seeks articles from scholars with the intent of creating a significant body of knowledge with a nationalist perspective and establish a recognised forum for debates involving academicians and policymakers.

EDITOR'S NOTE

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To Seize the Moment

In August 2019, the special status accorded to the state of Jammu and Kashmir vide Article 370 was revoked by the Indian Parliament and the state was divided into two union territories—The Union Territory of Ladakh (without a legislature) and the Union Territory of Jammu and Kashmir (with a legislature). In December of the same year, Parliament of India passed the Citizen Amendment Bill (CAB). The passage of both these bills in Parliament was indeed an epoch-making moment and exhibited firm political resolve in addressing long-standing issues.

Article 370 gave the erstwhile state of J&K a special status, which prevented its emotional integration into the Indian Union. However, it was Article 35A that empowered the J&K state legislature to define permanent residents of the state and provide special rights and privileges to those permanent residents. Through Article 35A, a veneer of Constitutionality was given to provisions which were discriminatory to women, Valmikis, West Pakistani refugees who had settled in the state as also to other minority groups. It was thought of by many that Article 370, though a temporary provision in the Indian Constitution, could not be abrogated. Similarly, concerning the grant of citizenship to the minority groups who fled religious persecution from Pakistan, Afghanistan and Bangladesh, there was a view that the matter was too complicated and that passing legislation to grant citizenship to these hapless people was fraught with risk. That the government of the day took these historic decisions points to the strength and resilience of India's democracy and the power of India's parliament. While the issues remain contentious and hotly debated, the very fact that they were debated in Parliament before being put to vote and the fact that the proceedings were televised live, point to transparency in the system where the will of the people prevails. Long pending issues have finally been brought to centre stage and through legislation made into law. This obviously will pose its own set of problems which would need to be addressed. But sans legislation, the problems would simply have dragged on interminably. Now we have a real possibility of resolution and closure.

In November 2019, a heinous act of rape and murder took place, which left the country in shock and rage. A young veterinary doctor, while returning from work on the night of 29 November in Hyderabad, was abducted,

raped, murdered and her body was thereafter burned. The sheer brutality of the incident enraged the country and there were calls for giving death sentence to the four accused who were apprehended by the police a day after the victim's charred body was found. This gruesome crime raised questions on women's safety and the tardy pace of justice delivery in the country. A twist to the case took place when all the four accused, when taken to the encounter site at 3 am on 6 December, attempted, as per the police, to escape with a pistol they snatched from one of the police officers. The police claimed that the accused in their escape bid, fired at the police officers and the police responded, killing all the four in the ensuing encounter.[1] There was jubilation and a sense of relief in many parts of the country at this immediate dispensation of justice, but there were many who felt troubled too.

Post the dastardly rape and murder and the arrest of the four suspects in the case, there was a sense of fatality that the case would drag on interminably. The police encounter hence came as a breath of fresh air, in that instant justice was delivered. But if that remains the only means of delivering justice in a time-bound manner, it reflects poorly on the Indian state and its criminal justice system. The slow pace of justice delivery in the country is indeed a cause of worry, as even in the much-publicised Nirbhaya rape and murder case, the death sentence granted to the convicts is yet to be executed, six years after the crime. But a police encounter is hardly the right way to go about delivering justice. If such a means is institutionalised, the certain misuse of such a provision will lead to far more dangerous outcomes.

A day after the four accused were shot dead in Hyderabad in the police encounter, the Chief Justice of India, Chief Justice Sharad Arvind Bobde, while speaking at the inauguration of the new building of Rajasthan High Court Bench in Jodhpur, said, "I don't think justice can ever be or ought to be instant. And justice must never take the form of revenge. I believe justice loses its character of justice if it becomes a revenge"[2]. These were indeed words of wisdom which needed to be said. The CJI also alluded to the need to settle cases expeditiously, which remains the bane of India's criminal justice system. The clamour for swift justice, especially in cases where a heinous crime has been committed, is unlikely to die down unless the courts can deliver justice speedily. There is no gainsaying the fact that India's criminal procedure is long and process-driven. But vigilante justice is not the panacea that we are looking for, though such acts might seem justified to an indignant public. If this becomes the norm, there would be even further dilution of accountability and an erosion in the credibility of the criminal justice system. Justice Madan B Lokur, in an article in the Indian Express, makes the succinct point that encounters achieve little and while they "seem to raise questions of instant justice, they actually raise questions of instant injustice".[3]

He goes on to say that while the problems are many, the solutions are many too and that all stakeholders need to identify all problems and demonstrate a will to resolve the issues. But there can be no getting away from the requirement of progressing cases in a time-bound manner. It is hoped that CJI Bobde will keep this as a priority item during his tenure.

India's burgeoning population growth is also a matter of concern. In his Independence Day speech on 15 August 2019, Prime Minister Modi also expressed concern over "population explosion," a trend that, if left unchecked, could go against efforts to bring millions of people out of poverty and undo the benefits of higher welfare spending for the poor. The Prime Minister said that this causes new challenges for the coming generations, and asserted that the central and state governments should launch measures to deal with the issue. He further stated that a small section of society, which keeps their families small, deserves respect and those who have small families are doing an act of patriotism.[4]

That India needs to control its population growth is a point well understood and all political parties are on the same page on this subject. Where they differ is on the means to be adopted. It would be difficult if not well-nigh impossible to give all Indians a decent life and jobs to its youth if population growth eats into the capacity of the state to provide for its citizens. A few years after Independence, as per the 1951 census, India's population was just over 31 crore. The population has increased to over 121 crores as per the 2011 census and is assessed to be over 137 crores today. An increase of over four times since a short period of 70 years has greatly strained the available infrastructure and is a drain on the finite resources of the nation, of which water is a key component. How India plans to curb its unsustainable growth in population will have to be seen, but there would be a need for legislative intervention. How this is to be brought about and implemented would remain the defining challenge for the next decade. It is hoped that this matter is vigorously debated in the media and legislation is brought about to reward those who have small families while imposing penalties on those that choose not to do so.

Religion, as far as the Constitution is concerned, is a personal matter and the state has no role to play in the same. But in the personal lives of most Indians, religion does play a vital role and is also deeply enmeshed in the national value system. As a secular country, India's laws should have been equal for all, but the Constitution has given special preference to religious minorities through Article 30 of the Constitution.[5] It is also discriminatory in terms of state control over religious places, which impact on Hindu places of worship and not on others. There is a need to define what constitutes a minority, both at the national level and at the level of states. These issues cannot be swept under the carpet, leaving the entire burden of secularism to be borne by the majority religion.

These are just a few of the issues which need open discussion and legislative correction. The government has shown great will in passing legislation, which earlier governments have shied away from and has also not shied away from taking bold decisions in the national interest on the specious grounds that the results could be destabilising. Vested interests will certainly attempt to muddy the discourse, but that cannot be grounds for inaction. Great will and fortitude has been shown in 2019, in passing major legislation which had been pending since ages. The momentum must be maintained in 2020, to catapult India to its destined leadership role in the coming decades. We must seize the moment. It may not come again.

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4 *"Independence Day: Full Text of PM Modi's Address to Nation." Business Today, 15 Aug. 2019, www.businesstoday.in/current/economy-politics/independence-day-pm-modi-address-nation-full-text-speech-15-august-red-fort/story/372903.html.-15*

5 *30. Right of minorities to establish and administer educational institutions*

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause

(2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

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The Knight-Errant?

Kanu Agrawal*

The knight, as an embodiment of valour, strength and mystery, has been the subject of enchantment for generations of fables. As an idea, it has always been associated as a maverick, whether it is the medieval knight wandering in search of adventures or the classic one step sideward and two steps forward movement in chess. The law, despite its obsession with conformity and consistency, has often thrown open its own version of the knight, through judges and judicial activism, with their own notions of dissidence, vigilantism and social reform. There have been various legends associated with dissenting judgments, shaping the history of the Supreme Court, some even gaining legitimacy subsequently, through larger benches affirming previous minority opinions[1].

The judicial resurrection of dissents is critical and makes it necessary to examine the four opinions of Chandrachud J., three of which are minority. The said opinions, understandably, have gained considerable traction within certain quarters, who were perhaps the target audience for the same. Considering the fact that he would, in the future, become one of the longest serving Chief Justices of modern times, the four opinions—the dissent in the *Puttaswamy II*[2] case, the limited minority opinion in the *Sabrimala Temple*[3] case [now referred to a larger bench], the dissent in the *Urban Naxal*[4] case and the judgment in the *BK Pavitra* case[5], require closer consideration.

The AADHAR dissent: The step sideward

After the eloquent majority judgment in the Puttaswamy I, importing the concept of *legitimate state interest*, the dissent in Puttaswamy II, comes as a slight surprise. The dissent is not based merely on a disagreement on the conclusions or the applicability of the doctrine of judicial review, rather it is grounded in a fundamental mistrust of the use of biometrics for public purposes. Ignoring how biometrics have, across numerous technological interactions, revolutionised the previously document/password based identification systems, the dissent, after conducting a scientific enquiry via a judicial opinion, concludes that biometrics cannot be foolproof.[6] This symptomatically leads to a negative finding under the proportionality test, as even if the object of the legislation constitutes a *legitimate state interest*, it would lead to exclusions of critical benefits to the marginalised populace. The possibility of these exclusions and the failure of the State to demonstrate the project as a proportional means to achieve state interests of minimisation of pilferage and targeted delivery of benefits, tips the balance of proportionality. The second leg of disagreement stems from misgivings about storing and management of Aadhaar data and the possibility of interlinking of separate data silos. This leads to negative conclusions on surveillance, profiling and privacy and administers a finding of unconstitutionality on presumptive

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apprehensions of interlinking of unidentifiable data patterns. Lastly, the opinion has a brief overlap with the majority judgment, albeit with differing conclusions on the money bill aspect. The dissent tears in to the characterisation of Aadhaar Act as a money bill, subjects it to substantive judicial review and renders the process and the resulting Act, unconstitutional.

This dissent is the step sideward and not backward, as it is a brilliant read on the academic front. In theory, the dissent fails to reason the applicability of the test of proportionality or the veiled '*least intrusive means*' to the doctrine to *legitimate state interests* and makes a fatal, fundamentally wrong presumption of Aadhaar data, solely in possession of the State, becoming a *bridge across discreet data silos*. Such factual assumptions, in absence of the Petitioner's empirically establishing the same, cannot be made by the Court sitting under writ jurisdiction. Further, it is often inadvisable to enter scientific questions[7]. It is based on individualistic idealism, almost with a pre-supposition of unfairness of State action and conduct, something unique within the constitutional sphere. It ignores how the dialogue between *technology and power* is not unprecedented and the relationship between the individual and State will continue to change drastically, from one age to another[8]. The said transformation is an undeniable facet of the continuous process of sophistication of the modern State, as with more means come more responsibility.

The Sabrimala Enthusiasm : The first step backward

The opinion in the Sabrimala judgment, prior to the recent reference of the 'question of law' to seven judges[9], forms a part of the three concurring opinions in the judgment. However, certain parts of the opinion form a part of the minority as the same is not resonated in the other two opinions of Misra, J. and Nariman, J. It is first necessary to discuss the majority opinion, considering the reference in the review does not provide elaborate reasons for disagreement rather, probably as a matter of *judicial maturity*, simply refers it to a larger bench to decide on questions concerning judicial policy in such matters. Gogoi J., speaking for the majority in the reference order, had previously given hints towards a different judicial approach in the *Adi Saiva*[10] case. In the *Adi Saiva* case, Court read down an amendment which provided that *archakas* could be appointed in a Temple from any caste, class or creed. The Court held that the exposition of the *Agamas* (the rules with regard to rituals followed in worship), excludes even other Brahmins from the sanctum sanctorum and from the performance of duties of poojas. Therefore, the Court implied that the exposition in Agamas does not discriminate on any constitutionally recognisable ground of caste, class, race or religion; rather it differentiates on the basis of the denominational doctrine and traditional lineage. The reference of the question of law and policy in Sabrimala review was therefore in line with the mature and tempered judicial policy in such matters. While the reference may decide the questions framed one way or the other, it is necessary to examine the judgement in *Indian Young Lawyers Association and Ors. v. State of Kerala and Ors.*(hereinafter referred to as the "original judgment)".

The majority opinion in the Sabrimala judgment, is an exercise laced with a sequence of errors, geometrically progressing in gravity. The first conclusion—that the devotees of Sabrimala do not constitute a *separate denomination*—may, on the limited precedent on the subject seem justifiable, but omitting the opportunity to developing upon the precedent, the *sequitur* is undeniably dangerous. The majority seems to presume that the group rights under Article 26 for administration/ management of religious premises is limited to *separate denominations*. There is no doubt as to why the majority in the subsequent reference order refers this exact question of whether the *"essential religious practices of a religious denomination, or even a section thereof are afforded constitutional protection under Article 26"* to seven judges. The denial of this recognition in the previous judgment, apart from ignoring the use of the phrase *sections thereof* under Article 26, fuels apprehensions of larger doctrinal problems of constitutionally approved discrimination amongst different categories of faiths in the Indian context.

The said apprehensions are based on a rather simple premise; if *essentiality* of a practice within a belief system is the determinative factor in defining the extent of constitutional freedom accorded to that particular religion/denomination, the degree of such religious freedom would be different for every religion/denomination, depending upon how wide is the scope of such *essentiality* within the said religion/denomination. This will invariably result in an arbitrary approach, wherein the degree of constitutional freedom varies as per the nature of a particular religion/ denomination and how strict it is in terms of defining its practices and requiring its adherent to practice them. Therefore, the *de facto* situation would be where some religions/denominations may have wide ranging '*essential practices*' arising from rigid prescriptive scriptures/manuscripts as opposed to another religion/denomination which may have little to none '*essential practices*'. The *traditionalists*, in this context argue that owing to the limited aspects which Indic faiths would consider *essential* to their survival, the protection guaranteed under Article 25 and Article 26 to them, in light of the essentiality doctrine, would undeniably be lesser than other faiths. It is argued that Indic faiths with the lack of sophisticated religious establishments, the complexity and diverse mosaic of temples in India, the lack of a streamlined path towards religious affirmation, the organic and unique history of every small sub-cultural unit within the omnibus idea of Hinduism, are points which separate it from the monotheistic, well organised, book based, inherently exclusionist ideas of Abrahamic faiths. The said differentiations may often be marketed as rational strengths, but on account of the essentiality doctrine, have turned out to be constitutional weaknesses. The extent of constitutional freedom becomes a product of these essentiality imbalances, resulting in rewarding the unyielding and punishing the malleable. Surprisingly, the said position seems to have been affirmed in the minority opinion of J. Rohinton in review petitions, that original judgment "*cannot be used to undermine the religious rights of others, including, in particular, religious minorities*" on the basis of a skewed interpretation of Article 25(2)(b),Article 29 and Article 30.[11]

Keeping the above said apprehension aside,

the Court has mysteriously ignored the fact that the essentiality doctrine is intended to interpret the constitutionally viable extent of State intrusions in religious matters. The same cannot be extended to justify the Court's intrusions in *public interest litigations*. Further, even if the Sabrimala and its devotees are not considered to be a *separate denomination*, the denial by the majority judgment to even discuss purported rights of the religious establishment under Article 26, points towards a serious omission. The majority opinion proves that while the essentiality doctrine is *de jure* uniformly applicable, the application of the said doctrine, manifests itself in a *de facto* arbitrary situation.

The minority part in the third concurring opinion, takes these inconsistencies in Misra, CJ.'s and Nariman, J.'s opinions, to another tangent altogether. After a similar analysis mentioned above, the opinion nonchalantly imports Article 17, the provision which bans "untouchability," to the Sabrimala debate. It makes sweeping conclusions on the subject of 'caste based exclusions' and the alleged "*hierarchical order of purity and pollution enforced by social compulsion*" without any submissions or factual or judicial analysis to that effect. The opinion places reliance on *Devaru* case[12] ignoring that the same concerned a state legislation which was enacted to reform and eradicate the systematic caste based exclusion across temples specifically under Article 25(2)(b) and cannot stand at the same footing as Sabrimala case. Article 17, if at all applicable in the said context, would be limited to cases of complete exclusion as was in the *Devaru* case and in the case of Sabrimala. The opinion presumes a *purity and pollution* based exclusion at Sabrimala in order to import the 'untouchability' under Article 17. The reliance on the opinion of Gogoi, J. in the *Adi Saiva* case is surprising, as although he held that Article 17 of the Constitution strikes at caste-based practices built on *superstitions and beliefs that have no rationale or logic*, but in the same paragraph, in the context of appointment of a certain sub-caste of brahmins as *Acharaks*, he carefully points out that not every exclusion would be hit by Article 17. The stark difference in approach is further accentuated as in the same paragraph, Gogoi, J. provided a more nuanced and intuitive understanding of what actually constitutes a *denomination*, held that the "offer" of the State to appoint Shaivite as Archakas in Shiva temples and Vaishnavas in Vaishnavite temples is *too naïve an understanding of a denomination* and a "denomination" is actually a far more *sharply identified subgroup*. The reliance on the *Adi Saiva* case is surprising and almost purposefully incomplete.

The next leg of minority opinion is, in part, dealing with the phrase "*laws in force*" in Article 13 and the judgement of *Narasu Appa Mali*[13]. This is relevant because the interpretation of the said article/provision defines the contours of judicial review by the Court as only *laws* falling under Article 13 would be subject to judicial review. In 1951, the Bombay High Court, in a two part judgment, by majority held that *personal laws* are not included in the expression "*laws in force*". In the second part, a split Division Bench, on an issue which can be termed as *obiter*, interpreted the phrase '*custom or usage*' under Article 13. Chagla, J. held that 'custom or usage' would be included in the definition of 'laws in force' whereas

Gajendragadkar, J. held otherwise. This interpretation is provided without controlling the meaning with its suffix - '*having the force of law*'. A harmonious construction would completely alter the understanding and the interpretation of the said phrase. Interestingly, while dealing with the issue of Triple Talaq in Shayara Bano case, Nariman, J. had held that the review of Narasu case is unnecessary as the practice of Triple Talaq was indirectly codified by the Muslim Personal Law (Shariat) Application Act, 1937 and hence, it was a '*custom or practice*' which is '*having the force of law*'. The minority opinion in Sabrimala, in an expansionist interpretation of Article 13, states that irrespective of the source from which a practice claims legitimacy, the Court's power of judicial review cannot be detracted considering the *constitutional vision of equal citizenship*. This zeal, if applied in the manner contemplated, mandates the Court to enter spheres which have remained untouched even by legislations or any writ of the State. The State, with all its "might" in terms of the tangible wherewithal and direct democratic writ, often shies away from entering religious spheres, especially the regulation of religious customs in holy places. Previously, the approach of the Court, through the essentiality doctrine, permitted state interventions in regulation of religious place through *ex-officio* appointments, but this approach would permit adventurist judicial intervention over and above what is contemplated even by the State.

Further, the use of the terms '*customs or practice*' in the text of Article 13 indeed creates a muddle, but constitutional interpretation has to take within the enforceable realities. If this interpretation is extrapolated to its extreme, then perhaps a writ petition questioning the practice and 4 AM timing of *bhasm-aarti* at a Shiv Temple on grounds of rationality, equality and arbitrariness would be maintainable. It may even be the case that *transformative constitutional morality* may render the practice unconstitutional. Nariman, J., perhaps preempting the anomalies of expanding the powers of judicial review over uncodified and unprotected customs and practices, has deftly skirted the issue after ignoring it altogether in Shayara Bano case[14] (Triple Talaq judgment). However, it is relevant to point out that the Supreme Court has, through various judgments, taken conflicting stands on the issue, which were altogether ignored during the submissions made by the counsel and the minority opinion in question. The pre-occupation with *Narasu* is hence uncalled for.

The last part of the opinion, which progressively deteriorates in reasoning, casts a serious shadow over the essential practices doctrine. The said doctrine has been questioned by scholars on both sides of the ideological divide—one being the *expansionists*, advocating for interventionist approach and the other being the *traditionalists*, advocating for a wider domain of exercise of religious freedoms. The minority opinion relies only upon opinions of various scholars falling under the first category and conducts a rather incongruent exercise in comparing the *group rights* and *individual rights*. The opinion boldly claims that the rights under the Constitution are only meant for *self-realisation of the individual*. The said position, apart from being etymologically inconsistent, has no basis in constitutional

jurisprudence. The fundamental rights under Article 15(4), Article 16(4), Article 17, Article 24, Article 26, Article 29 and Article 30 are all group rights and often there have been clashes between the said group rights and individual rights, wherein the Court has either harmoniously construed the conflicting fundamental rights, as in the cases concerning affirmative action, or applied the principle of proportionality, as in the Aadhaar judgment. The apprehension that elevating group integrity may cause blocking individual access to important public goods, is irrelevant as the said question is involved in almost every case of clash of fundamental rights, and therefore, the perceivable conflict between individual freedoms and religious denominational rights is not a special case of *blocking individual access to public goods*. In order to subtly delineate and diminish group denominations rights under the Constitution, the opinion in effect holds that some rights under Part III are more *fundamental* than others and the holy trinity of Articles 14, 19 and 21 apply intermittingly.

To suggest future course, the opinion relies upon an article by Jaclyn Neo which, while expanding upon the problems with the essential practices doctrine, suggest a two-stage test in adjudicating issues percolating to religious freedom. As per the scholar, in the first stage, the courts should accept a group's self definition on the issue and at the second stage, the courts should apply a balancing, compelling reason inquiry, or proportionality analysis to determine whether the religious freedom claim is outweighed by competing state or public interest. This test, if applied, opens the entire gamut of religious freedoms to be easily outweighed by vague and discretionary standards. This overshadowing has been expressly avoided in the constitutional provisions and falls foul of basic constitutional interpretation. Further, relying on a rather cryptic opinion of another scholar, the opinion exalts that the religious freedoms ought to be governed by an obscure *anti-exclusion principle*, which has no basis in constitutional text, theory or precedent. As stated above, while the anxieties of the scholar of *impairing the dignity* or *hampering of access to basic goods*, may be a relevant factor in defining the scope of religious freedoms in some context, the same cannot outweigh denominational rights under Article 26. The standard propounded by these scholars virtually leads to religious denominations/institutions coming under the definition of "State" under Article 12.

The freedoms mentioned under Article 25 and 26, can be curtailed only under the grounds mentioned in the text of the said articles, thereby marking specific portions of religious domain which remain outside the purview of State interference and obviously, the Court's purview in 'public interest'. Religious freedoms, by their very nature, cannot be subjected to a rationality review or the obscure *anti-exclusions test* in absence of any legislation or compelling circumstances. In effect, a lackadaisical interpretive approach, faithlessness in core constitutional text, importing prosaic foreign concepts and heavy reliance on specious opinions of scholars, has led to unjust conclusions. Religion and law have had an acrimonious history, and it was advisable that in Sabrimala, the colloquial opium of the masses remained untouched by the long arms of the law. No doubt, the above said

factors percolated the minds of the majority in the reference to seven judges with a specific mandate to settle issues concerning the laying down of a uniform "judicial policy" regarding such issues.

