AYODHYA RAM JANMABHUMI-BABRI MASJID LINGERING CONFLICT PROBLEM: A CRITIQUE OF ITS RESOLUTION BY THE CONSTITUTION BENCH OF THE SUPREME COURT IN *M. SIDDIQ V. MAHANT SURESH DAS* (2019)**

[POPULARLY KNOWN ***AS*** *AYODHYA CASE (2019)*]

Dr. Virendra Kumar*

Abstract

The prime purpose of our critiquing Ayodhya Case (2019) is two-fold. The first one is to present a rounded view of the Supreme Court's singular strategy that has led it to resolve a highly complex conflict problem revolving around the title of a disputed property. The conflict was lying loaded with religious susceptibilities, involving violation of the Rule of Law at some critical junctures (to wit, episodes of 1857, 1939, 1949 and 1992), and with sparse and scattered corroborative evidence drawn from diverse resources – archaeology, history, philosophy, religion, law and legal principles. In this respect, we have perceived and read the Supreme Court decision-making as an 'intriguingly interesting Judgment', which is characterised by antiquity, showing how to resolve the conflict problem skilfully and with ingenuity that has hitherto defied solution for centuries past, and that too within a relatively short span of 41 days of hearing!

The second purpose is to examine critically some of the interrogatives of public concern that tend to make the validity of the Supreme Court judgment somewhat suspect in the perception of public at large. In this wise, we have particularly examined the popular perception; namely, whether the Supreme Court judgement is 'majoritarian in character', representing 'the victory of faith over facts,' and unduly favouring the Hindus over the Muslims despite the secular credentials of the Indian State, even to the extent of rewarding them for their violation of the Rule of Law with impunity. A critical review on this count reveals that such public concerns stood completely negotiated by the Supreme Court in their judgment in the light of our critique as presented in this article.

All this has prompted us to conclude that the Supreme Court, in its endeavour of 'doing complete justice' by acting judiciously on the principle of 'justice, equity and good conscience,' has eventually produced an equitable, well-balanced and, therefore, acceptable historic judgment, ushering in an era with new beginnings!

This judgment is essentially premised on the Places of Worship (Special Provisions) Act, 1991, which was specially enacted by the Parliament to permit the Supreme Court by way of specific exception to deal with the Ram Janmabhumi-Babri Masjid lingering conflict problem in Ayodhya. Since that very Act of 1991 has now become the subject of judicial challenge through a Public Interest Litigation (PIL), challenging its constitutional validity (SC has already issued a notice to Central Government on March 12, 2021, intending to examine the validity of the law preserving religious character of places of worship as existing on August 15, 1947 and, on March 20, 2021 a plea has also been filed in the apex court to oppose the same), the Ayodhya case (2019) is most likely to be re-visited with all its subtlety and nuances. Herein lies the augmented value of the present critique.

I. Introduction

The judgment of the Supreme Court in *M. Siddiq v. Mahant Suresh Das*, popularly known as *Ayodhya case* (2019),[1] is perceived and read by us as an

---

** Special Lecture delivered on First Prof. (Dr.) Anil Kumar Thakur Memorial Lecture organized at Department of Laws, Panjab University, Chandigarh on Apr. 27, 2022.

* LL.M., S.J.D. (Toronto, Canada), Professor Emeritus in Law, [Founding Director (Academics), Chandigarh Judicial Academy; Formerly: Chairman, Department of Laws; Dean, Faculty of Law; Fellow, Panjab University & UGC Emeritus Fellow]

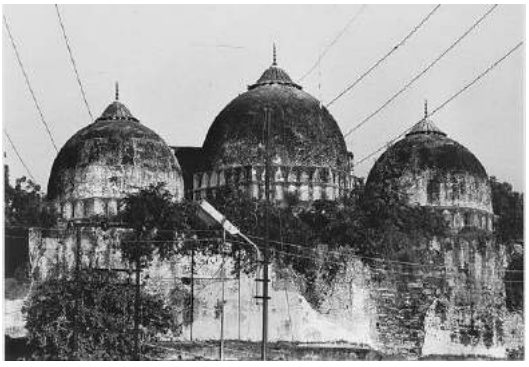
'intriguingly interesting Judgment.' This is in terms of its resolution of Ram Janmabhumi-Babri Masjid lingering conflict problem in Ayodhya. We may decipher the following few striking features that make it 'intriguingly interesting'.

First feature: *Ayodhya case* (2019) is characterised by ANTIQUITY, which arouses our inherent curiosity to know about its high value in terms of twin-factors; namely, its age and quality.[2] *In terms of AGE, Ayodhya case* (2019) deals with the conflict-problem between the Hindus and the Muslims, which has been lingering on for about 500 years![3]

However, in terms of *QUALITY, Ayodhya case* (2019) is a resolution of, not just a lingering conflict between the Hindus and the Muslims about the title of a piece of land but, a lingering dispute, which is *loaded with religious susceptibilities,* and this is what makes it truly 'intriguingly interesting'.

[Flash point of religious susceptibilities became manifest in the demolition of Babri masjid on December 6, 1992?]

Picture of three-domed structure built during the regime of Babur (r. 1526-30)



Picture of Babri Masjid in preparation of its demolition

Courtesy: GOOGLE

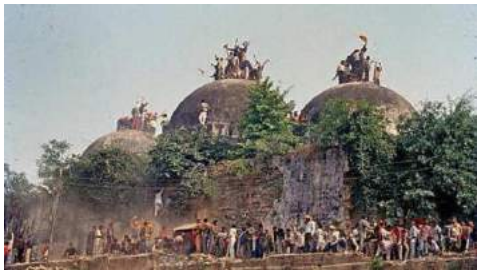
---

* The author is beholden to Sheetal Kumar Setia, Assitant Professor of Law at University of Mumbai, Mumbai, and Dr. Anil Kumar Thakur, Associate Professor of Law at Panjab University, Chandigarh for their invaluable support in the finalization of this article. Both of them ungrudgingly perused the manuscript and offered their incisive comments, which have been duly incorporated.

1 *M. Siddiq (D) thr. L.Rs. v. Mahant Suresh Das and Ors*. MANU/SC/1538/2019 (Decided on 09.11.2019), per Ranjan Gogoi, C.J.I., S.A. Bobde, Dr. D.Y. Chandrachud, Ashok Bhushan and S. Abdul Nazeer, JJ. Hereinafter, simply *Ayodha case (2019)*

2 An antique is invariably always considered to be a prized possession - something of a very of high value sheer because of its age and quality, and, therefore, it instantly invokes our curiosity!

3 Seemingly the conflict is about a piece of land in Ayodhya at a place traditionally believed as Ram Janmabumi (Ram Janmosthan), where an old three-domed structure, built during the reign of Muslim King Babur (r. 1526–1530), stood prior to its demolition by the Hindu *karsewaks* on December 6, 1992. For centuries past, this whole site has come to be known and called as Ram Janambhumi-Babri Masjid complex in Ayodhya. [Babur (14 February 1483 – 26 December 1530) was the first Emperor of the Mughal dynasty in the Indian subcontinent.]

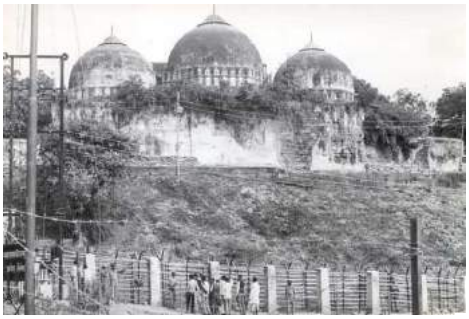


Courtesy: GOOGLE

Courtesy: GOOGLE

Picture of the site after the demolition of the masjid.

Second feature: *Ayodhya case* (2019) shows how the Supreme Court has resolutely resolved the conflict, which hitherto defied solution at least for more a century-and-a-half when it precipitated in the form of communal riots during the British regime in 1857, which led to bifurcation of Ram Janmabhumi-Babri Masjid complex into 'inner' and 'outer' courtyards. Such a separation was effected purely as a measure of 'law and order' for arresting the continuing conflict between the two communities of the Hindus and the Muslims.[4]



Picture showing inner and outer courtyards.
Courtesy: GOOGLE

Sketch picture of inner and outer courtyards
Courtesy: GOOGLE

[4] See *Ayodhya case (2019),* para 788(VI): "The setting up of a railing in 1857 by the British around the disputed structure of the mosque took place in the backdrop of a contestation and disputes over the claim of the Hindus to worship inside the precincts of the mosque. This furnished the context for the riots which took place between Hindus and Muslims in 1856-7. The construction of a grill-brick wall by the colonial administration was intended to ensure peace between the two communities with respect to a contested place of worship. *The grill-brick wall did not constitute either a subdivision of the disputed site which was one composite property, nor did it amount to a determination of title by the colonial administration*." (Emphasis added)

Third feature: *Ayodhya case* (2019) shows how the Supreme Court has skilfully negotiated the various twists and turns of the conflict during its chequered history of about 500 years in general and particularly since the year of 1857 during the British regime; through the episode of 1939 when the Babri masjid was partially damaged by the Hindus and restored by the British at their own expense; communal riots in 1949 leading to surreptitious installation of Hindu idols in the inner courtyard; and its complete demolition on December 6 in 1992.[5]

Fourth feature: *Ayodhya case* (2019) is a multi-dimensional judgment, inasmuch as it shows how the Supreme Court in their decision-making has relied upon voluminous collaborative evidence drawn from diverse resources, including History, Archaeology, Religion, Philosophy, and of course Law and legal principles.[6]

Two more features maybe added, which are seemingly peripheral, rather than substantive, in nature. Since these features are somewhat peculiar, they add value to the 'intriguingly interesting' character of the *Ayodhya case* (2019).

***Fifth feature*:** *Ayodhya case* (2019) is a uniquely unanimous judgment inasmuch as it seeks 'unanimity in anonymity'. It is distinctly different from the two other major conventional modes of seeking unanimity with a certain degree of added advantage. It is different from the cases in which unanimity is sought through one single judgment authored by one of the justices on the bench, and the other Judges append their signatures in agreement by simply adding, 'I agree.' See, for instance the 9-Judge bench decision of the Supreme Court in *I.R. Coehlo case* (2007).[7]

Ayodhya case (2019) is also different from the cases in which unanimity is sought through the writing of separate but concurring judgments. See, for instance, the 9-Judge Bench judgment of the Supreme Court in *Justice K S Puttaswamy (Retd.) case* (2017), in which there are as many as six separate but concurring judgments, producing the effect of unanimity.[8]

On comparison, in *Ayodhya case* (2019), on the contrary, there is one single judgment, authored by all the judges on the bench, as if each of the paragraph of the 806-para judgment had been penned down by each one of the Justices on

---

5 See generally, *infra*, Part III: Critical Analysis (2) "What are the contours of the basic premise which has prompted the Supreme Court to uphold the title of the disputed site in favour of Hindus?"

6 See, *infra*, note 90 and the accompanying text.

7 For analysis on this count, see, Virendra Kumar, "Basic structure of the Indian Constitution: The doctrine of constitutionally controlled governance [From His Holiness Kesavananda Bharati (1973) to I.R. Coelho (2007)] *Journal of the Indian Law Institute*, Vol. 49 No. 3 (2007) 365-398.

8 For exposition on this count, see, Virendra Kumar, "Dynamics of the 'Right to Privacy': Its characterization under the Indian Constitution [A juridical critique of the 9-Judge Bench judgment of the Supreme Court in Justice K S Puttaswamy (Retd.) case (2017)]," *Journal of the Indian Law Institute*, Vol. 61:1 (2019) 68-96.

the Bench individually, but incognito![9] And this is what makes the judgment, what we describe as, 'unanimity in anonymity,' and, thereby, reflecting their collective wisdom by completely concealing the identity of the contributing judges.[10] In this respect, conceptually it is most akin to the concept of Mitakashra coparcenary under Hindu Law, conveying 'community of interest, unity of possession', completely merging the identity of the contributing members into the joint family as a whole![11]

Sixth feature: *Ayodhya case* (2019) has an added flavour of an "Addenda," which is placed at the end of the judgment. It constitutes an intriguingly interesting feature, inasmuch as it provides, not just an 'extra information' but, a full-fledged, independent, judgment running into as many as 170 paragraphs, answering the specific question specifically that the Supreme Court refused to answer earlier in the Presidential reference.[12] It carries no name of the contributing judge, and not even the paragraph number, conveying as if something is added without being added, giving rise to an apprehension, whether Addenda is indeed a part of the judgement despite its inclusion?[13]

---

[9] The last operative para of the judgment – para 806 - which states that all the appeals shall stand disposed of in the above terms and that the parties are left to bear their own costs, followed by customary Acknowledgment, carries no names or signatures of the justices as a token of authenticating the judgment.

[10] *Ayodhya case* (2019) is neither unanimous in the traditional or conventional sense, wherein a judgment is authored by one of the judges by name on the Bench (usually, the senior most Judge or the Chief Justice if he is the member of the Bench), with or without inputs from other judges, and all the remaining judges append their respective signatures by stating "I agree." Nor it is a concurring judgment leading to unanimity. Structurally, it is, thus, a uniquely unanimous judgment of the Constitution Bench of five judges in which unanimity is achieved in a unique manner by departing from the usual either of the conventional modes!

[11] For the exposition of unity in Hindu joint family, see generally, Virendra Kumar, "Crucifying the concept of Mitakshara Coparcenary at the altar of income-tax law (A critique of Chander Sen and catena of cases dittoing its decision-principle)," *Journal of the Indian Law Institute*, Vol. 53 (2011) 413-436.

[12] See the prefatory remarks to the Addenda in *Ayodhya case* (2019): "One of us, while being in agreement with the above reasons and directions, has recorded separate reasons on: 'Whether the disputed structure is the birth-place of Lord Ram according to the faith and belief of the Hindu devotees'. The reasons of the learned judge are set out in an addendum." For refusal to answer the Presidential Reference by the Supreme Court, see, *infra*, note 37 and the accompanying text.

[13] The *Ayodhya case* (2019) verdict and its "addendum" are unsigned. A theoretical issue, therefore, could be raised about their legal validity or enforceability. This is on the analogy of the general principle that unsigned affidavits or evidence of any kind whatsoever from any litigant before the court are not acceptable. However, in the instant case it would indeed be pertinent to ask about the critical circumstances that had led the Supreme Court Constitution Bench to pronounce their unsigned judgment in an unprecedented manner on Saturday, November 9, 2019, which is not the regular working-day of the Supreme Court.
In our own view, Addenda raises a substantive issue about its intrinsic value. A bare perusal of the Addenda reveals that it does not provide merely some additional, supplementary, information. Aren't the reasons abstracted from the Addenda already an

II. Centrality of our critique and its contours

The prime purpose of our critique is to present a rounded view of the Supreme Court strategy [which we terms as the strategy of 'subjective-objective premise', seeking objectivity in subjectivity] that has eventually led it to resolve the highly complex conflict problem, which is loaded with religious susceptibilities,[14] involving violation of the Rule of Law at some critical junctures,[15] with sparse and scattered corroborative evidence shrouded in antiquity often suffering from 'inadequacy,'[16] and that too within a relatively short span of 41 days of hearings,[17] - a judgment eventually premised on

---

integral part of the judgment authored by all the judges including the one who chose to add especially on the issue which is central to the collective decision making? Aren't the additional reasons adduced in the Addenda need to be taken into consideration in the exposition of the eventual decision? It requires a healthy academic debate and discourse on the value of Addenda, which does not bear even the separate paragraph number.

If the Judge, the author of the Addenda, "while being in agreement with the above reasons and directions," still choses to add something, he must have something special to say, may be in terms of his rational to reach the same conclusion! Since the Addenda is not just a few additional statements, but a full-fledged systematic account of whole gamut of reasoning running into 170 paragraphs. In terms of its contents and complexion, it is something in the nature of a concurring judgment. It seems, the distinguished judge, who has put in lot of labour in articulating his thoughts, did not wish to go his labour waste, and thus vehemently chosen to put on record his analysis even incognito!! Thus, inclusion of Addenda, in our view, is not just an addition of some extra information, but seems to be a mode of 'accommodating' the judge by the other members of the Bench.

[14] See generally, *id.*, para 2: The subject matter of adjudication is the lingering dispute between two religious communities Hindus and Muslims over a piece of land admeasuring 1500 square yards located in the town of Ayodhya. "The Hindu community claims it as the birthplace of Lord Ram, an incarnation of Lord Vishnu. The Muslim community claims it as the site of the historic Babri Masjid built by the first Mughal Emperor, Babur." The origin of this dispute is shrouded in antiquity. Metaphorically speaking, as put by the Supreme Court, the genesis of the conflict may be traced to the "idea" which is "as old as the idea of India itself." On factual matrix, "The events associated with the dispute have spanned the Mughal Empire, Colonial Rule and the present constitutional regime." The factor of religious susceptibility tends to make evidence somewhat 'indeterminate' in character, and, therefore, its evaluation by the court is marked invariably, at least seemingly, by the element of 'subjectivity'.

[15] The Supreme Court has itself indicated at this arduous task by stating in the very first introductory paragraph of the *Ayodhya case* (2019): "This Court is called upon to fulfil its adjudicatory function where it is claimed that two quests for the truth impinge on the freedoms of the other or *violate the Rule of law*." See, *id*., para 1 (emphasis added). See also, *infra*, Part III (2)(vi) regarding the episode of 1939 when the Babri masjid was partially damaged unlawfully by the Hindus and restored by the British at their own expense; communal riots in 1949 leading to surreptitious installation of Hindu idols in the inner courtyard; and its complete demolition on December 6 in 1992 in violations of the rule of law.

[16] Exploration of evidence, which is lying embedded deep into the past, often creates the problem of its inadequacy.

[17] See, *Ayodhya case* (2019), para 2: "Constitutional values form the cornerstone of this nation and have facilitated the lawful resolution of the present title dispute through forty-

'justice, equity and good conscience' leading to its reasonable 'acceptability' by all the stake holders involved.[18] (We tend to term the SC judgment as the strategy of seeking 'objectivity in subjectivity'.)

The critical contours of our critique may be delineated as under:

(a) Epicentre of the Ayodhya conflict problem

What is the critical point involved in the Ram Jamabhumi-Babri Masjid conflict problem which caused a big bang, what we may term as, a socio-religious-political DHAMAKA, and became virtually the starting point of the precipitating conflict of our deep concern demanding its instant resolution? It all began with the demolition of the Babri Masjid (in the inner courtyard) and the Ram Chabutra (in the outer courtyard) of the Ram Jamabhumi-Babri Masjid complex in Ayodhya on December 6, 1992 by Hindu *karsewaks.* This demolition spree was in flagrant violation of the existing court order of maintaining *status quo* passed in 1949.[19]

(b) State's strategic-reactive-response to the conflict phenomenon

The State (to be read as the Central Government) instantly responded to meet the unprecedented crisis situation. At the first blush, since demolition of dilapidated structure created the acute problem of law and order, not only just confined to the town of Ayodhya in the State of Uttar Pradesh (U.P.) but, in the entire country. In fact, this episode, shook the conscience of the Nation as a whole through polarization of communal conflict on the basis of religion between the Hindus and the Muslims. Accordingly, to arrest the fall outs of this precipitating socio-religious-legal-political conflict phenomenon, the central government immediately moved in with two-fold, what we may term as, 'immediate' and 'mediate' responses.

---

one days of hearings before this Court." Besides, we may decipher at least two reasons that might have prompted the Supreme Court to hasten up the process of resolution of the conflict elsewhere. One, the conflict arising out of religious susceptibilities, which came to the Supreme Court on May 9, 2011 [see, *id.*, paras 29-32], should not be allowed to linger on as it disturbs the peace and tranquillity of society. Two, the issue of constitutional interpretation is to be decided by specially constituted Constitution Bench, and in the instant case, the Chief justice Ranjan Gogoi, who was leading the constitution bench in the last run of the case proceedings, was on the verge of retirement (demitting office on November 17, 2019), and if the case was not decided during his tenure, another Constitution Bench would be required to be constituted, and that would mean another round of proceedings afresh. All that would cause inordinate delay in the resolution of an urgent problem. Thus, in the instant case, there was an acute time-constraint, which limited the limits of any further endless exploration, and thereby indefinitely postponing the resolution of the conflict problem. The Chief Justice was determined to see the culmination of the case proceedings before he demitted office on Nov 17, 2019. Accordingly, within relatively a short span of 41 days hearing, the judgment was announced on Saturday, the 9th of November, 2019 in the crowded Court No. 1. [Unprecedented to hold the court on Saturday, the closed day for regular court work!]

[18] See, *infra*, note 149 and the detailed accompanying text.

[19] See, *infra*, Part III(2)(vi): "Ceaseless contestation over the possessory control in respect of the inner courtyard (termed by the Hindus as the *'Garbha Griha'*)."

Immediate response: Instant acquisition by the Central Government of "certain area in Ayodhya," including particularly the disputed area known as Ram Janmabhumi-Babri Masjid complex, through the Proclamation of an Ordinance,[20] which was soon repealed and replaced by *The Acquisition of Certain Area at Ayodhya Act, 1993*,[21] with a retrospective effect.[22]

The resultant impact of this move has been that on and from the date of commencement of this Act, "the right, title and interest" in relation to "certain area in Ayodhya,"[23] shall, by virtue of this Act, "stand transferred to, and vest in, the Central Government"[24] for "the maintenance of public order and harmony between different communities in the country."[25]

Statutory connotation of acquisition of "certain area in Ayodhya" needs to be noticed particularly. It refers to the area known as the area "relating to the structure (including the premises of the inner and outer courtyards of such structure), commonly known as the Ram Janma Bhumi- Babri Masjid, situated in village Kot Ramchandra in Ayodhya, in Pargana Haveli Avadh, in tehsil Faizabad Sadar, in the district of Faizabad of the State of Uttar Pradesh."[26]

The broad breakup of the acquired area is as follows: The total acquired area is 67.703 acres of land as "specified in the Schedule,"[27] which included 2.77

---

20 The Acquisition of Certain Area at Ayodhya Ordinance, 1993 (Ord. 8 of 1993) was issued on January 7, 1993 to acquire 67.703 acres of land in and around the Ram Janmabhumi-Babri Masjid complex.

21 No. 33 of 1993 [enacted on April 3, 1993]: "An Act to provide for the acquisition of certain area at Ayodhya and for matters connected therewith or incidental thereto." Hereinafter, simply cited as *Ayodhya Act of 1993*. Section 13 of this Act, dealing with 'repeal and saving', provides: "(1) Subject to the provisions of sub-section (2), the Acquisition of Certain Area at Ayodhya Ordinance, 1993 (Ord. 8 of 1993), is hereby repealed. (2) Notwithstanding anything contained in the said Ordinance,- (a) the right, title and interest in relation to plot No. 242 situated in village Kot Ramchandra specified against SI. No. 1 of the Schedule to the said Ordinance shall be deemed never to have been transferred to, and vested in, the Central Government; (b) any suit, appeal or other proceeding in respect of the right, title and interest relating to the said plot No. 242, pending before any court, tribunal or other authority, shall be deemed never to have abated and such suit, appeal or other proceeding (including the orders or interim orders of any court thereon) shall be deemed to have been restored to the position existing immediately before the commencement of the said Ordinance; (c) any other action taken or thing done under that Ordinance in relation to the said plot No. 242 shall be deemed never to have been taken or done. (3) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act."

22 Section 1(2) of the *Ayodhya Act*, 1993: "This Act shall be deemed to have come into force on the 7th day of January, 1993." [This was the day when Ordinance was proclaimed]

23 Specifically specified in the Schedule, as per Section 2(a) of the *Ayodhya Act of 1993*.

24 Section 3 of the *Ayodhya Act* of 1993, dealing with the acquisition of rights in respect of "certain area" in Ayodhya.

25 See Preamble of the *Ayodhya Act* of 1993.

26 See, *ibid.*

27 *Ibid.* See also as per Section 2(a) of the *Ayodhya Act* of 1993.

acres of disputed land in the Ramjanmabhoomi-Babri Masjid complex, out of which 1,480 square yards was occupied by the Babri Masjid compound until its demolition on December 6, 1992.

We may also notice the three-fold "effect of vesting"[28] as a sequel of acquisition by the Central Government:

(i) Expansive nature of 'vested' property: it is deemed to include all property – movable and immovable, such as lands, buildings, structures, shops of whatever nature, or other properties like temples, mosques, graveyards, and all other rights and interests in, or arising out of, such properties as were immediately before the commencement of this Act in the ownership, possession, power or control of any person or the State Government of Uttar Pradesh, as the case may be, and all registers, maps, plans, drawings and other documents of whatever nature relating thereto.[29]

(ii) Freedom from encumbrances and restrictive use of vested property: All properties vested in the Central Government are deemed to be free and discharged from all sorts encumbrances caused by trust, obligation, mortgage, charge, lien, etc., and freed from any attachment, injunction, decree or order of any court or tribunal or other authority restricting the use of such properties in any manner or appointing any receiver in respect of the whole or any part of such properties shall cease to have any effect.[30]

(iii) Abatement of all pending proceedings before any court, tribunal or other authority: On the commencement of this Act, any suit, appeal or other proceeding in respect of the right, title and interest relating to any property which has vested in the Central Government, pending before any court, tribunal or other authority, shall abate.[31]

Mediate response: The second simultaneous response of the Central Government, making Presidential reference to the Supreme Court under Article 143 of the Constitution constitutes an admirable attempt to settle the dispute by going to the root of the problem. The critical point raised in the reference is: "Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhoomi and Babri Masjid (including the premises of the inner and outer courtyards on such structure) in the area on which the structure stands..."[32]

(c) Judicial reactive response to the Executive spontaneous actions:

The judicial response has emerged on the basis of writ petitions challenging the Executive actions under the Act of 1993 on the touchstone of the Constitution. We have been able to decipher two main rounds of judicial responses of the Supreme Court.

---

28 See generally Section 4 of the *Ayodhya Act* of 1993.

29 Section 4(1) of the *Ayodhya Act* of 1993.

30 Section 4(2) of the *Ayodhya Act* of 1993.

31 Section 4(3) of the *Ayodhya Act* of 1993.

32 See, *Ayodhya case (2019)*, para 24.

The first round of judicial response of the Supreme Court: Cumulative and consolidated consideration of the pending writ petitions, challenging the constitutionality of *Ayodhya Act* 1993 before the High Court as well as the apex court, along with the Presidential Special Reference No. 1 of 1993 is reflected by the Constitution Bench of the Supreme Court in their decision in *Dr. M Ismail Faruqui v. Union of India* (1994). [33] This constitutes the inauguration of its first judicial response by the Supreme Court on the touchstone of the Constitution.

The result of the first round of judicial response of the Constitution Bench in *Dr. M Ismail Faruqui* (1994) may be abstracted in terms of their three-point holdings:[34]

(i) Section 4(3) of the Act of 1993, which provides for the abatement of all pending suits and legal proceedings, was declared as unconstitutional and, therefore, invalid, because, "without providing for an alternative dispute resolution mechanism for resolution of the disputes between the parties thereto," it clearly constitutes "extinction of the judicial remedy for resolution of the dispute [through the instrumentalities of the courts] amounting to negation of Rule of law."[35]

(ii) The remaining provisions of Act of 1993 were held to be constitutional and valid, inasmuch as Section 4(3) of the Act, which has been held unconstitutional, is "is severable from the remaining Act."[36]

(iii) In view of the holding under (i) and (ii) above, responding to Special Reference made by the President of India under Article 143(1) of the Constitution to the Supreme Court has become "superfluous and unnecessary and does not require to be answered," and, therefore, "very respectfully" declined to answer and returned "the same."[37]

---

[33] The writ petitions challenging the constitutionality of the Act of 1993 under Article 226 of the Constitution before Allahabad High Court were transferred to the Supreme Court, which were heard along with the Presidential Special Reference No. 1 of 1993 and decided by the Constitution Bench in their single judgment, *Dr. M Ismail Faruqui v. Union of India*, MANU/SC/0860/1994: (1994) 6 SCC 360, dated 24 October 1994. Hereinafter simply, *Dr. M Ismail Faruqui (1994).*

[34] The Constitution Bench of the Supreme Court in *Dr. M Ismail Faruqu*i (1994) has articulated and crystalized its decision in the form of as many as 12 points, but, for our analysis we have identified three pivotal points, and the remaining points as an illumination of those pivotal points. See generally Ayodhya case (2019), para 25.

[35] See, Ayodhya case (2019), para 25, citing para 96(1)(a) of the Constitution Bench decision in *Dr. M Ismail Faruqui (1994).*

[36] See, *id*., para 25, citing para 96(1)(b) of the Constitution Bench decision in *Dr. M Ismail Faruqui (1994).* Accordingly, the challenge to the constitutional validity of the remaining Act, except for Sub-section (3) of Section 4, was rejected on the basis of the doctrine of severability.

[37] See, *id*., para 25, citing para 96(11) read with para 96(12) of the Constitution Bench decision in *Dr. M Ismail Faruqui (1994).*

(d) Three consequences of constitutional invalidity of the abatement provision under Section 4(3) of the Act of 1993 in Dr. M Ismail Faruqui (1994):

First consequence: Revival of all the "pending suits and other proceedings relating to the disputed area within which the structure (including the premises of the inner and outer courtyards of such structure), commonly known as the Ram Janma Bhumi - Babri Masjid, stood," "for adjudication" before the appropriate courts.

Second consequence: Pending the outcome of adjudication, the Central Government was appointed as a statutory receiver for the maintenance of status quo and to hand over the disputed area "in terms of the adjudication made in the suits for implementation of the final decision therein."[38]

---

[38] See, *id*., para 25. citing para 96(4) of the Constitution Bench decision in *Dr. M Ismail Faruqui (1994), which* limits the vesting power of the Central Government: "The vesting of the said disputed area in the Central Government by virtue of Section 3 of the Act is limited, as a statutory receiver with the duty for its management and administration according to Section 7 requiring maintenance of status quo therein Under Sub-section (2) of Section 7 of the Act. The duty of the Central Government as the statutory receiver is to hand over the disputed area in accordance with Section 6 of the Act, in terms of the adjudication made in the suits for implementation of the final decision therein. This is the purpose for which the disputed area has been so acquired." Since the purpose of the vesting power consequent to the acquisition of entire 68 acres of land, in terms of the decision of Supreme Court in *Dr. M Ismail Faruqui (1994)* would vary, depending upon whether the property acquired is disputed property or whether it is for developmental purposes for the public at large other than the disputed property, further conclusions arrived at by the Constitution Bench under para 96(5-9) are required to be reproduced in full:

(5) The power of the courts in making further interim orders in the suits is limited to, and circumscribed by, the area outside the ambit of Section 7 of the Act.

(6) The vesting of the adjacent area, other than the disputed area, acquired by the Act in the Central Government by virtue of Section 3 of the Act is absolute with the power of management and administration thereof in accordance with Sub-section (1) of Section 7 of the Act, till its further vesting in any authority or other body or trustees of any trust in accordance with Section 6 of the Act. The further vesting of the adjacent area, other than the disputed area, in accordance with Section 6 of the Act has to be made at the time and in the manner indicated, in view of the purpose of its acquisition.

(7) The meaning of the word "vest" in Section 3 and Section 6 of the Act has to be so understood in the different contexts.

(8) Section 8 of the Act is meant for payment of compensation to owners of the property vesting absolutely in the Central Government, the title to which is not in dispute being in excess of the disputed area which alone is the subject matter of the revived suits. It does not apply to the disputed area, title to which has to be adjudicated in the suits and in respect of which the Central Government is merely the statutory receiver as indicated, with the duty to restore it to the owner in terms of the adjudication made in the suits.

(9) The challenge to acquisition of any part of the adjacent area on the ground that it is unnecessary for achieving the professed objective of settling the long standing dispute cannot be examined at this stage. However, the area found to be superfluous on the exact area needed for the purpose being determined on adjudication of the dispute, must be restored to the undisputed owners.

Third consequence: In view of the two consequences as stated above, responding to Special Reference made by the President of India under Article 143(1) of the Constitution to the Supreme Court had become "superfluous and unnecessary" and did not require to be answered," and, therefore, "very respectfully" declined to answer and returned "the same."

(e) Result of revival of judicial remedy: The first round of judicial response in Dr. M Ismail Faruqui (1994)

The Full Bench of the Allahabad High Court,[39] decided the multiple suits "on a finding that Hindus and Muslims were in joint possession," and accordingly "directed a three-way bifurcation of the disputed site, one third each being assigned to the Muslims, Hindus and Nirmohi Akhara."[40]

The decision of the Allahabad High Court of 'equal division' of disputed property, along with the Presidential reference, came to be challenged before another Constitution Bench of the Supreme Court through a number of writ petitions, and the same was decided by it in the case, titled as, *M. Siddiq v. Mahant Suresh Das*, called the *Ayodhya case (2019).* With this begins the second round of judicial response of the Supreme Court to the *Ram Janma Bhumi- Babri Masjid conflict problem*.

(f) The second round of judicial response of the Supreme Court in M. Siddiq v. Mahant Suresh Das (2019)

It began with the plethora of appeals against the 'equal division' judgment of Allahabad High Court along with the pending Presidential Special Reference

---

However, the challenge by the undisputed owners to acquisition of some religious properties in the vicinity of the disputed area, was rejected at that stage by granting them the liberty "to renew their challenge, if necessary at a later appropriate stage, in cases of continued retention by Central Government of their property in excess of the exact area determined to be needed on adjudication of the dispute." *Id.*, para 25, citing at para 96(10) of the Constitution Bench decision in *Dr. M Ismail Faruqui (1994).*

39 The Full Bench comprised of Justices S.U. Khan, Sudhir Agarwal and D.V. Sharma.

40 *Ayodhya case (2019)*, para 789. The decision was rendered on 30 September 2010 to the following effect: "Justice S.U. Khan held that *title follows possession* and based on the provisions of Section 110 of the Evidence Act came to the conclusion that the disputed site should be equally distributed between the three parties. Justice Sudhir Agarwal held that the area under the central dome of the disputed structure is believed to be and worshipped by the Hindus as the place of birth of Lord Ram. This part of the land, he held, *constitutes the deity called 'Sri Ramjanmasthan'* which has specific significance to the Hindus. Insofar as the other land within the inner courtyard is concerned, Justice Agarwal held that *it has been continuously used by members of both communities for prayer and worship*, noticing that the prayer for relief in Suit 5 had been "worded in a manner showing that the same has not been asked from the Court but has been left to the discretion of the Court if it finds expedient". Justice Agarwal held that in order to do complete justice and to avoid a multiplicity of litigation, it was open to the court to mould the relief Under Order VII Rule 7 of the Code of Civil Procedure. Justice Agarwal therefore also joined in directing a three-way bifurcation in terms of a preliminary decree. Justice D.V. Sharma, decreed Suit 5 in its entirety." Ibid. [Emphasis added]

No. 1 of 1993.[41] A five-judge bench, headed by the then CJI Gogoi, in a unanimous verdict reversed the 'equal division' judgment of the Allahabad High Court, and decreed the entire 2.77 acre of disputed land in favour of deity 'Ram Lalla', and also directed the Centre to allot a five-acre plot out of the acquired land to Sunni Waqf Board for building a mosque in Ayodhya.[42]

The reversal of the 'equal division' judgment is mainly for two reasons. One, none of the disputing parties before the court asked for division of the disputed property in their respective pleadings, not even as an alternative relief,[43] and while deciding the question of title, "it is not open to the court to grant relief to the Plaintiff on a case for which there is no basis in the pleadings."[44] In this process of assuming the jurisdiction of a civil court in case

---

41 There were appeals arising out of "four regular suits which were instituted between 1950 and 1989," resulting in three judgments of the Allahabad High Court, in which voluminous evidence, both oral and documentary was led, "running the course of 4304 pages."

42 This historic judgment in *M. Siddiq v. Mahant Suresh Das* (2019) was delivered on November 9, 2019 (Saturday).

43 The dispute between the Hindus and the Muslims over the immovable property in Ayodhya admeasuring 1500 square yards was not over the division of that property on the basis of joint ownership amongst the Ayodhya case (2019)contesting parties. The Allahabad High Court was called upon to decide specifically the question of title particularly in the declaratory suits, while hearing: (i) a suit by a worshipper seeking the enforcement of the right to pray (Suit 1); (ii) a suit by Nirmohi Akhara asserting shebaiti rights to the management and charge of the temple (Suit 3); (iii) a declaratory suit on title by the Sunni Central Waqf Board and Muslims (Suit 4); and (iv) a suit for a declaration on behalf of the Hindu deities in which an injunction has also been sought restraining any obstruction with the construction of a temple (Suit 5). See, *Ayodhya case (2019)*, para 791.

44 *Ayodhya case (2019)*, para 792, citing *Srinivas Ram Kumar v. Mahabir Prasad* MANU/SC/0021/1951 : 1951 SCR 277 (para 9), in which a three judge Bench of this Court held: "…. in the absence of any such alternative case in the plaint it is open to the court to give him relief on that basis. The Rule undoubtedly is that the court cannot grant relief to the Plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet." This principle was reiterated in the judgment of the Constitution Bench in *Sri Venkataramana Devaru v. State of Mysore* MANU/SC/0026/1957: 1958 SCR 895, in which Justice Venkatarama Aiyar, speaking for this Court held: "The object of requiring a party to put forward his pleas in the pleadings is to enable the opposite party to controvert them and to adduce evidence in support of his case. And it would be neither legal nor just to refer to evidence adduced with reference to a matter which was actually in issue and on the basis of that evidence, to come to a finding on a matter which was not in issue, and decide the rights of parties on the basis of that finding." On the contrary, the High Court had adopted the course, which was not open to it. It granted reliefs which were not the subject matter of the prayers in any of the suits. "In the process of doing so, it proceeded to assume the jurisdiction of a civil court in a suit for partition, which the suits before it were not."
The above provision requires a Plaintiff to specifically claim either simply or in the alternative the relief, which is sought. However, it clarifies that it is not necessary to ask for general and other reliefs which may always be given in the discretion of the court. This provision does not entitle the court in a civil trial to embark upon the exercise of recasting virtually the frame of a suit, which was undertaken by the High Court. There was no basis in the pleadings before the High Court and certainly no warrant in the reliefs which were

of a suit for partition, the High Court misconstrued the provision of Order VII Rule 7 of the Code of Civil Procedure, which clearly obliges the plaintiff to state the relief "specifically" in his plaint.[45] By clarifying the ambit of this provision, particularly the phraseology of "the relief which the Plaintiff claims either simply or in the alternative," the Supreme Court has, *inter alia*, stated:[46]

"This provision does not entitle the court in a civil trial to embark upon the exercise of recasting virtually the frame of a suit, which was undertaken by the High Court. There was no basis in the pleadings before the High Court and certainly no warrant in the reliefs which were claimed to direct a division of the land in the manner that a court would do in a suit for partition."

In the light of this exposition, the Supreme Court has held that the High Court "completely erred in granting relief which lay outside the ambit of the pleadings and the cases set up by the Plaintiffs in Suits 3, 4 and 5."[47] In this respect, the High Court has also omitted to bear in mind the "trite law" that, unlike in the case of a suit for partition, every party is not "both a Plaintiff and Defendant."[48]

The second reason for the reversal of the High Court judgment is that the premise of 'equal division' did not resolve the problem of 'law and order' either.[49]

(g) Final round of review petitions followed by curative petitions

Several review petitions were filed under Article 137 of the Constitution[50] before the 5-Judge Constitution Bench delivering the historic verdict on

---

claimed to direct a division of the land in the manner that a court would do in a suit for partition.

45 Order VII Rule 7 of the Code of Civil Procedure provides: "Every plaint shall state specifically the relief which the Plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same Rule shall apply to any relief claimed by the Defendant in his written statement."

46 *Ayodhya case (2019),* para 792. The Supreme Court has reinforced this construction by citing *Shiv Kumar Sharma v. Santosh Kumari* MANU/SC/7929/2007: (2007) 8 SCC 600 (Para 27), in which S.B. Sinha, J., while speaking for a two judge Bench, stated: "A court of law cannot exercise its discretionary jurisdiction dehors the statutory law. Its discretion must be exercised in terms of the existing statute." To the same effect is cited the judgments of Justice Ashok Bhan in *Shamsu Suhara Beevi v. G. Alex* MANU/SC/0656/2004 : (2004) 8 SCC 569 at paragraph 11, and M Fathima Beevi, speaking for a three judge Bench in *Om Prakash v. Ram Kumar* ANU/SC/0101/1991: (1991) 1 SCC 441, by holding at paragraph 4: "...A party cannot be granted a relief which is not claimed, if the circumstance of the case are such that the granting of such relief would result in serious prejudice to the interested party and deprive him of the valuable rights under the statute." Cited in *Ayodhya case (2019),* para 793.

47 *Ibid.* [Para 793]

48 See *Ayodhya case (2019),* para 791: "In a suit for partition, it is trite law that every party is both a Plaintiff and Defendant."

49 See, *infra*, note 132 and the accompanying text.

50 Under Art. 137 of the Constitution Supreme Court has power to review any judgment pronounced or order made by it subject to the provisions of any law made by the

November 9, 2019.[51] The Bench considered 18 review petitions - nine petitions filed by parties who were part of the earlier litigation and the other nine filed by "third parties," and the Bench had rejected all the petitions in-chamber,[52] and thereby their order passed on November 9, 2019 stayed intact.

Parliament or any Rule made under Art. 145 of the Constitution. Supreme Court Rules have been framed in exercise of those powers. Rule 2 of Order 40 of the Supreme Court Rules mandates that an application for review "shall be by a petition, and shall be filed within thirty days from the date of the judgment or order sought to be reviewed. It shall set out clearly the grounds for review." As a matter of course, a review petition is to be circulated *without oral arguments before the same Bench*. If a judge on the original Bench has retired, then a new judge shall be appointed for the purpose. Most of the review petitions are heard in-chamber. The Bench is entitled to reject the review petition, without offering any reason. Normally, it is a one line order in which the Bench says that it finds no merit in the review petition. However, an exception was made in *Sabrimala temple case* (2018), wherein review petitions were considered in open court with a fresh round of arguments, see Virendra Kumar, *Socio-religious Reform through Judicial Intervention: Its limit and limitation under the Constitution ([A critique of the Supreme Court judgment in Sabarimala Temple case (2018)]* – published as a monograph by Panjab University, Chandigarh: [PU Publication Bureau, First Edition 2020].

51 For the requisite details of the review petitioners, see the following relevant reported account in *The Indian Express*, December 7, 2019, which is abstracted as under: On December 2, 2019 the first plea seeking review of Ayodhya verdict was filed in the apex court by Maulana Syed Ashhad Rashidi, legal heir of original litigant M Siddiq and also the Uttar Pradesh president of the Jamiat Ulama-e-Hind. He had sought review of the verdict on 14 counts and said that "complete justice" could only be done by directing reconstruction of Babri Masjid. He had also sought an interim stay on the operation of the verdict in which it had directed the Centre that a trust be formed within three months for construction of the temple at the site.

It was followed by six more review petitions on December 6, 2019, seeking reversal of November 9, 2019 judgement. Still two more review petitions were filed on December 9, 2019, one by the Akhil Bharat Hindu Mahasabha and the other by 40 persons, including rights activists who have jointly moved the court seeking review of its verdict. Akhil Bharat Hindu Mahasabha sought a limited review of the November 9 verdict; it had moved the court against the direction to allot a five-acre plot to Sunni Waqf Board for building a mosque in Ayodhya. It had also sought deletion of findings declaring the disputed structure as a Mosque.

The review plea filed by 40 persons, including political commentator Prabhat Patnaik, historian Irfan Habib, economist and activists Harsh Mander, Nandini Sundar and John Dayal, had stated they were "deeply aggrieved" by the verdict as it "errs in both fact and law." Accordingly, it had sought a full bench for hearing the review plea saying it is not merely a title dispute but a "contestation about the core of India's constitutional morality, and the principles of equal citizenship, secularism, justice, rule of law and fraternity".

Review petition filed by the Nirmohi Akhara, demanding a clarification on its role and representation in the trust to be set up by the government for the Ram temple construction, was not listed in front of the bench on Thursday, December 12, 2019 as it was filed only on Tuesday, December 10, 2019.

It may also be added that the Bench declined permission to file review petitions to those, including Prabhat Patnaik, stating that they were not parties to the Ayodhya land dispute.

52 The in-chamber proceeding was taken up by a bench headed by Chief Justice S A Bobde and also comprising Justices D Y Chandrachud, Ashok Bhushan, S A Nazeer and Sanjeev

After the rejection of review petitions, there is one more opportunity, which is still available to the parties in a legal battle who are aggrieved by the result of their review petitions. This is by way of filing a curative plea in the Supreme Court as a last resort - a remedy, which is, unlike the provision of review petitions under Article 137 of the Constitution, born out of the inherent power vested with the Supreme Court. Such a petition is decided on the basis of principles enunciated by the Supreme Court in *Rupa Ashok Hurra v. Ashok Hurra & another* (2002) 4 SCC 388: AIR 2002 SC 1771.

A curative petition must be submitted through the certification by a senior advocate. It is incumbent upon the petitioner in such a petition to establish that there was a gross miscarriage of justice or a genuine violation of principles of natural justice. The petitioner shall also state that the grounds mentioned in the plea were taken up in the review plea and it had been rejected by circulation. The curative petition must first be placed by circulation before a Bench of the three senior-most judges, and the judges who passed the concerned judgment. If the majority of the judges are convinced that the matter needs reconsideration, it will be listed as far as possible, before the same Bench that heard the plea. In the event of the Bench holding at any stage that 'the petition is without any merit and vexatious, it may impose exemplary costs on the petitioner.' The Supreme Court has also stipulated that 'curative petitions must be a rare case rather than a regular one.' Bearing in mind the profile of stringent conditions as outlined above for making out a case for filing curative petition after the outright rejection of the review petitions in the Ayodhya case (2019), there is little chance for its successful culmination.[53]

Khanna. Justice Khanna was the only judge who was not a part of the five-judge Constitution bench that had delivered the historic verdict. He filled in the vacancy caused on the retirement of then Chief Justice of India Ranjan Gogoi.

[53] A curative petition was filed in the Supreme Court on January 21, 2020 against its November 9, 2019 Ayodhya judgement by the Peace Party of India (a political party from Uttar Pradesh) through its president Mohammed Ayub, whose review petition was earlier dismissed. In his curative petition, he pleaded before the apex court to reconsider its decision, which was "based on faith." He assertively claimed in his petition that the title must be based on exclusive and unimpeded possession which had to be established by evidence. "Hindus were never were able to prove unimpeded possession with respect to outer or the inner courtyard," he said in the petition. Besides, he also submitted that the judgment of Supreme Court relied upon patent errors and created rights based on illegal acts. See, *Hindustantimes*, January 21, 2020 [e-paper - Updated: Jan 21, 2020 14:13 IST]
Islamic group Popular Front of India (PFI) was the second organisation to file a curative petition in the Supreme Court in the Ayodhya case on March 6, 2020. In its petition, the PFI stated that even though it was not one of the parties in the main Ayodhya and dispute case, yet the verdict delivered by the five-judge bench of the Supreme Court on November 9, 2019, adversely affected its rights. *Inter alia*, it pleaded that it should be heard in an open court while also arguing that the apex court should put a stay on its verdict in the Ayodhya case which granted the ownership of the 2.77 acres of land which was at the centre of the dispute to the Hindus, paving the way for the construction of a Ram Temple.
See, TIMESNOWNEWS.COM [Updated: March 06, 2020, 11:29 AM IST]

III. Critical analysis:

1) How has the Supreme Court perceived the problem of the title to the disputed property?

The critical issue relating to the title of the disputed property stands clearly crystalized in the Presidential Reference No. 1 of 1993 to the Supreme Court. The issue posed is:

"Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhoomi and Babri Masjid (including the premises of the inner and outer courtyards on such structure) area on which the structure stands..."

Emanating from the Presidential Reference, the core contentious issue to be resolved by the Supreme Court is: In whom does it lie the title of the land where stood the disputed dilapidated structure, called, the Ram Janma Bhoomi and Babri Masjid complex (including the premises of the inner and outer courtyards on such structure)?

The Muslims claimed that the Masjid was constructed on the "vacant land," whereas the Hindus disputed this fact by arguing that the Masjid was constructed by demolishing the existing Hindu temple.

In legal parlance, the claim and counter-claim is simply a question of legal title – the title of ownership, which is, speaking jurisprudentially, based on the notion of 'prior possession,' in which the actual possession gives rise to the legal presumption of the title, termed as "possessory title" in the absence of an "independent title" (say, in the form of a specific grant from the Mughal emperor).[54]

Summation of the claim on behalf of the Muslims is that "they were in possession of the inner and outer courtyard" at the disputed land and "the continuous nature of that possession creates a presumption of title [in their favour], which the Hindus cannot displace."[55] In other words, "possession may be sufficient to decide title."[56] This assertion is sought to be supported by canvassing the provisions of Section 110 of the Indian Evidence Act, 1872.[57]

The details of the outcome of both the curative petitions is, however, not available.

[54] The Muslims were unable to establish a specific grant of the land underlying the mosque as a foundation of independent claim to legal title during Muslims Rule or upon the transfer of power to the colonial administration after 1857. The documentary evidence which had been relied upon by them merely consisted of revenue records pertaining to grants for the upkeep and maintenance of the mosque, and not the legal title as such. See, *Ayodhya case (2019),* para 783.

[55] This is how the Supreme Court has summed up the claim of the Muslims on the basis of 'possessory title', see, *Ayodhya case (2019),* para 783.

[56] *Id*., para 782. See the submissions made by Dr. Rajeev Dhavan, appearing on behalf of Sunni Central Waqf Board, on the effect of the existence and destruction of a temple on the title to the disputed property, *ibid.*

[57] See, *id.*, para 782: "The burden of proof is upon the person who asserts possession without title, particularly having regard to the provisions of Section 110 of the Evidence Act."

Section 110 of Act of 1872, which specifically deals with the "Burden of proof as to ownership," categorically provides:

"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

This provision of Section 110 of the Act of 1872 inheres the jurisprudential principle, which states that 'possession is nine points of law', which implies that the person, who is in actual possession of property, holds a better title against everybody except its true owner. The clear question to be resolved, therefore, is: 'Who is the true owner of the site where the disputed structure stood before its demolition in the instant case?'

The Hindus have been consistently claiming now for the past more than 150 years, since its bifurcation into inner and outer courtyards in 1857 that the title of the disputed site belongs to them.[58] If so, then it instantly takes them out of the ambit of Section 110 of the Evidence Act, on the basis of which the Muslims premised their claim to 'possessory title' of the disputed site. The Supreme Court has negated the assertion of 'presumption' of title in favour of the Muslims[59] by holding that under Section 110 of the Evidence Act,[=] the claim to 'possessory title' arises only where the adversary affirms that he is not the owner of that property, and this is not true in the fact-matrix of the instant case.[60]

In the light of settled judicial precedents,[61] the Supreme Court has held that the presumption of the principle of possessory title applies "when the facts

---

[58] For the factual matrix, showing how the disputed site has been a flash point of continued conflagration over decades, see, *Ayodhya case (2019),* paras 10-12 giving a dispassionate account starting from 1856-57, through the tumultuous events of 1877, 1885, 1949, 1950.

[59] See, *id.*, para 784. *Cf.* The observations made by Justice S.U. Khan of the Allahabad High Court in the Full Bench judgment delivered on September 30, 2010: "Justice S.U. Khan held that *title follows possession* and based on the provisions of Section 110 of the Evidence Act came to the conclusion that the disputed site should be equally distributed between the three parties," cited in Para 789 [Emphasis mine]

[60] See, *ibid.* [para 784]: Section 110 is based on the principle that possession itself may raise a presumption of title. But this applies when the facts disclose no title in either of the disputants in which case, as it is said, possession alone decides. On the other hand, it is also well-settled that the presumption cannot arise when the facts are known.

[61] See *Nair Service Society Ltd. v. K.C. Alexander* MANU/SC/0144/1968 : AIR 1968 SC 1165 (para 17): Justice M Hidayatullah speaking for a three judge Bench of the Supreme Court held that "possession may prima facie raise a presumption of title no one can deny but this presumption can hardly arise when the facts are known." In other words, "[w]hen the facts disclose no title in either party, possession alone decides;" *M.S. Jagadambal v. Southern Indian Education Trust* MANU/SC/0529/1987: 1988 (Supp) SCC 144 (para 18): Justice K Jagannatha Shetty, speaking for a two judge Bench of the Supreme Court held that possession continues with the title holder unless and until the Defendant acquires title by adverse possession; *Chief Conservator of Forests, Govt. of A.P. v. Collector* MANU/SC/0153/2003 : (2003) 3 SSC 472 (para 20): Justice Syed Shah Mohammed Quadri, speaking for a two judge Bench of **the Supreme** Court held: "...presumption, which is rebuttable, is attracted when the possession is prima facie lawful and when the

disclose no title in either of the disputants in which case, as it is said, possession alone decides."[62] This implies that the presumption principle "cannot arise when the facts are known."[63]

2) *What are the contours of the basic premise which has prompted the Supreme Court to uphold the title of the disputed site in favour of Hindus?*

The contours emerging from the 'evidentiary record' that constitute the basis for deciding the title in favour of Hindus may be abstracted in the form of following *six* narrative-facts:

(i) *The nature of the structure underlying the mosque at the disputed site*: This, in fact, is the question that formed the basis of Presidential reference to the Supreme Court. On this count, the archaeological findings, on preponderance of probabilities, reveal that the underlying structure is of Hindu religious origin, dating back to twelfth century A.D.[64]

(ii) *Historical records of travellers,*[65] *read with the contents of gazetteers*: These indicate the "existence of the faith and belief of the Hindus that the disputed site was the birth-place of Lord Ram," which was manifested in the "[p]revalence of the practice of worship by pilgrims at the disputed site including by parikrama (circumambulation) and the presence of large

---

contesting party has no title;" *State of A P v. Star Bone Mill & Fertiliser Company* MANU/SC/0190/2013 : (2013) 9 SCC 319 (para 21), the Supreme Court inter alia held: "Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party," which means that "if at any time a man with title was in possession of the said property, the law allows the presumption that such possession was in continuation of the title vested in him." Cited in *Ayodhya case (2019),* para 785.

62 *Ayodhya case (2019),* para 785 (Emphasis supplied)

63 Ibid.

64 See *Ayodhya case (2019),* para 788 (I), in which the Supreme Court, while drawing reasonable inference on the basis of the standard of proof which governs civil trials, from the archaeological findings, observes: "The underlying structure which provided the foundations of the mosque together with its architectural features and recoveries are suggestive of a Hindu religious origin comparable to temple excavations in the region and pertaining to the era." However, the conclusion in the ASI report about the remains of an underlying structure that these are of a Hindu religious origin, symbolic of temple architecture of the twelfth century A.D., the Supreme has cautioned, must be read "contextually", bearing in mind certain caveats, such as: "Since the ASI report dates the underlying structure to the twelfth century, there is a time gap of about four centuries between the date of the underlying structure and the construction of the mosque. No evidence is available to explain what transpired in the course of the intervening period of nearly four centuries;" and that the ASI report "does not conclude that the remnants of the pre-existing structure were used for the purpose of constructing the mosque (apart, that is, from the construction of the mosque on the foundation of the erstwhile structure)." See, *id*., para 788(II). See also, *id.*, para 788(III), elucidating the caveats: "No evidence has been placed on the record in relation to the course of human history between the twelfth and sixteen centuries. No evidence is available in a case of this antiquity on (i) the cause of destruction of the underlying structure; and (ii) whether the pre-existing structure was demolished for the construction of the mosque."

