ISSN: 2347-4351

CALQ (2021) VOLUME V ISSUE I | FEBRUARY, 2021

COMPARATIVE CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW QUARTERLY

CENTRE FOR COMPARATIVE CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW

NATIONAL LAW UNIVERSITY, JODHPUR (Rajasthan, India)

PUBLISHED BY:

THE REGISTRAR, NATIONAL LAW UNIVERSITY, JODHPUR
ISSN: 2347-4351

BOARD OF ADVISORS

CONTENTS

EDITORS' NOTE

As Editors-in-Chief, it gives us immense pleasure to present Issue 1 of Volume 5 of the Comparative Constitutional Law and Administrative Law Quarterly Journal ("**CALQ**").

IN THIS ISSUE

In ***Desegregating Equality: Towards A Right to Inclusive Education For Children With Disabilities***, *Sanjana Srikumar* argues that the framework of right to education of children with disabilities must be adequately considered under the right to education and right to equality and not as a separate category of education. To drive this point home, she has discussed the "Doctrine of Separate but Equal" and further relied on jurisprudence from US Supreme Court judgements and International covenants to substantiate her argument. The paper then draws a comparison on right to inclusive education between Indian legal framework and concludes that the State has positive obligations to ensure meaningful inclusion.

In ***Queers In Combat: Analysing The Indian Armed Forces' LGBT Exclusionary Policy***, *Allen Benny Mathews* & *Samarth Singh* shed light on the Indian Armed Forces' exclusionary policy against homosexuals, in light of decriminalization of Section 377 of Indian Penal Code under Navtej Singh Johar v. Union of India. The authors have provided a comparative analysis of policies adopted by armed forces in other nations and have discussed mechanisms how these policies can be implemented in India. Several important excepts on homosexuality ranging from ancient Indian history to colonial military history in India have been discussed further, in order to explain sociological factors pertinent to the matter at hand.

In the backdrop of ongoing debate on electoral malpractices in presidential elections in Nigeria, we present ***From The Polling Booths To The Courtrooms: Challenges Of Strict Application Of Time Frame In Judicial Contestation Of Election Disputes In Nigeria***, where *M.A. Etti & M.A. Lateef* argue that the strict interpretation of the constitutional provisions on the time limit for adjudication of electoral disputes defeats the essence of substantial justice and impacts negatively on the role of the judiciary in social engineering. The authors have further compared the

effects of this malpractice in Kenya from that of Nigeria and have come up with several solutions to curb this menace.

In ***Competing Challenges Of Public Morality To Constitutional Morality: Comparative Study Of Mob Justice In Sub-Continent Countries***, *Aditya Rawat & Divyanshu Chaudhary* discuss the need to reconcile Constitutional morality with public morality, using recent incidents of religion based mob lynching. The authors have further delved into this issue by drawing a comparison between legal framework on mob lynching in India and Pakistan. This article argues that public morality needs to be in symbiotic understanding with Constitutional morality.

In ***Curbed Application of Ouster Clause in Indian Legal Framework: The Unsettled Conflict Between Legislature And Judiciary***, *Anitha Bharathi* seeks to simplify the ambiguities surrounding "Doctrine of Ouster Clauses" and how these clauses exclude judicial review. The author has provided a comprehensive insight into how the concept of statutory finality is different from Ninth Schedule under the Constitution of India. She suggests that intention of the ouster clause in the statute must be looked at, in order to resolve the conflict between powers of judiciary and legislature and has relied on several judgements to bolster her argument.

In ***A Comparison Of Judicial Opinions Defining Federal Structure And State Autonomy: Contrasting S.R. Bommai V. Maryland***, *Preetham Correa* deliberates on the contrasting definitions of Federal Structure and State Autonomy, in the American and the Indian landscape. The comment enumerates how the Supreme Court of both these countries, as the interpreters of the Constitution, found themselves adjudicating these disputes whenever they ensued. For this, Preetham also equips himself with two landmark decisions- *S.R. Bommai v. Union of India* and *McCulloch v. Maryland*- which have demarcated the line between the Union and the states vis-à-vis the division of political and legislative powers. The case comment explores the nuances of these decisions in a comparatively analytical manner while examining the far-reaching effects they have on federal and state relations in the world's largest and oldest democracies.

Sixteen Stormy Days: The Story of the First Amendment to the Constitution of India by Tripurdaman Singh has been reviewed by *Hartej Singh Koccher*. The book traces the politico-socio-legal background of

the incidents leading up to the first amendment of nascent Constitution of India, within 16 months after coming into existence.

ACKNOWLEDGEMENT

Through the course of the previous year, we have faced considerable challenges and have found ourselves looking for the shore. In moments such as those, it was our University through the Hon'ble Vice Chancellor, Prof. (Dr.) Poonam Pradhan Saxena, which has kept us going. The guidance and support of our University's Registrar, Mr. Sohan Lal Sharma was unparalleled. We take this opportunity to thank Prof. (Dr.) I.P. Massey, Director, Centre for Comparative Constitutional Law and Administrative Law, for having dwelled and deliberated on every aspect of this issue to further the vision of the journal.

We owe our gratitude for the consistent efforts made by the IT Department of our University, represented by Mr. Gyan Bissa, which has ensured that the journal is equipped with the best of resources at all times.

The culmination of this issue demands that we thank the members of the Editorial Board for their unequivocal dedication to the cause of the journal. They have once again proved that at the end of the day, it is all about team-work. While we hand over the reign to the next editorial board, we hope that the journal attains new dimensions in its upcoming years.

At the end, we hope that this issue proves to be a useful resource for our readers and helps in fostering informed discourse on the subjects of constitutional law and administrative law. We reiterate that it is the feedback of our readers, which is held in the highest regard. Therefore, should you have any queries or suggestions for us, write to us at **editorcalq@gmail[dot]com**.