The Urban Naxal dissent : The next step backward

The arrests of five 'writers' and 'activists' took place recently in connection with their links/ membership with Maoists organisations and the Communist Party of India (Maoist), which had been previously banned by the Central Government in 2009 by way of a notification under the Unlawful Activities Prevention Act. The Communist Party of India (Maoist), as per the manifesto, has an agenda which actively works towards the violent overthrow of the Democratic Republic of India in order to establish a communist state. As per the Government, the Communist Party of India (Maoist), has a detailed and sophisticated approach for achieving the aforesaid aim. The manifesto, which was extensively read by the State Government during the hearing, states that the organisation divides the nature and type of its activities in '*struggle areas*' and in '*urban areas*'. The activities in struggle areas are violent and seek to destabilise and eradicate the writ of the Indian State, whereas the work in urban areas seeks to create a subterfuge, to disguise the activities of the party in struggle areas as local peaceful activism. As per the submissions, the Communist Party of India (Maoist) has created a mechanism, wherein by working under-cover (in the present case as activists/teachers), the workers in urban areas clandestinely aid the movement in the struggle areas through perceivably independent civil society organisations, termed as '*front organisations*'. The sum and substance of the allegation on the arrested persons was that, during the investigation carried out by the Police in the FIR registered regarding the Bhima-Koregaon violence, it had emerged that the five arrested persons were members of the Communist Party of India (Maoist) and had previously aided the party in the mechanisms as enunciated above.

Following the arrests, there were widespread, somewhat bizarre reports in various media establishments of an '*emergency like situation,'* alleging that the State had indiscriminately arrested innocent people, who do not share the ideology of the government in power. As the said reports gained traction and the role of law enforcement agencies was under public scrutiny, the state police held a press conference, prima facie, detailing the allegations against the arrested persons. The detailing may not have been appropriate considering the pendency of the investigation, but necessarily quelled public apprehensions and provided a reasonable rejoinder in interest of law enforcement.

Before the matter had reached the Supreme Court, three out of the five arrested persons had already approached their respective jurisdictional High Courts seeking reliefs in the nature of bail. It must be noted that it is necessary as per any writ courts' registry rules that while filing a writ petition, a necessary declaration has to be made to the effect that the petitioner has not approached any other forum seeking similar reliefs. In order to overreach the same, the surrogate petition was filed by 'eminent persons' seeking reliefs in the nature of bail, quashing and a special investigation team under

the supervision of the Supreme Court for the five arrested persons. The petition was purportedly in 'public interest' and made hyperbolic allegations of 'muzzling of dissent,' 'erosion of democracy,' etc.

As per the prevailing law, a public interest litigation in a criminal matter, at the behest of strangers, is simply not maintainable.[15] Despite taking a preliminary objection as to the maintainability, during the hearing the State placed on record the entire case-diary and the documentation therewith under a sealed cover for the perusal of the Court. The majority opinion, upon perusal of the material, opined that it was not a case of arrest because of *mere dissenting views* or on account of opposing political ideologies, but particularly concerned the *link* of the arrested persons with the members of the banned organisation and its activities. This finding, on facts and on the basic understanding of the prevailing law under UAPA, marked the major point of difference between the opinions. It must be noted that as per the statutory regime of the UAPA, membership of the banned organisations itself is a punishable offence.[16] While there have been some academic criticisms of the said provisions, the Petitioner had not questioned the vires of the said provisions. A debate regarding the interpretation of the said provisions is pending after the *Raneef* and *Arup Bhuyan* judgements, which held that *mere membership* cannot attract criminal liability and the standard that is to be applied would be '*active membership*'[17]. At the instance of the Union of India, the said judgment has been referred to a larger bench for arguments on lowering the threshold[18]. Nevertheless, the State sought to establish a case of 'active membership' against the five arrested persons and not of *mere membership*.

The dissenting opinion, in order to overcome the vice of non-maintainability, facetiously relied upon a subsequent affidavit filed by the arrested persons, 'supporting' the petition, without realising the obvious bar of entertaining two simultaneous writ remedies at two separate forums. In addition, the affidavit can't cure the original defect of lack of locus standi. In eagerness to thwart State action which allegedly sought to muzzle dissent and persecute persons for being defenders of human rights, the dissenting opinion expands the limited jurisdiction under Article 32, especially concerning prayers for a SIT. The opinion takes the press briefing as the only basis of lack of fairness on part of the investigating agency, and concludes that a SIT, monitored by the Supreme Court, is necessary. The press briefing was made the basis of sweeping comments on conduct of investigating agency sans any reference to the veracity of the actual investigation carried out and material gathered therefrom; the dissent concludes that the press briefing attempts at '*manipulating public opinion*' resulting in a media trial and thereby Maharashtra Police cannot be trusted to carry out an independent investigation.

While discussing the contents of the sealed cover, the dissenting opinion notes, '*general allegations against the philosophy of a banned organisation, its policies and the modalities followed in the execution of its unlawful activities constitute one thing*' but '*linking this to specific activities of named individuals is a distinct matter*'. This is the genesis of the error and in a veiled manner, shows the misinterpretation

of the law. The Unlawful Activities Prevention Act does not require '*specific activities of named individuals*' or a '*direct link*' to a particular criminal incident to attract criminality. If that was the case, the Act would not be required at all as the aforesaid would still be punishable under the Indian Penal Code. The Unlawful Activities Prevention Act criminalises *active membership* of banned organisations and doesn't require a group of persons to actually conspire to assassinate the Prime Minister and take steps thereupon. It criminalises the *active membership* of the said group of persons of an organisation that has an aim of assassination of the Prime Minister. The correctness of the said statute may be a matter of general public debate or even a matter for a constitutional challenge, but since the said Act was not under challenge in the Urban Naxal case, there was no occasion to apply any other standard while adjudging the nature or the sufficiency of allegations contained in the sealed cover. Perceivably, the standard applied in the dissenting opinion is of '*imminent lawless action*' or "*clear and present danger,*" a doctrine that has evolved in the United States and has no applicability to the Indian statutory or constitutional context and have been specifically rejected by constitution benches of the Supreme Court[19].

Reservation in promotions approval : The deliberate ignorance

The provisions for equality in the Constitution, comprising of Article 15(1), 15(2), 16(1), 16(2) and Article 14 prohibit discrimination of grounds of religion, race, sex, caste or place of birth, equality of opportunity and non-arbitrariness respectively. Together, these provisions have been referred to as the '*equality code*' of the Constitution. Article 14 providing for equality of opportunity/protection and right against arbitrariness serves as the genus, while examining the critical issues concerning affirmative action. Arbitrariness, as a concept, has had its own journey in judicial precedents. At first, the *Royappa* case[20], which was followed in the famous *Maneka Gandhi* case[21], provides that equality is antithetic to arbitrariness, with them being 'sworn enemies' of each other. Arbitrariness has been compared to the 'whim and caprice of an absolute monarch' and as a 'golden thread which runs through the whole of the fabric of the Constitution'[22]. The most recent exposition on the arbitrariness doctrine, that being of '*manifest arbitrariness*', came to be coined in the *Sharyara Bano* case[23], further extends the scope of judicial review and entrusts the Court with a crucial constitutional obligation. The said position also solidified the contested doctrine of 'substantive due process', an American import, which was referred to as '*substantive judicial review*' in Puttaswamy I case.

The relationship between these affirmative action provisions and the non-arbitrariness/equality texts itself has a colourful history. At first, in *M.R. Balaji case*[24], the Court states that purely caste-based policy of reservations would be ultra-vires the Constitution with Article 16(4) being an '*exception'* to Article 16(1). Subsequently, in the *N.M. Thomas case*[25], a Court which was manned by judges with substantially different ideologies than at the time of the *Balaji* case, justified 'caste' as the basis for affirmative action and in an abstract theoretical, rendered reservations as a facet of

equality itself. This was followed in *Indra Sawhney*[26], which expressly held that the affirmative action provisions are a '*reinstatement of equality*'. The *Indra Sawhney* case also sought to rationalise the overall quota scheme by reading in quantitative limitation[27] and qualitative exclusion[28].

In the public service domain, affirmative action exists pervasively at the entry level, and has ceased to be a bone of contention or litigation. However, reservations in matter of promotions, over and above the reservation at the higher educational and entry level, is a matter of judicial concern. Pertinently, the *Indra Sawhney* case unequivocally held that affirmative action in promotions of government employees, would be ultra vires the Constitution. The said issue has been a bone of contention between the Parliament and the Judiciary ever since and the Parliament has consistently sought to erode the core text of constitutional equality through successive constitutional amendments[29]. First, the constitution was amended to expressly provide an enabling power to provide for reservation in promotions. Through the 90s, the Courts made meagre attempt in balancing the fragments of equality and developed service law doctrines of the '*pigeon hole rule*' and '*catch up principle*' to balance the effect of the amendment[30]. The '*pigeon hole rule*' provides that even if reservations exist in promotions, the promotions would be regulated by a running account roster.[31] The said rules, though developed judicially, helped contain the fall over effects of reservations in promotions.

In order to nullify the balancing effect of the *catch up* rule, in complete disregard to constitutional propriety (a la constitutional morality), the Parliament enacted the 77th, 81st, 82nd, and 85th amendments, to reservation in promotions *with consequential seniority*. The provisions for 'consequential seniority' (along with pre-existing reservation in promotions) meant that once a reserved category person, technically junior in rank and profile, is promoted over the unreserved candidate, he/she becomes senior to the general category employee for all times to come. The said amendments came to be challenged and tested at anvil of the basic structure doctrine in the *M. Nagaraj* case[32], which upheld the amendments but imposed restrictions on enabling power of the State under Article 16(4A) and 16(4B). The Court stated that a fresh objective exercise of collecting '*quantifiable data*' justifying reservation in promotions in terms of parameters of efficiency, backwardness and inadequacy of representation in particular class or classes of posts, is necessary to extend reservation in promotions with consequential seniority. These perquisites were the chains attached to the enabling power providing that the "*opinion of the State*" would have to be formed on objective, identifiable and quantifiable factors. The *M. Nagaraj* case uses the word 'compelling' in the context of the data numerous times, heightening the requirement for the quality, the relevance and the applicability of the data. Post the *M. Nagaraj* case, the Supreme Court held the statutes providing for reservation in promotions in Uttar Pradesh, Rajasthan, Tamil Nadu and Karnataka to be ultra vires with statutes from Madhya Pradesh, Bihar and Tripura (the "Jarnail bench"), pending a final decision.

The judgment in M. Nagaraj was referred to

a five judge bench in the Jarnail Singh case to examine its correctness on two counts: first, whether the controlling factor of the requirement of quantifiable data to establish backwardness of Scheduled Castes and Scheduled Tribes as a precursor to the exercise of power to provide for reservations in promotions is correct law; and second, whether the concept of 'creamy layer' can be made applicable to the Scheduled Castes and Scheduled Tribes.

The bench in Jarnail, speaking through Rohinton J.[33], answered the question by placing heavy reliance on a prophetic passage in the *N. M. Thomas* case where J. Iyer states that he has three major apprehensions with reservations in general. The first was the danger of the benefits being snatched away by the creamy layer amongst the backward classes excluding the weaker sections. Second, the claim to self-identification as backward will be overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness though substantially lightened, would wish to wear the weaker section label as a means to compete with people in the general category. Third, the ignoring of the larger solution, which could come only from improvement of social environment, added educational facilities and cross-fertilisation of castes. The judgment in *Jarnail* refers to the broader object of amelioration of backward classes and clarifies that this cannot be achieved "*if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were.*" This, in essence, becomes the rationale to exclude the creamy layer within the Scheduled Castes and Scheduled Tribes from the benefit of reservation in promotions. Therefore, the Court in the *Jarnail* case, affirmed the validity of the application of the qualitative exclusion by way of creamy layer standard to reservations in promotions. This changed a long standing but erroneous constitutional 'belief' of inapplicability of 'creamy layer' concept to SC/ STs and being limited to 'other backward classes'. This conclusion was also clearly grounded in the constitutional obligation of substantive judicial review and manifest arbitrariness.

After the verdict of the constitution bench in *Jarnail*, it became clear that any enactment, which failed to carve out the qualitative exception before extending reservations in promotions with consequential seniority, would fall foul of Article 14 and Article 16. In *Pavitra I*[34], the Supreme Court had already declared the Karnataka 2002 Act providing for consequential seniority along with reservations in promotions as unconstitutional on the ground of absence of any quantifiable data which is mandatory as per the *M. Nagaraj* case. Post *Pavitra I*, the Karnataka Government, 'revived' the exact same provisions on the basis of the Ratna Prabha Committee Report. The said report, like most statistical exercises, was geared towards painting a pre-determined picture by brushing away inconvenient facts. The revival of provisions, already declared unconstitutional in *Pavitra I*, was challenged in *Pavitra II*[35]. The questions to Pavitra II were clear:

Whether the data takes away the basis of Pavitra I ? and

Whether the failure to incorporate qualitative exclusion results was in breach of Article 14 and Article 16?

The Court, in answering these questions, abdicated its basic constitutional obligation of substantive judicial review and betrayed the trust reposed in it by *M. Nagaraj* and *Jarnail*.

In reviewing the Ratna Prabha Committee Report, the Court failed to analyse the data, test it as per the requirements set in the precedents and to apply its own doctrine of substantive judicial review in a complete abdication of the constitutional obligation. This resulted in validating the revived provisions without the requisite constitutional basis. In order to evade its constitutional obligation, *Pavitra II* relies on *Indra Sawhney*[36] and *Barium Chemicals* case[37], to hold that the opinion of the government on the 'inadequacy of representation' of the SCs and STs in the public services, is a matter which forms a part of the 'subjective satisfaction' of the State. On this basis, the Court held that the only question that could be analysed would be whether the report considered material which was irrelevant or extraneous or had drawn a conclusion which no reasonable body of persons could have adopted. While the said proposition has some basis in classic administrative law making, the same would not be applicable in the sphere of reservation in promotions wherein the requirement of the robust data was read in by way of basic structure test. It may be noted that the sanctity of the data, and its heightened standard is clear from constant reference to a 'compelling need' highlighted in *M. Nagaraj*. The requirement of data, as a precondition to exercise of the enabling power, was meant to be a measure to curtail excessiveness and to make sure that the exercise of such power is as per the de-facto situation. The data being cadre specific marked the measure of its qualitative-ness and specificity. The Court in *Pavitra II*, failed to judicially review the data against the binding precedent in *M Nagaraj* and *Jarnail* which held that that "*quantifiable data shall be collected by the State, on the parameters as stipulated in Nagaraj (supra) on the inadequacy of representation, which can be tested by the Courts*".

This abdication of judicial responsibility, if analysed in juxtaposition of the data presented before the Court, paints a disconcerting picture. First, the data collected by the state government was limited and sampled. The sampling enabled the State to deliberately not collect data from all government department and specifically ignore the departments where there was a high reserved category representation. The Court, by allowing the sampling of data rather than a complete analysis, allowed the States to cherry-pick the data and shadow other purportedly inconvenient parts.

Second, the data was collected on the hypothetical standard of 'vacancies' as per 'total sanctioned posts' and not on the basis of the de facto position. The data was collected on the basis of grades (A, B, C and D) and not on the basis of cadre in various promotional posts in contravention of M. *Nagaraj* and the *UPPCL* case[38]. This judging of 'inadequacy in representation' on the basis of vacancies from total sanctioned posts rather than cadre resulted in a grave anomaly. It must be noted that vacancies calculated from 'total sanctioned posts' would never depict the genuine situation in the service as total sanctioned posts are rarely ever filled up in any government department which have large backlogs for both, unreserved and reserved category. To illustrate,

suppose there are 100 sanctioned posts in a department, and 30 are occupied by unreserved candidates and 15 are occupied by reserved candidates and 55 remain 'vacant'. The reservation is 30 percent, which implies that 30 posts must be manned by reserved category employees. From the sanctioned posts standpoint, there would be an 'inadequacy' of 15 vacancies for reserved category. Whereas when the same is compared to the de facto situation, it would be clear that the reserved category representation is more than adequate with 15 out of the 45 posts (1/3rd posts) being actually occupied by reserved category candidates. Due to its failure to see through the said methodology, the Court, in effect, validated a dishonest data collection exercise.

Third, *Pavitra II* defines standard of 'adequacy' on the basis of the proportion of reserved category persons to the total population of the State. Even if one studies the etymology of the words adequate/adequacy on one hand and proportion/proportional on the other, it would be clear that under no circumstance can 'adequacy' be ever equated with 'proportionality' in population. The standard for "adequacy" is to be adjudged at a level lower to proportion of the population by comparing the actual representation with the 'adequate representation'. The Constitution mandates of adequacy of representation and not a pro-rata distribution of State service amongst caste groups in a State. In equating 'adequacy' with 'proportion of population,' *Pavitra II* ignored perhaps six decades of precedents from the *Rangachari* case[39] to the *Jarnail* case. Further, the Court failed to indicate any marker as to the requirement of compelling nature of inadequacy, and merely based it on a 'subjective satisfaction' of vague notions. The Court in *Pavitra II*, by ignoring the mandate of substantive judicial review, has allowed the States with boundless leeway to fabricate convenient data and trample upon the equality code. The methodology adopted by the Court, results in deceitfully masking factual position resulting in manifest injustice and perpetuating inequality.

Apart from the above mentioned abdication of constitutional obligation, the Court in Pavitra II has made certain elementary doctrinal errors. First, the Court renders the judgment on the presupposition of treating reservation in promotions as a fundamental right. The judgment notes that it is "*considering the validity of a law which was enacted by the State legislature for enforcing the substantive right to equality for the SCs and STs*". This perhaps is the genesis of the error. Reservations, cannot, in any manner whatsoever, be regarded as a substantive right to equality. There may indeed be certain theoretical discussions in precedents wherein reservations were read to be part of warped definition of equality, but the affirmative action provisions have consistently been held as 'enabling provisions' which permit the State to exercise the power as and when required. Affirmative action cannot be claimed as a matter of right or mandamus and is actually dependent upon the discretion of the State which is subject to rigorous judicial review.

Second, *Pavitra II* confuses the concept of efficiency with diversity of representation and inclusiveness. In a first, the otherwise insulated concept of 'efficiency' fell prey to the liberal enthusiasm of reading in expansive concepts of

diversity and inclusiveness in all forms. This reinterpretation has little theoretical or legal basis as diversity and equal representation cannot be conflated with 'efficiency'. It may be noted that the benchmark for adjudging persons, across sectors, can be of qualitative or quantitative nature or a mix of both. In fact, the over-dependence on 'qualitative benchmarks' in judging merit in society, as sought to be propounded in *Pavithra II*, often leads to perpetuation of class/caste and hinders social mobility. It can be argued that it was the over-dependence on "qualitative benchmarks" which perpetuated the "caste system" or that still perpetuates the nepotism in the judicial system. The subjectivity and discretion enables intangible and unquantifiable factors which perpetuate nepotism/discrimination in various forms. It is the modernisation of systems that has helped us move from a majorly qualitative to majorly quantitative mechanism of adjudging merit, which has been a catalyst for social mobility across fields. Therefore, efficiency and quantitatively definable merit go hand in hand and any detachment in the name of inclusiveness of "substantive equality" is actually a step backward.

Third, *Pavitra II* grafts a highly contentious and obscure idea of 'merit' on to the Constitution and its equality code. The Court, relying heavily on the Amartya Sen's post-modern rambling about a Utopian society, states: "*merit must not be limited to narrow and inflexible criteria such as one's rank in a standardised exam, but rather must flow from the actions a society seeks to reward, including the promotion of equality in society and diversity in public administration*." Through this, the judgment seeks to re-define merit and efficiency, superimposing abstract social science principles grounded in staunch post-modernist/communist philosophy. Admittedly, there is nothing wrong in citing Prof. Amartya Sen's ideas on "merit," howsoever detached from reality they may be, but it is only fair for the Supreme Court to stay ideologically neutral in such matters. The Court cannot rely solely on a scholar on one side of a stark ideological divide and completely ignore the views on the other side. The judgments coloured by such staunch ideological bias, often result in bad precedents.

Lastly, on the issue of 'creamy layer,' *Pavitra II* seeks to overreach the constitution bench judgment in *Jarnail*, without any basis or analysis whatsoever. The rule of precedent and the importance of adherence to judgments of larger benches require no elucidation. In *Jarnail*, the Constitution bench had unanimously opined that the failure to exclude the 'creamy layer' from the benefit of reservation in promotions with consequential seniority would render such enactment as bad in law. In *Pavitra II*, most surprisingly, despite the opinion in *Jarnail* being fresh in the minds of everyone, the Court held: "*the concept of creamy layer has no relevance to the grant of consequential seniority*". It may be noted that 'consequential seniority' has no meaning without the context of reservations in promotions and the qualitative exclusion is a necessary requirement for any reservation in promotion enactment to be Article 14 and Article 16 compliant. The blatant overreach of the ratio of *Jarnail* by stating that the *Pavitra II* is limited to consequential seniority is nothing but insincere.

In essence, *Pavitra II* marks an astonishing

departure from the precedent on the subject and seems to be written in complete forgetfulness of Article 14, Article 15 and Article 16(1), along with an atypical affinity to the exceptionality of Article 16(4)/(4A)/(4B). A 'judgment' is defined as the act or process of forming an opinion or making a decision after careful thought. A judgment cannot be a pre-determined conclusion which is sought to be justified thereafter by a meandering simulated analysis.

Conclusions

The four opinions, and the findings therein, clearly shows a distinct departure from precedent in the constitutional approach and statutory interpretation. They also express a conveniently inconsistent judicial approach wherein incursions by the State in the "right to privacy" qua the object of judicious distribution of State largesse and incursions in the "right to free speech" qua the maintenance of public order and security of the State, are quashed as disproportionate whereas judicial incursions in the denominational "right to manage religious institutions" qua women's rights and State incursions in the "right to quality" qua reservations to depressed classes is upheld as proportional. Some fundamental rights, clearly seem to be *more equal* than others.

The said four opinions are not merely differences; they are statements of intent and expressions of a jurisprudential legacy. Having seen the era of *constitutional morality* unfold, it will be interesting to see the future, when the author of today's minority opinions would wield the power of the master of the roster. To contextualise the same, one must remember that the most avid dissenter in the history of the Supreme Court, never dissented as the Chief Justice.[40] The Knight-errant shapes his path on the edge of a thin line of morality, separating the right from the wrong, utilising activism as a means of dispensing a greater notion of justice. The caveat on this path remains, as a small slip towards vigilantism, turns the *Knight-errant* into just an errant Knight.

