RNI No. DELENG/2020/79244 ISSN 2347-1522
Vol. IV Issue No. 1 JANUARY-FEBRUARY 2023

INDIA FOUNDATION JOURNAL

Editorial

- Challenges for 2023 - Dhruv C. Katoch

Focus : Society and the State

- Manifesting Uniformity: Ideas to Implement the Uniform Civil Code - Vikramjit Banerjee & Janhvi Prakash
- The Implementation of a Uniform Civil Code - Zeenat Shaukat Ali
- Waqf in India: A Dangerous Anachronism in a Secular State - Suvrojyoti Gupta
- EWS Amendment Judgement: The Unending Closure on Reservation - Siddharth Acharya
- Judiciocratic Veto: The Mystery of Elevation, Designation and Basic Structure Doctrine - Ayush Anand & Shubhendu Anand
- Towards Muslim Women's Progress in India - Zeba Zoariah

Interview

- Confronting Challenges through Civilisational Perspective: An Interview with **Shri Swapan Dasgupta** - Rami Niranjan Desai

Defence and Security

- Digital Lending Apps: The Invisible Threat to National Security - Siddharth Acharya

Book Review

- Ajay Singh's "Russia Ukraine War: The Conflict and its Global Impact" - Dhruv C. Katoch

Editorial Board

Table of Contents

Editor's Note

Challenges for 2023 ..... **Dhruv C. Katoch** 3

FOCUS: Society and the State

Manifesting Uniformity: Ideas to
Implement the Uniform Civil Code ..... **Vikramjit Banerjee and Janhvi Prakash** 6

The Implementation of a Uniform Civil Code ..... **Zeenat Shaukat Ali** 11

Waqf in India: A Dangerous Anachronism in a Secular State ..... **Suvrojyoti Gupta** 19

EWS Amendment Judgement:
The Unending Closure on Reservation ..... **Siddharth Acharya** 28

Judiciocratic Veto: The Mystery of Elevation,
Designation and Basic Structure Doctrine ..... **Ayush Anand & Shubhendu Anand** 35

Towards Muslim Women's Progress in India ..... **Zeba Zoariah** 45

Interview

Confronting Challenges through Civilisational Perspective :
An Interview with **Shri Swapan Dasgupta** ..... **Rami Niranjan Desai** 49

Defence and Security

Digital Lending Apps: The Invisible Threat to National Security ..... **Siddharth Acharya** 56

Book Review

Ajay Singh's "Russia Ukraine War: The Conflict and its Global Impact" ..... **Dhruv C. Katoch** 63

India Foundation Journal

Vol. IV
Issue No. 1

January-February 2023

Editor
Maj Gen (Dr) Dhruv C Katoch

Printed on behalf of India Foundation

Printed at Pearl Printers, C-105, Okhla Industrial Area, Phase-1, New Delhi-110020

Published at India Foundation, J-1 and H-1, Ground Floor, Upasana Building, 1 Hailey Road, Near K.G Marg, New Delhi - 110001

RNI No.- DELENG/2020/79244
ISSN 2347-1522

Annual Subscription - Rs.3000/-
Single copy - Rs.500/-

For advertising details contact
Phone: 011- 41654836 / 43012351,
journal@indiafoundation.in
www.indiafoundation.in

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 the 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 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 and other issues of social, religious and political significance. 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.

Challenges for 2023

Dhruv C. Katoch*

India's rise to a USD 10 trillion economy within the next 10 to 15 years has been often spoken off with a great deal of optimism by economists in India and abroad. Now, a recent report by a London-based consultancy, Centre for Economics and Business Research (CEBR), has also reiterated the same. In its report published in December 2022, CEBR states that at a time when the world is moving into recession, India's growth rate over the next decade will average 6.5 percent, propelling India into the USD 10 trillion bracket by 2035 and to third position in global rankings. But there was a cautionary note too. Political factors, the report stated, could hold India back.[1]

It is however, not just political factors which we need to be concerned about. There are social and economic factors too, which could spoil the India growth story. India's rise as an economic power is not something which India's adversaries are taking kindly to. On the contrary, they are doing all in their power to stymie India's growth story. Some western countries too, with whom India shares good relations, are also averse to the idea of an economically strong India which is also moving towards self-sufficiency in advanced technology. They see in a growing India, a potential threat to their economic interests. These countries too, would like to see an India which is perpetually dependent on them—an India which perforce plays second fiddle to Western interests.

That of course, is not how the story will play out. Leaving aside a black swan event, India's growth story can, at the worst be delayed, not denied. But both India's adversaries as also some who are India's friends, have been exploiting internal fault lines within India, to muddy the waters of India's rise. Opposition to India's rise has come in the political, social and economic domain and while India has faced up to these challenges stoically over the last few years, the coming years will, in all likelihood, see a renewed effort on the part of both internal and external agencies to create trouble and fissures within Indian society.

There was consternation in many capitals across the world when the NDA government was sworn in, in 2014, as they felt that the leverage they enjoyed with earlier governments would not be available. On that score they were right. That led to a series of events, orchestrated from within the country, but with huge funds supplied from abroad, to showcase India as an intolerant country. That is why we saw protests erupt in the country, on various issues, but timed for effect, to peak in January, when the eyes of the world would be on India's Republic Day celebrations. These protests ranged in the social sphere from allegations of human rights abuses to intolerance towards religious minorities. In the economic domain, we witnessed protests against Sterlite Copper, the Kundankulam nuclear power plant, the Narbada Dam and many others. In the political domain there were protests against the farm laws and the

*Maj. Gen. Dhruv C. Katoch is Editor, India Foundation Journal and Director, India Foundation.

Uniform Civil Code, which were used to disrupt normal life.

It is likely that some of the protesting groups had genuine concerns about certain government policies. In a vibrant democracy such as exists in India, expressing an alternate point of view is a part of the democratic process. But the methods used to express discontent were uncalled for. It became apparent that the protests were designed to create anarchy and fissures in society through disruption and violence.

Many areas were blockaded for months on end in an attempt to shut down parts of the country, but it redounds to the wisdom and maturity of the Indian masses that they did not fall prey to such disruptive tactics and the nation emerged stronger and more united, with a focus on growth. Indeed, since 2014, we have had major reforms in the Indian polity, foremost among them being the Goods and Services Tax (GST) and the revocation of the special status given to Jammu and Kashmir through Article 370.

GST unified the country economically, by making provisions for a single tax on the supply of goods and services, right from the manufacturer to the consumer. With its implementation, a variety of earlier indirect taxes, including the value-added tax, service tax, purchase tax, excise duty, and others were done away with, making it easier for business entities. The apprehensions expressed by some who opposed the GST have been blown away by the successful implementation of this transformative economic reform. Throughout the current financial year, GST collections have been in excess of Rs 1.4 lakh crore, despite the fact that the Indian economy as well as the world economy was badly impacted by the Covid pandemic in 2020 and 2021. The revocation of the Special Status given to the state of Jammu and Kashmir under Article 370 and the bifurcation of the state into two union territories, Ladakh and Jammu and Kashmir, was perhaps the most important legislation passed since independence. The move was bitterly opposed by certain political groups, but the events on the ground since then have thrown up for the first time, the possibility of peace in the Union Territory of Jammu and Kashmir after over three decades of violence and bloodshed. These and many other reforms such as the abolition of instant triple talaq were vigorously opposed by certain interest groups, but were the need of the hour.

But many more important legislations are required, to truly reflect a vibrant, secular and democratic India. As we enter 2023, we need to anticipate the opposition that the reforms process will generate in certain quarters and through positive narrative building, prevent disruptive elements within society to hold the country to ransom. Reforms are required on many sensitive issues such as the Waqf Act, which was first passed by Parliament in 1954 and which was subsequently repealed, only to be replaced by a new Waqf Act in 1995 which gave it extraordinary powers, not in consonance with the Indian Constitution. Other issues pertain to the control of many Hindu temples by the government, which is against the very concept of a secular state. Protecting the rights of Muslim women needs reform on issues such as polygamy, wearing of hijab, the practise of nikah

halala as also of equal rights in inheritance. This will have to be undertaken through the legislative process as it will not be forthcoming from within Muslim society and will find resonance when the issue of adopting a Uniform Civil Code comes up.

With the general elections due in the first half of 2024, there will be attempts made to oppose political, social and economic reforms in the year ahead. How these issues are handled will define the nature of Indian polity over the coming decade and will determine how soon India achieves its ambition of becoming a USD 10 trillion economy.

References:

1 https://economictimes.indiatimes.com/news/economy/policy/india-to-become-10-trillion-economy-by-2035-cebr/articleshow/96526283.cms

◆◆◆

FOCUS

Manifesting Uniformity: Ideas to Implement the Uniform Civil Code

Vikramjit Banerjee and Janhvi Prakash*

Introduction

Article 44 presents the idea of a Uniform Civil Code applicable within India. However, a lack of effort to produce an all-encompassing code is witnessed on part of the State. The vast diversity of the country's demographic renders this topic precarious and extremely sensitive.

The main reason such a mammoth exercise has not yet been undertaken is perhaps due to the absence of conducive strategies which can be utilized to accomplish this statutory instrument. With this paper, the authors recommend three strategies for the implementation of the Uniform Civil Code, a necessary mechanism and one standardised in most developed countries around the world.

Supreme Court's stand on Uniform Civil Code

The Supreme Court has repeatedly highlighted the importance of a Uniform Civil Code. Beginning from 1985, the then Chief Justice Y.V. Chandrachud in the *Shah Bano Begum*[1] case spoke of how a common civil code will promote national integration by "removing disparate loyalties to laws which have conflicting ideologies". In the 1995 case of *Sarla Mudgal vs Union of India*[2], Justice Kuldip Singh held that securing a uniform civil code throughout India is an "unequivocal mandate" under Article 44 of the Constitution.

Advancing to 2017, Justice Kehar and the present Chief Justice of India, Justice Chandrachud rejected a PIL filed by a Catholic advocate who wanted divorce granted by Church Courts to be deemed legally valid. The Court held that despite Christian marriages being solemnised as per the 'canon law' or Christian Personal Law, when it came to divorce-related matters, only that which is granted by courts under the Indian Constitution and the Indian Divorce Act of 1869, is legally valid. Such personal laws have no place in the country if they interfere with the basic tenets of the Indian Constitution. Therefore, the application of an array of different personal laws for communities has been condemned by the Supreme Court.

The need for a Uniform Civil Code is realised repeatedly as the Courts spend judicial time adjudicating, essentially what is the same issue with a different face. Whether it be the right of women in joint family property or the triple talaq - all could have been dealt with fastidiously with one uniform statutory mechanism.

The Controversy Surrounding the Uniform Civil Code

The idea of the application of one common statutory mechanism for personal law throughout

*Mr. Vikramjit Banerjee is a Senior Advocate, Supreme Court of India and Additional Solicitor General of India and Janhvi Prakash is an Advocate.

the country has various controversies attached to it. This is because governance under the ambit of personal laws is closely linked with the fundamental right to freedom of religion. The Constituent Assembly debates exemplify this tension. One group pressed for the 'fundamental right to personal law'. An opposing group led by Dr B.R. Ambedkar was staunchly against it. They wanted UCC to be enshrined as a fundamental right. A consensus could not be established and for this reason, the Constituent Committee set the duty of formulating a UCC on the State. A similar incoherence exists today – more than 70 years later.

India, within it, contains much diversity, and people. Transforming laws, bearing in mind the diverse religious communities is a delicate topic to brush upon. The criticisms of the UCC are that it is detrimental to the pluralist ethos of the nation. That it is not possible to reconcile divergent laws and formulate a uniform statutory code that will be accepted by all communities. Precedence exists of various minorities having the right to govern their personal matters, as an extension of freedom to practise their religion guaranteed by Article 25 of the Indian Constitution.

An extension of the above argument is the failure of the UCC to consider the plight of Scheduled Tribes. Scheduled Tribes roughly comprise 8.6% of the total Indian Population. Tribes based in areas such as the Northeast, Jharkhand, Lakshadweep, etc follow their own customary laws.[3] These customary laws are unique so with the advent of a prospective UCC – the sentiments of communities will be further marginalised.

However, it can be asserted confidently that personal laws are not based on gender equality. Personal laws perpetuate gender discrimination and sex inequality. Yet, every time this perspective is highlighted – extreme disdain is reciprocated along with the accusation of religious discrimination or even discrimination against minorities. Practices like female genital mutilation, polygamy, and exclusion from inheritance– all squarely showcase the deep-rooted gender bias prevalent in all personal laws. Giving protection as envisaged in *Narasu*[4] to these laws, unequivocally limits constitutional guarantees.

Three Strategies towards a Uniform Civil Code

I. Codification

Codification is the process of compiling, arranging, and systematising the laws of a given jurisdiction, or of a discrete branch of the law, into an ordered code[5]. It regulates without contradiction, exclusively and completely the whole of the law or at least a comprehensive part of it. It is meant to be lasting, comprehensive, and concluding, thereby leaving no scope in adjudication for shaping the law[6].

A dynamic strategy to implement the UCC – is simply to codify a strictly uniform statutory mechanism like any other codified law – like the Indian Penal Code. The intent behind this is to demarcate the boundaries upon which the UCC can govern and lay jurisprudence on.

A comparative study of the personal laws of different religions will show that the sheer diversity of these laws, zealously adhered to, will not allow any uniformity. It is the author's argument that this perspective must be changed – it should not be the case that the law caters to all the sentiments

of the community but rather that the practices of the community are valid by virtue of the basic code given. The Uniform Civil Code must act as a sieve allowing only those practices and customs to pass which are constitutionally viable. They must pass the scrutiny of Constitutional tenets.

We cannot expect a secular judiciary to adjudicate upon matters through the eyes of religion, given the task of codifying the vast personal laws, and their regional variances. Every citizen of India must be seen as a citizen first, who has certain rights that arise from the Constitution, and not from personal laws.

Often, when advocating for a Uniform Civil Code, the State of Goa is often referenced. After liberation from the Portuguese in 1961, Goa continued with the Portuguese Civil Code, 1867. It survives in accordance with Section 5 of the Goa, Daman and Diu (Administration) Act, 1962.

However, this parallel might not be as appropriate as within the Portuguese Code itself there exist exceptions for Catholics, and Hindus and Muslims are both covered by the Code and Shastric Hindu Laws. Even though, the case of Goa cannot be applied identically, the authors suggest it can be used as a guiding light to initiate the task of formulating a Uniform Civil Code.

II. De-codification

In 1781, regulations prescribed that both the Hindu and Muslim communities will be governed by their 'personal' law in matters relating to inheritance, marriage, religious usage and institutions. The colonial government was not equipped to consider the orally transmitted customary law of villages, castes, and religions. Instead, it relied on classic textual law and its commentaries interpreted by local priests. These priests were not aware of each region's local practices as every community had its customary laws which were followed by all members regardless of creed.

When personal law Acts were formulated, such as The Hindu Marriage Act and the Divorce Act or the Sharia Act, what occurred was the codification of religious laws. Customary laws were neglected. Even within Hinduism, there are different kinds of customary personal laws specific to groups like Mitakshara, Dayabhaga, Marumakkathayam etc. Therefore, what we witness is the imposition of religious laws of one view over the entirety of members of the religion, in complete disregard of their own customs. These imposed laws are completely alien to people and infringe on their right to practise their long-held customs. Therefore, personal laws are not in consonance with the sentiments and age-old practices of communities as this discrepancy still exists.

After the adoption of the Constitution, secular judges continued to resolve questions relating to the family by relying on religious doctrines. The 1951 landmark judgment of the Bombay High Court, *The State of Bombay vs Narasu Appa Mali*[7] lays down the extent to which personal laws can be subjected to fundamental rights. The ratio decidendi of this judgment was that personal laws are not subject to fundamental rights as personal laws are not *'laws in force'* under the meaning of Article 13(1) of the Indian Constitution. Hence, personal laws cannot be struck down as being violative of fundamental rights.

A subtle critique of the rationale in *Narasu*

can be seen in the judgment of Sabrimala Temple case[8] wherein Justice Chandrachud under the heading of '*The Ghost of Narasu'* addressed this issue and its limitation. This limitation is the condition to "public order, morality and health". It is our view that *Narasu Appa Mali* needs to be re-looked at and the protection afforded by *Narasu* to personal law from fundamental rights should be discarded.

Even in the Constitutional text, Article 25(2) empowers the State to make laws to regulate or restrict any "economic, financial or secular activity" associated with religion. Considering this, the authors suggest removing the protection extended by *Narasu* to personal laws and a gradual de-codification of them.

III. Common Charter of Rights/Obligations

The Supreme Court has taken a cautious approach to decide cases of religious contention. There is a 'case-by-case' approach instead of a universal stance. On 22nd August 2017, the Supreme Court passed landmark judgment[9] holding Talaq-e-Biddat, or triple talaq, as unconstitutional. Triple talaq has been contentious since the *Shah Bano* case, involving a woman who was divorced using this practice. In this case, the Supreme Court held that the Criminal Procedure Code was a non-religious law and hence applied to all religions. By virtue of this ratio decidendi, the divorced 62-year-old woman was granted maintenance. This case displays the power the Supreme Court has to nullify the laws which are in violation of fundamental rights guarantees under Part III of the Indian Constitution.

It is the authors' argument that instead of a case-to-case approach, the legislature can simply formulate a 'Charter of Rights and Obligations' in Personal Law, not far from the Fundamental Rights, which are set in stone and cannot be changed, as a prequel to then formulating and applying the UCC.

In place of a perfect all-encompassing UCC, a start can be made with the less contentious issue of a charter empowering women and obliterating discrimination against them. A slow gradual change in policies will not cause upheaval and will be easier for the various communities to accept.

Conclusion

The constitutional imperative of equality applies to all citizens, irrespective of their status or gender. Therefore, the Uniform Civil Code is a key tool in the national integration of the country with which equality can truly be attained in form of gender justice, and security when it comes to marital issues, inheritance and so forth. The authors suggest any of the three aforementioned strategies may be used to attain the goal of a uniform statutory mechanism governing personal laws, however, they acknowledge that Strategies I and II may seem controversial presently. Therefore, they recommend Strategy III i.e. promulgating a 'Charter of Rights/Obligations'. It is a pragmatic method which avoids the controversy of assailing customs and instead protects them. Therefore, it can be used efficaciously to bridge the gap between constitutional mandates of equality and equity in the current societal-religious and traditional structure of India.