65 See, *id.,* para 788(IV), dealing chiefly with the historical records of Tieffenthaler and the account of Montgomery Martin in the eighteenth century.

congregations of devotees on the occasion of religious festivals [such as Ram Navami, Sawan Jhoola, Kartik Poornima]," "even prior to the annexation of Oudh by the British [in 1856] and the construction of a brick-grill wall in 1857."[66]

(iii) *Babri-Masjid - the common place of worship:* It is a matter of record that the Babri-Masjid bears the inscription of "Allah" on the structure, along with the religious symbol of Hindus – "Varah, Jai-Vijay and Garud outside the three domed structure," coupled with the evidence furnished by Hindu witnesses and duly "acknowledged" by Muslim witnesses that "Hindus used to offer prayer to the Kasauti stone pillars placed inside the mosque."[67] It is clearly "suggestive" that the mosque at the disputed site was used by both the communities as a common place of worship "down the centuries."[68]

(iv) *The existence of Islamic structure at the disputed site – no diminishing of Hindu faith*: The construction of Babri Masjid at the disputed site did not dilute in any way the eternal faith of the Hindus[69] that that was the place where Lord Ram was born, and, in fact it was this assertion of faith and belief, which later led to the riots in 1857 when the Hindus were prevented from offering prayer and worship within the precinct of the Mosque.[70] The continuing riots prompted the colonial administration in 1858 to erect railing to bifurcate the areas of worship into the 'inner courtyard' and the 'outer courtyard,' and thereby permitting the Muslims *thenceforth* to offering Namaz "inside the railing within the domed

---

66 *Ibid*. British interest in Awadh began in the 1760s, and after 1800 they exercised increasing control there. It was annexed (as Oudh) by the British in 1856, an action that greatly angered Indians and which has been cited as a cause of the Indian Mutiny (1857–58), the largest Indian rebellion against British rule.

67 See, *id*., para 788(XI, read with para 788(XII).

68 *Ibid.*

69 See, *id.*, para 788(V): "The evidence indicates that despite the existence of a mosque at the site, Hindu worship at the place believed to be the birth-place of Lord Ram was not restricted. The existence of an Islamic structure at a place considered sacrosanct by the Hindus did not stop them from continuing their worship at the disputed site and within the precincts of the structure prior to the incidents of 1856-7. The physical structure of an Islamic mosque did not shake the faith and belief of Hindus that Lord Ram was born at the disputed site." It is only after the colonial government's intervention, the evidence of commencing of offering namaz by the Muslim residents emerged, and the evidence relied on by the Sunni Central Waqf Board revealed that the offering of namaz by the Muslim residents commences from around 1856-7. See, *ibid*.

70 See, *id*., para 788(VI): "The setting up of a railing in 1857 by the British around the disputed structure of the mosque took place in the backdrop of a contestation and disputes over the claim of the Hindus to worship inside the precincts of the mosque. This furnished the context for the riots which took place between Hindus and Muslims in 1856-7."

structure of the mosque[71] and worship by the Hindus outside the railing."[72]

The avowed objective of raising the railing by the colonial administration "was intended to ensure peace between the two communities with respect to a contested place of worship," and that "the grill-brick wall did not constitute either a subdivision of the disputed site which was one composite property, nor did it amount to a determination of title by the colonial administration."[73]

It needs reiteration that raising grill around the disputed structure did not dampen or dilute the faith and belief of the Hindus that the "three domed structure" was the 'Garbh Grih' of Lord Ram,[74] and the manifest assertion of this faith and belief led them to the "setting up of the Ramchabutra" [near the pre-existing "Sita Rasoi"][75] in "close physical proximity to the railing" "within a hundred feet or thereabouts of the inner dome."[76]

(v) *The opening of another door, in addition to the existing one*: This was done with the permission of the British administration, in or about 1877, which "indicates recognition of the presence of a large congregation of Hindu devotees necessitating additional access to the site in the interest of public peace and safety."[77] In fact, "[t]estimonies of both Hindu and Muslim witnesses indicate that on religious occasions and festivals such as Ram Navami, Sawan Jhoola, Kartik Poornima, Parikrama Mela and

---

71 Thenceforth, Muslims continued to offer Namaz despite "contestation over their possession of the inner courtyard after 1858." See, *id*., para 788(XIV): "On a preponderance of probabilities, there is no evidence to establish that the Muslims abandoned the mosque or ceased to perform namaz in spite of the contestation over their possession of the inner courtyard after 1858. Oral evidence indicates the continuation of namaz."

72 Id., para 788(XII). See, *id*., para 741: There is "no evidence of possession, use or offering of worship in the mosque prior to 1856-7," that is over the period of 325 years between the alleged date of construction in 1528 until the erection of railing by the colonial government in 1857.

73 *Id*., para 788(VI). See also, *id.*, para 742: "The construction of the railing was not an attempt to settle proprietary rights. It was an expedient measure to ensure law and order. Disputes between 1858 and 1883 indicated that the attempt to exclude the Hindus from the inner courtyard by raising a railing was a matter of continuing dispute."

74 See, *id.,* para 788(VII): Construction of Ramchabutra "must be seen in the historical context as an expression or (sic) assertion of the Hindu right to worship at the birth-place of Lord Ram. Even after the construction of the dividing wall by the British, the Hindus continued to assert their right to pray below the central dome… (and) pilgrims used to pay obeisance and make offerings to what they believed to be the 'Garbh Grih' located inside the three domed structure while standing at the iron railing which divided the inner and outer courtyards."

75 See, *id.*, para 741: Worship at the Ramchabutra and at the pre-existing Sita Rasoi led to the worship of the Hindus being "institutionalised."

76 *Id.*, para 788(VII), read with para 788(VIII).

77 *Id.*, para 788(IX). The Deputy Commissioner declined to entertain a complaint against the opening made in the wall by holding "that the opening up of the door was in public interest," *ibid.*

Ram Vivah, large congregations of Hindu devotees visited the disputed premises for *darshan.*"[78] Moreover, the "oral testimony of the Hindu devotees establishes the pattern of worship and prayer at Sita Rasoi, Ramchabutra and towards the 'Garbha Griha', while standing at the railing of the structure of the brick wall."[79]

(vi) *Ceaseless contestation over the possessory control in respect of the inner courtyard (termed by the Hindus as the 'Garbha Griha')*: Despite the bifurcation of the old complex in 1857, it continued to remain the productive source of at least three major communal conflicts in contemporary history of India after 1857:

- The riots of 1934, resulting into damage to the domes of the mosque, which was renovated by the British administration at their own expense, and that facilitated the offering of regular Nawaz by Muslims.
- Incident of 22/23 December 1949 that "led to the desecration of the mosque and the ouster of the Muslims otherwise than by the due process of law," resulting in attaching the "inner courtyard" under the Section 145 of Code of Criminal Procedure 1898 on 29 December 1949 and the receiver took possession." Thenceforth, "only Friday namaz was being offered" at the mosque.
- Destruction of the mosque on 6 December 1992, which took place "in breach of the order of status quo", and which the Supreme Court censured by observing that "the obliteration of the Islamic structure was an egregious violation of the Rule of law."

What is the conclusion derived by the Supreme Court from the 'evidentiary record' in terms of possessory control of the Ram Janabhumi-Babri Masjid complex after its 1857-bifurcation in the light of six narrative-facts as abstracted above? The conclusion may be crystalized on two main counts:

A. *Possessory control over the outer courtyard*: "After the construction of the grill-brick wall in 1857, there is evidence on record to show the exclusive and unimpeded possession of the Hindus and the offering of worship in the outer courtyard. Entry into the three domed structure was possible only by seeking access through either of the two doors on the eastern and northern sides of the outer courtyard which were under the control of the Hindu devotees."[80]

B. *Possessory control over the inner courtyard*: This issue remained inconclusive as neither the Hindus nor the Muslims could establish their claim to the total exclusion of the other in view of two emerging facts: one, exclusive possessory control of the Muslims to the mosque at the disputed site stands negated; two, "the desecration of the mosque and the

---

78 *Id.,* para 788(X).
79 *Ibid*.
80 *Id.,* para 788(XIII).

ouster of the Muslims otherwise than by the due process of law" in 1949, and destruction of the mosque on December 6, 1992 "in breach of the order of status quo" "constituted a serious violation of the Rule of law,"[81] and this made the claims of the Hindus to the inner courtyard also suspect.

In view of the above, the contentious issue that remained to be resolved by the Supreme Court is: How to settle the contested claim of the Hindus to the 'inner courtyard' (admeasuring about 1500 square yards), [82] as distinguished from the outer courtyard about which the issue of title already stood settled in favour Hindus,[83] where the Babri Masjid stood prior to its demolition on December 6, 1992?

3) What is the Supreme Court singular-strategy to deal with the issue of title to 'inner courtyard,' which is loaded with religious susceptibilities and hitherto defied solution at least for more than a century and a half?

In this queer position, for deriving the meaningful direction to resolve this knotty problem, the Supreme Court re-called and re-iterated the commandments of the Constitution and the constitutional system of governance:[84]

---

[81] For these two abstractions, see the "net result" deduced by the Supreme Court in, *id.*, para 788(XVIII):

(i) The disputed site is one composite whole. The railing set up in 1856-7 did not either bring about a sub-division of the land or any determination of title;

(ii) The Sunni Central Waqf Board has not established its case of a dedication by user;

(iii) The alternate plea of adverse possession has not been established by the Sunni Central Waqf Board as it failed to meet the requirements of adverse possession;

(iv) The Hindus have been in exclusive and unimpeded possession of the outer courtyard where they have continued worship;

(v) The inner courtyard has been a contested site with conflicting claims of the Hindus and Muslims;

(vi) The existence of the structure of the mosque until 6 December 1992 does not admit any contestation. The submission that the mosque did not accord with Islamic tenets stands rejected. The evidence indicates that there was no abandonment of the mosque by Muslims. Namaz was observed on Fridays towards December 1949, the last namaz being on 16 December 1949;

(vii) The damage to the mosque in 1934, its desecration in 1949 leading to the ouster of the Muslims and the eventual destruction on 6 December 1992 constituted a serious violation of the Rule of law; and

(viii) Consistent with the principles of justice, equity and good conscience, both Suits 4 and 5 will have to be decreed and the relief moulded in a manner which preserves the constitutional values of justice, fraternity, human dignity and the equality of religious belief.

[82] See, *id*., para 788(XIX): The assertion by the Hindus to offer worship **"**within the three domed structure in the inner courtyard" has been contested by the Muslims.

[83] The Hindus have already "established a clear case of a possessory title to the outside courtyard by virtue of long, continued and unimpeded worship at the Ramchabutra and other objects of religious significance," *ibid.*

[84] See, *id.*, para 795.

- After attaining political independence on 15th August 1947, "India as a nation realised the vision of self-determination," when, we, the people of India, adopted, enacted and gave to ourselves this Constitution, which was inaugurated on January 26, 1950.
- Constitution of India symbolises "as an unwavering commitment to the values which define our society."
- "At the heart of the Constitution is a commitment to equality upheld and enforced by the Rule of law."
- "Under our Constitution, citizens of all faiths, beliefs and creeds seeking divine provenance are both subject to the law and equal before the law."
- "The Constitution does not make a distinction between the faith and belief of one religion and another," and "[a]ll forms of belief, worship and prayer are equal."
- The Supreme Court "as the final arbiter must preserve the sense of balance that the beliefs of one citizen do not interfere with or dominate the freedoms and beliefs of another," and "uphold the Constitution and its values."
- "Those whose duty it is to interpret the Constitution, enforce it and engage with it can ignore this only to the peril of our society and nation."
- "The Constitution speaks to the judges who interpret it, to those who govern who must enforce it, but above all, to the citizens who engage with it as an inseparable feature of their lives."

Thus, the modus operandi of resolving the Ram Janmabhumi-Babri Masjid conflict in the instant case is. thus, on the basis of Constitution: "Irrespective of the status of a mosque under the Muslim law applicable in the Islamic countries, the status of a mosque under the Mahomedan Law applicable in secular India is the same and equal to that of any other place of worship of any religion; and it does not enjoy any greater immunity from acquisition in exercise of the sovereign or prerogative power of the State, than that of the places of worship of the other religions."[85]

Admittedly, religious faiths and beliefs of all people are equal before the law under the Constitution, but still the quirky complex issue remains: 'How to decide the title to the disputed property which is inseparably linked with religion?'

This has led the Supreme Court to recognise the singular strategy that "Title cannot be established on the basis of faith and belief *alone*,"[86] and, therefore, it must search and look deep into the "settled principles of evidence"[87] that would

---

85 *Id.,* para 25, citing para 96(2) of the Constitution Bench decision in *Dr. M Ismail Faruqui* (1994).

86 *Id.,* para 788 (emphasis added).

87 See, *Id.,* para 796: "In deciding title to the disputed property, the court applies settled principles of evidence to adjudicate upon which party has established a claim to the immovable property.

allow it to adjudicate upon the disputed title to the immovable property by taking into account the factor of religious 'faith and belief' of the disputants.

This has led the Supreme Court to evolve an innovative recourse:[88]

"Faith and belief are indicators towards *patterns of worship at the site* on the basis of which claims of possession are asserted. The court has evaluated in a situation in which the state has expressly stated in its written statement that it claims no interest in the land."

(Emphasis supplied)

What does this mean? What are the implications of this 'innovative recourse'? It yieldes two meaningful functional directions. One, that religious 'faiths and beliefs'' are abstract and invisible notions; however, when these are fructified into customary 'normative rules,' they become manifest and visible, and, thereby, instantly recognizable, yielding in law invaluable supporting corroborative evidence for evaluating "the rival claims to possessory title."[89]

Two, since the state has "no interest in the land," this has led the Supreme Court to explore diverse sources; namely, Archaeology, History, Philosophy, Religion, Travellers accounts, *et al*., for searching customary normative rules relating to 'faith and belief' of both the Hindus and the Muslims, and it is this exploratory approach, which provides a "unique dimension" to the adjudicatory task of the Supreme Court in the fact matrix of the instant case.[90]

Diverse sources have, thus, become resources for yielding invaluable supporting corroborative evidence about "the nature and use of the disputed premises as a whole by either of the parties," and also the "factor in the length and extent of [that] use."[91]

On the principle of 'preponderance of probabilities', in the absence of historical records throwing light on possessory title of the disputed property,[92] the Supreme Court has culled the corroborative evidence, which is clarified and crystalized by "oral arguments" presented before it, for the eventual determination of the possessory title with respect to "the inner court yard."[93]

The Constitution Bench of the Supreme Court has crystalized the corroborative evidence of probative value[94] on three main counts:

One, the historical records reveal that none of the parties to dispute could prove its claim to independent ownership,[95] and that any attempt "to exclude the

---

88 *Id.*, para 788.

89 See, *Id*., para 788.

90 See, *Id*., para 796.

91 See, *Id*., para 771. (Emphasis supplied)

92 See, *Id*., para 705 read with para 795.

93 See, id., para 795.

94 Probative evidence is the one which is sufficiently useful to prove something important in a trial, and which must be weighed by the trial judge.

95 See, *Ayodhya case* (2019), para 771.

Hindus from the inner courtyard by raising a railing was a matter of continuing dispute."[96]

Two, "[t]here is no evidence to the contrary by the Muslims to indicate that their possession of the disputed structure of the mosque was exclusive and that the offering of namaz was to the exclusion of the Hindus"[97]

Three, there is no denying the fact that dispossession and desecration of mosque on the intervening night between 22/23 December 1949 by the installation of Hindu idols, with clear intention "to deprive them of their place of worship," followed by its total destruction on December 6, 1992 by the Hindu activists "in breach of the order of status quo" clearly "constituted a serious violation of the Rule of law."[98]

[The last Friday *namaz* was offered on 16th December 1949.]

Stated positively, it is established that the Hindus used to worship in the inner court yard of the three-dome structure even "prior to the annexation of Oudh by the British in 1857."[99] Negatively stated, the "Muslims have offered no evidence to indicate that they were in exclusive possession of the inner structure prior to 1857 since the date of the construction in the sixteenth century."[100]

After the 1857-bifurcation, the *namaz* was offered by the Muslims, though they were "obstructed in free and unimpeded access to mosque for the purposes of offering namaz."[101] "The exclusion of the Muslims from worship and possession took place on the intervening night between 22/23 December 1949 when the mosque was desecrated by the installation of Hindu idols," with clear intention "to deprive them of their place of worship," although unlawfully.[102] This precipitated situation led the administration to invoke the relevant provisions of Code of Criminal Procedure 1898[103] for initiating the proceedings

---

96 See, *id*., para 742, citing the instances of disputes after 1856 bifurcation between 1858 and 1883.

97 See, *id*., para 788(VII).

98 See, *supra*, Part III (2)(vi): "Ceaseless contestation over the possessory control in respect of the inner courtyard (termed by the Hindus as the 'Garbha Griha'."

99 See, *id.*, para 798.

100 *Ibid.*

101 *Ibid.*

102 *Ibid*. Prior to desecration, "the last Friday namaz was on 16 December 1949," *ibid*.

103 Section 145 of the Criminal Procedure Code 1898 (Cr.P.C.) [which remains the same in The Code of Criminal Procedure, 1973] is designed to prevent a breach of peace over a dispute related to immovable property. The sub-section (1) of Section 145 provides: "Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute."

for "attachment of the inner courtyard" and appointing "a receiver", while, of course permitting "worship of the Hindu idols."[104]

"During the pendency of the suits, the entire structure of the mosque was brought down in a calculated act of destroying a place of public worship" by the Hindu activists on December 6, 1992, which "wrongly deprived" the Muslims "of a mosque which had been constructed well over 450 years ago."[105]

Crystalized corroborative evidence of probative value has, thus, led the Supreme Court to their final decision:

A. "Dividing the land will not subserve the interest of either of the parties or secure a lasting sense of peace and tranquillity."[106]
B. On "a balance of probabilities, the evidence in respect of the possessory claim of the Hindus to the composite whole of the disputed property stands on a better footing than the evidence adduced by the Muslims,"[107] and, therefore, possession of the "inner and outer courtyards shall be handed over" by the Central Government to the designated body of Hindus as envisaged under the provisions of the Acquisition of Certain Area at Ayodhya Act 1993.[108]
C. Simultaneously, the Central or the State Government shall make "allotment of alternate land to the Muslims for the construction of a mosque and associated activities", because "the Muslims were dispossessed upon desecration of the mosque on 22/23 December 1949 which was ultimately destroyed on 6 December 1992." [109]

---

104 *id.,* para 798.

105 Ibid.

106 *id.,* para 799. Bifurcation of disputed site "admeasures all of 1500 square yards," as was commended by the High Court, is neither legally sustainable, nor conducive for "maintaining public peace and tranquillity" on lasting basis, *ibid*.

107 *id.,* para 800.

108 See, *id.,* para 805(2). The Central Government pursuant to the powers vested in it under Sections 6 and 7 of the Acquisition of Certain Area at Ayodhya Act 1993 shall formulate a scheme. The scheme shall envisage the setting up of a trust with a Board of Trustees or any other appropriate body Under Section 6. The scheme shall make necessary provisions in regard to the functioning of the trust or body including on matters relating to the management of the trust, the powers of the trustees including the construction of a temple and all necessary, incidental and supplemental matters. In respect of the rest of the acquired land, the Central Government will be at liberty to make suitable provisions by handing it over to the Trust or body for management and development in terms of the scheme framed in accordance with the directions issued by the Court. Possession of the disputed property shall continue to vest in the statutory receiver under the Central Government, untill in exercise of its jurisdiction under Section 6 of the Ayodhya Act of 1993, a notification is issued vesting the property in the trust or other body. See also 805(5): "The right of the Plaintiff in Suit 1 to worship at the disputed property is affirmed subject to any restrictions imposed by the relevant authorities with respect to the maintenance of peace and order and the performance of orderly worship."

109 Id., para 800, read with para 805(3). By decreeing Suit 4 instituted by the Sunni Central Waqf Board and other Plaintiffs, the Supreme Court, has directed the Central Government that while handing over of the disputed property to the Hindus, "a suitable plot of land

D. Allotment of 5 acre land "out of the acquired land" "within the city of Ayodhya"[110] has been done by the Supreme Court in the exercise of powers under Article 142 of the Constitution "for doing complete justice" [111] to the Muslims,[112] who were "deprived of the structure of the mosque through means which should not have been employed in a secular nation committed to the Rule of Law,"[113] and thus constituting a remedial measure of "restitution to the Muslim community for the unlawful destruction of their place of worship."[114]

IV **My Conclusions**

(a) Structural conception

---

admeasuring 5 acres shall be handed over to the Sunni Central Waqf Board, the Plaintiff in Suit 4." The 5-acre of land "shall be "allotted either by: (a) The Central Government out of the land acquired under the Ayodhya Act 1993; or (b) The State Government at a suitable prominent place in Ayodhya." In effectuating this allotment, the Supreme Court further directed that the Central Government and the State Government "shall act in consultation with each other." On the allotment of the said land, the Sunni Central Waqf Board would be at liberty "to take all necessary steps for the construction of a mosque on the land so allotted together with other associated facilities."

110 *Id.,* para 801. The Supreme Court has also invoked its special powers under Article 142(1) of the Constitution in respect of Suit 3 filed by Nirmohi Akhara, whose claim based on the plea of shebaitship was held to be barred by limitation, and, therefore, rejected; nevertheless, "having regard to the historical presence of Nirmohi Akhara at the disputed site and their role," by directing the Central Government that "in framing the scheme, an appropriate role in the management would be assigned to the Nirmohi Akhara," id., para 804.

111 Under Article 142(1), the Supreme Court "in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe."

112 See, *Ayodhya case (2019*), para 205(3)(v).

113 See, *id*., para 800. The Supreme Court has reinforced its course of justice by adding: "The Constitution postulates the equality of all faiths. Tolerance and mutual co-existence nourish the secular commitment of our nation and its people." *Ibid*.

114 *Id.,* para 801. For ensuring the transfer of the ordered allotted 5 acre land, the Court has added: "This exercise, and the consequent handing over of the land to the Sunni Central Waqf Board, shall be conducted simultaneously with the handing over of the disputed site comprising of the inner and outer courtyards" to the Hindus in terms of the scheme framed by the Central Government "in exercise of the powers conferred upon it by Sections 6 and 7 to set up a trust or any other appropriate mechanism to whom the land would be handed over" as per the decree passed by the Court in Suit 5 [the deity of Lord Ram- a juristic person] , see, *id*., para 803. [Section 6 of the Acquisition of Certain Area at Ayodhya Act 1993 empowers the Central Government to direct that the right, title and interest in relation to the area or any part thereof, instead of continuing to vest in the Central Government shall vest in the authority or body or trustees of any trust which is willing to comply with the terms and conditions as government may impose. Section 7(1) provides that the property vested in the Central Government Under Section 3, shall be maintained by the government or by any person or trustees of any trust, authorities in this behalf, see para 802]

The conclusions are conceived in terms of our responses to some of the interrogatives of public concern that tend to make the validity of the Supreme Court judgment somewhat suspect in the perception of the public at large. The endeavour here is to explore and explain whether such concerns stood negotiated by the Supreme Court in their judgment in the light of our analytical critique as presented above.

(b) Pivotal issue of public concern

We have searchingly crystalized the issue by asking pointedly: 'What is the most central, critical, issue of public concern emanating from the Supreme Court judgement that has been hitherto raised and got currency in popular public perception?'

Perhaps, the most crucial issue of popular public concern that I have been able to decipher is this: The Supreme Court judgement is 'majoritarian in character', representing 'the victory of faith over facts,' inasmuch as in their resolution the Supreme Court has unduly favoured the Hindus over the Muslims in secular India,[115] even to the extent of rewarding them for their blatant violation of the Rule of Law.[116]

(c) Genesis and grounding of popular public perception

---

[115] Five Review petitions filed on December 6, 2019 by Mufti Hasbullah, Moulana Mahfoozur Rahman, Misbahuddin, Mohammad Umar and Haji Nahboob, duly supported by the All India Muslim Personal Law Board, seeking review of the Supreme Court judgment of November 9, 2019, *inter alia*, alleged: "Although the judgment claims that title had to be based on secular grounds and values… the emphasis on prayer and belief in the judgment shows that it was entirely based on Hindu faith and belief…" See, *The Indian Express*, December 7, 2019

See also the reporting by Nikhila Henry in POLITICS (A weekly letter) [courtesy Google - 09/11/2019 4:36 PM IST | Updated 10/11/2019 11:39 AM IST], which has articulated the views of Faizan Mustafa, a law professor and Vice Chancellor of Nalsar University of Law, Hyderabad, and Shri PDT Achary, former Lok Sabha Secretary General on the decision of the Supreme Court in the Ram Janmabhoomi-Babri Masjid title suit.

(It needs mentioning that both Professor Mustafa and Shri PDT Achary are distinguished jurists in their own right and that their cautious critical comments invariably always generate a very lively healthy debate on various issues of current constitutional significance.)

Professor Mustafa, shortly after the Supreme Court judgment was pronounced on November 9, 2019, is reported to have stated that "the Supreme Court seems to have weighed religious belief over the rule of law," and that the judgment "upholds a majoritarian point of view."

[116] In the five Review Petitions filed on December 6, 2019 by the Muslim parties (supra, note 115, vide reporting in *The Indian Express*, December 7, 2019), one of the main grievances for seeking review was that the Supreme Court in their judgment of November 9, 2019 "condones serious illegalities of destruction, criminal trespass and violation of rule of law including damaging the mosque and eventually destroying it."

Prof Mustafa is reported to have said on the unlawful demolition of the mosque: "…. The first rule of equity is that one who seeks equity must come with clean hands and an illegal act does not give a claim to equity….." Likewise, Shri PDT Achary opined: "An illegal act, declared as such by a court, can't create any legal right in the perpetrator. … Violation of law does not create equitable right." See, supra, note 115.

This may be traced to the following five 'naked facts':

(1) Three-domed structure, which was built during the reign of Moghul King Babur in 1526, was undeniably known as Mosque or Masjid.
(2) Mosque or Masjid is an exclusive place for Muslims to offer their prayer.
(3) The communal riots in 1857 led the British to bifurcate the disputed land where the three-domed structure stood into 'inner' and 'outer' courtyards for facilitating the offering of Namaz exclusively by the Muslims in the inner courtyard, leaving the outer court yard to the Hindus.
(4) To quell and subdue the riots of 1949, in which the Hindu idols were surreptitiously placed inside the central dome by desecrating the Mosque, the inner courtyard was 'attached' and a 'receiver' appointed till the pendency of suits.
(5) On December 6, 1992 the Mosque was raised down by the Hindus "in breach of the order of status quo," and that clearly "constituted a serious violation of the Rule of Law."

Substantially, the thrust of public criticism is: Notwithstanding this five-fact-narrative, awarding the entire disputed land to the Hindus to the total exclusion of the Muslims by the Supreme Court amounts to rewarding the violators simply because they, the majority Hindus, eternally believed that that place is the birth place of Lord Ram.[117] In general perception, this is the majoritarian judgment, betraying 'victory of faith over facts'!

(d) ***Critical reviewing of popular public perception***

In our analysis, however, we find that this very 5-fact-narrative reveals altogether a different perception-story, when construed connotatively. It is, indeed, a trite statement in social sciences to affirm that the so-called 'naked facts' are 'inert' or 'lifeless,' because these do not speak for themselves as such; however, these very 'naked facts' become 'alive, active and alert' and start speaking for themselves when these are construed in the context in which they took roots.[118] Therefore, these five naked facts need to be expounded contextually as under:

---

[117] See, *supra*, notes 115 and 116.

[118] Such a course is in consonance with the dictates of the law of evidence. To wit, under the provisions of Section 57 of the Indian Evidence Act, 1872 the Court is obliged to take judicial notice of the facts of all laws in force in the country and duly enacted by the legislature or other competent public authority, etc., enunciated in as many as 13 broad categories. Significantly, it is also specifically added as residuary principle:

"In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference. If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so."

On the basic premise of this principle, it is inferred that the "definition of facts, which Court must take judicial notice is not an exhaustive definition." [For this exposition of Section 57 of the Indian Evidence Act, 1872, see, *Ayodhya Case* (2019), para 77 of Addenda.] However, the "phrase 'on all matters of public history, literature, science or art'

Fact 1: Re Babri Masjid (1526-1992) and its possessory title at the disputed site: The Muslims claimed that it was built by Babur for them at the "vacant land", and they were unlawfully dispossessed of it by the Hindus first in 1949[119] and finally in 1992;[120] the Hindus disputed their claim by asserting that the Babri Masjid was built at the site, which is the birth place (*Garbhagriha*) of Lord Ram and where there already existed a Hindu temple.[121] [Archaeological Survey of India (ASI) has verified this assertion at least to the extent that the remnants beneath the three-domed structure, called the Mosque or Masjid, bore the signs of 12th century Hindu temples.[122]]

Fact # 2: Re Mosque or Masjid – whether it was an exclusive place of worship for the Muslims: The Muslims claimed that by virtue of its very nomenclature, a mosque or masjid bearing the inscription of "Allaha" is the exclusive place of worship for the Muslims; the Hindus, on the other hand claimed that the existence of the Islamic structure, did not deter them to offer their prayer at the Mosque, inasmuch it also carried the religious symbol of Hindus – "Varah, Jai-Vijay and Garud outside the three domes," [123] besides offering prayer to the "Kasauti stone pillars placed inside the mosque." This virtually negated the claim that the disputed structure was the place of worship *only* for the Muslims to the exclusion of the Hindus. [124]

Fact # 3: Re 1857-bifurcation of Ram Janmabhumi-Babri Masjid complex into 'inner' and 'outer' courtyards: It simply meant – allowing the Muslims to offer *namaj* in the inner courtyard without in anyway impinging upon the issue of its title, while recognizing the un-impeded-right of the Hindus to offer worship in the outer courtyard, *duly supported by the customary mode of offering prayer*.[125] No such evidence of offering *namaz* at the three-dome structure after 1526 till 1857-befurcation could be adduced by the Muslims.[126]

Fact # 4: Re 1949-riots leading to 'attachment' of 'inner courtyard' and appointment of 'receiver': Desecrating the mosque by placing Hindu idols in the

---

are wide enough to empower the court to take into consideration Gazetteers, travelogues and books."[*Ibid*.] The only "rider" is that "if the Court is called upon by any person to take judicial notice of any fact, the Court may refuse to do so until and unless, such person produces such book or any document." [*Ibid.*]

119 See, *supra*, Part III, Critical Analysis (2)(vi), "Ceaseless contestation over the possessory control over the inner courtyard (termed by the Hindus as the 'Garbha Griha')."

120 *Ibid.*

121 See, *supra*, Part III, Critical Analysis (2)(ii), "Historical records of travellers, read with the contents of gazetteers."

122 See, *supra,* Part III, Critical Analysis (2)(i), "The nature of the structure underlying the mosque at the disputed site," along with its footnote and the accompanying text.

123 See, *supra,* Part III, Critical Analysis (2)(iii), "*Babri-Masjid –the common place of worship,"* along with its footnotes and the accompanying text.

124 *Ibid.*

125 See, *supra,* Part III, Critical Analysis (2)(iv), "*The existence of Islamic structure at the disputed site – no diminishing of Hindu faith*," along with its footnotes and the accompanying text.

126 *Ibid.*

central dome, and permitting the Hindus (despite their criminal trespass) in the meanwhile to continue with their worship for maintaining peace and order, manifest the violent form of assertion of their faith since time immemorial that the disputed site is the birthplace of Lord Rama.[127]

Fact # 5: Re Violent demolition of the three-domed-structure in the inner courtyard by the Hindus on December 6, 1992: In the historical context it represents the culmination of the continuing faith and belief that that was the birth place of Lord Ram and that this belief and faith is eternal and non-negotiable,[128] and thereby revealing that the 'unlawful act' of demolition seems to be a strong 'reaction' to the hitherto legally unresolved lingering conflict problem for decades, nay, centuries, rather than the intent to violate the rule of law!

It is this contextual import of factual matrix that has led the Supreme to decree the entire 2.77 acre of land, including the disputed area of about 1500 square yards of inner courtyards where the three-domed structure stood before its demolition, in favour of Hindus for the construction of a Ram temple,[129] and also direct the Central/State Government to allot a five-acre plot to Muslims for building a mosque elsewhere in Ayodhya.[130]

(e) Shifting of the mosque from the original site

As an integral part of removing misgivings in public perception about the legitimacy of the Supreme Court judgment, we may also deal with the issue: Why shifting the original site of the Masjid to another appropriate place within the vicinity of Ayodhya is considered to provide a viable solution to the lingering conflict problem?

---

127 See, *supra,* Part III, Critical Analysis (2)(vi), "*Re 1949-riots leading to 'attachment' of 'inner courtyard' and appointment of 'receiver.'* See also the assertion of the Nirmohi Akhara, representing a religious sect amongst the Hindus, known as the Ramanandi Bairagis: "The Nirmohis claim that they were, at all material times, in charge and management of the structure at the disputed site which according to them was a 'temple' until 29 December 1949, on which date an attachment was ordered Under Section 145 of the Code of Criminal Procedure 1898. In effect, they claim as shebaits in service of the deity, managing its affairs and receiving offerings from devotees. Theirs is a Suit of 1959 for the management and charge of 'the temple'," *Ayodhya case* (2019), at para 5.

128 See, *supra*, Part III, Critical Analysis (2)(iv), "The existence of Islamic structure at the disputed site – no diminishing of Hindu faith," along with its footnotes and the accompanying text.

129 Pursuant to this order, the Central Government cleared the formation of a Trust, known as Shri Ram Janmabhoomi Teerth Khsetra Trust, on February 5, 2020, who would be handed over the whole of the acquired 67.703 acres for the construction of Ram Mandir.

130 On behalf of Muslims, Uttar Pradesh Sunni Central Waqf Board accepted the 5-acre land allotted by the State Government in compliance of the Supreme Court judgment. This land has been allotted at Dhannipur village of Raunahi block, around 30 km away from Ayodhya on Lucknow-Gorakhpur highway for the construction of a mosque and other related religious charitable purposes. See, *The Indian Express* (February 25, 2020): "UP Sunni Board accepts Ayodhya land; to build mosque, hospital, library."

The rationale adduced by the Supreme Court for shifting is that the division of the disputed land between the Hindus and the Muslims "will not subserve the interest of either of the parties or secure a lasting sense of peace and tranquillity."[131] We may, however, decipher at least three underlying reasons for this judicious move, which, we believe, should be helpful in correcting the popular public perception on this score.

The first underlying reason for shifting proposition is that distant physical separation between the Hindu temple and the Muslim mosque is desiderated. This is considered necessary for avoiding religious animosity, as the history of continuing conflict of more than 150 years reveals that mere bifurcation of the site in close proximity (even assuming joint possessory title), could not resolve the conflict, which is deeply rooted in religious susceptibilities.[132]

The second sound reason, supporting to shift the site of the mosque, is premised on the fact that the Muslims, unlike the Hindus, did not believe that their mosque to be an integral part of the land where it stood prior to its demolition in 1992. It needs emphasis to state that, on the contrary, the idea and existence of a Hindu temple is considered all along inseparable from the land itself where it stood or supposedly stood. May be, owing to this proximity, the Supreme Court awarded the whole of the disputed site to the Hindus in their adjudication for the construction of a Hindu temple**.**[133]

The third underlying reason for shifting the mosque is that the distant physical separation of the mosque from the temple would be beneficial to both the Hindus and the Muslims, as that would provide the full freedom to manage

---

131 See, *Ayodhya case* (2019), para 799: The Supreme Court disapproved division of the site "admeasures all of 1500 square yards," as was commended by the High Court, as the same is neither legally sustainable, nor conducive for "maintaining public peace and tranquillity" on lasting basis.

132 See, *id.*, para 10: "The disputed site has been a flash point of continued conflagration over decades. … The bifurcation [of the disputed site in 1856-57], as the record shows, did not resolve the conflict and there were numerous attempts by one or other of the parties to exclude the other."

133 See, *Ayodhya case* (2019), para 3: "The disputed land forms part of the village of Kot Rama Chandra or, as it is otherwise called, Ramkot at Ayodhya, in Pargana Haveli Avadh, of Tehsil Sadar in the District of Faizabad. An old structure of a mosque existed at the site until 6 December 1992. The site has religious significance for the devotees of Lord Ram, who believe that Lord Ram was born at the disputed site. For this reason, the Hindus refer to the disputed site as Ram Janmabhumi or Ram Janmasthan (i.e. birth-place of Lord Ram). The Hindus assert that there existed at the disputed site an ancient temple dedicated to Lord Ram, which was demolished upon the conquest of the Indian sub-continent by Mughal Emperor Babur. On the other hand, the Muslims contended that the mosque was built by or at the behest of Babur on vacant land. Though the significance of the site for the Hindus is not denied, it is the case of the Muslims that there exists no proprietary claim of the Hindus over the disputed property." In our critique, we have been able to cull enough corroborative evidence, which prompted the Supreme Court, on the basis of preponderance of probabilities, that the Hindus have better "proprietary claim" to the inner courtyard than the Muslims.

their "own affairs in the matter of religion" under Article 26 of the Constitution, with least interference from outside, including the State, whose regulatory power is constitutionally defined and limited by making it subject to only "public order, morality and health."[134]

(f) Supreme Court's source of power and its exploration with ingenuity for accomplishing the 'intriguingly interesting Judgment'

Most apparently, the unique source of power is Article 142 of the Constitution, which, *inter alia*, expressly states: "The Supreme Court in the exercise of tis jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it…." A bare perusal of this constitutional provision shows that it confers very wide and undefined power on the Supreme Court when it comes to do "full justice," particularly in the absence of any specifically enumerated power.[135]

However, the *'unique* feature of the *Ayodhy case (2019)* is that the Supreme Court have shown 'judicial ingenuity' in the exercise of their undefined powers for 'doing complete justice' at least on two counts:

One, in respect of the concept of juristic person: it has allowed the idols of Ram Lalla placed in the Mosque to be treated as juristic person, but denying the same status to the specific 'site' – *Asthan Shri Ram Janmabhoomi* or simply *Shri Ram Janmosthan (that is, the site itself constituted the deity called 'Sri Ramjanmasthan')*[136] - where the demolished structure stood, for the simple reason, that if the site is also allowed to be treated as a juristic person, then the whole jurisdiction of the Supreme Court to do 'complete justice' would be lost.

Two, in respect of treating the crime imputed to the juristic person merely as a civil wrong: This enabled the Supreme Court to apply the concept of compensation for the injury caused to the Muslims by allotting them land double of the disputed area for the construction of the mosque elsewhere![137]

The rationale of modifying the established jurisprudential concept of juristic person for doing complete justice we may find in the classical statement of Justice Oliver Wendell Holmes Jr (1841-1935), one of the most respected and distinguished American jurists, who expounded the genesis of living law by

---

134 For the full length analysis of the right to freedom of religion under Articles 125 and 126 of the Constitution, see author's monograph published by Panjab University, Chandigarh*: Socio-religious Reform through Judicial Intervention: Its limit and limitation under the Constitution.* [PU Publication Bureau, First Edition 2020]

135 See, Virendra Kumar, "Judicial Legislation under Article 142 of the Constitution: A pragmatic prompt for proper legislation by Parliament," *Journal of the Indian Law Institute*, Vol. 54 (2012) 364-381.

136 See, *supra*, note 40, wherein the disputed site had been held by the Allahabad High Court that "*constitutes the deity called 'Sri Ramjanmasthan'* which has specific significance to the Hindus." See also, *Ayodhya case* (2019), Addenda, para 102, extracting "a copy of the letter dated 25.08.1863 sent by the Secretary, Chief Commissioner of Oudh to the Commissioner, Faizabad Division, where 'Mosque' was referred as 'Janam Sthan Mosque'," and worshipped by the Hindus as 'deity.

137 See, *supra*, note 114 and the accompanying text.

stating long ago: "The life of the law has not been logic: it has been experience," *The Common Law* (1881).[138] It's so true. It echoes the ethos of Indian society in regulating our social relationship,[139] which have been captured by the Judicial Committee of the Privy Council on the strength of Hindu classical law more than 150 years ago (in 1868) by stating axiomatically that "under the Hindu system of law, clear proof of usage will outweigh the written text of the law." [140]

On the fact matrix of the instant case, demolition of the mosque on December 6, 1992 was "in breach of the order of status quo," which clearly "constituted a serious violation of the Rule of law."[141] The existent "status quo" order was passed by the Magistrate Court in 1949 under the Code of Criminal Procedure, which ordained that the complexion of the three-domed structure would not be changed during the period of 'attachment' and that the Hindus could, however, continue to offer prayers to the idols placed in the central dome of the structure to the exclusion of the Muslims![142] This 'attachment' continued for the next more than four decades – from December 22-23, 1949 to December 6, 1992! Is this the purpose of 'attachment' and appointment of 'receiver' under the Code of Criminal Procedure?

We need to bear in mind the circumstances in which the Executive Magistrate passed the order on the intervening night of December 22/23, 1949. His sole and singular objective-concern was to maintain "public order and tranquillity." This was the time most proximate to the partition of India on the basis of religion in 1947, involving movement and exchange of an estimated 14.5 million people, termed as the 'largest mass migration in history' across the newly drawn borders of India and Pakistan. It was this context, which prompted the Executive Magistrate with the avowed of maintaining 'peace and order', to permit the Hindus to continue to offer their prayers to the instantly installed Ram Lalla idols in the central dome to the exclusion of Muslims. In

---

138 By this exquisite emphasis on 'experience', Justice Holmes should not be understood to mean that 'logic' in law is of little importance. In fact, in his later work he elucidated: "We have too little theory in the law rather than too much," in "The Path of the Law," 10 *Harvard Law Review* 457 (1897)

139 See, Virendra Kumar, "Customary Appointment of an Heir: Has it been Abrogated?" *Journal of the Indian Law Institute*, Vol. 18 (1976), 279-99.

140 *The Collector of Madura v. Moottoo Ramalinga Sathupath* (1868) 12 Moo I.A. 397 at 436, where the Judicial Committee of the Privy Council, after stating that the different commentaries had given, rise to the different schools of law, observe that "the duty of an European Judge, who in under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities [*Smritis*], as to ascertain whether it has been received by the particular school which governs the District with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law."

141 See, *supra*, notes 98.

142 *Ibid*.

that fringy and hostile environ, to think of India in which "the religious character of a place of worship existing on the 15th day of August, 1947 shall continue to be the same as it existed on that day," was yet a distant dream to be realized – an ideal that actually fructified only four decades later in the enactment of *The Places of Worship (Special Provisions) Act of 1991,*[143] when modicum of peace and order became the order of civil society in which peace and justice became synonymous.[144] In view of the peculiar historical context and character of "Ram Janma Bhumi-Babri Masjid in Ayodhya in the State of Uttar Pradesh," it needs emphasis to state that the Parliament has specifically excluded the lingering issue of Ayodhya conflict from the operational ambit of the special seminal provisions of the Act of 1991.[145]

Thus, in this backdrop, the act of demolition in violation of the Executive Magistrate's order passed in 1949, permitting the Hindus to offer their prayers to the installed Ram Lalla idols to the exclusion of Muslims, in our submission, could be construed simply as an instance of abridging the distance between *de facto* and *de jure* claim! If so, then legitimising the violation of the status quo order by the Supreme Court[146] could be easily visualized as an attempt of 'doing complete justice'[147] by acting judiciously on the principle of 'justice, equity and good conscience,' which is jurisprudentially termed as the ultimate or residuary source of law. [148] Eventually, it is this premising exercise of the

---

143 See, Section 4(1) of *the Places of Worship (Special Provisions) Act of 1991*.

144 *Cf.* The five review petitioners, *inter alia*, said and stated with utmost equanimity that the "purpose of this review petition is not to disturb the peace of this great Nation but in the spirit that any peace must be conducive to justice. In respect of this case Muslims has always maintained the peace but Muslims and their properties have been victim of violence and unfairness treatment… The judgment under Review erred in privileging peace over justice while not appreciating that there could be no peace without justice." See, *supra*, notes 115 and 116, relating to the five Review Petitions filed on December 6, 2019 by the Muslim parties reported in *The Indian* EXPRESS, December 7, 2019.

145 Section 5 of *the Places of Worship (Special Provisions) Act of 1991* specifically exempts the application of the provisions of the Act of 1991: "Nothing contained in this Act shall apply to the place or place of worship commonly known as Ram Janma Bhumi-Babri Masjid situated in Ayodhya in the State of Uttar Pradesh and to any suit, appeal or other proceeding relating to the said place or place of worship."

146 *Cf.* The five review petitioners claimed "giving antecedent title to the Hindus, means that the site belonged to them in l992" and that the "judgment thus takes advantage of the destruction of the mosque in effectively holding that had the mosque not been destroyed in l992, this judgment would have ordered it to be destroyed". See, *supra*, note 144.

147 *Cf.*, The five review petitioners said that Muslims had never asked for the five acres of land and that "…awarding the entire disputed land to the Hindus, shows that exercise under Article 142 did not meet the test of complete justice." *Ibid.* *[The Indian* EXPRESS, December 7, 2019.]

148 *Cf.*, The five review petitioners further stated that title could not have been given to Hindu parties on the basis of exclusive possession of the entire site which never existed at any point in time with the Hindus since it is admitted that Muslims entered and prayed at the site till December 1949 and were subsequently "prevented from doing so because of the

Supreme Court that has resulted in decreeing the entire 2.77 acres of land, including the disputed area of about 1500 square yards, to the Hindus for the construction of their temple; and in lieu thereof 5 acres to the Muslims for the construction of their mosque, and thereby producing an equitably well-balanced and, therefore, widely acceptable judgment![149] This judgment is truly termed

---

attachment while unfairly permitting Hindu worship following criminal trespass." *Ibid.* [*The Indian* EXPRESS, December 7, 2019.]

[149] Uttar Pradesh Sunni Central Waqf Board, the main litigant in the Ayodhya title suit case on behalf of Muslims, accepted the 5-acre land allotted by the State Government in compliance of the Supreme Court judgment. This land has been allotted at Dhannipur village of Raunahi block, around 30 km away from Ayodhya on Lucknow-Gorakhpur highway for the construction of a mosque and other related religious charitable purposes. The decision of acceptance was taken unanimously by six members of the Board, headed by Chairman Zufar Ahmed Faruqi, in a meeting held in Lucknow on Monday, February 24, 2020. The other members of the Board who attended the meeting include: Adnan Farooq Shah, Mohammad Junaid Siddiqui, Abrar Ahmad, Mohammad Juneed, and Maulana Syed Ahmad.

[The two Board members Imran Mahmood and Abdul Razzaque Khan, who had earlier raised objection to the plot offered, skipped this meeting. Faruqi, however, explained the absence Imran Mahmood by stating that he has not attended any meeting since 2010, whereas he had made no comment about the absence of other member.]

In a formal statement after the meeting Faruqi said: "The Government of Uttar Pradesh, in compliance of the order dated November 9, 2019 passed by Supreme Court in a Civil Appeal of 2010 and other connected matters, has allotted 5 acres land to the Uttar Pradesh Sunni Central Waqf Board. The board in its meeting held today has decided that it is accepting the aforesaid land."

Revealing the plan about the construction of the envisaged mosque, Faruqi further stated: "The board has resolved that it will constitute a Trust regarding the aforesaid 5-acre land. The said Trust will construct a mosque along with a centre to showcase Indo-Islamic culture of several centuries, a centre for research and study of Indo-Islamic culture, a charitable hospital, a public library, and other public utilities facilities for all sections of the society." Faruqi also stated that the name and size of the mosque was yet to be decided. He said, "We will constitute a trust for construction of the mosque, and details of the (proposed) trust and its office-bearers will be announced once the trust comes into existence, which is expected soon. We have not yet decided the dimensions of the mosque; it will be formed as per local requirements. There is already a shrine there, but not on the allotted land." See, *The Indian* EXPRESS (February 25, 2020) under the heading, "UP Sunni Board accepts Ayodhya land; to build mosque, hospital, library."

Prior to acceptance of the offer on February 25, 2020, the Waqf Board in its meeting on November 26, 2019, had reiterated that it would not file a review petition in the Supreme Court against the November 9 verdict that paved the way for the construction of a Ram Temple at the disputed site. At that time, however, the meeting remained inconclusive over accepting the 5-acre land offered by the apex court in lieu of the disputed land given to Hindus for the temple. In this respect, six of the seven members present at the meeting, including Chairman Zufar Faruqui, agreed with the Board's decision not to align with All India Muslim Personal Law Board (AIMPLB), which has decided to file a review petition. In the formal statement after the meeting, Faruqui said: "The Board has considered the judgement of the Supreme Court passed in the Babri Masjid case. The Board has reiterated its stand that it will not file any review petition in the Supreme Court… We had taken a public stand that we will accept the apex court's decision, even if it is not in our favour. It

'historic' as it represents "a unique achievement in the annals of the apex court" and "must count as a miracle" in producing a judgment in which "all parties expressed faith in the eventual judicial reasoning and result." [150]

On hindsight, we may also venture to add that perhaps one of the singular reasons of wide acceptability of the Ayodhya verdict of November 9, 2019 is that the eventual decision-making in Ayodhya case was preceded by a very strong and sincere attempt of the Supreme Court to find out an amicable solution of the conflict problem outside the court. It is towards this end the Supreme Court Constitution Bench, right at the threshold of hearing appeals against the September 30, 2010 verdict of the Allahabad High Court,[151] on February 26, 2019, despite 'the lack of consensus between the parties in the matter,' constituted a three-member mediation committee for exploring if the Ram Janmabhoomi-Babri Masjid Ayodhya title dispute case could be settled amicably.[152] The committee chaired by the former Supreme Court judge Justice

---

was not just our stand, but was the stand of all petitioners in the Ayodhya case." See, *The Indian* EXPRESS, November 27, 2019: "Ayodhya verdict: Sunni Board to not file review plea, will take call on 5-acre land."

We may also take note of the spontaneous reactive responses of the two known members of the Muslim community soon after the verdict was pronounced on November 9, 2019. The first response is that of Asaduddin Owaisi, AIMIM President: "The Supreme Court is supreme... and final but not infallible…. We don't need anyone's donation (of land)... There is no need to patronise us. Even today, Hyderabad people will give enough money to buy five acres." The other response is that of Iqbal Ansari, son of original litigant late Hashim Ansari in *Ayodhya case* (2019): "I respect the verdict. My father Hashim Ansari had filed the title suit. The issue had been dragging on for years. I am glad the matter is finally settled… We won't challenge the court verdict." See, *The Sunday Tribune*, November 10, 2019.

Cf.: A feeble expression of indirect acceptance seems to resonate in the resolution of the Jamiat Ulama-i-Hind (JUH) faction led by Maulana Mahmood Madani. The working committee of JUH adopted a resolution on November 21, 2019 describing the judgment of the Supreme Court in the Ram Janmabhoomi-Babri Masjid case as "the darkest spot in the history of free India" but said it wouldn't file a review petition as there was "possibility of further damage." See, The Indian EXPRESS, November 22, 2019.

150 See, Upendra Baxi, "Chiselling secularism" in *The Indian* EXPRESS, November 12, 2019. Professor Baxi is a very distinguished professor of law in Development at the University of Warwick, United Kingdom, and former vice chancellor of Universities of South Gujarat and Delhi. Besides, he is a leading light in legal education in our times, who through his passionate teaching and published quality research work continue to inspire both law scholars and teachers alike. In this article, he has termed the judgment as an "encyclopaedic decision," and through his critical appraisal he has shown how the Supreme Court admirably succeeded in meeting the constitutional mandate of secularism premised on "Equality of all faiths."

151 The Allahabad verdict ordered a three-way division of the disputed 2.77 acres site between the Nirmohi Akhara sect, the Sunni Central Wakf Board, Uttar Pradesh and the deity Ramlalla Virajman. See, *supra*, note 40.

152 While the Muslim petitioners had welcomed the Court's decision to go on for mediation, the Hindu bodies, except for the Nirmohi Akhara and the Uttar Pradesh government, were

Fakkir Mohamed Ibrahim Kalifulla included Art of Living founder, Sri Sri Ravi Shankar and senior advocate Shriram Panchu (an expert in mediation proceedings) as its members.

Proceedings of this committee were held in-camera.[153] The committee was desired to complete the mediation process within eight weeks. Since the interim confidential reports submitted to the Court seemingly showed some encouraging results,[154] it was granted extension at least twice for submitting the final outcome of the mediation proceedings first till July 31, 2019 and again till August 15, 2019,[155] enabling the Supreme Court to take up the Ayodhya Ram Janmabhoomi-Babri Masjid land title case immediately thereafter in an 'open court'.

However, in the absence of consensus even for having recourse to the alternative mediation process, the successful culmination of amicable settlement was indeed a remote possibility. Nevertheless, this initiative of the Supreme Court by way of judicial intervention was not an exercise in futility. In our own view, that must have given a candid opportunity to all the opposing parties involved at least to appreciate the predicament of one another as well as that of the Supreme Court in their eventual decision-making.

A few glimpses of the proceedings of the First Memorial Lecture (A few photographs taken on this occasion could be appended)

Appendix

The Places of Worship (Special Provisions) Act 1991 No. 42 of 1991
[18th September, 1991].

An Act to prohibit conversion of any place of worship and to provide for the maintenance of the religious character of any place of worship as it existed on the 15th day of August, 1947, and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Forty-second Year of the Republic of India as follows:--

Short title, extent and commencement.
1. Short title, extent and commencement.

---

not in favour, as for them the issue of disputed site belonging to Hindus was non-negotiable.

153 The court refused to divulge the details on the mediation efforts. The five-judge Constitution bench had barred both the print and visual media from reporting on the mediation proceedings. It also barred those participating in the proceedings from speaking to the media.

154 As the mediation committee told the Supreme Court that hitherto they were not experiencing any difficulty in the mediation process.

155 Second extension was granted on May 10, 2919.

(1) This Act may be called the Places of Worship (Special Provisions) Act, 1991.

(2) It extends to the whole of India except the State of Jammu and Kashmir

(3) The provisions of sections 3, 6 and 8 shall come into force at once and the remaining provisions of this Act shall be deemed to have come into force on the 11th day of July, 1991.

Definitions.

2. Definitions. In this Act, unless the context otherwise requires,--

(a) "commencement of this Act" means the commencement of this Act on the 11th day of July, 1991;

(b) "conversion", with its grammatical variations, includes alteration or change of whatever nature;

(c) "place of worship" means a temple, mosque, gurudwara, church, monastery or any other place of public religious worship of any religious denomination or any section thereof, by whatever name called. Bar of conversion of places of worship.

3. Bar of conversion of places of worship. No person shall convert any place of worship of any religious denomination or any section thereof into a place of worship of a different section of the same religious denomination or of a different religious denomination or any section thereof. Declaration as to the religious character of certain places of worshipand bar of jurisdiction of courts, etc.

4. Declaration as to the religious character of certain places of worship and bar of jurisdiction of courts, etc.

(1) It is hereby declared that the religious character of a place of worship existing on the 15th day of August, 1947 shall continue to be the same as it existed on that day.

(2) If, on the commencement of this Act, any suit, appeal or other proceeding with respect to the conversion of the religious character of any place of worship, existing on the 15th day of August, 1947, is pending before any court, tribunal or other authority, the same shall abate, and no suit, appeal or other proceeding with respect to any such matter shall lie on or after such commencement in any court, tribunal or other authority: Provided that if any suit, appeal or other proceeding, instituted or filed on the ground that conversion has taken place in the religious character of any such place after the 15th day of August, 1947, is pending on the commencement of this Act,

such suit, appeal or other proceeding shall be disposed of in accordance with the provisions of sub-section (1).

(3) Nothing contained in sub-section (1) and sub-section (2) shall apply to,--

(a) any place of worship referred to in the said sub- sections which is an ancient and historical monument or an archaeological site or remains covered by the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958.) or any other law for the time being in force;

(b) any suit, appeal or other proceeding, with respect to any matter referred to in sub-section (2), finally decided, settled or disposed of by a court, tribunal or other authority before the commencement of this Act;

(c) any dispute with respect to any such matter settled by the parties amongst themselves before such commencement;

(d) any conversion of any such place effected before such commencement by acquiescence;

(e) any conversion of any such place effected before such commencement which is not liable to be challenged in any court, tribunal or other authority being barred by limitation under any law for the time being in force. Act not to apply to Ram Janma BhumiBabri Masjid.

