Articles And Essays

ISSN 0975 - 0134

2019

The Indian Journal of Constitutional Law

Vol. 8

The Indian Journal of Constitutional Law

2019

Volume 8

Constitutional Law Society

Nalsar University of Law

The M.K. Nambyar SAARCLAW Chair in Comparative Constitutional Studies

The INDIAN JOURNAL OF CONSTITUTIONAL LAW

2019

Volume 9

CONSTITUTIONAL LAW SOCIETY

THE M.K. NAMBYAR SAARCLAW CHAIR IN COMPARATIVE CONSTITUTIONAL STUDIES

NALSAR UNIVERSITY OF LAW

Published by
The Registrar
NALSAR University of Law
Post Box No.1, NISA Hakimpet, Justice City,
Shameerpet, R.R. District -500078. India

Cite this Volume as:
8 INDIAN J. CONST. L. <PAGE NO.> (2019)

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Editorial

The year of 2017-18 was a crucial one for the Supreme Court. It marked the conclusion of matters that had been awaiting closure for decades, and the beginning of a few which will have far reaching ramifications on the future of Indian constitutional law. The past months witnessed a multitude of landmark judgments which addressed questions concerning, *inter alia*, the right to privacy, the right to bodily autonomy and dignity.

These landmark judgments shared one aspect in common: they required the re-examination of legal positions that were considered settled for decades. The Court approached this in two radically different ways- it either overturned those judgments, or found a way to skirt them. Though it reached the desired outcome by using both the methods, the latter approach has still left key questions of law undecided, which are likely to be raised again in the future. All of this evidences the dynamic nature of the Constitution and Indian constitutional law jurisprudence.

The VIII edition of the Indian Journal of Constitutional Law has attempted to keep track of these developments, and strives to present scholarship which examines the important questions of Indian constitutional law. It covers a wide range of subjects, addressing administrative law to constitutional law and socio-cultural rights.

This Editorial aims to discuss the key developments in Indian Constitutional Law for the year 2017-18 through synopses of a few crucial rulings.

SIGNIFICANT DEVELOPMENTS IN INDIAN CONSTITUTIONAL LAW 2017-18.

The year began with the landmark judgment of *Justice K.S. Puttaswamy v. Union of India*, in which anine judge bench of the Supreme Court unanimously held that the right to privacy is a fundamental right that is guaranteed by the Indian Constitution. The verdict was the long sort after culmination of a constitutional tussle that had started in 2015, when the Attorney General stated that the constitution did not protect or affirm the right to privacy, in the context of the Aadhar hearing. The case was then transferred, being a constitutional question, to a larger bench, and further to the nine judge strong bench. Puttaswamy is perhaps one of the most important civil rights decisions in the history of the Supreme Court. The impact is far reaching, touching privacy and transparency jurisprudence, free speech, surveillance, data collection and protection, LGBTQIA+ rights, food bans, artificial intelligence and other presently unfathomable issues.

In the judgement, the court is answering the two legal questions that were transferred to it by the constitutional bench. There is no actual majority, with Justice Chandrachud's opinion having plurality but no majority and it is only the operative part of the judgement that shall be binding. The verdict does not, and cannot, decide whether Aadhar is constitutional or whether state surveillance is permissible and other such questions, but merely provides the framework for these questions to be decided when they are raised before the court.

The operative order lays down four propositions of law. The first, that the decision reached in *MP Sharma*, in holding that the right

to privacy is constitutionally guaranteed is overruled as it wrongly relied on the Fourth Amendment to the United States Constitution to be a comprehensive constitutional guarantee, where instead it is merely a limited protection against unlawful surveillance. The second, that the decision reached in *Kharak Singh* in so far as it holds that the right to privacy is not constitutionally protected stands overruled. This is based on the judgment being internally contradictory as the court could not have struck down police surveillance without having invoked the right to privacy. Further, the finding that there was no right to privacy under Article 21 was premised on a very narrow reading of "personal liberty" which in turn had been derived from *AK Gopalan*, whose "silos approach" had already been rejected in *RC Cooper*. *AK Gopalan* had actually been overruled in this context in *Maneka Gandhi*. The third proposition is that the right to privacy is protected as an intrinsic part of the rights to life and personal liberty as enshrined in Article 21 and as part of the fundamental freedoms guaranteed by Part III of the Constitution. Privacy, in all six opinions, was seen as a part of liberty, human dignity and autonomy and is also crucial in guaranteeing the meaningfulness of the rights of freedom of speech, expression, association and religion. The final proposition is that the decisions following *Kharak Singh* that have enunciated the position of law in the previous proposition lay down the accurate position.

This was followed by the case of *ShayaraBano v. Union of India*, in which The Supreme Court heard a petition filed by a woman survivor of dowry harassment and domestic violence who had been divorced through instantaneous triple talaq. She sought the declaration on instantaneous triple talaq, polygamy and nikahhalala as illegal and unconstitutional as they violated Articles 14, 15, 21 and 25 of the Constitution. The Court however, only dealt with the issue of

instantaneous triple talaq. Instantaneous triple talaq, in any case, was not legally valid even before the petition as a number of high courts had held that for talaq to be deemed to be valid, it must be pronounced supported with reasonable cause. The larger issue, however, was whether the personal laws are covered by the scope of Article 13 in the Constitution. This is a contentious issue which has not definitively been decided.

The two judicial opinions rule in diametrically opposite directionson the question of constitutionality. Justice Khehar's opinion, joined by Justice Nazeer, views that portions of Muslim personal law which have been codified can be tested for fundamental right compliance but not those which have not been so codified. In doing so, he affirmed the *Narasu* judgement, immunizing Muslim personal law from constitutional challenge, as the Muslim Personal Law (Shariat) Application Act, 1937 has limited application. Justice Nariman's opinion, joined by Justice Lalit, contrarily holds that Muslim personal law as an entity itself was brought into existence itself by the state, in exercising its civil authority, which resultantly brought it within the ambit of Article 13. Thus, even uncodified Muslim personal law can be tested. The religion based finding in Justice Nariman's opinion that instantaneous triple talaq is irregular and sinful, which coincides with the constitutional reasoning from which the finding that instantaneous triple talaq is manifestly arbitrary, thus striking down the 1937 Act to the extent that it recognised the practise.

Justice Joseph held that since the purpose of the 1937 Act was to abolish those customs which were contrary to Shariat, and based on the reading of the Quran, instantaneous triple talaq was contrary to the Quran, it was not an integral part of Muslim personal

law and could not be protected under Article 25.

However, there are few points on which a majority opinion can be gleaned which means that it cannot be concluded that the case has ruled instantaneous triple talaq to be unconstitutional. The judgement is plagued with several contradictions and it remains to be seen how it plays out in application.

These two judgments illustrate the aforementioned dynamically different approaches taken by the Supreme Court towards precedents. While in the *Puttaswamy* judgment, the Court did not hesitate before overturning the settled position, in *Shayara Bano,* it avoided that discussion altogether. Both these judgments add a new color to Article 21.

Independent Thought v. Union of India was another crucial judgment which concerned the right to dignity and bodily autonomy enshrined in Article 21. A division bench of the Supreme Court read down the second exception to Section 375 of the Indian Penal Code. It categorically thus held that the exception would not apply to adult women. Despite this, the judgement has prepared the requisite groundwork to declare the marital rape exemption to be unconstitutional. It considered international instruments such the Convention on the Rights of the Child (CRC) and the Convention for the Elimination of all forms of Discrimination against Women (CEDAW). Since the marital rape exemption legitimized child marriage, it was found to be a violation of these instruments, which India is a signatory to. The exception was also found to be in contravention to Article 14 and Article 21 and thus unconstitutional. The exemption was also seen to be contradictory to other provisions of the Indian Penal Code and thus created internal inconsistencies as

well as inconsistencies with other laws in force. It also held that the social impact that child marriage had, as a result of the exemption was far too great to let the exemption persist. It remains to be seen how these can be applicable to marital rape simpliciter.

Thelong contested question of re-promulgation of ordinances was settled by the Court in *Krishna Kumar Singh v. State of Bihar*. A seven judge bench held that to re-promulgate an ordinance would be fraud on the constitution and that the satisfaction of the President of the Governor under Articles 123 and 213 respectively. Issuing an ordinance would not be protected from judicial review. The judgement broadened the scope of judicial review of ordinances and promotes transparency. It stated that re-promulgation is fundamentally against the principle of parliamentary supremacy, and laid down that the power of promulgation is conditional and does not constitute a parallel law making authority. It is subjective to legislative control which will decide the need for the ordinance among other factors. Article 123 of the Constitution lays out requirements which must be complied with before promulgating and ordinance and it ought not to be used as a source of parallel law making power. The verdict shall place bounds on abuse of power by the governments.

Other Judgments of the Supreme Court

Before the Court pronounced the judgment in the *Puttaswamy* case, *Binoy Viswam v. Union of India* raised the question of the constitutional validity of Section 139AA of the Income Tax Act. This section mandated that tax payers quote their Aadhar number while filing income tax returns or while applying for a new PAN card. Section 139AA(2) further provided for the cancellation of a tax payer's PAN card in case of non-compliance.

The petitioners were not permitted to make arguments pertaining to right to privacy under Article 21 of the Constitution, and thus challenged the provision on the grounds of violation of Articles 14 and 19(1)(g). They argued that since the Aadhar-PAN linking was only mandatory for individual assessees, it created a distinction between individual and non-individual assesses (like companies). This linkage bore no rational nexus to the objective of combating corruption or fraud as the Aadhar was more easily duplicable than the PAN, and consequently not an effective method to achieve the stated objectives of the linkage. The With respected to Article 19(1)(g) it was argued that since many important transactions were prohibited to be undertaken without a PAN card, its cancellation amounted to "*civil death,"* and this violated the freedom to practice any profession or carry on trade.

The Court rejected the Article 14 challenge by reiterating the government's assertion that the Aadhaar was the "most effective" way to weed out duplicates and establish an individual's identity. It further rejected the 19(1)(g) challenge without engaging with the proportionality of the measure. It upheld the constitutionality of the provision, but granted a partial stay on the cancellation of PAN cards due to non-compliance as the same would be "*manifestly unjust"* and could carry grave consequences. A subsequently issued CBDT circular mandated the linkage of PAN and Aadhaar for paying taxes after July 1, 2017.

The state's authority to appoint parliamentary secretaries was examined in *Bimolganshu Roy v. State of Assam.* A divisional bench comprising of Justices J. Chelameswar, R.K Agrawal and A. M. Sapre declared unconstitutional the Assam Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions)

Act, 2004. The primary question in this case was if the state could appoint a parliamentary secretary, and it was examined if this power was given by a combined reading of Article 194(3) and Entry 39 of List II of the Seventh Schedule of the Constitution. The Court held that both these provisions addressed the immunities provided to members of the legislature, and authorized the state to make laws with respect to that. However, none of these provisions authorized the state to create positions like that of a parliamentary secretary. Since the authority to make this legislation was not provided to the states by the Constitution, the Act was held unconstitutional.

Lastly, a brief but important verdict given by the Court in *K.L.N.V. Veeranjaneyulu v. Union of India.* A bench comprising of Justices A.M. Khanwilkar, Dipak Misra and Dr. D. YChandrachud refused to impose a ban on KanchaIlaiah's book '*Samajika Smugglurlu Komatollu*' in the case of *K.L.N.V. Veeranjaneyulu v. Union of India.* This book contained chapters which were critical of the 'Hindutva' ideology, prompting the petition of a ban under Article 32 of the Constitution. The Court held that writing a book was an exercise of the author's right to express his opinions freely, and any curtailment on this right will not be "*lightly viewed."* This statement is indicative of the sanctity of the right enshrined in Article 19(1)(a), which implies that any restriction on the same will be viewed with close scrutiny.

ACKNOWLEDGMENTS

We express our sincere gratitude to Mr. Mohsin Alam Bhat, Mr. Aditya Sondhi, Mr. Gautam Swarup, Mr. Sidharth Chauhan and Dr. Vasanthi Nimushakavi for reviewing the pieces for this edition. We are grateful for their invaluable comments and insights.

We further wish to thank Prof. Faizan Mustafa, Vice Chancellor, NALSAR University of Law, and Prof. V. Balakista Reddy, Registrar, NALSAR University of Law, for pledging their support and time to this Journal. We also appreciate the generosity of Mr. K.K. Venugopal and the M.K. Nambyar SAARCLAW Charitable Trust. We shall always be grateful for their support which has been instrumental to the release of the Journal since its very inception.

We also thank Dr. Vasanthi forhaving encouraged this initiative. Lastly, we would like to thank the administrative staff for the assistance they have rendered.

GENDERING DOMESTIC VIOLENCE AGAINST WOMEN: ARCHETYPE OR ANOMALY?

A CRITICAL COMMENT ON *HARSORA V. HARSORA*

Shivam[*]

Abstract

The recent decision of a Division Bench of the Supreme Court in Hiral Harsora v. Kusum Harsora[1] *striking down the words "adult male person" and the corresponding proviso from section 2(q) of the Protection of Women from Domestic Violence Act, 2005 [hereinafter PWDVA] has undoubtedly opened up new vistas of constitutional scrutiny into the validity of an enactment.*

Although the scope of a judgment is largely limited by the arguments of the parties before the Court, the omission of a discussion or even a passing reference to the doctrine of presumption of constitutionality undermines the authority of the decision. Even from the standpoint of equality analysis under Article 14 with reference to the principle of reasonable classification, the constitutionality of the said provision could have been easily upheld. The link between domestic violence and masculinity is widely explored and documented in scholarly literature both at the national level and worldwide and a statutory acknowledgement of this empirical reality is in keeping with the United Nations model framework for legislation on violence against women. In the light of the above, the paper proposes to examine the correctness or otherwise of the judgment on the touchstone of settled principles of constitutional adjudication and interpretation of statutes.

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[*] Ph. D. Scholar, Faculty of Law, New Delhi.

[1] (2016) 10 S.C.C. 165.

I. Factual Background of the Case

The case arose out of an appeal against the judgment of the Bombay High Court whereby it had read down Section 2(q) of the PWDVA to include a female co-respondent along with an adult male person within the definition of "respondent", be it in the capacity of a wife of the son/brother or sister of the concerned adult male person, who is or has been in a domestic relationship with the complainant and such co-respondent.

The factual matrix leading to the aforementioned challenge was that one Kusum Narottam Harsora and her mother Pushpa Narottam Harsora had filed two separate complaints under the PWDVA against Pradeep (brother/son), and his wife, and two sisters/daughters, alleging various acts of violence against them and hence seeking to implead them as respondents under Section 2(q) the PWDVA. Against this complaint, an application was moved before the Metropolitan Magistrate seeking discharge of the three females named in the complaint on the grounds that within the meaning of Section 2(q) of the PWDVA, a complaint could only be made against an adult male person. However, the Metropolitan Magistrate refused the discharge whereupon criminal writ petitions were moved before Single judge Bench of the Bombay High Court that discharged the aforementioned three females. Aggrieved by this judgment, the complainants preferred a writ petition under Article 226 of the Constitution of India before a Division Bench of the High Court challenging the constitutional validity of section 2(q) of the PWDVA and the same was ruled in aforementioned terms. In the appeal against the judgment of the High Court, a division Bench of the Supreme Court set aside the judgment of the Bombay High Court and deleted the words "adult male respondent" as well as the

corresponding proviso from Section 2(q) of the PWDVA holding that the erstwhile definition of "respondent" in Section 2(q) was not based on any intelligible differentia having any rational relation to the object sought to be achieved by the PWDVA but was in fact contrary to it.

In reaching the said conclusion, the Supreme Court relied heavily upon internal and external aids and the need to ensure internal and external consistency across statutes in a bid to arrive at the true purpose of the enactment. It is submitted that the approach of the Supreme Court in the instant case though novel and arguably scholarly is not supported by the settled principles of constitutional adjudication as also principles of statutory interpretation. The different heads of criticism have been elaborated below.

II. Presumption of Constitutionality

The presumption of constitutionality is a time-honoured tradition of constitutional adjudication. In a system of government based on constitutional supremacy, mutual respect for the wisdom of coordinate branches of the government is absolutely crucial for achieving the ideal of constitutional governance. It is a settled principle that a legislation enacted by Parliament or State Legislature carries with it a presumption of constitutionality and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.[2] Applied as a principle

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2 Chiranjit Lal Chowdhury v. Union of India, A.I.R. 1951 S.C. 41; State of Bombay v. F.N. Balsara, A.I.R. 1951 S.C. 318; State of West Bengal v. Anwar Ali Sarkar, A.I.R. 1952 S.C. 75; R.K. Dalmia v. S.R. Tendolkar, A.I.R. 1958 S.C. 538; Mohd. Hanif Qureshi v. State of Bihar, A.I.R. 1958 S.C. 731; Pathumma v. State of Kerala, (1978) 2 S.C.C. 1; Delhi Transport Corporation v. D.T.C. Mazdoor Congress, (1991) Supp (1) S.C.C. 600; Subramanian Swamy v. Director, CBI, (2014) 8 S.C.C. 682.

of construction, the doctrine of presumption in favour of the constitutionality of a statute means that if two meanings are possible then the courts will reject the one which renders it unconstitutional and accept the other upholding the validity of the impugned legislation.[3]

This principle of deference is centred not only on issues of representative legitimacy but also superiority of institutional design of the legislature and the robustness of the legislative process.[4]It is surprising that in the instant case neither the doctrine of initial presumption of constitutionality was invoked by the respondents nor considered much less relied upon by the court while reviewing the constitutionality of section 2(q) of the PWDVA thus, bypassing one of the settled canons of constitutional adjudication.

The scope of the presumption however, is not confined just to the enacting or substantive provisions of an enactment but is much wider and in fact, it informs the inquiry into the object and purpose of an enactment as well.[5]

Thus, the principle of constitutionality in favour of an enactment has deep foundations among the settled canons of constitutional adjudication and is not just a colonial relic or ornamental formality.

It would, however, be relevant to mention here that besides being rebuttable, the principle of constitutionality is also non-absolute in nature. The presumption of constitutionality is subject to

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3 State of Rajasthan v. Basant Nahata, (2005) 12 S.C.C. 77.

4 *See* F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85(4) NOTRE DAME LAW REVIEW 1461 (2010).

5 *See* State of Bihar v. Bihar Distillery Ltd., (1997) 2 S.C.C. 453.

the doctrine of 'strict scrutiny' which has the effect of reversing the presumption and the corresponding burden thereof. The doctrine of 'strict scrutiny' which was evolved by the American Supreme Court has been making not so subtle inroads into the constitutional jurisprudence of India[6] and in certain cases, it is arguably permissible for the superior courts to dispense with the initial presumption of constitutionality and adopt a more exacting standard of judicial review. However, in the instant case whether there was a need for adoption of the 'strict scrutiny' test is not quite apparent in that the legislation in question was not an example of 'suspect legislation' as understood in the light of decided cases[7] nor did the Court explicitly refer to or appear to have invoked this standard in the course of its reasoning.

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6 *See* Anuj Garg v. Hotel Association of India, (2008) 3 S.C.C. 1 [. . . it is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden therefor would be on the State]; Subhash Chandra v. Delhi Subordinate Services Selection Board, (2009) 15 S.C.C. 458 [Notwithstanding the lack of doctrinal clarity, the two-judge Bench did seek to put the ratio of Saurabh Chaudri v. Union of India, (2003) 11 S.C.C. 146 in perspective by holding that the 'strict scrutiny' test was not foreclosed for good by the Constitution Bench decision]; The Kerala Bar Hotels Association v. State of Kerala, (2015) 16 S.C.C. 421 [The classification at hand is based on social and economic class . . . Therefore, a strict scrutiny test must be applied, and the Government must be asked to provide a rigorous, detailed explanation in this classification]. *See also* Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review For Article 15 Infringement*, 50(2) JILI 177-208 (2008) [arguing for an intense review in cases of violation of the fundamental rights guaranteed by article 15(1), article 19(1)(a) and the negative rights under article 21 and acknowledging that the Court had taken 'tentative steps' in the right direction].

7 *See* Nair Service Society v. State of Kerala, (2007) 4 S.C.C. 1. [A statute professing division amongst citizens, subject to Articles 15 and 16 of the Constitution of India may be considered to be a suspect legislation. A suspect legislation must pass the test of strict scrutiny].

III. Test of Reasonable Classification under Art. 14 and the Impugned Classification

Article 14 of the Constitution of India ensures equality of treatment among equals in like circumstances.[8] Accordingly, it has been asserted: "The first step in determining whether Article 14 has been violated is a consideration of whether the persons between whom discrimination is alleged fall within the same class. If the persons are not deemed to be similarly circumstanced, then no further consideration is required"[9].

By way of judicial decisions, the doctrine of classification is read into Article 14.[10] The principles to be followed by the courts in arriving at a conclusion as to whether a classification offends the right to equality guaranteed under Article 14 have also been laid down in a number of cases.[11]

Equal protection claims under Article 14 are examined with the presumption that the State action is reasonable and justified.[12] The legislature is given the utmost latitude in making the classification and it is only when there is a palpable abuse of power and the differences made have no rational relation to the objectives

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8 Chiranjit Lal Chowdhuri v. Union of India, A.I.R. 1951 S.C. 41; Shri Kishan Singh v. State of Rajasthan, A.I.R. 1955 S.C. 795; Western U.P. Electric Power and Supply Co. Ltd. v. State of U.P., (1969) 1 S.C.C. 817; State of Jammu & Kashmir v. Triloki Nath Khosa, (1974) 1 S.C.C. 771; Air India v. Nergesh Meerza, (1981) 4 S.C.C. 335; T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 S.C.C. 481; M. Nagaraj v. Union of India, (2006) 8 S.C.C. 212.

9 Ratna Kapur & Brenda Cossman, On Women, Equality and the Constitution, 1(1) NATIONAL LAW SCHOOL JOURNAL 2-3 (1993).

10 M. Nagaraj v. Union of India, (2006) 8 S.C.C. 212.

11 For a brief summary of these principles, *see* Dalmia v. S.R. Tendolkar, A.I.R. 1958 S.C. 538 and In re: The Special Courts Bill, (1979) 1 S.C.C. 380.

12 Kathi Raning Rawat v. State of Saurashtra, A.I.R. 1952 S.C. 123.

of the legislation, that necessity of judicial interference arises.[13] The safeguard provided by Article 14 of the Constitution can only be invoked, if the classification is made on the grounds which are totally irrelevant to the object of the statute.[14]It is well-settled that the law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience.[15]

As regards the comprehensiveness of the classification, the law on the point was succinctly laid down by a Constitution Bench of the Court in Kedar Nath Bajoria v. State of West Bengal[16] in the following manner:

> [T]he legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain. If the classification on which the legislation is founded fulfils this requirement, then the differentiation which the legislation makes between the class of persons or things to which it applies and other persons or things left outside the purview of the legislation cannot be regarded as a denial of the equal protection of the law, for, if the legislation were all-embracing in its scope, no question could arise of classification being based on intelligible differentia having a reasonable relation to the legislative purpose.[17]

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13 *Id. See also* Anukul Chandra Pradhan v. Union of India, (1996) 6 S.C.C. 354 [The elbow room available to the legislature in classification depends on the context and the object for enactment of the provision].

14 D.C. Bhatia v. Union of India, (1995) 1 S.C.C. 104.

15 In re: The Special Courts Bill, (1979) 1 S.C.C. 380.

16 A.I.R. 1953 S.C. 404.

17 Kedar Nath Bajoria v. State of West Bengal, A.I.R. 1953 S.C. 404. *See also* Dharam Dutt v. Union of India, (2004) 1 S.C.C. 712; Welfare Association of ARP, Maharashtra v. Ranjit P. Gohil, (2003) 9 S.C.C. 358 [It is difficult to expect the Legislature carving out a classification which may be scientifically

While it is true that every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.[18] If a law deals equally with members of a well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.[19]

In the light of the principles discussed above, it is submitted that the finding on the part of the Court that the restrictive definition of 'respondent' in the erstwhile section 2(q) of the PWDVA was violative of the guarantee of equal protection was based on an improper application of the nexus test in that it purported to treat unequals as equals. It is further submitted that the impugned classification was based both on an intelligible differentia and had a rational relation with the object sought to be achieved by the Act. The link between 'violence against women' and masculinity is too

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perfect or logically complete or which may satisfy the expectations of all concerned, still the court would respect the classification dictated by the wisdom of Legislature and shall interfere only on being convinced that the classification would result in pronounced inequality or palpable arbitrariness on the touchstone of Article 14]; Namit Sharma v. Union of India, (2013) 1 S.C.C. 745[A statute is not invalid because it might have gone further than it did, since the legislature need not strike at all evils at the same time and may address itself to the phase of the problem which seemed most acute to the legislative mind].