References:

1 *[(1985) 2 SCC 556 : 1985 SCC (Cri) 245 : AIR 1985 SC 945]*

2 [1995] 3 SCC 635

3 As clamour for UCC rises, here's what you need to know about uniform civil code, India Today (2022), https://www.indiatoday.in/india/story/uniform-civil-code-in-india-ucc-bjp-muslim-hindu-personal-law-marriage-act-1942830-2022-04-28 (last visited Dec 2, 2022).

4 *The State of Bombay vs Narasu Appa Mali- AIR 1952 Bom 84*

5 BLACK'S LAW DICTIONARY 252 (7th ed. 1999)

6 FRIEDRICH KOBLER UBER DIE PRAKTISCHEN AUFGABEN ZEITGEMABER PRIVATRECHTSTHEORIE31 (1975). 47. KARST

7 *AIR 1952 Bom 84*

8 Indian Young Lawyers Assn v. State of Kerala, (2019) 11 SCC 1

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

◆◆◆

The Implementation of a Uniform Civil Code

Zeenat Shaukat Ali*

Introduction

Currently, within the existing legal framework, there exists no uniform family related law in a single statutory book for all Indians that is acceptable to all religious communities in India. The Uniform Civil Code (UCC) is an aspiration in that direction. It refers to a common civil law bringing a myriad of complex provisions of family laws under a single system. The Constitutional expression "We the People of India" in its dynamic unity integrally includes a national plurality of the people of India cutting across race, religion, caste. All its citizens need to seek a favourable solution that desiderates harmony and accommodative religious pluralism seeking a balance between right to religion and right to justice. The UCC reaffirms a commitment to a cardinal principle of equal rights in the legal sphere for all communities alike. Justice is the cornerstone that counts.

It is not simply one of minority protection but one of treating each human being with the equality and dignity safeguarding the foundational principle justice that is the Constitutional right of every Indian citizen. The UCC is in the best interest of religions. It does not negate religious sentiments but regressive dogmas that are not in consonance with harmony, justice, equity and good conscience.

In view of a fast-changing world, particularly after the post-partition period, drawing together as a global village, with science & technology expanding with lightning speed, new evolving circumstances in the crucial socio-economic sector have demanded a fresh balancing perspective in various fields, including the legal field. Family, as an integral part of society, needs a similar channelling. Though the exact outlines of such a code are yet to be spelled out, progressive modern aspects from all existing personal laws will need consideration while disregarding those that are regressive. Reform and the formulation of secular laws and autonomy of communities need not be exclusive processes. One need not threaten the other. Consensus is part of the democratic process. Deliberations for the implementation of a UCC is a crucial step forward.

Uniform Civil Code (UCC)

Besieging the Indian political scenario for several decades, the history of the UCC has been ridden with polemics and controversy. Time has not blunted the edge of this debate. The very term is severely contested within the realm of identity and electoral politics as well as the range of interest among feminist groups and activists engaged in social change. To grapple with its complexities in its current context, the predominantly distressing factor is the shrinking area of democratic standards and secular space leading to a sharp divide in opinions in an increasingly communalised national context.

The quest towards a UCC serves as a testing

*Zeenat Shaukat Ali is the Director General, Wisdom Foundation (World Institute of Islamic Studies for Dialogue, Non-violence, Gender Justice and Peace).

point of the true nature of our democracy. Impressively written into Part IV Article 44 of the Indian Constitution as a Directive Principle of State Policy, its aim to achieve a far-reaching equality for all Indians alike in the realm of civil and personal laws as initially conceptualised by the makers of the Constitution, has simply remained a distant dream. Mired with ferocious debates fuelled with the cataclysm of religious angst, this vision of our founding fathers still remains an aspiration.

It was in 1947 that the idea of a Uniform Civil Code was seriously discussed in the Constituent Assembly. A committee formed for the fundamental rights held the proposal for the Uniform Civil Code to be part of the Directive Principles of State. Thus, Article 44 of the Constitution says that: "the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".

Although Article 37 of the Constitution itself makes clear, that the Directive Principles "shall not be enforceable by any court," they are, nonetheless, "fundamental in the governance of the country". A compelling task in post-modern India is the conscious navigation for the required positive change a for a better future. Over the years various directions have been issued by the Apex Court for its implementation. Besides bringing a labyrinth of segregated laws that govern and regulate subjects on areas of a private sphere or family law such as marriage, divorce, maintenance, succession, minority, and guardianship, etc under one umbrella, the objective of this law is to ensure that all human relationships and needs are non-differentiated.

In a democracy, welfare as well as the conceptualisation of social justice are inseparable constituents. Hence, in this debate, the lens of political parties, the clergy, feminists, the state and judiciary should crucially focus and strategise on this neglected long standing issue. Political representatives, often taking shelter behind "safer strategies tend to lessen this prodigious reality. Many of India's citizens support reformist agenda for reforms. Particularly, feminist movements, within all communities challenge discrimination at all levels. Autonomous women's groups in India have consistently raised demands for a UCC, staunchly contesting patriarchal, misogynistic attitudes.

During the pre-independence colonial era, the Lex Loci report of October 1840 emphasised the need and necessity of uniformity in the codification of Indian law, particularly in the areas of crimes, proof, and contract. Hence, over a period of time, laws like the criminal, civil laws having a direct bearing on human relationships fruitfully evolved gaining due recognition without a storm. However, as the Proclamation of the Queen of 1859 pledging complete non-interference in religious affairs, personal laws maintained status quo.[1] Although distinguished leaders like Jawaharlal Nehru and Dr. B.R. Ambedkar campaigned for a standard civil code during the Constitution's development, but due to religious sensitivities, and perhaps a lack of public understanding at the time, the Uniform Civil Code was not codified, but was only included in the Directive Principles of State Policy (DPSP, Article 44).

After the first post-colonial agenda envisaging legal uniformity in criminal laws was established, the elusive question of the methodology to be

employed in skilfully using an altered harmonised model of uniformity of family laws as a viable option that could be turned into the official legal reality in India today, has been fiercely argued, especially by clerics. If, in the introduction of criminal laws, no religious leader insisted on retaining particular religious laws whereby all citizens use these laws equally, what interest would be served to differentiate the applicability of a common personal law to all Indian citizens without obscuration?

Unfortunately, misunderstandings accompanied by misinformation regarding the objectives as well as the implementation regarding the Uniform Civil Code abound. Some Muslims see this as part of an onslaught of Hindu domination over minorities. In view of the recent controversies and the silence emanating from the top leadership on these controversies, minorities insecurities intensify. Nevertheless, the points of consideration are several. Signs of a modern progressive nation—a nation moving away from caste and religious politics with a provision of equal status to all citizens, promotion of gender parity and national integration will bring every Indian, regardless of caste, religion, tribe or ethnicity, under one law. This, besides halting vote bank politics indulged in during every election, will take India forward towards its goal of transformation and development.

While viewing personal laws in the Indian context, it must be stated that it is not Muslim personal laws only, that are in need of urgent reform in several areas besides those relating to gender equity. All communities are structured in a manner where male supremacy dominates within the family and outside. There can be variations in degrees of patriarchy or gender discrimination, but there is little doubt that in the overall context, women's relegation reinforces itself, generally leaving little space for egalitarianism. A survey conducted by the Census authorities in 1961 on polygamy reveal this fact.[2]

Muslim Personal Law in the Indian Context

Those from the Muslim community contesting the enactment of a UCC, argue that as the source of personal laws are religion based, their fundamental right to religion under the Constitution are violated. Hence, implementing of UCC would be in contravention to Articles 14, 25, 29 and 30 that permit them the practice and propagation of their religion. However, the valid question here would be whether the practice of the triple talaq may be considered within the purview of religious activity despite the fact that it is not sanctioned by the primary religious text of the Quran?

The existence of the reprehensible instantaneous,"sinful" Talak-i-bidat, a remanent of the customary patriarchal and misogynistic practice of pre-Islamic Arabia, an innovative, heretical irrevocable form of divorce as its name suggests, whereby the husband was given the unwarranted right of a pronouncement of the word talaq thrice in one sitting making the divorce irrevocable was duly practised.

Further, in the expression "Muhammadan law" itself with its variations of spelling, popularly used to describe "Shariah Law" in India, was popularly given currency in India by the British regime. The law is therefore sometimes referred to as the Anglo-Muhammadan Law. "The British rulers in

India did, in the exercise of its legislative powers, curtail the scope of Islamic laws in this country. Within the scope of those portions of Islamic Law which survived this process of gradual curtailment, their legislative contribution, however, remained negligible"[3] Moreover, a critical examination the contours of "Muhammadan Law" as practised in India, establishes the need to move away from the stereotypical colonial interpretations of Islam, reaffirms the vast possibilities of rights of Muslim women otherwise denied to them as a consequence of patriarchal interpretations.

Perhaps the most controversial of these challenges was the well-known case of 'Shah Bano' and the ensuing chaos that led to the passing of the Bill entitled "The Muslim Women (Protection of Rights on Divorce Act)"[4] that overruled the judgement. It was the Supreme Court that came to the rescue of Muslim women through its decision in the Danial Latifi case.[5] More recently, in 'Shayara Bano',[6] the Supreme Court once again restored our faith in the ideals of equality and justice that it seeks to uphold by abolishing the highly contentious provision of talaq-e-bidat, paving the way for the Muslim Women (Protection Of Rights On Divorce) Bill, 2019, that criminalises the practice.[7]

The other argument forwarded by the Muslim minorities is that the enactment for the UCC must come from within the community. However, as the above instances demonstrate, every opportunity at their disposal was lost to codify the personal law and re-establish the justice given to them by the religion. Such implementation was ultimately left to the secular courts. Most Muslim personal laws yet remain uncodified and traditional in their content and approach. This is so despite the fact that over the years, several countries with a Muslim majority population like Turkey, Cyprus, Tunisia, Algeria, Pakistan (orthodox and conservative), Bangladesh, Malaysia, Indonesia, Jordon, Egypt, Iran, Iraq, Brunei, the UAE, Indonesia, Libya, Sudan, Lebanon, Saudi Arabia, Morocco and others either outlawed it, declared it illegal or used legal instruments and devices to bring about strictures in laws to reform it. In India, it remained a static practised law with no effort on the part of Muslims towards reform.

The contrasting responses to the Shah Bano and the Sharaya Bano case encapsulated the evolution of Indian society and polity seen in the past three decades. The verdict of the Court underlined the changing social and political dynamics in India that enabled a group of Muslim women to successfully overcome the conformist elements within the community. The liberal intelligentsia and even the sceptics and cynics supported the cause of gender justice.

Khula

Again, with reference to Khula, the recent landmark judgment of the division bench of the Kerala High Court of Justice Muhamed Mustaque and Justice C.S Dias, ruled that Islamic law recognises a Muslim woman's right to demand termination of a marriage (Khula). "A Muslim woman has the absolute right to terminate her marriage at will and does not need her husband's consent for it, while dismissing a review petition filed by a man challenging the divorce granted to his wife, under the Dissolution of Muslim Marriages Act,1939. "We declared that the right to terminate the marriage at the instance of a Muslim wife is

an absolute right, conferred on her by the holy Quran and is not subject to the acceptance or the will of her husband," said the division bench of Justice A. Muhamed Mustaque and C.D. Dias, of the Kerala High Court.[8] The court noted that Muslim women have the extra-judicial option of calling off the marriage "unilaterally" and went on to observe that the husband's petition against the divorce was not "innocuous" and appeared to have been filed at the behest of "Muslim clergies and hegemonic masculinity".

This judgment of the Kerala High Court is precisely celebrated for resurrecting the authentic position under Muslim Law reiterating the legal position that is holding the ground since more than 1400 years on the Muslim woman's right to obtain divorce without Court's intervention. In perfect consonance with Islam where the famous examples of Jamila and Bariah whose marriages were dissolved by the Prophet at their instance, in spite of the fact that the husbands of both were anxious to continue the marital tie bears testimony to this fact. The right of the wife to initiate the proceeding cannot be denied.[9] Muslims did not again seize the golden opportunity offered to effect transformation.

The greatest progress in law reform has been achieved by governments who stood firm, despite hostility of the clergy. Women achieved something approximating legal equality with men under the forceful leadership of the charismatic nationalist leaders like Kemal Ataturk (in Turkey in the 1920s) and Habib Bourguiba (in Tunisia in the 1950s), under the Shah of Iran in the 1960s, and in the Marxist states of the Peoples' Democratic Republic of South Yemen and Somalia in the 1970s.[10]

Polygyny

It is crucial to state that polygamy in Islam is a restrictive rather than a permissive ordinance. Evidence for this is apparent in the only Quranic verse dealing with polygamy which occurs only in connection with the protection and rights of orphans in Sura Nisa (4:3). Its restrictive intention regarding the subject is underpinned in 4:129 "You are never able to be fair and just as between women, even if it your ardent desire." The legislation introduced in the Quran on this aspect was a great improvement over unlimited polygamy and accepted sexual mores, thus clearing the way for monogamy. Its revelation occurred during the battle of Uhud when destitution and hardship left women in a vulnerable position, subject to manipulation and exploitation.

Turkey was the first to introduce reform of family laws, issuing the Ottoman Law of Family Rights (Qanun al Huquq qarar al-'Â'ilah al-'Usmâniyyah—a Civil Law) in 1917. It was the first Muslim-majority country to legally ban polygyny in 1926. This decision was not based on religious reasons, but rather was an entirely secular ban deeming modern day socio-economic conditions for polygamy as "unrealisable".[11],[12]

Tunisia was the next country to ban polygyny through legislation passed in 1956 and restated in 1964. Unlike Turkey, Tunisia banned polygyny on religious grounds, citing two main reasons. First, the Quran limited the practice of polygyny, thus it did not support the practice and clearly intended for the practice to be eliminated over time (4:3). Second, the Quran demands equal treatment of all wives in a polygynous marriage, which was deemed

impossible, thus making the practice illegal and punishable by law (4:129).[13]

Several other countries introduced strict laws to regulate and restrict polygamy. Algeria's considerably amended Code de la Famille (Family Code) and Morocco's new Moudawana (Family Law) (Articles 40-46) have both introduced greater regulation, extremely strict in the case of Morocco. Egypt (1920; Sudan (1929); Algeria (2005); Jordan (1951); Syria (1953) Morocco (1958); Pakistan 1961; Iraq (1959); Iran (1967, 1975); Kuwait, Lebanon, Bangladesh, 1971. Noel Coulson; Doreen Hinchcliffe (1978).[14] New or amended family codes are awaiting formal introduction in some francophone West African countries (Benin, Guinea, Mali, Niger).[15]

In India, voices for the demand to outlaw polygamy are rising. Inundated with a sense of misery, gloom, a lack dignity, deprivation, self-respect such a demand is increasing. Despite the trauma and suffering Muslim women undergo in India, despite their pleas, Muslim Personal Laws on polygamy yet retain this practice remaining uncodified and traditional in their content and approach. A study released by Bhartiya Muslim Mahila Andolan (BMMA) revealed "nearly 300 women were interviewed, among which 84 per cent of wives said that polygamy should be outlawed."[16] [17]

Conclusion

Undoubtedly, the task of actually devising a set of rules that will govern all communities in family law, is both formidable as well as cumbersome, both in view of the legal procedure as well as vast range of interests and sentiments involved. Considering the complexities involved, including compiling and envisaging a comprehensive variegated range of interests to be addressed including minority fears of the imposition of majority's preferences to override their interests, the task is challenging. It should be noted however, that democracies and developed countries like USA, Canada, Australia, UK, Russia, Turkey and others have adopted the Uniform Civil Code to eliminate discrimination amongst the communities. The status of a Uniform Civil Code is a guarantee of equal rights, regardless of caste, creed and colour, and is essential to prohibit discrimination based on creed or religious persuasion.

The Goa model needs special mention, especially in the light of the Supreme Court Judgement where the court praised the State's unique position of being the only province with Uniform Civil Code, albeit its concession. While mentioning the fact off its being the only state to where verbal divorce and polygamy cannot be practised, it likewise highlighted the Governments failure of fulfilling the expectations of our Founding Fathers.

Notwithstanding the plethora of challenges, it must also be duly recognised that reform or formulation of a Uniform Civil Code can no longer be skimmed over by avaricious dialectics. The denial of discussion, dialogue and debate towards attainment of goals and legal dictums halt advancement and progress, and can be counter-productive. Strategies can be formulated through the democratic process of consultation and consensus. The undertaking needs to be pursued with consistency and vigour.

To become a legal reality, the mandate of the State accompanied by high-minded statesmen and

legal experts, to promulgate laws with a creative vision, diminishing disparity, affirming cohesion with social sensitivity, and with a visualisation of fusion and plurality, both in the majority community and the minority communities, can be constructively generated. Since it involves a change in laws, an obvious prerequisite is sufficient support for the move within Parliament.

Postponement or delay getting caught up in dispute and strife is an old tactic. It will stake the vision, the perspective, the aspiration for social change. In our struggle for implementation of equality, cognisance of justice, incapacitating gender discrimination, rectification, and reform are the key. One might wonder, for how long the citizens of this country will have to bear the law's delay and the apathy of political offices, in failing to secure for them the ideals of our own Constitution. The possible way is for the Courts to urge the Government for its implementation.

References:

1 *Muslim and Hindu personal laws be left out of such codification; The Proclamation of the Queen of 1859 pledged complete non-interference in religious affairs.*

2 *The incidence of polygamous marriages was highest among Tribal communities 15.25%; Buddhists 7.97%, Jains 6.72%, Hindus 5.8%, Muslims 5.7%.* Scroll In *; "It may be allowed by Muslim personal law, but the incidence rate is not that high," said Ritu Menon, a feminist publisher and independent scholar, who worked on the subject as co-author of the book* Unequal Citizens: A Study of Muslim Women in India. *"This is true particularly in relation to Hindus, but across all communities, polygamy is not that common. Bigamy, on the other hand, is fairly common and that's true across religions."* Monday, December 19th 2022.