References:

1 *Justice H.R. Khanna in Additional District Magistrate V. Shivkant Shukla (1976) 2 SCC 521; Justice Fazal Ali in A. K. Gopalan Vs. State Of Madras, (1950) AIR 27; J. Subba Rao in Kharak Singh Vs. State of Uttar Pradesh & Ors, (1963) AIR 1295; Justice John Marshall Harlan and Justice Oliver Wendell Holmes in Lochner v. New York, 198 U.S. 45 (1905); J. Brandies in Olmstead v. United States, 277 U.S. 438 (1928) – are some case wherein a famous dissent has later become the law of the land.*

2 *K.S. Puttaswamy (Aadhar-5J.) v. Union of India, (2019) 1 SCC 1*

3 *Indian Young Lawyers Association and Others.v. State of Kerala and Others, 2018 SCC OnLine SC 1690*

4 *Romila Thapar v. Union of India, (2018) 10 SCC 753*

5 *B.K. Pavitra v. Union of India, 2019 SCC OnLine SC 694*

6 *K.S. Puttaswamy (Aadhar-5J.) v. Union of India, (2019) 1 SCC 1, Para 1194-1198*

7 *See Academy of Nutrition Improvement v. Union of India, (2011) 8 SCC 274; State of Kerala v. Joseph Antony, (1994) 1 SCC 301; Union of India v. S.L. Dutta, (1991) 1 SCC 505; State of M.P. v. Narmada Bachao Andolan, (2011) 7 SCC 639; Pooja Pal v. Union of India, (2016) 3 SCC 135*

8 *Michael Thad Allen and Gabrielle Hecht , Technologies of Power. Essays in honor of Thomas Parke Hughes and Agatha Chipley Hughes. Cambridge, ma and London: MIT Press*

9 *Kantaru Rajeevaru v. Indian Young Lawyers Association Thr. Its General Secretary and Others, 2019 SCC OnLine SC 1461*

10 *Adi Saiva Sivachariyargal Nala Sangam vs. Government of Tamil Nadu and Another, (2016) 2 SCC 725*

11 *See Paragraphs 20 and 28 of opinion of Rohinton J.*

12 *Sri Venkataramana Devaruand Ors. v. The State of Mysore Ors. 1958 AIR 255.*

13 *The State of Bombay v. Narasu Appa Mali, [AIR 1952 Bom 84]*

14 *(2017) 9 SCC 1*

15 *See Rajiv Ranjan Singh 'Lalan' (VIII) v. Union of India, (2006) 6 SCC 613; Simranjit Singh Mann v. Union of India, (1992) 4 SCC 653; Ashok Kumar Pandey v. State of W.B., (2004) 3 SCC 349*

16 *See Section 10 of the Unlawful Activities (Prevention) Act, 1967*

17 *See State of Kerala v. Raneef, (2011) 1 SCC 784; Arup Bhuyan v. State of Assam, (2011) 3 SCC 377*

18 *Arup Bhuyan v. State of Assam, (2015) 12 SCC 702*

19 *See Babulal Parate v. State of Maharashtra, (1961) 3 SCR 423; Madhu Limaye v. Sub-Divisional Magistrate, (1970) 3 SCC 746; Supdt., Central Prison v. Dr Ram Manohar Lohia, (1960) 2 SCR 821; followed in Ramlila Maidan Incident, In re, (2012) 5 SCC 1*

20 *E.P. Royappa v. State of T.N., (1974) 4 SCC 3*

21 *Maneka Gandhi v. Union of India, (1978) 1 SCC 248*

22 *Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722*

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

24 *M. R. Balaji And Others vs State Of Mysore, 1963 AIR 649*

25 *State Of Kerala & Anr vs N. M. Thomas & Ors, 1976 AIR 490*

26 *Indra Swahney v. Union of India & Ors., AIR1993SC477 (constitutional bench of nine judges)*

27 *Ceiling limit of 50% on the overall quota scheme including the proportion of the SC/STs. For more See I.R. Coelho (Dead) by LRS. Vs. State of T.N., 2007 (2) SCC 1*

28 *Members of an OBC who are denied benefit because their family income is above a defined maximum (about $10,000)*

29 *Rajeev Dhavan, Reservation bill for the SC/ST fails the test, The Mail Online India, 17 September 2012.*

30 *See the R K Sabharwal Vs St of Punjab AIR 1995 SC 1371, Union of India Vs Varpal Singh AIR 1996 SC 448, Ajitsingh Januja & Ors Vs State of Punjab AIR 1996 SC 1189, Ajitsingh Januja & Ors Vs State of Punjab & Ors AIR 1999 SC 3471*

31 *For example : if 16% of the posts are reserved then in a lot of 100 posts, posts falling at serial numbers 1,7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 91 would be reserved. When the total number of posts in a cadre are filled by the operation of the said roster, the running account ceases and when there is a vacancy, the same would be filled from amongst the category to which the post belonged in the roster. For example, if points 51 and 91 retire, then these slots are to be filled from amongst the reserved category. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the*

general category. The 'catch up' rule means that if a senior candidate of general category is promoted after SC/ST candidates, he would regain his seniority in promotion over the juniors promoted ahead of him under the reserved vacancies. For example, a general category candidate was in service from 1990 and the reserved category candidate joined the service in 1995 and was promoted from position X to Y, above the general candidate, by virtue of reservation. If the general category candidate is promoted to Y position while the reserved candidate is also at Y position, the general category candidate would regain seniority over such reserved candidate by virtue of the erstwhile seniority.

32 *M. Nagaraj v. Union of India,(2006) 8 SCC 212*

33 *Jarnail Singh v. Lachhmi Narain Gupta, (2018) 10 SCC 396*

34 *B K Pavitra v. Union of India, Civil Appeal No. 2368 Of 2011*

35 *Ibid – Note 5*

36 *Indra Sawhney v. Union of India, (1992) Suppl. 3 SCC 21*

37 *Barium Chemicals Ltd. Vs. Company Law Board; AIR 1967 SC 295*

38 *Uttar Pradesh Power Corporation V. Rajesh Kumar And Ors. (2012) 7 SCC 1*

39 *The General Manager, Southern Railway Vs. Rangachari, 1962 (2) SCR 586*

40 *The most avid dissenter is J. Subba Rao – 48 dissents in 9 years at the Supreme Court. Gadbois, 'Indian Judicial Behaviour', Pg 166.*

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FOCUS

Population Control through Restrictions on Right to Contest Elections: Constitutional Imperatives

Raghav Pandey and Sudhanva Bedekar*

1. Introduction:

Recently, speculation is ripe that the Government of India is considering control of population growth by taking recourse to sanction based legislative means[1], resulting in a debate concerning the need to control population growth by imposing sanctions. The issues concerning religious, caste and regional demographics, concerns of micro minorities like Parsees and Jews, the impact of population control measures on existing legislations and various other sociological aspects are likely to emerge. Presently, there is no strict sanction based parliamentary legislation in this area. A sanction which is widely used is the restriction on the right to contest elections for local bodies such as panchayats, zilla parishads, municipalities, etc. Imposition of such a restriction falls within the legislative powers of the States[2] and accordingly, most States have enacted provisions which restrict the right to contest elections to local bodies if the individual desirous of contesting elections has more than 2 children living. This paper will highlight the judicial scrutiny of such measures in the States of Haryana, Rajasthan, Gujarat and Andhra Pradesh.

An argument has been raised quite often that there is no need to control population growth[3] and any measures to control population ought to be incentive based and not sanction based. For the purpose of this paper, it is deemed fit to not go into the merits of such an argument but to focus strictly on the Constitutional scrutiny of the existing population control measures in the form of restrictions on the right to contest elections.

In as early as 1952, India became the first country in the world to launch a national program which emphasized family planning measures to restrict the population growth at a level consistent with the requirement of the national economy.[4] The well known 42nd Amendment to the Constitution of India inserted "Population Control and Family Planning" into the concurrent list. Currently, the National Population Policy, 2000 (hereinafter to be referred to as NPP) is holding forte. This policy has emphasized the need to achieve population stabilization through several promotional and motivational measures and has asserted that to achieve the targets, a multi sectoral approach would be necessary. It is pertinent to note that the NPP does not recommend imposition of strict sanctions to achieve population control. Various States such as Maharashtra, Gujarat, Rajasthan, Haryana, Andhra Pradesh, Uttar Pradesh, Bihar, West Bengal, Madhya Pradesh, etc. have adopted measures to control population and that till date, there is not much initiative from the Parliament on the sanctions front. In most states, sanctions focusing on restrictions from contesting elections are to be found in the relevant statutes and the provisions are similarly worded. A mention of such

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provisions has been made in Chapter 2 of this paper.

2. Sanctions based on Restriction on the Right to Contest Elections to Local Bodies:

In most States where sanctions are imposed, individuals become disqualified from contesting elections to the Panchayats and Municipalities. The State Legislatures have, vide Article 243-F(1)[5], derived competence to take such measures in relation to Panchayats.

2.1. The Constitutional position as highlighted by the Apex Court:

The first and perhaps the only occasion for the Supreme Court to examine the constitutional validity of such measures arose in ***Javed vs. State of Haryana***[6] wherein a three Judge bench of the Apex Court upheld the provisions of the Haryana Panchayat Raj Act, 1994 which provided disqualifications from assuming offices of Panch, Sarpanch, Up Sarpanch of Gram Panchayat or member of Panchayat Samiti and Zilla Parishad if there are more than two children living. Section 175(1)(q)[7] of the Haryana Panchayati Raj Act, 1994 was the relevant provision in this regard. The Court repelled the contentions raised on the grounds of violation of Articles 14 and 25 of the Constitution of India. As regards non-implementation of the policy in a uniform manner and an attraction of the vice of violation of Article 14, the Court observed as follows;

"A uniform policy may be devised by the Centre or by a State. However, there is no constitutional requirement that any such policy must be implemented in one-go. Policies are capable of being implemented in a phased manner. More so, when the policies have far-reaching implications and are dynamic in nature, their implementation in a phased manner is welcome for it receives gradual willing acceptance and invites lesser resistance. The implementation of policy decision in a phased manner is suggestive neither of arbitrariness nor of discrimination."

The Court thus held that such a law cannot be held to be discriminatory or suffering from the vice of hostile discrimination as against its citizens merely because Parliament or the legislatures of other States have not enacted similar laws. It was noted that a uniform policy may be devised by the Centre or by a State. However, there is no constitutional requirement that any such policy must be implemented. Commenting on the arguments buttressed regarding the violation of Article 21, the Court observed as follows;

". The lofty ideals of social and economic justice, the advancement of the nation as a whole and the philosophy of distributive justice - economic, social and political - cannot be given a go-by in the name of undue stress on fundamental rights and individual liberty. Reasonableness and rationality, legally as well as philosophically, provide colour to the meaning of fundamental rights and these principles are deducible from those very decisions which have been relied on by the learned counsel for the petitioners. The torrential increase in the population of the country is one of the major hindrances in the pace of India's socio- economic progress."

On a bare reading of the above text, it become clear that the Court while testing the legislative

provision on the anvil of Article 21 has asserted that the criteria of analysis on the test of reasonableness is not subjective and that analysis of legislations on the anvil of the Constitution needs to be restricted to the contours indicated by the Constitution. The Court noted the problem of population explosion in order to repel the contentions of violation of the Fundamental Rights. It thus upheld the Constitutional validity of the impugned legislative provision.

2.2. Analysis by the High Courts and examination of the various grounds raised:

There have been several occasions for the various High Courts to consider the Constitutional validity of such provisions. In ***Bharatbhai Dhanjibhai Modi vs. Collector, Porbandar***[8], the Gujarat High Court was called upon to examine the constitutional validity of Section 11(1)(h)[9] of the Gujarat Local Authorities Laws Act which provided that a person having more than two children will be disqualified to contest elections for councillor and that if subsequent to such election, a third child is born, such councillor shall attract the disqualification and his seat will be vacant. It was contended that the said provision will be in conflict with the provisions of the Hindu Marriage Act as not giving the wife marital bliss and having children was treated as cruelty. The Court noted that;

"the statutory provisions under challenge do not take away the right of the wife to enjoy the marital bliss, nor do they impinge upon her right to prevent pregnancy."

It was also contended that the impugned provisions will be in conflict with the provisions of the Medical Termination of Pregnancy Act and more particularly S. 3(2) of the said Act which provided the various grounds for termination of a pregnancy by a registered medical practitioner. The Court repelled the said contention. However, the judgement does not elaborate the arguments which were raised in this regard and the Court has summarily dismissed that contention. As regards the contentions regarding violation of Article 14, the Court noted that it was bound by the law laid down by the Apex Court in Javed.[10]

In ***Mukesh Kumar Ajmera vs. State of Rajasthan,***[11] S. 19(L)[12] read with S. 39 of the Rajasthan Panchayati Raj Act, 1994 which prescribed a similar disqualification was challenged on the grounds of lack of legislative competence and violation of Articles 14, 21, 25 and 26 before the Rajasthan High Court. The Court traced the legislative competence to Article 243F and also took note of Entry 5 to List II which authorizes the State Government to enact law relating to local government. It observed as follows;

"*Besides Article 243F(a), Entry No. 5 of List II of Schedule VII authorises the State Legislature to make any law relating to Local Government. Entry No. 20-A of List III, i.e., the Concurrent List of Schedule VII of the Constitution authorises the Union of India and the State Legislature to frame the law on population control and family planning. Entries mentioned in Schedule VII are the fields of legislation and not the powers. Power to legislate is drawn from the relative Articles of the Constitution. The State Legislature derives powers to enact laws relating to the Local Government from Articles 243F and 246 of the Constitution of India. To enact a law relating*

to the Local Bodies, is in the exclusive domain of the State Legislature. We, therefore, uphold the validity of these provisions in view of Article 246, Entry 5 of List II and Entry 20-A of List III of Schedule VII of the Constitution of India."

As regards the violation of Article 14, the Court noted that the said provision does not prohibit the State from introducing gradual reforms and that merely because a particular legislative scheme was not having universal application would not deem it *ultra vires* the Constitution. It observed as follows;

"The principle of equality enshrined in Article 14 of the Constitution does not mean that every law must have a universal application. Article 14 does not forbid classification for the purpose of legislation provided the classification is based on intelligible differentia and is not arbitrary. Every classification though likely to produce an inequality but inequality alone cannot determine the question of Constitutionality. The State, for the purpose of giving effect to its policies, can make laws classifying and distinguishing persons to be subjected to such law. The mandate of Article 14 is that all persons similarly situated should not be discriminated and not that the same Rule of law should be applicable to all the elected bodies. By the process of classification, the State has the power to make the law for a particular set of persons. Article 14 cannot be used for declaring a law made by the State unconstitutional by a process of comparative study of the provisions made in the State Law and the Law made by the Centre. Two laws made by different legislature, i.e., one by the Centre and the other by the State, cannot be read in conjection."

The Court noted that the classification was reasonable and had a nexus with the object sought to be achieved. It is to be noted that the Court was very clear in its exposition while repelling the contention of violation of Article 21. It held that there was no right to marry or procreate enshrined in the Constitution. Such a right, according to the Court, did not even qualify as a Common law right. Hence, the Court emphatically rejected the said contention. It is to be noted that the stand taken by the Court rejecting the very existence of a right to marry or procreate as a fundamental right would probably have to be revisited. In Chapter 3 of this paper, the researcher has addressed this issue in more detail. Additionally, the following observations of the Court are worth noting;

"These provisions have been enacted by the Legislature to control the menace of population explosion. Growing population is one of the major problems which India is facing today. Population progresses by geometrical progression while the resources increase only at an arithmetical rate."

The Court traced the legislature's powers to deal with population control measures to the Directive Principles of State policy. In another landmark case decided by the Rajasthan High Court[13], the fact situation was that the petition had three children but from two wives and as such, he had contended that the disqualification would not be attracted as the first child was born out of the wedlock with the first wife and two children were born after the wedlock with the second wife, which was subsequent to the death of the first wife. The Petitioner contended that the disqualification will be attracted if a 'couple' has more than two

children. However, the Court observed that on a plain reading of the explanation to the said provision, no such interpretation could be culled out and hence, the Court rejected the Petitioner's contentions and upheld his disqualification.

In the case of ***Saroj Chotiya vs. State of Rajasthan***,[14] S. 26 (xiv) of the Rajasthan Municipalities Act which also provided for a general disqualification to be a member of the municipalities if a person has more than two children, was challenged. The principal ground of challenge was that the provision was discriminatory and against basic human dignity, behavior and the institution of marriage. The Court emphatically noted;

"that the growing population has hampered national progress." It was observed that, *"the right to be elected is neither a fundamental nor a common law right but is merely a statutory right."*

3. The Right to Procreate as a facet of Article 21

On examination of the various judgements noted above, it is noticed that a very popular contention raised is that there cannot be a restriction on the right to procreate, which, is equated to the status of a fundamental right under Article 21 of the Constitution of India. Before dealing with the question as to whether at all it can be elevated to such a status, a very brief analysis of the judgements noted above and a reiteration of their ratio, in so far as they are concerned with this aspect would be relevant. In B.K. Parthasarathi,[15] the Court, while commenting upon the relevant provision in the Andhra Pradesh legislation, has noted that the provision does not directly curtail the right to procreate but it attaches a disqualification. In this manner, the Court has attempted to summarily brush aside the argument of procreation rights. In Mukesh Kumar Ajmera,[16] the Court refused to acknowledge the existence of a right to marry or to procreate as a fundamental right. It is therefore necessary to first determine whether the right to procreate exists as a fundamental right. In *Javed*,[17] it was vehemently argued that Article 21 be interpreted to its optimum level in light of the judgements rendered in *Maneka Gandhi vs. Union of India*[18] and *Kasturi Lal Lakshmi Reddy vs. State of Jammu and Kashmir*[19] and a judgement holding that the right to procreate is included within the ambit of Article 21 was invited from the Court. In *Suchita Shrivastava vs. Chandigarh Administration*,[20] the Court, speaking through Balakrishnan CJ has observed as follows;

"There is no doubt that a woman's right to make reproductive choices is also a dimension of `personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children."

It is pertinent to note that in the Court here,

does not comment on the 'right to procreate' in terms of giving birth to as many children as the woman would desire but in terms of 'right to make reproductive choices.' This case was concerned with the right to procreate and to make reproductive choices in terms of the Medical Termination of Pregnancy Act, 1971. It was concerned with the right to carry out abortion and hence, it cannot be relied upon to contend that the restrictions on the right to contest elections on birth of a third child are violating the right to procreate. The Court has not, in any manner, recognized the right to procreate simpliciter, as a fundamental right. It has to be appreciated in the context in which the question of imposing a restriction on the said right arises. In *Z vs. State of Bihar*[21] as well, the Court, while dealing with an issue arising out of the Medical Termination of Pregnancy Act, 1971, reiterated the view that the right to make reproductive choices is fundamental. However, once again, it is to be noted that the Court was discussing the said right in the context of permission to carry out abortion since there was a risk to the life of the mother. It is thus submitted that in most such cases addressing the issue of reproductive rights, the Court has dealt with such rights by restricting themselves to the reproductive rights of women only and that the said rights have been understood by the Courts in a negative sense. In *Air India vs. Nargesh Meerza*,[22] the Apex Court did not find fault with a rule that allowed the termination of the services of an air hostess on a third pregnancy with two children living. The Court gave more than one reason to justify its decision. It observed as follows;

"In the first place, the provision preventing a third pregnancy with two existing children would be in the larger interest of the health of the Air Hostess concerned as also for the good upbringing of the children. Secondly, when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of overpopulation which, if not controlled, may lead to serious social and economic problems throughout the world."

In this case as well, the Court did not comment on the status of the right to procreate. It is thus noted that the Supreme Court of India has not equated the right to procreate to the status of a fundamental right under Article 21 and in terms of restrictions on population growth, it would be wrong to say that there exists a fundamental right to procreate and all population control measures based on sanctions need to be set aside at the altar of such a right.

4. Blanket imposition of sanctions vs. Targeted imposition of sanctions:

In this paper, we have noted the judgements upholding the population control through restrictions on the right to contest elections from States of Rajasthan, Gujarat, Maharashtra, Andhra Pradesh and Haryana. It is now imperative to note the percentage population growth in these States from 2001 to 2011. It is observed that in the State of Rajasthan, the population has grown at the rate of 21%,[23] which is much higher than the national average. In the State of Gujarat, the population has grown at the rate of 19%[24] which is again

higher than the national average. In the State of Andhra Pradesh, the population has grown at the rate of 11% in the decade of 2001-2011, however, in the previous decade, it was almost 14%.[25] In the State of Maharashtra, the population growth from 2001 to 2011 has been 16%.[26] It is to be noted that the population growth figures in States of Rajasthan and Gujarat is much higher than the national average population growth rate. The question which arises is as to whether restrictions in the form of restraint on the right to contest elections to local bodies has aided in the process of population control. The Population Control measures in the country take various forms. As has been noted above, most measures to curb population are focused on informed choice and incentives and not on sanctions. Thus, it would be very difficult to state a proposition with certainty that minor sanctions as have been highlighted in this paper, have helped curb population growth. The domain of levy of minor sanctions has been left to the States. The Parliament has not done much in the sanction's arena. Also, as regards right to contest elections to the Parliament and the State Legislatures, though the Parliament is empowered to make law, no law imposing any such restrictions has ever been enacted. Looking at the issue from a constitutional standpoint, it is amply clear that such restrictions have been tested and upheld by the Courts repeatedly and hence, there does not remain much of a constitutional controversy in this area. However, the Courts have, in examining such laws, failed to note that the population growth rates are not uniform across all communities. The population growth rates differ across religious denominations. The statistics of the census of 2011 and that of 2001 make it amply clear that the population of certain religious denominations has been increasing at a rate much higher than the national average. As an example, it may be noted that the population of Muslims has increased at an alarming rate of 30%[27] from 2001 to 2011 whereas the population of Hindus has increased at the rate of 14%. Similarly, it is to be noted that the population of certain micro minorities like Parsees is decreasing. In order to stop the rapidly declining population of Parsees, the Government of India, in 2013, has launched the Jiyo Parsi scheme. The said scheme focuses on encouraging Parsee couples to have more than one child.[28] Hence, when confronted with a central government scheme which focuses on increase in the population growth rates of particular communities like Parsees, the question would arise as to whether the State legislations which are focusing on sanctions such as restrictions on the right to contest elections will survive. Admittedly, the Central Government scheme mentioned above is neither of a legislative character nor does it stem from legislation and hence, the State law would prevail. However, the question arises as to whether uniform application of such restrictions will pass the test of Article 14 as admittedly, not all communities can be looked at from the same lens. The Courts will have to consider, while examining constitutional validity of such restrictions, whether applying blanket rules for all communities can be considered to be valid in the existing scenario. If the population of a particular community is dwindling, then restrictive measures cannot be applied to that community since equating that community with other communities whose population is growing

rapidly will be a blatant violation of Article 14. The same logic would also apply to regions. Though initiating sanction-based programs has been left to the States, it is to be noted that within the States as well, there are several distinctions between communities as also between regions. This fact is true for sex ratios as well. The typical example of the State of Maharashtra can be taken to show that the sex ratio in the districts such as Ratnagiri and Sindhudurg is much better than the districts such as Satara, Sangli, Solapur, etc.[29] Admittedly, the focus area of the States has been to increase the sex ratio and hence, the birth of a girl child is encouraged. Thus, if a couple having two male children gives birth to a female child, such a birth will be encouraged by the State. However, on the other hand, since she is a third child, sanctions in the form of taking away the right to contest elections will be imposed. It is therefore amply clear that while looking at population control measures, several such overlapping aspects will have to be considered. Hence, whenever sanction-based population control measures are to be taken, such measures will have to be subjected to strict constitutional scrutiny as no two regions and no two communities can be equated in terms of population growth figures. The Supreme Court has repeatedly held that the right to vote and the right to contest elections are rights conferred by statute and they can be taken away by statute.[30] However, if blanket measures which apply across all regions in a State or across all communities irrespective of their population growth rates are adopted, then such measures will attract the vice of Article 14 and will have to be subjected to strict scrutiny. Not making a classification when a classification is required to be made, will also be hit by Article 14, as has been held by the Apex Court in the case of ***K.T. Moopil Nair vs. State of Kerala.***[31] In the case of ***Murthy Match Works vs. Assistant Commissioner of Central Excise***,[32] Krishna Iyer, J, observed that, *"Equal treatment of unequal groups may spell invisible yet substantial discrimination with consequences of unconstitutionality. That dissimilar things should not be treated similarly in the name of equal justice is of Aristotelian vintage and has been, by implication, enshrined in our constitution."* It is thus clear that from a constitutional standpoint, that the sanction mechanism has failed to use different lenses to look at different religious groups and also, within the states, at the different regions which encounter different issues.