18 State of Bombay v. F.N. Balsara, A.I.R. 1951 S.C. 318. *See also* In re: The Special Courts Bill, (1979) 1 S.C.C. 380 [When a law is challenged to be discriminatory essentially on the ground that it denies equal treatment or protection, the question for determination by Court is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of legislation].

19 State of Bombay v. F.N. Balsara, A.I.R. 1951 SC 318.*See also* Sakahawat Ali v. State of Orissa, A.I.R. 1955 S.C. 166 [It is for the Legislature to determine what categories it would embrace within the scope of legislation and merely because certain categories which would stand on the same footing as those which are covered by the legislation are left out would not render legislation which has been enacted in any manner discriminatory and violative of the fundamental right guaranteed by article 14 of the Constitution].

well established to require elaboration. A 2006 Executive Summary of the UN Secretary-General's Report on an in-depth study on all forms of violence against women as mandated by General Assembly resolution 58/185 outlined the causes of violence against women as under:

> The roots of violence against women lie in historically unequal power relations between men and women and pervasive discrimination against women in both the public and private spheres. Patriarchal disparities of power, discriminatory cultural norms and economic inequalities serve to deny women's human rights and perpetuate violence. Violence against women is one of the key means through which male control over women's agency and sexuality is maintained.[20]

Similarly, the UN Women has pointed out that:

> Violence against women and girls is rooted in ideas about masculine superiority and natural dominance. . . . it remains overwhelmingly true that men are the main perpetrators of violence, across marked social differences (of age, class, and race/ethnicity to name only three).[21]

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20 EXECUTIVE SUMMARY, STUDY OF THE SECRETARY GENERAL, ENDING VIOLENCE AGAINST WOMEN: FROM WORDS TO ACTION ii (2006), http://www.unwomen.org/-/media/headquarters/media/publications/un /en/ englishstudy.pdf?la=en&vs=954.

21 ALAN GREIG, SELF-LEARNING BOOKLET: UNDERSTANDING MASCULINITIES AND VIOLENCE AGAINST WOMEN AND GIRLS 40 (2016). *See also* UN WOMEN, TURNING PROMISES INTO ACTION: GENDER EQUALITY IN THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT 193 (2018) [While complex and context-specific factors underpin different forms of violence, the root causes are unequal gender power relations and discrimination against women and girls].

On the national level, a survey conducted by the International Center for Research on Women to explore the links between domestic violence against women and masculinity in the states of Punjab, Rajasthan and Tamil Nadu, revealed that as many as 85 per cent of men reported engaging in at least one violent behaviour in the past 12 months. Specifically, 72 per cent reported emotional violence, 46 per cent reported control, 50 per cent reported sexual violence, and 40 per cent reported physical violence.[22] Similarly, in a 2009 study conducted among the eastern Indian states of Orissa, West Bengal, Bihar and Jharkhand, the overall prevalence of physical, psychological, sexual and any form of violence among women of Eastern India was found to be 16 per cent, 52 per cent, 25 per cent and 56 per cent respectively.[23] The study also concluded that husbands were mostly responsible for violence in majority of cases and some women reported the involvement of husbands' parents.[24]

Thus, the statutory approach in providing a gender-sensitive and restrictive definition of the term "respondent" appears to underscore the empirical realities and a nuanced understanding of the nature of domestic violence against women. Besides, the statutory approach was also in consonance with the United Nations model framework for legislation on violence against women that emphasizes the need to adopt an evidence-based approach to legislative drafting.[25]

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22 INTERNATIONAL CENTER FOR RESEARCH ON WOMEN (ICRW), MEN, MASCULINITY AND DOMESTIC VIOLENCE IN INDIA: SUMMARY REPORT OF FOUR STUDIES 58 (2002).

23 Bontha V. Babu and Shantanu K. Kar, *Domestic violence against women in eastern India: a population-based study on prevalence and related issues*, 9 BMC PUBLIC HEALTH129 (2009), *available at* http://www.ncbi.nlm.nih.gov/pubmed/19426515 (last visited Apr. 21, 2017)

24 *Id.*

25 DEPT. OF ECO & SOC. AFFAIRS, DIVISION FOR THE ADVANCEMENT OF WOMEN, UN, HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN58 (2010).

IV. Constitutionality of Statutes vis-à-vis Principles of Statutory Interpretation

In coming to the conclusion that the words "adult male person" in the erstwhile Section 2(q) of the PWDVA did not square with Article 14 of the Constitution of India, the Supreme Court relied upon internal aids in the form of Preamble read with certain substantive provisions of the PWDVA namely, sections 2(f) [definition of "domestic relationship"], 2(s) [definition of "shared household"], 3 [definition of "domestic violence"], 18(b) [protection order prohibiting the "aiding or abetting in the commission of acts of domestic violence"], 19(1)(c) [residence order "restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides"], 20 [monetary reliefs] and 26 [relief in other suits and legal proceedings]. As far as external aids are concerned, the Court relied upon the Statement of Objects and Reasons along with the provisions of the Hindu Succession (Amendment) Act, 2005, Protection from Domestic Violence Bill, 2002 and Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. The central arguments relied upon by the Court in deciding against the validity of the impugned classification pertained to internal inconsistency, possibility of proxy violations and impunity enjoyed by potential female perpetrators.

The relevance of internal aids in the form of the Preamble and material provisions of an enactment in any constitutional adjudication concerning Article 14 has been conclusively settled by the pronouncement of a Constitution Bench after a review of a number of decisions on this point in the following manner:

> In considering the validity of the impugned statute on the ground that it violates Art. 14 it would first be necessary to ascertain the policy underlying the statute and the object intended to be achieved by it. In this process the preamble to the Act and its material provisions can and must be considered.[26]

In a bid to arrive at the exact object sought to be achieved by the PWDVA, the Court evidently felt the need and rightfully so to look into the preamble and the material provisions of the PWDVA. The Preamble to a statute is a "key to open the mind of the legislature"[27] and is also said to provide the "key to the general purpose of the Act".[28] Although not an enacting part, the preamble is expected to express the scope, object and purpose of the Act more comprehensively than the long title.[29]

Notwithstanding the admissibility of the preamble as an important internal aid, its interpretive utility *vis-à-vis* the enacting provisions of a statute is seriously limited. The Preamble undoubtedly is a part of the statute but since it is not an enacting part, it is not accorded the same weight as are other relevant enacting provisions to

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26 Kangsari Haldar v. State of West Bengal, A.I.R. 1960 S.C. 457.

27 Tribhuvan Parkash Nayyar v. Union of India, (1969) 3 S.C.C. 99; Arnit Das v. State of Bihar, (2000) 5 S.C.C. 488.

28 The Superintendent and Remembrancer of Legal Affairs, West Bengal v. Girish Kumar Navalakha, (1975) 4 S.C.C. 754.

29 G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 150 (10th ed., 2006). See alsoBrett v. Brett [1826] 162 E.R. 456 [It is to the preamble more specifically that we are to look for the reason or spirit of every statute, rehearsing this, as it ordinarily does, the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the Legislature in making or passing the statute itself].

be found elsewhere in the Act.[30] The preamble may, no doubt, be used to solve any ambiguity or to fix the meaning of words which may have more than one meaning, but it can, however, not be used to eliminate as redundant or unintended, the operative provision of a statute.[31] It is also well-settled that when the language of the section is clear and explicit, its meaning cannot be controlled by the preamble.[32] In fact, if the provision contained in the main Act are clear and without any ambiguity and the purpose of the Legislation can be thereby duly understood without any effort, there is no necessity to even look into the Preamble for that purpose.[33] It is therefore not permissible for the Court to start with the preamble for construing the provisions of an Act, though it would be justified in resorting to it.[34]

Understood in the light of the above, the Court definitely bypassed the settled principles of statutory interpretation when it sought to interpret the definition of "domestic violence" in Section 3 in the light of the Preamble instead of the definition clause[35] contained in Section 2(q) of the PWDVA. The definition clause being clear, categorical and exhaustive[36] did not require the invocation of

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30 Union of India v. Elphinstone Spinning & Weaving Co. Ltd., (2001) 4 S.C.C. 139.

31 State of Rajasthan v. Leela Jain, A.I.R. 1965 S.C. 1296.

32 Maharao Sahib Shri Bhim Singhji v. Union of India, (1981) 1 S.C.C. 166.

33 Maharishi Mahesh Yogi Vedic Vishwavidyalaya v. State of M.P., (2013) 15 S.C.C. 677.

34 M/s. Burrakur Coal Co. Ltd. v. Union of India, A.I.R. 1961 S.C. 954. *See also* Tribhuwan Parkash Nayyar v. Union of India, (1969) 3 S.C.C. 99.

35 On the importance of definition clause, see Indira Nehru Gandhi v. Raj Narain, 1975 Supp S.C.C. 1 [Where a word is defined in the statute and that word is used in a provision to which that definition is applicable, the effect is that whenever the word defined is used in that provision, the definition of the word gets substituted].

36 *See* Mahalakshmi Oil Mills v. State of Andhra Pradesh, (1989) 1 S.C.C. 164; P. Kasilingam v. P.S.G. College of Technology, 1995 Supp (2) S.C.C. 348.

the preamble. Thus, the case of internal inconsistency seemingly made out by the Court between Sections 3 and 2(q) of the PWDVA was one of judicial-making and not the result of legislative classification. In so far as Section 3 lists out the range of acts that may constitute domestic violence, there is obviously no gender component to it but all those instances of domestic violence are qualified by the term 'respondent' used in the opening portion of the Section and hence it could not be described as gender neutral.

Similarly, the invocation of an external aid in the form of Section 6 of the Hindu Succession Act, 1956 to interpret Section 2(s) of PWDVA and establish a case of "glaring anomaly" was also uncalled for in the circumstances of the case.[37]

The next apparently anomalous consequence examined by the Court pertained to Section 17(2) of the PWDVA that leaves open the possibility of proxy violations whereby female members (other than those excepted by the erstwhile proviso) may evict or exclude the aggrieved person from the shared household at the instance of an adult male. While that may be a plausible concern, to be sure, as Gauba points out, except for Section 18 of the PWDVA, "there is virtually no effective mechanism provided for enforcement of the other promised reliefs".[38] However, it is submitted that such a proxy violation may potentially constitute domestic violence because the definition of "economic abuse" in Section 3(d) [Explanation I(iv)(c)] includes "prohibition or restriction to continued access to . . . the

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37 *See* Col. D.D. Joshi v. Union of India, (1983) 2 S.C.C. 235 [If the language of the statute is clear and unambiguous, and if two interpretations are not reasonably possible, it would be wrong to discard the plain meaning of the words used in order to meet a possible injustice. In such a situation, it would be impermissible to call in aid any external aid of construction to find out the hidden meaning].

38 R.K. Gauba, *Domestic Violence Law-A Recipe for Disaster?,* 8 S.C.C.(J) 29 (2007).

shared household" and Explanation II clearly lays down that "whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" depends upon the "overall facts and circumstances of the case". In any case, the immediate remedy against the male perpetrator would lie in an application for a protection order against the respondent under Section 18. Such a protection order may as well be *ex parte* under Section 23 of the PWDVA.

In view of the qualitative difference between the nature of violence sought to be outlawed under the PWDVA and typical female-on-female violence justifying the scheme of classification, it is not necessary to discuss the potential implications of a restrictive reading of the definition of "respondent" on the infractions committed by non-exempted class of female perpetrators of the orders passed under Sections 18 and 19 of the PWDVA.

The reliance on Section 26 to bring out an all-embracing import of the legislation was equally misplaced since Section 36 clearly provides that the provisions of the PWDVA shall be in addition to any other law for the time being in force thereby acknowledging the room for accessing similar or additional reliefs under different enactments and before different fora. As has been rightly substantiated, some of those remedies may be available upon invocation of the relevant provisions of the Maintenance and Welfare of Parents and Senior Citizen's Act, 2007, the Hindu Adoption and Maintenance Act, 1956 and the law of injunction and partition.[39]

It is thus clear that the Court overstated its case while

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[39] *See* Sanjoy Ghose, *A Gender-Neutral Domestic Violence Law Harms Rather Than Protects Women*, THE WIRE, Nov. 3, 2016, https://thewire.in/law/a-gender-neutral-domestic-violence-law-harms-rather-than-protects-women.

highlighting the apparent anomalies in the scheme of the PWDVA.

As regards the reliance on the Statement of Objects and Reasons, it has been held that reference to the Statement of Objects and Reasons is permissible for understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute and the evil which the statute sought to remedy.[40] However, it is submitted that while concluding that the object of the PWDVA was "to provide various innovative remedies in favour of women who suffer from domestic violence, against the perpetrators of such violence",[41] the Court failed to contextualise the violence sought to be proscribed under the PWDVA. In this connection, it has been rightly pointed out:

> Violence is not a "neutral", "objective" term. It implies an evaluation of a person's behaviour. An act that is considered non-problematic, routine, and normal in one era/polity/geography/community, can over time and through change in discourse, become de-normalized and classified as violence. Domestic violence is itself a classic example.[42]

Referring to the Preamble and the Statement of Objects, the

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40 *See* State of West Bengal v. Subodh Gopal Bose, A.I.R. 1954 S.C. 92; K.K. Kochuni v. State of Madras, A.I.R. 1960 S.C. 1080; State of West Bengal v. Union of India, A.I.R. 1963 S.C. 1241; S.C. Parashar, ITO v. Vasantsen Dwarkadas, A.I.R. 1963 S.C. 1356; P. Vajravelu Mudaliar v. Special Deputy Collector, Madras, A.I.R. 1965 S.C. 1017; K.S. Paripoornan v. State of Kerala, (1994) 5 S.C.C. 593; A. Manjula Bhashini v. M.D., Andhra Pradesh Women's Cooperative Finance Corporation Ltd., (2009) 8 S.C.C. 431State of Tamil Nadu v. K. Shyam Sunder, (2011) 8 S.C.C. 737

41 Hiral Harsora v. Kusum Harsora, (2016) 10 S.C.C. 165.

42 Aparna Chandra, *Women As Respondents Under The Domestic Violence Act: Critiquing The SC Decision In Harsora V. Harsora*, LiveLaw.in (Oct. 14, 2016), https://www.livelaw.in/women-respondents-domestic-violence-act-critiquing-sc-decision-harsora-v-harsora/.

Court concluded that the expression "violence of any kind occurring within the family" contained in the Preamble read with the Statement of Objects and Reasons referred to not only categories of violence but also the range of perpetrators meaning thereby that women other than those contemplated under the erstwhile proviso to Section 2(q) could also be the perpetrators under the PWDVA. However, such a conclusion is not warranted if the Preamble and the Statement of Objects and Reasons appended to the Act are read in the proper context.

The Statement of Objects and Reasons of the PWDVA makes explicit reference to the Vienna Accord of 1994, Beijing Declaration and the Platform for Action (1995) and the General Recommendation No. XII (1989) of the UN Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) while laying down the background of the proposed legislation. In fact, the Preamble to the PWDVA is couched in language which is almost identical to the preamble of General Recommendation XII of the Committee on the Elimination of Discrimination against Women. It is also worth noting here that the term "violence against women" has a distinct and specific connotation in the international legal literature on the subject.

Referring to the CEDAW, the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) has acknowledged that though the CEDAW "does not explicitly mention violence against women and girls, General Recommendations 12 and 19 clarify that the Convention includes violence against women and makes detailed recommendations to

States parties."[43] The UN Women further mentions that the 1993 UN Declaration on the Elimination of Violence against Women (DEVAW) was the first international instrument to define and elaborate upon the concept of 'violence against women'.

Thus, it becomes necessary to read the General Recommendations 12 and 19 in conjunction with the 1993 UN Declaration on the Elimination of Violence against Women (DEVAW). The DEVAW defines "violence against women" as 'gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'.[44] More importantly, the DEVAW recognises that:

> ***[V]iolence against women is a manifestation ofhistorically unequal power relations between men and women***, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that ***violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men***.[45]

Moreover, The Beijing Declaration and the Platform for Action (1995) makes explicit commitment[46] to the equal rights and

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43 *Global norms and standards: Ending violence against women*, UN Women, http://www.unwomen.org/en/what-we-do/ending-violence-against-women/global-norms-and-standards#sthash.ebk9cHnM.96kH8X2y.dpuf (last visited April 21, 2017).

44 Declaration on the Elimination of Violence against Women (1993), art. 1.

45 *Id.,* Preamble.

46 Beijing Declaration and the Platform for Action (1995), annex. I [8].

inherent human dignity of women and men and other purposes and principles enshrined in the DEVAW and goes on to reiterate the definition and the foundation of the violence highlighted in the document.[47]

Understood in the light of the above, it would become clear that the primary object of the PWDVA is to proscribe male-on-female violence rooted in the ideas of patriarchal masculinities. Thus, the restrictive definition of 'respondent' in the erstwhile section 2(q) of the PWDVA was in keeping with the object of the enactment. As regards the exception carved via the erstwhile proviso, the same is reconcilable with the assertion in the Statement of Objects and Reasons that the PWDVA is meant to complement the criminal remedy under Section 498A of the Indian Penal Code with a civil one.[48]

In any event, it has been pointed out that: "There may be no exact correspondence between Preamble and enactment, and the enactment may go beyond, or it may fall short of the indications that may be gathered from the Preamble."[49] Hence, the conclusion reached by the Court was based on a seemingly perfunctory reading of the Preamble and the Statement of Objects and Reasons of the PWDVA.

V. Conclusion

The foregoing analysis reveals that the PWDVA is essentially a statute seeking to outlaw gender-based violence and providing civil remedies to the victims of such violence and hence while interpreting

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47 *Id.*, annex. II, [113], [118].

48 Clause (2) of Statement of Objects and Reasons to the PWDVA.

49 Attorney General v. HRH Prince Ernest Augustus of Hanover [1957] 1 All E.R. 49.

its provisions, the inquiry must proceed on an understanding that the term 'violence against women' has a distinct and specific connotation having its foundation in patriarchal/hegemonic masculinity. Thus, it becomes imperative that an inquiry into the constitutionality or correct interpretation of an impugned provision of the statute be informed by these considerations. A seemingly beneficial approach whereby the Court adopts a gender-neutral approach to expand the range of perpetrators under the PWDVA by relying upon hypotheticals and penumbral possibilities is normatively undesirable as it inadvertently papers over the lived realities of the victims of domestic violence. The gross mischaracterisation of domestic violence against women also glosses over the fact that it constitutes a prime example of discrimination by men against women. Even as the Court recognised the possibility of females being used by an adult male to commit proxy violations, it failed to note that the same group of females may be used by unscrupulous and conniving males to file a battery of false and motivated counter-complaints against the aggrieved persons in an effort to threaten, intimidate and harass them. Thus, an expansive interpretation of the term 'respondent' may also result in undesirable practical consequences. When the scope of the enactment was thus carefully circumscribed, it was rather cavalier to bypass the settled canons of constitutional adjudication and statutory interpretation in an effort to ostensibly enlarge the protective reach of the impugned enactment. It is submitted that while ruling upon the constitutionality of statutes, the Courts must be sanguine as to the fairness of the settled canons of constitutional adjudication. This approach will not only guard against unwarranted judicial adventurism based on subjective notions of fairness and justice but will also help in producing a consistent and coherent body of law for future application.

ADMINISTRATIVE ROLE OF CJI IN CONFLICT WITH ADMINISTRATION OF JUSTICE: AN ANALYSIS

Kashish Makkar[*]

Abstract

The January 12th, 2018 press conference by the four senior-most judges of the Supreme Court has highlighted the extent of arbitrariness in the exercise of administrative powers vested in the CJI. One of the major criticisms that has been levelled is the discretionary nature of the administrative powers vested in the CJI's office. This criticism is especially significant given the administrative side of the Supreme Court can, to a very large extent, determine the judicial side of the Supreme Court. In this paper the administrative powers, specifically the power of constitution of benches, conferred on the CJI which can potentially conflict with the administration of Justice in the apex court have been studied. The powers vested on the CJI have been tested on the mantle of discretion available to the CJI in such exercise. Such a test is important because it is this discretion which provides a room for arbitrariness. And, it is this arbitrariness which is necessarily violative of Article 14 as was laid down in Royappa. The recent order of the SC reaffirming the CJI's power as the master of roster has been taken as a case in point for the analysis of this arbitrariness. The author has also suggested a sui generis solution to the problem of this arbitrariness. The solution necessarily comes from within the judicial system, whereby the bench constituting power of the CJI is termed as an administrative power and is thus made subject to Part 3 of the constitution. In such a situation, the public can seek recourse to an arbitrary exercise of powers via a writ petition. Moreover, in order to

[*] B.A., LL.B. (Hons.) student at National Law School of India University. The author would like to acknowledge Avni Kapoor of University of British Columbia for her inputs and assistance in the development of the paper.

provide a rider on the discretion, a suggestion to include two other senior-most judges in the constitution of benches has been examined. This could be similar to the collegium system. However, this has been suggested just as a safeguard, the real protection can only come via the challenge through writ petition of this administrative power in cases of an arbitrary exercise of the same.

1. **Introduction**

The recent tussle between Chief Justice Dipak Misra and Justice Chelameshwar, and the mud-slinging that ensued brought to light the extent of judicial impropriety at the apex court. While this polemic has made the public sceptical of the integrity of the apex court, at the same time there has been increased scrutiny from all quarters over the functioning of the Supreme Court. One of the major criticisms that the Supreme Court has been subject to is the vesting of the widely discretionary administrative powers in the hands of the CJI. The powers for administration of the SC are increasingly significant in a court that is dealing with hundreds of cases on a daily basis.

This is especially significant given that the administrative side of the Supreme Court can to a very large extent determine the judicial side of the Supreme Court. For instance, particular cases of significance for the government in power can be allocated by the chief justice to judges who have been trained in specific schools of jurisprudence to obtain favorable outcomes. Such an allocation can be done for appeasement of the government which determines the appointment of these judges in various commissions of enquiry, tribunals etc. or other vested interests. This is the classic case of how administrative powers can get into the way of administration of justice.

Therefore, it is evident that the discretionary nature of these powers can give rise to issues like arbitrariness in allocation. As A.V. Dicey said, "*Wherever there is discretion, there is room for arbitrariness*". Simply put, the vesting of powers must not be susceptible to the vice of arbitrariness, which is also the crux of Article 14 and is basic to rule of law. Hence, if the exercise of powers by the CJI is subject to arbitrariness, it would not be far-fetched to say that it is antithetical to Rule of Law and Art. 14 of the constitution.

This paper aims to study the administrative powers conferred on the CJI which can potentially conflict with the administration of Justice in the apex court. The paper examines the exercise of these powers vis-à-vis the principles of Rule of Law and doctrine of arbitrariness under Art. 14 of the constitution. The most significant among these administrative powers is that of constitution of benches for hearing of cases. This power has been discussed in specific detail. A possible provision to deal with this problem has also been discussed in length at the end of the paper. The researcher has used a combination of descriptive and analytical approach. Mostly, non-empirical tools have been used for data collection. However, personal observation has helped the researcher.. The Bluebook guide to legal citation, (19th edn.) has been followed throughout the paper.

2. **Non-Comparative Arbitrariness & Article 14**

The doctrine of arbitrariness under article 14 of the constitution has two facets. The first facet deals with the application of the principle of 'arbitrariness' to any form of 'equality' analysis under article 14. The doctrine lies at the heart of 'reasonable classification' test used to determine the rationale behind

discrimination.[1] This facet of the doctrine deals with classification or discriminatory treatment vis-à-vis others under Article 14. Therefore, this is more often than not termed as comparative unreasonableness.

The second facet takes into account cases where no standard for comparative evaluation is available. This is along the lines of the Wednesbury Principle, i.e., A reasoning or decision is Wednesbury unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it.[2] Its Indian counterpart was *Sharma Transport* v. *State of A.P.,*

> *" 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."*[3]

Therefore, while the first facet of the doctrine of arbitrariness is conditional upon some comparatively differential treatment between two persons or two classes of persons, the arbitrariness doctrine is not limited to that. The second facet increases the scope of the doctrine far beyond analysis relating to equality. Due to the introduction of the second facet, the doctrine can now be invoked for any sufficiently serious failure to base an action on good reasons. Under this approach to constitutional adjudication, one need not allege any discrimination vis-a-vis others. Therefore, it has enormously widened the scope of the application of article 14 to include unreasonable & discretionary public actions.