Aditya Jain & Aditya J. Nair
Editors-in-Chief

DESEGREGATING EQUALITY: TOWARDS A RIGHT TO INCLUSIVE EDUCATION FOR CHILDREN WITH DISABILITIES

SANJANA SRIKUMAR[1]

A petition filed by special educators regarding the appointment of special educators in all schools in Uttar Pradesh, which is pending before the Supreme Court, has inadvertently raised significant concerns regarding judicial attitudes to questions of disability inclusion. The Court, in an interim order, went beyond the prayers and directed the State to instead consider the possibility of special schools for children with specific categories of disability, considering these children uneducable in common environments. While no binding directions to this effect have been passed yet, the view taken by the Supreme Court is characteristic of the paternalism commonly directed to children with disabilities, couched in terms of their welfare and based on unscientific presumptions regarding the feasibility of their integration or inclusion into common learning environments. The present paper seeks to highlight that this presumptive segregation is, in fact, inconsistent with developments in international human rights law and Indian domestic law. The Convention on Rights of Persons With Disabilities, 2006 as well as, the Right to Education Act, 2009 and the Rights of Persons with Disabilities Act, 2016 recognize the right to inclusive education i.e. the right to access to common classrooms and reasonable accommodation of that classroom to make inclusion meaningful.

The paper argues that inclusive education is inherent in the nature of both, the right to education and the right to equality and that the framework of education of children with disabilities must adequately consider this context. In doing so, the paper traces the right to inclusive education under international human rights, the Indian legal and policy framework, as well as judicial approaches to the adjudication of these rights. The paper

* Cite it as: Srikumar, *Desegregating Equality: Towards a Right to Inclusive Education for Children with Disabilities*, 5(1) COMPARATIVE CONST. L. ADMINISTRATIVE L. QUARTERLY (2021).

[1] Sanjana Srikumar is a graduate of National Law, University, Jodhpur and a Delhi-based advocate. Early versions of the arguments presented in this paper were conceived as an intervention application on behalf of Vidhi Centre for Legal Policy on this issue. Therefore, thanks are due to Pallavi Mohan, under whose mentorship the intervention application was drafted and with whom the author also co-authored a shorter version of this piece. (http://www.right-to-education.org/blog/separate-equal-classroom-indian-desegregation#comments). The author is also thankful for comments and inputs received during the litigation from Dr. Dhvani Mehta, Shankar Narayanan, Rashmi Nandakumar, Shambhavi Ravishankar and Maitreya Shah. Finally, thanks are due to Ojaswini Mandan and Maitreyi Singh, of the editorial board, for their research assistance.

concludes that the State is legally obligated to ensure that children with disabilities[2] have adequate access to the common learning environment any variance from the common learning environment must be strictly governed by the obligation of the State to ensure non-discrimination and positive obligations to ensure meaningful inclusion.

INTRODUCTION

"In the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[3]

The above observation, though made in the context of racial segregation of schools in the United States of America ("**US**"), in 1954, remains significant even today. The separate education of children with disabilities is continually justified in the same paternalistic and presumptive ways through which racial segregation in education would be justified: that, certain categories of children are uneducable in a common learning environment and must be segregated *for their own benefit*. Apart from the fact that there is no scientific evidence to suggest that children with a disability benefit from being educated separately, such a view ignores some fundamental characteristics of the right to equality and its intersection with the right to education. *First,* separation of a category based on presumptions of their ability, rather than the assessment of the individual is inherently arbitrary. *Second,* such a presumption is not related to the purpose of education; the right to education is an absolute right, where education is viewed as an end goal by itself. Therefore, the academic abilities of any student or any other economic/social/physical characteristic cannot be considered a basis for claiming this right from the State. *Third,* the inherent inequality is amplified in the sphere of public education. Refusing access to education is equivalent to denying equal

[2] The terms 'children with disabilities' and 'persons with disabilities' are used throughout the paper in line with the terms in international human rights law. It is acknowledged that members of the community and activists may prefer other terminologies. It is also essential to acknowledge that none of the members of the Bench or the parties were persons with disabilities. Counsels for intervenor, including the author, are also not members of the community. In this context, it is important to consider the structural barriers to persons with disability in the judiciary as well as academic research (see note 105). Resources on platforms such as SCCOnline are relied upon and therefore, the author reiterates the call by disability activists to ensure that these are made accessible to persons with disabilities.

[3] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

access to a public space, which is the first step of social participation. Put simply, the right to education is also a right to access to public spaces- the students claim access not just to the service of 'learning' but also the common learning environment, and therefore, this is a right that exists independent of 'learning outcomes'. Viewed in this manner, the right to education is the basis of the right to equal participation in society at all levels.

By contrast, it is worth considering the orders of the Supreme Court of India in *Rajneesh Kumar Pandey & Ors. v. Union of India & Ors.*[4] The Court, in the order dated 23.10.2017 observed as follows:

> *"Access to education has already been regarded as a Fundamental Right as per Article 21A of the Constitution. There is a statutory obligation under the Rights of Children to Free and Compulsory Education Act, 2009. It is impossible to think that the children who are disabled or suffer from any kind of disability or who are mentally challenged can be included in the mainstream schools for getting education. When we say `disability', we do not mean `disability' as has been defined in the Rights of Persons with Disabilities Act, 2016. The Rights of Persons with Disabilities Act, 2016 includes certain physical disabilities which may not be a warrant for getting admission in special schools. The students who suffer from blindness, deafness and autism or such types of disorder may be required to have separate schools with distinctly trained teachers."*
>
> *(Emphasis supplied)*

Thereafter, by order dated 04.12.2017, the Hon'ble Court observed as follows:

> *"It is stated in the affidavit that the State of U.P. is keen to have special schools having special teachers for imparting education to the disabled children who cannot be imparted education in normal schools. Ms. Aishwarya Bhati, learned Additional Advocate General appearing for the State of U.P. relying on the affidavit and the instructions has submitted that sixteen special schools have already been established and the teachers have been appointed and presently*

[4] W.P. (C) 132/2016.

