

Indian Constitutional Law Review

ISSN-2456-8325



EDITION X

July 2020

10 ICLRQ (1) 2020

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Cite as: 10 ICLRQ (1) 2020

ISSN No. 2456-8325

Published by



TABLE OF CONTENTS

EDITORIAL BOARD	1
BOARD OF ADVISORS.....	2
EDITORIAL NOTE.....	4

ARTICLES

ARTICLE 142 AND CONSTITUTIONAL MORALITY – A NEW ADDITION TO THE ARMOURY? <i>BY AAYUSH BAPAT & ZUNHAID TAPIA</i>	8
SEX DISCRIMINATION IN INDIA: THE JOURNEY FROM NARGESH MIRZA’S TRAGEDY TO JOSEPH SHINE’S TRIUMPH <i>BY ARVIND PENNATHUR & PRAKHAR BHATNAGAR</i>	26
THE WIDENING FISSURE OF UNDERCOVER OPERATIONS IN INDIA – THE CASE AGAINST DECEPTION <i>BY UMANG AGARWAL & AYUSH CHATURVEDI</i>	54
RIGHT TO EQUALITY UNDER ARTICLE 14: ANALYZING THE EVOLUTION OF EQUALITY JURISPRUDENCE WITH SPECIFIC REFERENCE TO REVIEW OF PRIMARY LEGISLATION <i>BY DHRUV PATEL</i>	70
UNDERTRIALS, VOTING AND THE CONSTITUTION <i>BY KRISHNESH BAPAT & MEGHNA JANDU</i>	93
COMPROMISING THE SOCIALIST DREAM: ARTICLE 12 AS A RAILROAD FOR KITSCHY NEO-LIBERALISM? <i>BY AESHA SHAH & GAYATRI PUTHRAN</i>	109
THE WHAT IS AND WHAT OUGHT TO BE OF DELHI POLICE <i>BY PRATIK SAHAI</i>	122
A NOTE OF THANKS	140

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EDITORIAL NOTE

“It must be remembered that law is not a mausoleum. It is not an antique to be taken down, dusted, admired and put back on the shelf. It is rather like an old vigorous tree, having its roots in history, yet continuously taking new grafts and putting out new sprouts and occasionally dropping dead wood. It is essentially a social process, the end product of which is justice and hence it must keep on growing and developing with changing social concepts and values.”

These words said by Justice P.N. Bhagwati in his celebrated judgment of *Motilal Padampat v. State of Uttar Pradesh*, still ring true in the 21st century. The society has been continuously evolving by leaps and bounds, giving rise to several issues, for which the law offers no solution or redressal. The legislature, which symbolises the elected representatives in a democracy have often been lackadaisical in their approach. The *Vishakha* judgment, that highlighted the absence of any legislation to curb the growing crime of sexual harassment of women at workplace was delivered in the year 1997. It took the legislature almost sixteen years to come up with a legislation that protected the fundamental rights of women. These times warrant an active role to be undertaken either by the judiciary or the executive in preserving these intrinsic civil liberties. In the absence of which, it becomes the duty of the legal academia and the civil society to remind the organs of the government their imperative responsibility towards the citizens of the country.

In furtherance of the same, the Indian Constitutional Law Review (Quarterly) through this edition, attempts to bring forth scholarship before you, that highlights the immediate need to bridge several gaps present in the legal landscape of our country. Through this publication, we aim to showcase critical analysis of contemporary issues, in order to raise multi-faceted pertinent questions. We aim to act as an impetus to further deliberations on unsettled premises as well as further discussions on the evolving jurisprudence in the legal fraternity.

In *Article 142 and Constitutional Morality – A New Addition to the Armoury?* the authors, Aayush Bapat and Zunhaid Tapia, have discussed the range of powers of the Court under Article 142 and the development of the circumstances around its invocation. Noting that the Apex Court

Indian Constitutional Law Review

has not strictly delineated the circumstances under which this provision may be used, the authors discuss the possibility of its use in conjunction with the principle of constitutional morality. Finally, they make a case for the need to establish boundaries and clarify the position of law with respect to such invocation and usage.

Furthermore, authors Arvind Pennathur and Prakhar Bhatnagar have critiqued the judicial approach on matters of sex discrimination by analysing the judgement of *Nargesh Mirza* in their paper entitled *Sex Discrimination in India: The Journey from Nargesh Mirza's Tragedy to Joseph Shine's Triumph*. In this piece, they have discussed in depth exactly how the courts have made use of Articles 14 and 15 of the Constitution to essentially propagate regressive patriarchal beliefs. They follow up these arguments on sex-based discrimination by further scrutinising the erstwhile law on adultery, where they succinctly sum up the court's rationale with an "*analogy that can be drawn with respect to a piece of land owned by a person – as long as you take the owner's permission, walking on it is all right.*" To conclude, they discuss the judgement of *Joseph Shine* in detail and explain the fallacy present in Justice Nariman's approach.

Umang Agarwal and Ayush Chaturvedi, on the other hand, examine the legal aspects of undercover or covert operations used by law enforcement agencies in an article titled *The Widening Fissure of Undercover Operations in India – The Case Against Deception*. The article begins by demonstrating the odd nature of undercover operations. It then examines the constitutional validity of these operations based on the right against self-incrimination and through the rule of law as a part of the basic structure doctrine. Thereafter, it locates these undercover operations under the criminal jurisprudence of the Indian legal system. Furthermore, the article highlights certain issues with undercover operations and offers insights to improve the situation.

In the article titled *Right to Equality under Article 14: Analysing the Evolution of Equality Jurisprudence with Specific Reference to Review of Primary Legislation*, Dhruv Patel critically analyses the Article 14 jurisprudence in India. The article while examining the interpretation of Article 14, traces the development of tests used by the Supreme Court, more specifically to see how they have been applied to review the constitutional validity of primary legislations based on Article 14. It also analysis the shortcomings of the tests used by the Supreme Court under Article

14. Finally, looks at the improvements or changes that are required in the Jurisprudence and offers some suggestions.

Authors, Krishnesh Bapat and Meghna Jandu, in the article titled *Undertrials, Voting and the Constitution*, look at the right to vote of under trial prisoners and the jurisprudence surrounding the same. The article examines the constitutional validity of Section 62(5) of the Representation of People's Act, which prohibits under trial prisons from exercising their right to vote. It does so by looking at the powers of the Parliament to restrict universal adult suffrage and examines the section based on Article 14 of the Constitution.

Additionally, the paper on *Compromising the Socialist Dream: Article 12 as a Railroad for Kitschy Neoliberalism* provides an interesting perspective in analysing Article 12 of the Constitution and the effects of its interpretation over the concept of socialism. The paper is an epitome of interdisciplinary research as it closely examines the case of the direct horizontal application of fundamental rights. The authors, Aesha Shah and Gayatri Puthran conclude by warranting an immediate need to extend the enforcement of fundamental rights to private bodies lest socialist ideals in the Constitution become an illusion.

Finally, in the backdrop of the recent anti-CAA across the country, and the particularly brutal turn they took in the capital city of Delhi, Pratik Sahai traces the history of control over Delhi's police force. He outlines the debates and reforms that have occurred in the governance of the city over time and analyses the factum of the Union Government having control over the state police force. He delves in the administrative and constitutional aspects of the issue while developing the idea of shared control of the Delhi police between centre and state. Throughout, he discusses the scenario in other countries and the models followed therein to give a holistic outlook of *What is and what ought to be of the Delhi Police*.

This edition marks the transcendental shift to a double blinded peer – review system that allowed the Editorial Board to engage with noted scholars, and academicians from within the fraternity and accentuated our scholarship with their erudite comments. We would like to thank our peer reviewers who provided substantial recommendations and suggestions for improvement.

Indian Constitutional Law Review

Moreover, it would be impossible to complete this exemplary feat, without the coordination between members of the ICLRQ Editorial Board including all the Senior, Associate and Member Editors, who worked tirelessly in ensuring a smooth publication. Finally, we would like to express our heartfelt gratitude towards the members of the Publishing Team, that provided us their guidance and encouragement at every step of the editorial process. We hope you find Volume X, instructive and engaging. We hope to hear your constructive critique too!

Happy Reading!

Truly,

ANSHUL DALMIA, *Editor-in-Chief*

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**ARTICLE 142 AND CONSTITUTIONAL MORALITY – A NEW ADDITION TO THE
ARMOURY?**

Aayush Bapat and Zunhaid Tapia[†]

Abstract

In light of the unfettered nature and a rather frequent invocation of extraordinary powers under Article 142(1) of the Constitution, this article expounds a constructive theory that builds upon the ever-increasing trend of such invocation of power by the Supreme Court. The central inquiry at hand is, firstly, the manner and nature of invocation of Article 142 by the Supreme Court; secondly, the interpretation of the term complete justice by the court; thirdly, to assess and analyse the power of the Court to make an order or pass a decree which is inconsistent or in conflict with the substantive provisions of any statute passed by the Parliament/Legislature of State; fourthly, the meaning of the term constitutional morality and its impact on the maxim of a reasoned decision. We concede that Article 142 bestows a power which is efficacious and indispensable in nature and examination of this expansive power has succoured the Court in nebulous cases wherein the provisions of substantive law are insufficient to solve contemporary discrepancies. Lastly, the article attempts to highlight notional scenarios where constitutional morality may serve as the bedrock for exercising powers under Article 142 leading to a phenomenon of possible judicial overreach. The article emphasizes and explains the importance of a reasoned decision of the Court and how justice may be jeopardized when the ratio decidendi in judgements is constructed on an ambiguous foundation. To avoid this scenario, we attempt to lay down some important recommendations for the exercise of this power.

[†] Third and Second Year students pursuing the B.B.A LLB. course at Symbiosis Law School, Pune.

I. INTRODUCTION

Rule of law can be said to include two broad mandates, firstly, that the subjects should be ruled by the law and must obey it, and, secondly, that the law itself should be such that subjects will be able to be guided by it.¹ In the international as well as national context, the endeavour of meaningful jurisprudence has always been to ensure that the law is accessible to all persons by virtue of its simplicity, clarity and definitive interpretation. The Supreme Court under its power of judicial review has struck down certain laws due to their inherent ambiguity and arbitrariness and laid down clear definitions for the interpretation of others. In this judicial effort, however, some provisions have been lost to confusion rather than clarity. A consummate yet formidable provision, Article 142(1) gives wide powers to the Supreme Court to pass any order or decree to do complete justice to any parties before it in a matter. This provision has also suffered from the trend of judicial incertitude. The true scope and limit of the jurisdiction conferred under this provision have been mooted in a plethora of judicial pronouncements.² This expansive power of the Apex Court is however confined by the condition that the court must provide appropriate reasoning and rationale to support the passing of any such order, this seemingly restricts the obscure scope of Article 142(1). The presence of a sound reason aids the common citizen in understanding the rationale behind the order and therefore to an extent, fulfils the second tenet of the rule of law i.e. being able to guide the citizen. The issue here arises in the invocation of Article 142(1) to do complete justice which when clubbed with the doctrine of constitutional morality as the *ratio*, leads to an ambiguous and unclear interpretation of the law.

II. ARTICLE 142(1) OF THE CONSTITUTION – INVOCATION AND JURISDICTION

¹ Joseph Raz, *The Rule of Law and its Virtue*, OXFORD SCHOLARSHIP ONLINE (1979), http://fs2.american.edu/dfagel/www/Philosophers/Raz/Rule%20of%20Law%20and%20its%20Virtue_%20%20Joseph%20Raz.pdf; Zunhaid Tapia & Gaurav Puri, *Joseph Raz's Rule of Law in India*, 1 JILIR (2019).

² National Insurance Co. Ltd. v. Parvathneni, (2009) 8 S.C.C. 785, 786 (India); University of Kerala v. Council of Principals of Colleges, Kerala, (2010) 1 S.C.C. 353, 362 (India).

Indian Constitutional Law Review

Jurisdiction is derived from the Latin word's 'jus' meaning law and 'dictio' meaning speak. It refers to the official power to make legal decisions and judgements.³ Article 142(1) being a Constitutional provision, the sanction to decide matters under Article 142(1) is bestowed by the Constitution itself, which reads as follows:

“(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...”⁴

A bare perusal of the provision provides testimony to the expansive and sweeping powers provided under Article 142(1). These powers are often referred to as unfettered powers of the court. In *Supreme Court Bar Association v. Union of India*,⁵ the Supreme Court while referring to its powers under Article 142, characterized its role in the following words:

“Indeed, the Supreme Court is not a court of restricted jurisdiction of only dispute-settling. The Supreme Court has always been a law-maker and its role travels beyond merely dispute-settling. It is a problem-solver in the nebulous areas.”

Resultantly providing a rather wide and ambiguous connotation to the powers of the Supreme Court in exercising its jurisdiction, thereby promoting the idea of a seemingly boundary less power.

III. ARTICLE 142(1) OF THE CONSTITUTION – COMPLETE JUSTICE

At the epicenter of this controversy is the ground for exercising its sweeping power. The qualification for the exercise being the necessity to do complete justice, it must be understood with conviction that the original object of Article 142(1) was to ensure that the Supreme Court mustn't

³ BLACK'S LAW DICTIONARY, (7th ed. 2015).

⁴ INDIA CONST. art. 142 cl. 1.

⁵ *Supreme Court Bar Association v. Union of India*, AIR 1998 S.C.1895 (India).

Indian Constitutional Law Review

be obliged to depend upon the executive for enforcement of its decrees and orders. Such a dependency would have tendencies of violating the principles of independence of the judiciary and separation of powers.⁶

The term justice itself has been considered to be evasive by nature. The Romans referred to justice as “*to give each his due*”.⁷ This general jurisprudential idea borrowed from the Romans finds a strong footing in English common law as equity or under justice, equity and good conscience. It seems that it is this common law idea of equitable jurisdiction which has been adopted into the Constitution.⁸

In *Supreme Court Bar Association v. Union of India*⁹, the Court observed that:

*“This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the due process of law between the parties.”*¹⁰

It has further been observed in the above case that the power under Article 142 has the nature of a corrective measure wherein equity is given preference over law to ensure that no injustice is caused. This is in stark contrast to the court’s previous observation that equity jurisdiction under Article 142 must be such that it does not lose its characteristics of being in accordance with the law.¹¹

Later decisions of the Court have also criticised the wide invocation and use of the power under Article 142. In *Secy. State of Karnataka v. Umadevi*,¹² a Constitutional Bench of the Apex Court held that the complete justice envisioned under Article 142 was justice according to law and

⁶ State of Bihar v. Bal Mukund Sah, (2000) 4 SCC 640; Chandra Mohan v. State of Uttar Pradesh, AIR1966 S.C. 1987 (India).

⁷ FAUSTINO BALLVE, ESSENTIALS OF ECONOMICS: A BRIEF SURVEY OF PRINCIPLES AND POLICIES (1st ed. 1963).

⁸ M.P. JAIN, INDIAN CONSTITUTION LAW 267 (7th ed. 2014).

⁹ *supra* note 6.

¹⁰ *supra* note 6; Delhi Electric Supply Undertaking v. Basanti Devi, AIR 2000 S.C. 43, 49 (India).

¹¹ Dr Justice B.S. Chauhan, *Courts and its endeavour to do Complete Justice*, NATIONAL JUDICIAL ACADEMY, <http://www.nja.nic.in/17%20Complete%20Justice.pdf>.

¹² *Secy. State of Karnataka v. Umadevi*, (2006) 4 S.C.C.1, 36 (India).

Indian Constitutional Law Review

not sympathy. It further observed that “*equitable considerations and individualization of justice*” have resulted in a state of confusion owing to conflicting decisions of the Court leading to uncertainty in the law. This crucial observation we find, accurately portrays the confusion that exists up till today as to the exact nature of complete justice as envisioned under the Constitution.

Justice has been described as “*an illusion as the meaning and definition of 'justice' varies from person to person and party to party.*”¹³ We find that there lies a paramount need of the Supreme Court to provide clarity as to this elusive term in future matters heard by the Court under Article 142.

IV. ARTICLE 142(1) OF THE CONSTITUTION – EXTENT OF POWER

An analysis of Article 142 also necessitates a probe into the extent of the power that can be exercised by the Court. The provision itself states that the Supreme Court may pass such decree or make such order in any cause or matter pending before it as is necessary for doing complete justice to the parties. This use of expansive terminology has strengthened the illusion that the power is seemingly boundaryless. There is no qualification on the type of decree or order that may be made by the Court in the exercise of its power nor is there any qualification as to the exercise of such power in a particular class or type of causes or matters before the Court. This construction has led to a stark contrast in interpretation and invocation over time since the inception of the Article itself. A brief study of the cases heard under Article 142 exhibits that at times, the Court has taken a somewhat both the narrow view and an extremely broad view of its power under Article 142. In some cases, particular reliefs have been granted while expressly providing that the case would not constitute a precedent and that the cases before it under Article 142 would be decided on the basis of a peculiar set of facts and circumstances.¹⁴

¹³Dr Justice B.S. Chauhan, *supra* note 11.

¹⁴ Pure Helium Pvt. Ltd. v. Oil and Natural Gas Corporation Ltd., (2003) 8 S.C.C.593 (India); Pohla Singh v. State of Punjab, (2004) 6 S.C.C. 126 (India); Bharat Petroleum Corporation Ltd. v. P. Kesavan, (2004) 9 S.C.C. 772 (India); M.P. JAIN, INDIAN CONSTITUTION LAW 273 (7th ed. 2014).

Indian Constitutional Law Review

In *Prem Chand Garg v. Excise Commissioner, Uttar Pradesh*¹⁵ the Court laying down an early precedent and also circumscribing its limits, discussed whether the Supreme Court under the garb of doing complete justice could frame a rule or pass an order or decree, in blatant opposition to provisions of substantive law. Answering in the negative, the Courts held that, while passing an Order under Article 142(1) whilst doing ‘complete justice’ must necessarily ensure that such Order is not inconsistent with the substantive provisions of the relevant statutory laws.

This view of the Court has been approved by a special bench (9 Judge Bench) of the Court¹⁶ and further reiterated in a plethora of other judgements,¹⁷

“...Article 142(1) does not contemplate doing justice to one party by ignoring mandatory statutory provisions and thereby doing complete injustice to the other party by depriving such party of the benefit of the mandatory statutory provisions.”¹⁸

This view on the matter however seemed to have been reversed in *Delhi Judicial Service Assn. v. State of Gujarat*¹⁹ where the bench unanimously clarified that the power under Article 142(1) to do ‘complete justice’ is on a different level and thereby of a different quality. Any contradicting or prohibiting provision in substantive law therein cannot stand as a limitation to this Constitutional power. This opinion was further approved in two subsequent judgements.²⁰

In *Union Carbide*,²¹ the Court further observed that in assessing the needs of complete justice, the Supreme Court may take note of existing statutory law/ express prohibitions in substantive law however this notice shall only be to determine what is or is not complete justice in

¹⁵ Prem Chand Garg v. Excise Commissioner, Uttar Pradesh, AIR 1963 S.C.996 (India).

¹⁶ Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 S.C.1, 14 (India).

¹⁷ A.R. Antulay v. R.S. Nayak, (1988) 2 S.C.C.602, 656 and 730 (India); Arjun Khiamal Makhijani v. Jamnadas C. Tuliani, (1989) 4 S.C.C. 612 (India).

¹⁸ Arjun Khiamal Makhijani v. Jamnadas C. Tuliani, (1989) 4 S.C.C. 612 (India).

¹⁹ Delhi Judicial Service Association. v. State of Gujarat, (1991) 4 S.C.C. 406 (India).

²⁰ Union Carbide Corporation v. Union of India, (1991) 4 S.C.C. 584 (India); Maniyeri Madhavan v. Sub-Inspector of Police, (1994) 1 S.C.C. 536 (India); Mohd. Anis v. Union of India, 1994 Supp (1) S.C.C.145 (India); *In re Vinay Chandra Mishra*, (1995) 2 S.C.C.584 (India).

²¹ Union Carbide Corporation v. Union of India, (1991) 4 S.C.C.584 (India).

Indian Constitutional Law Review

a particular case, the power of the Court under Article 142 cannot be restricted or prohibited by any statutory law.

Similarly, in *Vineet Narain v. Union of India*²² and *Vishakha v. State of Rajasthan*²³, the Court lends clearer direction to the power under Article 142. The Court ruled that ample powers under Articles 32, 141, 142 and 144 are conferred to fill the ‘vacuum’ till the legislature enacts a particular law that fills a gap in the existing system and discharges its role.

The Court has over the years taken inconsistent views as to the extent and scope of the power, in *Delhi Development Authority v. Skipper Construction*,²⁴ the Court opined that such an ambiguity worked towards the benefit of the people and observed; “*we think it is advisable to leave this power undefined and uncatalogued so that it remains elastic enough to be molded to suit the given situation.*”

Although, the judicial view upon this matter seemed diagonally divided it is necessary to observe that, in the subsequent judgements, the Court clarified the veracious position of law. Whilst ruling in favor of the existence of a superior power, the Court made a fine distinction between limitation on the power itself and the exercise of such power in *Bonkya v. State of Maharashtra*,²⁵ which was further reaffirmed and reiterated in *Supreme Court Bar Association. v. Union of India*, the court observed:

*“Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject.”*²⁶

²² Vineet Narain v. Union of India, AIR 1998 SC 889 (India).

²³ Vishakha v. State of Rajasthan, (1997) 6 S.C.C. 241 (India).

²⁴ Delhi Development Authority v. Skipper Construction, AIR 1996 S.C. 2005, 2011 (India).

²⁵ Bonkya v. State of Maharashtra, 1995 S.C.C. (6) 447 (India).

²⁶ *supra* note 6.

Indian Constitutional Law Review

This well-founded opinion of the Court also disapproved of the position stated earlier in *In re, Vinay Chandra Mishra*²⁷ which gave an extremely liberal view that the Court can disregard the statutory provisions dealing with the subject while hearing a matter under Article 142. This view was reiterated and approved in *M.S. Ahlawat v. State of Haryana*.²⁸

We find that the Court in its earlier liberal pronouncements has failed to appreciate the scheme of the Article itself. Article 142 refers heavily to procedural aspects and the phrase ‘complete justice’ cannot be utilized to elevate the status of the provision to a new substantive power for the court itself. A need for such a construction of the provision finds its root in various foreign judicial pronouncements.²⁹ Additionally, in the quest to secure complete justice, the Apex Court ideally must exercise caution to uphold the principles of the Rule of Law which are an integral part of the Basic Structure of the Constitution.³⁰

It is important to note that Article 142 of the Constitution³¹ finds its roots in Article 118 of the Draft Constitution,³² on a keen perusal of the Constituent Assembly Debates surrounding the Article, it is pertinent to note that no substantial emphasis was given to the term ‘complete justice’ and its interpretation, thereby suggesting that the framers of the Constitution intended it to be limited to its procedural aspect as opposed to the judicial interpretation in the recent cases.

It is apposite to note at this juncture that, Article 142(1) cannot be read in isolation and must be read in harmonious construction with the second part of Article being Article 142(2) whereunder three powers have been conferred upon the court being:

- a. Securing the attendance of persons before it;

²⁷ *In re Vinay Chandra Mishra*, (1995) 2 S.C.C.584 (India).

²⁸ *M.S. Ahlawat v. State of Haryana*, (2000) 1 S.C.C.409 (India).

²⁹ *Bourne v. Norwich*, (1967) 2 All ER 576, 578; *Towne v. Eisner*, 245 US 418, 425; *Bidie v. General Accident, Fire and Life Assurance Corporation*, (1948) 2 All ER 995, 998.

³⁰ *Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.C.225(India); *Indira Nehru Gandhi v. Raj Narain*, 1975 AIR 865; *P. Sambamurthy v. State of A.P.*, 1987 AIR 663.

³¹ INDIA CONST. art. 142.

³² Constituent Assembly Debates, *Draft Constitution of India, 1948*, CONSTITUENT ASSEMBLY DEBATES, (Feb. 21, 1948),

https://www.constitutionofindia.net/historical_constitutions/draft_constitution_of_india__1948_21st%20February%201948.

Indian Constitutional Law Review

- b. Discovery and production of documents;
- c. Investigation and punishment of contempt of itself.

On bare perusal of these powers, it is evident that they are merely procedural, i.e. with respect to the laws of evidence and Article 129 of the Constitution of India,³³ referring to the courts power to punish for its own contempt.

It is concerning that even today, the scope of Article 142 continues to be interpreted with both the restrictive as well as the liberal approach simultaneously.³⁴ This duality in interpretation is fertile ground for ambiguity. Even in the light of the lengthy judicial pronouncements there still exists a grey area with respect to the stance of judicial power as conferred under Article 142. The only pertinent question that remains with respect to such power is the accountability and responsibility that surrounds it. What in ideal terms should have existed in the Indian scenario is becoming highly evasive. This power of the Supreme Court of India has effectively tackled many social problems and hence there does exist a series of positive interventions by the Supreme Court. These include but are not limited to the development of the concept of public interest litigations, championing the rights of the deprived sections of society and minorities, corruption-related matters and sexual harassment at the workplace.³⁵ However, in each of these scenarios, there existed no substantive laws and therefore the Supreme Court was essentially filling a lacuna in the law, and not necessarily passing an order in contravention of provisions of substantive law.

Although the power under Article 142 of the Constitution may as per judicial interpretation confer upon the Supreme Court an extraordinary jurisdiction to pass any decree or order necessary to secure complete justice, there still exist certain norms that even the court must follow while deciding upon a matter. These include the Constitutional requirement of providing appropriate and relevant reasoning or rationale for a judicial pronouncement, in the absence of which a judgement may easily be appealed against, reviewed and declared as *per incuriam* or *sub silentio*. This

³³ INDIA CONST. art. 129.

³⁴ *Monica Kumar v. State of U.P.*, (2008) 8 S.C.C.781 (India); *Tamil Nadu Mercantile Bank Shareholders Welfare Association (2) v. S.C. Sekar*, (2009) 2 S.C.C.1806 (India).

³⁵ *Vishaka v. State of Rajasthan*, AIR 1997 S.C.3011 (India).

Indian Constitutional Law Review

requirement provides a partial check to the seemingly unfettered powers conferred under Article 142(1) of the Constitution of India.

V. CONSTITUTIONAL MORALITY

The nature of powers and manner of exercise under Article 142 remains at best ambiguous or in the words of the Court itself “*undefined and uncatalogued*”. Some Constitutional checks and balances have sufficiently ensured that this power is not exercised in an arbitrary and overzealous manner. The next phase of enquiry would be to assess what would happen, if these checks and balances themselves would lead towards ambiguity thereby further weakening the claim to the exercise of such sweeping powers. The origins of the concept of ‘*Constitutional Morality*’ can be traced as far back as the Constituent Assembly Debates wherein Dr. B. R. Ambedkar exclaimed that the Constitution must not be a mere document laying down details of administrative structure, it must demand utmost reverence. To him Constitutional Morality was the means to achieving this end. He opined that, it was not a natural sentiment, it would have to be cultivated and that Democracy was only a top-dressing on Indian soil which is essentially undemocratic.³⁶

The Court has observed that constitutional morality is meant to guide the Legislature in making administrative and policy decisions. In *NCT of Delhi*³⁷ the Court has observed that:

*“The Constitution of India, as stated earlier, is an organic document that requires all its functionaries to observe, apply and protect the constitutional values spelt out by it. These values constitute the constitutional morality.”*³⁸

This observation is testament to the paramount significance given to Constitutional morality such that all functionaries named in the Constitution and all those who derive their power from such functionaries must, in practice, observe, apply and protect the Constitutional values spelt out by it. Such an interpretation however furthers a literal approach to constitutional morality,

³⁶ *Constituent Assembly Debates, Vol. VII, 30th November 1948 (B.R. Ambedkar)*, CONSTITUENT ASSEMBLY DEBATES, https://www.constitutionofindia.net/constitution_assembly_debates.

³⁷ *State (NCT of Delhi) v. Union of India*, (2018) 8 S.C.C. 501 (India).

³⁸ *Id.*, 580.

Indian Constitutional Law Review

such that the phrase “*values spelt out by it*” refers to what is mentioned in the letter of the Constitution itself.

The Court, however, has vehemently discouraged such an interpretation by stating that:

“The provisions of the Constitution need not expressly stipulate the concepts of constitutionalism, constitutional governance or constitutional trust and morality, rather these norms and values are inherent in various articles of the Constitution and sometimes are decipherable from the constitutional silences as has been held in Kalpana Mehta.”³⁹

In our opinion, such a position is contradictory, as a constitutional principle cannot be said to be spelt out by the Constitution as well as be deciphered from the constitutional silences concomitantly. Such a contradiction in judicial thought with respect to the issue creates uncertainty. This uncertainty fails to fulfil an important condition of the rule of law which postulates that the making of particular laws should be guided by open, clear and general rules.⁴⁰ It is difficult for the functionaries to observe, apply and protect principles that are decipherable from constitutional silences as is for the ordinary citizen to cultivate such a morality.

The concept of Constitutional Morality has also found its reference in a plethora of judgements, initiating from the landmark judgement of *Kesavananda Bharti v. Union of India*⁴¹ wherein Justice Ray bases his opposition to the Basic Structure doctrine by opining that, denying the Parliament their amending powers as guaranteed under Article 368⁴² would be against Constitutional Morality. It is pertinent to note that Constitutional Morality as a judicial doctrine was devised and developed at a much later stage. Later references have been found in some judicial pronouncements, wherein the scope of the term morality in the eyes of law was being defined as ‘constitutional morality’ as opposed to ‘plural morality’ or ‘societal morality’.⁴³ However, it was

³⁹ State (NCT of Delhi) v. Union of India, (2018) 8 S.C.C.501, 57 (India).

⁴⁰ *supra* note 1.

⁴¹ Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C.225 (India).

⁴² INDIA CONST. art. 368.

⁴³ Naz Foundation v. Govt. of NCT of Delhi, 160 DLT 277.

Indian Constitutional Law Review

devised as a separate judicial doctrine only in the matter of *Manoj Narula v. Union of India*⁴⁴ wherein it was used as a threshold to interpret the term ‘aid and advice’ of the Prime Minister.

The contemporary understanding of Constitutional Morality although originating from the same genus has inadvertently diverged into several species. Constitutional morality does not mean only allegiance to the substantive provisions and principles of the Constitution. It signifies a ‘*constitutional culture*’ which each citizen in a democracy must inculcate and internalize.⁴⁵

This constitutional culture, although more than the express text of the Constitution itself, must have a strong association to the articles of the Constitution. The Court has observed that, Constitutional Morality in its strictest sense implies a strict and complete adherence to the constitutional principles enshrined in various segments of the document.⁴⁶ According to Dr. B.R. Ambedkar, in order to truly understand what constitutional morality reflects, it is necessary to answer what it is that the Constitution is trying to say and to identify the broadest possible range to fix the meaning of the text.⁴⁷

In *Indian Young Lawyers Association*,⁴⁸ the court attempts to provide some direction to the abstractionist idea of Constitutional Morality by stating that constitutional morality is a vehicle towards achieving the preambular goals imbibed in our constitution which contains noble objectives of Justice, Liberty, Equality and Fraternity.⁴⁹

We find that the observations and explanations provided by Dr. Ambedkar communicate that there must be a clear nexus between the articles of the Constitution and the morality so derived from the ‘spirit’ of the Constitution. It is fundamental that the Court, while pronouncing a judgement draws strongly from the Constitution itself aided by the intentions behind particular

⁴⁴ *Manoj Narula v. Union of India*, (2014) 9 S.C.C.1 (India).

⁴⁵ *State (NCT of Delhi) v. Union of India*, (2018) 8 S.C.C.50, 606-610 (India).

⁴⁶ *supra* note 45, at 573.

⁴⁷ *Constituent Assembly Debates, Draft Constitution of India, 1948*, CONSTITUENT ASSEMBLY DEBATES, (Feb. 21, 1948),

https://www.constitutionofindia.net/historical_constitutions/draft_constitution_of_india__1948_21st%20February%201948; *State (NCT of Delhi) v. Union of India*, (2018) 8 S.C.C.50 (India).

⁴⁸ *Indian Young Lawyers Association v. Union of India*, (2017) 9 S.C.C.1, 101 (India).

⁴⁹ *Id.*

articles or Constituent Assembly Debates. The omission of such an exercise would fracture norms of interpretation and jurisprudence.

VI. THE SPEAR OF ARTICLE 142 AND THE SHIELD OF CONSTITUTIONAL MORALITY

The *ratio decidendi* is viewed as the fulcrum of a judicial pronouncement. The power conferred under Article 142(1) is circumscribed by the constitutional requirement of supporting such exercise by a reasoned opinion. It is an established principle in law that the courts being adjudicating authorities are under the legal obligation to provide reasons for its decision. The giving of reasons is one of the fundamentals of good administration⁵⁰ and failure to give such reasons amounts to denial of justice.⁵¹

The administration of justice necessitates the giving of sufficient reasoning and rationale in any judicial pronouncement. It has been categorically observed that, the basic premise of a reasoned decision is not only to show that the citizen is receiving justice but is also a valid discipline for the Court itself and hence a statement of reasons is one of the essentials of justice.⁵²

In *Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota v. Shukla and Brothers* the Court observed that:

*“As arguments bring things hidden and obscure to the light of reasons, reasoned judgment where the law and factual matrix of the case is discussed, provides lucidity and foundation for conclusions or exercise of judicial discretion by the courts. Reason is the very life of law. Such is the significance of reasoning in any rule of law.”*⁵³

⁵⁰ Breen v. Amalgamated Engineering Union, (1971) 2 Q.B. 175, 191.

⁵¹ Alexander Machinery (Dudley) Ltd. v. Crabtree, 1974 ICR 120.

⁵² State of West Bengal v. Atul Krishna Shaw, 1990 AIR 2205.

⁵³ Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota v. Shukla and Brothers, (2010) 4 S.C.C. 785 (India).

Indian Constitutional Law Review

The absence of reasons essentially introduces an element of uncertainty, dissatisfaction and gives entirely different dimensions to the questions of law raised before the appellate courts.⁵⁴ Hence, the Apex Court has taken the view that it is always desirable to record reasons even if the statutory rules do not impose an onus upon the Courts. The courts are nevertheless expected to act fairly and in consonance with basic rule of law.⁵⁵ In the absence of a sound rationale, the legal premise of such a pronouncement attracts censure.