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1 Shri Ram Krishan Dalmia v. Shri Justice S.R. Tendolkar, 1958 AIR 538.

2 Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223.

3 Sharma Transport v. State of A.P. AIR 2002 SC 322.

The notion of doctrine of arbitrariness in relation to irrationality and unreasonableness and therefore, violative of article 14 was first developed in *E.P. Royappa* v. *State of Tamil Nadu,* wherein it was observed:

> *"Equality is a dynamic concept with many aspects and it cannot be 'cribbed, cabined and confined' within the traditional and doctrinaire limits. From the positivistic point of view equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies.... Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14"*[4]

The employment of the unreasonable, irrational and discretionary exercise of powers as yardstick in deciding upon the arbitrariness of administrative actions was discussed in *Om Kumar* v. *Union of India.* This marks the beginning of the using of non-comparative arbitrariness as a facet of Art. 14. The following was discussed:

> *"[W]here, an administrative action is challenged as 'arbitrary' under Article 14 on the basis of Royappa, the question will be whether the administrative order is 'rational' or 'reasonable' and the test then is the Wednesbury test. The Courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary."*[5]

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4 E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3, 38.

5 Om Kumar v. Union of India, (2001) 2 SCC 386.

This was followed in *Shrilekha Vidyarthi* v. *State of U.P.*[6] In the instant case the state government had passed an order which in effect removed all the existing district government counsel for appointing fresh ones in their place. The court held that even though the appointments of the counsel were contractual they have to be governed by the requisites of reasonableness and non-arbitrariness inherent in article 14 and the principle of the rule of law. It went on to observe:

> *"The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary"*

Therefore, article 14 of the constitution has been interpreted to be wide enough to include any discretionary, unreasonable or irrational exercise of power by any public authority.

3. **Administrative Powers of the CJI: An analysis**

The Chief Justice of India with respect to other justices of the Supreme Court is *Primus inter Pares,* i.e., first amongst equals.[7]

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6 Shrilekha Vidyarthi v. State of U.P. 1991 AIR 537.

7 Kamini Jaiswal v. Union of India & ors., Writ Petition [criminal] no.176 of 2017, [Supreme Court of India].

However, his role on the administrative side makes his stature higher than other justices. This is even more relevant given the effect of administrative powers on the judicial functions. The array of powers enjoyed by the CJI is very wide in nature. These powers are vested by virtue of constitutional provisions, Supreme Court rules and conventions.

In order to analyse the discretion enjoyed by the CJI in terms of these powers, it is imperative to analyse these powers in the first place.

3.1 Administrative powers vested under the constitution

There is plethora of administrative powers vested on the CJI by the constitution itself. Therefore, it cannot be denied that the heightened stature of the CJI is guaranteed in the constitution itself. Some of the powers vested on the CJI are directly related to maintaining the functioning of the SC by ensuring adequate strength of the judges in the SC. For instance, Article 127 gives the CJI power to appoint ad hoc Supreme Court judges. Similarly, Article 128 confers the power on the CJI to appoint retired SC judges to act as the judge of the court. Both of these powers require the prior consent of the president,[8] therefore, these powers cannot be termed discretionary. Even if there is any irrational discretion it would be ruled out on account of prior consent of the president.

Special administrative powers under Articles 257, 258, and 290 have also been vested with the CJI. These powers give the CJI the ability to appoint arbitrators to resolve certain financial disputes

8 IND. CONST., Art. 127,128.

between the centre and the states.[9] Since, these appointments have mostly nothing to do with the functioning of the judiciary in the SC, an analysis about their nature is beyond the scope of this paper.

There is a wide gamut of other powers too, for instance under Article 130 the CJI with the president's approval can change the seat of the SC to be outside of Delhi.[10] Another significant power that is vested in the CJI is under Article 146. This article gives the CJI powers to appoint officers and servants of the Court. In fact it vests the power to frame rules regarding their appointment in the hands of the CJI.[11] While the former has not been exercised ever, the fact that it requires Presidential consent again rules out discretion. The latter power can be termed to be discretionary. However, in light of the domain of the latter power not conflicting with judicial exercise of powers of the CJI in the SC as officers, any discretion whatsoever doesn't hamper the administration of justice.

3.2 Administrative Powers vested under the Supreme Court Rules

Under Article 145 of the Constitution, the Supreme Court with the approval of the President can make rules for regulating the practice and procedures of the court.[12] The Supreme Court Rules, 2013 and Handbook on Practice and Procedure and Office Procedure, 2017 are the rules that govern the procedure of the Supreme Court. Various administrative powers are vested on the CJI by virtue of these rules. It is these powers which can be extremely discretionary in nature. There is a wide gamut of powers that are vested in the CJI. In order to analyse the powers based on the

9 IND. CONST., Art. 257,258, 290.
10 IND. CONST., Art. 130.
11 IND. CONST., Art. 146.
12 IND. CONST., Art. 145.

broader theme of discretion that can be exercised, the same have been divided into two parts for better analysis.

3.2.1 Powers with limited discretion

Not all powers exercised by the CJI provide him with an absolute discretion and thus cannot be called to be arbitrary. For instance, it is given in the rules that every cause, appeal or matter shall be heard by a Bench consisting of not less than two Judges nominated by the Chief Justice.[13]

Now, it is clear that the nomination of the justices to the bench is as per the sole discretion of the CJI. However, this is not the case generally. Fresh cases are allocated as per subject category through automatic computer allocation, unless coram is given by the Chief Justice or the Filing Counter.[14]

Therefore, the discretion is generally restricted to the extent that the coram is provided by an automatic computer allocation system, which determines the coram on the basis of the subject matter to the case. It matches it with the field of expertise of the judge. For instance, Justice Ranjan Gogoi, would generally preside over tax matters.[15] Other relevant factors include engagements of the judge, urgency of the matter etc. The CJI can at any time change the composition or appoint a bench that he desires, despite the algorithm. However, this has generally not been observed empirically, except in the recent past. A study regarding the same has been taken up separately.

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[13] Supreme Court Rules (SCR), Order VI Rule 1, (2013).

[14] Handbook on Practice and Procedure and Office Procedure, Chapter XIII, Cases Coram and Lisitng, (2017).

[15] DC of IT, Bangalore v. Ace Multi Axes System, [2017] 88 taxmann.com 69 (SC); CIT v. Modipon Ltd. [2017] 87 taxmann.com 275 (SC)

3.2.2 Powers with un-channeled discretion

The Supreme Court Rules, 2013 provide un-channeled discretion to the CJI in certain cases. For instance, the Chief Justice can direct matters of urgent nature to be heard by a Judge sitting singly,[16] or to a division bench during summer vacation or winter holidays.[17] A similar discretionary power is vested in the Chief Justice whereby he can by a special or general order, direct a particular class or classes of cases to be listed before a particular Bench.[18] For instance, Chief Justice Dattu, as he then was, in December 2014 set up a special Social Justice Bench under Justice Lokur and Justice U.U. Lalit. The bench was set up to hear important issues affecting a large number of deprived and discriminated population, expeditiously. Therefore, this is one wide discretionary power in the hands of CJI.

Another very wide discretionary power is the power that the Chief Justice has to direct the Registrar for re-allocation of judicial work. This power can be exercised in cases of 'contingencies'. The exact scope has not been defined, however, it is clear that this power can be used to exercise unmatched control over SC.

There is yet another power, which has been the subject of the tussle between CJI and Justice Chelameshwar recently. This power relates to appointing of a larger bench by the CJI on reference being made from the Division Bench. This power is provided as:

> *"Where, in the course of hearing of any cause, appeal or other proceeding, the Division Bench considers that the case should be dealt with by a*

16 SCR, Order VI Rule 6, (2013).
17 SCR, Order II Rule 6, (2013).
18 Handbook on Practice and Procedure and Office Procedure, Chapter IV, General, (2017).

larger Bench, it shall refer the case to the Chief Justice, who shall thereupon constitute such a Bench for hearing it."[19]

This effectively means, whenever a case is referred by a two-Judge Bench to a larger Bench, the coram shall be allocated by the Chief Justice. After the Reference is answered by a larger Bench, wherever required, the case shall be placed before the Chief Justice for listing before an appropriate Bench for hearing and decision in accordance with the opinion of the larger Bench. Another similar power in this regard is the power given to the CJI where if a Bench directs listing of a case before another Bench, particular Bench, appropriate Bench or larger Bench, as the case may be, it will be the orders of the CJI that will list the matter before a particular bench.

These are the powers which heighten the stature of the CJI's office above other justices. Most importantly, these powers are vested with the CJI to be exercised on his discretion. And, there are no checks on the same, therefore, it is these powers which are the subject of arbitrariness in their exercise. In the following section it is these powers which will be the subject of analysis.

4. **Arbitrary Exercise of Administrative Power: A case in Point**

"*Discretionary Authority must mean insecurity for legal freedom.*"

-A.V. Dicey

As discussed above, the powers vested in the CJI by the Supreme Court Rules provide un-channelled discretion to the CJI. Such discretion can more often than not run into arbitrariness. The arbitrariness in this case is the non-comparative facet of arbitrariness as discussed in Chapter 2. This is anti-thetical to rule of law and is

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19 SCR, Order VI Rule 2, (2013).

violative of article 14 of the constitution. Such an arbitrary exercise can be analysed by understanding a case in point, i.e., the recent Master of Roster controversy.

Recently, a special hearing of 5 judges, headed by CJI was convened to determine who has the authority to determine the constitution of larger benches of the SC.[20] As per the SC rules, which has been reiterated in the order, it is clear that it is the CJI who has the prerogative to constitute larger benches of the SC when the same has been referred by the division benches.[21] However, it is this prerogative of constituting larger benches, that led to arbitrariness in exercise of the administrative powers by the CJI in the instant case.

After passing the order that it is the CJI's prerogative to constitute larger benches of SC, the CJI constituted a bench of 3 justices to hear a petition that sought appointment of an SIT to investigate charges of corruption in the highest level of the judiciary.[22] In order to understand the prayer sought in the petition, it is imperative to understand the context for the petition.

The CBI has been investigating allegations of a conspiracy in which a retired justice of Orissa High Court, I.M. Quddusi, promised a party to get a favourable decision from the Supreme Court, in exchange of gratification. The case that I.M. Quddusi was alleged to influence was heard by a bench having CJI as one of its members.[23] The facts allege corruption at the highest levels of judiciary and can potentially implicate all the members of the bench that was hearing

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20 CJAR v. Union of India & ors.,Writ Petition (Crl.) No.169 Of 2017.

21 *Supra* note 19.

22 *Supra* note 7.

23 Vakasha Sachdev, *Divisions in Supreme Court? Chief Justice Annuls Colleague's orders*, THE QUINT, (11/11/17), at:https://www.thequint.com/news/india/cji-unprecedented-order-reverses-sc-decision-judicial-bribery.

the case, including the CJI.

It was these allegations of corruption on this particular of bench of the SC for which the petitioner CJAR and Kamini Jaiswal sought an SIT enquiry. It was here that the conflict regarding the arbitrary exercise of administrative powers of CJI began, as the CJI had to constitute a bench for hearing the petition.

In effect, a bench constituted by the CJI was supposed to determine whether an SIT should be appointed to investigate a case that can potentially implicate the CJI. This clearly amounted to conflict of interest. Moreover, it is a clear violation of the principle 'Nemo Judex in Causa Sua' which is the basic principle of Natural Justice.

It is here that the administrative powers of the CJI are called into question as being unreasonable, irrational and widely discretionary to the extent that they can be classified as arbitrary under the Wednesbury Principle and Non-comparative arbitrariness under Article 14 of the constitution. Such an action on the part of the CJI also potentially violates Article 21 of the Constitution of India to the extent that Right to Justice Delivery is hampered. This is on account of the fact that a violation of Principles of Natural Justice by a Court necessarily amounts to a denial of a just and fair adjudicatory mechanism to citizens, which is the primary requirement of providing citizens access to justice under Article 21.[24]

This is reflective of the administrative role of CJI overpowering the administration of Justice.

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24 Anita Kushwaha v. Pushp Sudan, (2016) 8 SCC 509.

5. **Resolving the Conflict: The Way Forward**

The previous chapter clearly portrays how the exercise of administrative powers by the CJI can be unreasonable, irrational and discretionary to the effect of violating the principle of *Nemo Judex in Causa sua*. Such an exercise of power can be termed 'arbitrary' under the non-comparative arbitrariness facet of Article 14 and can also be found to be violative of Article 21 of the constitution.

Therefore, in this section, the author proposes a method for reconciling these administrative powers and restoring the administration of justice in the Apex Court. The approach involves bringing a reform from within the judiciary and hence would necessarily involve challenging the status quo via litigation through the means of a writ petition. This chapter would essentially highlight on the logistics that are required to be figured out before proceeding with the suggested course of action.

Hence, quite naturally, the logistical analysis begins with determining preliminary logistics for the filing of writ petition, goes on to determine the grounds on which the same should be filed and accepted, and finally ends with evaluating the potential of the writ petition to bring a real change in the status quo at the Apex Court.

5.1 Preliminary Logistics of filing a writ petition:

5.1.1 The Petitioner:

In *S.P. Gupta* v. *Union of India,*[25] the Supreme Court categorically observed that any member of the public or social action group acting bonafide can invoke the writ jurisdiction of the Supreme

25 S.P. Gupta v. Union of India, (1981) Supp SCC 87.

Court under Article 32 of the constitution, in order to seek redressal against a violation of a fundamental right where the interests of general public are involved.[26]

As aforesaid, in the instant case, the arbitrary exercise of administrative powers on the part of the CJI has clearly led to a violation of Principles of Natural Justice. Quite significantly, the Supreme Court has laid down that the protection of Principles of Natural Justice is at the core of a fair and just adjudicatory mechanism.[27] And, the provision of such an adjudicatory mechanism is vital under the Right to Justice Delivery which is guaranteed under Article 14 & 21 of the constitution.[28] This is the *locus standi* for the petitioner.

Therefore, any member of the public can move the Apex Court under Article 32 of the constitution via a writ petition claiming a violation of Fundamental rights of public in general on account of the arbitrary exercise of power by the CJI.

5.1.2 The Respondent:

Quite naturally, the respondent in the writ petition is the state. However, only the authorities prescribed under Article 12 of the constitution are answerable to a writ petition if they breach a fundamental right in the course of their actions. Judiciary or the Supreme Court is not one of the authorities which has been covered under the definition of State under Article 12. But, the definition is not exhaustive as well. The term 'other authorities' in Article 12 suggests that the definition is inclusive. Therefore, '*The Registrar,*

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26 Id, ¶18.
27 Anita Kushwaha, *supra* note 24, ¶34.
28 Anita Kushwaha, *supra* note 24, ¶33.

Supreme Court of India' and '*Union of India*' can be impleaded as the respondents if the CJI, in his administrative capacity, can be proved to be covered within the definition of State under Article 12.

The Supreme Court in *Prem Chand Garg* v. *Excise Comm, UP*,[29] has held that Judiciary while exercising administrative powers is covered under the definition of state under Article 12 and is subject to the Fundamental Rights guaranteed to citizens under Part III of the constitution.

Clearly, in the instant case, the dispute has arisen on account of the exercise of the administrative powers by the CJI, hence, following *Prem Chand Garg,* the CJI's administrative powers have to be covered under the definition of State under Article 12.

In any case, even if the above argument would not suffice, the landmark ruling of the Apex Court in *A.R. Antulay* v. *R.S. Nayak*[30] comes to the rescue of the petitioner in the instant case. The Supreme Court in *Antulay* categorically held that the order of a Court be it administrative or judicial, against the provisions of the Constitution or in violation of the principles of natural justice, can always be remedied by the Court *ex debito justiitae*.[31]

Therefore, the CJI's exercise of administrative powers can be made answerable via a writ petition if it is found to be in violation of Part III of the constitution. Hence, the *Supreme Court of India through its registrar* and *Union of India* can be impleaded as a respondents in the instant case.

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[29]Prem Chand Garg v. Excise Commissioner, U.P. 1963 Supp. (1) SCR 885.
[30] A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602
[31] Id, ¶238.

5.2 Grounds for filing the Writ

For the acceptance of the writ petition, the petitioner must satisfy a violation of a Fundamental Right resulting from the arbitrary exercise of powers by the CJI. A violation of Fundamental Rights in the instant case can be done on two counts, *first,* the exercise of powers by the CJI qualifies as non-comparative arbitrariness and is *per se* violative of Article 14 of the Constitution and, *second,* the exercise of powers by the CJI violates the Right to Justice Delivery guaranteed under Article 14 & 21.

5.2.1 Arbitrary exercise of powers, per se violation of Article 14.

As explained in Chapter 2, so long as the exercise of discretionary powers vested in an authority can be proved to be arbitrary and unreasonable, it can be held to be violative of Article 14 of the constitution. As has been held in *Om Kumar* v. *Union of India*,[32] if an administrative action is challenged as arbitrary under Article 14, the only questions that the court will determine are:

(a) Whether the administrative conduct is 'irrational' or 'unreasonable'?

(b) Whether his view is one which no reasonable person could have taken- The Wednesbury Unreasonableness.

(c) Whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration

If the answer to all of these questions is affirmative, then it would amount to a violation of Article 14.

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32 *Supra* note 5.

As per the turn of events explained in Chapter 4, i.e., the CJI's appointment of a 3-judge bench to hear a petition that sought appointment of an SIT to inquire the allegations of corruption levelled on him, violates the Principle of 'Nemo Judex in Causa Sua'. This is on account of the fact that even when there's a real likelihood of bias on the part of the judge in carrying out his functions, the function must not be carried forward.[33] This principle is a principle of Natural Justice. Violation of this principle by the CJI amounts to a conduct that is unreasonable on his part.

Similarly, no reasonable person in his place would have alienated a principle of Natural Justice, as it is the core of a fair and just adjudicatory mechanism.[34] One of the most relevant factors for consideration from an administrative point of view is that one who has been vested with discretion must preserve principles of Natural Justice in exercising the same. Breaching these principles amounts to acting illegally.[35]

Therefore, on all the counts this administrative action is arbitrary and hence, violates Article 14.

5.2.2 Violation of Article 14 & 21 on account of violation of Right to Justice Delivery

It was clearly and categorically laid down in *Anita Kushwaha*, that access to justice is a vital part of Right to Life under Article 21 of the Constitution.[36] The court stressed that since "life" includes a bundle of rights that makes life worth living, hence, there can be no

33 Jiwan K. Lohia v. Durga Dutt Lohia, AIR 1992 SC 188.
34 Anita Kushwaha, *supra* note 24, ¶34.
35 J. Mahopatra & Co. v. State of Orissa, (1984) 4 SCC 103.
36 Anita Kushwaha, *supra* note 24, ¶31.

juristic basis for holding that denial of "access to justice" will not affect the quality of human life. Therefore, access to justice is within the purview of right to life guaranteed under Article 21.[37]

The court further added that one of the primary requirements for providing the citizens access to justice is to set-up an adjudicatory mechanism which must not only be effective but must also be just, fair and objective in its approach.[38] And, the procedure which the court adopts for adjudication must be just and fair, and should uphold the well recognized principles of Natural Justice.[39]

The exercise of administrative powers by the CJI in appointing a bench to adjudicate Kamini Jaiswal's petition violated the Principles of Natural Justice. This in turn violates the fundamental right of Justice Delivery guaranteed under Right to Life. Hence, the writ petition that has to be filed challenging the exercise of such discretionary powers on the part of CJI must be held to be maintainable on this ground.

5.3 Potential of the Writ Petition to bring a change to the status quo

The final straw in the matter will be the listing and then the hearing of the writ petition. There can be two outcomes that can follow, *one*, where the CJI again chooses to be the master of roster and allocates the writ petition to a bench whose composition would be determined by him, or *two,* wherethe CJI recuses himself from the entire process and the writ goes for adjudication, without even a likelihood of bias, and the court lays down the law for future.

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37 Anita Kushwaha, *supra* note 24, ¶31.
38 Anita Kushwaha, *supra* note 24, ¶34.
39 Anita Kushwaha, *supra* note 24, ¶34.

In case the first scenario unfolds, it would mark the epitome of violation of the principle of *Nemo Judex in Causa Sua.* Therefore, it is highly unlikely that such a situation would unfold as such a move on the part of the CJI is bound to create a lot of ripples across circles and would subject the office of CJI to widespread criticism. However, in the unlikely circumstance where the bench is determined by the CJI, it would necessitate the need on the part of policymakers to formulate a framework that restricts the discretion enjoyed by the CJI in exercise of his Administrative powers.

In case the second situation unfolds, which is anyway more likely to happen, the bench would recognize the arbitrariness in CJI's exercise of powers and how it violates Art 14 & 21. As a result, it would have to lay down the law in order to permanently settle the conflict where the exercise of administrative powers hampers administration of justice, thus bringing a change to the status quo.

Hence, in both the paradigms, there will be a need for a reform in the framework governing the exercise of administrative powers at the Apex Court. Therefore, a recommendation for the same is in order.

A Recommendation for Change in the Law

In the status quo the only way forward, without compromising the independence of judiciary, is to increase the participation of the senior-most judges in the exercise of administrative powers.

Such a move is not unprecedented. The appointment of judges to higher judiciary under the constitution was envisaged to be done by the president in consultation with 'such of the judges of the

Supreme Court'.[40] In the initial years, the mechanism for appointment involved President appointing new judges to constitutional courts in consultation with the CJI.[41] However, by the third judges case, it was interpreted to be the CJI and the 4 senior-most judges of the Supreme Court.[42] Such a dilution was done in order to keep a check at the discretion and concentration of powers in the hands of the CJI.[43]

The same can be done in the instant case, an administrative body of atleast 3 seniormost judges overseeing the exercise of administrative powers by the CJI can be appointed. This body will act as a check on the discretion enjoyed by the CJI, which is the cause for the conflict in the first place.

Hence, a potentially, permanent solution can be found to this conflict.

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40 IND. CONST., Art. 124.
41 S.P. Gupta v. Union of India, (1981) Supp SCC 87.
42 Special Reference No. 1 of 1998, *In re*, (1998) 7 SCC 739.
43 Supreme Court Advocates on Record Association v. Union of India, (1993) 4 SCC 441.

1976 TO 2017: THE TRANSFORMATION OF THE TRIBUNAL SYSTEM IN INDIA

Anamika Kundu[*] *and Vasavi Khatri*[†]

Abstract

Tribunals in India owe their existence to the 42nd amendment that brought Art. 323A and Art. 323B into the Indian Constitution. The constitutionality of Administrative Tribunals Act has been challenged in several judgements and this paper studies the impact of some of those landmark judgements. This paper supports the criticisms that L. Chandra Kumar judgement has received. Further, the paper studies the recent Finance Act and argues how these amendments will hinder the functioning of tribunals as a mechanism to reduce judicial delays. Lastly, the paper also offers some recommendations to ensure that the objective with which these tribunals were established can still be effectively realized.

I. Introduction

Courts in India are known to have a huge backlog of cases, one of the most important causal factors of which is said to be the inherent procedural limitations of the judiciary.[1] It was also increasingly felt that judges were not equipped to deal with nuanced technical issues. And thus, the need based genesis of specialized adjudicatory bodies like tribunals took place.

Before launching into the history of tribunalisation, it is

* B.A., LL.B. (Hons.) student at West Bengal National University of Juridical Sciences.

† B.A., LL.B. (Hons.) student at National Law University of India, Bangalore.

1 Arun Roy V. and Vishnu Jerome, *Administrative Tribunals in India – A Welcome Departure from Orthodoxy?* 12 STUDENT ADVOC. 60, 60 (2000) (Describing the procedural limitations of the judiciary and defining tribunals).

imperative to understand the meaning of a "tribunal". Lexically, tribunals are "judgement seats; a court of justice; board or committee appointed to adjudicate on claims of a particular kind".[2] The term has not been defined in the Constitution of India but its meaning can be deduced from Supreme Court authorities. They are "adjudicatory bodies (except an ordinary court of law) constituted by the State and invested with judicial and quasi-judicial functions, as distinguished from administrative and executive functions".[3]

II. Evolution of Tribunals in India

The Constitution (Forty-Second) Amendment Act, 1976[4]

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2 *Id.*

3 *Id.*

4 India Const. Art 323A and Art 323B, *amended by* The Constitution (Forty Second Amendment) Act, 1976.

323A. Administrative tribunals.- (1) Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.