3 *Dr. Tahir Mahmood, "The Muslim Law of India" Law Book Company, Allahabad, U.P. 1980; Dr. Tahir Mahmood is a former member of the Law Commission and ex-Chairman, National Commission for Minorities.*

4 *Mohd. Ahmed Khan v. Shah Bano Begum and Ors, AIR 1985 SC 94* ***Muslim Women (Protection of Rights on Divorce) Act****, 1986 hereinafter written as the Act.*

5 *Danial Latifi & Anr v. Union of India (2001) 7 SCC 740*

6 *Shayara Bano v. Union of India, (2017) 9 SCC 1.S.4,*

7 *"Any pronouncement of talaq by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal;– Any Muslim husband who pronounces talaq upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine."*

8 *The offence is recognized as cognizable i.e., the arrest can be made without a warrant on a report of the same by the wife. Shaukat Ali, Zeenat; 'The Empowerment of Women in Islam; 1997, Simon and Feffer; pp 336-338*

9 *'Khula absolute, not subject to husband's will' — Kerala HC on Muslim woman's right to divorce, Story by Rewati Karan •The Print, 3 Nov 2022*

10 *Ann Elizabeth Mayer; "Law and Women in the Middle East" Women in a Changing World; February 17th 2010.*

11 *Tahir Mahmood, Family Law Reform in the Muslim World (Bombay: N. M. TRIPATHI PVT. LTD,1972), p. 17*

12 *Muslim Countries introduced reform in family law by means of regulations and legal instruments through the application of a number of legal devices like ijtehad, (creative reinterpretation); maslahah mursalah (public interest); tadwin (codification); tashri (legislation; mudawwanat al-a% w l al-ousaria-shakhc iyyah (personal status code); qanun (statute); marsum (ordinance); manshur (publications); qarar (ruling, regulation)*

13 *DYNAMICS OF TUNISIAN POLYGAMY LAW IN GENDER PERSPECTIVE Ayyus Sahidatul Chusnayaini Fakultas Syari'ah UIN Maulana Malik Ibrahim Malang; Tunisian Family Laws, British Embassy Tunis.*

14 *Noel Coulson; Doreen Hinchcliffe (1978). Louis Beck and Nikki Keddie (ed.). Women in the Muslim World. Cambridge, Massachusetts: Harvard University Press. p. 40.*

15 *Kusha, Hamid R. "Polygyny". The Oxford Encyclopedia of the Modern Islamic World. Oxford Islamic Studies Online.*

16 *Mirror Now, 84% Muslim women want polygamy outlawed, says study curated by: Aditya Paul Mumbai: Updated Dec 22, 2022 | A nationwide study released by Bhartiya Muslim Mahila Andolan (BMMA) on Tuesday revealed that being in a polygamous marriage causes enormous emotional trauma to the woman. During the research, nearly 300 women were interviewed, among which 84 per cent of wives said that polygamy should be outlawed. The questionnaires were distributed to women in polygamous marriages in West Bengal, Uttar Pradesh, Odisha, Telangana, Tamil Nadu, Karnataka, Maharashtra, Gujarat, Madhya Pradesh, Rajasthan and Delhi.*

17 *Protect Our Dignity, Ban Polygamy, Say Indian Muslim Women to PM; Cited a national research by BMMA which claims that out of 4710 Muslim women from 10 states, 92.1 percent women want a complete ban on oral divorce while 91.7 percent are opposed to polygamy. THE QUINT; Updated: 28 Nov 2015, 6:36 PM IST*

◆◆◆

Waqf in India: A Dangerous Anachronism in a Secular State

Suvrojyoti Gupta*

Introduction

The term waqf (plural auqaf) originates from the Arabic term Waqafa meaning therefore to detain or hold or tie up. The *Waqf Act 1995* defines Waqf as "*the permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable*…".[1] It refers to a class of assets—land, building, tenancies, cash etc and not merely Muslim religious structures like mosques and dargahs. In India a large bureaucratic scaffolding has been erected around the protection, preservation and expansion of waqfs. In Part-I of this work, I argue that the same is not necessary from the point of view of law, as the secular law of trusts is enough to deliver the outcomes that waqf are meant to deliver. In part-II, I take a historic look at the institution and argue that waqf in India have been used as an enabler of proselytisation, and the centralised and theocratically waqf management structure of medieval era has actually set a template that Islamist groups have demanded in independent India and obtained through the *Waqf Acts*. In part-III, I look into how waqf laws have developed and argue that it is procedurally inadequate, a refuge for Islamist politics and tends to create social conflict. The work ends with my recommendations and conclusions.

Part-I

The Concept of Waqf is Legally Redundant but Useful for Identity Politics

There are three kinds of waqfs understood[2] by Indian law namely

(i) Waqf by user: Where any land or building or any portion thereof has been used permanently for any religious or pious purpose, with the concurrence or knowledge of the owner, then it will be treated as waqf by user.

(ii) Waqf Mashrut-ul Khidmat: It is a public waqf where the wa'kifs (i.e creator of waqf) has devoted the property for the general benefit of the Muslim community and means a grant stipulated for rendering services.

(iii) Waqf al-al-aulad: A waqf created for the wa'kifs family and children.

Waqfs can be created only for a pious purpose consistent with the Shariat.[3] The essential features of waqf are perpetuity, irrevocability and inalienability.[4] There is no formality requirement for setting up a waqf (like say creating a document, registration etc).[5] The dedication of a given property as waqf need not even be express, it can simply be set up through user or reputation.[6] Once it has been declared as waqf, it is vested with Allah (the Islamic deity) for ever. Other communities in

*Prof. Suvrajyoti Gupta is Associate Professor at Jindal Global Law School, OP Jindal Global University.

India do not have anything quite analogous to the waqf.

Conceptually, waqf can be seen as a form of a trust, with some differences. First, waqf is fundamentally faith based; there is no waqf outside a sharia sanctioned activity unlike a trust. The waqf presuppose an Islamic regime with a Qazi enforcing it; because unlike the trustee under s. 16, 20, 36 and 40 of the *Indian Trusts Act 1882,* the mutawalli have very limited powers similar to receivers under the CPC.[7] Second, unlike trusts which are not necessarily irrevocable or perpetual, these are essential characteristics of a waqf. Third, unlike trusts, especially public charitable trusts, there is no requirement of certainty (i.e. disclose a specific charitable intention). The amounts can be distributed using the doctrine of cy-pres.[8]

The most important difference perhaps is that the law of trusts is enforced by the civil courts[9] and have extensive substantive and procedural protections for the trustees, beneficiaries and innocent third parties. There are special provisions under s.92 & 93 of CPC for public trusts that can apply to a Muslim religious trust as well. The best way to see this from the point of view of a layman would be that waqf is a form of preto-trust, that essentially resides in a world of Dar al Islam[10] where the overwhelming theological benefit of the waqf overrides any other proprietary and social concern that may arise. The common law of trusts on the other hand since its canon law / equity law past[11] has travelled far, to become a truly fair, secular all weather doctrine, that strives to reconcile different kinds of social and political interests.

Notwithstanding the differences, the entire set of objectives of waqf can be served through the law of trusts and other secular laws.[12] The civil court is sufficient to decide the disputes and the Waqf Tribunal, strictly speaking is not really necessary either. The existence of a separate law of waqf can only be attributed to historical Muslim identity politics and Islamist demands. In the next two parts I identify how this state of affair came to be and where does it stand now.

Part-II
The Dark Colours of the Waqf in Indian History

I can presume that the purpose of the original creators of waqf was benign. But in India and globally, the institution has acted as an enabler to Islamic imperialism, proselytisation and appropriation of other denominational sites.

During the entire Sultanate and Mughal periods, both the sovereign and private individuals created waqfs[13]. Throughout this time period, waqf management displayed a centralised and theocratic form of management. At the grassroots level, the waqfs were managed by mutawallis supervised by the Qazis, and in the later Mughal period by a religious office called Sadr-as -Sudur.[14] The system was centralised insofar as the chain of supervision went up from the Qazis all the way to the Sultan (in Sultanate) and the Padshah (during Mughal rule).

The ranks of the Qazis and Sadr were taken usually from the Ullama (i.e Islamic clergy and scholars). The applicable law and the sitting judge were both committed to the Shariah and not to secular sense of fairness. Thus, in effect, these courts would have displayed an enormous

prejudgment bias[15], regardless of the character and personal integrity of the judge. If a non-Muslim would plead proprietary or other interest in a property sought to be declared a waqf, the Qazi would balance the public policy imperative of waqf as a measure to spread of Islamic ideology, against the limited rights available to the dhimmi[16], and would have to decide in favour of the former. This logic would have operated with special force when the waqf land in question belonged to a former temple or religious establishment.

Another significant aspect of waqf in pre-British India was the close connection of this institution with proselytisation and religious and cultural appropriation. At the heart of this 700-year long proselytisation drive were the Sufis. There is an enormous literature on this theme, starting with Thomas Arnold's portrayal of Sufis as Islamic "missionaries" among non-Muslims.[17] Later, revisionist historians have sought to dilute Arnold's hard truth in favour of soft narratives. So Muzaffar Alam argues[18] that from 12th century onwards, Sufi orders (silsilas) began to expand, encouraging and promoting many beliefs held in common by Hindus and Muslims. Alam goes on to say that though some Sufis were puritanical and tyrannical, their general sense of moderation persuaded many Hindus to convert to Islam. Richard Eaton (an Islamophile and revisionist) calls this process "accretion and reform" whereby the Sufi saints would appropriate Hindu/local customs and nominally convert the population to Islam. Thereafter, later reform processes in Islam would convince them of the essential unity of Islam and they would become firmly integrated in the Muslim Ummah[19].

The Sufis worked as a network of Pirs/ Murshids and disciples (Murids or Shagrids) who together formed a silsilah or tradition[20]. These Sufi networks were sustained through a special kind of waqf called wajh-i-ma'ash, which is a part of allowance for subsistence. Sometimes, certain Sufis were granted entire villages with some plots of uncultivated land (read forested land) with stipulation to bring it under plough.[21] Richard Eaton explains this process beautifully.[22] While taking the example of Chittagong and Sylhet, he shows that the spread of Islam in these areas were led by charismatic Muslim Pirs, who cleared the jungles and established Muslim settler societies, that would overwhelm the demographically sparse indigenous population (animist, Hindu or Buddhist), and slowly impose Islam. These settler societies lay the local mosque and the local congregation is supported by generous land grants.[23] The land grants were mostly in form of waqf.[24] Thus, waqf provided the multi-generational finance, necessary to the Sufi order to convert the Indians.

There is a tradition of demolition and conversion of other denominational sites in a waqf, globally. The Ka'ba[25] and Al-Aqsa Mosque in Jerusalem[26] are the most famous examples of this phenomenon. This process is subsumed in historical silence in this country. What was the prior legal status of the lands granted in waqf, in Sultanate and Mughal period? Richard Eaton sidesteps this question, as if the lands granted were terra nullis[27], just because they were forested. The most probable situation is that tribal communities, local Hindu peasant farmers and in some cases Hindu or Buddhist religious institutions had rival claims over these lands, which were suppressed by the Ulama

dominated Qazis and local officials; only to be forgotten and denied later. Even now, claims to Hindu sites are made under the aegis of the waqfs. Such claims were made inter-alia in Ayodha Case[28] and in the Gyanvapi dispute[29]. Such claims were even made against national monuments[30]. The enactment of the *Places of Worship (Special Provisions) Act 1991* has further enabled these aggressive claims. Even when the legal logic is weak, the idea of a property "belonging to Allah, perpetual and inalienable", provide strong emotional and polemical force to these arguments.

Part-III
The Origin and Discontents of the Present Waqf Act

After the fall of Muslim rule, the British were not generally supportive of the waqfs. Their attitude was reflected in the Privy Council decision of *Abdul fateh Mohammad v Russomoy Dhur Chowdhury.*[31] In the instant case, it was held that a waqf made for the aggrandisement of family and the gift to charity is illusory, whether from small amount, uncertainty or remoteness is invalid. This decision was furiously objected to by Muslim jurists who thought of it as contrary to Islamic law on waqf.[32] Thereafter, the Empire brought the *Mussalman Waqf Validating Act 1913* (validating many waqf -al-al auld). Overall, the British empire generally dealt with cases through secular law, like the Official *Trustees Act 1913, the Charitable and Religious Trusts Act 1920* etc.

Post Montagu–Chelmsford Reforms 1919, communal polarisation increased in Indian polity. The Congress, the Muslim League and the British started competitive ethnic bidding for the Muslims. This resulted in a spate of Waqf Acts like *Bihar & Orissa Mussalman Waqf Act* 1926, *Bengal Waqf Act* 1934, *Bombay Mussalman Waqf Act* 1935, *United Provinces Muslim Waqfs Act 1936* etc. Though many of these Acts were repealed by the *Waqf Act 1954* the basic features continue to exist in our law.

Post-independence, India enacted the *Waqf Act 1954.* The legislation, based on the earlier waqfs legislation, created a Waqf Board. This Board is essentially a political body which has been provided with a large array of executive and quasi-judicial functions. The most important powers of the Board is to supervise and if necessary remove mutawallis, to sanction "in accordance with Muslim law" any alienation of waqf property and defend suit on behalf of the waqf. It created a corpus of funds in hand of the Waqf Board and also created a requirement of compulsory registration of Waqf properties. The Waqf Boards were to be manned by MPs, MLAs, persons from Muslim organisations like the State Jamiat-ul-Ulama-i-Hind or State Shia Conference, or persons trained in Islamic law or law and finance. They all had to be Muslims.[33] A Central Waqf Council was added later by an amendment Act in 1969.

\This Act created the economic and social power of the waqf. It created a mighty bureaucratic colossus in terms of Waqf Board which in principle is similar to the Mughal Sadr. The centralisation and pooling together of waqf resources concentrate enormous wealth in hands of the community that is not available to any other. From a strict economic point of view, the *Waqf Act* actually enhances the economic value of the assets by allowing the Waqf Boards to lease, mortgage or even sell waqf

property. A property that cannot be alienated or transferred essentially has only a book value but no market value.

The *Waqf Act 1954* can be seen as the beginning of appeasement politics in post-independence India. It contributed to the creation of Muslim politics centred around community property and community interests, which paved the way for the later rise of Islamist organisations like the AIMIM, AIDUF, AIMPLB etc. It is to be noted that the Waqf structure is a special treatment given to the Muslims. There are no analogous institutions for Hindus, Sikhs or Christians. The *Sikh Gurudwara Act, 1925,* merely pertains to the management of Gurudwaras and not the management of a whole class of property. While the post-independence Congress government was creating a Muslim power base, it was not half as generous to the Hindus. For Hindu temples, the law is still the *Religious Endowments Act 1863, Indian Trusts Act 1882* and some state legislations like the *Tamil Nadu Hindu Religious and Charitable Endowments Act 1959,* that puts the Hindu temples and religious institutions under direct state control.

The *Waqf Act 1954* was amended in 1964, 1969 and 1984; a major amendment in 1995 would have been sufficient. However, the so-called secular parties wished to virtue signal their Muslim vote bank and a new *Waqf Act* 1995 came into effect. The new Act added a new and dangerous innovation in terms of the Waqf Tribunal[34]. The tribunal has wide powers to decide matters pertaining to properties disputed to be a waqf property and interests involved in a property admitted to be a waqf property[35], lease, tenancy etc in a waqf property. The scope of exact jurisdiction of this court is to be decided by the state governments. The tribunal is manned by a judicial service personnel, a state civil service and one person who has specialised knowledge of Muslim law. The jurisdiction of the civil court is barred in matters covered by the *Waqf Act 1995*[36]. More ominously there is no appeal available from the decision of this tribunal or from any interim order by the tribunal[37]. This tribunal is not the Shariat court of the Qazi or the Sadr, but it is the nearest equivalent to the same in a secular country. Unlike the civil court that is directed towards giving justice, the tribunal is directed towards protection and better management of the auqaf; that is to say, this tribunal, by its very nature, is biased towards waqf. It is therefore far more difficult for innocent third parties to agitate their legitimate interests before this tribunal than the civil court.

The same Act also transferred many of the evacuee properties that were purportedly waqfs to Waqf Boards[38], thereby depriving many Sikh and Hindu refugees who had taken shelter there since partition. The Hindu Devottar properties in Pakistan and Bangladesh never received such special treatment. However, no matter how many amendments are made, more and more concessions continued to be demanded. The Sachar Committee report[39] added fuel to this fire. It was found that the total area under Waqf properties all over India is estimated at about 6 lakh acres and the book value at about Rs 6,000 crore.[40] This is the third largest land holding after Defense and Railways. Sachar was obsessed with using the waqf as a tool for community development, as theme directly lifted out of Islamic

economics. It is moot to ask, if the Indian state has ever sought to use "community assets" similarly for upliftment of any other community – say Hindus? Anyway, it was successful in triggering the draconian 2013 amendment to the Act. It created penal consequences for illegal alienation on waqf properties[41] and extremely draconian provisions for removal of encroachments.[42] Many of these encroachers might actually be the poorer members of the "community" that it seeks to protect. However, the biggest legacy of the 2013 amendment is to ring-fence the waqf properties from any claim of national development. Waqf lands cannot be acquired except under very onerous and unviable circumstances.[43] Considering most of the waqf land is in urban areas, this has created a structural impediment for urban development in India.

So finally, how does the waqf machine works? It can be understood with an illustration.

Consider Mr. X[44] has a land near Mr. Y's land[45]. The lands are not well demarcated, and possibly disputed. Mr. Y created a waqf on, Mr X's land, say by urging that the land is a burial ground, making himself or some connected person the mutawallis. This is possible since waqf can be created by user and no documentation is necessary. He then gets it registered with the Waqf Board[46]. The board is obligated to make enquiries about the land and Mr. X, if he would know, may even resist the registration. However, once again the Board has full powers to decide on whether the land is indeed a waqf property or not.[47] The Waqf Board as specified earlier is a political body with a mandate to protect and promote waqfs. Therefore, the proceeding before the Body is no more likely to result in a just outcome than before the mediaeval Qazi. The State administration is legally bound to follow the direction of the Waqf Board.[48] Mr X would have a small window appeal to the tribunal, an entity that also suffers from heavy prejudgment bias. There is no further statutory appeal from its decision. It will be particularly hard for Mr. X if the land has been demarcated as a waqf, (based on the registration by the Board) by the state survey of waqfs u/s. 4 of the Act. In between all this, Mr. X would be not only confronting Mr. Y but the entire waqf bureaucracy backed by the Waqf Fund and thousands of staff. He would also be intimidated with criminal prosecution that the 2013 amendments have added to the Act. Off course, Mr. X can offer bribes to Waqf officials and get out of the web. The Waqf Board is a wonderful source of corruption!

This land grab is not a figment of imagination. OPIndia cites at least 21 high profile instances where the Waqf Board has sought to register public or private lands as waqfs.[49] This includes an entire Hindu village in Tamil Nadu, government buildings in Surat, the so called Idgah Maidan in Bengaluru, Jathlana village in Haryana among others. These instances constitute a tip of the iceberg. The three most common forms of land grab seem to be claiming a land as Qabaristan (graveyard)[50], creating small Dargah's and offering prayer in public lands (this can be later claimed as waqf through user). These incidents show that the ill-adjusted legislation and the corrupt land grabbing elite it has created, is a perfect recipe for social conflict and communal disharmony.

