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1. Separation of Powers

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i. Abstract

Every country strived to make substantial work-flow of their nation during its initial period. A nation carries the burden of the welfare of its citizens. Thus, the structure of the nation must be strong. India, like many other countries, stands on three main pillars or organs viz. Executive, Legislature and Judiciary. The method and regulations of working of the three organs is termed as the doctrine of Separation of Powers. It is a fundamental principle of law that maintains that all three organs remain separate and distinct from each other to ensure that the different arms of government do not encroach upon each other. This doctrine works on a philosophy of promoting 'checks and balances' in the structure. It is always a matter of threat when too much or too little power is given to one single organ in a country. In such cases, either the organ may become autocratic and misuse the power and responsibility or it may simply become a handicap. It is a duty of the nation to avoid both the situation at any given time. This is where this doctrine comes in picture. It keeps a check on any unduly working in the system. The power given to each organ is specific but not rigid in India. The legislature has been given the power to make laws, the executive works on its enforcement and the Judiciary has the duty to undertake the cases wherein these laws are breached. Therefore, every organ is interlinked in a certain manner. However, their functions and roles may sometimes overlap.

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1. Introduction

It is only a soulful thought that converts itself into an inspirational concept, which then becomes the backbone of a constitution. Separation of Powers was a term coined by the great philosopher, Montesquieu in his publication 'spirit of laws', which was believed to be one of the greatest works of sociology and jurisprudence. Separation of Power is adapted as the basic structure of the Indian Constitution. It is indeed an essential essence of the Constitution providing fairness and justice to the citizens in several ways. However, Separation of Powers is not accepted entirely, which allows flexibility in applicability of the doctrine. It works on harmony between the working of the three organs of the Indian system. Article 50 of the Constitution of India deals specifically with the independence of Judiciary with the very object of providing its citizens fair and unbiased justice. Separations of powers between the executive, legislative, and Judiciary with appropriate checks and balances. Proper checks and balances secure discipline and affirm the smooth functioning of the organs.

Separation of Powers gives rise to Judicial Activism. 'Separation of Powers and Judicial Activism in India', is a concept that is high importance, especially, in reference to the growth of feelings and emotions among the various sections of the country's socio-political spectrum, of the need to have a healthy debate and discussion on the power and responsibilities of the different organs of our Constitution.[1] There have been several changes and amendments to the Constitution, but it is important to retain the essence and remember the object of the birth of our Constitution. Thus, it is of utmost importance to treat this concept as a guiding path to fair and unbiased Justice.

In the context of separation of powers, the state has been divided into three wings namely, judiciary, Legislature, and Executive with their function chalked out in our Constitution.

The Constitution of India is an amalgamation of the constitution and is very lengthy and explanatory. It is very well divided into parts and articles for a smooth understanding. Part III of the Indian Constitution lays down the fundamental rights that have been bestowed on the citizens of India. Article 13 of the Constitution protects Part III and mandates that no law shall be made by the state that would violate these fundamental rights. Thus, checks and balances

[1] As Expressed by Dr. K.N. Katju

are required when a law has to be formulated from the ends of both legislature and the judiciary. Judiciary of India has an added responsibility to keep a check on the legislature.

2. Meaning of Separation of Power

The Doctrine of Separation of power may have three things under its ambit:

i. A single person has to be a part of only one of the three different organs of the government.

ii. There must be no or least interference of one organ in the working of another organ of the government.

iii. One part or organ has to follow its functions and must avoid doing functions of any other organ.

3. Theory of The Doctrine

The explanation of doctrine given by Montesquieu is the most relevant and accepted amongst the various theories on the Separation of Powers. According to him, if the legislative body and the executive body become part of the same entity, there is no liberty. Similarly, liberty will be lost if the judiciary is not set apart from the executive and legislative powers. If it is joined together then the people will have to face arbitrary control of power.[2]

The theory of separation of power as presented by the great judge and philosopher, Montesquieu had a huge impact on the advancement of the law of administration and the roles of a government. Writing in 1765, Blackstone[3] had written in the year 1765 that the personal liberty of citizens shall end or die if all three functions are given to a single man. Thus, the

[2] I.P. Massey : Administrative Law, Edn. 1970, p. 35.
[3] Commentaries on the Laws of England, 1765.

constituent Assembly of France had proclaimed in the year 1789 that the concept of a constitution will be negligible in the nation where the separation of power is absent. This doctrine in America is the base of the whole structure of the constitution. In this way, it exercised a decisive influence in the minds of the framers of the constitution of the United States. This doctrine in India has been recognized as a basic feature of the Indian Constitution and has been discussed in detail in the constituent assembly as well.

4. Criticisms to the Theory

1. **Historical Incongruity:** Historically speaking, the theory was not correct, his exposition of this theory is based on the British constitution of the first part of the eighteenth century as he understood it. In reality, there was no separation of power under the constitution of England.
2. **Division of Functions:** The assumptions behind the doctrine is that the three functions of the government namely, legislative, judiciary, and the executive are divisible from each other. The fact, however, is that it is not so in reality. there are no watertight compartments. There is overlapping with each other. As Friedman and Benjafield say, the truth is that each of the three functions of the government contains elements if the other two and that any rigid attempt to explain and set apart the roles that may cause inefficiency in the government.[4]
3. **Practical Difficulties in its Acceptance:** It is difficult to take certain actions if this doctrine is accepted in its entirety. In practice, it is almost impossible to concentrate the power of one kind in one organ only. The legislature does not act merely as a law-making body, but also acts as an overseer of the executive, the administrative organ has a legislative function. The Judiciary has an added responsibility for rule-making.
4. **Adherence to it not possible in the Welfare State:** The modern state is a welfare state and it has to solve many complex socio-politico-economic problems of a country. In this

[4] Principles of Australian Administrative Law, 36(1962).

state of affairs, it is not possible to stick to this doctrine. According to Judge Frankfurter, the working of a modern-day government is impossible if the doctrine is conceived rigidly.[5]

5. **Organic Separation:** The position is that the doctrine of separation of powers is the strict sense is undesirable and impracticable. Therefore, it is not fully accepted in any country of the world. Nevertheless, it works the concept of checks and balances and works on prevention of abuse of the enormous powers of the executive,[6] the goal of the doctrine is to have "A Government of law rather that of official will or whim."[7] One of the features of this doctrine is that it is been accepted by all the jurists that the Judicial body must be independent of the other two pillars or organs of the system *vis*. Legislative and Executive. The basis of the doctrine is that the merger of all the power in the body will result in the negation of individual liberty.

5. Separation of Power in India

Article 50 of the Indian Constitution deals with the separation of power. It states that the state shall endeavor to set apart the judiciary power from the executive in the public sectors. This doctrine, however, is not strict or rigid in the Constitution. The clarity of Separation of Powers can be understood due to clear differentiation in the functions of the three organs. It is sufficiently done so to avoid unwanted overlap.

a. Constituent Assembly Discussion

During one of the Assembly debates, a member of the assembly Prof. K.T. Shah, strongly emphasized on insertion of a new Article 40-A through an amendment. The Article reads,

[5] Frankfurter – The Public and its Government (1930) quoted by B. Schwartz, in American Constitutional Law, 1955 Page 286.
[6] Indian Law Institute, Cases and Materials on Administrative Law in India, 1966 p. 71
[7] Vanderbilt, the doctrine of separation of powers and its present day significance, 1958, p. 51

"There shall be a complete separation of powers as between the principal organs of the State, viz; the legislative, the executive, and the judicial."[8]

This insertion was dissented by Shri K. Hanumanthiya a member of constituent assembly. Further, the chief architect of the Constitution of India, Dr. B.R. Ambedkar also disagreed to the point by Prof. Shah stating that it is indisputable that the judiciary must be separate from the executive. However, separation of the legislature from the executive isn't agreeable. The American Constitution lays a rigid separation of executive and legislature but the citizen weren't satisfied with it. He further added that the working of Parliament is very complicated and vast and it will difficult for the parliament members to make decisions without the direct views and guidance of the executive. Thus, separation of the legislature from the executive shall not be very appropriate.[9]

b. Observations of the Indian Courts

In the case of *Smt. Indira Nehru Gandhi v. Raj Narain,*[10] the court observed that both American and Australian Constitutions have a rigid differentiation or separation of the three organs. India however, has not expressed such separation of powers. He stated that the doctrine of 'Separation of Powers' is not a magical formula to keep the organs confined in its framework strictly.

In case of *Rai Sahib Ram Jawaya v. State of Punjab,*[11] the court observed that the Constitution of India has not recognized the said doctrine in complete rigidity but function and role of each branch of power is very well defined and differentiated in our Constitution and there is no contemplation of assumptions or confusion.

[8] Constituent Assembly Debates Book No.2, Vol. No. VII Second Print 1989, p. 959.
[9] Ibid p. 967, 968.
[10] AIR 1975 SC 2299 at 2470
[11] AIR 1955 S.C. 549 p.556

c. Principles of Checks and Balances

It was observed by Justice Mukherjee that there is not much dispute on the fact that there is not much place for the doctrine of Separation of Powers in today's Indian government system.

The theory of checks and balances is very well slated in our Constitution. However, there isn't any rigidity in separation. The judicial power of impeachment rests with the parliament. Similarly, the legislative function of ordinance making also rests with the president of India. Therefore, the Constitution of India has not applied the doctrine of separation of powers in its rigid or strictest manner.

d. Working of Checks and Balances

- **Checks and Balances**

  - Means that the powers of different branches of government are balanced.
  - No one branch has so much power that it can completely dominate the others.
  - Although each branch of government has its own special powers, the powers are checked because some powers are shared with the other branches.

- **Legislative Branch**

  - Power to make laws.
  - Divided into the Lower House (Lok Sabha) and the Upper House (Rajaya Sabha).
  - Each house checks the power of the other by refusing to pass a law proposed by the other house.

- **The executive and judicial branches have w**ays to check and control the power of Parliament to make laws:

  - When Parliament passes a bill, the president must sign it before it can become a law
  - The president has the right to refuse to sign a bill. If this happens, the bill cannot become a law unless Parliament votes again and passes the bill by a two-thirds majority of both houses.
  - The Supreme Court India can check the power of Parliament
  - The Court can declare a law to be in violation of the Constitution and, therefore, be void.

e. Judicial Independence

Independence of judiciary is necessary for maintaining the Rule of Law and fair judicial administration in the country

Judicial independence can be categorized into (1) "decisional independence." the independence of a judge in deciding cases, and (2) " institutional decision," the independence of the structure of the courts, the branch of law, or the judiciary as its own.

Decisional independence provides for an independent status to the judge with the autonomy in deciding cases without any political pressure or popular pressure and any-kind of fear. The courts can decide solely based on law; facts relevant to the said case. This sort of freedom protects the integrity of the judges and promotes fairness in all stages of the decision-making process. Decisional Independence helps the judiciary in controlling the arbitrary acts of the administration.

Institutional independence provides freedom from the influence and interference of various government machinery in the judicial functions. The purpose of providing institutional independence is to promote effective governance and management of the judiciary in the exercise of judicial powers. Institutional independence does not go-on proving that the court or

the judiciary is superior to other branches of the government. It only refers to the point that all the branches of the government are co-equal with regard to the working powers of the independent institute viz. Judiciary, Executive and Legislature, in the form of checks and balance as discussed above. Institutional independence shall also include appointments and removal of the judges. If so, vested in the hands of the hands of the executive it is to be taken a note of it that proper safeguard so that it may not be misused to affect the fairness.

The constitutional scheme has set an independent judiciary to deliver justice without any pressure and fear, it is naturally expected that "Judicial Discipline" is maintained so that society can be assured fair and integrity in the orders passed by the courts.

Separation of power concerns the independence of the judicial system from other branches of the government. Judicial Independence requires the independence of individual judges from any pressure that threatens not only actual impartiality but also the appearance of impartiality. Article 6 of the European Convention on Human Rights (ECHR) included both elements by requiring 'a fair and public hearing …… by an independent and impartial tribunal established by law'.

Judicial independence is an uncertain concept. It requires judges to be protected against external pressure but does not mean that they should not be accountable for their actions. Accountability has different meanings. It means, firstly, that a decision-maker must explain and justify its action and secondly, that a decision-maker might be penalized if its actions fall short of required standards. Judges are to some extent accountable in the first sense, which does not conflict with independence.

6. Judicial Activism in India

Judicial activism the thought process or a view which propagates that the Courts must use their creative interpretation of the Constitution in accordance with the need of the people while passing a judgment. This concept believes that judges are independent policymakers. It is a good way to overrule the ancient concepts and thoughts that are sometimes part of the law texts. Therefore, it goes beyond traditional ideas.

Judicial Activism in India shall be seen with reference to the review power granted to the Supreme Court.

As expressed by *Montesquieu,* the state of India has adopted the doctrine as president has the executive powers, parliament has legislative powers and the Supreme Court and its subordinate courts are vested with the judiciary powers. However, such adoption is partial.

This is the case as even though Legislature power is independent of the Judiciary still the Judiciary is empowered with the implementation of the laws which are made by the legislature. Also, the judiciary has the power to issue a list of principles and directions for the Legislative body in case of the absence of laws on a specific topic or issue.

The executive body sometimes also, intrudes upon judicial power, in matters such as the appointment of judges of the Supreme Court and High Courts. The Judiciary can in a similar manner use its review power to overlook and examine the law passed by the legislature. The legislature has the power to intervene in act of impeachment of the President of India, who is a part of the Executive. The same process of division shall also apply to the state government as well, i.e. the Governor (executive), State Assembly (legislative), High Court (Judiciary)

As previously mentioned, the concept the Judicial Activism in India can be worked with an allusion to the review power of the Supreme Court and the High Court.

It cannot be assumed that the legislative function is performed by the legislature, executive function is performed by the executive or the judicial powers by the judiciary only.[12]

It must be noted that the essential and incidental powers of the organs must be set apart. Therefore, even if one body cannot take over the essential powers of the other, it has a scope of exercising its 'incidental' powers which helps in the harmonious running of the nation. This distinction demarcates the amount of power, one organ can wield over the activities of another.

But is evident that the concept of Separation of Powers has not been integrated in its most rigid format in our country. Further, it has not even been given Constitutional status. However, the very approach has played a crucial role in upholding the constitutional principles and safeguarding the basic structure of the Constitution.

[12] Jayantlal Amritlal v. F.N. Rana (AIR 1964 SC 648), Bandhua Mukthi Morcha v. union of India (AIR 1964 SC 648), State of U.P. v. Umedram Sharma (AIR 1986 SC 802), Fida Ali v. State (AIR 1961 Guj. 151)

7. Conclusion

In today's era, the doctrine of Separation of Powers has come to not only mean organs such as the Executive, the legislature and the judiciary but has gained a lot more value in the base of working of our system. One completely clear outcome is that even if the work-frame of the executive and judiciary overlap; the judiciary is an organ that has to be separate at all times.

India had drafted the Constitution after a lot of research and deliberation. It was framed in accordance with the people of India. India is a democratic country. Thus, it is foolish to compare its working with countries like the United States. Our country could not have followed the said doctrine in complete strictness as even if there is the separation of powers, a constant support and coordination from all the organs to each other is required at all times for smooth working of the system. India also followed the concept of checks and balances to not overburden a particular organ with extreme powers.

The judicial review and activism functions of the judicial body of India is a vital essence element of our system. It helps the justice in keeping a check on the legislature, so that they do not surpass their roles and powers and exercise within the ambit and the procedure laid down in the constitution such the acts of the three organs do not go beyond the scope of the constitution and be declared as ultra-virus.

The Indian Constitution was very carefully framed to uphold the integrity and liberty of each of its citizens. It has embraced the guiding aspect of the doctrine instead of entirely embracing the doctrine of separation of powers. The doctrine is worked as per the needs of the nation and its citizens. Concepts like Judicial activism only guides and checks it further.

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2. Rule of Law in India: A Critical Analysis

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i. Abstract

The following research article seeks to discuss the very existence and definition of the term "Rule of Law" and how it has been treated as a misnomer in India. There have been several instances wherein Rule of Law has been ignored and in turn giving allegiance to the Rule of Men. This article endeavors to discuss a constitutional provision, two Supreme Court Judgments, and two statutory provisions that cover most of the Rule of Law that is followed in India. The protection and the immunity that is provided to the president, prime ministers, governors, and other officials is a major point of contention that is discussed, as they are provided with some facilities that directly violates "Equality of Men" a concept that is underlined directly under Article 14 of the Constitution of India as well the Rule of Law.

Looking at a relatively recent development of the Sabarimala Temple Judgment, the Apex Court judgment that has the supreme standing in the country is being overturned by the authorities and the officials who have responsibility for the temple, and therefore there is a gross violation of "Supremacy of Law".

This article also seeks to discuss one of the controversial cases in the Indian legal history, that is, the ADM Jabalpur Case that describes how Rule of Law wasn't being followed in the major part of the judgment and how Rule of Law has been an integral and vital aspect of Justice H.R. Khanna's descent in this judgment. This judgment goes further to talk about how cigarette smoking is prohibited in public areas and how in particular, the statutes with regards to this matter have been overlooked by the general public at large, and thus they have subsequently lost the value of enforceability.

The article lastly, seeks to discuss a provision under which any organization that is authorized by the Central Government could keep a check and collect information and data from any form of internet source, in a way practicing internet censorship, and thus create a way around the landmark judgment of Right to Privacy.