(2) A law made under clause (1) may—

(a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States;

(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;

(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;

(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints referred to in clause (1);

323B. Tribunals for other matters (1) The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature has power to make laws

(2) The matters referred to in clause (1) are the following, namely:

(a) levy, assessment, collection and enforcement of any tax;

added Art. 323A and Art. 323B in the Constitution of India[5]. Pursuant to this amendment, the Administrative Tribunals of India Act (*hereinafter* "ATA") of 1985[6] was enacted. The constitutionality of Section 28 of ATA and Article 323A, which jointly excluded the jurisdiction of all courts except that of the Supreme Court under Article 136, was challenged before a five-judge bench of the Supreme Court in *S.P. Sampath Kumar* v. *Union of India*.[7] It was held that an amendment which did not create a "void"[8] by excluding the jurisdiction of High Courts under Articles 226 and 227, but established another effective mechanism such as that of tribunals would be deemed constitutional.[9] Moreover, such an amendment would not violate the *basic structure* doctrine. According to Misra, J. High Courts were established a long ago and thus were a trusted form of redressal. Thus, merely giving all the powers of the High

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(b) foreign exchange, import and export across customs frontiers;
(c) industrial and labour disputes;
(d) land reforms by way of acquisition by the State of any estate as defined in Article 31A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way;
(e) ceiling on urban property;
(f) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in Article 329 and Article 329A;
(g) production, procurement, supply and distribution of foodstuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods;
(h) offences against laws with respect to any of the matters specified in sub clause (a) to (g) and fees in respect of any of those matters;
(i) any matter incidental to any of the matters specified in sub clause (a) to (h)

5 Constitution of India, Jan. 26, 1950

6 DD Basu, COMMENTARY ON THE CONSTITUTION OF INDIA 5540 (8th ed. 2011).

7 Arun Roy V. and Vishnu Jerome, *Administrative Tribunals in India – A Welcome Departure from Orthodoxy?* 12 STUDENT ADVOC. 60, 64 (2000) (Appeal against the decision of Administrative tribunals)

8 S.P. Sampath Kumar v. Union of India, (1987) 1 S.C.C. 124, ¶8.

9 *Id.*, ¶4.

Courts to the tribunals were not enough, there had to be substantial fulfillment of the powers conferred.[10] Therefore, using clause 2(d) of Article 323A, the Act could exclude the High Court's jurisdiction if it could show that it would function as effectively as the High Courts in matters of judicial review.[11]

A decade later, a seven-judge bench in *L. Chandrakumar* v. *Union of India*[12] grappled with the question of whether the superintendence of High Courts over all tribunal courts situated in their territory was a part of the *basic structure* or not. An Andhra Pradesh High Court judgement,[13] which had been impugned in one of the matters of *Chandrakumar* held that Article 323(2)(d) is unconstitutional as it empowers the Executive to exclude the jurisdiction of High Courts under Article 226 along with Section 28 of the ATA[14]. The High Court analysed various provisions of the Constitution and concluded that only the Supreme Court and High Courts have the power to decide whether statutes passed by bodies of the 'State' are valid or not. Judges in the case stated that *Sampath Kumar* did not consider earlier Supreme Court decision that explicitly held that Article 226 and Article 32 was the crux of judicial review in India and formed an important part of the basic structure. [15] Taking into account MN Rao's judgement,[16]*Chandrakumar* held that High Courts and Supreme Court were vested with the power of judicial review under Article 226 and Article 32 respectively. Furthermore, the constitutional safeguards such as judicial review that ensured independence of higher judiciary were not available to the lower

10 *Id.*, at ¶21 (Misra J).
11 *Id.*
12 L. Chandrakumar v. Union of India, A.I.R 1997 S.C. 1125.
13 Sakinala Harinath v. State of Andhra Pradesh, (1994) 1 APLJ 1.
14 A.I.R 1997 S.C. 1125, ¶30.
15 *Id.,* at , ¶32.
16 (1994) 1 APLJ 1, ¶55.

judiciary. These safeguards not only bestow power on the courts to strike down laws, but also contain provisions which give clear guidelines regarding tenure, salaries of judges, etc. Such mechanisms allow for the higher judiciary to function in isolation from other bodies of the State.[17] Therefore, the "exclusion clause" under Article 323A and Section 28 of the Administrative Tribunals Act was unconstitutional[18]. This judgement effectively overruled the *Sampath Kumar*[19] decision and laid down that judges of tribunals could never be effective substitutes to the higher judiciary. It clarified that the Administrative Tribunals Act was made with an intention to supplement the existing judiciary, and not to substitute it. The Court opined that tribunals would be subject to scrutiny before at least Division bench of a High Court, thus enabling litigants to first approach the High Court under Article 226.[20] The supervisory jurisdiction of the High Court is important to ensure the accountability of tribunals as for a case to go to the Supreme Court under Article 136, has to be of an exceptional nature, resulting in inaccessibility to justice.[21]

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17 *Id.,* at, ¶78.

18 The Administrative Tribunals Act, No. 13 of 1985, Section 28.
28. Exclusion of jurisdiction of courts except the Supreme Court under article 136 of the Constitution. —On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any court except—
(a) the Supreme Court; or
(b) any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947 (14 of 1947) or any other corresponding law for the time being in force, shall have], or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or such service matters.

19 (1987) 1 S.C.C. 124.

20 Basu, *supra* note 6, at 10692.

21 V.S. Deshpande, Judicial Review of Legislation, 15 J.l.L.I. 531 (1973).

While the judges in *L. Chandrakumar*[22] were emphatically focused on ensuring that High Courts enjoy the power of judicial review, they did not discuss the power of judicial review exercisable by the tribunals. The pronouncement was merely to the effect that tribunals could not exercise this power to the exclusion of High Court and Supreme Court. The opinion of the court for superintendence was because unnecessary litigation would be disposed of before it went to the High Courts and that the decision of the tribunal would assist the Courts in reaching a comprehensive decision on merits.[23]

This marks the beginning of Indian judicial system's journey along an unprecedented path to reshape the litigation process in the country. Was it in the best interest of the country to bring every issue under the ambit of judicial review of Supreme Court and High Court? What are the implications of this decision on the worsening legal logjam of the country?

III. The Finance Act, 2017 And its Implications on Tribunals

The recent Finance Act passed by the Lok Sabha in March, 2017 has raised several questions on the existing tribunal system due to the amendments proposed by the Act which aim to merge some of the tribunal bodies and do away with some in order to cut down on administrative costs and apparent ineffectiveness.

There have been several amendments proposing the restructuring of twenty-six tribunals. The suggestion to merge eight existing tribunals with the remaining nineteen has raised quite a few eyebrows. For instance, the suggestion to merge the Airports

22 A.I.R 1997 S.C. 1125.
23 *Id.,* at ¶91.

Economic Regulatory Authority Appellate Tribunal with the Telecom Disputes Settlement and Appellate Tribunal makes an odd combination as it is unlikely for the latter to have members with specialized knowledge regarding airports or vice versa.[24] Such suggestions possibly betray the government's priorities - monetary expenditure over speedy justice. Further, such mergers do not seem to be an effective solution to end the backlog of administrative cases.

Currently, all rules pertaining to the appointment, removal etc. of members are specified in their respective Acts. But §179, Finance Act[25] has now directed the transfer of this power to the government. This is in contravention to the Supreme Court's holding in *Madras Bar Association v. Union of India* where it stated that the executive must not interfere in the appointment process to maintain the independence of the judiciary[26]. Judges are impeached from the High courts and Supreme Court by way of vote in the Parliament.. The statutes establishing the tribunals mandate the removal of a member only through a Central Government order after an inquiry has been is conducted by a judge of the Supreme Court. For example, a judge in the National Green Tribunal (*hereinafter* 'NGT') could be only removed through an order by the Central Government after a thorough enquiry has been conducted by a judge of the Supreme Court.[27]. However, with the new rules made by the legislature under the Act, there has been elimination of such a mandate. Now, if the Government receives a complaint against a member, the ministry which has established the tribunal is authorized to look into the

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24 Prianka Rao, *Finance Bill 2017: Independence of tribunals could be affected,* HINDUSTAN TIMES, Apr. 14, 2017. http://www.hindustantimes.com/analysis/finance-bill-2017-independence-of-tribunals-could-be-affected/story-StaETXJ9sjqNHqRjbriCTI.html

25 The Finance Act of 2017 §179.

26 Madras Bar Association v. Union of India, A.I.R 2015 S.C. 1571.

27 The National Green Tribunal Act, 2010, § 10(2).

complaint.[28] The need for inquiry too is now decided by the ministry which makes a request to the concerned committee as mentioned in Rule 7.[29] This committee is then formed by the ministry which has established the said tribunal.[30]

Rule 4 lays down the method for appointment which states that it is the central government that shall do it on consultation with the Search-cum-Selection Committee. This committee again is mainly constituted by government officials which is a probable violation of the tribunals' independence.[31] It is to be noted that only three out of the nineteen tribunals follow the precedence of the NCLT case which is has been followed by the *Madras Bar Association* case specifying the procedure of tribunal appointments.[32] Every tribunal has a different composition for the search committees. For example, the committee for the selection of the Chairman of the Central Administrative Tribunal (*hereinafter* 'CAT'), the schedule prescribes two members of the judiciary, two members from the government and one expert selected by the Central Government. Whereas, in case of the Intellectual Appellate tribunal, the composition is one from the judiciary, two from the Executive and two nominated experts with no mention of the requisite qualifications.[33]

The process and composition laid down by the rules is

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28 The Tribunal, Appellate Tribunal and Other Authorities (Qualifications, Experience and Other Conditions of Service of Members) Rules, 2017, Rule 8(1).

29 *Id.,* Rule 8(2).

30 *Id.,* Rule 7.

31 *Id.,* Rule 4.

32 *See* Prashant Reddy https://spicyip.com/2017/06/government-of-india-launches-occupy-the-tribunals-movement-with-new-rules-on-appointments-to-the-ipab-18-other-tribunals.html

33 The Tribunal, Appellate Tribunal and Other Authorities (Qualifications, Experience and Other Conditions of Service of Members) Rules, 2017, Schedule.

discomforting as the complaints will be scrutinised by the body who is supposed to be held accountable for the misdoings. For instance, if a complaint is filed against a judicial member of the NGT, the complaint shall be looked into by the Ministry of Environment, the body that should be answerable in the first place.[34] Again, in case of the Intellectual Property Appellate Board, it has the power to decide matters of the Patents Office and the Trade Marks Registry. Both these offices function under the Department of Industrial Trade and Policy which has been given powers to scrutinise complaints.[35]

Coming to the problem of compensation, the members who currently hold these positions in the tribunals to be merged will be paid salary equivalent to three months for the premature termination of their office. §180, Finance Act[36] provides for absorbing the officers and other support staff of the eight tribunals into the principal ministry but there is no fall back option for the tribunal judges except the inadequate compensation. There has been no clear stance on whether they are entitled to any kind of retirement benefits either.[37] Every tribunal is set up by special acts which prohibit change of service terms once appointed. But the amendments do not pay them for the remainder of their term which may disincentivise competent individuals from accepting such appointments.

Regarding terms of service, for instance, §417A has been

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34 Prashant Reddy, *Has the Government signed the death warrant for the judicial independence of 19 tribunals?*, Scroll, (June 5, 2017 5:00 pm) https://scroll.in/article/839588/has-the-government-signed-the-death-warrant-for-the-judicial-independence-of-19-tribunals.

35 *Id.*

36 The Finance Act of 2017 §179.

37 Prashant Reddy, *Finance Bill 2017 debate: Changes made to tribunals are unconstitutional and ill-considered,* SCROLL, (Mar. 27, 2017 7:30 am)https://scroll.in/article/832884/changes-made-to-tribunals-in-the-finance-bill-are-unconstitutional-and-ill-considered

inserted into the Companies Act which will provide for the qualifications and terms and conditions of service of the Chairperson and Members, and this section is to be governed by §184 of the Finance Act.[38] This essentially gives the government complete power to decide who to appoint in such tribunals, thereby, violating the doctrine of separation of powers which forms the basic structure of the Constitution. Survival of a healthy democracy is contingent upon an independent judiciary. According to the doctrine of separation of powers, judiciary should be insulated from influence of executive and legislature. In *Rojer Mathew* v. *South Indian Bank*,[39] the Supreme Court reiterated that independence of judiciary and separation of powers are the cardinal principles which cannot be ignored while setting up tribunals. Even in *Union of India* v. *R. Gandhi, Madras Bar Association*, it was held that the power to legislature to constitute these tribunals is limited. This limitation has been read into the competence of the legislature to prescribe qualifications of judicial officers. Once the selection criteria and qualifications have been laid down by the legislature, superior courts can exercise their power of judicial review to ensure that the criteria and qualifications are adequate and appropriate.[40] In fact, conferment of this kind of power on the government has been criticised even in the 272nd Law Commission Report. The Commission recommends constitution of a committee for appointment of Chairman, Vice Chairman and judicial members of the tribunal. But this recommendation comes with the caveat that the committee cannot be headed by a member of the government since Central Government is a litigant in substantial number of disputes before tribunals especially in matters of taxation.[41] It will

38 The Finance Act of 2017 §184.
39 2018 SCC Online SC 500.
40 (2010) 11 SCC 1.
41 Para 5.18

harm the entire democratic process if it is to appoint those who will be dealing with such cases. If the government is a litigant and is also authorised to appoint the officers who would hear the arguments, a conflict of interest is bound to arise.[42]

The amendment also empowers the Central government to establish new tribunals to which the amendments apply without approval required from the parent tribunal. This kind of unchecked power is an abuse of democracy as various ministries can now introduce any new tribunal according to their whims and fancies.[43]

The amendments proposed by the Act is only shedding negative light on the functioning of the tribunal system and is a portrayal of the diminishing priority of the government to address the problems of the judiciary.

IV. Enlargement of Jurisdiction of High Courts vis-à-vis Tribunals

The judges in *L. Chandrakumar's* case agreed that tribunals provided expert bodies to deal with specialized categories of disputes, and that there was a dire need for speedy disposal of cases in a system abundant with delays.[44] However, the judgement defeated the purpose behind the establishment of these tribunals. Creation of Administrative Tribunals has no meaning if all the cases adjudicated by them are allowed to be heard before the concerned High Court as

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42 Mandira Kala, *How Finance Bill amendments affect Tribunals*, THE INDIAN EXPRESS, Mar. 27, 2017 http://indianexpress.com/article/explained/budget-2017-finance-bill-amendments-tribunals-arun-jaitley-4586925/

43 Prianka Rao, *Finance Bill 2017: Independence of tribunals could be affected,* HINDUSTAN TIMES, Apr. 14, 2017. http://www.hindustantimes.com/analysis/finance-bill-2017-independence-of-tribunals-could-be-affected/story-StaETXJ9sjqNHqRjbriCTI.html.

44 L. Chandrakumar v. Union of India, A.I.R 1997 S.C. 1125.

well. This section thus argues that enlargement of jurisdiction of High Courts is a change in an undesired direction.

The constitutional validity of various provisions has been scrutinized by the Supreme Court on several occasions. In *Sampath Kumar*,[45] the Supreme Court directed the carrying out of certain measures to ensure that the functioning of tribunals is constitutional in nature. Pursuant to these directions, the jurisdiction of Supreme Court under Art. 32 was restored. These Administrative Tribunals then became effective and real substitutes for HCs.

In *L. Chandrakumar*[46] the Court held that tribunals play a supplemental role and cannot act as substitutes of High Court. It granted litigants the freedom to appeal the decisions of these tribunals in High Courts. Perhaps one of the most baneful fallouts of this judgement is that orders of Administrative Tribunals are now being routinely challenged before High Courts.[47] The Law Commission has expressed its opinion against the *L. Chandrakumar* judgement in many of its reports. The Commission has recommended that the original conception of Administrative Tribunals should be restored and appeals to High Courts are unnecessary. If an appeal is to be provided, it should lie with the Supreme Court only.[48] However, it ought to be noted that barring the High Court to take cognizance of appeals coming from tribunals is not only restricting the path of justice, but also making tribunals a

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45 S.P. Sampath Kumar v. Union of India, (1987) 1 S.C.C. 124.

46 L. Chandrakumar, *supra* note 15.

47 Indian Law Commission Report No. 215 L. Chandra Kumar be revisited by Larger Bench of Supreme Court (Dec. 2008), paragraph 1.11, available at http://lawcommissionofindia.nic.in/reports/report215.pdf

48 Indian Law Commission Report No. 215 L. Chandra Kumar be revisited by Larger Bench of Supreme Court (Dec. 2008), paragraph 1.16, available at http://lawcommissionofindia.nic.in/reports/report215.pdf

substitute to High Courts even though the mode of appointment for the two is starkly different.[49] Therefore, even if there is a bar to the High Court's jurisdiction, there needs to be an alternative method to appeal as going directly to the Supreme Court is not a feasible prospect at all times due to time constraints, economic resources and legal aid.

The Commission has emphatically recommended the constitution of a National Appellate Administrative Tribunal dedicated solely for the purpose of adjudicating appeals against the orders of Administrative Tribunals.[50] Such a tribunal would be in line with the Council of Tribunals as established in UK. This body would be similar to the National Consumer Disputes Redressal Commission and enjoy a status higher than that of a High Court but lower than a Supreme Court.[51] An appeal against its orders would lie with the Supreme Court. The Law Commission opines that this is one of the most effective methods of dealing with issues that cropped up after the *L. Chandrakumar* judgement.

While the *L. Chandrakumar* judgement takes away the expeditiousness that Administrative Tribunals sought to bring, there is a more significant but less ballyhooed issue that needs to be discussed. The judges treated the power of judicial review of High Courts and Supreme Court on the same platform.[52] The Law Commission on the other hand, is of the view that power of judicial

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49 Gujarat Urja Vikas Nigam Ltd. v. ESSAR Power Ltd., (2016) 9 S.C.C. 103.

50 Indian Law Commission Report No. 215 L. Chandra Kumar be revisited by Larger Bench of Supreme Court (Dec. 2008), paragraph 3.1, available at http://lawcommissionofindia.nic.in/reports/report215.pdf

51 *Id.*

52 Indian Law Commission Report No. 215 L. Chandra Kumar be revisited by Larger Bench of Supreme Court (Dec. 2008), paragraph 5.23, available at http://lawcommissionofindia.nic.in/reports/report215.pdf.

review of High Courts under Article 226 is not as inviolable as that of Supreme Court under Article 32. It bases this argument on the fact that Article 32(4) explicitly preserves the supremacy of Supreme Court but there is no such provision with respect to Article 226.[53]

Post *Keshavananda Bharti*, it has become possible for SC strike down constitutional amendments on the grounds of unconstitutionality. This power was extended to HCs as well. Due to *L. Chandra Kumar* decision, this power can be exercised by HCs in matter related to tribunals as well, yet another criticism of the decision. It is proposed that the SC reserve to itself the power of judicial review. If that is not done and if all matters of tribunals are to be reviewed by High Courts, they would be free to strike down different parts of Constitutional amendments in different states and thus lead to a fragmented application of the Constitution. Therefore, while trying to uphold the basic structure of the Constitution, the Supreme Court has given a decision which challenges the integrity of the Constitution itself, because it unwittingly equates the powers of the Supreme Court and the High Court under Art. 32 and Art. 226 respectively, and as has been already discussed in the previous section of the paper, the power of judicial review of HCs is not as inviolable as that of SC.

Supreme Court's doubts and lack of confidence in the functioning of Administrative Tribunals are justifiable. However, undermining the role that these tribunals play in distribution of justice and divesting them of their powers and responsibilities is not the answer. The Court should perhaps adopt a more libertarian paternalism and simply nudge these tribunals to follow uniform procedures.

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53 *Id.*

V. Recommendations and Conclusion

As has been made apparent throughout the course of the paper, the researchers are of the view that the problems cropping up post *L. Chandrakumar* judgement need to be subverted. Tribunals will not be as effective in alleviating the problem of judicial delays if their orders are allowed to be appealed in High Courts. However, tribunals cannot be given absolute powers without any checks and balances. Therefore, as recommended by the Law Commission, there can be a system of intra-tribunal appeal, which is followed in every High Court as well.[54] Apart from this, there can be zonal benches for every tribunals where an appeal can be filed to a larger bench of the same tribunal.[55] If none of the given methods work out, here are several ways in which the objective behind establishment of tribunals can still be realized.

The Supreme Court's judgement which extends High Courts' power of judicial review could be perceived as the judicial system's lack of confidence in tribunals. This distrust perhaps stems from the fact that most of the judges in these tribunals are members of the executive. These judges may not be qualified to decide cases or could be affected by their political biases. The High Courts being of constitutional creation have more authority in the eyes of the entire judicial system with the Supreme Court time and again reaffirming the position of the High Court's in the country. Additionally, the

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54 Indian Law Commission Report No. 215 L. Chandra Kumar be revisited by Larger Bench of Supreme Court (Dec. 2008), paragraph 8.2, available at http://lawcommissionofindia.nic.in/reports/report215.pdf.

55 Venkatesan J., *Let appeals against tribunal order go straight to the Supreme Court suggests Law Commission,* The Hindu, Sept. 18, 2008. https://www.thehindu.com/todays-paper/tp-national/Let-appeals-against-tribunal-order-go-straight-to-Supreme-Court-suggests-Law-Commission/article15305678.ece

power for the issuance of writs emanates from the Constitution and cannot be given to a tribunal without an amendment. Such an amendment cannot exist as conferment of power of judicial review is a 'sovereign function' bestowed on courts which cannot be given to a tribunal which are not creations of the constitution[56]– more than a lack of confidence, this arises from the fact that the High Court's jurisdiction and power of judicial review has been constitutionally provided for; and further that there is a rather large corpus of judicial precedent that has been created in exercise of such powers.

Moreover, these tribunals do not necessarily rely on the Civil Procedure Code or the Indian Evidence Act.[57] Though they conform to natural law principles, their application is not uniform. This is the area of the Administrative Tribunals Act that needs to be developed. Firstly, a uniform set of procedural rules should be formulated keeping in mind the expeditiousness that these tribunals are supposed to offer. Lack of uniformity leads to varied methods used to come to a decision. There must be formulation of at least broad guidelines embodied into the statutes of each tribunal. The power to come up with such rules should lie with the tribunal itself. However, additional power must be granted to the supervisory body to ensure that the rules are in conformity with judicial practices and not extremely informal. This is one of the responsibilities of the Council of Tribunals in UK and should be incorporated in our system as well.[58] Being given powers of a Civil Court[59] it imperative to have at least a wide set of guidelines replicating that of other civil courts.

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56 Indian Law Commission Report No. 272 Assessment of Statutory Frameworks of Tribunals in India (Oct. 2017), paragraph 8.10, available at http://lawcommissionofindia.nic.in/reports/Report272.pdf.

57 M.P. Jain and S.N. Jain, PRINCIPLES OF ADMINISTRATIVE LAW 803 (6th ed. 2007).

58 Wraith and Hutchesson, Administrative Tribunals 131 (1973).

59 The Administrative Tribunals Act, 1985, §22(3).

Secondly, the Supreme Court in *L. Chandrakumar* judgement set out to protect the basic structure of the Constitution but overlooked the sphere in which the basic structure was actually being violated. The spirit of the Constitution provides for separation of powers but the ATA essentially resulted in an unwieldy amalgamation of the executive and judiciary, i.e., members of executive performing judicial functions.[60] An independent judiciary is a necessity for a functional democracy. Being free from external influence is the only way there can be adherence to rule of law.[61] Thus, the blatant violation of the doctrine of separation of powers is another area of the ATA that needs more attention.

The Finance Act, 2017 made some massive changes in the tribunal system with a motive to make it more economic and efficient. It is obvious that these changes have created a chaotic labyrinth instead of resolving any issues. Therefore, in order to save money and time, thirdly, the ATA could include provisions that limit the time consumed in deciding every case, and thereby save resources that are used in delivering a judgement.