Conclusion & Recommendations

The institution of waqf is legally unnecessary. The existence of the legal institution of waqf as well as the bureaucracy of the Waqf Board only make sense, as an identity issue and as a rotten borough for Islamist politics. But it may be noted that the in a secular country, only a rational legal system law must serve the common good and not act as a mere "identity marker". The law of waqf as it stands today is dangerous for public peace, communal harmony, violates private property rights and potentially encourages extremist politics.[51]

The *Waqf Act 1995* and *waqf* jurisprudence as it stands today, is clearly violative of right to equality under Article 14 in as much it creates a special system of procedural and substantive protection for a class of assets and religious establishments of one community, to the exclusion of all others.

An outright repeal may take time. In the meantime, there are a range of options that must be explored immediately. The first is to remove the extraordinary jurisdiction of the tribunal and restore the power of the civil court. Second, strong protection of third-party rights must be incorporated during the period of registration of waqf. An Ombudsman may be appointed to protect third party rights in waqf. Third, the bar on the acquisition of waqf land for public purpose may be removed. Finally, the Waqf Board must be prevented from claiming any waqf that predates the 1995 Act and was not registered at the point of its enactment. This would prevent the Board from making crackpot demands on historical monuments and government buildings. I believe it can also be seen through the lens of Article 44 that mandates the state to enact Uniform Civil Code for all communities. The discourse on UCC should travel outside personal laws and include waqf as well. In an ideal world the *Waqf Act 1995* ought to be repealed, to be replaced with a common system of Trustees of Religious Endowments.[52]

References:

1 *S. 2(r) of the* Waqf Act 1995

2 *AHMEDULLAH KHAN, COMMENTARY ON THE LAW OF WAQF (Asian Law House, 2017) (henceforth referred to as Khan 2017)*

3 *ASAF ALI ASGHAR FYZEE, OUTLINES OF MOHAMMEDAN LAW, 284 (Oxford University Press, 1974); This includes waqfs made for religious wars.MA Quereshi* Law of Waqf *, MUSLIM LAW ,514 (Central Law Publications , 2007), (henceforth Quereshi 2007)*

4 *Khan, 2017 at 4*

5 *Traditionally waqfs were created in the mosque with Muzzeins declaration or waqafnamas.*

6 *See the Privy Council decision* in Mohd. Imadadullah v Mst Bismillah *AIR 1922 PC 384. However once a property has become auqaf the Waqf Board is under a duty to register the same as per s.36 of the* Waqf Act 1995

7 *Quereshi, 2007 at 536*

8 *Cy-pres is a legal doctrine that gives courts the power to interpret the terms of a will, gift, estate, or charitable trust.*

9 *Under s. 9 of the Code of Civil Procedure 1908 (CPC) the civil court can decide all disputes of civil nature. Explanation I clarifies that , any property dispute or dispute over religious office comes within the purview of suits of civil nature.*

10 *Dâr al-Islam, in Islamic political ideology, the region in which Islam has ascendance*

11 *Some jurists argue that the law of trusts originate from Waqf, but this claim may be taken with a pinch of salt.*

12 *A Muslim can create trust.* Kassimaiah Charities Rajagiri v. Secy, madras State Waqf Baord *AIR 1964 Mad 18;* Garib Das v Munshi Abdul Hamid *AIR 1070 SC 1035*

13 *See Khan , 2017 at 8*

14 *Md. Thowhidul Islam* Historical Development of Waqf Governance in Bangladesh: Challenges and Prospects *Intellectual Discourse, Special Issue, 1129 , 1140 (2018)*

15 *An attitude, belief, or impression formed in advance of actual experience of something.*

16 *Protected people in an with second class rights, in exchange of jiziya*

17 *See generally TW Arnold, THE PREACHING OF ISLAM: A HISTORY OF THE PROPAGATION OF THE MUSLIM FAITH,193 (Library of Alexandria (17 March 2022)*

18 *Muzaffir Alam. The Languages of Political Islam: India1200-1800 (London: Hurst & Co., 2004) 82.*

19 *See generally the theories of conversion in Richard Eaton,* Approaches to the Study of Conversion to Islam in India *(November 12th 2022)*, *https://jan.ucc.nau.edu/~sj6/eatonapproachconversion.pdf*

20 *The Sufis were and continue to be divided into major orders like Qadri, Chsiti & Nashbandhi which in turn were broken into dozens of branches. See generally CAMBRIDGE HISTORY OF ISLAM , 621-622 (Peter Holt, Ann K.S. Lambton, and Bernard Lewis. Edt , Cambridge University Press) 621-622*

21 *Ahmedullah Khan at 10*

22 *Richard Eaton . THE RISE OF ISLAM AND THE BENGAL FRONTIER: 1204-1760 (Oxford India, 1993)*

23 *See generally Chapter 9,* The Mosque & Shrine in the Rural Landscape , *THE RISE OF ISLAM AND THE BENGAL FRONTIER, 234-267*

24 *Though Richard Eaton argues that these grants had the character of both an waqf and a grant. See THE RISE OF ISLAM AND THE BENGAL FRONTIER, 238 . However, I would argue that anything that has a character of waqf is essentially a waqf. It is immaterial what is the formal structure of the grant. Richard Eaton being a cultural historian probably does not understand legal conceptions that well.*

25 *Khan, 2017 at 7. It was undoubtedly a ancient site of pagan worship.*

26 *Part of the Jerusalem Islamic Waqf it probably stands on the site of the Second Jewish Temple*

27 *Literally meaning no body's land. This term have a pungent colonial past. Traditionally European settlers treated lands in the Americas and Australia as terra nullis , though clearly indigenous people had proprietary title over them.*

28 *See* M Siddiq & Ors v Mahant Suresh Das & Ors *(November 12th 2022), https://www.sci.gov.in/pdf/JUD_2.pdf*

29 *The classic example of this remains the case of* Gyanvapi Mosque. See Gyanvapi A Waqf Property, Only Waqf Board Can Hear Cases: Anjuman Intezamia Masajid*, Times of India Oct 12, 2022, 20:53 IST*

timesofindia.indiatimes.com/articleshow/94817653.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

30 *The Taj Mahal has been declared as an waqf by the Sunni Waqf Board. The matter has been challenged*

before the courts by ASI (November 11, 2022) https://www.news18.com/news/india/taj-mahal-a-waqf-property-bring-shah-jahans-signature-first-says-supreme-court-1714967.html

31 Cal XVIII 399, 1894 22 , LA 76

32 The court did apply the Islamic law or Mohamedan law as they called it. Its just that its interpretation was a common law one and not based on traditional Shariah jurisprudence.

33 See s. 10 of the Waqf Act 1954

34 S. 83 of the Waqf Act 1995

35 Rashid Wali Beg v. Farid Pindari*, 2021 SCC OnLine SC 1003*

36 *S.85 of the* Waqf Act 1995

37 S. 83(9) of the Waqf Act 1995 . *Compare this to*

38 *S.108 of the* Waqf Act 1995

39 Government of India, Social, Economic and Educational status of Muslim Community of India, Report (New Delhi: Cabinet Secretariat, 2006), 219. (henceforth the Sachar Committee)

40 Ibid at 219

41 S. 52A of Waqf Act 1995 *and s.54 of* Waqf Act 1995

42 S.55 and 55A of Waqf Act 1995

43 S. 51 of the Waqf Act 1995

44 Mr. X can well be a Muslim himself. Waqf administration is a state sponsored, elite driven machine that protects community interest and not necessarily members of that community. More importantly Mr. X can also be a public body like Municipal Corporation.

45 This example presupposes the culpability of Mr. Y but remember that the Waqf Board can move suo motu as well and just imagine a doubtful waqf and try to grab a piece of land for the greater good of the community.

46 S.36 of the Waqf Act 1995

47 S.36 and 40 of the Waqf Act

48 S. 28 & 29 of the Waqf Act 1995

49 How Waqf Boards have been insidiously encroaching upon and occupying various properties and claiming their right over them, OP India, Oct 22, 2022 (November 14th , 2022) https://www.opindia.com/2022/10/21-instances-when-waqf-boards-india-illegally-encroaching-various-properties/

50 In Islam unlike Christianity a graveyard need not be attached to a mosque or consecrated ground. So it would not be improper for a Muslim to bury the body in any land provided the proper funerary rites have been performed.

51 There is a theory in social science called the conveyor theory of radicalisation – it means one starts out with a minor functionary and a moderate organisation, to be progressively become more extremist in their views. Waqf administration is merely the entry point in the Islamist politics.

52 There is indeed a Public Interest Litigation pending before the Supreme Court challenging the Constitutional validity of the Waqf Act. See Delhi HC seeks Centre's stand on PIL against validity of Waqf Act , (November 13th 2022), Delhi HC seeks Centre's stand on PIL against validity of Waqf Act , The Hindu , *May 12, 2022, (November 13th 2022), https://www.thehindu.com/news/national/delhi-hc-seeks-centres-stand-on-pil-against-validity-of-waqf-act/article65407028.ece*

◆◆◆

FOCUS

EWS Amendment Judgement: The Unending Closure on Reservation

Siddharth Acharya*

Introduction

On 12th January, 2019, the Constitution (One Hundred and Third Amendment) Act, 2019[1] (hereinafter referred to as the 'Amendment Act') enacted by the Union Legislature received the Presidential assent, thereby making amendments to Articles 15 and 16, under PART III of the Constitution of India. The amendments brought in a provision for the reservation of the economically weaker sections (hereinafter referred to as 'EWS') in the Indian society. The Amendment Act came into effect on 14.01.2019. It is an opinion of a set of critics that such an amendment to the Constitution was brought by the ruling Bharatiya Janata Party as an economic gift given to the citizens right before the 2019 Lok Sabha general elections. However, this baseless and accusatory criticism has been crushed by a majority ruling of the Hon'ble Supreme Court in the case of **Janhit Abhiyan versus Union of India**[2] which has been elaborately dealt with in this article.

Where on one hand, Article 15(1) and 15(2) of the Constitution of India warrant general protection to the citizens and prohibits the State to discriminate the citizens of India on grounds *only* of religion, race, caste, sex or place of birth, Article 15(3), 15(4) and 15(5) on the other hand make special provisions for reservation of women and children and the socially and economically backward classes (SEBCs) existing in the Indian society. On similar lines, Article 16(1) and 16(2) provide for equal opportunity for all citizens in public employment. Articles 16(4), 16(4A), 16(4B) and 16(5) provide for reservation of the backward classes in public employment.

By means of the Amendment Act, Article 15(6) and 16(6) were incorporated in the Constitution which provided for reservation of the economically backward class of citizens for admission into educational institutions and for public employment, subject to a cap of 10%.

The opponents of this legislation, who found the Amendment Act discriminatory on various grounds, filed various writ petitions under Article 32 of the Constitution before the Supreme Court of India. These writ petitions were clubbed together and a common order in Writ Petition (Civil) No. 55 of 2019[3] was pronounced on 07.11.2022 by a Five-Judge Constitutional Bench of the Apex Court in a 3:2 split ratio.

The findings of Hon'ble Justice Dinesh Maheshwari, Hon'ble Justice Bela M. Trivedi and Hon'ble Justice J. B. Pardiwala were to the effect that the Amendment Act was not violative of the basic structure of the Constitution of India. However, the minority/ dissenting Judgment passed by Hon'ble Chief Justice of India U. U. Lalit and

*Siddharth Acharya is a practicing advocate in Supreme Court of India. Apart from legal profession he has directed acclaimed documentary films on Kashmir and CPEC. He writes extensively and frequently on Constitutional issues and judgments pronounced by Supreme Court.

Hon'ble Justice Ravinder Bhat was to the effect that The Amendment Act was violative of the Fundamental Rights under Part III of the Constitution of India and therefore, is liable to be declared as unconstitutional.

Primary Issues before the Court

The Five-Judge Bench after hearing the petitioners as well as the respondents in the present case have noticed the following issues which warrant determination:

I. As to whether reservation is an instrument for inclusion of socially and educationally backward classes to the mainstream of society and, therefore, reservation structured singularly on economic criteria violates the basic structure of the Constitution of India?[4]

II. As to whether the exclusion of classes covered under Articles 15(4), 15(5) and 16(4) from getting benefit of reservation as economically weaker sections violates the Equality Code and thereby, the basic structure doctrine?[5]

III. As to whether reservation for economically weaker sections of citizens up to ten per-cent in addition to the existing reservations results in violation of basic structure on account of breaching the ceiling limit of fifty per cent?[6]

In addition to the above, the Court has also dealt with other supplementary issues arising from the above-mentioned three issues which do not form a part of this article.

Contentions raised by the Petitioners

(a) The Constitution (One Hundred and Third Amendment) Act, 2019 is violative of the 50% reservation cap.

The counsels for the petitioners have submitted that providing for a 10% reservation '*in addition to existing reservation'* under articles 15 and 16 would be violative of the precedent laid down in the case of Indra Sawhney, which has been upheld by the Supreme Court and various High Courts over decades in numerous judgments. Further, that the cap of 50% cannot be breached under any circumstance unless if a law is protected under the 9th Schedule of the Constitution.[7]

(b) The reservation policy was introduced into the Constitution for bringing in an egalitarian society.

The counsels for the petitioners contended that the very purpose behind empowering the State with making reservations for the marginalised class of persons was to ultimately do away with a society wherein certain classes of persons are socially as well as educationally backward. It was submitted that the reservation provisions were made to "*address these historical inequalities that, as a vehicle of positive discrimination, the socially oppressed sections were provided reservations and special provisions so as to give them a voice in administration, access to resources such as education and public employment."*[8]

In support of the same it was submitted that the Amendment Act was violative of the basic structure of the Constitution as it sought to include those persons who were never socially and educationally backward, and therefore such amendment plays a fraud on the Constitution itself

(reliance placed on M. R. Balaji case[9]).

(c) Economic criteria cannot be the sole ground for reservation.

The Counsels for the Petitioners have placed reliance on various landmark judgments to contend that while passing the Amendment Act, the Legislature has erred in considering 'socially *or* educationally backward' as a ground for providing reservation as against 'socially *and* economically backward'. In support of the same, reliance was placed on **M. R. Balaji case** and **Indra Sawhney[10]**.

It was further submitted that the idea behind reservations as envisaged under Article 15 and 16 was to make adequate representation of the caste of people who were not adequately represented. However, the present amendment has failed to consider the aspect of 'representation' of the EWS which is evident from the fact that the EWS provides reservation for those people who have already been adequately represented in the society.

(d) The amendment in question aims to reward 'poor financial behaviors'

The learned counsels for the petitioners also contended that the amendment in question does not really serve a purpose in improving the drastic economic condition of India. Rather, this amendment is individualistic in its approach and nature which only aims to make provisions for those individuals who are economically weak. That such financial weakness/ backwardness which would be a ground for reservation was not based on a class, rather was dependent from person to person, and is therefore violative of Article 14 of the Constitution which allows for reservation for a 'class' of people who are at equal footing. Thus, the Amendment Act is violative of the basic structure of the Constitution of India.

Contentions Raised by the Respondents

The respondents in the present case presented their contentions to support the fact that the Amendment Act does not violate the basic structure of the Constitution, rather fosters it.

(a) 10% reservation would not affect the 50% limit set for the SEBC.

In support of the above contention, the Attorney General contended that the rights of the SEBC, SC and ST are not at all affected as they are already enjoying the perks of reservation in all sectors such as education, public services, legislature, and so on. Hence, the rights of a class of group that has already been provided reservation cannot be said to be violated and that such reservation for the economically weaker section cannot be said to be violative of the Equality Code. It was further contended that the 10% reservation is in addition to the already existing reservation for the SEBCs.

(b) There is no violation of the basic structure by the Amendment Act.

In support of its contention that the Amendment Act does not violate the basic structure of the Constitution, the counsels for the respondents have made a submission that mere violation of Article 14 of the Constitution does not amount to violation of basic structure. That for the violation of the basic structure, such violation should be '*shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice*'.[11]

It was further submitted that the present amendment did not violate the basic structure,

rather, was in consonance to the preamble to the Constitution by providing economic justice to the citizens of India by means of EWS Reservation.

(c) 50% cap for reservation can be violated in exceptional circumstances.

The learned Solicitor General of India has vehemently opposed the petitioner upon the issue whether the Amendment Act if brought into effect would cross the ceiling limit of the 50% reservation criteria as laid down in Indra Sawhney case or not. In support of the same it was submitted that the 50% reservation has neither been provided under the Constitution of India nor is said to be forming a part of the basic structure of the Constitution of India. Hence, any reservation made cannot be said to be violative of the basic structure merely because it surpasses the 50% reservation criteria as laid down in Indra Sawhney case.

(d) The right of EWS arises from the right to live a dignified life under Article 21 of the Constitution.

The respondent counsel Ms. Vibha Dutta Makhija has submitted that the right of the EWS envisaged in the Amendment Act arises from the right to live a dignified life as envisaged under Article 21 of the Constitution. She also stated that poverty affects dignity and that it was the duty of the State to eradicate poverty, thereby providing a dignified life to the EWS.

Last but not the least, the respondents have argued that the Constitution does not debar the Legislature from taking a step away from the traditional approach in achieving economic justice. Additionally, Mr. V.K. Biju has apprised the court of the statistical data on record and submitted that the economic criteria for reservation is the need of the hour on the basis of various reports and statistical data. He has further argued that even in **Indra Sawhney**, the Court took a conscious note that there may be a group or class of people, who can qualify for benefits of reservation irrespective of caste.

Judgement

The judgment popularly known as the 'EWS Judgment' was passed on 07.11.2022 with a 3:2 majority upholding the validity of The Constitution (103rd Amendment) Act, 2019.

A. Upholding the Constitution (103rd Amendment) Act, 2019

The validity of the Amendment Act was upheld by a majority in the 5-judge bench of the Hon'ble Supreme Court. Hon'ble Justice Bela M Trivedi, Hon'ble Justice J. B. Pardiwala and Hon'ble Justice Dinesh Maheshwari upheld that the petitions filed challenging the Amendment Act were liable to be dismissed as the said Amendment cannot be said to be violative of the basic structure of the Constitution. A provision for reservation of the EWS neither affects the rights of the SEBCs nor does such reservation made solely on the ground of economic inequality violates the basic structure.