In a plethora of judgements, the Apex Court has sponsored the idea that Constitutional Morality is *subficiens* a sound rationale. However, in our opinion such an elevation of Constitutional Morality to a substantive repository is valid only if strong bearings of the same to the constitution are clearly established within the pronouncement itself. We find that the exact definitions and boundaries of Constitutional Morality have not yet been laid down, further, there is a duality in interpretation of the concept itself.

For instance, the ‘judicial confusion’ created in the matter of *Indian Young Lawyers Association v. Union of India*⁵⁶ wherein two judges of the Apex Court relied upon the same concept of Constitutional Morality, however, arrived at diametrically opposing conclusions and findings, thereby demonstrating the ambiguous and concerning nature of the obscure concept of Constitutional Morality.

Such an elevation in the views of the Attorney General of India, Adv. K. K. Venugopal may effectively result in the Judiciary becoming the third chamber of the Parliament itself and in his opinion Constitutional Morality is a weapon that the judiciary does not need in its armoury.⁵⁷

⁵⁴ *Id.*

⁵⁵ M/s. Pipe Arts India Pvt. Ltd. v. Gangadhar Nathuji Golamare, 2008 (6) Mah LJ 280; Chabungbam Ibohal Singh v. Union of India, 1995 Suppl (2) S.C.C.83 (India).

⁵⁶ *supra* note 48.

⁵⁷ Priyanka Mittal, *Use of constitutional morality may lead SC to become third chamber of Parliament*, LIVEMINT (Dec. 09, 2018, 09:30 PM), <https://www.livemint.com/Politics/kmPJFgU8Qt61CCLLeIQ9z6I/Use-of-constitutional-morality-may-lead-SC-to-become-third-c.html>.

Indian Constitutional Law Review

The lack of judicial will to circumscribe its own powers with respect to Article 142, when combined with the expansive and liberal interpretation of Constitutional Morality augments the already existing cause of concern i.e. judicial overreach.

VII. CONCLUSION

Whilst delving into the jurisdiction of the Supreme Court, it is necessary to bear in mind that it is the apex judicial authority in the country and hence is bound to have a wide jurisdiction in order to secure justice and fairness, however, what is questionable is whether such jurisdiction can essentially be boundaryless under the garb of securing complete justice backed by Constitutional Morality. Such a concern is relevant whilst drawing an inference from Robert Michels, *'Iron Law of Oligarchy'* wherein he observes any institution or organization, however, so democratic with time turns into an oligarchy with some members assuming more power than others.⁵⁸

For instance, in the matter regarding the proposed elevation and judgeship of a homosexual Delhi High Court advocate, the Supreme Court collegium has constantly deferred its decision blaming security concerns because the partner of the proposed judge is a foreign national. A claim which is unfounded keeping in mind that the former Supreme Court judge Justice Vivian Bose was also married to a foreign national. Justice Madan Lokur, a prior member of the collegium exclaimed that:

*“It is getting increasingly difficult for the collegium to justify the delay and thereby holding back the recommendation. An opportunity has been presented to the collegium to take a progressive decision in favor of a meritorious and worthy candidate without being influenced by extraneous considerations.”*⁵⁹

⁵⁸ Pamela S. Tolbert, *Robert Michels and the Iron Law of Oligarchy*, CORNELL UNIVERSITY ILR SCHOOL 2010.

⁵⁹ Ajmer Singh, *Supreme Court collegium treads cautiously on appointing judge who is gay*, THE ECONOMIC TIMES (July 24, 2019, 08:23 AM), <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-collegium-treads-cautiously-on-appointing-judge-who-is-gay/articleshow/70355833.cms>.

Indian Constitutional Law Review

This in our opinion is an internalized derision of the concept of Constitutional Morality as laid down in *Navtej Singh Johar*.⁶⁰

Constitutional Morality in itself highlights the need to preserve the trust of the people in the institutions of democracy and hence the idea of Constitutional morality must inherently negate the idea of concentration of power in the hands of a few.⁶¹ It provides the basic rules which prevent institutions from turning tyrannical. It warns against the fallibility of individuals in a democracy, checks state power and the tyranny of the majority.⁶²

We find that this observation holds true for all functionaries under the Constitution including the Judiciary itself. The court in *KS Puttaswamy v. Union of India*⁶³ has observed that the *mere potential* to enable an intrusive state to become a surveillance state is alarming and it militates against the constitutional values and its foundational morality.⁶⁴

Therefore, drawing from the own observation of the court we find that the *mere potential* of the Judiciary becoming the third house of the Parliament is a distressing contingency and hence must be controlled by an adequate system of checks and balances.

VIII. RECOMMENDATIONS

Boundaries and Limitations to Exercise of Article 142 – We find that the observation in *Delhi District Administration v. Skipper Construction*⁶⁵ needs to be reviewed by the court in the light of the large number of cases being filed under Article 142.⁶⁶ A definitive interpretation would go a long way in reducing the confusion surrounding the provision and allow the citizens to be able to be guided by the existing law, thus fulfilling an important tenet of the Rule of Law. Presently, the court has not laid down either a test or certain conditions which would warrant the use of Article 142. In our opinion boundaries and limitations must be laid down by the Court with

⁶⁰ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).

⁶¹ *Govt. (NCT of Delhi) v. Union of India*, 2019 SCC OnLine S.C. 193 (India).

⁶² *supra* note 45, at 655.

⁶³ *K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1 (India).

⁶⁴ *Id.*

⁶⁵ *Delhi District Administration v. Skipper Construction*, (1996) 4 S.C.C. 662 (India).

⁶⁶ Annexure I.

Indian Constitutional Law Review

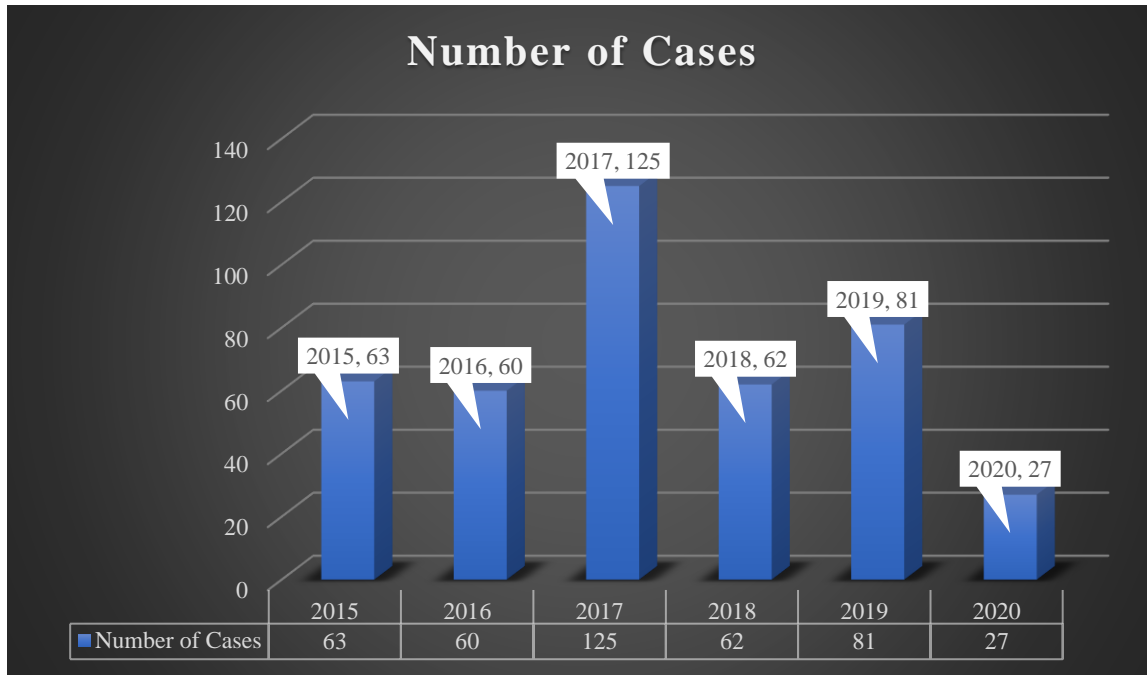
respect to the exercise of Article 142 thereby ensuring the certainty, clarity and definitiveness of the provision. Additionally, we believe that there is a need for the court to clarify the position of law regarding, whether the Supreme Court may bypass express statute or prohibition in statute while passing a decree or order under Article 142.

Nexus between the provisions of the Constitution and Constitutional Morality – Although Constitutional Morality cannot be said to be a judicial import, we find that there exist discordant interpretations of the same principle. Prof. D.D. Basu while making an observation on the position of the judiciary in America commented that, the Supreme Court of the United States sits over the wisdom of any legislative policy as a “third chamber or super-chamber of the Legislature”.⁶⁷ This observation was made in the context of extensive powers of judicial review and judicial discretion which enables the Supreme Court to invalidate law duly passed by the Legislature not only on the grounds that such law transgressed the powers vested in the legislature by the Constitution or by prohibitions contained in the Bill of Rights but also on the ground that such law was opposed to general principles said to underlie vague expressions, the meaning of which not expressly in the Constitution, would only be deciphered by the Supreme Court.⁶⁸ We find parallels between this observation of Prof. Basu and the current Indian scenario, especially with regards to the doctrine of Constitutional Morality. In order to mitigate such possibilities, it is necessary for the court to draw a strong correlation or nexus between the existing provisions of the Constitution and the morality so derived from it. When the court provides a strong nexus between the provisions and constitutional morality, such a pronouncement inspires trust, certainty and accessibility of the principle to all citizens as opposed to an abstruse inquiry existent only in the higher echelons of the Judiciary. This accessibility and trust are fundamental in ingraining *Constitutional Culture*.

⁶⁷ D.D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 43 (22nd ed. 2015).

⁶⁸ *Id.*

IX. ANNEXURE I:



Source: Original analysis from Manupatra Online Database Records.⁶⁹

⁶⁹ MANUPATRA, <https://www.manupatrafast.in>. (Original Research conducted by the authors from records available on the Manupatra Online Database).

**SEX DISCRIMINATION IN INDIA: THE JOURNEY FROM NARGESH MIRZA'S
TRAGEDY TO JOSEPH SHINE'S TRIUMPH**

Arvind Pennathur and Prakhar Bhatnagar[†]

Abstract

This paper attempts to trace the law on sex discrimination in context of Article 15 of the Indian Constitution. The first half of the paper focuses on the Nargesh Mirza case and analyses certain questions associated with it:

- (1) Can a sex based classification, prohibited under Article 15, be justified as a reasonable classification under Article 14? Specific to the case, could the differential treatment (which justified the creation of separate classes for men and women) be subjected to an Article 15 challenge itself?*
- (2) Can 15(3) be used a blanket justification for laws favouring women?*
- (3) In context of the discrimination 'only' on basis of an Article 15 category, is it justified if sex is added along with some other factor as a criterion for discrimination? What happens if the other factor is primarily a result of a stereotype attached with a particular sex?*

In the second half of the paper, an attempt is made towards evaluating the adultery law in India with respect to constitutional standards of sex discrimination.

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I. INTRODUCTION

India is a country that boasts of a culturally diverse and socially accommodative history. Whether it is the fact that the country has always believed in secular ideals or the fact that it recognises linguistic differences between its citizens, it has always come across as a nation that has been open to acceptance of varied identities. But with diversity, comes division, as well as inequality. While today's society might have progressed and developed an acceptance for concepts like equality, India's history is bloated with instances of discrimination, especially when it comes to the treatment that Indian women have received in both social and professional spheres.

The Constitution of India was drafted at a period of utmost uncertainty and instability. Amongst the various challenges that the drafters had to overcome, coming up with a provision that provided for equality amongst citizens was one of the toughest one. The drafters, relying upon the American Constitution, came up with Article 15 (which is the current Article 14):

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”

The article was set in a context of massive inequality and the primary aim behind coming up with Article 14 was to empower the State to be able to come up with methods and means of removing inequality by affirmative action, with an obvious consequence of discriminating in favour of the lower sections of the society to bring them up to the higher sections.¹ Therefore, the article incorporated both formal and substantive conceptions of equality with “equality before law” representing the formal notion and “equal protection of laws” representing the more substantive idea of equality. However, the legislature recognised that there were certain categories which were historically discriminated against and that the constitution had to offer them a much more substantive protection in the form an anti- discrimination provision. Thus, the constituent assembly came up with Article 9 (the current Article 15) to protect certain categories from discrimination:

¹ SAMRADITYA PAL, INDIA'S CONSTITUTION: ORIGINS AND EVOLUTION 215 (1st ed. 2015).

Indian Constitutional Law Review

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

(2) No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them, be subjected to any disability, liability, restriction or condition with regard to:

(a) Access to shops, public restaurants, hotels and places of public entertainment, or

(b) The use of wells, tanks, bathing Ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

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

Later on, sub clauses (4) and (5) were added to the article through constitutional amendments. While sub clause (1) prevents discrimination on grounds only of religion, race, caste, sex or place of birth, sub clause (3), almost as a proviso provides the state with the power to make provisions in favour of women and children. However, the interpretative history of these articles would make it clear how the courts have time and again adopted an extremely formalistic approach while interpreting both the articles which has not only narrowed their scope but also devoid them of one of the most important intentions with which they were brought: to undo the disadvantages and provide substantive equality which was denied to certain categories throughout the history of our country.

II. NARGESH MIRZA AND ITS IMPLICATIONS

1. Supreme Court’s Ruling

The main question in the case was about the constitutional validity of Air India’s Employee Service Regulations. There were three problematic regulations which terminated the service of air hostesses:-

Indian Constitutional Law Review

1. Upon attaining the age of 35 (the managing director by his discretion though could extend this to 45 years);
2. Upon marrying within first four years of service;
3. Upon first pregnancy.

The argument from the side of air hostesses was two pronged: *firstly*, the service regulations violated Article 14 since they made an unreasonable classification between male cabin crew members and air hostesses, who performed the same or similar functions, and the conditions which led to termination upon marrying or first pregnancy were manifestly arbitrary. *Secondly*, the service regulations violated Article 15(1) for selecting the air hostesses as there was hostile discrimination primarily on the ground of sex or disabilities arising from sex.

The court rejected both the contentions and held that the regulation satisfied the ‘*reasonable classification*’ test since the air hostesses and the male crew members essentially belonged to two separate classes by virtue of having different methods of recruitment, qualifications and promotion policies **and circumstances of retirement**. It held that Article 14 envisages equal treatment between equals only and thus would have no application to the current case since the air hostesses and male crew members belonged to two different classes. Next, the court delved into the question concerning the validity of the marriage and pregnancy clauses. While the court found the pregnancy clause to be violative of Article 14 for being “**not only manifestly unreasonable and arbitrary, but also containing the quality of unfairness and exhibiting naked despotism**”, the court found the marriage clause to be perfectly valid for benefitting family planning and ensuring success of the marriage. However, it is interesting to note that even though the court struck down the pregnancy clause, they accepted it with an amendment which terminated the services upon third and not the first pregnancy.

After the Article 14 scrutiny, the court then moved on Article 15 and held that the regulations did not violate the article. The court observed that the prohibition under Article 15 applied to discrimination on grounds ‘only’ of sex and the article has no application to the given case since sex is not the sole criteria and only exists in addition to some other considerations like the difference in service conditions of the air hostesses & male crew members.

2. The Implications

There is an obvious error and an apparent circularity in the reasoning which was adopted by the court in *Nargesh Mirza*. With regard to the Article 14 challenge, the Court upheld the validity of the rules based on the fact that both, the air hostesses and male crew members constituted separate classes. And the reason for arriving to that conclusion was the presence of different recruitment, promotion and retirement policies for both the classes. The reason of differentiation between men and women with regards to these policies was never examined by the Court. Instead of evaluating these policies as per the standards laid down in Article 15, the Court used these very policies to declare the air hostesses and the male crew members as different classes and then consequently negated the Article 14 challenge. The implication of such a holding is that in future, organisations can design different policies for men and women and later on justify this differentiation based on the fact that both categories constitute separate classes by virtue of having different policies.

With regard to the examination of marriage and pregnancy clauses, the court arrived upon two opposite conclusions with two forms of reasoning which are blatantly contradictory. While dealing with the marriage clause, the Court didn't subject the clause to any constitutional test, instead, it upheld the clause for reasons of family planning and for the reason that the process of hiring *ad hoc* air hostesses in place of pregnant air hostesses is hugely expensive. But, a similar clause putting the burden of family planning on male crew members was not looked into by the court at all. On the other hand, the court applied the test of arbitrariness to the pregnancy clause to strike it down and also suggested employment of *ad hoc* air hostesses if the pregnant air hostesses are considered incapable of performing the duties.

The Court did not find any violation of Article 15 either, based upon the fact that the discrimination was not based solely on sex but also on certain other considerations, which were not specified by the Court. However, looking at the Court's reasoning while upholding the marriage clause, it can be understood that these other considerations were the health of the employees, family planning and monetary issues which Air India faced. The implication of such a

Indian Constitutional Law Review

holding is that in future, policies discriminating on basis of sex can be coupled with any other considerations, not necessarily of a compelling nature, to avoid an Article 15 challenge. Further, even if these other considerations are arising out of certain stereotypical notions attached to a particular sex, the policy would be immune to an Article 15 challenge.

Another implication of the reasoning adopted by the court is the acceptance of the ‘*object*’ based and not the ‘*effect*’ based model under Article 15. If the policy doesn’t discriminate solely on the basis of sex, it is valid under Article 15, irrespective of the policy being discriminatory solely on the basis of sex in effect. Thus, the case had a huge impact upon the sex equality jurisprudence of India. Where exactly did the court go wrong in dealing with questions under Articles 14 and 15?

III. ARTICLE 14 V/S ARTICLE 15?

Article 14 of the Indian Constitution mandates equality of treatment and equal protection of law. But the question which then arises is: how large is the scope of Article 14, and does it exhaustively cover all aspects of equality? Furthermore, if it does, why is Article 15 required in our constitution?

In the case of *Vijay Lakshmi v. Punjab University*,² it was held that a reasonable classification between men and women, in line with an objective that is sought to be achieved, would not be violative of the constitution. Such an approach was further upheld in another case where the Court held that “*when women are discriminated only on the ground of sex, the basic question is whether it is founded on intelligible differentia and bears reasonable or rational relation or whether the discrimination is just and fair*”.³ The Court applied Article 14’s reasonable classification test to a case of sex discrimination and thus made way for justifying a provision violating Article 15 if it satisfies the classification test under Article 14.

² *Vijay Lakshmi v. Punjab University*, 2003 (8) SCC 440.

³ *Madhu Kishwar v. State of Bihar*, AIR 1996 SC 1864.

Indian Constitutional Law Review

However, such an interpretation renders the existence of Article 15 absolutely redundant. If discrimination made on the grounds mentioned under 15 was envisaged to be nonetheless justified through Article 14, then there would have been no requirement to add Article 15 to the Constitution. The fact that Article 15 exists in form of a separate provision indicates the fact that the drafters intended to provide special protection on certain grounds which they accordingly enumerated under the article.⁴ This is also evident from the fact that the selection of these grounds was extensively discussed in the Constituent Assembly debates.⁵

This idea also resonated through various decisions of the court. In the *Rani Raj Rajeshwari*⁶ case, the court clearly held that “*a classification which the Constitution forbids cannot possibly be said to be reasonable*”; thereby leaving no space for justification of provisions discriminating on grounds mentioned under Article 15, by application of the classification test.

It has also been held that rights under Article 15(1) are ‘absolute’ in nature and there is no possibility of restricting them unlike the case of Article 19.⁷ The combined effect of Articles 14 and 15 is not to prohibit state from making unequal laws as long as they are based on reasonable grounds.⁸ The prohibition only applies to the making of unequal laws based upon unreasonable grounds, which includes the grounds mentioned under Article 15(1).⁹ Furthermore, such an interpretation would nullify Articles 14, 15 and 16, which have been understood to constitute a single code of equality.¹⁰ The formal idea of equality not only requires treatment of equals equally, but also extends to treating unequals unequally, thereby allowing a space for social hierarchies to coexist with principles of equality.¹¹

Article 14’s classification test, which is generally said to include this formal idea of equality, therefore, does not tackle the other aspect of equality that is to break down the existing

⁴ Tarunabh Khaitan, *Beyond Reasonableness – A rigorous standard of review of Article 15 infringement*, 50 JILI 177, 195 (2008).

⁵ *Id.*

⁶ *Rani Raj Rajeshwari v. State of UP and Ors*, AIR 1954 All 608.

⁷ *A N Rajamma v. State of Kerala and Ors*, 1983 LAB IC 1388.

⁸ 4 DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 104 (8th ed. 2011).

⁹ *Alfred Baid v. Union of India*, 1976 AIR (Del) 302.

¹⁰ *Id.*

¹¹ C.A MacKinnon, *Sex Equality under the Constitution of India: Problems, Prospects, and ‘Personal Laws*, 4 INT’L J. CONSTITUTIONAL L. 181, 182 (2006).

inequalities in the society.¹² This is where the existence of Article 15 becomes absolutely pertinent for protecting certain categories from discrimination and breaking through the hierarchies that have existed in the society for a very long time. Moreover, if Article 14 was envisaged to act as a justification for provisions discriminating on the basis of categories mentioned under Article 15, then there would have been no requirement to include clause (3) to the latter. Clause 3 provides the state with the power to make special provisions for women and children. Thus, in absence of Article 15(3), a provision made to benefit only women would *prima facie* stand in violation of Article 15(1). But if the same provision can be justified by applying the reasonable classification test with the objective of that provision being beneficial to women, then Article 15(3) would be rendered absolutely redundant. The importance of Article 15(3) was further explained in the *Yusuf Abdul Aziz*¹³ case where the court held even though sex is a sound classification, no discrimination in general can be made on this ground since the Constitution itself provides for certain special provisions under Article 15(3). The clear implication arising out of this decision is that the only sex based classifications which are permitted under the Constitution are the ones falling within the ambit of Article 15(3).

In such a scenario, an alternative reading of Article 14 vis-a-vis Article 15 is required. One way is to read Article 14 as a clause which protects those groups from discrimination which do not find a specific mention under Article 15. Historical evidence for this approach exists in the fact that the Constituent Assembly's chapter dealing with equality rights only included an anti-discrimination provision, clearly showing how equality was understood in terms of non-discrimination.¹⁴ The drafters of the Constitution included certain grounds under Article 15 recognising them to be historically disadvantaged; but also at the same time being aware of the fact that new grounds might come up in future which might require protection from discrimination as well. It is thus possible that it was in this context that the drafters enacted Article 14; to act as a general anti-discrimination provision protecting categories which might come up in future and fall outside the scope of Article 15.¹⁵

¹² *Supra* note 4.

¹³ *Yusuf v. State of Bombay*, 1954 SCR 930.

¹⁴ Gautam Bhatia, *Equal moral membership: Naz Foundation and the refashioning of equality under a transformative constitution*, 1 INDIAN L REV. 115, 134 (2017).

¹⁵ *Id.*

Indian Constitutional Law Review

A similar approach was also upheld in the *Charan Singh*¹⁶ case, where the court held that Articles 14 to 16 enshrine **the right to equality and prohibit discrimination**. The court further, in context of Article 14 and 15 observed that:

“Equality is not only proclaimed as an ideal but is sought to be achieved in actuality by asking the State to remove inequality and enabling it to make appropriate provisions. These two classes of provisions should, therefore, not be conflicting but have to be read together to make up the ideal of equality effective and real.”

Thus, if such an interpretation is adopted, it would not only resolve the ostensible conflict between Articles 14 and 15, but would also fit into the narrative of Articles 14 to 16 forming a single code of equality. The effective interpretation of Article 15 has not just been hindered by way of pitching it against Article 14, but also by narrowly interpreting the term ‘only’ present within the former’s text. The discussion in the next part focusses on this aspect of Article 15’s interpretation.

IV. THE ‘SEX PLUS’ APPROACH

Article 15 of the Constitution of India prohibits discrimination that is based upon certain categories that were considered to be historically disadvantaged by the drafters. However, the scope of the article has been considerably narrowed down by the Indian courts through their interpretation of the phrase “**on grounds only of**” which precedes the enumerated categories under the Article.

While the initial drafts of the article had no mention of this phrase,¹⁷ it has become an important phrase for the interpretation of the protection under the Article. The fact that a provision is subjected to the Article 14 test the moment it is found that it does not discriminate only on

¹⁶ *Charan Singh v. Union of India*, ILR 1979 Delhi 422.

¹⁷ *Constituent Assembly of India Debates*, Vol. XI, 25 November 1949, <http://parliamentofindia.nic.in/ls/debates/vol11p11.htm>.

grounds under Article 15, makes this phrase extremely important. In the case of *Mahadeb Jiew v. BB Sen*,¹⁸ the court held that what is prohibited under Article 15 is discrimination on grounds only of sex, and discrimination based upon **sex along with other grounds** is permitted. The other ground in this particular case was property. In the case of *Mrs RS Singh v. State of Punjab*,¹⁹ a rule prohibiting women to become a jailor was upheld by the court for the reasons that its absence would subject women to dangerous situations, and that a woman performing this role would be subjected to ‘hazardous predicaments’. Going one step further, the court in *Girdhar Gopal v. State*²⁰ held that cases where the discrimination is not based solely upon the grounds under clause (1) and is coupled with considerations of “**propriety, public morals, decency, decorum and rectitude**”, it would not violate Article 15.

There is a common thread running through all the three cases. The court denied the application of Article 15 in all three of them since **sex was coupled with other considerations** (property in the former and safety in the latter). But a more nuanced analysis of these ‘other considerations’ in both these cases would reveal that these considerations were almost an inevitable consequence of the sex itself. More specifically in the second and the third case, the other considerations were results of stereotypes that women are not suitable for certain types of jobs and women are only expected to behave in a certain manner. In such a scenario, can it be said that the discrimination was not based on grounds only of sex?

The problems with this ‘sex plus’ approach are plenty. Firstly, such an understanding completely ignores the fact that factors like economic status, property ownership etc. are intertwined with the sexual identity of the person itself.²¹ It ignores how women in India have been historically subjected to discrimination which has stripped them of both economic well-being and property ownership. Therefore, the error in the approach adopted in the *Mahadeb Jiew* case lies in the fact that it does not recognise that an additional consideration like property would inevitably be discriminatory against women.

¹⁸ *Mahadeb Jiew v. BB Sen*, AIR 1951 Cal 563.

¹⁹ *Mrs RS Singh v. State of Punjab*, AIR 1972 Punjab and Haryana 117.

²⁰ *Girdhar Gopal v. State*, 1953 CriLJ 964.

²¹ Shreya Atrey, *Through the looking glass of intersectionality: Making sense of Indian Discrimination Jurisprudence on Article 15*, 16 THE EQUAL RIGHTS REV. 160, 168 (2016).

Indian Constitutional Law Review

Secondly, the approach adopted by the court in *Mrs RS Singh* case is problematic since it not only furthers the stereotypical notions surrounding women in the society, but in fact legitimises them by allowing the rule to pass the test of Constitution. The courts have upheld similar stereotypical notions through other methods as well; for example, policies where an unequal burden has been put upon women, thereby furthering the stereotype of only one particular sex having certain type of burdens. The best illustration of such an approach can be found in the *Nargesh Mirza* case. The Court first discusses treating equals equally but then upheld a policy which imposed the burden of making a marriage successful solely on women. The Court thus by imposing an uneven burden on women, implicitly accepts their unequal status in a marriage. Without even delving into the question of Article 15, such an approach can be found to be problematic when seen in light of the constitutional morality requirements. The rules that have the effect of furthering the stereotypical notions about a particular sex stand against requirement of inclusiveness under constitutional morality that can be derived from Articles 25, 29²² and the preamble itself.

Concerns about the extremely formalistic approach to Article 15 adopted by the cases above, have also been expressed through various decisions of the court. In the case of *Walter Alfred Baid v. Union of India*,²³ the Court held that discrimination based on sex with other considerations having their ‘genesis in the sex itself’ would be prohibited under Article 15. The Court further observed that provisions discriminating against all women by virtue of certain physical disparities between the sexes are nothing but discriminatory on grounds only of sex. While there might be a difference in the physical capabilities of both the sexes, it is not permitted to exclude all women from a particular type of work in a blanket fashion. Therefore, the only grounds that can save such discrimination from being caught by Article 15 are the ones that are independent of sex.²⁴ In another case, a policy was struck down by virtue of it representing stereotypical morality and furthering certain notions of sexual roles.²⁵ Thus, what the anti-stereotyping approach essentially warrants is rejection of sex-based classification, having its basis in the natural distinction between

²² *Supra* note 14.

²³ *Supra* note 9.

²⁴ *Supra* note 9.

²⁵ *Anuj Garg v. Hotel Association of India*, AIR 2008 SC 663.

Indian Constitutional Law Review

both the sexes. The distinction itself has to be evaluated to check whether its roots lie in the existing stereotypes that with time appear to be natural.

A strict application of the anti-stereotyping principle is required due to the catastrophic implications that arise out of the ‘sex plus’ approach. One implication is that it allows the State to come up with discriminatory policies against women, merely by adding additional grounds analogous to their sex. In the recent judgment of *Navtej Johar v. Union of India*,²⁶ the Court while reading down Section 377 of the Indian Penal Code reiterated the issues with the ‘sex plus’ approach and observed that:

“This formalistic interpretation of Article 15 would render the constitutional guarantee against discrimination meaningless. For it would allow the State to claim that the discrimination was based on sex and another ground (‘Sex plus’) and hence outside the ambit of Article 15. Latent in the argument of the discrimination, are stereotypical notions of the differences between men and women which are then used to justify the discrimination. This narrow view of Article 15 strips the prohibition on discrimination of its essential content.”

In such a scenario, what is required is an expansive interpretation of the term ‘sex’ in Article 15. If the term *sex* was interpreted to mean *gender* in context of Article 15, it would allow consideration of social and cultural constructs attached with the sex of an individual,²⁷ and would allow consideration of the disadvantages that are purely sex based but lie outside the ambit of Article 15 due to the ‘sex plus’ approach.

In *National Legal Services Authority v. Union of India*,²⁸ the Court held that:

“Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be

²⁶ *Navtej Johar v. Union of India*, 2018 SCC OnLine SC 1350.

²⁷ Gwendolen White, *"Sex" and "Gender": Two Confused and Confusing Concepts in the "Women in Corporate Management" Literature*, 47 J. BUS. ETHICS 89, 90 (2003).

²⁸ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

Indian Constitutional Law Review

addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' Under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity."

A similar argument was also upheld in the recent decision of *Navtej Johar*.²⁹ The Court observed as to how the impact of a law must be interpreted while considering its larger social context. The Court also held that the requirement of Article 15 is to read the term 'sex' in context of other socio-political and socio-economic factors.³⁰ Thus, the correct approach under Article 15 is to liberally read the term 'sex' and to also bring considerations that have their genesis in sex within the ambit of the Article.

Another aspect of Article 15 that has been problematically interpreted to further sex discrimination is sub clause (3). Next part of the paper focusses on the decisions interpreting this aspect of the Article.

V. 15(3): SHIELD OR A SWORD?

Article 15(3) of the Indian Constitution provides the State with the power to make special provisions for women and children notwithstanding Article 15(1). But there are certain questions which need to be answered with regard to the scope of Article 15(3). To start with, does the ambit of Article 15(3) overlap that of Article 15(1), and does Article 15(3) allow the making of any

²⁹ *Supra* note 26.

³⁰ *Id.*

Indian Constitutional Law Review

special provision for women or children, including provisions which are not necessarily beneficial to them?

The court in the case of *Yusuf Abdul Aziz v. State of Bombay*³¹ made a slightly peculiar observation:

“It was argued that clause (3) should be confined to provisions which are beneficial to women and cannot be used to give them a license to commit and abet crimes. We are unable to read any such restriction into the clause.”

In *Padmraj Samarendra v. State of Bihar*,³² the Court upheld the validity of a provision under Article 15(3) because it was required for satisfying the medical needs of the public. The implication of this is the fact that the State can make special provisions for women not just with the intention of positive discrimination in favour of women but also to satisfy public needs. Taking the interpretation even further away from the ‘benefit of women’ narrative, the court in *Leela v. State of Kerala*³³ upheld the traditional view of keeping women away from jobs only meant for men and also upheld a policy prohibiting women from working during night hours. The court defended this policy with Article 15(3), clarifying its intent to protect women from hazardous jobs and to **protect them from areas which the parliament deemed fit.**

Therefore, it becomes amply clear that from the approach adopted by the court in the cases above that Article 15(3)’s scope is not limited to making provisions beneficial for women and the considerations for coming up such provisions can include public needs and the requirement to keep women away from jobs not meant for them.

However, such an approach is patently problematic for various reasons. Not only does the approach take the attention of Article 15(3) away from serving the interests of the women, it also legitimises the very discrimination the provision aims to fight against. It allows the state to come up with policies in the name of protectionism and thus reinforce the idea of construing women as

³¹ *Supra* note 13.

³² *Padmraj Samarendra v. State of Bihar*, AIR 1979 Pat 266.

³³ *Leela v. State of Kerala*, 2004 (102) FLR 207.

the weaker sex. The approach becomes even more problematic if we look at the intention and purpose of bringing such clause in the first place.

A reference to the Constituent Assembly debates would clearly show how the drafters intended the clause to act as an empowering mechanism through which the State could **discriminate in favour of women**, so as to undo the disadvantages that were suffered by them historically.³⁴ The intention with which Article 9(2) (Current 15(3)) was brought was to bring policies which benefitted women and took them out of patriarchal control.³⁵ In the *Charan Singh*³⁶ case, the Court held, that the existence of Article 15(3) presupposes women as a historically disadvantaged group and allows the State to make provisions to lessen the inequality between the sexes. In *Govt of AP v. Vijaykumar*,³⁷ the Court elaborated the exact scope and purpose of Article 15(3). It was held that the purpose of Article 15(3) is to remove the ‘**socio-economic backwardness**’ of women and to strengthen them in a way that reduced the equality between men and women. The Court observed that Article 15(3) has to be used as a tool to **improve the status of women**. A similar view was also upheld by Justice Chandrachud in the recent case of *Joseph Shine v. Union of India*³⁸, where he observed that the State could not make policies which further paternalistic and patriarchal notions in the name of protection under Article 15(3).