5. Conclusion:

It is to be noted that we are discussing about sanctions and not incentives, and hence, such laws will have to be subjected to a stricter scrutiny. From the perspective of the makers of policy, it will be politically inconvenient to take region/community centric measures. However, in my submission, if a community and region centric approach is not adopted, then the laws will be liable to be struck down, being hit by Article 14 of the Constitution. To conclude with, it is noted that population control measures which focus on minor sanctions have been upheld by the Court by applying the nexus with the object sought to be achieved test. However, it is also opined that sanctions on population control cannot be imposed in a blanket manner but will have to focus on only those

communities or regions which have a very high population growth rate. In all other cases where the population growth rate is high but not greater than the national average, sanction-based measures need not be taken, rather, the focus area may be shifted to incentive based and awareness-based programs. It is submitted, as a concluding note that the Courts ought to, in light of the data available, examine the population control measures by noting that the population growth rates across all sections of the society are not uniform. The policy makers are well aware of the existing scenario with respect to population explosion. As has been noted earlier, political inconveniences and compulsions are very much recognized and acknowledged as factors for non-implementation of targeted sanctions. However, such political compulsions and inconveniences cannot be allowed to cause injustice to certain sections of the society which do not require sanction-based measures. It is therefore submitted that in the case of such communities whose population growth rates are not high or much lower than the national average, the law fails to show a nexus with the object sought to be achieved and thus, a need is felt to revisit such sanction-based population control programs.

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2 *Article 243-F, Constitution of India, 1950.*

3 *E.g. See Oomen Kurien, Why India must move policy away from population control, Observer Research Foundation, 19/04/2019, available at, https://www.orfonline.org/research/why-india-must-move-policy-away-from-population-control-50032/, last visited on 05/09/2019.*

4 *Introduction, National Population Policy, 2000.*

5 *243F. Disqualifications for membership*

(1) A person shall be disqualified for being chosen as, and for being, a member of a Panchayat

(a) if he is so disqualified by or under any law for the time being in force for elections to the Legislature of the State concerned: Provided that no person shall be disqualified on the ground that be is less than twenty-five years of age, if he has attained the age of twenty-one years;

(b) if he is so disqualified by or under any law made by the Legislature of the State.

6 *AIR 2003 SC 3057.*

7 *175. (1) No person shall be a Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such who - (q) has more than two living children.*

8 *(2008) 2 GLR 1128.*

9 *"11(1)- No person may be a Councillor:(h) who has more than two children."*

10 *Supra note*

11 *AIR 1997 Raj 250.*

12 *"S.19L- a person is disqualified to be elected as a Panch or a Member to the Panchayat Raj Institution if he has more than two children."*

13 *RLW 2005 (4) Raj 2295.*

14 *AIR 1998 Raj 28.*

15 *Supra note 17.*

16 *Supra note 11.*

17 *Supra note 6.*

18 *(1978) 1 SCC 248.*

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31 *AIR 1961 SC 552.*

32 *AIR 1974 SC 497.*

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FOCUS

Implications of Separation of Powers for Judiciary in India:The Constitutional Jostling

Dr Shruti Bedi*

When the founding fathers gathered in the Constituent Assembly to draft the Indian Constitution, the concept of separation of powers was a fundamental political maxim which dominated the thinking of the members. They desired to separate the government into three co-equal branches—judiciary, executive and the legislature.

This separation of powers doctrine developed over centuries of political and philosophical deliberations emerged as essential to the sustainability of a democratic government. Aristotle spoke of the three agencies—the general assembly, public officials and the judiciary.[1] After the conception of Parliament, John Locke developed this theory in his *Two Treatises of Government* (1689), where the three powers were defined as "legislative", "executive" and "federative".[2] Ultimately, Charles de Montesquieu (1689-1755), cultivated and expanded the doctrine based on his understanding of the English system.[3] While expounding on the significance of clearly sketching out the powers of the three branches, he noted that "there would be an end of everything, were the same man or the same body, whether of the nobles or the people, to exercise those three powers, that of enacting the laws, that of executing the public resolutions, and of trying the cases of individuals"[4]. Intending to protect the liberty of the individual, Montesquieu, favoured the theory of one authority acting as a balance against the other - *Le pouvoir arête le pouvoir* - power halts power.[5]

The agenda of separating powers in India is evident from the perusal of the statements made in the Constituent Assembly which subsequently resulted in the adoption of Article 50[6] of the Constitution. The first Prime Minister of India was unequivocal in his desire to separate the judicial and executive functions.[7] The framers of the Constitution were unambiguous in their view that clearly and distinctly the "judiciary needed to be kept separate from the influences of the executive".[8]

The intention and the plan to separate the powers was obvious and precise. However, implementation was another complication. Accordingly, the separation of powers envisaged by the Indian Constitution is not as rigid as the US Constitution. While focussing on efficiency in the governmental functionality, overlapping of powers was fated to occur. It was this understanding that impelled the framers to include the concept of separation of powers as a directive. Hence Article 50 which talks about the separation of the judiciary from the executive is a Directive Principle under Part IV.

India was greatly influenced by the British Parliamentary system and consequently adopted the path of parliamentary democracy. In the USA it is the freedom of judiciary which is placed at a higher level in comparison with the Legislature/

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Congress. We in India have given a similar status to the Indian Judiciary. Justice is the first promise of the Indian Constitution as provided in the Preamble. We, the people of this nation, look to the judiciary for justice. It upholds the rule of law and is instrumental in ensuring justice to all. Consequently, the independence of the judiciary is not only a requirement but an imperative for securing justice. Further, to maintain the independence of judiciary we are obligated to warrant the separation of the essential powers and functioning of the organs of the government. This article analyses the core functions of the judiciary and why and how it needs to be separated from the other organs.

Separation of Powers: Balancing the See-Saw

Separation of powers has acquired the prominence of a basic and essential feature of the Indian Constitution.[9] It is present in the jurisprudence of the Constitution which lives up to its accolade of the longest constitution when it categorically defines and delineates the powers and functions explicitly of the three branches. However, this doctrine is not present in its rigidity but has a fluid presence. It nudges the three institutions of the Indian democracy towards a harmonious and healthier interaction rather than a stern and strict approach required in instances of fractious conduct.

A prominent element of the theory of separation of powers is the system of checks and balances, the evident purpose being to check the absolute acquisition of power by one organ and restricting it within its boundaries and domain. No one organ can acquire a predominant position over the other. Precise equality amongst the three is neither attainable nor is it a desired aim of the constitution. The provisions of the Constitution, tactfully and artfully check and balance the possible abuse of powers. Judicial review under Articles 226 and 32 is a befitting illustration of this system. J.J. Shelat and Grover in *Kesavnanda Bharti v State of Kerala*[10] had opined:

" … There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution yet it envisages such a separation to a degree as was found in Ranasinghe case [Bribery Commr. v. Ranasinghe, 1965 AC 172: (1964) 2 WLR 1301: (1964) 2 All ER 785 (PC)]. …"[11]

The Indian Constitution provides for cooperative federalism which does not envisage a harsh and an unyielding separation of powers. Harold Laski speaks of a similar notion when he says, "Separation of powers does not mean equal balance of powers"[12]. The Supreme Court has relied upon this exposition in *Indira Nehru Gandhi* v. *Raj Narain*[13]:

"… The doctrine of separation of governmental powers is not a mere theoretical, philosophical concept. It is a practical, work-a-day principle. The division of Government into three branches does not imply, as its critics would have

us think, three watertight compartments. Thus, legislative impeachment of executive officers or judges, executive veto over legislation, judicial review of administrative or legislative actions are treated as partial exceptions which need explanation."[14]

Overlapping of Powers: A Necessary Concomitant of Democracy in India

'In modern governance, a strict separation is neither possible nor desirable.'[15] Overlapping of certain functions of the organs does not necessarily imply a violation of the principle of separation of powers. That is a consequence only in the eventuality of one organ annexing the *essential function* of another. This stance was glimpsed from the observation of Sathasivam J. speaking for the court while considering the constitutional validity of the Members of Parliament Local Area Development Scheme[16]:

"While understanding this concept [of separation of powers], two aspects must be borne in mind. One, that separation of powers is an essential feature of the Constitution. Two, that in modern governance, a strict separation is neither possible nor desirable. Nevertheless, till this principle of accountability is preserved, there is no violation of the separation of powers. We arrive at the same conclusion when we assess the position within the constitutional text. The Constitution does not prohibit overlap of functions, but in fact, provides for some overlap as a parliamentary democracy. But what it prohibits is such exercise of the function of the other branch which results in wresting away of the regime of constitutional accountability. …Thus, the test for the violation of the separation of powers must be precisely this. A law would be violative of separation of powers not if it results in some overlap of functions of different branches of the State, but if it takes over an essential function of the other branch leading to lapse in constitutional accountability."[17]

Overlapping occurs under the Constitution in numerous instances. The Parliament is empowered to prescribe the number of judges in the Supreme Court [Art. 124(1)]. Pursuant to this, the Supreme Court (Number of Judges) Act, 1956 was passed. The impeachment process for the removal of a judge, both Supreme Court and High Court, is carried out through the special majority in the Parliament after an investigation into the charges [Art. 124(4)]. For carrying out this onerous responsibility, the Parliament is empowered to legislate to regulate the procedure for the presentation of an address in the impeachment process and the investigation and proof of the misbehaviour or incapacity of a Judge [Art. 124(5)]. Parliament, by law, determines the salary of a judge [Art. 125(1)] as well as their privileges, allowances etc. [Art. 125(2)]. Following this, the Supreme Court Judges (Conditions of Service) Act, 1958 has been enacted. Further, Parliament is enabled to confer on the Supreme Court, by legislation, additional powers to entertain and hear appeals and criminal proceedings [Art. 134(2)]. Parliament has enacted the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, in furtherance of this provision. Article 135 enables Parliament to make a law about the jurisdiction and power of the Supreme Court with respect of any matter to which the provisions of Articles 133 and 134 do not apply. The power of

review of the Supreme Court under Article 137 is subject to any law that Parliament may pass. Parliament can by law enlarge the jurisdiction of the Supreme Court concerning a matter conferred by the government. Parliament by law can also add to the power of the Supreme Court to issue the generally recognised writs under Article 32 [Art. 139].

There are a whole plethora of provisions of parliamentary and legislative checks placed on the judiciary, which controls its administrative functioning. However, these checks do not violate the theory of separation of powers nor do they impinge on the independence of the judiciary.[18] The powers of the three organs do not display a rigid separation, but intermingle with each other to allow checks against misuse. To quote Jackson, J. of the US Supreme Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*[19] the Constitution enjoins upon its branches "separateness but interdependence, autonomy but reciprocity". The scheme of the Constitution exhibits a certain uniqueness which is peculiar in its application to the traditions of this country. A constitutional issue will therefore only arise when there is an overlap in the form of a check concerning an essential or basic function of one organ as against the other. This article evaluates the functioning of the executive and the legislature and the overlap if any, impacting the essential and basic role of the judiciary.

The Essential Judicial Functions: Separating the Chaff

The members of the Constituent Assembly envisaged the judiciary as the bastion of rights and justice. The Assembly was keen to keep the judiciary out of politics to maintain and sustain its independence. This was done by fortifying the constitutional provisions. At the initial glance the provisions seem to be unduly concerned with the administrative aspects of the judicial system, tenure, salaries, allowances, retirement age, detailing of the judicial provisions and more importantly the mechanism to appoint judges. However, on a closer look, the member's interest with routine matters was to insulate the courts from the forces of the government. Independence of judiciary was to be protected and the areas of concern were prominently the appointment, removal and transfer of judges and its basic function of judicial review. This article also seeks to analyse the extent of executive and legislative control on these essential aspects of the functioning of judiciary.

Appointment, Transfer and Removal of Judges

The issue of appointment of judges to the apex court and the high courts as well as the transfer of judges had been a bone of contention for the framers and it continues to be a matter requiring careful consideration. The power to appoint judges to the Supreme Court is vested in the President. Article 124(2) further makes it mandatory for the President to consult the Chief Justice of India in all cases of appointment of judges other than the Chief Justice of India. For the initial part of the Supreme Court's history, this provision was understood to mean that the President would consult the President but was not obligated to act in accordance with the advice. In a series of cases, this issue of primacy regarding the appointment of judges was discussed and debated at length. The

affirmation to the primacy of the judiciary in the matter of appointment of judges was consciously recorded.

The Supreme Court, in 1974, in *Samsher Singh* v. *State of Punjab*[20], while keeping in mind the cardinal principle of 'independence of judiciary,' concluded that consultation with the highest dignitary in the judiciary i.e. the Chief Justice of India, in practice meant that the last word must belong to the Chief justice of India. This position was maintained in *Union of India* v. *Sankalchand Himatlal Sheth*[21] but was altered in the *First Judges case*[22] in 1981 by a seven-judge bench which held that the term "consultation" could not be read as "concurrence". However, the earlier position was restored in 1993 by a nine-judge bench in the *Second Judges case*[23] while overruling the *First Judges case*. This position was reaffirmed in the *Third Judges case*[24] by a nine-judge bench. Consequently, it is evident that historically, all the three wings of governance have uniformly maintained that while making appointments of judges to the higher judiciary "independence of the judiciary" was an accepted integral component of the Constitution. Accordingly, the term "consultation" used in the provisions under consideration had to be understood as vesting primacy with the judiciary with reference to the subjects contemplated under Articles 124, 217 and 222.[25] The *Second* and the *Third judges' cases* held that "consultation" expressed under Articles 124, 217 and 222 were to be read as vesting primacy, with the unanimous opinion expressed by the Collegium of judges headed by the CJI based on a participative consultative decision-making process. Further, while striking down the 99th Amendment, which created the National Judicial Appointments Commission, the apex court in *Supreme Court Advocates-on-Record Association v Union of India*[26] clarified that President in Articles 124(2) and 217(1) meant the President acting in accordance with the advice of the Council of Ministers headed by the Prime Minister. Since the opinion of the CJI/Collegium has finality, the advice of the Council of Ministers must be in accordance with the unanimous opinion of the Collegium with the CJI at the head.

While recognising that too much power with the Executive could be perilous, it was also perceived that too much power in the hands of a single individual, the Chief Justice of India would have its hazards. Accordingly, the opinion of the Chief Justice of India was interpreted to mean the collective opinion of the senior-most judges of the Supreme Court, which served as an internal check against making the Chief Justice singularly powerful.[27]

The removal of judges is not an internal matter of the judiciary. The Constitution provides that a judge of the Supreme Court holds office till 65 years and that of a High Court till 62 years. The judges cannot be removed before the age of retirement except on the presentation of an address by each House of Parliament passed by a specified majority on the ground of proved misbehaviour or incapacity [Art. 124(4)]. Thus, has the Constitution endeavoured to put judges of the Supreme Court above executive control. While the Executive does not exercise any control over the removal of judges, the Legislature imposes a check on judicial misuse of power through the constitutional process of impeachment. The Parliament has been circumspect

as far as the removal of judges is concerned and till date, no judge has been impeached.

The Power of Judicial Review

Another subject of concern concerning the impact of separation of powers on the judiciary is 'judicial review'. Judicial review is an essential power for the courts. The Constituent Assembly's aim, while framing the judicial provisions was to establish the foundations of the judiciary's review power and its duty to uphold the Constitution.[28] The essence of democracy is that the judiciary has been entrusted with the power to control the Executive and the Legislature whenever it is alleged that the said organs have exceeded their constitutionally assigned authority.

The two provisions that most emphatically express the power of judicial review under the Indian Constitution are Articles 32 and 226.[29] These provisions of the writ jurisdiction of the Supreme Court and the High Courts place a serious check on the exercise of executive and legislative power of the government. Article 32 allows the petitioners to directly approach the apex court for enforcement of their fundamental rights through the writs of *habeas corpus, mandamus, quo warranto, certiorari* and *prohibition*. Article 226 is broader in its scope and empowers the high courts to issue directions, orders and writs both for the protection of fundamental rights as well as for any other purpose. The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances.[30] Abuse of power can always be checked through judicial review of the action complained of.[31]

Many times, it is the exercise of the power of judicial review by the constitutional courts which has disgruntled the Executive or the Legislature. However, being an essential and basic feature, it cannot be ignored. The 42nd amendment of the Constitution was challenged in *Minerva Mills Ltd.* v. *Union of India*[32] which provided that no amendment of the Constitution could be challenged on any ground before the courts and that there will be no limitation on the constituent power of Parliament to amend the Constitution. While observing that the Constitution had conferred limited amending power on Parliament, the Supreme Court held that judicial review to determine whether a law was to give effect to Part IV could not be excluded as the judicial review was part of the basic structure.[33] It noted that though there is no rigid separation of powers between the Executive, the Legislature and the Judiciary, there is however a broad demarcation. The Judiciary is entrusted with the duty to keep the Executive and the Legislature within the limits of the power conferred on them which is also a basic feature of the Constitution.[34]

In *L. Chandra Kumar* v. *Union of India*[35], part of Articles 323-A(2)(*d*) and 323-B(3)(*d*) to the extent it excluded the jurisdiction of the High Courts in respect of specified matters for which jurisdiction was conferred on Tribunals was struck down as violative of the basic structure. In *Raja Ram Pal* v. *Lok Sabha*[36], the question of the extent of judicial review of parliamentary matters came up for consideration. Sabharwal C.J., speaking for K.G. Balakrishnan, D.K. Jain, JJ. and himself, held that procedural irregularities in Parliament cannot undo or vitiate what happens within its four walls,

that is, internal parliamentary proceedings. However, proceedings that are substantively illegal or unconstitutional, as opposed to irregular are not protected from judicial scrutiny by Article 122(1) of the Constitution.[37]

In *I.R. Coelho* v. *State of T.N.*[38] the apex court considered the scope of judicial review of the inclusion of a law in the Ninth Schedule by a constitutional amendment thereby providing immunity from the challenge in view of Article 31-B of the Constitution. It was held that every such amendment shall have to be tested on the touchstone of essential features of the Constitution which included those reflected in Articles 14, 19 and 21 and the principles underlying them.[39]

In many instances the decisions of the Supreme Court e.g. *2G Spectrum case*[40] and *Coal Scam case*[41] the actions of the Executive were found violative of constitutional obligations causing huge loss to the public exchequer. Policies of the State for the arbitrary acquisition of land or in violation of environmental laws have been struck down by this Court. Dissolution of State Assemblies and dismissal of State Governments have also been struck down by this Court.[42] The Supreme Court also has had to deal with the issues arising out of decisions of Speakers in recognising or otherwise the defections in the Central or State Legislatures.[43] The judiciary has been assigned the role of determining powers of every constitutional organ as well as the rights of individuals. Disputes may arise between the Government of India and the States, between a citizen and the State or between citizens. They may involve issues of constitutionality or legality and also of allegations of mala fides even against the highest constitutional dignitaries. To provide justice to the people, the judiciary is required to be impartial and independent. It is imperative to keep it separate from executive control and influence. Without separation of powers and independence of the judiciary, neither the primacy of the Constitution nor its federal character, social democracy, nor the rights of equality and liberty can be effective. The Constitution establishes and envisages an extremely powerful Supreme Court to protect and guard it. However, the provisions detailed above signify what M.C. Setalvad once observed, "not the supremacy of the courts but the supremacy of the Constitution"[44].

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FOCUS

Revisiting Article 30: Exclusive Rights for Minorities in a Secular Nation

Dr Seema Singh*

Introduction

Modern India was created in 1947 but Bharat as one of the world's most ancient civilization was acknowledged as "Vishwaguru" for its immense contribution to humanity throughout history.

Knowledge, as ordained in ancient Indian texts, has endowed the human race with copious philosophies and ideas for peace and harmony. The land of *Bharat* and its ancient wisdom has insisted on mankind traversing across the dark to realize what is *eternal* or *Sanatan*. Enriched with philosophical heritage, India has been native to contrasting schools of thought who have held conflicting views but culminated unto the realisation of the "Brahma" or the "Supreme being" and hence every single living entity according to the interpretations of its scriptures is acknowledged as the manifestation of the Eternal or Param-atman. Such belief has led the people of the subcontinent to welcome and accept dissent.

Indian philosophers did not seek to justify religious faith; philosophic wisdom itself is accorded the dignity of religious truth. The theory is not subordinated to practice, but the theory itself, as theory, is regarded as being supremely worthy and efficacious[1].

Ekam Sat Vipra Bahudha Vadanti is one Sutra quote picked from over one hundred Upanishads which are ancient Sanskrit texts of spiritual teaching and ideas of Hinduism. This aphorism means: That which exists is One, sages call it by various names. This idea from Upanishads is deeply ingrained into the Indian civilisation ethos for thousands of years, resulting in acceptability of any religious community into this country. Furthering the traditions, Jains & Buddhists further capitalise on the idea of co-existence and inclusiveness. The Indian traditions are pluralistic and have always offered freedom of worshipping the Divine in the name and form of one's choice and according to one's sanskaras making it is pluralistic both at the level of religious practices as well as philosophical teachings. For this reason, we find more sects inside Hinduism than among all of the world's religions put together.