> *the schools are functional. The special schools are imparting education to visually impaired, hearing and speech impaired, mentally disabled and physically disabled children. It is submitted by her that the schools have residential facilities and they also admit students who belong to non-residential category."*

At this juncture, the Petitioners drew the attention of the Court to provisions in the Rights of Persons with Disabilities Act, 2016, which clearly provides for inclusive education for children with disability and guarantees equality and non-discrimination. Therefore, the Court directed the counsel for the State to work out a scheme for implementation of the Act, keeping in mind the obligations of non-discrimination under the Act.

Since then, the Supreme Court continues to consider the facilities available in special schools in Uttar Pradesh, with occasional mentions of the need to consider infrastructure in mainstream schools.[5] While converting a *simpliciter* service matter which sought implementation of the existing legal framework into one where the judiciary determines State policy, the case has inadvertently opened up the question of the nature of India's obligation for providing education to children with disability. The litigation also raises the larger institutional concerns regarding the ability of the Supreme Court to make such decisions, considering the absence of formal mechanisms to ensure that policy is based on evidence as well as consultation with the relevant stakeholders.

The order dated 23.10.2017 indicates that certain categories of disability would require segregated education or that it was open for the State to meet its obligation of providing education to children with disabilities in special schools rather than by ensuring reasonable accommodation in the general school system. Such a view is not only in violation of the right to education on an equal basis as understood in international human rights law and

[5] Order dated 06.09.2018 notes that: "[…] *Ms. Aishwarya Bhati, learned Additional Advocate General for the State of Uttar Pradesh, shall obtain instructions with regard to the ratio of special teachers required in a general school.*" Reference is made in order dated 04.04.2019 to the Scheme for Integrated Education for Disabled Children. The said scheme is prior to the Rights of Persons with Disabilities Act, 2016, which is currently in force and the orders of the Court fail to take into account the requirements of inclusive education therein.

domestic constitutional law, but also ignores corresponding statutory changes, built upon decades of activism.

These seemingly harmless, well-intentioned errors turn questions of entitlement into questions of policy, subject to State discretion. It is submitted that the State has to ensure the integration of children with disabilities within common learning environments to ensure the right to equality. There is a negative obligation on the State to prevent discrimination in access to education as well as a positive obligation to ensure that access is meaningful, which can be done by suitably modifying the common learning environment to ensure accommodation of children with disabilities. Some of these obligations are subject to a *progressive realization* while others must be realized immediately. Significantly, these obligations must recognize equal access to the common learning environment as inherent to the right to dignity and the right to equal participation in society at all levels. In such a framework, the right to inclusive education for children with disability is not concerned with logistics or paternalistic assumptions of the ability of such children; non-discrimination in access to education is an end goal by itself, and the common learning environment itself must diversify to provide reasonable accommodation for effective assimilation. These rights are well-settled in international human rights instruments and comparative equality law, as well as India's constitutional, statutory and policy framework.

INTERNATIONAL HUMAN RIGHTS LAW

The Convention on Rights of Persons with Disabilities, 2006 was adopted on 13th December 2006 and came into force on 3rd May 2008. This is the first comprehensive statement on the applicability of international human rights to persons with disabilities, six decades into the UN system. The rights of persons with disabilities were not expressly recognized until then. However, the rights articulated in the Convention trace their history and basis through earlier Conventions and declarations.

The basis of many of these rights is the Universal Declaration of Human Rights, which recognized the *"inherent dignity and of the equal and inalienable rights of all members of the human family*"[6], the right to equality (Article 1), non-

[6] Universal Declaration of Human Rights, Preamble.

discrimination (Article 2), the right of equal access to public service (Article 21) and the right to social, economic and cultural rights (Article 22). These rights are also recognized in the International Covenant on Civil and Political Rights, 1966.[7] Furthermore, the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**"), which was adopted alongside the International Covenant on Civil and Political Rights ("**ICCPR**"), made some significant advancements, in particular, the recognition of the right to participate in cultural life, the right to health and the right to social security. It is pertinent to note that in all the aforementioned Conventions, the prohibition of discrimination on certain grounds consists of a non-exhaustive list that includes sex, race and other such grounds. While none of the Conventions expressly recognize discrimination against persons with disabilities, arguably, they do so implicitly, as discrimination of a nature similar to grounds listed therein.

The ICESCR also introduced the right to education. Primary education in particular was to be free and available to all.[8] The right is absolute and no basis of exclusion from the education system is recognized. More significantly, education isn't viewed as a means to livelihood. Education is an end to itself which is directed towards the goals of human dignity and respect for human rights, as well as its role in enabling *all persons to effectively participate in a free society*. This recognition, as would be evident below, was crucial to the case for inclusive education.[9]

Thereafter, international instruments began to recognize specific concerns of persons with disabilities. The Declaration on the Rights of Disabled Persons, 1971[10] and on the Rights of Mentally Retarded Persons, 1971[11] sought to *promote the integration* of *mentally retarded persons* but recognized that many countries, at their present capacity had limited resources to utilize towards this end and to provide such education to disabled/mentally retarded persons as would enable them to develop their ability to their

[7] International Covenant on Civil and Political Rights, art. 2 and 25.

[8] International Covenant on Economic, Social and Cultural Rights, art 13.

[9] *See* UN Committee on Economic, Social and Cultural Rights (CESCR),General Comment No. 5: Persons with Disabilities (1994), ¶ 35, *noting* that most States now recognize the possibility that children with disabilities may be educated in the general education environment.

[10] The Declaration on the Rights of Disabled Persons, 1971.