5. Act not to apply to Ram Janma BhumiBabri Masjid. Nothing contained in this Act shall apply to the place or place of worship commonly known as Ram Janma Bhumi-Babri Masjid situated in Ayodhya in the State of Uttar Pradesh and to any suit, appeal or other proceeding relating to the said place or place of worship.
Punishment for contravention of section 3.

6. (1) Punishment for contravention of section 3. Whoever contravenes the provisions of section 3 shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.
(2) Whoever attempts to commit any offence punishable under sub- section (1) or to cause such offence to be committed and in such The Place of Worship (Special Provisions) Act, 1991 attempt does any act towards the commission of the offence shall be punishable with the punishment provided for the offence.
(3) Whoever abets, or is a party to a criminal conspiracy to commit, an offence punishable under sub-section (1) shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code, (45 of 1860.) be punishable with the punishment provided for the offence. Act to override other enactments.

7. Act to override other enactments. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any law other than this Act. Amendment of Act 43 of 1951.

8. Amendment of Act 43 of 1951. In section 8 of the Representation of the People Act, 1951, in subsection (1),--
(a) in clause (i), the word "or" shall be inserted at the end;
(b) after clause (i), as so amended, the following clause shall be inserted, namely:--
"(j) section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991,"

V. S. RAMA DEVI,
Secy. to the Govt. of India.

INTERMEDIARY SERVICES OR EXPORT OF SERVICES?: AN EXPLORATION OFVERIZON AND GENPACT JUDGMENTS IN THE LIGHT OF CONSTITUTION (ONE HUNDRED AND FIRST AMENDMENT) ACT, 2016

Prof (Dr.) Aman Amrit Cheema[*]
Ankit Awal[**]

Abstract

The litigation revolving around the interpretation of intermediary services vis-à-vis the export of services began during the erstwhile indirect taxation regime. The interpretation adopted by the Revenue resulted in exporting of taxes which in turn, defied the Constitutional spirit. The issue was thereafter settled by the Hon'ble Delhi High Court in the case of Verizon Communication India Pvt. Ltd. vs. Assistant Commissioner, Service Tax in favour of taxpayers. It was held that the recipient of service was determined on basis of the fact that who made the payment for the service. With the introduction of goods and services tax regime in India, the issue was brought into litigation again on the premise that the scope of intermediary services is different under the two tax regimes. The Adjudicating and Appellate Authorities decided the issue against the taxpayers and raised the demand of taxes. The matter travelled upto the Hon'ble Punjab & Haryana High Court in the case of Genpact India Pvt. Ltd. vs. Union of India wherein, it was held that sub-contracting was excluded from the scope of intermediary services and that the scope of intermediary services under the goods and services tax regime is the same as was under the erstwhile service tax regime. Thus, the issue has been settled by the Hon'ble Court in the favour of the taxpayers.

Keywords: *Export of services, Intermediary, Interpretation, Sub-contracting.*

I. Introduction

The indirect taxation regime in India has been completely overhauled by way of the introduction of goods and services tax in India. With effect from 1st July, 2017, the Central Government brought the *Central Goods and Services Tax Act, 2017*[1] and the *Integrated Goods and Services Tax, Act, 2017*[2] into force. The State Governments/ Union Territories introduced their respective *State/Union Territory Goods and Services Tax Act, 2017*. The said enactments collectively subsumed the earlier indirect tax laws which *inter-alia* includes the *Central Excise Act, 1944*[3], the *Finance Act, 1994*[4], the *Central Sales Tax Act, 1956*[5], respective *State Value Added Tax Acts*.

The goods and services tax regime was brought in with the objective of "One Nation, One Tax". This means that the Governments intended to levy the same tax on supplies of all goods or services or both making the entire country a

[*] Professor (Laws), Panjab University Regional Centre, Ludhiana.
[**] Research Scholar, Department of Laws, Panjab University, Chandigarh.

1 Central Goods and Services Tax Act, 2017, No. 12, Acts of Parliament, 2017 (India).
2 Integrated Goods and Services Tax Act, 2017, No. 13, Acts of Parliament, 2017 (India).
3 Central Excise Act, 1944, No. 1, Acts of Parliament, 1944 (India).
4 Finance Act, 1994, No. 32, Acts of Parliament, 1994 (India).
5 Central Sales Tax Act, 1956, No. 74, Acts of Parliament, 1956 (India).

common national market. This was in stark contrast to the erstwhile indirect taxation regime where, the taxable events were different for levy of different types of taxes and duties. For instance, the central excise duty was levied on the manufacture of goods, service tax was levied on the provision of services, value added tax was levied on intra-state sales and central sales tax was levied on inter-state sales.

The goods and services tax is a destination-based consumption tax. The mandate for apportioning the goods and services tax levied and collected by the Government on inter-state supplies is provided by virtue of Section 9 of the *Constitution (One Hundred and First Amendment) Act, 2016*. As per Section 9, the tax shall be apportioned between the Centre and the States[6]. Further, Section 17 of the *Integrated Goods and Services Tax Act, 2017* lays down the manner of apportionment of taxes. This strengthens the principle of goods and services tax being a destination-based consumption tax. Further, Section 16 defines a "zero-rated supply" to *inter-alia* mean an export of goods or services or both since the destination or consumption of supply is outside India.

Owing to the world becoming a global village where the nations are interdependent on each other and considering the fact that India is a young nation, India is increasingly becoming a very popular centre for providing outsourcing services. Many multinational corporations are setting up their offshore centres or back-end offices in India. This helps them to cater to the demands of their customers in other foreign countries. The arrangements are executed between the Indian and foreign entity in order to export services to the foreign entity.

The Legislature has always levied the taxes and duties on domestic transactions. The intent has been to ensure that the taxes are not exported. This ensures that the goods and services of domestic manufacturers/traders remain competitive in the international market. This is also in line with the underlying principle of the Constitution of India. Keeping in view the said objective, the levy of taxes on the export transactions has always been exempted by the Central Government.

In the above background, it becomes imperative to understand the present discussion on export of services and intermediary services. Here, a faulty interpretation of the latter concept has resulted in defying the Constitutional spirit of not exporting the taxes. The concept of intermediary services was introduced to tax a transaction of a very different nature where, a person acts as a bridge or a facilitator between at least two parties. However, by adopting an incorrect interpretation of the said concept, the department has resorted to

6 INDIA CONST. art. 269A, cl. 1.

taxing those transactions of export which are performed by an Indian entity on principal to principal basis.

An intermediary transaction attracts the levy of taxes in India while that of an export does not. The litigation pertaining to intermediary services started in the erstwhile service tax regime. The same continued even under the current goods and services tax regime since the concept has not undergone any change under the goods and services tax regime. The issue was discussed at length in a number of judicial pronouncements in the erstwhile taxation regime. The same has finally been settled by the Hon'ble Punjab & Haryana High Court in the favour of assessees under the current regime thereby, upholding the Constitutional spirit.

II. Interpretation of Intermediary Services under The Erstwhile Service Tax Regime

The erstwhile service tax regime defined the concept of intermediary vide clause (f) of Rule 2 of the Place of Provision of Services Rules, 2012. The provision was worded in a manner that the term "intermediary" was defined to mean any person, like a broker, an agent. Such person is tasked with the responsibility of arranging or facilitating the supply of goods or provision of main service, between at least two persons. But the term does not include a person who provides the main services or supplies the goods himself.

The service provided by an intermediary is separate or distinct from the provision of main service to the service recipient. Where a person is engaged for providing the main service or supplying the goods himself or on his own account, then such a person falls out of the scope of intermediary services. Thus, it is essential that there must be two or more transactions of provision of services or supply of goods. Only a transaction where a person acts as a mere facilitator or arranges the provision of services/supply of goods falls within the ambit of intermediary services.

The concept of intermediary can be explained with the help of an example. Where a consultant acts as a facilitator and refers a client to a law firm for provision of legal services, then he acts as an intermediary as he is not providing the main services to the client on his account. On the contrary, where a consultant avails the legal services himself in his own name and then provides the services independently to the client basis the services availed by him from the law firm, then he does not act as an intermediary. In fact, provides the main services on his account.

The Service Tax Education Guide was released by Central Board of Indirect Taxes & Customs (Central Board of Excise & Customs, earlier) on 20.06.2012[7].

[7] CENTRAL BOARD OF EXCISE & CUSTOMS, SERVICE TAX EDUCATION GUIDE, Para 5.9.6.

It further clarified that generally a person who undertakes the task of arranging or facilitating a provision of service, or a supply of goods, or both, between at least two persons, qualifies as an 'intermediary'. However, it is essential to note that an intermediary does not undertake any material alteration or further processing.

The Education Guide also laid down certain factors to aid in determining as to when a person will be said to be an intermediary in a particular transaction. The factors are listed below:

- Value and nature: An intermediary is not authorised to alter the nature and value of the main service. He is only responsible for facilitating the provision of a service by a principal. However, the intermediary may be permitted to negotiate a different price, by the principal himself. If the intermediary is not sanctioned with said authority, he cannot assume the same and act on behalf of the principal.
- Separate commission: The intermediary charges a commission for providing his services. The value of such commission is separate and identifiable from the main supply that he is facilitating or arranging.
- Title and identity: It is essential that while acting on behalf of the principal, the service provided by the intermediary is visibly distinguishable.

The above requirements of the Education Guide were discussed in the case of ***Commissioner of GST, Gurgaon-II vs. Orange Business Solutions Pvt. Ltd.***[8] Here, the Hon'ble Customs, Excise & Service Tax Appellate Tribunal laid down the essentials of intermediary services.

The litigation pertaining to this ambiguous concept always revolved around the fact as to whether a particular transaction qualifies as an intermediary service or export of service. The former attracts the levy of taxes hence, the Revenue has always been inclined towards treating a transaction of provision of services to overseas entity as an intermediary service. On the other hand, the assessees/service providers have always taken the stand that the transaction qualifies as an export of services which is exempted from the levy of service tax.

In order to understand the issue in detail, it is important to refer to the relevant provisions of the Place of Provision of Services Rules, 2012. These Rules determine the place where the services have been provided and accordingly determine the levy of service tax.

---

[8] Commissioner of GST, Gurgaon-II v. Orange Business Solutions Pvt. Ltd., 2019 (27) G.S.T.L. 523 (Tri. - Chan.) (India).

In order to ascertain the place of provision of services, the general rule is laid down in Rule 3 of the Place of Provision of Services Rules, 2012. In terms of the general rule, the service shall be deemed to be provided at the place where the recipient of services is located. The proviso caters to an eventuality where the location of recipient of service is not ascertainable. In such an eventuality, the service shall be deemed to be provided at the place where the provider of services is located. The exclusion contained in the proviso is not applicable in case of online information and database access or retrieval services.

Rule 9 of the Place of Provision of Services Rules, 2012 is an exception to the general rule contained in Rule 3. It is an exception because it provides that in case of certain specified services, the place where the provider of services is located shall be the place of provision of services. Clause (c) of said Rule 9 refers to intermediary services being one of those services where the place where the provider of services is located shall be the place of provision of services. Meaning thereby that irrespective of the place where the recipient of service is located, if the location of an intermediary service provider is in India, then the place of provision of services shall be in India. Then, the transaction will be subject to the levy of service tax.

The issue of leviability of service tax arose in respect of such transactions where the recipient of services was located outside India while the location of provider of services was located in India. While the taxpayers treated such transactions as export of services, the Revenue entertained a view that such transactions were in the nature of intermediary services. In such a case, Rule 9 of the Place of Provision of Services Rules, 2012 would apply. Hence, the services will be deemed to be provided at the place where the provider of services is located.

Analysis Of Decision Of The Delhi High Court In The Case Of *Verizon Communication India Pvt. Ltd. vs. Assistant Commissioner, Service Tax*

In the case of ***Verizon Communication India Pvt. Ltd. vs. Assistant Commissioner, Service Tax***[9], the issue raised before the Hon'ble Delhi High Court was whether the services provided by Verizon India under a Master Supply Agreement with MCI International Inc. (hereinafter referred to as "**Verizon US**"), for rendering connectivity services for the purpose of data transfer, constituted export of telecommunication services under the *Finance Act, 1994*. The Hon'ble High Court held that although the subscribers to the services of Verizon US were 'users' of the services provided by Verizon India but Verizon US was the 'recipient' of such service under the Master Supply Agreement and it was Verizon US that paid for such service. Thus, for the

[9] Verizon Communication India Pvt. Ltd. v. Assistant Commissioner, Service Tax, 2018 (8) G. S. T. L. 32 (Del.) (India).

period post 2012, the place of provision of services was required to be determined under Rule 3 of the Place of Provision of Services Rules, 2012. Hence, the telecommunication service was deemed to be provided at the location of the recipient of service, which was outside India. In turn, it was concluded that the Assessee was engaged in export of services.

The above decision of Hon'ble Delhi High Court was followed by the Principal Bench of Hon'ble Customs, Excise & Service Tax Appellate Tribunal at New Delhi in the case of ***Verizon India Pvt. Ltd. vs. Commissioner of Service Tax***[10]. The Revenue contended that the appellant was providing intermediary services. Thus, the place of provision of services would be the place where the provider of services was located in line with Rule 9 of the Place of Provision of Services Rules, 2012. The Hon'ble Tribunal held that the appellant provided output services and raised invoices on Verizon US on principal to principal basis. That the appellant was not acting as intermediary between another service provider and Verizon US.

The above decision rendered by the Hon'ble Delhi High Court was followed in a very recent decision passed by Hon'ble Customs, Excise and Service Tax Appellate Tribunal, New Delhi[11].

The above decision passed by the Hon'ble Delhi High Court settled the issue pertaining to levy of service tax on such transactions. However, the issue remains a widely litigated one with cases of many assessees pending decision till date.

III. Interpretation of Intermediary Services under The Goods And Services Tax Regime

The definition of intermediary given under the current goods and service tax regime is similar to what existed during the erstwhile indirect taxation regime.

The scope and interpretation of the term 'intermediary' has been elucidated in the current taxation regime under the *Integrated Goods and Services Tax Act, 2017*[12]. The meaning of the term is the same as that contained in the erstwhile service tax regime.

---

[10] Verizon India Pvt. Ltd. v. Commissioner of Service Tax, 2021 (45) G. S. T. L. 275 (Tri. - Del.) (India).

[11] Commissioner of Central Tax, CE & ST v. Singtel Global India Pvt. Ltd., 2022 (12) TMI 469 - CESTAT New Delhi (India).

[12] Section 2 (13)- "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account.

The term ‘intermediary’ means a person who facilitates or arranges the supply of goods or services or both, between at least two persons. A clear exclusion from the definition of term ‘intermediary’ is a person who provides such goods or services or both himself. Therefore, where a person is providing the services on his own as a principal and he is not acting as an agent/facilitator between at least two persons for supply of goods or service, then such service cannot be classified as an intermediary service. Thus, it is clear that for a registered person to be considered as an intermediary, there are two essentials which can be inferred from the definition of intermediary:

- Firstly, an intermediary is a person who facilitates or arranges a provision of services or supply of goods.
- Secondly, he is considered to be a link or a bridge between two parties.

In other words, there has to be a defined supplier of goods or services vis-à-vis a service receiver/customer for which the role of facilitator is to be played by a third party, i.e., the intermediary. In the absence of a tripartite arrangement, intermediary cannot be said to have been involved in the transaction.

The Revenue started raising the demand of goods and services tax by attempting to treat the services as intermediary services under the current goods and services tax regime as well. The issue raised by the Revenue rested primarily on the premise that the judicial pronouncements laid down under the service tax regime were not applicable. This is because the ambit and scope of intermediary services were wider under the current indirect taxation regime.

The statutory provisions were unambiguous and the intent of the Constitution was clear to not levy taxes on the export transactions. To further this, the Department of Revenue, through the Central Board of Indirect Taxes and Customs, recognised the difficulty faced by assessees engaged in export of services. Thus, the Central Board of Indirect Taxes and Customs issued a clarification in the form of the Circular No. 159/15/2021-GST dated 20.09.2021 to clear the air over the issue. In the said Circular, it was clarified that the concept of intermediary under the goods and services tax regime was in fact borrowed from the erstwhile service tax regime. Thus, there was, in essence, no alteration in the realm of intermediary services in both the indirect taxation regimes, but for the inclusion of supply of securities in the goods and services tax law.

The Circular proceeded to lay down the following primary requirements of intermediary services:

- There should be a minimum of three parties. Out of these, two are involved in the main supply and third party undertakes the ancillary supply, or arranges or facilitates the main supply.
- There should be two separate and distinct supplies. One of the supplies is the main supply and the other is an ancillary supply. Where a person undertakes the main supply of goods or services or both, on a principal to principal basis, for another person, he cannot be said to be a supplier of intermediary services.
- An intermediary does not supply the main service and only plays a subsidiary or supportive role. Thus, an intermediary acts in the nature of an agent, broker or any other similar person.
- Any person, who undertakes the main supply, whether fully or partially, on a principal to principal basis, is specifically excluded from the scope of an intermediary. The use of word 'such' in the definition of the term 'intermediary' under the goods and services tax regime means the main supply itself, which could be of goods or services or both, or securities.
- Where the supplier of main supply outsources the supply, either fully or partly, to a sub-contractor, the transaction is excluded from the ambit of intermediary services. In other words, sub-contracting is an important exclusion.
- The applicability of clause (b) of sub-section (8) of Section 13 is not attracted when the location of both supplier and recipient of supply is in India. The said provision is applicable only when the location of either the supplier of intermediary services or that of the recipient is outside India.

The taxable event for the levy of goods and services tax in India is the supply. Section 13 of the *Integrated Goods and Services Tax Act, 2017* is the relevant provision, which comes into play where the location of either the supplier of services or that of the recipient is outside India. In such a case, the place of supply of services is required to be ascertained as per Section 13.

The general rule for determining the place of provision is contained under sub-section (2) of Section 13 of the *Integrated Goods and Services Tax Act, 2017*. According to the said sub-section, the place of supply of service shall be the place location of the recipient of service. However, in a situation where the recipient of service cannot be located ordinarily, then the place where the supplier of service is located shall be kept as the basis for determining the place of provision of service. Further, sub-sections (3) to (13) thereof contain specific provisions in respect of specified services. Accordingly, in case of services specified in sub-sections (3) to (13) contained in Section 13, the place of supply shall be determined as per the respective principle given in each of the sub-sections. In case of other services, sub-section (2), being the general principle,

shall be applicable. The same is accordingly applied to determine the place where the services have been supplied.

Clause (b) of sub-section (8) of Section 13 provides that in respect of intermediary services, the place where the provider of service is located shall be the place of supply of service.

It is imperative to mention here that a transaction of export of services is a zero-rated supply as provided under the *Integrated Goods and Services Tax Act, 2017* in the form of Section 16. The definition of "export of services" is contained in sub-section (6) of Section 2 of the *Integrated Goods and Services Tax Act, 2017* to mean the supply of any service where the following conditions are satisfied:

- The location of the supplier of service is in India;
- The location of the recipient of service is outside India;
- In terms of the statutory provisions discussed above, the place of supply of services is outside India;
- The payment is made to the supplier of service in convertible foreign exchange or in Indian Rupees, in such situations as permitted by the Reserve Bank of India;
- The recipient and the supplier of service are not merely establishments of a distinct person.

Despite the issuance of clarification in the nature of Circular dated 20.09.2021, the issue remained litigious. This is because the Revenue continued to treat the export of services as supply of intermediary services by contending that the third condition enumerated above was not satisfied in such transactions. In turn, the denial of refund claims caused hardship to the entire service industry.

Reference here can be made to the ruling given by the AAAR, Karnataka in the case of ***Infinera India Pvt. Ltd.***[13] The Authority relied on the general meanings of the terms 'arranging' and 'facilitation', which are used in the definition of intermediary. It held that the said terms would generally cover a broad range of activities in the nature of sales promotion or marketing of the services or goods of the client, identifying prospective buyers for the products of the clients or identifying the sources of supply of the goods or services which are required by the client, negotiating the prices with a potential buyer or a potential supplier, acquiring sales orders in respect of the goods or services of the client and similar transactions. Since the appellant was providing pre-sale and marketing service of the products of the overseas client, the said service was in the nature

[13] In Re: Infinera India Pvt. Ltd., 2020 (33) G. S. T. L. 491 (App. A. A. R. - GST - Kar.) (India).

of facilitating the supply of the products of the overseas client. Hence, the appellant was correctly classified as an intermediary as provided under the *Integrated Goods and Services Tax Act, 2017*.

Similarly, in the ruling of ***Vservglobal Private Limited***[14], the Ld. Appellate Authority for Advance Ruling, Maharashtra held that the appellant was providing services in the nature of an intermediary. This is because the appellant was providing back office support services in relation to the goods in question which belonged to either the overseas client of the appellant or the client's supplier. The Authority rejected the claim of the appellant about principal supply being 'Back office Support' and 'Accounting' and other services being ancillary.

It is evident that the definition of intermediary was wildly misinterpreted by the Authorities under the goods and services tax regime. This resulted in a plethora of litigation on the issue.

IV. *Genpact India Pvt. Ltd. v. Union of India*: An Analysis

The issue pertaining to the dispute between intermediary services and export of services reached the Hon'ble Punjab & Haryana High Court. In the case of ***Genpact India Pvt. Ltd. vs. Union of India***[15], the assessee invoked the writ jurisdiction of the Hon'ble High Court. The writ petition was entertained since the case involved a substantial question of law.

Brief Facts of The Case

It is pertinent to note that the said Petitioner had earlier approached the Hon'ble High Court by filing a writ petition[16]. However, vide the Order dated 29.01.2021, the Hon'ble High Court remanded the matter to the First Appellate Authority in that stage. It was held that the Authority passed a cryptic and non-speaking order. It was also held that the reasons assigned for classifying the Petitioner as an intermediary were not sustainable as the test of law laid down in the judgements passed in erstwhile service tax regime was not satisfied.

Pursuant to the remand proceedings, the First Appellate Authority again passed an order classifying the services as intermediary services. Consequently, the Petitioner challenged the said order by way of filing another writ petition before the Hon'ble Punjab & Haryana High Court.

---

[14] In Re: Vservglobal Private Limited, 2019 (26) G. S. T. L. 127 (App. A. A. R. - GST) (India).

[15] Genpact India Pvt. Ltd. v. Union of India, 2022 (11) TMI 743 - Punjab and Haryana High Court (India).

[16] Genpact India Pvt. Ltd. v. Union of India, 2021 (2) TMI 816 - Punjab and Haryana High Court (India).

The factual matrix of the case was that the Petitioner was a Business Process Outsourcing (hereinafter referred to as "**BPO**") service provider located in India. The Petitioner executed an agreement dated 01.01.2013 (hereinafter referred to as "**MSA**"), with an entity called, Genpact International Incorporated (hereinafter referred to as "**GI**"). GI was located outside India. GI engaged the Petitioner to undertake the actual performance of BPO services to the foreign clients of GI or such clients, which were located outside India. The services *inter-alia* included maintenance of vendor/customer master data, scanning and processing of vendor invoices, book keeping, preparation/ finalization of books of account, generating ledger reconciliations, managing customer receivables; technical IT support; data analysis; development, licensing and maintenance of software as per clients' needs. The Petitioner filed an application claiming the refund of unutilised input tax credit which accumulated as a result of the supplies of such services. The services were zero rated and on which, the Integrated Goods and Service Tax was not paid, under the Letter of Undertaking.

Submissions Made By The Petitioner

It was contended that where a person is engaged in supplying the main services, he was excluded from the definition of "intermediary". The Petitioner contended that it was engaged in supplying the services "on its own account" and was not acting as a facilitator of any supply. The Petitioner was in fact, tasked with the responsibility of providing all services on its own. It was also responsible for all the risks concerning the performance of services and the pricing of such services. It was also contended that in terms of the MSA, the petitioner was engaged by GI to supply services to it on a "principal to principal" basis. The petitioner was not acting on behalf of GI, as an agent. In the absence of a separate agreement between the petitioner and the customers of GI, the petitioner could not be compared to that of an agent or a broker in any manner. Further, the petitioner was performing the actual services under the sub-contracting arrangement executed by GI. It was not "arranging" or "facilitating" the service, which is essential to qualify as an "intermediary". Thus, the petitioner could not be regarded as an "intermediary".

The petitioner also pointed out the difference between the charges given to an intermediary and a main supplier of services. While in the case of an "intermediary", the turnover was in the nature of a mere commission or a facilitation fee, the Petitioner received the entire charge for the main service itself. The same also comprised its turnover. The Petitioner referred to the fact that the BPO services have been provided by the petitioner since a long time. Such services were in fact classified as "export of services" under the previous indirect taxation regime. The tax authorities were also sanctioning the refund claims to the petitioner on a regular basis. The petitioner argued that there was

no material change in the transactions undertaken by the petitioner. Further, the scope and ambit of "intermediary services" under both the indirect taxation regimes have remained largely identical as a result of similarly-worded statutory provisions. Thus, the authorities did not have the liberty to entertain a different view for the same assessee in respect of a different period.

The petitioner's case was also strongly furthered by the Circular dated 20.09.2021. The Circular clarified that sub-contracting arrangements fall outside the ambit of "intermediary services".

Submissions Made by the Respondent

The Revenue, in turn, referred to several clauses of the MSA and submitted that largely two types of services were performed.

The Revenue furthered its submissions that the petitioner facilitated the supply of main services by GI and was only supplying support services. It was also contended that the petitioner was, in turn, acting on behalf of GI where, GI was engaged in the supply of services. That the petitioner was acting in a supporting capacity and the relationship between GI and petitioner was that of a principal and agent.

Insofar as the submission pertaining to sanction of refund for the previous tax period was concerned, the Revenue argued that the doctrine of res-judicata was not relevant in respect of issues arising under tax regime for different assessment years.

Findings of The Hon'ble High Court

The Hon'ble High Court analyzed the clauses of MSA and reached a conclusion that there was a sub-contracting arrangement between GI and the petitioner for providing the services to the customers of GI. That the MSA was entered into between GI and petitioner for provision of such services which GI was contractually required to perform for its customers. Thus, the petitioner was sub-contracted such services and was responsible for actually performing the BPO services and information technology services for the customers of GI. The fact that the petitioner was responsible for all risk related to performance of services evidences that the petitioner was in fact providing services on its own account.

The Hon'ble High Court further held that the following ingredients must be satisfied by the Revenue to classify a person as an intermediary:

- The presence of a principal-agent relationship must be established.
- The person must act as a facilitator between at least two parties. He must arrange or facilitate the supply of the service.
- The main service, which is intended to be supplied to the service recipient, must not be actually performed by the intermediary.

Basis the relevant clauses of the MSA, it has been held that the petitioner was not acting as an intermediary in any sense where the petitioner was not facilitating any services.
The Hon'ble High Court laid down another important ratio. A comparison of the definition of "intermediary" under the service tax regime and the goods and services tax regime reveals that the scope of the term is similar. This has also been clarified vide the Circular dated 20.09.2021. Since the scope and ambit of provision has not changed, it has been held that the department cannot be permitted to take contradictory stands for different periods. The principle of consistency ought to be followed. The Hon'ble Court also relied on the decision of ***Radhasoami Satsang Soami Bagh, Agra vs. Commissioner of Income Tax***[17]. Here, the Hon'ble Supreme Court held that the department cannot be permitted to take different stands without there being any change in the factual scenario.

Even in the decision of the Hon'ble Apex Court in the case of ***Bharat Sanchar Nigam Ltd. vs. Union of India***[18], the ratio was repeated. It was held that in the event of no change in the facts and law in a subsequent assessment year, the quasi-judicial as well as the judicial authority are not generally permitted to take a contradictory stand.

It has also been held that in the absence of an agreement between the petitioner and the customers of GI, the petitioner cannot be equated to be an agent or broker in any manner. The petitioner was given its fees or relevant charges by GI for its services, which was the main contractor. The main services were although supplied by the petitioner under the arrangement of sub-contracting, the commission for such main services was received by GI from its clients since it was the main contractor. The petitioner does not have any direct contact with the customers of GI. It does not get any remuneration from them for providing the main services directly to the foreign customers of GI. Further, the Revenue had failed to furnish any evidence or proof to substantiate the allegation that the petitioner was liaisoning or acting as an "intermediary" between GI and the foreign customers of GI as required by the statutory provisions. Vide the circular dated 20.09.2021, it has already been clarified that sub-contracting is excluded from the ambit of intermediary services.

In view of the above decision, the Hon'ble High Court has settled the issue in favour of assessees especially in respect of business process outsourcing services. At the same time, it is important to understand that the ratio laid down

---

[17] Radhasoami Satsang Soami Bagh, Agra v. Commissioner of Income Tax, (1992) 1 SCC 659 (India).

[18] Bharat Sanchar Nigam Ltd. v. Union of India, (2006) 3 SCC 1 (India).

in the above decision will apply with equal force to other assessees placed in similar industries where a part or whole transaction is sub-contracted to the parties operating in India. Hence, the decision rendered by the Hon'ble High Court will go a long way. It will ease the burden cast on High Courts and prejudice caused to assessees as a result of unnecessary litigation, especially where the issue was already settled in their favour in the erstwhile service tax regime.

V. Conclusion

It is clear that the issue pertaining to interpretation of intermediary services is highly contentious and the litigation has been continuing since the erstwhile service tax regime. However, the ratio laid down by the Hon'ble Punjab & Haryana High Court will aid in reduction of litigation in respect of intermediary services. It will also assist in other issues where the scope and ambit of statutory provisions under the erstwhile indirect taxation regime and current goods and services tax regime has remained identical. Further, the decision has brought a sigh of relief for the entire service industry which is functioning on the model of business process outsourcing or knowledge process outsourcing. The decision of the Hon'ble Court has also resulted in setting right the spirit of the Constitution of India, which suffered at the hands of the implementing authorities.

References

Book:

- Central Board of Excise & Customs, *Service Tax Education Guide*, 2012

List of Cases:

- Bharat Sanchar Nigam Ltd. v. Union of India, (2006) 3 SCC 1
- Commissioner of Central Tax, CE & ST v. Singtel Global India Pvt. Ltd., 2022 (12) TMI 469 - CESTAT New Delhi
- Commissioner of GST, Gurgaon-II v. Orange Business Solutions Pvt. Ltd., 2019 (27) G.S.T.L. 523 (Tri. - Chan.)
- Genpact India Pvt. Ltd. v. Union of India, 2022 (11) TMI 743 - Punjab and Haryana High Court
- Genpact India Pvt. Ltd. v. Union of India, 2021 (2) TMI 816 - Punjab and Haryana High Court
- In Re: Infinera India Pvt. Ltd., 2020 (33) G. S. T. L. 491 (App. A. A. R. - GST - Kar.)
- In Re: Vservglobal Private Limited, 2019 (26) G. S. T. L. 127 (App. A. A. R. - GST)
- Radhasoami Satsang Soami Bagh, Agra v. Commissioner of Income Tax, (1992) 1 SCC 659
- Verizon Communication India Pvt. Ltd. v. Assistant Commissioner, Service Tax, 2018 (8) G. S. T. L. 32 (Del.)
- Verizon India Pvt. Ltd. v. Commissioner of Service Tax, 2021 (45) G. S. T. L. 275 (Tri. - Del.)

WOMEN PARTICIPATION IN PANCHAYATI RAJ: AN ANALYSIS

Dr. Sangita Laha*

Abstract

In India, 'Panchayati Raj' is seen as an institutional manifestation of 'democratic decentralisation'. It suggests growth and wise leadership. Decentralization of power to the Panchayats is observed as a means of empowering people which is achieved through involving them in decision making process. It is a type of grassroot participatory governance that has been tried out in the third tier of governance in India.But, the study of Panchayati Raj and women's participation are in limited numbers. Participation of women has so far been negligible in the decision-making process in political institution. Studies available on women in the political process in the country are critically limited to on the role of women in the freedom struggle. There are very few studies of women's participation in the electoral process as voters, candidates and members of the legislature and their participation in Panchayats. Apart from this, there has been some superficial examinations of the role of women in public life and studies of women's organizations.

This paper makes a humble effort to study the effectiveness of women's participation and empowerment in Panchayati Raj system. The first part of the paper discusses on 73rd Amendment Act that makes an effort bridging the gap of women's political participation. The second part makes some statistical analysis. While the third part discusses the challenges that women face in participating in panchayats.

Keywords: *Participation, Effectiveness, Empowerment, Public life.*

I. INTRODUCTION

Decentralization is about good governance. The term "decentralization" is frequently used and is associated with democracy. Local government is one form of a decentralized system. 'Democratic decentralization is defined "as a meaningful authority that devolves to local units of government." It is accountable to the local citizenry, who enjoys political rights and liberty.[1] It is affected by the transfer of authority or responsibility for decision making, management or allocation of resources from higher level of government to its subordinate units. It serves as a remedy for authorisation and bureaucracy. The idea is a process of restructuring authority in order to establish a system of co-responsibility between institutions at the federal, regional, and local levels. This has been partly achieved in India by participation of citizens at the grass root level of governance.

The initiative by the government of India giving constitutional status to the Panchayati Raj instituions was taken with the enactment of the 73rd and 74th Constitutional Amendment Act in 1993 and in 1994. The 73rd Constitutional Amendment Act provides one-third reservation for women in grass root levels of

* Associate Professor & Dean of Faculty, National University of Study & Research in Law, Ranchi.

1 B.C.BANIK, SANTOSH KUMAR & UC SAHOO**,** '*Introduction: Panchyati Raj Institutions and Rural Development; Contextualising the Discourse,* PANCHYATI RAJ INSTITUTION AND RURAL DEVELOPMENT 2 (Rawat publications, New Delhi, ISBN No 81-316-0107-2).

rural governance. But till date, there is hardly any holistic picture that depicts of qualitative change after the introduction of reservation of in the 73rd Amendment Act. In order to get a proper understanding, this paper analyses on the following objective.

II. OBJECTIVE OF THE STUDY:

The objective of this research is -

a. To examine an appraisal of the relationship that women members have with their locality and the role that they played in solving local problems;
b. To make an assessment of the improvements, if any, made by women members in local bodies in taking, or influencing, decisions; and
c. To make an examination of the interest evinced by women members in addressing the issues and needs of children and women.
d. To examine and explore the role played by women representatives of Panchyati Raj Institutions with the help of the available statistics taken from the Ministry of Panchayats, Government of India and that of other states.

III. LITERATURE REVIEW:

There are limited numbers of studies which have assessed the role or effectiveness of Panchayat in empowerment of women. Reliance were placed on the basis of data's mainly collected through various administrative sources like published official documents/reports from formal and informal institutions i.e. Official websites of 'Panchayati Raj' pertaining to the Ministry of Panchayati Raj. References were made from the Planning Commission, the reports of five year plans, the notifications and legislations of Government of India, Eighteenth Report on the subject 'Women participation' in States of Jharkhand, Chhattisgarh, Madhya Pradesh, Gujarat, Uttar Pradesh, Bihar, Rajasthan, Maharashtra and Orissa etc. References were given to government policies also. The study referred to various books, articles published in different journals, newspapers and magazines, archives, electronic sources etc.

The case of affirmative action in India is crucial, as the identity of a woman is layered in the various intersecting forces of caste, class, religion and ethnicity and is not manifested only in terms of 'gender'. Hence a fresh look is required. Based on the above, the following research questions have been formulated as under –

IV. RESEARCH QUESTIONS:

- Whether the participation of women as elected representatives in PRI in respect of their mobility, network and sphere of interaction with Panchayat members at different levels, community and higher level have progressed?

- Whether such reservation has brought qualitative change in the democratic process and in lives of women elected representation and women in general.

V. HYPOTHESIS:

- The elected women representative have been high in the local bodies which apparently has brought a quantitative change in the last twenty years.
- The given conservative background, do the women members' actually participate in the Panchayati Raj Institutions, being an unchartered area, the need is felt for this study.

METHODOLOGY OF RESEARCH:

The methodology of the study in this paper adopted is 'doctrinal method'.

What is Democratic decentralisation in India context?

To quote Prime Minister Narendra Modi "The democratic spirit is integral to our civilization ethos. Elected republican city-states such as Lichhavi and Shakya prospered in India as far as 2500 years back. The democratic ideal is fundamental to the character of our civilization. Elected republican city-states like Lichchhavi and Shakya flourished in India.. The 'Uttaramerur' inscription from the 10th century, which established the fundamentals of political participation, exhibits the same democratic ethos. One of the most prosperous nations in ancient times, i.e. India had a very democratic attitude and ethos which is an interal part of Indian civilization. The term 'Sabha'(gathering),' Samiti' (smaller unit or Committee) 'Rajan' or Raja (Householder, Leader) existed and were found in Vedic literatures. Centuries of colonial rule could not repress the democratic spirit of the Indian people which found full expression with India's independence, and led to an unparalleled story in democratic decentralized nation-building over the last 75 years."

One of the fundamental tenets of democracy that emerged in India in the form of Panchayati Raj, or local self-government groups, is 'democratic decentralisation'. It covers the village level (Gram Panchayat), clusters of villages (block Panchayat) and the district level (District Panchayat). Originating in the ancient Indian subcontinent it is found in Pakistan, Bangladesh, Sri Lanka and Nepal.

In India, 'Panchayati Raj' is seen as an institutional manifestation of 'democratic decentralisation'. It suggests growth and wise leadership. Decentralization of power to the Panchayats is observed as a means of empowering people which is achieved through involving them in decision making process. It is a type of grassroots participatory governance that has been tried out in the third tier.

VI. THE PANCHAYATI RAJ EXPERIMENT

The state of Andhra Pradesh was the first to experiment with democratic decentralisation in 20 blocks at the rate of one block in each district in 1958.[2] Local governments being closer to the people can be more responsive to local needs and can make better use of resources. Therefore, the system of democratic decentralization popularly known as 'Panchayati Raj is considered as an instrument to ensure democracy and socio-economic transformation. Added to this is the 73rd Constituional Amendment Act which provided space for reservation was ensuring participation of women and the marginalized sections.

Considerable headway has been made since the enactment of the 73rd and 74th Amendments. As a result, around 2, lakhs Panchayats at the village level; 6022 Panchayats at the intermediate level and 535 Panchayats at the district were constituted. These Panchayats are being manned by about 29.2 lakh elected representatives. This has led to the broadening of democracy.[3] Many States have devolved functions and powers to local authorities. For example; State Finance Commissions have been constituted and have made recommendations for resource allocations to PRIs. "Panchayat" has been used as a key term in governance in India too.[4]

Since the implementation of the 73rd Amendment, until 31st May 1998, there were 768,582 women in Gram Panchayats (GPs), 38,582 in Panchayat Samitis, and 4,030 in Zilla Parishads. However, this number was still less than one-third of the total seats reserved for women.[5]Although these Acts provide a skeletal uniformity to local government across India, a number of provisions were left to the discretion of the respective state legislatures, to be specified in their conforming Acts.[6]

After Amendment Acts,[7] the Parliament succeeded in bringing in political decentralization. These amendment acts provide the constitutional guarantee to

---

2 S P Aiyar; "*Democratic Decentralisation Experiment in India*", The Economic Weekly, January 14, 1961, https://www.epw.in/system/files/pdf/1961_13/2/democraticdecentralisationexperiment__in__india.pdf.

3 M L KANTHA RAO;"*Goverance Reforms through Decentralisation: With specific reference to Andhra Pradesh,"* GOOD GOVERANCE AND INCLUSIVE GROWTH; REFORMS AND DEVELOPMENT,Regal Publications,2013, NewDelhi,ISBN 978-81-8484-251-7.

4 Poornima Vyasulu and Vinod Vyasulu; '*Women in Panchyati Raj Grass Roots Democracy in Malgudi',* Decentralisation and local Governments, The Indian Experience, EPW Orient Swam2018,pg77

5 Tyagi and Sinha, 2004

6 India's Constitution specifies local government as a "concurrent subject" that can be legislated on by both the central and the state government and is subject to national level legislation only on the request of a minimum of three states.

7 The Constitution (73rd Amendment) Act, 1992 added Part IX consisting of 16 Articles and the Eleventh Schedule to the Constitution; the Constitution (74th Amendment) Act, 1992 added Part IX-A consisting 18 Articles and Twelfth Schedule to the Constitution.

basic and essential features of the self-governing democratic institutions in rural and urban areas, reservation of seats to SCs, STs and women and devolution of financial and administrative powers. The provisions of the amendment acts ensured that one third of the total elected seats and positions of chairpersons in rural and urban local bodies would go to women.[8] This initiation was a critical turning point in the development of grassroots democratic institutions in the nation. It hoped to empower women. In the history of state initiatives on the political empowerment of rural women, the 73rd Amendment to the Constitution and the insertion of measures under Article 243 are viewed as turning points. It suggested a paradigm shift in how the cause of women was approached.

As a result of political decentralization, about one million women were estimated to emerge as leaders at the grass root level in the rural areas alone, of these, 75,000 were chairpersons.[9] Considering the importance of gender equality in realization of human rights, the new provisions engrafted in the Constitution engrafted along way in bringing women at the equal stratum.[10]

VI. EMPOWEREMENT

Participation and empowerment are closely linked with each other being an integral part of democratic decentralization. Therefore, it is necessary to know what empowerment means as it has linkage to democratic decentralization. .The term 'empowerment' has many dimensions and is used in different contexts like global, economic, political, national, personal, collective, and social.

The dimension that was adopted by the United Nations Development Programme in 1996 as it was gender perspectives in development goals. It included a commitment to promote the empowerment of women in political and economic decision-making. It suggested that empowerment would be promoted through increasing women's decision-making powers with the support for income generating activities and provision of skills and education to women. Thus, the term 'Empowerment' has been used in relation to women.

---

8 INDIA CONSTI. Article 243D (3) of the Constitution provides that ―Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.

INDIA CONSTI. Article 243T (3) of the Constitution provides that ―Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

9 LEILA SETH; 'TALKING OF JUSTICE: PEOPLE'S RIGHTS IN MODERN INDIA *',* 123 ALEPH, New Delhi, 2014

10 Sanjit Kumar Chakraborty; " *Women's Rights in India: A Constitutional Insight"* (2018), Prof. (Dr.) N.K. Chakrobarti (eds.), Gender Justice 129-183 (R. Cambray & Co. Pvt. Ltd., Kolkata, 2018, ISBN 978-81-89659-33-2), Available at SSRN: https://ssrn.com/abstract =3688004 or http://dx.doi.org/10.2139/ssrn.3688004

Like ‘women’s welfare’, ‘up liftment’, ‘development’, ‘awareness’ and ‘reservation’.[11]

Women development movements and feminists used the term ‘women empowerment’ in order to include women in the development process. Sometimes, it was also termed as ‘racial empowerment’ when used in the black and civil- rights, and ethnic minority movements.

However, empowerment is now used to indicate both, a process of empowering groups or individuals, and an outcome in which a person or group is empowered. The term ‘empowerment’ has been used for more than two decades. There is no fixed authoritative definition on the term .In general it means ‘power to think and act freely’ refers to the marginalized group to exercise their choice, and fulfill their potential as full and equal members in the society.

VII. THE INDIAN SCENARIO

Indian culture assigns the women the responsibility of primarily parenting and nurturing. They accordingly, develop a psychological make-up and choose to confine themselves to the private sphere i.e. home. This has resulted in women being marginalized in all spheres of activity more specifically political. Along with these general precepts the social environment of the women undoubtedly affects her political participation.

Independent India straightway took the plunge when it framed its Constitution vide Articles 325[12] and Article 326[13] and granted the right to vote to all its citizens. Thus, political empowerment of women means participation and exercising political rights. In other words, it means not only exercising the right to vote, but also power sharing, co-decision making, co-policy making at all

---

11 Pamela Singh; “*Participation-Concept and available framework”,* Women’s Participation in Panchayati Raj, Nature and Effectiveness, Rawat publications, ISBN 978-81-316-0119-8, pg 81.

12 INDIA CONSTI. Article 325: *“No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.*— There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them”.

13 INDIA CONSTI. Article 326*: “Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage.*— The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.”

levels of governance of the State.[14]

India's founding father Mahatma Gandhi had conceived of India's independence with village as the base of the whole structure. He visualized that "Independence must begin at the bottom. Thus, every village will be a republic or panchayat having full powers in this structure composed of innumerable villages; there will be ever widening, never ascending circles." (Harijan: 1946).[15] But later, it was made a part of the Directive principles of State Policy vide Article 40 of the Constitution of India.[16]

Participation of women has so far been negligible in the decision-making process in political institution. Studies available on women in the political process in the country are critically limited to

a) On the role of women in the freedom struggle,
b) Women in the electoral process as voters, candidates and members of the legislature and
c) Their participation in Panchayats after the 73rd Constitutional Amendment.
d) Apart from this there have been some superficial examinations of the role of women in public life and studies of women's organizations

WOMEN'S 64th AMENDMENT RESERVATION BILL.

As part of the process of empowering women, the 64th and 65th Amendment Bills of the Indian Government suggested a nearly 30 percent reservation in favour of women in the membership of panchayats at all three levels, in the total seats as well as in the SC/ST seats. The process of adding reservations was tentative and slow, and the chairperson's position was only reluctantly added in the final bill. However, the Rajya Sabha rejected the Bills. The reservation rate for women rose to 33 percent in 1989 with the advent of the National Front. But the Bill was approved by the Narasimha Rao administration. The reserve remained at 33 percent in the 73rd and 74th constitutional amendments, which were submitted in September 1991 and became the 72nd and 73rd in 1992, respectively. In 1993, it became part of the Constitution.

However, attempts to enact a 33 percent reserve for women in Parliament have fallen short. The 81st constitutional amendment bill, which would have allocated

---

[14] J.P. Singh; "*Indian Democracy and Empowerment of Women"*, XLVI (4), the Indian Journal of Public Administration 618 (2000).

[15] Nirmala Buch," *Women's Experience in new Panchayats: The emerging leadership of rural women*", https://www.cwds.ac.in/wp-content/uploads/2016/09/WomensExperiencePanchayats.pdf

[16] INDIA CONSTI. Artcle 40-"The *State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government."*

33 percent of the seats in Parliament to women, was introduced in the Lok Sabha in 1996. Finally, in 2010, it was approved by the Rajya Sabha, but the Lok Sabha has not yet taken action.

CONSTITUIONAL AMENDMENTS: RESERVATION FOR WOMEN IN VILLAGE PANCHAYAT[17]

The 73th Constitutional Amendment Act, 1992 passed by the Parliament ensures one third of the total status for women in all elected officers in local bodies whether in rural areas or urban areas.The amendment ordains that every state shall have panchayats at the village, intermediate. [18]The amendment mentions down that every state shall have panchayats at the village, intermediate and district level having a population not exceeding twenty lakhs of population at intermediate level.[19] Panchayats is an elected body for a term of five years. [20]If it is dissolved sooner, it requires that elections to be held within six months.[21]

These provisions in the constitution helped in conferring uniformity in the structure of gram panchayats at village level with a variation of total number of members in a gram panchayat which varies on the basis of total population of the village and enactments passed by the respective states legislatures,[22] no doubt, on the pattern suggested by 73rd Constitutional Amendment Act. Thus, the 73rd Amendment brought decentralisation reform and through 33 percent of reservation for women ensured the participation and inclusion of marginalised and historically excluded groups in the process of governance.

Achieving proper representation for all groups also entails persuading the village's impoverished and marginalised residents to engage politically and meaningfully. The Gram Sabha institution and the mechanisms for reserving seats for members and chairpersons' offices have both been included in the constitutional amendment to serve this objective. In accordance with national reservation policy, the states' panchayat raj legislation not only stipulates the reservation of seats for SC/ST, women, and members of historically underrepresented castes, but it is also put into practise.

The provision made in the amendment by the Parliament to endow the panchayats with such powers and authority as enable them to function as institutions of local self-government. Law may contain provisions for the devolution responsibilities upon panchayats at appropriate level (a) preparation of plans for economic development and the implementation of schemes for economic development,

---

17 73rd and 74th Amendment of Indian Constitution came into operation on 24th April 1993

18 Article 243-B (1), The Gazette of India Extraordinary Part-II, Section-I, The Constitutional (Seventy-Third Amendment) Act 1992, Ministry of Law, Justice

19 Article 243-B-2,ibid.

20 Article 243 -E-l, ibid.

21 Article -243-3b, ibid.

22 Article- 243-C, ibid.

justice including those in relation to the matters listed Schedule of the Constitution.[23]

WOMEN IN PANCHAYATI RAJ INSTITUTIONS – FACTS AND STATISTICS:

Democracy ensures empowerment, while Panchayat Raj Institutions (PRIs) guarantees participation of all segments of society in the process. This in turn creates power in an individual's own life, society and community. Hence, 'empowerment' is a process. Central and State governments have implemented many programmes to provide equal opportunities in education, employment and to improve economic status of women.

When independence was declared, Mahatma Gandhi observed: "As long as women of India do not take part in public life there can be no salvation for the country; the dream of decentralization could never be fulfilled. It would have no use for the kind of Swaraj to which such women have not made their full contribution"[24]

According to Global Gender Gap Report 2012, the rank of India is 105 out of 135 countries based on the composite index of economic participation, educational attainment, political empowerment, and health and survival.[25]The demographic figures for women in India also show considerable disparities between women and men, these differences being the result of the traditional view that men are superior to women.

RESERVATION FOR WOMEN:

In 1992, when the 73rd and 74th Constitutional Amendments introduced local self-governance to consciously empower women as decision makers with 1/3rd of the seats reserved for women. Through this amendment, one-third of the seats are reserved for women as members and chairpersons of these institutions. These amendments gave a 33 percent reservation to women in local bodies to promote the political participation of women in the decision making process and public policy and to bridge the gender gap in politics at the local level, where the society is still running on patriarchal lines and aristocrat behaviour.

POST 73rd CONSTITUIONAL AMENDMENT ERA:

Kanataka was the first state in India to introduce a policy of reservation for women in Panchayati Raj institutions in 1985. It provided for 25 percent reservation for women at the district and mandai panchayat levels. The

---

23 Article 243-G.The Constitutional (Seventy-Third Amendment) 1992.

24 M.K. Gandhi; *"India of My Dreams",* Chapter 54: *Regeneration of Indian Women,* https://www.gandhiashramsevagram.org/my-dream-india/chapter-54-regeneration-of-indian-women.php

25 "*Global Gender Gap report",2022*, World economic forum; https://www3.weforum .org/docs/WEF_GGGR _2022.pdf.

experiences in the states of Kamataka, West Bengal, and Andhra Pradesh, were followed by some recommendations of the Ashok Mehta Committee. This further intensified the notion that women's presence in the PRIs would be a crucial step towards furthering local involvement in development planning. Approximately 3 million elected Panchayat officials at different levels staff these Panchayats.[26] The 73rd Constitutional Act and different Panchayat Acts of different states have provided the basis for political empowerment. As per the information available from the ministry, some 20 states have brought reservation for women and the mariganilised in panchayats.

As per provisions contained in the Constitution, "1/3rd of the Seats of Panchayati Raj Institutions and 1/3rd offices of the Chairperson at all level of Panchayati Raj Institutions which is covered by Part IX of the Constitution are reserved for women.[27] The following states like Andhra Pradesh, Bihar, Chhattisgarh, Jharkhand, Kerala, Maharashtra, Orissa, Rajasthan, Tripura and Uttarakhand have made legal provision for 50 percent reservation for women among members and Sarpanches.[28] Thus, women's entry into panchayats, both as members as well as heads has pushed them into the process of decision-making and policy implementation considerably. Table 1.1 enlists the percentage of Elected Women Representatives (EWR) in different states of India.

TABLE-1.1

ELECTED WOMEN REPRESENTATIVESOF DIFFERENT STATES IN INDIA, 2018[29]

States	No. of Panchayats		Elected Representatives		
	District Level Intermediate Level	/Village	Total	Total Women	Women (%)
Chandigarh	1	1	12	NA	NA	-
Jammu and Kashmir	22	323	4453	38282	11169	29
Goa	2	NA	191	1559	514	33
Haryana	21	126	6205	68152	24876	37
Uttar Pradesh	75	821	59075	718667	297235	41
Telangana	9	438	8695	103468	46702	45
Odisha	30	314	6211	100791	49697	49
Andhra Pradesh	13	660	126920	156049	78025	50
Assam	21	191	2193	26844	13422	50

[26] https://www.pria.org › panchayat

[27] INDIA CONSTI. Article 243 D.

[28] Press Information Bureau, Government of India, Ministry of Panchayati Raj published on 12th August 2011; https://pib.gov.in/newsite/PrintRelease.aspx?relid=74501

[29] Ministry of Panchayat Raj, Government of India.

Maharashtra	34	351	28031	203203	101466	50
Sikkim	4	NA	176	1099	549	50
West Bengal	19	341	3342	59296	29579	50
Karnataka	30	176	6021	95307	50892	53

ELECTED WOMEN REPRESENTATIVES IN UNION TERRITORIES[30]

UT's	**No. of Panchayats**			**Elected Representatives**		
	District	**Intermediate Level**	**Village Level**	**Total**	**Total Women**	**Women (%)**
Dadar Nagar Haveli	1	NA	20	136	47	35
Andaman and Nicobar	2	9	70	NA	NA	NA
Lakshadweep	3	N.A.	10	NA	NA	NA

Table 1.1 above presents the total elected members in different states of India .For example , elected women representative in the state of Jammu and Kashmir is 29 percent, followed by Goa with 33 percent, Haryana having 37 percent,41 percent in Uttar Pradesh ,Telangana having 45 percent and so on.

Today, there are about 3 million elected representatives of these panchayats, out of which 1.3 million are women actively participating in Panchayats, according to *Ministry of Panchayati Raj* (Bhatnagar, 2019).[31] However, the mere presence of women does not guarantee the quality or effectiveness of their participation, that their voices will be heard in critical decisions, or that concerns of women electorates will automatically be championed. Many women elected to local government on reserved quotas are new to the public sphere of politics, while several others are inexperienced with governance institutions, and unfamiliar with procedures and protocols of formal meetings.

The Table – 1.2 enlists State – wise women representatives in PRIs in the year 2020.

TABLE-1.2

30 Source: Ministry of Panchayat Raj, Government of India.

31 "*Take Five: "Elected Women Representatives are key agents for transformational economic, environmental and social change in India", UN Women, https://www.unwomen.org/en/news/stories/2019/7/take-five-rahul-bhatnagar-india*

STATUS OF WOMEN REPRESENTATION IN PANCHYATI RAJ IN DIFFERENT STATES AND UNION TERRITORIES OF INDIA AS ON 23rd Sep. 2020

Number of Women Representatives (EWRs) in Panchayati Raj Institutions in the in the country, State/Union Territory-wise in the year 2020[32]

UTs/STATES IN INDIA	Total PRI Representatives	Total EWRs	Percentage of women in PRI
Dadra & Nagar Haveli	147	47	31.97%
Andaman & Nicobar Islands	858	306	35.66%
Lakshadweep	110	41	37.27%
Daman & Diu	192	92	47.91%
Jammu & Kashmir	39850	13224	33.18%
Uttar Pradesh	913417	304538	33.34%
Goa	1555	571	36.72%
Arunachal Pradesh	9383	3658	38.98%
Punjab	100312	41922	41.79%
Haryana	70035	29499	42.12%
Tripura	6646	3006	45.23%
Madhya Pradesh	392981	196490	49.99%
Gujrat	144080	71988	49.96%
Andhra Pradesh	156050	78025	50%
Karnataka	101954	51030	50.05%

[32] https://ruralmarketing.in/stories/know-the-numbers-of-women-representatives-in-gram-panchayats/

Himachal Pradesh	28723	14398	50.12%
Rajasthan	126271	64802	51.31%
Jharkhand	59638	30757	51.57%
Bihar	136573	71046	52.02%
Kerela	18372	9630	52.41%
Assam	26754	14609	54.60%
Chhattisgarh	170465	93392	54.78%
Ladakh	NA	NA	NA
Manipur	1736	880	50.69%
Odisha	107487	56627	52.68%
Maharashtra	240635	128677	53.47%
Sikkim	1153	580	50.30%
Tamil Nadu	106450	56407	52.98%
Telangana	103468	52096	50.34%
Uttarakhand	62976	35177	55.85%
West Bengal	59229	30458	51.42%
Total	3187320	1453973	45.61%

An analysis of Table 1.2 depicts the latest statistics of elected women representative of all states of India reveal a total 1.453973 lakh elected women representatives in PRI .Women representatives in Jammu and Kashmir is minimum with 33 .83 percent. Comparatively, women representatives in Bihar comprise 71,406, which make around 52.02 percent. Himachal Pradesh has 50.12 percent while Jharkhand (a tribal dominated state) has 51.57 percent. Chattisgarh has 54.78 percent of women representatives in Panchayats. Likewise, Rajasthan

has 126271 lakh representatives out of which 64802 are elected women representatives. Uttarakhand, a hill dominated state has 55.85 percent of women representatives .Surprisingly a bigger state like Uttar Pradesh, the scenario is starling. Out of the 9.13417 lakh representatives, 3, 04538 are women, which mkes around 33.34 percent despite the state having 50 percent of reservation in Panchayats.[33]

THE IMPACT:

The outcome of statistics shown in Table-1.7 also elicits that the percentages of women at various levels of political activity have shifted dramatically as a result of the constitutional change, from 4-5 percent before to 25-40 percent after. But the difference is also qualitative, because these women are bringing their experience in the governance of civic society. In this way they are making the state sensitive to the issues of poverty, inequality and gender injustice.[34] Today, around fourteen states of India have 50-58 percent representation of women in Panchayat Raj Institutions in which Jharkhand leads the way with 59 percent closely followed by Rajasthan and Uttarakhand.