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1. Introduction

"Rule of Law" is considered to be the grund norm and is a fundamental building block on which most of the modern societies in the world have based their governments on. The term "Rule of Law" saw its development from the French phrase "La Principle de Legality", which translates to "the principle of legality". Expanding it into a broader sense, "Rule of Law" means that Law is supreme and no individual is above the law. In a niche sense, "Rule of Law" insinuates that all the government authorities must exercise all the powers that they are vested with should be something that has been adopted through an established procedure.

Rule of Law essentially underlines and is the flag bearer of the slogan "a government of laws, no men". "Rule of Law" does not necessarily provide for anything specific or particular like Fundamental Rights, Directive Principles of State Policy, Principles of Equity, etc. But Rule of Law does provide two very basic and fundamental concepts, that is:

1. The law should be and must be obeyed by the people.
2. Law must be able to guide the behaviors of other people.

2. Origin of Rule of Law

The origin of the Rule of law is a bit hazy because it goes back seven centuries prior, back to the thirteenth century when Judge Barton during the rule of King Henry III had expressed his opinion, "The King himself ought to be subject to God and the law because the law makes him the King"[13].

Sir Edward Coke, who is generally known as the founder of the theory of "Rule of Law", was opinionated with the belief that the king who is considered the supreme, should be under God and therefore under law as well.[14]

[13] Ryan, Kevin (2005). "Lex et Ratio: Coke, the Rule of Law and Executive Power". Vermont Bar Journal. 2005 (Spring). ISSN 0748-4925.
[14] Avaibale at: https://www.lawteacher.net/free-law-essays/administrative-law/origin-and-concept-of-rule-of-lawadministrative-law-essay.php#ftn4 (last viewed on May 29, 2020)

In India, the novel concept of "Rule of Law" can be traced back to the Vedas and the Upanishads which propagate the propaganda that Law is the King os Kings.

However, the credit for the development of the modern "Rule of Law" and its implementation into the society has been majorly due to the efforts of the renowned jurist Prof. A.V.Dicey who in his book, "Introduction to the Study of the Law of the Constitution" that was published in the year 1885, strived to develop the modern concept of "Rule of Law".

3. Dicey's Theory of the Rule of Law

Dicey's theory of "Rule of Law" had encapsulated three major principles-[15]

- **Supremacy of Law**

As per Dicey's theory of Rule of Law, in any society, the law must be absolute supremacy and therefore no man should be made or could be lawfully made to suffer by way of body or goods except when there is a very distinct breach of law that has been established with sufficient material evidence in an ordinary legal manner in the Court of law. According to Dicey, the government, as well as the people, should abide by the laws of the land.[16]

- **Equality before Law**

Dicey's concept of equality before the law came before the Napolean System of administration where the Courts dealt with the matters related to Government officials that were different from

[15] A. V. Dicey, Introduction to the study of Law.
[16] Ibid.

the normal courts. According to this system, whether if it's a government official who holds authority or any normal citizen, everyone should be treated with equality.[17]

- **Predominance of Legal Spirit**

Dicey propounded the third principle of Rule of Law and compared England with the other countries, wherein the rules, rights and the duties of the citizens are written down in a Constitution which serves as the grund norm for that society, but England has no such written Constitution and the rights which the people are vested with are due to the Judicial Decisions.[18]

4. Critical Analysis of Dicey's Theories

Although Dicey has been primarily responsible for the propounding of the three main principles of "Rule of Law" there has been a lot of criticisms of Dicey's theory. Some of them have been enlisted below:[19]

1. When Dicey developed the principle of "Equality before the law", his main focus and intent was directed towards the Judicial System in the Napolean Courts where there were two different types of courts- one for the normal citizens and the other type of court was to settle disputes against administrative authorities. This kind of a facet was violative of "Rule of Law" according to Dicey as there is a very probable situation wherein there would be certain kind of bias that would be reflected in the Courts. Dicey, however, had failed to recognize there existed another appeal authority that was preceded by judges who did not have any connection with administrative authorities.
2. According to the theory that was propounded by Dicey, England followed the principle of "Rule of Law", but the main issue that existed with Dicey's theory was that the

[17] A. V. Dicey, Introduction to the study of Law.
[18] Ibid.
[19] Ibid.

parliament in the United Kingdom was formed based on Magna Carta in the year 1215 which was given to the general public by the then king, King John. The fact that this was not given by the people to themselves and was attributed to the general public by themselves is a sheer violation of equality of law.

3. Dicey had propounded the principle of "Supremacy of Law" he found the law to be very clear and fixed, but he was mistaken as the condition in England was not he thought it was because there had been no codification of law.

4. Dicey's propagation of the theory of "Rule of Law" does not seek to distinguish between the regimes that are considered to be democratic with those that are violative of basic human rights.

Bringing in an example to explain the above statement, in Germany during the Second World War, when the country was undergoing the dictatorship regime of Hitler if the theory propounded by Dicey is used, then one should be upholding the supremacy of law and should be supportive enough to entail the predominance of legal spirit without the acknowledgment of the fact that the law in force is nothing but against the very spirit of natural justice.

Although Dicey is responsible for framing the principles of "Rule of Law", still it has proved to be very difficult to come to the grass-root level of what exactly does "Rule of Law" mean, as the term itself is very subjective. Every person has their notion as to what "Rule of Law" actually stands for, some might reckon that it only entails supremacy of law but there are others who think that it is a combination of principles like clarity, equality, and so forth. Some very common ingredients that the concept of 'Rule of Law' actually encapsulates have been enlisted below:

1. A government that is bound and is ruled by law;
2. Equality before law;
3. Establishment of law and order;
4. Effective and efficient application of justice; and
5. Effective protection of human rights.

"Rule of Law" in the books of Dicey wasn't exactly applicable to the situation in India because we do have a written constitution which owes its formation as per the rule of the social contract theory.[20]

In India, the situation is considered to be quite complex. There exist situations wherein the principles of Rule of Law are very well visible but there are certain grim situations wherein Rule of Law is completely given the second track.

The Hon'ble Supreme Court of India ruled that the law of equality is a basic and an essential feature that is to be followed in the case of public employment and this feature is also entailed in the basic structure of the constitution and therefore, Rule of Law becomes the core of the constitution.[21] The High Court of Jammu and Kashmir has also reiterated the above-mentioned principle of the Supreme Court wherein it was said that the rule of law is the basic structure of the Constitution.[22]

5. Case Studies on The Rule of Law in India

There have been several instances highlighted in the Indian legal history wherein the Rule of Law is predominantly not followed:

- **Protection given to the President and Governors**

India has been a blind advocate in following the maxim "*Rex Non-Postest Peccare*" which means that King can never do any wrong. The Indian Constitution also entails the same through Article 361. According to this Article:

[20] Where people of the nation come together and give their powers to an entity in whose return, they get rights and have to fulfil some obligation in the form of rights. The Preamble of the Constitution of India is the best example of Social contract theory as it states "We the people do hearby adopt, enact, and give to ourselves this constitution.".
[21] The State of Bihar and Ors. vs. Kirti Narayan Prasad, 2018 (15) SCALE 352.
[22] Niva Sinha & Ors. vs. State of J&K and Ors., 2018 SCC OnLine J&K 1000.

> *"The President, or the Governor or Rajpramukh of a State, shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties*[23]*, "No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State, in any Court during his term of office"*[24]*, "No process for the arrest or imprisonment of the President, or the Governor of a State, shall issue from any Court during his term of office"*[25] .

These provisions have always provided a clear exception to the Rule of Law in India and have always extended some unequal immunity to the president, governors, or rajpramukh of a state.[26] If we follow an ideal Rule of Law in a modern Indian society, then such forms of exceptions should be encouraged and therefore there is a clear violation of the theory of Rule of Law that has been propounded by A.V. Dicey.

- **The Sabarimala Temple Issue**[27]

The above-mentioned case pertains to the Sabarimala Sree Dharmashastra Temple that is located in the Pathanamthitta district of Kerala. At Sabarimala, the deity that was previously worshipped was Ayyappan. Lord Ayyappan was believed to be "sanyasi" and to pay due respect to the deity, women aged 10-50 should be restricted from entering the premises of the Temple.

This particular practice was in consonance with Rule 3(b)[28]. Finding this to be a violation of human rights, a Public Interest Litigation (PIL) was filed in the High Court if Kerala against the Devasom Board that had been previously entrusted with the responsibility of the

[23] Article 361(1) of The Constitution of India.
[24] Article 361(2) of The Constitution of India
[25] Article 361(3) of The Constitution of India.
[26] Available at: htttp://epao.net/epSubPageExtractor.asp?src=education.Human_Rights_Legal.Right_To_Equality_Is_Not_Absolute_But_Highly_Qualified_Under_The_Constitution_Of_India_By_Arjun (last accessed 08.05.2020).
[27] Indian Young Lawyers Association and Ors. vs. The state of Kerala and Ors., 2018 (8) SCJ 609.
[28] The Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965.

maintenance of the temple. The High Court had upheld the views of the Devasom Board thus giving in allegiance to Rule 3(b)[29].

This judgment of the High Court of Kerala was subsequently challenged in the Supreme Court of India. The Hon'ble Supreme Court recognized that for a particular clause, rule or a provision to be held good, it should conform with the various statutes that are in force and secondly, the authority that makes the rules should have the power to frame these very rules and if anyone of these essentials is not fulfilled them the rule that is disputed is said to be void.[30] The Supreme Court of India had ruled out that this disputed judgment was in violation of Article 25[31] of the Constitution and thereby struck it down.

According to Article 141 of the Constitution of India, any judgment of the Supreme Court of India is binding on every other court and is entitled to take the shape of the law. This statute underlines the Doctrine of Precedent in India. The effect of this Supreme Court judgment has almost been nil, therefore, there seems to be a clear and gross violation of Supremacy of Law in this scenario. When it came to the purview of the general public that two girls belonging to the menstruating age, Bindu and Kanakadurga, had entered the temple there had been outright violent protests that spread across the states with the protestors pelting stones and blocking the national highways. Various rallies were conducted by the different political parties in protest of women having entered the temple premises. These incidents, on the other hand, point out there is still a predominance of "Rule of men" rather than that of "Rule of Law".

- **ADM Jabalpur Case**[32]

This case is with regard to the presidential order that was passed on the 27th of June 1975 when India had been going through the period of Emergency. This order had proved to be curtailing the rights of the people under Article 226[33] of the Indian Constitution to file a writ of Habeas Corpus as a writ petition. The Supreme Court held the view in the ADM Jabalpur case that

[29] Indian Young Lawyers Association and Ors. vs. The state of Kerala and Ors., 2018 (8) SCJ 609.
[30] General Officer Commanding-in-Chief vs. Dr. Subhas Chandra Yadav, AIR 1988 SC 876.
[31] Freedom of conscience and free profession, practice and propagation of religion
[32] Additional District Magistrate, Jabalpur vs. Shivakant Shukla, AIR 1967 SC 1207.
[33] Power of the High Courts to issue certain writs.

liberty is something that is confined and is controlled by the law, whether it is under common law or if it is under statutes, and thus the court states that the persons involved in the case do not have the locus standi to file a case under the writ of Habeas Corpus in any of the High Courts as it was not ruled illegal and it was based on some extraneous considerations.

Justice H.R.Khanna, however, gave a dissenting judgment and stated that Article 21[34] of the Constitution of India stating that this article gave a very basic assumption of Rule of Law. In this judgment, he specifically stated that, "Without such sanctity of life and liberty, the distinction between a society that is lawless and the one governed by laws would cease to have any kind of meaning."[35]

Followed by this, in the judgment of Keshavnanda Bharti[36], the Hon'ble Supreme Court ruled that the parliament cannot amend or make changes to the basic structure of the Indian Constitution, and Article 21 of the Indian Constitution is also considered under the basic structure of the Constitution of India.

The case of the ADM Jabalpur case was consequently overruled by the Justice Dr. D.Y. Chandrachud in the Right to Privacy case[37], where Justice Chandrachud had explicitly stated that "*The judgment rendered by all the four judges constituting the majority in ADM Jabalpur are seriously flawed. Life and personal liberty are inalienable to human existence. These rights are, as recognized in Kesavananda Bharati, primordial rights. They constitute rights under natural law. The human element in the life of the individual founded on the sanctity of life*."

Thus, the Right to Privacy judgment showed that how the rule of law could be bypassed and could be given importance to the Rule of Men which would be reflective due to the political, economic, social, etc. conditions in the nation.

[34] Right to life and personal liberty
[35] Freedom of conscience and free profession, practice and propagation of religion
[36] His Holiness Kesavananda Bharti Sripadagalvaru and Ors. vs. State of Kerala and Anr., AIR 1973 SC 1461.
[37] Justice K. S. Puttaswamy and Ors. vs. Union of India and Ors., AIR 2017 SC 4161.

- **Prohibition of Cigarette Smoking at Various Public Spaces**

The High Court of Kerala on the 12th of July,1999 upheld a judgment where it was stated that the health of the public is endangered by smoking that is passive and therefore it is violative of Article 21[38] of the Constitution of India, if the smoking in public places is something that is exercised.[39]

The Hon'ble Supreme Court on the 2nd of November, 2001 had passed a judgment that stated the adverse effects of smoking in places that are public and also stated some of the adverse effects of smoking in public places and also stated that people should abstain from smoking in any public areas as passive smoking is something that couldn't be allowed at any cost and mentioned in this particular judgment to hold good and valid till the parliament comes up with legislation on this particular topic.[40]

In the year 2003, the parliament had passed the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003.

The above-mentioned legislation was the one that had replaces the 2001 judgment, Section 4[41] of this act stated that "No person should ever smoke in a public place", and is anyone ever goes against the provisions of Section 4 then he would be liable with a punishment of Rs. 200 under Section 21 of the above-mentioned act. The State of Gujarat has taken one step forward in the year 2017 when they had banned 'Hookah' and had imposed a fine of about Rs. 50,000 and a minimum of Rs. 20,000 that was coupled with imprisonment that could be extended to a period of three years but not less than that of a year.[42]

If the attention of this issue is shifted to the ground reality then it can be noticed that the laws of smoking in any public place are something that is cared about trivially. People are almost

[38] Power of the High Courts to issue certain writs
[39] K. Ramakrishnan and Anr. vs. State of Kerala and Ors., AIR 1999 Ker 385.
[40] Murli S. Deora vs. Union of India and Ors., AIR 2002 SC 40.
[41] Cigarettes and other Tobacco Products (Prohibition of advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003
[42] Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) (Gujarat Amendment) Act, 2017.

often seen smoking in public places which shows that "Rule of Law" is prevalent to this day, as there is a violation of Supremacy of Law.

- **Section 69 of The Information Technology Act, 2000**

"Right to Privacy" is one of the fundamental aspects of Article 21[43] of the Indian Constitution by the Supreme Court of India.[44] This judgment was passed in the year 2017 on the 24th of August, but this judgment did not consider Section 69[45] of the Information Technology Act, 2000 and the clause b[46] of the same provision.

The Supreme Court has tried to vest the power of privacy via a judicial judgment, but its effect has been nullified by the existence of these two sections. These sections have in a way given rights to the central government an immunity to breach into the citizens' right to their privacy and collect their information. The law that is declared by the Supreme Court should be able to take the shape of law in the jurisdiction that it can call its own.[47] This should explicitly mean that the Right to Privacy judgment should be followed as an established law in India and it should be considered supreme. But considering the fact that these two sections have still not been declared ultra vires by the Supreme Court[48] is in itself a violation of Rule of Law.

[43] Fundamental Right regarding Right to life and personal liberty.
[44] Justice K. S. Puttaswamy and Ors. vs. Union of India and Ors., AIR 2017 SC 4161
[45] Power to issue directions for interception or monitoring or decryption of any information through any computer resource
[46] Power to authorize to monitor and collect traffic data or information through any computer resource for cyber security
[47] Article 141 of the Constitution of India: Law declared by Supreme Court to be binding on all courts The law declared by the Supreme Court shall be binding on all courts within the territory of India.
[48] Article 13 of the Constitution of India: The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void

6. Conclusion

Looking at all the above-mentioned circumstances, it is still very difficult to conclude that India follows Rule of Law, because in some cases the Rule of Men is so prevalent. Even if Rule of Law is considered as a separate and an abstract entity in itself, then too, we get to see that it is, in the end, a man who frames laws that other men have to follow and thus Rule of Men acts as a veil over Rule of Law.[49] Though Rule of Law seems to be the best theory that could be inculcated into the Indian society, it still acts as a far-fetched concept in the Indian context and situation.

[49] Contra: An Introduction to the study of law of Constitution, by A. V. Dicey

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3. Victim Participation to Ensure Criminal Justice

By: Nilakshi Srivastava

Pg. No: 28-41

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i. Abstract

Since time immemorial, whenever a crime is committed it is considered to be committed against the society as a whole. Hence, the state took it upon themselves to run the criminal proceedings essentially putting the actual victim at a backseat in the entire criminal justice system reducing the to a mere witness. However, it is high time for making a paradigm shift from this to a more victim-centric approach and the important advantages and drawbacks of this approach are discussed below. An analysis is made to the amendments that have been brought to the Rome Statute in order to incorporate victim participation in criminal proceedings at the International Criminal Court. Next, a comparison is made with the legal framework in India and identify the scope of improvement.