In support of the above ratio passed by the Hon'ble Supreme Court, Hon'ble Justice Bela M. Trivedi has emphasised upon the Statements of Objects and Reasons for the Constitution (One Hundred and Third Amendment) Bill to bring into light that a large chunk of the EWS have been excluded from attaining quality education as a result of their economical incapacity. Such persons are

neither eligible for reservation nor have the financial capacity to receive the best education. Hence, the Constitution had been rightly amended. Hon'ble justice Bela M. Trivedi has observed as under:

"Therefore, the constitutional amendment could not be struck down as discriminatory if the state of facts are reasonably conceived to justify it. In the instant case, the Legislature, being aware of the exclusion of economically weaker sections of citizens from having the benefits of reservations provided to the SCs/ STs and SEBCs citizens in Clauses(4) and (5) of Article 15 and Clause(4) of Article 16, has come out with the impugned amendment empowering the State to make special provision for the advancement of the "economically weaker sections" of citizens other than the classes mentioned in Clauses(4) and (5) of Article 15 and further to make special provision for the reservation of appointments or posts in favour of the economically weaker sections of the citizens other than the classes mentioned in Clause(4) of Article 16. The impugned amendment enabling the State to make special provisions for the "economically weaker sections" of the citizens other than the scheduled castes/schedules tribes and socially and educationally backward classes of citizens, is required to be treated as an affirmative action on the part of the Parliament for the benefit and for the advancement of the economically weaker sections of the citizens. Treating economically weaker sections of the citizens as a separate class would be a reasonable classification, and could not be termed as an unreasonable or unjustifiable classification, much less a betrayal of basic feature or violative of Article 14."[12]

In support and in addition to what has been held by Hon'ble Justice Bela M. Trivedi and Hon'ble Justice D. Maheshwari, Hon'ble Justice Pardiwala emphasised on the need to revise the criteria on which the reservations under the Constitution were made. He emphasised the fact that the reservations were not meant to become a vested interested in a class of people, rather, it was meant to represent the marginalised class of people and ultimately reach an egalitarian society.

The verdict written by Justice Pardiwala reminds us of the fact that the reservations under the Constitution are never meant to be for indefinite period. For instance, the reservation under article 15 and 16 were to bring about social harmony aimed to be achieved within 10 years of the Constitution coming into force, which however continues even after more than seven decades of the Constitution coming into force.

(*A similar view was also taken by Justice Bhat and CJI U. U. Lalit, who passed a verdict declaring the Amendment Act as unconstitutional.)*

B. Dissenting Judgement

The minority view comprising of the verdict passed by Hon'ble Justice Ravindra Bhat and Hon'ble Chief Justice of India U. U. Lalit held that the Amendment Act was violative of the basic structure and therefore is unconstitutional.

On the amendment made under article 15 by means of inserting 15(6), Hon'ble Justice R. Bhat has held that 15(6) is unconstitutional on the sole

ground that it excludes the representation of the poorest sections of the society who are socially as well as educationally backward. Hence, such a provision discriminating against the down-trodden was violative of the Equality Code. Hon'ble Justice R. Bhat further held that Article 16(6) was liable to be declared unconstitutional on two main grounds. Firstly, on the ground of non-inclusion of the already socially and educationally backward class of persons. Secondly, that since Article 16 purports to solve the issue of lack of representation of a particular community/ class, providing reservation to the EWS under article 16 was clearly violative of the basic structure of the Constitution.

Critical Analysis

Since the enforcement of the Constitution of India, reservation has been an arena which affects every Indian individual intensely, irrespective of the caste one belongs to. In India, policies with respect to reservations have been in place since the formation of the Constitution of India. However, it is important to remember that the reservation policies post Indian independence were incorporated keeping in mind the societal scenario of India at the time of independence, i.e., these reservations were brought to give proportionate representation in jobs and education to SC, ST, SEBC and OBC groups who bore the pain of social exclusion. However, with the changing socio-economic conditions of the Indian societies, the upliftment of the Scheduled Tribes, Scheduled Castes, Socially and Economically Backward Class and other backward class by means of reservation policies have proved to be unjust for the upper caste individuals who are not equally well-off.

Further, reservation policies favouring the Scheduled Tribes, Scheduled Castes, Socially and Economically backward and Other Backward Class have always been maliciously used for the electoral gains and the reality of India has been ignored. Many state governments such as Andhra Pradesh, Telangana, Tamil Nadu, Maharashtra and so on, have been blatantly violating the precedent laid down by the Supreme Court in the case of Indra Sawhney in order to take political advantage of the reservations policies. These actions of the state governments have been declared unconstitutional by the Supreme Court from time to time.

The actual purpose of the reservations has always been defeated and therefore, the Government has rightly taken a grip on reality of the socio-economic conditions existing in the country and passed The Constitution (103rd Amendment) Act, 2019. The Government has also *vide* the particular exclusion of the ST, SC, SEBC, OBC from the EWS quota has ensured that the upper caste group who have been unable to represent themselves in the society primarily benefit from the Amendment Act.

The benefit of reservation should be availed by the persons from the lowest strata of the society and somebody who has taken undue advantage of these policies since generations shall not be allowed to take benefit of such reservations.

It is for the first time that the Supreme Court has, vide its EWS Judgment, showed its concern towards the genuinely weaker sections of the society that have been excluded from attaining quality education as a result of their economic incapacity. Such persons are neither eligible for

reservation nor have the financial capacity to receive the best education. The Amendment Act has been rightly passed to represent the marginalised class of people and ultimately reach an egalitarian society.

Last but not the least, the Amendment Act and the ruling of the Hon'ble Supreme Court in the EWS judgment is a true tribute to the makers of the constitution of India and the vision of Dr. B. R. Ambedkar, the father of the Indian Constitution and also an economist. Through his speeches, he always laid emphasis on uplifting the economically weaker sections of society, as reflected in the following statement given by him in the Constitution Assembly debates:

"…that every individual who is qualified for a particular post should be free to apply for that post, to sit for examinations and to have his qualifications tested so as to determine whether he is fit for the post or not and that there ought to be no limitations, there ought to be no hindrance in the operation of this principle of equality of opportunity."

Thus, by incorporating Articles 15(5) and 16(6) into the Constitution, the Government has ensured that it is not just the socially and educationally backward class that is entitled to get justice but also the poor people of India. The Amendment Act and its confirmation by the Hon'ble Supreme Court is a big step towards achieving economic equality in the Indian democracy.

Present Status of the Case

Congress leader Dr. Jaya Thakur moved Review Application before the Supreme Court seeking review of the judgment passed by three of the five-judge bench of the Apex Court which upheld the constitutional validity of the Amendment Act providing 10% reservation for the economically weaker sections (EWS). However, the same is still pending adjudication.

References:

1 *https://www.india.gov.in/sites/upload_files/npi/files/consti.103amend.pdf*

2 *WRIT PETITION (CIVIL) NO. 55 OF 2019*

3 *https://main.sci.gov.in/supremecourt/2019/1827/1827_2019_1_1501_39619_Judgement_07-Nov-2022.pdf*

4 *Para 31(a), Janhit Abhiyan Versus Union Of India [Writ Petition (Civil) No. 55 of 2019]*

5 *Para 31(b), Janhit Abhiyan Versus Union Of India [Writ Petition (Civil) No. 55 of 2019]*

6 *Para 31(c), Janhit Abhiyan Versus Union Of India [Writ Petition (Civil) No. 55 of 2019]*

7 *https://www.mea.gov.in/Images/pdf1/S9.pdf*

8 *Para 7.1, Janhit Abhiyan Versus Union of India [Writ Petition (Civil) No. 55 of 2019]*

9 *1963 Supp (1) SCR 439*

10 *1992 Supp (3) SCC 217*

11 *Para 25.1, Janhit Abhiyan Versus Union of India [Writ Petition (Civil) No. 55 of 2019]*

12 *Para 20, Janhit Abhiyan versus Union of India [Writ Petition (Civil) No. 55 of 2019]*

◆◆◆

Judiciocratic Veto: The Mystery of Elevation, Designation and Basic Structure Doctrine

Ayush Anand & Shubhendu Anand*

Introduction

Under the Indian Constitution, legislature, judiciary and the executives are the three pillars of the State. It is based upon certain doctrines which has established *rule of law* based modern democratic societies. Some of the examples of such principles are a). ***Separation of power,*** b). ***Doctrine of check and balance*** and c). ***Transparency*** in the state affairs.

To keep a check on three pillars of the government it has been provided with an accountability mechanism amongst each other. Executive is accountable to the legislature and judiciary both. Judiciary is also accountable to the legislature. Similarly, the power of the legislature is also checked by the judiciary as it cannot make any law which is *ultra-vires*. But finally, it is only the legislature which has been made accountable to the people which has elected it to rule over them. Therefore, judiciary and executive both are accountable for the legislature and ultimately, it is only the legislature which is answerable to the people.

The focus of this article is on two aspects: One, is the Parliament fulfilling its role with respect to the judiciary and two, whether the Supreme Court is meeting its mandate with due observance of the above said basic democratic principles of the governance model adopted in our Constitution?

24th Amendment

Article 368 as adopted by the Constituent Assembly was debated as Draft Article 304 of the Constitution on 17th September 1949. After debating this provision, it was adopted without any change.[1] Article 368 has been through three amendments: the 7th, 24th and 42nd Amendments. These were necessitated to maintain the supremacy of the Parliament in view of some judgments passed by the Supreme Court curtailing power of the Parliament to amend the Constitution. The 24th Amendment stated: *(i) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power* ***amend by way of addition, variation or repeal any provision of this Constitution*** *in accordance with the procedure laid down in this article."*[2]

The power to amend gives the Constitution the capacity to cater to the changing needs of society and to evolve organically. The wide powers given by the 24th amendment thus gave Parliament the power to overcome the judgment passed by the Supreme Court in *Golaknath Case (1967).* The Constituent Assembly debates indicate that the original framers of the constitution were well aware of the consequences of having a rigid Constitution. It was never their intent that the Supreme Court should be the final arbiter to decide whether an amendment made under Article 368 is valid or otherwise on Constitutional parameters.

*Ayush Anand & Shubhendu Anand are Advocates, Supreme Court of India.

At that time, Members were even against allowing State Governments any say in exercise of this power by the Parliament, but in deference to the federal structure of the state, *ratification by state* clause was accepted by all.

Basic Structure Doctrine

Rigid Constitution comes with its own problems as seen by the example of the Constitution of the *Republic of Ireland*, which requires the consent of the people through Constitutional Referendum, before any amendment can be made.[3] Considering the vastness and population of India, a referendum clause would have been counterproductive, which is why this power has been left to be exercised by the elected Parliament, without any limitation. Hence the *ratio* laid down in *Golaknath Case* that Parliament cannot amend Part III of the Constitution was overruled in 1972 in the *Kesavananda Bharati case*[4] by affirming the Constituent power of the Parliament under Article 368 and that the Act made under Article 368 is not a 'law' as mentioned under Article 13. However, the *Kesavananda Bharati* case also introduced the doctrine of the Basic Structure of the Indian Constitution, and held that this cannot be abrogated, even by a Constitutional Amendment.

What constitutes the Basic Structure now includes an ever-expanding list, which the Supreme Court has taken upon itself to determine, on a case to case to basis. In this series, ***independence of judiciary*** was also recognised as a basic feature of the Constitution under the doctrine of Separation of Power in Second Judges Case of 1993, i.e., *SCAORA Vs. UOI*[5].

Appointment of Judges

Vide Article 124, every judge of the Supreme Court is to be appointed by the President after consultation with the Chief Justice of the Supreme Court as the President may deem necessary for the purpose. In First Judges case of 1982, i.e., S. P. Gupta Vs. UOI[6], the Supreme Court, held that under Article 124, the word "consultation" does not mean concurrence. The President was thus not bound to make a decision based on the consultation of the Supreme Court. This meant that the appointment of judges is a function to be exercised by the President (through executive) as per the principle of natural justice that no one should be the judge on his own cause for accountability of the judges under the ***Doctrine of Checks and Balances.***

However, this majority view was overruled in *SCAORA Vs. UOI* (*supra*), also known as the *'Second Judges Case',* wherein a nine-judge bench overruled the decision given in S. P. Gupta case (supra) and gave primacy to the Chief Justice of India (CJI) over the President on appointment of judges and transfer matters by holding that the word '**consultation'** would not lessen the primary role of the CJI in judicial appointments and started interpreting it as **'concurrence'** by relying upon the doctrine of separation of power and independence of judiciary. This has later been formalised in the form of Collegium System in 1998 in *Third Judges case* and since then, the five senior most judges in the Supreme Court are appointing judges of the Supreme Court and High Courts and having the final say in transfer matters also. Therefore, elevation to the bench from the bar since 1993 has become the sole function of

the senior most judges of the Supreme Court or ***Juristocrats*** of the Supreme Court. It must be noted that this practice of judges appointing judges is unique to India and exists in no other country.

Invention of Basic Structure Doctrine: Permissible Limit of 'Amendment'

In a constitution which makes no separate provision of total revision but simply prescribes the machinery to amend the Constitution, can such power of amendment include the power to make total revision and substitute the Constitution by another? The Supreme Court, by inventing the concept of 'un-amendability of the basic structures' by way of interpretation has held that certain essential parts of our Constitution are so basic that its amendment will change the character of the Constitution itself and hence cannot be amended and that Parliament does not enjoy absolute Constituent Power under Article 368 for this purpose.

But what if the Constitution was required to be amended fundamentally. How would we go about amending the same, without a formal procedure? Some countries have overcome this problem by providing separate provisions for revision in their Constitution. The **Constitution of Switzerland** provides for referendum before initiating partial amendment or repeal/total revision of the Constitution. The **Constitution of West Germany** (1949) has a provision that states that if the existing constitution of 1949 is to be replaced *in toto* or to be replaced by new one, it can be done only by a plebiscite of the 'German people' while the partial amendment is left by Article 79 in the hands of Federal Legislature. However, the basic principles contained in Arts. 1-20 are not subject to any amendement. Traces of the Doctrine of Basic Structure adopted by the Supreme Court of India and the necessity behind such adoption can be found here. On the scope of Art. 79(3) it was held by the German Court that *"The purpose of Art. 79 para 3 is a check of the legislators amending the Constitution to prevent both abolition of the substance or basis of the existing constitutional order, by the formal legal means of amendment and abuse of the Constitution to legalise a totalitarian regime."*

In the Indian Constitution such power is deliberately absent, and it is not a mistake. The Supreme Court can bar any amendment to the Constitution which it deems to be affecting the basic structure of the Constitution. But what if such an amendment was required? Will it not be the prerogative of the people of India to decide the same by referendum and not the Supreme Court? The judiciary cannot be the final authority to decide on our Polity. This is a matter that can only be exercised by the true representative of people.

The Conflict of two Doctrines

In *Keshvananda case,* Sikri, C.J. held that *'the doctrine of basic structure will act as a safety valve against the arbitrary use of amending power by Parliament'.* This certainly serves a great purpose in safeguarding the freedom and liberty of the citizen in a case of a totalitarian regime like the emergency imposed by the Indira Gandhi government for 21 months between 1975-1977. But what if the courts start applying the principle of doctrine of basic structure in every case against the popular will of the country and

starts interfering with the power of legislature in violation of *doctrine of separation of power* itself under the garb of independence of judiciary? Should not the Doctrine of Checks and Balances apply to the judiciary too?

Additionally, what constitutes *'independence of Judiciary'* and when can we say that such independence is being violated or will be violated? Is the judiciary immune to follow the fundamental basics of a rule of law based democratic country, which is the very foundation of its power? Will this not lead to a new form of aristocracy in our country where *'juristrocrats'* will have a veto power on deciding the polity & broad policy of the nation?

The Supreme Court itself has already held in ***Keshavananda Case, State of Bihar V. Bal Mukund Sah,[7] and then in I R Coelho V. State of Tamil Nadu[8],*** that the '***Principle of Separation of Powers'*** between Legislature, Judiciary and Executive is part of 'basic structure'. It is hence apparent that these two doctrines are in severe conflict with each other.

Legislation should always be a business of political will of the people in a democratic political society. If the judiciary also starts legislating, then it will not only make law more confusing but would also amount to breach of doctrine of Separation of Power as held in a judgment in the year 2020 in the case of ***Dr. Ashwini Kumar Vs. UOI & Anr[9].*** This can but lead to 'judicial aristocracy' where law starts emanating from a selected few intellectual of the Constitutional Courts.

Parliament, working under the Constitution, cannot also change the basic element of the same such as substituting democracy with monarchy or the federalism enshrined in our Constitution as rightly observed by the Sikri C.J. in Keshvananda case. What is needed then is a fine and calibrated balance between judicial powers barring Parliament from making specific new amendments to the Constitution. However, in all other cases, they must have the power to legislate on behalf of the citizen as per their will and their need, which is very essential for organic stable growth of the society and law.

Today what constitutes those certain basic features of Constitution, which are un-amendable and for which Parliament can't exercise its power, is uncertain and confusing which can only be decided on case-to-case basis as per the satisfaction of the Supreme Court. In ***Ashok Kumar Thakur V. Union of India (2008) 6 SCC 1;*** the Court observed that *"to determine if a constitutional amendment violates the basic structure, a two-step 'Effect Test' as laid down in **I. R. Coelho case** is to be applied on a case-by-case basis and it has to be examined in each individual case keeping in mind the scheme of the Constitution…".* So, today it's a complete judicial discretion to hold any amendment in Constitution valid or invalid on the basis of doctrine of basic structure. How then do we deal with judicial reforms, which are a pressing need today?

Brief History

Judicial interpretation of the powers vested in Article 368 first came to the fore in 1951, within a year of the Constitution coming into force, when the Constitution (First Amendment) Act was passed. The amendment sought to curtail the Right to Property guaranteed by Article 31. Its

constitutionality was challenged and the matter was decided by a 5 Judge bench of the Supreme Court in ***Sankari Prasad Singh Deo v. Union of India***[10]**.** The judgement held that Fundamental Rights are also subject to the amending power of the Parliament under Article 368. The Court distinguished between the *Ordinary Legislative Power* and *Constituent Power* and held that this is a constituent power and not ordinary legislative power. The judgement went on to state that…**the terms of article 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatever.** Subsequently, in ***Sajjan Singh V. State of Rajasthan***[11]***, the Apex Court, in a majority judgement,*** held that 'amendment' includes any change and not necessarily a change by way of improvement. Hence it would include repeal or substitution.