[11] Rights of Mentally Retarded Persons, 1971.

maximum potential.[12] In 1982, the World Programme for Action Concerning Disabled Persons was adopted, which recognized the obligation to promote the realization of the right of disabled persons to participate fully in social life.[13] The Convention on Rights of the Child, 1989, however, provides specifically for non-discrimination on the basis of disability,[14] conditions which ensure dignity and participation in the community,[15] appropriate assistance subject to available resources and effective access to education in a manner conducive with social integration and individual development.[16] The Convention also provides for the right to education on the basis of equal opportunity where primary education is available free to all and secondary education is available and accessible to every child.[17] In 1993, the Vienna Declaration affirmed the equal rights of persons with disabilities including the right to education and active participation in all aspects of society.[18] The Declaration noted eloquently that *"the place of disabled persons is everywhere"* and called for the removal of all socially determined barriers that restrict full participation in society. Thereafter, the demand for inclusion in mainstream schools began to be articulated, with guidelines on limiting special education settings and gradually streamlining special education settings into mainstream schools.[19]

---

[12] UN General Assembly, Declaration on the Rights of Disabled Persons, 1971, Preamble, ¶ 6; UN Declaration on the Rights of Mentally Retarded Persons, 1971, Preamble, ¶ 2.The difference between integration and inclusion is discussed in the Committee on Protection of Rights of Persons with Disabilities, General Comment No. 4 (2016) on 'Article 24: Right to Inclusive Education' (¶ 11).

[13] UN General Assembly, World Programme on Action Concerning Disabled Persons, Preamble.

[14] Convention on the Rights of the Child, art. 2; *See also* UN Committee on the Rights of the Child, General Comment No. 9 (2006) on 'The Rights of Children with Disabilities, CRC/C/GC/9, ¶¶ 66-67.

[15] *Id.,* art. 23(1).

[16] *Id.,* art. 23(2)-(3); *See also* World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs, 1990.

[17] *Id.,* art. 28; *See also* African Charter on Human and Peoples' Rights, art. 17, art. 18.4; African Charter on the Rights and Welfare of the Child, art. 11, 13, 20(2).

[18] World Conference on Human Rights, Vienna Declaration and Programme of Action, 1993, ¶¶ 63-65.

[19] *See* United Nations General Assembly, Standard Rules on the Equalization of Opportunities for Persons with Disability, 1993, Rule 6; World Conference on Special Needs Education, Salamanca Statement and Framework for Action on Special Needs Education, 1994.

However, these instruments represented an older model of disability- one that viewed disadvantages in equal participation in society as a result of the disability and therefore, inherent. Such a model resulted in a *welfare-based* view of State obligations,[20] wherein the State serves to assist such persons to the maximum extent possible. While the ICESCR and the CRC recognize the universality of education as well as the significance of equal participation in society, the Convention on Rights of Persons with Disabilities, 2006 ("**CPRD**") goes a step further by expressly adopting a rights-based approach to disability. The CPRD differs from previous perspectives in two significant ways: *first,* it recognizes that disability is a result of environmental and attitudinal barriers that restrict their ability to participate in society on an equal basis; *second,* it views State obligations as justiciable, being connected to core rights such as human dignity, thereby lifting inclusion from a policy objective to an enforceable right.

CPRD: DISABILITY INCLUSION AS A HUMAN RIGHT

The Preamble to the CPRD reaffirms the "*universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination."*[21] Among several reiterations of the rights of persons with disability, the Preamble recognized that discrimination on the basis of disability is antithetical to human dignity. It is stated that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children. The significance of accessibility of education in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms is also recognized.

Significantly, the Preamble provides that disability itself "*results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."* This is a significant affirmation of the social model of disability i.e. disability is a result of social construct created by an ability-oriented environment and its failure to include, rather than medical or biological and therefore,

[20] *See* Committee on Protection of Rights of Persons with Disabilities, General Comment No. 4 (2016) on 'Article 24: Right to Inclusive Education', ¶¶1-2,11.

[21] United Nations Convention on the Rights of Persons with Disabilities, Preamble (c).

inherent[22] This is characterized as a human rights-based approach to disability rather than medical or charity-based approach.[23] This is reflected equally in the definition of persons with disabilities in Article 1 as "*those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."*

Article 2 provides that:

> *"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;*
>
> *"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."*

A combined reading of the affirmations in the Preamble and Articles 1-2 makes it clear that a failure to adjust the common environment to ensure due access to persons with disability on an equal basis also amounts to discrimination and is, in fact, viewed as the cause of disability. The CPRD provides for non-discrimination, full and effective participation and inclusion in society as well as equality of opportunity as part of its general principles.[24] Article 4 provides for the obligation of State parties to ensure the "*full realization of all human rights"* without discrimination of any kind. Article 4(2) further recognizes the obligation to take measures to "*the maximum of its available resources*" for the progressive realization of economic,

---

[22]*See* Donohue & Berman, *The Challenges of Realising Inclusive Education in South Africa,* 34(2) South African Journal of Education (2014), Art. #806; Gauthier De Beco, *The Right to Inclusive Education: Why is it so difficult to implement?,* International Journal of Law in Context (Oct. 2017), 1.

[23]UNGA, Report of the Special Rapporteur of the Human Rights Council on the Rights of Persons with Disabilities, Catalina Devandas- Aguilar, A/71/314,¶ 10-12.

[24] Convention on Rights of Persons with Disabilities, 2006, art. 3 and 5.

social and cultural rights and immediate realization of rights that are considered immediately applicable in international law.[25] Article 7 provides for rights of children with disabilities to the full enjoyment of all human rights and fundamental freedoms on an equal basis with other children.

Article 24 of the Convention provides for the right to education for children, as under:

> *"1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:*
>
> *(a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;*
>
> *(b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;*
>
> *(c) Enabling persons with disabilities to participate effectively in a free society.*
>
> *2. In realizing this right, States Parties shall ensure that:*
>
> *(a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;*
>
> *(b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;*
>
> *(c) Reasonable accommodation of the individual's requirements is provided;*

[25]As will be explained below, this provision creates obligations to ensure immediate access to inclusive education environments.

> *(d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education.*
>
> *(e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.*
>
> *[…].* "

Article 24(3) and (4) provide for the right to learn life and social development skills.