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1. Introduction

To administer the criminal law efficiently, effectively and even-handedly a fundamental obligation of any law-abiding body is to be governed by the rule of law. This function is an attribute of the State or nations as well as international tribunals. The quality of governance democratic country is judged inter alia, by how the justice system is administered, and its effectiveness and the fairness of an international tribunal instilling faith in an international order. Society is a local or international reasonably expects that the criminal justice system will promote the common good and free atmosphere, the failures or inadequacies in the criminal justice system apparatus are bound to have an adverse effect on the life and conduct people. One such neglected aspect is that of victim participation.

2. Concept of Criminal Justice

Proponents of victims' rights argue that the criminal justice system should reflect and strike a balance between the rights of the victim and the rights of the accused. They further contend that prosecutorial discretion should be modified to allow the interests of the victim to come to the fore at the trial, as the rights of the defendant currently take center stage.[50]

Secondly, those in favor of providing the victim with a greater voice in the criminal justice process contend that auxiliary prosecution, through a specific victim lawyer ought to be available for the victim. The predominant fear, however, pertaining to the introduction of a victim prosecutor, in addition to the public prosecutor, is that this practice would violate the due process rights of the defendant.[51]

[50] Rupert Holden, Victim Participation within the International Criminal Court, 3 King's Inns Student L. Rev. 51 (2013).

[51] *Ibid.*

2.1. The Rational behind the Concept

Following the crimes that were prosecuted in the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), there was a need for the ICC to design an incorporative system for victims that was mindful of the immense suffering they had experienced. The Nuremburg and Tokyo International Military Tribunal (IMTs) were groundbreaking for prosecuting serious crimes. Despite the enormity of victim suffering during World War II, some claim that the IMTs had 'betrayed victims' by failing to adequately consider their interests. Hence incorporation of the same was important in the existing criminal structure.

2.2. Advantages of Such Participation

Victim participation has several advantages. It is considered to be indispensable for shedding light on international crimes. Victims bring in light high atrocities faced by them by the hands of the most power centric people or group of people and in hence, in view of this, should be able to speak in their capacity.

Victim participation can also be considered a form of (moral) reparation, as the person who has been wronged get a sense of being part of the justice delivery system. Telling of their stories can help victims to heal their pain and restore their dignity.

Furthermore, victim participation can contribute to reconciliation by helping both victims and torturers to reintegrate with their communities. It allows both victims and torturers to identify themselves with the participants in the proceedings. While participation in practice is only accessible to certain persons, those that remain at home can feel involved in the process thanks to modern channels of communication like video conferencing, social media etc. Hence, it is a natural understanding that victim participation can be an effective tool to ensure criminal justice.

2.3. International Instrument that Envisages on Victims Rights of Participation

In particular, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (the Basic Principles) anticipated that international law's future would be increasingly victim- orientated. The ethos behind the Basic Principles has been substantially incorporated into the Rome Statute, considering the language in Principle 6(b) is directly mirrored in Article 68(3).

3. Recognition of Victim Participation Mechanism by the International Criminal Court

3.1. The Legal Framework

Victim participation in proceedings is a part of the Rome Statute of the International Criminal Court (ICC). It is specially outlined in Article 68(3) of the Statute, which provides that '[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.' The Chambers were given the task of arranging victim participation within this framework.[52]

The framework provided for it by the drafters of the Rome Statute is vague, hence creating troubles in its interpretation over the years. The modalities for the participation of victims are further outlined in the Rules of Procedure and Evidence

Article 68(3) is one of its kind provision which is applicable throughout the entire procedure before the ICC, which consists of three phases: pre-trial, trial, and appeal.

[52] Article 68 (3), Rome Statute of the International Criminal Court, 1998.

Further, when under Article 15(3) the Prosecutor opens an investigation *proprio motu* or when under Article 19(3) of the statute, the jurisdiction of the Court or the admissibility of a case is challenged, and when reparations are awarded to victims under Article 75 all of these can be done my legal representatives of the person approaching the tribunal.

Generally, Article 68(3) has permitted victims to:[53]

a. propose evidence, including calling witnesses;

b. discuss evidence proposed by prosecution and defense, which includes examining the witness and making submissions on the evidence's admissibility or probative value;

c. access the Registry's record of case;

d. attend public and closed sessions; and

e. participate in oral and written motions.

Allowing victims to exercise these rights throughout all stages of proceedings has equipped victims with the necessities to contribute to the ICC's mandate of ending impunity for international criminals and further the main aim of such participation.

3.2. Who can be Classified as a Victim under the Rome Statute

The Rome Statute's drafters recognized that participation from indeterminate numbers of victims could be costly and time-consuming, and would risk bringing unbearable prejudice to the accused if victims adopted quasi-prosecutorial roles. Hence, the rules are quite stringent on the same.

The Rules of Procedure and Evidence the term “victim”. According to Rule 85(A), victims are 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'. This covers both direct and indirect victims, the latter being most of the time family members. Victims are 'natural persons' if they supply the ICC with proof of

[53] Gauthier de Beco, Victim Participation in Proceedings before the International Criminal Court: Resolving Contentious Issues, 3 Hum. Rts. & Int'l Legal Discourse 95 (2009).

identity. This requirement has been problematic, as victims in war-stricken regions are often unable to obtain the necessary documentation."

3.3. Definition of Harm to Qualify as a Victim

The major problem in determining harm is that neither the Rome Statute nor its accompanying rules define 'harm'. However, the Pre-Trial Chamber in one of the cases has held that harm should be assessed case by case in light of Article 21(3),66 which requires interpretation of the Rome Statute to be 'consistent with internationally recognized human rights'. Accordingly, 'harm' includes physical suffering," emotional suffering69 and economic loss, based upon Principle 1 of the Basic Principles.

Victims may suffer harm both directly and indirectly. Direct victims suffer harm as a result of the commission of a crime within the ICC's jurisdiction, whilst indirect victims suffer harm as a result of harm that has been suffered by the direct victim.

3.4. Conditions imposed on the Victims who wish to Participate

There are various conditions provided in the Article itself. First, Article 68(3) of the Rome Statute provides that victims may only participate when their personal interests are affected. This leaves a certain margin of discretion to the judges.

Second, Article 68(3) of the Rome Statute provides that victims may share 'their views and concerns at stages of the proceedings determined to be appropriate by the Court'.

Third, Article 68(3) of the Rome Statute provides that victim participation must be 'not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Furthermore, victims may be allowed only to make opening and closing statements. In addition, they might have to choose legal representatives to participate in the proceedings, as is foreseen by Article 68(3) second sentence. According to the Rules of Procedure and Evidence, victims

may choose their legal representatives by themselves, although the Chamber may order them to choose common representatives.

To balance the interest for the defense as well, the Defence must be made aware of victims' requests to intervene and have the opportunity to react. During the proceedings, it has the right to reply to any observation made by their legal representatives. These conditions appear to be quite stringent to create hurdles in fluent participation.

To participate in proceedings before the ICC victims must fulfill three conditions: their interests must be affected; their participation must be appropriate, and they must respect the rights of the accused by any means possible even if it's unfair to bring such proof to people who are already suffering to showcase their worthiness to appear as a victim.

3.5. Specific Benefits of Victim Participation under ICC

First, victim participation has facilitated accountability and punishment for perpetrators of crimes within the ICC's jurisdiction. Crucial investigative and trial matters are often resolved through victims' testimonies.

Second, victim participation is necessary to create a credible historical narrative of the conduct that occurred. Verification of truth is a core victim interest. The ICC has acknowledged victims have much to contribute to establishing truth given their intimate experience of the crimes.

Third, victim participation is fundamental to the development of the ICC's mandate of using justice to foster sustainable peace and prevent conflict. The promotion of peace is the ultimate aspiration for any notion of justice. The ICC's mandate does not extend to overseeing the peaceful transition of societies in conflict, but it certainly requires the ICC to use its power to create conditions that conduce reconciliation in conflict-stricken regions.

For victims, the process of truth-telling contributes to healing grief-stricken communities that benefit from understanding how and why they were victimized.

Fourth, victim participation has been crucial in determining appropriate reparations. The ICC has been mandated to create a restorative reparations model.

3.6. Problems Pertaining to Victim Participation under ICC

However, the road is not all rosy as it might appear on the outset. The principal problem relating to victim participation in proceedings before the ICC is that it conflicts with other interests.

Throughout the ICC's history, there has been concern that victim participation shall amount to double prosecution, which affects the accused's rights to receive just and impartial judgment. However, the ICC has categorically rejected this argument, as victims merely 'give a different color to the facts presented in court but the clouds of doubts are always hovering.

Victim participation, however, might violate the rights of the accused in two ways. First, victim participation could affect his or her right to a fair trial. This right is protected by Article 67(1) and builds on both Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention on Human Rights (ECHR). The right to a fair trial implies the equality of arms. This means that parties to the proceedings must be on an equal footing, a critical issue for accusatorial systems.

Second, victim participation could affect the right of the accused to an expeditious trial. Article 67(1)(c) of the Rome Statute stipulates, as do both Article 14(3)(c) of the ICCPR and Article 6(1) of the ECHR, that the accused should 'be tried without due delay'. This means that he or she has the right to be found guilty or not as soon as possible

It is obvious that if the victim's participation is allowed in international criminal trials, it may take more time because they concern about the most serious crimes and because they raise complex issues, but this is not a reason to prolong them further. Thus, victim participation, however, *de facto* extends the proceedings.[54]

[54] Sarah Moynihan, The Voiceless Victim, A Critical Analysis of the Impact of Enhanced Victim Participation in the Criminal Justice Process, 3 ISLRev 25 (2015).

4. Reflection on Participation of Victims in India Criminal Justice System

It is well understood that in criminal cases in India, the contest is between the accused and the State, represented by the Public Prosecutor. In effect, we all can agree that role assigned to a victim for a crime committed against him/her is marginal. The dual is fought between the State and the accused and in this, the interest of the victim is usually forgotten.

If the victims are allowed effective participation, not only will this provide much-needed relief and succour to the victims, but will also help in the proper implementation of criminal justice in India instilling the faith back in India criminal system.

4.1. Current Notions

Till date, the exclusion of the victim from the prosecution scene is sought to be justified by the concept that, by and large, crimes are directed against the society as a whole. Crimes foment unrest in the society and trigger off repercussions on societal life. The State which takes upon itself the duty to protect the life, liberty, and property of the people, and to enforce the rule of law, exercises its police power to check crimes and bring offenders to just punishments.

At present sadly it can be observed that the role played by a victim of crime in our criminal justice delivery system is not that pivotal. After the F.I.R. (first information report) is filled there is not much that the victim can do to ensure justice. He/she waits till the stage at which when he/she is called upon to give evidence in the court by the prosecution hence taking virtually a backseat in the criminal justice without much to be engaged in. They are neither a participant in the criminal proceedings launched against the offender, nor even involved in the ultimate decision-making as their views and opinions are only equal to any other witness in court. There are a plethora of instances in which the victim has been subjected to secondary victimization by the acts of the accused or their associates.[55] The law does not give much relief

[55] P. V. Reddi, Role of the Victim in the Criminal Justice Process, Student Bar Review, Vol. 18, No. 1 1-24, (2006).

in the long proceedings of the court. In some exceptional cases, an ad hoc ex gratia amount may be extended towards the victims on the discretion but usually the victim has to look for themselves. One such instance where the court took a proactive measure to ensure the interest of victims was of *Bhopal Gas Tragedy*.[56] However, their role in the process has been marginal.

4.2. Legal Provisions

The major legislation that governs the legal criminal proceedings in India is The Code of Criminal Procedure, 1973 in short referred to as CrPC. Section 301 of CrPC prosecutors of the case. It deals with the Public Prosecutor or Assistant Public Prosecutor and lays down its authority in the case. It enjoins a lawyer to prosecute any person, the Public Prosecutor conducts the prosecution, and the lawyer directions of the Public Prosecutor or the Assistant Public Prosecutor, if by the permission of the Court, submit written arguments. This inherently means that the counsel for the victim or by a private first informant can assist the Prosecutor with submit written arguments after the evidence in such an event, as pointed out by the Supreme Court in *Hukum Chand* case[57] is more or less that of a junior cannot act independently of Public Prosecutor. Hence, in short, every trial before a court be conducted by a Public Prosecutor who is a representation of the state and has nothing to do with the victims per se.

Next is Section 302 bearing the caption "Permission to conduct prosecution ", which is with reference to the inquiries and trials in a Magistrate's court. Section 301(2) applies to the prosecutions conducted in all courts whereas section 302 is confined to trial in a Magistrate's court. The distinction between sections 301(2) and 302, as highlighted by the Supreme Court in the decision of *J.K. International v. State*,[58] seems to suggest that a counsel engaged by a victim or a third party may be allowed to intervene, nay, play a primary role in the conduct of prosecution before a Magistrate's court, whereas in the sessions court, he is only permitted to have a limited or subordinate role. These provisions, namely, sections 301 and 302, give some

[56] M.C. Mehta and Ors. vs Union of India and Ors., (1986) 2 S.C.C. 176.

[57] Shiv Kumar vs Hukam Chand and Ano., (1999) 7 S.C.C. 467.

[58] M/s J.K. International vs State (NCT of Delhi), (2001) 3 S.C.C. 462.

scope for the intervention of the victim or the person aggrieved by the offense, in the trial proceedings.

In some specific cases like the cases of sexual assault or rape or any such similar offenses, at the stage of investigation, the statement of the victim is recorded and she is sent for medical examination, if necessary. In accordance with this, on a predetermined date, the victim is called upon to the court to give evidence or any other testimony. Additionally, the court has the *suo moto* power or the inherent power to summon the victim as a witness, at their discretion when they deem fit. The prosecution agency in India, the police, or the CBI is usually the in charge of conducting a criminal proceeding and the victim himself/herself who filed the complaint to initiate criminal is not made a party to the proceeding itself. However, there can be an except in a case where the proceedings are initiated based on a complaint made directly to a Magistrate and a cognizance has been taken.

However, one unique feature must not be missed. It arises when if on the consideration by the Magistrate is taken of the police report or charge sheet, and he concludes that he is not inclined to take cognizance and is in favor to drop the proceedings altogether, then, in that case, an opportunity is to be given to the victim to put their side of the story before such proceedings are completely dropped. The procedure was established in lieu of the *Bhagwant Singh v. Commissioner of Police*[59] case by the Supreme Court and is allowed to play at stage of an investigation.

One more important element found in CrPC relates to *Plea Bargain* incorporate by an amendment called the Criminal Law (Amendment) Act, 2006. It introduced the section 265A to 265C. However, the same is has nothing to do with the participation in the trials itself.

The *154th Law Commission Report* dealt with the topic of Victimology, but confined itself to a discussion on victim compensation. It did not address the issue of participation of victims in investigation and prosecution.

[59] Bhagwant Singh v. Commissioner of Police, (1985) 2 S.C.C. 537.

5. Conclusion

Victim's rights groups, largely responsible for the changes, welcomed the modifications made to the Rome Statute and its attached Rules to allow victims a central role throughout the criminal trial process. However, it is still uncertain whether the structural transformations presented by active participation will benefit the victims, infringe upon the rights of the accused, jeopardize prosecutorial discretion, or hamper the functioning of the ICC.

The Courts must continue to respect the rights of victims to freely express their views and provide worthy information along with opinions at various stages of the proceedings and in a way that does not infringe upon the fair trial rights of the parties.

Now analyzing the case close at home, our very own criminal law system might have some provisions but there is a lot to be incorporated. Our criminal system must aim at ensuring safety instilling a sense of security in the victims. This not only that the victim be allowed to participate in a meaningful way in the proceedings. Drawing a road map to give a better deal to the victims is the way to look forward.

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4. Effect of Unfair Contract Terms on Small Business Owners: A Comparative Study of Australian and Indian Laws

By: Ayush Negi

Pg. No: 42-59

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i. Abstract

In recent times there have been recurring accounts of small business vulnerability, their exploitation, and disadvantages arising from unfair contract terms. Small Business**es** are very viable for the economy in terms of job and employment, innovation. To save time and resources, large businesses prepare standard forms of contracts and present them to small business owners on 'take it or leave it' basis. Small Businesses due to lack of resources and expertise have no choice but to agree to the terms of the contract proposed by large businesses and may not be in a better position to manage the risk allocated to them through contract. There was an urgent need to create a legal framework to protect the commercial interest of small business owners from such unfair terms in the contract. This paper studies, analyzes, and compares the position of law in India and Australia regarding unfair contract terms.

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1. Introduction

In today's era, contracts are a fundamental part of business facilitating transactions made between business owners by identifying promises, allocating the risk, and providing a mechanism for enforcement. Standard form of contracts are mostly pre-prepared by one party to the contract and the other party has either has to accept it or reject it, thus leaving behind no scope for negotiation. In the standard form of contract, the party who is offering contract generally holds most of the bargaining power and often uses this power to include such terms which may exploit the weaker party to the contract. Small business owners may face a similar experience of exploitation from the hands of large business owners. Large Business owners may present them with the standard form of contract which is in most of the cases are one-sided or largely favors the large business parties. Small business owners due to lack of economic resources, legal and technical expertise, and lack of negotiating power are not able to critically analyze the terms of the contract which may later be proved to be unfair for such small business owners. Small business set-ups may have little or no choice but to accept the terms of the contract in a belief that this is the only avenue to explore commercial opportunity. It is generally observed that large business set-ups offering a standard form of contract have better knowledge about the terms and conditions of contract and they use such knowledge and privilege to enhance their commercial interest and dominance over the small business owners which may go beyond the reasonable legitimate commercial interest. Hence some terms and conditions may unfairly advantage one party at the expense of others, with the potential to transfer all or much of the risk involved in the transaction to the weaker party to the contract. Such unfair contract terms may have broader implications on the economy and may bring undesirable economic costs.