This issue was again considered when the 17th amendment was challenged and heard before an eleven Judge bench in ***Golak Nath V. State of Punjab (1967) 2 SCR 762;*** though the majority did not give categorical answer regarding the scope of Art. 368, a view was expressed (*obiter*) by some Judges that it should not go to 'the extent of abrogating the present Constitution and substituting it by an *entirely new one'*. In this case it was held that no provision of Part III or Fundamental Rights can be altered by an amendment under Article 368. Thereafter, to provide solution and overcome the difficulty caused due by the Golaknath case for enabling agrarian reforms & to bring right to property outside the ambit of fundamental rights, the ambit of the amending power under Art. 368 was sought to be clarified by enacting the Constitution (24th Amendment) Act, 1971 which, *inter alia,* inserted cl. (1) in Art. 368, containing the words *'amend by way of addition, variation or repeal any provision…'* The validity of this Amendment Act was unanimously upheld by the Special Bench in ***Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.***

The language used by the several Judges who constituted the majority in the Keshavananda case was not identical. The common ratio however was that the limitation to the power conferred by Art. 368 came from the very meaning of the word 'amend'. Justice Khanna observed in Para 1427: *The words "amendment of this Constitution" and "the Constitution shall stand amended" in Article 368 show that what is amended is the existing Constitution and what emerges as a result of amendment is not a new and different Constitution but the existing Constitution though in an amended form. The language of Article 368 thus lends support to the conclusion that one cannot, while acting under that article, repeal the existing Constitution and replace it by a new Constitution."*

Similarly, the limitation of the amending power was observed by Justice Mathew in Para 1567 as also by other judges. Justice Mathew summed up his conclusion in Para 1162, stating *that… Parliament could under Article 368 amend Article 13 and also the fundamental rights, and though the power of amendment under Article 368 is wide, it is not wide enough to totally abrogate or what would amount to an abrogation or emasculating or destroying in a way as would amount to abrogation of any of the fundamental rights or other essential*

elements of the basic structure of the Constitution and destroy its identity. Within these limits, Parliament can amend every article. In this view of the scope of the amending power in Article 368, I hold the Twenty-fourth Amendment valid, for it has the same amending power as it existed before the amendment."

However, contrary to the above majority view, another proposition, advanced by some other Judges (Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud JJ.) though in minority, negates any implied restriction to be imposed on the powers of the Parliament with respect to Article 368 and held it as against the wish of the framers of our Constitution. Ratio of the arguments can be summarised as observed by Justice Dwivedi in Para 1888 as under:

The grants of legislative power are ordinarily accorded the widest amplitude. A fortiori, the constituent power in Article 368 should receive the same hospitable construction. The word "amendment" should be so construed as to fructify the purpose underlying Article 368. The framers of the Constitution have enacted Article 368 for several reasons.

- ***First,*** *the working of the Constitution may reveal errors and omissions which could not be foreseen by them. Article 368 was designed to repair those errors and omissions.*
- ***Second,*** *the Court's construction of the Constitution may not correspond with the Constitution-makers' intention or may make the process of orderly government difficult.*
- ***Third,*** *the Constituent Assembly which framed the Constitution was not elected on adult franchise and was in fact not fully representative of the entire people.*
- ***Fourth,*** *at the apex of all human rights is the right of self-preservation. People collectively have a similar right of self-preservation. Self-preservation implies mutation, that is, adaptation, to the changing environment. It is in the nature of man to adjust himself to the changing social, economic and political conditions in the country. Without such adaptation the people decays (sic) and there can be no progress.*

Justice Dwivedi, after analysing Constituent Assembly Debates and Constitutional Jurisprudence worldwide against the implied limitation being imposed on Article 368 in the form of basic structure, observed that **Article 368 is the master, not the slave of the other provisions. Acting under Article 368, Parliament is the creator, not the creature of the Constitution** for the organic and natural growth of the society as per the need of every generation. Para 1890 goes on to state: *It is difficult to believe that those who had fought for freedom to change the social and political organisation of their time would deny the identical freedom to their descendants to change the social, economic and political organization of their times. The denial of power to make radical changes in the Constitution to the future generation would invite the danger of extraordinary constitutional changes of the Constitution.*

The Doctrine of Basic Structure

With a narrow margin of 7:6, it was held in the *Keshvananda's Case* that there are certain basic features of the Constitution which are un-amendable and Parliament can't exercise its power under Article 368 on similar line as of Constituent Assembly to amend *'Basic Structures of the Constitution*' and it can only be done by replacing the existing Constitution. Three modes have been suggested to replace the existing Constitution or amend the basic features: (a) Complete Revolution (b) Parliament converting itself into a Constituent Assembly & (c) Referendum/Plebiscite.

After *Keshvananda's Case* the scope of Parliamentary Power to amend the Constitution under Art. 368 have been curtailed and came under the purview of judicial scrutiny, whether it is violative of basic structure of the Constitution or not. According to Sikri, C.J. the 'basic structure' was built on the basic foundation i.e. the freedom and dignity of individual; He observed in (*As per Shelat & Grover JJ.)*

"**Para 582.** ….. If the historical background, the preamble, the entire scheme of the Constitution, relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure**. (These cannot be catalogued but can only be illustrated):**

1 The supremacy of the Constitution.
2 Republican and Democratic form of government and sovereignty of the country.
3 Secular and federal character of the Constitution.
4 Demarcation of power between the Legislature, the executive and the judiciary.
5 The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
6 The unity and the integrity of the Nation.

After *Golak Nath Case* no fundamental right could be taken away or abridged. But After *Keshvananda's Case* it is for the Court to decide whether a fundamental right is a basic structure or not. In ***Indira Gandhi V. Raj Narain (AIR 1975 SC 2299),*** the Supreme Court added the following features as 'basic structure' to the list of basic features laid down in *Keshvananda's Case:*

1. Rule of Law
2. Judicial Review
3. Democracy, which implies free and fair elections
4. Jurisdiction of Supreme Court under Article 32.

Further in ***Minerva Mills Ltd. V. UOI (AIR 1980 SC 1789);*** the Hon'ble Supreme Court by 4:1 majority struck down clauses (4) & (5) of Art. 368 brought by 42nd Amendment Act, 1976 to overcome the doctrine of basic structure. It has been struck down on the ground that these clauses destroyed the essential feature of basic structure of the Constitution. The Court held that the following are also the basic features of the Constitution:

1. Limited power of Parliament to amend the Constitution
2. Harmony and Balance between fundamental rights and directive principles
3. Fundamental rights in certain cases

4. Power of judicial review in certain cases.

Doctrine of Basic Structure as it Stands Today

After the re-affirmation and extension of the applicability of the doctrine of Basic Structure in the *Minerva Mill's Case*, it is now evident that so long as the decision in *Keshvananda's Case* is not overturned by another full bench of the Supreme Court, any amendment of the Constitution is liable to be interfered with by the Court on the ground that it affects one or other of the basic features of the Constitution.

Independence of Judiciary and Collegium system for appointment of Judges

In a recent case challenging the Constitutional validity of 99th amendment to the Constitution which paved the way for NJAC, ***Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1;*** the Supreme Court has struck down the amendment brought with overwhelming political consensus to bring ***transparency*** in judicial appointments as an alternative to collegium system on the basis of violation of independence of judiciary being one of the basic structure of the Constitution by majority of 4:1. It has held indirectly that collegium system is a basic feature of our Constitution! But it is flying on the face of the doctrine of Separation of Power, the Doctrine of Check and Balance and transparency in all public affairs of the State including judicial appointments.

However, the dissenting view delivered by Justice Chelameshwar also held independence of Judiciary as a part of basic structure but observed that the 99th Amendment was not violative of any of such basic features of the Constitution and indeed was necessary for increasing the efficiency and accountability of the Judiciary. In his dissenting view Chelameshwar J. precisely tried to balance both conflicting doctrines in Para 1212: ***Primacy of the opinion of judiciary in the matter of judicial appointments is not the only means for the establishment of an independent and efficient judiciary****. There is abundance of opinion (in discerning and responsible quarters of the civil society in the legal fraternity, jurists, political theorists and scholars) that primacy to the opinion of judiciary is not a normative or constitutional fundamental for establishment of an independent and efficient judiciary…"*

Judicial Reform: The Mystery of Elevation and Designation

On careful analysis the minority view taken by Justice Chelmeshwar appears more correct. Independence of judiciary will not be compromised if the executive or parliament have a say in the appointment process. On the contrary, it will increase transparency and confidence of the people in its process. The 99th Amendment with the National Judicial Accountability Bill was brought to fill the legislative vacuum created after adoption of the Collegium System to codify the process of appointment of judges. The common aspiration of the people was in its support to start with this judicial reform as there were allegations regarding methods being adopted for elevation of few selected classes of the advocates to the Constitutional Courts.

Opacity in the issue of representation among the judges is a matter of great concern, which can easily be assuaged by adopting basic democratic

principles adopted to establish the Rule of Law for executive and legislative wing of the State. The issue of designation as senior advocate by the Constitutional Courts is also marred with doubts of favoritism. To become a senior advocate, there is an impression that one has to be very close and known to the judges. Differentiation in the legal profession, as created under the British System between Barristers (UK law Graduates) and Vakils (Indian law Graduates), continues today under Advocates Act, 1961, as Senior Advocates and Advocates.

Today, overall, the Constitutional Courts are rightly under the accusations of opacity and favoritism to give good career prospects to a few selected class, which is continuing to enjoy the independence of judiciary in their own benefit. Therefore, the mystery of elevation to the benches and designation as a senior advocate by the *Juristocrats* needs to be solved. In judicial appointments and designations both we should start applying the legal principle propounded by Lord Hewart, the then Chief Justice of England in *Rex Vs. Sussex* (1924) *"Justice must not be done but also be seen to be done"*, with respect to fairness and transparency in elevation and designations.

Conclusion

In the light of the above discussion, it can be said that the basic structure doctrine lays down a vague and uncertain test. Can anything be called 'basic' which is not prone to any definite definition and of which even its creator is not sure about its contour? Further, the basic rational behind an amending provision in any Constitution is to provide an opportunity to the future generations to make suitable adjustments in it and thus bypass the fear of revolt/Constitutional breakdown. If this is the position, then how can it be assumed that certain basic provisions of the Constitution would never require amendment?

History has seen primarily three forms of government, viz monarchy or autocratic dictatorial regimes, aristocratic forms of government, and democratic governance models. Occasionally, in the timeline of history, we find one form of government yielding to another. Inefficient and bad democratic model of governance during the times of Socrates resulted in the rise of autocratic empires in Europe following the teachings of Aristotle. Monarchy of China and Czars of Russia succumbed ultimately to the communist models of governance in China and in the then USSR. Similarly, colonial imperialism gave way to the modern democratic rule-based governance model in USA and Bharat. Which system is better over the other is hugely contested, the entire cold war being based on these fault lines. Even today, it plays a crucial role when we see continuous reflux in the polarity of the world. But history is testament to the fact that conversion from one governance model to the another, is invariably due to bad governance, inability to provide stability and justice and failure to meet the popular will of the people.

We need to avoid the apparent conflict between the Judiciary and Legislature. The reconciliation between 'Basic Structure Doctrine' and 'Doctrine of Separation of Powers' can only be achieved if the different organs of the State adopt the 'Doctrine of Self Restraint'. The institutions which enjoy infinite power can only maintain such power if such institutions can

preserve its dignity and respect in a democratic society in the long run. Arbitrary and wanton exercise of such extraordinary powers may in future limit the scope of such power itself.

References:

1 *https://www.constitutionofindia.net/constitution_of_india/amendment_of_the_constitution/articles/Article%20368*

2 *See Section 3 of the Constitution (Twenty-fourth Amendment) Act, 1971*

3 *https://www.citizensinformation.ie/en/government_in_ireland/irish_constitution_1/constitution_introduction.html*

4 *(1973) 4 SCC 225*

5 *(1993) 4 SCC 441)*

6 *AIR 1982 SC 149*

7 *(2000) 4 SCC 640*

8 *(2007) 2 SCC 1*

9 *(2020) 13 SCC 585*

10 *AIR 1951 SC 458*

11 *AIR 1965 SC 845*

◆◆◆

Towards Muslim Women's Progress in India

Zeba Zoariah*

Origins of Hijab in Islam

The practice of veiling predates Islam in the Arabic peninsula. "Khimar" as it is referred to is a head scarf that was practised by both men and women in the pre-Islamic world, which basically is a scarf that is worn to cover the head and extends below on the back of a person. Depending on the length of the "Khimar", several words in Arabic exist to describe the garment worn by a person. Reference to the Khimar can also be found in verse *Surah al-Nur 24:31*[1] of the Quran, which basically prescribes women to use the "Khimar" and use it to cover the chest. Hence, this semantic difference has to be understood in order to understand the debate about Hijab/Burqa being an essential practice in Islam.[2] The other Surah in the Quran that discusses cloaking women in Islam is the *Surah-al-Ahzab 33:59*, which mandates the following,

"O Prophet! Tell your wives and your daughters and the women of the believers to draw their cloaks (veils) all over their bodies (i.e. screen themselves completely except the eyes or one eye to see the way). That will be better, that they should be known so as not to be annoyed. And Allah is Ever Oft-Forgiving, Most Merciful."

Essential Religious Practice vs Fundamental Rights in India

While arguments including a Karnataka High Court judgement in the **Resham v. State of Karnataka and Others (2022)** claim "Hijab as a non-essential part of Islam"[3,4], it is necessary to understand the fact that the word "Hijab" in its form cannot be found in the Quran. As discussed previously, the word is "Khimar". It is hence clear from these verses that an objective analysis of veiling or cloaking in Islam can be viewed as "essential practice". Although this expression "essential practice", purely from the academic point of view is based on references to the Quran and other religious scriptures of Islam, it has no legal basis. In India, the essentiality test is defined as, *"Test to determine whether a part or practice is essential to the religion - to find out whether the nature of religion will be changed without that part or practise"*, as per the **Commissioner of Police v. Acharya Jagdishwaranand Avadhuta (2004)** judgement[5] of the Honourable Supreme Court. An in-depth discussion on establishing Hijab as an essential practice in Islam and its practice as a fundamental right can be found in Shashwata Sahu's article.[6] Although the premise of the argument is centred on individual rights, fundamental rights as well as education of Muslim women, it is clear from Article 25 and Article 19(2) that restrictions on fundamental rights too can be imposed in order to maintain public order, morality and health. Hence, the argument of Hijab as an essential practices from the perspective of restriction on fundamental rights, does not stand

*Zeba Zoariah is a final year LL.B student at O.P Jindal Global University and is a Bachelors in Global Affairs from the same university. She writes articles on women rights, technology and law.

on firm ground. Additionally, the Karnataka High Court judgement as referred earlier, also cites examples of how practitioners of Islam, do not always wear the Hijab in public life, therefore, deeming it not as an essential practice.

Hijab in the Global Context

So, what exactly is Hijab and how does one have to reconcile the practice of veiling and contextualise it in contemporary Indian society? The term Hijab itself in Arabic means "barrier" or "partition", and is applicable to both men and women in Islam. It however, overtime assumed patriarchal connotation and has resulted in its imposition only on veiling women. While, most societies across the world contain one form of patriarchy or the other, Hijab however is viewed as one of the most regressive of patriarchal impositions on women. It is interesting to note that the discussion on "Hijab as an essential practice" in India is contemporaneous with protests against "Hijab" and oppression of women in Islamist regimes like Iran. It is also important to note that even a country like Kingdom of Saudi Arabia is witnessing a slow but steady move towards liberalism and women's rights under Mohammad bin Salman. Mohammad bin Salman himself, much to the chagrin of conservative elements of the Saudi society, has made it clear that the practice of Abaya or Hijab is not mandated by Islam and the country is currently undergoing a wave of progressivism.[7] It is therefore ironical that India is witnessing unending debates on the practice of Hijab, when the country where Islam originated is moving away from regressive patriarchal impositions.

Muslim Women's Rights are a part of Women's Rights

While political debates on issues like Hijab in India muddy the waters of women's progress, it is essential to have a nuanced view on the discussion. Taking political sides in order to shape narratives is detrimental to Muslim women's rights and reinforces control over them by the religious clergy. The time is ripe in India to initiate serious debates and discussions on the implementation of uniform civil laws in India, which on paper remains secular, yet courts intervene in matters of religious importance such as in the case of the Sabarimala verdict, Ayodhya verdict and even the Triple Talaq abolition. In a sense, Indian courts have assumed the status of religious authority, while the constitution of India declares the country as a secular state. Muslim women in India have been at the receiving end of "protecting secularism" for long, especially if one witnesses the reversal of Supreme court judgements such as in the Shah Bano case of 1986. While freedom of religion is guaranteed by India's Constitution in Articles 25-28, it is also necessary that religious elements and practices that are deemed unsuitable for the current day be identified and restricted, for the country to progress ahead. It is vital to recognise today, that the onus of upholding freedom of religion should not rest on the shoulders of Muslim women or should not be viewed from the point of view of minority rights. Issues that are faced by Muslim women should only be viewed from the prism of women's rights. This fundamental change in our judicial processes and public debates has to be emphatically established in order to move beyond religious debates.

Political Agendas as an Impediment to Muslim Women's Rights

One can argue that there are concerted efforts going on globally and in sections of Indian intellectual class to portray India as undemocratic or being oppressive to minorities. Such efforts are primarily carried out to tarnish the current political dispensation and can effectively be countered by appropriate counter-narratives. Agenda driven and motivated movements should not become an impediment for the progress of Muslim women in India. What such movements essentially do in a country like India are the following:

- Encourage regressive Islamist elements to hijack the debate
- Keep Muslim women oppressed under patriarchal practices
- Prevent Muslim women from achieving their potential

With close to 200 million followers of Islam in India and with half of them being women, the progress of Muslim women in India is integral to the nation's progress. As the world's fifth largest economy and soon to become the world's largest country by population, India is on the cusp of an era of tremendous transformation. It is in this context that Muslim women be equipped with necessary skills, vocational training and education, for them to join the mainstream of the society and contribute in a major way towards India's economic progress. With women's progress comes reform within the society, and in India's Muslims, reform is long overdue. Several issues related to radicalisation, ghettoisation and discrimination against "non-believers", can be achieved with the emancipation of Muslim women. While, women in India's other religious denominations have achieved tremendous progress and contribute in a major way to national progress, Muslim women in India are being denied such opportunities and worse, are being subjected to debates on issues like Hijab. This only encourages regressive elements to dictate terms and conditions on the behaviour of Muslim women and hence such elements must be denied that opportunity to do so.