WOMEN AS SARPANCH

Women Sarpanch accounts for nearly 43 percent of total gram panchayats across the country. Uttar Pradesh has the highest number of women sarpanches at 19,992 but only 34 percent of total sarpanches. The state of Odisha has 3600 woman sarpanches, an above average 58 percent of the total number. Manipur has the least percentage of women sarpanches with just 2 percent representation.[35]

TABLE-1.3

NUMBERS OF WOMEN AS SARPANCH (YEAR 2017)[36]

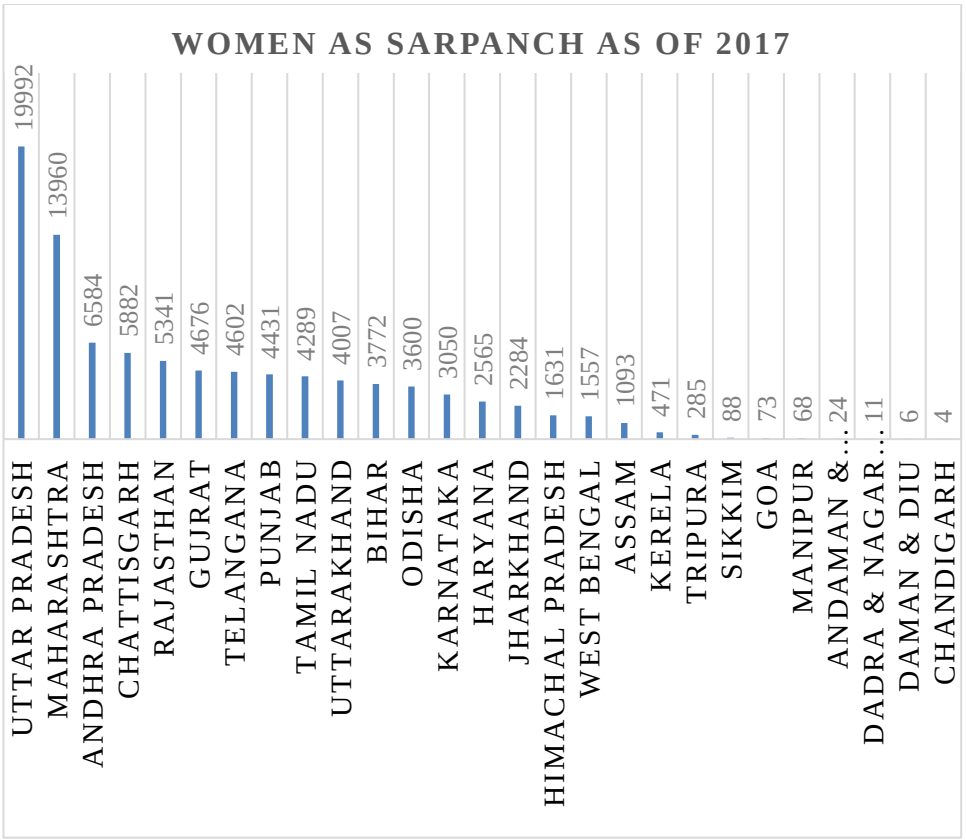
---

33 The Print, 24th April2021, https://theprint.in/opinion/77-women-in-panchayati-raj-institutions-believe-they-cant-change-things-easily-on-ground/644680(assessed on14th December2021).

34 Shashi Kaul and Shradha Sahni;' *Study on the Participation of Women in Panchayati Raj Institution'*, https://www.researchgate.net/publication/321219264_Study_on_the_Participation_ of_Women_in_Panchayati_Raj_Institution

35 Tejasmi Pratima Dodda; "*Representation to Participation: Women in Panchayat Raj Institutions & State Assemblies,* 7th April 2018;https://factly.in/representation-to-participation-women-in-panchayat-raj-institutions-state-assemblies/

36 https://factly.in/representation-to-participation-women-in-panchayat-raj-institutions-state-assemblies



Source: 16th July, Hindustan Times

The Table 1.3 depicts the number of women Sarpanches as on 2017.The statistics above reflects that many states in India have very few women Sarpanches even though completing three decades of the Constitutional Amendment Act.The Institution of "Sarpanch-pati" or "Adhyaksha-Pati" might not have any legal sanction, but it is thriving in many Panchayats in many states of India

THE CHALLENGES AND HURDELS:

Traditionally politics has been perceived as a male domain. Men always enjoy higher visibility in public and political affairs while women have to stay away from political affairs and remain in private domain. Traditional mindset of people supports exclusion of women from political life.

GENDER INQUALITY

WOMEN AS 'RUBBER STAMPS/ PROXIES

This lead on the subject of discussion on the sarpanch patis, where the husband of the woman sarpanch manages the affairs of the Panchayat and she is only a

proxy candidate.[37] It is also found that most women file their candidature for elections to PRI s not out of their own will, but due to the pressure of husbands, sons or other male member of the family or the village or due to the pressure of some political party. The proxy representation in Panchayats has become quite common.

LOW EDUCATION LEVEL

Yet, some drawbacks embedded in the system have also surfaced, demanding rectification as soon as possible for translating its noble objectives into reality. Many women pradhans, who haven't progressed beyond high school, have neither empowered themselves nor been at the forefront of decision- making for the communities they lead.

CORRUPT PRACTICES IN ELECTIONS

It is further argued that Panchayat elections have come to be dominated by the prevalence of corrupt practices. Political atmosphere is also considered as one of the deterrents which create an unfavourable condition for women's participation in political processes. Power games are controlled by monetary deals. Political processes have become expensive. The cost of election also put hindrance as few women have own income and hardly they own productive resources.[38]

CASTE POLITICS

The election of scheduled caste women as political leaders question the traditional social hierarchy of Indian villages and discrimination based on deep-rooted caste prejudices is commonly used by upper castes to maintain status quo.Their work is accepted only as long as they don't challenge the power of men or question male privileges, e.g. by addressing issues of alcohol abuse or domestic violence.[39]

PREVALENCE OF VIOLENCE:

Further, the atmosphere of growing violence, character assassination and unscrupulous struggle for power, have been a serious deterrent to women's participation in political process. The prevalence of violence that has come to be associated with the PRJ elections in many states also impedes the free and fair participation of women in the processes of village self-governance. Most such violence seems to have been resulting from the existence of 'caste4

---

37 '*Women's empowerment through Panchayati Raj*'; Centre for Developments of Human Rights, From*Bulletin Archives: originally published in June 2009*, http://www.cdhr.org .in/womens-empowerment/womens-empowerment-through-panchayati-raj/

38 Shivani Phukam,; "*Participation of women in PanchayatiRaj institutions: a study of JorhatZilaParishad*" dspace.nehu.ac.in/bit stream/1/7181/1/S%20Phukan%20Pol%20Sc.pd

39 Ibid

war'(Panchayati Raj Update 2001) where people belonging to lower castes5 are tortured and murdered for daring to stand against upper caste candidates.

Further, prevalent societal restrictions require that women do not venture into public spaces alone. The traditional patriarchal concept of women's real place being within the four walls of the house is strongly prevalent in rural India. Due to the traditional household role assigned to women, the dominant belief is that if women go out of the four walls of the house to participate in local politics then it would mean that the men do not have any hold on her.

LOW SALARY

One of the major causes of such corruption is argued to be the fact that the salaries paid to PRJ-members are extremely low. This impedes their participation in the decision making deliberations in the PRI's.

VIII. SUGGESTIONS:

DEVELOPMENT PLANS

The identification of implementing agency should be done by the village panchayat subject to the approval of the block panchayat. Village panchayat should arrange for accommodation for the programme. Village panchayats must provide linkages with community and assist the implementing agency in seeking their participation. Village panchayat should also verify whether benefits are reaching the bonafide beneficiaries.

It may identify gaps and problems in implementation of the programmes and communicate them to the programme agencies and administrative bodies for their rectification.

All the programmes related to empowerment of SCs are implemented through the State Governments. Therefore, PRIs being at the grass-root level institutions must evolve itself for promoting self-governance equitably / effectively.

ICDS PROGRAMME

The village level panchayat should also see that the ICDS center's operate regularly and necessary equipment's like weighing machines are available and in working order. District and Block level panchayats should arrange training programmes for anganwadi workers, ensure timely supply of food supplements / equipment. It must review the implementation of the schemes, and promote inter-sect oral linkages particularly between health and nutrition staff and review impact of the programme on mal-nourished children.

SOCIAL JUSTICE AND EMPOWERMENT

For empowering the SCs, the nodal Ministry of Social Justice & Empowerment implements various programmes, which encompass welfare, development and protective measures. These include-

a) educational developmental programmes such as Post-Matric Scholarships, Pre-Matric Scholarships, Provision of Hostels, Special Educational Development Programmes for SC girls and Coaching and Allied schemes etc;

b) Economic Development Programmes such as employment and income generating activities supported through National and State level SC/ST Finance and Development Corporations and iii) Social justice and protective measures through implementation of PCR Act (Protection of Civil Rights) 1955 and the SC/ST POA (Prevention of Atrocities) 1989 and the Scheme for Liberation and Rehabilitation of Scavengers

CONCLUDING REMARK:

The reservation provisions have brought an influx of women and have transformed grassroots democracy and given rural women the power to exercise their right and be involved in village governance. Currently, twenty states in India have made provisions in their respective State Panchayati Raj Acts and increased the reservation of women to 50 percent. Efforts are on to increase the reservation from 1/3rd to 1/2 all over India.[40] Additionally, states such as Odisha have made it mandatory that if the chairperson in a village is a man, the vice-chairperson must be a woman. As of now, Jharkhand leads the way with 58 percent, closely followed by Rajasthan and Uttarakhand.[41]

The most crucial obstacle in the way of real political empowerment of women through Panchayati Raj has seen to occur at the stage of the filing of the nomination for candidature itself. While summing up, it can be stated that the reservation for women has been an important impetus to women's empowerment in India on village level but there is no guarantee for the participation of the elected women in the decision making process. Steps are being taken to overcome these hindrances, but it is a time-consuming process. Inclusion or representation of women by itself is not a solution; there is difference between formal power and effective power. There clearly exists a discrepancy between the formal and effective use of power of elected women. Changing the gender composition of elected assemblies is largely an enabling condition but it cannot present itself as a guarantee. There is a need to change many aspects of the existing gender

---

[40] Dr Rajesh Kumar Sinha; *Women in Panchyat*; Kurukshetra,July2018; https://www.pria.org/uploaded_files/panchayatexternal/1548842032_Women%20In%20Panchay

[41] EJESWI PRATIMA DODDA; '*Representation to Participation: Women in Panchayat Raj Institutions & State Assemblies'* 7th April, 2018, https://factly.in/representation-to-participation-women-in-panchayat-raj-institutions-state-assemblies/

relations, power distribution and to take hard decisions concerning power-sharing.

References

Book:

- Archana Pandey ; 'Panchayat, Gender and power in Bihar', International Journal of Research in Social Science,Vol. 8 Issue 2, February 2018, ISSN: 2249-2496
- B.C.Banik, Santosh Kumar and UC Sahoo; 'Introduction: Panchyati Raj Institutions and Rural Development; Contextualising the Discourse', Panchayati Raj Institution and Rural Development, Rawat publications, New Delhi, ISBN No 81-316-0107-2 , page 2
- J.P. Singh; "Indian Democracy and Empowerment of Women'', XLVI (4), the Indian Journal of Public Administration 618 (2000).
- Leila Seth; 'Talking of Justice: People's Rights in Modern India ', 123 ALEPH, New Delhi, 2014

Websites:

1. M.K.Gandhi; "India of My Dreams", Chapter 54: Regeneration of Indian Women,https://www.gandhiashramsevagram.org/my-dream-india/chapter-54-regeneration-of-indian-women.php
2. Nandita Datta; "Huge structuctural reforms needed in Panchayati Raj system", http://www .livemint.com/Politics/
3. Nirmala Buch, "Women's Experience in new Panchayats: The emerging leadership of rural women" http://www.cwds.ac.in.
4. Pamela Singh; "Participation-Concept and available framework", Women's Participation in Panchayati Raj, Nature and Effectiveness, Rawat publications, ISBN 978-81-316-0119-8, pg 81.
5. Rajesh Kumar Sinha; Women in Panchyat; Kurukshetra,July 2018; https://www.pria.org/uploaded_files/panchayatexternal/1548842032_Women%20In%20PanchayRameshGaddam ; 'Women Empowerment though political participation and the role of PRIs ,International Journal of Advanced Research in Commerce, Management & Social Science (IJARCMSS),,Volume02,No.01,January-March,2019.
6. Sanjit Kumar Chakraborty; " Women's Rights in India: A Constitutional Insight" (2018), Prof. (Dr.) N.K. Chakrobarti (eds.), Gender Justice 129-183 (R. Cambray & Co. Pvt. Ltd., Kolkata, 2018, ISBN 978-81-89659-33-2),
7. Shashi Kaul and Shradha Sahni;' Study on the Participation of Women in Panchayati Raj Institution', https://www.researchgate.net/publication/321219264_Study_on_the_Participation_ of_Women_in_Panchayati_Raj_Institution
8. Shivani Phukam; "Participation of women in PanchayatiRaj institutions: a study of Jorhat ZilaParishad" dspace.nehu.ac.in/bitstream/1/7181/1/S%20Phukan%20Pol%20Sc.pd.
9. Tejasmi Pratima Dodda; "Representation to Participation: Women in Panchayat Raj Institutions & State Assemblies, 7th April 2018;https://factly.in/representation-to-participation-women-in-panchayat-raj-institutions-state-assemblies/
10. Women's empowerment through PanchayatiRaj'; Centre for Developments of Human Rights, From Bulletin, http://www.cdhr.org.in/womens-empowerment/womens-empowerment-through-panchayati-raj/

PEARLS AND PITFALLS OF THE DOCTRINE OF CONSTITUTIONAL MORALITY

Dr. Deepak Kumar Srivastava*

Abstract

A society is intangible, and we need new steps of intellectuals to grow society in every dimension, be it science, technology, or social sciences. As per society's demand, the Law cannot remain motionless, and it needs to be modified with time. Morality is a standard of what is right and what is wrong, and it can also be a communicative conduct specific to a person or society. The concept of morality is not uniform and differs from person to person, place to place, and civilization to civilization. The concept of morality is not defined at any place in the Constitution. Therefore, for "constitutional morality," we can say that it is an undefined behavioural conduct relating to constitutional facets.

In the modern sense, constitutional morality means to abide by the substantial moral entailment that the Constitution carries. Indian courts have formulated that inherent to the Indian Constitution lies a morality called "Constitutional Morality." Constitutional morality acts as an interpretive device to help courts to ascertain the meaning of the Constitution's text in contested cases. Constitutional morality is vital for constitutional laws to be effective. Without constitutional morality, the operation of a constitution tends to become arbitrary, inconsistent, and whimsical. Legal experts are divided in their opinion on constitutional morality. One set of these experts believes that constitutional morality is necessary to implement and interpret constitutional provisions effectively. In contrast, others believe it is a tool for the arbitrary use of power by the judiciary. In this context, the paper attempts to understand the doctrine of Constitutional Morality, its background, the approach of the Indian courts in the application of this doctrine, and the pearl and pitfall of it.

Keywords: *Constitutional Morality, Judicial approach, Pearls and Pitfalls.*

"The constitutional functionaries are required to show constitutional behaviour, trust and morality so that we can have constitutional governance."[1]

-Justice Dipak Misra

I. Prologue

The Constitution is the supreme and fundamental law of any country. Jurisprudentially it has been considered a *grundnorm*.[2] Since it is written as a statute, the general principles of statutory interpretation will apply to the interpretation of the Constitution.[3] There are theories regarding constitutional interpretation. The three most noteworthy theories are originalism, textualism, and living law theory. 'Originalism' states that the Constitution's most accurate perspective is its makers' original intent. 'Textualism' says that the only correct way to interpret the Constitution is to read it and interpret it in a literal sense. In its early years, the Supreme Court adopted a textualist and originalist approach,

* Associate Professor of Law, Hidayatullah National Law University, Raipur, Chhattisgarh.

1 J Dipak Misra, *One can't be bereft of constitutional morality* (July 29, 2022, 10:20 AM), https://www.deccanherald.com/national/individual-cannot-be-bereft-696376.html.

2 Grundnorm is a concept in the Pure Theory of Law created by Hans Kelsen, a jurist and legal philosopher. Kelsen used this word to denote the basic norm, order, or rule that forms an underlying basis for a legal system.

3 (Feb. 1, 2022, 11:00 AM), https://thelawcommunicants.com/principles-of-constitutional-interpretation/.

focusing on the plain meaning of the words used in the Constitution. Recently the Court has acknowledged as critical to its interpretive exercise the purpose for which the Constitution has been enacted. India's Constitution, at its very inception, was different. In enacting the Constitution, the founders of our Republic expressed a sense of unease with the status quo and raised expectations of root-and-branch social revolution and transformation. The Court is now started to interpret the Constitution following its revolutionary and transformative potential.[4]

According to the above approach, the Constitution is to be interpreted not in a literal sense but according to the value and morals enshrined in the document. The Constitution should be altered, or the way the Constitution is interpreted should change the meaning of the word.[5] The Constitution is a unifying, unique, and fundamental document for the governance and functioning of a country. The constitutional law of India stands witness to how the Indian judiciary has tried to make the Indian Constitution living. For that, the Courts have employed new tests and doctrines over the years to interpret the constitutional provisions to their spirit. The "doctrine of severability," "doctrine of eclipse," "colourable legislation", and so forth are some examples of the concepts introduced by the judiciary. None of these concepts was referred to in the Constitution; the Court develops these by interpreting the powers granted in the Constitution.

Similarly, constitutional morality is an undefined code of conduct and is also a result of judicial interpretations and is not referred to anywhere in the Constitution. The concept was dormant for an extended period after the Constitution came into force, there were slight mentions of the concept, but no meaning or significance was attached to it then. But in recent years, the judiciary invoked constitutional morality very frequently, which has created a dilemma for scholars about its pearls and pitfalls.

II. Meaning

Constitutional morality refers to a set of moral principles and values that are considered essential for the proper functioning of a constitutional democratic system. It encompasses the idea that the Constitution of a country should not only be a legal document but also a moral one that upholds certain moral values and ideals.

Constitutional morality includes principles such as the rule of law, equality, justice, freedom, and human dignity. It also involves the protection of

---

4 Chintan Chandrachud, *The four phases of constitutional interpretation* (Feb. 1, 2022, 11:00 AM), https://www.thehindu.com/opinion/lead/the-four-phases-of-constitutional-interpretation/article30653706.ece, The judiciary is beginning to interpret the Constitution in line with its revolutionary and transformative potential.

5 (Jan. 1, 2023, 11:00 AM), https://study.com/learn/lesson/constitutional-interpretation-approaches-originalism-textualism-living.html.

individual rights and freedoms and the obligation of the state to uphold these rights.

The concept of constitutional morality is considered important in ensuring that the Constitution is not just a set of legal rules but also reflects the moral and ethical values of a society. It helps to create a moral and legal framework that can guide the actions of the state and its citizens, and ensures that the Constitution remains relevant and in tune with the changing values and needs of society over time.

III. Background

The term constitutional morality is an undefined code of conduct. The concept of constitutional morality was advocated by the British Classicist named *George Grote* in the 19th century in his book "A History of Greece." The concept was given by *Grote* during the review of the state of the Athenian Democracy in the age of *Kleisthenes*, points out that it became necessary at that time to create in the multitude, and through them to force upon the leading men, the rare and difficult sentiment which he termed constitutional morality. He described Constitutional Morality as a "paramount reverence for the forms of the Constitution" of the land. It essentially implied a "co-existence of freedom and self-imposed restraint". It means that while citizens would respect the Constitution and obey Constitutional authorities, they would also have the freedom to criticize those Constitutional authorities, and Constitutional authorities would have to act within the limits imposed by the law.[6] In June 1912, a leading member of the New York Bar, *William Dameron Guthrie*, delivered an address at the Pennsylvania Bar Association where he also relied on Grote's "constitutional morality."[7]

In the Indian context, the word Constitutional Morality was first used by Dr. B.R. Ambedkar while introducing the Draft Constitution to the Constituent Assembly, Dr. Ambedkar quoted Grote who had said: "The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is an indispensable condition of government at once free and peaceable; since even, any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer the ascendancy for themselves."

Thereafter, Dr. Ambedkar added further and stated:

"While everybody recognized the necessity of diffusion of constitutional morality for the peaceful working of the democratic constitution, there are two

---

6 Pratap Bhanu Mehta, *What is Constitutional Morality* (Feb. 01, 2023, 12:00 PM), https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.html.

7 William D Guthrie, *Constitutional Morality*, 196 THE NORTH AMERICAN REVIEW 154, 154–73 *JSTOR* (Feb. 01, 2023, 12:05 PM), http://www.jstor.org/stable/25119811.

things interconnected with it which are not, unfortunately, generally recognized. One is that the form of administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing its form of administration and making it inconsistent and opposed to the spirit of the Constitution. ……The question is, can we presume such a diffusion of constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on Indian soil which is essentially undemocratic."[8]

Dr. Ambedkar also explained the meaning of constitutional morality in his and quoted Grote again "By constitutional morality, Grote meant… a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the constitution will not be less sacred in the eyes of his opponents than his own."[9]

Today, the meaning and connotation of the phrase have acquired newer interpretations. But essentially, constitutional morality is a sentiment among the common masses necessary for establishing a peaceful and stable government. It is supposed to be a perfect balance between freedom and restrictions on those freedoms.[10]

After a couple of mentions in the Constitutional Assembly Debates, not much significance was given to this doctrine. Although few references to constitutional morality surfaced in certain judgments, most of them lacked substance and didn't realize the meaning of constitutional morality entirely.

Only in a few cases[11] the court invoked constitutional morality but did not discuss it at length. In fundamental rights case,[12] the court recognises the

---

8 Naz Foundation v. Government of NCT of Delhi, (2009) 160 DLT 277, para 79 (Cf. reversed by Supreme Court in Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, Also see, Shri. Goapal Subramanium, "*Constitutional Morality-Is it Dilemma for the State, Courts and Citizens"*, 1st D D V Subba Rao Memorial Lecture (2016), (Dec. 01, 2023, 12:00 PM), http://www.aprasannakumar.org/pdf%20files/Constitutional-Morality. pdf.

9 Mehta, *supra* note 6.

10 N. Mishra, 2021. *Making of Constitutional Morality by Indian Judiciary – Academike* (Nov. 15, 2023, 12:00 PM), https://www.lawctopus.com/academike/constitutional-morality-india/#_ftn33.

11 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 at page 616, S P Gupta v. Union of India, A.I.R. 1982 S.C. 149 (India).

12 *Ibid.*

importance of societal rights, sometimes over those of the individual. Considering themselves as trustees of the Constitution, the Judges of the Supreme Court could not allow State sponsored abrogation of the Constitution and devised a method to limit the Constituent power of Parliament. It was reasoned by the Supreme Court that if the Basic Structure of the Constitution was distorted to fulfil any presently prevailing need, it would leave the Constitution unrecognizable, and all the commitments made by the Drafting Committee in 1950, and constitutional morality itself, would be left as a vague memory.

IV. Pragmatic Judicial Approach to Morality

The concept of "constitutional morality" refers to the adherence to the principles of the Constitution, including the values of democracy, equality, and justice, as well as respect for individual rights and freedoms. In recent years, there has been a growing recognition of the importance of constitutional morality as a guiding principle for judicial decision-making.

"There is an asymmetry in society and the State should ignore it, every effort to achieve homogenisation or standardisation across all sections must be curbed as it violates the principle of Constitutional morality."[13]

In recent times the doctrine of 'constitutional morality' has become weighty and germane for the judges while giving meaning to the words used in the Indian Constitution. The Supreme Court has adopted a pragmatic approach towards the application of the doctrine of constitutional morality.[14]

A pragmatic judicial approach to constitutional morality requires judges to balance the text and values of the Constitution with the practical realities of social and political life. This means that judges must be willing to adapt the principles of the Constitution to changing circumstances while remaining true to its core values.

In practice, this approach may involve interpreting the Constitution in a way that recognizes the evolving social and political context in which it operates, or giving priority to certain constitutional values to address pressing social problems. In many cases, the court has applied this doctrine by saying that constitutional morality is considered to be the silence of the constitutional text and a tool to fill the gaps of the constitutions to meet the demands of future generations.[15] The court has also observed that it will also help society to move forward by upholding the individual dignity of the citizens by subjecting them to a process of self-renewal by not limiting the ambit of the constitutional

---

13 *Id*. at 8.

14 Kaushal Kishor v. State of Uttar Pradesh, Writ Petition (Criminal) No. 113 of 2016.

15 K S Puttuswamy v. Union of India and Ors. (2017) 10 SCC 1.

guarantee of justice to the forms and procedures of the constitution and by providing an enabling framework for the societies to progress.[16]

The concept of constitutional morality was addressed by the Supreme Court in *Manoj Narula v. Union of India*.[17] Simply put, the principle of constitutional morality involves examining the norms or provisions of the constitution and acting in conformity with them, and not violating the rule of law or acting arbitrarily. According to the court, the traditions and conventions have to grow to sustain the value of such morality and people at large and persons in charge of institutions must strictly be guided by it. The working of constitution of India is made for a progressive society and its implementation and working will depend upon the prevailing atmosphere and conditions.

In *Joseph Shine* v. *Union of India*[18] court has observed that in a democratic country, there should be an assurance of basic rights that are essential for the free, impartial and proper living of the citizens of the country as the requirement for the fulfilment of constitutional morality. In the other words for ensuring constitutional morality, there should be an assurance of equality to all citizens, for example, equality before the law, non-discrimination on account of sex, and dignity, all of which were prohibited due to Section 497.[19] The court observed that constitutional morality is not similar to the popular opinion, for passing the judgement in criminal cases the basic principle needs to be tested in the view of the constitution that determines the act criminal in nature and holds the guilty of the criminal. The principle that is opted for should be considered the trinkets of morality not by the majority of the people's thinking. The court further observed that, in correlation with constitutional morality, it is the aim to remove the discrimination at various stages against the lower part of the society that prohibits their participation in the society and wants to establish equity at large.

Subsequently, in another scintillating judgment in the *Navtej Singh Johar* case, which pertained to Section 377[20] of IPC, 1860, the Supreme Court said that:

---

16 Navtej Singh Johar v. Union of India, A.I.R. 2018 S.C. 4321 (India).

17 Manoj Narula v. Union of India (2014) 9 SCC 1 (India).

18 Joseph Shine v. Union of India A.I.R. 2018 S.C. 1676(India).

19 Indian Penal Code, Section 497: Adultery: Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

20 Indian Penal Code, Section 377: Unnatural Sex: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1 [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

"Constitutional morality cannot be martyred at the altar of social morality". While in the Sabarimala judgement, where the age-old custom of debarring menstruating women of a certain age group from the temple was in question, the court observed, "…existing structures of social discrimination must be evaluated through the prism of constitutional morality. The effect and endeavour are to produce a society marked by compassion for every individual."

In the case of *NCT of Delhi* v. *Union of India*[21] where the concept of constitutional morality is expressly invoked by the court as a guiding light in constitutional interpretation[22], this was in the context of deliberative democracy. The Chief Justice noted that the concept of constitutional morality is that fulcrum which acts as an essential check above high functionaries and citizens aligned as experience has shown that unbridled power without any checks and balances would result in a despotic situation which is antithetical to the very idea of democracy. We must not forget the concept of triangular values that are enshrined under the preamble of the constitution of India. That attracts our attention to the concept of constitutional trust; it is the trust that repeals under the functionaries of the constitution. The trust is that they will be guided by constitutional morality, objective pragmatism and balance that is required to sustain a proper administration.

On the same notion, the most important case which brought attention to the concept of constitutional morality was Sabrimala case[23], in the case at hand the issue of non-admission of women of the age of 10-50 years into the temple was adjudged and three judges referred to the constitutional morality concept but came to different conclusions about the said concepts. The majority opinion, delivered by the then Chief Justice of India, and his observation was:

"The term 'morality' occurring in Article 25 (1) of the Constitution cannot be narrowed down and be viewed in terms of what it means to be an individual, a section or a religious sect. In cases where there is a violation of fundamental rights the term 'morality' naturally implies constitutional morality and the Constitutional Courts decision must conform with basic principles of

---

Explanation. —Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

21 NCT of Delhi v. Union of India (2018) 8 SCC 501 (India).

22 "*Constitutional morality in its strictest sense implies a strict and complete adherence to the constitutional principles as enshrined in the various segments of the document. It is required that all constitutional functionaries to "cultivate and develop a spirit of constitutionalism" where every action taken by them is governed by and is in strict conformity with the basic tenets of the Constitution*."

23 Indian Young Lawyers Association & Ors v. The State of Kerala & Ors, (2019) 11 SCC 1(India).

constitutional morality that emanate from the constitution itself."[24], he added, "Having said so, the notions of public order, morality and health cannot be used as a colourable device to restrict the freedom to freely practise religion and discriminate against women of the age group of 10 to 50 years by denying them their legal right to enter and offer their prayers at the Sabarimala temple for the simple reason that public morality must yield to constitutional morality."[25]

Concurring with the majority view, Justice Chandrachud observed:

"The Constitution is meant as much for the agnostic as it is for the worshipper. It values and protects the conscience of the atheist. The founding faith upon which the constitution is based in the belief that it is in the dignity of each individual that the pursuit of happiness is founded. Individual dignity can be achieved only in a regime which recognizes liberty as inhering in each individual as a natural right. Human dignity postulates equality between persons. Equality necessarily is equality between sexes and genders. Equality postulates a right to be free from discrimination and to have the protection of the law in the same manner as is available to every citizen. Equality above all is a protective shield against the arbitrariness of any form of authority. These founding principles must govern our constitutional notions of morality. Constitutional morality must have a value of permanence which is not subject to the fleeting fancies of every time and age. If the vision which the founders of the constitution adopted has to survive, constitutional morality must have content which is firmly rooted in the fundamental postulates of human liberty, equality, fraternity and dignity. These are the means to secure justice in all its dimensions for the individual citizen. Once these postulates are accepted, the necessary consequence is that the freedom of religion and, likewise, the freedom to manage the affairs of a religious denomination is subject to and must yield to these fundamental notions of constitutional morality. In the public law conversations between religion and morality, it is the overarching sense of constitutional morality which has to prevail. While the constitution recognizes religious beliefs and faiths, its purpose is to ensure a wider acceptance of human dignity and liberty as the ultimate founding faith of the fundamental text of our governance. Where a conflict arises, the quest for human dignity, liberty and equality must prevail. These, above everything else, are matters on which the constitution has willed that its values must reign supreme."[26]

He went on to add that;

"*A claim for the exclusion of women from religious worship, even if it be founded in religious text, is subordinate to the constitutional values of liberty,*

---

[24] Ibid.
[25] Ibid.
[26] *Id*. at 23.

dignity and equality. Exclusionary practices are contrary to constitutional morality."[27]

However, in the same case[28] Justice Indu Malhotra, in her dissenting judgment, used the ideal of constitutional morality to reject the arguments of the petitioners. She even observed that permitting the entry of women into Sabarimala will violate the concept of constitutional morality. In her words: "The concept of Constitutional Morality refers to the moral values underpinning the text of the constitution, which are instructive in ascertaining the true meaning of the constitution, and achieve the objects contemplated therein. Constitutional morality in a pluralistic society and secular polity would reflect that the followers of various sects have the freedom to practise their faith following the tenets of their religion. It is irrelevant whether the practise is rational or logical. Notions of rationality cannot be invoked in matters of religion by courts. The followers of this denomination, or sect, as the case may be, submit that the worshippers of this deity in Sabarimala Temple even individuals have the right to practise and profess their religion under Article 25(1) under the tenets of their faith, which is protected as a Fundamental Right. Equality and non-discrimination are certainly one facet of Constitutional Morality. However, the concept of equality and non-discrimination in matters of religion cannot be viewed in isolation. Under our Constitutional scheme, a balance is required to be struck between the principles of equality and non-discrimination on the one hand, and the protection of the cherished liberties of faith, belief, and worship guaranteed by Articles 25 and 26 to persons belonging to all religions in a secular polity, on the other hand. Constitutional morality requires the harmonization or balancing of all such rights, to ensure that the religious beliefs of none are obliterated or undermined."[29]

Therefore, according to *Justice Indu Malhotra*, constitutional morality, which referred to the moral values of the constitution, guaranteed the freedom to hold and practice personal religious beliefs. The logic of such practices cannot even be a subject matter of question before the court. In her observation, when there is a conflict between the principles of equality and non-discrimination with the liberty of faith, belief, and worship, the solution should be designed so that the religious beliefs of no person are obliterated or undermined.

In *Kantaru Rajeevaru* v. *Indian Young Lawyers Association*[30], the Supreme Court referred to a larger bench to define constitutional morality. The Court observed that the expression is not defined anywhere in the Constitution. And

---

27 *Id.* at 23.
28 *Id*. at 23.
29 *Id.* at 23.
30 Kantaru Rajeevaru v. Indian Young Lawyers Association (2020) 3 SCC 52 (India).

contours of this expression need to be delineated to prevent it from becoming subjective.

Analyzing the above series of judgments, one thing becomes amply clear, “the silences of the Constitution are also to be ascertained to understand the Constitution”. Constitutional morality is this silence of the constitutional text Therefore, from the above discussion, we can say that the concept of “constitutional morality” over time has been interpreted differently by different judges. Moreover, it can be observed that judges have been using the concept freely and without any limitation to the scope of the said concept.

At the same time, a pragmatic judicial approach to constitutional morality must also be grounded in the principles of the rule of law and judicial restraint. This means that judges must be careful not to overstep their constitutional role and must respect the boundaries of their authority. Overall, a pragmatic judicial approach to constitutional morality requires judges to be responsive to the needs of society while remaining committed to the fundamental principles of the Constitution.

V. Pearls and Pitfalls of the Doctrine

There are many pearls and pitfalls of the doctrine of constitutional morality. Pearls of the doctrine of constitutional morality can include the following:

- Provides a deeper understanding of constitutional values: The doctrine of constitutional morality recognizes that a constitution is not simply a set of legal rules, but is rooted in a broader set of moral values. This recognition can lead to a deeper understanding of the constitution's underlying principles and values, which can help to guide the interpretation and application of the law.
- Promotes a values-based approach to decision-making: By recognizing the importance of moral values in the constitution, the doctrine of constitutional morality promotes a values-based approach to decision-making, which can help to ensure that the law is applied in a way that reflects these values.
- Encouraging moral reflection: By requiring that the Constitution reflect the moral values of society, the doctrine of constitutional morality encourages citizens to engage in moral reflection and debate about the principles that should guide their society.
- Strengthening the legitimacy of the Constitution: When the Constitution reflects the moral values of society, it is seen as more legitimate and thus more likely to be followed and respected by citizens.
- Promoting constitutionalism: The doctrine of constitutional morality promotes constitutionalism, the idea that the Constitution should be the supreme law of the land and that all laws and actions of the government should be in accordance with it.

- Allows for flexibility in interpretation: The doctrine of constitutional morality allows for a certain degree of flexibility in the interpretation of constitutional provisions, as it acknowledges that the meaning and significance of these provisions may change over time in response to changing social, economic, and political circumstances.

There are many pitfalls of the doctrine of constitutional morality are as follows:

- Potential for subjectivity: The doctrine of constitutional morality can be subjective, as it relies on the interpretation and application of moral values, which can vary depending on one's personal beliefs and cultural background. This subjectivity can lead to inconsistency in the application of the law.
- Limiting diversity: If the doctrine of constitutional morality is used to promote a particular set of moral values, it may limit the diversity of views and perspectives within society.
- Can undermine the rule of law: By allowing for a certain degree of flexibility in interpretation, the doctrine of constitutional morality can also undermine the rule of law, as it may allow judges and other legal actors to depart from established legal principles in favour of subjective moral judgments.
- Conflicts with individual rights: The promotion of certain moral values through the doctrine of constitutional morality may come into conflict with individual rights and freedoms, such as the right to free speech or religion.
- Difficulty in adapting to change: As society changes, the moral values and principles that should be reflected in the Constitution may change as well. The doctrine of constitutional morality may struggle to adapt to these changes, leading to a disconnect between the Constitution and the values of society.

VI. Analysis

As discussed above the scholars are not in accord and have two different opinions as beneficial and having drawbacks of the doctrine of constitutional morality. One set of scholars believes in the ongoing trend of constitutional morality and suggests it to be a advantageous concept while keeping pace with the emerging needs of society upholds the rule of law. To apply the doctrine of constitutional morality it is required to be complemented and supplemented by judicial values and ethics. A standardized bench mark has to be developed so that there is no scope for legal contradictions. There is a need for a balance in an application, Constitutional morality may be invoked based on the provisions of the Constitution to question the conduct of the State and to identify the metes and bounds within which the State must operate. However, it cannot be used to

emasculate the discretion and prerogative constitutionally vested in the State to define public morality under it as an elected body. There shall be Commitment to the ideals and aspirations of the Constitution: The democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the Constitutional parameters without paving the path of deviancy and maintaining institutional integrity and the requisite Constitutional restraints through their actions. In this direction, awareness must be created among the common public regarding their rights as well as their responsibilities or duties towards the country.

Along with these, it is asserted by the proponents of this belief that constitutional morality is nowhere defined in the constitution and the use of the said principle by various judges failed to deliver a constant definition of the same. Hence, the uncertain status of the said principal paves way for arbitrariness and judicial overreach.

Former Attorney General KK Venugopal also criticized by saying "Constitutional morality is very harmful to the country. And if we use this concept, we do not know our destination where it will be. I hope constitutional morality dies. Otherwise, our first PM Pandit Nehru's fear that Supreme Court will become the third chamber might come true.[31]

Moreover, the said concept is said to breed trust among the people in the democratic institutions of the country. Human liberty, equality and dignity are believed to be the founding stone of the said concept by the proponents of this doctrine.

There is no denying the fact that the doctrine of constitutional morality is transformative and had helped judges reach milestones with decisions. But the doctrine is surrounded by speculations and concerns. It can be deduced from the history of the said doctrine that neither Dr B. R. Ambedkar nor Grote deliberated on the use of this doctrine to keep a check on legislative actions by the courts. The uncertainty in the definition and scope of constitutional morality paves way for arbitrariness and makes it a tool to exercise judicial overreach. The sheer disregard for public morality under the said doctrine also raises doubts about the intention behind this doctrine. Therefore, the researcher believes that if there is a standard definition of the concerned doctrine and a roadmap to its scope the doctrine has the potential to develop into a more holistic principle to realize the rationale behind the Constitution of India.

---

[31] K K Venugopal, "*Constitutional Morality Must Die or SC Could Become Parliaments Third Chamber, as Nehru Feared*", TIMES NOW (Dec. 9, 2018, 2:00 PM), https://www.timesnownews.com/india/article/kkvenugopal-attorney-general-sabarimala-news-address-constitutional-morality-supreme-court-jawaharlal-nehrubharatiya-janata-party-chief-justice-of/328266.

VII. Conclusion

The requirement of certain principles and limitations for the application of Constitutional Morality cannot be denied. However, the viewpoint here is not to completely dissolve the aspect of constitutional morality but rather harmoniously construct it to better the functioning of the judiciary and the judicial powers embarked upon them. The courts can thus employ Constitutional Morality as an effective tool for interpretations of the rights conferred on the individual by the Constitution.

The doctrine of constitutional morality is a useful tool for interpreting and applying constitutional provisions, but it must be used with care to avoid potential pitfalls and challenges. Recognizing the importance of both legal and moral principles can help to ensure that the law serves its intended purposes and reflects the values of the society it serves.

References

Books

- Constitution of India by V. N. Shukla by Mahendra Pal Singh, 2019
- M P JAIN, INDIAN CONSTITUTIONAL LAW, 2018
- INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES EDS ZOYA HASAN, E, SRIDHARAN, R SUDARSHAN

Acts

- Constitution of India, 1950
- Indian Penal Code, 1860

Articles

- K K Venugopal, *"Constitutional Morality Must Die or SC Could Become Parliaments Third Chamber, as Nehru Feared"*, TIMES NOW (Dec. 9, 2018)
- Pratap Bhanu Mehta, "*What is Constitutional Morality*"
- Guthrie, William D. *"Constitutional Morality."* The North American Review, vol. 196, no. 681, 1912
- Shri. Goapal Subramanium, *"Constitutional Morality-Is it Dilemma for the State, Courts and Citizens",* 1st D D V Subba Rao Memorial Lecture (2016)
- Chintan Chandrachud, *The four phases of constitutional interpretation.*
- *J Dipak Misra, "One can't be bereft of constitutional morality"*

THE PLACES OF WORSHIP (SPECIAL PROVISIONS) ACT, 1991 AND GYANVAPI MASJID CONTROVERSY WITH SPECIAL REFERENCE TO *BHAGWAN ADI VISHWESHWAR VIRAJMAN CASE*

Dr. Neelam Batra[*]
Priyanka[**]

Abstract
The Places of Worship (Special Provisions) Act, 1991 had been enacted in 1991 with the intent to foreclose all kinds of claims and reclamation by one community over places of worship of other community. But in spite of its enactment, the courts in present are overstepping the provisions of the 1991 Act and entertaining petitions related to conversion of religious places. One such petition is filed in the name of Bhagwan Adi Vishweshwar Virajman currently pending before the civil court in Varanasi, which demands for removal of Gyanvapi Masjid. The civil court in its order dated 17th November 2022 rejected the objection of Anjuman Intezamiya Management Committee under Order 7 Rule 11 of the Code of Civil Procedure, 1908 and held the suit maintainable. This article analyses the maintainability of the suit in view of the provisions of the 1991 Act.

Keywords: *Religion, Worship, Mosque, Temple, Reclamation.*

1. Introduction

In view of George Bernard Shaw, "there is only one religion, though there are hundreds of versions of it."[1] This statement is unsubtly true in respect of India, where numerous 'versions' of religion have emerged and flourished. It may be appropriate to call Indian society as 'highly religious and multi-religious'. There are numerous religious versions/traditions prevalent in India, to name a few, such as Hinduism, Christianity, Buddhism, Jainism, Islam, Sikhism etc. Apart from these, a large number of Indian inhabitants claim themselves to be 'atheists'. All the religious groups have their own set of established religious doctrines, fundamental principles, dogmas and practices and places for prayer/worship. In fact, religion is an inseparable part of the individual life in India. Recognizing the same, the Constitution of India grants everybody the fundamental right 'to freely profess, practise and propagate' religion under its Article 25. If everyone exercises such right in a reasonable manner without causing disruption in the exercise of similar right of others, there would not arise any disputes related directly or incidentally to religion. But the thought of 'supremacy' of one's own religion in comparison to that of others gives rise to several inter-religious disputes. For an Indian, religion is a personal, but perhaps the most-sensitive matter. In respect of interreligious matters, we often witness prevailing environment of tension and discontent, which gravely impacts upon the interreligious communal harmony. India has witnessed massive communal discord before and after independence, due to which India itself was divided in 1947 on religious lines. Communal heat and passion have never declined at any

[*] Assistant Professor, Panjab University Regional Centre, Ludhiana.
[**] Research Scholar, Department of Laws, Panjab University, Chandigarh.

[1] *George Bernard Shaw: Quotes*, BRITANNICA (Apr. 06, 2023, 12:00 PM), https://www.britannica.com/quotes/George-Bernard-Shaw .

point of time in independent India. Increase in inter-religious conflicts lead to animosity and unrest in the social milieu.

One such legal dispute is in relation to ownership of Gyanvapi Masjid of Varanasi and discovery of a stone-structure similar to a *Shivalinga* in the *wazukhana* (ablution pond) during a court-commissioned survey in May 2022 which has aroused communal sentiments and social unrest between the Hindu and the Muslim communities. It has been fuelled by the Varanasi Civil Court order dated 17th November 2022 holding the civil suit namely *Bhagwan Adi Vishweshwar Virajman and Others* v *State of Uttar Pradesh through Secretary and Others*[2] maintainable, wherein demand for reclamation of Gyanvapi Masjid site to the Hindus after the removal of its structure has been made. Through this research study, the researcher tries to analyse the said order of 17th November 2022, which is in violation of the provisions of the Places of Worship (Special Provisions) Act, 1991 and also against the Supreme Court verdict of the Ayodhya dispute[3].

2. Significant provisions of the Places of Worship (Special Provisions) Act, 1991

Keeping in view the *Gyanvapi Masjid* dispute, wherein the demand for removal of its structure has been made in several civil suits filed for the purpose, it becomes relevant to discuss the important provisions of the Places of Worship (Special Provisions) Act, 1991 which was enacted with the primary object to prohibit such disputes to arise and be adjudicated by the judiciary. The Places of Worship (Special Provisions) Act, 1991 came into force on 18th September 1991. It mandated that the religious nature of the places of worship existing on the date of independence of India from the British Rule i.e., 15th August 1947 shall not be altered for religious purposes. Simultaneously, it also ousted the jurisdiction of the courts to hear such petitions, so that no legal proceedings that involve the demand for alteration of any religious structure remain pending in the law courts or other legal authority.

Section 3[4] and Section 4[5] are the most important provisions of this 1991 Act. While Section 3 of the Act is addressed to every person for prohibiting the conversion of any place of worship for religious purposes; Section 4 makes a declaration that nature of the religious places constructed before 15th August 1947 will remain the same as it was on that date. Section 4(2) has the effect of ouster of jurisdiction of the courts in respect of hearing the matters related to conversion of the religious buildings. It has further provided some exceptions under Section 4(3), upon which the provisions of section 4(1) and section 4(2) will not apply,

---

2 Bhagwan Adi Vishweshwar Virajman and Others v State of Uttar Pradesh through Secretary and Others, Civil Suit 712 of 2022 (India).

3 M. Siddiq (Dead) Through LRs. v Mahant Suresh Das and Ors. (2019) 4 SCC 656 (India).

4 The Places of Worship (Special Provisions) Act, 1991, § 3 (India).

5 *Id.,* § 4.

such as an ancient monument, a dispute related to conversion finally decided, a dispute about conversion settled by negotiation etc., a conversion by acquiescence, a matter of conversion not challengeable due to law of limitation.

Section 5[6] exempted Babri Masjid (in Ayodhya) dispute from the applicability of the Act due to which the legal proceedings over the dispute continued in the court and got its final adjudication by the Supreme Court in 2019.[7] Section 6[8] of the Act prescribed punishment of imprisonment along with fine for the principal offender, attempter, abettor or facilitator of the offence of conversion of a religious place. Section 7[9] declares that the Act to be overriding over all other laws.

The Act was enacted necessarily for maintenance of law, order and social solidarity which was highly disturbed during 1980-90s because of countrywide reclamation movement for the birthplace of Lord Ram in Ayodhya, which eventually led to the destruction of Babri Masjid structure in 1992. Through the enforcement of the Act, it was intended that no such demands or movements would arise in future in relation to the disputed religious places. But, while the Act is still in force, several demands over disputed religious structures have arisen in some parts of the country. Among them, legal disputes over Shahi Idgah in Mathura and Gyanvapi Masjid in Varanasi have led to communal unrest in the country.

3. The Places of Worship (Special Provisions) Act, 1991: Judicial Approach

Judiciary of India has highlighted the significance of the 1991 Act in its several rulings. The Bombay High Court in its ruling in *Yusuf Ajij Shaikh*[10] observed that aim of the Act is to deter any religious group from unlawfully occupying and altering a religious place, which belongs to another religious group. It mandates that religious character of a place of worship has to be preserved and no one makes change in the character of a religious place. It is imperative so that communal harmony is not disturbed due to human acts against religious structures. The Punjab and Haryana High Court in *Bharpur Singh* v *Union of India*[11] held that the purpose of the Places of Worship (Special Provisions) Act, 1991 is preservation of the religious nature and to ensure that no person is allowed to alter a place of worship into place of worship of different religion. Further, the Supreme Court in its Ayodhya verdict[12] regarded the enforcement of the Places of Worship (Special Provisions) Act, 1991 in furtherance of the fulfilment of

6 *Id.*, § 5.

7 *Supra* note 3.

8 *Supra* note 4, § 6.

9 *Supra* note 4, § 7.

10 Yusuf Ajij Shaikh v Special Land Acquisition Officer, (1995) BOMLR 823 (India).

11 Bharpur Singh v Union of India, (1996) 114 PLR 591 (India).

12 *Supra* note 3.

constitutional obligation of equality of all the religions, secularism and non-retrogression by ensuring the protection of religious places belonging to all the religions.

Currently, legality of the Places of Worship (Special Provisions) Act, 1991 itself is in challenge before the Supreme Court. The Act has been challenged on several grounds as violation of the fundamental rights, contravention of secularism, taking away judicial review, violation of Hindu Law etc. The petitions challenging its constitutional validity will be heard in July 2023 by the Apex Court.[13]

3.1 The Places of Worship (Special Provisions) Act, 1991 and Gyanvapi Masjid Controversy

3.1.1 Gyanvapi Masjid Dispute and its brief History

Gyanvapi Masjid dispute is related to demand of routine worship and ownership of a 17th-century religious structure known as Gyanvapi Masjid situated in plot no. 9130 in Dashashwamedh ward of Varanasi, next to renowned Kashi Vishwanath Temple. The structure of Gyanvapi Masjid was erected in 1669 after demolition of a part of the ancient temple of Lord Vishweshwara/Vishwanath, as ordered by Mughal ruler Aurangzeb.[14] The temple of Lord Vishwanath venerated presently was constructed nearby the site of Gyanvapi mosque by Queen of Indore, Ahilyabai Holkar from 1777 to 1785.[15] The western wall at the back side of the Gyanvapi mosque still retains the remnants of the temple-wall and visibly holds the symbols of ancient temple, which was erstwhile situated at the same site. It is worth mentioning that unlike Babri Masjid in Ayodhya (where namaz was not offered since 1949 and was later demolished in 1992), Gyanvapi mosque is regularly used for namaz by the Muslim community.

In 1936, in the case of *Din Mohammad* v *Secretary of the State*[16] Gyanvapi Masjid except the enclosure was declared as waqf property. Against this judgment, petition filed in Allahabad High Court was also dismissed[17] The controversy gained momentum during Ram Janmabhoomi reclamation movement of 1980-90s. It was declared that the sites of Babri Masjid (Ayodhya), Shahi Idgah Masjid (Mathura) and Gyanvapi Masjid (Varanasi) will be reclaimed and restored to their original ancient status of Hindu temples. In 1991, Gyanvapi

---

13 *Supreme Court lists pleas challenging constitutional validity of Places of Worship Act for hearing in July*, INDIA LEGAL (Apr. 5, 2023, 4:32 PM), https://m.indialegallive.com/article/supreme-court-constitutional-validity-places-worship-act/307418 .

14 MEENAKSHI JAIN, FLIGHT OF DEITIES AND REBIRTH OF TEMPLES 96 (2019).

15 *Id.* at 97.

16 Din Mohammad v Secretary of the State, Civil Suit No. 62 of 1936 (India).

17 Din Mohammad v Secretary for State in India, 1942 SCC OnLine All 56 (India).

Masjid dispute also reached before the judiciary. Civil Suit 610 of 1991[18] with demand of removal of the mosque structure and transfer of its possession to the Hindus was filed before the civil court and its hearings were stayed by the High Court in 1998. In 2019, one plea demanding inspection and survey by the archaeological department was filed and the same was accepted by the civil judge in 2020. However, the order of archaeological survey and legal proceedings before the civil court were stayed by the Allahabad High Court in 2021.

Thereafter, five household women namely Rakhi Singh, Laxmi Devi, Sita Sahu, Manju Vyas and Rekha Pathak filed a civil suit[19] with the main demand to allow daily worship of Goddess *Shringar Gauri* situated at the western wall (at the back side) of the Gyanvapi mosque and all other deities (visible and invisible) present therein.[20] They made a claim that regular worship of the deities continued before and after 15th August 1947, but it was stopped in 1990s under the orders of the government. In furtherance of the legal proceedings before the Civil Judge Senior Division Varanasi, an inspection and survey by the court-commissioner was ordered to be conducted in the whole premises of Gyanvapi Masjid in the presence of all the parties under the suit and their advocates. But the women petitioners of the suit were not allowed entry into Gyanvapi Masjid by the managing committee of the mosque. During the survey and videography, the survey team found a stone structure similar to *Shivalinga* encircled with well-like enclosure in the ablution pond of the mosque after removing the water therefrom on May 16, 2022.[21] This discovery has fuelled the religious sentiments across the country and also resulted in more petitions being filed demanding for protection and worship of the *Shivalinga* found therein. In present, more than twelve petitions are pending before the district judiciary of Varanasi, which relate to Gyanvapi mosque dispute. All of them demand for flattening of Gyanvapi mosque structure and permitting for Hindu worship at the site. Ablution pond of Gyanvapi Masjid has been sealed under the order of the Civil Judge Senior

---

18 Ancient Idol Swayambhu Lord Vishweshwar v Anjuman Intejamiya Masjid and Others, Civil Suit 610 of 1991 (India).

19 Rakhi Singh and Others v State of Uttar Pradesh and Others, Civil Suit 693 of 2021, now Civil Suit 18 of 2022 (India).

20 Sudhir Kumar, *5 Women who got together for their Right to Worship Shringar Gauri*, HINDUSTAN TIMES (June 1, 2022, 12:48 AM), https://www.hindustantimes.com/cities/lucknow-news/5-women-who-got-together-for-their-right-to-worship-shringar-gauri-101654024685476.html.

21 Rajat Sharma, *Gyanvapi Mosque: How Shivling was found inside wazukhana (ablution pond)*, INDIA TV (May 17, 2022, 4:15 PM), https://www.indiatvnews.com/news/india/opinion-gyanvapi-mosque-how-shivling-was-found-inside-wazukhana-ablution-pond-aaj-ki-baat-blog-post-2022-05-17-777229.