It is, therefore, clear that the right to education for children with disabilities includes the right to an inclusive education system, which, among others, enables persons with disabilities to participate effectively in society. This right includes the right to access the general education system on an equal basis as well as a reasonable accommodation of this environment to the needs of children with disabilities. The support provided must be within the general education system and consistent with the goal of inclusion, thereby effectively precluding segregation of education. The Committee on Rights of Persons with Disabilities in the 'General Comment No. 4 on Article 24: Right to Inclusive Education' explains the significance of inclusion as distinct from the previous models of education. These can be understood in terms of the following stages:

(i) 'exclusion' wherein children with disabilities were prevented from accessing education in entirety;
(ii) segregation, wherein they were offered education but in separate settings, which is a model that continues under special schools;
(iii) integration, which referred to education in the general school environment to the extent that children with disabilities can be accommodated in such environments.[26]

Inclusion on the other hand moves beyond integration and requires accompanying structural changes to the common education environment

[26] Committee on Protection of Rights of Persons with Disabilities, General Comment No. 4 (2016) on 'Article 24: Right to Inclusive Education', ¶11.

to accommodate the needs of individual children.[27] It is also emphatically stated that some aspects of the right to inclusive education are immediately realizable which include the right to access free and compulsory education without discrimination and the right of reasonable accommodation.[28] Support provided by the State should be directed at complete inclusion including support in accessing common school environments and participation in out-of-school activities with peers.[29] Textbook and curricula must strive to combat gender and disability-based social prejudice.[30]

Significantly, for the purposes of our present discussion, the purpose of inclusive education is to ensure equal participation in society at all levels, including the right to live within the community.[31] The Convention also disregards expectations of learning outcomes based on the disability of the child.[32] Therefore, discussions of the purpose of special schools are non-compatible with the human rights approach, special schools are based on the view that children with disabilities are uneducable and burdensome, and inconsistent with the recognition of the role of education as a site of social inclusion.[33]

While the right of access to inclusive education is immediately realizable, it is recognized that some rights are subject to progressive realization. States must, over time, invest in capacity building to enhance inclusion. Specifically, with regard to segregated education, it is provided that the State must move towards de-institutionalization (living outside of the community) and that maintaining segregated education settings is inconsistent with the obligations under the Convention.[34] Segregated education is permitted only with a view to not inconvenience or unduly

---

[27] *See Bryne, Hidden contradictions and conditionality: conceptualizations of inclusive education in international human rights law,* 28(2) Disability and Society 232-244.

[28] *Id.,* ¶¶30, 40; UNGA, Report of the Special Rapporteur of the Human Rights Council on the Rights of Persons with Disabilities, Catalina Devandas- Aguilar, A/71/314, ¶ 25.

[29] *Id.,* ¶33.

[30] *Id.,* ¶44.

[31] *Id.,* ¶50.

[32] *Id.*, ¶¶ 4(b), 12(c), 25.

[33] UN HRC, Vernon Munoz, Report of the Special Rapporteur on the Right to Education: The Right to Education of Children with Disabilities, A/HRC/4/29, ¶ 11.

[34] *Id.,* ¶¶13, 32, 39, 68. Para 32 considers the roadmap of moving from segregated to inclusive education to be one based on individualized education plans.

prejudice children with disabilities during the period of transition but over time, the State must move resources from segregated to inclusive education set-ups.

In subsequent 'Conference of Parties' meetings, the significance of inclusive education as the basis of participation in civic and community life was reiterated. For instance, in the Ninth Conference of Parties, while considering barriers for persons with intellectual disabilities, it was pointed out that children who had access to schools were found to be more likely to have meaningful relationships, employment and access to the cultural and civic life of communities.[35] Yet, the Twelfth Conference noted that implementation was poor and that, on a review of 86 country reports of the 178 countries that had ratified the Convention, highlighting that the segregation of children with disabilities remained a significant concern.[36] Implementation of the Convention requires the recognition of the wider goals of education including evidence to demonstrate that inclusive education systems build greater acceptance of disability in society, and mutual respect and understanding among children with and without disabilities.[37]

In light of the above, it is submitted that the views of the Supreme Court, in considering children with disabilities uneducable based on the category of disability or urging further investment in special schools was contrary to international human rights law.

THE INDIAN LEGAL FRAMEWORK

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which is now repealed, first considered the question of the education of children with disabilities. Herein, Section 26 provided that the Government and local authorities shall:

[35] Report of the Ninth Session of the Conference of State Parties to the Convention on the Rights of Persons with Disabilities, CPRD/CSP/2016/5, ¶22.
[36] Report of the Twelfth Session of the Conference of State Parties to the Convention on the Rights of Persons with Disabilities, CPRD/CSP/2019/5, ¶32.
[37] UNOCHR, *From Exclusion to Equality- Realizing the Rights of Persons with Disabilities: A Handbook for Parliamentarians* (2007), pp. 81-85.

> *(a) Ensure that every child with a disability has access to free education in an appropriate environment till he attains the age of eighteen years;*
>
> *(b) Endeavor to promote the integration of students with disabilities in the normal schools;*
>
> *(c) Promote setting up of special schools in Government and private sector for those in need of special education, in such a manner that children with disabilities living in any part of the country have access to such schools;*
>
> *(d) Endeavor to equip the special schools for children with disabilities with vocational training facilities.*

The focus was on *special* schools. However, the States' duty was to *endeavour* to *promote* integration in *normal* schools. Therefore, the integration was not a mandatory obligation; rather it was, at its highest, a derogable policy directive. Similarly, the National Policy on Disability, 2006, while acknowledging the need for inclusive education, stresses the need for *appropriate* education including the maintenance of special schools.[38]

A significant change even prior to the CPRD was the formal adoption of the right to education in Part III of the Indian Constitution.[39] The newly introduced Article 21A provided for the right of *all children of the age of six to fourteen years in such manner as the State may, by law, determine.* Therefore, constitutionally, the right to education was available equally to children with disabilities in a manner that may be statutorily determined. In light of this constitutional guarantee, the Right of Children to Free and Compulsory Education Act, 2009 ("**RTE Act**") was introduced and made significant strides in the sphere of inclusive education. The Act was introduced keeping in view *the values of equality, social justice and democracy and the creation of a just and humane society which can only be achieved through a provision*

[38] Ministry of Social Justice and Empowerment, National Policy for Persons with Disabilities (2006), ¶ 48.