It becomes essential to enact legislation and create a legal framework in order to protect the commercial interest of small business owners and other weaker parties from such exploitation of unfair contract terms. Since 1984, significant developments can be seen taking place in other countries to deal with the 'unfairness' in contracts. Many countries came up with, voluminous reports of law commissions, statues, and a piece of legislation to address the issue of unfairness in the contract. This paper aims to study the existing position of law in India and Australia regarding the unfairness in the contract in relation to small business owners. The article

discusses the past provision and sections and the law which were there in these countries to protect the interest of the small business community and the present position of law existing now to deal with unfairness and unfair terms in the contract. The entire paper is divided into three chapters followed by the conclusion in the end. The first chapter talks about the position of law in India, Second chapter talks about the position of law in Australia and the third chapter compares the position of law existing in these two countries.

2. Position of Law in India

In matters of unfair terms in the contract, there have been significant developments taking place in other countries and detailed legal framework and statutes have been proposed or enacted. In India also, the subject of unfair terms in contracts has attracted grave significance in recent times with respect to not only consumer contracts but also with regards to other contracts like business to business contracts. In view of the growing importance of this subject and recent developments taking place in other countries, Law Commission of India had taken the detailed study on this subject suo-moto and proposed a separate legislation for dealing with unfair terms in contracts, apart from the provisions of Indian Contract Act and Specific Relief Act, just like other countries such as UK, Singapore or Australia has enacted.

Law Commission of India recognized the disadvantages of a standard type of contracts that are one-sided and the weaker party has no choice but to abide by the contract, therefore it felt necessary to regulate unfairness arising in the contract. Keeping in the mind the tremendous expansion in business activities in India, there was a need for a separate legislation to address the problem of unfairness in the contract and thus protect the interest of weaker party against the stronger one.[60] Thus on the recommendations of the Law Commission of India, Parliament has proposed a bill in 2018 called, 'UNFAIR (PROCEDURAL AND SUBSTANTIVE TERMS) CONTRACT'.

The Indian Contract Act has several provisions such as undue influence, coercion, misrepresentation, mistake, fraud, etc which are related to 'voidable contracts'**.** These

[60] Law Commission, *Procedural and Substantive Terms in Contract* (Law Com No 199, 2006) pg.10.

provisions are indeed procedural. Similarly, the Indian Contract Act also contains provisions dealing with the 'void contracts' or 'void terms' and these provisions are substantive provisions. Likewise, the Specific Relief Act also contains provisions for granting relief in case of substantive and procedural unfairness. This bill declares certain provisions of the Specific Relief Act and India Contract Act as procedural and substantive and provides guidelines to courts for each of their determination and further provides remedies to remove such type of unfairness in the contract. It was felt that, in the absence of such guidelines, there would be uncertainty in judicial interpretations and thus affecting the interest of the parties involved. A clear demarcation would bring clarity and certainty in the law and therefore would be relevant to protect the interest of the parties. [61]

Procedural Unfairness means whether there is unfairness in relation to how the terms of the contract arrived or entered into between the parties. Procedural unfairness involve*s* looking into the conduct, knowledge, and positions of parties immediately before the contract and whether one party has imposed standard terms on the other party without any negotiations.

Substantive Unfairness may be termed as harsh or oppressive or one-sided. For an instance, one party to the contract may have excluded itself from the liability arising from negligence or breach of contract or might have given the power to it to alter the terms of the contract unilaterally.

2.1. Position Before The Bill on 'Unfair (Procedural and Substantive Terms) Contract'

Before this bill, there were numerous laws such as the India Contract Act, Specific Relief, and even the provisions of the constitution, to protect the interest of the small business community. Under the relevant provisions of these laws, a contract may be declared void on the grounds of unconscionable, unreasonable, or unfair.

[61] *Id.* at 13.

Section 16: Undue Influence (Indian Contract Act)

Section 16 of the Indian Contract Act is one of the provisions which deals with the inequality in the bargaining powers and unfair advantage of one party over the other. Section 16 talks about undue influence where the relations between the party are such that one party is in a position to dominate the will of the other party and use that dominant position to obtain unfair advantage of the other party, then the contract can be said to be induced by undue influence.[62] Further section 16(3) states that the burden of proof that such a contract was not unconscionable and not induced by undue influence lies on the party who was in a dominant position.

Unconscionable in relation to contract means absence of choice on the part of one party to the contract to avoid and not bound by the contractual terms which unfavorably favors the other party to the contract. In *Poosathurai*,[63] the Privy Council held that both the elements of unconscionable nature and dominant position need to be satisfied before the contract can be called as unfair to the other party.

Section 27: Agreement in Restraint of Trade (Indian Contract Act)

According to section 27, an agreement that restrain the other party from exercising lawful business, trade, or profession is void to that extent.[64] Restraining one of the parties to the contract from carrying on lawful profession contains monopolistic tendencies and is aimed at avoiding competition and against the party's interest as well as the society.[65] Supreme Court in *Gujrat Bottling Co. Ltd.*[66] held that if the negative stipulation (restraint of trade) is confined or restricted to the period of the agreement only and not beyond that and further such negative stipulation is necessary to protect the business interest of another party then negative stipulation would be termed as valid.

[62] The Indian Contract Act 1872, sec 16.
[63] *Poosathurai v. Kannappa Chettiar* (1920) 22 BOMLR 538.
[64] The Indian Contract Act 1872, sec 27.
[65] Law Commission, *Procedural and Substantive Terms in Contract* (Law Com No 199, 2006) pg.26.
[66] *Gujrat Bottling Co. Ltd. v. The Coca Cola Co. & Ors.* 1995 SCC (5) 545.

Section 28: Restraint on Legal Proceedings (Indian Contract Act)

Section 28 states that agreements which restrict the party absolutely from enforcing any rights in relation to contract by usual legal proceedings or by limiting the time by within which such time can be enforced or by discharging any party from any liability in respect of any contract on the expiry of a specified period to restrict the other party from enforcing rights.[67] In *Hakam Singh,*[68] Apex Court ruled that restriction imposed must be absolute and the party is wholly precluded from using any legal remedy. However partial restrictions would not be considered as void.

Section 67A (Indian Contract Act)

According to section 67A, if the court concludes that terms or any part of the contract is unconscionable then the court may refuse to enforce the contract or any part of it which is unconscionable.[69]

Section 20 (Specific Relief Act)

Section 20 deals with the discretion of the court to grant or refuse to grant the decree of specific performance. The court may not grant the decree of specific performance if the terms of the agreement are unfair and gives undue advantage to the other party. [70]

Article 14 (Constitution of India)

Generally, standard forms of contracts are tainted with unfair provisions as there is little scope for negotiation. Further existing provisions of the Indian Contract Act may not be adequate to rescue weaker parties if the terms of the contract may not fall within in ambit of section 16, 27, or 28 of the Indian Contract Act. However, Judiciary has come to rescue the weaker party who under the pressure of circumstances (mainly economic or due to ignorance) arising out of the

[67] The Indian Contract Act 1872, sec 28.
[68] *Hakam Singh v. Gammon (India) Ltd* 1971 AIR 740.
[69] The Indian Contract Act 1872, sec 67A.
[70] The Specific Relief Act 1963, sec 20.

inequality in the bargaining powers agreed to such terms, by using article 14 of the constitution since unfairness in contractual terms by authorities can also fall within the meaning of 'State' under article 12. [71]

In *Central Inland Water Transportation Corporation Ltd*.,[72] Apex Court broadens the applicability of unconscionable terms and unfairness beyond the provisions of the Contract Act. Supreme Court in this case emphasized the term 'distributive justice' where the law must aim at removing economic inequalities and rectifying injustice resulting from transactions and dealings between the unequal in the society. Regarding unconscionable bargain, Supreme Court held that such contracts where the weaker party enters into a contract under pressure arising generally through economic circumstances, then such a contract would be regarded as void as opposed to public policy. In this case, Supreme Court ruled that conditions related to the termination of employees beyond any reasonable cause and merely on a three-month notice were unfair, unreasonable, and unconscionable and against the public policy and thus violative of Article 14 of Indian Constitution.

2.2. Proposed Bill*:* 'Unfair (Procedural and Substantive Terms) Contract'

Procedural Unfairness under Indian Contract Act

Section 3 has categorized some provisions of the Indian Contract Act into procedural unfairness. They are section 15 (coercion), Section 16 and 19A (Undue Influence), Section 17 (fraud), Section 18(Misrepresentation) and Section 19 (agreements without free consent).

Procedural Unfairness under the Specific Relief Act

Section 4 has categorized some provisions of the Specific Relief Act into procedural unfairness. They are Section 20(2)(a) which talks about the conduct and circumstances of parties before entering into a contract, Section 20(2)(c), where the party entered into the contract under the circumstances which though not make the contract voidable but makes it inequitable. Section

[71] Law Commission, *Procedural and Substantive Terms in Contract* (Law Com No 199, 2006) pg.32.
[72] *Central Inland Water Transportation Corporation Ltd v. Brojo Nath Ganguly & Anr* 1986 AIR 1571.

27(1)(a), where the contract is voidable by one party and interested person in the contract sues to have it rescinded and such rescission is adjudged.

General provision related to Procedural Fairness

Apart from these, section 5 provides for General Procedural Fairness, where any contract or any term of it results in an unjust advantage to the one-party with regards to the conduct of the other party.

Guidelines to determine Procedural Unfairness

Section 6 provides for the guidelines in order to determine procedural unfairness for the purpose of section 5. Some of the important guidelines are: a) knowledge and understanding of the terms and their effects, b) bargaining strength of each party, c) commonly accepted standards of fair dealing, d) whether the terms of the contract were subject to negotiation, e) whether it was reasonable or practicable for the party to negotiate for the alteration of the contract or term therein or to reject the contract or a term therein, f) whether expressions in the contract are incomprehensible or unreadable.

Substantive Unfairness in the India Contract Act

Section 7 talks about substantive unfairness in the India Contract Act. They are section 10 (free consent, lawful object, and lawful consideration, Section 20(both the parties were under a mistake), section 23 and 24 (Object or consideration of the contract is unlawful), Section 25 (agreements without consideration), Section 26 (agreements in restraint of marriage), Section 27 (agreements in restraint of trade), Section 28 (agreement in restraint of legal proceedings), Section 29 (uncertain agreements), Section 30 (agreement by way of wager) and Section 56 (agreement to do impossible act).

Substantive Unfairness in the Specific Relief Act

Likewise, section 8 talks about substantive provisions of the Specific Relief Act with regard to unfairness. Section 18(a), where on account of mistake, misrepresentation or fraud, the performance of a contract is sought which is different from what parties to the contract agreed to or does not contain all the terms agreed between the parties on the basis of which one of the parties entered into the contract, shall be substantive.

General provision related to Substantive Unfairness

Further section 9 defines a contract as substantively unfair if the contract or any term excludes or restricts the liability arising from negligence or exclude liability from breach of contract without justification. Apart from these sections, section 12 talks about the general substantive unfairness, where the term of the contract is harsh, unconscionable or oppressive to one of the parties.

Guidelines to determine Substantive Unfairness

Section 13 provides guidelines for section 12 to determine whether the contract or term is substantively unfair. Some of them are: a) whether the imposed conditions of the contract were unreasonably difficult to comply with, b) not reasonable to protect the legitimate interest of the other party, c) whether a contract has led into an unequal exchange of monetary values or has created a substantive imbalance in the party, d) impose disproportionate penalties or e) entitles one of the parties to modify the terms of the contract unilaterally.

Remedies Available

If the court finds the contract or terms as procedural or substantively unfair to one of the parties then as per section 17 court is empowered to grant any relief such as refusing to enforce the contract or any term of it, declare the contract or term void, altering the terms of the contract to remove unfairness, refund of consideration, allowing compensation or damages, injunction or any other relief necessary in the interest of justice.

3. Position of Law in Australia

In Australia, based on the report submitted by the Productivity Commission – Review of Australia's Consumer Policy Framework (2008)[73], provisions related to the protection of consumers from unfair contract terms in standard form of contract were introduced in Australian Consumer Law (ACL) and the Australian Securities and Investment Commission Act 2001 (ASIC). Standard forms of contracts distort the relationship between buyer and seller and result in the imposition of one-sided contracts and thus leaving no rescue to the weaker party (consumer). Therefore Australia brought the relevant provisions to ameliorate the imbalance existing between the parties and to empower the court to determine any unfair terms in standard form of contract and thus make that term or contract void.

However, it was not until 2014, when the unfair terms in the contract can be used to protect the interest of small businesses. In Treasury Review (2014), Queensland Law Society submitted that the majority of small business do not possess the same level of bargaining power due to lack of economic resources when dealing with large business thus there is strong need to extend the protection unfair terms to small business and improve the access to justice for another vulnerable and marginalized group which is equally at risk.[74] As a result, Australia brought the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015. The Act amends ACL and ASIC Act 2001, extending the protection from unfair contract terms which were currently available to consumers, to small business as well and came into effect in 2016.

[73] The Treasury *(2018), Australian Government, Review of Unfair Contract Term Protections for Small Business,* https://consult.treasury.gov.au/market-and-competition-policy-division-internal/c2018-t342379/supporting_documents/Discussion_Paper__Review_of_UCTs%20%20Final.pdf *(last visited May 27, 2020).*

[74] The Treasury (2014), Australian Government, *Extending Unfair Contract Term Protections to Small Businesses*, https://treasury.gov.au/sites/default/files/2019-03/C2014-025_E53165D4D8B24B4799395680E68FE0B0.pdf (last visited May 27, 2020).

3.1. Key features of the Act

Standard Form of Contract

In order to determine whether the contract is a standard form of contract or not, the Court is required to take into account whether: a) One of the parties hold all or most of the bargaining power, b) the contract was prepared and drafted by one party without any discussion and negotiation, c) other party was offered to either accept or reject the offer (leave it or take it), d) the terms of the contract take into account or consider any specific characteristic of other party or the particular transaction and e) any other matter prescribed by regulations.

Unfair Defined

Unfair is defined in the legislation as those contract terms which: a) cause a significant imbalance in the parties' rights and obligations arising in the contract, b) are not considered as reasonably necessary to protect the legitimate interest of the party and which would advantageous position to one party, c) it would be a detriment (financial or otherwise) to the party if such term/s were to be relied upon.

The Act is Confined to Small Business Contracts

Small businesses lack resources (economic or otherwise), legal and technical expertise, and bargaining power to negotiate the terms of the contract with large business therefore the Act aims to prevent small businesses from injustice arising due to such unfair terms and inequality in bargaining power.

The Act defines a small business as: a) a business that employs less than 20 people, b) the upfront price payable under the contract does not exceed $300,000 or $ 1 million if the contract runs for more than twelve months. Further, the Act uses the 'headcount method' to determine how many people are employed in business and it does not include full-time equivalents nor does it include casual employees.[75] The legislation introduced sub-section 12BI(2) in AISC

[75] Competition and Consumer Act 2010, sec 12BF.

Act and sub-clause 26(2) in ACL in order to define 'up-front' price as: a) the amount provided for the supply or sale as per the contract, b) disclosed at or before the parties entered into contract and c) does not include any other consideration that is contingent on the happening or non-happening of any particular event.

Exemptions

Certain terms of the contract are exempted from the ambit of 'Unfair Terms'. The Unfair Contract Term protections do not apply to the terms that: a)forms the main subject matter of the contract, b) set the 'upfront price' which is payable under the contract, c) which are required by the law of Commonwealth. Further contracts that are subject to protection under a law that is prescribed by the regulation are also exempted from 'Unfair Terms'. In addition provisions of Unfair Contract Terms, does not apply to the marine contracts, contract for the carriage of goods by ships.

Remedies Available to Small Business

Small Business (a party to the contract) may request before the court to declare certain terms in contract as unfair. The unfair term may be separated from the entire contract so that the remaining part of the contract can operate without any unfair terms involved in it. The court after concluding that any term in the contract is unfair can impose pecuniary penalty or order compensation and can also issue an injunction. Other remedies the court can use are: a) to declare the unfair term or the contract void, b) altering the contract to remove unfairness c) to return or refund the property d) repair or providing the parts of goods supplied under the contract, e) ordering resupply of services f) amend or reconvey transfer of interest inland.

4. Comparative Study of Position of Law on Unfair Contract Terms in India and Australia

Few countries in the world have legislation on unfair contract terms and Australia is one of them. The provisions related to unfair contract terms are legislated in two statutes: Australian Consumer Law (ACL) and the Australian Securities and Investment Commission (ASIC). These two legislations were amended in 2016 to expand the protection from unfair terms in the contract to small businesses also. The former deals with the issues of unfair terms arising in the contract of goods, services, and land while later deals with the issue of unfair terms in financial products and services. However, in India, the separate legislation to deal with the unfair terms in the contract is still in the nascent stages. The bill on the Unfair Contract has not become an Act. Further, the bill does not provide any demarcation between unfair terms in the contract for goods, services, land, and the contract for financial products and services.

In the recent amendments made in ACL and ASIC, small business has been defined as the party which employs fewer than 20 persons and either the upfront price payable under the contract does not exceed $100,000 or if the contract is for 12 months then the upfront price payable under the contract does not exceed $250,000. But in India, the bill on Unfair Terms in Contract does not provide any such definition for ‘small businesses’.