However, this throws an important question upon us: what exactly should the test be for a policy to fall under the ambit of Article 15(3)? Should the test be positive in a sense of it requiring the policy to achieve certain objectives, or should it be negative so as to keep the objectives open but define what the policy cannot do? Drafters of the constitution required policies under Article 15(3) to benefit women, whereas some recent cases like *Joseph Shine* bend more towards the negative test requiring the policies to not further the stereotypical notions surrounding women.

In such a scenario, the author believes that the Court should bend towards the negative test rather the positive test. Article 15(3) is meant to act as a clause validating positive discrimination

³⁴ Dr. MC Sharma v. The Punjab University, AIR 1997 P H 87.

³⁵ Joseph Shine v. Union of India, 2018 SCC OnLine SC 1676.

³⁶ *Supra* note 16.

³⁷ Govt of AP v. Vijaykumar, 1995 AIR 1648.

³⁸ *Supra* note 35.

Indian Constitutional Law Review

in favour of women and any policy as long as not going against the very idea of non-discrimination should be allowed to be brought under its ambit. The problem with using the ‘benefit’ test for such policies is that it would give the State the power to decide what is beneficial for women. For example, can a policy making the process of divorce easier only for women be justified under Article 15(3)? Therefore, it is difficult for the state to decide where the actual benefit of a particular woman lies. There is also a possibility that the state’s notion of benefit might be dominated with patriarchal notions and stereotypes. Thus, it is best that the negative test is applied to evaluate policies vis-à-vis Article 15(3).

Moreover, to give full effect to the principles of affirmative action enshrined under Article 15(3), it is pertinent that it is read as a part of the overall scheme of equality and not as an exception to those principles. It was observed by the Court in the *Vijaykumar* case as well, that both clauses (1) and (3) under Article 15 go together and the scope of clause (3) is wide enough to cover the entire range of state activity that is covered under clause (1).³⁹ If Article 15(3) is treated as an exception to Article 15(1) and the equality code in general, it would be subjected to the same treatment as was rendered to Article 15(4) in the initial cases like *MR Balaji*. Principles of affirmative action are very much a part of the overall scheme of equality and non-discrimination and treating them as an exception would clearly go against the intention of the drafters behind introducing these provisions.⁴⁰

After having discussed the problems around the general interpretation of Articles 14 and 15, the paper in the next part discusses the implication of the problematic interpretation on the Adultery law in India.

VI. ARTICLE 15(3) AND ADULTERY LAW

Society lives and dies by the relations that people share with one another. The very notion of people coming together to achieve a higher purpose and becoming something more than the

³⁹ *Supra* note 37.

⁴⁰ *Supra* note 1, at 118.

Indian Constitutional Law Review

sum of their parts is what allowed humanity to prosper for over 20,000 years.⁴¹ An integral part of such a prolonged existence is marital relations; all over the world, marriage is seen as a special bond between two people, and it is the duty of both parties to care for each other in sickness and in health. In India, marriage forms a part of religion itself, as the bond between a man and his wife is regarded to be an extremely important step in both parties' lives, as it provides for expansion of a family's social and economic position, as well as a way to establish a smaller family.⁴² The bond is regarded as sacred and it is not to be defiled under any circumstance.

Just like any other relation that humans share, a marriage must be built on notions of self-respect and equality for both parties. Such magnanimous ideals are propagated throughout society and thus from a young age, humans are motivated to adhere to them without much thought;⁴³ are we not taught as children to respect everyone and to treat everyone with dignity? However, in spite of such standards, if one's actual behaviour is deviant from this ideal that society has built for itself, there will be condemnation by members of one's own family and the general public.⁴⁴ This is important in the grand scheme of things as such an action acts as a deterrent to others thinking of not obeying the societal code of conduct, and perhaps one of the strongest forms of rebuke is seen in instances where the marriage is not viewed with the same feeling of intensity and faith by both the parties, such as cases of adultery.

Adultery is generally defined as the act of maintaining sexual relations with a person outside one's own marital structure. If two people are married, and one of the parties maintains a sexual relationship with another person while still being married, then that person is said to have committed adultery. It has been regarded as an act worthy of condemnation as it signifies unfaithfulness in its highest form. Adultery has always been regarded as an immoral act since ancient times. The Babylonian king Hammurabi had codes in place that laid down that the act of

⁴¹ Elizabeth Howell, *How Long Have Humans Been on Earth?*, UNIVERSE TODAY, (January 19th, 2015), <https://www.universetoday.com/38125/how-long-have-humans-been-on-earth/>

⁴² Giri Raj Gupta, *Love, Arranged Marriage, and the Indian Social Structure*, 7 J. COMPARATIVE FAMILY STUDIES, 75, 85 (1976).

⁴³ Kingsley Davis, *Forms of Illegitimacy*, 18 OXFORD UNIVERSITY PRESS: SOCIAL FORCES, (1939).

⁴⁴ *Id.*

adultery was a crime and that people would be punished with death⁴⁵ for its commission.⁴⁶ Assyrian law codes state that if a man discovers his wife engaging in adultery, he can do whatever he pleases with both the wife and the adulterer without any measure of guilt.⁴⁷ Early English law went a step further and characterised adultery as more than a mere criminal violation, but held it to be a violation of a husband's right over his property.⁴⁸ In 1707, the then Chief Justice John Holt stated that a man who had sexual relations with another's wife had committed the 'highest invasion of property' and that no person could possibly receive a higher provocation,⁴⁹ likening it to theft.⁵⁰ In 19th century Britain, women were viewed merely as chattel as one's chastity was seen as a central component of honour.⁵¹ Back then, the main object of adultery law was not to protect the bodily integrity of a woman or to secure the rights of woman as owner of her body, but it was to ensure that husbands could exert their ownership over their wives in order to ensure the purity of their own bloodlines.⁵² A similar connotation had come from ancient Greek and Roman law, which stated that adultery was a violation of the exclusive rights of male sexual privileges with his wife.⁵³ An illustration of the morality in early England can be seen in the novel '*The Scarlet Letter*' by Nathaniel Hawthorne, when an adulterous woman was forced to bare the letter 'A' in public, while her husband suffered no such indignity. This is reflective of the fact that women have always been punished severely for adultery while men do not bear such a burden.⁵⁴

1. A Move Towards Change: Other Countries

Adultery has always been regarded as a moral wrong, irrespective of its criminal aspect. While the decision to decriminalise it has come recently in India, various other countries have already decriminalised laws relating to adultery. For instance, in 2015, adultery was decriminalised

⁴⁵ Dhananjay Mahapatra, *Why was adultery law enacted in 1860 and why it had to go now*, TIMES OF INDIA, (September 28th, 2018), <https://timesofindia.indiatimes.com/india/why-was-adultery-law-enacted-in-1860-why-it-had-to-go-now/articleshow/65987873.cms>

⁴⁶ *Supra* note 35.

⁴⁷ Morris Jastrow, *An Assyrian Law Code*, 41 J. AM. ORIENTAL SOC., (1921).

⁴⁸ *Supra* note 35.

⁴⁹ Samuel H. Pillsbury, *Judging Evil: Rethinking the Law of Murder and Manslaughter*, NYU Press (2000).

⁵⁰ Encyclopedia of Diderot & d'Alembert, Vol. 1 (1751), published by André le Breton, Michel-Antoine David, Laurent Durand and Antoine-Claude Briasson.

⁵¹ *Supra* note 35.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ James R. Mellow, *Hawthorne's Divided Genius*, 6 THE WILSON QUARTERLY (1982).

Indian Constitutional Law Review

in a 7-2 majority of South Korea's Constitutional Court.⁵⁵ It was Article 241 of the Korean Penal Code and it was struck down due to the acknowledgment by the Court that they should not interfere with the private lives of the citizens.⁵⁶ The majority acknowledged that while the intention of such a law was to promote good marriage culture, there must exist a balance between the interest of the legislature in promoting values and the fundamental right of self-determination, which in turn included sexual self-determination. In Uganda, the highest court of the land held that it violated Article 21 (equality under the law), Article 24 (respect for human dignity and protection from inhuman treatment) and Article 33(1) - protection of rights of women of their Constitution.⁵⁷ Even as early as 1996, a decision by the Guatemalan Constitutional Court struck down the punishment for marital infidelity on the basis of the equality guaranteed by the Constitution to both parties.⁵⁸

In the United States, 17 out of 50 states regard adultery as a criminal offense.⁵⁹ However, in cases such as *Lawrence v. Texas*,⁶⁰ the Court ruled that the right to liberty encompassed the right for consenting adults to conduct their lives in whatever manner they choose. They based the reasoning on the fact that the act of adultery is a personal choice in which the State has no jurisdiction. The Supreme Court of North Carolina followed this rationale and held that the law of adultery violated the Fourteenth Amendment of the Constitution as well as the substantive due process clause.⁶¹ Another argument made in favour of the law being unconstitutional is how it implicated the right to privacy. According to an article by Martin Siegel, it implicates it in three ways: marital privacy, right to association, and freedom of expression.⁶² While it is an unconventional choice, it is not deprived of the right to privacy, as different individuals are free to make different choices.⁶³ Siegel further says that adultery should be looked at as nothing more than an additional element in a continuum of interactions between people and that it cannot be

⁵⁵ *South Korea Legalises Adultery*, THE GUARDIAN, (February 26th, 2105), <https://www.theguardian.com/world/2015/feb/26/south-korea-legalises-adultery>

⁵⁶ *Id.*

⁵⁷ *Supra* note 35.

⁵⁸ Thalif Deen, *Adultery laws unfairly target women*, U.N says, IPS NEWS AGENCY, (October 24th, 2012), <http://www.ipsnews.net/2012/10/adultery-laws-unfairly-target-women-u-n-says/>

⁵⁹ *Supra* note 26.

⁶⁰ *Lawrence v. Texas*, 539 US 558 (2003).

⁶¹ *Supra* note 35.

⁶² Martin J. Siegel, *For Better or For Worse: Adultery, Crime & the Constitution* 30 J. FAMILY L. (1991).

⁶³ *Bowers v. Hardwick*, 478 U.S.205.

Indian Constitutional Law Review

classified as purely a sexual activity,⁶⁴ and that a law criminalising adultery also has the potential to implicate first amendment rights under freedom of association, citing *Roberts v. United States Jaycees*⁶⁵ which says that the right extends to 'expressive association' as well. The article reaffirms that the act is one that is well within the confines of marriage and that it deserves the veil that other private affairs are given, citing *Eisenstadt v Braid*,⁶⁶ which says that a marriage's privacy and autonomy are the best ways to safeguard liberty.

The decision of the legislators of the Indian Penal Code to criminalise the act of adultery may have been one to ensure that a semblance of morality is instilled among the Indian people due to the emphasis on the sanctity of marriage in the country.⁶⁷ However, the law that was put into place is unconstitutional due to being wildly discriminatory against the very group of people it claims to protect. The wording of the law reduces women to objects, thereby furthering patriarchal notions rather than quashing them, and thus it contributes negatively to the perception of women in Indian society. However, with *Joseph Shine's* decision, the gears have shifted and there is now a new sense of worth and autonomy for women.

2. Indian Law

Laws concerning adultery have always been detrimental to sentiments of women and were framed and executed in ways that contributed to their oppression; a contemporary example of such a law can be seen in the now defunct Section 497 of the Indian Penal Code. Thomas Macaulay drafted the first copy Indian Penal Code, and in his draft he wrote that there would be no advantage in criminalising adultery as he differentiated between two classes of people who could be negatively affected by such a law: those who feel violated on an emotional level due to the wife's actions and those who would feel aggrieved by the loss of the wife in a household sense. Under the differentiation, he said it was best to treat adultery as a civil injury, not a criminal one. He also said that the legislature should not punish acts that may be immoral simply because they are

⁶⁴ *Supra* note 62.

⁶⁵ *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

⁶⁶ *Eisenstadt v Braid*, 405 U.S. 438 (1972).

⁶⁷ Abhinav Sekhri, *The Good, The Bad, and the Adulterous*, SOCIO-LEGAL REVIEW, <http://www.sociolegalreview.com/wp-content/uploads/2015/12/The-Good-the-Bad-and-the-Adulterous-Criminal-Law-and-Adultery-in-India.pdf>

Indian Constitutional Law Review

perceived as such. However, the Court Commissioners said that adultery should be made an offence due to difficulty of evidence being shown and the possibility that with such a system in place, the law would fail to punish the offence. They limited the cognizance of adultery to only those committed with a married woman, and in a move that was intended to be sympathetic to the oppression of women in India, they remarked that only the man should be made liable for punishment. Thus, Section 497 of the Indian Penal Code was put into effect, which reads:

“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.”

There were three main challenges to the constitutional validity of Section 497 prior to the recent decision of *Joseph Shine v. Union of India*. The first was the case of *Yusuf Abdul Aziz v. State of Bombay*,⁶⁸ where the petitioner’s argument was that the section offended Articles 14 and 15 of the Constitution. However, the Supreme Court defended the section, saying that it came under the ambit of Article 15(3). The Court said that the provision protected women as it prevented them from being held liable for the offence of adultery.

It was not until 1985 that the matter came before the Supreme Court again, in the case of *Sowmithri Vishnu v. Union of India*.⁶⁹ The petitioners argued that Section 497 was an instance of ‘romantic paternalism’. However, the Court gave a highly regressive line of reasoning for upholding the section, saying that it was commonly accepted that men are ‘seducers’ and that upon this ground the law could not be interpreted to mean that either a man or a woman could be guilty of the offence⁷⁰ to prevent several sections of the code from being restructured. Their reasoning rested on the assumption that since men were the only ones who could commit such an action, in

⁶⁸ *Supra* note 13.

⁶⁹ *Sowmithri Vishnu v. Union of India*, 1985 AIR 1618.

⁷⁰ *Id.*

Indian Constitutional Law Review

the eyes of the court, they were the only ones who could be held responsible and thus, they are the only ones who could be punished by the law. The last major decision on the matter was *Revathi v. Union of India*,⁷¹ in which the legality of Section 198(1) of the Code of Criminal Procedure was litigated. This decision followed the regressive trend set by the earlier judgments and did not recognise sexuality of women. The Court ruled that the man is the only person who could be treated as the ‘outsider’ and who could disrupt a marriage and failed to take into account that ‘an outsider woman’ could just as easily invade the sanctity of matrimonial privacy. The sexuality and societal status of women was subverted and the male psyche was placed on a higher pedestal, giving the impression that men were entitled to own their wives (like property) and that a woman’s sexuality was not something that they could claim for themselves. Such a line of reasoning endorsed a patriarchal mindset.⁷²

At the outset, two issues can be flagged with such reasoning that the court has adopted in three cases. *Firstly*, the judgments implied that women are nothing but the victims of men, and that they are ‘vulnerable’ to seduction, hence their exclusion from punishment under the section. This viewpoint inherently classifies women as weaker than men, which is blatantly discriminatory. *Secondly*, Section 497 placed emphasis on ‘consent’ of the man and made it abundantly clear that women were considered as the property of the husbands. The provision made it illegal for sexual intercourse without consent of the husband, but if consent was given, then it became legitimate. The Courts’ rationale can be summed up in an analogy that can be drawn with respect to a piece of land owned by a person – as long as you take the owner’s permission, walking on it is all right. This attitude is, again, discriminatory. Such an interpretation of a provision of the law plays right into the belief that women are weak and cannot be left to their own devices. If one looks at the decisions in each of these judgments carefully, it is also apparent that they are all steeped in extreme gender bias and written with a patriarchal mentality. In *Anuj Garg v. Hotel Association of India*,⁷³ the Court held that if there was ever a conflict of interest between stereotypical roles of men and women and the privately recognised rights of any individual, then the rights of the

⁷¹ *Revathi v. Union of India*, 1988 AIR 835.

⁷² KI Vibhute, "Adultery" in the Indian Penal Code: Need for a Gender Equality Perspective, 2001 6 SCC (Jour) 16.

⁷³ *Supra* note 25.

individual would have to prevail,⁷⁴ and that stereotypes could not be used to justify discrimination.⁷⁵

Coming right off the heels of the Supreme Court decriminalising homosexuality and reading down Section 377,⁷⁶ the decision of the court to decriminalise adultery was the one that was much applauded by society as the law was viewed as archaic in such a progressive age. The issue with the previous judgments was that they all implied that women were victims and that they are ‘vulnerable’ to seduction and it was evident that the decisions were steeped in extreme gender bias and written with a patriarchal outlook on the relationship between men and women within a marriage, something *Joseph Shine* noticeably addressed.

The primary judgment, written by Former Chief Justice Dipak Misra and Justice Khanwilkar, emphasized on the Article 14 test of reasonable classification, saying that while there was intelligible differentia in that the husband is being allowed to move against the man in the adulterous relationship, while the wife could not, there was no rational nexus between the law and its objective, as the law was premised on stereotypical notions involving the role of women in society. The judgment cited *Pawan Kumar v. State of Himachal Pradesh*,⁷⁷ which emphasized that each woman had a right to life that must be socially respected. The arbitrariness test was also used by the court, and it was determined that it was irrational that the husband could “deal with the wife as he likes”⁷⁸; a notion that was deemed excessive and disproportionate. Justice Misra noted that the provision suffered from the absence of logicity of approach and that due to this, it violated Article 14.

The judgment also derived the concept of dignity from *K Puttaswamy v. Union of India*,⁷⁹ re-affirming that it was a pillar of the Indian Constitution and that the state has a duty to facilitate

⁷⁴ *Id.*

⁷⁵ Gautam Bhatia, *Sex Discrimination and the Constitution – X: The Culmination of the Anti-Stereotyping Principle in Anuj Garg*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, (August 29th, 2015), <https://indconlawphil.wordpress.com/2015/08/29/sex-discrimination-and-the-constitution-x-the-culmination-of-the-anti-stereotyping-principle-in-anuj-garg/>.

⁷⁶ *Supra* note 26.

⁷⁷ *Pawan Kumar v. State of Himachal Pradesh*, 2017 7 SCC 780.

⁷⁸ *Supra* note 35.

⁷⁹ *K Puttaswamy v. Union of India*, 2017 10 SCC 1.

Indian Constitutional Law Review

dignity of every individual,⁸⁰ and that a life without dignity is a life with no substance.⁸¹ Justice Chandrachud, in *Puttaswamy*, stated that when dignity required privilege, democracy would have lost its way. What then, would be the state of the country if dignity required you to be a man? It is problematic to uphold archaic provisions that remove the dignity of one gender alone, as such notions are violative of the basic constitutional principles that hold our democracy together. *Madhu Kishwar v. State of Bihar* states that Indian women have been continuously suffering discrimination, having been subjected to rampant inequality on a daily basis, and that this offends their dignity and right to life. Section 497 acts as another enabler for the continued loss of dignity of women by comparing them to chattel and depriving them of their sexuality. Therefore, the Court concluded that Section 497 effectively curtailed the essential dignity which women are entitled through creating gender stereotypes and thus was violative of Article 21.

Justice D.Y. Chandrachud gave a conclusive argument towards the unconstitutionality of the provision, saying that the wording of the section implies that women have no sexual agency and that criminal exemption is then granted to the woman in order to ‘protect’ her. He further said that Section 497 was based on the understanding that once a woman is married, she has no identity due to being subordinate to the husband. By recognising, accepting and enforcing these notions, the section was inconsistent with the ethos of the Constitution. He addressed the argument given by the court in *Yusuf*, saying that Article 15(3) is meant to serve as a powerful remedy to discrimination and prejudice faced by women for centuries, not a provision that furthers patriarchal notions disguised with a veil of protection to women.⁸² Given the subservient status of women in Indian society, such a law has been created to ensure that women have some recourse of the law to place them on a status equal to that of men. It is not unlike affirmative action, in that its function is to ensure a common platform for both men and women in the eye of the public.⁸³ The presumed lack of sexual agency means that criminal exemption is then granted to the woman in order to ‘protect’ her. However, Article 15(3) is a provision whose intention was to bring out equality between men and women in a country where there is an obvious patriarchal outlook on almost all facets of life. The sense of both dignity and autonomy are absolutely essential crucial to substantive

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Supra* note 26.

⁸³ *Supra* note 8.

Indian Constitutional Law Review

equality, and Section 497 takes this away by reducing women to mere property and by shutting down their sexual agency. Hence, Article 15(3) does not protect a statutory provision that entrenches patriarchal notions in the garb of protecting women.

In *Yusuf*, the reasoning for the Court to use Article 15(3) is that it is a section that permits creation of laws that allow for gender bias towards women, given their social and economic handicaps⁸⁴. In *Independent Thought v. Union of India*,⁸⁵ the Court held that the original intent behind Article 15(3) was to incorporate special provisions for women and children in order to integrate them into society and to take them out of patriarchal control. This escaped the notice of the Court, which was that it was enacted to improve the status of women and ensure that they are treated with dignity and respect.

In the case of *Dattatraya Motiram More v. State of Bombay*,⁸⁶ the Court held that Article 15(3) is not offended if positive discrimination towards women is the effect of a policy by the State, however, if the law in question is based on stereotypes surrounding the sexuality of woman, then can it be allowed to stand? The test for a law coming under the ambit of Article 15(3) is whether the provision in question has a tangible effect on the physical or social disabilities of a woman in existing social conditions,⁸⁷ and a law that perpetuates a stereotype that women are nothing more than the property of their husbands cannot go ignored. Justice Malhotra also proceeded along similar lines as she attacked the stereotypical mindset behind the provision itself, citing *Anuj Garg v. Hotel Association of India*.⁸⁸ As the very notion of women being treated solely as victims and viewed as property was discriminatory as it places them below men, the law, in her reasoning, could not be allowed to stand. Justice Chandrachud made similar observations in his judgment in *Navtej Johar v. Union of India*,⁸⁹ where the Court struck down Section 377.

While the judgment as a whole was progressive, Justice Nariman's argument for keeping Section 497 outside the ambit of Article 15(3) was unsatisfactory, as he proceeded on purely

⁸⁴ 1 MP JAIN, INDIAN CONSTITUTIONAL LAW 1061 (5th ed. 2003).

⁸⁵ *Independent Thought v. Union of India*, (2017) 10 SCC 800.

⁸⁶ *Dattatraya Motiram More v. State of Bombay*, AIR 1953 Bom 311.

⁸⁷ *Supra* note 69.

⁸⁸ *Supra* note 25.

⁸⁹ *Supra* note 26.

Indian Constitutional Law Review

technical terms without going into the merits of the mentality behind the provision. He argued that Article 15(3) could not be used to justify the section as it only applied to provisions that were created after the commencement of the Constitution. However, what he failed to recognise was the inherent discrimination that the section in question perpetuated, which was something the other judgments picked up on and addressed accordingly. The notion that women are weaker than men and are nothing more than victims of the offense was the greatest offense of the section, and rather than delving into the reasoning behind this mindset, the judgment dismissed the challenge on a mere technicality, rather than a ground of substantive law. Even though the conclusion remains correct, his failure in recognising the inherent discrimination present within the section cannot be ignored, as it is an aspect that all the other judges have based their judgment on. The implication of this argument is inclusion of laws like adultery within the ambit of Article 15(3), which have been made after the commencement of the Constitution.

VII. CONCLUSION

From the decision in *Nargesh Mirza* to the decision in *Joseph Shine* and *Navtej Johar*, the Indian courts have come a long way. From what was an extremely formalistic treatment given to the Right to Equality, the Court now is moving towards the principles of substantive equality; something that was originally envisaged to be provided by our Constitution. Amongst all these decisions though, the important conclusion that can be drawn is the absolutely pertinent nature of both Articles 14 and 15. These two articles are required not only to treat equals equally, but to undo the historical disadvantages that have been conferred upon certain categories. This is what also makes the idea of affirmative action an important part of the scheme of equality.

Returning to the questions raised at the beginning, it is pertinent to read Articles 14 and 15 in particular manner, to not only avoid the problematic outcomes of the past, but also to achieve a harmonised effect to counter the inequalities prevalent in our society. Hence, firstly, Article 14 must not be read in a manner so as to enable it to justify discrimination based on categories mentioned under Article 15. Secondly, the narrow 'only' approach under Article 15 must be done away with, especially in cases where the additional grounds are nothing but a different form of a ground mentioned under the Article. A broader reading which allows looking at the actual intention

and effect of the categorisation must be adopted. Lastly, the benefit element under Article 15(3) must not be jeopardised so as to justify a discriminatory policy. The intention of the provision has to be kept paramount, with constitutional morality and not public morality guiding its interpretation. Additionally, an appropriate interpretation of Article 15(3) is necessary, as it is the source of affirmative action in favour of women and children. Any interpretation that narrows down its scope would stand against proper fulfilment of the guarantees under Articles 14 to 16.

Moving forward, archaic laws that were made in a different time will have to be re-examined in order to ensure that they are not subjected systematically oppressed groups of people to any further degradation. Generational change occurs not only due to people being more open minded and talking about certain societal issues that were once considered taboo, but also because of judges interpreting laws differently. One such example of a law being interpreted broadly occurred recently in the United States, where the Supreme Court ruled that the language of the Civil Rights Act of 1964 has to be interpreted in a more liberal fashion. Earlier, under this statute, employment discrimination based on sex was prohibited, and the question before the Court was to decide whether the ambit of the word 'sex' should be expanded to include sexuality as well. The question was decided in the affirmative, thus making it unlawful for a person to be fired from their place of employment simply because they might be homosexual or transgender.⁹⁰ The expanded interpretation of the law could create a ripple effect, including spurring a re-examination of the ban on transgenders serving in the military.⁹¹

There are studies that have shown that differences in sexual attitudes are in fact based on generations, as opinions tend to shift from one era to the next.⁹² The last two decades have been notable for a resurgence of women's rights that has led to different, positive forms of thinking.⁹³ Certain events that occur in a decade may alter sexual attitudes for both a parent generation and

⁹⁰ Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, THE NEW YORK TIMES, (June 15th, 2020), <https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html>

⁹¹ Julie Moraeu, *Supreme Court's LGBTQ ruling could have 'broad implications' legal experts say*, NBC NEWS, (June 23rd, 2020), <https://www.nbcnews.com/feature/nbc-out/supreme-court-s-lgbtq-ruling-could-have-broad-implications-legal-n1231779>

⁹² C.K Sigelman, L. Sigelman, and M. Goodlitttle, *Sex Differences in the Moral Values of College Students and Their Parents*, *Sex Roles*, 70: 877-883. (1984).

⁹³ Lynn Parkin Atkinson, Richard A. Dodder, *Differences over Time and Generation in Sexual Attitudes*, 20 INT'L REV. MODERN SOCIOLOGY (1990).

Indian Constitutional Law Review

the student generation – for example, mothers viewed practices such as sexual intercourse and adultery in a more conservative light in 1978. But in 1985, they were more aggressive with displays of affection and discussions of sex; the topic was not considered a taboo or something to be hushed up about anymore.⁹⁴ Recent decisions of the Supreme Court of India, such as *Navtej Johar* and *Joseph Shine*, both of which overturned draconian laws, indicate that we are in the midst of yet another generational turnover: one that recognises the individuality of groups that have been historically side-lined and is set on remedying the wrongs of the past.

⁹⁴ *Supra* note 91.

**THE WIDENING FISSURE OF UNDERCOVER OPERATIONS IN INDIA – THE CASE
AGAINST DECEPTION**

Umang Agarwal and Ayush Chaturvedi[†]

Abstract

With the continuing development of state-of-the-art technology and scientific know-how, there is a constant tussle between the criminals and law enforcement agencies to outplay the other in this game of technologies and scientific advancements. It is for this purpose, one proactive method that the law enforcement agencies adopt is undercover or covert operations. The paper scrutinizes the constitutional validity of such undercover operations on the ground of Article 20(3) of the Constitution which envisages the fundamental right against self-incrimination. Because of the oddity nature of such operations involving arbitrary and discretionary power, the paper also observes such operation through the lens of ‘rule of law’ held to be the basic structure of the Constitution. Moreover, undercover operations stand outside the ambit of ‘deception’ as enshrined in section 29 of the Indian Evidence Act, 1872 and therefore the question of admissibility of evidence collected through such operations always hangs in between. Because of the foregoing reasons, it is of paramount importance to examine the application of undercover operations for criminal investigations by the state agencies

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I. INTRODUCTION

The blend of technological advancement and scientific know-how has brought forth challenges to the existing criminal justice delivery system throughout the world. As the technological advancements have empowered the Investigating Agencies in effective tackling of criminal activities¹, it is also responsible for the shift in the nature of investigation from traditional Reactionary Police Action to a Pro-active Police Action².

The method of tackling and suppressing crime adopted by investigating authorities can be divided into two categories: reactionary police action and pro-active police action.³ Reactionary Police Action is a method of a criminal investigation which involves investigating authorities responding to specific complaints from individuals or community of people and follow-up investigation for procurement of evidence.⁴ Traditional thinkers of criminal jurisprudence have suggested such a method to be inadequate for acting as a deterrence to crime.⁵ This limb has established the principle of law with lucid demarcation regarding the procedure of investigation, method & legality of evidence collected. It is authorities, powers and legal obligations of individuals which are involved in such process.

Whereas, proactive policing is a method of the criminal investigation in which police take initiatives on its own to develop information about a crime and ways of its suppression.⁶ Such a method includes deceptive techniques such as telephone tapping, electronic surveillance, or an undercover policing which attracts several legal and philosophical deliberations among sagacious cerebrums around the globe⁷. Although the Apex court in many cases has admitted the evidence

¹ James Byrn & Gary Marx, *Technological Innovations in Crime Prevention and Policing. A Review of the Research on Implementation and Impact*, CAHIERS POLITIESTUDIES JAARGANG, 17, 20 (2011-13).

² Emmanuel N. Amadi, *A Qualitative Analysis of Community Policing in the United States*, 4(1) AMERICAN INTERNATIONAL JOURNAL OF CONTEMPORARY RESEARCH, 19, 22 (2014), ¶5.

³ D.J. Black & A.J. Reiss, *Police control of juveniles*, 35 AMERICAN SOCIOLOGICAL REVIEW, 63–77 (1970).

⁴ DEPT. OF JUSTICE, CANADA, POLICE DISCRETION WITH YOUNG OFFENDERS, (Jan, 7th 2015), <https://www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/discre/org/styles.html>.

⁵ ROBERT TROJANOWICZ et. al., COMMUNITY POLICING: A CONTEMPORARY PERSPECTIVE (3rd edn, 2002).

⁶ Ankony, Robert C., *The Impact of Perceived Alienation on Police Officers' Sense of Mastery and Subsequent Motivation for Proactive Enforcement*, 22(2) POLICING: AN INTERNATIONAL JOURNAL OF POLICE STRATEGIES AND MANAGEMENT, 120- 32 (1999).

⁷ D.H. BAYLEY., PATTERNS OF POLICING: A COMPARATIVE INTERNATIONAL ANALYSIS (2nd ed. 1990). See, D.J. Black, *The social organization of arrest*, 23 STANFORD LAW REVIEW, 1087–1111 (1971).

procured from proactive means of investigation such as telephone tapping⁸ and electronic surveillance⁹ but the legality of undercover operations for procuring evidence is still hovering as an unsolved dilemmatic puzzle due to lack of legislative and judicial action.

II. ODDITY NATURE OF UNDERCOVER OPERATIONS

As opposed to the tackling of opportunistic and impulsive crime, some crimes like bribery of local officials¹⁰, food stamp fraud, prostitution rings etc. requires a complex and secretive method of handling. Prominent scholar Gary Marx has classified undercover operation into surveillance operation, preventive operation and facilitative operation based upon the magnitude of interference of authorities in crime¹¹. Unlike the other methods of a criminal investigation, undercover operations possess complex polycentric legal issues owing to the nature of interference of the authorities. Under the Indian legal system, such interferences raise issues on following counts.

Firstly, undercover operations are different not only because of their covert and deceptive nature but also because the police officers themselves participate in the very crimes they are investigating. Such facilitation of crime may amount to State-authorized criminality whose justification may be least sustainable in law.¹² Such was the case of *Flemming Ludin Larson v. Union of India*,¹³ where the petitioner negotiated and delivered the banned drugs to undercover detectives from Hollywood Police Department in Broward County, State of Florida. The petitioner was then arrested and charged. However, the legality of covert operation was not discussed in this case since the question in issue was the jurisdiction of the Metropolitan Magistrate to extradite the Petitioner.

Secondly, there are several unanswered polycentric legal questions about this non-traditional approach to investigation. For instance, the nature of cases in which it can be allowed,

⁸ S. Pratap Singh v. State of Punjab, 1964 AIR 72.

⁹ Yusufalli Esmail Nagree v. State of Maharashtra, 1968 AIR 147.

¹⁰ United States v.. Myers, 692 F2d. 283 (2nd Cir. 1983).

¹¹ GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 60-67 (1988)

¹² Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62(1) STANFORD LAW REVIEW 155-198 (2019).

¹³ *Flemming Ludin Larson v. Union of India*, 1999 SCC OnLine Del 426.

Indian Constitutional Law Review

the restrictions which can be placed, prerequisites of conducting such operation, the authorities to order the same, the implied legality resulting therefrom, the explicit legislation which can be made in coming future, right to know the working of the government and authorized criminality being opposed to basic premises of democratic policing.