Fourthly, a supervisory body could be created under the aegis of the Ministry of Law and Justice or under the Law Commission. As long as this body reduces the burden that *L. Chandrakumar* judgement imposes on High Courts, it will ensure smooth functioning of both, the tribunals and the judiciary. In the United Kingdom, there is a provision in the Tribunals Act which allows for an Administrative Justice and Tribunals Council[62] which is supposed to oversee the functioning of various tribunals and make sure that they are working

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60 *Id.*

61 Registrar (Admn.) High Court of Orissa v. Kanta Satapathy, A.I.R. 1999 S.C. 3265.

62 Tribunals, Courts and Enforcement Act, 2007, sch. 7 part 1 (Eng.)

efficiently and making justice fair and accessible to the masses. This kind of a body would make administrative justice system in our country less problematic. The composition of such a council can consist various stakeholders such as judges of the Supreme Court nominated by the Chief Justice of India, judges of the High Courts, Executive members with the minimum level being Secretary of the Government and lastly, a senior advocate nominated by the Bar Council of India.[63]

Additionally, the chairman of tribunals of such a council ought to be a person with legal qualifications. Even though UK implemented this only for certain tribunals, we must do it for each and every tribunal[64]. The popular Legatt committee report has observed that a major chunk of cases in the UK have been adjudicated by tribunals. Moreover, it has time and again emphasised that not only do tribunals need to be independent, but that the independence should be visible to the public eye. For this to take place extensive power ought to be given to the Lord Chancellor and in our case the Chief Justice of India. Again, the report has reiterated the fact that there needs an urgent uniformity across the tribunals of our country especially in areas of appointment, removal etc. This report is a visible call for reformation in our system as well.[65]

Lastly, the way our constitution is built makes it inevitable for the SC and HCs to do away with the power of judicial review and

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63 Vidhi Centre for Legal Policy, Reforming the Tribunals framework in India: An interim report (Apr. 2018), available at https://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/5b1e34c5758d467b0ba1e206/1528706268669/8th+June%2C+Final+Draft.pdf.

64 Gavin Drewry, The Judicialisation of Administrative Tribunals in the UK: From Hewart to Leggatt, 28 TRAS 51 (2009),

65 Arvind P. Datar, Tribunals: A tragic obsession (Feb. 2013), available at http://india-seminar.com/2013/642/642_arvind_p_datar.htm.

removal of this will lead to a direct importation of the French tribunal system. In France, the administrative tribunal system is in complete isolation from the Executive even though it is part of it.[66] This cannot be done in India as the constitution is considered to be supreme law in our country and does not allow for amendments by popular will as done in France. But there have to be certain structural changes introduced in the Constitution in order to enhance the system of tribunals in India and give way for alternative modes of resolving disputes. With such an immense load of cases, it is necessary to look at additional systems of redressal.

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PERSONAL LAW VS. FUNDAMENTAL RIGHTS DIVIDE: THE CASE FOR JUDICIAL INTERVENTION

S. Mohammed Raiz and Susanah Naushad[*]

Abstract

The conflict between personal laws and fundamental rights is not new, however the issue has come into the limelight again with the pronouncement of the Shayara Bano judgement last year. This year, two more petitions have been filed challenging the validity of the personal laws, by attempting to test them on the anvil of fundamental rights. Personal laws have remained static and archaic over the years, whereas fundamental rights have evolved in line with modern sensibilities. Therefore, the conflict between the two is inevitable. However, the uncertain and inconclusive stance of the courts regarding the issue has kept it unresolved. In the instant article, the authors have delved into the divergent views taken by courts on whether personal laws can be or should be subject to Part III of the Constitution. The authors go on to discuss the Shayara Bano judgement, and also present a brief critique on the Muslim Women (Protection of Rights on Marriage) Bill, 2017. Finally, the authors attempt to provide a balanced solution to the issue.

I. Introduction

With the recent Supreme Court pronouncement declaring the practice of triple talaq to be illegal, the questions regarding sanctity of personal laws have again been raked up. Personal Law has been defined as law that governs a person's family matters regardless of where the person goes.[1] It necessarily involves spheres of law such as

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* Associates at Khaitan & Co.

1 *Black's Law Dictionary*, 1326, (Bryan A Garner, 10th Ed.).

marriage, divorce, partition, succession etc. Fundamental Rights on the other hand are those invaluable rights conferred on the people by Part III of the Constitution of India, the derogation of which is not permitted except within the parameters provided in Part III itself.

Personal laws are predominantly archaic, with most of them giving little regard to women rights. This has made clashes between personal laws and constitutional rights imminent in the modern world. In the recent past, we have been witness to several debates both within courts and outside it on whether fundamental rights would override personal laws, especially those which are incompatible with the modern- day ideologies and morality. However, the question has never been answered conclusively, as the Courts have given conflicting views on the subject.

In the instant article, the authors attempt to discuss the question of whether 'Personal Laws' are capable of being tested on the anvil of the Fundamental Rights guaranteed by Part III of Constitution of India, 1950 ("the Constitution"). The authors have endeavoured to throw light on the same by tracing the judicial precedents on the issue to highlight the divergence of views, and then finally attempted to give a balanced solution to resolve the conflict.

II. Personal Law and Fundamental Rights: Divergent Views

Article 13 of the Constitution provides that both 'laws in force' and any 'law' made by the State would be void if they are inconsistent with or in contravention to the rights conferred under Part III. Article 13(3) defines the terms 'laws in force' and 'law' in an inclusive manner. Thus, for Personal Laws to be violative of Fundamental Rights, the particular Personal law has to necessary fall under the ambit of Article 13. In this context, the following

judgments have to be analysed.

One of the earliest and still often cited judgment in this regard is **State of Bombay vs Narasu Appa Mali**[2] ("Narasu Appa").The validity of a state legislation, i.e. Bombay Prevention of Hindu Bigamous Marriages Act, 1946, was the original issue in this case. It was first contended that the Act was violative of Article 14, 15 and 25 of the Constitution. It was held by the Court regarding this that it was within the ambit of the State to enact the impugned legislation for social welfare as per Article 25(2)(b) and that there is no discrimination or arbitrariness as per Articles 14 and 15. It was then contended that the institution of polygamy among Muslims as well as Hindus is void as per Article 13 of the Constitution and hence the impugned legislation is discriminatory since polygamy is criminalised only with respect to Hindus and not Muslims. The Court was thus called upon to interpret Article 13 of the Constitution in the context of personal laws. While answering this question, it was held that although 'custom or usage' is included in Article 13 and hence has to be consistent with Fundamental Rights, Personal Law being different from 'custom or usage' is not included under the ambit of 'laws in force' as provided under Article 13(1).

Thereafter, in the case of **Krishna Singh vs Mathura Ahir**[3] ("Krishna Singh"), the Supreme Court held as erroneous a view propounded by the High Court in the Impugned Judgment. The High Court had held that the erstwhile strict rule against Sudras being capable of entering into the order of Yati or Sanyasi as advanced by Smriti writers has ceased to be valid because of the Fundamental Rights guaranteed under Part III of the Constitution. The Supreme

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2 State of Bombay vs Narasu Appa Mali, AIR 1952 Bom 84.

3 Krishna Singh vs Mathura Ahir, (1981) 3 SCC 689.

Court held in this regard that '*Part III of the Constitution does not touch upon the Personal Laws of the parties*' and that Personal Laws of the parties has to be applied based on recognised authoritative sources of Personal Law and not based on the High Court's own concept of modern times. After the holding thus, the Court went on to discuss the history, scriptures and customs under Hinduism to determine the question at hand, i.e. regarding Sudras being capable of entering into the order of Yati or Sanyasi, and finally answered the question in the affirmative.

In the case of **Mary Roy vs State of Kerala**[4], the question was whether Sections 24, 28 and 29 of Travancore Christian Succession Act, 1092, was unconstitutional as being violative of Article 14 of the Constitution. It was initially observed in the judgment that this question is of great importance since the property rights of women belonging to Indian Christian Community residing in the erstwhile State of Travancore would be affected. However, the Supreme Court subsequently declined to answer the question by holding that since it has been held that the Indian Succession Act 1925 would apply to the former State of Travancore, and Travancore Christian Succession Act, 1092 would have no applicability, there is no need to examine the unconstitutionality of the impugned provisions.

In the case of **Anil Kumar Mahsi v. Union of India**[5],the vires of Section 10 of the Indian Divorce Act, 1869, which governs Christians, was challenged by the husband in the Supreme Court as being violative of Article 14 of the Constitution. The Court, without making any mention of the **Krishna Singhcase**, or the proposition

4 Mary Roy vs State of Kerala, (1986) 2 SCC 209.
5 Anil Kumar Mahsi v. Union of India, (1994) 5 SCC 704.

that Personal Law of parties should not be tested on the anvil of Fundamental Rights, went on to examine the impugned provisions on merits and held that it is not discriminatory and hence not unconstitutional.

Similarly in **Saumya Ann Thomas v. Union of India**[6], the Kerala High Court ("Kerala HC") read down Section 10A(1) of Indian Divorce Act, 1869 without adjudicating on the applicability of Fundamental Rights to Personal Laws. The judgment in Saumya Ann was subsequently followed by Karnataka High Court in **Shiv Kumar v. Union of India**[7]. Further, in **Fazru vs State of Haryana**[8], without referring to **Narasu Appa** and **Krishna Singh**, it was held by the Punjab and Haryana High Court that '*custom or usage or for that matter even Personal Law would be taken to be the law in force*' as per Article 13(1).

However, a more holistic view was adopted by Andhra Pradesh High Court ("AP HC") in **Youth Welfare Federation vs Union of India**[9] ("**Youth Welfare**"). A full bench of the AP HC was called upon to adjudicate on the vires of Section 10 and 22 of Indian Divorce Act, 1869. The issues framed expressly covered the question as to whether Personal Laws are included within the ambit of Article 13(1) and whether legality of Personal Laws can be tested based on Part III of the Constitution. The Court after analysing the judgments of **Narasu Appa** and **Krishna Singh** went on to hold that the view adopted in **Narasu Appa** was the right one. It was held that non-statutory Personal Laws, which existed at the commencement of the Constitution, do not fall under the expression 'laws in force' under Article 13(1) and hence they transcend the Fundamental Rights. It

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6 Saumya Ann Thomas v. Union of India, 2010 (1) KLJ 449.
7 Shiv Kumar v. Union of India, AIR 2014 Kant 73.
8 Fazru vs State of Haryana, AIR 1998 P&H 133.
9 Youth Welfare Federation vs Union of India, 1996 SCC On Line AP 748.

was further held that Personal Laws which '*have been modified or abrogated by statute or varied by custom or usage having the force of law*' can be tested under Part III for its constitutionality. Accordingly, since Indian Divorce Act, 1869, was a statutory law, the Court proceeded to test the constitutionality of the same.

III. Judicial Restraint Exercised

There have been several instances when the judiciary has refrained from delving into questions involving Personal Laws and their constitutionality. In **Maharshi Avadesh vs Union of India**[10], the writ petition filed seeking (i) enactment of a common civil code for all citizens, (ii) declaration that Muslim Women Protection of Rights on Divorce Act, 1986 was void and (iii) to prevent enacting Shariat negatively affecting rights of Muslim women, was dismissed by a very short judgment. The Court simply held that these issues fall under the domain of the legislature and it is not for the Court to legislate on these matters.

A similar position was adopted in **Ahmedabad Women Action Group vs Union of India**[11] ("Ahmedabad Women Action Group"), where writ petitions in public interest were filed praying for a declaration that the practice of Polygamy and Unilateral Talaq by men, in Muslim community were void being violative of Article 14 and 15 of the Constitution. Several other provisions in the statutes pertaining to Hindus and Christians were also challenged as unconstitutional. Relying on various judicial precedents, the court declined to entertain the writ petitions and examine the matter on merits. It was held that these matters wholly involve issues of state

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10 Maharshi Avadesh vs Union of India, 1994 Supp (1) SCC 713.

11 Ahmedabad Women Action Group vs Union of India, (1997) 3 SCC 573.

policies and hence not within the domain of the judiciary. Notably, the judgments of **Narasu Appa Mali** and **Krishna Singh** was cited and relied upon by the Court in the context of whether Part III of the Constitution applies to Personal Laws.

In **Sandhya Rani vs Union of India**[12], the constitutionality of Section 11(i) and 11(ii) of Hindu Adoption and Maintenance Act, 1956, was challenged before the Bombay High Court. Relying on **Ahmedabad Women Action Group** and principles of Hindu Law, the Court refrained from examining the constitutionality of the impugned provisions.

In **P.E. Mathew vs Union of India**[13], the Kerala HC relied on **Ahmedabad Women Action Group** to hold that '*Personal Laws do not fall within Article 13(1) of the Constitution and that they are not laws as defined in Article 13(1).*'

IV. Interference With Non-Statutory Personal Laws

Notably, an interventionist approach with even non-statutory Personal Law was adopted by Kerala HC in **Kunhimohammed vs Ayishakutty**[14] ("Kunhimohammed") and **Nazeer vs Shemeema**[15] ("Nazeer") Both these cases were among other things dealing with the issue of validity of a unilateral triple talaq. In **Kunhimohammed**, the court expressly disagreed with the view propounded in **Narasi Appu** and held that Personal Laws would also be covered by 'laws in force' under Article 13(1) and have to stand the test of Article 14 and 21. It was further held that **Krishna Singh** has not accepted and

12 Sandhya Rani vs Union of India, AIR 1998 Bom 228.
13 P.E. Mathew vs Union of India, AIR 1999 Ker 345.
14 Kunhimohammed vs Ayishakutty, 2010 SCC OnLine Ker 567.
15 Nazeer vs Shemeema, (2017) 1 KLJ 1.

endorsed the dictum in **Narasu Appa**. In **Nazeer case**, it was held that within a religious group or community, discrimination on gender basis between its members cannot be made without any support of religious precepts. The reasoning adopted here was that the test of reasonableness enshrined in Article 14 of the Constitution, would apply within a religious group even though it would not apply between different religious groups.

The view propounded by an Armed Forces Tribunal at Lucknow Regional Bench in the case of **Lance Naik/Tailor Mohammed Farooq vs Chief of Army Staff**[16], that '*Constitution is the mother of all law and has overriding effect over Personal Law as well as other provisions, practices or usage which offend the constitutional rights of persons, collectively or individually*' and that rights conferred by Article 14 and 21 would prevail over Personal Laws was relied upon by the Allahabad High Court in **Aaqil Jamil vs State of U.P.**[17].

V. Shayara Bano – The Missed Opportunity

The entire issue covered by this article could have easily been decided, since the Supreme Court had the opportunity to address a question regarding the same in **Shayara Bano vs Union of India**[18], ("Shayara Bano") - the recent judgment wherein the practice of instantaneous triple talaq was set aside by a 3:2 majority. The judgment, which itself contains 3 separate judgments, is one which invokes the attention of scholars when it comes to culling out the ratio and majority decision on the issues addressed. But for the purpose of the present article, the authors are confining the analysis

16 Lance Naik/Tailor Mohammed Farooq vs Chief of Army Staff, 2016 SCC OnLine AFT 450.

17 Aaqil Jamil vs State of U.P., 2017 SCC OnLine All 1325.

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

of the judgment to the issue at hand viz. Personal Law and Fundamental Rights.

The minority judgment delivered by Hon'ble Justices J.S. Kehar and S. Abdul Naseer upheld the judgments rendered in **Narasu Appa** and **Krishna Singh**. Correctly or incorrectly, the Hon'ble Justices went one step further to hold that Personal Law is constitutionally protected under Article 25.

In the judgment delivered by Hon'ble Justice Kurien Joseph, the question of whether Personal Law is amenable to Fundamental Rights is not touched upon, and hence it is not relevant for our present discussion to comment on the said judgment.

The third judgment delivered by Hon'ble Justices R.F. Nariman and U.U. Lalit, also considered the question of whether **Narasu Appa** was correct in law. However, after framing the question, instead of deciding the same, the Hon'ble Judges proceeded on a different footing to hold that Muslim Law, including triple talaq is codified under the Muslim Personal Law (Shariat) Application Act, 1937 ("Shariat Act"), and hence, being a statute, it can be tested for violation of Fundamental Rights.

Although the Supreme Court did not conclude on the interplay between Personal laws and Fundamental rights, it went on to hold the practice of unilateral triple talaq unlawful and unconstitutional. Even if one was to construe Hon'ble Justice R.F. Nariman's judgment as holding that statutory personal laws are amenable to a challenge for violation of fundamental rights, it is pertinent to note that such a view would still not be considered as a majority opinion and hence would not be binding.

While the authors agree with the proposition that codified Personal Law can be tested under Part III, the authors disagree with the finding that Muslim Personal Law is codified under the Shariat Act. This is because the Shariat Act was intended to exclude customs or usage and make Shariat the primary law for Muslims[19], and furthermore it contains no substantive provisions regarding how the subjects covered by it are to be dealt with. Notably, the other two judgments rendered by Hon'ble Justice J. S. Kehar and Hon'ble Justice Kurien Joseph also held that Muslim Personal Law is not codified under the Shariat Act, thereby making the basic proposition which lead to Hon'ble Justice Nariman's eventual findings a minority decision.

However, it has to be said that a golden opportunity to decide the controversy of whether Personal Law can be tested against Fundamental Rights, and if it is only codified Personal Law that can be so tested, was missed out by the Constitution Bench in the Shayara Bano case.

VI. The Way Forward - Method to the Madness

The authors are of the opinion that the correct view propounded whilst interpreting the interplay between Personal Laws and Fundamental Rights was the one in Youth Welfare case. The Andhra Pradesh High Court rightly differentiated between statutory Personal Law and non-statutory Personal Law, whilst holding that only the former and not the latter would be covered by Article 13. There is indeed a sound logic behind this reasoning. Once Personal Law is codified into a statute, they undoubtedly fall under the expression 'laws in force' or 'law', depending on whether such statute

[19] S. 2, The Muslim Personal Law (Shariat) Application Act, 1937.

was enacted before or after the commencement of the Constitution. This means that the State has already intervened on that particular sphere of Personal Law and enacted a statute, and any such statute having been enacted by the State has to essentially comply with the prescriptions of Part III.

On the other hand, uncodified Personal Law is different in as much as it is still governed by the religious prescriptions and the State in its wisdom has decided not to intervene in that particular sphere. In such a scenario, it might not be for the judiciary to test the rightness or justness of such Personal Laws based on the concepts of modernity and progressiveness, and whether they are in consonance with Fundamental Rights. This is because religion essentially involves practices that have been carried on over long periods of time and practices which may not necessarily be logical to the modern person. These long practiced traditions and practices is however, the basis for religion, and there are a large number of people who strongly believe in these. Notably, the judgement rendered by Hon'ble Justices J.S. Kehar and S. Abdul Naseer in Shayara Bano expressed the same view.

Furthermore, the authors are of the opinion that the judiciary is ill-equipped to deal with matters of uncodified personal laws, particularly because it is for the legislature to enter into consultations with the relevant affected groups, appoint committees, conduct studies and finally come to the decision of whether to codify the personal law and if so then how it ought to be codified. Ultimately, even in the biggest of cases, all the judiciary has at its disposal is the bar which presents its arguments using materials on record and the bench which scrutinises the materials and arguments and comes to a decision. The diversity of opinion and the voice of the layman is

undoubtedly restricted as compared to a legislative exercise undertaken by the representatives of the people who come from all parts of the country.

VII. The Draftsman's Duty

However, with due regard to the aforesaid opinion, it has to be admitted that there are instances when one feels that maybe the legislature is not utilising the machinery at its disposal, and refrains to undertake a holistic examination of the concerned issue and subject. This is particularly true when one analyses bills like the Muslim Women (Protection of Rights on Marriage) Bill, 2017 ("Bill"), which would be apposite to analyse given the above context. The said Bill is a lacunae filled legislation which is an example of poor draftsmanship. The Bill, which criminalises talaq-e-biddat (instant triple talaq), was introduced in the Lok Sabha pursuant to the Shayara Bano judgement. It was passed in the Lok Sabha without much debate and discussion, and is currently pending in the Rajya Sabha.

On a bare perusal of the Bill, it seems that the Bill is a result of a misreading of the Supreme Court judgement of Shayara Bano.[20] The judgement pronounced instant triple talaq as invalid which essentially means that the marriage will not be dissolved by the pronouncement of the same by the husband. However, the Bill presupposes that the pronouncement of triple talaq would irrevocably dissolve the marriage, and accordingly provides to "void" it under Section 3 of the Bill. Moreover, the Bill provides for imprisonment of the husband for upto three years if he pronounces instant triple talaq to his wife. However, it should be noted that the

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[20] *The Trouble with the Triple Talaq Bill*, The Hindu, available at https://www.thehindu.com/opinion/op-ed/a-very-flawed-law/article22288659.ece, last seen on 25/08/2018.

Shayara Bano judgement only held the practice of instant triple talaq invalid, and it did not criminalize it. Therefore, the Bill envisages an absurd situation where a man would be imprisoned for an act which in itself is an invalid and *non est* act. Moreover, practically, there is a high probability of this provision serving as a breeding ground for unsubstantiated complaints by wives, filed solely with the intention of harassing their husband. Complex evidentiary questions such as whether a single talaq was pronounced (which is still a valid method of divorce under Muslim Personal Law) or whether three talaqs were pronounced would also arise in such a situation.

Further, the Bill goes on to discuss post-divorce issues like maintenance for the wife, completely overlooking the fact that instant triple talaq would not even be recognized in the eyes of law. It seems like the scheme of the Bill leans more towards penalising the husband without any logical justification.

One can only hope that the legislature undertakes a more comprehensive exercise and utilises the mechanism and resources at its disposal in future, before delving into codification of personal laws, which is and will remain a very sensitive issue in a country like India.

VIII. Conclusion

It can thus be seen that there is significant divergence when it comes to judicial pronouncements on the issue at hand. There are judgments which expressly state that Personal Laws do not fall under the ambit of Article 13 and hence are not amenable to a challenge of Fundamental Rights violation. However, in recent times, a contrary view has emerged and even Personal Laws are tested against the anvil of Fundamental Rights. Notably, a non-interventionist approach has

also been adopted in certain cases wherein it has been held that the relief prayed for is not within the domain of the judiciary.

Even though the issue at hand was not decided by the Supreme Court in the Shayara Bano case, other opportunities await with respect to the same. In the matter pending before a Constitution Bench of the Supreme Court - Goolrukh Gupta vs Sam Rusi Chotia[21], the case pertains to the rights of a Parsi born woman who marries a non-parsi, particularly her religious and legal status, including the right to take part in the funeral ceremonies of her parents. It is a question which involves adjudication of uncodified Parsi Personal Law and whether they are violative of Fundamental Rights. The issue of Polygamy and Nikah Halala among Muslims has also been challenged and referred to a Constitution Bench in the case of Sameena Begum vs Union of India[22]. One has to await the outcome of the said cases, to see how it will affect the judicial propositions laid down by previous judgments.

As captured above, even when the legislature deals with the issue of Personal Laws, history shows that many a time, the laws that are ultimately formulated are poorly drafted and less than commendable in their objective.

In light of the above, it is stated that a balance needs to be struck between the enforcement of Personal Laws, which are founded on dated practices, traditions and customs, and Fundamental rights, which encapsulate modern civil rights and liberties. What has to be paid heed to by the judiciary or the legislature, while delving into these issues is the sensitive nature of

21 Goolrukh Gupta vs Sam Rusi Chotia, SLP(C) No. 18889 of 2012.
22 Sameena Begum vs Union of India, WP(C) No. 222 of 2018

the issues involved and the socio-political ramifications of the same. Further, the possibility of the vacuum in law arising from a particular Personal Law being struck down as unconstitutional should also be an important consideration so as to holistically deal with issues pertaining to Personal Laws.

Only time will tell whether the answer in the path ahead lies in codification of all the uncodified Personal Laws, or enacting a Uniform Civil Code, or maintaining the status quo of the judiciary selectively examining the constitutionality of Personal Laws. Due to the complexity of the issue involved, and considering there are various and many a time conflicting interests of the concerned stakeholders involved, any action taken towards dealing with Personal Laws should necessarily involve public consultation, soliciting opinions and extensive (and hopefully reasoned) parliamentary debate.

PREVENTING CRIMINALIZATION OF THE HOUSE

Shreenath A. Khemka[*]

Democracy is the edifice of the Indian Constitution, and the electoral process is its cornerstone[1]. With political experience it has become evident that democratic success lies in the quality of choice presented to the electorate. Choosing the bad among the worse is not only electorally adverse, but also deleterious to political institutions in the longer run. The foremost contention in this regard has been to keep criminals out of the political system.