The bill on Unfair Contract Terms in India has demarcated unfairness into ‘procedural’ and ‘substantive’ unfairness. The bill declares certain provisions of the Indian Contract Act and Specific Relief Act as procedural or substantive unfairness along with the statutory guidelines to determine the same. However, in Australian Law, there is a lot of confusion and mismatch of substantive and procedural unfairness. Unlike Indian law, no such demarcation has been made between procedural and substantive unfairness. Australian law simply defines ‘unfairness’ as causing a significant imbalance of rights and obligations, giving one party an advantageous position or been detrimental (financial or otherwise) to the interest of one party.

The remedies provided under Australian and Indian law regarding unfair terms are almost similar such as declaring such term or contract void and unenforceable, ordering injunction, compensation or damages, or altering the terms of contracts to remove unfairness and many others.

It is to be noted that Australia has amended provisions of ACL and ASIC to expand the protection to small businesses which was earlier given to the consumers. Thus with such amendments, Australia has enacted provisions which specifically caters to the need of small businesses. In 2019, Australia announced to strengthen the current laws protecting small businesses from unfair terms in the contract such as making unfair terms as illegal and attaching civil penalties.[76] However, no such specific legislation or provisions are there not even under the new proposed bill to specifically take care of the interest of the small business community. The newly proposed bill can be termed as an umbrella which covers and accommodates the need of various interest holders such as consumers, suppliers, business owners.

5. Conclusion

The tremendous expansion in the commercial sector has opened the door of opportunities for the business community. In this regard, the matter related to unfair terms in the contract has attracted profound significance. To protect the interest of the weaker party, it was important to enact a comprehensive set of laws that deal with the unfair terms in the contract and provide justice to the weaker party and provide a conducive environment for doing business. In the last decades, many major countries such as the USA, UK, or Australia have undertaken the initiative to frame laws for the consumers and small business owners and granting them protection from the exploitation of standard terms of contracts which are majorly one-sided.

In India, the Law Commission of India recognized the disadvantages of a standard type of contracts that are one-sided and the weaker party has no choice but to abide by the contract, therefore it felt necessary to regulate unfairness arising in the contract. On the recommendations of the Law Commission of India, Parliament has proposed a bill in 2018 called, 'UNFAIR (PROCEDURAL AND SUBSTANTIVE TERMS) CONTRACT'. Before the coming of this legislative framework, the Indian Contract Act and Specific Relief Act were the two important legislations that protected the party from the unconscionable and unfair terms in the contract. These provisions dealt with coercion, mistake, misrepresentation, fraud, undue

[76] Jonathan Casson*, Small Business and Unfair Contract Terms: Changes on the Horizon,* Holman Webb Lawyers, https://www.holmanwebb.com.au/blog/299/small-business-and-unfair-contract-terms-changes-on-the-horizon(last visited May 27, 2020).

influence, agreement in restraint of trade, etc. Similarly, the Specific Relief Act also contains the provisions which empower the court to refuse to grant decree if it will put one party in an advantageous position over the other. However, it was felt that there is a need for proper and separate framework of provisions which deals with the unfairness in the contract so that weaker party to the contract can have access to easy and simple remedies. Moreover, the Indian Parliament considered that the division of 'unfairness' into procedural or substantial was necessary to avoid confusion and mis-mash of substantive and procedural fairness. Thus it provided in the bill the clear demarcation of certain provisions of Indian Contract and Specific Relief Act as substantive and procedural unfairness along with the statutory guidelines for the determination by the court. The bill also contains various remedies available to the small business owner if the term/s of the contract is unfair such as declaring such term or contract void, issue injunction, order damages, alter terms of the contract to remove unfairness. Thus under Indian laws, a separate framework and clear demarcation would ensure uniformity, certainty, and clarity of law which would be of extreme importance to the small business owners.

Australia also introduced a legislative framework to protect the interest of weaker parties such as consumers against unfair contract terms. It enacted Australian Consumer Law and Australian Securities and Investments Commission Acts to address the issue of unfair terms arising in the contract. Later in 2016, Australia expanded the protection from unfair terms to the small business owners also as it was felt that small business owners due to limited resources and lack of expertise may face exploitation from large businesses. The provisions of ACL were amended to address the issues unfair terms arising in the contract of goods, services, and land, and similar provisions of ASIC were amended to incorporate unfair terms for financial products and services. Unfair Contract Terms have been defined in the legislation as those contract terms which would cause a significant imbalance in the parties' rights and obligations arising in the contract or which are not considered as reasonably necessary to protect the legitimate interest of the party and by which one party would be in an advantageous position by such term in the contract or which would be a detriment (financial or otherwise) to the party if such term/s were to be relied upon. Further, Australia recently announced to introduce relevant amendments to strengthen the current laws protecting small businesses from unfair terms in the contract such as making unfair terms as illegal and attaching civil penalties, further changing the definition of 'small business', removing the 'upfront price' payable threshold.

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Small businesses are very crucial to the economy in terms of innovation, employment, and productivity. A legislative framework to address the issue of unfairness in the contract is necessary to ensure the efficient allocation of risk in the contracts and providing confidence to small business owners in agreeing to the contracts. Removal of unfair terms in contracts would boost the confidence of small business owners in dealing with other large businesses thus helping them to expand their operations and creating the environment of healthy competitiveness which would also be beneficial for the whole economy.

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5. Constitutional Basis of Tax in India

By: Sonali Sethi

Pg. No: 60-69

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i. Abstract

Nation's economy depends on the system of taxations as tax is the most essential part to run economy so basically, taxes are generally an involuntary fee levied on an individual or corporation that is imposed by the government either state government or central government to finance the government activities. The 88th Amendment to the Constitution of India assigned the power to tax services to the central government. Only the Legislative Act allowed for a collection of taxes in India allows no other method. The government cannot introduce any other method. Any tax levied not backed by law or is beyond the powers of the legislating authority is unconstitutional. The latest reform reaches an innovative idea of GST with motives to subsume all indirect taxes at the center and the state level, to make one-country-one-tax, to reduce the cascading effect of taxes on taxes and thus to increase productivity and transparency, increase tax-GDP ratio and to reduce/eliminate tax evasion and corruption. This paper deals with the structure of the Indian tax system, its constitutional framework, and the current changes in the system. Though it is difficult to achieve the ideal objective, reforms help us to keep the focus on further reforms.

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1. Introduction

The nation's economy depends upon the system of taxations. The collection of tax is the most essential part of the nation. The taxation system can lead to revenue mobilization in response to growth and result in revenue grows faster than GDP. Tax is a compulsory contribution to state revenue, levied by the government on worker's income and business profits, or added to the cost of some goods, services, and transactions.[77] India offers a well-structured tax system. Tax is the source of revenue for the government. India's tax structure has three federal structures consisting of the central government, state government, and other local authorities. These authorities impose taxes and duties on individuals and corporate bodies within the country and the local authorities are mainly include municipal parties and the local councils. However, article 265[78] of the Indian Constitution states that Taxes not to be imposed save by authority of law No tax shall be levied or collected except by authority of law so basically Tax in India can only be composed by Legislative Act, no other method allowed. The government cannot lead to any other method.

Tax is classified into two categories i.e. direct tax and indirect tax. Direct tax is the tax imposed directly on the taxpayer and paid directly to the government by the taxpayer. It cannot be shifted to someone else. Direct taxes are income tax, corporate tax, perquisite tax, gift tax, and inheritance tax. Indirect tax is a tax collected by an intermediary from the person who bears the ultimate economic burden of the tax. It can be shifted to someone else and ultimately paid for by the end consumer of goods & services. Indirect taxes are custom duty, excise duty, service tax, GST Tax promotes savings as well as investments. If an individual makes a certain set of investments, a part amount of the same would be tax exempted, thereby enabling him or her to pay a reduced amount of taxes and helps to growth in GDP.

The evolution of the tax system in independent India started with the implementation of the report of the Taxation Enquiry Commission[79]. This was the first comprehensive attempt to review the existing tax system and design a system that would cover the central, state, and local taxes and was intended to fulfill a variety of objectives such as raising the level of savings and

[77] Available at: https://en.oxforddictionaries.com/definition/tax
[78] Article 265 of Constitution of India
[79] Government of India. 1953. Report of the Taxation Enquiry Commission.(New Delhi: Ministry of Finance,1953

investment, transferring resources from the private sector to public sector, etc. On the indirect taxes side, a major simplification exercise was attempted by the Indirect Taxes Enquiry Committee.[80] Thus since the year 1991, the Indian tax system has undergone some significant change and these changes were initiated in accordance with the country's financial policies.

Until 2003 India's constitution didn't expressly assign to any level of the state the facility to tax services. In 2003 an amendment to the constitution specifically assigned the power to tax services to the central government and the 88th Amendment to the Constitution of India (Article 268 A). Article 268A[81] of the Indian constitution, 1949 deals with the Service tax levied by Union and collected and appropriated by the Union and the States. Further Omitted by the Constitution (One Hundred and First Amendment) Bill, 2016 as in present scenario tax on services has been carried in GST, such a provision is no longer required.

2. Indian Constitution and Taxation

In a federal constitution, as is the case in India, since there is a distribution of powers between the federal and state governments, the question has sometimes been passed whether the federal or state legislature by exercise of its taxation power invade any region of legislation, although it is impliedly forbidden to enter it, and this by the simple process of making the liability to the tax depends upon matters with those regions. There are decisions from other federations in which taxes huge been struck down on the ground that such taxes invaded a legislative field demarcated exclusively for the other by the constitution. But the correct approach seems to be to treat such laws only as legitimate exercises of taxation power.

The power to tax is an inherent sovereign power of a state to collect a contribution of money or other property from its citizens and the inhabitants of its territory for defraying its general expenditure as taxation as the source of the public revenue. The essential nature of tax lies in its being a burden or charge imposed by the legislative power on a person or property for public purposes. Taxation proceeds on the theory that the very existence of the government is a

[80] Government of India 1977.Report of the Indirect Taxation Enquiry Committee.New Delhi :Ministry of Finance
[81] Article 286A of Constitution of India.

necessity and the taxpayer is supposed to receive his just compensation in the protection which government affords to life, liberty, and property. A federal constitution may delineate the taxing power of the federal and constitutional governments. Article 265[82] of the constitution provides that no tax shall be levied or collected except by authority of law but the word law in this sentence comprehended the power of the present of India and governor of the states, to make law by issuing ordinances.

The executive as well as the judiciary is powerless to impose any tax. The tax may be in money or kind. A system of levy of paddy from agriculturists during the harvest season may be viewed as a form of tax on agriculturists if proper conditions already stated are fulfilled. If however, the state pays the price of paddy of collect from the concerned person, then certainly it will lose the character of tax and will partake the character of acquisition. The conscription of men for service in armed forces and a system providing for compulsory public labor by citizens may be viewed as instances of taxes in kind. But all compulsory payments made in favor of the states are not taxes.

There are several articles in the constitution of India, which define the financial relations between Union and States such as Article 246 (Seventh Schedule) of the Indian Constitution contains the legislative powers (including taxation) of the Union Government and the State Governments. It contains the following 3 lists covering the various subjects:[83]

- **List I - Central List:** It contains the areas where only the parliament i.e., Central Government can make laws (including taxation laws.),
- **List II—State List:** It contains the areas in where only the State Legislature can make laws (including taxation laws), and
- **List III - Concurrent List:** It contains the areas where both the Parliament and the State Legislature can make laws concurrently.

It is vital to notice that this list doesn't specify any law regarding taxation, there is no head of taxation under the concurrent list and hence Union and the State have no concurrent power of taxation. The constitution of India has followed the example of the United States of America in incorporating certain fundamental rights enforced by the Court of law. Part III of the constitution of India which deals with the fundamental right but the only provision which

[82] Article 265 of Constitution of India.
[83] Article 246 of Constitution of India.

expressly deals with taxation power are Article 27 and Article 31(5) (b) (1) of the Constitution of India. But The Parliament can step in where a state legislature had been found incompetent to levy a tax to impose such tax and end may even provide for retrospective operation.

Goods and Service Tax is a new revelation that is soon to make its appearance in the Indian Indirect Tax Regime. In the budget speech of 2010-11, the Indian Finance Minister has promised to attempt to make GST applicable in India from 2011 along with Direct Tax Code. On 8th September 2016, the 101st amendment of the constitution was passed. Article 246A[84] a Special Provision With Respect To Goods and Services Tax was inserted in the 101st amendment of the constitution. Article 246A provides that anything contained in articles 246 and 254, Parliament and the Legislature of every State, Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-state trade or commerce. Few important changes in the constitution were made to improve the taxation system via 101st amendment of the constitution:

- ARTICLE 248, 250,249, 269, 270,271, 286,366, 368, was amendment
- Article 268A was omitted
- Article 269A, 279A was inserted

The above mention changes are essential for the implementation of GST in the nation. The aim to bring about these amendments in the Constitution is to confer simultaneous power on Parliament and State legislatures to create laws for levying GST at the same time on each group action of offer and merchandise and Services. So basically these amendments deal with provisions for the Union and States with respect to the GST legislation. It also specifies that Parliament has exclusive power to form laws with relation to GST on interstate transactions. Thus, as per these provisions, Central Government and State Governments shall make the CGST and SGST Act respectively, while the IGST Act shall be made by Central Government only.

GST may be a revenue enhancement on the provision of products and services, right from the manufacturer to the consumer. Credits of input taxes paid at every stage are going to be out

[84] Article 246A of Constitution of India.

there within the sequent stage of value addition. GST basically may be a tax solely on price addition at every stage. The final purchaser of the product or service will bear the GST charged by the last dealer within the offer chain, with set-off benefits at all the previous stages. Under GST, there would be only one tax from the manufacturer to the buyer, leading to transparency of taxes paid to the final consumer. So there will be relief in overall tax burden.

This is as a result of underneath the GST regime, the whole offer chain is going to be economical resulting in gains and interference of leakages. It is expected that it will result in the overall tax burden on most commodities to come down, which will benefit consumers and the main motive of GST is to make one-country-one-tax to reduce the cascading effect of taxes on taxes and thus to increase productivity and transparency, increase tax-GDP ratio and to reduce/eliminate tax evasion and corruption. These new changes to form a new direct tax code had been planned to expect that lower taxes and simpler rules will ensure compliance and more revenue.

3. Case Laws

Jagannath Bakah Singh v. State of Uttar Pradesh[85]

Article 31(2) has no application to taxation law given Article 31(5) (b)(i). Article 31(2) would be inapplicable to a taxing statute because the taxing statute does not purport to acquire or requisition any property.

[85] A.I.R.(1962) S.C. 1563,1571.

Ravi Verma Raish v. Union Of India [86]

The tax laws are aimed at dealing with complex problems of infinite variety necessitating adjustment of several disparate elements. The courts accordingly admit, subject to adherence to the fundamental principles of the doctrine of equality, larger play to legislative discretion in the matter of classification.

Shanti Swaroop Sharma v. State of Punjab [87]

It was held that it was more as akin to rent or compensation payable to an owner by the occupier or lease of land for the use or exploitation of resources contained in it. It was also laid down that merely because the provision with regard to royalty was made by statute or that uniform rates were prescribed throughout the state would not make it compulsory exaction in the nature of a tax.

4. Conclusion

The Constitution of India envisages a sovereign democratic republic to secure to all its people's social and economic justice. Though the Constitution does not subscribe to any definite economic theory as such, certain provisions of the directive principles of state policy certainly indicate that what is intended to achieve is a society, where social and economic equality exists. Moreover, the Constitution is very important in relation to taxation. Understanding of every law, the validity of subordinate legislation and administrative actions must be in the background of the provisions of the Constitution. The Indian taxation system has witnessed several modifications over the years.

There has been the standardization of income tax rates with governing laws enabling common people to recognize the same. This has resulted in ease of paying taxes, improved compliance,

[86] A.I.R (1969) S.C. 1098
[87] A.I,R (1969) PUNJ..79,90

and enhanced enforcement of the laws. Though in this paper, little attention has been paid to dwell on Central Council of Finance ministers, this is a very important aspect that constitution must address whereas in India there was a requirement of a simplified form of taxation with greater emphasis on income tax- e tax on all types of income and receipts (whether agricultural, non-agricultural, capital u receipt or revenue receipt, etc.,) a wealth tax, and a tax on estate or inheritance, apart from other duties like excise duty, customs duty and sales tax. Only by efficient taxation of income wealth and succession concentration of wealth can be prevented.

This problem was solved by passing the GST amendment as If each state is allowed to tinker with GST tax base and rate, then, there will be every possibility that this noble work will not bring any better situation than that is prevalent today. These above are some of the issues that need to be dealt with by constitutional amendments in the process of introducing GST In India.

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6. Capital Punishment: Critical Analysis

By: Yash Raj Chaudhary

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i. Abstract

Capital punishment is the use of punishment which is sanctioned by the government for the death of a criminal after the criminal act committed by him in the state. But if you think that killing someone else in the search for justice will be considered as a better option. Instead, we should give a thought to remove or eliminate crime from society rather than criminals. Only China is the country where the rate of the death penalty has been high since many centuries, almost 1000 people are executed every year by them in search of justice whereas in India death penalty is given only in rarest of the rare cases even sometimes death penalty/sentence is changed into life imprisonment. Number is not any concern as India has executed around 4-5 criminals in the last 20 years. But in China, once the death sentence is given it cannot be opposed by anyone in any circumstances. Due to the increase of death penalty around world United Nation (UN) quoted that "life is important and death is no solution for anything", however, they also stated that killing another person in the name of law or justice is not any type of human activity, it showcases the inhuman behavior in us. Yet we are nobody to take the decision of death of any other person.