Who is Hindu

India is considered as one of the most ancient civilizations of the world. According to the scriptural description of the Brahman, the entire earth planet is called Bharatvarsh.

Vishnu Puran defines Bharath as-

उत्तरं यत्समुद्रस्यः हिमाद्रेश्चैव दक्षिणम्।
वर्षं तद् भारतं नामः भारती यत्र संततिः।।

(Vishnu Puran)

The country (varc am) that lies north of the ocean and south of the snowy mountains is called Bhâratam; there dwell the descendants of Bharata. It is also called as Aryavart. According to Rigveda, the inhabitant of Aryavart are referred as Aryans or Bhartiya[2].

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Unlike other major religions like Islam and Christianity which are associated with one God, Hindus do not claim any one prophet, god, or one religious book, believing in multiple philosophical concepts and variety of customs and traditions. "Bharat"—the Hindi name for India—means "The Land of Knowledge". Over thousands of years, Hinduism has continuously assimilated ideas and thoughts of people.

In the year 1995, in the case of Bramchari Sidheswar Shai and others vs State of West Bengal, Honourable Supreme Court tried to define the term 'Hindu'. In this judgment, the court identified **seven defining characteristics** of Hinduism and by extension Hindus:

1. Acceptance of the Vedas[3] with reverence as the highest authority in religious and philosophic matters and acceptance with reverence of Vedas by Hindu thinkers and philosophers as the sole foundation of Hindu philosophy.
2. Spirit of tolerance and willingness to understand and appreciate the opponent's point of view based on the realisation that truth was many-sided.
3. Acceptance of great world rhythm, a vast period of creation, maintenance and dissolution follow each other in endless succession, by all six systems of Hindu philosophy[4].
4. Acceptance by all systems of Hindu philosophy, the belief in rebirth and pre-existence.
5. Recognition of the fact that the means or ways to salvation are many.
6. The realisation of the truth that Gods to be worshipped may be large, yet there being Hindus who do not believe in the worshipping of idols.
7. Unlike other religions or religious creeds Hindu religion not being tied-down to any definite set of philosophic concepts, as such.

Thus, by definition, being Hindu means a person who accepts the authority of Vedas and who strives to live following Dharma—God's divine laws as revealed in the Vedic scriptures, which prescribe good for all beings, whether animate or inanimate.[5]

Expressing the inclusivity of Hindu or Sanatan culture, Swami Vivekananda said in his famous speech in Chicago, "I feel proud to belong to a faith which, in its ancient Sanskrit language, has no equivalent or substitute for the word exclusion". He further stated, "India, as a nation, has sheltered the persecuted and the refugees of all religions and all nations of the earth."[6]

In the entire available history of pre-independent India, the term 'minority' (on any basis) has never been used or recognized. It is also a matter of historical record that Hindus have not been hostile to other faiths. Jews lived peaceably in India before they did anywhere else. Muslim traders from Arab countries practiced their faith undisturbed in Kerala, more than a thousand years ago. Parsis came in the seventh century and Christians in the fourth, unsupported by armies[7].

India always believed in oneness according to its Vedic and Upanishadic preachings. According to Maha Upanishad (6.71–75), अयं निजः परो वेति गणना लघुचेतसाम्। उदारचरितानां तु वसुधैव कुटुम्बकम्।। This is mine, that is his, says the small-minded, The wise believe that the entire world is a family.

Thus, it is proved based on historical records that the Hindu view is not exclusivist and it does not believe in *othering*.

Divide and Rule Policy

The 1857 War of Independence came as a major setback for British rulers, with the realisation sets in that a united India will not allow them to rule over this land for long. This led to a change of strategy and by 1858, the strategy began playing out by pitting Indians against each other—princes against people; Hindu against Muslim; caste against caste; and provinces against provinces.[8] In western philosophy, diversity is always understood in terms of differences. Earlier they used to construct their territory with a sense of othering[9].

The partition of Bengal in 1905, between the largely Muslim eastern areas from the largely Hindu western areas, is an example of this divisive politics. In another case, the Miller Committee in 1918, recommended Mysore Government to look into the question of reservation, recommending all communities as backward, other than Brahmins. To divide Hindus further, the Census Commission suggested for 1911 Census, to exclude untouchables, (comprising about 24% of Hindu population and 16% of the total population in 1908) from Hinduism.

The Communal Award was announced by the British Prime Minister, Ramsay MacDonald, in August 1932. This was yet another expression of the British policy of divide and rule. Communal Award was to grant separate electorates in British India for the Forward Castes, Lower Castes, Muslims, Buddhists, Sikhs, Indian Christians, Anglo-Indians, Europeans and Untouchables (now known as the Dalits). Creation of the Muslim League as a political party in 1906 was the result of such divisive politics, which subsequently led to the advocacy for the establishment of a separate Muslim-majority nation-state, in the form of Pakistan in 1947. The British government's three points divisive agenda involved encouraging Muslim League/Muslim Separatists, projecting diversities among Hindus as differences to break them into small communities and creating a sense of insecurity among princely states about their existence.

Trail of Constituent Assembly

To address the rising pressure of the nationalist movement, the British government in 1927 constituted the Simon Commission. The Indian leadership, while rejecting the Commission as it had no Indian member, attempted to develop a framework for an Indian Constitution. A committee was constituted under Motilal Nehru which submitted its report in 1928. This report was accepted by the Congress but was rejected by Jinnah. In the meantime, talks for the Constituent Assembly were ongoing between the British government, Congress and the Muslim League. Gandhi Ji, who in 1922 supported the idea of Swaraj (Self-Governance) but was against the imperialist concept of constitution, had by 1931, agreed to accept the path of electoral politics.

In August 1935, the Government of India passed the Government of India Act 1935 under the British Act of Parliament. The introduction of the Act ended the diarchy system by giving more freedom to British India for better governance in

the form of Provincial Autonomy and established a diarchy at the Centre. This Act extended the principle of communal representation by providing separate electorates for minorities, depressed classes (scheduled castes), women and labour (workers)[10]. This GoI Act, 1935, was rejected by the Congress in a Conference of Elected Representatives in 1937 on the ground that it nourished the roots of exploitation and slavery of India and re-enforced the foundation of British Imperialism in India.[11]

In 1936 and 1939 Congress Working Committee passed the resolution for the Constituent Assembly. Under the Cabinet Mission Plan of 1946, for the first time, elections were held for the Constituent Assembly. The Constitution of India was drafted by the Constituent Assembly, and it was implemented under the Cabinet Mission Plan on 16 May 1946. The members of the Constituent Assembly were elected through the indirect election, where the members were chosen by the Provincial Assemblies elected through the restricted franchise.[12]

The elections for the 296 seats assigned to the British Indian provinces were completed by August 1946. Congress won 208 seats, and the Muslim League 73.[13] After this election, the Muslim League refused to cooperate with the Congress and the political situation deteriorated. Hindu-Muslim riots began, and the Muslim League demanded a separate Constituent Assembly for Muslims in India. In 1946, expressing his view on Constituent Assembly, Gandhi Ji stated that the Constituent Assembly was the creation of the British government. Absence of Muslim League and Provincial Representatives violated the conditions the government had put for it. He suggested that Congress should stay away from the Constituent Assembly.

From 1946 to 1949 the Constituent assembly worked in three phases. The first phase (9 December 1946 to 2 June 1947) was tied up with the conditions laid down by the British government. The second phase (03 June 1947 to 14 August 1947) was the phase of Indian Partition. The third phase, was post-partition, beginning from 15 August 1947, when the Constituent Assembly became the sovereign authority and continued its work till 26 November 1949. As a result of the partition, under the Mountbatten Plan, a separate Constituent Assembly of Pakistan was established on 3 June 1947. The representatives of the areas incorporated into Pakistan ceased to be members of the Constituent Assembly of India.[14]

It is amply clear that the period in which the Constituent Assembly was drafting the Constitution, the country was facing the trauma of division and riots in which millions of people were brutally killed. Efforts to bring the Muslim League to Constituent Assembly were futile. Post partition Pakistan became a Muslim country but India remained secular. It seems that post-partition a pressure was working on Constituent Assembly, where the Assembly was trying to project its face as more secular in the absence of Muslim League. A point to be noted is that the Constituent Assembly adopted the Government of India Act, 1935 as its base document though the same was rejected by Congress in the year 1937. As India's Constitution was created at a time of great upheaval, it was bound to have imperfections—a fact recognised by Nehru, who stated, "Today, especially when

the world is in turmoil and we are in the process of very swift transition, what we see today may not be wholly applicable tomorrow. Therefore when we make a Constitution which is as sound and as basic as we can make it, it should also be flexible and for a period we should be in a position to change it with relative facility."[15]

Constituent Assembly and Religious Minority

Minorities were given special protection in the Indian Constitution. As discussed earlier, the term religious minorities was propagated by the British to divide India based on religion for their ends. During the Constituent Assembly debate, the House rejected the idea of minorities as a rule. The bitter feeling of the partition created a strong feeling of resentment in Constituent Assembly and the members preferred to use the term "certain classes" rather than using the term minorities.

In the Constituent Assembly, few members like Qazi Karimuddin, Z.H. Lari and D.H. Chandrasekhariya supported the idea of proportional representation but the Assembly scrapped all suggestions and provisions discussed for the political representation of minorities to discourage the tendency of separatism through separate electorate based upon quota in proportion to their population.[16] Even while discussing the right to worship or practice, the Constituent Assembly agreed that all Indian citizens should be identified as citizens of India. The prominent argument for rejection of such a demand was based upon the consideration of nationhood and national unity.

Begum Aizaz Rasul (United Provinces: Muslim) raised valid points. She supported the idea of integration of all communities in one nation irrespective of giving preference to their religious orientation. She said that it is in the interests of the minorities to try to merge themselves into the majority community, as in the long run, it will help them to win the goodwill of the majority. She further said that the Muslims living in this country should throw themselves entirely upon the good-will of the majority community, should give up separatist tendencies and throw their full weight in building up a truly secular state. She further stated that those Muslims who wanted to go to Pakistan have done so. Those who decided to stay here, she said, should be on amicable terms with the majority community and realise that they must develop their lives according to the environments and circumstances existing here[17].

Jai Prakash Narayan and Damodar Seth argued that if any protection is required to be given to minorities, then that should be only linguistic. To Seth, if religious minorities were allowed to run their educational institutions, it would "promote communalism and anti-national outlook."[18] Mr H.C.Mukerjee, Chairman of the Minorities Sub-committee in the Advisory Panel, expressed his disapproval, stating on 11 May 1949, "there are certain people who feel alarmed over the future of their communities and want to come to the legislature to safeguard the interests of the groups they belong. But once fundamental rights have guaranteed religious, cultural and educational safeguard, presence of people belonging to certain groups is not necessary."[19] While the Indian Constitution through Article 30 recognizes minorities based on religion, the Constituent Assembly had discussed that cultural rights should

be provided for linguistic groups alone and not for religious groups. Mr.Swaroop Seth suggested recognition of minorities based on religion or community was not in keeping with the secular character of the state. If such minorities were granted the right to establish and administer educational institution of their own, it would not only block the way to national unity but also promote communalism and anti-national outlook[20]."

Leaders like G.B. Pant and Rajkumari Amrit Kaur had similar concerns. They opposed the idea of establishing separate educational institutions or state aid to these institutions. Article 23 of the draft constitution, which later assumed the shape of Articles 29 and 30 were discussed rigorously in the Constituent Assembly to resolve what rights should be exclusively conceded to minorities. The original draft of the fundamental rights submitted to the Constituent Assembly on 16 April 1947 by the Sub-committee on Fundamental Rights did not contain any provision corresponding to Article 30(1) and did not even refer to the word minority. The letter submitted by K.M. Munshi to the Minorities Sub-committee on the same date when, along with some other rights, the rights now forming part of Article 30(1) was proposed, referred to the term "national minorities". The drafting committee, however, sought, to make a distinction between the rights of any section of the citizen to conserve its language, script or culture and the right of the minorities based on religion or language to establish and administer educational institutions of their choice and for this, the committee omitted the word "minority" in the earlier part of the draft Article 23 corresponding to Article 29, while it retained the word in the latter part of the draft Article 23 which now forms part of Article 30(1)[21].

B.R.Ambedkar sought to explain the reason for substitution in the Draft Constitution of the word minority by the words "any section" observing: It will be noted that the term minority was used therein not in the technical sense of the word "minority" as we have been accustomed to using it for certain political safeguards, such as representation in the legislature, representation in the service and so on. The word is used not merely to indicate the minority in the technical sense of the word, it is also used to cover minorities which are not minorities in the technical sense, but which are nonetheless minorities in the culture and linguistic sense. That is the reason why the word "minority" was dropped because it was felt that the word might be interpreted in the narrow sense of the term when the intention of this House…was to use the word "Minority" in a much wider sense to give cultural protection to those who were technically not minorities but minorities nonetheless.[22]

It is important to mention that the Constituent Assembly never tried to define religious minorities. We should not forget that the purpose of the British government to encourage religious minorities was to enhance the concept of sectarianism and separatism. The boycott of Constituent Assembly by Muslim League put an unknown pressure on the members of Constituent Assembly and to develop the feeling of security among those who preferred to stay in India, the term 'religious minority' was used in Articles 29 and 30 of the Indian Constitution.

Religious Minority in Constitution & Post Independent India

It is unfortunate that neither in pre-independence India nor in post-independent India, the term religious minority has been defined. Even the Moti Lal Nehru Report (1928) which talks about the strong desire of protecting minorities did not define the term. Similarly, the Sapru Report (1945), which proposes the Minority Commission, is silent over the term. In its practical application, we appear to be following the idea of minority created by the British to divide India.

The Indian Constitution at several places uses the term minority/religious minority. Under Article 30, the term is specifically used to provide specific protection,[23] but here too, it remains undefined. The National Commission for Minorities Act, 1992, enabled the Centre to notify minorities for the limited purposes only and in the exercise of that power, the government had notified five communities as minorities. So the usage of the term is largely at the disposal of the Centre. Inclusion of word 'secular' during the emergency proclaimed by then Prime Minister Indira Gandhi, in the Preamble (42nd Amendment 1976) of the Constitution has further extended the scope for the misuse of term religion and religious minorities. It became more divisive, blurring the line between protection and promotion of religious minorities.

In Kerala Education Bill (1957 [1958] INSC 20) the issue of interpreting the term minority was raised before the court. The Apex Court held that any community having less than 50 per cent of the total population should be identified as a religious minority. But this definition is extremely vague and gives more discretion to the executive to play with the term 'religious minority' for political purposes.

Indian democracy is based upon 'Representative Government' and gives the right to cast vote to every adult belonging to any religion or caste. As the democracy in India is procedural any political party winning a maximum number of seats (even by receiving merely 23 to 32 per cent of votes cast) will be capable of forming the government. Today, around 1800 political parties are registered with the Election Commission of India. Regional parties with regional interest are playing an instrumental role in national politics. Most of the time they have segmented and consolidated vote bank, either belonging to certain castes or communities or based upon certain caste and community combinations. It encourages political parties to be the representative of that segment to play divisive games to keep their vote bank intact.

The political history of independent India makes it clear that political parties, their agenda to rule and the spirit of Constitution are not properly aligned. While the Preamble to the Indian Constitution has lofty goals of promoting 'Equality and Fraternity,' but in reality, differences are promoted. We still have an anomalous situation where people belonging to different religions are governed by different personal laws. As of date, Muslim Law is still un-codified. While Hindu temples are under governmental control, mosques and churches are completely autonomous. The Hindu Religious and Charitable Endowment Act, allows state governments to take over temples and control their vast properties and assets. The State government has the right to divert this money collected from temples for any purposes which have nothing to do with a temple or religious activities of Hindus.

Article 30 gives protection only to religious minorities and they can receive funds from the government for running their educational institutions. Any legislation made for social justice is not applicable on minority educational institutions, so they are outside the ambit of the Right to Education Act under which 25 per cent seats are reserved for weaker sections (Article 21A) and also are not under the obligation to make reservations for SC/CT/OBC in educational institutions whether aided or unaided by the government (Article 15(5)). But no such privilege is available to the non-minority community. Even if they are not receiving aid from the government they are bound to implement Article 21A,[24] and Article 15(5)[25]. It is discriminatory and indirectly lures the majority to convert into the minority to avail the benefits of these exclusionary clauses, thus violating the very provisions of the Constitution which declare that encouragement or lure for the conversion is illegal.

In the case of Kerala Education Bill, the Supreme Court held that the religious minorities should be identified at the state level to avail the protection of Articles 19 and 30. But, very recently, the National Commission for Minorities has refused to consider a plea on the ground of lack of jurisdiction filed by Ashwini Upadhyay, a Supreme Court advocate, who sought to declare Hindus as a minority community in eight states. In all these states and union territories, (Jammu & Kashmir, Lakshadweep and six states of Northeast India), Hindus are in a minority but they are not receiving any benefit which other minorities are receiving in Hindu majority states. This is sufficient to raise concerns over the concept of Constitutional equality.

It is important to mention here that the Ministry of Minority Affairs which was carved out from the Ministry of Social Justice has a tentative annual budget of 4,500 crores, but the ministry has no criteria to define and identify minorities[26]. The National Commission for Minority Educational Institutions Act, 2004 as amended time and again in 2006 and 2010, has been enacted to safeguard the educational rights of the minorities enshrined in Article 30(1) of the Constitution. The Act defines "minority" under Section 2 (f) as for this Act, means a community notified as such by the Central Government. Furthermore, as regards the indicia to be prescribed for grant of minority status certificate, a reference to Section 2(g) of the Act has become inevitable as it defines a Minority Educational Institutions. Section 2 (g) is as under: "Minority Educational Institution" means a college or an educational institution established and administered by a minority or minorities.

In 23.10.1993, vide a gazette notification issued by the Ministry of Welfare, Government of India, five religious communities viz; the Muslims, Christians, Sikhs, Buddhists and Zoroastrians (Parsis) were notified as minority communities[27]. The percentage of these religious minorities in Indian population reflects a sharp contrast. As per 2011 census their population percentage is Muslims-14-15%, Christians-2.96%, Sikhs-1.57%, Jain-0.945 Buddhist-0.96%, other religion-0.66%. Thus Muslims, with the largest proportion of the minority population is the most favoured community, as a vote bank by most of the prominent political parties. It is presumed that the community votes en masse as Fatwas (religious edicts) are issued by the religious leaders of the

community in favour of particular parties.

Opposition of political parties to *Triple Talaq* and Common Civil Code are few examples to show the minority appeasement which is against the fundamental ethos of equality and fraternity of Indian Constitution. NRC (National Register of Citizens) and Citizenship Amendment Bill are other examples where a few political parties are trying to establish that there is no difference between refugees and infiltrators and are deliberately ignoring the mass infiltration from neighbouring countries to India's border area which is gradually changing the demography of certain border states and also causing serious threats to national security.

There is debate over recognising minority groups and their privileges. One view is that the application of special rights to minority groups may harm some countries, such as new states in Africa or Latin America not founded on the European nation-state model, since minority recognition may interfere with establishing a national identity. It may hamper the integration of the minority into mainstream society, perhaps leading to separatism or supremacism. The same concern was shown by the Supreme Court in the case of Bal Patil (2005) where petitioner demanded to give the status of religious minority to Jain Community. The Apex Court agreed with TMA Pai judgment that linguistic minorities are to be identified based on their population within a particular state of India since the states were originally reorganised on linguistic lines. On the other hand, the Court observed that calibrating religious minority status based on their population at the state level would militate against the integrity and secular fabric of India.[28]

Encouraging religious ideologies and gradual demand of minority status by different communities (Now Sindhi and Jats) is not a good sign for national unity. Religion has always remained a bone of contention among people belonging to different religious communities and even in the 21st century, violence in the name of religion is undergoing a revival. The past decade has witnessed a sharp increase in violent sectarian or religious tensions. These range from Islamic extremists waging global Jihad to the persecution of Rohingyas in Myanmar and outbreaks of violence between Christians and Muslims across Africa. According to Pew Research Centre, in 2018 more than a quarter of the world's countries experienced a high incidence of hostilities motivated by religious hatred[29].

In a country like India full of religious and cultural diversity, promoting religious divides can give disastrous results and create hurdles in proper integration of religious minorities with the rest of the country. The idea of a minority was an imperialistic scheme to perpetuate rule over India and this led to the division of the country. Today, under the garb of minority, the politics of 'minority' is creating havoc for national unity and integrity.

India's unity and integrity would be strengthened if we avoid concepts of religious minority in the Indian Constitution. When the Constitution is secular and secularism is a part of the basic structure of the Constitution, and in the absence of any persecution history of any minority religion in the country, giving special rights to religious minorities does not seem logical. It is not good even for religious minorities who then become victims of vote bank politics. It is hence time to seek Constitutional Amendment and to abrogate Article 30 of the Constitution.

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23 *Article 30. Right of minorities to establish and administer educational institutions*

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause

(2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

24 *Article 21(A) in Indian constitution provides 'free and compulsory education of all children in the age group of six to fourteen years (6–14) as a Fundamental Right in such a manner as the State may by law, determine.'*

25 *"Nothing in this article or sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or the Scheduled Castes or the Scheduled Tribes 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.]"*

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Removing State Control from Religious Institutions: Constitution (Amendment) Bill, 2019 (Amendment of Article 26)

Arjun Singh Kadian*

India is a secular state, premised on equality to all its nationals. However, certain provisions of the Constitution however tend to discriminate against the majority community, especially in matters dealing with religion. One such is Article 26 of the Indian Constitution. Designed to provide protection to the minority communities, in its application it discriminates against the majority community.

To rectify this anomaly, Constitution (Amendment) Bill, 2019 (Amendment of Article 26) was introduced in Parliament by Lok Sabha Member of Parliament from Baghpat (Uttar Pradesh), Dr Satya Pal Singh. The Statement of Objects and Reasons of the Constitution Amendment Bill brought into the proceedings of the Parliament the following:

"As per our constitution, the state has no religion. The state has to treat all religions and religious people equally and with equal respect without, in any manner, interfering with their right to freedom of religion, faith and worship"[1]

A similar Bill had earlier been introduced in parliament in 2017, but had lapsed and was introduced for the second time on 22 November 2019. After tabling the Bill, Dr Satya Pal Singh, addressing the media, stated that post-Independence, care was taken by the Constitution to allow the minorities to control their educational and religious institutions so that their fears were allayed. However, Hindus were not extended the same treatment, generating an unhealthy feeling of discrimination among the majority community.