Questions of electoral reform have been a tug of war between the executive and the judiciary and now with the petition[2] before the Supreme Court to disqualify chargesheeted individuals from contesting elections, the rope has been pulled taught to its snapping point. While the prayer in the particular case is audacious, the irony is that the law does not even keep the convicts out of the Parliament; let alone chargesheeted individuals. At the present, lacunas allow convicts to contest elections[3] and legislators are not wholly disqualified for criminal convictions.[4]

Electoral participation occurs either as a voter or a candidate.[5] A voter can be disqualified only through a parliamentary law imposing restrictions on the exhaustive criteria of non-residence,

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* Lawyer, NALSAR (2017) & Cambridge (2018).

1 Read by the Supreme Court through the Basic Structure Doctrine.

2 In the case of *Public Interest Foundation v. UOI*, pending before the Constitutional (5 Judge) Bench of the Supreme Court.

3 2013 amendment to Section 62 of the Representation of Peoples' Act.

4 Sections 8(1), 8(2), and 8(3) of the Representation of Peoples' Act.

5 As direct participants under the Constitution, read along with the Representation of Peoples' Act.

unsoundness of mind, and crime.[6] A candidate may be disqualified on various grounds, accruing before and after the electoral verdict. Articles 102(e) and 191(e) augment the Constitutional grounds[7] by providing the Parliament with the power to create additional grounds. The rationale for having separate set of criteria between a voter and a candidate was to maintain a higher threshold for admittance to the House, than to elect them.

The Representation of Peoples' Act (RoPA) is a parliamentary law in furtherance of both Articles 102(e) and 326 of the Constitution as it lays down detailed circumstances of disqualification for both voters and candidates in the electoral process. Therein, Chapter III of the RoPA enlists exhaustive statutory grounds of disqualification for candidates, which although addresses criminal convictions, does not extend to chargesheets.

Criminal conviction under the RoPA is not an absolute disqualification for legislators. Sections 8(1) and 8(2) only provide for a particular set of crimes for which the person can be disqualified. Section 8(3) holds that convictions only of a minimum term of 2 years are adequate to disqualify a legislator. Therefore, a sitting MP or MLA convicted for any term less than 2 years cannot be disqualified from their seat. In other words, the legislator holds the seat while serving the sentence for their crimes. This is an egregious legislative condonation to allow criminals to hold parliamentary positions.

Disqualification under the Indian law can be understood to

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6 Article 326 of the Constitution.

7 Office of profit, unsoundness of mind, insolvency, foreign citizenship, and defection.

be of two types: immediate[8] and continuing[9] (or punitive). While all disqualifications are immediate, not all are continuing[10]. Whilst the Parliament has the prerogative to legislate on punitive disqualification for certain class of misdemeanor, it cannot condone an immediate disqualification by clubbing the two together. Section 7(2) of the RoPA makes the blunder by conflating the two kinds of disqualifications thereby allowing petty crimes[11] to neither be a continuing disqualification, nor an immediate one[12]. Petty crimes may not invite punitive disqualification of 6 years[13], yet should still apply as an immediate disqualification till the time the defect has been cured[14]. The current legislation[15] wrongly clubs different classes within the same category and therefore amounts to an over-categorization under Article 14.

Interestingly, Section 62(5) of the RoPA restricts the right to vote in case the voter is under custody or undergoing sentence, thereby automatically disqualifying the voter[16]. This creates a bifurcation between voters and candidates; where conviction and custody serve as disqualification for the former and not for the latter.

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8 An immediate disqualification is when a defect exists to contest or continue to hold the post of legislator.

9 Continuing disqualification is punitive in the sense that it disallows a person from contesting elections for a certain time period, even after the defect has been cured.

10 Defection and Office of Profit are examples of disqualifications which do not continue once the defect has been resolved.

11 Up to 2 years of imprisonment.

12 Excepted by Section 8(3) of the Representation of Peoples' Act.

13 As per legislative prerogative encapsulated within Section 8(3) of the Representation of Peoples' Act.

14 In the present context, completion of the criminal sentence.

15 Section 7(2) of the Representation of Peoples' Act.

16 Interestingly, the Chief Election Commissioner had recently expressed favorability to provide under-trial prisoners the right to vote (but not convicts), currently the right is sanctioned at present (for both alike).

In *Chief Election Commissioner v. Jan Chaukidar*[17], the Supreme Court had upheld the Patna High Court's decision[18] to bar criminal convicts from contesting elections. The decision bridged the gap between the different disqualificatory criteria for a voter and a candidate by holding that a person barred from voting could equally not contest the elections. Because Section 62(5) of the RoPA prohibited people serving sentences from voting; they equally couldn't contest elections.

The Centre (UOI) filed a Review Petition against this decision, however while the Review was pending, the 2013 amendment to the RoPA was adopted. The RoPA was craftily amended so that even though an 'elector' maybe barred from voting in an election, they could still contest it[19]. The subterfuge in the 2013 amendment was to carve out a distinction between 'electors' who were voters, and those who could not vote but still would be eligible to contest elections. With the amendment in the law, the Review Petition became unnecessary and the *Jan Chaukidar verdict* became infructuous. Later, the Delhi High Court[20] and the Allahabad High Court[21] reaffirmed the 2013 amendment and ratified the paradoxical legal position that a person could be barred from voting in an election and still retain the right to contest.

Such a legal position violates the rudimentary logic that one must first be eligible to vote, if they are to contest elections[22]. The threshold for voting is much lower than the threshold for contesting

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17 Civil Appeal Nos. 3040-3041 of 2004.

18 2004 (2) BLJR 988, 2004 (3) JCR 284 Pat.

19 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.

20 *Manohar Lal Sharma v. UOI*, W.P. (C) 7459/2013 & CM. APPL. 15956/2013.

21 *Lok Prahari v. UOI*, Misc. Bench No. 800 of 2014.

22 Because the set of candidates is a sub-set of voters.

elections, and allowing the latter over the former, defies reason. This classification between 'electors eligible to vote' and 'electors not eligible to vote, but eligible to contest' is absenting any rationale, except to allow a loophole for convicts to contest elections.

To propose through the RoPA that an 'elector' under Article 325 is distinct from a 'voter' under Article 326 is interpretively myopic, simply because a statutory construct cannot bind a constitutional term. Article 325 of the Constitution envisages a unified general electoral roll, whereas Article 326 lays down the criteria of universal adult suffrage. That is the reason for the Constitution to enunciate 'elector' under Article 325 in different terms from a 'voter' under Article 326. Moreover, the distinction is arbitrary under Article 14 because it lacks both an intelligible differentia and reasonable nexus with Part XV of the Constitution. Article 325 prescribes no criteria to be an elector. Article 326 enunciates both the qualifications and the disqualifications so as to define elector as 'voter'. Statutorily segmenting the terms into two artificial classes of persons is both interpretively bad and technically myopic[23].

On the other hand, the plea of chargesheet-based disqualification[24] might be jumping the gun. Firstly, stretching Sections 8(1), 8(2), and 8(3) of the RoPA so that convictions include chargesheets would lead to a forced reading of the statute. Secondly, to restrict the right to contest elections merely on the basis of a chargesheet is a tough proposition[25]. Thirdly, such a low threshold

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23 Because an elector under Article 325, absenting the definition of the voter under Article 326, is a strawman.

24 In the pending case of Public Interest Foundation v. UOI.

25 Presumption of innocence in criminal law dictates that guilt cannot be adduced without a successful conviction.

for electoral exclusion is capable of being misused to deny competing candidates a chance at the polls, especially in favor of the government[26].

The primary need is to ensure that criminals do not sit in the House. Statutory evasions of allowing convicts to contest elections and not disqualifying legislators for their criminal convictions erode public confidence in the House. The Supreme Court must reconsider the constitutionality of the 2013 amendment to the RoPA, whilst not creating a threshold so low; so as to be misused by political opponents, most of all the government.

[26] Which has a favorable position in determining as the prosecution who gets chargesheeted and when.

ARBITRARY ARBITRARINESS: A CRITIQUE OF THE SUPREME COURT'S JUDGEMENT IN SHAYARA BANO V UNION OF INDIA

*Alok Prasanna Kumar**

ABSTRACT

Arbitrariness has long been a ground used by courts to strike down administrative action in India. Its applicability to legislation has been a matter of contention until the issue was put to rest by the Supreme Court of India in Shayara Bano v Union of India, where it was used by Justices Nariman, Joseph and Lalit to strike down triple talaq as unconstitutional. However, this line of reasoning is philosophically and jurisprudentially unsound, and may need re-consideration though the larger outcome of the triple talaq case is correct. The central idea with which I write this paper is that while subjecting executive action to the doctrine of arbitrariness may have been constitutionally envisaged, subjecting Parliamentary action to such standards is absolutely not so.

I. Introduction

A Constitution Bench of the Supreme Court of India "set aside" *talaq-e-biddat* (or "triple talaq") in *Shayara Bano v Union of India.*[1]While the judgement was initially considered to be a 3-2 judgement against the legal validity of triple talaq, a closer scrutiny leaves us with an altogether absurd 2-1-2 result![2] Justice Kurien

* The author is a Senior Resident Fellow at the Vidhi Centre for Legal Policy.The author thanks Aarthi Rajan, Shankar Narayanan, Siddharth Sonkar and Zoheb Hossain for their comments on an earlier version of this article. The author also thanks Charith Reddy and Sushmita Patel for their help in research and editing. Any errors are the author's alone.

1 *Shayara Bano v Union of India*, (2017) 9 SCC 1, ¶ 395.

2 See Girish Shahane, *Secular civil code: with triple talaq struck down its time to reform other unjust faith based laws*, Scroll.in, available at

Joseph agrees with Justice Nariman's judgement on behalf of himself and UU Lalit to the extent that Section 4 of the Shariat Act is "arbitrary", but disagrees with Nariman's conclusion that triple talaq is a part of Islamic jurisprudence.[3] While a majority of judges accept the proposition that the triple talaq has no legal sanctity, the manner in which they arrive at it is quite contradictory and hard to reconcile.[4]

Assuming for a moment that the ratio of this case is that a majority of judges agreed upon the finding that Section 4 of the Shariat Act is unconstitutional, the manner in which this conclusion has been arrived is debatable. While the impact of the judgement on Muslim personal law and Muslim women's rights remains to be seen, it is noteworthy for one other thing: Nariman's judgement has tried to put to rest a controversy that arose since the judgement of the Supreme Court in *Mardia Chemicals v Union of India*,[5] namely the question of whether a law made by Parliament could be held unconstitutional on the ground of arbitrariness alone. Doubt was cast upon the correctness of *Mardia Chemicals* in *Subramanian Swamy v CBI*[6] and it was referred to a Constitution Bench in the context of the validity of Section 6-A of the Delhi Special Police Establishment, 1946. However, the eventual judgement of the Constitution Bench made no reference to arbitrariness, preferring to strike down Section 6-A only on the basis that it created a classification which had no reference to the purposes of the law.[7]

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https://scroll.in/article/848142/secular-civil-code-with-triple-talaq-struck-down-its-time-to-reform-other-unjust-faith-based-laws last seen on 05/12/17.

3 *Shayara Banov* ¶ 5.

4 I have consciously avoided using the term "majority judgement" in this comment precisely because it is hard to call any of the three judgements a "majority judgement" and it is best to identify them by the name of their authors.

5 (2004) 4 SCC 311.

6 (2005) 2 SCC 317.

7 *Subramanian Swamy v Union of India*, (2014) 8 SCC 682.

Prima facie, it seems Nariman's judgement has finally settled the matter. The Supreme Court also seems to think so since three judges in *Navtej Johar v Union of India*[8] cite *Shayara Bano* as an authority for the proposition that a law made by Parliament can be declared as unconstitutional on grounds of being "arbitrary".[9] A majority of the opinions in *Navtej Johar*, hold that Section 377 of the Indian Penal Code if "arbitrary" for criminalizing homosexual acts.

While the eventual outcomes in both *Shayara Bano* and *Navtej Johar* are correct, it is my argument in this article that relying on the doctrine of arbitrariness to declare the enforcement of triple talaq or Section 377 unconstitutional simply does not hold up to scrutiny. I argue that failure in legal and logical reasoning apart, it vastly expands the power of judicial review into the territory of questioning legislative wisdom itself, and not just testing whether a law is constitutionally valid or not.

In laying out my argument for the above proposition, I will first trace the link between arbitrariness and inequality as articulated by courts in India. The next part of this comment will analyse Nariman's judgement in detail, breaking down his argument for holding triple talaq as being unconstitutional. The concluding part of this article will summarise the argument against arbitrariness as a ground to strike down legislation and why there is no constitutional basis *at all* for saying that arbitrariness is a ground to strike down Parliamentary legislation.[10]

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8 2018 SCC Online SC 1350.

9 *Navtej Johar,* ¶ 238, 336, 523 in the judgements of CJI Misra, and Nariman and Chandrachud JJ respectively.

10 For the purposes of this paper, Parliamentary legislation includes laws made by Legislative Assemblies in the State.

II. Conceptions of arbitrariness in Indian law: EP Royappa to Mardia Chemicals and Malpe Vishwanath

Arbitrariness, simply put, is a lack of reason.[11] Justice Bhagwati's concurring judgement in *EP Royappa v State of Tamil Nadu*[12] is ostensibly the first to link arbitrariness, as a ground to strike down executive action, with the Article 14 guarantee of equality.[13] Though it was later emphasized in *Maneka Gandhi v Union of India*,[14] the first time the Supreme Court used the doctrine arbitrariness as expounded in *Royappa* to strike down executive action seems to be in *Air India v Nargesh Meerza*[15]where it was held that the service regulations governing female air crew of Air India were "unreasonable and arbitrary" in so far as they mandated compulsory retirement upon getting pregnant.[16]

Bhagwati's attempt to link arbitrariness with Article 14 came in for severe criticism from HM Seervai.[17] Seervani makes four separate arguments as to why the "new doctrine", as he calls it, is untenable.[18] He finds Bhagwati's statement of the "new doctrine" logically fallacious and unhinged from the distinction between the action of a person which may be arbitrary and laws made by a body.[19] An arbitrary law, according to Seervai, may better describe a

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11 TAO Endicott, *Arbitrariness* Canadian Journal of Law and Jurisprudence Volume 27, Issue 1 page no 49-71, (2014);.

12 1974 SCR (2) 348.

13 That does not mean that the test of reasonable classification under Article 14 did not involve some element of "non-arbitrariness" even prior to *Royappa*. See Shankar Narayanan, "*Rethinking Non-arbitrariness*", National Law School Journal 134 2017.

14 (1978) 1 SCC 248.

15 (1981) 4 SCC 675.

16 *NargeshMeerza.*, ¶ 82.

17 HM Seervai, *Constitutional Law of India*, Vol I 436-441 (4th Edition, 2015).

18 HM Seervai, *Constitutional Law of India*, Vol I 438 (4th Edition, 2015).

19 HM Seervai, *Constitutional Law of India*, Vol I 441 (4th Edition, 2015).

dictatorial or a monarchical form of government where all law making power is vested in one person, and consequently has no relevance in a constitutional system where a body set up by the constitution is given law making power.

While arbitrariness as a facet of inequality was the basis for striking down delegated legislation from as far back as *Nargesh Meerza*, it had never been used to strike down laws themselves until *Mardia Chemicals v Union of India*.[20] *Mardia Chemicals* used an "extra-constitutional test" namely that of arbitrariness,[21] to strike down Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) as being arbitrary and therefore violative of Article 14 (implicitly following *Royappa*).

Mardia Chemicals however, makes no mention of *State of AP v McDowell's Ltd.*[22]where the court had rejected the notion of a parliamentary law being struck down for being "arbitrary". *McDowell's* makes a constitutional argument *against* giving courts the power to strike down laws on grounds of arbitrariness – that legislatures, which are elected by the people, are likely to know what is best and therefore should not be second guessed by the courts. In doing so, *McDowell* walks a fine line between questioning the very basis for judicial review and allowing the courts to question the wisdom of the legislature in every matter.

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20 Supra 6.

21 Abhinav Chandrachud, "*How Legitimate is Non-Arbitrariness? Constitutional Invalidation in Light of Mardia Chemicals v Union of India*",2(Indian Journal of Constitutional Law 179 (2008).

22 *State of AP v Mcdowell & Co. And Ors.*,(1996) 3 SCC 709. In tracing the genealogy of arbitrariness, it would not be amiss to mention *State of Tamil Nadu & Ors v Ananthi Ammal& Ors.*,(1995) 1 SCC 519, ¶ 17, where part of a Tamil Nadu law was struck down as being ultra vires Article 14 because it was "wholly unreasonable" (). However, in *McDowell* this was explained away as actually referring to discriminatory treatment and not arbitrariness.

Does Nariman's judgement in *Shayara Bano* complete the trajectory of arbitrariness while adequately addressing the concerns mentioned above?

Respectfully, it does not.

III. Arbitrariness as a ground to strike legislation: An analysis of Justice Nariman's opinion in Shayara Bano

Nariman begins by tracing the history of Article 14 and arbitrariness not only to *Royappa* but also to earlier judgements such as *SG Jaisinghani v Union of India*[23]and *Indira Gandhi v Raj Narain*.[24]Interestingly, he offers a new basis for linking Article 14 and arbitrariness – the rule of law. While no doubt arbitrary *decisions* of government authorities are destructive of the rule of law, it is highly doubtful if one can erase the category distinction between a law and an executive action in one stroke - to say that arbitrary *laws* are also against the rule of law. While the attributes of the rule of law are well known and have been discussed by several legal philosophers,[25] laws being *necessarily* informed by reason is not one of them. The necessary implication of Nariman's attempt to link arbitrariness with rule of law and Article 14 is that the judicial review of laws becomes a vastly wider exercise – rather than seeing whether a law conforms to the Constitution, it now becomes the judge's task to see whether the law is sufficiently *justified*. This is not per se problematic. The Constitution requires courts to go into the justification for and/or reasonableness of laws in the context of the fundamental freedoms protected under Article 19, religious freedom under Article 25 and

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23 *SG Jaisinghani v Union of India & Ors.*,(1967) 2 SCR 703.

24 *Indira Gandhi v Raj Narain*,1975 Supp SCC 1.

25 See for instance, Joseph Raz, *The Authority of Law: Essays on Law and Morality*, (edition,1979).

26, and in the context of reservations under Articles 15(3) and 16(3). However, in each of these instances, there are specific grounds on which the court is required to test laws for their reasonableness – something lacking entirely in relation to Article 14, which makes reading arbitrariness into it problematic. This effectively means that the court can question the Parliament as to *why* it is making certain laws, and not the how (as it is meant to). While courts are constitutionally permitted to ask *why* in the context of certain restrictions being imposed Parliament, it would be wholly defeating of parliamentary democracy if every law has to be justified to the courts on grounds beyond those provided in the Constitution.

Indeed, this concern is raised by Jeevan Reddy in *McDowell*, which Nariman addresses at two levels. First, it is implied that *McDowell's* ignores two previous binding judgements, namely *Ajay Hasia v Khalid Mujib Sehravardi*[26]and *Dr. KR Lakshmanan v State of TN*.[27]Second, it is pointed out that substantive due process, which is undoubtedly a part of Indian law, also requires that laws be struck down on grounds of being "arbitrary".

Both these claims need to be addressed.

The reference to *Ajay Hasia* as a binding judgement is somewhat bewildering as the case did not involve a challenge to any statutory law at all. The passage cited can, at best, be considered a passing observation and it's a stretch to hold that it's an authority for the proposition that laws can *necessarily* be tested for arbitrariness. As far as the *Lakshmanan* case is concerned, it is so contradictory (using "discriminatory" and "arbitrary" interchangeably) that it is hard to

26 (1981) 1 SCC 722.
27 (1996) 2 SCC 226.

even point out what the ratio of the case is.[28] It has not been followed in any subsequent case by the Supreme Court but has been distinguished in *Union of India v Elphinstone Spinning and Weaving Co Ltd.*[29]

The second claim, while partially true - substantive due process is indeed protected under the Constitution – it is not quite clear how Nariman traced this to Article 14 instead of Article 21. He cites his own judgement in *Mohd Arif v Supreme Court of India*,[30]but does not point out that the case was decided on the test of Article 21 and not Article 14. Merely because a law taking away life and liberty under Article 21 should not be arbitrary and unreasonable, it does not automatically follow that a law can be struck down as a violation of Article 14 for being "arbitrary". Nariman seems to use "substantive due process" as a wand to brush side constitutional concerns without actually explaining what it has to do with the present case.

As with cases starting from *Royappa*, Nariman never clarifies what it means for a Parliamentary law to be "arbitrary" in the course of his judgement. The definition of "arbitrarily" offered in the judgement[31] and repeated in *Navtej Johar* applies to the decision of an individual and makes no sense when applied to the norms set out by a body. Even on the facts of the case, it has been difficult to parse whether the practice of triple talaq is itself considered arbitrary or if Section 4 of the Shariat Act is for enforcing triple talaq or both. These three things mean very different things in the context of what "arbitrariness" is, but no clarity is obvious from Nariman's

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28 See *A Varadharajan v State of Tamil Nadu*, (2004) 1 LW 436, ¶ 20.

29 (2001) 4 SCC 139.

30 (2014) 9 SCC 737.

31 *Shayara Bano, ¶ 100 where the definition in Sharma Transport v State of AP* (2002) 2 SCC 188 *is adopted.*

judgement. It is also possible, that as with *Dr KR Lakshmanan*, *Nargesh Meerza* and *Ananthi Ammal*, Nariman means discriminatory when he says "arbitrary". The key difference between "arbitrary" and "discriminatory" is that the former does not need a comparator whereas the latter does.[32] In each of these cases, including *Shayara Bano*, there is no proper articulation of what a test for arbitrariness, in the context of laws, looks like. It suggests that Jeevan Reddy, when he caustically referred to the term arbitrary as "[a]n expression used widely and rather indiscriminately – an expression of inherently imprecise import", was not too far off the mark.[33]

In any event, Nariman's judgement holding that arbitrariness is a ground to strike down Parliamentary law directly conflicts with the Supreme Court's advisory opinion in *In Re Natural Resources Allocation*[34]where it has noted, with approval Jeevan Reddy's caution in *McDowell*.[35] This automatically makes the judgement a prime candidate for re-consideration by a larger bench (even if it does not imply overturning the result of the case). Even in *Navtej Johar*, no attempt has been made to harmonize the contradictory approaches in *Shayara Bano* and *In re Natural Resources Allocation*.

IV. Conclusion: What to make of Nariman's reasoning

Seervai's critique of *Royappa* holds true – it is logically and legally incorrect to say that all arbitrary acts are *necessarily* violations of Article 14 as well. It is correct that some arbitrary acts may amount to violations of Article 14, but it is not necessarily so. Legally, it is not possible to impute unconstitutionality as a necessary feature of all

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32 Tarunabh Khaitan, *Equality*, first page, cited pag ein *The Oxford Handbook of the Indian Constitution*, (Madhav Khosla, edition, year).

33 *State of AP v. Mcdowell& Co. And Ors.*,¶ 43.

34 *In Re Natural Resources Allocation*,(2012) 10 SCC 1.

35 *In Re Natural Resources Allocation*,(2012) 10 SCC 1, ¶ 105-6.

arbitrary acts, whether they are laws or executive actions. *Royappa's* fallacious reasoning has been wholeheartedly embraced but applied in a terribly incoherent fashion by Nariman in *Shayara Bano* and compounded in *Navtej Johar* when applied uncritically.

Holding that legislation can be struck down for being arbitrary also features a fundamental category error – it erases all distinction between administration action under a legislation and the legislation itself. Executive action can be struck down on grounds of arbitrariness because the executive is required to act in accordance with the dictates of Parliament and cannot be based on the whims of the decision maker. Further confusion has arisen from striking down delegated legislation also as arbitrary. The law as it stands on the issue of arbitrariness and Article 14 has completely confused the legislative, judicial/quasi-judicial and executive functions of the executive, when it comes to judicial review.

On the other hand, Parliament traces its powers to the Constitution itself, as does the judiciary, and in holding that parliamentary law can be arbitrary, the judiciary is holding the Parliament to a standard that does not exist in the constitution. It is, instead, holding the Parliament to a standard developed by the judiciary itself. While Parliament is supposed to be accountable to the electorate at large, the doctrine of arbitrariness expects it to be accountable to the dictates of judges as well!

This absurd conclusion is wholly the result of the incorrect line of reasoning adopted by the Supreme Court in *Royappa*, and which should not have been extended by Nariman in *Shayara Bano*. It leads to directly what Jeremy Bentham warned us about: arbitrary rule by judges which is wholly destructive of the rule of law.[36]

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[36] Supra 11.