Division[22] and also of the Supreme Court[23] and nobody is allowed entry there, so that *Shivalinga* found there shall be granted protection from human activities. In one sense, the order of sealing of ablution pond of Gyanvapi Masjid itself is in violation of the provisions of the Places of Worship (Special Provisions) Act, 1991. The civil suit praying for worship of Shringar Gauri was transferred from Civil Judge Senior Division to the District Judge of Varanasi under the order of the Supreme Court for hearing firstly on the ground of its maintainability.[24] The District Judge held the civil suit demanding for regular worship of Shringar Gauri as maintainable on Sept. 12, 2022, reasoning that the prayers made in the suit only demand for regular worship of the deities (visible and invisible) but do not claim alteration of status quo of the site in dispute. Therefore, the barring of court jurisdiction to hear the dispute under the Places of Worship (Special Provisions) Act, 1991 is not attracted. As under the said civil suit, no demand is made for converting the mosque into a temple, but only a civil right to worship is demanded, which has been discontinued since 1990s. Further, the provisions of the Waqf Act, 1995 does not extend to a civil dispute, which involves non-Muslim parties in it.[25] It may be mentioned that the managing committee of Gyanvapi Masjid, Anjuman Intezamiya Committee challenged this order before the Allahabad High Court in revision.[26] The High Court reserved its judgment under the revision over maintainability of the civil suit on Dec. 23, 2022.

3.1.2 *Bhagwan Adi Vishweshwar Virajman* v *State of U.P. and Others* Case

A Civil Suit was filed by Kiran Singh Bisen as the next friend of Lord Adi Vishweshwar before the civil court of Varanasi. Various demands made in the suit are: (a) to declare the deity Lord Adi Vishweshwar as the owner of the property in dispute (Gyanvapi Masjid Complex). (b) to remove the mosque

---

22 Diksha Munjal, *Explained The Gyanvapi Mosque and Kashi Vishwanath dispute and the Current Case*, THE HINDU (May 16, 2022, 11:43 AM), https://www.thehindu.com/news/national/gyanvapi-mosque-kashi-vishwanath-temple-history-case-explained/article65411250.ece.

23 Srishti Ojha, *Gyanvapi Mosque Case– Protect Area Where Shivalinga is Stated to be Found, No Restrictions on Muslims' Rights : Supreme Court Clarifies Varanasi Court's Order*, LIVE LAW (May 17, 2022, 5:28 PM), https://www.livelaw.in/top-stories/gyanvapi-mosque-case-direction-to-protect-shiv-ling-spot-wont-restrict-rights-of-muslims-to-offer-namaz-perform-religious-obsevances-supreme-court-clarifies-199347.

24 Shruti Kakkar, *Breaking: Supreme Court Transfers Gaynvapi Mosque Suit To District Court Varanasi*, LIVE LAW (May 20, 2022, 4:22 PM), https://www.livelaw.in/top-stories/supreme-court-gyanvapi-mosque-suit-199672.

25 Sparsh Upadhyay, *Plaint Avers Hindu Deities were Worshipped inside Gyanvapi Mosque Complex even after Aug. 15, 1947; Places of Worship Act No Bar to Suit : Varanasi Court* LIVE LAW (Sept. 12, 2022, 4:54 PM), https://www.livelaw.in/news-updates/hindu-deities-worshipped-inside-gyanvapi-mosque-complex-august15-1947-places-worship-act-bar-suit-varanasi-court-209037.

26 Committee of Management Anjuman Intezamia Masjid Varanasi v Rakhi Singh and Ors., Civil Revision 101 of 2022 (India).

structure and transfer of possession of the site to the deity, Lord Vishweshwar and (c) to stop the entry of Muslim community for namaz in the mosque complex and to prohibit the Muslims from creating any hurdles in the conduct of proper and regular worship of the Hindu deities at the said site.[27]

In the said suit, *Anjuman Intezamiya* Management Committee (Managing Committee of Gyanvapi mosque) filed objection under Order 7 Rule 11 of the Code of Civil Procedure, 1908 on several grounds, including that proceedings in that civil suit are prohibited to be continued because of the legal bar imposed by the Places of Worship (Special Provisions) Act, 1991 and also under the provisions of the Waqf Act, 1995, the Code of Civil Procedure, 1908, the Limitation Act, 1963 and the U.P. Kashi Vishwanath Temple Act, 1983.

The civil court after hearing the objections filed under Order 7 Rule 11 of the Code of Civil Procedure, 1908 pronounced its order on November 17, 2022 over the maintainability of the suit. It was held that the continuation of the proceedings under the suit are not barred under legal provisions. The court in its order reasoned that the suit is not barred under the provisions of the Limitation Act, Order 1 Rule 8,[28] Order 7 Rule 3[29] or under Section 9[30] of the Code of Civil Procedure, 1908. The civil court has jurisdiction to try the civil suit, where infringement of a fundamental right as well as a civil right is complained of. Further, the plaint of the suit has properly disclosed the cause of action for filing the civil suit, which is to be determined from the bundle of facts. The plaint avers the nature of the property in dispute to be of a 'temple' at the time of independence even after demolition of its upper portion in 1669. Thus, the doubt arises about the 'religious nature' of the property in dispute at the time of independence, for which evidence has to be brought during trial. Therefore, Order 7 Rule 11[31] of the Code of Civil Procedure, 1908 does not debar the suit. In addition, the provisions of the Waqf Act, 1995, would not be applicable to the present suit, as its provisions would not apply to the matters involving non-Muslims. Also, the question of the property in dispute being a waqf legally can be decided only through evidence during trial of the case. Provisions contained under the U.P. Kashi Vishwanath Temple Act, 1983 do not prohibit initiation of legal proceedings for demand of right to worship the deities present within the temple premises or outside. In respect of the judgment in *Din Mohammad* v *Secretary of State*,[32] Hindus were not a party to that suit. Therefore, it cannot take away the right of the Hindu parties. Further, because of the existence of the deities

---

27 Bhagwan Adi Vishweshwar Virajman and Others v State of Uttar Pradesh through Secretary and Others, Civil Suit 712 of 2022 (India).

28 The Code of Civil Procedure, 1908, O. 1, R. 8 (India).

29 *Id.*, O. 7, R. 3.

30 *Id.*, § 9.

31 *Id.*, O. 7, R. 11.

32 *Supra* note 16.

within the property in dispute before and after the date of independence, the nature of the deity's property is not changed even after its destruction. Also, the claim of the regular worship at the property in dispute before and after independence till 1993 and religious nature of the property in dispute at the time of independence has to be proved by evidence. Therefore, the continuation of the further legal proceedings is not against the provisions of the Places of Worship (Special Provisions) Act, 1991.[33]

4. Detailed analysis regarding the correctness of maintainability of the aforesaid suit[34]

Now, the task of the civil court is to ascertain if the property in dispute retained the religious character of a 'temple' after its demolition and imposition of superstructure of 'mosque' since 1669. The major question is whether after such demolition, the religious nature of the property in dispute changed and it ceased to be the deity's property? For such ascertainment, the court will have to look at Hindu Law of dedication to the deity and Muslim Law related to waqf. Hindu Law provides that after dedication, the temple land and property belong to the deity.[35] In similar terms, Muslim Law states that 'once a waqf, always a waqf'.[36] Thus, there is conflict over the application of Hindu Law of dedication and Muslim Law of waqf to be applied in respect of the property in dispute. It is never denied that structure of Gyanvapi mosque was constructed at the site of the demolished *Vishweshwar* Temple. At the time of demolition in 1669, the land belonged to the deity and was forcefully converted into a mosque. Subsequently, the new temple was constructed nearby at the distance of about 50 meters therefrom. But at the time of independence, the nature of the property in dispute was undoubtedly of a 'mosque' with namaz being offered regularly. Even after assuming that worship of the visible and invisible deities continued somehow in Gyanvapi mosque complex after the demolition of the ancient temple, nevertheless it must not be forgotten that the Muslim community too has never abandoned Gyanvapi mosque at any point of time. Therefore, it is equally difficult to predict what would be the legal outcome if Hindu parties are able to prove through evidence the status of Gyanvapi structure as that of a 'temple' at the time of independence (because of existence of the deities), as the provisions of the Act, 1991 strictly prohibit any kind of alteration in the religious nature of a place of worship. It is also important to mention here that the management

---

33 Sparsh Upadhyay, *BREAKING: Varanasi Court Dismisses Masjid Committee's Challenge To Maintainability Of Suit Seeking Possession Of Gyanvapi Premises*, LIVE LAW (Nov. 17, 2022, 3:38 PM), https://www.livelaw.in/news-updates/varanasi-court-dismisses-masjid-committee-challenge-maintainability-suit-seeking-possession-gyanvapi-premises-214352.

34 *Supra* note 27.

35 Rangacharya and Ors. v Guru Revti Raman Acharya, AIR 1928 All 689 (India).

36 Chhedi Lal Misra v Civil Judge, Lucknow and Others, 1998 (4) AWC 459 (India).

committee of the mosque, *Anjuman Intezamiya* has filed a civil revision[37] against the rejection of their application under Order 7 Rule 11 by the Civil Judge, which is now pending before the District Judge, Varanasi.

In the opinion of the researcher, the civil suit *Bhagwan Adi Vishweshwar Virajman* is not maintainable for the continuation of further legal proceedings before the civil court and particularly barred under Sub-rule (d) of Order 7 Rule 11 of the Code of Civil Procedure, 1908. As, the reliefs demanded in the suit are barred under the Places of Worship (Special Provisions) Act, 1991 and also the suit property is not expressly covered under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 in order to exclude the suit property from the purview of the 1991 Act. Discussion regarding the same is made hereunder:

(a) Applicability of the Places of Worship (Special Provisions) Act, 1991

The order dated 17th November 2022 in *Bhagwan Adi Vishweshwar Virajman case* is in violation of the provisions of the Places of Worship (Special Provisions) Act, 1991, because the Act under its Section 4 expressly debars all kinds of the legal proceedings which demand for any sort of alteration in the religious status of any public place of worship constructed in pre-independence days. This provision is applicable to all the places of worship erected before 15th August 1947. It mandates the preservation of the religious nature as it was on the date of independence of India, notwithstanding ancient status and usage of a religious structure. It does not matter whether a particular religious place was forcefully devastated, usurped or converted at any point of time in history. Gyanvapi mosque was constructed in 1669 in Mughal reign, hence the provision of Section 4(1) is applicable in respect of it. While the prayers in this civil suit[38] *Bhagwan Adi Vishweshwar Virajman* expressly demand for removal of the mosque structure. Till the time the prohibition over legal proceedings is there in force under the provisions of the Act, 1991, the path for any kind of legal recourse for alteration of religious structures is foreclosed. Therefore, the civil court ought to have dismissed the Civil Suit 712 of 2022.

(b) Ayodhya verdict of the Apex Court

The Supreme Court under its Ayodhya verdict of 2019 had cautioned against 'retrogression' and declared the Places of Worship (Special Provisions) Act, 1991 to be highly important measure in furtherance of secularism and equality of all religions. Although a wrong committed always remains a wrong, notwithstanding how much time has elapsed. In this sense, wrongful demolition of the ancient temple of Lord Vishweshwar in 1669 would always be considered a 'historical wrong' committed by the then ruler. But as the Supreme Court in its

---

37 Committee of Management Anjuman Intezamiya Masajid Varanasi v Bhagwan Aadi Vishweshwar Viraajman and Others, Civil Revision 162 of 2022 (India).

38 *Supra* note 27.

Ayodhya verdict held that the court cannot entertain the claims stemming from 'the actions of the Mughal rulers against Hindu places of worship' in present.[39] Therefore, historical wrongs committed under the previous regimes cannot be undone or rectified and the Supreme Court itself has discouraged against such demands to be made. Such claims would indeed open 'pandora's box' with unending demands for undoing of historical wrongs.

It may also be mentioned here that the Supreme Court made an oral observation on 20th May 2022 that ascertainment of the religious nature of a place of worship is not barred and can be done as a 'processural instrument'.[40] In the view of such observation, although the court is not prohibited to ascertain the nature of Gyanvapi structure as it was on 15th August 1947, but alteration or removal of Gyanvapi mosque is strictly prohibited.

(c) Gyanvapi mosque as an ancient monument

It is true that Gyanvapi mosque structure is more than 100 years old in accordance with the requirement of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 to declare it an ancient monument[41] in order to bring it in the exception of Section 4(3)(1) of the Places of Worship (Special Provisions) Act, 1991. But Gyanvapi Mosque has not yet been declared as an 'ancient monument' and it is in management of the Sunni Central Waqf Board and not under the control of Archaeological Survey of India.

In the case before Himachal Pradesh High Court namely, *Satinder Kumar* v *Union of India*, [42] the High court hold the view that a religious place declared to be 'ancient monument' renders it out of the purview of the Places of Worship (Special Provisions) Act, 1991. But thereafter the use of such religious structure must not be against its religious nature and ethos. Therefore, in the view of said ruling also, the suit *Bhagwan Adi Vishweshwar Virajman* is not maintainable, as it demands for regular Hindu worship in Gyanvapi mosque.

It may be mentioned that Delhi Civil Court had dismissed a petition[43], which demanded for restoration of 27 demolished Hindu and Jain temples and worship in Qutub Minar complex. The civil judge reasoned that although Qutub Minar complex being an ancient monument is covered under the exception of Section 4(3)(a) of the Places of Worship (Special Provisions) Act, 1991, but such exception cannot be taken in isolation to frustrate the objective of the Act. But it should be seen in the larger context of the Act and its objective. Past historical wrongs must not be allowed to cause disruption towards peace of present and

---

39 *Supra* note 3.

40 *Supra* note 24.

41 Ancient Monuments and Archaeological Sites and Remains Act, 1958, § 2(a).

42 Satinder Kumar v Union of India, AIR 2007 HP 77 (India).

43 Tirthankara Lord Rishab Dev v Union of India, Civil Suit 875 of 2020 (India).

future. However, the plea against the dismissal was accepted in the District Court later.

(d) No legal right vested in the Hindu parties

The Supreme Court ruling in *Most Rev. P.M.A. Metropolitan* v *Moran Mar Marthoma*[44] had opined that the suits filed to enforce any right vested or recognized before the coming into force of the Places of Worship (Special Provisions) Act, 1991 to be outside the purview of the Act and hence maintainable for continuation of further legal proceedings.

In this sense, the suits filed in respect of Shahi Idgah of Mathura (for declaration of illegality of the compromise of 1968 which was signed between Shahi Idgah Masjid Committee and Shri Krishna Janamsthan Sewa Sansthan) can be held to be maintainable. Because the right to challenge the compromise vested in the Hindus before 1991 and also because of Section 4(3)(b) and Section 4(3)(c) of the Act, 1991, that dispute is out of the purview of the 1991 Act. But any such right did not vest in Hindu parties in relation to Gyanvapi mosque in Varanasi.

(e) Ruling in *Din Mohammad* v *Secretary of State*

Gyanvapi mosque was declared to be a waqf by the Civil Court in *Din Mohammad* v *Secretary of State*[45] and was also approved by High Court in *Din Mohammad* v *Secretary for State in India*[46]. Therefore, it is a binding precedent, which accepts the position of Gyanvapi structure as a mosque in the time of pre-independence. That is why, the demand for removal of Gyanvapi mosque structure is not maintainable under the said civil suit.

5. Conclusion

During 2021-2022, numerous persons have filed more than a dozen petitions in relation to Gyanvapi mosque dispute before the civil court in Varanasi, having identical plaints and prayer clauses, which is a recent example of multiplicity of legal proceedings. In spite of that, these petitions having identical demands are being admitted and heard by the civil court by overstepping the provisions of the Act, 1991. Recently, former judge of the Supreme Court, Gopala Gowda opined that the Supreme Court's Ayodhya judgment encouraged the Right Wing to demand for Gyanvapi and other mosques.[47] Thus, the opinion of several scholars that Ayodhya judgment has the impact of fuelling the ongoing tension between the Hindu and Muslim communities is not unfounded. As, more and more demands about 'doubtful and disputed religious buildings' are brought before the

---

44 Most Rev. P.M.A. Metropolitan v Moran Mar Marthoma, 1995 Supp (4) SCC 286 (India).

45 *Supra* note 16.

46 *Supra* note 17.

47 *Track Record Of Supreme Court In Last 8 Years Is Disappointing: Former SC Judge Justice Gopala Gowda,* LIVE LAW (Jan. 7, 2023, 7:47 PM), https://www.livelaw.in/top-stories/track-record-of-supreme-court-in-last-8-years-is-disappointing-former-sc-judge-justice-gopala-gowda-218360.

court across the country. Such several instances include Shahi Idgah Masjid situate in Mathura, Meena Masjid of Mathura, Bhojshala Complex in Dhar, Malali Masjid in Mangaluru, Qutab Minar Complex of Delhi, Teele wali Masjid of Lucknow etc.

The courts in India have to act more cautiously and vigilantly in dealing with such kind of disputes, keeping in view the underlying objective of the Places of Worship (Special Provisions) Act, 1991 to curb the communal hatred; as further progresses in such disputes may have far-reaching consequences of grave disruption of communal harmony in Indian society. Instead of 'literally' interpreting the law (The Places of Worship Act, 1991), it is demanded that the lower judiciary show some judicial activism and provide rulings while applying the underlying spirit of the 1991 Act, without being influenced by clever drafting or similar considerations.

References

Book

- Meenakshi Jain, *Flight of Deities and Rebirth of Temples* (Aryan Books International, 2019).

Legislation

- Ancient Monuments and Archaeological Sites and Remains Act, 1958
- The Code of Civil Procedure, 1908
- The Constitution of India
- The Places of Worship (Special Provisions) Act, 1991

List of Cases

- 1942 SCC OnLine All 56
- 1995 Supp (4) SCC 286
- (1995) BOMLR 823
- (1996) 114 PLR 591
- 1998 (4) AWC 459
- (2019) 4 SCC 656
- AIR 1928 All 689
- AIR 2007 HP 77

Websites

- 5 Women who got together for their Right to Worship Shringar Gauri <*https://www.hindustantimes.com/cities/lucknow-news/5-women-who-got-together-for-their-right-to-worship-shringar-gauri-101654024685476.html*>
- Breaking: Supreme Court Transfers Gaynvapi Mosque Suit To District Court Varanasi <*https://www.livelaw.in/top-stories/supreme-court-gyanvapi-mosque-suit-199672*>
- BREAKING: Varanasi Court Dismisses Masjid Committee's Challenge To Maintainability Of Suit Seeking Possession Of Gyanvapi Premises <*https://www.livelaw.in/news-updates/varanasi-court-dismisses-masjid-*

committee-challenge-maintainability-suit-seeking-possession-gyanvapi-premises-214352>.

- Supreme Court lists pleas challenging constitutional validity of Places of Worship Act for hearing in July <*https://m.indialegallive.com/article/supreme-court-constitutional-validity-places-worship-act/307418*>
- Explained The Gyanvapi Mosque and Kashi Vishwanath dispute and the Current Case <*https://www.thehindu.com/news/national/gyanvapi-mosque-kashi-vishwanath-temple-history-case-explained/article65411250.ece*>
- George Bernard Shaw: Quotes <*https://www.britannica.com/quotes/George-Bernard-Shaw*>
- Gyanvapi Mosque*:* How Shivling was found inside wazukhana (ablution pond) <*https://www.indiatvnews.com/news/india/opinion-gyanvapi-mosque-how-shivling-was-found-inside-wazukhana-ablution-pond-aaj-ki-baat-blog-post-2022-05-17-777229*>.
- Gyanvapi Mosque Case– Protect Area Where Shivalinga is Stated to be Found, No Restrictions on Muslims' Rights : Supreme Court Clarifies Varanasi Court's Order
- <*https://www.livelaw.in/top-stories/gyanvapi-mosque-case-direction-to-protect-shiv-ling-spot-wont-restrict-rights-of-muslims-to-offer-namaz-perform-religious-obsevances-supreme-court-clarifies-199347*>
- Plaint Avers Hindu Deities were Worshipped inside Gyanvapi Mosque Complex even after Aug. 15, 1947; Places of Worship Act No Bar to Suit : Varanasi Court <*https://www.livelaw.in/news-updates/hindu-deities-worshipped-inside-gyanvapi-mosque-complex-august15-1947-places-worship-act-bar-suit-varanasi-court-209037*>
- Track Record Of Supreme Court In Last 8 Years Is Disappointing: Former SC Judge Justice Gopala Gowda < *https://www.livelaw.in/top-stories/track-record-of-supreme-court-in-last-8-years-is-disappointing-former-sc-judge-justice-gopala-gowda-218360*>

JUDICIAL CONTRIBUTION TOWARDS STRENGTHENING PERSONALITY RIGHTS VIS-A-VIS AMITABH BACHCHAN VS RAJAT NAGI AND OTHERS, 2022

Dr. Sunaina*

Abstract

People in India are heavily influenced by celebrity-endorsed products. So it is not surprising that their consumption in regular households occurs, whether the product is an affordable daily-use item like an energy drink promoted by Indian cricketer Virat Kohli or an expensive one like gold or diamonds. In a country like India people worship celebrities like actors, cricket players, or even politicians as "larger than life" figures. A person's right to their personality and image is their ability to manage how their persona in the form of their voice, signature, likeness, appearance, silhouette, feature, face, expression, gesture, mannerism, and distinctive character etc is used and commercialised.

Personality rights are the rights of a person related to his or her personality which can be protected under the right to privacy or as property of a person. An individual's personality is a means by which one individual recognizes other and identifies his place in the society. These rights are important to celebrities as their names, photographs or even voices can easily be misused in various advertisements by different companies to boost their sales. A large list of unique personal attributes contributes to the making of a celebrity. All of these attributes need to be protected, such as name, nickname, stage name, picture, likeness, image and any identifiable personal property, such as a distinctive race car. This paper is an attempt to study the judicial contribution towards the protection and strengthening of personality rights and at the same time what new challenges may occur in protecting them.

Keywords: *Amitabh Bachhan, Celebrity, Personality, Rights.*

I. Introduction

People in India are heavily influenced by celebrity-endorsed products.[1] So it is not surprising that their consumption in regular households occurs, whether the product is an affordable daily-use item like an energy drink promoted by Indian cricketer Virat Kohli or an expensive one like gold or diamonds.[2] In a country like India people worship celebrities like actors, cricket players, or even politicians as "larger than life" figures.[3] A person's right to their personality and image is their ability to manage how their persona in the form of their voice, signature, likeness, appearance, silhouette, feature, face, expression, gesture, mannerism, and distinctive character etc is used and commercialised.[4] Personality rights refer to a right of a person related to his or her personality which can be protected under the right to privacy or as property of a person.[5] An individual's personality is a means by which one individual

* Assistant Professor of Law, Panjab University SSG Regional Centre, Hoshiarpur.

1 What are personality rights https://www.dnaindia.com/explainer/report-explained-what-are-personality-rights-and-why-amitabh-bachchan-filed-plea-in-delhi-hc-over-them-3005470

2 Ibid

3 Ibid

4 Ibid

5 Ibid

recognizes other and identifies his place in the society.[6] These rights are pertinent because the various attributes of their personality like their names, photographs, voices etc can be misused for financial gains. There can be unique personal attributes such as name, nickname, stage name, picture, likeness, image that contribute to the making of a celebrity. Such attributes need to be protected. Personality rights consist of two types of rights; First: The right of publicity, or the right to keep one's image and likeness from being commercially exploited without permission or contractual compensation, which is similar (but not identical) to the use of a trademark.[7] Second: The right to privacy or the right to not have one's personality represented publicly without permission. However, under common law jurisdictions, publicity rights fall into the realm of the 'tort of passing off.'[8] Such misrepresentation damages the goodwill of a person or business, resulting in financial or reputational damage.[9]

Celebrity

A celebrity can be defined as "a person who, by his accomplishments, fame or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a public personage.[10] He is, in other words, a celebrity." The roots of the word celebrity come from the Latin word "celebritatem" implying "the condition of being famous." [11] The idea of being a celebrity requires an attribute of being famous and every person performing live may not be famous.

The recent personality right dispute that has arisen is of the megastar Amitabh Bachhan whose images and voices are being used to endorse the products without the consent of the actor. The problem is not limited to one megastar only. Another recent example is that of Tamil superstar Rajinikanth. His advocate S. Elambharathi has issued a public notice warning of civil and criminal action against those who infringe the personality rights of his client through unauthorised use of the actor's name, image, voice or any other distinctive elements uniquely associated with him.[12] The notice stated that "Shivaji Rao Gaekwad, alias Rajinikanth, was one of the most celebrated, acclaimed and successful actors in Indian cinema, particularly in south Indian cinema. He had a humongous reputation, having acted in many films across different languages for

---

6 Anurag Pareek and Arka Majumdar, *Protection of Celebrity Rights- The Problems and the Solutions,* 11 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 415 (2006).

7 Ibid

8 Ibid

9 Ibid

10 Prakash Sharma and Devesh Tripathi, *Celebrity Agony: Establishing Publicity Rights Under The Existing IPR Framework,* I.L.I LAW REVIEW Summer Issue (2019).

11 Ibid

12 https://www.thehindu.com/news/national/tamil-nadu/actor-rajinikanths-advocate-issues-public-notice-against-infringement-of-his-personality-rights/article66444370.ece

the last few decades. His charisma and nature as an actor and a human being has earned him the title 'Superstar' called upon by millions of his fans worldwide. The sheer proportion of his fan base and his respect across the film industry is unmatched and indisputable. Any damage to his reputation or personal would entail a great loss to our client."[13] The use of celebrity's image etc cause huge losses to them. In addition to this the public is also misled which further create new issues and challenges to cope up. This paper is an attempt to analyse the legal and judicial perspectives and to offer suggestions to overcome the limitations or at least mitigate the problems.

I. Legal Materials and Methods

The study is mainly doctrinal and the data has been collected from judicial decisions, websites and journals. Focus of research is primarily observational and descriptive.

II. Legislative Perspective on Personality Rights in India

In India there is no comprehensive statutory framework on personality rights. It is only The Emblems and Names (prevention of improper use) Act, 1950, which to a limited extent, protects the unauthorized use of few dignitaries' names by prohibiting the use of names given in its schedule.[14] Protection of personality rights is one of the facets of Article 21 under the Constitution of India. In addition to it, under the Copyright Act, 1957 moral rights are only granted to authors and performers, including actors, singers, musicians, and dancers.[15] Section 38 of the Act recognizes performers' rights and this can be effectively used to prevent the unauthorized marketing of one's performance. The provisions of the Act mandate that the Authors or the Performers have the right to be given credit or claim authorship of their work and also have a right to restrain others from causing any kind of damage to their work. Section 57 of the Act which recognizes the moral right of the author, can also be used to protect the reputation of the author. The Indian Trademarks Act, 1999 also protects personal rights[16] restricting the use of personal names and representations.

III. Judicial Contribution towards protection of Personality Rights

---

13 Ibid

14 Pareek, *supra* note 6.

15 Copyright Act, 1957 Section 38 B.

16 The Indian Trademarks Act, 1999 Section -14 provides that where an application is made for the registration of a trade mark which falsely suggests a connection with any living person, or a person whose death took place within twenty years prior to the date of application for registration of the trade mark, the Registrar may, before he proceeds with the application, require the applicant to furnish him with the consent in writing of such living person or, as the case may be, of the legal representative of the deceased person to the connection appearing on the trade mark, and may refuse to proceed with the application unless the applicant furnishes the registrar with such consent.

The case of **Shivaji Rao Gaikwad v Varsha Productions**[17] was brought by renowned Indian actor Mr Rajinikanth. The plaintiff sought grant of interim injunction restraining the defendant from using the plaintiff's name/image/caricature/style of delivering dialogues in the forthcoming project/film titled 'Main Hoon Rajinikanth' or in any of the forthcoming projects/films in any manner whatsoever amounting to infiltration of the plaintiff's personality rights by such unauthorised use, pending disposal of the suit. The court observed that although "Personality Rights" is not defined in any Indian statute, Indian courts have recognised it in a number of judgments. Since a prima facie case for granting interim injunction was made out hence relief was granted to the plaintiff. The Court further observed that personality rights vest on those persons, who have attained the prestige of a celebrity and no proof of falsity, confusing or deception is required when the celebrity is identifiable. Hence, the Defendant was restrained from using the title, *'Main Hoon Rajinikanth'.*

In **ICC Development (International) Ltd., v Arvee Enterprises and Another**[18] the plaintiff was organizer of Cricket World Cup 2003 and had filed a suit for injunction against the defendant who had created and aired an advertisement with the tagline- "buy a Philips audio system and win a ticket to World Cup". It was contended that ICC has their persona or identity of their own and has registered their trademark and mascot in several countries. The Delhi Court did not agree that ICC is a celebrity and thus it has not created any persona of their own. In case it would have been a celebrity there must have been infringement or passing off of celebrity rights. It was held that the right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice, etc. An individual may acquire the right of publicity by virtue of his association with an event, sport, movie, etc. However, that right does not inhere in the event in question, that made the individual famous, nor in the corporation that has brought about the organization of the event. Any effort to take away the right of publicity from the individuals, to the organiser (non-human entity) of the event would be violative of Articles 19 and 21 of the Constitution of India. No persona can be monopolised. The right of Publicity vests in an individual and he alone is entitled to profit from it. For example if any entity, was to use Kapil Dev or Sachin Tendulkar's name/persona/indicia in connection with the 'World Cup' without their authorization, they would have a valid and enforceable cause of action.

---

[17] Shivaji Rao Gaikwad v Varsha Productions Civil Suit No.598 of 2014 Decided by High Court of Madras on 3 February, 2015

[18] ICC Development (International) Ltd., v Arvee Enterprises and Another 2003 (26) PTC 245 (India).

In **Titan Industries Ltd v. Ramkumar Jewellers**[19] it was observed that no one was free to trade on another's name or appearance and claim immunity. The Delhi High Court recognized Mr. Amitabh Bachchan and his wife, Mrs. Jaya Bachchan's personality rights. An advertisement by Titan Industries Ltd., featuring the renowned couple, was infringed by the defendant. The court observed that the defendants' advertisement itself contained a clear message of endorsement and the message was false and misleading as the plaintiffs had not consented to the same. The court passed an order of permanent injunction against the defendants thereby recognising the personality rights of the celebrities.

In **Ms. Barkha Dutt v Easyticket, Kapavarapu, Vas**[20], it was held by the Work Intellectual Property Organizations (WIPO), (the international agency governing internet domains), that an unauthorized use of a famous person's name is not a bonafide use and if such name is used to lure users, it does not confer rights or legitimate interests on the infringer. The right to commercially use or exploit one's own name, vests with the person who has worked to create the fame and can lawfully restrict any other third party from exploiting that fame for commercial purposes.

In **Mr. Gautam Gambhir v. D.A.P & Co. and Another**[21] the defendant was running the restaurants with the tag line 'by Gautam Gambhir' while the plaintiff had absolutely no connection with the said restaurants. The plaintiff, an international cricket player alleged that his name has attained a special distinctive character by virtue of extensive use and has attained the status of a well known mark. He sought protection of his personality rights. The court held that "celebrity status of the plaintiff is not disputed. However, there is no material on record to infer if any time in running the said restaurants with the tagline 'by Gautam Gambhir', the defendant ever represented to the public at large in any manner that the said restaurants were owned by the plaintiff or he was associated with them in any manner. The law is that no one is entitled to carry on his business in such a way as to represent that it is the business of another, or is in any way connected with the business of another. Of course, an individual is entitled to carry on his business in his 'own' name so long as he does not do anything more to cause confusion with the business of another and if he does so honestly/bonafide. In the instant case, the plaintiff is not associated with the

---

19 Titan Industries Ltd v. Ramkumar Jewellers MANU-DE/2902/2012.

20 Ms. Barkha Dutt v Easyticket, Kapavarapu, Vas, Case No. D2009-1247 before Administrative Panel, WIPO Arbitration and Mediation Centre Decided on 30th October, 2009.

21 Mr. Gautam Gambhir v. D.A.P & Co. and Another Civil Suit (Commercial) 395/2017 Decided by High Court of Delhi on 13 December, 2017.

restaurant business. Nothing has come on record if any time, the plaintiff was invited for any inauguration or function of the restaurants in question. No overt act has been attributed to the defendant whereby he at any time attempted to make representation to any individual or the public at large that the restaurants were owned by the plaintiff. The plaintiff has given only one instance of an individual who had some confusion with the said restaurants to be owned by the plaintiff. No 'disclaimer' was ever issued by the plaintiff to dispel the so-called confusion in the public who recognized the plaintiff only to be associated with Cricket. The said restaurants are being run by the defendant after getting necessary permission from the authorities. When the logo 'Hawalat Lounge and Bar by Gautam Gambhir' was registered by the Trademarks Registry in Class 43 in respect of restaurant service, there was no objection before the Trademark Registry. It is categorically claimed by the defendant that inside or outside the restaurants, he had never displayed any picture/photo/poster of the plaintiff to cause confusion in the public. In all the webpages/online platforms i.e. facebook, WhatsApp, etc. and at all his displays otherwise, viz. stationery, wall pictures, merchandises, etc. the defendant has very prominently put numerous of his 'own' pictures to associate his 'own' identity with his 'own' restaurant business. Apparently, plaintiff's name was not commercialized by the defendant. Nothing has emerged on record if there was any loss to the goodwill of the plaintiff in his field i.e. Cricket because of running of the restaurants by the defendant with the tag line in his 'own' name. In view of the above discussion, the suit fails and is dismissed with no orders as to costs."

In **Rajat Sharma v. Ashok Venkatramani and another**[22], the Plaintiff filed a suit for ex-parte injunction against the defendant as the latter had used the phrase "INDIA ME AB RAJAT KI ADALAT BAND" in their advertisement. The Delhi High Court upheld the celebrity rights of the plaintiff and also recognized the publicity rights over the show "Aap Ki Adaalat." Holding advertisement as prima facie illegal, the court restrained the Zee Media from issuing any advertisements in the print media, which contains the name of Rajat Sharma. Recognizing that Rajat Sharma had an unassailable right in his public persona and identity as a famous television show host, the court viewed that the use of the statement in the advertisement amounts to false advertising

In **Arun Jaitley v. Network Solutions Pvt. Ltd and Others**[23] the court observed that the popularity/fame of a person will be no different on the internet than in reality. Jaitley had filed a suit seeking permanent injunction against the defendants from misuse and immediate transfer of the domain name www.arunjaitley.com. By passing the judgement in favour of the petitioner, the

---

22 Rajat Sharma v. Ashok Venkatramani and another Civil Suit (Commercial) 15/2019.

23 Arun Jaitley v. Network Solutions Pvt. Ltd and Others Civil Suit (OS) 1745/2009 and I.A. No. 11943/2009 and 17485/2010 decided by Delhi High Court on 4 July, 2011.

court observed "the said name due to its peculiar nature/distinctive character coupled with the gained popularity in several fields whether being in politics, or in advocacy, …has become a well-known personal name/mark under the trade mark law which ensures him the benefit to refrain others from using this name unjustifiably in addition to his personal right to sue them for the misuse of his name".[24]

In **Krishna Kishore Singh v. Sarla A Saraogi and Others**[25] the plaintiff, (father of late actor Sh. Sushant Singh Rajput) sought ad-interim ex-parte injunction against the named and unnamed defendants from using his son's name, caricature, lifestyle or likeness in forthcoming films and other ventures, contending that any such publication, production, or depiction would be an infringement of personality rights, right to privacy which includes right to publicity, cannot be undertaken without the prior approval of his legal heir; and a violation of right of fair trial under Article 21 of the Constitution of India. The Plaintiff submitted that since an FIR has been lodged on account of unnatural death of his son and the matter being investigated by the CBI, and there being no conclusive report submitted as yet, the restriction was hence sought. The Plaintiff pleaded that the defendants are trying to exploit this media frenzy and public curiosity surrounding SSR's life and the circumstances surrounding his death, for their commercial gain. The Plaintiff's counsel had made a widely circulated statement that no movie(s), book(s) or series based on the Plaintiff's son should be made without obtaining the prior consent of his family. Despite that, without approaching the family, defendants were making a movie titled 'Nyay: The Justice' claiming it to be a "tribute to Sushant Singh Rajput". The court summarised the following broad principles:

(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.
(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once

---

24 *Personality Rights* https://byjus.com/free-ias-prep/personality-rights-upsc-notes/.

25 Krishna Kishore Singh v. Sarla A Saraogi and Others Civil Suit(Commercial) 187/2021 Decided by Delhi High Court on 10 June, 2021.

a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. In the interest of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(3) There is yet another exception to the Rule in (1) above - indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and the Parliament and Legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

(4) So far as the government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

(6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media.

However, in this case the court held that since the plaintiff failed to satisfy the three-pronged tests of; a) non-establishing of prima facie case; b) belated action by plaintiff and c) on the aspect of irreparable loss, the suit was not premised as a tortious action for defamation, for grant of pre-emptory injunction to restrain exhibition of the films, the application was dismissed.

In, **Amar Nath Sehgal v. Union of India**[26]**,** the Delhi High Court had observed that "many rights flow from a creation, which includes the paternity right in the work, i.e. the right to have his name on the work. It may also be called the

[26] Amar Nath Sehgal v. Union of India 117 (2005) DLT 717.

identification right or attribution right. The second one is the right to disseminate his work i.e. the divulgation or dissemination right. It would embrace the economic right to sell the work or valuable consideration. Linked to the paternity right is the third right, the right to maintain purity in the work. The Court further held that the right to assert authorship also includes a right to object to distortion, mutilation or modification in a work, if it is prejudicial to the honour or reputation of the author. The contours, the hue and the colours of the original work, if tinkered, may distort the ethos of the work. Distorted and displayed, the viewer may form a poor impression of the author. Plaintiff's right to be compensated for loss of reputation, honour and mental injury due to the offending acts of the defendants, was also upheld by the Court."

In **Justice K. S. Puttaswamy (Retd.) v. Union of India**[27]the court held that "every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent".

In **Sonu Nigam v. Amrik Singh (alias Mika Singh) and Another**[28] the Bombay High Court, on 26th April, 2014 granted an injunction in favour of singer Sonu Nigam, restraining the singer Mika Singh and the recording label OCP Music from publishing an advertisement that impinged on Sonu's personality, image and civil rights.[29] The dispute was regarding the publicity of the Mirchi Music awards. The defendants had put up billboards and hoardings containing Sonu Nigam's image advertising the awards ceremony, without Sonu's consent. These hoardings were different from the official hoardings put up by Mirchi Music Awards itself. The official hoardings had also contained pictures of Sonu, but Mirchi Music Awards had not obtained Sonu's permission who therefore filed a suit for unauthorised infringement of his personality rights. The court only took cognizance of the argument based on personality rights, and restrained the defendants from publishing, displaying or reproducing the advertisement through hoardings and also through Mika's account on Twitter.[30]

In **D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Others**[31] plaintiff company was incorporated in 1996, in which the letters 'DM' stand for the initials

---

27 Justice K. S. Puttaswamy (Retd.) v. Union of India Writ Petition (Civil) No. 494 of 2012 Decided by Supreme Court on 26 September, 2018.

28 Sonu Nigam v. Amrik Singh (alias Mika Singh) and Another Civil Suit 372/2013 Decided by Bombay High Court.

29 https://spicyip.com/2014/05/bollywood-music-awards-and-personality-rights-sonu-nigam-v-mika-singh-and-ors.html.

30 Ibid.

31 D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Others Civil Suit (OS) No. 893/2002 Decided by High Court of Delhi on 29 April 2010.

of the name, Daler Mehndi. The company was originally incorporated to manage Mr. Daler Mehndi's career. Subsequently, Mr. Daler Mehndi assigned all his rights, title and interest in his personality inherent in his rights of publicity along with the trademark 'DALER MEHNDI' as well as goodwill vested therein to the Plaintiff. Defendants were engaged in the business of selling dolls, which were cheap imitations of and identical to the likeness of the Mr. Daler Mehndi. Such dolls were imported from China and sold by each defendant. The dolls were being sold as 'DALER MEHNDI' dolls. Plaintiff filed a suit seeking permanent injunction against the defendants restraining them from infringing his right of publicity and against false endorsement, leading to passing off. Plaintiff claimed damages and rendition of accounts. The court observed that the commercial use of an individual's identity is intended to increase the sales of product by fusing the celebrity's identity with the product and thereby the defendants were selling those dolls, on the basis of publicity value or goodwill in the artist's persona into the product i.e. doll. It was held that no one is free to trade on another's name or appearance and claim immunity because what he is using is similar to but not identical with the original. The right of publicity can, in a jurisprudential sense, be located with the individual's right and autonomy to permit or not permit the commercial exploitation of his likeness or some attributes of his personality. However, a word of caution has to be expressed here. In a free and democratic society, where every individual's right to free speech is assured, the over emphasis on a famous person's publicity rights can tend to chill the exercise of such invaluable democratic right. Thus, for instance, caricature, lampooning, parodies and the like, which may tend to highlight some aspects of the individual's personality traits, may not constitute infringement of such individual's right to publicity. If it were held otherwise, an entire genre of expression would be unavailable to the general public. Such caricature, lampooning or parody may be expressed in a variety of ways, i.e. cartoons in newspapers, mime, theatre, even films, songs, etc. Such forms of expression cannot be held to amount to commercial exploitation, per se; if the individual is of the view that the form of expression defames or disparages him, the remedy of damages for libel, or slander, as the case may be, would then, is available to him. An individual claiming false endorsement must prove that the use of the identity likely misled consumers into believing the concerned personality endorsed the product at issue. In this case, it has seen that the use of Mr. Mehndi's persona for the purpose of capitalizing upon his name by using its conjunction with the commercial product is not proper or legitimate; it amounts to a clear dilution of uniqueness of such personality and gives rise to a false belief that, plaintiff has either licensed or the defendants have some connection with them (i.e. the plaintiff or the artist), to use its exclusive right to market images of the artist. In a passing off action, one has to see as to whether the defendant is selling goods/service so marked to be designed or calculated to lead purchasers to believe that they are plaintiff's goods. Even if a person uses another's well-known trademark or trade mark similar thereto for goods or services that are not

similar to those provided by such other person, although it does not cause confusion among consumers as to the source of goods or services, it may cause damage to the well-known trade mark by reducing or diluting the trademarks power to indicate the source. Further, where a person uses another person's well-known trade mark or trademark similar thereto for the purpose of diluting the trade mark, such use does not cause confusion among consumers but takes advantage of the goodwill of the well-known trade mark, it constitutes an act of unfair competition. [32] Injunction was granted in favour of the plaintiff.

IV. Amitabh Bachchan v Rajat Nagi and Others Delhi[33]

Bollywood legend and veteran actor Amitabh Bachchan had filed a civil suit in the Delhi High Court in 2022 demanding a ban on the commercial use of his name, image, voice and personal characteristics without permission. The renowned actor also sought a restraining order against book publishers, T-shirt vendors, and various other businesses.[34] In addition to it, he also demanded rupees two crore as damages for loss of reputation and goodwill of his personality rights. The Delhi High Court passed an interim order preventing the unlawful use of Amitabh Bachchan's name, image and voice. Through its order, the court restrained persons at large from infringing the personality rights of the actor. In this case, from Bachchan, Big B and AB to his "unique style of addressing the computer as Computer *ji* and saying *Lock kiya jaaye*" - the actor had demanded protection of his personality rights.[35]

Brief Facts

Mr. Amitabh Bachchan, the plaintiff, sought protection of his publicity/personality rights on the ground that his name, voice and images were being misused by unscrupulous third parties. The suit was filed against the named defendants, as well as unknown 'John Doe' defendants, seeking an injunction against the world at large. The Defendants were involved in activities misappropriating the Plaintiff's photographs and characteristics by running fake 'Kaun Banega Crorepati' (a famous Indian game show hosted by the Plaintiff) lottery scam, operating websites and mobile apps, publishing general knowledge books bearing the image of the Plaintiff, dealing in clothing items and posters bearing the Plaintiff's images and likeness, and registering domain names containing the name of the Plaintiff. The Plaintiff also sought directions to be issued to the Department of Telecommunication, the Ministry of Electronics and Information Technology and the telecom service providers to pull down all the

---

32 https://www.indiancaselaws.wordpress.com/2015/07/19/d-m-entertainment-pvt-ltd-v-baby-gift-house-and-ors/

33 Civil Suit (Commercial) 819/2022 Decided by High Court of Delhi on 25 Nov 2022 .

34 https://www.mmnews.tv/indian-court-restrains-infringement-of-amitabh-bachchan-personality-rights/

35 https://www.theprint.in/india/big-b-computer-ji-lock-kiya-jaaye-what-amitabh-bachchans-suit-for-personality-rights-means/1247185/

weblinks and websites and block access to all phone numbers used by the defendants to circulate WhatsApp messages that unlawfully infringe the plaintiff's personality and publicity rights.

Order by Delhi High Court

The Court opined that plaintiff had made out a prime facie case in its favour for the grant of an ad-interim ex-parte injunction and the balance of convenience was also in favour of the plaintiff and against the defendants. The Court noted that defendants were using plaintiff's celebrity status for promoting their own activities, without plaintiff's permission or authorization. Therefore, plaintiff would suffer irreparable harm and injury to defendant's reputation. Thus, the Court granted an ad-interim ex-parte injunction in favour of Amitabh Bachchan, thereby restraining defendants from infringing Amitabh Bachchan's publicity or personality rights by misusing his name 'Amitabh Bachchan/Bachchan/BigB/AB', voice, image or any other attribute that was exclusively identifiable with him, for any commercial or personal gain.[36]

The court restrained the defendants from infringing the plaintiff's publicity or personality rights by:

a) misusing his name "Amitabh Bachchan/ Bachchan/ Big B / AB"; and
b) his voice, image and any other attribute which is exclusively identifiable with him, for any commercial or personal gain.

The court also issued directions to (a) DoT and MeitY to ensure that respective internet service providers pull down the links and websites; and (b) the telecom service providers to block access to all phone numbers being used by the Defendants to circulate messages on WhatsApp and other mobile messaging apps, which infringe upon the Plaintiff's personality and publicity rights.

V. Challenges and Suggestions

a) Although the courts pass orders in rem restraining the world at large, the enforcement of such orders against a 'John Doe' i.e., unknown, pose their own challenges, making it incumbent upon the plaintiffs to keep a look out for errant parties. Celebrities have to keep a constant check on the violators for the protection of their personality rights.[37]
b) It should become necessary for celebrities to register their names to save their personality rights. This may help in preventing to a certain extent, possible harm to the celebrities.
c) At present, there is no comprehensive statutory law exclusively dealing with the protection of personality rights in India. The provisions are scattered in multiple statutes. Keeping in view the growing tendency of media and financial frauds, a comprehensive legislation is need of the hour.

---

36 https://www.scconline.com/blog/post/2022/11/28/delhi-high-court-grants-ex-parte-ad-interim-injunction-to-amitabh-bachchan-protecting-his-publicity-rights/

37 https://www.lexology.com/library/detail.aspx?g=00a2efa4-bebc-45fc-b134-68037969bac9

d) There is a high possibility of increase in misuse and abuse of personality rights due to the financial gains involved in the entire process. Hence a robust mechanism is required to detect such illegalities enabling the state agencies in preventing violation of personality rights.
e) Where ever the laws are insufficient, judiciary can play an active role by legislating thereby filling the lacunae in the existing laws or in the absence of requisite laws.
f) Indian courts will have to be cautious enough not to equate the personality and publicity rights of celebrities with that of property. Doing so would impair the primacy of fundamental rights and the larger public interest.[38]
g) A balance between the public interest and the individual interest of the celebrity is to be maintained.
h) The legal system in India is not adequate to tackle the modern prodigy of endorsement advertising. Hence a system is required in the contemporary digital era to handle such matters smoothly.

V. Conclusion

According to advocate Niharika Kashyap, "A commoner without the assent of the individual should not use someone's personality for their own benefit. This amounts to the offence of tort, inclusive of the Copyrights Act as well." [39]
The judiciary has positively contributed towards recognizing the various aspects of personality rights. A detailed legislation would be an added advantage to fill up the lacunae in law and keep in pace with the rapidly changing aspects of commercialization of personality. Although judicial contribution is significant but still there are a lot many aspects to be catered to. The financial profits involved in the endorsements by incorporating celebrities without their consent is a magnetic ground to attract more violations. Hence a framework of stringent punishments and compensatory provisions must be proposed.

References

Book:

- Anurag Pareek and Arka Majumdar, 'Protection of Celebrity Rights -The Problems and the Solutions' *Journal of Intellectual Property Rights* Vol 11, November 2006, 415.
- Prakash Sharma and Devesh Tripathi, 'Celebrity Agony: Establishing Publicity Rights Under The Existing IPR Framework' *ILI Law Review* Summer Issue 2019

Websites

- https://www.dnaindia.com/explainer/report-explained-what-are-personality-rights-and-why-amitabh-bachchan-filed-plea-in-delhi-hc-over-them-3005470
- https://www.indiancaselaws.wordpress.com/2015/07/19/d-m-entertainment-pvt-ltd-v-baby-gift-house-and-ors/

[38] Prakash Sharma Devesh Tripath, 'Celebrity Agony: Establishing Publicity Rights Under The Existing IPR Framework' *ILI Law Review* Summer Issue 2019.

[39] https://www.indiatoday.in/information/story/what-is-personality-right-2303146-2022-11-29

- https://www.indiatoday.in/information/story/what-is-personality-right-2303146-2022-11-29
- https://www.lexology.com/library/detail.aspx?g=00a2efa4-bebc-45fc-b134-68037969bac9
- https://mmnews.tv/indian-court-restrains-infringement-of-amitabh-bachchan-personality-rights/
- https://www.scconline.com/blog/post/2022/11/28/delhi-high-court-grants-ex-parte-ad-interim-injunction-to-amitabh-bachchan-protecting-his-publicity-rights/
- https://www.spicyip.com/2014/05/bollywood-music-awards-and-personality-rights-sonu-nigam-v-mika-singh-and-ors.html
- https://www.thehindu.com/news/national/tamil-nadu/actor-rajinikanths-advocate-issues-public-notice-against-infringement-of-his-personality-rights/article66444370.ece
- https://theprint.in/india/big-b-computer-ji-lock-kiya-jaaye-what-amitabh-bachchans-suit-for-personality-rights-means/1247185/

List of Cases:

- Amar Nath Sehgal v Union of India, 117 (2005) DLT 717.
- Amitabh Bachchan v. Rajat Nagi and Others Delhi Civil Suit (Commercial) 819/2022
- Arun Jaitley v Network Solutions Pvt. Ltd and Others Civil Suit (OS) 1745/2009 and I.A. No. 11943/2009 and 17485/2010
- D.M. Entertainment Pvt. Ltd. v Baby Gift House and Others
- ICC Development (International) Ltd., v. Arvee Enterprises and Another 2003 (26) PTC 245
- Justice K. S. Puttaswamy (Retd.) v. Union of India Writ Petition (Civil) No. 494 of 2012 decided by Supreme Court on 26 September, 2018
- Krishna Kishore Singh v. Sarla A Saraogi and Others Civil Suit (Commercial) 187/2021
- Mr. Gautam Gambhir v. D.A.P & Co. and Another Civil Suit (Commercial) 395/2017
- Ms. Barkha Dutt v. Easyticket, Kapavarapu, Vas Case No. D2009-1247
- Rajat Sharma v. Ashok Venkatramani Civil Suit (Commercial) 15/2019
- Shivaji Rao Gaikwad v. Varsha Productions Civil Suit No.598 of 2014
- Sonu Nigam v. Amrik Singh (alias Mika Singh) and Another Civil Suit 372/2013 Bombay High Court
- Titan Industries Ltd v. Ram Kumar Jewellers MANU-DE/2902/2012

CONSTITUTIONAL VALIDITY OF DEATH PENALTY IN INDIA: A LEGAL STUDY

Dr. Pooja Sood[*]
Jyoti Mangal[**]

Abstract
Punishment etymologically, derives its origin from Greek term meaning to cleanse. The purpose of inflicting punishment upon an individual was initially retribution or private vengeance. But with passage of time the objective shifted from retribution to deterrence and then finally to rehabilitation. In order to be effective, a punishment should be such which creates deterrence in the mind of the offender as well as other members of the society and at the same time also opens new avenues of rehabilitation of victims as well as offenders who are involved in a crime. In India, the law which provides for punishments of almost all the crimes is Indian Penal Code,1860. It provides for various forms of punishments ranging from Death penalty to fines and compensations. Debates have been going on since decades now regarding the efficacy of these punishments as the rate of crime commission in India is rising day by day despite these punishments. Capital Punishment as a form of punishment has always been a point of contention amongst the legal intelligentsia. Objections as to its efficacy as well as constitutional validity of its mode of execution has always been the main point of discussion in India as well as across the globe. This paper is an attempt of the researchers to analyse the efficacy of Death Penalty as a form of punishment and Constitutional Validity of Hanging as a mode of its execution.

Keywords: *Constitutionality, Crime, Death Penalty, Execution, Punishment.*

I. Introduction

Death Penalty, which is popularly known as Capital Punishment, is the highest form of punishment which can be awarded to an accused person for committing the most heinous offences prescribed under the Penal law of a State. Capital Punishment is executed by taking away the life of the convicted person as per the procedure which is prescribed in Law. The word "capital" is derived from the Latin *capitalis*, which means "concerning the head"; therefore, to be subjected to capital punishment means to lose one's head.[1]

In early times, death penalty was even awarded for committing less serious offences, or to suppress dissent against the political superior, etc. It was a gross misuse of this form of punishment and with passage of time the misuse was reduced in the nineteenth and twentieth centuries. As of today, there are various countries including Europe and Latin America which have abolished capital punishment as a form of punishment. The countries which still practice Capital Punishment as a form of punishment have prescribed it for the extremely heinous offences such as premeditated murder, treason, etc.

But there are still many countries across the globe which do not follow any such distinction of gravity of offences while awarding death penalty to a convict.[2] In

[*] Assistant Professor, UILS, PUSSGRC, Hoshiarpur, Punjab.
[**] Research Scholar, Department of Laws, Panjab University, Chandigarh.

1 New World Encyclopedia, *Capital Punishment*, (Apr. 05, 2022, 12:00 PM http://www.newworldencyclopedia.org/entry/Capital_punishment.

2 *supra* note 1.

May 2012, Amnesty International had provided a data revealing that around 141 countries of the world have abrogated capital punishment either in writing or at least practically. It has been also stated that China holds the record of maximum executions per year and in 2008 the number of executions recorded in China alone were 1,718 approximately. According to another report of Amnesty International, Iran, USA, Saudi Arabia and Pakistan executed approximately (346), (111), (102) and (36) people respectively in 2008.

Gradually the world has witnessed a rapid growth in the number of supports advocating for abrogation of death penalty across the globe. In December 2007, the United Nations adopted a resolution in which it was highlighted that death penalty as a form of punishment lacks the deterrence needed and is in direct contravention of the human rights of an individual. Thus, it was decided in the resolution that a temporary suspension on the executions and work on complete abolition on death penalty as a form of punishment across the globe. However, India has maintained its status of voting against the resolutions of UN against death penalty. Another initiative to abolish death penalty as a form of punishment could be marked in the form of The World Coalition against the Death Penalty (WCADP) which was created in 2002 in Rome. In this direction only, 10th day of October in the year 2006 was observed as World Day against the Death Penalty.[3]

I. Theories of Punishment

The basic idea of inflicting punishment is based on the ideology that for every offence committed by any individual, proportionate punishment should be awarded. Every punishment if inflicted, has a certain objective to achieve. Based on the purpose or objective behind punishment inflicted, it can be safely concluded that the approach behind inflicting punishment has changed over a period of time. The objective of punishment is always related to the ideology which is followed by a criminal legal system. This ideology and objective relationship of Criminal system and punishment can be easily understood with the knowledge of theories of punishment.

There are five different theories of punishments which have evolved over a period of time. Various theories of punishments are:

- Retributive Theory
- Deterrent Theory
- Preventive Theory
- Expiatory Theory
- Rehabilitative Theory

Retributive Theory

[3] BBC, Introduction to Capital Punishment, accessed 04.04.2023 http://www.bbc.co.uk /ethics/capitalpunishment/intro.html

According to this theory the main objective or purpose behind infliction of punishment was retribution or personal vengeance. That implies eye for an eye and tooth for a tooth. But this punishment failed in controlling crime commission and thus was stopped being followed.