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1. Introduction

Capital punishment is the use of punishment which is sanctioned by the government for the death of a criminal after the criminal act committed by him in the state. In other words, it is a legal act of the government against someone who commits any capital offense in the state. This practice of killing people as punishment has been practiced in many countries all over the world for a very long time. Crimes that can lead to the death sentence by the judiciary are considered as capital offenses or capital crimes. The sentences of order manner are called a death sentence whereby the step of taking out such sentences by the judicial process is known as execution. The carrying out of such a punishment is as old as the concept of government. Any criminal who has received a sentence of death and is waiting for the execution is considered to be as condemned and is considered to be a death row. This is not applied is normal circumstances of the offenses but to people who have committed various forms of bad crimes like rape, child rape, terrorism, mass murder, hijacking, sedition, treason, piracy, war crimes, drug crimes or any act made of aggravated robbery, or any offense against the other human or genocide and even in some cases of recidivism and kidnapping and many more. From ancient to present time, there have been various methods of executions such as stoning, drowning, impaling, beheading but in modern times it is performed through chemical injections or gases, hanging, shooting, or electrocution.

But it is performed by the judicial act and practiced by state, so when any non-state organization speaks of having execution of a person, they have committed a murder. The phrase “Capital Punishment” has been obtained by the Latin word used for the head, whereas punishment such as flogging, takes its name from the Latin word of the body. The phase death penalty/punishment is used in place of capital punishment, though inflicting of the death sentence is not performed always because of commutation to life imprisonment. Sometimes, it is important that we differentiate capital punishment from extrajudicial execution carried out without any due process of law.

In a major change in public opinion from 30 years ago, most Americans now favor capital punishment, although not dogmatically. When people are presented with stringent alternatives

(such as life in prison without parole), opposing capital punishment has been increasing considerably.

The public is not alone. The U.S. Supreme Court ruled in 1972 that executions are not inherently "cruel and unusual punishment." Courts have spent the last two decades determining how states can conduct death penalty proceedings constitutionally, and legislatures have been quick to modify state procedures to accommodate the courts' rulings. Prosecutors and judges have increasingly sought and imposed the death penalty.

56 countries still follow the death penalty, whereas 106 countries in the world have completely removed it from its root of laws for all the crimes, 8 nations have removed capital punishment for ordinary offenses in the state while keeping and following it for some special situations like war and 28 believe its roots but abolished in practice. It is the matter of the fact that Capital punishment is an active debate in nations and states all over the world and its position varies from political or cultural ideology. Statistics reveal that almost 60-65% of the world's people live in the nations where such punishment is practiced like Nigeria, Egypt, Indonesia, Pakistan, Bangladesh, United States, China, Saudi Arabia, India, Japan, South Korea, Taiwan, Ethiopia, Sri Lanka, Iran and among many other Islamic countries. It is reported that China has been executed more people than combined of all the rest of the countries.

2. History

Hanging of the people who oppose authoritarian state (dissidents) or committees any criminal crime has been nearly used by all the people from the starting of every era of human existence. Before the development of any authentic system like the prison system, there was no other option to be more protective or safe from criminals and incapacitations of criminals, the prison system was developed in the nineteenth-century which has made the difference in society afterward. In this new era of time, the death sentence usually involved impalement, boiling alive, blowing from a gun, hanging, keelhaul, sawing, etc.

Many historical records and different primitive tribal practices resulted that the execution/capital punishment was a part of their developed judicial system. The practice of

shunning and compensation was generally considered enough to be a type of justice for the tribal societies.

Many a time tribal warfare or blood feuds or compensation happens after any kind of offense carried out by other tribes or by any person in the community itself. They were least interested in any kind of apology from the offender. Usually, a blood feud occurs due to the problems of their families or any member of tribe falls. Before the development of the adjudication system formed on the basis of state or any organized religion, this practice was commonly used.

In the modern era, the practice of death penalty or capital punishment is granted on certain crimes which are considered to be heinous in nature such as brutal murder, war crimes, treason, or terrorism where people were killed at large scale. In some countries, it is granted for sexual crimes which are not acceptable in the society like rape or sodomy or fornication. Even in some nations, they give the death penalty for religious crimes like Zina, Qisas, blasphemy, witchcraft, etc. In some Islamic countries, drug possession and drug trafficking are also considered as capital offenses. It also includes human trafficking which is strictly punishable especially in China. China also took offenses like corruption and financial cheating very seriously and grant punishment of the death penalty.

3. Abolition of Death Penalty

The history says that Japan was the first country to abolish the death penalty. Around 724, the capital punishment is banned under the Emperor Shomu but lasts only a few years. Again it happens in 818, where Emperor named Saga removed the roots of the death penalty by the advice of other Emperor Shinto of that time. This time abolish remained abolished till 1156. In its native country China, capital punishment was removed just for few years their famous Emperor Xuanzong of state tang for at least 11-12 years way back in times replacing it with scourging or exile. In England, Sir Thomas More Utopia, published a book in 1516 which talks about the benefits and discomforts of the death sentence at the end it makes no firm conclusion about it. Moreover, he has himself executed in 1535 for committing the crime of treason. Influenced by many books, the first permanent abolition in modern times was made by Grand Duke Leopold II of Habsburg, the future Emperor of Austria. Similarly, the United Kingdom

also removed the punishment of the death penalty from certain crimes such as murder but leaving it only for severe crimes like treason, human trafficking, piracy with violence and wartime military offenses in 1965. It was a five-year experiment by them and the last execution made by them was in 1964, then they completely abolished in 1969, and later on, they took a decision to remove it for all the minor crimes in the year 1998.

Similarly, The Romans decided to abolish the death penalty following that it doesn't provide any justice in society, they made it clear in the year 1849. Venezuela followed them and abolished capital punishment in the year 1863. In Portugal, after the legislative proposals in 1852 and 1863, they decide to abolish or banned such punishment from their country in 1867.

It is said that many countries made their decision of abolishing capital punishment after World War II from both their laws and from practices. Around 102 countries have been completely abolished capital punishment, another 6 countries have done for all the crimes but leaving it for some special situation which may protect them at that time for peace. 32 nations more have banned it as they have not practiced it for the last 10 years and established a policy against execution.

4. Merits of Capital Punishment

It is considered that there are many benefits of the death penalty which is the main reason that many nations across the world still follow. Countries like China, Iran, and the United Nations actively practice this punishment without taking any other thoughts.

The death penalty is considered as the greatest tool to discourage criminals and create fear in their minds that if they commit any capital crime they will be punished by death. This will lead to a reduction of the crime rate and heinous crime will be lower down almost nil. This gives the reason for the judiciary as capital punishment would be the most effective tool to deterrent the crimes. The normal human being would always give a though if he/she knows that the committing of the crime could lead to death as punishment.

Some of the nations like Saudi Arabia, where the heinous crime or several capital crimes does not exist because the death penalty has been practiced regularly at large scale. China is also

one of those countries where death sentence to the offender is given easily, they even use the death sentence for drug smuggling and human trafficking. This has been to reduce illegal activities in China.

The death penalty has been used as a source to reduce the expenses of the government. Imprisonment is considered to be a very high-costing thing as each nation has to provide basic amenities such as shelter, food, clothes, etc to prisoners to treat them like the other normal human. Let's look at the cases where a criminal is sentenced to life imprisonment. This criminal has to be taken care of by the country until and unless his/her death. By the time of his/her death, he/she would be costing a lot to the state in the term of money. But the person is executed for his heinous crime then a lot of money of state would be saved.

It is a thought that arises from the society that justice is not served to the criminal until he/she is punished equally to his offense. It is human tendency that wanted to punish offenders to the death who take away the life of another person without an eye blink. Many crimes are not acceptable in the society that should have the punishment of the death penalty. To a sound human being, the death penalty is considered a severe punishment. In some circumstances like terrorist attacks whose intentionally kill many other people should only be punished by the death penalty.

Many criminals like the serial killer in society are not meant to live with other people as the habit of killing continues over a long time. These people are violent and of unsound mind who does not give though of their act. Keeping in the cells for life imprisonment doesn't give us a guarantee that they would be kept away from other people. For many years we have heard the news of running away from prisoners from the prison, when they run away they again start committing the same crime as before. It makes the society unsafe and unprotective which put the lives of many innocent people on the stakes. This is the reason why people wanted to execute those who commit heinous crimes.

5. Demerits of Capital Punishment

Our cultures and traditions say that killing somebody else is kind of immoral activity in the society. So it is considered to be a sin to take away the life of another person by a state or by

any person. Killing is something you cannot promote or endorse. As Christianity is the religion followed in most countries across the world their people have abolished the death penalty from their nations. Christians say that they never support or promote killing of any kind.

The capital punishment is considered as inhuman act and form of cruelty performed by the state or judiciary by many people. They think that a criminal should also be treated, as equal as, another human being while punishing them for their crimes. Life is precious and nobody has the right to take away another person life. They argue about that when state or society punish a person by killing him for his crime of murder so what is the difference between society and criminal? Does it make society a murderer? Does it make the state justified by its act?

We all know that the methods used by the state for execution are painful and the person suffers a lot before dying. Isn't it make us crude or inhuman by our acts? Some of the methods of executions are hanging, shooting, by injecting chemicals.

The report shows that even some innocent natives of society have been ending up killed by the death penalty. The awful thing to imagine is that it is unfortunate situations where a person ends up killed through the death penalty for offensive he never committed. There have been instances where a person is framed for the crime he hasn't committed but sentenced to death. It is the hardest part to agree that sometimes the truth took a long time to come before the people and the innocent ones have been executed. This raises a great concern whether the death penalty should be abolished or not.

There are cases where a person commits the offense of murder in his anger and frustration where he/ she has no control over his/her emotions which makes him commit a mistake he doesn't want to commit. We all agree that committing murder is a crime and a person should be punished for his act but a murder committed by a person out of his mental state should he be punished? We should give a thought that whether that murder was planned? Whether he wanted to kill another person? Is he intended to do that act? In some countries, these questions are not taken into consideration a person who commits a murder irrespective of his mental or emotional state is hanged or executed for his actions.

Every human born on this earth has the right to live and no state or nation has any right to take away the life of a person. A life is considered a god's gift. Therefore the death penalty violates the rights of humans which he gets by his birth.

Apart from capital crimes, in some Islamic countries, a person is sentenced to death for minor offenses or crimes which aren't dangerous towards society. One of such crime which is considered under this is apostasy where one individual is punished just for abandoning his religion.

6. Public Opinion on Capital Punishment

The public opinion on the topic like capital punishment/ death penalty varies from country to country according to the crime rate. Countries where large no. of the population opposes capital punishment include Norway where 75% of people oppose it and 25% are in support. Most Finns, French, and Italians population also oppose the execution. A poll in 2016 shows the image that 40% of Americans are still against capital punishment, which was an increase in facts as 36% in 2010 and 30% in 2001 were opposing it.

From recent times, it has been seen that support for capital punishment has been grown after hearing many brutal crimes of murder and rape but reports state that actual completion of a death sentence is very rare comparing to death sentences granted. While support of capital punishment in China has been still high for several crimes, where executions have been dipped with 12000 in 2002 to 3000 executed in 2012. However country like South Africa where this kind of punishment has been abolished a long time ago, a poll suggested that 76% of people want to re-introduction of death punishment due to increasing incidents of rape and murder. Similarly, a poll in 2017 depicts that 57% of Brazilians support capital punishment, the same poll found the upcoming youth of Mexico supports the punishment of death than the older ones The facts show that people aged between 25-35 supports the execution of those who condemned.

To safeguard the human rights, the International body lays down certain restrictions over the use of capital punishment for certain age groups such as one nation cannot punish a person younger than 18 as it would always be considered as a juvenile, yet some countries in the world don't follow and give a sentence to death and execute a juvenile. Since 1990, 149 executions of juvenile offenders have been recorded in 10 countries. The facts show that these executions of juveniles have been fewer than the total number of people executed across the world but the

subject matter is why these juveniles have been executed. These countries are Iran, Pakistan, China, Sudan even the USA is one of them. There are many more, However, the significance of this goes beyond the numbers and the question arises that the commitment of the executing states to follow the international laws. One of the countries, who have been in headline about these cases is Iran which has executed more double the many child offenders as the rest nine countries combined.

7. Capital Punishment in India

Capital punishment is considered as one of the debatable topic in India from many years, However, it is legally practiced here. Many instances of the death penalty have been recorded since 1990, one of the incidents took place in March 2020. In one of the cases, the Supreme Court ruled out the Section 303 from the IPC (Indian Penal Code), which lays down the punishment of the death penalty for the offenders who committed the crime of murder even when they are serving punishment of life imprisonment.

One of the matters of dispute in India is several people executed by the government after the Independence: the official reports state that only fifty-two people have been executed, however research by the People's Union who acts for Civil liberties indicating that 1,422 executions have been made alone from 1953 to 1963. Research published by NLUD (National law college of Delhi) was that they studied around 1,415 prisoners of the country who had been already executed by the Government and Judiciary of India since 1947.

In the colonial period, death was prescribed as one of the punishments in-laws through the Indian Penal Code 1820 which include the number of capital crimes. It remained in effect even after the Independence in 1947. The first and foremost hanging in India was done by Two people named Narayan Apte And Nathuram Godse as they commit the Assassination of Mahatma Gandhi on 15th November, 1949.

In the case of *Bachan Singh v. State of Punjab (1980)*, the Supreme Court itself states that the death penalty will not be granted in every case of murder but it would be given only in those cases which are rarest of rare. This was previously made in the case of Jagmohan Singh in 1973 and the Rajender Prasad case in 1979. The Supreme Court of India states that Honour killing

will fall within the "rarest of rare cases" recommended that capital punishment to be extended to those who do killing in the name of honor killing will be considered for the death penalty. The court also imposed capital punishment on those police officers who do murder in the name of encounter. Those cases won't be left without punishment.

The term of curative petition hasn't been a part of any law before 2002. This concept has been arising from an Indian case named as Rupa Ashok Hurra. In this case, our apex court state that an aggrieved person will have a right to get a relief from the order of Supreme Court as the court itself can make mistake or abuse the power, the court can rehear the petition for relief to exercise the law inherent by them in the right manner.

Apart from the court, our Constitution gives power to our president in cases of the death penalty which are as follow:

Power of the President as per the Indian Constitution

Article 72 of the Indian Constitution says that President has the capacity to turn down the orders death sentence made by the Supreme Court. President can give reprieves, or pardons, or respite the punishment or can suspend the sentence given to any person by the court.

(a) He has the power to hear and consider all the cases of punishment of Court Martial.

(b) He has the capacity to turn down the sentence made by the Supreme Court.

8. Conclusion

In my view, after all the study on capital punishment, I have a strong opinion that capital punishment shouldn't be abolished in any circumstances as it is acceptable both morally and socially to some extent. It gives a lesson to criminals for the heinous activities committed by them in different ways in the society, it would raise fear in the mind of people that if they commit such crime in society can cost death sentence. In the modern era, the death penalty has been carrying out through the chemical injection or gases in which the pain and suffering is the least as a comparison to the crime committed by them, earlier there were various method such as stoning or hanging, shooting, even with the electric shock till the person dies. Currently, the

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method used for execution has been eased out more than ancient times. However, it ends the argument made that it is a brutal and cruel way for executed. It has become a more humane system since it rules out the torture of prisoners. Capital punishment is considerably good to act because it makes the possibility of running escaping from prison nil as well as the offender cannot commit the crime again in the society. Capital punishment has also reduced the crime rate as average human behavior will have a fear of committing any such crime resulting in his/her death. The death penalty has deterrent the crimes and will able to make society more peaceful and humanly. In the end, I would say capital punishment is conducted in a more humanly way and would reduce the crime as much as possible in the world.

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7. Preamble and Constitutional Interpretation

By: Amol Thorat

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i. Abstract

With the increasing no. of problems and cases, the law needs to adopt solutions that are not contradictory and will maintain its importance within civilians. In the same way, we need to understand the principles of the preamble and its link with the auspicious framework of law i.e., Constitution. Since Independence, our country has faced many political and social difficulties such as defection, power-centric politics, inconsistency with provisions of the statute. Our constitution is the largest in the world, also comes up with flaws in it. To set and find a remedy on such flaws, our judiciary is trying to interpret and solve such issues. In this research, we will find how 85 words on a single page describes the largest constitution of the world. We will also discuss why the judiciary is a legit body to interpret as itself is appointed by political means. Also, their debates and controversies of distribution of authority to interpret. Why the judiciary is known for the watchdog of democracy and protector of constitution. Also, we will explore some predictions of future contributions of legal protocols and statutes in India.

The research covers multiple topics on the Constitution of India. Although, I agree with the present situation where the judiciary keeps an eye on every moment when there is a question of law, especially of the preamble and its basic structures.

1. If there was no preamble, then it would become difficult for the promulgation of basic principles.
2. If unlimited powers with restrictions to amend are given to legislation then we can see more complications in existing laws and its functions.
3. If the Supreme Court does not restrict violation of basic structures, then the spirit of preamble loses and loses the importance of constitution among people.
4. The purposive or structural approach is the best way of interpretation.

Keywords: Preamble, Constitutional Interpretation, doctrines, political roles, judiciary, and amendments.