Thirdly, the rampant use of such proactive measure by the authorities creates a slippery slope relating to the entity by which such power can be exercised. This ultimately raises a question of the legality of covert operations executed by the individuals in private capacity. The issues relating to sting operation by a private entity was involved in *Court on its own motion v. State & Ors.*,¹⁴ (“*R.K. Anand case*”) wherein Delhi High Court initiated a *suo motu* proceeding for the contempt of court based on the News channel telecasted program which was the clandestine operation carried out employing a concealed camera. In the operation, prime witness acting as the mole showing the meeting between the Special Public Prosecutor and the Senior Defence Counsel, negotiating for his sell out in favour of the defence. However, in these cases also the Court restrained itself from discussing the legality of covert operations by rejecting the plea of inadmissibility of such evidence on the ground that the conviction for contempt of court is *sui generis* and something entirely different from proceeding.¹⁵

Fourthly, although there is no judicial pronouncement whose subject-matter directly and substantially challenges the legality of the covert or undercover operation, the use of increasingly invasive investigative technique makes it an issue of paramount importance. Since the harm posed by organized crime is proportionately higher in this tech-savvy era; there is an increase in the frequency of cases involving proactive police action. This kind of investigation involves dilemmatic question on ensuring public safety through the arrest of suspects without violating their right. Also, there has been an increase in the trend of covert operation conducted by private individuals (e.g. sting operations by News Reporters as evident from *R.K. Anand case*) who are neither authorized impliedly nor conferred such right by any explicit legislation. The consistent growth of such vigilantism may pose a threat to society unless done under the established

¹⁴ *Court on its own motion v. State & Ors*, 2009 Cri LJ 677.

¹⁵ *Ibid*, at ¶150.

procedure under *lex loci* since these administrative measures of handling crime do not strictly fall within the ambit of the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872.

III. WEIGHING UNDERCOVER OPERATIONS ON CONSTITUTIONAL THRESHOLD

The fundamental notion of an organized state involves a group of people (Govt.) whose selection is based on a particular standard mutually decided by people selecting them. Such consensus envisages the dispute resolution mechanism whenever there is a conflict between the state action and individual rights. Constitution of India is one of such written consensuses which *inter alia* governs the conflict between State and Individuals. However, all the state actions are not amenable to Constitutional *Grundnorm*. For an action to violate a fundamental right, it must fall within Article 13 of the Constitution of India. One argument that can be advanced in favour of undercover operation is that it forms the part of an Administrative Action and cannot be considered as “Law in force” within the meaning of Article 13. But the detailed analysis of the same suggests otherwise.

1. Undercover operations are administrative actions subject to Constitutional Grundnorms

For continuation of a crime curbing activity carried out by Investigating Agencies to eradicate the crime from society, it is of ultra-importance that such activity must not go beyond the Constitutional yardstick. Such issue exaggerates in proportionality when there exists no legislation upon an activity practised so much and having immense potential to secure as well as violate fundamentals of societal peace and harmony.

As per *Balaji v. State of Mysore*¹⁶, an administrative action can be tested against the touchstone of fundamental rights. Also, a fundamental right cannot be restrained merely by an administrative direction on the ground that it does not have the force of law¹⁷. Furthermore, *Tata Cellular v. Union of India* laid down that the even though Court have restraint themselves from

¹⁶ *Balaji v. State of Mysore*, AIR 1963 SC 649.

¹⁷ *Bishan Das v. State of Punjab*, AIR 1961 SC 1570.

Indian Constitutional Law Review

intermeddle in administrative decisions yet the administrative decisions can be tested by application of the *Wednesbury*¹⁸ principle of reasonableness and must be free from arbitrariness, bias or mala fide.

The correct understanding of the *Wednesbury* principle is that a decision will be said to be unreasonable in the *Wednesbury* sense if (i) it is based on wholly irrelevant material or wholly irrelevant consideration, (ii) it has ignored a very relevant material which it should have taken into consideration, or (iii) it is so absurd that no sensible person could ever have reached to it.¹⁹

In *Shalini Soni v. Union of India*²⁰ the Supreme Court observed: "It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote." Also, the Supreme Court in *R.C. Cooper v. Union of India*²¹ declared that the benefits and policies underlying government legislation or action "have a little relevance in determining the legality of the measure". Such decision points out that the court is concerned with the law and such concern is unaffected by merit of policy. Therefore, an action motivated by necessity does not itself imbibe legality within itself. Also, for qualifying such action to be comparable to any other existing right, such action must fall within the borderline of *lex suprema* and *lex loci*.

2. Position Under Lex Suprema

With the emergence of State, the quintessence of curbing crime was also realized and with development of such idea, flourished modern criminal justice system. But the method and manner prescribed by such system must conform and not contradict to the *lex suprema*. The Constitution of India under Article 20(3) prohibits self-incriminating evidence taken out of compulsion. The privilege under Article 20(3) applies to testimonial confessions and the Courts in India have varied

¹⁸ *Madbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁹ *Administrative Law and Judicial Review of Administrative Action*, Markandey Katju J., (2005) 8 SCC (J) 25.

²⁰ *Shalini Soni v. Union of India*, (1980) 4 SCC 544, ¶7.

²¹ *R.C. Cooper v. Union of India*, AIR 1970 SC 561.

Indian Constitutional Law Review

in their judicial pronouncements on the issue whether 20(3) encompasses more besides oral evidence.

The decision of the Apex court in *Selvi v. State of Karnataka*²² serves as the foundation for a comprehensible understanding of legal question involved in undercover operation relating to self-incrimination. The Court observed that *Article 20(3) aims to prevent the forcible 'conveyance of personal knowledge that is relevant to the facts in issue'* irrespective of such knowledge *to be inculpatory or exculpatory*. The Court further observed that *it takes great skill on part of the interrogators to extract and identify information which could eventually prove to be useful. While some persons are able to retain their ability to deceive even in the hypnotic state, others can become extremely suggestible to questioning. This is especially worrying, since investigators who are under pressure to deliver results could frame questions in a manner that prompts incriminatory responses*²³.

To avail the rights under Article 20(3), three elements need to be satisfied. **Firstly**, the person must be accused. **Secondly**, there must be an element of compulsion to be a witness against himself and **lastly**, the evidence must have been used against himself.²⁴

Exploring very first condition for the applicability of Article 20(3) is that the person accused must have stood in the character of an accused person at the time he made the incriminatory statement.²⁵ The dispute of condition precedents before a person can be called as an accused is still churning in legal minds. Also, the Court itself seems to be inconsistent in having a uniform stand while answering this question. One limb of judicial interpretation mandates the pre-requisition of formal accusation while the other one does not require any such pre-requisition.

In one instance under the first limb, it was held that an accused person would mean those accused persons against whom police had filed charge-sheet after completing an investigation

²² *Selvi v. State of Karnataka*, A.I.R 2010 S.C. 1974.

²³ *Id.*

²⁴ *Delhi Judicial Service Association v. State of Gujarat*, AIR 1991 SC 2176; *Mohd. Dastagir v. State of Madras*, AIR 1960 SC 756; *Balkishen v State of Maharashtra* AIR 1981 SC 379.

²⁵ *R K Dalmai v. Delhi Administration*, AIR 1962 SC 1821.

under section 173(2)²⁶ of the Code of Criminal Procedure, 1973. It is not enough that he should become an accused any time after the statement has been made.²⁷ This expression includes within its ambit, only a person against whom a formal accusation relating to the commission of offence had been labelled which, in the normal course, may result in prosecution.²⁸

However, contra positioned limb states that the person can be termed to be an accused, against whom any kind of evidence is sought and to be led or used in a criminal trial or proceeding against himself. It does not predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applicability.²⁹ It was also observed that persons proceeded against under Chapter VIII³⁰ of Criminal Procedure Code, 1973 are persons against whom there is an accusation in the ordinary acceptance of the word.³¹ It is, therefore, concluded that at the stage of collecting information, it can be predicted that the person will be in the position of an accused.

Therefore, the first limb of Article 20(3) is satisfied when any evidence is seemed to be collected against a person by the means of an undercover operation which ultimately leads to an accusation against him. Also, it is worth distinguishing that Article 20(3) uses the phrase 'to be a witness' and not 'to appear as a witness'. Therefore, a formal accusation by the concerned authorities is not required for attracting the protection of under Article 20(3). One can be forced to witness against himself in the future by the evidence collected in remote past, and would certainly attract protection under Article 20(3).

3. Presumption of the presence of compulsion in practicing Undercover Operations

One of the principal requirements of confessional statements is that of voluntariness. The confessional statement will be excluded from evidence as involuntary if it has been obtained from an accused either by fear of prejudice or hope of advantage, exercised or held out by a person in

²⁶ Balveer & Anr. v. State of U.P & Anr., (2007) 1 All LJ 496.

²⁷ State of Bombay v. Kathi Kallu Oghad, AIR 1961 SC 1808.

²⁸ Raja Narainlal Bansilal v. Maneck Firoz Mistry, AIR 1961 SC 29.

²⁹ State of U.P. v. Deoman Upadhyaya, AIR 1960 SC 1125; Punja Mava v. State of Gujarat, AIR 1965 Guj 5.

³⁰ Code of Criminal Procedure, 1973, Chapter VIII.

³¹ In re Baba Yeshwant Desai, ILR (1911) 35 Bom 401.

authority.³² That particular and well-established form of involuntariness was described by Dixon J. as "the classical ground for the rejection of confessions and that looms largest in a consideration of the subject."³³ Where the statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. It may have been made in circumstances where issues of legal rights or consequences, or considerations of choice either to speak or remain silent, never entered the mind of the maker.

Compulsion is a physical act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the statement involuntary and exhorted. Therefore, the factor of compulsion need not always be physical, it can also be psychological, meaning thereby, compelled testimony under Article 20(3) is not limited to physical torture or coercion but extends also to techniques of psychological interrogation which can cause mental torture or mental compulsion in a person subjected to such interrogation.³⁴ The Court has recognized that the coercion can be mental or physical.³⁵

The protection under Article 20(3) is available against the person being compelled to witness against himself. It does not mean that he need not give information on matters which do not tend to incriminate him.³⁶ The presumption of the presence of compulsion *prima facie* seems to be embedded in practising deception because of its inherent nature and the very objective for which it is practised.

As held in *Miranda v. Arizona*³⁷ and further upheld in *Nandini Satpathy v. P.L. Dani & Ors.*,³⁸ that environment and atmosphere created during an investigation for the purpose to subjugate the individual to the will of his examiner carried its own badge of intimidation. This may not be physical intimidation, but it is equally destructive of human dignity.³⁹

³² *Ibrahim v. The King*, [1914] AC 599 at 609.

³³ *McDermott v. The King*, (1948) 76 CLR 501 at 511-512.

³⁴ IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 5 (1931); *Chambers v. Florida*, 309 US 227.

³⁵ *Nandini Satpathy v. P.L. Dani and Ors.*, AIR 1978 SC 1025.

³⁶ *Ratanlal Bhogilal Shah v. D.K. Guha*, AIR 1973 SC 1196.

³⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966).

³⁸ *Nandini Satpathy v. P.L. Dani and Ors.*, AIR 1978 SC 1025, ¶44.

³⁹ Arthur E. Sutherland, "Crime and Confession." *Harvard Law Review*, vol. 79, no. 1, 1965, pp. 21-41. *JSTOR*, www.jstor.org/stable/1338857.

Indian Constitutional Law Review

The presence of psychological compulsion was also discussed by the Hon'ble Supreme Court in the case of *Yusufalli Esmail Nagree v. State of Maharashtra*⁴⁰. The court held that by the active deception of the police, there is a possibility that the person is compelled to be a witness against himself. Had the appellant known that the police had arranged a trap, he would not have talked as he did. He may be starved or beaten and a confession may be extorted from him. By deceitful means, he may be induced to believe that his son is being tortured in an adjoining room and by such inducement he may be compelled to make an incriminating statement.⁴¹

Undercover officers may use, in the hope of eliciting admissions, calculated scenario to induce a person to choose to reveal information that otherwise would be concealed. The subjects herein are subjected to powerful psychological pressure, since it is not unusual for people to reveal secrets under pressures that are no less compelling.⁴² Covert operations involve tactics that are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already that he is guilty by using personal information like having a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women and many more.⁴³

In undercover police activity, and of covert surveillance, there is an attempt to gain information from people who, if they were aware of what was going on, would remain inactive or silent. There is a sense in which it can be said that intercepting a telephone conversation, or secretly recording an interview, always deprives a person of the opportunity to remain silent in circumstances where, if the person had realized that he or she was under observation, the person would have remained silent.

Cornelius v. The King,⁴⁴ gave as an example of an involuntary statement, one that is given in consequence of a threat made, or a promise of the advantage given, by a person in authority i.e.

⁴⁰ *Yusufalli Esmail Nagree v. State of Maharashtra*, AIR 1968 SC 147.

⁴¹ *Id.*, at ¶9.

⁴² *Collins v. The Queen*, (1980) 31 ALR 257, at 307 (per Brennan J.).

⁴³ Lewis R. Katz, "*Criminal Interrogation and Confession*", by Fred E. Inbau & John E. Reid, 19 Case W. Res. L. Rev. 188 (1967), at Pg. 87.

⁴⁴ *Cornelius v. The King*, [1936] HCA 25; (1936) 55 CLR 235 at 245.

Indian Constitutional Law Review

if a statement is made as a result of violence, intimidation, or of fear, it is not voluntary." In *R v. Baldry*,⁴⁵ it was held that "by the law of England, in order to render a confession admissible in evidence it must be perfectly voluntary; and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority, vitiates a confession."

Therefore, there can always be a presumption against the undercover operations that the evidence collected thereof is involuntary and is the result of threat or compulsion. This satisfies the second limb of Article 20(3).

It is on this ground, whenever the evidence so collected through the undercover operations are used against the accused, it is violative of Article 20(3) of the Constitution. This question the Constitutionality of the Undercover operation itself as violative of Part III of the Constitution.

IV. CONTRAVENTION OF RULE OF LAW

Apart from Article 20(3), undercover operations also go contrary to the concept of rule of law. Rule of law means the absolute supremacy or predominance of law as opposed to the influence of arbitrary power and exclude the existence of arbitrariness.⁴⁶ The subliminal form in which rule of law is contained in our Constitution and the obligation of State to prevent it was highlighted in *NALSA case*⁴⁷ where the court observed that *the rule of law is not merely public order. The rule of law is social justice based on public order.... The substantive rule of law "is the rule of proper law, which balances the needs of society and the individual."* This is the rule of law that strikes a balance between society's need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. It is the duty of the Court to protect this rich concept of the rule of law.⁴⁸

⁴⁵ *R v. Baldry*, (1852) 2 Den 430 at 444-445.

⁴⁶ A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 198, (8th ed. 1915).

⁴⁷ *National Legal Services Authority v. Union of India*, AIR 2014 SC 1863.

⁴⁸ *Id.*

Indian Constitutional Law Review

Undercover operations give wide power in the hands of Administrative officers to investigate by way of search and seizures or in any other form without warrant solely upon their discretion. This violates the essential ingredients of rule of law that is the exclusion of arbitrariness⁴⁹ and leads to lawlessness on the part of the Government.⁵⁰ Absence of arbitrary power is the first essential of rule of law upon which our whole constitutional system is based.⁵¹ Covert Operation Policy leaves the law enforcement agencies with wide discretionary power to carry on the investigation in any manner at their whims and fancies. Since, in cases of undercover operations, the officers have the discretion to use any tool available to them to extract out confession and evidence that maybe by promise inducement or threat.

In undercover operations, the police may also incite individuals to commit a crime who did not have any criminal intent to begin with.⁵² Many studies discuss the lack of control over undercover policing, in light of secrecy, deception and risks attached to the instrument.⁵³ The most essential characteristic is that the law must operate to constrain the arbitrary exercise of power.⁵⁴ Statute giving wide discretionary power to the executive is bad in law.⁵⁵ In words of Justice Douglas of the U.S. Supreme Court “*where discretion is absolute, man has always suffered...absolute discretion is more destructive of freedom than any of man’s other invention*”⁵⁶ Also, “*absolute discretion marks the beginning of the end of liberty*”.⁵⁷

V. LOCUS UNDER INDIAN LEGAL SYSTEM

⁴⁹ ADM Jabalpur v. S. Shukla, AIR 1976 SC 1207.

⁵⁰ M.P. JAIN, INDIAN CONSTITUTIONAL LAW, 8 (8th ed. 2014).

⁵¹ S.G. Jaisinghani v. Union of India, AIR 1967 SC 1427, ¶14.

⁵² A. Ashworth, Re-Drawing the Boundaries of Entrapment, 3 Crim. L. Rev., 161-79 (2002); Joseph A. Colquitt, Rethinking Entrapment 41 American Crim. L. Rev., 1389-437 (2004).

⁵³ Den Boer, M. (1997), Undercover Policing and Accountability from an International Perspective. Maastricht: European Institute of Public Administration.; Wagner, G. A. (2007), 'United States' Policy Analysis on Undercover Operations', International Journal of Police Science & Management, 9: 371.

⁵⁴ V.K. SARAF, EXECUTIVE AUTHORITY AND THE RULE OF LAW, IN RULE OF LAW IN A FREE SOCIETY, 59 (N.R. Madhava Menon.,ed. 2, 2009)

⁵⁵ Union of India v. M.E. Reddy, AIR 1980 SC 563, ¶8.

⁵⁶ United States v. Wunderlick, 342 US 98, 101 (1951).

⁵⁷ New York v. United States, 342 US 882, 884 (1951).

Indian Constitutional Law Review

After understanding the extent of permissibility undercover operation enjoys within the Indian Constitution, the extent of permissibility under incidental provisions and practice under Indian Criminal jurisprudence must be explored.

1. Undercover operations and Deception under Section 29

The veil of legality to deception under Indian *lex loci* is given by Section 29⁵⁸ of the Indian Evidence Act, 1872 which legitimizes the confession taken by the means of deception. As per this provision, confession does not become irrelevant merely on the ground that it was obtained through deception provided that the person on whom deception was practised is an accused. Therefore, it is unambiguously clear that the confession as a means of evidence taken through deception is lawful.

However, what is pertinent to note here is that undercover operations are different from the deception within the meaning of Section 29. In addition to their covert and deceptive nature, in undercover operations, the police officers may themselves participate (with varying degree of involvement in different circumstances) in the very crimes they are investigating.

Gary Marx⁵⁹ identifies three different types of undercover operations distinguished by varying objectives and active involvement thereof. Surveillance or Intelligence operation [A] which is the most passive form of action as it involves indirect interference of investigation agency. Preventive approach [B] which is relatively more active and it involves the interference to stop the particular act from resulting in the offence. Facilitative Approach [C] involved the most active interference of investigating the agency. It may involve crime amplification by encouraging the commission of offence either through strengthening the concerned suspect or weakening the related victim.

These three types evidently encompass an increasing level of complexity and dilemma regarding legality and admissibility with maximum being with Facilitative Approach.

⁵⁸ Indian Evidence Act, 1872, §29.

⁵⁹ Gary T. Marx, “*Undercover: Police Surveillance in America*”, Univ. of California Press (1989).

2. Admissibility of Illegally Obtained Evidence

When such Pro-active actions, in fulfilling its objective to successfully prosecute the accused, precipitates to the admissibility of evidence in Court of Law, the hindrance of legality bolsters itself. It is pertinent to note that the admissibility of evidence is determined by its extent of relevancy and not by the method it is procured. Hence, Indian Courts do not strictly follow the ‘Fruit of Poisonous Tree’ principle as laid by Justice Felix Frankfurter in *Nardone v. The United States*.⁶⁰

The judgment propounded by Privy Council in *Kuruma v. The Queen*⁶¹ observed that the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how the evidence was obtained.⁶² In the case of *Yusoufalli Esmail Nagree v. The State of Maharashtra*⁶³, the Apex Court did not accept the contention that the evidence illegally obtained by tape recording or photograph violates Article 20(3) and 21 of Constitution of India.

Furthermore, Law Commission of India recommended the addition of section 166A in the Evidence Act enabling the Courts to enjoy the discretionary power while considering the admissibility of illegally or improperly obtained evidence if the admission of evidence brings the administration of justice into disrepute. As Justice Benjamin Cardozo precisely pointed out the crux of judicial precedents that the criminal is to go free because the constable has blundered is definitely not what the law seeks to achieve.

VI. UNDERSTANDING THE LEGALITY OF UNDERCOVER OPERATIONS IN FOREIGN JURISDICTION

⁶⁰ *Nardone v. The United States*, 308 U.S. 338 (1939) 1.

⁶¹ *Kuruma v. The Queen*, [1955] AC 197.

⁶² Emson R., “*Evidence Obtained by Unlawful or Unfair Means*”, Macmillan Law Masters. Palgrave, London (1999).

⁶³ *Yusoufalli Esmail Nagree v. The State of Maharashtra*, AIR 1968 SC 147.

Indian Constitutional Law Review

The use of undercover operations as a means of proactive policing for criminal investigation has been a centre of debates not only in India but also under the other jurisdictions such as the United States. Deception in the investigation has been firmly entrenched in the contemporary American policing.⁶⁴ The roots of the undercover operations in the US can be traced back to the Cold War period which suggested continued, if not greater, reliance upon undercover policing as it gave enormous power to the police authority against any suspects. In a series of cases, the US Court has emphatically denied the Fourth Amendment protection to those who had disclosed information to third parties, whether that third party is a true criminal associate, a police informant, or an undercover investigator.⁶⁵

Secondly, as observed by the renounced academician Elizabeth E. Joh that over the past fifty years pursuant to the strict international laws, there has been a gradual decline in the use of the physically coercive techniques such as third-degree or other similar brutal techniques and increase in psychological coercion or deception.⁶⁶

The prime example of the use of Undercover operations in the US is the Abdul Scam (Absacm) in the late 1970s. where some undercover agents in the disguised of rich Arabs, approached members of Congress and offered them money in return for political favours. Though the Scam resulted in several convictions, but the use of this technique was criticized as well. It is, therefore, the Department of Justice issued the Attorney General Guidelines for FBI Undercover Operations.⁶⁷

In the European Countries as well as the legality of the undercover operations is still unsettled. In United Kingdom investigation agencies argues the legitimacy of the undercover operations on the ground of common law tradition of implicit police powers wherein police activity required no explicit legal authorization. Moreover, in the Judgement of the European Court of

⁶⁴ Julius Wachtel, *From Morals to Practice: Dilemmas of Control in Undercover Policing*, 18 Crime L. & Soc. Change 137 at 144.

⁶⁵ Hoffa v. United States, 385 U.S. 293 (1966). See also, Lewis v. United States, 385 U.S. 206 (1966); Lopez v. United States, 373 U.S. 427 (1963).

⁶⁶ *Supra note 12* at P. 162.

⁶⁷ Gershman, B. L. (1982), *Abscam, the judiciary, and the Ethics of Entrapment*, The Yale Law Journal, 91: 1565.

Indian Constitutional Law Review

Human Rights in *R v. Khan*⁶⁸ the House of Lords criticized the lack of any legislation for such an invasive investigative method where police personnel can be allowed to mount monitoring equipment to the outside wall of a house of the accused. It is then the legislature enacted the Police Act 1997 and Regulation of Investigatory Powers Act (RIPA) 2000, regulating covert policing methods.

VII. CONCLUSION

It can be validly concluded that the practice of undercover operation envisages moral as well as legal conflict within its core. It poses several equally justified but contrary compartments of thoughts like between the rule of necessity and basic rights. In the simplest of the cases, it may happen that investigating agents to implicate certain criminal gang may pretend to be the member of some rival gang. As discussed above, this simple set of fact can raise a number of legal and social issues pertaining to the hence attracted liabilities and available defences. Secondly, the legal question regarding extraction of evidence using physical torture and admissibility of the same is court of law would also arise.

Even though the need for such participation of the investigating agencies is well recognized but the lack of any legislative regulations and judicial pronouncements upon such power creates the vacuum in law. This leaves the unfettered power in the hands of the investigating agencies to use such intrusive investigative techniques at their whims and fancies.

While acknowledging the necessity of these actions in the curbing the crime of high potential, the threat to basic human rights and this discretionary power in hands of authorities cannot be overlooked. Instead of waiting for its own *Abscam* or *R v. Khan* incident, India should take inspiration from these incidents to frame rules and regulations or should come up with the administrative guidelines to regulate such intrusive techniques in criminal investigations failing to which will lead to inaction on its part which will further encourage more vigilantism and chaos.

⁶⁸ (1996) 3 All ER 289.

**RIGHT TO EQUALITY UNDER ARTICLE 14: ANALYZING THE EVOLUTION OF
EQUALITY JURISPRUDENCE WITH SPECIFIC REFERENCE TO REVIEW OF PRIMARY
LEGISLATION**

Dhruv Patel[†]

Abstract

Article 14 of the Constitution of India enjoins upon the State not to deny any persons 'equality before the law' and 'equal protection of the laws' as a fundamental human right. Over the years, the Supreme Court has taken an activist approach to become the champion of human rights, consequently transforming some provisions of the Constitution, perhaps even beyond the premise of constitutional principles. This article analyses the interpretation of Article 14, traces the trajectories on which the 'classification test' and the 'arbitrariness test' have traversed and how the Supreme Court has applied them to review the constitutional validity of primary legislations upon the anvil of Article 14. This article makes a critical examination of the shortcomings of these tests and also analyses the aspects where improvements, transformations or changes are required. This article concludes that the recent developments in classification test through judicial opinions, has to a certain extent, made it free from the shackles of formalistic interpretation of equality and deferential standard of review. Classification test has the potential to become the primary test used for reviewing constitutional validity of primary legislations. The elements of the proportionality test which trigger an all-encompassing inquiry into the necessity, object and societal impact of the impugned legislation must percolate into this test. This article further concludes that the applicability of arbitrariness test must be defined / limited. Consequently, the arbitrariness test must be applied only within the ambit of the classification test; or its contours must be specifically defined within the premise of constitutional principles; or the application of the arbitrariness test must be minimized or abandoned if there are alternative ways to arrive at the same result,

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Indian Constitutional Law Review

to ensure that legislative wisdom is not truncated by judicial wisdom.

I. INTRODUCTION

The Constitution of India is a living document. Its dynamic nature enables it to evolve with time, as per the changing needs and circumstances. Consequently, the Fundamental Rights have developed and evolved during their constitutional voyage of 70 years. In many of its judgements, the Supreme Court of India has interpreted the Constitution as something more than a bundle of rights guaranteed to the citizens of India against the excesses of the State, by envisioning it as a document that strives to ensure that the Indian society becomes fairer, more inclusive and more progressive in its outlook.

The Constitution of India is a ‘transformative constitution’. Although the transformative character of the Constitution has enabled it to evolve over a period of time, transformative constitutionalism functions within the ambit of the text¹, structure and history of the Constitution; it rejects an interpretation that cannot be reconciled with a historical reading of the text of the Constitution and thus retains aspects of constitutional originalism.²

Transformative constitutionalism enables the courts to play an important role in the democratic project by adopting transformative understanding of the values of liberty, equality and fraternity.³ Although transformative constitutionalism enables judges to ‘update’ the Constitution, however, in absence of any rational explanation, basis or direction for evolution, ‘living tree constitutionalism’ would be reduced to “*a vehicle of judicial ideologies masquerading as constitutional evolution*”.⁴

Against this backdrop, this article makes an in-depth analysis of the evolution of equality jurisprudence in India, primarily by exploring the manner in which the two doctrines under Article

¹ Gautam Bhatia analyses the interpretative theory underlying the concept of ‘transformative constitutionalism’ and argues that “the contemporary, dominant approach to constitutional interpretation is that of a ‘living tree’: the Constitution is treated as an evolving document, with the judges bearing the responsibility of ‘updating’ it so that it keeps pace with the changing times.” See GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS Prologue (HarperCollins India, 2019).

² See *Id.*

³ It does not, by any means, allow the courts to interfere with the democratic process by assuming functions of other organs of the Government or by determining outcomes. See *Id.*

⁴ *Id.*

Indian Constitutional Law Review

14, viz., the ‘classification test’ or the ‘old doctrine’ and the ‘arbitrariness test’ or the ‘new doctrine’ have been evolved and applied by the Supreme Court, from *Anwar Ali* to *K.S. Puttaswamy* and from *E.P. Royappa* to *Hindustan Construction* respectively, to review the constitutional validity of primary legislations upon the anvil of Article 14. The recent judgements of the Supreme Court have rejuvenated the long-term debate upon the scope and applicability of these two doctrines that have evolved through transformative constitutionalism. Traditionally, only the classification test was used to review the constitutional validity of primary legislations. Due to its limited scope, formalistic interpretation of equality and deferential approach, the Supreme Court conceptualized the arbitrariness test. The arbitrariness test, for a substantial period after its inception, was applied to review the constitutional validity of only administrative actions and subordinate legislations, until recently when the Supreme Court established that its applicability extends to primary legislations as well.

Over the years, Article 14 has been elevated to a highly activist magnitude through transformative constitutionalism. Application of manifest arbitrariness test by the Supreme Court in recent cases reveals that the test has probably lost its connection with Article 14. Consequently, Article 14 seems to have been taken beyond the premise of constitutional principles, which, even by liberal standards of transformative constitutionalism, is not permitted.

It is essential to critically examine the shortcomings of these doctrines and the areas and aspects where they have potential to improve or transform or change; and also ascertain their future potential: the progressive potential of classification test and the seemingly harmful potential of arbitrariness test. This examination is crucial, especially since two major legal decisions of the Union Government, viz., the abrogation of Article 370 of the Constitution and Citizenship Amendment Act, 2019 are challenged for potentially violating Article 14.⁵

II. ARTICLE 14: RIGHT TO EQUALITY

The Preamble to the Constitution pledges to guarantee the people of India, “*justice; social,*

⁵ This article does not discuss the constitutional validity of the Abrogation of Article 370 and / or Citizenship Amendment Act, 2019 upon the anvil of Article 14.

economic and political” and *“equality of status and opportunity”*.⁶ The meaning of equality, as embedded in the spirit of the Constitution, is succinctly encapsulated by K.K. Mathew J. in the following words:

*“Equality is not an imperative to treat in identical ways men who are unequal in their physical or intellectual attainments. It is a policy of Equality of concern or consideration for men whose different needs may require different treatment...It is Equality of opportunity for all individuals to develop whatever personal and socially desirable talents they possess and to make whatever unique contributions their capacities permit...It does assume that men, treated as equals in a community of persons, may become better. The emphasis upon respect of the personality of all individuals, the attitude which treats the personality not as something fixed but as a growing developing pattern, is unique to the philosophy or democracy.”*⁷

*“Equality is one of the magnificent cornerstones of the Indian democracy.”*⁸ At the time of drafting the Constitution, Right to Equality was combined with ‘due process’ clause under Right

⁶ The Doctrine of Equality is considered to be a foundation of social justice since it rejects a society where some men are considered to be on a higher pedestal than other men. The Doctrine of Equality, in another sense, is also considered to be the foundation for providing adequate opportunities to all people. However, complete equality in any State seems to be merely idealistic, far from practicality, since men *have* to be treated unequally because of their unequal rank, circumstances, ability, race and even sex. Therefore, it may be easier to understand and realise equality in contradiction of inequality. Equality, in the dynamic sense, means the reduction of harshest forms on inequality. *See* SHAILJA CHANDER, JUSTICE V.R. KRISHNA IYER ON FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES 86 (Deep and Deep Publications Pvt. Ltd., 1992).

⁷ SHAILJA CHANDER, JUSTICE V.R. KRISHNA IYER ON FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES 85-86 (Deep and Deep Publications Pvt. Ltd., 1992).

⁸ *See* Indira Sawhney v, Union of India, A.I.R. 1993 S.C. 477 (India).

Indian Constitutional Law Review

to Life and Liberty.⁹ However, in the final stages of drafting, these rights were delinked.¹⁰

Consequently, a separate provision for Right to Equality, i.e., Article 14 was introduced into the Constitution, which provides that:

“The State shall not deny to any person¹¹ equality before the law and the equal protection of the laws within the territory of India.”¹²

Article 14 contains two expressions, viz., ‘equality before the law’ and ‘equal protection of the laws’.¹³ Both of these expressions have been incorporated in the Universal Declaration of Human Rights¹⁴ and strive to establish *equality of status* guaranteed in the Preamble to the Constitution.

‘Equality before the law’ does not mean absolute equality before the law. It implies the inherent absence of any special privilege to any individual and thus leads to the interpretation that all

⁹ The Constituent Assembly discussed the provisions pertaining to equality at great length and in great depth. Initially, the Advisory Committee on Fundamental Rights, made provision for only ‘equal treatment of the laws’. This provision was combined with ‘due process’ clause under the Right to Life and Liberty. See Advisory Committee, *Fundamental Rights: Interim Report*, Clause 21 (1948).

The Drafting Committee modified this provision by replacing the phrase ‘equal treatment of laws’ with ‘equality before the law’ and added a new clause, namely, ‘equal protection of the law’. Surprisingly, even in the Draft Constitution, the Right to Equality was combined with the Right to Life and Liberty under a single provision. See DRAFT INDIA CONST. art. 15.

Draft Article 15 was taken up for discussion on 6th and 13th of December 1948. The discussions that took place on these two days revolved around the first part of, whereas the second – ‘equality before law’ part - was not debated at all. See Constituent Assembly Debates, *Article 14 Debate Summary*, CENTRE FOR LAW AND POLICY RESEARCH (May 15, 2020, 01:18 PM), https://www.constitutionofindia.net/constitution_of_india/fundamental_rights/articles/Article%2014.

¹⁰ In its letter to the President of the Constituent Assembly dated 3rd November 1949 presenting its revised Draft Constitution, the Drafting Committee mentioned that – “We have considered it more appropriate to split this article into two parts and to transfer the latter part of this article dealing with “equality before law” to a new article 14 under the heading ‘Right to Equality.’” See *Id.*

¹¹ The term “*any person*” in Article 14 guarantees equality before the law and equal protection of the laws to literally any person including citizens, non-citizens, natural persons, legal persons, companies, associations of persons, etc. and is guaranteed without any regard to race, color or nationality. See J.N. PANDEY, *CONSTITUTIONAL LAW OF INDIA* 79 (52d ed., Central Law Agency, 2015).

¹² INDIA CONST. art. 14.

¹³ See *Indira Sawhney v, Union of India*, A.I.R. 1993 S.C. 477 (India), in which it was observed that: “Article 14 prohibits the State from denying to any person within the territory of India equality before the law or the equal protection of the laws. All persons in like circumstances must be treated equally. Equality is between equals. It is parity of treatment under parity of conditions.”

¹⁴ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). See Article 7 of the Universal Declaration of Human Rights which states: “All are equal before the law and are entitled without any discrimination to equal protection of the law.”