Deterrent Theory
The retributive theory of punishment was replaced with deterrent theory. According to this theory, punishment such be such which if inflicted would create fear in the minds of the potential offenders as well as other people. But this theory also turned out to be ineffective in controlling crime commission.

Preventive Theory
According to this theory, the potential offender should be detained as a preventive measure in order to control crime commission. But again, this theory also failed.

Expiatory Theory
As per this theory, the main purpose of punishment is making person expiate for the offence committed by him. But again, due to complexities in order to ascertain the guilt realisation of offender, this theory also proved to be non-fruitful.

Rehabilitative Theory
This is the most recent theory prevalent for awarding punishments. According to this theory the main focus of Courts while imposing sentence should be towards reforming and rehabilitation of the offender.

II. Kinds of Punishments
Apart from death penalty, there has been a number of punishments recognized under the judicial system of India as well as across the globe. It goes without saying that the ancient form of punishments were very less rational and more barbaric as compared to the modern form of punishment as they exist in present times. In ancient times, punishments like stoning, crucifixion, docking stools, transportation for life, social boycott, mutilation of body parts, public executions etc., were amongst the various forms prevalent.

With the advent of Mughals in India, came the Islamic penal system. The punishments which were prescribed under the Muslim law were even more barbaric than the ancient punishments and were also based upon bias. The Muslim legal system was lopsided heavily in the favour of muslim men only. The Muslim law didn't give any rights or chance of being heard to the females as well as to people who were non muslims. The punishments which were prevalent during the Muslim era was namely Qisas, Hadd, Dayut, Tazir and Siyasat. These punishments basically talked about blood money, confiscation of property etc. as form of punishments but the basis of awarding these punishments was not rational.

The credit of growth of Indian legal, judicial and penal system, somehow goes to the Britishers. When the Britishers came to India and thought of ruling the same, they started bringing changes in the existing arrangements of India and one such change was formalization of laws and courts in India. The present Penal Law of India i.e. Indian Penal Code, 1860 was also enacted during the British Era and Section 53 of this code talks about the various forms of punishments which are recongnised in India in present times. The punishments are as follows:

- Death Penalty
- Life Imprisonment
- Imprisonment (Rigorous and Simple)
- Forfeiture of Property
- Fines

Earlier, Transportation for life was also a kind of punishment but it was later on repealed. Along with fines, the new trend which is upcoming in the Courts these days is compensation which is directly to be paid to the victim of the crime or his dependents.

Historical Background

The historical development of the concept of punishment especially death penalty as a form of punishment can be traced back to the Vedic period. During Vedic era, it was believed that safety of the society is the prime object that by destroying a single offender, the act of execution was productive of religious merit. (Brihaspati XXVII, p.26).[4] It is pertinent to mention here that even the oldest epic Bhagwat Gita has justified killing in some cases as noble- a virtuous act and to act contrary to it is a sin, an act of cowardice, which is unbecoming of a man. According to Dharamshastra, killing a murderer (Atatayinah) is one's duty, may the killer be a preceptor, child, old man or even a learned Brahim. The murderer should be slain at once without considering whether the act is virtuous or vicious.[5] As the society progressed from tribal to social one, it became a general trend of awarding death penalty for a number of offences having serious societal implications and repercussions. The rules and regulations prescribing the code of conduct for the member of society were prescribed in a more formal manner and strict sanctions were attached for those who will not abide by those rules of conduct. Hammurabi, of 1760 BC was another ancient document which was supportive of inflicting capital punishment as a form of punishment. This was the document which was an amalgamation of 282 laws collected by King Hammurabi, and also included the theory of an "eye for an eye." Capital punishment as a form of punishment finds its place in numerous ancient texts like

4 ANIL TREHAN, PENOLOGY AND VICTIMOLOGY- A PERUSAL, Shree Ram Law House, 2011 (Ed. 1st) 5-6.

5 PROF. N. V. PRANJAPE, CRIMINOLOGY AND PENOLOGY, Central Law Publications, 2021 (Ed 20th), 221-222

the Jewish Torah, the Christian Old Testament, and the writings of an Athenian legislator named Draco, etc.[6]

Initially, the manner in which capital punishment was to be executed, were designed in such a manner that they used to enhance the pain to be experienced by the person to be executed. They were designed in such a way that death will occur slow, will be more painful and will torture the person more. Stoning, crucifixion, burning at the stake, and crushing by elephants are some examples of such methods. With passage of time, it was felt that even if a person is guilty of committing certain offence still cruel and barbaric form of punishments should not be used to punish and offender and shift was made towards recognising more humane practices. With passage of time, especially towards the late 18th and early 19th century, the authorities entrusted with the task of inflicting punishments discovered other methods in which death penalty can be executed in a fast and least painful manner which included hanging and beheading with the guillotine. Although these methods of executions were still bloody, barbaric and violent for some people, others found them to be more compassionate as the result was instant and thus was not torturous to the executed person.[7]

III. Modes of Execution

As of 2008 per Amnesty International, 58 countries of the world have death penalty as a form of punishment. China is the country having highest rate of execution. Around 139 countries of the world have abolished death penalty on moral grounds. In the 37 States and federal governments that currently have death penalty statutes, five different methods of execution are prescribed:

Lethal Injection

In this method, the condemned person is usually bound to a gurney and a member of the execution team positions several heart monitors on his skin. Two needles (one is a back-up) are then inserted into usable veins, usually in the inmate's arms. Long tubes connect the needle through a hole in a cement block wall to several intravenous drips. The first is a harmless saline solution that is started immediately. Then, the inmate is injected with sodium thiopental - an anesthetic, which puts the inmate to sleep. Next flows pavilion or pancuronium bromide, which paralyses the entire muscle system and stops the inmate's breathing. Finally, the flow of potassium chloride stops the heart. Death results from anesthetic overdose and respiratory and cardiac arrest while the condemned person is unconscious.[8]

Electrocution

---

6 Crime Museum, Origin of Capital Punishment, accessed 05.04.2023 https://www.crimemuseum.org/crime-library/execution/origins-of-capital-punishment/ ,

7 Supra note 6

8 Death Penalty Information Centre, (2019 Copyright), Description of Execution Methods, accessed 05.04.2023 https://deathpenaltyinfo.org/descriptions-execution-methods

For execution by the electric chair, the person is usually shaved and strapped to a chair with belts that cross his chest, groin, legs, and arms. A metal skullcap-shaped electrode is attached to the scalp and forehead over a sponge moistened with saline. The sponge must not be too wet or the saline short-circuits the electric current, and not too dry, as it would then have a very high resistance. An additional electrode is moistened with conductive jelly (Electro-Creme) and attached to a portion of the prisoner's leg that has been shaved to reduce resistance to electricity. The prisoner is then blindfolded. A jolt of between 500 and 2000 volts, which lasts for about 30 seconds, is given. The current surges and is then turned off, at which time the body is seen to relax. The doctors wait a few seconds for the body to cool down and then check to see if the inmate's heart is still beating. If it is, another jolt is applied. This process continues until the prisoner is dead. The prisoner's hands often grip the chair and there may be violent movement of the limbs which can result in dislocation or fractures. The tissues swell. Defecation occurs. Steam or smoke rises and there is a smell of burning.[9]

Gas Chamber

For execution by this method, the condemned person is strapped to a chair in an airtight chamber. Below the chair rests a pail of sulfuric acid. A long stethoscope is typically affixed to the inmate so that a doctor outside the chamber can pronounce death. The warden then gives a signal to the executioner who flicks a lever that releases crystals of sodium cyanide into the pail. This causes a chemical reaction that releases hydrogen cyanide gas. The prisoner is instructed to breathe deeply to speed up the process. The inmate does not lose consciousness immediately. The inmate dies from hypoxia, the cutting-off of oxygen to the brain.[10]

Firing Squad

For execution by this method, the inmate is typically bound to a chair with leather straps across his waist and head, in front of an oval-shaped canvas wall. The chair is surrounded by sandbags to absorb the inmate's blood. A black hood is pulled over the inmate's head. A doctor locates the inmate's heart with a stethoscope and pins a circular white cloth target over it. Standing in an enclosure 20 feet away, five shooters are armed with .30 caliber rifles loaded with single rounds. One of the shooters is given blank rounds. Each of the shooters aims his rifle through a slot in the canvas and fires at the inmate. The prisoner dies as a result of blood loss caused by rupture of the heart or a large blood vessel, or tearing of the lungs. If the shooters miss the heart, by accident or intention, the prisoner bleeds to death slowly.[11]

Hanging

---

9 Supra note 8

10 Ibid.

11 Ibid.

For execution by this method, the inmate may be weighed the day before the execution, and a rehearsal is done using a sandbag of the same weight as the prisoner. This is to determine the length of 'drop' necessary to ensure a quick death. If the rope is too long, the inmate could be decapitated, and if it is too short, the strangulation could take as long as 45 minutes. The rope, which should be 3/4-inch to 1 1/4-inch in diameter, must be boiled and stretched to eliminate spring or coiling. The knot should be lubricated with wax or soap "to ensure a smooth sliding action," according to the 1969 U.S. Army manual.[12]

Immediately before the execution, the prisoner's hands and legs are secured, he or she is blindfolded, and the noose is placed around the neck, with the knot behind the left ear. The execution takes place when a trap-door is opened and the prisoner falls through. The prisoner's weight should cause a rapid fracture-dislocation of the neck.[13] Death results from slow asphyxiation.[14]

V. Legislative Provisions

Death penalty in India is awarded for either offences which fall under the country's main substantive penal legislation, the Indian Penal Code, or under other laws. Execution of capital punishment is carried out by hanging as provided under Section 354(5) of the Criminal Code of Procedure, 1973 i.e., "Hanging by the neck until dead", In India, death penalty is an exception while life imprisonment is a rule. This means that death penalty is awarded only in exceptional cases and that too which fall within the bracket of rarest of rare cases dictum.

IPC prescribes death sentence as a punishment for 13 distinct offences such as punishment for criminal conspiracy (s. 120B)[15], murder (s. 302)[16], waging or attempting to wage war against the Government of India (s. 121)[17], abetment of

---

12 Supra note 8

13 Ibid

14 Ibid

15 Indian Penal Code, Section 120B: Punishment of criminal conspiracy (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, 2[imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence. (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.]

16 Indian Penal Code, Section 302: Punishment for murder.: Whoever commits murder shall be punished with death or imprisonment for life, and shall also be liable to fine.

17 Indian Penal Code, 1860, Section 121: Waging, or attempting to wage war, or abetting waging of war, against the Government of India: Whoever, wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine

mutiny (s.132)[18], dacoity with murder (s. 396)[19] etc. The Criminal Amendment Act of 2013 and 2018 have even introduced death penalty in cases of sexual offences. Apart from IPC there are several other legislations which have incorporated death penalty as a punishment for certain specific offences for example the NDPS Act, laws relating to army and security, anti – terrorism laws etc.

In India, the procedure of awarding the capital punishment, its execution and even the pardoning in such cases, has been prescribed in detail under our Constitution and Code of Criminal Procedure. Under Indian Legal system, the Sessions Court is empowered to try and award death penalty to a convict but the same has to be submitted before the high Court of that State for confirmation.[20] If the sentence is confirmed by the High Court, the convict has a right to prefer an appeal against such confirmation order in the Supreme Court of India only after obtaining a special leave to appeal from the High Court concerned.[21] If the convict doesn't succeed in the Supreme Court, then he has another remedy to exhaust. He can submit a 'mercy Petition' before the head of the State. Indian Constitution provides for clemency of capital punishment by the President.[22] Similar powers

---

[18] Indian Penal Code, 1860 Section 132: Abetment of mutiny, if mutiny is committed in consequence thereof: Whoever abets the committing of mutiny by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Government of India, shall, if mutiny be committed in consequence of that abetment, be punished with death or with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[19] Indian Penal Code, 1860 Section 396: Dacoity with murder: If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

[20] Code of Criminal Procedure,1973, Section 366: Sentence of death to be submitted by Court of Session for confirmation: (1) When the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court. (2) The Court passing the sentence shall commit the convicted person to jail custody under a warrant.

[21] Indian Constitution, Article 134: Appellate jurisdiction of Supreme Court in regard to criminal matters- (1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or (c) certifies under Article 134A that the case is a fit one for appeal to the Supreme Court: Provided that an appeal under sub clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of Article 145 and to such conditions as the High Court may establish or require

[22] Indian Constitution, Article 72: Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases- (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence.(a) in all cases where the punishment or sentence is by a court Martial; (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union

lie with the Governor of a State under Article 161[23]. These provisions are incorporated under Indian law with a view to ensure that the accused is sentenced to death only after all the possible remedies have been exhausted by the offender and there is no room for error left as capital punishment once executed is impossible to reverse.

II. Judicial Attitude

For the first time, the question pertaining to the constitutional validity of death penalty as a form of punishment was raised before the Supreme Court of Indian in the celebrated case of *Jagmohan Singh* v. *State of U.P*[24] It was contended that execution takes away all the fundamental rights guaranteed under Article 19, Judicial discretion to award capital punishment not based on standards, discretion being violative of Article 14 of the Constitution and no reasonable classification between the important facts and circumstances forming the basis of decision as to whether a person should be awarded death penalty or life imprisonment. After due consideration of arguments advanced by both the parties, the constitutional bench upheld the constitutional validity of death penalty as a punishment as Article 21 recognises deprivation of life with due process of law as valid and constitutional.[25]

Another case of 1974, *Ediga Anamma* v. *State of Andhra Pradesh*[26] is also a celebrated case on death penalty. Justice Krishna Iyer in this case commuted the death sentence of the convict to life imprisonment by taking into account factors like age, gender, socio-economic background etc. It was held that judges should also take into consideration the condition of the offender and condition or haplessness in which he committed the crime.

Bachan Singh v *State of Punjab*[27] is the case which holds the credit of giving birth to the "rarest of the rare cases" doctrine. In this case although the doctrine was not elaborated in detail but it was emphasised that while deciding culpability, aggravating or mitigating circumstances need to be looked into in each case.[28]

---

extends;(c) in all cases where the sentence is a sentence of death (2) Nothing in sub clause (a) of Clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force."

23 Indian Constitution, Article 161- Power of Governor to grant pardons, etc, and to suspend, remit or commute sentences in certain **cases** The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends

24 Jagmohan Singh v. State of U.P 1973 AIR 947 (India).

25 Supra note 24

26 Ediga Anamma v. State of Andhra Pradesh 1974 AIR 799 (India).

27 Bachan Singh v State of Punjab AIR 1980 SC 898 (India).

28 Aditi Agarwal, (2014), Death Penalty: An Overview of Indian Cases, accessed 05.04.2023 https://www.lawctopus.com/academike/death-penalty-an-overview-of-indian-cases/

Mithu v. *State of Punjab*[29] was another case where the mandatory death sentence under Section 303 was declared unconstitutional and hence invalid. The Section was held to be violative of Articles 14 and 21 of Indian Constitution thus deleted from the IPC.[30]

In *T.V Vatheeswaram* v. *State of Tamil Nadu*[31] and *Sher Singh* v. *State of Punjab*[32] the question pertaining to delay in execution of capital punishment was raised before the Apex Court. It was also contended that whether a prolonged delay in the execution of death penalty is a sufficient factor to commute the capital punishment into life imprisonment. In the first case, it was laid down that prolonged delays in executions are sufficient reasons to commute, the majority in the latter case had a different view.

Macchi Singh v. *State of Punjab*[33] was the case in which the Apex Court gave detailed guidelines pertaining to the "rarest of the rare rule". The Court laid down that while awarding death penalty the following factors should be taken into consideration:

1. Manner of Commission of Murder
2. Motive for Commission of murder
3. Anti-Social or Socially abhorrent nature of the crime
4. Magnitude of Crime
5. Personality of Victim of murder

In 1989, in another case of *Allauddin* v. *State of Bihar*[34], Justice Ahmadi held that until and unless there are special reasons and special circumstances exist, in a particular case, death penalty should not be awarded as a rule.

In India, more than 700 convicts have been executed since independence. 1810 people were sentenced to death by the trial courts of India during the period of 2000 to 2014. But the sentence of more than half of them was later on commuted to life imprisonment. Out of these, 443 accused were even acquitted by the Higher Courts later on. Till 2015, the four most infamous convicts who were hanged were Dhananjoy Chatterjee (2004), Mohammad Ajmal Amir Kashab (2012), Afzal guru (2013) and Yakub Menon (2015).[35] The most recent accused to be executed were the convicts of Delhi gang rape case in 2020.

---

29 Mithu v. State of Punjab 1983 AIR 473 (India).

30 *Supra* note 28

31 T.V Vatheeswaram v. State of Tamil Nadu 1983 AIR 361 (India).

32 Sher Singh v. State of Punjab 1983 AIR 465 (India).

33 Macchi Singh v. State of Punjab 1983 AIR 957 (India).

34 Allauddin v. State of Bihar 1989 AIR 1456 (India).

35 Marshan Singh & Shubham Raj, "*Constitutionality of the Death Penalty and its Comparative Study*", accessed01.04.2022 https://law.dypvp.edu.in/plr/Publication/all-publication /Constitutionality-of-Death-Penalty-and-its-Comparative-Study-and-Implications-on-Modern-Penology-ver-1.pdf

Indian courts sentenced 1,455 prisoners to death between 2001 and 2011, according to the National Crime Records Bureau. During the same period, sentences for 4,321 prisoners were commuted to life imprisonment. According to a survey conducted by a researcher, there are approximately 490 convicts who are waiting for years for the execution of their sentence in Indian jails at present.[36]

III. Arguments in Favour of Retention

1. For very serious offences like murder, sedition, gangrape, etc. simple imprisonment, forfeiture and fines would not be an adequate punishment.
2. Courts while awarding such sentences are always guided by various principles. Thus, if they award such punishment then their rationale should not be questioned.
3. If Capital Punishment or death sentence and life imprisonment without remission will be completely abolished, then it will certainly add on to higher crime rates.
4. Sometimes situations are such that there is a need to put deterrence upon society in order to prevent such crimes from being committed.
5. We adopted a policy that "Life Imprisonment is a rule and death penalty is an exception". It implies that somehow, we are still not that harsh in our approach.
6. Complete abolition of such sentences would render the police machinery as well as judiciary handicapped because for most heinous crime, we would have to resort to simple imprisonment only.
7. If such punishments will be abolished then the trust of the victim as well as the society as a whole upon the judicial system will be shaken as every offender will get similar sentence irrespective of the nature and gravity of the offence committed.

IV. Arguments in Favour of Abolition

1. These types of punishment are against the fundamental right of life and freedoms as enshrined under Article 19 and 21 of Indian Constitution.
2. Sometimes these punishments go wrong. If an innocent gets convicted and executed of a serious offence then it cannot be reversed.
3. This type of punishment reflects vengeance as well as retribution as it reflects some sort of personal vengeance against the offender.
4. This punishment fails to reform the offender because this punishment doesn't inspire the offender to reform. Whether he is expiating or not, he has to undergo the punishment.
5. This punishment is cruel, inhumane and degrading. The offenders are very much ill-treated by the authorities and other offenders.
6. Also, this kind of punishment brutalises the society as well as State. For imposing such punishment very hard view is to be adopted by the Courts which sometimes make the judges brutal.

---

[36] Supra note 28

7. People who are in favour of human rights argue that this punishment doesn't take account of value of human life. The bad conduct of a person in no way destroys the value of human life.
8. People argue that this kind of punishment doesn't teach any lesson to the offender. He is least bothered about the expiation for the offence when he knows he has to remain in jail till his last breath.
9. People argue that prisons are hell upon earth. The authorities indulge in prison abuse and commit atrocities upon the prisoners. Also no one actually bothers to keep a track record of the reformation of the prisoners behind bars.

V. Recent Trends in India

In *Manoj v. State of Madhya Pradesh* (2022)[37], the Apex Court observed that that the Bachan Singh principles must be applied to each specific case in light of its circumstances. The Court in this case listed various guidelines for a better assessment of the parameters and scope of rehabilitation.

In *Mohd. Arif @ Ashfaq v. State (NCT Of Delhi) (2022)*[38], the Supreme Court upheld the execution of Lashkar-e-Taiba militant Mohammed Arif for the 2000 Red Fort Attack case, which resulted in the deaths of three people, including two army officers. The Court denied his review petition, which questioned his conviction and sentence. The Bench noted that terrorist acts are regarded as the most aggravating situations when they pose a threat to the unity, integrity, and sovereignty of India. The Court further stated that this factor completely outweighs all other factors that could possibly be taken into account as mitigating circumstances based on the evidence.

The Project 39A by National Law University, Delhi published the sixth edition of the *Death Penalty in India: Annual Statistics Report* which provides an annual update on the use of the death penalty in India along with legislative and international developments on the issue. As on 31st December 2021, there were 488 prisoners on death row across India (a steep rise of nearly 21% from 2020), with Uttar Pradesh having the highest number at 86. This is the highest the death row population has been since 2004 as per the data from the Prison Statistics published by the National Crime Records Bureau.[39]

In 2021, Punjab and Madhya Pradesh, introduced the death penalty for causing deaths by spurious liquor, while Maharashtra did so for 'heinous' offences of rape and gangrape. The Women & Child Development Ministry also introduced a bill

---

37 Manoj v. State of Madhya Pradesh (2022) CRIMINAL APPEAL NOS. 248-250 OF 2015 (India).

38 Mohd. Arif @ Ashfaq v. State (NCT Of Delhi) (2022) CRIMINAL APPEAL NOS. 98-99 OF 2009 (India).

39 Project 39A, NLU Delhi, Annual Statistic Report, 2021, Available at https://www.project39a.com/annual-statistics-page-2021 accessed on 01-04-2023

proposing the capital punishment for repeat aggravated trafficking offences involving children and women.[40]

The above data clearly depicts that the Indian courts have recently again shifted towards the approach of awarding Death Penalty in the cases where a strict message is required to be sent to the society at large. Thus, after almost a decade, there is a rise in the instances of death penalty being awarded by the Indian Courts although globally the trend depicts a downfall in the number of cases in which death penalty was awarded or executed.

VI. Conclusion and Suggestions

After measuring both pros and cons of having harsh or soft law, it can be concluded that India, as a nation of various laws, already have several soft legislations and also the penal provisions of the Indian judicial system are somehow soft only. Thus, we need not adopt a softer policy in relation of punishing the offenders. If more and more soft legislations will be introduced then the concept of having a safe and secure State will somehow be defeated. The Indian judiciary has already asserted that the death penalty as a form of punishment is constitutional and hanging as a mode of execution of death penalty is also the most humane and least painful method of executing an offender. Moreover, currently 58 countries representing about one-third of all the countries worldwide, retain death penalty for ordinary capital crimes also. Thus, there is no harm in retaining death penalty as the highest form of punishment in the Country.

References

Books:

- Pranjapee, N. V., Criminology and Penology, Central Law Publications, 2021 (Ed 20th)
- Trehan, Anil, Penology and Victimology- A Perusal, Shree Ram Law House, 2011 (Ed. 1st)

Article in an Electronic Journal:

- Agarwal, Aditi, "Death Penalty: An Overview of Indian Cases", *Academike: Articles on Legal Issues*, (2014), https://www.lawctopus.com/academike/death-penalty-an-overview-of-indian-cases/
- Singh, Marshan, Raj, Shubham, "Constitutionality of the Death Penalty and its Comparative Study", *Pimpri Law Review* https://law.dypvp.edu.in/plr/Publication/all-publication/Constitutionality-of-Death-Penalty-and-its-Comparative-Study-and-Implications-on-Modern-Penology-ver-1.pdf

Website:

- BBC, Introduction to Capital Punishment, http://www.bbc.co.uk/ethics /capitalpunishment/intro.shtml
- Crime Museum, Origin of Capital Punishment, https://www.crimemuseum.org/crime library/execution/origins-of-capital-punishment/

[40] *Ibid.*

- Death Penalty Information Centre, Description of Execution Methods, https://deathpenaltyinfo.org/descriptions-execution-methods
- New World Encyclopedia, Capital Punishment, http://www.newworldencyclopedia.org/entry/Capital_punishment
- Project 39A, NLU Delhi, Annual Statistic Report, 2021, https://www.project39a.com/annual-statistics-page-2021

List of Cases:

- *Jagmohan Singh* v. *State of U.P* 1973 AIR 947
- *Ediga Anamma* v. *State of Andhra Pradesh* 1974 AIR 799
- *Bachan Singh* v *State of Punjab* AIR 1980 SC 898
- *Mithu* v. *State of Punjab* 1983 AIR 473
- *T.V Vatheeswaram* v. *State of Tamil Nadu* 1983 AIR 361
- *Sher Singh* v. *State of Punjab* 1983 AIR 465
- *Macchi Singh* v. *State of Punjab* 1983 AIR 957
- *Allauddin* v. *State of Bihar* 1989 AIR 1456
- *Manoj v. State of Madhya Pradesh* CRIMINAL APPEAL NOS. 248-250 OF 2015
- *Mohd. Arif @ Ashfaq v. State (NCT Of Delhi) CRIMINAL APPEAL NOS. 98-99 OF 2009*

DOMAIN OF CONTEMPT POWER OF COURT IN RELATION TO FREEDOM OF SPEECH AND EXPRESSION

Dr. Sandhya Rohal[*]
Dr. Jannat Bamal[**]

Abstract
Indian Judiciary is the guard of law and order and it is to be given security to give decisions equitably. This concept of safeguarding the judiciary to work independent is somewhere based on the doctrine of separation of power. Punishment for contempt is a huge power guaranteed to the judiciary for proper functioning of the courts and to deliver the decisions with equity. Contempt of Court has been characterized as any lead which will in general disregard the power of Law and Court.
This research paper is based upon the thrust to know that Right to Freedom of Speech and Expression refers to the freedom that a person has to express his thoughts but this right is not absolute in nature which means it comes with certain restrictions. Article 19(1)(a) of the Constitution of India deals with above right.[1] *There are three research questions drafted to make analysis:*

1. *To know that the power to punish for contempt of court enables the courts of law to function efficiently.*
2. *To know that Fair Criticism of Conduct of Judges, the institution of judiciary and its functioning is consistent with Article 19(1)(a) of Constitution of India,1950.*
3. *To know that there is a need for striking a fine balance between freedom of speech and expression on one hand and fair criticism of administration of justice on the other.*

Keywords: Judiciary, Contempt, Constitution, Fair criticism, Freedom of speech and expression.

1. Introduction:

In India, the idea of contempt of court could be followed back to pre-autonomy period during the hour of the East India Company when Mayor Courts were set up as Courts of Record.[2]

Halsbury has articulated that hatred comprises of any words, verbally expressed or composed which hinder the course of organization of equity. It was held by the Apex Court that upkeep of poise and regard of the Courts is a significant part of the guideline of law and order.[3]

[*] Assistant Professor, Department of Laws, Bhagat Phool Singh Mahila Vishwavidyalaya Khanpur Kalan, Sonipat.
[**] Assistant Professor, Department of Laws, Bhagat Phool Singh Mahila Vishwavidyalaya Khanpur Kalan, Sonipat.

1 https://blog.ipleaders.in/an-analysis-of-the-right-to-speech-and-expression-and-contempt-of-court/.

2 MP JAIN, OUTLINES OF INDIAN LEGAL AND CONSTITUTIONAL HISTORY (6th Edition,2010).

3 Arundhati Roy, *In Re* A.I.R 2002 S.C. 1375 (India).

Under the Indian High Courts Act 1861 established High Court as a Court of Record at Allahabad with the ability to punish for contempt.[4]

The standard of ability to rebuff for disdain of court was set down in ***Re Abdul and Mahtab***[5]. The appointed authorities might even force disciplines, for example, fine or prison term assuming they accept that scorn has happened. In India, we have the Contempt of Courts Act 1971 which characterizes and restricts the court's powers in rebuffing scorn of court and manages the technique. Indian law has partitioned hatred of court into two sub classes which are considerate scorn and criminal disdain. Articles 129 and 215 of the Indian Constitution enable to the Hon'ble Supreme Court and the High Courts to rebuff for hatred. Article 129 of the Constitution characterizes the Hon'ble Supreme Court as a court of record and it likewise gives it the powers to rebuff for its hatred. A court of record implies a Court whose records are of evidentiary esteem and can be introduced under the watchful eye of any Court. This chapter furnishes the Apex Court with the ability to rebuff for the scorn of subordinate courts also.[6] This ward of the Hon'ble Supreme Court under Article 129 is autonomous of the Contempt of Court Act 1971.[7]

1.1. POWER TO PUNISH FOR CONTEMPT OF COURT IS THERE TO ENABLE COURTS OF LAW TO FUNCTION EFFICIENTLY

Researchers believes that behind every enforcement there is always sanction. This punishment for contempt is completely a sanction for maintaining a decorum in a court room. To support this, believe there are few supportive facts are mentioned below: -

a) The Apex court has likewise held that the arrangements with respect to hatred of court under the Indian law are not only for the security of judges and Courts, they are for the insurance of individuals.[8]
b) Everybody is qualified for a free and reasonable organization of equity. The Calcutta High Court has seen that the ability to rebuff is subjective, limitless and uncontrolled so it ought to be practiced with extraordinary alert and care.[9]
c) Presently, by the temperance of Article 129 and 215 of the Indian Constitution, both the Hon'ble Supreme Court just as the High Courts have the ability to rebuff for their scorn and furthermore the disdain of subordinate courts.[10]

---

4 K. Balasankaran Nair, *Law of Contempt of Court in India* (2004).
5 *In Re* Abdul and Mahtab 1867(8 W.R. Cr. 32) (India).
6 Delhi Judicial Service Assn. v State of Gujarat, (1991) 4 SCC 406 (India).
7 Rajeshwar Singh v Subrata Roy Sahara, A.I.R 2014 S.C. 476 (India).
8 Mohomad Yamin v Om Prakash Bensal, 1982 (India).
9 Legal Remembrancer v Matilal Ghose &Ors., (1914) I.L.R. 41 Cal. 173 (India).
10 *In Re*: Vijay Chandar Mishra, (1995) 2 S.C.C 603(India).

d) Purview to rebuff for hatred is there to detail extreme assent against the individual who won't conform to the request for the court or ignores the request.[11]

1.2 The Domain of Right to Freedom of Speech and Expression and Contempt of Court:

Section 5 of The Contempt of Courts Act 1971[12] states that fair criticism is not to be termed as contempt of court. However, the irony of the situation is highlighted when it is the judiciary against whom the remark has been made, gets the power to decide whether the same was constructive in nature or not.[13]

This fine line difference between the contempt and fair criticism is question to rethought.

1.3 Analysis of above approach:

The power to punish for contempt of itself proved as this power to Hon'ble Supreme Court[14] and High Court[15] have been given in the Constitution of India. It is also given in the Contempt of Courts Act under Section 14 that Hon'ble Supreme Court and High Court both have the power to punish for contempt. This concept of punishment for contempt is not a new concept rather it is from era of kings. Power to punish for contempt is well explained in many cases such as ***P.N. Duda v. Shiv Shankar and others; Prashant Bhushan Case; Arundhati Roy case etc.***[16]

Indian legislation divides contempt of court into two parts and researcher interpret the same in own words: -

Civil contempt: Intention of the wrongdoer can never be a subject to analyze by the researcher during the whole research period.

Criminal contempt: Contempt of court and disdain the image of judicial officer as an individual which is subject matter of this research.

There are many instances where time to time Hon'ble Court punish for contempt of itself which is empowered by the Indian Constitution. Our Country is democratic country where every action of a public authority is under the

---

11 Kapildeo Prasad Shah and ors v State of Bihar and ors., (1999) S.C.C 569 (India)

12 The Contempt of Courts Act 1971, Act of 70 of 1971 (India).

13 https://www.mondaq.com/india/libel-defamation/980554/free-speech-vs-contempt-of-court-an-analysis-in-light-of-the-prashanth-bhushan-case-.

14 INDIA CONSTI. art. 129 cl.(8) Grants Hon'ble Supreme Court of India, the power to punish for contempt of itself
INDIA CONSTI. art. 142 (2) Enables the Hon'ble Supreme Court of India, to investigate and punish any person for its contempt.

15 INDIA CONSTI. art. 215 Grants every High Court the power to punish for contempt of itself..

16 *Id.at 5.*

analysis of the judicial review. In the case of punishment for contempt of itself is empowered under Article 129 and 215 respectively. So, the basis of punishment of individual under the empowered judiciary by the Constitution is subject to proof where the burden is lying on judiciary itself.

So here researcher believes that the concept of natural justice where one cannot be judge of his own case subject to analyze. Researcher may suggest that the first respondent Judge as an individual may not be judge of his own case and may shift to another court to decide the ratio behind the prescribed punishment. If the case will be held in another court any probability for the biasness will be converted to negative. Same is suggested in P.N. Duda case.So here the concept of punishment for criminal contempt is based upon the concept of maintaining the administration of justice but the trial may be tried to another court to maintain the concept of natural justice.

2. FAIR CRITICISM OF CONDUCT OF JUDGES, THE INSTITUTION OF JUDICIARY AND ITS FUNCTIONING IS CONSISTENT WITH ARTICLE 19(1) (A) OF CONSTITUTION OF INDIA, 1950

It has been submitted by Researchers here that many scholars found that out of all the fundamental rights, freedom of speech and expression is regarded as the one which is abused the most. Democracy is often regarded as the government of the people. Hence it is very much necessary that people are free to put forward their opinions and constructively fair criticize the administrative functioning or any other issue that they feel is not happening correctly to maintain rule of law.[17]

A remark based on the researcher's or speaker’s unbiased assessment about a topic of public interest is known as a fair comment. Restrictions enumerated under Article 19(2) of the Indian Constitution, 1950 limits people from making unfounded and irresponsible comments to protect and maintain the security of the State, friendly relations with foreign States, public order, decency, morality, sovereignty and integrity of India and in relation to contempt of court, defamation or incitement to an offence.[18]

Article 19 (1)	Article 19(2)
Allowing; fair criticism	Restrictions for contempt of court

2.1. The Contempt of Courts Act of 1971

[17] *Id.at 5.*
[18] *Id.* at 6.

Section 5 of the Act provides that fair comment or fair criticism is not a contempt of the court. [19] But this in itself does not provide complete immunity to the people including the media as whole. The case would however still be finally decided on case to case basis and then be understood whether it amounts to contempt of the court or not. Hence the courts have discretion in allowing what is contempt and what does not amount to contempt.[20]

These days concerning trend is the court's tendency to consider character insults on their reputation to be contempt. It is sometimes forgotten that the law of contempt is intended to defend the judiciary's institution from slanderous and baseless attacks on the institution rather than the individuals who make up the institution.[21]

However, as seen in the sex scandal case of Karnataka, where their hon'ble court was so enraged by their media coverage that they filed contempt of court cases against a large number of Karnataka media publications, it appears that the court frequently fails to differentiate between contempt of judge and contempt of a court of law. Misconduct by judges is deserving of the harshest reprimands. To guarantee that contempt powers are not exploited as a haven by a corrupted and accommodating system, modifications to the Act must be made.[22]

In recent years, the judiciary has assumed an increasingly prominent role. As a result, it's sad that the spark of judicial activism has been matched by judicial authoritarianism. The court has displayed a growing intolerance for criticism and has used its contempt powers to silence all voices of dissent in a backward manner.[23]

Even if there is minor excess, courts are fundamental to our constitutional democracy and must be subjected to fair scrutiny. Respect for the court must be won by the quality of the court's decisions, as well as the justice and neutrality of the court's approach, rather than through repressive contemptuous measures.[24]

The increased use of contempt powers by the court is a red flag, signaling the need for immediate introspection to see if there is a flaw somewhere, or if people are dissatisfied with the justice they are receiving. However, it would not be forgotten that regular attacks on the judiciary's dignity would rock the

---

19 Section 5 of the Contempt of Courts Act, 1971.

20 The Contempt of Courts Act 1971, No. 70 , Acts of Parliament ,1971 (India).

21 Rahul Donde, *Use and Abuse of the potent power of contempt*, Vol. 42, Issue 29, Economic and Political Weekly (2009).

22 *Id.at 6.*

23 *Id.*at 8.

24 *Id. at 8.*

foundations of the system. Judges have a lot of responsibilities that are both responsible and unpleasant, thus they need to be protected as much as possible.[25]

Simultaneously, the court would not be overly sensitive, and it would not exercise its authority based solely on a question of appropriateness or an excessive sense of the judges' dignity; it would operate with impartial dignity and decency. Because great power comes with heavy responsibility, the higher judicial levels must wield the formidable power of contempt with care and caution to ensure that personal freedoms are not inadvertently violated.[26]

2.2. Domain of Fair Criticism Vis-A-Vis Contempt of Court

The specifics of each case determine what constitutes reasonable criticism or contempt. However, examining the different cases in which the Indian Hon'ble Supreme Court has found defendants guilty or dismissed contempt charges reveals that judges have broad discretion in determining whether a "speech" is contemptuous or not, and that the court has exhibited varying amounts of tolerance for criticism.[27]

"Allegation of corruption is not a ground for contempt proceedings as it is related to the condemnation of justice/judge for biased judgement."[28]

2.3. Analysis:

As we can observe by above explanations that the statement stands disproved as in our country biased criticism is not acceptable and there are number of contempt cases pending under High Courts. There are a greater number of civil contempt and criminal contempt cases are in less ratio to the civil cases. That's why we can say that even when fair criticism is given as exception under Section 5 of the Contempt of Courts Act then also there are so many cases on basis of caste, religion which may be a violation of rule of law. This needs to be stopped as if these will be followed in the same pace then there will be a greater number of contempt cases rather than other type of cases. Everyone has the right to freedom of speech and expression and this should not be violated in sake of disrespect as individual. Contempt of court has been enacted to protect the administration of justice. But in practical cases are based upon person biased. Now-a-days Court takes suo moto action against the statement which

---

[25] Albuquerque, O., 2020. *Fair criticism is not contempt*. Free Press Journal (Dec.11,2021) see also, https://www.freepressjournal.in/analysis/fair-criticism-is-not-contempt.

[26] AG Noorani, *Contempt of Court and Free Speech*, Vol. 36, Issue No, 20, Economic and political Weekly(2001).

[27] *Id.* at 10.

[28] See also; https://www.thehindu.com/news/national/supreme-court-drops-contempt-case-against-prashant-bhushan-for-corruption-remarks-in tehelka/article65828997.ece#:~:text=The%20case%20had,Courts%20Act%2C%201971.

have been circulated in any form of data. Such as ***Prashant Bhushan***[29] case: in this case court took suo moto action against him regarding his tweets which he gave on social media platform. Such are few instances where to maintain the administration of justice and rule of law in society, judiciary works as first respondent. In such way trust on natural justice and concept of separation of power is getting background.

So researchers agree with the concept of fair criticism and suggesting for maintain a balance about separation of power by avoiding individual biased criticism.

3. NEED FOR STRIKING A FINE BALANCE BETWEEN FREEDOM OF SPEECH AND EXPRESSION ON ONE HAND AND ADMINISTRATION OF JUSTICE ON THE OTHER HAND BY ADOPTING A MORE LIBERAL APPROACH IN PUNISHING CONTEMPT OF COURT

Mostly in a democratic country this right of speech and expression is provided to its citizens while at the same juncture to maintain the integrity and trust of the judicial system in the people of the country. It is necessary to maintain the coherence between these two.[30]

Indian constitution provides this Right as a fundamental right and the power of the Court of Records for punishing the contemnor is subject to Article 19, so that these two principles can run without any hinderance and as a complimentary to each other.[31].

In April 1991, Article 19 in conjunction with the Human Rights Centre of the University of Essex convened a two-day Consultation at which over thirty consultants from round the world participated. The Consultation itself was a coffee budget affair with a number of those attending covering their own travel costs; a testament, perhaps, to the good interest and concern regarding a way to address the growing development of ethnic violence and emotion[32].

4. SUGGESTIONS

At last researcher would like to propose some suggestions which are required for maintaining the balance between the above-mentioned research questions.

---

29 *In Re:* Prashant Bhushan and Another (CRL.) No. 1 of 2020 (India).

30 *Id.at 11.*

31 Sofia bhambri," STRIKING A BALANCE BETWEEN FREEDOM OF SPEECH AND CONTEMPT: THE LEGAL CONDUNDRUM", S. BHAMBRI & ASSOCIATES (Dec. 13,2021) https://www.sbhambriadvocates.com/post/striking-a-balance-between-freedom-of-speech-and-contempt-the-legal-condundrum.

32 India,Ninth Periodic Report to CERD.UN Doe.CERD/C/149/Add.ll. Fali Nariman, "Freedom of Speech and Blasphemy: The Laws in India and the UK;"No.42 International Commission of Jurists Review(1989).

4.1 Suggestions and Recommendations to reconcile the domain of freedom of speech and expression and contempt of court:

I. Role of Judge as adjudicator in Contempt of Court:

"Contempt of Court" is an important topic for discussion in judicial branch as it is the third pillar of democracy. Under due process of law, the court must be secured against danger, compulsion and terrorizing for the allotment of reasonable equity without dread or favour.

In our democratic country there are three pillars i.e. Legislature, Executive and Judiciary; these follow the rule of Separation of powers and there is no interference in the work done by each. As it is well said that in every case due process of law to be followed and if anyone violates any law then the proceedings will be heard by the judiciary with due process of law but if there is a case of contempt of court which is initiated by judge for the act done in his court then there the due process should be followed. Although judge as adjudicator in his case of contempt of court is not wrong as he is the guardian of the law and he have the right to start the procedure but this can lead some biasness. So researcher's would to suggest that there may be independent committee to deal with the contempt case and they may be given the power to punish the person for the wrong done if it is proved with due process of law. Law of contempt should be used only for the proper functioning of the court and not to prevent criticism. [33]

II. Free Articulation required for due process of law:

Free articulation means the right to speak freely as provided under Article 19 (1)(a)[34] as Right to Freedom of Speech and Expression in the Indian Constitution. Free articulation is based upon this Article 19. As we know that article 19 comes up with certain reasonable restrictions and this concept of free articulation is required to protect the person from scorn laws which are used by the superior authorities such as Contempt of Court is now-a-days used by the judges for the protection of their reputation not for the dignity of court. Contempt of Courts Act is for the Justice and protect the dignity of court and not for the judges as individual. Judges use their power to punish inadequately in violation rights of common man under Article 14 of Indian Constitution which provides "Equality before Law". Article 14[35] states that no one should be denied equality before the law or the equal protection of laws. With this it can be said that implementation of free articulation is required for the Article 14

---

33 Self .

34 INDIA CONSTI.art.19 cl.1(a).

35 *Id. at 13.*

given under Indian Constitution as if it is not implemented then there will be biased law. [36]

III. Necessity of amendments in the present Laws which were adopted earlier:

Indian laws have been originated in the time of British rule and at that time those laws were made for slaves and at that time laws were harsh and scorn procedure were followed by them upon us but with the change of time those laws need to be amended according to the requirements of time. Those scorn procedures of law need to be changed. [37]

The Apex court or Hon'ble Supreme Court as the gatekeeper of the Constitution should cautiously ensure free discourse even against legal disdain. In western nations like England and the United States hatred locale is sparingly practiced giving a lot of extension to the reasonable and useful analysis which is considered as the platform of present-day majority rules system. It is about time in India to get rid of the pervasive moderate perspective on scorn law and get the liberal methodology pushing free articulation sought after by western and other ward nations. [38]

IV. Amendment in the Contempt of Courts Act:

Understanding the requirement for getting rid of the customary and moderate methodology, the Indian assembly passed "The Contempt of Courts Amendment Act, 2006" and amended the Section 13 which states that there must be valid defence in the form of justification of truth if it is for the sake of public. [39]

With this amendment there will be no contempt proceeding if it is justified as true facts in valid defence and also it is in the public interest. Now protection of truth can be argued in scorn of court procedures in case such an affirmation of reality was in the public interest and is real.[40]

V. To provide vulnerability in laws:

As it is rightly said that with the change of time laws should be made vulnerable and needs to be amended and they should be made adaptable according to time. Many terms which are not required in current scenario needs to be deleted. Justice has also likewise said that the arrangements in regards to the Contempt of Court in India are dubious and have unsure limits. Researcher would like to suggest that the equivalent ought to occur in India however imagine that this vulnerability in law can be taken out assuming the rule can give an appropriate

---

[36] *Id*. at 13.
[37] *Id.* at 13.
[38] *Id*. at 13.
[39] The Contempt of Courts (Amendment) Act, 2006,,No. 6, Acts of Parliament, 2006 (India).
[40] *Id.at 14.*

and thorough clarification and meanings of these terms which are the purposes behind the vulnerability.[41]

Foreign democracies also recognize that contempt is an archaic law and contempt has practically become obsolete there. For example:

- United Kingdom to erase the term outrage the court' under the ambit of criminal hatred.
- In England the term "Scandalising the court" was abolished in 2013
- In Canada - the real, substantial, immediate danger to the administration is the standard of contempt
- In American courts expressions of contempt regarding judges or legal matters are not subject to the law of contempt[42]

With this researcher would like to suggest that certain terms which tends to degrade the law and change of time law should be implemented and changed.

VII. To provide more clarity on "Disdain of Judges" and "Scorn of Court":
The contempt law is for the maintenance of court proceeding and not to disrupt the administration of justice. This law is for the administration of justice and not for the judges as Individual. But in practical contempt cases are mostly related to 'Disdain of Judges' which means Disrespect of Judges by anyone. It is clearly mentioned in the Act that this Contempt law is for Scorn of Court which means Open Disrespect of court i.e. not following the orders given by the court; causing the hurdles for making the delay in judicial proceedings.[43]

VIII. To Provide provisions for disciplinary action against contempt of court:
The Contempt of Courts Act is not providing clarity under Section 12.[44]Under this section punishment for contempt is provided. As we know that judges can't work without the help of Advocates and contempt of court is mostly upon the advocates. Judges must treat advocates just as partners as no single person can work alone and these both authorities are complimentary for each other. So researcher would like to suggest that there must be a provision for disciplinary actions which is to be taken before starting the judicial proceedings against the contemnor. Under the Act there is no provision for it , it needs to be amended for proper functioning of the courts as there will be more cases of contempt only .There is an extension for act of spontaneity of reformatory arrangements of the Act and have it more explicit just as another arrangements of Act which are needing improvement. [45]

---

41 *Id.at 15.*
42 *Id.*at 15.
43 *Id.at 15.*
44 The Contempt of Courts Act 1971, No. 70 Acts of Parliament, 1971(India).
45 *Id.at 16.*

IX. To use Rule of Law as touch stone to know Contempt of Court:

Rule of law is the basic principle which is followed in democratic country. Our constitution has adopted this principle as it is said "Law is above all". No one is above the law and everyone is similar in the eyes of law. This principle has been originated from the French phrase **'la principe de legality'** which means principle of legality. In simple words it can be said that society to be ruled by law not by men. And rule of law means that there are rules which are neutral and adaptable . It has been rightly said by **K. Balasankaran Nair** in his paper **Law of Contempt of Court in India (2004)** that **"Be you ever so high, law is above you".**[46]

X. To provide clear provision on jurisdiction of court:

In this Researcher would like to suggest that there can be provision in the Act for the proper jurisdiction of the courts to decide the contempt cases. As of today it is up to the discretion of the courts to decide upon the jurisdiction of the case. Sections in the Act doesn't provides proper explanation what that wants to contend. Such as Section 5 in the Contempt of Courts Act it is said fair criticism of judicial act is not contempt but it has not defined what is the fair criticism, it varies from case to case, person to person. [47]

CONCLUSION:

This paper is based upon three main points:

1. **That the power to punish for contempt of court is there to enable the courts of law to function efficiently:**

With the study of laws it is found that this concept of contempt is not a new concept. In the era of Rajas or Kings this was used in a way as if someone speaks against the decision of king, the person is punished and boycotted. Then during the era of Britishers, Indians were treated as slaves and they make harsh laws and if anyone goes against the decisions of them he is strictly punished. First Contempt of Courts Act came up in 1926 which was during British Rule and this Act was made to follow the laws made by the Britishers. But After Independence and making of the Constitution of India,1950 , Honorable Supreme Court and High Court have been given the power to punish for contempt of itself under Article 129 and 215 respectively. This power is required to function the administration of court efficiently. Also, in 1952 the 1926 Act was repealed and latest Act is of 1971 that is "The Contempt of Courts Act, 1971". Under this Act of 1971 also power has been given to Supreme Court and High Court to punish for the Contempt. The Hon'ble Supreme Court has the discretionary power to deal with the cases. This is used when someone distracts and disrespect the dignity of court and which in turn

---

[46] K. Balasankaran Nair, paper *Law of Contempt of Court in India* (2004)(India).

[47] The Contempt of Courts Act ,1971, No. 70 Act of Parliament,1971(India).

will demolish the confidence of people in the judiciary so this is required for proper functioning of courts.

2. **That Fair Criticism of Conduct of Judges, the institution of judiciary and its functioning is consistent with Article 19(1)(a) of Constitution of India,1950:**

Based on the research this point stands disproved as in our country criticism of any kind is not tolerated and there are number of contempt cases pending under High Courts. There are more number of civil contempt and criminal contempt cases are in less ratio to the civil cases. That's why we can say that even when fair criticism is given as exception under Section 5 of the Contempt of Courts Act then also there are so many cases on basis of caste, religion.

'Fair Criticism' is not defined anywhere in the Act or any other law. This is interpreted on the basis of their own opinions. The criteria of "Fair Criticism" needs to be explained and to be followed and Right of anyone not to be violated and Fundamental Right to Freedom of Speech and Expression is given to every citizen. Fair Criticism means that it will be based upon the facts and every case to be dealt with according to facts and no one to be treated biased and each person to be punished equally not to be discriminated on the basis of any class, creed or religion. Everyone has the right to freedom of speech and expression and this should not be violated in sake of judges disrespect as individual. Contempt of court has been enacted to protect the administration of justice not for the judges as individual. But in practical cases are more of judges as individual. Now-a-days Court takes suo moto action against the statement which have been circulated in any form of data. Such as Prashant Bhushan case: in this case court took suo moto action against him regarding his tweets which he gave on social media platform.

3. **That there is a need for striking a fine balance between freedom of speech and expression on one hand and administration of justice on the other by adopting a more liberal approach in punishing for contempt of court:**

On the basis of research this point stands as proved. There is a need for maintaining the balance between Right to freedom of speech and expression on one hand and administration of justice on the other hand. This can be done by adopting a liberal approach in the manner that neither right is infringed nor it hampers the administration of justice. Some terms need to be amended in the Act and legal proceedings should be done after study of facts not to be done ambiguously in haphazard manner. Everyone shall be allowed to enjoy the Right to Freedom of Speech and Expression but he or she shall also be in the limits and not tp cross certain limits as it will hamper delay in administration of justice.

The judiciary must recognize the significance of any judicial action being questioned and not treat such criticism as contempt of court.

At last researchers would like to conclude the paper on the note that there is a need for amendment in laws for proper functioning of laws.

REFERENCES:

BOOK:

- MP Jain, *Outlines of Indian Legal and Constitutional History* (6th Edition, 2010)

ARTICLES:

- K. Balasankaran Nair, Law of Contempt of Court in India (2004)
- Rahul Donde, Use and Abuse of the potent power of contempt, Vol. 42, Issue 29 , *Economic and Political Weekly*(2009)

WEBSITES:

- Vinod Vyasulu, *On Contempt, Contemners and Courts on Contempt, Contemners and Courts*, Vol. 30, Issue 45, Economic and Political Weekly (1995).
- J, V., 2010. *Encourage fair criticism as judges are not infallible: court*.The Hindu (Dec.11,2021). https://www.thehindu.com/news/national/Encourage-fair-criticism-as-judges-are-not-infallible-court/article16123745.ece.Albuquerque, O., 2020. *Fair criticism is not contempt*. Free Press Journal.(Dec.11,2021) https://www.freepress journal.in /analysis/fair-criticism-is-not-contempt.
- https://www.thehindu.com/news/national/supreme-court-drops-contempt-case-against-prashant-bhushan-for-corruption-remarks-intehelka/article65828997.ece#:~:text=The%20case%20had,Courts%20Act%2C%201971
- Sofia bhambri," *STRIKING A BALANCE BETWEEN FREEDOM OF SPEECH AND CONTEMPT: THE LEGAL CONDUNDRUM", S. BHAMBRI & ASSOCIATES* (Dec. 13,2021) https://www.sbhambriadvocates.com/post/striking-a-balance-between-freedom-of-speech-and-contempt-the-legal-condundrum.
- India,Ninth Periodic Report to CERD.UN Doe.CERD/C/149/Add.ll. Fali Nariman, *"Freedom of Speech and Blasphemy: The Laws in India and the UK*;"No.42 International Commission of Jurists Review(1989).

LIST OF CASES:

- *Arundhati Roy , In Re* A.I.R. 2002 S.C. 1375
- *In Re Abdul and Mahtab* 1867(8 W.R. Cr. 32)
- *Delhi Judicial Services Assn. v State of Gujarat*(1991) 4 SCC 406
- *Rajeshwar Singh v Subrata Roy Sahara,* A.I.R. 2014 S.C. 476
- *Attorney General v Times Newspapers Ltd.* 1974 AC 273
- *Mohomad Yamin v Om Prakash Bensal,* 1982
- *Legal Remembrancer v Matilal Ghose & Ors.* (1914)I.L.R. 41 Cal. 173
- *In Re. Vijay Chandar Mishra (*1995) 2 S.C.C. 603
- *In Re: Prashant Bhushan and other Another*(CRL.) No. 1 of 2020

INDIAN WOMEN'S FALLING PARTICIPATION IN THE LABOUR FORCE: A GENDER DISCRIMINATION PERSPECTIVE

Dr. Balwinder Kaur*

Abstract

The involvement of women equally in the workforce is central for ensuring female rights and gender impartiality. Women are significant contributors to the economic development of the country but consideration given to her for his services is not sufficient. Traditionally, people believe that higher parity between f–emale and male employees in a similar business led to amicable and effective surroundings; therefore, all workers will be persuaded to contribute to and promote the business greatly. Across the globe, the females aged between 25 to 54 merely 63 per cent are engaged in different employment whereas the participation of men is 94 per cent of the same age. The Global Sustainable Development Goals guarantee to provide decent working conditions and ensure gender fairness and the upliftment of women. The cause could be her socio-economic interferences tarnished by discrimination and her role as a worker and guardian of society. The number of women participating in the labour force is less because of this females are expected to take up jobs which are unsafe and underpaid and under such circumstances, complete growth remains out of range. The paper examines female participation in the labour force in India. The second part of the paper deals with to what extent marital status, educational level and age influence women's participation in the labour force and the last part of the paper discusses various regulations and strategies which can be instrumental in increasing women's participation in the Labour force.

Keywords: *Gender-discrimination, Female Participation, Gender, Employment.*

I. Introduction

The survey conducted by the Centre for Monitoring Indian Economy (CMIE) data depicts that the overall labour force participation rate (LFPR)of India has dropped to 40%.[1] The Labour force participation was 47 per cent in 2016 which was already low. Astonishingly, the labour participation rate (LPR) fell to 39.5 per cent in March 2022. The percentage of participation was lower equated to the 39.9 per cent participation rate documented in February. The lowest labour participation rate was recorded at 39.6 per cent in the second wave in June 2021. The LPR during April-June 2021 was recorded at 40 per cent. During March 2022 the labour force came down from 3.8 million to 428 million. Since July 2021 this was the lowest labour force in eight months. March 2022 recorded the lowest labour force participation in eight months. The decline in employment was noted from 1.4 million to 396 million.[2] As per the Ministry of Statistics & Programme Implementation (MOSPI), data on Employment and Unemployment is composed with the help of the Periodic Labour Force Survey. The latest PLFS for the year 2020-21 shows that the Worker Population Ratio (WPR) on a normal position basis for those who are of 15 years and above 15

* Assistant Professor of Law, Hidayatullah National Law University, Raipur.