RESOLVING THE CULTURAL RIGHT-ANIMAL RIGHT CONFLICT: ANALYSING ARTICLE 29(1) THROUGH THE PARADIGM OF JALLIKATTU

Dushyant Thakur[*]

Abstract

Throughout the world, India is well-known for uniqueness and diversity of its cultures. Culture is considered as a form of expressions of the people in a society, which is assimilated in such a way so that they become virtually inseparable. So much so, that after a certain point in time, a society is identified by the culture and the practices within. In some of these cultural practices, animals have a part to play which establishes a multifarious relationship between cultural rights and animal welfare. At times, such practices may have a negative impact on the animal to such an extent that the animal rights are compromised. One such instance which came to light in India is of Jallikattu. The Supreme Court imposed a blanket ban on Jallikattu in 2014. This position was subsequently reversed by the Government of Tamil Nadu through an amendment in Prevention of Cruelty Act. When challenged by the animal rights activists, protection for Jallikattu as a cultural right was sought under Article 29(1) of the Constitution. Upon observing the involvement of the question of interpretation of the Constitution, the matter has been referred by the Supreme Court to the Constitution Bench.

The essay shall focus on possible interpretations of Article 29(1) using Constituent Assembly Debates (CAD), Directive Principles and Fundamental Duties. CAD will provide an insight into the intention of the makers of the Constitution. Whereas, Directive Principles and Fundamental Duties are vital to identify the scope and limits of Article

[*] Student of B. Com. LL.B. (Hons.) at Gujarat National Law University.

29(1). Among the Directive Principles, the focus has also been given on international law obligations of India. Cue will also be taken from the practice adopted by other countries in settling the customary conflict between cultural rights and animal welfare, which has provided guidance to the Supreme Court in the past.

Through this essay, the author envisages an expansive interpretation of Article 29(1), thereby placing cultural rights over animal welfare particularly for the case of Jallikattu. An expansive interpretation over a narrow interpretation will provide more scope for jurisprudential development of the Article in a positive direction.

I. INTRODUCTION

In May 2014, Jallikattu was banned by the Supreme Court, holding the practice to be in contravention of the Prevention of Cruelty to Animals Act 1960.[1] In its analysis, the Court went even further to extend the scope of Article 21 of the Constitution of India to bring animals within its purview.[2] A review petition was filed in May 2014 itself, which was dismissed subsequently in 2016.[3] Post-dismissal of the petition, the government of Tamil Nadu enacted the Prevention of Cruelty to Animals (Tamil Nadu Amendment) Act 2017[4] and the Tamil Nadu Prevention of Cruelty to Animals (Conduct of Jallikattu) Rules, 2017[5] in January 2017 to override the 2014 judgment of the Supreme Court.

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1 *Animal Welfare Board of India v. A. Nagaraja & Ors.*, (2014) 7 SCC 547 ["The 2014 judgment" hereinafter].

2 *Id.*

3 *Chief Secretary to the Government, Chennai, Tamil Nadu & Ors. v. Animal Welfare Board & Anr.*, (2017) 2 SCC 144 ["Review Petition" hereinafter].

4 Prevention of Cruelty to Animals (Tamil Nadu Amendment) Act, No. 1 of 2017 ["Amendment Act 2017" hereinafter].

5 Tamil Nadu Prevention of Cruelty to Animals (Conduct of Jallikattu) Rules, 2017 ["Jallikattu Rules" hereinafter].

The Amendment Act 2017 defined Jallikattu[6] and legalized it on the ground of being a culture and promoting the protection of native breed of cattle,[7] while Jallikattu Rules provided for regulation of Jallikattu by prescribing a procedure for its conduct and rules for taking care of the bull involved.[8] Animal rights activists challenged this move before the Supreme Court.[9] It is being contended by the animal rights activists that the enactments violate the internationally recognized freedoms with respect to animals, which were accepted by the Supreme Court in the 2014 Judgment.[10] Tamil Nadu, on the other hand, contended that Jallikattu is a cultural right, protected under Article 29(1) of the Constitution.[11] Upon observing the involvement of a substantial question about the interpretation of the Constitution, the matter has been referred to the Constitution Bench.[12] The matter is *sub judice*.

The contention raised, seeking protection of cultural right for Jallikattu, might be the only argument available with the Government of Tamil Nadu now in Jallikattu's defence. The case becomes more imperative because it involves deciding upon the conflict between cultural rights and animal rights, for which Article 29(1) will have to be interpreted. This makes the case important on two fronts: (1)

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6 Amendment Act 2017, *supra* note 4, S.2. It states, "Jallikattu means an event involving bulls conducted with a view to follow tradition and culture on such days from the months of January to May of a calendar year and in such places, as may be notified by the State Government, and includes "manjuviratu", "vadamadu" and "erudhuvidumvizha"."

7 Amendment Act 2017, *supra* note 4, S.4 & 6.

8 Jallikattu Rules, *supra* note 5, R. 3 & 4.

9 People for Ethical Treatment of Animals (PETA) India & Anr. v. State of Tamil Nadu, W.P.(C) No. 1011/2017.

10 Krishnadas Rajagopal, *Jallikattu issue to go to Constitution Bench*, THE HINDU (Dec. 12, 2017), ttp://www.thehindu.com/news/national/jallikattu-issue-to-go-to-constitution-bench/article21512807.ece.

11 *Id.*

12 *Id.*

Depth of the Article 29(1) in context of culture has never been explored before, and; (2) The case also involves deciding upon the conflict between cultural rights and animal rights in the form of Jallikattu, which again has been never done in India before.

In no way, however, this should be confused with protecting Jallikattu as a right to practice religion under Article 25[13] of the Constitution of India. In the review petition, it was attempted to protect Jallikattu using Article 25.[14] The Supreme Court whilst examining the petitioner's contentions out rightly rejected the argument that Jallikattu as a festival could be brought within the purview of Article 25 as a religious practice.[15] Non-acceptance of Jallikattu as a religious practice has no influence on the question of Jallikattu being a cultural right or not. Religion is merely a way in which cultural values are articulated.[16] Hence, culture is a bigger set to which religion forms a part. Therefore, even if Jallikattu is not a religious practice, a possibility exists that Jallikattu forms part of the culture.

The purpose of this essay is to explore possibilities for interpretation of Article 29(1) of the Constitution with respect to Jallikattu and to suggest the most suitable interpretation for the provision for deciding upon the conflict. For this purpose, development and significance of Jallikattu will be explored **(Part II)**. After developing an understanding of Jallikattu, the author has tried

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13 INDIA CONST. art. 25, cl. 1. It states, "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

14 Review Petition, *supra* note 3.

15 *Id.*

16 DONALD EUGENE SMITH,INDIA AS A SECULAR STATE 372 (1963) ["SMITH" hereinafter].

to show possible alternatives available to the Supreme Court for interpretation of Article 29(1) **(Part III)**. Thereafter, the position of the international community on the conflict between cultural rights and animal rights is depicted **(Part IV)**. A perspective of international law is also taken to understand the meaning of culture and position in international law on the conflict between cultural rights and animal rights, given the significance of international law in the interpretation of the Constitution **(Part V)**. On the basis of this analysis and options explored, the author suggests the interpretation which should be adopted along with the reason for such suggestion **(Part VI)**. Thereafter, concerns of the animal rights activists are addressed **(Part VII)**. The last part provides the conclusion **(Part VIII)**.

II. Jallikattu: Development and Significance

A. Historical Development and Cultural Significance

Jallikattu is a part of a four-day long harvest festival is celebrated in Tamil Nadu, named Pongal which is a festival of thanks-giving to nature. Given the pertinent role cattle play in the Indian agricultural practices, the third day is dedicated to them. It is called Mattu Pongal and it is on this day that Jallikattu is organised.

Jallikattu takes a cue from *Eru Thazhuvuthal*, which means "embracing a bull."[17] From everyday affair for a herder of stopping a bull from running away from the herd, it took the form of a sport wherein young men catch the bull by his hump to "embrace it" and then eventually stop him. *Eru Thazhuvuthal* took the form of Jallikattu when a small bag containing gold coins was tied on a bull's horns,

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17 VIJAYA RAMASWAMY, HISTORICAL DICTIONARY OF THE TAMILS 175 (2nd ed. 2017).

who was to be stopped by embracing it. The prize for stopping the bull was the gold coins in the bag. This is what Jallikattu literally means i.e. grabbing a bag of coins tied to the horns of a bull.[18]

Jallikattu is not new or something which has been developed recently in the culture of Tamil Nadu. In fact, it is an ancient sport dating back more than 5000 years which is evident from the seals of Indus Valley Civilization.[19] Specifically to Tamil culture, various rock art discoveries have been made dating back to prehistoric times depicting Jallikattu.[20] Sangam literature, which provides the most valuable information on history and culture of Tamils,[21] offers an extensive poetic description of the bull-taming sport.[22] Jallikattu has even been accounted for in the detailed writings of the British administrators, particularly highlighting the cultural worth attached to the sport.[23] Such bull-taming sport also finds its mention in the writing of A.L. Basham, who observed that it had "some ritual significance" in the Dravidian culture.[24]

The history relevant to Jallikattu depicts two things. One, Jallikattu is deeply rooted in Tamil culture and cultural significance attached to it for the people of Tamil Nadu is immense. And two, the

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18 Kalaiyarasan A., *Politics of Jallikattu*, 52 ECONOMICS AND POLITICAL WEEKLY 10, 10 (2017); Jalli/salli means coins and kattu means tied.

19 CORPUS OF INDUS SEALS AND INSCRIPTIONS 77 (Jagat Pati Joshi & Asko Parpola eds., 1987).

20 Vidhya Venkat, *Bull-taming in Tamil Nadu's ancient rock art*, THE HINDU (Jan. 19, 2017), http://www.thehindu.com/news/national/tamil-nadu/Bull-taming-in-Tamil-Nadu%E2%80%99s-ancient-rock-art/article17061183.ece?homepage=true.

21 SAILENDRA NATH SEN, ANCIENT INDIAN HISTORY AND Civilization 204 (2nd ed. 1999).

22 A.R. Venkatachalapathy, *Catching a sport by its horns*, THE HINDU (Jan. 21, 2017), http://www.thehindu.com/opinion/lead/Catching-a-sport-by-its-horns/article17069540.ece.

23 5 EDGAR THURSTON, CASTE AND TRIBES OF SOUTHERN INDIA 43-46 (1909).

24 A.L. BASHAM, THE WONDER THAT WAS INDIA 210 (2011).

intention of people taking part in the sport is of embracing the bull to stop him, rather than overpowering the bull.

Further, taking into consideration the historical and cultural significance of the sport and particularly the day on which it is organised, two incongruities arise out of the claim made against Jallikattu before the Supreme Court. First, it has been claimed that bulls are harmed in a sport organised on the day especially celebrated to honour them. Second, harm is claimed from a sport, which as history supports, never intended to harm the bull. In fact, historians themselves accept the point that particular precautions were taken to make sure the bull is not harmed.[25]

B. Significance in Preservation of Breed

Kangayam is one of the six native breeds of cattle found in Tamil Nadu.[26] Bulls of this breed are most popularly and extensively used for Jallikattu due to their sturdiness.[27] In fact, some people rear breed of such bulls only to stage the strength, agility and alertness of the bull through the sport. This activity increases the demand of the bull, which successfully displays his strength, agility and alertness. Such bull is preferred for mating with cows. This process reiterates the survival and continuation of the fittest in the breed, improving the quality of the breed as a whole. Since most of the transportation and agriculture work is being handled by machines nowadays, worth

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25 *Id.*

26 These breeds are Kangayam, Pulikulam, Umbalachery, Barugur, Alambadi and Malai Maadu; *See*Himakiran Anugula, *Banning Jallikattu Will Undermine Tamil Nadu's Inigenous Cattle Breeds*, THE WIRE (Jan. 10, 2017), https://thewire.in/19157/banning-jallikattu-will-decimate-indias-indigenous-cattle-breeds/.

27 Swaminathan Natarajan, *Jallikattu: Why India bullfighting ban 'threatens native breeds'*, BBC NEWS (July 19, 2016), http://www.bbc.com/news/world-asia-india-36798500.

of owning bull has declined and is now limited only for the purpose of participation in this sport. After the 2014 ban on Jallikattu, people have no initiative to rear native breed of bulls.[28] Further, reports suggest some of the bulls making their way to the slaughter house while others being sold at a petty price.[29] Therefore, not only Jallikattu is of cultural import but also plays a significant role in preserving the native breed of cattle.

III. Possible Interpretations of Article 29(1)

While referring the matter to the Constitution Bench, one of the questions raised by the Supreme Court was whether the State of Tamil Nadu can claim cultural right to conserve Jallikattu under Article 29(1).[30] The marginal heading of Article 29 reads as 'Protection of interests of minorities."[31] Therefore, the first question of appositeness is that who are the minorities and whether Tamils will come within the purview of this Article. An answer to this question can be found both in the constituent assembly debates and a judgment of the Supreme Court.

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28 *Aparna Karthikeyan,* Slipping Hold: How the jallikattu ban threatens indigenous cattle breeds and rural livelihoods in Tamil Nadu*, THE CARAVAN (Oct. 1, 2016), http://www.caravanmagazine.in/reportage/slipping-hold-jallikattu-ban-threatens-indigenous-cattle-breeds-rural-livelihoods-tamil-nadu.*

29 Sudhirendar Sharma, *Jallikattu Ban Strikes at Root of Local Economy Nurturing Super Healthy Indigenous Breeds of Bull*, OUTLOOK (Jan. 18, 2017), https://www.outlookindia.com/website/story/jallikattu-ban-strikes-at-root-of-local-economy-nurturing-super-healthy-indigeno/297689.

30 *'Jallikattu a Cultural Right?' Constitution Bench to Examine*, THE QUINT (Dec. 13, 2017), https://www.thequint.com/news/politics/sc-refers-jallikattu-matter-to-constitution-bench.

31 INDIA CONST., *supra* note 13, art. 29, cl. 1. It states, "Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same."

The contemporary form of Article 29(1), although similar to the corresponding clause present in the Draft Constitution,[32] was not incorporated as was reported by the Committee of Fundamental Rights in 1947. The Committee on Fundamental Rights instead of extending the right guaranteed under Article 29(1) to 'any section of citizens residing in the territory of India or any part thereof,' limited it merely to "minorities."[33] This was pointed out by Z.H. Lari during the constituent assembly debates. He moved an amendment to restore the original position.[34] This changed position was justified by B.R. Ambedkar. As per him, the minority was never intended to be understood in the technical sense, but a wider scope was envisaged.[35] Therefore, removal of the term "minority" was considered apt to give wide sense to the Article. The motion moved by Z.H. Lari was negatived by the Assembly.[36] This signifies that intention of makers of the Constitution was never to constraint scope of the clause merely to minorities, but extending it to every section of citizens who wish to conserve their distinct language, script or culture.

The observation of the Supreme Court favoured such originalist interpretation, noting that the words used in the Article were, 'any section of the citizens.' This includes right of majority, along with the minorities, to conserve their distinct culture,[37] as

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32 DRAFT CONST. art. 23, cl. 1. It states, "Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script and culture of its own shall have the right to conserve the same."

33 7 LOK SABHA SECRETARIAT, CONSTITUENT ASSEMBLY DEBATES: OFFICIAL REPORT 893 (photo. reprint 2003) ["CONSTITUENT ASSEMBLY DEBATES" hereinafter].

34 *Id.*

35 *Id.*, at 923.

36 *Id.*, at 924.

37 *The Ahmedabad St. Xaviers College Society & Anr. v. State of Gujarat & Anr.*, AIR 1974 SC 1389.

political minority in a State has not been referred to in the Article.[38] Since Tamil Nadu is a part of India, Tamils residing therein will definitely be considered a section of the citizens residing in the territory of India.

Other than the phrase discussed above, interpretation of two terms in Article 29(1) becomes pertinent to decide upon the conflict with respect to Jallikattu. These terms are *culture* and *conserve*. Interpretation of culture will actually determine if Jallikattu can be considered as culture and extent of interpretation of the term "conserve" will be used to decide whether Jallikattu is capable of being conserved.

A. Interpreting "Culture" in the Context of Jallikattu

In between the two terms, the first point of discussion is regarding interpretation which can be adopted for the term "culture." From Societal perspective, culture is an inseparable part to achieve goals of holistic development of all, something which mankind aspires to achieve since early civilization. For State's point of view, protection to culture is another opportunity among many to establish confidence among its people that they live in a regime which provides them with all such rights which aid them to have a worthy existence.

The makers of the Indian Constitution have made no attempts to arrive at a uniform definition for the term. Yet, according to one of the speakers, Prof. K.T. Shah, culture of mankind is a progressive and developing fact which encompasses within its

[38] 6 D.D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 5513 (9th ed. 2016) ["D.D. BASU" hereinafter].

purview collective heritage of a community's past.[39] This includes arts, learnings, sciences, religion or philosophy.[40]

However, due to lack of the meaning given to the term collectively, the originalist interpretation cannot be done. Oxford Dictionary defines the term 'culture' as the ideas, customs, and social behaviour of a people in a particular society.[41] Further, for a better understanding of this term, a study analysing 164 definitions given by various anthropologists, psychologists, sociologists and philosophers in their writings may be taken into consideration.[42] This study has been widely accepted by Indian jurists in their writings.[43] The study shows that majority of the definitions has stressed on culture as a collective name for human achievements, namely material, social, religious and artistic.[44] This may include traditions, customs and behaviour unified by a common belief in them to take the form of culture.[45] Distinctive quality to a culture is provided by the value it contains.[46] Additionally, Granville Austin has referred the term culture to include 'certain traits, viewpoints, and ingrained experiences and attitudes that are integral to the citizen.'[47]

Upon analysis of the definitions and understanding of the term "culture" taken along with the historical development of

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39 CONSTITUENT ASSEMBLY DEBATES, *supra* note 33, at 896.

40 *Id.*

41 *Culture,* OXFORD DICTIONARIES (July 1, 2018), https://en.oxforddictionaries.com/definition/culture.

42 A.L. KROEBER & CLYDE KLUCKHOHN, CULTURE: A CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS 145 (1952).

43 D.D. BASU, *supra* note 38, at 5516; JUSTICE HIDAYATULLAH, CONSTITUTIONAL LAW OF INDIA 560-561 (1984).

44 SMITH, *supra* note 16, at 372.

45 *Id.*

46 *Id.*

47 GRANVILLE AUSTIN, WORKING OF A DEMOCRATIC CONSTITUTION 637 (1999).

Jallikattu,[48] it can be observed that Jallikattu finds its mention in the Sangam literature and writings of the British administrator. It is being practiced for centuries now to the extent that it has been ingrained in the Tamil culture. Therefore, Jallikattu is definitely a part of Tamil culture. Accordingly, Jallikattu will come within the purview of the culture under Article 29 (1).

Preservation of our rich heritage and culture is even required under the Fundamental Duties.[49] Although, Fundamental Duties do not explicitly provide for duties of the State, but of every citizen who collectively constitute as a State.[50] Therefore, even Fundamental Duties can used as an interpretative guide of the Constitution.[51] Such use of Fundamental Duties have been made in the past.[52] This was also reflected in the 2014 Judgment, in which Jallikattu was banned taking aid of Article 51A (g) and (h) of the Constitution.[53]

Further, since Jallikattu helps in the preservation of native cattle breeds,[54] support of Article 48 of the Constitution can also be taken. Article 48 requires State to 'take steps for preservation and improvement of the cattle breeds'[55] and can be used to determine scope and ambit of the Fundamental Right relied upon.[56] Such

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48 *See supra* Part II(A).

49 INDIA CONST., *supra* note 13, art. 51A (f).

50 *A.I.I.M.S. Students' Union v. A.I.I.M.S. & Ors.*, (2002) 1 SCC 428.

51 *Id.*

52 *State of U.P. v. Yamuna Shanker Misra*, (1997) 4 SCC 7; *M.C. Mehta v. Union of India*, (1997) 2 SCC 353; *see generally* Justice Dipak Misra, *Fundamental Duties and Constitutional Perspective*, AIFTP ONLINE (Sep. 20, 2014), http://www.aiftponline.org/journal/December%202014/fundamental_duties.html.

53 The 2014 judgment, *supra* note 1.

54 *See supra* Part II(B).

55 INDIA CONST., *supra* note 13, art. 48.

56 *Re: Kerala Education Bill, 1957*, AIR 1958 SC 956 ["Kerala Education Bill" hereinafter].

preservation is also the object of the Amendment Act 2017,[57] which can be determined through preamble of the legislation.[58]

Therefore, upon reading of the term "culture" under Article 29(1) in consonance with Article 48 and Article 51A(f) of the Constitution, possibility is certainly available with the Supreme Court to bring Jallikattu within the ambit of culture, as has been provided in the Constitution.

Here and now, it is apt to bring up a judgment of the Bombay High Court, in which a claim on Article 29(1) was addressed.[59] In the case, the ban on the slaughter of bulls and bullocks was under challenge. One of the grounds on which the ban was challenged was the violation of Article 29, slaughtering being a cultural practice. Against this argument, the respondent asserted that Article 29 is for the preservation of "essential culture" and since slaughtering is not part of the essential culture of any community, protection of Article 29 cannot be claimed. This proposition was accepted by the Bombay High Court.[60] Through a discussion on this judgment, the intention of the author is merely to put forth another way of interpretation. However, in the author's opinion, the *ratio* in this case regarding the interpretation of Article 29(1) is flawed. The ratio in this case was based on whether a particular culture could be considered 'essential' or not. A similar interpretation is preferred in Article 25, wherein protection is extended only to 'essential' religious activities.[61] The root of this interpretation can be found in the intention of makers of the Constitution through reference to the constituent assembly

57 Amendment Act 2017, *supra* note 4, Preamble.

58 *Hiral P. Harsora v. Kusum Narottamdas Harsora*, (2016) 10 SCC 165.

59 *Sheikh Zahid Mukhtar & Ors. v. The State of Maharashtra & Ors.*, 2016 SCC OnLine Bom 2600.

60 *Id.*

61 *The Commissioner, Hindu v. Sri Lakshmindra Thirtha Swamiar*, AIR 1954 SC 282.

debates.[62] Still, the use of this doctrine remains controversial due to the institutional problems it creates since it has been reduced to a purely subjective test.[63] However, extending this already problematic doctrine to Article 29 would be constitutionally impermissible as the Constitution makers never contemplated such a doctrine with reference to Article 29. Further, such an extension will create the same problems of interpretation which Article 25 has been facing.

B. Interpreting the term "Conserve"

Next term which comes up for interpretation is "conserve." Even if Jallikattu comes within the purview of culture under the Constitution, it is still required to be examined if the practice is capable of being conserved. Upon reading of the clause, particular emphasis can be observed on this particular word.[64] One aspect which can be taken into consideration is that of the constituent assembly debates. During debates, an amendment was moved by Prof. K.T. Shah to add the word "develop" in the clause after the word "conserve."[65] According to him, conservation is a static position, while development is progressive.[66] As already stated, he believed, culture is a collective heritage of a community's past and develops with time. Therefore, apart from providing protection to already existing culture, subsequent development in the same should

62 CONSTITUENT ASSEMBLY DEBATES, *supra* note 33, at 781.

63 Gautam Bhatia, *"Essential Religious Practices" and the Rajasthan High Court's Santhara Judgment: Tracking the History of a Phrase*, INDIAN CONST. L. AND PHIL. BLOG (July 1, 2018) https://indconlawphil.wordpress.com/2015/08/19/essential-religious-practices-and-the-rajasthan-high-courts-santhara-judgment-tracking-the-history-of-a-phrase/.

64 D.D. BASU, *supra* note 38, at 5515.

65 CONSTITUENT ASSEMBLY DEBATES, *supra* note 33, at 896.

66 *Id.*

also be protected.[67] This view of his was shared by Jaipal Singh.[68] However, this motion was also negated by the assembly.[69]

To the contrary, another aspect is that of an expansive interpretation given by Prof. D.D. Basu to the word conserve itself. For this purpose, he has established the difference between the right to preserve and the right to conserve, considering the former as a passive and the latter as an active right. According to him, the term "conserve" used in the Constitution is not limited to its literal meaning, but includes the right to profess, practise and preach one's culture and the right to adopt any lawful measure to preserve one's culture.[70]

Examination of the approaches will show two ways in which the term "conserve" can be interpreted by the Supreme Court. This in-turn will also help the Court to determine the reason behind non-acceptance of the motion moved by Prof. K.T. Shah. This is because the reason for such rejection has not been mentioned or discussed in the debates. One way would be to interpret "conserve" *narrowly*, as was done by Prof. K.T. Shah, and comprehend negation of the motion as non-consideration by the majority of the makers of the Constitution to extend the protection to subsequent developments in the culture. Another way is to interpret the term *expansively* on the lines of Prof. D.D. Basu. If interpreted in this way, the motion will be seen as negated because broad interpretation to "conserve" was implicit in the constitution.