Indian Constitutional Law Review

individuals and classes of individuals are equally subject to the law of the land.¹⁵

The right to equality before the law originates from the English Common Law and the Irish Constitution^{16,17} Its roots can be traced to the second principle of the Rule of Law propounded by British jurist, Albert Dicey, which states that:

“We mean in the second place, when we speak of the ‘rule of law’...not only that with us no man is above the law, but...that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”¹⁸

‘Equal protection of the laws’ implies equal treatment of all individuals in equal circumstance without any discrimination.¹⁹ Equal protection of the laws aims to establish that among equals the law should be equal and should be equally administered, that like should be treated alike.²⁰ Thus, the rule is that the like should be treated alike and not that unlike should be treated alike.²¹ Right to equal protection of the laws originates from Section I of the 14th Amendment to the American Constitution.²²

¹⁵ Dr. Jennings has aptly stated that: “Equality before law means that among equals the law should be equal and should be equally administered, that like should be treated alike .The right to sue and be sued, to prosecute and be prosecuted for the same kind of action should be same for all citizens of full age and understanding without distinction of race, religion, wealth social status or political influence.” See W. IVOR JENNINGS, THE LAW AND THE CONSTITUTION 49 (3d ed., University of London Press Ltd., 1943); See PANDEY, *supra* note 11.

¹⁶ See *State of West Bengal v Anwar Ali Sarkar* A.I.R. 1952 S.C. 75 (India), in which Mukherjea J. identified the English Constitution as the source of the phrase ‘equality before the law’. In Special Reference No. 1 of 1978 (1979) 1 S.C.C. 380 (India), Chandrachud C.J. described it as a basic principle of republicanism, and attributed its source to the Irish Constitution. See Tarunabh Khaitan, *Equality: Legislative Review under Article 14 (The Oxford Handbook for The Indian Constitution)*, SSRN (May 16, 2020, 05:01 PM), <https://ssrn.com/abstract=2605395>.

¹⁷ Tarunabh Khaitan, *Equality: Legislative Review under Article 14 (The Oxford Handbook for The Indian Constitution)*, SSRN (May 16, 2020, 05:01 PM), <https://ssrn.com/abstract=2605395>.

¹⁸ ALBERT DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 193 (9th ed., Macmillan 1939); *Id.*

¹⁹ See *Indira Nehru Gandhi v. Raj Narain*, A.I.R. 1975 S.C. 2299 (India), in which, it was held that the Rule of Law, which is the spirit of Article 14 and is embodied in it, is a part of the “*basic structure*” of the Constitution, and therefore it cannot be abrogated or transgressed by an amendment under Article 368 of the Constitution.

²⁰ POIYVIOS G. POLYVIUO, THE EQUAL PROTECTION OF THE LAWS 4 (Duckworth 1980).

²¹ DR. V.N. SHUKLA, CONSTITUTION OF INDIA 27 (5th ed., Eastern Book Company 1969).

²² See U.S. CONST. amend. XIV, § 1: “No State shall deny to any person within its jurisdiction the equal protection of the laws.”

Indian Constitutional Law Review

In *State of West Bengal v. Anwar Ali Sarkar*²³ (“*Anwar Ali*”), P. Shastri, C.J., observed that the second expression is the corollary of the first and it is difficult to imagine a situation in which the violation of equal protection of the laws will not be violation of equality before the law. Thus, according to him, in substance, the two expressions mean one and the same thing. However, subsequently, in *Srinivasa Theatre and Ors. v. State of Tamil Nadu and Ors.*²⁴ B. Jeevan Reddy J. observed that:

“The two expressions do not mean the same thing even if there may be much in common. Their meaning and content has to be found and determined having regard to the context and scheme of our Constitution. The word “law” in the former expression is used in a generic sense – a philosophical sense – whereas the word “laws” in the latter expression denotes specific laws in force.”

Therefore, the foregoing discussion shows that Article 14 ensures Equality among equals; its aim is to protect persons similarly placed against discriminatory treatment^{25, 26}

The horizons of the Right to Equality embodied in Article 14 have broadened enormously through judicial pronouncements by virtue of transformative constitutionalism. The Supreme Court has developed two doctrines, viz., the ‘classification test’ and the ‘arbitrariness test’, to test primary legislations, subordinate legislations and administrative actions upon the anvil of Article 14. Let us proceed to explore the evolution of these doctrines, specifically the manner in which they have

²³ *State of West Bengal v. Anwar Ali Sarkar*, A.I.R. 1952 S.C. 75 (India).

²⁴ *Srinivasa Theatre and Ors. v. State of Tamil Nadu and Ors.*, 1992 A.I.R. 999 (India).

²⁵ Right to Equality transcends beyond Article 14 into Articles 15, 16, 17 and 18 of the Constitution. See *Shamsher Singh Hukam Singh vs The Punjab State and Ors.*, A.I.R. 1970 P.H. 372 (India), in which R Sakaria J. has rightly observed that: “The scheme and the setting of Articles 14, 15 and 16, particularly under a common caption, and their language unmistakably show that they belong to one family. While Article 14 can be called the genus, Articles 15 and 16 are its species.” The Supreme Court has always referred to Articles 14, 15 and 16 as “equality code” and has stated that they should be read together on numerous occasions. See *Gautam Bhatia, Equal Moral Membership: Naz Foundation and the Refashioning of Equality*, SSRN (May 15, 2020, 08:12 PM), <https://ssrn.com/abstract=2980862>. The relationship amongst them flows from Article 14, which is of a very wide amplitude and guarantees the Right to Equality in a general way, to Articles 15 and 16 which guarantee the Right to Equality in specific set of circumstances. See *Shamsher Singh Hukam Singh vs The Punjab State and Ors.*, A.I.R. 1970 P.H. 372 (India).

Further Article 17 prohibits untouchability in any form and Article 18 prohibits Indians from assuming any titles – they provide a direct remedy to historical circumstances.

²⁶ *Western U. P. Electricity Power and Supply Co Ltd v. State of U.P.*, 1970 A.I.R. 21 (India).

been applied to review the constitutional validity of primary legislations.

III. THE ‘CLASSIFICATION TEST’ OR THE ‘OLD DOCTRINE’

Article 14 prohibits class legislation but permits reasonable classification of persons, objects and transactions by a legislative action for achieving the specific ends, *provided* the classification is not “artificial, arbitrary or evasive”.²⁷ There must be a real and substantial difference, having a reasonable relation to the object sought to be achieved by the legislature. This is the classification test, which has been articulated by S.R. Das J. in *Anwar*²⁸ thus:

“In order to pass the test of permissible classification two conditions must be fulfilled viz. (i) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others left out of the group, and (ii) that the differentia must have a rational relation to the objects sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct and what is necessary is that there must be nexus between them.”

In *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar*²⁹ (“*Dalmia*”) the Supreme Court had clarified the scope of classification test by holding that classification may be on certain bases “geographical, or according to objects or occupations or the like”, and the law would be constitutional if “on account of some special circumstances or reasons applicable to the [individual / group] and not applicable to others, the [individual / group] can be treated as a class.”

Since its inception, classification test has been extensively used by the Supreme Court to test primary legislations and even strike them down in case they fail to meet its requirements.³⁰ In

²⁷ See PANDEY, *supra* note 11.

²⁸ *State of West Bengal v Anwar Ali Sarkar*, A.I.R. 1952 S.C. 75 (India).

²⁹ *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar*, A.I.R. 1958 S.C. 538 (India).

³⁰ See Special Courts Bill, 1978, Re, (1979) 1 S.C.C. (India) 380, 423, in which, Chandrachud. C.J. observed that: “As far back as 1960 it was said by this Court in *Kangari Halder* that the proposition applicable to cases arising under Article 14 have been repeated so many times that they now *sound platitudinous*. If it was so in 1960, it would be even more true in 1979.” See *Lachman Das v. State of Punjab* *Lachman Das v. State of Punjab*, A.I.R. 1963 S.C. 222 (India), in which, a word of caution against over-emphasis on the classification test which seemed to be gradually truncating

Indian Constitutional Law Review

*Ajay Hasia v. Khalid Mujib Shehvardi*³¹ (“*Ajay Hasia*”), P.N. Bhagwati J. concluded that classification test is merely a part of Article 14, and not its end, by observing that:

“The doctrine of classification which is evolved by the courts is not paraphrase of Art. 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of Equality.”

The classification test has been criticized by many constitutional experts and scholars due to its inherent limitations. Prof. P.K. Tripathi in his *Telang Lectures on Right to Equality* explained that there must be three elements of classification test which he labelled as ‘Why’, ‘What’ and ‘Whom’.³² He makes a pertinent observation that the contemporary classification test as applied by Supreme Court takes into consideration only the criterion for classification, object for classification³³ and mutual relationship between them,³³ but blatantly ignores the element of ‘What’ and its relationship with other two elements or wrongfully confuses it with either the ‘Why’ element or the ‘Whom’ element, especially when the legislative action or measure fails to explicitly state its objects. He makes a further observation that, the scope of classification test is further limited by the fact that it cannot be applied in certain circumstances.³⁴

An analysis of the conditions incorporated in this test reveals that its first condition³⁵ is

the heart and spirit of Article 14 was articulated thus: “Overemphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the article of its glorious content. That process would inevitably end in substituting the doctrine of classification for the doctrine of Equality.”

³¹ *Ajay Hasia v. Khalid Mujib Shehvardi*, A.I.R. 1981 S.C. 487 (India).

³² P.K. TRIPATHI, *SOME INSIGHTS INTO FUNDAMENTAL RIGHTS* (Bombay University Press 1972). See V.K. Sircar, *The Old and New Doctrines of Equality: A Critical Study of Nexus Tests and Doctrine of Non-Arbitrariness*, EASTERN BOOK COMPANY (May 16, 2020, 09:08 PM), <https://www.ebc-india.com/lawyer/articles/91v3a1.htm>

³³ Which correspond to elements of ‘Whom’ and ‘Why’ respectively.

³⁴ For example, one person statutes, where the statute only states the policy and makes provision for special treatment but leaves it to the wisdom of the executive to fulfil this policy by picking persons who shall be given such treatment, where the statute provides a broad framework as to the classes of people to whom it applies, etc. See TRIPATHI, *supra* note 32. See V.K. Sircar, *The Old and New Doctrines of Equality: A Critical Study of Nexus Tests and Doctrine of Non-Arbitrariness*, EASTERN BOOK COMPANY (May 16, 2020, 09:08 PM), <https://www.ebc-india.com/lawyer/articles/91v3a1.htm>.

³⁵ “The classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others left out of the group.”

Indian Constitutional Law Review

based on Aristotelian notion of equality that provides that only equals must be treated equally and therefore embodies a formal understanding of equality. Consequently, un-equals can be treated differently without violating Article 14.³⁶ It aims to check whether the classification made is reasonable by examining and evaluating the grounds or reasons based on which some individuals are treated differently. However, the ambit of this approach as prescribed in *Anwar Ali and Dalmia*, does not permit investigation into the intelligibility of initial division, such as sex-based division made for treating men and women unequally. Consequently, as MacKinnon observes, such an approach to equality, “*maps itself onto existing social hierarchies*”, approving and accepting them instead of testing them.³⁷ The classification test, therefore, in the manner in which it was initially applied in many cases, failed to test complex inequalities.

The second condition³⁸ of this test is considered to be a highly deferential standard of review which merely requires the intelligible differentia to have a rational nexus with the object of the classification without delving into finer questions of its necessity and societal impact.³⁹ Prof. Traunabh Khaitan argues that a strict standard of review is composed of 3 major elements⁴⁰:

- a. Suitability: Examining whether impugned legislation actually furthers objective of classification.
- b. Necessity: Examining whether impugned legislation is absolutely necessary to achieve the object of classification or there are alternative ways of doing so without infringing any right or doing so to a lesser extent. If so, legislation in question is suitable *but not* necessary.
- c. Balancing competing interests: Even if impugned legislation is both suitable and necessary it must balance competing interests, primarily by weighing the interest of the State against the efficacy of impugned legislation to achieve the interest. Therefore, if the measure

³⁶ See *Air India v. Nergesh Meerza & Ors.*, 1982 S.C.R. (1) 438 (India), in which, the Supreme Court has expressly reflected this point by observing that “[I]f equals and un-equals are differently treated, no discrimination at all occurs so as to amount to an infraction of Article 14 of the Constitution. A fortiori if equals or persons similarly circumstanced are differently treated, discrimination results so as to attract the provisions of Article 14.”

³⁷ Gauri Pillai, *Naz to Navtej: Navigating Notions of Equality* (NUJS Law Review, 2019), NUJS (May 17, 2020, 11:33 AM), <https://nujslawreview.org/wp-content/uploads/2020/02/123-4-Gauri-Pillai.pdf>.

³⁸ The differentia must have a rational relation to the objects sought to be achieved by the Act.

³⁹ Khaitan, *supra* note 17.

⁴⁰ Tarunabh Khaitan, *Beyond Reasonableness Review: A Rigorous Standard of Review for Article 15 Infringement* (Journal of the Indian Law Institute, Vol. 50, No. 2, pp. 177-208, April-June 2008), SSRN (May 17, 2020, 12:07 PM), <https://ssrn.com/abstract=1246892>.

Indian Constitutional Law Review

restricts a right only slightly, but possesses the ability to further the interest of the State to a substantial extent, it shall be permissible.

This three-prong test is called the “proportionality review”⁴¹. The classification test incorporates only the element of suitability (by demanding the existence of rational nexus between the intelligible differentia and the objective of the Act), but excludes the elements of necessity and balancing competing interests making standard of review under Article 14 highly deferential.⁴² The standard of review under this test is so deferential, as Khaitan⁴³ observes, that even the Supreme Court remarked that:

*“...sustained attempt[s] to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equity enshrined in Article 14 of the Constitution.”*⁴⁴

The Doctrine of Proportionality was recently used in *Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.*⁴⁵, to hold that Right to Privacy is a Fundamental Right under Article 21 of the Constitution. S.K. Kaul J. has articulated its elements thus:

*“(a) the action must be sanctioned by law; (b) the proposed action must be necessary in a democratic society for a legitimate aim; (c) the extent of such interference must be proportionate to the need for such interference; (d) There must be procedural guarantees against abuse of such interference.”*⁴⁶

⁴¹ *Id.*

⁴² Pillai, *supra* note 37.

⁴³ Khaitan, *supra* note 40.

⁴⁴ L.I.C. of India v. Consumer Education and Research Centre, A.I.R. 1995 S.C. 1811, 1822 (India).

⁴⁵ *Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.*, (2017) 10 S.C.C. 1 (India).

⁴⁶ *See Id.*, in which, this doctrine was applied by the Supreme Court to uphold the validity of the Aadhar Act. A.K. Sikri J. laid down this four-fold proportionality test: “(a) A measure restricting a right must have a legitimate goal (legitimate goal stage). (b) It must be a suitable means of furthering this goal (suitability or rationale connection stage). (c) There must not be any less restrictive but equally effective alternative (necessity stage). (d) The measure must not have a disproportionate impact on the right holder (balancing stage).”

Indian Constitutional Law Review

In the same vein, Khaitan categorically argues that classification test can ask the following questions, in addition to the traditional ones⁴⁷:

- a. Does the rule have a disproportionate impact on different classes of persons?
- b. Is the differentia presumptively impossible?
- c. Is the apparent object genuine?
- d. Is the apparent object legitimate?

The recent developments brought about by the Supreme Court in the classification test are promising in the direction identified by Khaitan. In *Navtej Johar v. Union of India*⁴⁸ (“*Navtej Johar*”), where Supreme Court struck down Section 377 of the Indian Penal Code, 1860 and decriminalised same-sex relationship, the judgements of D.Y. Chandrachud J.⁴⁹ and Indu Malhotra J. have led to progressive evolution of the classification test. Chandrachud J. observed that:

“Article 14 has a substantive content on which, together with liberty and dignity, the edifice of Constitution is built. Simply put, in that avatar, it reflects the quest for ensuring fair treatment of the individual in every aspect of human endeavour and in every facet of human existence.”

The “*substantive content*” indicates establishment of a notion that the effect of law must be understood by taking into consideration the broader social context within which the law is embedded.⁵⁰ Chandrachud J. observed that when Section 377 clashed with existing social and moral perceptions, it deprived LGBTQ+ community of their rights and caused great harm to their individuality, personhood, and dignity.

⁴⁷ Khaitan, *supra* note 17.

⁴⁸ *Navtej Johar v. Union of India*, (2018) 1 S.C.C. 791 (India).

⁴⁹ D.Y. Chandrachud J. reiterated that “Equating the content of equality with reasonableness of a classification on which a law is based advances the cause of legal formalism. The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so, the test of classification risks elevating form over substance. The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights.” See *Navtej Johar v. Union of India*, (2018) 1 S.C.C. 791 (India).

⁵⁰ Gautam Bhatia, Vasudev Devadasan & Mihir Naniwadekar, *Civilization has been Brutal: Navtej Johar, Section 377, and the Supreme Court’s moment of Atonement*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (May 17, 2020, 04:43 PM), <https://indconlawphil.wordpress.com/2018/09/06/civilization-has-been-brutal-navtej-johar-section-377-and-the-supreme-courts-moment-of-atonement/>.

Indian Constitutional Law Review

Indu Malhotra J., on the other hand, argued that where a legislation discriminates on the basis of “*intrinsic or core trait*” it *ipso facto* fails classification test and thus cannot be treated as reasonable classification.⁵¹ She put forward a radically progressive argument by stating that Right to Equality under Article 14 rules out certain classifications at the threshold. In other words, legislation based on a core trait (related to personal autonomy such as discrimination on the basis of sex) – a trait which has been or is systematically discriminating is automatically violative of Article 14.

In *Joseph Shine v. Union of India*⁵², where the Supreme Court struck down Section 497 of the Indian Penal Code, 1860 and decriminalised adultery since the said provision, which only punished the male participant at the instance of the husband, but not when the husband ‘consented’ or ‘connived’ with respect to the ‘act’, was highly asymmetric, Chandrachud J. and Malhotra J. carried forward and developed their opinions from *Navtej Johar*. Chandrachud J.⁵³ observed that the court must go beyond the traditional classification test and focus on ‘substantive disadvantage’.⁵⁴ Malhotra J. held that the historical foundation of adultery provision is based on the premise that women are chattels, the classification that it draws (between who is aggrieved and who isn’t, and who can sue and who can’t) is vitiated by an illegitimate constitutional purpose.⁵⁵ Therefore, while the classification may be intelligible, and there may exist a rational nexus with a goal, that goal itself (in this case, the subordination of women) is ruled out by the Constitution.⁵⁶ Such interpretations of the classification test have challenged existing social hierarchies to test complex inequalities.

⁵¹ *Id.*

⁵² *Joseph Shine v. Union of India*, 2018 S.C.C. Online S.C. 1676 (India).

⁵³ Chandrachud J. observed that: “To move away from a formalistic notion of equality which disregards social realities, the Court must take into account the impact of the rule or provision in the lives of citizens. The primary enquiry to be undertaken by the Court towards the realisation of substantive equality is to determine whether the provision contributes to the subordination of a disadvantaged group of individuals.” See *Joseph Shine v. Union of India*, 2018 S.C.C. Online S.C. 1676 (India).

⁵⁴ Gautam Bhatia, Vasudev Devadasan and Mihir Naniwadekar, *The Supreme Court Decriminalizes Adultery*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (May 17, 2020, 05:17 PM), <https://indconlawphil.wordpress.com/2018/09/27/the-supreme-court-decriminalises-adultery/>.

⁵⁵ Malhotra J. observed that: “Hence the offence of adultery was treated as an injury to the husband, since it was considered to be a “theft” of his property, for which he could proceed to prosecute the offender. The said classification is no longer relevant or valid, and cannot withstand the test of Article 14, and hence is liable to be struck down on this ground alone.” See *Joseph Shine v. Union of India*, 2018 S.C.C. Online S.C. 1676 (India).

⁵⁶ Bhatia, *supra* note 54.

Indian Constitutional Law Review

Therefore, it is humbly submitted that the classification test in its initial form embodied only a formal conception of equality that inherently kept in place existing social hierarchies, and subjected the impugned legislation only to a deferential standard of review. The aspects of proportionality test which provide for in-depth inquiry into the necessity, objective and societal impact of the impugned legislation, can and must percolate into the classification test which shall make it an all-encompassing test, ensuring complete justice to the society by looking into its problems from every possible angle. The progressive interpretations of the classification test within the premise of constitutional principles, recently made by D.Y. Chandrachud J. and Malhotra J., have set the course in the right direction (by revealing its true potential) to make this test adequately equipped to become the primary test, if not the only test, to review the constitutional validity of a primary legislation upon the anvil of Article 14.

IV. THE ‘ARBITRARINESS TEST’ OR THE ‘NEW DOCTRINE’

Tripathi correctly speculated that, due to the inherent limitations of the classification test, as revealed by virtue of its extensive doctrinaire application till mid-1970s, *“the Supreme Court will sooner rather than later free itself from the shackles of this dogma.”*⁵⁷ The Supreme Court was inclined to take Article 14 to a highly activist magnitude by broadening its horizons, perhaps, even beyond the constitutional principles. This activist approach of the Supreme Court became apparent in *E.P. Royappa v. State of Tamil Nadu*⁵⁸ (*“E.P. Royappa”*), when Bhagwati J. articulated the new concept of equality thus:

“Equality is a dynamic concept with many aspects and dimensions and cannot be ‘cribbed, cabined and confined’ within the traditional and doctrinaire limits. From a positivistic point of view, equality is antithesis to arbitrariness. In, fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in

⁵⁷ V.K. Sircar, *The Old and New Doctrines of Equality: A Critical Study of Nexus Tests and Doctrine of Non-Arbitrariness*, EASTERN BOOK COMPANY (May 18, 2020, 04:00 PM), <https://www.ebc-india.com/lawyer/articles/91v3a1.htm>.

⁵⁸ *E.P. Royappa v. State of Tamil Nadu*, A.I.R. 1974 S.C. 555 (India).

Indian Constitutional Law Review

*that it is unequal both according to political logic and constitutional law and therefore is violative of Article 14.”*⁵⁹

The judgement of the Supreme Court in *Royappa* delinked the ‘arbitrariness test’ from the ‘classification test’ to review the validity of State action.⁶⁰ The arbitrariness test was approved in *Ajay Hasia*⁶¹. Subsequently, in *Maneka Gandhi v. Union of India*⁶², Bhagwati J. proceeded to lay down the scope of this ‘great equalising principle’ thus:

“It [Article 14] is indeed the pillar on which rests securely the foundation of our democratic republic. And therefore, it must not be subject to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for, to do so would be to violate its activist magnitude....”

However, while some scholars have hailed this transition from ‘traditional and doctrinaire approach’ to ‘substantive equality approach’, some have criticized it. H.M. Seervai, aptly criticized the new doctrine on the ground that *E.P. Royappa*, as it defines ‘arbitrariness’ – does not do so in a self-evident or self-interpreting way and even in 37 years (as matter of fact even today) after the judgment, the Supreme Court has failed to define the ambit and boundaries of this test.⁶³ Seervai went on to say that “the new doctrine hangs in the air because it propounds a theory of equality without reference to the terms in which Article 14 confers the Right to Equality.”⁶⁴ Tripathi⁶⁵ observed that the problem with the new doctrine is that it does not require classification to trigger

⁵⁹ The word arbitrariness had appeared in judicial opinions before *Royappa*. as well. For instance, *See Chiranjit Lal Choudhry v. Union of India*, 1950 S.C.R. 869 (India), in which, F. Ali J. observed that “any classification which is arbitrary and which is made without any basis is no classification and a proper classification must always rest upon some difference and must bear a reasonable and just relation to the things in respect of which it is proposed.”

⁶⁰ Gautam Bhatia, *Equal Moral Membership: Naz Foundation and the Refashioning of Equality*, SSRN (May 18, 2020, 04:00 PM), <https://ssrn.com/abstract=2980862>.

⁶¹ *Ajay Hasia v. Khalid Mujib Sheravardi*, (1981) 1 S.C.C. 722 (India).

⁶² *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 1628 (India).

⁶³ Bhatia, *supra* note 60.

⁶⁴ H.M SEERVAI, *CONSTITUTIONAL LAW OF INDIA* 438 (4th ed., Universal Law Publishing 2015). *See* Khaitan, *supra* note 17.

⁶⁵ Tripathi, while critically examining the potentially wide ambit of arbitrariness test, observed that “arbitrariness by Article 14 is the arbitrariness or unreasonableness in discriminating between one person and another and if there is no discrimination there is no arbitrariness in sense of Article 14.” *See* TRIPATHI, *supra* note 32; *See* Khaitan, *supra* note 17.

Indian Constitutional Law Review

an inquiry, whereas the *Right to Equality, whatever else it might be, must be comparative*. If the new doctrine is merely reduced to a test of arbitrariness with no further direction for inquiry it would become formless, structure-less and a mighty powerful tool in the hands of the judiciary without anyone to question the authority and the manner in which it chooses to use this tool.

For a substantial period after its inception, there were two doubts surrounding arbitrariness test in context of its applicability, namely:

- a. Whether the arbitrariness test is only a part of the first condition of the classification test or also a standalone test having its own substantive content?
- b. Whether the arbitrariness test can be used to review the constitutional validity of administrative actions and subordinate legislations only or to strike down primary legislations as well, if found to be arbitrary?

It has been observed that the arbitrariness test is embodied in the spirit of the classification test and is applicable as a general test of unreasonableness⁶⁶ (i.e. standalone test) as well. The former constitutes comparative unreasonableness whereas the latter considers a case where there is no possibility of comparative evaluation.⁶⁷

This becomes another point of criticism. Khaitan⁶⁸, argues that the arbitrariness test equates arbitrariness with unreasonableness⁶⁹, which may not be true in all circumstances, and therefore makes the new doctrine weaker. He explains that all forms of unreasonableness do not necessarily contain an element of inequality.⁷⁰ Rejecting the application of arbitrariness test in this vein, he

⁶⁶ See *Sharma Transport v. Government of Andhra Pradesh*, AIR 2002 SC 322 (India), in which, Pasayat J. had observed that: “The expression ‘arbitrarily’ means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.”

⁶⁷ Shivam, *Arbitrariness Analysis Under Article 14 With Special Reference to Review of Primary Legislation*, ILI L. REV. 188 (2016).

⁶⁸ Khaitan, *supra* note 17.

⁶⁹ See *Sharma Transport v. Government of Andhra Pradesh*, AIR 2002 SC 322 (India), in which, Pasayat J. has observed that: “The expression ‘arbitrarily’ means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.”

⁷⁰ For example, prohibition on criticizing government, prohibition on drinking coffee, prohibition on going to malls, etc. may be unreasonable, but this unreasonableness has little or nothing to do with inequality.

Indian Constitutional Law Review

aptly states, “*Article 14 may mean many things, but it cannot mean anything.*”

Further, it is observed that the arbitrariness test, which was initially used to check the validity of administrative actions and subordinate legislations only, after oscillating judicial opinions in the recent years, has been empowered to review the validity of primary legislations as well.

Initially the extent of applicability of arbitrariness test was laid down in *Ajay Hasia*⁷¹ where, the Supreme Court held that:

“It must therefore now be taken to be well settled that what Article 14 strikes at, is arbitrariness because any action that is arbitrary, must necessarily involve negation of equality...Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of “authority” under Article 12, Article 14 immediately springs into action and strikes down such State action.”

However, it was in *State of Andhra Pradesh v. McDowell & Co.*⁷² (“*McDowell*”) that J. Reddy J., provided an answer to the question on applicability of arbitrariness test on primary legislation for the first time, by holding that:

“...no enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act.”

This view was confirmed in *Natural Resources Allocation, in re*⁷³ and also ratified by a

⁷¹ *Ajay Hasia v. Khalid Mujib Sheravardi*, (1981) 1 S.C.C. 722 (India).

⁷² *State of Andhra Pradesh v. McDowell & Co.*, (1996) 3 S.C.C 709 (India). Reddy J. also observed that: “it is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted.”

⁷³ *Special Reference No. 1 of 2012*, (2012) 10 S.C.C. 1 (India). The Supreme Court held that: “A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity.”

Indian Constitutional Law Review

five judge-bench in *Subramanian Swamy v Central Bureau of Investigation*⁷⁴. Therefore, judgments in these three cases clearly concluded that arbitrariness test is not available for legislative review. However, in the absence of a substantial volume of judicial precedents, doubts continued to persist regarding the application of arbitrariness test to review primary legislation.

Recently, there has been substantial development in this area, starting with *Rajbala v. State of Haryana*⁷⁵ (“*Rajbala*”) in which the Supreme Court upheld State of Haryana’s amendments to the Panchayati Raj Act, 2015, which had imposed educational, debt and property-based restrictions upon right to contest Panchayat elections. Chelameswar J. rejected the arbitrariness test and upheld the rationality of the classification test to review primary legislation. The Supreme Court held that:

*“[I]t is clear that courts in this country do not undertake the task of declaring a piece of legislation unconstitutional on the ground that the legislation is “arbitrary” since such an exercise implies a value judgment and courts do not examine the wisdom of legislative choices unless the legislation is otherwise violative of some specific provision of the Constitution.”*⁷⁶

However, things took a turn once again in *Shayara Bano v. Union of India*⁷⁷ (“*Shayara Bano*”), where the Supreme Court struck down Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 which sanctioned Triple Talaq as a mode of divorce by holding that Triple Talaq is ‘manifestly arbitrary’. R.F. Nariman J. held that manifest arbitrariness entails something done by the legislature “*capriciously, irrationally and / or without adequate determining principles. Also something which is excessive or disproportionate.*” Nariman J. observed that:

“Arbitrariness in legislation is very much a facet of unreasonableness in Articles 19 (2)-(6), as has been laid down in several judgements of this

⁷⁴ *Subramanian Swamy v Central Bureau of Investigation*, (2014) 8 S.C.C. 682 (India).

⁷⁵ *Rajbala v. State of Haryana*, (2016) 2 S.C.C. 445 (India).

⁷⁶ Chelameswar J. went on to suggest that: “To undertake such an examination would amount to virtually importing the doctrine of “substantive due process” employed by the American Supreme Court at an earlier point of time while examining the constitutionality of Indian legislation.” *See Id.*

⁷⁷ *Shayara Bano v. Union of India*, (2017) 9 S.C.C. 1 (India).

Indian Constitutional Law Review

court, therefore, there is no reason why arbitrariness cannot be used in the aforesaid sense to strike down legislation under Article 14 as well.”

By making such an observation, Nariman J. has broadened the horizons of Article 14 further than ever before. He then went on to hold that the decision of Supreme Court in *McDowell*⁷⁸ is *per incuriam* and consequently test of ‘manifest arbitrariness’ can be used to invalidate primary legislation⁷⁹. In *Shayara Bano*⁸⁰, only two judges (one implicitly) held that arbitrariness test can be used to review validity of primary legislation. However, this position was finally settled and strengthened in *Navtej Johar*⁸¹ in which majority of judges held that a law can be held unconstitutional if it is “manifestly arbitrary” and consequently struck down Section 377 of Indian Penal Code, 1860 to decriminalise same-sex relationship.

The application of arbitrariness test in *Committee of Creditors of Essar Steel Limited v. Satish Kumar Gupta and Ors.*⁸² (“*Essar Steel*”), shows that arbitrariness test has been elevated to such an extent that it seems to have lost its touch with Right to Equality under Article 14, and has become a rather generic test applied in a prescription-less and structure-less form. In this case, the Supreme Court, apart from clarifying various aspects of the Insolvency and Bankruptcy Code, 2016, also held that a mandatory time-period of 330 days as fixed under Section 12 of the Code for completion of Corporate Insolvency Resolution Process was manifestly arbitrary.⁸³ Nariman J. used the manifest arbitrariness test to strike down a part of Section 12 under Article 14 although little or no component of Right to Equality was involved in instant case. Such application of manifest arbitrariness opens the gate for truncating legislative choices with judicial choices.

⁷⁸ *State of Andhra Pradesh v. McDowell & Co.*, (1996) 3 S.C.C 709 (India).

⁷⁹ Especially since there is no distinction between subordinate legislation and primary legislation when it comes to testing them upon the anvil of Article 14.

⁸⁰ *Shayara Bano v. Union of India*, (2017) 9 S.C.C. 1 (India).

⁸¹ *Navtej Johar v. Union of India*, (2018) 1 S.C.C. 791 (India).

⁸² *Committee of Creditors of Essar Steel Limited v. Satish Kumar Gupta and Ors.*, (2019) 2 S.C.C. 1 (India).

⁸³ This may be a welcome move, but the matter of concern is taking recourse to the constitutional doctrine of manifest arbitrariness when there was little ground for doing so, which in itself is worrisome *See* Dhruva Gandhi and Sahil Raveen, *Supreme Court’s IBC Judgement And the Continuing Problems with “Manifest Arbitrariness”*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (May 18, 2020, 10:04 PM), <https://indconlawphil.wordpress.com/2019/12/08/guest-post-the-supreme-courts-ibc-judgment-and-the-continuing-problems-with-manifest-arbitrariness/>.

Indian Constitutional Law Review

Similarly in *Hindustan Construction Company v. Union of India*⁸⁴ (“*Hindustan Construction*”), the Supreme Court struck down Section 87 of the Arbitration and Conciliation Act, 1996 (to resolve a long-term confusion) on the ground that it is manifestly arbitrary, and held that merely filing an application for setting aside an arbitral award under Section 34 of the Act does not lead to automatic stay on execution of that award. Here again there was little ground for taking recourse to this constitutional doctrine since little or no component of Right to Equality was involved in the case.⁸⁵

Therefore, it is humbly submitted that the increased usage of manifest arbitrariness test in such an *unnecessarily broad* manner to review the constitutional validity of primary legislation poses a great threat, which has probably verified the prophecy of constitutional experts who had expressed their word of caution against the application of this test without defining its boundaries and ambit. The manifest arbitrariness test, as resurrected, invoked and applied by Nariman J., possesses the potential to truncate the legislative choices with judicial choices, as admonished by Chelameswar J. in *Rajbala*.