[39] The Constitution (Eighty-sixth Amendment) Act, 2002. *See generally* Unni Krishnan v. State of Andhra Pradesh, (1993) 1 SCC 645. The unamended art. 45 of the Directive Principles of State Policy preceded the adoption of the right to education as a Fundamental Right.

of inclusive elementary education to all.[40] Thus, the aim of inclusive education was recognized even prior to enactment to give effect to the CPRD.

At the outset, the right of every child to free and compulsory education, as provided under Article 21-A, is reiterated as a right to education in a *neighbourhood school,* thus recognizing the significance of education within the community.[41] The appropriate government has a duty to ensure the setting up of neighbourhood schools where they don't exist.[42] The neighbourhood school is meant to be the *site of inclusion* and the *common space of education.*[43] The obligation to ensure *free and compulsory education* extends to the provision of *free elementary education* to children between the ages of six and fourteen, as well as to ensure their admission, attendance and completion of elementary education.[44] It is further provided in Section 3(2) that no child shall be liable for the payment of any expenses which prevents him from completing primary education. However, the proviso to this Section stated that children with disabilities would receive education in terms of the Persons with Disabilities Act (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. An Amendment in 2012 removed this *proviso*, which appeared to imply that children with disabilities were not excluded from Section 3(2).[45] Section 3(1) was also amended to delineate that the right to free and compulsory education was granted to every child, including a 'child with a disability'. *Vide* this Amendment- a child with a disability, in turn, was defined under Section 2(ee) as follows:

> *(A) a child with "disability" as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996);*

---

[40] The Right of Children to Free and Compulsory Education Bill, 2008, Statement of Objects and Reasons, ¶ 4.
[41] RTE Act, § 3(1).
[42] RTE Act, §§ 6, 8(b).
[43] Ministry of Human Resource Development, RTE Act: Clarification of Provisions, § 3, https://www.mhrd.gov.in/sites/upload_files/mhrd/files/upload_document/RTE_§_wise_rationale_rev_0.pdf.https://www.mhrd.gov.in/sites/upload_files/mhrd/files/upload_document/RTE_§_wise_rationale_rev_0.pdf
[44] RTE Act, § 8(a), Explanation.
[45] RTE (Amendment) Act, 2012.

> *(B) a child, being a person with disability as defined in clause (j) of section 2 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (44 of 1999);*
>
> *(C) a child with "severe disability" as defined in clause (o) of section 2 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (44 of 1999).*

However, the language of the *proviso* to Section 3(2), which was deleted by the 2012 Amendment, was replicated in a newly-added Section 3(3). This reaffirmed that the right to education of children with disabilities would be provided in terms of the Act of 1995 as provided above. This "special" and distinct regime governing the education of children with disabilities is contrary to the language of Article 21-A of the Constitution. Section 4 further affirms that children have the right to *age-appropriate* classrooms, even where they have not received any prior education. Here, the State has an obligation to ensure special training to enable them to attend such age-appropriate classrooms. Therefore, it is clear that even in cases of children without disabilities, there may be cases where there is an absence of parity in education levels. The obligation to bridge any such divides rests on the State and not the child.

Secondly, the Act is premised on a scheme of affirmative action to remove barriers to education in both State-run schools and others. The scheme of the Act includes (a) schools owned, managed and controlled by the State, Central or local governments; (b) aided schools receiving grant or aid in whole or in part to cover its expenses from the Government; (c) specified category schools[46] and (d) unaided schools with no grants from the Government.[47] Furthermore, the premise of the Act recognizes that the provision of quality and inclusive education is an obligation of not just schools that receive support from the government but also schools that are unaided.[48] To this end, the Act has defined *child belonging to disadvantaged groups,* which referred to children from Scheduled Castes and Tribes and

[46] This includes schools such as Kendriya Vidyalaya, Sainik Schools etc and other schools to be notified within the meaning of § 2(p) of the RTE Act.
[47] RTE, § 2(n).
[48] The Right of Children to Free and Compulsory Education Bill, 2008, Statement of Objects and Reasons, ¶ 4.

other socially or educationally backward groups which face social, cultural, economical, geographical, linguistic, gender or other such barriers to education, which are to be specified by notification under the Act. The Act has also defined *children belonging to weaker sections,* which includes children from families below a specified annual income.[49] The 2012 Amendment specifically introduced 'child with a disability' within the meaning of children belonging to disadvantaged groups, thereby including them within the ambit of affirmative action provisions in the Act. Schools which are owned and controlled by the Government have the obligation to ensure free and compulsory education to all children, and schools which receive aid are similarly obligated to provide free and compulsory education the proportion of aid provided (and a minimum of twenty-five per cent of students admitted).[50] In addition, the State and Central Government, as well as local authorities, have an obligation to ensure that children belonging to the disadvantaged group (which includes children with disabilities) are not discriminated against in their access to education *on any grounds*.[51] Unaided schools and specified category schools, on the other hand, are obligated to admit children from disadvantaged and weaker sections to an extent of twenty-five per cent of the strength in Class I and shall be reimbursed by the State [52] As a result, children with disabilities have the right to be included in all categories of schools. The Clarification on Provisions issued by the Ministry of Human Resource Development recognizes that schooling is a means of social cohesion and that inclusive education is inherent in earlier terms such as *neighbourhood schools.*[53] The clarification particularly notes that inequitable schooling reinforces existing social and economic hierarchies and that the idea of inclusive schooling is consistent with Constitutional values such as fraternity, social justice and equality of opportunity.[54]