Uniform Civil Laws and Oppressive Elements in Islam

Today, every India is aware of how medieval mindsets have resulted in the complete annihilation of minority rights in Islamist nations like Pakistan. The country is a failed state and has totally marginalised any liberal voice that is critical of elements that have hindered the country's progress. From abduction and forced conversions of underage girls to intolerance against Hindus, Pakistan is a basket case of religious extremism and its impact on Muslim women's progress. Similarly, in Afghanistan, women are today accorded second class status with severe restrictions on their rights. In the case of Iraq and Syria, the emergence of ISIS has led to women of Yazidi and Kurdish heritage being viewed merely as sex-slaves and objects for gratification of men's desires. Europe, thanks to the influx of immigrants from countries like Libya, Syria, Morocco, Tunisia etc, has become unsafe for women, with countries like Sweden figuring among countries with most number of rape cases. Mass molestations and underage girls being groomed for sexual favours are being witnessed from countries ranging from Greece to Germany and from France to the UK.

"Sharia no go zones" where even law enforcement agencies cannot effectively enforce law have mushroomed across countries like Belgium, Netherlands, Norway etc.

In such a scenario, the only way to ensure Muslim women are safe is by bringing in civil laws that bring them on equal footing with women from other religious backgrounds in India. Uniform civil laws in India are a major step in the direction of gender equality in India, especially in terms of inheritance and maintenance. Medieval practices like Nikah, Halala and Polygamy are still common in India and Muslim women have for long been victims of such practices. Muslim women often find themselves at crossroads as large sections are kept so oppressed and away from any education that they are even unaware of laws and legality. In such a scenario, discussion around uniform civil laws will make Muslim women of India aware of what their future course of action should be in order to achieve equity with their counterparts from other religious denominations.

Conclusion

There is a need to bring forth discussions related to uniform civil laws in India in an effort to narrow the gap between rights enjoyed by non-Islamic women and Muslim women. Discussions raking up religious sentiments and efforts to divert the discussion away from Muslim women achieving the optimal potential or to keep them oppressed under oppressive patriarchal practices are detrimental to the larger national cause towards progress and development. The onus of secularism by imposing norms like Hijab and Niqab should not lie on the shoulders of Muslim women in India. Muslim women's rights should purely be viewed from the point of view of women's progress without political or religious agendas that are the motivation behind the scenes. Finally, the only way for Muslims of India to join the mainstream and contribute in a major way to the nation's progress is by emancipating the Muslim women, who as professionals equipped with skills to survive in the 21st century, are likely to usher in the much-needed reform.

References:

1 *http://quransmessage.com/articles/a%20deeper%20look%20at%20the%20word%20khimar%20FM3.htm*

2 *LANE. E.W, Edward Lanes Lexicon, Williams and Norgate 1863; Librairie du Liban Beirut-Lebanon 1968, Volume 2, Page 807-808*

3 *https://theprint.in/judiciary/hijab-not-integral-to-islam-says-karnataka-high-court/873548/*

4 *https://www.livelaw.in/pdf_upload/75-resham-v-state-of-karnataka-15-mar-2022-412165.pdf*

5 *https://main.sci.gov.in/jonew/judis/25984.pdf*

6 *https://www.ijllr.com/post/the-hijab-row-a-case-study-of-karnataka*

7 *https://www.youtube.com/watch?v=I1BmwaFIJ0c*

◆◆◆

Confronting Challenges through Civilisational Perspective : An Interview with Shri Swapan Dasgupta*

Rami Niranjan Desai*

Rami Desai: Let me begin by asking you about the civilisation state. What does it mean and what in your opinion does it really entail?

Swapan Dasgupta: Well, you see, I think India is a very unique case. The normal yardsticks by which people measure a nation state, you know commonality of either faith, language, ethnicity and things like that, somehow don't work and it hasn't worked in the case of India. The usual Treaty of Westphalia model is not applicable in the case of India. What makes India and what binds it together is a form of culture. Now, culture is sometimes very difficult to define. Why is it that one part of India feels attracted to another part of India? I would put it that India is not a nation state in that sense but a civilisational state, bound by a sense of oneness, bound by emotional bonding. It's very difficult sometimes to define it. Some people have called it 'sacred geography', some people have called it something else, but whatever it is, I think, a civilisational state does epitomise this thing where a lot of people live together in harmony. You know, it used to be said, India is as much a nation as the equator. The reason why people didn't quite get the hang of it is because they never thought that culture or civilisation and the commonalities of that, could actually be the basis on which a nation state can be built. India has demonstrated that.

Rami Desai: So, as it becomes more popular where people are talking about the civilisational state, what changes in society as one comes to accept this terminology?

Swapan Dasgupta: Nothing changes in society, society evolves. And in India what has happened is, the mere fact that there has been a greater degree of communication, there has been a unifying feature of the markets, etc. It appears now, that on top of the civilisational state, some other form of political unity is also coming into being. That's a more recent phenomenon and a lot of people have attached much importance to it. What gives it salience, I believe is that in the context of twentieth and twenty-first centuries, its gives purposefulness in the way we act as a country. On top of the civilisational state, we now have a certain measure of political unity.

Rami Desai: We find America, China and India all being called civilisational states. Are there very stark differences in the way China and the US are seen as compared to India?

Swapan Dasgupta: We of course see them. In China there is a certain measure of Han uniformity, and they have tried to achieve uniformity

*Shri Swapan Dasgupta is former Member of Parliament, Rajya Sabha.

*Ms. Rami Niranjan Desai is Distinguished Fellow, India Foundation.

in terms of their language also, which is not something we do in India. Here we have different linguistic expressions. America also has this thing about the melting pot, whereby a certain measure of uniformity is tried to be imposed. It is not forcibly imposed, but it sort of works in that way. In India we don't. We actually celebrate diversity and look at our civilisation as a mosaic, with different parts complementing each other. This is difficult to explain, but there are various features whereby India is seen as one entity, and this has always been the case. India has lacked political unity. India never had a single state, but there was a sense of 'Bharatvarsha', a sense of India which always existed and people in their minds, in their imagination always thought of India as a single entity. This sense has been there for a very, very long time.

Rami Desai: So, as this term becomes more popular not just in India but even abroad, do you think that it impacts foreign policy, as also the way the world looks at India and the way India looks at the world?

Swapan Dasgupta: Well, I don't think it's become totally popular. I think there are a lot of people who still resist the idea that Indian is a civilisational State. They try to measure India in terms of other yardsticks and often find it wanting and therefore a lot of the academic discussions on India sometimes concentrate disproportionately on the fissiparous tendencies that may or may not exist in the country and on how India is shaping up. India, firstly, is not a power which has existed on the basis of conquest. This is one of the unique features of India. There's never been any examples of Indian conquest. Indeed, influence yes, not conquest. India had a certain influence in Southeast Asia, you know parts of Bali, Indonesia, Cambodia, present day, Cambodia, even Sri Lanka. There's been no lot of Indian influence there. But you cannot say that India physically made that a colony. That I think is very very important. Secondly, I think the reach of India in terms of its civilisational impact and in terms of its attractiveness was because there was no single centre. In China, there is this sense of the centre — the middle kingdom. In India, there's never been this idea of a centre, so each of these complementary parts have a certain degree of autonomy and are equal in that sense. There's no hierarchy in these constituent parts, and that is an important thing to note. Now in terms of foreign policy, it's been some time; it's been a while before it has made considerable gains. Earlier, from the time of Nehru and Krishna Menon, India saw itself as a moral force in world affairs. But the problem was that preachiness was not accompanied by any measure of economic strength. There was this caricature of India with a begging bowl, leading a hand to mouth existence, begging for sustenance. Now, that phase is well and truly over. There is today an understanding in the world that even though India may not be the topmost of the developing countries, it certainly has a unique place in the world and does not need

to rely on others for its sustenance. Today, many Asian countries and some African countries look at India, not merely as a leader in terms of its ability to head organisations such as NAM and G 20, but more as an alternative centre of economic well-being. So, the civilisational state has meshed in with the idea of India as a growing economic power. And I think it's complementary. In India, we often emphasise the soft power approach far greater than we approach the hard power. The former approach has also worked in terms of our ability to make a dent in the IT sector in terms of our brain power which we've actually too generously exported to the world without necessarily sometimes looking at ourselves. That is the Indian footprint we see all over the world.

Rami Desai: Coming back to India as a civilisational state framework, how do you see recent flashpoints such as the hijab controversy?

Swapan Dasgupta: Well, the question will always be asked: How does a civilisational state work with the Constitution? This is because the Constitution is based on certain rules, certain understanding of how society is to be ordered. Now, in the case of something like the hijab controversy, for example, you could say, well, it's not really offensive in any way. It doesn't affect people outside the Islamic world, and affects only a part of Islamic Society. It should, therefore, be left alone and the normal rules of gender equity, which should be there in a modern state, need not apply. And if we take the idea of a civilisational state to be its diversity, we can simply let the matter rest there. But we are also talking about certain common, consensual values here. When those consensual values are offended in some way, whether it happens under the framework of a Hindu or Muslim custom, or the custom of any other religion, it has to be set right. A civilisational state does not necessarily exclude the humanitarian basis, the humanness of any civilisation. In the case of the hijab controversy, it is also seen as an affront to the women concerned. It offends their self-respect, their dignity and their status in the public eye and that is why there has been a movement against it. Now obviously it's not gone unchallenged and those who support it state that it is based on their scriptures. I am not getting into that controversy, whether that is the case or not. All I can say is that a civilisational state does not necessarily mean that the civilisation is frozen in antiquity, that the civilisation is not modern.

Rami Desai: So, if the Constitution often seems to become the battleground when we talk about civilisation state, do you think that there would be challenges when legislation such as the Uniform Civil Code is brought in?

Swapan Dasgupta: Well, the Uniform Civil Code is an aspiration which is written in the Constitution, but we are from actualising the same, partly because we haven't got a draft for a common code to actually take shape. The people

need to know the changes that will come about by the UCC. Till the time it is applied, until the time it is made into part of Indian law, we should have a system whereby all the other civil codes which exist are based on certain common notions of humanity and that gender equity is respected. That's the interim stage leading to the point where you can have Common Civil Code based on our ability to extrapolate all the good features of all the different cultures and traditions which are there. But this is a very difficult task to accomplish. To start the process, we need a draft which can be discussed.

Rami Desai: Considering the fact that India is uniquely, ethnically and theologically diverse, how do we synthesise it all under a civilizational state?

Swapan Dasgupta: Well, you're right in saying it's ethnically diverse. Let us take the case of customary law, which is one of the biggest problems we are going to face, particularly in northeastern India. How do we weave that in? Where do we give the space for local cultures and traditions? Now that's a big challenge. Why should local traditions and cultures be actually suppressed and made uniform, in a one size that does not necessarily fit all. So, we can have a common Civil Code, but where do we accommodate differences? Now that is both an intellectual and a legal challenge. That is why I say, it's not something which should be taken very casually. That is why a draft is very, very important. We need a working paper first, where people can come to terms with what is acceptable and what is not. I don't think human ingenuity is lacking, so customary law can be brought. And then there is the tradition of common law which exists in the United Kingdom, in which customary law actually fits in various ways.

Rami Desai: I think that is a point very well made because we have large tribal populations with ancient practices that we don't quite understand.

Swapan Dasgupta: We understand it on their own terms, but we do not understand it when it comes to how it engages with the modern world.

Rami Desai: Absolutely. One of the problems that I face while studying these areas is the fact that even the academic tools that we use are outsider tools, such as anthropology or sociology and thus, this remains an intellectual challenge. But having said that, we also have been talking a lot about the freedom of temples from state control. Again, you know it's been in the news. It's been controversial. What are your views on that?

Swapan Dasgupta: Well, I think it's not that complicated an issue. In India, most religious shrines are controlled by their own people. For the Gurdwaras, it is the

SGPC which exercises control in terms of a 1920s enactment. You have certain self-regulating bodies for the mosques. But when it comes to

temples, some have self-regulation, but the larger ones are controlled by the state-controlled bodies. Now, initially, the purpose behind it might have been to weed out some corrupt practices and other distortions which might have crept in. But I think we have gone beyond that now and a demand exists in society that the Hindus too, must regulate their own religious practices and their religious institutions. And when that is not happening, the majority community feels discriminated against and that is a very dangerous thing to happen, for it could lead to a strong backlash. I think it is time now for the Hindu community to regulate its own temples, and for that the state can act as a facilitator. Look on it as Privatisation. How do we facilitate privatisation in a smooth and orderly manner, where the new controlling authorities are also accountable. It is more of a management challenge than anything else.

Rami Desai: But then on the other side you also have the Waqf Board controversy.

Swapan Dasgupta: Yes, some of these Waqf Boards are extremely badly managed and some are extremely corrupt also, as stated by members of the community itself. The Waqf Boards also cannot be left to their own devices. I think the Waqf Boards too need a certain degree of reform and accountability. Who are they catering to? Are they catering to the community or are they catering to a small group of people who are the management trustees? The idea behind the workforce has been defeated.

Rami Desai: Quite right. But having said that, why do you think all of these controversies are coming up now? Have people become more aware of all these issues, or has it been gradually happening?

Swapan Dasgupta: No, I think there has been a fundamental change in the way people are looking at the polity. There was a time when it was believed that the only thing which really mattered was the economy, the need to improve the living standards of people, the GDP etcetera. The importance of religion and religious institutions was consciously underplayed. It was always an important factor, but it was never formally recognised in the structures of power. So, it existed as an informal grey area. But now, such grey areas have assumed greater significance for the people and have become very important. They are part of the larger institutions of life, and social existence is based also on these things. That is the reason why the internal workings of these institutions are being examined with a more critical eye, than was hitherto the case. I think what we are seeing is that the legitimacy of religion has been acknowledged in India. While it was always there informally and we as the people of the country knew ourselves to be deeply religious, there was a mismatch between what was perceived by the people and how the same was viewed by the state and by the polity. The polity thought that religion would become less and less important in the lives of people as modernity set in. But that was an erroneous conjecture.

Rami Desai: Would you say that was true of of, let's say, the European world or the Western world?

Swapan Dasgupta: Well, that was certainly the belief in India among the elites as far as the 1980's/90's. Right from independence, that was the sort of elite aspiration that we will become something in the nature of a mini Europe in terms of our values if not anything else and in fact progress was assessed in terms of how much closer you've arrived to America or to Europe. I don't think those assumptions are true any longer.

Rami Desai: Yes, public awareness has increased a great deal and perhaps people are reading a lot more. Or perhaps it is the social media that has created such a general awareness that India seems to have come into its own.

Swapan Dasgupta: Well, it's a combination of social awareness and other factors, but I think economic progress has got a lot to do with it. When you develop a greater degree of self-confidence in yourself, you're able to stand up to people and say, look, you know, I don't need your charity. So, you don't become victims of condescension and view yourself as people who are successful and who have abilities in their own right. I think that's the change which has happened. This sort of self-deprecation really took place at a time when India had been drained of its wealth by foreign rulers and had lost political and economic sovereignty; it didn't happen prior to that. But the fact that despite such onslaughts over the past millennium, we still retained some measure of ourselves and preserved our core identity, bespeaks the strength of a civilisational state. There may be areas of it which are slightly battered. But it's there. The fundamentals are intact.

Rami Desai: Quite right. So let me come to my final question now. There's also been a lot of discussion around reservations for the EWS, the economically weaker sections. This has now been largely accepted. Do you think this debate now trumps the kind of caste-based reservations and the idea that we had of that sort of discrimination?

Swapan Dasgupta: Well affirmative action is always a problematic issue. It's you know what and who are you benefiting? Now in India, at one level we are talking about a casteless society, but on another level constitutionally, we've accepted caste as a category. The last caste census was carried out in 1941 and today, we are again harking back to it. †here has been the politicisation and the empowerment of certain castes, which has become a major factor. Castes are important politically and in other ways too. Now, reservations for the economically weaker section is an attempt to find a way out for those who just got left out and who felt shortchanged by the entire process. It is a way of trying to coexist two different principles altogether. One is based on caste, and the other is not based on birth but your circumstances. So, we are trying to mesh two very different systems. Per se, I don't see anything

wrong with it, but I don't think caste is likely to go away. I think we've revived caste in a big way. What we can hope for is that casteism goes away and maybe caste exists as a social category. But I may be being too wildly optimistic on that front because I think this is a problem. This is going to be a serious problem in terms of our future development if caste becomes more than just the social category.

Rami Desai: You just said that we've sort of revived it. How have we revived caste in a big way.

Swapan Dasgupta: You know caste was again thought to be something which will gradually erode. But it appears to have formalised into the Indian system. Firstly, there was reservation for the scheduled castes and tribes. This was then extended to the backward castes. Again, there's a tussle about who could become backward and who could not. So, everybody wants a share of the reservation pie and in that context, you find the EWS coming in. They too want a share of the pie. All this has led to caste being revived in a big way. Because it's seen as the category, it's seen as the unit in which a certain privilege can be obtained.

Rami Desai: So, you don't see a social shift happening?

Swapan Dasgupta: Alas, no. I think caste is going to remain, but I hope its influence is not malevolent.

◆◆◆

Digital Lending Apps: The Invisible Threat to National Security

Siddharth Acharya and Manan Agarwal*

The Indian economy recently cemented its position as the world's fifth largest economy overtaking the United Kingdom. The Prime Minister of India at the SCO summit 2022 projected GDP growth at 7.5% which would be the highest among the world's biggest economies.

Amidst these ground-breaking milestones India needs to stay cautious of the impending dangers surrounding this growth especially from its hegemonic and hostile neighbour China. The threat from China is manifold from the tangible and downright threat of military engagement on the borders to the intangible and largely uninterrupted threats through virtual/technological means.

The Financial Debt Threat

Driven by its quest for ultimate global dominance and in a bid to out-muscle the US stronghold in strategising military resources in critical locations globally, China has, in the last decade, adopted every trick in and out of the book. The Belt and Road Initiative (BRI) of the Chinese Communist Party (CCP) is one such example, where China is engaged in the financing of infrastructure projects of poor, developing countries in a series of long-term loans at seemingly high interest rates. The consequences of this financing are slowly coming to light with the most recent example being the usurping of the Hambantota International Port of Sri Lanka which is of critical geopolitical importance with respect to exercising control in the Indian Ocean.

A Time magazine article described Chinese debt as *methamphetamine of infrastructure finance: readily available, highly addictive and with long term negative effects that far outweigh any temporary high*. A 2021 study titled "Review of How China Lends: What Did 100 Chinese Lending Contracts Teach Us?" Is revealing. The study, which analysed the terms of 100 Chinese infrastructure lending contracts, found a lack of adequate disclosure of terms and conditions and an existing vagueness in the terms. Additionally, it revealed that post-pandemic, debtor capability of repayment of these debts has been greatly endangered owing to the nature of the economic status of the borrowing nations, which simultaneously increased the risk of dire consequences for the borrower nations.