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1. Introduction

" WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC and to secure to all its citizens …"

In this part of Preamble, it didn't even mention which form of government that India has sought to adopt. Also the same with the provisions of India. Its judiciary, interpreted through the origin and history of the land, pronounced that India has a parliamentary form of democracy. Similarly, we need to think that a single-page document is the meaning or soul of the world 's largest constitution which governs the 1.3 billion population. The fact we need to understand that preamble and constitution was drafted by the constituent assembly which was elected representatives of people at that time (1940-50). As the time changes, we need to get updated so as our laws too. In the same manner, amendments are made by legislators keeping in mind that 'the change is needed in order to maintain law and order in the society.' We also need to understand most of the laws are adopted not created by our state. The scenarios, circumstances, climate, and problems were different in different countries. Pre-making or in the process of making our constitution, the planners/drafters studied the constitutions of the other 60 countries. As a researcher, we need to analyze existing data and make inferences and predictions. I don't mean to disrespect or criticize our constitution, but the thing is our constitution is lengthiest and mostly we adopted certain provisions from different countries. This is why the inconsistency and variety in our constitution and present laws are seen, it would have been better if the constitution was short and sweet and no provisions could be contradictory to each other.

The question arises who has the authority to interpret the true meaning of articles of the Constitution when its language understanding issue, ambiguous or has two contradicting meanings. So, its Supreme Court of India which has the final arbiter on the interpretation of the constitution, everybody was bound by the said declaration of law. [88]A codified constitution

[88] Kannadasan v. State of T.N., (1996) 5 SCC 670.

is a nation's founding document, which not only constitutes the nation, but also establishes the rules for its governance.[89]Also, the subject matter of this research is on the preamble and why and how the judiciary is a legit body to interpret the constitution. Preamble of India was adopted on 26 November 1949 and later enforced on 26 January 1950. It represents the whole structure of the fundamental values, also aims & objectives of founding fathers of the nation. It serves mainly two purposes - i. It indicates the source from which the constitution derives its authority. ii. It states the objects, which the constitution seeks to establish and promote. We will explore the preamble and its significance, scope, and role in basic structures. The framers of the Constitution of India set out three broad purposes: India is a Republic because the head of the state is not a hereditary monarch. Democratic because the decisions which the representatives of legislature makes are elected by the people through the principle of universal adult franchise. The US which is 227 years old and has only 27 amendments and India which is only 70 years only and has 104 amendments. Now, we get to know either there are flaws in drafting or politicians take unfair advantages to amend according to their choices or both. And, we will learn the contradiction or overruling of SC judgments, the inconsistency of opinions of SC judges of provisions in statutes & articles in the constitution.

2. Preamble: Formation and Basic Principles

1. Sovereign

Sovereign means Supreme. This word is taken from Article 5 of the Ireland Constitution. The country decided to be a member of the commonwealth nation under the leadership of Pandit Nehru. Also, we need to know the membership of UN and commonwealth nations won't affect sovereignty and India can backout from membership at their will without any sanctions. India is an independent country and does not dominate or get dominated by other countries. It means

[89] Keith E Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 6 (University Press of Kansas 1999).

the state has the final authority to discuss and decide the internal and external affairs of the country. For example, India is free from the UK's queen orders.

2. Socialist

It was enacted through the 42nd amendment. This means that the means of production and goods are under control by the government wholly or partially. The word used in the preamble here is inspired by the philosophies of Jawaharlal Nehru and Mahatma Gandhi. It aims to remove the poverty, ignorance, and inequality of opportunities. It also includes socio-economic equality. Govt. will endeavor to make distribution of the wealth more equal and provide a decent standard of living to all its citizens. That is why, right to private property in Article 19 is removed through a constitutional amendment. In ***Air India Statutory Corporation v. United Labour Union***[90], the Supreme Court elaborated on the concept of "socialism" and stated that the word socialism was expressly brought in the constitution to establish an egalitarian social order through rule of law as its basic structure. In ***Samatha v. State of Andhra Pradesh***[91] the Supreme Court observed that the word Socialist used in the Preamble must be read from the goals, Article 14, 15, 16, 17, 21, 23, 38, 39, 46 and all other mutual articles sought to establish, i.e. to reduce inequalities in status, income and to provide equality of opportunities.

3. Secular

Enacted by 42nd Amendment. It suggests that the State has no official religion. But this term is seen as rigid in foreign countries. These countries used to define it as anti-religion. But, In Indian Context, this word is adopted for positive secularism. It doesn't deprive any individual's right to profess and follow a certain religion. We have the freedom to profess, propagate and

[90] Air India Statutory Corporation v. United Labour Union, AIR 1997 SC 645

[91] Samatha v. State of Andhra Pradesh,AIR 1997 SC 3297

practice religious practices, customs or rituals. Although the government must not promote, propagate, or discriminate against any religion.

In ***Aruna Roy v. Union of India***[92], the Supreme Court has said that secularism has a positive meaning that is developing, understanding, and respect towards different religions. In Valsamma Paul v. Cochin University, the court said secularism is a bridge between religion in a multi-religious society to cross over the hindrance of diversity. In the case of ***St. Xavier's College v. State of Gujarat[93], the*** court held that "secularism is neither anti-God nor pro-God, it is like a devout, agnostic and atheist."

4. Democracy

Demo means '*people'* and cracy means '*rule*.' In India, the parliamentary form of democracy is adopted and the decisions will be through the will of the people not through monarch. Here, not only political democracy is concerned but also social and economic democracy. From the first line and last line of the preamble, we can interpret the sense of unity and democratic nature. In ***Union of India v. Association for Democratic Reforms case[94],*** SC observed: "Democracy cannot be alive without free and fair elections." It implies all three pillars are separate and mutually dependent on each other. Gandhiji's favorite concept of RAM RAJYA is highlighted in such forms of democracy where every citizen has the right to question the working of government and this helps in maintaining efficient democracy.

5. Republic

The word republic is derived from 'res publica'. It is exactly opposite to the hereditary system. Here, the Prime Minister is the real head and the President is the nominal head. Both of them

[92] Aruna Roy v. Union of India, (2002) 7 SCC 368

[93] St. Xavier's College v. State of Gujarat, 1974 AIR 1389

[94] Union of India v. Association for Democratic Reforms, 2002 (3) SCR 294

are elected indirectly by the people of India through universal adult franchise. Every citizen is treated equally in eyes of law irrespective of his/her social and economical background.

3. Role of Preamble in Constitution

In ***Re Berubari Union and exchange of enclaves case***[95], stated that preamble is not a part of our constitution citing that Willoughby has observed about the preamble of American Constitution "it has never been regarded as a source of any substantive power conferred on the Government of the US or any of its department. Such powers embrace only those expressly granted in the body of the Constitution." I agree to a point that we have adopted certain lines from foreign nations but disappoint with the bench assuming that the US constitution doesn't include preamble in it so similarly, we won't. The reasoning given in the majority by the bench is what unacceptable. It laid down the power of the amending clause that it can amend the whole constitution if it wishes but cannot amend the preamble as it is not part of the Constitution prima facie. Later the judgment was overruled by a larger bench (13) of SC in the case of ***Kesavananda Bharati v. State of Kerala***[96], stating that the procedure established for the making of the constitution was the same of the preamble i.e., through the constituent assembly. "*Preamble walks before the Constitution*."[97] It was also held that preamble is a part of the constitution and cannot be amended in a way that will harm the basic structure of the constitution made by drafters. It cited the quote from the judgment of ***Tribhuvan Prakash Nayar v. Union of India***[98], which held that if the language of the enactment is capable of more than one meaning then that one is to be preferred which comes nearest to the purpose and scope of the preamble. It ultimately indicated the importance of preamble merely in interpreting the constitution in tough scenarios. Legislators cannot transgress with the basic features and it is ultra vires. Later the legislators amended the amending clause with the change in title from 'procedure' to 'power', it included a bar of jurisdiction on every court to look after legislative

[95] Re Berubari Union and exchange of enclaves, AIR 1960 SC 845

[96] Kesavananda Bharati v. Union of India 1973 4 SCC 225

[97] Supra note 10 , Khanna J. opinion, the provisions which indicate basic structures are unalterable, rest is alterable.

[98] Tribhuvan Prakash Nayar v. Union of India, 1970 AIR 540

bills and absolute power to amend the constitution. In ***Minerva Mills v. Union Of India***[99], it was held that such amendment harmed the basic structure of judicial review, thus this enhancement of power by legislative was struck down and declared void.

In ***Golak Nath v. State of Punjab***[100]Chief Justice Subba Rao had held that the preamble to an Act sets out the main objectives which the legislation is intended to achieve through its implementation. Hence, Preamble has a cornerstone to every part of the statute or set of rules made within the territory of India as mentioned in Article 1. In the SCJ of ***Ashoka Kumar Thakur v. Union of India***[101], when a constitutional provision is interpreted, the cardinal rule is to look to the Preamble to the Constitution as the guiding star and the directive principles of State policy as the "book of interpretation". The Preamble embodies the hopes and aspirations of the people and directive principles set out the proximate grounds in the governance of this country. In ***Kashi Prasad* v. *State of U.P***[102]The court held that even though the preamble cannot be used to defeat the provisions of the legislation itself, it can be used as a vital source in making the interpretation of the legislation. If any law attracts to violation of preamble, then it is challenged in the court of law and ultimately declared to be void. Then what about the Citizenship Amendment Act, which is a full-fledged violation of Article 14. If this act covers 6 religions from 6 places, what about the Bahamas, Jews, atheists, etc peoples. I don't personally see this in anti-muslim or pro-bhakt decision, but as a constitutionalism perspective. This is a violation in the preamble i.e., Secularism. Why is the Indian Judiciary still waiting while the amendment is violating one of the basic structures? A major question mark which the judiciary needs to give the decision and should be away from dust and din of politics.

[99] Minerva Mills v. Union Of India, 1980 AIR 1789

[100] Golak Nath v. State of Punjab, 1967 AIR 1643

[101] Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1

[102] Kashi Prasad v. State of U.P, AIR 1950 All 732

4. Interpretation of Articles in Court of Law

In Harsharan Verma v. Union of India[103], courts cannot undertake matters of constitutional interpretation unless there is a live issue before them. In the SCC of ***P. Kannadasan v. State of T.N.***[104], it was held that "the Supreme Court is the final arbiter on the interpretation of the Constitution." In the case of ***B.R. Kapur v. State of T.N***[105], It is the duty of the Supreme Court to interpret the Constitution. It must perform that duty regardless of the fact that the answer to the question would have a political effect. The best example is ***A.K.Gopalan v. State of Madras***[106], where the question was in Article 21 of the Indian Constitution: "Procedure established by law" and "due process of law" by the American Constitution are the same? SC held that both are different and went for textualism in interpreting the article 21.

However, ***Kesavananda Bharati Case***[107] overruled the above judgment and held that both are the same. Due process of law was established through common law. And, India follows common law. SC explicitly said that "**Same Soul and a different body.**" Later in the famous case of Maneka Gandhi v. Union of India[108], it was held that Article 21 includes an exception clause of "procedure established by law." SC said that that law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. Indian SC believes that the constitution is dynamic instead of static document.

[103]Harsharan Verma v. Union of India, 1987 Supp SCC 310

[104] P. Kannadasan v. State of T.N., (1996) 5 SCC 670

[105] B.R. Kapur v. State of T.N., (2001) 7 SCC

[106] A.K.Gopalan v. State of Madras, AIR 1950 SC 27

[107]Supra note 10

[108]Maneka gandhi v. Union of India, 1978 AIR 597

Interpretation of Article 19

In ***Bijay Cotton Mills v. State Of Ajmer***[109], is the landmark case of the interpretation of the Spirit of the Constitution. The Mills challenged the certain provisions of the Minimum Wages Act 1948 which according to them were violating Art.19(1)(g) of the Constitution of India. The Supreme Court considered the importance of Art 43 of the Constitution of India and declared that the State has the ultimate power to uplift the living standard of the people. The Mills which cannot provide the minimum wages have neither moral nor legal right to exist. The Right to Trade is under the Spirit of the Constitution which recognizes the socialist principles as our way of life.

In ***State of Punjab v. Devans Modern Breweries Ltd***.[110], it was observed that the right to carry a business or trade subject to the imposition of reasonable restrictions made by law. If a certain state law allows the prohibition of liquor, then the trader is bound not to engage in selling liquor.

In the 7 judge bench SCC of ***Abhiram Singh v. C.D. Commachen***[111], it was discussed whether the S.123 (3) violates Article 19(1)(a) and Article 245(1) - Prohibits of making laws which violate the Constitution. The SC in a clever manner interpreted that right to be elected as MP is not a fundamental right. In S.123, it doesn't stop a candidate from speaking or campaigning but imposes conditions to elect as MP. If anyone wants to be elected an MP, he/she must follow the rules of the RP Act.

In ***All India Bank Association Employees Limited v. NIT***[112], SC said that the right to strike or right to a lockout doesn't cover in Article 19(1)(c).

In the famous case of ***Bijoe Emmanuel v. State of Kerala***[113], Facts were - 3 school children stood for the national anthem but didn't sing. Their headmaster asked the reason and punished

[109]Bijay Cotton Mills v. State Of Ajmer, 1955 AIR 33

[110] State of Punjab v. Devans Modern Breweries Ltd., (2004) 11 SCC 26

[111] Abhiram Singh v. C.D. Commachen, (2017) 2 SCC 629

[112] All India Bank Association Employees Limited v. NIT, 1962 SCR (3) 269

[113] Bijoe Emmanuel vs State Of Kerala, 1986 SCR (3) 518

them. They knocked on the door of the high court, but HC rejected their petition citing the disrespect of the National Anthem. Then the children under special leave go for SC, SC held that 3 children didn't disrespect the national anthem as they were not singing because their religion says only to sing the religious and cultural songs. They didn't disrespect and didn't violate the National Honor act, 1971. SCJ added a principle under Article 19 that Freedom of Speech & Expression includes the right to remain silent also.

Court interpreted that the right under Art.19 is not absolute and is subject to 8 rounds prescribed in Art. 19 (2).

Interpretation of Art.136 - ***Ashok Nagar Welfare Association v. R.K. Sharma***[114], SC held that article 136 doesn't mean the right of appeal to any party, but it confers only to discretionary powers of SC. The criminal cases will not be interfered with by the Supreme Court.

Interpretation of Art.131 - In ***T.N. Cauvery Sangam V. Union of India***[115]It was observed that whenever there will be a dispute between states for water boundaries, the court will not interfere as mentioned in Art.131 of the constitution since parliament has enacted the Inter-Water dispute act, 1956.

5. Doctrine of Interpretation

Philip Bobbitt describes six ways to interpret a constitution when it seems ambiguous: historical, textual, prudential, doctrinal, structural, and ethical.[116] These above methods of interpretation are used by foreign courts. Also we will explore the methods used in India Perspectives:

[114] Ashok Nagar Welfare Association v. R.K. Sharama, (2002) 1 SCC 749

[115] T.N. Cauvery Sangam V. Union of India, AIR 1990 SC 1316

[116] See Philip Bobbitt, Constitutional Interpretation (Blackwell 1991).

1. Textualism

It focuses on the meaning of the words. Justice Scalia of the US Supreme Court is championed in this theory of interpretation. According to her, this theory looks for objectified intent from the language used by lawmakers. The textualism technique is also known as the principle of fidelity. It finds out the meaning of words present in the constitution. It doesn't consider the history but only the direct meaning of words.

In the ***Shankari Prasad Case***[117], SC opted for the method of textualism to find the intent of legislators when discussing limitations to Article 13 & Article 368. Similarly, in the ***Sajjan Singh Case***[118], Hidayatullah J stated that Article 368 did not say that every provision of the Constitution could be amended with a two-thirds majority.

In the case of ***State of Gujarat v. Shantilal Mangaldas***[119], held that the compensation cannot be challenged because the owner has been deprived was not provided for. But within the year, SC held that compensation must be a just equivalent.[120] Many contrasting cases in the Indian judiciary are a problem.

2. Structural or Purposive

This method of interpretation is not interested in engaging the exact meaning of the confused words or unambiguous provisions. It engages in investigating the mindset of the legislators and makes inferences through the parliament debates while enacting or adopting the law. Aharon Barak, a former President of the Supreme Court of Israel, is the main founder of the doctrine of purposive interpretation. He observed that purposive interpretation demonstrates its sensitivity to the uniqueness of a Constitution in the balance it strikes between *subjective*

[117] Sri Sankari Prasad Singh Deo vs Union Of India, 1951 AIR 458

[118] Sajjan Singh vs State Of Rajasthan, 1965 AIR 845

[119] State of Gujarat v. Shantilal Mangaldas, 1969 AIR 634

[120] Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248

purpose i.e., the intent of the authors of the Constitution, and *objective purpose* i.e., the intent of the system.[121] Here Subjective purpose relates to the intention of lawmakers and objective purpose relates to constitutional text which works or a better democracy. The best example for this approach is the ***Kesavananda Bharati Case***[122], where article 368 was interpreted in a way where parliament can amend the whole constitution using 2/3rd MPs in favor of the bill but without abrogating or altering the spirit and basic structures of the Constitution. This case shows the line between subjective i.e., Intend of constituent assembly and objective i.e., Intend of the system.

We need to understand that the Constitution is a living document and attached and very sensitive to social changes. From my point of view, the purposive approach is the best way to interpret because it not only works to secure the public interest and welfare but also saves from the evil use of parliamentarians to fool everyone into the gameplay of the meaning of the words and capture their political motives.