A cursory reading of the bill would be enough to understand the reasons why the honourable Member of Parliament (MP) has moved for introduction of the Bill in Parliament. In support of his Bill, Shri Satya Pal Singh stated, "Over the last seven decades, it has come to mean that the majority community cannot enjoy the same rights as the minorities in a secular country. Hindus cannot manage their institutions, as exclusive rules and regulations are imposed only on Hindu institutions. This is discrimination and hence my bill is introduced to ensure that everyone is equal before the eyes of the law".[2]

As per Koenrad Elst, a well-known Indologist and advocate for the cause, "The Private Bill and the present initiative will surprise a part of the Indian public and the vast majority of the foreign India-watchers, as they don't know (or the knaves among them feign not to know) that there exists any anti-Hindu discrimination at all".[3]

The case for the bill is a fairly old one and has off late permeated into the national consciousness. The bill, introduced by the honourable MP intends to correct some historical injustices perpetrated in the name of secularism, seeks to amend the Constitution and free temples and Hindu religious institutions from state control. It demands that the

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state shall not frame laws that allow it to control a religious institution, and put a hold on misappropriation of temples' income in the name of secular practices. Further, the bill tries to correct the majority-minority distinction and the practices that follow.

The Case for the Bill

Before we delve into provisions of the bill and the stated objectives behind them and the reasoning, it is important to dig into the history of the three subjects it broadly deals with. These subjects are:

- Hindu Religious Institutions
- Educational Institutions
- Minority-Majority Segregation

Hindu Religious Institutions

The government control over Hindu temples and religious institutions derives its teeth from colonial laws and was thoughtlessly continued post-independence. Traditionally, Hindu Temples have acted as religious and cultural hubs for the Hindu society, being centers of dance, art and providing jobs and patronage to a host of people. Temples also managed their properties which were given as donations to it by the community. Administration within the temple would establish *pathshalas, gaushalas,* rest-houses and other institutions for the poor, destitute and needy.

It is now popularly understood that the British ruled India for no charity. Sanjeev Sanyal, economist and historian, Shri Shashi Tharoor, MP, and others too have written and spoken in great detail about the drain of wealth from India during the colonial era. Further, for the British agenda of colonisation and conversions to succeed, the hold of temples on the Indian society had to be weakened. Temples were brought under government control mainly in south India because not too many temples in the north possessed such massive property or wealth. The British introduced the Madras Regulation VII of 1817 to do this.[4]

The Religious Endowments Act 1863 handed over the temple administration to the trustees from the British government. With this, numerous temples in the Madras Presidency went under the control of the respective trustees and the role of government in supervising them decreased. It was on the trustees now to run the temple according to the traditions and tenets of the temple and the community. This tradition continued for a few decades. However, in 1925 The Madras Religious and Charitable Endowments Act was introduced by the British affecting the administration of these temples. Seemingly, the act faced stiff resistance from Muslims and Christians communities and under prevalent duress; the act was renamed as Madras Hindu Religious Endowments Act.[5]

In 1925, the Madras Hindu Religious Endowments Act, 1923 (Act I of 1925) was passed by the local Legislature with the object of providing for better governance and administration of certain religious endowments. A radical change was introduced, however, by Act XII of 1935. The Government was not satisfied with the powers of the Board then existing and they clothed the Board with an important and drastic power by introducing a new Chapter, Ch. VI-A, by which jurisdiction was given to the Board to notify a temple for reasons to be given by it.[6] This was one of the most radical moves by the British government in temple administration laws. The Hindu religious

endowment Board (three to five members) was now armed with powers to take over and administer temples.

In 1951, the Tamil Nadu government passed the Hindu Religious and Charitable Endowments Act and took over the control of temples and their funds. The provisions of the act were opposed and challenged in the High Court and later taken to Supreme Court in the *Shiru Math* case. Many of the core provisions of the act were struck down yet some years later, the Tamil Nadu government passed a new law, The Tamil Nadu Hindu Religious and Charitable Endowments Act, in 1959. The Bill was passed and placed on the Statute Book as the Act XXII of 1959.[7] Sri Patanjali Sastri, Second Chief Justice of India, publicly expressed his view that the bill violated the principles and implications of a secular state**,** which require that the state should not actively or passively associate itself with the religious life of the people.[8]

The new Act abolished the Hindu Religious Endowments Board and vested its authority in the Hindu religious and charitable endowments department of the government headed by a commissioner. It also mandated that if the government believes that any Hindu public charitable endowment is being mismanaged, it may direct the commissioner to inquire and bring the endowment under government control. This provision of mismanagement does not apply to Muslim and Christian communities.[9]

It was said that the purpose of the Act was to manage the funds of the temple properly and to improve the general management of the institution. However, the Act set a precedent for other states to follow. Soon, temples across the country were taken over by different governments through sequential legislations.

Educational Institutions

After coming to power in 2004, the Indian National Congress-led United Progressive Alliance (UPA) Government passed a Constitution Amendment Bill. The Constitution (Ninety-third Amendment) Act, 2005 added clause (5) in the Constitution which allowed the state to make special provisions for the advancement of socially and educationally backward classes of citizens or Scheduled Castes or the Schedule Tribes. However, this clause did not apply to minority educational institutions, separating minority institutions from others and escaped from providing for disadvantaged citizens of the country.

Minority-Majority Segregation

Article 30 confers on all minorities—religious or linguistic—the right to establish and administer educational institutions of their choice. These words have been interpreted by the courts to mean that the founding fathers of the Indian Republic wanted to give the minorities' unbridled freedom to run educational institutions with bare minimum interference from the government. But with Article 15(5), the Indian state regulates private institutions heavily. Since minorities remain largely free, these regulations only stifle the Hindu-run institutions leading to unprecedented financial and regulatory advantage to minorities over majority-run institutions.

Steps towards an Equal Future

Dr Satya Pal Singh's Bill, introduced in the

Parliament, is an attempt to correct the biases in the Constitution which have been enumerated above. The Bill is called the Constitution (Amendment) Act, 2019. It seeks to amend/add/ delete certain provisions of Articles 15, 26, 27, 28, 29 and 30. The reasons thereof are discussed in subsequent paragraphs.

ARTICLE 15

The Bill seeks to omit Clause 5 of Article 15 of the Constitution. The provisions of Article 15 are:

Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition concerning with regard to—(a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes. [By the 1st Amendment Act, 1951]

(5) Nothing in this article or sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or the Scheduled Castes or the Scheduled Tribes 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.] [By the 93rd Amendment Act, 2005]

(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 the State from time to time based on family income and other indicators of economic disadvantage.[By the 103rd Amendment Act, 2019]

Explanation:

Article 15 of the constitution prohibits

discrimination on the grounds of religion, race, caste, sex or place of birth. However, clause (5) which is proposed to be omitted was added by the Congress-led United Progressive Alliance (UPA) government in 2004 by the 93rd Amendment Act. It is the *basis* of sectarian laws in education, the most important being the Right to Education Act (RTE). This clause paved the way for the government to reserve seats for students from socially and educationally backward classes in private educational institutions other than those run and managed by religious and linguistic minorities. Omitting the clause would free minority educational institutions and under the Right to Education Act, it would open doors to students from disadvantaged communities regardless of their minority status.

ARTICLE 26

The provisions of Article 26 are as under:

Article 26: Freedom to manage religious affairs.—Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(a) To establish and maintain institutions for religious and charitable purposes;
(b) To manage its affairs in matters of religion;
(c) To own and acquire movable and immovable property; and
(d) To administer such property following the law.

Explanation

The Bill seeks to amend Article 26 by adding four clauses to the Article as under:

The existing article 26 of the Constitution shall be renumbered as clause (1) thereof and after clause (1) as so renumbered, the following clauses shall be inserted, namely—

(2) Notwithstanding anything contained in article 25, the State shall not control, administer or manage, whatsoever, any institution, including its properties, established or maintained for religious or charitable purposes by a religious denomination or any section thereof.

(3) All laws in force in the territory of India, in so far as they are inconsistent with the provisions of this Article shall, to the extent of such inconsistency, be void.

(4) The State shall not make any law which enables it to control, administer or manage, whatsoever, any institution, including its properties, established or maintained for religious or charitable purposes by a religious denomination or any section thereof, and any law made in contravention of this clause shall, to the extent of such contravention, be void.

(5) In this article, the expressions "law" and "laws in force" have the same meaning as respectively assigned to them in clause (3) of Article 13.

Article 26 of the Constitution bestows rights on all religious denominations, *irrespective of majority or minority*. In a catena of judgments, the Supreme Court iterated the same. Significantly, in *Pannalal Bansilal Pitti vs. State of Andhra Pradesh*, the Apex Court opined, "While Articles 25 and 26 granted religious freedom to minority religions like Islam, Christianity, and Judaism, they do not intend to deny the same guarantee to Hindus. Therefore, protection under articles 25 and 26 is available to the people professing Hindu religion, subject to the law therein. The right to establish a

religious and charitable institution is a part of religious belief or faith and, though law made under clause (2) of Article 25 may impose restrictions on the exercise of that right, the right to administer and maintain such institution cannot altogether be taken away and vested in another party; more particularly, in the officers of a secular government."

We also find a contradiction in Article 25, Freedom of conscience and free profession, practice, and propagation of religion, between Clause 1 and Clause 2 of the Article. These clauses are:

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience, and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

We hence find a contradiction, wherein Clause (1) of Article 26 that provides for the freedom of profession, practice and propagation of religion, seeks to liberally interfere vide Clause (2) in the institutions of Hindus while allowing unlimited religious freedom to members of other faiths. Clause (1) of Article 25 states that all persons are equally entitled to freedom of conscience; Clause (2) takes that away from Hindus, specifically.

As discussed in detail above with respect to Hindu religious institutions, the government has routinely taken over temple administration since independence on the pretext of mismanagement, maladministration, etc. whereas mosques and churches are exclusively managed by respective communities. Temples receive massive donations in wealth and properties yet all of it is not utilized for the betterment of the Hindu community.

ARTICLE 27

The provisions of Article 27 are as under:

Article 27: Freedom as to payment of taxes for promotion of any particular religion.—No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

The Bill proposes that the existing Article 27 of the Constitution shall be renumbered as Clause (1) thereof and after clause (1) as so renumbered, the following clause shall be inserted, namely:-

"(2) No moneys out of the Consolidated Fund of India, the Consolidated Fund of a State, the Contingency Fund of India or the Contingency Fund of a State or out of the fund of any public body shall be appropriated for advancement or promotion of a section of citizens solely or primarily based on their religious affiliation or belonging to one or more religious or linguistic denomination."

Explanation

There are many schemes, programs, etc., that

the government has undertaken in the last few decades of independence that serve exclusively for a sect or religion. There are exclusive scholarships programmes for minorities and they are given lucrative loans via specific organisations like the National Minorities Development and Finance Corporation. Besides, the government, through its Multi-sectoral Development Programme (MsDP), gives special grants to districts where the concentration of minorities is 20 per cent and more. Similarly, many other sectarian schemes exist whose beneficiaries decided primarily based on religion are reflecting India's bogus claims of secularism.

The bill proposes to free the state from taking such steps. The additional clause ensures that no money is taken from government coffers to specifically address the interest of a section of citizens based on their religious affiliation or belonging to one or more religious or linguistic denomination. This essentially takes the 'Religion' out of the financial resource distribution. Any sectarian schemes by the government would then be deemed unconstitutional. Along with previous Articles, this frees Religions from being treated as a mere vote bank.

ARTICLE 28

The provisions of Article 28 are as under:

Article 28: Freedom as to attendance at religious instruction or religious worship in certain educational institutions.—(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

The Bill proposes to insert an additional Clause after Clause 3 as under:

"(4) Nothing in this Constitution shall be deemed to forbid the teaching of traditional Indian knowledge or ancient texts of India in any educational institution, wholly or partly maintained out of State funds".

Explanation

Clause (4) which is proposed to be inserted displays respect for the Indian traditional knowledge system which flows out of ancient Indian philosophical systems and tries to push its education. The first page of the Report of the Committee on Integration of Culture Education in the School Curriculum notes, "All of us are concerned about diminishing moral values..." The committee is 'bothered' about the declining awareness among our children about their cultural backgrounds.[10]

Dr Satya Pal notes, that it was never the intention of the framers of the Constitution to keep the study and learning of traditional knowledge systems and civilisational heritage including study of such great texts like the Vedas, the Upanishads,

the Mahabharata, the Ramayana, etc. from out of the public education system, yet, these have been completely kept out of education system leading to deracination of Indians from their cultural and civilisational moorings which does not augur well for the future of the country.' Hence, an introduction of Clause (4) allows the teachings of traditional knowledge and values imbibed in ancient Indian texts to improve the state of education in India.

ARTICLE 29

The provisions of Article 29 are as under:

Article 29: Protection of interests of minorities.—(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

The Bill proposes a change in Article 29 of the Constitution, in the marginal heading, as under: for the words "interests of minorities", the words "cultural and educational rights" shall be substituted.

Explanation

The heading of this Article does not suit its body. While the heading talks of interest of minorities, the two clauses in the Article talk of conserving distinct language, scripts or culture[29(1)], or admission into educational institution[29(2)]. By substituting the words 'cultural and educational rights' the Bill aims to put a stop to this incongruity. This incongruence has the potential for misunderstanding as if these rights are conferred only on minorities.

ARTICLE 30

The provisions of Article 30 are as under:

Article 30: Right of minorities to establish and administer educational institutions.—(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

The Bill proposes a change in Article 29 of the Constitution, as under:

(a) in the marginal heading, for the word "minorities", the words "all sections of citizens, whether based on religion or language", shall be substituted;

(b) in clause (1), for the word "minorities", the words "sections of citizens" shall be substituted;

(c) In clauses (1A) for the words "a minority", the words "a section of citizens" shall be substituted; and

(d) In clause (2), for the words "a minority", the words "a section of citizens" shall be substituted.

Explanation

The Article in its present form, confers rights on minorities without speaking about the rights of the majority community. Dr Satya Pal notes, "the aspirations for conserving and communicating religious and cultural traditions and language to succeeding generations is legitimate and applies to all groups, big or small. It is, therefore, felt that the scope of Article 30 of the Constitution should be widened to include all communities and sections of citizens who form a distinctly religious or linguistic group".

Conclusion

The Bill introduced by the honourable MP proposes to amend articles 15, 26, 27, 28, 29 and 30. This is an issue of great public import, as the Preamble to the Indian Constitution talks of securing for all its citizens, JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the nation.

By discriminating against the majority community, the objectives of the Constitution will be hard to realise as such provisions create a feeling of separateness and militate against the principles of Justice, Equality and Fraternity as enshrined in the Preamble. However, it is to be noted that the said bill is a Constitution Amendment Bill and would require consensus among different parties, which may not be forthcoming. It is hence necessary to evoke public consciousness on this issue and raise awareness levels, to see that the Bill gets the requisite support for its passage.

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FOCUS

Legality of Collegium and the NJAC Debate

Shivam Singhania, Shubhendu Anand[1]*

Introduction

The judicial appointment has hardly been a settled debate in the evolution of constitutional jurisprudence. The appointment structure has seen two diametrically opposite faces – the pre *Second Judges* case and the post *Second Judges* case. Initially, Article 124 was literally interpreted and consultation was on the pleasure of the President, with the final decision resting with him. Therefore, the executive had absolute control over the appointment of judges. *Sankalchand*[2] *the* case upheld this understanding of the Constitution, although the foresight of luminaries such as P.N. Bhagwati, Fazal Ali and Krishna Iyer did act as a check on this unfettered power, by emphasising that the counsel of the Chief Justice carries great weight[3] and the government may also be asked to explain with cogent reasons, its departure from the counsel of the Chief Justice if a case is made out in this regard.[4] However, the underlining principle was that the Chief Justice has no power of veto and the government is not bound by the advice of the Chief Justice.[5] A similar view was taken in *S.P. Gupta.*[6]

The *Second Judges*[7] case completely altered the system of judicial appointments. It held that 'consultation' in Article 124 amounted to 'concurrence' with the opinion of the Chief Justice and to keep away the decision of appointments from the sole discretion of the Chief Justice, it formulated a collegium (crystallising an informal constitutional convention) to recommend the appointment of judges.

Independence of judiciary is unquestionably a part of the basic structure of the constitution. The manner of judicial appointments should, therefore, be such that independence of the judiciary is not encroached upon. An important question is whether judicial primacy is itself a part of the basic structure or only a way of judicial appointment to upkeep the independence of the judiciary? What does the primacy of judiciary possibly mean? Can it mean a scheme such that the opinion of the judiciary will hold ground, regardless of the opinion of any other stakeholder? Can another way be devised wherein independence of the judiciary is intact and the system can better facilitate the ends of justice than the collegium? Where does a structure such as the National Judicial Appointments Commission stand vis-a-vis the answers to the above questions?

Primacy, Independence of Judiciary and NJAC

Article 124(2) provides for consultation of the Judges of the Supreme Court and the High Courts as the President may deem necessary and that the Chief Justice shall always be consulted. The Constituent Assembly extensively debated the scenario and outcome of compulsorily binding the President to the advice he may seek. The contention was twofold: the President has been allowed freedom to decide whom to consult but is

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bound by advice, which can be conflicting from other such opinions he may seek and the President may have to be bound by opinions of High Court judges in an appointment at superordinate offices.[8]

Dr Ambedkar says the following in response to amendments in the Constituent Assembly to the present Article 124:

"With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly, both on the impartiality of the Chief Justice and the soundness of his judgment. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I, therefore, think that that is also a dangerous proposition".

It is amply clear that the Constituent Assembly wanted the consultation process to not tie down the President through unwritten principles. Neither the President could unilaterally make decisions with regard to appointments nor did the Chief Justice have any control to overturn the President's decisions. This middle course was further solidified in the *Sankalchand* judgment as explained above.

The involvement of the Judiciary (more specifically the Chief Justice as other consultations are purely a matter of choice of the President) in appointments has never crossed the line where it has had an overpowering effect over the President. In this context, the argument of 'constitutional convention' in the *Second Judges* case also raises pertinent questions. The Executive has been found to conventionally concur with the Chief Justice always and therefore the recommendation of the Chief Justice ought to be binding on the Executive leaves a vacuum between the two yet to be filled. Judicial primacy cannot be established because the executive has been known to concur with the Chief Justice.

Furthermore, there have been proponents of the argument that establishment of judicial primacy in the *Seconds Judges* case is in a specific, restricted context and not an intrinsic constitutional principle to be a part of the basic structure.[9]

"…This will ensure composition of the courts by appointment of only those who are approved of by the Chief Justice of India, which is the real object of the primacy of his opinion and intended to secure the independence of the judiciary and the appointment of the best men available with undoubted credentials."[10]

The driving contention for Justice Verma's majority was the fact that men in the same arena are better placed to adjudge best possible candidates to serve the judiciary and therefore it is a role assigned to the judiciary (thus establishing judicial primacy).[11]

However, judicial primacy as a concept innate to constitutional mechanism has never found any reference whatsoever apart from the undeniable basic element of independence of the judiciary. Constituent Assembly debates and all previous decisions of the Supreme Court may have hinted to a higher Executive role but never to an overriding

judicial role. The Second Judges case quickly moves from concurrence to an overpowering judicial primacy. They keep reiterating it as the only measure to uphold the independence of the judiciary because the link to the independence of the judiciary is the key to the existence of judicial primacy. Therefore, what if the independence is better served without judicial primacy?

The bench also came up with an imaginative set up called the 'collegium' by taking cognizance Dr Ambedkar's (albeit, only selectively) words that the Chief Justice alone cannot be allowed to have a voice that shall be concurred with by the President. However, the necessity of 'plurality of judges' seems more of a convenient escape route, now that they had made the judiciary the final word in appointments but could not afford a singular opinion to be final. It simply is opposite to the text of 124(1) as the President is forced upon with multiple opinions, seeking which in the first place was his prerogative.

In this light, exploring the structure of NJAC on the touchstone of constitutional jurisprudence (minus the conclusions of Second Judges case) before the *Fourth Judges* case[12] will lead us to better conclusions.

The NJAC provides for the Chief Justice and two senior-most judges, the Law Minister and two 'eminent persons' nominated by a committee of the CJI, PM and LoP (or Leader of single largest party) in the Lok Sabha. The concerns raised by various judgments on Executive interference, political appointees etc. is not lost upon us after the supersession of judges and notions of 'committed judiciary'. It is valid that the era of Constituent Assembly and *S.P. Gupta* was a completely different one, wherein jurisprudence began with an assumption of 'committed executive' always acting in common interest of the people and its institutions. Therefore, a continued stubbornness to follow words spoken half a century ago is not recommended. Independence of the judiciary will not seem to be protected at the fancy and pleasure of the President. Also, the inconsistencies of the collegium—opaqueness, closed knit system, alleged favouritism[13] and the above-discussed arguments of questions on its legal basis show us that a system of blindly submitting to the wisdom and impartiality of judges and accepting what they decide without any evidence or a question or two because they are judges and will not do a wrong defies the strong checks and balances culture that the judiciary itself has tried to popularise in our democracy.

In this regard, a Judicial Appointments Commission serves the purpose of 'concurrence' best. It is an Executive-Judiciary model[14] in which decisions without the concurrence of the two blocks is not possible.

Accountability is a sure outcome as the Commission will be self-regulated. Whether any appointment procedure should be available for public scrutiny is another debate which raises questions over prejudicing a candidate's chances or jeopardises his functioning as a judge. Even without that, two organs of a state on the same table is a self-accountable system which can be trusted per se rather than a gang up of a handful few of either the Executive or Judiciary.

The NJAC had majorly three contentions with its composition – (a) the presence of Law Minister (b) ambiguity over 'eminent persons' and their

nomination process and (c) veto of any two members.

The presence of Law Minister as raised by Justice Joseph is a conflict of interest issue because he represents the largest litigant in the country on a body for appointing judges. Not delving deeply into the discussion, the conflict of interest persisting even in the collegium system, even though the Executive's was a ceremonial role. It persisted before *Second Judges* when the Executive had absolute control over the appointment. It is a difficult proposition to accept that framers of the Constitution discussed, debated and continued with an apparent conflict of interest along with the judiciary for close to four decades. The understanding is that the Law Minister is in a different capacity (not a litigant) as representative of the President to look for 'concurrence'. Concerns for favoured appointees are well found but 1/6th of voting power in a body cannot appoint cronies alone.

The last thing we require is persons not capable or versed with the functioning of the judiciary or the justice system to be involved in the appointment. Eminent persons should only be restricted to jurists, practitioners or scholars of eminence. Two eminent persons exercising a veto over the Executive and Judiciary, who may be nominated by the PM and LoP in collusion against the CJI is a valid concern. It is proposed that the Commission should have a position for one eminent person. Possibility of a bipartisan compromise between the PM and LoP is extinguished if the nominee is only one.[15]

Veto of any two members is significant otherwise it would replicate the collegium without any change. The existence of a veto in itself cannot set off flares and impinge upon the independence of the judiciary. Considering its practicality, the highest probability is of the judges' candidate passing through (with added transparency utilizing presence and agreement of a neutral and eminent legal luminary/scholar) while it becomes difficult for the government to stall uncomfortable appointments as there is little scope for the single eminent person to not be neutral.