V. CONCLUSION

In light of the foregoing analysis, it is humbly submitted that:

- a. The Supreme Court has used transformative constitutionalism in a rational manner to develop the classification test within the premise of constitutional principles, however, it has used transformative constitutionalism rather unreasonably to broaden the horizons of the arbitrariness test, probably beyond the limits of constitutional principles, perhaps to the extent that it has lost touch with Right to Equality under Article 14.
- b. The classification test has come a long way from its formalistic interpretation of equality and deferential standard of review. D.Y. Chandrachud J. and Indu Malhotra J. have recently

⁸⁴ *Hindustan Construction Company v. Union of India*, 2019 (16) SCALE 823 (India).

⁸⁵ Dhruva Gandhi & Sahil Raveen, “*Hindustan Constructions - Another Instance of The Failings of Manifest Arbitrariness*”, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (May 18, 2020, 10:28 PM), <https://indconlawphil.wordpress.com/2020/04/04/hindustan-constructions-another-instance-of-the-failings-of-manifest-arbitrariness/>.

Indian Constitutional Law Review

unlocked its potential to challenge existing social hierarchies and test complex inequalities, thereby pointing its evolution in the right direction. However, the elements of the proportionality test which trigger an all-encompassing inquiry into the necessity, object and societal impact of the impugned legislation must be incorporated into this test. This test must be raised to such a level of all-inclusiveness that it becomes the primary tool for reviewing primary legislations under Article 14.

- c. The applicability of the arbitrariness test to review the constitutionality of primary legislations under Article 14 must be defined and / or limited immediately to ensure that legislative wisdom is not truncated by judicial wisdom. For doing so:
 - i. The arbitrariness test may be used only as a part of the first condition of classification test, *only* for determining whether or not the classification is arbitrary for the purpose of Article 14. This will automatically limit this test's scope to comparative unreasonableness. As is aptly pointed out by Tripathi, the Right to Equality, *whatever else it might be, must be comparative*.
 - ii. The arbitrariness test, to put it in Seervai's words, still *hangs in the air*. Since the inception of this test, the Supreme Court has not defined the ambit or boundaries of this test to limit its scope. On the contrary, the Supreme Court has applied it in an unnecessarily broad manner, as is revealed in various judicial opinions that have been discussed. Therefore, the contours of the arbitrariness test must be defined within the premise of constitutional principles, to ensure that the test itself is not used *arbitrarily*, if it is intended to be used as a standalone test in the future. This, possibly can be done by defining the term "arbitrariness" for the purpose of Article 14, with reference to the terms in which Article 14 confers the Right to Equality;
 - iii. In both, *Essar Steel* and *Hindustan Construction*, the Supreme Court applied the arbitrariness test to strike down the respective impugned provisions, although the cases involved little or no component of Right to Equality. In order to ensure that the arbitrariness test is not used unreasonably, its application must be abandoned if the case does not involve any component of Right to Equality under Article 14.

Indian Constitutional Law Review

It is well known that rights like Right to Equality are like “empty vessels”⁸⁶ in which each generation pours its content by judicial interpretation. Hopefully, the next pour of content will not damage the vessel!

⁸⁶ Pal J. (quoting Learned Hand J.) did publicly acknowledge that rights like the right to equality were ‘empty vessels’ into which ‘each generation pours its content by judicial interpretation’. See Ruma Pal, ‘Judicial Oversight or Overreach: The Role of the Judiciary in Contemporary India’ (2008) 7 SCC J-9, J-16; See Khaitan, *supra* note 17.

UNDERTRIALS, VOTING AND THE CONSTITUTION

Krishnesh Bapat and Meghna Jandu[†]

Abstract

Right to Vote is significant to an individual's participation in their government. In India, the right to vote is recognized as a statutory right and is subject to limitations imposed by the statute. One of the limitations that the statute imposes on the exercise of the right to vote is laid down in Section 62(5) of the Representation of People's Act, 1951 which broadly states that no person confined in a prison under a sentence of imprisonment or otherwise, can vote in any election. A bare reading of this provision makes it clear that the limitation is not only on the exercise of the Right to Vote by persons convicted of a crime, but also on undertrials and detainees. The objective of this paper is to discuss the unconstitutionality of section 62(5) insofar as it limits the right to vote of those not convicted. We discuss the unconstitutionality of Section 62(5) in two ways. Firstly, we reason that the Parliament can only restrict the Adult Suffrage in terms of Article 326 of the Constitution and Article 326 does not provide the power to curtail the right to vote of undertrials. And secondly, we argue that Section 62(5) is manifestly arbitrary insofar as it denies undertrials and detainees the right to vote but permits them to contest election. We also critique the judicial pronouncements which have upheld Section 62(5). Our criticism of these judgments focuses on the improper application of the 'reasonable classification test' by the Constitutional Courts. Lastly, we have attempted to locate the right to vote in International Instruments and have also looked at important interventions by Courts in other jurisdictions which made efforts to safeguard the prisoners' right to vote.

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I. INTRODUCTION

As of 31st December 2018, the total number of prisoners in India were 4,66,084.¹ 3,23,537 of those prisoners (a staggering 69.4%) were either under detention or were awaiting trial. In spite of the lack of conviction, these prisoners were not permitted to vote in elections that took place in 2019 and 2020. The prohibition on prisoners' right to vote is because of Section 62(5) of the Representation of People's Act, 1951 (*hereinafter referred to as 'RPA, 1951'*)² which states-

“Section 62: Right to Vote

(1).....

(2).....

.....

....

(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police:

Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force.

Provided further that by reason of the prohibition to vote under this sub-section, a person whose name has been entered in the electoral roll shall not cease to be an elector. [Emphasis supplied]”

As is evident from a bare reading of this provision, all those who are confined in prison, whether under a sentence of imprisonment or in lawful custody of police **or otherwise**, cannot vote. At the outset, there are two important consequences of this prohibition. *Firstly*, the consequences are normative as this provision devalues the citizenship of all prisoners. As right to vote is a concomitant of citizenship, this provision, by denying prisoners the right to vote, creates

¹ Prison Statistics India 2018, NATIONAL CRIME RECORDS BUREAU (Apr. 29, 2020), <https://ncrb.gov.in/sites/default/files/Executive-Summary-2018.pdf>.

² § 62 Representation of People Act, No. 43 of 1951, INDIA CODE.

a sub-class amongst the citizenry. *Secondly*, the implications are practical - as all prisoners are denied the right to choose representatives, not only are electoral outcomes affected but this also results in prison reforms never being a priority in the legislative agenda.³⁴

In this paper, we argue that denying undertrials and detainees the Right to Vote is constitutionally impermissible. This paper offers a criticism of the law as it stands and proposes that Section 62(5) must be read down insofar as it disenfranchises undertrials and detainees. Our argument is not that the right to vote is a Fundamental Right, as a number of judicial pronouncements have held that it is only a statutory right.⁵ While we respectfully disagree with the dictum in those decisions, the arguments we have made in this paper are not affected by those pronouncements. We have instead argued that Section 62(5) insofar as it denies undertrials and detainees the right to vote, is not permitted by the Constitution and is manifestly arbitrary. This argument is primarily made in Part II, which follows this introduction. In Part III, we analyse the jurisprudence on Section 62(5). The Hon'ble Supreme Court in *Anukul Chandra Pradhan v. Union of India*⁶ has held that Section 62(5) is constitutionally valid. We respectfully disagree with the decision and we have provided reasons for the same. Finally, in Part IV we have briefly analysed the position of international treaties and foreign jurisprudence on the question of right to vote for those confined in prisons.

II. SECTION 62(5) AND THE CONSTITUTION

In this part, we argue that the curtailment of right to vote of under-trial and detained persons is *ultra vires* the Constitution. There are broadly two reasons for it – *firstly*, the Constitution does not permit the Parliament to restrict the right to vote of those who have not been convicted in a Court of Law (A) and *secondly*, since, those who are under trial or in detention can contest

³ Baljeet Kaur, *Prisoners' Right to Vote: Citizen without a Vote in a Democracy Has No Existence*, 54 ECONOMIC AND POLITICAL WEEKLY (2019).

⁴ Pablo Marshall, *Voting from Prison: Against The Democratic Case For Disenfranchisement*, 11 ETHICS & GLOBAL POLITICS, 1,9 (2017).

⁵ *Jyoti Basu v. Debi Ghosal*, (1982) 3 S.C.R. 318 (India); *See Union of India v. Association for Democratic Reforms and Another*, (2002) 5 S.C.C. 294 (India); *See People's Union for Civil Liberties v. Union of India*, (2003) 4 S.C.C. 399 (India); *See Kuldin Nayar & Others v. Union India & Ors.*, (2006) 7 S.C.C. 1 (India).

⁶ *Anukul Chandra Pradhan v. Union of India*, A.I.R. 1997 S.C. 2814 (India).

elections, restricting them from voting is manifestly arbitrary **(B)**. We make these arguments *in seriatim*.

1. Article 326 and Its Limited Scope

The Parliament enacted Section 62(5) of RPA, 1951 pursuant to the power vested in it under Article 326 of the Constitution read with Schedule 7 List I Item 72.⁷ Article 326 states-

“Article 326: The elections to the House of the People and to the Legislative Assembly of every State shall 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. [Emphasis supplied]”

Article 326 of the Constitution realizes one of the goals of the Indian freedom struggle⁸ – it states that elections to the House of People and to the Legislative Assembly of every state shall be on the basis of Adult Suffrage. Adult Suffrage, though not a Fundamental Right, is guaranteed by the Constitution and stands at a similar footing to Article 300-A, which guarantees that a person cannot be deprived of his property. The phrase ‘*shall be entitled*’ in the last line of Article 326, makes it clear that voting, under our Constitution, is a matter of right for citizens above the age of 18 years.⁹ The Constitution, however, permits the Parliament to disqualify certain citizens from voting on the grounds specified in Article 326. These grounds include *non-residence, unsoundness*

⁷ INDIA CONST. Schedule 7 List 1 Item 72. The entry reads as: *Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President; the Election Commission.*

⁸ R.C AGRAWAL AND BHATNAGAR MAHESH, CONSTITUTIONAL DEVELOPMENT AND NATIONAL MOVEMENT IN INDIA 395 (S. Chand, 2005).

⁹ Virendra Kumar, *Citizens Right to Vote: Role of The Supreme Court in Empowering Citizenry to Bring About A Systemic Change Through Nota for Cleansing Our Body Politic (A Juristic Critique Of Constitutional Developments)*, 56 J. INDIAN LAW INSTITUTE 25, 45 (2014).

Indian Constitutional Law Review

of mind, crime or corrupt or illegal practice. Therefore, if a citizen is of unsound mind, he can be disqualified from voting through law. However, the law enabling such disqualification will not be permitted under Article 326 if the law disqualifies a citizen even before unsoundness of mind is proven. The legislature, hence, can disqualify citizens from voting only if any one of the grounds mentioned under Article 326 is **proven** against such citizens. If citizens could be disqualified from voting on a mere suspicion that they fall within one of the grounds mentioned under Article 326, even laws which disqualify citizens who are alleged of having an unsound mind or have a FIR registered FIR against them, will be permitted under Article 326. Such a scenario is not contemplated by Article 326 and is squarely contrary to the concept of Adult Suffrage envisioned in the Article.

The debates of the Constituent Assembly also make it clear that Article 326 permits disqualification from voting only if any one of the grounds mentioned in the Article is proven against citizens. On 8th January, 1949, a motion was moved in the Constituent Assembly which sought instructions to be issued to authorities for the preparation of electoral rolls so that elections may be held in 1950.¹⁰ The motion stated that those who are not citizens of India and those who are of unsound mind as declared by competent court, should not be included in the electoral rolls. Mr H.V Kamath enquired why the disqualifications mentioned in Draft Article 67(6) [later adopted as Article 326] like crime or corrupt or illegal practices were not included in the motion. Dr. B.R Ambedkar responded in the following manner:

“Now, with regard to the question of crime all that I need say is this, that the Drafting Committee, in using the word ‘crime’ in that particular article [Article 67(6)], was merely reproducing the provision contained in the Sixth Schedule of the Government of India Act, and I do not think that the Drafting Committee had anything more in mind than what is stated in that article. According to that article, the commission of a crime is not by itself any disqualification. The disqualification is only when a person is punished and detained in imprisonment. It is during the period of imprisonment that he loses the right to vote. That point can be further accommodated when we come to

¹⁰ Constituent Assembly Debates, 8th Jan 1949, Vol. VII.

the additional disqualifications mentioned in the article to which Mr. Kamath referred.”

Therefore, it is clear that the intention of the Constituent Assembly behind Article 326 was that it should be used as a tool to disqualify those who have committed crime and have been convicted and imprisoned for it. Dr B.R Ambedkar said so explicitly. Commission of crime is not by itself a disqualification. Punishment was considered by the assembly a *sine qua non* for disqualification. Section 62(5) of the RPA, 1951 has been enacted pursuant to Article 326 and it disqualifies everyone confined in prison, from voting. It does not matter whether the accusation against the citizen of committing a crime is proven. The lone fact that he is in prison, disentitles him from voting. As a result of this provision, 3,23,537 citizens who have not been convicted of any offence, were unable to vote in the elections held in 2019 and 2020.¹¹ Article 326 only permits disenfranchising those who have been convicted of committing a crime. Section 62(5), hence, is *ultra vires* the Constitution as it goes beyond the law-making power conferred by Article 326.

2. Manifestly Arbitrary Under Article 14

In this sub-part we argue that Section 62(5) is manifestly arbitrary as the second proviso to Section 62(5) read with Section 4 and Section 5 of the RPA, 1951 permits undertrials and detainees to contest elections but does not allow them to vote. For the sake of clarity, the argument here is not that undertrials should not be allowed to contest elections but that in the event that they are allowed to contest elections, there is absolutely no justification for denying them the right to vote.

The second proviso to Section 62(5) was inserted by the Parliament through the Representation of People (Amendment and Validation) Act, 2013. The proviso was inserted as a response to Hon’ble Supreme Court’s decision in *Chief Election Commissioner v. Jan Chaukidar*¹². The Hon’ble Supreme Court in *Jan Chaukidar* had upheld the decision of the Patna High Court in *Jan Chaukidar v. Union of India*¹³ and held that a person who is barred by Section

¹¹ *Supra* note 1.

¹² *Chief Election Commissioner v. Jan Chaukidar*, 2013 (7) S.C.C. 507 (India).

¹³ *Jan Chaukidar v. Union of India*, 2004 (2) B.L.J.R. 988 (India).

Indian Constitutional Law Review

62(5) is not an elector and is therefore not qualified to contest election to the House of People or Legislative Assembly of a State.

To arrive at the aforementioned conclusion, the Hon'ble Supreme Court and the Patna High Court had interpreted Section 4 and Section 5 of RPA, 1951. Section 4 of RPA, 1951 lays down the qualifications for membership of the House of the People and states that being an "elector" is a prerequisite for contesting Parliamentary constituency.¹⁴ Similarly, one of the qualifications in Section 5 of the RPA, 1951 for membership of Legislative Assembly, is that he or she must be an "elector".¹⁵ As per the Hon'ble Supreme Court, since a person who is prohibited from voting because of Section 62(5) is not an "elector", he cannot contest elections because of the disqualification in Section 4 and Section 5. By enacting the Representation of People (Amendment and Validation) Act, 2013 the Parliament changed the basis of the decision in *Jan Chaukidar* by adding the second proviso to Section 62(5). The second proviso states that notwithstanding the prohibition to vote imposed by Section 62(5), a person whose name has been entered in electoral roll will be considered an elector. The Representation of People (Amendment and Validation) Act, 2013 was upheld by the Delhi High Court in *Manohar Lal Sharma v. Union of India*¹⁶. Therefore, the law as of this day, is that while undertrials in lawful custody can contest elections, they cannot exercise their right to vote.

The doctrine of manifest arbitrariness was elucidated by Nariman J in *Shayara Bano v. Union of India* –

"On a reading of this judgment, it is clear that this Court did not read McDowell (supra) as being an authority for the proposition that legislation can never be struck down as being arbitrary. Indeed, the Court, after referring to all the earlier judgments, and Ajay Hasia (supra) in particular, which stated that legislation can be struck down on the ground that it is "arbitrary" under Article 14, went on to conclude that "arbitrariness" when applied to legislation cannot be used loosely. Instead, it broad

¹⁴ § 4(d) Representation of People Act, No. 43 of 1951, INDIA CODE.

¹⁵ § 5(c) Representation of People Act, No. 43 of 1951, INDIA CODE.

¹⁶ *Manohar Lal Sharma v. Union of India*, 2014 SCC Online Del. 570 (India).

Indian Constitutional Law Review

based the test, stating that if a constitutional infirmity is found, Article 14 will interdict such infirmity. And a constitutional infirmity is found in Article 14 itself whenever legislation is "manifestly arbitrary"; i.e. when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favouritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment. Positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest, etc." [Emphasis supplied]

The doctrine of manifest arbitrariness was subsequently used by 5 Judges in *Navtej Singh Johar & Others v. Union of India* to partially strike down Section 377 of the Indian Penal Code.¹⁷ It is pertinent to note that Section 377 of the Indian Penal Code, is a facially neutral provision but was discriminatory in its operation. Therefore, the doctrine of manifest arbitrariness is particularly helpful to test the constitutionality of statutes which have a disparate impact.¹⁸ Section 62(5) may appear neutral but does have a disparate impact on undertrials and those in detention.

Section 62(5) is manifestly arbitrary as it is discriminatory, irrational and on the face of it, not informed by reason. This is because, *firstly*, the second proviso to Section 62(5) extends presumption of innocence to undertrials as far as their right to contest elections is concerned but does not extend the same presumption with regard to their Right to Vote. While upholding Representation of People (Amendment and Validation) Act, 2013 in *Manohar Lal Sharma*, a Division Bench of the Delhi High Court had held:

“39. In our opinion, one must distinguish between convicted prisoners on the one hand and undertrials on the other. Further, as our criminal justice system is based on the principal of “innocent until proven guilty”, we cannot presume our undertrials to be guilty insofar as right to contest elections is concerned.” [Emphasis supplied]

¹⁷ *Navtej Singh Johar & Others v. Union of India*, (2017) 9 S.C.C. 1 (India); See Dr. Abhinav Chandrachud, *Navtej Singh Johar vs Union of India – Key Highlights*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (Sep. 9, 2018), <https://indconlawphil.wordpress.com/2018/09/09/guest-post-navtej-johar-v-union-of-india-key-highlights/>.

¹⁸ Dhruva Gandhi, *Rethinking “Manifest Arbitrariness” in Article 14: Part II – Disparate Impact and Indirect Discrimination*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (May 21, 2020), <https://indconlawphil.wordpress.com/2020/05/21/guest-post-rethinking-manifest-arbitrariness-in-article-14-part-ii-disparate-impact-and-indirect-discrimination/>.

Indian Constitutional Law Review

Therefore, the law as it stands, presumes undertrials to be innocent for the purposes of one right (right to contest elections) but not for another right (right to vote) because of their position as undertrials in prison. There is no justification for not extending the presumption with respect to right to vote.

Secondly, the second proviso to Section 62(5) has a rationale which is opposite to the constitutional and legislative policy. In the Constitution, judicial pronouncements and elsewhere in the RPA, 1951 the restrictions on contesting elections are more onerous than those on voting in an election. For instance, Article 84 of the Constitution requires a person to fill a seat in Lok Sabha to be at least twenty five years of age. Article 326 on the other hand permits anyone who is above the age of eighteen to vote. Article 102 of the Constitution disqualifies one from being a member of either Houses of the Parliament, if they are an undischarged insolvent or if they hold an office of profit. On the other hand, insolvency or holding an office of profit is not a criterion for debarring a citizen from voting. In *Public Interest Foundation v. Union of India*¹⁹, a five-judge bench of the Hon'ble Supreme Court, directed all candidates contesting elections to disclose the criminal cases pending against them. Section 75A of the 1951 Act requires all those elected to the Parliament to reveal their assets and liabilities. There is no obligation on citizens to either disclose the criminal cases against them or disclose their assets and liabilities in order to vote. Evidently, Section 62(5), is quite opposite to the rest of the legislative policy and has created a situation wherein voting is more onerous than contesting elections for a class of citizens. Therefore, Section 62(5) is manifestly arbitrary.

III. SECTION 62(5) BEFORE CONSTITUTIONAL COURTS

The constitutionality of Section 62(5) of RPA, 1951 has been previously challenged and the provision has been upheld by the Constitutional Courts. However, the challenges did not limit themselves to the right of undertrials to vote and instead contended that Section 62(5) in its entirety was constitutionally invalid. Constitutional Courts have rejected this argument and have upheld the constitutionality of Section 62(5). This paper stands on a different footing. The contention here

¹⁹ *Public Interest Foundation v. Union of India*, 2018 S.C.C. Online S.C. 1617 (India).

Indian Constitutional Law Review

is not that Section 62(5) in its entirety is constitutionally invalid. This paper has simply argued that Section 62(5) must be read down insofar as it restricts the rights of undertrials and detainees to vote. However, as the judgments which have upheld Section 62(5) have not appreciated the distinction between undertrials, detainees and convicts, it is important, respectfully, to point out our disagreements with those judgments. The disagreements which follow are in addition to the arguments put forth in Part II and are, largely, responses to the reasoning provided by the Constitutional Courts.

In February 2020 in the case of *Praveen Kumar Choudhary & Others v. Election Commission of India & Others*²⁰, a Division Bench of the Hon'ble Delhi High Court held that the prohibition on prisoners' right to vote was constitutionally valid. The reasoning of the Hon'ble Court can be divided in two parts. *Firstly*, the Hon'ble Court began with a clarification regarding the nature of the 'right to vote' which it explained was a statutory right. This deduction about the nature of the right to vote is in consonance with the position taken by Constitutional Courts on earlier occasions. The Hon'ble Court held that since the right to vote is conferred by a statute, the statute can impose limitations on it. *Secondly*, the Hon'ble Court proceeded to examine the statute, i.e., RPA, 1951, on the touchstone of Part III of the Constitution. Specifically, the Hon'ble Court sought to examine whether denying the right to vote to persons in jail was permissible under Article 14 of the Constitution. The Hon'ble Court held that the classification between those in prison and those outside prison was reasonable and thus Section 62(5) was constitutionally valid. To explain why the classification was reasonable, the Hon'ble Court relied on the decision of a three-judge bench of the Supreme Court in the case of *Anukul Chandra Pradhan v. Union of India*.²¹

In *Anukul Chandra Pradhan*, the Petitioner had challenged the constitutionality of Section 62(5) on the ground that it violated Article 14 of the Constitution. The Hon'ble Court upheld the constitutionality of Section 62(5) without addressing the right to vote of undertrials and detainees. The then Chief Justice of India, Justice J.S Verma, writing for the Hon'ble Court, held that the classification between those in prison and those outside of prison was reasonable. It is pertinent to

²⁰ Praveen Kumar Choudhary v. Election Commission of India, High Court of Delhi, W.P.(C) 2336/2019 decided on 11th February, 2020 (India).

²¹ Anukul Chandra Pradhan Vs Union of India, (1997) 6 S.C.C. 1 (India).

Indian Constitutional Law Review

note here that the Hon'ble Court considered everyone in prison, irrespective of whether they are convicted or not, to be a class amongst themselves. The Hon'ble Court observed that the classification between those in prison and those out of prison was justified and *a priori*, Section 62(5) was constitutionally valid because - *firstly*, if a person was in prison as a result of their own conduct, they could not demand equal rights and liberties as those who are not in prison. (**Para 8**) *Secondly*, the exclusion of persons with criminal background from the election scene as voters was in furtherance to the objective of preventing criminalization of politics and *any provision enacted with a view to promote this objective must be welcomed* (**Para 5**). Furthermore, the Hon'ble Court commented that such restriction placed on prisoners is also a matter of administrative ease, as permitting every person in prison to vote would require deployment of a much larger police force and much greater security arrangements in the conduct of elections (**Para 8**).

This decision of the three-judge bench of the Hon'ble Supreme Court has remained a point of reference in most subsequent cases where the question of prisoners' right to vote has arisen. However, there are certain shortcomings in the reasoning of this judgment which must be addressed. While the administrative difficulty quoted by the Hon'ble Court in its decision is an issue outside the scope of this paper, it is by itself a reflection on how insignificant the exercise of the right to vote by prisoners is in the eyes of the Hon'ble Court. The criticism in this paper is limited to the erroneous application of reasonable classification test laid down by the Hon'ble Supreme Court in *State of West Bengal v Anwar Ali Sarkar*.²² In that case the Hon'ble Supreme Court held that –

*"In order to pass the test of permissible classification two conditions must be fulfilled viz. (i) that the classification must be founded on an **intelligible differentia** which distinguishes those that are grouped together from others left out of the group, and (ii) that the differentia must have a rational relation to the objects sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct and what is necessary is that there must be nexus between them."*

²² State of West Bengal v Anwar Ali Sarkar, A.I.R. 1952 S.C. 75 (India).

Indian Constitutional Law Review

In light of the reasonable classification test, there are two concerns with judgment in *Anukul Chandra Pradhan* - *firstly*, the finding of the Hon'ble Court that anyone in prison is a class amongst themselves for the purposes of the Right to Vote is not founded on an intelligible differentia and *secondly*, even if there is a distinction between the classes, the distinction does not have a relation to the object sought to be achieved by RPA, 1951.

On the *first* aspect, the classification proposed by the Hon'ble Court in *Anukul Chandra Pradhan* is that everyone in prison constitutes one group and those outside of prison constitute another. The Petitioner had pointed to the incongruity of this classification as all persons in jail, including convicts, under-trials and detainees, cannot form a class amongst themselves. The Hon'ble Court overlooked this argument and proposed the aforementioned classification which is based on the following assumptions - *firstly*, that a convicted person outside jail (for example, on parole or furlough), is evenly situated to one who has not committed a crime and therefore, is equally entitled to vote. *Secondly*, every person in jail is equally undeserving of the right to vote. The classification based on these assumptions, especially the second one, is not founded on an intelligible differentia as there are vast differences between under-trials, detainees and convicts. Most importantly, that under-trials and detainees have not been convicted of any crime. Judicial dictum has previously recognised this crucial distinction.²³ The line of thought which groups under-trials, detainees and convicts in the same category is problematic and is perhaps based on popular perception which considers everyone in prison to be rogue.

In addition to the aforementioned assumptions, the Hon'ble Court's classification has lost sight of the rationale behind the reasonable classification test. Under Article 14, equality before the law or equal protection of laws does not mean treating everyone the same way. Rather, it means that equals must be treated equally while unequals must be treated differently.²⁴ The reasonable classification test is simply a mechanism to ensure that unequals are not treated in the same manner. In *Anukul Chandra Pradhan*, the Hon'ble Court upheld a provision which treats unequals, equally. As mentioned above, undertrials, detainees and convicts are different classes and

²³ State of U.P v. Amarmani Tripathi, (2005) 8 S.C.C. 21 (India); See Undertrial Prisoners v. Union of India, 1994 (6) S.C.C. 731 (India); See Babu Singh and Others v. State of Uttar Pradesh, 1978 S.C.R. (2) 777 (India).

²⁴ MAHENDRA PAL SINGH, VN SHUKLA'S CONSTITUTION OF INDIA 48-49 (11th ed. 2016).

cannot be grouped into one. Additionally, this classification is especially discriminatory to those who cannot furnish bail as any person who can manage to furnish bail is able to secure their right to vote. The Hon'ble Court has thus failed to fulfil the first condition of the reasonable classification test as the classification created is simply arbitrary and there is no intelligible differentia between those who are imprisoned and those who are not.

On the *second* aspect, assuming that there is an intelligible differentia between those in prison and those out of prison, the second condition of the reasonable classification test still remains unfulfilled. In Paragraph 5 of the Judgment, the Hon'ble Court had stated that the object of Section 62(5) is to prevent criminalisation of politics. Since being imprisoned is not necessarily an indication of criminality, the subversion of the right to vote of each person who in prison is not in furtherance to the object of prevention of criminalisation of politics.

IV. INTERNATIONAL JURISPRUDENCE ON PRISONERS' RIGHT TO VOTE

Internationally, Treaties have formally recognised voting as an important means of people's participation in the government. Article 21 of the Universal Declaration of Human Rights broadly recognizes the right of every individual to participate in their government either directly or through freely chosen representatives.²⁵ ²⁶ Article 25 of International Covenant on Civil and Political Rights (*hereinafter referred to as 'ICCPR'*) provides for an unhindered right to vote to every citizen without any unreasonable restrictions.²⁷ The United Nations Human Rights Committee provides their interpretation to ICCPR through General Comments. General Comment 25 on Article 25 of the ICCPR addresses the limitations that can be placed on the right to vote.²⁸ It states

²⁵ art. 21, G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

²⁶ *Supra* note 3.

²⁷ art. 25, G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Mar. 23, 1976).

²⁸ United Nations Human Rights Committee, Draft General Comment No. 25, ¶ 14, U.N. Doc. CCPR/C/21/Rev.1/Add.27 (1996).

Indian Constitutional Law Review

that the ground for deprivation of citizens' right to vote should be objective and reasonable. Further, with regard to disenfranchising prisoners it states that "*If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.*" India, in spite of having ratified ICCPR, has not amended its law to conform to the requirements of Article 25.

Provisions similar to Article 25 exist in other international treaties as well, including African (Banjul) Charter on Human and People's Rights²⁹, and European Convention on Human Rights (*hereinafter referred to as 'ECHR'*).³⁰ Article 3 of Protocol No. 1 of the ECHR imposes a positive obligation on State Parties to hold free elections to *ensure free expression of the opinion of the people in the choice of the Legislature*.³¹ The European Court of Human Rights had the opportunity to interpret this provision in the context of convicts in the case of *Hirst v The United Kingdom*.³² The applicant in that case being a convicted criminal was barred from voting by Section 3 of the Representation of People's Act, 1983. Section 3 imposed a blanket ban on the right to vote by all convicted persons detained in a penal institution. While the E.Ct.H.R. conceded that the right guaranteed by Article 3 of Protocol No. 1 was not absolute and states were allowed to impose certain limitations on the exercise of this right, it found that Section 3 impaired the essence of this right by imposing a blanket ban on the right to vote of all convicts.

Apart from these international instruments, a few countries have led the way in the struggle for suffrage of those in prison. South Africa's Constitutional Court dealt with the question of prisoners' right to vote in the case of *August v. Electoral Commission*.³³ The Court held that South Africa's Constitution imposed a positive obligation on the government to ensure that every individual could exercise the universality of the franchise, which it believed was crucial to nationhood. Moreover, the Court added that *Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than*

²⁹ art. 13, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), African Charter on Human and Peoples' Rights (Oct. 21, 1986).

³⁰ The European Convention on Human Rights art. 3, Nov. 4, 1950, ETS No.005.

³¹ *Id.*

³² *Hirst v United Kingdom (No.2)* (2005), E.Ct.H.R. 681.

³³ *August v. Electoral Commission* 1999 (3) SA 1 (CC) (S. Afr.).

Indian Constitutional Law Review

disenfranchisement. In *Sauvé v Canada*, the Canadian Supreme Court held that a law that denied voting rights to persons serving two years or more in prison was unconstitutional.³⁴ The Court held that denying prisoners the right to vote would be more detrimental than beneficial. It emphasised taking away the right to vote as a penal action does not serve a valid criminal law purpose and that such a law would pose a hindrance to the objective of rehabilitation of convicted persons into the society.

While the Courts in India have emphasised that the right to vote is to be treated as an ordinary statutory right, the judicial pronouncements from Canada and South Africa suggest that right to vote ought to be placed alongside other commonly regarded human rights.

V. CONCLUSION

The law in India with regard to prisoners' right to vote does not meet the threshold that is laid out in the international human rights framework. At the same time, it does not align with the scheme of the Constitution. Section 62(5) of the RPA, 1951 is *ultra vires* the Constitution as it not only goes beyond the law-making power conferred in the Parliament by virtue of Article 326, but also because it violates Article 14. The Courts have had numerous opportunities to correct the illegality of this provision by limiting the scope of Section 62(5). However, a reasonable classification to limit the scope of the restriction under this provision has not been drawn as yet. The Constitutional Courts have refused to limit the scope of Section 62(5) so as to not restrict undertrials and detainees from voting, citing the reason that the electoral process must rid itself of any criminality. On the other hand, the Hon'ble Delhi High Court has upheld the Representation of People (Amendment and Validation) Act, 2013 which introduced the second proviso to section 62(5) of the RPA, 1951. The Court in that case distinguished between convicts and undertrials on the basis of 'innocent until proven guilty' and allowed undertrials to contest elections. Such reasoning elopes the classification of voters confined in prison and continues to treat voting as more onerous than contesting elections.

³⁴ *Sauvé v Canada* 2002 S.C.C. 68 (Can.).

Indian Constitutional Law Review

While the Constitutional Courts have chosen not to interfere, Section 62(5) of the Representation of People Act, 1951 continues to disenfranchise every single prisoner, thereby taking away their option to participate in the formation of the government as citizens of the country. The law, therefore, systematically ousts a large number of voters from the electoral process, leading to little or no representation of their concerns in the legislature.

**COMPROMISING THE SOCIALIST DREAM: ARTICLE 12 AS A RAILROAD FOR
KITSCHY NEO-LIBERALISM?**

Aesha Anurag Shah and Gayatri Puthran[†]

Abstract

Since the launch of the New Economic Policy in 1991, the evolution of government policies has advanced with a neoliberal undercurrent. The private sphere has grown many-fold, and now has a strong influence on the structuring and functioning of society as a whole. This expansion in the power of the private sphere, however, is not matched by an equal extension of constitutional obligations. Article 12 of the Constitution of India restricts enforceability of fundamental rights as against only State actors. While judicial precedents have expanded its scope, they have done so inconsistently. A general doctrine or principle for direct horizontal application is still unformulated.

This paper studies the correlation between the socialist doctrine under the Constitution and the exemption under Article 12 - to consider whether it is incompatible with this aim. It considers whether free-reign neoliberalism is irreconcilable with the socialist dreams of the drafters of the Constitution. Finally, it studies whether holding private enterprises answerable to uphold fundamental rights through direct horizontality under Article 12 would help affording citizens the security and equality essential to the socialist conception of the Constitution.