6. Conclusion

Imagine if there was no preamble and amendment clause in our constitution. Today's picture would be very different, the judiciary would face hurdles in between to trace the footprints of law. There would be no complete power to legislate in the true sense, they cannot make amendments in the statutes. Complexity could increase in such cases. No basic structures to protect the interests of common people as most of them are embedded in the preamble. Remember anti-defection laws, they couldn't exist in such a scenario. Wealthy people will rule the government, justice will be sold in the market. Strikes, lockouts, riots, internal and external imbalances could make our country in the worst situation. Thanks to our freedom fathers and constitution protectors who could work hard to make our constitution sustainable. In Indian History, the 42nd amendment is good and bad. Our constitution implicitly supports secularism and also directly recommends UCC in directive principles. But, we need to remember, our first phase of partition was on a religious basis. Keeping this aside, why is the interpretation of the

[121] Aharon Barak, Purposive Interpretation in Law, 371 Princeton University Press, 2005

[122] Supra note 10

article in some cases contradictory? Is this a failure of the judiciary? The only victimized body of this failure is the common people. The 123 years old epidemic act couldn't help to face the current COVID situation. Then why we adopted the contract law, epidemic law, etc which was during the British Raj. If amendments were necessary with the increasing time, then why India didn't adopt its concrete laws. In the UK & US, there were mainly 2 to 3 political parties i.e., why there are fewer chances of a hung parliament or fractured mandate. In India, the case is different, there are many regional political parties, which eventually need more clarity of law to govern in hung assemblies. The same article 75 was adopted, which made the president power-centric at times of hung assembly, later SR Bommai case, interpreted the form of democracy and initiated for floor test technique. If the provisions of the constitution had not been taken from other countries,

I believe that today we won't face complications and inconsistency in interpretations and decisions.

Preamble is the heart of the Constitution. A body without a heart is dead, because the circulation of blood will stop. It has become the tool for interpretation which is an accurate and efficient way of interpreting any article, law, statutes. Comparing the textual and purposive understanding of interpretation, a purposive approach will kill/sanitize the smudges. It's important to clear our mind that instead of looking for a word in a dictionary, the court should look at the objectives of that unambiguous word and protect the innocent. Throughout the research, we explored the role of the judiciary in interpreting the world's lengthiest constitution and the importance of preamble.

In such uncertain times, if the politicians keep their selfish motives aside and stop playing politics, then our nation will win this battle against corona. The Post-corona period will be tough and I think the laws need to be more sustainable and clarity in them is a must.

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8. Decriminalization of Adultery with reference to Joseph Shine Case

By: Chirag Ahuja

Pg. No: 98-110

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i. Abstract

Adultery was defined as an offence under the Indian Penal Code,1860. It punishes the male offenders who have committed sexual intercourse with the wife of another man without the consent of her husband. In this offence only the male person was liable. This act was committed by the third person against a person with respect to his wife. This means that if a married man and unmarried woman or the widow or the consent of the husband is there, then it would not amount to adultery. It was not required for the adulterer to know she whose wife woman is and she is a married woman it should be known by him.

Supreme court has amended its 158 years old law of Adultery in its recent judgement in case of Joseph Shine vs Union of India. The judgement overruled the earlier judgements which criminalized the offence of adultery. Now it has become legal and not ethical though. Marriage involves with the confidence of two partners with their trust and loyalty to each other. The court stepped back to interfere in the lives and personal matter of each other and considered adultery as a civil wrong and a matter to seek divorce.

The Writ petition was challenged under section 497 of IPC and section 198 (2) of CrPC which is a Public Interest Litigation.

Section 497 becomes the prima facie which discriminates the men and violates Article 14, 15 and 21 of the constitution and thus Article 497 was held unconstitutional. When the sexual intercourse takes place with the consent of both the parties then there was no good in exempting one from the liability and criminalizing the other one. The sexual privacy is part of the right to privacy, thereby section 198 become the violation of article 14,15 and 21. The consensual relationship outside marriage might breakdown the marriage and that would not be protected anyhow under the Article 21. The right to privacy and liberty is not the absolute one and thereby is the subject to reasonable restrictions.

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1. Introduction

Before the enactment of the Indian Penal Code, Adultery was not considered as an offence in India both for men and women. Nor it was included in the Penal Code first draft. Though, it was added by the Second Law Commission. It was noted by the Law Commissioners that the

prevailing social infrastructure and the dependent economical position of women were not in the favor of punishing the adulterous men. It was noted that the wife was to be considered for accepting her husband's adulterous relationship as his right. She must not feel humiliated and must not be a shocking culture for her.

Law Commissioners added adultery in the Indian Penal Code as an offence which punishes only the male offenders leaving the women who already are considered as the humiliated member living under the unkind conditions within family.

In the recent judgement under the case of Joseph Shine vs Union of India, the Supreme Court struck down the Victorian Morality law on Adultery which was 158 years old. The judgement has overruled all the previously held judgements.

With this judgement, along with the pros come cons. Though Adultery has now become legal but it is not ethical. The custom of marriage depends on the confidence of partners upon each other and now Court has stepped its foot back from interfering in the lives of the people whether personally or morally. Now Adultery is only a civil wrong which has only become the remedy for seeking a divorce.

2. Essentials for Offence of Adultery

For the commitment of the offence of Section 497 of IPC, it requires the following essentials:

- **Sexual Intercourse:** There must be a sexual intercourse between a male person with a married woman other than the wife of himself.

- **Married Woman:** The offence of adultery involves a married woman who indulges herself in intercourse with another man. Without marriage living with another man and having children with him would not be an offence of Adultery.
- **Knowledge:** To commit the offence of Adultery, there must be the knowledge for the crime, where the man must know that she is married or has a reason to believe that she is married to another man.

3. Case Laws

The question about the validity of the IPC section 497 and Cr.P.C. 198 arose in front of court a multiple time.

In the case of Yusuf Abdul Aziz vs State of Bombay[123], the appellant was prosecuted for the offence of adultery under section 497 of IPC. When the complaint was filed, the husband of the wife appealed to the High Court of Bombay to conclude the constitutional validity of Article 228. The challenge was addressed in front of Court. It stated the challenge on the prohibition on treating the wife as an abettor as it was considered as the violation of the Article 14[124] of the Constitution of India. There the Court held that it was safeguarded by Article 15 (3)[125] of the Indian Constitution.

In another case of *Sowmithri Vishnu vs Union of India*[126], 3 challenges were put in front of Court. First, that section 497 gives the husband right to file a complaint on another person with whom his wife is in adultery but does not give the right to the wife to file a complaint on a married woman if her husband is committing the offence of adultery with her. Secondly, the wife does not get the right to file a complaint against her husband for being in adultery with other woman and third that it does not contain offences against the married woman and unmarried woman. Under this, the Chief Justice, Chandrachud said by the definition the crime of the adultery can be committed by the only man and not by the woman and to make it gender-

[123] 1954 AIR 321
[124] Equality before law and equal protection of law
[125] State has the power to make certain provisions for children and women
[126] 1985 AIR 1618

neutral is the job of Legislative. The judgement says that it is the man who is the seducer and not the woman. The position has undergone through various changes over the years and it is Legislature who considers that the Section 497 should amend or not.

In another case of, V. Revathi vs Union of India[127], the court noted that the section 497 does not allow the husband of the offending wife to prosecute her and also does not give the right to wife to prosecute him and thereby no spouse has the right to charge against the disloyalty and therefore this section doesn't discriminate on the ground of sex.

4. Joseph Shine Case Analysis

Facts

Joseph Shine a citizen of Kerala filed public interest litigation on October 2017 under the Article 32 of the Constitution. The petition challenged the constitution of adultery as an offence under the Section 497 of IPC which is read with section 198 (2) of the CrPC, which discriminates men and violates the Article 14, 15 and 21 of the Constitution of India. The reason behind this writ petition was to protect the Indian men from the offence and punishment of extramarital affairs by the act of the wives of a husband who is in adultery with the other man. The petitioner i.e. Joseph Shine has a close friend who has committed suicide because of the malicious rape charges by a woman.

This case was brought to the Hon'ble Supreme Court of India through a writ petition under Article 32 of the Constitution of India with the PIL which challenges the validity of Section 497 of IPC. It was opposed as it is the violation of the Fundamental Rights under Article 14, 15 and 21.

Section 497 of IPC states: Adultery is an offence, where a person has sexual intercourse by knowing that the woman is the wife of another man and without the men's consent, that intercourse would amount to the offence of Adultery and would not amount to the offence of

[127] 1988 AIR 835

rape and shall be punished with the imprisonment which can extend to 5 years or with fine or both, where the wife will not be held as an abettor.[128]

Section 198 (2) of CrPC states: No person other than the husband of a woman shall be deemed to be an aggrieved for the offence punishable under Section 497 or 498 of IPC, provided in the absence of him, the person who had the care of the woman on his behalf with the grant of the court can file a complaint on his behalf.[129]

Section 497 of the IPC was challenged, which criminalized the adultery by the imposition of culpability on man who engages sexual intercourse with the wife of another man's wife.

The crime of adultery was punished with a maximum punishment of 5 years imprisonment. The consenting parties and women were exempted from the prosecution. And a married woman could not file a complaint under section 497 when her husband is in a sexual relationship with another woman. This was in the view of the CrPC section 198 (2) which specified for the charges of the complaint under Section 497 and 498.

Issues

Validity of Section 497 arose on the 3 grounds:

1. That it is the violation of the Fundamental rights of Article 14, 15 under the Constitution of India.
2. It violates the right to life and right to privacy under Article 21.
3. Section 198 (2) of CrPC contains prosecution procedure under the 10th chapter of IPC which shall be unconstitutional to the extent which applies to the offence under IPC section 497 of IPC.

[128] Section 497 in The Indian Penal Code
[129] Section 198 in The Code Of Criminal Procedure, 1973

The petition wanted to address certain problems under Section 497:

- To make Adultery law gender-neutral as the law only punished the male offender and no action against woman offenders were taken.
- As per the section, no woman can file a complaint against her husband for being in adultery with another woman as there is no such provision.
- Women were treated as an object under the law of adultery as if the husband agrees it would not amount to an offence under the act of adultery covered under Section 497.

Judgement

Joseph Shine filed a petition in December 2017 challenging the validity of Section 497. The 3 bench judge was headed by the CJI of India, Dipak Mishra and referred the petition from a five-judge Constitution bench, admitting the validity of law to be archaic[130] which comprises of CJI Dipak Mishra and Justices DY Chandrachud, R F Nariman, Indu Malhotra and A M Khanwilkar.

While hearing the previous matters the court always seem to be based on taking decisions with societal presumptions. The court struck down the law through 4 separate and concurrent judgements and declared that the husband can't be master of the wife.

The judgement was held as:

- **Section 497 is constitutionally invalid and archaic.**

IPC Section 497 trespasses the privacy of the women and also deprives their Fundamental Rights including the Right to liberty and life. Article 21 covers sexual autonomy in it as it talks about personal liberty in it. In a commitment to the relationship, there must be companionship

[130] Antiquated or outdated

for the same element and they must respect each other's decision. Both husband and wife should treat each other with dignity, equality and must respect sexual autonomy of both.

Section 497 deprives the woman Right to Equality as they didn't get the free consent for their sexual act and more likely to be considered as an object for sex for their spouse. It thereby violates Article 14 and 15 of the Indian Constitution. Thus, it is gender stereotype as it provides women to have her husband's consent to indulge in sexual acts which shows that men are superior to women and thus offends Article 21 of Indian Constitution.

- **Section 497 to be no longer a Criminal Offence**

In the judgement, it was stated that a crime is something which is committed as a whole to the society whereas adultery is more likely to be a personal issue. Treating Adultery as a crime would be more likely for a state to violate the private life of individual and thus Adultery doesn't seem to be a crime and more likely to invade privacy sphere of the marriage. But it continues to be a civil wrong and a ground to seek divorce. After Adultery is committed the decision lies upon the husband and wife to decide as it involves something upon their discretion. It has become a challenging situation in front of the court under different scenes which has led the court to come to this stage and thus declaring Adultery as a crime would be an injustice towards the system.

- **A Husband cannot become the master of his wife.**

The judgement states that a woman cannot be considered as a property of their father or husband any more. They must be given equal status in society and they must have got all the rights equal to that of a man.

- **Section 497 is Arbitrary**

Through this judgement, it was stated that the Adultery crime under Section 497 is arbitrary. It doesn't preserve the holiness of marriage as for a husband it can allow his wife to have an affair with someone else. This points out more towards the proprietary rights of a husband over his wife. Moreover, wife doesn't get the right to file a complaint towards her husband or his affair with someone as there is no provision for the same under Section 497.[131]

Rationale

The provision under Section 497 and Section 198 (2) has a lot of loopholes:

I. Firstly, the case of Adultery can be brought by the only husband of the adulterous wife. And in his absence, it can be brought by a person taking care of his wife at the time of the offence only with the approval of the court.

II. Women cannot file the complaint as according to the provision, no person other than the husband can be the aggrieved party.

III. Husband's consent decides whether the offence has occurred or not.

IV. The wife who is being in Adultery won't be punished in any circumstance even as an abettor.

V. The only person who will get punishment under this offence will only be the paramour of his wife.

[131] Available at: https://www.thenewsminute.com/article/centre-says-women-too-should-be-punished-adultery-should-it-be-crime-85083

Due to these loopholes, it was held that the law of Adultery is gender-biased and does not cover many circumstances and cases of Adultery. Section 497 stated that the offence of Adultery can only be committed by the wife and not by the husband.

1. This section punishes only the male offenders for the Adultery as an offence.
2. There was no provision of offence where a married man involves in a sexual relationship with an unmarried woman as it only criminalizes the offence with intercourse with the married woman.
3. Whole of the scenario depends upon the consent of the husband as it means that woman can after taking the consent of his husband can have an affair which would no longer be an offence of Adultery.

The argument was based upon the violation of the Fundamental Rights of Article 14 and 15 of the Constitution for the following reasons:

1. It's clear discrimination as only male offenders were punished and women were exempted from being an offender. Though Adultery involves the participation of the woman and man but only men were penalized for the offence and women were given immunity. Thereby, violates the equality provision under the Constitution as it is discrimination for men.
2. The law also discriminates against a woman as men were given sexual autonomy to have extramarital affair only with an unmarried woman. And also, at the same time restricts woman for indulging themselves in any other sexual relations.

The law only penalizes the third person to the marriage, where the person was involved with a married woman. It was considered that the women were treated as a property of the husband and thereby, such person was treated as a trespasser and was punished for the offence.

5. Conclusion

The criminal Adultery law in India was covered in Section 497 of IPC. The decision that the Supreme Court takes is the one of its kind is landmark judgement which overruled all the previous judgements. The provision under the IPC before the judgement stated that the husband cannot prosecute his wife for breaking the sacredness of marriage be being in adultery with another man. The law didn't allow the husband to prosecute either husband or the wife for being in adultery. And the law doesn't give the remedy to the woman whose husband is in Adultery with the other woman which is against the violation on gender-based grounds.

India has a rich and diverse culture which is unique on its own. Western culture has great significance in influencing its culture on Indian families. Though the lifestyle is changing, the western culture brought itself with lots of pros and cons. The marriage failing rate has risen.

Dale Carpenter[132] commented it by saying that people live complex life. They fell in love, lie cheat and drink and none of which makes them less entitled as said by Justice Kennedy[133] to respect the private lives of individual.

The law was challenged multiple times but it was unchanged as we can see in the cases of Yusuf Abdul Aziz vs State of Bombay, V. Revathi vs Union of India or Sowmithri Vishnu vs Union of India.

Hence, in Joseph Shine vs Union of India, the Apex Court struck down the offence of Adultery which is about 158 years old and said that it is unconstitutional and held that it violates the Fundamental Rights of Article 14, 15 and 21 under the Indian Constitution. Supreme Court with the reference of Article 21 stated that:

Right to privacy is the absolute right of a person and is deeply connected with the individual's dignity and they must get the right to make their own decision.

The judgement took a great initiative and struck down the 158 years archaic law of Adultery covered under the Section 497 of IPC along with CrPC section 198(2) as both of these sections were gender-biased and were based upon the discriminative classification against the women.

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[132] American Legal commentator and professor of Law
[133] American Jurist who was also an Associate Justice in United States of America's Supreme Court

The provision was discriminative with 2 ways, firstly that women were not given right to prosecute her adulterous husband and secondly it does not punish wife as abettor for being in adultery.

This judgement put an idea of transformative justice. Though the judge has put a significant effort in providing equality and justice but it also increased Adultery as it has become non-punishable and it is no longer an offence now. But the judgement has been criticized as it infringes the remedies which were available to spouses when any partner indulges themselves in adultery.

The judgment does seem to be silent on the effects of the social institution like that in marriage and along with the children born from such a relationship.

Now though Adultery is no longer a Criminal offence and is not punishable but it has become a ground to seek divorce because of lack of commitment between the partners.

India has a rich and diverse culture which is unique on its own. Western culture has great significance in influencing its culture on Indian families. Though the lifestyle is changing, the western culture brought itself with lots of pros and cons. The marriage failing rate has risen.

Dale Carpenter commented it by saying that people live complex life. They fell in love, lie cheat and drink and none of which makes them less entitled as said by Justice Kennedy to respect the private lives of individual.