---

[49] RTE Act, § 2(d) and (e). This category in different States has included varied grounds- such as *HIV- affected children* as per the orders of the Supreme Court in Naz Foundation v. Union of India, (2018) 11 SCC 547.
[50] RTE Act, § 12(1)(a) and (b).
[51] RTE Act, § 8(c) and 9(c).
[52] RTE Act, § 12(1)(c) and (2).
[53] MHRD, Clarification on Provisions: The Right of Children to Free and Compulsory Education Act, 2009, § 12.
[54] *Id.*

Finally, the Act regulates schools of all the categories mentioned above and provides for the issuance of a certificate of recognition for schools to be established or run; including on the basis of compliance with *norms and standards* provided in the Schedule.[55] This provision ensures the quality of education for all children on an equal basis. However, the Schedule, while providing substantive inputs of minimum standards on a wide range of issues including pupil-teacher ratio, working hours, building specifications etc, does not mandate norms necessary for inclusion of children with disabilities, other than the requirement to ensure barrier-free access.[56]

The aims of inclusion are more expressly crystallized in the Rights of Persons with Disabilities Act, 2016 ("**RPWD Act**"). This Act was introduced to give effect to the CRPD. Section 2(m) thereof defines inclusive education as "*a system of education wherein children with and without disabilities learn together and the system of education is suitably adapted to meet the learning needs of different types of students.*" This definition thus covers both access to the same school environment as well as suitable modifications to ensure that inclusion is meaningful. Section 3 of the Act provides for the right to equality and life with dignity, as well as a *reasonable accommodation.* The said provision states that no person with disability shall be discriminated on the ground of disability unless the act or omission is a *proportionate means of achieving a legitimate aim.*[57]

Section 16 of the Act further provides that the appropriate government shall *endeavour* that all educational institutions funded or recognized by them provide inclusive education to the children with disabilities. It is worth mentioning here that the Standing Committee on the Bill prior to enactment had recommended that the term 'endeavour' be replaced with 'ensure' to stress the binding nature of the obligation.[58] In any case, the provision provides further that towards this end, the educational institutions "*shall (i) admit them without discrimination and provide education and opportunities for sports and recreation activities equally with others; (ii) make building, campus and various facilities accessible; (iii) provide reasonable accommodation according*

[55] RTE Act, § § 18,19.
[56] RTE Act, The Schedule, 2(ii).
[57] Rights of Persons with Disabilities Act, 2016, § 3(3).
[58] Report of the Standing Committee on Social Justice & Empowerment on the 'Rights of Persons with Disabilities Bill, 2014' (2015), ¶ 3.6

to the individual's requirements; (iv) provide necessary support individualised or otherwise in environments that maximise academic and social development consistent with the goal of full inclusion; (v) ensure that the education to persons who are blind or deaf or both is imparted in the most appropriate languages and modes and means of communication; (vi) detect specific learning disabilities in children at the earliest and take suitable pedagogical and other measures to overcome them; (vii) monitor participation, progress in terms of attainment levels and completion of education in respect of every student with disability; (viii) provide transportation facilities to the children with disabilities and also the attendant of the children with disabilities having high support needs."

Therefore, the provisions of the section consist of a series of binding obligations towards the end of inclusive education. Herein, it is submitted that while endeavour may recognize that inclusive education is subject to progressive realization; the specific steps to be taken by educational institutions provided thereunder are to be immediately realized. Such a reading is not only consistent with the legislation being considered as rights-based and the language of the provision, but also international human rights law in the context of the CPRD.[59] It is also worth considering here that even in cases of *benchmark disability,* children have been provided with the right to education in a *neighbourhood school* or *special school* of *their choice,* notwithstanding the RTE Act, thereby preserving the right of access for children with all disabilities, subject to the choice of the child.[60] Such a provision is in line with international obligations to preserve the choice of education for children with disabilities during the transition to and progressive realization of inclusive education. While Section 16 provides for the duty of the State to regulate schools, Section 17 provides for measures to be taken by appropriate government and local authorities themselves, including a survey of school-going children to identify children with disabilities, teacher training, promotion of alternate means for communication such as Braille, sign language, among others.

The National Education Policy 2020[61] recognizes the goals of inclusion and equitable education. The policy recognized that education is a tool for social justice and equality. In light of this, the Policy considers the need to

[59] *See* Syed v. Govt (NCT of Delhi), 2019 SCCOnline Del 9015 (discussed below in Part IV).
[60] RPWD Act, § 31.
[61] pp. 24-28.

include children with disabilities at every stage of education. The provisions of the RPWD Act were endorsed and the policy recognized the need for several measures towards achieving those goals- the inclusion of disability experts in the framing of the curriculum; the provision of assistive devices; the inclusion of children with disabilities in all aspects of school life including extra-curricular activities such as art, music and sports; the inclusion of disability awareness and gender sensitization for the training of all teachers; among others. In the case of children with benchmark disabilities, it was reiterated that the choice of regular or special schools was of the child. However, the policy did not take into account the *progressive realization* of inclusion and a roadmap to the desegregation of education.

THE WAY FORWARD

In providing for reforms in education within the RPWD Act without any reference to or amendment of the RTE Act, the Legislature risks the same mistake as before i.e., to view *special education* as a separate category of education (to be considered by the Ministry of Social Justice without any involvement of the Ministry of Human Resource Development). In reading Section 16, it is clear that the legislative intent is to regulate schools which are funded by the Government or *recognized* by them. Therefore, this covers all categories of schools in the RTE. The *recognition of schools* is subject to compliance with norms and standards as per Sections 18 and 19 of the RTE, read with the Schedule. It, therefore, follows that since schools regulated by the RTE Act must also comply with Section 16, the norms and standards of the RTE Act must be read to include the requirements of Section 16, either through judicial interpretation in an appropriate case or legislative amendment. The legislative amendment provides for the possibility to lay down specifications of the standards. Furthermore, the definitions in Section 2(ee) of the RTE Act also require Amendment to reconcile with the definitions of disability in the RPWD Act rather than previous legislations. It is unfortunate that the Amendments to the Act, even after the RPWD Act was passed, have not taken into account the need to reconcile the RTE Act with the RPWD Act.