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I. INTRODUCTION

“Socialism is... not only a way of life, but a certain scientific approach to social and economic problems.” - Jawaharlal Nehru¹

Socialist thought was inherent in the Constitution from its very inception. Its presence ranges from implicit inference (as in the Objectives Resolution²) to explicit mention in the preamble, and various Constituent Assembly Debates by prominent thinkers like B.R. Ambedkar, R.K. Sidhwa and M. R. Masani³. They envisioned the future India to be ‘an economic and political democracy [...] [where] men will neither be slaves to capitalism nor to a party or the State’⁴. The present India is a crude parody of this vision - where **unregulated** capitalism *is* freedom. Crony capitalism - the coalition of private and public actors to further their own interests, almost always to the detriment of the general public⁵ - is on a rise⁶, as evidenced by India’s high rank in the Economist’s Crony Capitalism Index⁷. This index calculates crony-sector wealth as a percentage of the GDP of a nation. Globalization has placed massive power in the hands of the private sector, such that *shareholders* are better protected than *citizens* of the country.

This paper aims to question whether Article 12 of the Constitution, by limiting the application of fundamental rights as against only State actors, gives free reign to private entities to shape the treatment of individuals in the mainstream. The absence or presence of fundamental rights has been regarded to influence an individual’s self-perception and personality development⁸.

¹ JAWAHARLAL NEHRU, THE BASIC APPROACH (1958).

² R. K. SIDHWA (C. P. & Berar: General) Wednesday, the 30th July 1947, CAD.

³ DR. B. R. AMBEDKAR, (Bombay: General), Friday, the 25th November, 1949; M. R. MASANI (Bombay: General) Tuesday, the 17th December, 1946.

⁴ M. R. MASANI (Bombay: General) Tuesday, the 17th December, 1946, CAD.

⁵ Laura Amico, *Do Democracy and Capitalism Really Need Each Other?*, HARVARD BUSINESS REVIEW (Mar. 11, 2020), <https://hbr.org/2020/03/do-democracy-and-capitalism-really-need-each-other>.

⁶ Chiranjib Sen, *Curbing Crony Capitalism in India*, APU (2017), <https://azimpremjiuniversity.edu.in/SitePages/pdf/APU-Working-Paper-Series-5-curbing-crony-capitalism-in-India.pdf>.

⁷ *India ranks 9th in crony-capitalism index: What does it mean for India*, INDIA TODAY (May 11, 2016), <https://www.indiatoday.in/education-today/gk-current-affairs/story/crony-capitalism-322911-2016-05-11>.

⁸ Maneka Gandhi v. Union of India, AIR 1978 SC 597, 619; Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14(2) Am. U. Int’l. L. Rev. 442; S. P. Bhargava, *Fundamental Rights and the Indian Constitution*, 9(3) Indian Journal of Political Science 24.

It must be considered whether exempting the private sector from abiding by them has a direct impact on the individual and the society, thereby defeating the purpose of the word “Socialist” in the Constitution. Recently, there have been declarations purporting the removal of this word from the preamble⁹. At the time of the commencement of the Constitution, the political landscape of India was such that private actors could not constrain individual liberties and freedoms. This no longer holds true.

This paper will examine the case for direct horizontal application of fundamental rights - for the purpose of acting as a safety net when legislation and policies, as a result of the corrupt political-corporate nexus, may deliberately fail to protect citizens in the interest of corporations. If relief is absent or inadequate in legislation and in executive actions, fundamental rights can provide a locus standi as a last resort. In doing so they act as a net: for exercising the judicial machinery in cases that fall through the loopholes of biased legislation. This line of reasoning requires us to consider the possibility of unconstitutional intent and efficacy of legislation. Such critical examination is often hit by the doctrine of *presumption of constitutionality and legitimacy*. To debase this presumption which is in favor of legislation and policy, practical examples and legal theories of eminent scholars (such as Upendra Baxi and Larry Diamond) are referenced later on in this paper.

II. THE CURRENT CIRCUMFERENTIAL SCOPE OF ARTICLE 12

To juxtapose the proposition of the horizontal application of fundamental rights with the existing ambit of Article 12, the boundaries of its scope must first be charted. Currently, the debate in courts is surrounding the phrase “other authorities”. They have adopted either a structuralist or a functionalist approach. The judges began with a structuralist approach in the 50s¹⁰, moving towards a more functionalist approach in the late 70s and early 80s¹¹ and in recent times have again resorted to a structuralist approach.

⁹ *Anti-Democratic: Socialist Party on BJP MP's Bid to Remove 'Socialist' From Preamble*, THE WIRE (Mar. 22, 2020), <https://thewire.in/politics/socialist-party-preamble-bjp>.

¹⁰ *Rajasthan State Electricity Board v. Mohanlal*, A.I.R. 1967 S.C. 1857; *University of Madras v. Shanta Bai*, AIR 1954 Mad 67.

¹¹ *RD Shetty v. International Airports Authority*, A.I.R. 1979 S.C. 1628; *Central Inland Water Transport Corporation v. Brojonath Ganguly*, (1986) 3 S.C.C. 156.

Indian Constitutional Law Review

The functionalist approach, operating through the agency-and-instrumentality test, made it possible to include corporations which were acting on the behalf of the State under article 12 (so as to prevent the State from evading this article from behind a corporate veil). In *RD Shetty v International Airports Authority*¹², the Authority was held to be actionable under article 12, since it shared the government's role as a welfare-provider and could issue licenses to private entities¹³. In the case of *Ajay Hasia Etc v Khalid Mujib Sehravardi & Ors.*¹⁴, a broader six-part framework was laid down for the agency and instrumentality test, in order to further the goal of including private enterprises operating on the behalf of the government. In *Pradeep Kumar Biswas v Indian Institute of Chemical Biology*¹⁵ the test was narrowed down, to only include authorities in which the government had deeply entrenched functional, financial and administrative control¹⁶. This continuous switching of approaches has left us with no clear ratio. However, in both the approaches, the accused violator has to have some link to the government or must be working in some governmental capacity.

Even those judicial precedents which do adopt *direct* horizontal application do not invoke Article 12 for the same, but rather go into textual interpretation of individual fundamental rights¹⁷. In *Indian Medical Association v Union of India*¹⁸, private establishments were made subject to Article 15 by taking into account the aspirations of the constitution for an egalitarian society. In *People's Union for Democratic Rights v Union of India and Ors*¹⁹, despite Justice P.N Bhagwati's impassioned judgment calling out the unequal protection of *law in general* between the privileged and the poor, the judicial remedy of horizontal application pertained *specifically* to Article 23. This patchy application of fundamental rights greatly limits the intersection of constitutional and private law²⁰. While both cases fervently acknowledge a persistent need to encumber private entities with fundamental rights accountability, they play it safe by making this obligation localized and

¹² A.I.R. 1979 S.C. 1628.

¹³ *Managing Director, Uttar Pradesh Warehousing Corporation v. Vinay Narayan Vajpayee*, 1980 AIR 840; *Central Inland Water Transport Corporation v. Brojonath Ganguly*, 1986 A.I.R. SC 1571.

¹⁴ A.I.R. 1981 S.C. 487.

¹⁵ (2002) 5 S.C.C. 111.

¹⁶ *ibid.*

¹⁷ *Consumer Education & Research Centre v. Union of India & Others*, (1995) 3 S.C.C. 42.

¹⁸ (2011) 7 S.C.C. 179, 113.

¹⁹ (1982) 3 S.C.C. 235.

²⁰ STEPHEN GARDBAUM, *THE INDIAN CONSTITUTION AND HORIZONTAL EFFECT* 23 (OUP, 2016).

centered on the right in question. In doing so, both judgements miss the mark by passing on the opportunity of developing all-encompassing jurisprudence.

This paper's proposition is wholly different - private entities acting in their private capacity must be included under Article 12, so as to develop an *overarching* jurisprudence rather than an isolated interpretation of specific fundamental rights.

III. A CASE FOR HORIZONTAL APPLICATION FROM THE LENS OF SOCIALISM

According to the Supreme Court in *Samatha v State of Andhra Pradesh*²¹, 'establishment of the egalitarian social order through rule of law is the basic structure of the Constitution.' This effectively underscores the predominant position of socialism as an essential feature of the Constitution. As mentioned previously in *People's Union for Democratic Rights*, Justice P.N. Bhagwati enumerates the meaning of socialism in the constitution, saying that the legal fraternity protecting the interest of private entities translates to the extinction of fundamental rights for the common people. Socialism in the constitution promises a new socio-economic order, and should be interpreted in a way to facilitate this change. In *D.S Nakara and Ors. v Union of India*²², the Supreme Court described socialism in the Constitution to mean ensuring a decent standard of life and security. Unregulated capitalism is often considered to be antithetical to social welfare. It would be meaningful to consider whether exemption from fundamental rights accountability endorses this, thereby compromising the security and equality attributed to 'socialism' as theorized by a culmination of the above cases.

Ever since the 1991 launch of the New Economic Policy in India, the balance has tipped in favor of private entities.²³ The evolution of neo-liberal policy in the last 30 years has caused public

²¹ (1991) 8 S.C.C. 191.

²² A.I.R. 1983 S.C. 130.

²³ Raju Das, *Critical Observations on Neo-liberalism and India's New Economic Policy*, 45 (4) J. Contemp. Asia (2015).

Indian Constitutional Law Review

welfare to take a back seat (for sectors like education²⁴ and social development²⁵). The effect of neo-liberal agenda on government policy has relegated the role of the State from service provider to service facilitator, making it difficult to implement welfare measures such as re-distributive policy.²⁶ Recent trends showcase a burgeoning Thatcherism in government policy, and a parallel rollback of welfare spending is evident²⁷. In light of this, diminished accountability of private enterprises towards fundamental rights could be detrimental to socialism under the constitution.

B.R. Ambedkar warns us of that the limitation of only State intervention, and not private actors, in private lives emboldens the privileged thereby defeating the socialist aim of the constitution, when he says:

“Constitutional lawyers [...] argue that where the State refrains from intervention in private affairs, economic and social – the residue is liberty. What is necessary is to make the residue as large as possible and state intervention as small as possible. [...] To whom and for whom is this liberty? Obviously, this liberty is liberty to the landlords to increase rents, for capitalists to increase the hours of work and reduce the rate of wages. [...] In other words what is called liberty from the control of state is another name of the dictatorship of the private employer”²⁸

Ambedkar distinctly underscores the shift from the classic welfare state to the regulatory welfare state²⁹. He cautions that this shift is just a substitution of one form of subjugation with another. The neo-liberal policy evolution happening over the last few decades itself cannot be transformed overnight; both crony capitalism and the judiciary’s reluctance to interfere with policy

²⁴ S. Venkatanarayanan, *Economic Liberalization in 1991 and Its Impact on Elementary Education in India*, 5(2) Sage Open (2015).

²⁵ CHARAN D. WADHWA, BUSINESS ENVIRONMENT: INDIAN AND GLOBAL PERSPECTIVE 274 (Faisal Ahmed & M. Absar Alamm eds., PHI Learning 2017).

²⁶ Sarah Joseph, *Neoliberal Reforms and Democracy in India*, 42 (31) EPW 3213 (2007).

²⁷ Frank Daniel & Rajesh Singh, *Advisers to India's Modi dream of a Thatcherite revolution*, REUTERS (Apr. 4, 2014), <https://www.reuters.com/article/us-india-election-modi-insight/advisers-to-indias-modi-dream-of-a-thatcherite-revolution-idUSBREA3500S20140406>.

²⁸ G. S. LOKHANDE, BHIMRAO RAMJI AMBEDKAR: A STUDY IN SOCIAL DEMOCRACY 43 (Intellectual Publishing House, 1977).

²⁹ Hila Shamir, *The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State*, 15 (1) Theor. Inq. Law 14 (2014).

matters would stall it. The judiciary has historically displayed this aversion³⁰ despite the fact that this could lead to the “constitutional goal of socialism [being] discarded and replaced with the economic policy of liberalization”³¹.

This criticism of the public-private divide can be imported into the context of Article 12, which by endorsing it, neglects to acknowledge situations where the involvement of the State should be irrelevant to trigger the protection of fundamental rights. Even purely private acts of corporations have a deep and pervasive power to quash basic liberties. Classical liberalism acknowledges the importance of basic individual liberties over those of economic liberties³², but when amalgamated with capitalism, the private enterprise assumes state-like power in asserting the importance of private ownership over that of individual liberty³³. The effect of limiting article 12’s application to State actors is the elevation of the economic liberties of few over the individual liberties of many. This conflicts directly with the socialist premise of a restructured society.

This is further buttressed by the fact that exploiting fundamental rights could actually be profitable for private entities. Advertisement agencies, social media companies and search engines are the biggest profiteers of exploiting privacy³⁴. Freedom of speech can also be compromised for a profit motive³⁵. This exemption of fundamental rights accountability as endorsed by Article 12 is then at direct loggerheads with the conception of socialism theorized in cases like *D.S Nakara* and *People's Union for Democratic Rights*.

While there are non-constitutional protections enforceable against non-State actors, in the next part we prove why these protections are inadequate and necessitate the enforcement of fundamental rights as a safety net.

IV. FUNDAMENTAL RIGHTS AS A SAFETY NET

³⁰ BALCO Employees Union v. Union of India, A.I.R. 2002 S.C. 350.

³¹ Pratap Kumar & Aditya Swarup, *Socialism and the New Economic Order: Constitutional Perspectives*, 3 NALSAR Stud. L. Rev. 9 (2007).

³² Samuel Freeman, *Capitalism in The Classical and High Liberal Traditions*, 28(2) CUP 21 (2011).

³³ *ibid* 41.

³⁴ L. H. Newman, *Twitter Puts Profit Ahead of User Privacy-Just Like Facebook Did Before*, WIRED (Oct. 9, 2019), <https://www.wired.com/story/twitter-two-factor-advertising>; D. Meyer, *Google and Ad Industry Accused of ‘Massive’ Abuse of Intimate Data*, FORTUNE (Jan. 29, 2019), <https://fortune.com/2019/01/28/google-iab-sensitive-profiles>.

³⁵ L. VICKERS, FREEDOM OF SPEECH AND EMPLOYMENT 58 (OUP 2002).

1. When legislation proves an inadequate protection against Non-State actors

Rights protected against non-state actors through subject-wise laws are either non-existent, incomplete, inefficient or biased due to crony capitalism, when it comes to protecting the rights of the individuals. The examples for this are enumerated below.

a. Right to Privacy

The Personal Data Protection bill, that covers private actors, has not yet been passed, which gives way to companies like Facebook to actively breach privacy rights of individuals in India.³⁶ Unlike their foreign counterparts, Indian citizens remain helpless against such a breach as the right to privacy in the country applies only to state actors³⁷. The non-existence of a privacy law also enabled Blackberry in 2013 to allow the government to intercept data sent over its devices.³⁸ The WhatsApp case that allowed the Facebook family to access data sent over WhatsApp is yet another example from an endless list of cases where non-state actors have violated the right to privacy.³⁹

b. Right to Freedom of Speech

Reddit, “the front page of the internet” that is supposed to be a platform to freely express, breaches the human right of free speech by appointing moderators that recklessly remove posts not in line with their personal beliefs. These moderators at times promulgate propaganda by acts such as removing all pro-India posts and promoting pro-Pakistan ones. It is no surprise that Chinese censorship major, Tencent, invested in the company.⁴⁰

c. Transgender Persons (Protection of Rights) Act 2019

³⁶ J. Isaak & M. J. Hanna, *User Data Privacy: Facebook, Cambridge Analytica, and Privacy Protection*, 51(8) IEEE Computer (2018).

³⁷ Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1.

³⁸ Kadhim Shubber, *Blackberry Gives Indian Government Ability to Intercept Messages*, WIRED (Jul. 11, 2013), <https://www.wired.co.uk/article/blackberry-india>.

³⁹ Karmanya Singh Sareen v. UOI, (2016) 233 D.L.T. 436.

⁴⁰ Richa, *Terror Targeted Through Social Media?*, OP INDIA (Feb. 22, 2019), <https://www.opindia.com/2019/02/reddit-india-propaganda-censorship/>.

Indian Constitutional Law Review

Although this Act protects transgender persons from discrimination by private entities like employers, they fail to cover the entire transgender community. This occurs as a result of the Act violating the ‘self-identification of gender principle’ laid down in the NALSA judgement⁴¹. Moreover, after surgery application is to be made to the District Magistrate to classify as a transgender by filling necessary documents with a signature of the Chief Medical Officer of the medical institute where the surgery was performed. Such a requirement gives the district magistrate an unchecked power of discretion and leaves out many individuals that identify as a transgender. For these individuals, there would be no relief available under the Transgender Act or under any other law in place, if they are discriminated against by an employer.

d. Industrial Law in India

Even though discrimination in giving jobs is prohibited for certain classes of people, many remain unprotected when it comes to private employment. For instance, Zeeshan Khan was denied a job at Hari Krishna Exports Pvt. Ltd. because of his religion as evidenced by their response to his application over mail. In such a scenario, the industrial law in place does not give any relief to Zeeshan against the discrimination by the company.⁴²

The legislators’ action of passing the Code of Wages 2019 and Occupational Health Safety and Working Conditions Code, 2019 (OHSW), was a clear hint of their crony-capitalist mindset. These codes did away with labour inspections that deter violations by creating a designation of public servants known as ‘inspectors-cum-facilitators’. These personnel can even forgive the violation of the employer in accordance with Section 54(3) of the Code of Wages. Strict penalties that previously applied to employers, like attachment of property have been done away with by these codes. Moreover, the principal employers have been absolved of liability to pay the contract labour as per 55(1) of OHSW. Therefore, these labour laws, in lieu of protecting the labour against violations of their rights, unambiguously prioritize the ‘ease of doing business’ of the employer⁴³.

⁴¹ National legal Services Authority v. Union of India, A.I.R. 2014 S.C. 1863.

⁴² Abhishek Sudhir, *Religious Apartheid*, SCROLL (Jun. 4, 2015) <https://scroll.in/article/731392/religious-apartheid-india-has-no-law-to-stop-private-sector-from-discriminating-on-grounds-of-faith>.

⁴³ Gautam Mody, *India’s Labour Laws are Being Amended for Companies, not Workers*, THE WIRE (Jul. 24, 2019), <https://thewire.in/labour/indias-labour-laws-are-being-amended-for-companies-not-workers>.

A possible opposition to the above would be that casting a doubt on existing legislation is against the presumption of constitutionality and legitimacy normally exercised in favor of these legislations. In the next sub-part, we forward two theories to argue that this presumption must be set aside.

- a) Inspector cum facilitator sec 54(3) non-obstante clause
- b) Contractors

2. Transformative constitutionalism and critique of neoliberalism

a. Transformational Constitutionalism

The discussion on transitional justice entails the evaluation of legal responses based on their chances of living up to democratic ideals⁴⁴. One of the essential elements of a democracy according to Larry Diamond, an eminent political sociologist, is the protection of human rights of all citizens⁴⁵. This, combined with the element of transition in the society, bolsters a transformation of the fundamental rights' application as inscribed in the constitution.

Transformative constitutionalism operates on two levels. The first level involves accepting the constitution as an evolving text and thereafter bringing a change to it which the society requires in the present environment. This change takes place by either an alteration in the letter of the text or a renewed interpretation by the courts which harmonizes the text with its spirit. On the second level, the aforementioned change has implications in the society such that the society is transformed into a more egalitarian and democratic one.⁴⁶ Keeping up with the same essence and goal, horizontal application of the fundamental rights must be enforced. The essence would be to make the spirit of holding responsible the powerful violator of fundamental rights consonant with the text of Article 12. As discussed above, because the state in a capitalist milieu has been divested of the power that existed and was conceptualized under a socialist society-the same power having transferred to the companies running free, with the least amount of state intervention-the

⁴⁴ Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106(7) Yale L. J. (1997).

⁴⁵ Larry Diamond & Leonardo Morlino, *The Quality of Democracy: An Overview*, 15(4) J. Democracy (2004).

⁴⁶ Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14(1) S. Afr. J on Hum. Rts. (1998).

responsibility must also shift to the one in control today. With this enforceable liability of the enterprises, the goal of a more equal and democratic society will be realized as equality and protection of human rights, respectively, extends to the private sphere of enterprises. Upendra Baxi beautifully conceptualized the idea of transformational constitutionalism as a path to heal the wounds of the past⁴⁷. The wounds here would be the violations by capitalists in their liability-free reign aimed towards less-powerful stakeholders of their enterprise. Moreover, as Ruti Teitel in her essay puts it, “wherever transitional justice has not been delivered, there is often a concomitant move away from the state and its political monopoly to claim for representation”⁴⁸ by the non-state actors to whom the power has been relocated.

Now, if presumption of constitutionality is strictly followed, it will weaken the transformative character of the grundnorm and will subsequently leave no scope for syncing with the dynamic milieu under the impression that nothing is wrong with the current legislations.

b. Critique of Neoliberalism

The link between neoliberalism and the supposition of constitutional legitimacy, is to facilitate government policy favoring private corporations to the detriment of the poor or rural masses⁴⁹. The most obvious example in the Indian context is the agrarian crisis caused by trade liberalization - leading to depeasantization of laborers. The use of land for special economic zones was prioritized over its use for agricultural purposes, to boost industrialization and by extension, amassing of wealth in the hands of industrialists.⁵⁰ In this sense, the supposition of legitimacy of government policy and law very clearly forwards the neoliberal agenda:

⁴⁷ Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65(3) AJCL (2017).

⁴⁸ RUTI TEITEL, TRANSITIONAL JUSTICE AND TRANSFORMATION OF CONSTITUTIONALISM 62 (Tom Ginsburg & Rosalind Dixon eds., Edward Elgar Publishing, 2011).

⁴⁹ David Singh Grewal & Jedediah Purdy, *Law and Neoliberalism*, 77(4) LCP 16 (2015).

⁵⁰ Ponnada Rao & Hari Behera, *Agrarian Questions under Neoliberal Economic Policies in India: A Review and Analysis of Dispossession and Depeasantization*, 7(1) OA (2019).

Indian Constitutional Law Review

Our use of neoliberalism especially illuminates ideological stakes in areas of law that are not often treated together these days, notably at the intersection of constitutional law and the private economy.⁵¹

To continue such a presumption, then, would only exacerbate the class divide in society today thereby defeating the socialist philosophy in the Constitution.

V. CONTENTIONS BY THE VERTICALISTS

There are three most prominent arguments that the verticalists make against horizontal application of rights. The first one is that if rights are applied to private entities, it will lead to the intrusion of the coercive state into the acts of the private parties. This argument has its basis in classical liberalism as they assert that it would lead to rolling forward the “frontiers of State” and rolling back, the “frontiers of civil society”.⁵² Second, enforcing the rights against private parties would open up already settled areas of private law.⁵³ The intersection of human rights with private legal relationships will have to be figured out and hence there will be a proliferation of uncertainty. It will also result in an unbearable number of cases in front of the courts, thus increasing its already existing weight. Third, through the concept of indirect horizontality, a breach of fundamental rights can still be corrected in the private sphere and therefore an explicit enforceable application, with all its demerits, is not required.⁵⁴ The principle suggests that even though there is no private application of the basic rights in private law, they constitute an objective value system, they have a “radiating effect” in private law. The courts in many countries like Canada and South Africa have accepted this principle and it is an important part of German jurisprudence.⁵⁵

The first argument does hold some credibility. However, Justice Kriegler of South Africa mentioned that the idea of capitalists thriving on the exploitation of the under-privileged is even more malicious than the idea of state intervention.⁵⁶ Also, our suggestion does not involve the

⁵¹ *ibid.*

⁵² Howard Davis, *Public Authorities as “Victims” under the Human Rights Act*, 64(2) Cambridge Law Journal (2005).

⁵³ *Retail Wholesale & Department Store Union Local v. Dolphin Delivery Ltd.*, [1985] 33 DLR 174.

⁵⁴ Peter Quint, *Free Speech and Private Law in German Constitutional Theory*, 48(2) Maryland L. Rev. (1989).

⁵⁵ Ashish Chugh, *Fundamental Rights Vertical or Horizontal*, 7(9) S.C.C. (J) (2015).

⁵⁶ *Du Plessis v. De Klerk*, 1996 (3) S.A. 850 (CC).

Indian Constitutional Law Review

interference of the state to the Orwellian extent. It does not involve the state sneaking into the houses of people and monitoring every step of citizens, but just a check on fair practices in the marketplace. While the second argument brings forth the reality of overburdened courts, and its definite amplification with the horizontal application, it does not have any standing against the goal of delivering justice. Hindrances in delivering justice, cannot lead to a denial of justice. Lastly, the issue with the third contention is that an indirect horizontal application, however persuasive, is not binding and hence it leaves the victim exposed to the discretion and interpretive inclinations of the court.⁵⁷

VI. CONCLUSION

This paper concludes that - the catalyzation effect of globalization on the shift of power from the State to the private enterprise, without a parallel extension of constitutional obligations, renders existing protections for citizens either defunct or deficient. To provide unassailable protection to citizens, and prevent their exploitation, article 12 must have direct horizontal application. Socialism has been placed on the back-burner as far as government policy is concerned. Until there is a fundamental ideological change in policy-making, the best protection that can be given to retain the socialist ideal in the meanwhile, would be to make private enterprises answerable to fundamental rights violations. If the constitution does not adapt to changing needs, the society envisioned by its drafters will remain but a distant dream. Markets must not be allowed to dictate the constitutional values because, above all other reasons mentioned in the paper, ‘the grundnorm is the norm on which all the norms are based and beyond which no norm is presupposed’ as is put by the legal philosopher Hans Kelsen.⁵⁸

⁵⁷ Gavin Phillipson, *Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the HRA*, 66 MLR 726, 730 (2003).

⁵⁸ WILLIAM E. CONKLIN, *THE INVISIBLE ORIGIN OF LEGAL LANGUAGE: THE GRUNDNORM* (Springer Netherlands, 2001).

THE WHAT IS AND WHAT OUGHT TO BE OF DELHI POLICE

Pratik Sahai[†]

Abstract

The police being the most apparent representative of the state's power must be continually checked, elicit faith from the people and not face a legitimacy crisis from the community's perspective for smoother governance. Federal capitals often enjoy a lower degree of autonomy when compared to other states due to conflict of interests bound to arise between the Centre and state by virtue of being the seat of the central government and also an autonomous territory in its own right for the local population. Achieving a balance between the two is a delicate task and both writers on asymmetrical federalism and political theorists continue to struggle with this question. Security is one such entry where the Union's interest, in the garb of national interest, gets attracted easily making the policing of the capital a complex issue. This gets exacerbated when the capital being discussed is one with demographics and crime rate like that of Delhi. The governance of 'Delhi' Police is not in the hands of the Delhi government but entirely with the Union Home Ministry by virtue of Article 239AA of the Constitution. The paper seeks to argue how this is at variance from basic principles of federal and democratic government. It puts forth that control over the police force is imperative for effective governance and to meet the needs of the citizenry while evaluating possible grounds to challenge the current regime. Further, it posits that the monopoly of the Union over Delhi Police is justified largely on administrative grounds and not on any strong normative or doctrinal reasoning. Taking into account these administrative grounds and security reasons, a shared control mechanism over the force is also proposed. Lastly the handling of this issue in various federal capitals is studied; Firstly, to bring to light international best practices and how other federal countries attempt to strike a balance between the two competing interests and secondly, to highlight how excessive reliance on any one

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country to justify the current position is misplaced due to inevitable historical, factual and constitutional differences.

I. INTRODUCTION

The police force is an extremely powerful and important machinery and its governance must be continually evaluated as it is the arm of the state directly interacting with the citizenry,¹ increasing the scope of exploitation and possibilities of abuse if unchecked for long. The exercise becomes particularly complex when the force being evaluated is that of a national capital due to conflict of interests bound to arise between the two governments at play in a federal setup. What must be seen is how the force is distributed between tasks being carried out in the interest of the Nation and regular police and security work for the local population. Further, the issue is of great relevance today especially when talked about Delhi with questions being raised on the quelling of Anti-CAA protests, allegations of violation of use of force norms, complicity in the Delhi riots and what not.

The Delhi Government constitutionally lacks the power to legislate on Entries 1 and 2 i.e. Public Order and Police, of the State List² and hence the Delhi Police is entirely controlled by the Union Home Ministry (MHA). Apart from demands for statehood across party lines at different times suited to their political gains,³ the demand to specifically get the police force within the state government has also garnered steam. The problem gets exacerbated when different parties form governments at the Centre and state explaining how a tussle on this issue has been brought up much more post 2013. The state government has made repeated requests to bring in the requisite constitutional amendment to get control over the police even if to a limited extent as eventually the citizenry demands accountability from them and not the MHA⁴ which is exactly the concern Tarachand Khandelwal, a Member of Parliament from Delhi, had raised⁵ during the enactment of

¹ Mathew Jones, *Democratic Governance and the Role of the Police*, Vol. 68 Issue 3, PUBLIC ADMINISTRATION REVIEW, 581, at 581 (2008).

² INDIA CONST, art. 239AA, cl. 3a.

³ Niranjana Sahoo, *Statehood for Delhi: Chasing a Chimera*, Observer Research Foundation Occasional Paper 156, at 2, (2018).

⁴ Economic Times, *Bring Delhi Police under Delhi Government, Arvind Kejriwal urges Home Ministry*, ECONOMIC TIMES, 17th January 2014 at https://economictimes.indiatimes.com/news/politics-and-nation/bring-delhi-police-under-delhi-govt-arvind-kejriwal-urges-home-ministry/articleshow/28964575.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

⁵ Gopal Subramaniam, *Legal Opinion on Government of National Capital Territory of Delhi*, at 100, 19th May 2015.

the GNCTD Act.⁶ None of these concerns have been adequately addressed or deliberated in parliament and are almost always nipped in the bud.⁷ A constant back and forth has continued on this issue and as expected it has become highly politicized. Recently the state government, doing the limited it could, passed a resolution in its assembly asking the MHA to at least devolve some police control in the larger public interest for implementation of laws and effective governance in Delhi, till a constitutional amendment is discussed.⁸

Thus, the issue is in limbo in this fashion. This paper hence seeks to trace the constitutional history of Delhi without which understanding any arguments in favor of or against the state government's control over the police force would be nugatory. Further it evaluates the grounds the state government may have to propose a constitutional amendment and discusses the need for, and proposes a shared control mechanism over the force. Lastly, for an enhanced understanding this paper goes into how other federal countries have dealt with the issue as the considerations largely remain the same.

II. DELHI'S CONSTITUTIONAL JOURNEY

Delhi has undergone tumultuous changes in terms of its constitutional status and has been governed by various statutes only to be substituted by new ones, but at no point did the Delhi Government have requisite control over the police force for effective governance within the state. So, it becomes imperative to contextualize these changes to fully understand the arguments supporting and opposing the state government's demands.

Delhi did not always enjoy the capital status and until 1901 Delhi was simply an administrative unit of the Punjab province. Post the 3rd Delhi Durbar, in 1911, it was declared as the capital by the British in a very secretive and swift decision and Calcutta stood replaced.⁹ The

⁶ The Government of National Capital Territory of Delhi Act, 1991, No.1, Acts of Parliament, 1992.

⁷ Aman Sharma, *Home Ministry refuses to give control of Delhi Police to State government*, ECONOMIC TIMES, 10TH February 2014 at https://economictimes.indiatimes.com/news/politics-and-nation/home-ministry-refuses-to-give-control-of-delhi-police-to-state-govt/articleshow/30131586.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

⁸ Satyender Jain, Delhi Legislative Assembly resolution, 7th Session (Part IV), 26th November, 2018 at <http://delhiassembly.nic.in/Resolutions/GovtResln.htm>

⁹ S.K. SHARMA, STATEHOOD FOR DELHI?, Prabhat Prakashan, at 2 (2019).

Indian Constitutional Law Review

Delhi Laws Act of 1912 concretized its classification as a province to be ruled by a Chief Commissioner¹⁰ and this system continued until independence.¹¹ Thus, since Delhi's designation as the capital, the Central Government always wanted Delhi under its direct control and was hesitant to devolve powers to the provincial government. The issue of Delhi's population lacking an effective representative government was answered by the Pattabhi Sitaramayya Committee formed in 1947 to chalk out a plan for governance of Delhi post-independence. It essentially proposed a mechanism akin to the one currently in force, with a legislative assembly and a Lieutenant Governor. The rationale of the committee was that since the smallest of villages being part of a province, enjoy self-government then the metropolis of Delhi should in no way be deprived of the same.¹² But what irked India's Trinity of Ambedkar, Nehru and Patel was the extensive legislative power of the state assembly over all items in the state list, including police, which meant coextensive executive powers on those entries as well. This became such an issue that an emergency meeting of the drafting committee was called on 25th July 1949 at Sardar Patel's residence.¹³ Eventually the constituent assembly was divided with most of the members on one side and the likes of Mahavir Tyagi, R.K. Sidhwa and Deshbandhu Gupta on the other. The latter opposed the decision to not incorporate the committee's recommendations¹⁴ and wanted Delhi to be administered like any other state and were in fact the ones who pushed for the formation of this committee.¹⁵ The move to not incorporate the recommendations was defended by drawing analogies to other capitals like Canberra and Washington D.C. Such reasoning was flawed, as pointed out by Gupta, for various reasons like Delhi having an independent existence as it was not made specifically to serve the purpose of a capital and it also had a significantly higher population than any of the other capitals being relied upon.¹⁶ Ultimately the Government of Part C States Act was passed which created a legislative assembly with limited powers for Delhi as seven essential subjects including Public order and Police were statutorily beyond the assembly's powers.¹⁷ Thus

¹⁰ The Delhi Laws Act, 1912, No. 13, Acts of Parliament, 1912.

¹¹ The Government of India Act, 1935, 26 Geo. 5 Ch2 (India).

¹² Sahoo *Supra* N. 3 at 5.

¹³ SHARMA *Supra* N.9 at 4.

¹⁴ *Id.*

¹⁵ Constituent Assembly Debates, *speech by* Deshbandhu Gupta, 4.34.196, vol. 4, (July 30, 1947), available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/4/1947-07-30

¹⁶ Constituent Assembly Debates, *speech by* Deshbandhu Gupta, 7.51.95, vol. 7, (November 8, 1948), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-08?paragraph_number=92%2C97%2C99%2C93%2C98%2C95%2C96%2C94#7.51.95.