Conclusion

The independence of the judiciary is a part of the basic structure of the Constitution. Judicial appointments are directly linked to the independence of the judiciary. Therefore, judicial appointments cannot be done in a manner infringing the independence of the judiciary. However, judicial primacy per se is not a part of the basic structure itself as seen through Constituent Assembly debates and Constitutional jurisprudence before the *Second Judges* case. Even in the *Second Judges* case, judicial primacy was the only way to ensure judicial independence. However, the fallacies in the collegium are not a secret. Moreover, a system of complete Executive exclusion and a judiciary-only appointment was not thought of and is a matter of judicial imagination.

The NJAC would rather serve better to achieve 'concurrence' between the Executive and Judiciary (consultation being an outdated concept as it gives complete control to the Executive). With a different structure suggested above, the NJAC will ensure the right balance by making a judicial nominee the easiest to be appointed but not without the support of the Executive or a neutral distinguished legal mind. On the other hand, it remains

substantially difficult for the Executive to stall 'uncomfortable' appointments without merits and certainly impossible to make favoured appointments without the agreement of the judiciary.

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Constitutionality of the Reorganisation of Jammu and Kashmir

Vikrant Pachnanda*

Introduction

On 5 August 2019, it was history in the making, when the Indian government under the leadership of Prime Minister Narender Modi reorganised the state of Jammu and Kashmir into (i) the Union Territory of Jammu and Kashmir with a legislature and (ii) the Union Territory of Ladakh without a legislature. The government, while taking this momentous step took into account two aspects; firstly the Ladakh Division of Jammu and Kashmir had a large but sparsely populated area with very difficult terrain. Moreover, the long pending demand of the people of Ladakh for a Union Territory status for the region was seen as ineludible for them to realise their aspirations. Secondly, the constant cross border terrorism in the existing State of Jammu and Kashmir also raised severe concerns regarding the internal security situation. This article, however, will deal with the question of the legal sanctity accorded while taking such a decision, delving into the legality concerning the reorganisation of the state of Jammu and Kashmir. The legal aspects which this article will consider are as under:

A. Article 370 of the Indian Constitution

B. The Constitution (Applicable to Jammu and Kashmir) Order, 1954 (C.O.48)

C. The Constitution (Applicable to Jammu and Kashmir) Order, 2019 (C.O.272)

D. Articles 2-3 of the Indian Constitution

E. The Jammu and Kashmir Reorganisation Act, 2019

Article 370 of the Indian Constitution

Article 370 is part of Part XXI of the Constitution which provides for temporary, transitional and special provisions. The heading of this Article in the Constitution speaks for itself as it categorically states that this is only a temporary provision concerning Jammu and Kashmir. Article 370(1)(d) states that such of the other provisions of the Constitution shall apply concerning Jammu and Kashmir subject to such exceptions and modifications as the President may, by order specify. This provision then has two provisos with the first being that no such order, which relates to the matters specified in the Instrument of Accession of Jammu & Kashmir[1] referred earlier in Article 370(b)(i) shall be issued except in consultation with the State Government. The second proviso is that no such order which relates to matters other than those referred aforesaid shall be issued except with the concurrence of this government. This provision also states that no such order which relates to matters other than those referred to above shall be issued except with the concurrence of the State Government.

This Article defines the Government of the

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State of Jammu and Kashmir for the purposes of this very Article to be…

The person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated 5th March, 1948.

The Hon'ble Supreme Court of India in the case of *SBI v. Santosh Gupta*[2] ruled that the provisions of the Indian Constitution other than those covered by Article 370(1)(b) would apply to the State of Jammu and Kashmir subject to such exceptions and modifications as the President may by order specify in the exercise of power under Article 370(1)(d) as explained above.

Clause 3 of the Instrument of Succession governing the accession of Jammu and Kashmir to the Dominion of India[3] stated that the Maharaja of Jammu and Kashmir accepted the matters specified in the schedules thereto as the matters concerning which the Dominion Legislature may make laws of the state of Jammu and Kashmir. As per this schedule, the matters with respect to which the Dominion Legislature could make laws of this State pertained broadly to (A) Defence, (B) External Affairs, (C) Communication and (D) Ancillary such as *inter alia* elections to the Dominion Legislature, subject to the provisions of the Government of India Act, 1935 and of any order made thereunder and jurisdiction and powers of all courts with respect to the aforesaid matters.

Therefore, as per the Santosh Gupta judgment, the provisions of the Indian Constitution other than those pertaining to the aforesaid matters as well as those matters in the Union and Concurrent Lists, which in consultation with the Government of Jammu and Kashmir, are declared by the President to correspond to these matters specified in the Instrument of Accession, would apply to the State of Jammu and Kashmir subject to such exceptions and modifications as the President may by order specify in exercise of power under Article 370(1)(d). Article 370(3) gives the power to the President, who may notwithstanding anything in the foregoing provisions of this article, by public notification, declare that this Article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify. This clause also has a proviso which states that the recommendation of the Constituent Assembly of the State of Jammu and Kashmir shall be necessary before the President issues such a notification. Furthermore, as per Article 370(c), the provisions of Articles 1 and 370 would apply concerning the State of Jammu and Kashmir respectively as well in addition to the above.

The Constitution (Applicable to Jammu and Kashmir) Order, 1954 (C.O.48)

In exercise of the powers conferred by Article 370(1) of the Constitution, the President, with the concurrence of the Government of the State of Jammu and Kashmir, made the Order known as the Constitution (Application to Jammu and Kashmir) Order, 1954. This order provided for the provisions of the Indian Constitution which in addition to Article 1 and 370, would apply concerning the State of Jammu and Kashmir and also stated the exceptions and modifications subject

to which they would so apply. This order *inter alia* added sub-clause (4) to Article 367 whereby references to the Government of this State after 10 April 1965 would be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers.

The Constitution (Applicable to Jammu and Kashmir) Order, 2019 (C.O.272)[4]

In exercise of the powers conferred by Article 370(1) of the Constitution, the President, with the concurrence of the Government of the State of Jammu and Kashmir, made the Order known as the Constitution (Application to Jammu and Kashmir) Order, 2019 on 5 August 2019. This order came into force at once and thus superseded the aforesaid earlier order of 1954. As per this Order, all provisions of the Constitution as amended from time to time would apply concerning the State of Jammu and Kashmir. Further as per this order, there was an addition to Article 367 as far as its application in this State was concerned. These additions included *inter alia* in the proviso to clause (3) of Article 370 of the Indian Constitution, the expression "Constituent Assembly of the State referred to in clause (2)" would be read as "Legislative Assembly of the State".

Articles 2-3 of the Indian Constitution

Article 2 provides for the Parliament to make a law to admit into the Union, or establish, new States on such terms and conditions as it thinks fit. Further Article 3 states that Parliament may by law *inter alia* form a new State by separation of the territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State as well as alter the boundaries of any State. However no Bill for this purpose shall be introduced in either House of Parliament except on the President's recommendation and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.

It is important to note that as per the Explanation I to this Article, the word 'State' as referred above concerning Article 3 includes a Union Territory except the aforesaid proviso. Moreover as per Explanation II to this Article, the power is conferred on Parliament to form a new State by separation of the territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State as well as alter the boundaries of any State, includes the power to form a Union Territory by uniting a party of an State or Union Territory to any other State or Union Territory.

The Jammu and Kashmir Reorganisation Act, 2019

The Jammu and Kashmir Reorganisation Bill, 2019 was introduced in the Rajya Sabha or Upper House of the Parliament of 5 August 2019 by the Home Minister, Shri Amit Shah. The Bill provided for the reorganisation of the state of Jammu and Kashmir into the Union Territory of Jammu and Kashmir (with a legislature) and Union Territory of Ladakh (without a legislature). Thereafter on 9 August 2019, the Jammu and Kashmir

Reorganisation Act, 2019 was enacted for the reorganisation of the existing State of Jammu and Kashmir and matters connected therewith or incidental thereto.[5] These connected/incidental matters include inter alia (i) reorganisation of Jammu and Kashmir (Sections 3-4), (ii) provision of a Lieutenant Governor (Sections 5 and 58), (iii) Legislative Assembly of Jammu and Kashmir (Section 14), (iv) Council of Ministers (Section 53), (v) High Court (Sections 75-77), (vi) Abolition of Legislative Council (Section 57), (vii) Advisory Committees being appointed by the Central Government for various purposes including (a) distribution of assets and liabilities of corporations of the existing State of Jammu and Kashmir between the two Union Territories, (b) issues related to the generation and supply of electricity and water and (c) issues related to the Jammu and Kashmir State Financial Corporation (Section 85) and (viii) Extent of laws which includes 106 central laws that would be made applicable to the Union Territories of Jammu and Kashmir and Ladakh on a date notified by the central government as well as repeal of 153 state laws being repealed and 166 state laws that would continue to remain in force (Section 95).

Analysis in the Light of the Aforesaid Legal Provisions

As per the Presidential Order of 2019, all provisions of the Indian Constitution as amended from time to time would now apply concerning the State of Jammu and Kashmir subject to the exceptions and modifications as specified in this order in exercise of the power under Article 370(1)(d). The exceptions and modifications specified therein include the concurrence of the Legislative Assembly of the State of Jammu & Kashmir in the light of the proviso to Article 370(3) while passing such order. Concerning the reorganisation of the State into the Union Territories of Jammu & Kashmir and Ladakh respectively, Article 3 of the Constitution categorically permits that the Parliament may by law i.e. the Jammu & Kashmir Reorganisation Act, 2019, form a new Union Territory by separation of the territory from any State.

Therefore there is no illegality in there being two separate Union Territories of Jammu & Kashmir and Ladakh and all provisions of the Indian Constitution applicable to them. There has been no abrogation of Article 370 of the Constitution, though some of its provisions have been removed. Article 370 was brought in at a time when the Indian Constitution was not fully implemented in the state of Jammu & Kashmir. Based on the instrument of accession, certain powers were given to the erstwhile State of Jammu & Kashmir but there was a power reserved to apply the Indian Constitution over some time by Presidential Orders to this State. However, this provision was only temporary and not permanent in nature.

The Presidential Order of 1954 had introduced the fundamental rights with ifs and buts to this State. However, the Presidential Order of 2019 has now taken this away and the entire Indian Constitution is now applicable to Jammu & Kashmir. As far as the reorganisation of states is concerned, it has been happening in India all along. Examples of such reorganisation include the formation of new States of Chattisgarh, Uttarakhand and Jharkhand and

more recently, the formation of the State of Telangana. The President has to send the recommendation of the State to the Union and then the Union Parliament passes the reorganisation law. In the case of Jammu & Kashmir, as the Assembly had been dissolved, the Parliament seized the powers and acted as a State Assembly as per Article 356(1)(b). This article states that the President while proclaiming an emergency on account of the failure of the constitutional machinery in the State, may declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament.

Thereafter, it sent the recommendation and reorganisation bill and Parliament acting as the Parliament passes it. There is nothing illegal about it. In fact reorganisation of Jammu & Kashmir and substitution of the 1954 Presidential Order with the 2019 Presidential Order have nothing to do with each other. Even without reorganising the State as per Article 3 of the Constitution, the Presidential Order could have still been substituted as per Article 370(1)(d). In the present scenario, there has been no amendment to the Constitution. By way of the Presidential Order of 2019, the government has introduced the whole Constitution to Jammu & Kashmir instead of introducing it in bits and pieces as was the case when the Presidential Order of 1954 was in force.

Conclusion

In my view, the exception to the fundamental rights which had been created has been taken away and the fundamental rights have been given full play in Jammu & Kashmir. This only strengthens and does not violate the basic structure doctrine as laid down in the Keshavanand Bharti case[6]. The governance of the two newly created union territories will now presently be in the hands of the Centre through their respective governors. A major surgery of attaching a body part rather than detaching it has been done and that the erstwhile state of Jammu and Kashmir (Now the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh) is now fully integrated with India.

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India-Vietnam Relations: From Sustainable Tradition to Expanding Modernity

Associate Prof. Dr. Le Van Toan*

The foundation of strong Vietnam-India relations is the deep and rich cultural strength of the two countries. When talking about India, we in Vietnam think of India as one of the four earliest cradles of civilisation. Of these, the Indian civilisation has been in existence from 3,000 BCE and perhaps even earlier, and has constantly enriched and diversified throughout the course of history. The other three ancient cradles of civilisation in the world were the Mesopotamian, Egyptian and Chinese civilisations. Of these, the Mesopatamian and Egyptians civilisations were completely disrupted, while the Chinese Yellow River civilisation was sometimes shaken and disrupted (as in the period of Emperor Qin Shi Huang when Confucian books were burned or the Cultural Revolution of Mao Zedong).

The Indian civilisation has always been cultivated, and over time has become enriched and diversified in unity, as well as continuously become as great as the Himalayas, and as majestic as the holy Meru Peak —or the "pillar of heaven" shining with the bright light of the Eastern sky. This makes India mysterious.

India is mysterious because it is known as the land of myths and legends with so many miracles, as well as the land of fairy tales and legends of thousands of angels and gods creating a mysterious spiritual oriental path. India is mysterious because it is home to all the great religions of the world, either founded or adopted (Hinduism, Buddhism, Jainism, Sikhism, Islam, Christianity, Zoroastrianism, Judaism, etc.) and the country is the subcontinent which has the largest number of religions in the world. Every religion in India has their own principles and doctrines but all live in peace, tolerance and kindness in an Indian house.

India is mysterious because it is one of the most religious and philosophical countries in the world. Indian philosophy is rich and diverse which has many different schools divided into two large systems: Astika (theism) and Nastika (atheism). Astika is an orthodox system, which accepts the epistemic authority of the Vedas, defends the philosophy and Hindu religion, and recognises the preeminent position of the Brahmins. Nastika is an unorthodox system, which rejects the absolute supremacy of the Vedas and many principles of Hindu philosophy. In particular, the two schools of philosophy are different but they share a fundamental point that is the way of life. This basic point is different from western philosophy. The essence of western philosophy is that awareness is within the limits of reason while in India it is the way of life. The way of life is a way in which a practitioner is a devoted human being earnestly lives and dies with his or her thoughts and expresses them in their daily behaviours and actions in life. On the contrary, awareness is the subject, which stands still on a certain ivory tower and observes

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life as an outsider looking down on the river. The reason praised and worshipped by the Western is just a small level among different levels of the truth. Ethics are the basis of reason, and reason is only a temporary means of the path to truth. Indian philosophy is based on morality, which is different from Western philosophy, which is based on reason.[1]

When talking about Indian culture, we think of a heroic culture. How can it not be heroic when India is the earliest cradle of human civilisation; how can it not be heroic when the Indian religions "read" for the literature to record. Over a few millennia, Indian literature has given the world many great works of spirituality and philosophy, such as the Ramayana and the Mahabharata. India has given to the world great poets and authors, from Kalidasa to Rabindra Nath Tagore, the former a saint and the latter a great enlightened thinker of Modern India. Since ancient times, Indian culture has also been global. India did not expand the territory with hot wars to occupy the land of other countries, but it expanded its cultural boundary and occupied a cultural space outside India. Today, India is the country having the fastest economic growth rate in the world and is expected to have the third largest economy after the US and China by 2025-2030. By then, India will also be the world's fourth powerful military, with a young labour force and dynamic growth. Therefore, India will be a model of combining economic development and the world's largest democracy.

Vietnam too is a special nation. It is special because Vietnam originally is a country in Southeast Asia and not a part of China. The original geography of Southeast Asia includes the Yangtze river section to the south, the southern area of Tan Lanh range and the present Assam area. The natural environment in this area was suitable for developing wet rice culture.

Anthropologically speaking, until the middle of the first millennium BCE, the Bach Viet area (Baiyue or Hundred Yue) in a broad sense, or the Viet-Muong region was basically the non-Chinese and non-Indian region. Vietnam and China are mainland Asia. Vietnam is a region of wet rice agriculture, China is a region of dry rice (planting millet, sorghum, barley). From the middle of the first millennium BCE, China expanded into the Yangtze river basin and the south area, the Bach Viet area gradually shrunk, leaving Vietnam as the only remaining representative of the Bach Viet in the past, having the status of nationality-state, and the status of nation-people. From that time, there had been similarities between Vietnam and China.[2] Therefore, the differences between Vietnam and China came first, and the similarities of the two countries came later.

It is special because, since early times, Vietnamese culture tends to exchange, integrate and acculturate (with other cultures). The country thus has a multilingual and rich culture, and Dai Viet civilisation is among the 34 earliest civilisation of mankind. Many scholars in the world agree that the Vietnamese cultural identity was created from the cultural region of the Red River wet rice culture nearly 4,000 years ago, which was strengthened in 2,000 years of fighting and negotiating with China, as well as integrated in 2,000 years of cultural exchange and enrichment with Indian culture, and this was enough for Vietnamese culture to successfully acculturate. In addition,

Vietnam's history of more than 4,000 years of cultural acculturation to Western culture, included both coercion and cultural dialogue. This at times was resisted and at times absorbed and had both positive and negative consequences. It was both very dialectical, and at the same time difficult to dialectically argue, but the most important thing is that Vietnam maintained its national identity while modernising.

Vietnam is also special because, from the perspective of the struggle for independence, freedom, national liberation and reunification, Vietnam defeated all stronger foreign invaders, such as the Han, Tang, Song, Yuan, Ming and Qing dynasties of China, as well as French colonialism and American imperialism. With the victory against all invading armies, Vietnam set a shining example of patriotism, fighting spirit, courage, intelligence and creativeness which is admired and highly appreciated by progressive mankind loving peace, justice, democracy and humanity around the world.

It is special because, from the perspective of foreign policy, Vietnam just got out of war and the embargo against the country was lifted, but Vietnam has already formulated a policy of "multi-lateralisation and diversification", connecting and establishing diplomatic relations with 189 countries, promoting economic, trade and investment relations with 224 markets in all continents in the world, establishing a comprehensive strategic partnership with three major countries: India, Russia and China, and having good relations with all other major countries, including the five member states of the United Nations Security Council, signing a new One Strategic Plan 2017-2021 (OSP) between Vietnam and 18 United Nations agencies. Vietnam has been elected to many international organisations, such as the United Nations Human Rights Council (2013); chairperson of the Board of Governors of the International Atomic Energy Agency 2013-2014 (IAEA); UNESCO World Heritage Committee 2014-2017; non-permanent member of the United Nations Security Council (the first time in 2008, the second time in 2019 for the term of 2020-2021), as well as rotating chairman of the ASEAN.

Vietnam's specialty has attracted many scholars and politicians in the world. When invited by incumbent President of the United States Donald Trump to the White House, former U.S. Secretary of State Henry Kissinger told President Trump about the history and unique characteristics of the Vietnamese people, and he emphasised: "Vietnam is such a special country—a special nation, so the U.S. should have a special relationship with them".[3]

The relationship between Vietnam and India is a special one with a long history of civilisation dating back more than 2,000 years. The bilateral relationship between the two countries has gone through four waves of cultural exchanges and great acculturation, which laid a solid foundation for long-term development.

Firstly, the wave of Indian Buddhist cultural exchange spread to Vietnam. This is the wave of exchange that Indian Buddhism spread to Vietnam by sea from the Indian Ocean to the East Sea and arrived in Do Son, Hai Phong, Vietnam, during the Great Ashoka period (third century BCE) before the religion spread to China. Vietnamese people simply exchanged and acculturated Buddhism to the local cultural sphere because Buddhism is both

a religion and a philosophy advocating equality, humanity, democracy and having no caste system, which is consistent with the culture of the Vietnamese people who are polytheistic, thus they easily accepted Buddhism and made the religion having national characteristics. Vietnamese monks studied Buddhism and established Vietnamese Buddhist sects such as the Thao Duong sect in the Ly dynasty and Truc Lam sect in Tran Dynasty in order to counterbalance Confucianism and Chinese Buddhism, and more importantly, they used Buddhist thought to adjust and balance foreign thoughts and religions, making them suitable to Vietnamese people's cultural minds. Albert Einstein, the greatest scientist of the twentieth century, told Jawaharlal Nehru, the Prime Minister of India, when the two met each other in the U.S. in 1947: "If there is any religion that would cope with modern scientific needs, it would be Buddhism."[4] Therefore, when Buddhism met the Vietnamese thoughts of kindness and democracy, the religion could easily combine with these thoughts and fully develop.

Secondly, the wave of cultural exchange and acculturating the Hindu culture to Vietnam. This was a wave of cultural exchange and acculturation that Hinduism actively entered Vietnam by sea from the Indian Ocean to the South China Sea, and arrived in Da Nang, Quang Nam provinces in Central Vietnam in the early years CE. The imprints of this cultural exchange and acculturation are cultural specialties, arts, architecture, and sculpture of Champa culture. The cultural contact between India-Champa happened in two ways: spreading religion and heritage. This cultural exchange and acculturation took place in many areas: writings, beliefs; sculpture, architecture; calendar and literature. Today, intangible cultural heritage such as the folk songs of the South Central Vietnam, the Cham dance are still handed down and developed; tangible cultural heritage such as the My Son Sanctuary (Quang Nam, Da Nang) still stands the test of time and now is being restored.

Thirdly, the wave of cultural exchange and acculturating Vietnam's Funan culture to Indian culture. This is the wave of exchange and acculturation in which the India's Brahmin culture played an active role. Funan is an ancient country in Vietnamese history. In its flourishing period, this kingdom's territory included the South Central Vietnam, spreading to the Menam valley (Thailand), which was merged into Chan Lap territory in the seventh century. At the end of the seventh and eighth centuries, the kingdom was separated from Chan Lap and became a part of Vietnam's territory. Since ancient times, the Indian Brahmin priests, most notably Kaundinya (Huntian), came to this region, and collaborated with local people to establish a country following Indian model in all aspects: politics, social institutions, urbanisation, transportation, technology, agriculture and the religious system and cultures, in which Brahmanism played a major role. In this area, Oc Eo culture of Vietnam has indigenous origin, which was developed from Sa Huynh culture, and played a major role in cultural exchange and acculturation to Indian culture. The result of that acculturation is still present today.

Fourthly, the fourth wave of cultural exchange and acculturation, during which Ho Chi Minh, the Vietnamese national liberation hero and the world's

great man of culture, played a leading role. India's ancient traditional culture and new Indian thoughts were crystallised in the minds of great men such as the great poet Rabindranath Tagore, Mohandas Karamchand Gandhi and Jawaharlal Nehru. In the path of finding a way to save the country, President Ho Chi Minh studied, collected, and actively received the light of the world's thoughts, including Buddhist thought, Hinduism, the enlightened thought of Tagore, the nonviolent thought of Gandhi, and the thoughts of Nehru, a leading architect of a modern India.[5]

As early as 1921, Ho Chi Minh started studying about India and the Indian independence movement. He wrote many articles about India such as "Revolutionary movement in India"[6] published in La Revue Communiste, No. 18-19, August, 9-1921; "Oriental women"[7] published in Russia's Rabotnisa in 1924, "Workers movement in India"[8] published in France's Inprekorr in 1928. In 1927, Ho Chi Minh met Gandhi and Motilal Nehru, as well as wrote a poem "To Nehru" in 1943 when they were both in prison. Ho Chi Minh also invited Nehru to visit Vietnam in 1954, and he visited India in 1958. The similarities in ideologies and cultural personalities among Ho Chi Minh, Tagore, Gandhi and Nehru and what they had done for India and Vietnam are the root, as well as the sustainable foundation for the continuous development of Vietnam-India relations.