1 Mahesh Vyas, "*The unemployment rate falls from grace, economic*" Outlook Apr. 11, 2022.

2 Yogima Seth Sharma, "*India's labour force shrinks by 3.8 million in March, lowest in eight months*", The Economic Times Apr.14,2022.

years for both males and females was 73.5% and 31.4% respectively.[3] As per the data available in 2022 of female labour participation or employability is at 51.44 per cent, where 41.25 per cent in 2021. It shows that only 9.2 crores of women are employable in urban India. Since the last three decades, female labour force participation has declined over the years.[4] Employed and those who are available for work are part of the Labour force. When we subtract people who are not part of the labour force from those who are participating, we will get an actual number of workers. As per the Periodic Labour Force Survey in the year 2019-20, only 28.2% of women in the 15-60 age group were in the labour force. Among this percentage, 30% of women were working without wages in households. As per the survey, only 65% of females who were employed in the labour force earn wages.[5] Apart from the rate of women's participation the size of the female workforce is also declining. In 2004-2005 the women's workforce was nearly 148.59 million and it came down to 104.1 million.[6] As per the Periodic Labour Force Survey quarterly, 2021 the women's Labour Force Participation rate had come down to 21.2 % in March 2021 compared to 21.9% in 2020. In the same year, the female unemployment rate amplified to 11.8% in March 2021 from 10.6% the year before. [7] As per the Centre for Monitoring Indian Economy (CMIE), there was a 0.9 million enhance in men's employment and women's jobs were cut down to 2.4 million in the employment map.[8] International Labour Organisation mentioned in its database ILOSTAT That India scores 121 out of 131 countries. India's rank is lower than Pakistan's.[9]

As compared to other developing countries the ratio of women who are employed or in search of work is very low and coming down over the years. There is heavy gender discrimination in the Indian economy. The high-profile posts are generally reserved for men and women are underrepresented. In India, the paid workforce is mainly male-dominated. Industries like Textiles, tobacco, education, domestic services and health are the area where the female

---

3 Government of India, Report: "*Women participation in workforce*" (Ministry of Labour & Employment 2022).

4 Business Wire India, "*Budget 2022 - India likely to see a jump in women workforce participation in urban India by 10 percent*" Business Standard, Feb. 02, 2022.

5 The World Bank Group, "*Labour force participation rate, female % of female population ages 15+)* modelled ILO Estimate) Dec.6,2022.

6 C Rangarajan, Padma Iyer Kaul, Seema, "*Where Is the Missing Labour Force*?" Vol.46, Issue No.39, Sept.24, 2011.

7 Government of India, Report: "*Dip in Unemployment Rate in Urban Areas*" (Ministry of Labour & Employment, Dec. 15, 2022).

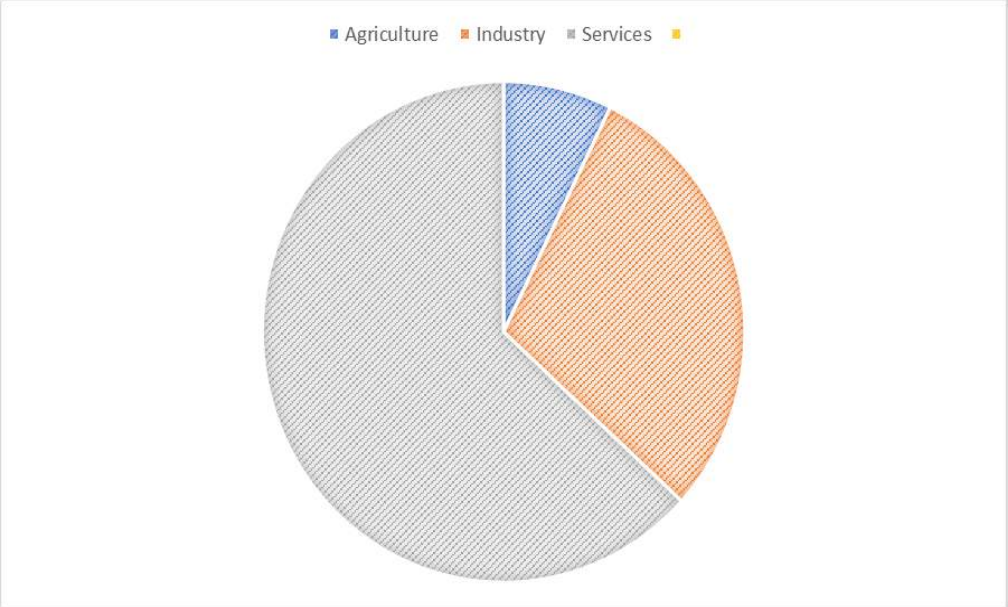
8 Samit Vartak, "*Know where the Indian economy stands and where it is likely headed*", Economic Outlook, Feb.8, 2023.

9 Statics On the Population and Labour Force Available At https://ilostat.ilo.org/topics /population-and-labour-force/ last visited on Feb.9 2023.

workforce remain concentrated.[10] The covid-19 pandemic has worsened the situation. [11] In 2018 as McKinsey reported that women contribute only 18% to India's GDP, which is considered to be the lowermost across the world.[12] The most recent Periodic Labour Force Surveys specify an additional decrease in participation. The participation rate during January-March 2021 was (16.9) per cent, the state of Himachal Pradesh reported (29.6), Tamil Nadu (24.2), Andhra Pradesh reported around (23.1) labour force participation in West Bengal reported (19.5) of female participation. The worst Female labour force participation was reported in Bihar, Delhi and Uttar Pradesh respectively 4.4, 8.8 and 9.7 per cent.[13]

Sectoral Assessment of Female Workforce Participation

Source: Sectoral distribution of workforce for women (2018-19) PLFS.



In general, the workforce is divided into three different segments Industry sector, allied service and the agriculture sector. The trend of workforce distribution is in general expectation is it will change from one sector to another. There is a huge transfer from agriculture to industry and then to the service sector. It is noted that labour productivity is much higher in the allied service and Industry sector compared to agriculture, the two Censuses and

[10] Supra Note 1.

[11] Rina Chandranan, "More than 40 percent of India's women confined to domestic work, report says", Reuters Mar.7,2016.

[12] Government of India, Periodic Labour Force Survey (PLFS) – Annual Report [July, 2019 – June, 2020] (Ministry of Statistics & Programme Implementation April 2017.)

[13] Government of India, Periodic Labour Force Survey (PLFS) – Annual Report [July, 2020 – June, 2021] (Ministry of Statistics & Programme Implementation April 2020.)

2004-2005 show a decay in the number and portion of workers between 2018–19 engaged in agriculture.[14]

As per the Gender perception, around 86.1 million women are engaged in the agricultural sector. Approximately are engaged in the service sector. In the year 2019-20 23.9 million, people were employed in construction and industry and 40 per cent of male workers are employed in agriculture. The service sector and industry engage 27 per cent. The workforce belongs to both areas rural and urban. Of the rural households 71 per cent and 29 per cent belong to urban households.[15] The trend reveals that maximum females are involved in the agriculture sector in rural areas. The other sectors where the maximum female participation is noted are the trade, and hospitality industries. In the urban area, the majority of female participation can be seen in manufacturing, hospitability construction, transport, storage and communications. In the year 2021, 88 million women in India were self-employed. The number of self-employed women increased by 9.4% in 2021. The country had the highest number of self-employed women in the year 2021, and the lowest in the year 2018. As per the World Bank data for 2020, 51.1% of women had engaged in the labour force and only 26.2% of Indian women are involved in the labour force.[16] As per the Economic Participation and Opportunity metric, the position of India is sixth. India's position as per the World Economic Forum's Global Gender Gap Report 2021only better than Syria, Pakistan, Iraq, Yemen and Afghanistan.[17]

In India, the choice for women to take part in employment is the outcome of different social and economic influences. According to ILO, some of the significant drivers for lower participation of women in the workforce include Fertility rates, marriageable age, educational attainment, Economic growth/repeated things and Urbanisation. As per the NSSO data women are employed in labour-intensive, informal work and home-based work which are considered low-productivity sectors. It is reported the percentage of females involved in agricultural activity came down The share from 88.1% in 1977-78 to 73.2% in 2017-18, but for the same period, the percentage of rural men engaged in agriculture declined from 80.6% to 55%. The number of jobs for females in the service sector was 35.7% in the year 1977-78 but it rose to 60.7% in 2017-18. In the service sector, women were engaged in nursing and teaching. Indian women engaged and contribute to the economy in different arrangements but unfortunately, much of their work is not recognized are taken for the official statics. Many Women's work activities within the household such as caring for old and young family members, cooking, and reproduction do not recognize by

[14] Supra foot note.13.
[15] Supra footnote.13.
[16] Supranote.5
[17] World Economic Forum, Report: The Global Risks Report 2023 ,18th Edition, Jan.2023.

the system of national accounts or other economic statics. [18] This is one of the reasons for Low female labour force participation. In India Women's involvement in labour force participation is decided to a great extent by religion, caste, marital status and other sociocultural norms these factors regulate at multi-level and restrict women's mobility and access to employment. The other hurdles are inadequate education, and discrimination in the workplace compel women to end up with non-wage employment or keep away from the labour force.[19]

In most South Asian countries, the socio-cultural rules control females' decision to join the labour market. The traditional view of men's role as the main breadwinner in the family impacts females' decision to participate in the workforce. It was stated that low education and sociocultural limits and household responsibilities regulate and limit female participation in formal work.[20] It was stated by Farzana Afridi in her article titled, 'What Determines Women's Labor Supply? The Role of Home Productivity and Social Norms', that social standards surrounding women play an important role and restraint on FLFP as it establishes the norm that women are case givers and belong to the home. National Family Health Survey displays that around 13% out of 50% are not permitted to visit village markets alone.[21] These restrictions are connected to the caste system. It is seen in a society that women from the upper caste are more likely to face social restrictions. There are various causes which contribute to a decline in women's participation the number of educated women has increased when it comes to the participation of girls in the education sector, especially after the right to education Act was enacted, Child labour declined and most important change in domestic responsible also contributed to the decline of FLFP.

Gender equality is a subject of great importance in India. It regulates the rights of men and women. The Constitution protects the rights of women and also provides the right to equality which is a fundamental right to every citizen who safeguards them from every kind of discrimination and different gender issues.

Absence of family backing

---

[18] Indrani Mazumdar, N Neetha, Indu Agnihotri," *Migration and Gender in India*," Vol XlViii, No 10 Economic & Political Weekly, Mar. 9, 2013.

[19] Thomas, J.J., M. P. Jayesh, "*Changes in India's Rural Labour Market in the 2000s: Evidence from the Census of India and the National Sample Survey*" ras.org. Vol. 6, No. 1 Jan.-June, 2016

[20] Isis Gaddis, Stephan Klasen, "*Economic Development, Structural Change, And Women's Labour Force Participation*" Journal of Population Economics, Springer; European Society for Population Economics, Vol. 27(3), 639-681, July.

[21] Farzana Afridi, Moni Sankar Bishnu, Kanika Mahajan, "*What Determines Women's Labor Supply*? The Role of Home Productivity and Social Norms", Journal of Demographic Economics, 2022.

Nearly 352 minutes spend by Indian women per day on domestic work which is 577% more than men (52 minutes). [22] As per ILO among the world, Indian men bear less than 10% of the load of unpaid house workers concerning time spent (an average of 31 minutes).[23] It is noticed across regions; women's employment is more expected to disturb due to marriage and children than men's. Family responsibilities put an extra burden on women. In the case of single motherhood, the care and financial burdens fall on the female's shoulder. Generally, as far as unpaid care work is concerned women are spending more time as compared to men. Across the globe, women spend a significant part of their day fulfilling the requirements of their reproductive and domestic roles. This responsibility is an addition to their job and puts an extra onus on women. The different distribution of unpaid work between men and women depicts a violation of females' right and create hurdle in their economic development. As per NSSO data women have mostly been embarking on labour-intensive, home-based, and informal work focused in low-productivity sectors.[24] A major percentage around 30% of females are engaged in domestic activities which will be considered outside of the labour force. The countries with a higher percentage of unpaid care work done by females have a higher percentage of females in defenceless jobs, which consumes energy and time. One of the reasons for gender gaps in the labour force is a disparity in the allotment of unpaid care work among men and women.

Gender Pay Gap

As per the Global Gender Gap Report 2018 conducted by World Economic Forum India scored 108th position out of 149 countries on the gender gap index. . In 2006 the World Economic Forum introduced the Global Gender Gap Index.[25] The purpose of it was to provide a structure for seizing the enormity of gender-based disparities and following their development over time. As per OECD data, the Gender wage gap explains the variance between the middle earnings of men and women as linked to the median wages of men.[26] In 1993-94 Indian women used to earn on average,48% less as compared to their male counterparts. As per labour force survey data of the National Sample Surveys Office in 2018-19, this gap came down to 28%. According to the Periodic Labour Force Survey (PLFS) 2020-21 the pandemic overturned decades of

---

22 Employment: Time spent in paid and unpaid work, by sex available at https://stats.oecd.org/index.aspx?queryid=54757 last visited on 7.2.2023.

23 Jacques Charmer, "*The Unpaid Care Work and the Labour Market An analysis of time use data based on the latest World Compilation of Time-use Surveys*" available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_732791 last visited on 7.2.23

24 Government of India, National Sample Survey Organisation 1970-2018.

25 PTI, "India ranks 108th in WEF gender gap index 2018", The Economic Times, Dec. 18, 2018.

26 Gender Wage Gap available at https://data.oecd.org/earnwage/gender-wage-gap.htm last visited on 24.1.23.

development and indicates an increase in the gap by 7% between 2018-19 and 2020-21. This contributed to lower female labour force participation. The gap is intensified by the structural and social domination that is faced by all women. One of the reasons behind this gender gap in labour workforce participation is the degenerated sex ratio. The present gender pay gap is huge. Females earned Rs 19 per cent as against men who are earning Rs 46.19 as per Monster Salary Index (MSI) in India. [27]The median net hourly wage for men was Rs 242.49 while women used to get Rs 196.3 in 2018.[28] For understanding the position of working women in India and their challenges the survey was conducted by Monster.com. In that survey around 71 per cent of men and almost 66 per cent of females accepted that gender parity shall be the major concern for their organisations. [29]As far as organised sectors are concerned the gap is considerable but the condition of women is pathetic in the unorganised sector. One of the reasons women are underpaid is that women labourers are not skilled and they don't have access to on-the-job training. Their double role as a family protector and bread earner forced them to grab very few chances of employment. Not only Wage gap disparity there are other challenges like sexual harassment and discrimination. As per the 2019 survey conducted by MSI, there is a notion around 46%of women think that they leave their employment after maternity leave. It is generally assumed that women do not perform well in leadership positions due to their family commitments and they are less serious about their jobs once they got married.

Rising Education, Declining Women's Employment

The significance and impacts of education on workforce participation for males and females are acknowledged by economists.[30] The data states that as far as education is concerned the population of working-age females has seen big differences between 1993-94 to 2011-12. This was the period when there was a rise in secondary and higher-educated women who were hesitant to participate in the labour force. Highly educated women are not very keen to join the labour force due to their family responsibilities and the female who are less educated face double challenges. Throughout all levels of education, the gender employment gaps are evident but it is clearer with less education. The gender employment gap in respect of OECD countries where there are less education stands at 19.5% which is anytime higher than the gap among highly educated

---

27 PTI, "Gender Pay Gap Still High, Women in India Earn 19% Less Than Men: Report", Business Today, Mar. 07, 2019.

28

29 Shobhita Dhar, "*Survey on Gender Finds Only 38% Indian Women Have Say In Defining Their Identity*", The Times of India, Oct. 11,2020.

30 Sanghamitra Kanjilal-Bhaduri Francesco Pastore, "*Returns to Education and Female Participation Nexus: Evidence from India*" Dec. 2017.

(8.5 percentage points) countries. [31] It has been well-known that at a very low-slung education level, the participation rate of women is high, at present this level of participation came down with improvements in education and a rise in a higher level of education. The women are also reluctant to work in unskilled jobs.

Gender inequality and discrimination are existing for a long time in our society. The recent Judgement of the Babita Puniya case depicts the discrimination in the military since long women officers were facing gender discrimination and equal admission to an appointment in the Indian Army.

In this case, the division bench of the Apex Court including Justice D Y Chandrachud and Justice Ajay Rastogi stated:

"The time has come for a realization that women officers in the Army are not adjuncts to a male-dominated establishment whose presence must be "tolerated" within narrow confines."[32]

The perception of gender equality is protected in the Indian Constitution. The Constitution empowers the state to effectively tackle discrimination against women with suitable methods. India since its fifth five-year plan has made a huge change in the trend of women's concerns from welfare to development to safeguard the rights and legal entitlements of women in 1990 the National Commission for Women was set up. For women's participation in the local bodies of Panchayats and Municipalities through the 73rd and 74th Amendments, reservations have been provided in the Indian Constitution.

II. Government's Initiatives

The notion of 'gender equality' is protected in our Indian Constitution. The Constitution directs the state to prohibit discrimination against women and adopt positive measures in favour of women. It is fact that as per the outline of our democratic structure, the policies, programmes and laws have been designed for women's advancement in different areas. Since 1974-78 from the fifth-year plan onwards we have witnessed a transformation in policies, programmes and laws there is a shift from women's welfare to development. To secure the rights the legal power of women in 1990 the government set up the National Commission for Women. The government brought major amendments to the Constitution and brought special reservations for women in the Panchayats and Municipalities for women to ensure their participation in the decision-maker at local levels. India signed many international conventions which confirm equal rights for women. The main among them is the

---

[31] Indicator A5 How does Educational Attainment Affect Participation in the Labour Market? Available at https://www.oecd-ilibrary.org/education/education-at-a-glance-2016/indicator-a5-how-does-educational-attainment-affect-participation-in-the- last visited on 30.1.23.

[32] Secretary of Defence Vs. Babita Puniya, Civil Appeal No. 1210 Of 2020. (India).

Convention on Elimination of All Forms of Discrimination Against Women (CEDAW),[33] The Mexico Plan of Action, The Nairobi Forward-Looking strategies, the Beijing Declaration as well as the Platform for Action (1995) and the Outcome Document adopted by the UNGA Session on Gender Equality and Development & Peace for the 21st century, titled "Further actions and initiatives to implement the Beijing Declaration and the Platform for Action" recognized by India. However, a wide gap still exists between the laws, plans, policies, programmes and reality of the position of women in India. Gender inequality establishes in different forms the most evident is the nonstop decline in female labour force participation in the previous few years. The total population of women is around 48.5%. Only 27.4% of females in India are working in the workforce. It was shocking to notice that in the year 2019-2024, females were holding only 14.39% of seats in the upper house (Lok Sabha) and 8.8% of women in the lower house (Rajya Sabha (2010).).

The percentage of female MLAs in the various legislative Assemblies was around 7.3% during 2011-15. From the data, it is evident that there is an underrepresentation of females in law-making bodies. At present we have only 14.39% of seats in the Lok Sabha. The reservation of 33 per cent seats for women is still pending. For the violation of fundamental rights state can be made responsible, only the State has a duty not to discriminate based on sex. There are fewer policies and laws concerning the prohibition of discrimination against a female by any enterprise or organization. In the Companies Act 2013, there are reservations for independent director there is very less female who is part of leadership positions, especially at the board level many positions are vacant. Many existing customs that spread discrimination against females are not covered under the legislative framework. The stress should be made to dampen biases and eradicate practices and customs that remove discrimination against women with the help of appropriate laws. Despite laws women hardly get equal opportunity in employment, lack of sufficient and quality crèches for children discourages females from joining the workforce. Apart from this, the socio-norms regarding female roles need to be changed. Through different stakeholders like educational institutions, social and political leaders, and religious and civil society organisations, females need to be aware of the equal participation of females in the progress of the nation. In the Apex Court, the sanctioned strength of female judges is 34 but at present only 4 female judges are there. The number of female Judges in the High Courts is 80 against the sanctioned post of 1113 Judges. The percentage of female judges in the high courts is 7.2% and 2.4% senior advocates in the Apex Court. The Election Commission Data depicts that out of the 543 seats, only 66 seats were held by women in the 16th Lok Sabha. During the 2009 elections, out of 8070

[33] Convention on Elimination of All Forms of Discrimination Against Women,2008.

candidates, only 556 were held by women. [34] The women reservation Bill, which introduces 33 per cent seats for the female candidate in the Parliament and State Assemblies introduced by the Deve Gowda government in 1996 but the government is failing to pass this bill.[35] India is known for its growing number of working women in the world. The United Development Program's human development Index ranks low on gender equality. As per the demographic data of 2017 Till 2050 among South Asian countries India shall have the worst sex ratio. [36] India is considered to be the highest level of sex discrimination at birth. As of 2011, the sex ratio is 918 girls for 1000 boys. Empowering girls needed intensive speculation and association. We require an immense awareness program to Educate the girl child. The Indian government had taken initiative in the form of programmes like 'Beti Bachao, Beti Padhao' to protect the girl child and provide them access to education. The Beti Bachao program's objectives are to protect the girl child against unnecessary biases and propose assistance to challenge female foeticide. For dropping the Gender Gap, the government has taken several initiatives in all areas Economic, Political, and Social.

As per the World Economic Forum's published report of 2021 concerning the Global Gender Gap India stands at 140 out of 156 countries with a 0.625 (out of 1) score. This Report offers a score after examining the gap between women and men in four areas, viz., the participation of women in and opportunity of women in Economic activity, the involvement in Educational Achievement, the status of survival and health and one of the factors is Political Empowerment. If we compare India's position to last year it has to reduce or come down mainly because of the Political Empowerment dimension.[37] The percentage of women participation came down to 13.5 per cent in politics the number of women ministers decreased to 9.1 per cent in 2021 from 23 per cent in 2019. The participation of women in Economic activities declined by 3 per cent as compared to 2019 and overall, the female labour force participation and opportunities came down to 22.3 per cent, "translating to a gender gap of 72 per cent."

In the education sector, India covered 96.2 per cent of the gender gap, despite of this the literacy comparison showcases more women are illiterate (34.2 per

---

[34] Election Results - Full Statistical Reports Available At https://Eci.Gov.In/Statistical-Report/Statistical-Reports/ Accessed On 26.12.22

[35] Revathi Krishnan, *"India Slips Two Spots To 131 On Human Development Index 2020, Ranks Low On Gender Equality*", The Print, Dec. 2020.

[36] William Joe, "*Probabilistic Projection of The Sex Ratio At Birth And Missing Female Births By State And Union Territory In India*." Aug.2022.

[37] Government of India, Report: 'Global Gender Gap Report' (Ministry of Women and Child Development Dec. 2021).

cent) than men 17.6 per cent.[38] It is from 2006 the Global Gender Gap Index has looked at and measured gender-based gaps because of four key areas Educational Attainment, Economic Participation and Opportunity, Political Empowerment and health and Survival and looking at development towards finishing these gaps over time.

It is fact that for attaining gender equality policymakers have to stress practical and transformative plans from different partners like governments, workers, employers' organisations and civil society organisations. Equal accessibility of resources is vital for achieving gender equality and also for sustainable development. During the Pandemic, we have witnessed high levels of unpaid domestic and care work taken care of by the women population. In India, before the pandemic, various studies recognized the unequal and gendered distribution of unpaid work. It has uncovered social inequality. Not only this even availing health facilities, safety, and security is unequal, and the majority of our people live in hazardous conditions. we see that it is standing on top of prevailing divides.[39] One of the major reasons behind entrenched gender inequality is the fact India is a male-dominated society. All areas like religion, society, economics and culture are dominated by males. The patriarchal society controls everything, the women's entry into the labour force is hampered by the patriarchal norms. These norms are passed on to different generations. It's reflected in narrow-minded practices such as violence against girls and women gender-specific abortions, and gender inequalities in education and health.

The government has been implementing various programs and policies to upsurge women's entry into the labour market like quotas based on gender and funding skills and occupational training-based programs. The need of the hour is to find out the reason for declination through research and strategy to bring them into the labour force. The possibility of cultivating skills and vocational training is important but many times these programs have proven to be unproductive.[40] It is fact that not all but only one-fifth of these trainees are engaged after one year of training in India. [41] The government keep on taking numerous steps to enhance women's participation in the labour force and the standard of their employment. The government defending requirements have been unified in the labour laws for equal opportunity and an affable work environment for women workers. The government enhanced paid maternity

---

38 Tanvi Akhauri, "*India Slips 28 Places in Global Gender Gap Index: Breaking Down Our Points Of Inequality*", She the people, March 31, 2021.

39 Prabha Kotiswaran, "*Revaluing Unpaid Work the Case of the Orunodoi Scheme in Assam*" available at https://www.epw.in/journal/2022/26-27 last visited on 3.2.23.

40 Mackenzie, "*David How Effective Are Active Labor Market Policies in Developing Countries? A Critical Review of Recent Evidence*", The World Bank Research Observer, Volume 32, Issue 2, Aug.2017.

41 Soledad Artiz Prillaman, "*Strength in Numbers: How Women's Groups Close India's Political Gender Gap*", American Journal of Political Science, Sept. 2021.

leave from 12 weeks to 26 weeks and also incorporated provisions for necessary crèche facilities in institutions having 50 or more employees in the Code on Social Security,2020.

It is argued by analysts that Indian women face legal and economic limitations in working. Many regulations try to help women in the workplace but their effect is contrary for example, to safeguard women's safety, the Factories (Amendment) Act of 1987, Section 66(1)(b) states that "no woman shall be required or allowed to work in any factory except between the hours of 6 a.m. and 7 p.m."[42] The Beedi and Cigar Workers (Conditions of Employment) Act, 1966 Section 25 specifies that "no woman shall be required or allowed to work in any industrial premise except between 6 a.m. and 7 p.m."[43] The Mines Act, 1952 Section 46(1)(b) forbids the employment of women in any mine above ground except between the hours of 6 a.m. and 7 p.m.[44] Now new Code brought Changes the women workers are now permitted to work in the aboveground mines including opencast. The women can work between 7 pm and 6 am, likewise, below-ground work they can work between 6 am and 7 pm in supervisory, technical and managerial work under the Code on Occupational Safety, Health and Working Conditions (OSH),2020. The provision incorporated in the Code on Wages,2019 that there shall be no discrimination in an institution or any unit thereof among workers on the ground of gender in matters relating to wages by the same employer, in respect of the same work or work of similar nature done by any employee. To enhance the employability of female workers, the Government is offering training to them through a network of Women's Industrial Training institutes, National Vocational Training Institutes and Regional Vocational Training Institutes. It is necessary to adopt a gender-disaggregated approach to skill gap investigation in developing vocational training. Employers need to encourage and accept females in diversified courses. As per the Survey females who got formal training in urban areas a mere 38.6 per cent were in the workforce, those who are unemployed are 10 per cent and around 51 per cent were not in the workforce. Mere training is not sufficient they should be in employment. In 2001 India introduced 'Gender-Budgeting' to keep gender perspective in programme formulations and policy. The purpose of such an initiative is to remove disparities in budgetary allocations.

To understand the cause of India's declining female labour force participation one needed perfect and up-to-date data. We need to conduct more surveys for additional data collection. No doubt every year the ministry conducts an employment survey but these surveys cannot be analysed because of lack of time and resultant not possible to understand the current labour market. One of

---

42 The Factories Act, Section 66(1) (b).

43 The Mines Act, 1952, Section 46(1)(b).

44 Beedi and Cigar Workers (Conditions of Employment) Act, 1966, Section 25.

the suggestions would be more regular and stringent surveys would certainly help policy creators to regulate programs and policies in response to economic surprises. In addition, such data will permit a better understanding of variances in the data. The surveys also help us to identify how India's 200 million women are involved in different household activities and their involvement in the labour market activities. The Centre and State government can take initiative in managing data collection, using the required technological structure as well as suitable motivations to collect good quality data towards a greater understanding of FLFP and how to bring them into Skill India and Make in India. To conclude it is fact that despite the reduction in fertility rates, growth in education, and strong economic growth, India's FLFP has deteriorated over current years, signifying effective action is essential to rise women's labour market participation and attachment.

Conclusion

Despite the many efforts at uplifting the socio-economic status of women in the country, glitches continue – the falling sex ratio and the upsurge in female foeticide and infanticide in certain parts of the country; increasing violence and domination against women as a straight significance of growing religious fundamentalism within the country; the growing helplessness and in formalisation of women workers as a result of liberalisation and globalisation; deteriorating health and education status; and a lack of contact to vital resources. To enhance female labour force participation, we have to work on five major areas - women should educate themselves for this we need to provide access to education. The women shall get opportunities to participate in decision-making for economic success. Sexual assault and violence must stop against women. End child marriages. By emphasizing these areas we will move or achieve parity between women and men in society. The state can implement these actions these are neither tough nor unachievable. The state encourages female participation in the labour force by initiating positive steps like demystifying gender stereotypes and safeguarding a safe and inclusive workable environment.

References

ARTICLES

- Mahesh Vyas, "*The unemployment rate falls from grace, economic*" Outlook Apr. 11, 2022.
- Yogima Seth Sharma, "*India's labour force shrinks by 3.8 million in March, lowest in eight months*", The Economic Times Apr.14,2022.
- Business Wire India, "*Budget 2022 - India likely to see a jump in women workforce participation in urban India by 10 percent*" Business Standard, Feb. 02, 2022.
- The World Bank Group, "*Labour force participation rate, female % of female population ages 15+)* modelled ILO Estimate) Dec.6,2022.

- C Rangarajan, Padma Iyer Kaul, Seema, "*Where Is the Missing Labour Force*?" Vol.46, Issue No.39, Sept.24, 2011.
- Samit Vartak, "*Know where the Indian economy stands and where it is likely headed*", Economic Outlook, Feb.8, 2023.
- Rina Chandranan, "More than 40 percent of India's women confined to domestic work, report says", Reuters Mar.7,2016.
- Indrani Mazumdar, N Neetha, Indu Agnihotri," *Migration and Gender in India*," Vol XlViii, No 10 Economic & Political Weekly, Mar. 9, 2013.
- Thomas, J.J., M. P. Jayesh, "*Changes in India's Rural Labour Market in the 2000s: Evidence from the Census of India and the National Sample Survey*" ras.org. Vol. 6, No. 1 Jan.-June, 2016
- Isis Gaddis, Stephan Klasen, "*Economic Development, Structural Change, And Women's Labour Force Participation*" Journal of Population Economics, Springer; European Society for Population Economics, Vol. 27(3), 639-681, July.
- Farzana Afridi, Moni Sankar Bishnu, Kanika Mahajan, "*What Determines Women's Labor Supply*? The Role of Home Productivity and Social Norms", Journal of Demographic Economics, 2022.
- PTI, "India ranks 108th in WEF gender gap index 2018", The Economic Times, Dec. 18, 2018.
- Gender Wage Gap available at https://data.oecd.org/earnwage/gender-wage-gap.htm last visited on 24.1.23.
- [1]PTI, "Gender Pay Gap Still High, Women in India Earn 19% Less Than Men: Report", Business Today, Mar. 07, 2019.
- Shobhita Dhar, "*Survey on Gender Finds Only 38% Indian Women Have Say In Defining Their Identity*", The Times of India, Oct. 11,2020.
- Sanghamitra Kanjilal-Bhaduri Francesco Pastore, "*Returns to Education and Female Participation Nexus: Evidence from India*" Dec. 2017.
- Revathi Krishnan, *"India Slips Two Spots To 131 On Human Development Index 2020, Ranks Low On Gender Equality*", The Print, Dec. 2020.
- Soledad Artiz Prillaman, "*Strength in Numbers: How Women's Groups Close India's Political Gender Gap*", American Journal of Political Science, Sept. 2021.
- Mackenzie, "*David How Effective Are Active Labor Market Policies in Developing Countries? A Critical Review of Recent Evidence*", The World Bank Research Observer, Volume 32, Issue 2, Aug.2017
- Tanvi Akhauri, "*India Slips 28 Places in Global Gender Gap Index: Breaking Down Our Points Of Inequality*", She the people, March 31, 2021.
- William Joe, "*Probabilistic Projection of The Sex Ratio At Birth And Missing Female Births By State And Union Territory In India*." Aug.2022.

REPORTS

- Government of India, Report: "*Women participation in workforce*" (Ministry of Labour & Employment 2022)
- Government of India, Report: "*Dip in Unemployment Rate in Urban Areas*" (Ministry of Labour & Employment, Dec. 15, 2022).

- Government of India, Periodic Labour Force Survey (PLFS) – Annual Report[July, 2019 – June, 2020](Ministry of Statistics & Programme Implementation April 2017.)
- Government of India, Periodic Labour Force Survey (PLFS) – Annual Report[July, 2020 – June, 2021](Ministry of Statistics & Programme Implementation April 2020.)
- World Economic Forum, Report: The Global Risks Report 2023 ,18th Edition, Jan.2023.
- Government of India, Report: 'Global Gender Gap Report' (Ministry of Women and Child Development Dec. 2021).

LEGISLATION

- Beedi and Cigar Workers (Conditions of Employment) Act, 1966
- The Mines Act, 1952
- The Factories Act, 1948

WEBSITES

- Statics On the Population and Labour Force Available At https://ilostat.ilo.org/topics/population-and-labour-force/ last visited on Feb.9 2023.
- Employment: Time spent in paid and unpaid work, by sex available at https://stats.oecd.org/index.aspx?queryid=54757 last visited on 7.2.2023.
- Jacques Charmer, "*The Unpaid Care Work and the Labour Market An analysis of time use data based on the latest World Compilation of Time-use Surveys*" available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_732791 last visited on 7.2.23
- Indicator A5 How does Educational Attainment Affect Participation in the Labour Market? Available at https://www.oecd-ilibrary.org/education/education-at-a-glance-2016/indicator-a5-how-does-educational-attainment-affect-participation-in-the-last visited on 30.1.23
- Election Results - Full Statistical Reports Available At https://Eci.Gov.In/Statistical-Report/Statistical-Reports/ Accessed On 26.12.22
- Prabha Kotiswaran, "*Revaluing Unpaid Work the Case of the Orunodoi Scheme in Assam*" available at https://www.epw.in/journal/2022/26-27 last visited on 3.2.23.

LIST OF CASES

- Civil Appeal No. 1210 Of 2020

CONSTITUTIONAL ECONOMICS IN INDIA: A SURVEY OF INDIAN CONSTITUTION

Dr. Rohtash*

Abstract

Constitutional Economics determines the national character of the economic life with corresponds to fundamental principles of Justice. The Constitution of India, especially, Preambular ideas along with Directive Principles of State Policy carries the aspirations of distributive justice including the socio-economic and political justice. Entry 35 carries the provision for managing the public debt, Entry 36 related to the foreign exchange, Entry 37 with respect to the foreign loans, Entry 38 contains the Reserve Bank of India i.e. central monetary authority, Entry 41 talks about the foreign trade, Entry 45 carries Banking, Entry 46 and 48 highlight the components of capital market, Entry 47 carries Insurance in the Union List, almost similar macroeconomic framework available for the States in the State List in the Seventh Schedule and under the scope of the Article of 246 of the Constitution. The Entry 20 of the Concurrent list contains the planning related to social and economic life of the contrary. The allocation and distribution of the societal resources shall rest upon the Finance Commission under Article 280 of the Constitution. In the light of the Article 112, we can call that the Parliamentary control financial matters. Moreover, the Constitution of India if we go deeper into the Constituent Assembly debate find that macroeconomic framework philosophy is blending of ancient Indian political economic ideas and both western modern Classical ideas and Keynesian activism. This research paper divided into three parts Part I related to Introduction of Constitutional Economics and highlights the Constitutional provisions related to the macroeconomic framework, Part II discuss the working of macroeconomic framework under Indian constitution and the legislative intent to achieve the macroeconomic stability by enacting The Fiscal Responsibility and Budget Management Act, 2003 and Part III suggestions and conclusion.

Keywords; *Constitutional Economics, Law & Development, Macroeconomic Stability, Socio-economic Justice, Constitutionalism*

I. INTRODUCTION

Constitutional economics determines and orders the economic life of a country through the affirmative and legislative action, especially, in the Constitution of India it is a blending of both directly ancient Indian political economic ideas, Keynesian activism and indirectly ideas of the Classical economics. Intuitional economics is the core idea behind the Keynesian activism while free and liberal market driven economics promoted by the Classicals. Constitutional economics is referred to as the school that deals with constitutionalism and economics. The term "constitutional economics" can be defined as "the set of institutional legal rules defined in the constitution that frame the activities and choices of political and economic agents."[1]

The impact of Constitutions on the economic performance is of a country due to following three reasons. *First,* A constitution can be unwritten or written, as some countries follow written while some follow unwritten constitutions but the

* Assistant Professor (Part Time) Department of Laws, Panjab University, Chandigarh.

1 GEOFFREY BRENNAN, THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY 166-178 (London: Cambridge University Press, 2008).

constitutional conventions play an important role in the working of the Constitutions. In the United States, the central monetary authority is not independent in US constitution but the board of the authority is enjoying independence through the executive. The *de facto* autonomy of the bank lies in the unwritten constitution conventions. The legislative intent is clear through the Act of legislation on the autonomy of the highest monetary authority. In comparison the United Kingdom exclusively relied on the constitutional convention as far as the highest monetary authority is concerned. *Second*, the constitutional framework may be effective of ineffective on the macroeconomic activities. The rigid set of principles, *for instance*, the formerly communist countries having fewer roles in managing political affairs related to economic activities. In other words, such rigid principles were imposing various constraints both on the society and on the market during the transition from traditional economic activities to modern one. These rigid set of principles also created hurdles to adopt free liberal competitive market structure and their political life from communism to democracy. The present day in these countries constitutions are ineffective to promote the socio-economic-cultural transition. The respect for the constitutions may be laid in the effectiveness of the constitution itself. *Third*, the countries having the traditions of the constitutionalism and institutionalism promote and facilitate the adoptability and adjustability according to the circumstances. Both the original and amended constitutional provisions and court decisions addressing the real problems of the society related to the economic life. The constitutional design, especially in the Europe, is sufficient to manage the macroeconomic activities, therefore the working of constitutions is subject to the constitution creation and development. [2]

The Preambular ideas in the Constitution of India affect the formulation of economic policy, economic policy outcome to some extent and macroeconomic performance to larger extent. There is a research gap in the field of *constitutional economics* that how the Constitutions shape the economic philosophy of respective country.[3] The nature of Constitutions determines the nature of the constitutional agencies and institutions, further both these are important determinants of the nature of the constitutional economics and accountability of governments especially in the matters of development economics. Constitutional economics manages, protects and engineers the contending and competing interests of different sections and among different communities.[4] Constitutional governance on macroeconomic framework signifies that Constitution provides rules of economic governance i.e. allocation of societal resources on such

---

2 Jon Elster, *The Impact of Constitution on Economic Performance*, Proceedings of the World Bank Annual Conference on Development Economics, 1994

3 Torsten Person and Guido Tabellini, *Constitutions and Economic Policy* 18 The Journal of Economic Perspective 75, 76-78 (2004).

4 Charles A. Beard, An Economic Interpretation of The Constitution of The United States 98-127 (The Macmillan Company, New York, 1935).

principles that suitable to circumstances and promotes economic growth in the short run and economic development in the long run, set the ideas of economic planning either designed that development through the free and liberal market driven or centrally planned economy (welfare approach).Variations in Constitutions with respect to direct and indirect democracy determine the nature and function of the constitutional, political and economic institutions. Constitutional patterns are different according to the national, regional and local conditions of the societies.[5] The constitutional macroeconomic features i.e. budgetary procedures, allocation and distribution of societal resources with respect to vertical and horizontal arrangements, monetary and fiscal policy framework, fiscal discipline and fiscal behaviour of the State, national and sub-national institutions and public debt management maximise the welfare of the society and laid down the guiding principles for potential macroeconomic outcome.[6] The available research work suggests that mostly democratic constitutions carry the Classical economic rights i.e. freedom of trade, of contract, to carry any business, occupation and profession and of private property. Thus, the vision of the constitutional economics, at micro-level, is to provide the fundamental and legal rights against the economic inequalities and creating equal economic opportunities for all. Constitutional economic governance implies that there are rules of economic governance i.e. the constitutional agencies must act exactly within the power conferred on them.[7] The constitutional rules of economic governance that executive relied upon the legislative prescriptions. The subordinate constitutional functionaries must act within the rules of constitutional governance and legislative intent and prescriptions.[8] Thus, Constitutions matter for economic performance to the extent that they promote stability, accountability, and credibility.

Constitutional failure occurs, whenever the constitutional provisions or lack of rule of law, resultantly, uncertainty may appear on the executive decisions or orders and leadership in power failed to honor and carries the framework for the macroeconomic stability. The abutment of the citizenry' rights by the executive or by the decree rather than through the legislative process. The transfer of power is the positively correlated with the macroeconomic stability. The empirical evidences show that most of the constitution failure occurs due to lack of the enforcement mechanism do not exists. Constitutional success requires strong institutions and constitutional agencies to enforcement the constitutional mandate

---

5 Alesina, Aiberto and Robert Perotti, *The Political Economy of Budget Deficits* 42 IMF Staff Papers 1, 11-26 (1995).

6 B. Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets* 14 Journal of Institutional and Theoretical Economics 286 (320-309).

7 Persson, Torsten and Guido Tabellini, *Constitutional Rules and Economic Policy Outcomes* 11 American Economic Review 166, 174-189 (2004).

8 POTERBA, JAMES & JURGEN VON HAGEN, FISCAL RULES AND FISCAL PERFORMANCE 56 (University of Chicago Press, Chicago, 1999).

and develops constitutional cultures to promote respect and honor for the constitutional conventions.[9] Constitutionalism can enhance economic efficiency by solving the problem of time inconsistency. It has been argued by many writers that individuals tend to discount the future by a non exponential function that causes them to deviate from their plans. Conceived of as a requirement for a supermajority, constitutionalism can promote economic efficiency.

Constitutional choice depends on the leadership in the power that how the choices revel or the decisions are made by paying due consideration to nature of the coming generations in the matters of the both financial and economic stability. Farsightedness and ability to predict and to make decision to prevent the uncertainty and ability to predict the long run trends of the future generational behavior will influence the macroeconomic stability. The constitutional choices differ from the political and administrative day to day decision. The constitutional choices are ideal in the theory but in the practice these must having the capability and ability to address the competing and contending interests of the society in the both short run and long run. The success of the Constitution also depend that decisions are not based on the self interest but problem solving one. The modern economic analysis is very difficult to predict and revels the choices accordingly. Moreover, the constitutional choices are the reality in context to put the economic life of the country in order. Modern economies are globalised themselves and well interconnected in order to carry day to day economic activities in the competitive global economies. The success of the constitution is in the matters of the macroeconomic stability depending upon both market institutions and public institutions to coordinate with global economy.[10]

Constitutional economics reveals constitutional choices on the basis of the either *egalitarian* or *utilitarian* philosophy to manage the competing and contending interests of the society. It sets the path in the lights of the basic and foundational principles in the Constitution to achieve the aims, aspirations and hopes the constitution carries. Constitutional economics is a sub-discipline of the political economy and in the foundations of the socio-economic analysis. The traditional economic ideas based analysis is attempted to explain the revealing of choices by the economic agents. The economic agents interact within the legal framework, institutional mechanisms, political culture & environment and constitutional structures. Such interaction is effective, productive and sustainable if the above-said framework, mechanism, culture and structure are suitable to circumstances. The constitutional economic analysis is alternative to the extra legal-institutional framework to the traditional economic analysis. Therefore, the constitutional economic analysis requires better standard set of constitutional defined rules and

---

[9] Levmore, S., *Bicameralism: When are two decisions better than one?* 12 International Review of Law and Economics 141, 145-16 (1992).

[10] J. BUCHANAN, THE ECONOMICS AND THE ETHICS OF CONSTITUTIONAL ORDER, 113-128 (University of Michigan Press 1991).

conventions to carry. The central task to coordinate the economic activities subject to the scarcity of resources and constraints imposed by constitutional conventions and defined rules. The constitutional economists recommended the policy design and policy advise to the leadership in power.[11] Constitutional economics, therefore, is important to prevent constitution itself.

THE NATURE OF CONSTITUTIONAL ECONOMICS IN INDIA: India adopted a normative welfare constitution. The Preamble to the Constitution of India and the Directive Principles of State Policy carry the vision of the Economic justice and certainly welfare character of the State but not directed a particular model for socio-economic development. The choice for choosing the development path the Constitution is rest upon the leadership of the time that to manage scarce resource in the best interest of the national economic life and suitable to circumstances. At the commencement of the Constitution there were mainly two popularly economic models US Model i.e. free and liberal market driven model and USSR Model i.e. centrally planned model, the former followed by the countries to the large extent and the letter a very small. The leadership of the day was chose the centrally planned model in the best interest of the country and obviously suitable to Indian conditions with expanding the role of the market subject to the given conditions. The constitutional economics in Indian Constitution targeted both normative individualism and positivity individualism.

II. LAW, DEVELOMENT AND PLANNING:

The Planning Commission of India was the nodal agency of the Union government for the purpose long run and short plans for the socio-economic transformation of the country. The Planning Commission was the extra-constitutional institution. Therefore in the planning in India is under control of the executive to a larger extent. The Constitution is salient on the economic planning. The economic development is largely strategise and the ideas carry by the Preamble, the Directive Principles of the State Policy and on the wisdom and farsightedness of the leadership in power.

The Part IV the Directive Principles of State Policy and the Entry 20 of the Concurrent List laid down the foundations, directions and patterns of *Development Economic* in India. Directive Principles of State policy are the fundamental principles to the public policy. Part IV monitors the national economy. Article 39(b) contains the idea of socialist economy by prohibiting the monopoly of material resources that these can sub-serve the common good in the best interests of the nation. Article 39(c) carries the aspiration of the economic system that trickled down the benefits of both economic growth and development. The final effect of these two constitutional provisions reflected the idea of *Distributive Justice* in India. The Directive Principles of State Policy

[11] Ludwing Van Den Hauwe, *Constitutional Economics* 16 The Elgar Companion to Law and Economics 83, 93-97 (1999).

desirous to laid down the ideal economic democracy in India and will try to reach on the same. The constituent assembly paid due considerations to various way to reach the economic democracy i.e. individualistic, socialistic or communistic ideas and patterns. The founding fathers of the constitution were well known and understood the historic conditions and reality of the society that both exploiters and exploited classes existing. So in this background and such reality the Constitution of India, especially the Preamble and Part III lay down the foundation of the social and economic democracy in the country and the Statesmen, leadership and government in power chooses the economic policies to achieve the social and economic democracy. The Entry 20 of the Concurrent List is one of the sources of development economic in India. The Constitution is silent on the development planning. It is very strange that the Constitution gives welfare State but does not provide the framework for economic and development planning. All such planning that is very important to reach the objective and discharge the functions of the welfare State. The Constitution carries such welfare Character of welfare State without the rule of law. The Constitution left behind the economic, social and development planning totally on the bureaucratic control. Resultantly Indian economist followed, imported and applied the western economic ideas to the Indian conditions. The experience and empirical study of the Indian planning suggest that these ideas were partial success in the economic history of Independent India.[12]

Article 39(d), 42, 43 and 43A reflects the nature of *Labour Economics* in India. Article 39(d) talks about equal pay for equal work lays emphasis on the eliminations of gender discrimination in the wages. Article 42 contains that State shall maintains the humanly working conditions and paid due consideration to the women worker too. Article 43 carries concepts of living wage, fair wage and minimum wages. It stated that State should by enacting suitable legislature and economic organisation promote the full enjoyment of leisure, standard of life and cultural opportunities for Labour class of the Society. Article 43A highlights the participation of the worker in the management of the industries. The combined effect of these Articles founds and directs the welfare labour economic in India. The 73rd and 74th Constitutional Amendments give constitutional status to the Local self governments in India. These amendments institutionalise the socio-economic justice and materialising the idea of inclusive growth. The Article 243G and 243W carries the power, authority and responsibilities of the *Panchayati Raj* Institutions and Municipalities preparation for plans and implementation of scheme for economic development respectively.[13]

---

[12] L. Viswanathan, R.V. Anuradha, *Liberalisation, Public Interest and Indian Constitution* 36 Journal of the Indian Law Institute 378, 380-381 (1994).

[13] Chanchal Kumar Singh, *Economic Policies and Political Processes in the Pursuit of Constitutional Goals* 53 Journal of the Indian Law Institute 333, 339-342 (2011).

Article 112 of the Constitution of India is the legitimate source of the *Fiscal policy*. It provides the annual financial statement popularly termed as *Budget* before the Parliament. The said Article establishes the supremacy of the Parliament especially the House of the People through the vote of the House over the financial matters. This supremacy suggests that public finance only rests upon the House of the people neither the President nor the concerned minister under authority is competent on the same. The matters of the Public Finance are great core of concerns. Therefore, the lower house of the parliament is the watchdog and sole custodian of all the financial matter of the Union. The said Article beautifully designed by the Constituent Assembly certain matters under the expenditure *charged upon* category the Consolidated Fund of India related to the independency of the Constitutional Institutions keeps beyond the party politics and all other matters left remains on the confidence of the House. So, the Article 112 designed in order to strengthen economic and financial stability, to achieve proper funding of economic development and in the interest of the national credibility.[14]

The Article 265 and 266 related to the *Economics of Public Finance.* Article 265 makes it clear that taxation can only be levied only by an authority of law or Act of Legislation. The purpose of the taxation in Indian Constitution is clear, that like developed economies and mature countries experienced, levied for the purpose of the development projects and promoting the public utility character of the State. The legislation cannot delegate the power to levy the taxation in India. Therefore, taxation is the legal compulsory payment in India. The Article 266 talks about the revenues of India and the revenues of the States named as the Consolidated Fund of India and the Consolidated fund of the States keeping their custody with President of India and the Governor of the States respectively. All revenues received by the Union and the States credited in the respective fund. The Parliamentary procedures for withdrawing any amount of money through the Article 116 i.e. 'Vote on Account' and 'Vote on Credit' from the above said funds. Therefore, the *Public Money* is controlled by legislation.

ROLE OF FINANCE COMMISSION, RESERVE BANK OF INDIA AND COMPTROLLER AND AUDITOR GENERAL OF INDIA: The Article 280 stated the Finance Commission of India is for advising and recommending the with regard to the finances of the Union and of the States. Fiscal federalism is the core objective of the Finance commission and empowering the backward States in the Union by transferring financial resources on the basis of the principles developed since the commencement of the commission that suits to circumstance and reaches to the objectives. Cooperative Federalism is the principle behind the working of the Commission by reducing the regional imbalances including vertical and horizontal imbalances in the development due to geographical and

[14] Constituent Assembly of India, Debates, Part I (10 June, 1949).

economical barriers. The recommendations of the Finance Commission strengthen the fiscal stability of the country and fiscal relations of the Union with the States. The commission plays an important role to balance the contending interests and competing claims of the States and of the Union. The elements of equity can be traced in the history of the Finance Commission in the Horizontal distribution. Moreover, the Horizontal imbalances have been addressed by the commission through the Grants-in-Aid on the basis in the need of assistance to the States. The combined effect of the Articles 112, 265 and 280 is that *Economics of Public Finance* shall be governed within the Constitutional framework.[15]

Entry 38 of the Union List carries the provision of the central monetary authority i.e. The Reserve Bank of India. This entry is the source of the *Monetary Economics*. The overall Economic Policy of a country is divided into the fiscal and monetary policy. The objective behind the establishment of the Reserve Bank of India is to guide and guard the monetary interests and stability.[16] The conduct and determination of the effective monetary policy depend upon the independency of the central monetary authority. The independency of the monetary authority needs that the economic interests of the country beyond the party politics and the government cannot finance itself without limits through money creation.[17] The Reserve Bank of India finances the Government through the credit creation and the borrower and the banker to the government. All such functions require the independency of the highest monetary authority. The Preamble of the Reserve Bank of India Act, 1934 stated one of the objectives that to make the monetary standards that suit to the Indian conditions.[18] The participatory style of the Reserve Bank is not independent in India in practice. The conflicts in the short term objectives in the economic policy may inflict certainly and considerable loss to economy therefore the integrated economic policies are possibly the best solution to such conflicts. The independency of the Reserve Bank of India is matter of the great core of concern both in practice and in the Constitution to achieve the macroeconomic stability. Placing Reserve Bank of India in the Entry 38 in the Union List putting under the control of the legislative and executive is not a good idea. This position and status of the highest Bank is always under political pressure. It clear from the experiences of all developed economies that monetary system management is the long term macroeconomic impacts. If any injury caused to the monetary system it will take

---

15 S. P. Aiyer, *India's Emerging Co-operative Federalism* 21 The Indian Journal of Political Science 307, 309-311 (1960).

16 Dr. C. Rangarajan, Governor, Reserve Bank of India, *Tenth M.G. Kutty Memorial Lecture* (1993).

17 Grilli, Vittorio, Donato Masciandaro and Guido Tabellini, *Political and monetary Institutions and Public Financial Policies in Industrialised Countries* 13 Economic Policy 341, 366-375 (1991).

18 The Preamble, Reserve Bank of India Act, 1934.

a long time to recourse. Therefore the strong monetary system requires the autonomous centrally monetary authority.[19] The Article 148 stated that there shall be the Comptroller and Auditor General of India for supervising and audit the public money, public accounts, resources and all the expenditure made from the Consolidated Fund of India. All the three Constitutional institutions play an important role in the macroeconomic stability in India. The Finance Commission and the Comptroller and Auditor General of India are independent constitutional agencies while Reserve Bank of India is putting under the Union List lacking the independency. The suggestion related to such challenge will discuss in the conclusion of the paper.[20]

III. THE FISCAL RESPONSIBILITY AND BUDGET MANAGEMENT ACT, 2003 AND FISCAL DISCIPLINE:

The fiscal position of country is one of the major determinants of the macroeconomic stability, pace of economic development and fiscal sustainability.[21] The said Act is the legislative intent on the fiscal prudence in India. The Act ensures the inter-generational equity in the fiscal affairs of the Union by imposing restriction on the Government through the legislative actions. The Act further lays emphasis on the macroeconomic stability in the long run by removing the fiscal impediments and makes suitable conditions for the effective conduct of the monetary policy. The public debt management is the sole objective for achieving the fiscal sustainability by putting the limits on the borrowings, debt and deficits of the Union government through the fiscal procedural commitments such as medium term expenditure statement and fiscal management principles.[22]Section 3 of the Act mandatory that central government lay down the Fiscal; Policy Statement before the Parliament including the Statements on mid-term fiscal policy review, medium term expenditure and macroeconomic framework. The scrutiny by the Parliament of the fiscal policy must contains taxation, expenditure, lending, borrowings, investment and pricing of administrative goods that have potential implications on budget. Section 4 carries the Fiscal Management Principles to develop fiscal discipline in the country by limiting the fiscal deficit, Government debt. Section 6 promotes the fiscal transparency by taking suitable measures in fiscal operations in public interest. The Central Government shall give monthly statement of its accounts. The Act carries the provisions that Central Government systematically carried out the functioning of all fiscal indicators such as fiscal deficit, primary deficit,

---

19 N. L. Mitra and Rakesh Kumar, *Constitutional Response to Good Governance and Macro-economic Management* 42 Journal of the Indian Law Institute 335, 340-369 (2000).

20 J. V. M. Sharma, *Federal Fiscal Relations in India: Issue of Horizontal* Transfer 32 Economic and Political Weekly 1719, 1714- 1716 (1997).

21 Alt, James and Robert Lowry, *Divided Government, Fiscal Institutions and Budget Deficits: Evidences from the States* 88 American Political Science Review 811, 816-826 (1994).

22 The Preamble, The Fiscal Responsibility and Budget Management Act, 2003.

budgetary deficit and revenue deficit. The assessment of and fiscal policy strategy is the foundations of the inter-generational equity on fiscal sustainability.[23]

IV. SUGGESTIONS AND CONCLUSION:

The research work suggests the conclusion that the economic analysis of constitution depends and grows in the light political economy of the country. There is wider scope in the Constitution of India to adopt the international practices on institutional framework for macroeconomic stability. The legitimacy of the macroeconomic institutions should be sourced from the constitution. In other words, economic institutional can only be grow with strict rule of constitutions and under strict financial discipline. Institutional discipline depends upon the constitutional conventions and judicial articulation.