¹⁷ The Government of Part C States Act, 1951, No. 49, §21, Acts of Parliament, 1951 (India).

Indian Constitutional Law Review

since its formation, police control was expressly prohibited for the Delhi assembly. Unsurprisingly this diarchal model failed due to conflicts between the two powerheads leading to the resignation of the first Chief Minister, Shri Brahm Prakash¹⁸ and in this backdrop the State Reorganisation Commission recommended abolition of the legislative assembly citing deterioration in administrative standards as a primary reason.¹⁹ The States Reorganisation Act of 1956 abolished the existing system of classification of states and made a binary classification of States and Union Territories.²⁰ Delhi was classified as the latter and had its assembly abolished and various municipal bodies governed Delhi for local matters through different statutes.²¹ To this many lawmakers remarked that Delhi was being treated differently, presumably keeping the Central Government's interest in mind, as in fact most Part C states did not meet this fate.²² Finally, the Justice Sarkaria Committee was set up in 1987 (popularly known as the Justice Balakrishnan Committee after the resignation of Justice Sarkaria) to reevaluate the administration of Delhi and propose requisite changes. The report submitted in 1989 had a central theme that there existed a conflict of interest between developing the capital according to the demands of the local population or for the nation as a whole. On one end of the spectrum the local population wanted to govern themselves and have their representatives in an assembly while the Centre wanted control to discharge various national and international obligations.²³ The committee considered 5 options, one of which was granting full statehood but eventually went with a special constitutional status i.e. Delhi continuing to be a union territory but with a legislative assembly having a restricted mandate.²⁴ They did not want to impede national interest in any way or make the central government devoid of powers on essential items like police which would be the case if complete statehood had been granted. Consequently the 74th Amendment bill was passed giving birth to

¹⁸ Prabhaskar K Dutta, *Beyond Delhi Chief Secy Assault Row: Why Every Chief Minister has fought with L-G*, INDIA TODAY, (27th February 2018), <https://www.indiatoday.in/india/story/beyond-delhi-chief-secy-assault-row-why-every-chief-minister-has-fought-with-l-g-1178417-2018-02-27>; Sahoo *Supra* N.3 at 7.

¹⁹ Ministry of Home Affairs, *Report of the State Reorganisation Commission*, 1955 at 157, https://www.mha.gov.in/sites/default/files/State%20Reorganisation%20Commission%20Report%20of%201955_270614.pdf

²⁰ The States Reorganisation Act, 1956, No. 37, Acts of Parliament, 1956 (India).

²¹ Delhi Municipal Corporation Act, 1957, No. 66, Acts of Parliament, 1957; Government of Union Territories Act, 1963, No. 20, Acts of Parliament, 1963; Delhi Administration Act, 1966, No. 19, Acts of Parliament, 1966.

²² Dr. Yogesh Pratap Singh & Dr. Afroz Alam, *Constitutional Dilemma of Delhi*, Livelaw, (25th October 2016) <https://www.livelaw.in/constitutional-dilemma-delhi/>

²³ Government of N.C.T of Delhi v Union of India and Ors., (2018) 8 S.C.C. 501.

²⁴ *Id.*

Indian Constitutional Law Review

Articles 239AA and 239AB.²⁵ Further the GNCTD Act²⁶ was also enacted, which was vehemently opposed by the likes of Madan Lal Khurana who critiqued the Act *inter alia* on the exclusion of the police from the state's control as even then law and order was a huge issue for Delhi and no Chief Minister would have been able to address it without any control over the police.²⁷ The passing of the Act and the amendment gave rise to the current model of governance of Delhi, wherein the state government does not have any control over the police force. In the coming years, of the many proposals discussed in Parliament, even those granting statehood to Delhi did not envisage giving police control to the state in any form.²⁸

III. ANALYSIS

Delhi Police, one of the largest metropolitan police forces in the world, is also one of the strongest forces across India in terms of the percentage of actual strength to its sanctioned strength.²⁹ In terms of absolute strength it is behind only to significantly larger states like Maharashtra, Uttar Pradesh, etc.³⁰ It also receives one of the highest budgets which has been consistently increasing.³¹ The praise to its strength and budget aside, the reality remains that the increment in budget, no matter how great, is hardly ever utilized in needed sectors like staff quarters, safety cells and so on and only heads like technological advancements see an increase in funds.³² While, the use of its numbers shows a misguided sense of priority with a huge chunk of the force being employed to cater to VIP Security creating a deficit for local police work.³³ It must

²⁵ The Constitution (Sixty-Ninth Amendment) Act, 1991 (India).

²⁶ *Supra* N.6.

²⁷ Subramaniam *Supra* N.5 at 93.

²⁸ Department-Related Parliamentary Standing Committee on Home Affairs, *106th Report on The Constitution (One Hundred and Second Amendment) Bill, 2003 and State of Delhi Bill 2003*, Rajya Sabha Secretariat, 5th December 2003.

²⁹ Common Cause and Lokniti – CSDS, *Status of Policing in India Report 2019: Police Adequacy and Working Conditions*, at 19, August 2019.

³⁰ Bureau of Police Research and Development, Ministry of Home Affairs, *Report on Data on Police Organisations in India (As on January 01, 2019)*, at 64 (2019).

³¹ *Id.* at 131-132.

³² Hindustan Times, *Delhi Police budget sees jump of Rs 465cr*, H.T., (5th Jul., 2019), <https://www.hindustantimes.com/india-news/delhi-police-budget-sees-jump-of-rs-465cr/story-W75cYfmFdITcgRIK14gOrO.html>

³³ Dwaipayan Ghosh, *VIP Security comes before policing*, Times of India, (21st December 2012) at <https://timesofindia.indiatimes.com/city/delhi/VIP-security-comes-before-policing/articleshow/17701813.cms>; Vinay Lal, *The Security Fantasies of the Indian Nation-state: Black cat commandos, gunmen and other terrors*, Vol. 20 Issue 2, SOUTH ASIA: JOURNAL FOR SOUTH ASIAN STUDIES, 103, at 130-131 (2007).

be kept in mind that VIP duty can also predominantly be taken care of by other agencies working in the capital³⁴ like the SPG, reducing the number of Delhi Police personnel on that job.

1. The Idea of Good Governance in a Federal Democracy

Lord Denning, while elaborating on the police's power to make arrests, had put forth: -

*“In safeguarding our freedoms, the police play a vital role. Society for its defence needs a well- led, well-trained and well-disciplined force of police whom it can trust”*³⁵

While with the events unfolding in the past year, the legitimacy of Delhi Police has never been questioned more strongly, raising the question of why the force's control lies with the MHA and what are the possibilities to bring changes to this model. Many have argued that such a legitimacy issue can be effectively dealt with by implementing 'democratic policing', which includes transparency, accountability, rule of law and most importantly subordination to civil authority.³⁶ Similarly, Skogan, while evaluating Chicago Police's legitimacy crisis had put forth that any force to be democratic must be decentralized and ought to engage with the local community.³⁷

Delhi is at a *sui generis* constitutional status i.e. a class in itself in comparison to other Union Territories due to its constitutionally created cabinet style of government.³⁸ With it come basic principles like democracy, representative governance, federalism and accountability which the 2018 Constitution Bench³⁹ interpreting Article 239AA relied upon and the 2019 Division Bench⁴⁰ deciding particular issues of conflict between the L-G and state government reiterated.

³⁴ Subramaniam *Supra* N.5 at 70.

³⁵ ALFRED DENNING, THE DUE PROCESS OF LAW, at 102, Oxford Scholarship Online, (March 2012).

³⁶ NATHAN PINO AND MICHAEL WIATROWSKI, DEMOCRATIC POLICING IN TRANSITIONAL AND DEVELOPING COUNTRIES, Ashgate- Interdisciplinary Research Series in Ethnic, Gender and Class Relations (2006).

³⁷ WESLEY G. SKOGAN, POLICE AND COMMUNITY IN CHICAGO: A TALE OF THREE CITIES, Oxford Scholarship Online, (May 2012).

³⁸ *New Delhi Municipal Corporation v. State of Punjab*, (1997) 7 S.C.C. 339.

³⁹ *Supra* N. 23.

⁴⁰ *Govt.(NCT Of Delhi) v. Union of India*, (2019) SCC OnLine SC 193.

Indian Constitutional Law Review

These principles have time and again been reinforced emphatically. Be it representative governance⁴¹ postulating that the elected representatives speak for the collective as a whole to address their grievances and that it must be a government by the people,⁴² or simply raising democracy, which encompasses that citizens do legitimately expect their governments to prioritize public interest over any other consideration,⁴³ to an unassailable feature of the Constitution.⁴⁴ Together these ideas bring about ‘good governance’ which mandates, in addition to the above, institutional integrity, deference to unwritten constitutional values and a sense of accountability at large.⁴⁵ As pointed above the citizens demand accountability from the local government,⁴⁶ be it to check the abuse of power by the police or to ensure maintenance of law and order. This lack of accountability of the force to the elected representatives of the people of Delhi and thereby even to the people itself, is a drawback which was also highlighted in the Balakrishnan Committee report.⁴⁷ Hence undoubtedly, control over the force is imperative for effective and good governance⁴⁸ which is also a fundamental right of the citizens under Article 21 of the Constitution.⁴⁹ Furthermore, our Constitution has been termed to be of federal character and the principle of federalism has been held to be a part of our basic structure.⁵⁰ Thus even if the Centre is granted more powers under the Constitution, it does not mean the states act as mere appendages and the local population’s interests get trumped by the Union’s as the principle of federalism has not been watered down.⁵¹

We must keep these seemingly abstract ideas in mind and contemplate how the legitimate expectations of people like being provided security by, as well as, from the police are to be met whenever the question of control over the force arises. These judicially recognized constitutional ideas force us to ask ourselves, ultimately which government gets voted in by the local population and would strive to meet its demands unlike an already heavily burdened MHA. This argument

⁴¹ Kuldip Nayyar v. Union of India Ors., (2006) 7 S.C.C. 1.

⁴² S.R. Chaudhary v State of Punjab, (2007) 7 S.C.C. 126.

⁴³ Manoj Narula v Union of India, (2014) 9 S.C.C. 1.

⁴⁴ Indira Nehru Gandhi v. Raj Narain (1975) Supp S.C.C. 1.

⁴⁵ *Supra* N. 43.

⁴⁶ *Supra* N. 4; *Supra* N. 5.

⁴⁷ Balakrishnan Committee Report, *Reorganisation of Delhi Set-up*, ChIV Part I, 1989.

⁴⁸ Subramaniam *Supra* N.5 at 215.

⁴⁹ Goberdhan Lal v State of U.P, (2000) S.C.C. OnLine All 308, 2000 40 ALR 290.

⁵⁰ S.R. Bommai and Ors. v Union of India and Ors, (1994) 3 S.C.C. 1.

⁵¹ *Id.*

Indian Constitutional Law Review

gets further strengthened when we see how eminent jurists have argued that it is incorrect to assume that administrative law principles cannot apply to standards of judicial review for constitutional questions.⁵² If that is so, we must not have any hesitation to question the status quo on thresholds like legitimate expectations doctrine or even better, against constitutionally recognized principles like that of democracy, accountability, good governance, federalism and so on as highlighted above. These principles thus bring considerable weight against the current regime and warrant a constitutional amendment to bring the police force within the state government's control.

In other words, while the 69th Amendment through Article 239AA does exclude police from state control but we must not forget that exercise of constituent power is at a higher pedestal and confers democratic, political and societal powers on the local population residing in the national capital⁵³ and ultimately their demands should be met by the government exercising power over them. Ensuring the security and protection of the citizenry and the upkeep of law and order is the primary responsibility of any government⁵⁴ but this is impeded when the said government constitutionally lacks the authority to do so. The objects clause of the 69th Amendment relies on the Balakrishnan Committee report and states the need to have a legislative assembly “*with appropriate powers to deal with matters of concern to the common man.*”⁵⁵ With the increasing crime rate and law and order issues⁵⁶ policing cannot be said to fall beyond any envisaged “matter of concern to the common man” and the 69th Amendment is essentially going against its objective by not providing this power to the assembly. Further, it has been observed by the Supreme Court that construction of constitutional provisions conflicting with their purpose or negating their object must be eschewed if they oppose the true meaning and spirit of the constitution.⁵⁷

⁵² Soli Sorabjee, *Decision of the Supreme Court in S.R. Bommai v. Union of India: A Critique*, 1994 3 S.C.C. (Jour) 1.

⁵³ *Supra* N. 23.

⁵⁴ Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth amendment*, Vol. 41 Issue 3, DUKE LAW JOURNAL, 507, at 510, 536 (1991); Anne Marie Slaughter, *3 Responsibilities every Government has towards its Citizens*, WORLD ECONOMIC FORUM, 13th February 2017 at <https://www.weforum.org/agenda/2017/02/government-responsibility-to-citizens-anne-marie-slaughter/>

⁵⁵ *Supra* N. 25.

⁵⁶ Ministry of Home Affairs, National Crime Records Bureau, *Crime in India 2018: Statistics*, Volume I, Table 1A.3 at 11, December 2019.

⁵⁷ Supreme Court Advocates-on-Record Association and Anr. v. Union of India, (1993) 4 S.C.C. 441.

Indian Constitutional Law Review

To conclude, this gap between citizens and the police force, which directly interacts with them but is answerable to another authority and not the one voted to power by the same citizens, goes against the constitutional ideas explained above including the fundamental right to good governance and also the objective with which the 69th Amendment was enacted.

2. The Consistent Stand to Maintain Status Quo

The Balakrishnan Committee was of the opinion that the factors which influenced the Parliament to exclude crucial subjects like public order and police from the state assembly in 1951 still existed.⁵⁸ The same factors influenced most of the drafting committee members who felt that the Centre needed control over the police force and could not just be a tenant of a state government,⁵⁹ something very similar to how the U.S. government justifies control over Washington D.C.⁶⁰ Some of these factors are:- Law and order of the capital being the concern of the nation as a whole, the increased risk of terrorist attacks, possible attempts to overthrow the Central Government, higher likelihood of unrest and agitation movements, the protection needed for various institutions within the capital and visiting dignitaries.⁶¹ But the Balakrishnan committee also opined that various other specialized forces working in the capital were capable of handling these situations but would need to continually coordinate with the Delhi Police and if these two forces were controlled by separate governments it would lead to inevitable conflicts and consequent security lapses.⁶² We must see this point, a concern of bureaucratic or administrative convenience, in the light of the reality that interdepartmental and inter-agency conflicts existed at the time even when the separate agencies were controlled by the MHA⁶³ and still remain, be it due to a lapse in coordination, issues of jurisdiction or other technicalities. Further, none of these factors warrant the total ousting of the state government from the force.

⁵⁸ Subramaniam *Supra* N. 5 at 68.

⁵⁹ Sahoo *Supra* N. 3 at 17.

⁶⁰ James Madison, Federalist Papers No.43: *The Powers conferred by the Constitution further considered*, (January 1788).

⁶¹ Subramaniam *Supra* N. 5 at 69.

⁶² Subramaniam *Supra* N. 5 at 71.

⁶³ Lal *Supra* N. 33 at 124.

In sum a common thread of ‘national interest’, or in the words of J. Chandrachud ‘national imperative’, runs through all these factors⁶⁴ and has taken precedence over interests of the local population. Though the 2018 Supreme Court decision⁶⁵ was a progressive one it did revolve too much around similar conceptions of ‘national interest’ to justify what are the exceptional circumstances warranting the interference of the Lieutenant Governor. The same needs a boundary as currently it is vague and unclear as to what these exceptional circumstances will encompass,⁶⁶ creating a possibility of misuse on its own basis. While J. Chandrachud’s opinion helps to some extent,⁶⁷ but it also requires further explanation. Thus, before accepting status quo we must keep in mind that this national interest principle is an abyss, as it can be seen as narrowly or in as broad a manner as required, essentially capable of justifying any position.

3. Primary Functions of the Force and Consideration of a Shared Control

There have been consistent demands to segregate the police forces on the basis of teams supposed to handle law and order and teams specifically meant for investigation possibly with sub-grouping in the latter for the different categories of offences.⁶⁸ Judicial guidelines have been passed to the same effect⁶⁹ and judges have termed this segregation as the need of the hour for efficient and just policing.⁷⁰ Retd. Justice Thomas Joseph has observed that it is not the case that the police is not equipped to handle investigations but rather is not free to do so due to law and order and other duties being borne by a common unsegregated force.⁷¹ Now coming to the Delhi Police, in addition to the difficulties faced by police forces across states due to non-segregation, they face

⁶⁴ *Supra* N. 23.

⁶⁵ *Supra* N. 23.

⁶⁶ Alok Prasanna Kumar, *Statehood for Delhi: A Legitimate Demand*, Vol 53 Issue 28, ECONOMIC & POLITICAL WEEKLY, 12, at 13, (2018).

⁶⁷ Gautam Bhatia, *Working a Democratic Constitution: The Supreme Court’s Judgment in NCT of Delhi v Union of India*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG, (4th July, 2018) <https://indconlawphil.wordpress.com/2018/07/04/working-a-democratic-constitution-the-supreme-courts-judgment-in-nct-of-delhi-v-union-of-india/>

⁶⁸ Sarthak Karol, *Bifurcation of the Indian Police System: Investigation Wing and Law & Order Maintenance Wing*, May 3, 2015 at <http://dx.doi.org/10.2139/ssrn.2601997>

⁶⁹ *Prakash Singh v Union of India*, (2006) 8 S.C.C. 1.

⁷⁰ Justice Thomas P. Joseph, *Bifurcation of Police Investigation Wing and Law and Order Wing*, LIVELAW, 1st January 2014 at <https://www.livelaw.in/bifurcation-of-police-investigation-wing-and-law-order-wing/>

⁷¹ *Joseph Kuncheria v State of Kerala*, (2011) SCCOnLine Ker 4267; 2014 3 K.L.T. 1.

other myriad duties exclusive to them which come with their own unique problems.⁷² While time and again it has been reinforced that the police's prime responsibilities are the protection of life and property of the citizens and investigation into offences.⁷³ Thus the point again arises that the police's basic duty towards the citizens of Delhi gets diluted and this gets further amplified when the force is not directly answerable to the citizens through their elected representatives. Hence, we can infer that an overhaul in the structure and administration of Delhi Police is needed.

Interestingly, the CBI was declared unconstitutional⁷⁴ on similar grounds as discussed here on the importance of having different functions segregated for the state police and the centrally controlled CBI. Though the decision was stayed immediately⁷⁵ it raises an interesting point to think about. The High Court relied on the difference between 'investigation' and 'intelligence' and how the CBI was to only do the latter else it was violating Article 21 and even posing a threat to India's federal character. Though the principles behind the judgment cannot be directly imported here as the situation is quite different primarily due to the unique constitutional status of Delhi. But we do see where the court was going with this line of reasoning, as to how the centrally controlled CBI was to only gather intelligence or assist in investigation while let investigation per se be left with the state police. Even in general parlance the CBI steps in only when the case involves some national interest be it in terms of public fraud, or it is a specific notified offence or is directed by the government or the courts. Other such centrally controlled agencies like the CRPF, NSG, BSF, IB, SPG by their very nature do not cater to particular needs or everyday law and order of a local population like a force like Delhi Police is supposed to. In this list of bodies,⁷⁶ with their specific functions, Delhi Police does *prima facie* come off as a misfit. The Union Ministry should step in where national interest like defence, central intelligence and so on are clearly involved. While with Delhi being the national capital, there do arise special issues of security but none are so grave as to warrant the total monopoly of the union over the force. Previous proposals discussing a shared control over the force⁷⁷ had put forth that areas within the NDMC be controlled by the Union

⁷² OM PRAKASH MISHRA, POLICING DELHI: URBANIZATION, CRIME AND LAW ENFORCEMENT, at 69-72 Oxford Scholarship Online, (2012).

⁷³ Manohar Lal Sharma v Principal Secretary and Ors, (2014) 2 S.C.C. 532.

⁷⁴ Navendra Kumar v Union of India and Ors., (2014) 1 G.L.R. 529.

⁷⁵ Union of India through Secretary DoPT v Navendra Kumar, (2014) 14 S.C.C. 344.

⁷⁶ MHA Demand No.48, Police, Notes on Demands for Grants 2020-2021, <https://www.indiabudget.gov.in/doc/eb/sbe48.pdf>

⁷⁷ *Supra* N. 4.

Indian Constitutional Law Review

leaving other parts of Delhi Police with the state government. While it is true that such a scheme would most likely not work due to practical and administrative difficulties and come with its own set of problems, it is also true that most of the tasks for which the Centre requires the Delhi Police can be met by these other agencies controlled by the MHA⁷⁸ and to solve the risk of a shortage of personnel - a fixed number of Delhi Police officers can be demarcated, creating a team to be controlled by the Union for its needs. While for extreme circumstances emergency provisions to the aid of the Centre will always exist. With the formation of such a special unit with adequate personnel the Centre must hand over the control of the force to the state government so investigative and regular law and order policing work for Delhi's population can be overseen by the state government itself and not the distant MHA. This proposal must at least be deliberated upon as on putting things in perspective we see that – Delhi has the highest crime rate across states and UTs which is manifold to that of comparable metros.⁷⁹ Further, Delhi is predicted to become the world's most populous city by 2030⁸⁰ and comprises the most densely populated districts of India.⁸¹ Thus one cannot help but question how an elected government representing such a population cannot have any say in the policing of its territory.

IV. COMPARATIVE ANALYSIS

The entire issue thus gets brought down to two competing interests i.e. Central Government's interest in the capital and other interests the local population may have and which is to be given weight over the other. Hence for a more holistic understanding it is imperative to see how other countries have dealt with the issue.

1. Brazil

⁷⁸ Subramaniam *Supra* N. 5 at 70.

⁷⁹ *Supra* N. 56; *Supra* N. 56 Table 1B.1 at 81.

⁸⁰ United Nations, Department of Economic and Social Affairs, Population Division, *World Urbanisation Prospects 2018: Worlds Cities in 2018*, 2018 at https://www.un.org/en/events/citiesday/assets/pdf/the_worlds_cities_in_2018_data_booklet.pdf

⁸¹ Office of The Registrar General and Census Commissioner, Ministry of Home Affairs, Census 2011 data at http://dataforall.org/dashboard/censusinfoindia_pca/.

Indian Constitutional Law Review

Brazil's capital- Brasilia, a part of the 'federal district', akin to Delhi has transformed from a centrally controlled region to a somewhat autonomous region,⁸² though the former has more autonomy especially after its 1988 Constitution. Brazil has a complex policing structure. The states have their own civil and military forces, which work independently as they are segregated to cater to investigative and law and order work respectively, while the union controls forces like the Federal Police Department, a railway and highway force along with a special reserve force – FNSP to assist states on their requests and with prior permissions.⁸³ Though the Union has considerable policing powers over the federal district and its territories,⁸⁴ but Brasilia has control over 'public security' through its civil⁸⁵ and military police forces striking a reasonable balance between the capital and the Union.⁸⁶

4. Australia

Australia's Capital, the Canberra district, is technically owned by the Commonwealth⁸⁷ but by virtue of the Australian Capital Territory (Self-Government) Act 1988⁸⁸ has its own assembly to govern the region. Much like Delhi's GNCTD Act, the statute provides how the assembly is to function in terms of its powers, membership and so on.⁸⁹ While the assembly cannot legislate on policing services by the Federal Police within the territory,⁹⁰ it has powers to legislate for the 'peace, order and good government' within the territory⁹¹- An entry very similar to the one given to the President of India to regulate Union Territories which lack legislative assemblies.⁹² That being said, the local executive does have the power to govern on matters of 'law and order',⁹³ thus a fair-balance is struck and the Australian model for Canberra is considerably ahead to that of Delhi's. It must be noted that the Balakrishnan committee, responsible for the current set-up,

⁸² Subramaniam *Supra* N.5 at 243.

⁸³ Luiz Fabricio Thaumaturgo Vergueiro, *Brazilian Security Structure*, <https://fas.org/irp/world/brazil/fabrverg.pdf>, (2008).

⁸⁴ Constitution of the Federative Republic of Brazil 1988, art. 21(14).

⁸⁵ Constitution of the Federative Republic of Brazil 1988, art. 24(16).

⁸⁶ Constitution of the Federative Republic of Brazil 1988, art. 144.

⁸⁷ Commonwealth of Australia Constitution Act, 1901, §125,.

⁸⁸ Australian Capital Territory (Self-Government) Act, 1988, No. 106 of 1988.

⁸⁹ Sahoo *Supra* N.3 at 23.

⁹⁰ *Supra* N. 88 §23.

⁹¹ *Supra* N. 88 §.22.

⁹² INDIA CONST. Art. 240.

⁹³ *Supra* N. 88, §37 read with Sch. IV.

Indian Constitutional Law Review

overlooked some of these intricacies while studying the Australian model for its report.⁹⁴ Lastly, on an interesting note, most of the territory's police force is a branch of the Federal Police itself but the personnel are responsible to the ACT government through various contracts.⁹⁵ These are essentially purchase agreements and the revenue accruing to the Federal Police is remitted to the ACT Government.⁹⁶ The local Government also has the power to issue directions to prioritize specific goals for the force.⁹⁷ Though such an arrangement may only work where the population is low and lesser personnel are required, like Australia, but it does provide an interesting perspective on the issue.

5. United States

The tension between the national government and capital city is most prominent in the case of Washington D.C and it is said to be treated most unfairly in comparison to other federal capitals.⁹⁸ It is imperative to note some of the interesting federalism arguments that were used to justify this model. It was argued that, in addition to costs, housing the federal government would also bring benefits in terms of investments and other opportunities.⁹⁹ While, in a federation being created as a union of states, all constituent units must be equal and no unit must disproportionately benefit or be allowed to influence federal positions.¹⁰⁰ So D.C. was seen as an administrative centre, from where the Union could fulfil its duties without hindrances, instead of a partner in the federation, explaining the wordings of the seat of government clause¹⁰¹ which restricts the capital's area and mandates a transfer of the land to Congress by cessation from its existing state. Further,

⁹⁴ Subramaniam *Supra* N.5 at 228.

⁹⁵ An ongoing arrangement between the Minister of Justice of the Commonwealth and ACT Minister for Police for the provision of Policing services to the ACT, (June 2017) http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Arrangement_FINAL_Signed_reduced.pdf

⁹⁶ Agreement between the ACT Minister for Police, Federal Police Commissioner and Chief Police Officer of ACT for the provision of providing policing services to ACT, 2017-2021, http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/2017-2021_Purchase_Agreement_Signed.pdf

⁹⁷ Mick Gentleman, Minister for Police and Emergency Services, ACT Government, Ministerial Direction, (28th October, 2019), http://cdn.justice.act.gov.au/resources/uploads/JACS/Ministerial_Direction_2019-ACT_Policing.PDF

⁹⁸ Hal Wolman et al., *Capital Cities and their National Governments: Washington D.C. in Comparative Perspective*, Working Paper No.30, George Washington Institute of Public Policy, The George Washington University, (11th June 2007).

⁹⁹ CAROLINE ANDREW et al., *THE PROBLEM OF THE CAPITAL CITY*, 30-34, Klaus Nagel ed., Institute of Autonomous Studies Spain, 2013.

¹⁰⁰ *Id.* at 56.

¹⁰¹ U.S. CONST. Art. 1 §8(17).

Indian Constitutional Law Review

keeping in mind federal principles, the Capital was mandated to be under 100 sq. miles to restrict the disproportionate growth of the Central Government and prevent a consequent loss of state authority.¹⁰² The D.C. administration, including police control, must be analysed in this backdrop. The policing system of America is very unique and is much more decentralized¹⁰³ with about 18,000 agencies functioning at the international, federal, state, county and municipal levels employing 22,00,000 full time sworn officers.¹⁰⁴ This system comes with its set of own merits and demerits.¹⁰⁵ With respect to D.C. while the Mayor has administrative control over the Metropolitan Police,¹⁰⁶ D.C.'s primary law enforcement agency, it is not enough as the Congress has plenary powers which can be exercised any time.¹⁰⁷ Being a federal territory, it lacks any state police and many agencies like the Capitol Police, Pentagon Police, F.B.I, Park Police, etc., not under the control of the D.C. Administration, have heavy presence in the area.¹⁰⁸

As this is a model where the capital is most disadvantaged, even after having such a decentralized policing structure, one may easily but mistakenly rely on it to justify India's position. Thus factors like- The principles that went behind choosing D.C. as the capital, the fact that Delhi is roughly eight times the current area of D.C. and even on expansion D.C. cannot grow much due to the constitutionally imposed limit, how unlike Delhi,¹⁰⁹ D.C. was specifically carved out to be the capital and is owned by the Congress, and even then the Mayor exercises administrative control over the MPD, must be borne in mind.

V. CONCLUSION

¹⁰² ANDREW *Supra* N. 99 at 30-32.

¹⁰³ Simon Bronitt & Mark Finanne, *Comparative Perspectives on Australian-American Policing*, Vol 46 Issue 3, JOURNAL OF CALIFORNIA LAW ENFORCEMENT, 18, at 18 (2012).

¹⁰⁴ Duren Banks et al., *Program Report: National Sources of Law Enforcement Data*, Bureau of Justice Statistics, U.S. Department of Justice, 4th October 2016.

¹⁰⁵ Police: Organisation and Management- The American System of Policing at <https://law.jrank.org/pages/1668/Police-Organization-Management-American-system-policing.html>

¹⁰⁶ §401-§402, Part IV, Reorganization Plan No. 3 of 1967, 81 Stat 948.

¹⁰⁷ §601, District of Columbia Home Rule Act, 1973, Public Law 93-198, 87 Stat. 774.

¹⁰⁸ Jocelyn Fontaine et al., *Promising Practices of the District of Columbia Metropolitan Police Department*, District of Columbia Crime Policy Institute, Urban Institute, (2010).

¹⁰⁹ *Supra* N. 16.

Indian Constitutional Law Review

From the discussion it becomes evident that there always exists some distrust between the Union and the capital's Government leading to certain important governance issues being left out of the latter's control. Contrary to Pt. Nehru's stance of preferring statutes to govern Delhi as it was a changing situation and they ought to not be divorced from reality,¹¹⁰ the Balakrishnan committee recommended constitutional amendments to bring in the proposed changes to ensure 'stability and permanence'.¹¹¹ Over years, on seeing the nature of interaction between the force and citizenry of Delhi we can safely assume stability still has a long way to go. While the current model is entrenched in the Constitution, so a relatively high threshold exists to bring about a change but we must not forget basic constitutional ideas to which we all are subservient.

The idea of the state government functioning with such a limited mandate of being completely devoid of any authority over the police force goes against rudimentary conceptions of democracy and representative governance, federalism, accountability and good governance. We must not forget the objective with which the 69th Amendment was enacted and how much Delhi has changed since then. Further we must not stop asking the question as to whom the police force owes its primary duty to. It is a basic tenet of true democracies that the ultimate say must vest with the representative government responsible to give effect to the wishes of the citizens and effectively address their concerns.¹¹² This is not to say that police excesses do not occur in full-fledged states, or that it is an ideal situation, but a better response can be given by the local government working specifically for the territory even if just to secure elections as that is the principle behind universal adult franchise and regular elections in a democracy.¹¹³

Where two competing interests exist, one must never be permitted to totally prevail over the other which is the case today. A balance must always be tried to be struck as attempted in other jurisdictions. In this light, the Union ought to at least deliberate on the idea of shared control in a bona-fide manner- be it on the proposal in this paper or any other viable solution that it comes up

¹¹⁰ Constituent Assembly Debates, 1st August, 1949 *speech by* Jawaharlal Nehru, 9.108.221, vol. 9, https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-08-01?paragraph_number=223%2C222%2C221%2C224%2C225#9.108.221.

¹¹¹ *Supra* N. 23; *Supra* N. 25.

¹¹² *Supra* N. 23.

¹¹³ *Mohinder Singh Gill v Chief Election Commissioner, New Delhi*, (1978) 1 S.C.C. 405.

Indian Constitutional Law Review

with. Instead rules are being notified,¹¹⁴ completely amalgamating personnel above a certain rank at the disposal of the MHA for transfers within Union Territories including Delhi¹¹⁵ ignoring Delhi's separate needs due to its population size¹¹⁶ and crime rate.¹¹⁷ Thus, Delhi remains stuck in this constant battle and even public prosecutors are till date conflicted over who gets to represent Delhi Police.¹¹⁸

¹¹⁴ Ministry of Home Affairs, The National Capital Territory of Delhi, Andaman and Nicobar Islands, Lakshadweep, Daman and Diu, Dadra and Nagar Haveli and Chandigarh (Police Service) Rules 2018, G.S.R. 921(E), (25th September, 2018).

¹¹⁵ Vijaita Singh & Jatin Anand, *Police forces in 6 UTs merged*, THE HINDU, (27th September 2018), <https://www.thehindu.com/news/national/police-forces-in-6-uts-merged/article25052441.ece>

¹¹⁶ *Supra* N. 80; *Supra* N. 81.

¹¹⁷ *Supra* N. 79.

¹¹⁸ Karan Tripathi, *Understanding the 'Tug of War' as to who should represent Delhi Police in Delhi Riots cases*, LIVELAW, (23rd June 2020) <https://www.livelaw.in/top-stories/understanding-the-tug-of-war-as-to-who-should-represent-delhi-police-in-delhi-riots-cases-158775?infinitemscroll=1>.

A NOTE OF THANKS

The Editorial Board, Coordinators and the Publishing Unit of the Indian Constitutional Law Review seek to express their gratitude to all members, contributors, advisors and well-wishers who have been immensely important to the growth and evolution of the constitutional law landscape of India and who continue to be involved in the discourse surrounding it.

We express our heartfelt gratitude to all Peer Reviewers who have provided their valuable time and incisive insights in the framing of this edition.

Finally, a special thank you to the Editors and Members who have played a crucial role in the development and outcome of this publication. This would not have been possible without every one of you.

Anshul R Dalmia

EDITOR-IN-CHIEF

on behalf of the esteemed members of the Editorial Board, the Coordinators, and the Publishing Unit.

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