Towards Expanding Modernity

For nearly half a century of receiving and promoting good values in the traditional relations, cultural acculturation and ideological exchange between the two nations, the leaders and the peoples of the two countries have been continuously fostering and cultivating bilateral relations, making the relations develop from a strategic partnership (2007) to a comprehensive strategic partnership (2016). We can make a general assessment of the achievements of Vietnam-India relations in the modern era with the following thoughts.

Over the past half century, the world has experienced many changes; bilateral and multilateral relations in many countries have shifted and changed, but the relationship between Vietnam and India has remained faithful, transparent and straightforward and has flourished with no obstacles, despite the two countries being geographically far apart and in having great differences in geographic area, population, race, religion, development orientation, as well as the role and the position in the world. What factors, foundations, and motivations have created such a faithful, transparent and ever-growing relationship? To answer this question, we should confirm the following arguments:

Firstly, the Vietnam-India relationship has been nurtured and fostered by cultural background, since there have been cultural exchanges and acculturation between the two countries for more than 2,000 years, and the relationship has always been nurtured, cultivated and developed.

Second, the similarities of the two countries' leaders in the twentieth century, in the field of politics, diplomacy, defence and national development laid a solid foundation for bilateral relations between the two countries. The roots laid by Ho Chi Minh, Gandhi and Nehru have enabled later leaders of Vietnam and India and the peoples of the two countries to build and nurture the relationship.

Third, Vietnam-India relations have been synchronously built from base to superstructure, backbone of which is mutual political trust. From the international perspective, there are very deep bilateral relations. At times there have been ups and downs, obstacles and conflicts in relations, paying high prices and full of pain, but Vietnam—India relations have always overcome all challenges, and the two countries' relations are especially faithful and pure. There is very high political trust between Vietnam and India as there are no problems between the two countries. Moreover, there are similarities in strategic interests; thus the two countries are willing to trust each other and share mutual interests on almost all bilateral and multilateral issues, including complicated issues like the East Sea dispute. Such political trust is always strengthened by the frequent exchange of high-ranking delegations of the Parties, States, National Assembly, Parliament and Governments of both countries. In recent years, Vietnam's General Secretary of the Communist Party, President, Chairperson of National Assembly, Prime Minister, Deputy Prime Minister of Vietnam often pay visits to India.

Similarly, India's President, Vice President, Prime Minister, Deputy Prime Minister and Speaker of Parliament also visited Vietnam. High-level visits do not only lay the foundation for the implementation of the signed cooperation agreements, but also deepen the political trust between the two countries.

Fourthly, the political foundation for the openness of the environment and the development space of the two countries since Vietnam started its renovation in 1986 and India conducted reforms in 1991 have been really flexible and open. The two countries have achieved significant achievements in many spheres: politics, diplomacy, economics, national defence, security, energy, culture, education, science and technology and people-to-people diplomacy. That India changed its policy from "Look East" to "Act East" in the new context and new vision, in which Vietnam is the pillar of this policy, is an important factor in further deepening relations between the two countries.

For nearly half a century, the Vietnam-India friendship has continuously developed, and achieved many good results, but these achievements still do not fulfil the potential and expectation of the two countries. Meanwhile, our two countries are facing many opportunities and challenges.

The world is now facing new situation with following remarkable developments:

- There are growing trends in economic globalisation, as well as internationalisation of production and labour division. Participation in global production networks and value chains has become indispensable for economies.
- Global political and security issues are now complicated and unpredictable with many different intertwined trends, such as competition and cooperation at the same time, increasing volatility and mutual influence among nations. Many problems have arisen at the same time such as traditional and non-traditional security, environmental security, energy security, food security; expanding influence of international terrorism; complicated developments in the Middle East; crisis on the Korean Peninsula;

tensions between Russia and the U.S., Russia and EU, the U.S. and China, Brexit in the UK, etc which demonstrate that protectionism, emerging populism, pragmatism in international relations are dominating words and actions, which are sometimes inconsistent of some heads of states.

- Mankind is entering the era of Industrial Revolution 4.0. Knowledge and intellectual property increasingly play an important role, and become a decisive factor in the development of human society. Because of the rapid development of science and technology and the universal sovereignty of the nation-states, that is, no nation or any single region will dominate the world in terms of economy, technology or population. However, the human race has not yet entered any particular era (American era, Chinese era, etc.), rather than a global era.
- The Asia-Indian Ocean-Pacific region, especially the East Sea dispute, is now becoming a flashpoint in the face of China in the vortex of Sino-American relations.
- International institutions are being challenged. The most obvious example is that China is ignoring the ruling of International Tribunal for the Law of the Sea, belittling international law, unilaterally interpreting international law contrary to the common standards and common interests of the international community, blatantly sending the survey vessel Haiyang 8 and the escorted vessel to operate illegally in Vietnam's exclusive economic zone and continental shelf. These are dangerous actions, threatening regional and international peace and security.

In this new context and new vision, in order to develop the increasingly solid friendship between Vietnam and India, apart from improving and strengthening national strength of each country in a creative and effective way in the new situations of multi-lateralisation and diversification of external relations, our two countries must strengthen political belief, and always be shoulder to shoulder according to the speech of former Indian President Pranab Mukherjee at the Opening Ceremony of the Centre for Indian Studies, Ho Chi Minh National Academy of Politics (September 15, 2014): "The relations between the two countries have never been as good as they are today... To protect common interests such as peace and prosperity, India and Vietnam must stand side by side... India will always be a reliable and loyal friend of Vietnam".[9]

Confirming the bilateral relations using thoughts, feelings and trust is very important. However, in order for all of these to be realised, it is necessary that the leaders, managers and people of the two countries are determined to implement them in reality. Because all the limits of development come from the people themselves, and from the way work is organised, as well as the principles of institution's operation and work implementation mechanism.

With high mutual political trust, especially pure loyalty, as well as love and similarities in the development of the two countries, we believe that the friendship between Vietnam and India will become increasingly comprehensive and deepened.

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Challenges of Indian Aviation MRO Industry

Gp Capt RK Narang, VM*

The MRO (Maintenance, Repair and Overhaul) of aircraft, components and aero-engines is globally regarded as a strategic business, which has remained underexploited in India. India can leverage burgeoning aviation MRO industry to retrieve 90,000 jobs, save USD 2 billion of foreign exchange and create the potential for USD 5 billion of exports by correcting anomalies in our tax structure, which is expected to witness an exponential growth in the times to come. In India, foreign MRO companies have benefitted from a favourable tax regime with a disadvantage to the local MRO industry. The MRO industry was literally 'handed over' to foreign MRO companies and as of now, 90 per cent of the MRO requirements of India are being imported. There has been no investment by foreign investors in this sector despite allowing 100 per cent Foreign Direct Investment (FDI). Indian operators continue to obtain MRO services from foreign MRO services providers because of associated cost advantage for Indian carriers/ operators to import MRO.

India is in the midst of an aviation boom due to rapid expansion of civil aviation industry. Its growth rates are expected to be around 20 per cent per annum. Airbus and Boeing data indicate that the commercial aircraft fleet comprising 550 aircraft in 2017-18 increased to 700 aircraft by 2018-19[1] and is expected to grow to 1000 aircraft by 2023. India's MRO import bill was USD 2.0 billion in 2019, which is expected to rise to USD 3 billion by 2023 unless the potential of this industry is realised and corrective actions are taken.

Indian commercial aviation industry needs about 1,000 new aircraft in the next 10 years and 2,000 new aircraft in the next 20 years. The 2018 long-term forecast of Boeing indicates that India would need another 2,300 jet aircraft valued at USD 320 billion in the next 20 years. The forecast predicts that India would need about 10 regional jets (below 90 seats), 1,940 single-aisle aircraft (90>200 seats) and 350 wide-body aircraft (>=200 seats) aircraft by 2037.[2] India would continue to be a major driver for the region's commercial aviation industry with more than five per cent of the world's commercial fleet. The long-term forecast of Airbus predicted that India would need 1,750 commercial aircraft from 2017 to 36. These would include 1,320 single-aisle aircraft and 430 wide-body aircraft that are valued at USD 255 billion.[3]

India has lost 90,000 direct jobs to countries like Sri Lanka, Singapore, Thailand, France and Germany, which can be brought back to India by correcting the fiscal tax imbalance. Indian engineering is amongst the best in the world and its industry possesses the requisite expertise to undertake MRO in India. India can become the MRO hub of South Asia, given its scale and technical capabilities if the Indian government provides a level playing field to the domestic MRO industry. India can convert this USD 2.0 billion[4] of net import of MRO in 2019 into a USD 5 billion export potential in the next 5-10 years. The long-

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term forecast of commercial aircraft manufacturers indicates that this sector is likely to witness a boom and create enormous 'high value' job opportunities in India. To achieve this, India must formulate a tax and regulatory mechanism that not only provides equal opportunities to Indian MROs but rather rewards them for creation of 'high value' jobs and revenue generation within the country. The review of tax structure can prevent the drain of precious foreign exchange and capability to foreign locations.

Policy Gaps and Lack of Ownership: Struggles of Indian MRO Industry

GST Anomaly

The Planning Commission Working Group on Civil Aviation, in its report in June 2012, highlighted the issue of discriminatory tax policy resulting in Indian MRO players suffering from higher tax burden of nearly 40 per cent over foreign MRO and need for providing impetus to Indian MRO service providers.[5] The introduction of the Goods and Services Tax (GST) by the Indian government did not fully correct the discriminatory domestic taxation policies of India. The effective GST being levied on the MRO being done abroad is 5 per cent (IGST on Import). The airline can take a set off against the IGST, thereby placing Indian MRO services providers in a disadvantageous position. On the other hand, when the identical service is performed by Indian MRO, GST is levied at 18 per cent. The tax disparity has contributed to moving out of 90 per cent of the Indian MRO work to foreign destinations and companies.

Another challenge for the domestic MRO industry is unfavourable domestic tax structure vis-a-vis tax structures in other countries. The GST on aviation MRO is levied at 18 per cent compared to 7 per cent charged by Singapore and Malaysia, while there is no tax on the MRO industry in Sri Lanka. Also, Indian MRO services providers do not undertake high-value services like MRO of aero-engines, heavy maintenance (C&D checks), modifications and components as they are unable to compete with foreign vendors due to adverse tax structure. The tax structure has also impeded the development and growth of the MRO industry. The GST on import of tools and test-benches is 18 per cent against a GST of 5 per cent on aircraft components, which further discourages setting up of testing and MRO facilities in India.

The publishing of civil aviation 'Vision-2040' prepared by the Federation of Indian Chambers of Commerce and Industry (FICCI) for the Ministry of Civil Aviation (MoCA) in January 2019 recognised the massive outflow of foreign exchange from Indian carriers and need for massive policy support. The vision document quoted several initiatives taken by the government to facilitate the growth of domestic MRO industry; however, it also highlighted that the most important pillar for the growth of the domestic industry, i.e. GST tax anomalies was yet to be corrected.[6] Indian MRO industry is working in the extremely unfavourable environment within the country and it could face closure given adverse taxation policy and other challenges. The GST anomaly needs to be corrected to provide domestic MRO industry with an equal opportunity, which is essential for its survival.[7]

Airport Royalty

The National Civil Aviation\ Policy (NCAP)-2016 gave exemption to MRO services providers

from charging 'Airport royalty and additional charges' for five years.[8] However, the lack of implantation of this provision almost three years after the announcement of the policy is a perfect example of gaps in the execution mechanism of India. The AAI continues to charge airport royalty under the Gross Turn Over (GTO) tax (under different headings like ground handling/ revenue sharing/ demurrage, etc.) that varies between 11 per cent and 20 per cent for using facilities at an airport, which adversely impacts their competitiveness. The charging of airport royalty by the Airport Authority of India (AAI), one of the departments of the Ministry of Civil Aviation despite the announcement of NCAP-2016 is indefensible. The unveiling of the NCAP-2016 and its non-implementation could also create a credibility gap about India's commitment to 'Make in India' initiative.

CAR 66: Restrictive Regulation for Maintenance Technicians

The aviation regulatory agencies decide the qualifications and certification criteria for employing technicians in the aviation MRO industry. India's regulations for aviation maintenance technicians are formulated by the Director-General of Civil Aviation (DGCA) while Federal Aviation Authority (FAA) and European Union Aviation Safety Agency (EASA) formulate these regulations in the US and Europe respectively. The criteria for aviation maintenance technicians as laid down by the above aviation regulatory agencies are given below.

Regulations for Aviation Maintenance Engineer		
Regulation Reference	**DGCA**	CAR-66 Subpart C-Components
	FAA	A-FAR 145
	EASA	EASA: Foreign Part-145 Approvals
Sub Section of Regulation	**DGCA**	66.A205 Requirements
	FAA	145.157 Personnel Authorised to approve an article for Return to Service
	EASA	1.3 Component Certifying Staff Qualification Criteria
Educational/ Basic Training Level	**DGCA**	21 years old, 10+2 with physics, chemistry, maths and
	FAA	Trained in or has 18 months practical experience with the methods, techniques, practices, aids, equipment and tools used to perform the maintenance, preventive maintenance or alternations
	EASA	School-level or Apprenticeship certification
Aeronautical Training Requirements	**DGCA**	10+2 with physics, chemistry, maths and has CAR 66 License or 3 Yrs AME Course/ B Tech and passed CAR 66 Module
	FAA	Authorised to approve an article by the certified repair station
	EASA	Aeronautical School Diploma or Certificate or technical school diploma or certificate or aeronautical military school diploma

Table: Aircraft Component Maintenance Mechanic Certification by DGCA[1], FAA[2] & EASA[3]

Aircraft Maintenance Licence	Maintenance License by DGC A	Certification by Maintenance Agency	Certification by Maintenance Agency
Examination by Aviation Regulatory Agency	Yes	No	No

The key differences among the regulatory provisions for aircraft technicians of the three aviation regulatory organisations can be summed up as follows:

Regulations for Aviation Maintenance Engineer

The factory workers employed by Indian MRO industry have to pass a test conducted by DGCA to be eligible for undertaking MRO services in aviation MRO centres in India. While aviation factory workers in Europe and the US do not have to pass a similar examination. The limited number of DGCA license holder makes it difficult to find an adequate number of qualified technicians. Also, employing highly qualified personnel in place of highly skilled worker for relatively low-end jobs adversely impacts the economic viability of the MRO operators. Also, DGCA, continuing with the age-old practice of maintaining a hold over the aviation industry through examinations and licences indicates its intrusive approach and lack of faith in the industry. This has added to the challenges for the Indian MRO industry, which erodes their economic viability and competitiveness.

These regulations provisions have acted contrary to Indian leadership's approach of minimum governance to stimulate Indian industry. The draft CAR-66 released by DGCA in 2016 also did not include enabling provisions for MRO technicians.[12] While it is important to ensure that quality does not suffer, however, intrusive policies and regulatory provisions often become restrictive and need to be reviewed by laying down standards on the lines of global aviation regulatory standards.

Way Ahead

Proposed Tax Structure

Most foreign OEMs and principle MRO Services providers are not registered in India. They undertake MRO activities by sending engine and other components to foreign MRO services providers for overhaul (which is not taxed) and by importing replacement engines, components and spares, which are charged @ 5 per cent under Chapter No. 88. Foreign MROs do not have to discharge GST. The local MRO company registered in India is required to pay GST for both spares as well as for the labour (out of which about 55 per cent is labour) @ 18 per cent which places local MROs at a disadvantage. When foreign OEMs give sub-contract to Indian MRO service providers for their Indian customers, Indian MROs charge GST @ 18 per cent. Foreign OEMs are not able to avail the benefit of the input tax credit in the absence of registration under GST. Hence GST @ 18 per cent becomes an additional burden to foreign companies. Indian MROs, therefore, become uncompetitive and lose out to other foreign MRO

services providers, who charge much lesser taxes.

India can exploit the tremendous potential of the MRO industry by creating a fiscal environment that gives Indian MRO industry an advantage over its foreign competitors for a limited period of five years so that they can create the necessary infrastructure. Alternatively, the domestic aviation MRO industry should at least be provided with a level playing field so that it can compete with foreign competitors and bring greater MRO business and associated jobs to India. The following is recommended:

(a) Option-I. The GST on MRO performed in India is reduced to 5 per cent as is being done for import of MROs suppliers by the Central Board of Indirect Taxes (CBIT).

(b) Option-II. The GST on aviation MRO imports is charged at 18 per cent.

Predicted Revenue from Direct Taxes

Either of the above measures would provide a level playing field to Indian Industry and correct the anomalies of the current taxation policy that gives undue advantage to foreign MRO services providers and incentivises MRO imports. The changes in tax structure as proposed above are likely to result in better revenue collection as Indian MRO's ramp up their capability. The revenue generated from the direct taxes recovered from the employment of the staff and business transactions of the local industry will soon surpass the existing revenue of the government.

The total size of the foreign MRO Services industry (as estimated by the Ministry of Civil Aviation) was Rupees 9800 crores while the size of the Indian MRO industry was Rs. 700 crore during the year 2017-18. The following table provides a comparative analysis of envisaged changes in revenue collection as per the present tax structure vis-a-vis two envisaged scenarios as proposed above:

Rs. Crore

Total Size of MRO Market in India 2017-2018			
Import	9,800		
Local	700		
Tax Structure & Tax Collection			
	Present Tax Collection	**Proposed Tax Structure & Collection**	
		Option 1	**Option 2**
		GST @ 5% on Indian and Foreign MROs	GST @ 18% on Indian and Foreign MROs
GST on Foreign MRO	490*	490	1,764
GST on Local MRO	126**	35	126
Total	618	529	1,890
Difference over Present	NA	(89) (Reduced tax in due course is expected to increase revenue collection)***	1,272

Note. MRO involves the replacement of spares and carrying out maintenance, repair and overhaul activities concerning the engine, replacement of components and airframe (C&D checks etc).

Predicted Revenue from Indirect Taxes

The revenue generated from MRO industry with revised tax structure could touch USD 10 Billion in 10 years if the impact of indirect employment, collection of income tax from employees in India and other benefits accruing from exports is taken into account, e.g. if 9,800 crores foreign MRO is shifted to India, the loss of revenue under Option 1 will be offset 10 times the reduction of revenue as shown below:

Globally 55 per cent of MRO revenue is generated from labour charges. The increase in tax revenue from the income tax collected from the salary of the employees at an average income tax rate of 15 per cent (Rs. 9800*55% *15% = Rs. 809 crores) would amount to Rs 809 crore. This would be ten times the direct tax collection loss of Rs 89 crore as shown in the **Option-I** of the above table. The tax revenues from indirect employment and ancillary industries will be additional.

NCAP Implementation

The exemption from paying the airport royalty by MRO services providers should be promulgated in the Gazette as well as implemented on the ground at the earliest.

Review of CAR 66

The provisions of CAR 66 dealing with Licensing of Aircraft Maintenance technicians need to be reviewed to provide Indian industry with an equal playing field by aligning the DGCA CAR with that of the EASA and FAA.

Challenges for Indian MRO Industry

The remarks of Oliver Andries, French CEO of Safran Aircraft Engine to the visiting Indian Defence Minister Rajnath Singh in October 2019 that "India is set to become the third-largest commercial market for aviation and we are keen to create a strong maintenance and repair base in India to serve customers, but we need to make sure that the Indian tax and customs systems are not terrorising us", got widespread attention in India. Foreign OEMs often get an audience with Indian leaders and can influence the policy decisions in their favour due to the large value of their contracts and diplomatic leverage used by their leadership. The audience with the top leadership of India and the follow-up by their governments provide them with a big advantage vis-a-vis Indian manufacturers and MRO services providers. Indian MRO companies being small entities, often do not enjoy leverage to influence such policy decisions to correct tax anomalies. Indian industry leaders have to wait for years for corrections of such anomalies despite getting an audience with political leaders and decision-makers, which follows a slow process of decision making involving bureaucratic delays, cumbersome consultation process and time-consuming procedures, which become major hurdles in policy corrections. These simple and logical measures facing delays and indecision are inexplicable but sad realities of decision making in India.

Lack of Ownership

The anomalies in Integrated Goods and Services Tax (IGST) on import of MRO parts and Goods and Services Tax (GST) on domestic MRO industry do not require an expert or an economist to figure out. On the other hand, MoCA and finance Ministry despite having been involved in the introduction of several policy reforms, failed to take note of the critical tax anomalies and policy gaps, which is unacceptable as well as indefensible. Also, publishing of the National Civil Aviation Policy (NCAP) by Ministry of Civil Aviation in 2016 and non-implementation by one of its departments, i.e. AAI indicates lack of communication and lack of ownership of policies within the same Ministry.

These anomalies are causing irreparable harm to the domestic MRO industry and need to be corrected.[13] The nascent Indian MRO industry is at the critical juncture, where they are facing stiff competition from overseas MRO services providers with the opening up of the Indian civil aviation sector. The inaction or delays in corrections by the India government could mean the death knell for some of them. This would hurt the 'Make in India,' programme, which is one of the first and most important initiatives of Prime Minister Narendra Modi.

Conclusion

Indian MRO industry has not taken off despite the launch of Make in India and UDAN initiatives in the absence of policy corrections as well as lack of will to implement them. The tax for import of 5 per cent on import of MRO services and 18 per cent GST on MRO services provided by local MRO services providers is surprising as it just does not gel with the pronouncement of the country that is aspiring to develop the domestic industry. It is against the basic principle of Make in India initiative and yet this issues has been lingering on for a long time. The basic premise and assertion of the Indian Prime Minister to take the country towards minimum governance, itself gets diluted if DGCA policies continue to be overcautious. DGCA retaining more powers than is required indicates its lack of confidence in the Indian industry. Its CAR on certification of aviation maintenance technicians for MRO industry needs to be revisited and reviewed to be brought at par with the practices followed by FAA and EASA.

MRO facilities in India, with the proposed policy corrections and resolution of tax anomalies, has the potential to enable airlines operating in India to achieve faster turnaround times, savings in operating costs and reduce foreign exchange outflows. The correction in adverse tax structure is essential to fill the technological vacuum and reduce dependence on foreign vendors. This will make Indian MRO services competitive to get business in India as well as from neighbouring countries, which will result in an increase in jobs, growth of MSME sector and provide a boost to the economy. Indian Government has made the 'Make in India' initiative as one of its key objectives along with identification of Aerospace and Defense as a key sector under this initiative. The development of a robust domestic MRO industry must be made a priority area through necessary policy corrections.

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