The Constitutional Governance in India depends upon the strengths, independency and functioning of the Constitutional agencies and *subordinate constitutional institutions*. The constitutional framework is on macroeconomic left on the wisdom of the leadership in power and the functioning of executive. The constitutional rules and framework on the macroeconomic stability and management is sufficient but do not have sufficient implementation machinery. India *adopted a normative welfare constitution* that requires the affirmative action of the State to reach on the Preambular aims and to materialise Preambular ideas to carry Preambular aspirations. The macroeconomic experience in the post constitutional era draws conclusion that India need rule of law based independent economic institutions with more autonomy such as Finance Commission and Reserve Bank of India. The populist political measures should not interfere and impact the decision making monetary. The reserve Bank of India should be acted outside the control of legislation and party politics but within the constitutional framework and integrated with aims and objective of the fiscal policy. The Macroeconomic framework should be coordinated within the constitutional framework. Even the constitution provides the sufficient framework for fiscal transparency but it needs to be strengthened. The institutional quality is one of determinants of the macroeconomic stability. Maintain the macroeconomic stability is not easy task when the economy is globalised. Public spending and of such audit-ability is a matter of great core of concern.

The financial prudence that loan amount must be used only for the purpose of increasing the assets and income earning capacity of the it must not be used for public debt financing nor moreover, meeting revenue expenditure. So, in this background the Fiscal Responsibility and Budget Management Act, 2003 enacted by the Parliament but due to Global recession in the period of 2008-2012 this Act amended again in the year of 2022. Therefore, the history of Fiscal Responsibility and Budget Management Act, 2003 suggest that the government is not serious both in commitment and in practice to achieve the fiscal sustainability in India.

[23] Ursula Hicks, *Fiscal Federalism in India* 34 Public Finance Analysis 358, 360-361 (1976)

There is a long way to go to realise fiscal responsibilities and management of the budget. The constitutional economics can grow only with independency and autonomy of the economic institutions. Therefore, we need strong and rule of law based institutions in order to achieve macroeconomic stability. The constitutional framework on the macroeconomic stability requires the predictability and less uncertainty in both the short and long run economic decisions.

The conventional understanding of economic analysis is necessary but not sufficient condition for the economic analysis of constitution. It requires the able leadership and farsightedness and well institutional coordination in the economic decision making and efficient enforcement mechanism in order to achieve the macroeconomic stability. The structural changes in the modern economic activities must be addressed through the institutional framework. The power of decision making must be shared across the different level of institutions, it must not be concentrated in the few hands or institutions. The constitutional framework must institutionalise the economic activity in order to reveal the resources and economic choices for the macroeconomic stability.

The constitution must ensure that politicians are held responsible for their actions and that there is a mechanism for voting them out of office. Accountability affects both economic efficiency and security. If the executive is not subject to sanctions, it cannot make credible promises. Also, threats to basic security may not be deflected if those responsible cannot be held accountable. The constitution must provide a framework that is relatively stable and immune to strategic manipulation. The provision of basic rights should not be at the mercy of changing majorities. By ensuing stability of the basic framework, the constitution discourages wasteful rent-seeking. Also, stability and non manipulability of the political system are needed in order to underwrite accountability. The constitution should facilitate and encourage long-term planning by citizens by protecting them against retroactive legislation and taxation and against expropriation without full compensation. Stability is a necessary but insufficient condition for predictability. The constitutional rule should address the institutional discipline and institutional accountability. Institutionalism is the core essence of the constitutional economics and great core of concern for the constitutional success in the matters of macroeconomic stability. Constitutional rules and constitutional agencies appear to have greater economic consequences.

ANNEXURE

Constitutional Economics in Indian: A survey of Indian Constitution

	Constitutional Provisions	**Subject Matter**

Fiscal Economics	**Article 112, 113, 114, 115 & 116**	**Annual Financial Statement, (Budget)** Article 112 of the Constitution of India is the legitimate source of the ***Fiscal policy*.** It provides the annual financial statement popularly termed as ***Budget*** before the Parliament. The said Article establishes the supremacy of the Parliament especially the House of the People through the vote of the House over the financial matters. The said Article beautifully designed by the Constituent Assembly certain matters under the expenditure *charged upon* category the Consolidated Fund of India related to the independency of the Constitutional Institutions keeps beyond the party politics and all other matters left remains on the confidence of the House.
	Article 265 & 266	These Articles related to the ***Economics of Public Finance.*** Article 265 makes it clear that taxation can only be levied only by an authority of law or Act of Legislation. The Article 266 talks about the revenues of India and the revenues of the States named as the Consolidated Fund of India and the Consolidated fund of the States keeping their custody with President of India and the Governor of the States respectively.
Monetary Economics (Money, Banking & Insurance)	**Entry 38, 43, 45, 46 & 47 of the Union List**	It carries the provision of the central monetary authority i.e. The Reserve Bank of India. This entry is the source of the ***Monetary Economics*.** The objective behind the establishment of the Reserve Bank of India is to guide and guard the monetary interests and stability. The Reserve Bank of India finances the Government through the credit creation and the borrower and the banker to the government. All such functions require the independency of the highest monetary authority, the highest monetary authority.
Economic Development & Planning	**Preamble, Article 39(b) & 39(c), Article 243G, 243W and 243ZI, Entry 20 of the Concurrent List**	The Part IV the Directive Principles of State Policy and the Entry 20 of the Concurrent List laid down the foundations, directions and patterns of ***Development Economic*** in India. The final effect of Article 39(b) & 39(c) reflected the idea of ***Distributive Justice*** in India. These Constitutional

		Provisions carry the ideas of economic and social justice, formulation of plans for economic and social development.
Labour Economics	**Article 39(d), 42, 43 & 43A**	Reflects the nature of ***Labour Economics*** in India, equal pay for equal work lays emphasis on the eliminations of gender discrimination in the wages, concepts of living wage, fair wage and minimum wages, the participation of the worker in the management of the industries.
Finance Commission of India *(Economics of Public Finance)*	**Article 280 & 281**	Finance Commission of India is for advising and recommending the with regard to the finances of the Union and of the States. ***Fiscal federalism, Cooperative Federalism.***
Public Borrowings	**Article 292 & 293, Entry 35 & 37 of the Union List**	Borrowings by the Union upon the Consolidated Fund of India and borrowings by the States upon the Consolidated Fund of States and management of public debt.
Trade, Commerce & International Trade	**Article 301, 302,303,304,305 & 307 Entry, 41 & 42 if the Union List**	The promotion of the trade, its nature, development within the territory of India and among the States.
Capital & Stock Market	**Entry 48 of the Union List**	Future and Forward markets, Foreign Direct Investment and Foreign Institutional Investment

References

Books

- Robert M . Maclver, *Democracy and the Economic Challenge* (Alfred A. Knopf, New York, 2nd edn., 1952).
- Stefan Voigt, Constitutional *Economics: A Primer* (Cambridge University Press, New York, 1st edn., 2020).
- **Geoffrey Brennan, Hartmut Kliemt, Robert D. Tollison, Methods *and Morals in Constitutional Economics Essays in memory of James M. Buchanan* (Springer Berlin Heidelberg, New York 3rd edn., 2013).**
- **Francisco Cabrillo, Miguel A. Puchades-Navarro, *Constitutional Economics and Public Institutions: Essays in Honour of José Casas Pardo* (Edward Elgar, Cheltenham,1st edn., 2013).**
- **Tony Prosser, *The Economic Constitution* (Oxford University Press, Oxford 1st edn., 2014)**

- James D. Gwartney, Richard E. Wagner, *Public Choice and Constitutional Economics* (JAI Press, Michigan 1st edn., 1988)
- **Geoffrey Brennan, James M. Buchanan, *The Reason of Rules Constitutional Political Economy*** (Cambridge University Press, New York, 1st edn., 2008)
- Charles A. Beard, *An Economic Interpretation of The Constitution of The United States* (The Macmillan Company, New York, 1935).
- Poterba, James and Jurgen Von Hagen, *Fiscal Rules and Fiscal Performance* (University of Chicago Press, Chicago, 1999).
- J. Buchanan, The *Economics and the Ethics of Constitutional Order*, (University of Michigan Press, Michigan 1st edn., 1991).

Research Papers

- Jon Elster, "The Impact of Constitution on Economic Performance", Proceedings of the World Bank Annual Conference on Development Economics, (1994).
- Torsten Person and Guido Tabellini, "Constitutions and Economic Policy" 18 *The Journal of Economic Perspective* 75 (2004).
- Alesina, Aiberto and Robert Perotti, The Political Economy of Budget Deficits 42 IMF Staff Papers 12 (1995).
- B. Weingast, "Constitutions as Governance Structures: The Political Foundations of Secure Markets" 14 *Journal of Institutional and Theoretical Economics* 286 (1999).
- Persson, Torsten and Guido Tabellini, "Constitutional Rules and Economic Policy Outcomes" 11 *American Economic Review* 166 (2004).
- Levmore, S., "Bicameralism: When are two decisions better than one?" 12 *International Review of Law and Economics* 141(1992).
- **Ludwing Van Den Hauwe, "Constitutional Economics" 16 *The Elgar Companion to Law and Economics* 83 (1999).**
- Dr. C. Rangarajan, Governor, Reserve Bank of India, Tenth M.G. Kutty Memorial Lecture (1993).
- Grilli, Vittorio, Donato Masciandaro and Guido Tabellini, "Political and monetary Institutions and Public Financial Policies in Industrialised Countries" 13 *Economic Policy* 341 (1991).
- N. L. Mitra and Rakesh Kumar, "Constitutional Response to Good Governance and Macro-economic Management" 42 *Journal of the Indian Law Institute* 335 (2000).
- Alt, James and Robert Lowry, "Divided Government, Fiscal Institutions and Budget Deficits: Evidences from the States" 88 *American Political Science Review* 811 (1994).

THE IMPORTANCE OF FUNDAMENTAL DUTIES FOR INDIA'S UNITY AND DEVELOPMENT

Homa Bansal*

Abstract

In India, the concept of fundamental duties has been practiced since the Vedic Age. Fundamental duties are just as equal as fundamental rights and they cannot be separated from each other. The fundamental duties remind citizens that they have some fundamental duties to follow, just as they have some fundamental rights to enjoy. The fundamental duties encompass promoting harmony and a sense of brotherhood among all people in India, protecting the natural environment, and striving towards personal and collective excellence. Although these duties are not legally enforceable, they are an essential component of India's democratic society and help to reinforce the values and ideals upon which it is based.

Fundamental duties are an integral part of the Constitution of India. The Fundamental Duties enshrined in Article 51A of the Indian Constitution embody the highest ideals advocated by great political leaders, philosophers, and social reformers. These duties aim to educate Indian citizens about their responsibilities towards society and emphasize the importance of civic engagement. By encouraging citizens to act in a responsible and ethical manner, the Fundamental Duties also serve as a deterrent against anti-national and antisocial behavior.

Research Questions:

1. *Why are fundamental duties important in India's development?*
2. *How do fundamental duties promote national unity and integrity?*
3. *What are the gaps in the Indian constitution that need to be addressed to ensure the effective implementation of fundamental duties?*

Research Methodology: *The research methodology used in this paper is qualitative research. It involves an extensive review of literature, including relevant articles, books, and government reports. The paper analyzes the data gathered from these sources to provide insights into the importance of fundamental duties for India's development. The study will also analyze relevant case studies to illustrate the impact of fundamental duties on society. The findings of this paper will contribute to the existing literature on fundamental duties and their impact on India's development. The study aims to provide insights into the challenges faced in implementing fundamental duties and recommendations to address them.*

KEYWORD: *Fundamental Duties, Society, 42nd Amendment, Article 51A.*

I. INTRODUCTION

India is a land rich of diverse cultures where 1.4 billion people of different race, religions caste, caste and creeds resides. The government realized that there was a need to maintain harmony and brotherhood among all the citizens of India. In mid-70s, the government established some fundamental obligations that all Indian people must follow. The primary goals of basic obligations were to play a crucial role in preserving our country's unity, integrity, and sovereignty. Fundamental Duties are regarded as one of the innovative characteristics given to the constitution by the 42nd amendment in 1976. The fundamental duties constituted in the Constitution for citizens are useful in one's daily life.

* Assistant Professor, University Institute of Laws, Panjab University Regional Centre, Ludhiana.

India is in an exclusive club of few countries in the world that has a concept of both the rights and duties ingrained in its constitution which needs to be followed by a citizen since ancient times. A lot of religious texts like *Ramayana* and *Bhagwad Gita* asks people to perform their duties i.e., "*Kartavyas".* The Fundamental duties, if followed properly by the citizen of India, will resolve almost every problem there is within Indian society. Even though the government of India has not fully able to implement these duties in these 5 decades, it is constantly working towards Implementing these duties so that the citizens of India can live in peace and harmony. Three factors contribute to the formation of a nation.

1. Noble ideals.
2. Citizens' ability to achieve their aspirations.
3. The third and most important factor is each citizen's persistent and unwavering endeavour to strive for greatness and move his nation forward.

To that end, the fundamental duties serve as a cornerstone of humility and patriotism[1].

Rights and duties must coexists. Rights in the absence of duties will result in anarchy and chaos. The Fundamental Duties foster a strong feeling of duty towards the society while acting as a continual reminder of the national objectives as a whole. There is still a lot of people who due to the lack of education, doesn't know their duties towards other nation and their nation as a whole. Recently, Mr. Narendra Modi, the P.M. of India has recognized the seriousness of this issue and stated that "Fundamental Duties, along with the Constitution must be taught to our children in school."[2]

II. ORIGIN OF FUNDAMENTAL DUTIES IN INDIA

Indians followed an unwritten set of duties which they owes towards their elders, fellow citizens, nation/kingdom and environment since time immemorial. The concept of *kartavya* (the performance of one's duty towards the society as a whole) frequently comes up in ancient texts like *Ramayana* or *Bhagwad Gita.* In verse 47 of Chapter 2 of *Bhagwad Gita*, Lord Krishna says to Arjuna "*karmaṇy-evādhikāras te mā phaleṣhu kadāchana, mā karma-phala-hetur bhūr mā te saṅgo 'stvakarmaṇi*" which means "You have a right to perform your prescribed duties, but you are not entitled to the fruits of your actions. Never

---

1 Report: Government of India, "*National Commission to Review the Working of the Constitution*", 373 (Ministry of Law, Justice and Company Affairs, 2001)

2 Hindustan Times Correspondant, "Citizens must fulfil fundamental duties, says PM Modi on Constitution Day", The Hindustan Times, (August 18, 2021, 01:56 PM IST), https://www.hindustantimes.com/india-news/time-now-to-focus-on-our-duties-pm-modi-on-constitution-day/story-2PO9Av8PmLfpxu3abImenO.html

consider yourself to be the cause of the results of your activities, nor be attached to inaction."[3]

Great thinkers like Swami Vivekananda and great leaders like Mahatma Gandhi, Netaji Subhash Chandra Bose were also in the support of Fundamental duties. Our Constitution's founding fathers were distinguished jurists and individuals of brilliant mind and vivid insight. They did not consider it vital to include a special Chapter on fundamental duties while framing the Constitution, maybe because they considered people' rights to obey certain obligations in any civilised community. It was added via 42nd amendment act[4] to the constitution upon the recommendation of Swaran Singh Committee. It was passed by both the houses in the middle of November in 1976 in the middle of emergency. The concept of fundamental duties was borrowed from the Constitution of the Soviet Russia. The only democratic state that included the duties of a citizen until then was Japan. Japan was the only democratic state to include citizen duties until then. The chapter three of the Japanese Constitution mentions the Rights and Duties of the Japanese citizens. The Constitution of Japan, which was established in 1947, is based on three principles: the sovereignty of the people, respect for fundamental human rights, and the renunciation of war as a means of ensuring peace. The Indian Constitution includes fundamental duties in Article 51A. Originally, there were only ten fundamental duties. The 86th Amendment included one more duty to the Fundamental Duties in 2002.

IMPORTANCE OF FUNDAMENTAL DUTIES

The fundamental duties were incorporated into the constitution as an attempt to balance a person's civic "freedoms" with their duties as a citizens. While exercising Fundamental Rights, citizens are also required to perform these duties. Article 51A, which has been in the Constitution for almost 45 years, is supported by all major parties. These responsibilities serve as a reminder to Indian citizens that, while they have the rights granted to them by the constitution, they also have responsibilities to their country and their fellow citizens. They also act as a reminder to citizens to avoid doing anything anti-social or anti-national, such as insulting the national anthem or flag.

The duties enshrined in Article 51A also serves as an inspiration to the citizen for promoting a sense of discipline, love, respect and commitment towards each other and public property. These duties are created to make a citizen feel that each and every citizen needs to contribute in achieving the national goals of reducing inequality, crimes and other social evils. All Indian citizens have an ethical obligation to safeguard India's patriotism and togetherness. The absence of a punishment for failing to fulfil Fundamental Duties does not diminish their

[3] *Shrimad Bhagwad Gita*, Chapter2, Verse 47

[4] The Constitution (Forty-Second Amendment) Act, 1976

significance. Fundamental Duties are our Constitution's conscience, and they should be seen as fundamental values that all Indian citizens must maintain.

Article 51A, in addition to offering guidance, acts as a motivation for residents to foster a feeling of discipline, love, respect, and devotion for one another and public property. Smt. Indira Gandhi, the late Prime Minister, recognised the importance of fundamental tasks. She stated that, "The moral value of fundamental duties would not be to smother rights but to establish a democratic balance by making people conscious of their duties equally as they are conscious of their rights".[5]

From time to time, the Supreme Court stated the significance of fundamental duties in numerous landmark cases. In the case of Dr Dasarathi v. State of Andhra Pradesh[6], the Supreme Court has pointed out that according to Article 51A (j), every citizen has a duty to strive for excellence in all realms of individual and collective actions so that the nation as a whole can continually advance to greater levels of endeavour and success.

Fundamental duties are required for the successful operation of all Indian legislation. Fundamental duties assist the government in explaining the citizen's responsibility to society, other citizens, and the nation. These responsibilities also assist the Indian government in maintaining the country's peaceful atmosphere. It also contributes to the nation's development and expansion. Furthermore, fundamental duties motivate people to conserve natural and public resources. It also assists the government of India in making the best use of all available resources. Fundamental duties also increase a law's constitutional viability.

HOW FUNDAMENTAL DUTIES COMPLEMENT FUNDAMENTAL RIGHTS

Fundamental duties must go in harmony with fundamental rights. According to Article 21 of the Indian Constitution, every child is entitled to be educated. Clause (k) Article 51A makes it mandatory for the parents to provide education to their children between ages six and fourteen. This illustrates how fundamental rights and obligations reinforce one another. However, in today's environment, people are only interested in their rights and are hesitant to discharge their responsibilities. There are several examples of people misusing their fundamental rights while neglecting their duties.

The Supreme Court has upheld the constitutionality of several acts that further the purposes indicated in the fundamental duties. These duties are not only

---

5 *Fundamental Duties.* The Hans India. (September 9, 2021, 4:36 AM IST), https://www.thehansindia.com/posts/index/Hans/2016-07-25/Fundamental-Duties/244609

6 Dr. Dasarathi v. State of Andhra Pradesh, AIR 1985 AP 136 (India).

necessary for all people, but they can also be enforced by the Court through various laws. The Supreme Court has repeatedly urged the state to guarantee that these responsibilities be carried out efficiently. The Supreme Court ruled in the case of Javed vs. State of Haryana[7] that fundamental duties entrenched in Article 51A of the Indian Constitution and the DPSP enshrined in Part IV of the Constitution must be construed in conformity with fundamental rights. They cannot be read alone.

Fundamental rights and responsibilities, as well as fundamental rights and fundamental duties, must be balanced. Prioritizing only fundamental rights or fundamental duties would create an imbalance. Duty is viewed as the ultimate source of right. While assessing the reasonableness of legislative limits on the enjoyment of various freedoms, the courts consider the fundamental duties enshrined in Article 51A, The court further stated that tasks such as maintaining the country's sovereignty, unity, and integrity, as well as safeguarding public property, are not inconsequential.[8]

The recent examples of violating these fundamental duties can be seen daily on the news where any political leaders frequently use religion in order to please various religious minorities. While doing so, they breach their fundamental obligation under Article 51A(c), which states that "the power, unity, and integrity of the country" must be safeguarded by its citizens. They split society into many religions and castes. Another example is the anti-national slogans chanted by the students of various universities in New Delhi and stone pelting while chanting anti-national slogans in Jammu and Kashmir.

ENFORCEABILITY OF FUNDAMENTAL DUTIES

Besides citizens, the legislative and executive branches of governmental and non-governmental institution must also follow the fundamental duties. Duties are only fulfilled by citizens when they are compelled to do so by law or are influenced by their role models. Therefore, enacting appropriate legislation to make it compulsory for citizens to comply with their duties is essential. The obligations should only come into effect if legislative and judicial requirements exist, but fundamental duties continue to be violated. The legislative void must be filled when existing laws fall short and do not enforce the necessary discipline.

Added by the 42nd Amendment to the Constitution, duties now become statutory obligations and are enforceable by law. If these duties are not satisfied, the Indian Parliament has the authority to impose consequences through legislation. The kind and person against whom these responsibilities are imposed determine the success of this provision. There can be no appropriate enforcement of duties if

7 Javed v. State of Haryana, (2003) 8 SCC 369 (India).

8 Re: Ramlila Maidan Incident, (2012) 5 SCC 123 (India).

everyone is unaware of them. Many individuals are politically uninformed of what they owe to society and their nation because they are legally illiterate. A house, college, or another venue might serve as the site of mediation for the fulfillment of duties. It has been established that rights without obligations are licenses for rights holders to do anything, and this leads to choice in a society where rights become the norm. Enforcing fundamental duties is therefore a way of balancing or equalizing the rights of individuals in society.

Rights bring people joy, but duties makes a citizen to act responsible with those duties. It is not unconstitutional since it infringes on rights. Our rights are not absolute and must always be limited, as are our essential duties. A basic role of fundamental duties is to warn individuals against anti-social behaviour that is disrespectful to the state. The enforcement of basic obligations constrains those who breach the norm of state respect. Fundamental duties create civic discipline and state unity. They assist people attain their national goals by encouraging residents to actively participate in numerous activities and civic tasks rather than just watching.

There are a number of laws that impose obligations, provide specifications, punish, and make citizens follow their basic duties, including the Prevention of Insults to National Honour Act, 1951, the Protection of Civil Rights Act, 1955, the Unlawful Activities (Prevention) Act, 1967, the Representation of the People Act, 1951, and the Environment (Protection) Act, 1986. Thus, fundamental duties, while non-justiciable, strive to accomplish responsible citizenship and civic society standards in some way.

III. FURTHER DEVELOPMENTS IN THE FUNDAMENTAL DUTIES

1. Justice Verma Committee Report Of 1999

Under the chairmanship of Justice J.S. Verma, the Committee to Operationalise Suggestions to Teach Fundamental Duties to Indians. Among other things, Verma argued that Article 51-A should protect the obligation to vote at elections, participate in democratic governance, and pay taxes.[9] The maibn purpose of this report was to attain an accountable citizenry via way of means of emphasising on attention concerning the provisions of essential obligations and offering the identical via medium of schooling.

2. National Commission To Review The Working Of Constitution

This advisory panel was established to pass expert suggestions and comments on how citizens' fundamental duties can be realized, determining the critical question of whether Article 51-A has served its purpose and, if not, where people have precisely failed to implement it. According to the Commission, "the first and foremost step required by the Union and State Governments is to sensitise

[9] Justice Verma Committee Report, 1998.

the public and establish a broad knowledge of the provisions of fundamental obligations among citizens along the lines advocated by the Justice Verma Committee." Thus, essential tasks, while non-justiciable, strive to accomplish responsible citizenship and civic society standards in some way.

3. 86th Amendment

The duties which were introduced to the Constitution after 1976, were integrated vide 86th Amendment Act[10] is contained in Article 51-A(k) – that in accordance with article 21-A of the Constitution of India, every parent should provide their children between the ages of 6-14 with opportunity to get formal education.

Protection of Fundamental Duties via Indian Penal Code, 1860.

The Indian Penal Code, 1860 contains several provision which punish the breach of the fundamental duties contained under Article 51A, (c), (e) and (i) of the Constitution of India. The respected provisions of Indian Penal Code are mentioned below:-

a) Offences against the State

Sections 121, 121A, 122, 123, 124A, 131, and 132 of the Indian Penal Code punish anyone who wages war, attempts to wage war, conspires to wage war, collects men, arms, or ammunition in preparation for war, conceals the existence of any design to wage war, incites hatred or contempt, excites disaffection, abets mutiny, or seduces a soldier, sailor, or airman. Furthermore, Sections 153-A and 153-B of the Indian Penal Code provide for punishment of an offender who disturbs or attempts to disturb the peace and unity of the nation by causing dissension, animosity, or hate between different groups of people in India.

These sections are intended to develop the feeling of shared brotherhood in order to safeguard India's unity. It is true that, like liberty, unity exists in people's thoughts, which may be influenced and contaminated by instilling feelings of animosity, anger, and ill-will by disagreeable signs, speech, or writings. Thus, the clause punishes a person who fails to execute his responsibility of supporting India's unity, sovereignty, and integrity and causes or attempts to cause disaffection or dissension among the people. However, it is difficult to penalise someone ipso facto under this clause. Many circumstances must be examined, and a balance must be maintained between the basic freedom of speech and expression and the appropriate constraints placed on freedom before penalising a person under the foregoing clauses. While punishing disagreeable stuff, care must be made to ensure that writings that honestly attempt to emphasise the truth about any crucial conditions or happenings are not penalised, regardless of whether the writings have generated an environment of high tension and hostility. Knowing the truth is a fundamental human right. Even Article 51A (e)

[10] Ins. by Constitution (86th Amendment) Act, 2002

of the Indian Constitution makes it a duty for every Indian citizen to "cultivate the scientific temper, humanism, and the spirit of inquiry and reformation."[11].

b) Offences relating to religion

India is a secular nation. In English, the term 'secular' denotes 'free of religion.' However, secularism took on a very new connotation in India. It does not signify 'lack of faith' in this context, but rather 'equal acceptance for all religions.' The word 'secular' was inserted to the Indian Constitution by the 42nd Amendment in order to prevent religious or communal unrest. Sections 295, 295-A, 296, 297, and 298 of the Indian Penal Code penalise any person who attempts to undermine national unity by inciting religious hatred. The provisions penalise anybody who offends religious sensibilities by harming or defiling a place of worship, outraging religious feelings, disturbing religious assembly, trespassing on burial grounds, expressing improper anti-religious comments, and so on.

Provision under Indian Penal Code punishing the breach of duty to renounce the practices derogatory to the dignity of women mentioned under Article 51A (e) of the Constitution of India

The founders of the Constitution sought to guarantee that their inhabitants lived in dignity at the time of their independence. They intended to improve women's standing and made concerted attempts to provide them with numerous rights. The preamble to the Constitution expresses the framers' desire for equitable treatment of all people. Everyone, regardless of caste, colour, or gender, should have equal position and opportunities. Furthermore, Articles 14 and 15 of the Indian Constitution ensure equality to all and ban gender discrimination in any form. The basic responsibility was introduced to the Constitution by the 42nd Amendment in 1976, which lays duty on every citizen of India to renounce acts detrimental to the dignity of women. Therefore, one person’s duty to respect a woman corresponds with the woman’s fundamental right of equality. If her right is violated she can claim her remedy from the Courts.

The following sections of Indian Penal Code protect the rights of women. The sections provide for penalizing any person who commit offences against women[12]:-

- Kidnapping (Sec 359,360,366)
- Eve Teasing (Sec 509)
- Chain snatching (Sec 378)
- Rape (Sec 376,376A,376B,376C,376D)
- Sexual Harassment (Sec 354A)
- Domestic Violence (Sec 498A)

---

11 Justice E.S. Venkatramaiah, *The Citizen and Constitutional Duties*, 32 CMLJ 15 (1996).

12 Crimes Against Women – A Legal Perspective, (September 29,2021, 6:50) PMhttps://www.indianbarassociation.org/crimes-against-women-a-legal-perspective/.

- Honour Killing (Sec 299-304)
- Cyber Crimes (Bullying, Abuse, Violence, Pornography) (354A, 354B, 354C)
- Dowry deaths (Sec 304-B)
- Acid Attacks (Sec 326A, 326B)
- Stalking (Sec 354D)
- Assault to outrage modesty (Sec 354, 354B)

IV. FACTORS AFFECTING THE PERFORMANCE OF FUNDAMENTAL DUTIES

Some of the following elements that contribute to the failure to execute the fundamental duties enumerated Article 51A of the Indian Constitution are as follows**:**

1. Illiteracy and Poverty

Poverty is both a burden and a cancer to Indian society. A poor individual who is reliant on others for his daily bread is frequently exploited by society. Politicians are frequently observed toying with their emotions during elections by making false promises. Poverty frequently leads to illiteracy. Such a person is so preoccupied and overwhelmed by fulfilling the essentials of life that he cannot be expected to do his obligations and ponder larger concerns such as "brotherhood," "environmental preservation," "following the constitution," and so on. A person who is unaware of his rights cannot be expected to carry out his obligations and responsibilities. The government should run educational initiatives to educate individuals about their rights and keep them from being exploited. At the same time, individuals must be made aware of their responsibilities.[13]

The primary reason for failure to perform fundamental duties is illiteracy paired with poverty. Only an educated individual can comprehend things from a larger perspective. He can distinguish between right and wrong actions more clearly. He understands that if he acts selfishly, he would have to pay a price for it sooner or later. Only a well-educated individual can consider 'sustainable' growth and development. Education develops a guy into a nice human being who is responsible for his responsibilities. However, formal education does not serve the aforementioned aim. Education must be dynamic in order to effect change. It should address the nation's current social, political, and economic challenges. The spirit of scientific temper should be developed via education, as should the

[13] Poverty alleviation programmes, (August 29, 2021, 8:50 PM) https://niti.gov.in /planningcommission.gov.in/docs/plans/mta/mta-9702/mta-ch6.pdf.

habit of thinking clearly and rationally. Education assists a person in attaining intellectual pinnacle by lighting the torch for the pursuit of perfection.[14]

Unfortunately, while formal education is offered in schools and universities, even educated persons are unaware of their rights and responsibilities. The state should take targeted steps to educate residents about their constitutional rights. The Delhi State Legal Service Authority (DSLSA) has begun one such initiative in which students from both public and private schools are educated on a variety of socio-legal issues such as sexual offences, juvenile justice, gender inequality, teen pregnancy, drugs, traffic rules, constitutional fundamental rights and duties, and so on. More such steps are needed so that every person understands what recourse they have if their rights are violated and what obligations they have as a responsible citizen of India.

2. Corruption

Corruption is another important factor preventing India from reaching its full potential. Corruption occurs when the bearer of an office abuses his position and influence to acquire selfish, unlawful benefits. Today, corruption has permeated so deeply into administrative operations that the vast majority of officials and employees are believed to be corrupt. People are so disillusioned and saddened by corruption that they are not afraid to publicly blame top officials. People have formed the impression that the task will only be completed through bribes. This depresses the public, who, in turn, neglects to do their duties. As a result, a never-ending vicious spiral forms. Thus, in order to reestablish public faith in the government, corruption must be eradicated from the system.[15]

3. Regional and Communal Conflict

Regional and sectarian differences are another impediment to fulfilling the primary obligation of promoting brotherhood and togetherness among the people of India. It is every citizen's responsibility to preserve the national interest and prevent any behaviour that might jeopardize the aforementioned goal. However, as a result of regional and community conflict, the emphasis changes to preserving one's own interests. In such a heated environment, national interests are frequently overlooked in favour of personal interests. As a result, individuals must be educated to safeguard the national interest regardless of their ethnicity, religion, caste, language, or other characteristics.[16]

Despite the fact that Fundamental Duties are important for the growth of the nation, they are not rigidly enforced by the residents of the nation. There is a

---

[14] Maharashtra State Board of Secondary and Higher Education v. K.S. Gandhi 1991 (2) SCC 716.

[15] D.N. Saxena, Citizenship Development and Fundamental Duties 95(Abhinav Publications, New Delhi, 1st edn.,1988).

[16] M.C.Mehta v. Union of India, AIR 1115, 1998 SCR (20) 530..

need to enforce these obligations so that they benefit all segments of society. However, enforcing these duties is not that straightforward. More than effective rules and regulations, persons' behavioral patterns must be altered. An honest and responsible citizen is urgently needed.

4. Indiscipline

Discipline is essential for the administration's smooth and continual operation. It makes the life of a person more organized. A person who follows all of the rules and regulations is less likely to make a mistake. Laws and regulations that are thoughtfully crafted and well implemented can bring about greatness in society. However, indiscipline has been deeply ingrained in our conduct, and we rarely adhere to any norms or laws. People in India are frequently uninterested in their jobs. The situation has deteriorated to the point that individuals prefer to be referred to as idlers rather than committed earnest workers. One of the most important causes for acquiring the attribute of indiscipline is a lack of any type of incentive or punishment for executing or failing to execute one's responsibility. Discipline is the primary cause of many bad habits, including corruption, bribery, and tardiness. To change people's attitudes and behaviours, an intensive educational programme is necessary.[17]

V. CRITICISM OF FUNDAMENTAL DUTIES

Even though obliging fundamental duties are essential for the betterment of our society, there are a lot of critics of fundamental duties. The critics of fundamental duties gives various reasons for why fundamental duties were not needed to be added to the constitution, some of those reasons are:

1. Critics do not consider that the fundamental duties should be exhaustive. In their view, this list does not include other essential and important duties, such as paying taxes and voting, which were also suggested by the Swaran Singh Committee.

2. In fundamental duties, complex terms like composite culture cannot be understood by the average person. It is impossible to establish the true meaning of a statement due to a lack of understanding. it can be difficult for a person who doesn't have a higher education.

3. Critics believe that the Constitution should not include these duties since they cannot be enforced by a court.

[17] Causes Of Indiscipline, (September 26, 2021, 3:30 PM), https://www.whatishumanresource.com/Causes-Of-Indiscipline .

4. Certain duties are obligatory for citizens, such as honoring the national flag and singing the national anthem. Therefore, these duties did not need to be incorporated into the Constitution.

5. Due to the fact that these duties are placed in Part IV-A of the Indian Constitution, which can be considered as an additional part of the DPSP, they are not given much attention. According to critics, it should given an equal value as fundamental rights.

VI. HOW CAN THE GOVERNMENT INSPIRE THE CITIZENS TO OBLIGATE TO THEIR FUNDAMENTAL DUTIES

The fundamental duties were added in the constitution in 1976, but a citizen will not fulfill its duty towards other people and the society if he is too busy trying to feed his family on minimum wages. There are some things the government can do to inspire the citizens of India to fulfill their fundamental duties-

1. Strict actions must be taken against the corrupt officers and politicians which manipulates the poor and illiterate citizens. It will demotivate the corrupt leaders to do any unethical act while holding a chair in the government office, but it will give a chance to better and honest officers to do their duty without any objections. It will ultimately improves the standards of living of a common citizen, which will make the citizen aware of their duties towards other citizens.

2. The penal system of India is reformative on the paper, but there are not a lot of detention centers which genuinely follow the concept of reformation of prisoners. The government need to keep an eye on the reformation of prisoners. If a person in the prison gets reformed, the society itself starts to get better. Take an example of Norway, where the prisoners lives in a humane conditions in the detention centers and after completing their sentences the prisoner gets reformed and stops committing the crime. Ultimately, the crime rates diminished sharply in Norway.[18]

3. The government of India must resolve the religion and cast based problems instead of using it as an issue for gaining votes. This issue is by far the biggest impediment in the prosperous growth of India. People hate and degrade each other and their religion without any reason. The government should implement the rules which supports the ideology of "*Vasudhaiv Kutumbhakam*" which means "the whole world is our family". If the government can successfully implement this ideology in India, implementing the fundamental duties will be easy.

---

[18] *How Norway turns criminals into good neighbours*. BBC News (September 26, 2021, 5:15 PM), https://www.bbc.com/news/stories-48885846

4. The poverty and illiteracy is the biggest reason why the citizen are unaware of their duties. The government, since the past 3 decades, is working constantly to remove these issues. The overall literacy rate of our country is about 75% and India is the 5th largest economy in the world. If this is compared to the time when India gained its independence, it is a huge difference, but the government is moving very slowly to resolve these issues. The government needs to increase its speed to resolve these problems so that a citizen can learn and follow these fundamental duties.

VII. CONCLUSION

Fundamental duties are critical to India's development. Fundamental Duties define an individual's responsibilities to society, fellow citizens, and the nation. It also cautions citizens against anti-national and anti-social behaviour and punishes those who engage in such behaviour. It serves an important role in preserving national unity and integrity. It also fosters a sense of belonging among Indian citizens to their country. They accurately explain each individual's position as an ideal citizen, which also helps Indian individuals grow and achieve success. It keeps the country in unity and tranquilly. The primary goals of fundamental duties were to give citizens with a precise set of norms that they must follow. The adoption of fundamental duties was done to safeguard Indian citizens' sovereignty, secularism, unity, and fraternity. It's worth noting that our Indian government recognised the necessity for fundamental duties and enacted them in order to foster unity among its citizens. Although there are a few gaps in our constitution that should be addressed, they are the greatest way to keep India unified for the time being.

The fact that the fundamental duties are not enforceable does not diminish its importance. Many requirements have been created as separate laws and made legally enforceable, but this does not undermine the significance of the other duties stated in Article 51A. It is not simply the duty of the state to provide everything in the constitution; People also need to be aware of their role in society. Also, duties such as paying taxes and exercising the right to vote must be performed by all citizens of the country who earn money. These responsibilities give everyone a sense of social duty. These fundamental duties are usually taken into account when interpreting fundamental rights. Fundamental duties forms an essential part of an independent society since they not only allow individuals to exercise their rights but also remind them of their responsibilities to the nation. Because the duties have the term 'fundamental' attached to them, they are highly important and must be followed by everyone.

REFERENCES:

Books:

- Mathur, S. (2022). *Fundamental Duties: A Study on Sensibility Among Citizens of India*.

- Desai, F. P., & Prajapati, N. (2022). *Relating the Philosophy of Siva Gita to Amish Tripathi's Immortals of Meluha the Mythic and Heroic Tale of Dharma and Karma. Shodhasamhita*, 65-95.
- Gaur, S., & Sood, A. (2019). *Fundamental Duties: Time to Reconsider the Eclipsed Part of Constitution*. Supremo Amicus, 11, 367.
- Pedra, A. S. A., *et. El.*. *The fundamental duty of disobeying a corrupt and oppressive government*.
- Devi, P. (2021). *Fundamental Duties under Indian Constitution and their Enforceability: A Study*. Galaxy International Interdisciplinary Research Journal, *9*(12), 417-425.
- Rao, V. K. R. V., & Singh, S. S. (1976). *Fundamental Duties and Directive Principles Under the Proposed Amendments to the Constitution [with Concluding remarks by the Chairman Sardar Swaran Singh]*. India International Centre Quarterly, 3(4), 266-284.

CASE COMMENTS ON 'JANHIT ABHIYAN VS UNION OF INDIA' FAMOUSLY KNOWN AS 'EWS RESERVATION CASE'

Dipti Bansal*

Abstract

In 2019, a Bill was introduced in the Parliament for having Economically Weaker Section (EWS) quota for those sections of society who are not getting any benefit from the earlier reservation. The Parliament passed the 103rd Amendment to the Constitution of India and thus 10% quota was fixed for those who though belong to general category but are economically weak.

This 103rd amendment added new clause 6 with explanation to Article 15 and clause 6 to Article 16 of the constitution of India wherein it provided for a maximum of ten percent reservation for "the economically weaker sections" of citizens other than "the Scheduled Castes", "the Scheduled Tribes" and the non-creamy layer of "the Other Backward Classes" in Educational Institutions and jobs.

The 103rd Constitutional Amendment Act was challenged before the Apex Court by way of filing of different writs petitions/SLPs/transferred cases. The Constitution Bench of Hon'ble Supreme Court vide four separate judgments under Janhit Abhiyan V. Union of India, 2022 dated 07.11.2022 upheld the constitutional validity of the 103rd amendment vide 3:2 split verdict. The question before the court was whether the EWS reservation would be violating the basic structure of the Indian Constitution and whether it breaches the fifty percent ceiling of reservations as per already settled Supreme Court Judgments.

The Hon'ble court held that the 10% reservation would give due importance and acknowledgment to those poor from upper castes, who always aspire to get some help, but were always ignored from the governmental benefits in the name of being from upper caste. Further, this reservation would be a welcoming step in removing the stigma that reservation is always granted according to caste.

Keywords: *Reservation, Indra Sawhney, 103rd Amendment, EWS, Basic Structure*

I. COMMENTS ON JUDGMENT 'JANHIT ABHIYAN VS UNION OF INDIA' FAMOUSLY KNOWN AS 'EWS RESERVATION' BY SUPREME COURT OF INDIA.

It's true that India got independence from British rule way back in 1947 but it is also well-known fact that even after 75 years still certain sections of our community are facing discrimination on the basis of colour, caste, religion, sex, status, etc. The underprivileged people in any form are still discriminated and exploited at the hands of the privileged sections of the society. The drafters of our constitution dreamt of an egalitarian state where all are considered equal, regardless of caste, gender, race, religion, or age. This idea led to the formation of one of the Fundamental Rights known as Right to Equality enshrined under Articles 14-16 of the Constitution of India. Article 14 of the Constitution provides two types of equality, formal and substantive equality. Through formal, we mean where everyone is equal in the society regardless of gender, race, status, etc. and everyone will be treated as per the merit. The other form of equality aims at ending 'individual discrimination' meaning thereby taking

* Assistant Professor (Guest Faculty), Department of Laws, Panjab University, Chandigarh.

cognizance of underprivileged groups and granting them some special protections, so that they can be uplifted and brought at par with the already privileged sections of the society. Finally, the idea of protective discrimination cropped up to ensure social justice in society through Articles 15 and 16 of the Constitution of India, whereby special provisions were made thereby granting reservations for Backward Classes, Women, Scheduled Tribes, Schedules Castes in Educational Institutions and jobs for their overall advancement.

Initially in 1950 the provisions under Constitution of India did not consider inclusion of Backward Classes for the benefits of protective discrimination through reservations. Later during the 1970s when there were protests all over the country for including these Backward Classes under the provisions of Articles 15 and 16 of Constitution of India, need arose to consider such demands. As a result, in January 1979, Second Backwards Class Commission (Mandal Commission) submitted its report in 1980 with a proposal to grant 27% reservation to other backward class with already pre-existing 22.5 percent reservation for the SCs and STs. However, this could not be implemented due to political reasons.

In 1991, the government again tried to implement Mandal Commission report but with a modification of carving out a reservation quota in jobs and education for the Economically Backward Class in the 'General' category by proposing 10 per cent reservation for such sections through O.M. This led to increase in the total reservation to 59.50 per cent, considerably in excess of the ceiling of 50 per cent fixed by the Supreme Court. Resultantly, Indra Sawhney filed a writ petition against the implementation of Mandal report before the Apex Court. Through its landmark judgment in **Indra Sawhney V. Union of India Judgment (Mandal Commission case)**[1] the Hon'ble Supreme Court established that there shall be a 50% ceiling on reservation including all the categories. Further, it was established that under Article 16(4) of Constitution of India, backward classes of citizens can be identified on the basis of caste only and not on economic criteria.

The concept of a creamy layer was laid down and it was directed that persons belonging to a particular family whose income is more than 8 Lakhs will be considered as creamy layer and shall be excluded while identifying backward classes. This decision ended the debate of giving 10% reservation on the economic basis.

Even after the Indra Sawhney judgment in 1992, the State of Tamil Nadu, which had 69% reservation, moved High Court and Supreme Court asking that the reservation policy of the state government should be allowed to continue for the benefit of the Backward Classes. However, the Supreme Court passed an interim order reiterating that the reservation should not exceed 50 per cent in the matter of

[1] Indra Sawhney V. Union of India, AIR 1993 SC 477.

admission to educational institutions.

Thereafter, the Tamil Nadu government introduced a Bill, 1993 in the State Assembly to nullify the interim order passed by the Supreme Court. The Bill was passed by the State Legislature and later forwarded for President's assent. After getting President's assent, the 69% reservation in Tamil Nadu was settled. The said Act stating 69% reservation was also brought under the Ninth Schedule of the Constitution.

In 2019, a Bill was introduced in the Parliament for having Economically Weaker Section (EWS) quota for those sections of society who are not getting any benefit from the earlier reservation. The Parliament passed the 103rd Amendment to the Constitution of India and thus 10% quota was fixed for those who though belong to general category but are economically weak. This time the Government implemented the 10% quota through a more secure method which is constitutional amendment as compared to the earlier government which gave 10% reservation through an Executive Order. This 10% reservation was identical to the 1991 executive order except that the 1991 order did not have the backing of a Constitutional Amendment.

This 103rd amendment added new clause 6 with explanation to Article 15 and clause 6 to Article 16 of the constitution of India wherein ***it provided for a maximum of ten percent reservation for "the economically weaker sections" of citizens other than "the Scheduled Castes", "the Scheduled Tribes" and the non-creamy layer of "the Other Backward Classes***" in Educational Institutions and jobs. This new reservation provides reservation to the persons who are from general category but are economically weak. The financial position of a person to claim EWS category reservation depends upon his and his family's annual income, which should be less than ₹8 lakh.

The 103rd Constitutional Amendment Act was challenged before the Apex Court by way of filing of different writs petitions/SLPs/transferred cases, which were disposed of by 3:2 split verdict by the Constitution Bench of Hon'ble Supreme Court vide four separate judgments[2] dated 07.11.2022.

Following were the main issues before the Apex Court

(1) Whether the EWS reservation would be violating the basic structure of the Indian Constitution?
(2) Whether exclusion of SEBCs/OBCs/SCs/STs covered under Articles 15(4), 15(5) and 16(4) of Constitution of India from the scope of EWS reservation is right?

[2] Janhit Abhiyan V. Union of India, 2022 SCC OnLine SC 1540.

(3) Whether providing 10% reservation to EWS breaches the fifty percent ceiling of reservations as per already settled Supreme Court Judgments.

II. Main Contentions raised by the petitioners challenging the 103rd amendment

1. The petitioners challenged the above said amendment on the ground that reservations are granted to those sections of the society who were not deprived of basic resources and opportunities in life. This amendment empowers already privileged sections of the society, thus basic structure of the constitution shall be violated.
2. That the economic ground can never be the criteria for reservation as it is transient in nature and cannot be compared with the status of backwardness, which will never change. Reservation should be given to those who were disadvantageous because of birth and not by wealth. Moreover, there will never be an end to reservation as there would always be people in the society who would be poorer than others.
3. That the Apex Court in case of ***M. Nagaraj & Others vs Union of India & Others***[3] had laid down width test. As per the amendment, there are no limitations or indicators that have been established to identify the people falling under the EWS. Whereas, for each category, be it SC, ST or OBC, the Constitution is providing the reservation by virtue of Articles 366(24), 366(25), 338, 340, 341 etc. Hence for this reason also, the amendment in question fails the guided power test.
4. That the Supreme Court in ***Indra Sawhney***[4] case had held against the economic criteria to be the sole criteria for reservation.
5. That the reservation cannot uplift a person economically. For economic upliftment the government should provide subsidies as per DPSPs mentioned in the Constitution. In the present scenario, as per the statistics, even after providing reservation in favour of SCs/STs and OBCs, the reserved category is still poor.
6. This reservation of ten percent exclusively for general category, who are economically weak, would reduce the availability of seats of persons from creamy layer category in Socially and Educationally Backward Classes/Other Backward Classes. Thus, destroying the basic structure of the Constitution.

III. Contentions raised by the parties in support of 103rd amendment

1. That the impugned Amendment neither violates the "basic structure of the Constitution" nor rule of equality by excluding the already reserved classes under Articles 15(4) and 16(4) of Constitution from the EWS category rather it strengthens basic structure.

---

3 M. Nagaraj & Others vs Union of India & Others (2006) 8 SCC 212.

4 s*upra* note 1.

2. That through Articles 38 and 46 and Preamble to the Constitution, State has been given a directive to eliminate social, economic and political differences and to encourage justice. Even Supreme Court had recognized poverty as a base for affirmative action as it is a main cause for social and educational backwardness. Thus, new class promotes 'Economic Justice', as set out under Preamble of our country, thereby fostering basic structure of the constitution.
3. That the 'Living Tree' approach should be followed to elucidate the Constitution which means that a constitution is organic and must be read in a broad and progressive manner so as to adapt it to the changing times. The right of EWS has emanated from Articles 21, 46, 51 (c) and 253 of the Constitution of India and "Universal Declaration of Human Rights and International Covenant on Economic, Social and Cultural Rights". The amendment allows the State to achieve economic justice by removing poverty by giving reservation to economically weaker sections of the society.

IV. Relevant provisions and Precedents analyzed by the Apex Court while deciding the matter

While deciding the matter in hand, Hon'ble Apex Court had considered various provisions of Constitution of India in detail especially; Preamble of India which specifies the goal which the constitution drafters had in their mind while drafting the Constitution, Article 368 to check the procedure adopted for constitutional amendment. Articles 13 to 18 of the fundamental rights thereby specifying that there will be no discrimination among citizens of India on specific grounds, but calls for reasonable classification. Articles 38, 39, 46 are the directive principles of the State Policy and aim to achieve an "egalitarian socio-economic order and eliminate social, economic and political differences" and administer distributive justice. Further landmark **judgments like Kesavananda**[5], which partially overruled **Golak Nath**[6] and established that there can be amendments in the Constitution but subject to the basic structure of the Indian constitution.

The main authority was **Indra Sawhney v. Union of India**[7] wherein it was held that "the economic criterion alone for determining backwardness of classes or groups is impermissible, because the indicators are social and educational backwardness having regard to the express terms of Articles 15(4) and 16(4)".

After all the relevant discussion and as per the already settled precedents the constitutional validity of the 103rd amendment was upheld vide 3:2 split verdict.

---

5 s*upra* note 1.

6 I.C Golaknath & Ors vs State of Punjab 1967 SCR (2) 762 (India).

7 *supra* note 1.

While passing judgment in favour of impugned amendment, the Hon'ble Judges based their decision on the aim to achieve egalitarian socio-economic order, the State has the permission of the constitution to consider and cater the needs of economically weak sections of the society as explained from the texts of Preamble and provisions in Part III and Part IV of the Indian Constitution.

Practically, while observing vertical reservation, it has always been practiced that the target group is given benefit by excluding others from the reservation to achieve the desired results. The amendment which classifies EWS as a separate class from those who already exist under Articles 15(4), 15(5) and 16(4) of the Constitution falls under reasonable classification thereby making themselves eligible to get the reservation benefits. The same principle was applied when reservation was granted to groups of SEBCs, OBCs, SCs, and STs and others were excluded in their reservation. In other words, if exclusion of general EWS from SEBCs/OBCs/SCs/STs reservation is correct compensation then so is the exclusion of SEBCs/OBCs/SCs/STs from EWS reservation.

Moreover, while considering the precedent settled in case of Indra Sawhney which established a ceiling limit of 50% in reservation for the benefit of meritorious candidates of general category, the court commented that those who are already availing the benefits of reservation, should not raise any objection to the reservation which is given for the upliftment of other weaker sections of society through affirmative action of State.

The court even criticized that "basic structure" cannot always be used as a weapon to kill every effort of the State to do economic justice as given under Preamble and DPSP and, in particularly Articles 38, 39 and 46 of the Constitution. Articles 15 and 16 of the Constitution while providing reservation to the certain sections of the society act as exception to the general rule of equality.

Therefore, it was held that EWS can be validly treated as a separate class and will be a reasonable classification under Article 14 of the Constitution which lays down that "Equals cannot be treated unequally; unequals also cannot be treated equally". If unequals would be treated equally then it would defeat the provisions of equality as per Articles 14 and 16 of the Constitution. The 103rd amendment has not affected the rights given to SCs/STs and backward class of citizens covered under Articles 15(4), 15(5) and 16(4) in any way, it has just created another class within general category who are economically weaker without affecting already reserved category rights.

However, the parliament did not infringe substantive or procedural limitations under Article 368 of the Constitution of India. The 103rd amendment was passed through proper procedure and has acted within the allowed limits as per

Preamble, Fundamental Rights and DPSPs of the Constitution without violating the basic structure of the Constitution of India as held in ***Kesavananda* Bharti**[8]case.

Through the present judgment it is even considered that this might act as a first step in removing caste-based reservation from the system and will serve for the benefit, promotion and upliftment of those generals who are financially weak and are not covered under Articles 15(4) and 16(4) of the Constitution. Sooner, our Constitutional goal of social and economic justice for all sections of society can very well be achieved with the affirmative action of the State in the form of the 103rd amendment.

Hon'ble Justice S. Ravindra Bhat had a different approach and considered that the reservations for EWS category is not on sound grounds as the new category under EWS never faced any backlashes from the society nor were they discriminated with intention. Moreover, they had their chances of growth unlike the socially and educationally backward classes (and SC/STs), who were consciously made victims of discrimination and genuinely required some support to grow in their life, which they got in the form of reservations. However, the exclusion of other disadvantaged sections of the society from the EWS reservation, who are similarly placed, just because of reason that these sections are already getting the benefit of reservation, was considered as violation of equality code as well as basic structure of constitution.

The already reserved categories have been forced to confine to their already granted reservation quotas (15% for SCs, 7.5% for STs, etc.), which is again disadvantageous to them. Further, they cannot commute from their reservation to EWS reservation, even if they are economically weak.

V. WAY AHEAD

The main concern of the of our Parliament and Judiciary must be to achieve social and economic justice through affirmative action by the State. Therefore, reservation solely on the economic criteria does not violate the basic structure of the Indian Constitution nor infringe the equality code by prohibiting already reserved classes under Articles 15(4), 15(5) and 16(4) from the benefit of EWS reservation.

It is also a matter of thought for all of us that for how long this reservation should continue in the name of underprivileged society when many among the reserved categories are holding top most positions in the country and still their next generation are filling forms for admission and jobs under reserved category. That according to Article 334 of the Constitution, the provisions

[8] (1973) 4 SCC 225

relating to the reservation of seats for the SCs and the STs in the Lok Sabha and State Assemblies shall end on the expiration of a period of eighty years from the commencement of the Constitution. By the 104th amendment reservation pertaining to Anglo-Indian Community had already been ceased. Similarly, a time line has to be there with regards to the reservations/special provisions as mentioned under Articles 15 and 16 of the Constitution of India. Policy of reservation cannot be allowed for all times to come if we really want an egalitarian, classless and casteless India. In the words of **Sardar Patel** - "But in the long run, it would be in the interest of all to forget that there is anything like majority or minority in this country; that in India there is only one community…"

That reservation should be implemented to secure social and economic justice and eliminate the social, educational and economic backwardness of the weaker sections. Those who have attained education and employment from backward class and do not need any more reservation should be excluded from the reservation so that the focus can be shifted to those classes who are in genuine need of help. The need of the hour is to check the criteria to check the backwardness.

That the 10% reservation to economically weaker sections of the society is a welcoming step that would address issues of educational and income inequality in India as this section has always been deprived of higher educational institutions and public employment due to scarcity of finances. This would give due importance and acknowledgment to those poors from upper castes, who always aspire to get some help, but were always ignored from the governmental benefits in the name of being from upper caste. Further, this reservation would remove the stigma that reservation is always granted according to caste.

References:

List of Cases:

- *I C Golaknath & Ors v. State Of Punjab & Anrs* 1967 SCR (2) 762
- *Indra Sawhney v. Union of India* AIR 1993 SC 477
- *Janhit Abhiyan v. Union of India*, 2022 SCC OnLine SC 1540
- *Kesavananda Bharti v. State of Kerala,* (1973) 4 SCC 225
- *M. Nagaraj & Others v. Union of India & Others,* (2006) 8 SCC 212