The geo-political locations of the countries who have been beneficiaries to the Chinese loans greatly affect the diplomatic interests of India from a national security point of view. Debt-trapping nations and seizing infrastructural assets of border countries offers the Chinese potent resources to establish strategic military units increasing their ability to acutely monitor and strategise attempts

*Siddharth Acharya is a practicing advocate in Supreme Court of India. Apart from legal profession he has directed acclaimed documentary films on Kashmir and CPEC. He writes extensively and frequently on Constitutional issues and judgments pronounced by Supreme Court.

to infiltrate and influence other growing economies like India.

The Data and Cyber Threats

Christopher Wary, the Director of the Federal Bureau of Investigation (FBI) of the USA, in a 2020 event spoke on the economic and national security threat posed by China to the US. He called the attempted economic espionage threat the greatest long-term threat to the US. He then elaborated on the means used by China to carry out Intellectual Property Theft to bolster their technological innovation. He also spoke of the use of cyber resources to procure high volumes of critical citizen data which China then uses to monitor activity and pose a serious irreversible threat.

State funded cyber-attacks on top US tech companies poses danger not only to the US citizens but also puts global user data at risk. The growing threat of data attacks and lack of adequate means of detection and seemingly inadequate regulations around data protection make India a soft target for cyber-attacks. The trade and use of data for undesirable purposes not only puts the privacy of citizens at risk but also adds a serious national security threat. A 2021 German study classified all the elements of personal data misuse in 11 different categories including use for derivation of coercive incentives, creating religious and racial disharmony, influencing political narratives, social engineering, organised crime, evidence manipulation, torture, bullying among others.

Considering these threats, India needs a strictly enforced and robust data protection framework. This is the prominent reason why the government has stressed upon the requirement of locating data processing units and data servers of foreign companies within the territorial limits of the country also termed as 'Data Localisation.' It is of particular importance to preserve the privacy of the citizens of the country and ultimately secure the sovereignty of the nation and not hinder its socio-economic development through blatant intangible weaponising means of data and cyber-attacks.

An adversarial, resourceful, powerful neighbour, which has hostile intentions against India, and which has ready access to information on all aspects of citizen activity, poses a serious threat to India's security, sovereignty, integrity, and development.

The Threat in India

In India, where direct financing, military engagement as well as diplomatic intimidation approaches have failed, China has resorted to more capricious means for causing disturbances in the socio-economic setup. This, after China unleashed the wrath of biological warfare on the world which considerably slackened the growth of the global economy except its own. It is a combination of two of its weapons widely used in the global scenario—finance (debt) and abusing large scale citizen data.

During the pandemic, China flooded the Indian market with several digital lending apps which fell outside the purview of the RBI's regulations and carried out large scale individual lending to desperate borrowers in need of money due to the unfortunate circumstances led by the pandemic. The government bodies, then focused on dealing with the mass hysteria surrounding the crises of the pandemic, failed to take note as it occurred.

The modus operandi of the apps was entering into outsourcing agreements with NBFCs (Non-Banking Financial Companies) to carry out digital lending on the furnishing of First Loss Default Guarantees to them.

The hidden aspects of their arbitrary operation included charging fluctuating interest rates and exorbitant penal charges, unclear terms and conditions, illegal data collection, data export and unauthorised processing. The apps engaged Recovery Agents who used sensitive data (extracted without knowledge and authorisation of the users from their devices) as leverage to blackmail innocent borrowers in paying unreasonably high interest and penal charges. The consequences are only being slowly discovered and acknowledged now, nearly two years after the onslaught of operations of these apps. The borrowers have faced the brunt with incidents of harassment and blackmailing, leading to some borrowers even committing suicide.

It is now being discovered that many of these apps had no legal standing whatsoever and have been since banned from operating in a series of notifications issued regarding the same. The disproportionate, unnecessary, and unauthorised data collection by these apps and particularly exporting of all the data back to China has been the prominent reason why the government has recently, in more instances than one, moved to ban several Chinese apps. It comes as a major threat to the privacy of citizens and has the potential for far-reaching consequences in the future—data monitoring, influencing social/political decision making, targeted advertising, offshore data trading, social engineering, predictive policing etc.

The other immediate threat of capturing innocent buyers in debt traps makes a sizeable portion of the workforce insolvent and renders them incompetent to contribute to their personal growth thereby restricting the overall growth of the nation.

The Scope of Illegal Operations

A recent Directorate of Enforcement (ED) investigation revealed that the Instant Loan Providing Digital Apps also known as Fintech companies backed by Chinese funds carried out large scale digital lending activities on entering into MoU agreements (Memorandum of Understanding) with NBFCs without any interference or checks. The Lending Apps took control of the social media data of the clients. High interest rates and late fees were imposed. The investigation also reveals the major decisions related to the operations of these Fintech companies were instructed by Chinese owners based in Hongkong. 12 NBFCs are said to have been involved in such agreements with various foreign backed Fintech companies having disbursed a total sum of 4430 crore leading to a total profit of 819 crore.

The entire sum of 819 crore is being regarded as proceeds of crime and being further investigated under the provisions of the Prevention of Money Laundering Act, 2002. The operations of the Chinese Digital Lending Applications are indeed audacious. In short, they operate on agreements (with questionable validity) with NBFCs, (several of them said to have expired licenses), exploiting desperate borrowers by charging them unreasonably high interest and variable charges, extracting and exporting high volumes of

unauthorised citizen data including personal and financial data, blackmailing and harassing them by hiring recovery agents acting as extortionists, disrupting the financial stability of citizens of the unorganised sector, hindering financial growth of the nation, posing a serious financial and national security threat and quite audaciously making a huge profit out of it all.

The Action: Too Little Too Late?

The RBI had been aware of these threats by the Digital Lending Apps and a Working Group on Digital Lending was established on 13 January 2021. The Working Group submitted its report of recommendations on 18 November 2021. On 10 August 2022, through a press release, the RBI adopted certain parts of the recommendations of the Working Group for immediate implementation. Finally, on 2 September 2022, an official circular was issued providing further clarity on the details of implementation of the recommendations and brought forth strict guidelines on the operation of Digital Lending Apps and Lending Service Providers. It emphasised the direct movement of funds to and from the bank accounts of the regulated entities and the bank account of the borrower. It also laid down instructions on data collection, storage, and processing mechanisms to be strictly followed by the apps. A deadline of 30 November 2022 was given for the apps to make their systems compliant with the terms issued under the guidelines.

Additional legislation with respect to data protection is long overdue with the government having recently withdrawn the Personal Data Protection Bill, 2019 after a Joint Parliamentary Committee recommended a host of amendments to the bill. A new piece of legislation is expected to be introduced, incorporating the recommended amendments as early as in the winter session of the Parliament which shall be the governing law in matters relating to data protection in the country.

It can be argued that the RBI perhaps waited too long to intercept and investigate the practices followed by Digital Lending Apps and probably did not take the scope of their operations all too seriously. It is however, for the best that further delay has been avoided and affirmative action has been taken. Material efforts are now being seen to be put in order to regulate Indian and foreign backed lending companies, whose operations were indubitably putting a strain on the financial stability of a major section of population. To counter and prevent compromising of citizen data privacy, strict provisions have been issued in the latest guidelines on Digital Lending.

Conclusion

The Indian economy being on the ascendant and India's good relations with most nations in the South and South-East Asian region is probably a cause of concern for Beijing. The CCP has consequently adopted various means to cause disturbances in India such as creating tension on India's border with Tibet, exerting undue influence over countries like Nepal and Bhutan which have traditional strong ties with India and by providing strategic loans under its BRI to strengthen its geopolitical and military stance by encircling India with investment in infrastructure projects in countries all around it. China is leaving no stone unturned in its no-holds barred attempt to interrupt

the overall socio-economic development of India.

The underlying threat, pursuant to the illegal collection and processing of data, should not be taken lightly and a strong model to detect data breaches and efficient countering mechanisms need to be established. The downsides and negative uses of data can have alarming consequences given the tense political climate within the country. It could be used to further hateful agendas and contribute adversely to the already highly polarised society.

Furnishing unregulated debts predominantly to those in the unorganised sector is bound to have an adverse impact in the economic stability of the entire sector. Steps need to be taken to mitigate the harm already done and ensure the prevention of any further damage. Furthermore, instances like these will serve to cause severe apprehensions about emerging technologies and their potential uses, particularly in finance. It will make public trust and acceptance a difficult prospect for future government policy initiatives in adopting these technologies in banking, finance, and other sectors. The net result being a large chunk of the population may well miss out on the convenience and truly beneficial aspects of the technological advancements.

These attempts are, in all probability, just one example of how China is trying to cause major imbalances in the overall socio-economic fabric of India. Future threats need to be anticipated in the interest of the citizens and the larger interest of preservation of the sovereignty of the country. This can be done through vigilance and caution and by keeping abreast with the ever-evolving realm of technology.

References:

- *Directorate of Enforcement (ED) Press Release 3rd August, 2022*

  https://enforcementdirectorate.gov.in/sites/default/files/latestnews/HYZO%20Loan%20APP%20PAO%20No%203.pdf

- *RBI Guidelines on Digital Lending, Circular issued 2nd September 2022*

  https://rbidocs.rbi.org.in/rdocs/Notification/PDFs/GUIDELINESDIGITALLENDINGD5C35A71D8124A0E92AEB940A7D25BB3.PDF

- *The Threat Posed by the Chinese Government and the Chinese Communist Party to the Economic and National Security of the United States, Christopher Wray (Director Federal Bureau of Investigation) - Hudson Institute, Video Event: China's Attempt to Influence U.S. Institutions Washington, D.C. July 7, 2020*

  https://www.fbi.gov/news/speeches/the-threat-posed-by-the-chinese-government-and-the-chinese-communist-party-to-the-economic-and-national-security-of-the-united-states

- *China Cyber Threat Overview and Advisories - Cybersecurity and Infrastructure Security Agency, United States of America*

  https://www.cisa.gov/uscert/china

- *Financial Stability and National Security in an Era Of Hegemonic Rivalry: The Need To Tighten United States Securities Disclosure Requirements by Joel Slawotsky (University of Pennsylvania Journal Of Business Law, 2020)*

  https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1603&context=jbl

- *It's A (Debt) Trap! Managing China IMF Cooperation Across The Belt And Road – Dylan Gerstel (Researcher at Center for Strategic and International Studies)*

  https://csis-website-prod.s3.amazonaws.com/s3fs-public/181017_DebtTrap.pdf?MKq76lYIBpiOgyPZ9EyK2VUD7on_2rIV

- *Johnston, Lauren A, Reviewing How China Lends: What Did 100 Chinese Lending Contracts Teach Us? (April 30, 2021)*

  Available at SSRN: https://ssrn.com/abstract=4070631 or http://dx.doi.org/10.2139/ssrn.4070631

- *Balding, Christopher, Chinese Open Source Data Collection, Big Data, And Private Enterprise Work For State Intelligence and Security: The Case of Shenzhen Zhenhua (September 13, 2020).*

  Available at SSRN: https://ssrn.com/abstract=3691999 or http://dx.doi.org/10.2139/ssrn.3691999

- *Kröger, Jacob Leon and Miceli, Milagros and Müller, Florian, How Data Can Be Used Against People: A Classification of Personal Data Misuses (December 30, 2021).*

  Available at SSRN: https://ssrn.com/abstract=3887097 or http://dx.doi.org/10.2139/ssrn.3887097

- *RBI's Report of the Working Group on Digital Lending including lending through Online Platforms and Mobile Apps*

  https://rbidocs.rbi.org.in/rdocs//PublicationReport/Pdfs/DIGITALLENDINGF6A90CA76A9B4B3E84AA0EBD24B307F1.PDF

- *"China harvests masses of data on Western targets"*

  https://www.washingtonpost.com/national-security/china-harvests-masses-of-data-on-western-targets-documents-show/2021/12/31/3981ce9c-538e-11ec-8927-c396fa861a71_story.html

- *WHO-convened Global Study of Origins of SARS-CoV-2: 14 January-10 February 2021, Joint Report*

  https://www.who.int/emergencies/diseases/novel-coronavirus-2019/origins-of-the-virus

- *WHO calls for further studies, data on origin of SARS-CoV-2 virus, reiterates that all hypotheses remain open*

  https://www.who.int/news/item/30-03-2021-who-calls-for-further-studies-data-on-origin-of-sars-cov-2-virus-reiterates-that-all-hypotheses-remain-open

- *WHO Director-General's remarks at the Member State Briefing on the report of the international team studying the origins of SARS-CoV-2*

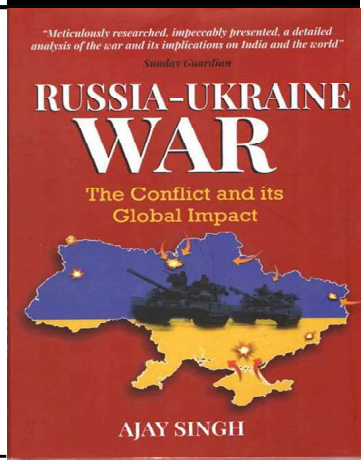
  https://www.who.int/director-general/speeches/detail/who-director-general-s-remarks-at-the-member-state-briefing-on-the-report-of-the-international-team-studying-the-origins-of-sars-cov-2

- *The Open Data Market and Risks to National Security: https://www.lawfareblog.com/open-data-market-and-risks-national-security*
- *https://time.com/5381467/china-africa-debt-us-security/*
- *data.imf.org*
- *https://en.wikipedia.org/wiki/Operation_Aurora*
- *https://www.ft.com/content/f27a543b-7678-4130-9c05-db0492d9c240*
- *https://www.cnbc.com/2019/06/12/chinas-loans-causing-hidden-debt-risk-to-economies.html*

◆◆◆

BOOK REVIEW

Russia Ukraine War: The Conflict and its Global Impact



Author: Ajay Singh

Publication: Pentagon Press

Pages: 213

Price: Rs. 895, Hardcover

Book Review by Maj Gen Dhruv C Katoch*

Ukraine became an independent country in 1991, following the break up of the Soviet Union. On 24 February 2022, Russian forces moved into Ukraine, to halt what Moscow perceived to be a deliberate attempt by NATO to continue with its eastward expansion, which could potentially result in Ukraine joining the grouping. That was a red line which Moscow would not allow to be crossed, and was presumably the trigger that led to Russian forces invading Ukraine. But the events leading up to the Russian attack had been brewing since the Orange Revolution of 2004. Ukraine became an area of contestation between the European Union and Russia, which in turn divided the country into two blocs: A pro-European Western Ukraine and a pro-Russia Eastern Ukraine. This tussle led initially to the Orange Revolution, then to the Euromaidan protests of 2014 and finally to the Russian invasion of 2022.

In 1954, the Russian-populated oblast of Crimea was transferred from the Russian to the Ukrainian Soviet Republic. At that time, since both were part of the Soviet Union, it mattered little, but control of Crimea, which had a 75 percent Russian ethnic majority was vital to the security interests of Russia as its Black Sea Fleet was headquartered there. Following the Euromaidan protests in 2014, Russian forces seized control of the Crimean region on 18 March 2014. In April of that year, fighting broke out between the Ukraine army and pro-Ukraine forces on one side against those supporting an independent Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR), which had been self-proclaimed in April 2014. That conflict, since then has led to thousands of people being killed and over a million being internally displaced.

The Minsk accords, first agreed in September 1914 and later revised in February 2015 as Minsk II, could have led to peace and stability but they were violated and the self-governance promised to the Donbas region did not come about. Tensions between Russia and Ukraine continued to rise, till on 22 February, Russia formally recognised the DPR and LPR and then two days later, invaded Ukraine.

Most military observers were of the view that the Russian military would bring the war to a quick closure. Russian aims were initially limited to affect a quick change in regime and install a government

*Maj. Gen. Dhruv C. Katoch is Editor, India Foundation Journal and Director, India Foundation.

which was not hostile to Russian interests and which would commit Ukraine to not joining NATO. A combination of military ineptness on the part of the Russian military leadership plus the rallying of the people by President Zelensky has seen the war drag on now for over 10 months, with no signs of the conflict coming to an end any time soon. Russia has taken most of the Donbas region, and the Zaporizhzhiya and Kherson oblasts to give it control over the entire northern coastline of the Black Sea bordering Ukraine, less the city of Odessa. This has linked Crimea to the Russian mainland by the land route, passing through Donbas and Zaporizhzhiya, and has secured Russian access to the Atlantic via the Mediterranean Sea. But at the same time, a fresh set of challenges, which make conflict resolution a distant dream has been thrown up.

For Russia, it would be politically unacceptable to give back what it has gained on the battlefield. Similarly, for Ukraine, the minimum acceptable solution is a return to the status quo. How such irreconcilable positions can be addressed remains to be seen.

This book, "Russia Ukraine War: The Conflict and its Global Impact" delves a bit into history, but for the most part is focussed on the conduct of military operations. The last quarter of the book looks into the geo-political impact of the war and the economic consequences for the world which the war has caused, especially as it comes just when the world was emerging from two years of an economic slowdown caused by the Covid Pandemic.

How the war has been fought so far has been analysed with clinical professionalism, to include the planning and preparatory phase of operations, followed by the actual conduct of operations by the Russians as well as the counter offensive by Ukraine. The wealth of details brought forth in the book makes it a delight for the military professional to understand various aspects of the war-fighting that has taken place as also, where things went wrong for the Russians in terms of conduct of operations at the operational and tactical levels as also weaknesses at the military leadership level. The host of military and political lessons which the war has thrown up need to be seriously studied, for they have application for India as well as all other militaries and governments across the world.

The last quarter of the book gives out a set of scenarios which could bring about the end game, but the book also looks into the possibility of the war degenerating into a nuclear conflict which could have horrific consequences. The Russia-China convergence has also been covered as has the NATO angle in this war. Importantly, the book looks into the global impact of the war and how this could lead to a new world order. It ends with a well-thought essay on the lessons which India could learn from the war.

The war is not over and doubtless, much of the information about the conduct of operations remains classified and not open to the public. But even so, the book remains an important source document, with a wealth of analysis on different aspects of the war as well as on its geo-political and geo-economic impact. The author, Col Ajay Singh as well as those who contributed to it deserve to be congratulated on taking out this very educative volume. Meticulously researched and impeccably presented, the book is strongly recommended for all those who have an interest in the military and in international relations as also for the lay reader.

◆◆◆

Wishing our Readers
A Very Happy Healthy and
Prosperous 2023


INDIA FOUNDATION
Analysis * Advocacy * Awareness