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67 *Id.*
68 *Id.* at 907.
69 *Id.* at 925.
70 D.K. SEN, COMPARATIVE STUDY OF INDIAN CONSTITUTION 638 (1966).

If the historical development of Jallikattu presented in this essay is to be accepted, it does not matter if the narrow interpretation for "conserve" is adopted or the expansive one. It is capable of being conserved under both. This is primarily because, upon analysis of the relevant factual data, the conclusion arrived by the author is that the practice of Jallikattu since all these years has majorly remained the same. This means that no significant or subsequent development in the practice of Jallikattu has been observed.

However, what was accepted by the Supreme Court in relation to Jallikattu in Tamil culture and tradition is different.[71] The Supreme Court observed in the 2014 judgment that Jallikattu, as practiced now, was not a part of Tamil culture.[72] This is because of the manner in which it is conducted has changed over time. In other words, the present form in which Jallikattu is conduced involves a *subsequent development*. This is where narrow and expansive interpretation of the term "conserve" becomes relevant. If given expansive interpretation to the term, Jallikattu is capable of being conserved, even in the present form. And if a narrow interpretation is given to the term, subsequent development to the practice of Jallikattu is not capable of being conserved.

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71 The history considered by the Supreme Court in relation to Jallikattu has been criticised by various authors for the depth it lacks. *See e.g.* Geetanjali Sharma & Shivam Singh, *Regulating India's Blood-Sport: An Examination of the Indian Supreme Court's Decision in Animal Welfare Board of India v. A. Nagaraja*, 6(1) JINDAL GLOBAL L. REV. 113, 120 (2015); Adithya Reddy, *Animal rights versus Cultural rights: Imagined conflict*s, BHARAT NITI (Dec. 11, 2014), https://www.bharatniti.in/article/animal-rights-versus-cultural-rights-imagined-conflicts/15; Senthil Raja, *Supreme Court Ban on Jallikattu is Erroneous*, VIJAYVANI (Jun. 14, 2014), http://www.vijayvaani.com/ArticleDisplay.aspx?aid=3232.

72 The 2014 judgment, *supra* note 1.

IV. Position of Other Countries on the Cultural Rights-Animal Rights Conflict

The conflict between cultural rights and animal right is not unique to the sole issue of Jallikattu. Previously, other countries have encountered similar rifts and have tackled them in diverse ways. Such practices adopted by States and comparative analysis will enlighten the Supreme Court in India while decide upon the conflict. The countries referred hereinafter must be distinguished from the countries referred in the 2014 judgment, where reference was made with respect to countries where rights of animals have been recognised. Those references did not deal with resolution of the conflict between cultural rights and animal rights.

With respect to cultural practices concerning bull, conclusions arrived at by the judiciary in Spain, France and South Africa will be valuable. In 2010, bullfighting was banned by the regional government of Catalonia.[73] Catalonia lies in the north-eastern region of Spain. On the other hand, two State laws had declared bullfighting as a "cultural heritage." In 2016, the Spanish Constitutional Court overturned the ban.[74] It was observed that the competence of the State to conserve "cultural heritage" takes precedence over the law by autonomous community to ban the activity.[75] The Court, however, agreed that the autonomous community can regulate the organisation of bullfighting events and

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73 *Catalonia bans bullfighting*, THE GUARDIAN (July 28, 2010), https://www.theguardian.com/world/2010/jul/28/catalonia-vote-on-bullfighting-ban.

74 *Catalan bullfights: Spanish top court overturns ban*, BBC NEWS (Oct. 20, 2016), http://www.bbc.com/news/world-europe-37719997.

75 Stephen Burgen, *Spanish court overturns Catalonia's bullfighting ban*, THE GUARDIAN (Oct. 20, 2016), https://www.theguardian.com/world/2016/oct/20/spanish-court-overturns-catalonia-bullfighting-ban.

their development.[76] In France, Criminal Code imposed punishment for any act of cruelty upon any animal.[77] However, regions with uninterrupted traditional bullfighting are exempted from the rule.[78] When the animal rights activists challenged the exemption for a ban on bullfighting, the Constitutional Council of France rejected the claim.[79] The Court ruled this exception to be reasonable.[80] In both Spain and France, although bullfighting has been recognised as a cultural heritage and traditional practice respectively, the practice has not been protected using the argument of protection of cultural rights. This is because cultural rights have not been given the protection of fundamental rights in these countries. In South Africa, cultural rights are protected under Article 31 of the Constitution.[81] A case was brought before the High Court against a cultural practice organised during the First Fruit Festival, in which young warriors kill bull with their bare hands.[82] The High Court observed that the constitutional rights of Zulu people to practice their religion and culture were involved.[83] Placing cultural rights over animal protection, the application to ban the practice was dismissed. Importance of practice in the lives of Zulu people was given significance to decide that "the balance of convenience weighs heavily in favour of the traditional community."[84]

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76 *Id.*

77 CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 521-1 (Fr.).

78 *Id.*

79 Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-271 QPC, Sep. 21, 2012 (Fr.).

80 *Id.*

81 S. AFR. CONST. art. 31, 1996.

82 David Bilchitz, *Animal Interests and South African Law: The Elephant in the Room, in* ANIMAL LAW AND WELFARE: INTERNATIONAL PERSPECTIVE 131, 138 (Deborah Cao & Steven White eds., 2016).

83 *Stephanus Smit NO & Ors. v His Majesty King Goodwill Zwelithini* [2009] ZAKZPHC 75 (S. Afr.).

84 *Id.*

Other than bullfights, another example where such conflicts can be seen is in the cases of cockfighting. Instances of Philippines and Peru can be taken for understanding the stand prevalent there in such conflict, where a stand has been taken in the favour of cultural practices by the legislation itself. Cockfighting is deeply embedded in the culture of the Philippines.[85] Cockfights are held in cockpits, regulated in Philippines through the Cockfighting Law 1974.[86] The preamble of the law itself states that cockfighting has been a traditional and customary form of activity among Filipinos.[87] Further, an exception has been made for practices by indigenous cultural communities in the Animal Welfare Act 1998 which prohibits torturing animals.[88] In Peru, cockfighting is believed to have begun in the 16th century and continues to be permitted by the government.[89]

A *Contrary* position is adopted in the United Kingdom ("UK" hereinafter). Fox hunting as a cultural practice was involved, which has been sufficiently depicted in art and literature.[90] It was contended that ban on such hunting practices under the Hunting Act 2004 is incompatible with the European Convention on Human Rights.[91] However, the claim did not sustain and such hunting was held to be in the violation of the Hunting Act 2004.[92]

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85 Aurora Almendral, *'Just way of making a living': Cockfighting a way of life in Philippines*, NBC NEWS (Aug. 26, 2013), https://www.nbcnews.com/business/travel/just-making-living-cockfighting-way-life-philippines-f6C10945776.

86 Cockfighting Law, Pres. Dec. No. 449, §5 (1974) (Phil.).

87 *Id.*, Preamble.

88 An Act to promote Animal Welfare in the Philippines, otherwise known as "The Animal Welfare Act of 1988", Rep. Act No. 8485, §6(1) (1988) (Phil.).

89 1 ENCYCLOPAEDIA OF LATINO CULTURE: FROM CALAVERAS TOQUINCEANERAS 757 (Charles M. Tatum Ed., 2013).

90 *R v. Her Majesty's Attorney General & Anr.*, [2007] UKHL 52.

91 *Id.*

92 *Id.*

The case of Australia is particularly unique, where consistency lacks among various States and territories itself with regard to stand taken in culture-animal conflict.[93] An example of Queensland and Northern Territory is useful to show this inconsistency. In Queensland, through S.8(1) of the Animal Care and Protection Act 2001, acts or omissions under an aboriginal tradition even if it is cruel to an animal is exempted.[94] Exactly opposite position prevails in Northern Territory. S.79(2) of the Animal Welfare Act 1999 specifically states that for acts and omissions constituting an offence, cultural, religious or traditional practices will not be a defence.[95]

It can be observed that such conflicts between cultural rights and animal rights have been resolved differently in different countries. In some countries, cultural rights have been given the position in the Constitution itself, which has been affirmed by the judiciary of the country. While in some other countries, legislation for animal welfare itself carves an exception for cultural and traditional practices. Where there is no clear position given in the Constitution or animal welfare legislation, then such conflicts are resolved by the judiciary of the country.[96] At the same time, for resolution of these conflicts, the Courts of these countries have not refrained from maintaining that such practices can be regulated.[97] Therefore, the Courts have ruled for regulated cultural practices.

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93 Dominique Thiriet, *Traditional Hunting: Cultural Right v Animal Welfare*, 31 ALT L. J. 63, 63 (2006).

94 *Animal Care and Protection Act 2001* (Qld) s 8(1) (Austl.).

95 *Animal Welfare Act 1999* (NT) s 79(2) (Austl.).

96 Examples of such countries are Spain, France and United Kingdom.

97 Example can be taken of bullfighting in Spain, where the Court did not deny the regulation of the sport. Also, cockfighting in Peru and Philippines is regulated through legislations.

V. A Perspective of International Law to the Conflict

The conflict between cultural rights and animal rights is not just restricted to national boundaries. These two cross paths even in the field of international law. International law in the present context becomes relevant from the point of view of Article 51(c) in the Directive Principles, which directs India to respect international law and its treaty obligations.[98] As already stated, such Directive Principles play a role in the interpretation of fundamental rights by determining its scope and ambit.[99] Therefore, when a treaty to which India is a party is in question, whether or not incorporated into Indian law, there will be a general assumption that the Parliament does not intend to breach its international obligations.[100] Further, various international law obligations have been read into fundamental rights by the Supreme Court in the past.[101]

International law will be useful on two points for the matter at hand: for understanding the meaning of the term "culture" and its limits in the international law, and; understanding stance of international law in the conflict between cultural rights and animal rights to determine which one has been given an upper hand.

When cultural rights are concerned, International Covenant on Economic, Social and Cultural Rights becomes relevant.[102] India

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98 INDIA CONST., *supra* note 13, art. 51(c).

99 *Kerala Education Bill*, *supra* note 56.

100 Lavanya Rajamani, *International Law and Constitutional Schema, in*THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Sujit Choudhry et al. eds., 2016).

101 *See generally* V.G. Hegde, *Indian Courts and International Law*, 23 LEIDEN J. INTL. L. 53 (2010).

102 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 ["ICESCR" hereinafter].

acceded to the ICESCR on April 10, 1979.[103] Parties to the Convention are required to recognize "everyone's right" to participate in "cultural life."[104] This right has also been recognised in the Universal Declaration of Human Rights.[105] Interpretations given by the Committee on Economic, Social and Cultural Rights ("the Committee" hereinafter) for ICESCR have been regarded as authoritative by the International Court of Justice.[106] The Committee has interpreted culture broadly, considering it as "a living process" which evolves with time.[107] In a way, the Committee includes "subsequent developments" within the purview of culture. This can even be substantiated through state practice, which sufficiently shows that it is not necessary for a cultural practice to be carried out in an ancient way, but, can be adopted in a modernised way.[108] Such state practice is particularly important in interpretation[109] and determination of the scope of a treaty.[110]*Further*, the Committee has

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103 STATUS OF INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en (last visited Dec. 30, 2017).

104 ICESCR, *supra* note 102, art. 15, ¶1(a).

105 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 27 ¶1 (Dec. 10, 1948).

106 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶112 (July 9).

107 U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 21, ¶11, U.N. Doc. E/C.12/GC/21 (Dec. 29, 2009) ["General Comment No. 21" hereinafter].

108 *Members of the Yorta Yorta Aboriginal Community v. State of Victoria* (2001) 110 FCR 244 (Austl.); Garifuna Community of Cayos Cochinos and its Members v. Honduras, Inter-Am. Ct. H.R. Case No. 12.548, at ¶216, (Feb. 21, 2013); United Nations Human Rights Committee, UN Doc. A/56/40 (Vol. II), ¶¶11–29 (Oct.27, 2000).

109 Vienna Convention on the Law of Treaties art. 31, ¶ 3(b), May 23, 1969, 1155 U.N.T.S. 331.

110 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶¶55-56 (July 8).

explicitly acknowledged that culture encompasses sport and games.[111] Therefore, it seems clear enough that Jallikattu will be considered with the limits of culture, even if it is a subsequent development. Thus, it is protected under the ICESCR.

It is also pertinent to note that, while specifying limitations to the right to participate in cultural life, no mention has been made to animal rights or welfare.[112] In fact, traditional hunting practices have been considered as cultural activities.[113] Further, various international treaties for protection and conservation of animals also creates an exception for traditional and cultural practices. An Example can be taken of the Convention on Biological Diversity.[114] It protects the use of biological resources[115] in accordance with traditional cultural practices.[116] Another example can be taken of Convention on the Conservation of Migratory Species of Wild Animals[117] ("CMS" hereinafter). The CMS prohibits taking of the listed migratory species.[118] However, an exception to this prohibition allows traditional use of the species.[119] Overall, balance appears to tilt in the favour of cultural rights from the international law perspective.

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111 General Comment No. 21, *supra* note 107, at ¶13.

112 General Comment No. 21, *supra* note 107, at ¶¶17-20.

113 *Kitok v. Sweden*, Communication No. 197/1985, Rep. of the HRC, U.N. Doc. CCPR/C/33/D/197/1985 at 221, ¶4.1 (July 27, 1988); *Lansman v. Finland*, Communication No. 511/1992, Rep. of the HRC, U.N. Doc CCPR/C/52/D/511/1992 (Oct. 26, 1994).

114 Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S 79 ["CBD" hereinafter].

115 *Id.*, art. 2.

116 *Id.*, art. 10, ¶3.

117 Convention on the Conservation of Migratory Species of Wild Animals, June 2, 1979, 1651 U.N.T.S. 333 ["CMS" hereinafter].

118 *Id.*, art. III, ¶5.

119 *Id.*, art. III, ¶5(c).

VI. Suggested Interpretation of Article 29(1)

Till now, the author has tried to cover all major resources which can be used for interpretation and explored what all interpretation can be adopted by the Supreme Court. Hereinafter, it will be discussed what would be the ideal interpretation which could be adopted for Article 29(1) of the Constitution which will assist in resolving the conflict between cultural rights and animal rights presented in the form of Jallikattu.

With respect to the question, if Tamils will come within the purview of Article 29(1), the answer is positive. This is sufficiently clear from the relevant discussion in the essay.[120] Next is the question regarding interpretation of the term culture. It is the author's belief that Jallikattu will come within the purview of culture under Article 29(1). Such interpretation is strengthened when Article 29(1) is read in consonance with Article 48 and 51A(f) and the scope available is utilized. Scope available with the Supreme Court is further enhanced by taking international law into consideration regarding the meaning accorded to the term culture. Through this interpretation, Jallikattu will be considered as a culture, even if the Supreme Court held on to its previous position that Jallikattu is subsequent development to Tamil culture. Further, "essential culture" should not be read into Article 29(1), because of the flaws already signified by the author.

International law diverges from Indian law in terms of interpretation of the term 'culture'. "Culture" itself has been interpreted in international law broadly enough to bring subsequent development i.e. Jallikattu within its purview. On the other hand, India will have to rely upon the expansive interpretation of

120 *See supra* Part III.

"conserve" for protecting subsequent developments in a culture, if the scope provided by international law to the Supreme Court with regard to culture is not utilised. Irrespective of whether or not the international law is taken into consideration for interpreting culture, in the author's view, expansive interpretation should be given to "conserve," as given by Prof. D.D. Basu. Through this, any subsequent development in a culture will be capable of being conserved. Even the Supreme Court in relation to the term "conserve" observed that the right under Article 29(1) is unqualified.[121]

Further, in relation to the conflict between cultural rights and animal rights, international law tilts in favour of cultural rights. This is also the position taken in various other countries.[122] With reference to the stance adopted by the judiciary in the UK, it must be cleared that violation of ECHR was claimed. The position is extensively different as is present in India. While Indian Constitution explicitly requires protection of culture, ECHR does not provide for such protection. Further, UK does not have a written Constitution. Further, Jallikattu in India does not involve killing of bulls, while in UK, fox hunting was in question.

Expansive interpretation of Article 29(1) has been envisaged by Dr. B.R. Ambedkar himself, who wanted State to impose no limitation over the provision.[123] This position was also adopted by the Supreme Court by holding that the Article is not subject to any reasonable restriction, as is the case with Article 19(1), and the right conferred though the Article is absolute.[124]

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121 *Jagdev Singh v. Pratap Singh*, AIR 1965 SC 183.
122 *See supra* Part IV.
123 CONSTITUENT ASSEMBLY DEBATES, *supra* note 33, at 896.
124 *Supra* note 121.

Overall, it is the author's view that an expansive interpretation should be adopted for Article 29(1). Through this interpretation, Jallikattu as a part of Tamil culture "cannot be restricted." As already stated, this is the first case in which depth of Article 29(1) in the context of culture will be explored. Such expansive interpretation, as has been suggested by the author, will ensure the positive future development of Article 29(1). Narrow interpretation by the Supreme Court in the very first case related to the subject matter will leave the future development of the provision in jeopardy. This is because such narrow interpretation would leave little room for jurisprudential development. Any future decision relevant to the present subject matter will have to be decided within the bounds set by this judgment. Further, it has been recognised by the Supreme Court itself that attempt should be made to expand the scope and ambit of the Fundamental Rights, rather than constraining them.[125]

VII. Regulation, not a Blanket Ban is a Win-Win Situation

The expansive interpretation of Article 29(1) suggested above does not intend to disregard animal rights or welfare completely. Jallikattu should be regulated. The intent is to circumvent blanket ban over Jallikattu, and not regulation in any way. The interpretation should be done in such a way so that "regulation, not amounting to restriction," is protected.[126]

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

126 According to the framers of the Constitution, as well as the Supreme Court, restriction cannot be introduced under Article 29(1). However, this does not in any way mean that the practice cannot be regulated. As per the Black's Law Dictionary, regulation can be done through restriction. However, regulation is not limited to that and may be used to control a given practice.

Jallikattu inherently never intended to harm bulls. Over a period of time, with more participation and increased competition, certain activities were introduced which were never originally a part of Jallikattu. These practices include poking the bull, biting and twisting their tail etc.[127] Concerns of animal rights activists are encircled over these practices. It must be noted that such activities will not be considered within the purview of *subsequent development* to the culture for the purpose of suggested interpretation of Article 29(1) because these are the external practices not recognised by the culture itself and are against its values. Since Jallikattu is organised on the day to honour cattle, which involves embracing of bull, the activities go against the spirit of the culture, *i.e.* Jallikattu, itself. Hence, considering the activities as subsequent development to the culture will be a faulty interpretation and is not suggested by the author.

Such practices are a deviation from Jallikattu, as was practiced originally. The makers of the Constitution certainly would not have foreseen such activities. This is where the originalist interpretation fails. However, in such situation the conceptualism theory can be relied upon. The theory "requires the Court to determine the underlying purpose of a constitutional provision and to apply this purpose in developing modern governing principles."[128] Through such interpretation, underlying purpose of conserving culture can be preserved and regulations can be protected for various modern practices introduced. As has already been discussed, regulation of such events is also done in other countries.[129] Regulation is being

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127 The 2014 judgment, *supra* note 1.

128 Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEXAS L. REV. 1207, 1234 (1984).

129 *See supra* Part IV.

sufficiently done through the Jallikattu Rules. The Rules provide for procedure for conducting Jallikattu.[130]

Further, safety of the bull has also been taken care of. The Rules provides for proper examination of bulls by qualified veterinarians of Animal Husbandry Department in order to protect the animal from any abuse like injury or use of alcohol.[131] Size of holding area, arena and bull run area has been specifically prescribed to make it suitable for the bull.[132] Additionally, the Animal Welfare Board of India (AWBI) has released guidelines on conduct of Jallikattu event.[133] The Guidelines even require the events to be properly videographed.[134] If implemented properly, these measures are adequate to answer the concerns of the animal rights and welfare activists will be addressed. Systematic implementation of the regulations and guidelines should be focused upon so that the practice can continue with the true spirit of Constitution of India.

Additionally, the claim of violation of Section 11 of the Prevention of Cruelty on Animals Act was also raised.[135] Considering Jallikattu from the point of view of cultural right under Article 29(1),

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130 Jallikattu Rules, *supra* note 5, R. 3.

131 *Id.*, R. 4.

132 *Id.*, R. 5 & 6.

133 *AWBI beefs up Jallikattu Guidelines*, THE HINDU (Jan. 7, 2018), http://www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/awbi-beefs-up-jallikattu-guidelines/article22389781.ece; *Animals Welfare Board Issues Guidelines For Conduct of Jallikattu, Says Put Bulls On Nicotine, Cocaine Tests*, OUTLOOK (Jan. 10, 2018), https://www.outlookindia.com/website/story/animals-welfare-board-issues-guidelines-for-conduct-of-jallikattu-says-put-bulls/306656.

134 Malavika Vyawahare, *Videotape bull races, say animal welfare board's new guidelines*, HINDUSTAN TIMES (Jan. 6, 2018), https://www.hindustantimes.com/india-news/videotape-bull-races-say-animal-welfare-board-s-new-guidelines/story-B17zLcGDnEhAID1umE2mfM.html.

135 The Prevention of Cruelty to Animals Act, No. 59 of 1960, S. 11 ["PCA" hereinafter]; The 2014 judgment, *supra* note 1.

one of the major consequences can be declaration of the provision of the PCA as invalid since it is in contravention of Article 29(1) to the extent it is oppressive on the cultural right.[136] However, it is the author's belief that the practice of Jallikattu in its original form does not contravene the PCA. Hence, the question of invalidation of PCA should not arise. However, this sufficiently shows that the claim on the basis of PCA might fail on the account of Article 29(1).

VIII. Conclusion

Culture forms an important part of India and has a privileged position in its citizens' life. This is probably why the makers of the Constitution considered it so important to provide protection to cultures in fundamental rights.

The question presented before the Constitution Bench of the Supreme Court in the form of Jallikattu is not merely a matter of animal rights now. In the form of question presented, protection of Indian cultures, which provide uniqueness to India, is at stake. Narrow interpretation, in this case, will put various cultures in India at peril. On the other hand, expansive interpretation (with proper regulation) will not only bring Indian position in conformity with the international practice and international law, but will also uphold intention of the Constitution makers to provide unqualified protection to cultural rights in India.

However, it must be noted that even though Directive Principles and Fundamental Duties insinuate preservation of culture, it cannot be denied that Fundamental Duties also prescribe for respecting living creatures.[137] Reading such Fundamental Duty with

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136 CONSTITUENT ASSEMBLY DEBATES, *supra* note 33, at 896.

137 INDIA CONST., *supra* note 13, art. 51A(g).

Article 29(1) might possibly curtail the scope of the Fundamental Rights. It can be observed that such an interpretation for deciding between cultural rights and animal rights will lead to conflict within the Constitution itself, where, one interpretation will impose a blanket ban on cultural practices, while the other would cause unrestricted cruelty and killing of animals.

The proper way of resolution of the conflict will be systematic synchronisation of cultural rights and animal rights. This means no restriction or blanket ban over the cultural right, but at the same time, proper regulation of the cultural practices so that animal welfare is not sacrificed. Hence, a balanced approach will be regulation, rather than blanket ban on the culture. For practically achieving such balance, proper implementation is must. It should be noted that violation of the Jallikattu Rules attracts a fine or imprisonment up to three months or both.[138] Here comes the role of the animal rights activists, who can look after the proper implementation of the Jallikattu Rules. If the Rules are not being followed, enforcement mechanism can be utilised. This will act as a deterrent for people organising or taking part in the event violating the Rules. Added to this is the videotaping requirement issued by the AWBI, which again will keep a check over the implementation of the Rules and Guidelines.

So far as the Supreme Court is concerned, it is its duty to keep the larger picture in mind while deciding the case, rather than limiting the view merely to animal rights and imposing a blanket ban on Jallikattu again. Whatever stance is adopted by the Supreme Court, it will be crucial indeed; it shall be a significant determinant of the future of protection of cultural rights in India.

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138 PCA, *supra* note 135, S. 38(3).