JUDICIAL APPROACHES TO INCLUSIVE EDUCATION

The present section discusses select case laws to demonstrate that judicial analysis of inclusive education in domestic and international human rights

requires an analysis of not just the nature of the right to equality but also the nature of the right to education. In light of these case studies, the relevant Indian precedents are considered.

DESEGREGATION AS SOCIAL JUSTICE

Perhaps, the foremost contribution to the conception of equality in schooling was made in the US Supreme Court judgment of *Brown v. Board of Education* in 1954.[62] The Supreme Court herein considered the racial segregation of public education under various State laws. The Federal District Courts in most of those States had taken the view that education facilities could be 'separate but equal' i.e., as long as the facilities provided to both races were substantially equal, segregated facilities were permitted. The Supreme Court, however, took into account the significance of the State's obligation to provide education i.e. it allowed a child to adjust to his environment, it was the foundation of good citizenship and the ability to participate in society, and it became the basis of future professional success.[63] Therefore, such an opportunity, "*where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*"

The Court then observed as follows:[64]

> *"We come then to the question presented: does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.*
>
> *[…]*
>
> *Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."*

On this basis, the Court concluded that: in the field of public education, the doctrine of "*separate but equal*" has no place. Separate educational

---

[62] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
[63] *Id.,* ¶ 493.
[64] *Id.,* ¶¶ 493-494.

facilities are inherently unequal.[65] To a large extent, these findings are an early precursor to the articulation of this concept in special education contexts.

On the other hand, the European Court of Human Rights in *D.H. &Ors. v. Czech Republic*[66] did not proceed on the basis of the inherent inequality of segregation and instead proceeded to examine the differences between special schools for Roma children and mainstream schools, including justifications of their inability to cope with the common education system. In fact, in that case, it was legislative changes relating to the abolition of *special schools* and recognition of inclusive education for children with disabilities that preceded and became the basis of racial inclusion within education.

A perverse reading of individual potential has allowed for denial of a common education to children who are unable to *adjust* to the common environment- a reversal of the burden of the education system to adjust itself.[67] The Supreme Court of Canada sought to justify this in terms of the difference dilemma i.e., in case of race and gender, the perceptions of difference were based on stereotype, whereas in case of disability, the differences were 'real' and therefore, in case of disability, segregation may be negative or positive for the achievement of equality- depending on the ability of the child to benefit from the common education system.[68]

MEANINGFUL ACCESS TO EDUCATION AND INDIVIDUAL POTENTIAL

The focus on individual goals is a judicial approach that refers to diversity itself as a goal of education, instead of making an assumption regarding common targets that each child is expected to reasonably achieve. Mere integration into the common education setup, however, doesn't ensure

---

[65] *Id.,* ¶ 494.

[66] D.H. & Ors. v. Czech Republic, Application No. 57325/00 (13 Nov 2007), ¶¶205-210.

[67] *See* Dupin v. France*,* Application No. 2282/2017, European Court of Human Rights (Press Release) (referring to the original judgment, which is in French); Stoain v. Romania*,* Application No. 289/2014 (25 Jun 2019). *See also* Enver Sahin v. Turkey*,* Application No. 23065/12 (30 Jan 2018) (permitting right to education on the basis of equal opportunity in case of physical disabilities and the need for barrier-free access).

[68] Eaton v. Brant County Board of Education*,* (1997) 1 SCR 241.

meaningful access to education. Courts have on this basis considered that facially neutral laws may have adverse impacts on particular communities.

The US Supreme Court has declined to adopt a substantive standard that assesses the ability of the system to empower children with disability to achieve their potential. The Court considered its first disability education case in *Board of Education, Hendrick Hudson v. Rowley*[69] to consider the scope of 'free appropriate public education' under the Education of Handicapped Children Act, 1975. The Act provides for an individualized education program and the Court found that the Act was limited to ensuring *meaningful* access to public education on appropriate terms.[70] However, the Court rejected the finding of the District Court that free appropriate public education means *"an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children*"[71] and found that the Act did not lay down any substantive education standards. Therefore, the provision of interpreters to Amy Rowley, a child with minimal residual hearing, wasn't considered necessary on the basis that the child fared above average in the class with a hearing aid, without any assessment of the individual needs and potential.[72] Nonetheless, the Court has upheld the need for measures that ensure access- such as medical support services that enable a child to attend school.[73]

By contrast, in *Moore v. British Columbia,* (2012) 3 SCR 360,[74] the Court rejected a *comparator* analysis and found that the failure to ensure necessary

---

[69] Board of Education, Hendrick Hudson v. Rowley, 458 US 176 (1982).
[70] *Id.,* ¶ 192-195.
[71] *Id.,* ¶¶ 185-186, 200.
[72] However, a concurring opinion (which considered that the school provided alternative forms of support that were suitable) and a dissenting opinion(that considered the school's support insufficient) both found that the Act provides for substantive equal opportunity commensurate with children without disabilities, rather than mere access. Endrew F v. Douglas County School District*,* (US SC Case No. 15-827) (2017) substantially upheld the majority's standard, even though it stated that *Rowley* cannot be considered a *de minimus standard.* However, it refused to accept the substantive equality standards adopted by the dissenting/concurring opinions.
[73] Cedar Rapids Community School v Garrett *F.,* 526 US 66 (1999).
[74] The budgetary implications of the policy as well as the scope of discrimination claims as systemic or individual are discussed in context of the legislation under which the claim is made, and beyond the scope of the present paper. It is significant that the Court here makes no attempt to distinguish Eaton v. Brant Board of Education*,* (1997) 1 SCR 241.

remedial instruction for Jeffrey Moore, a child with a severe learning disability (dyslexia) amounted to discrimination under Section 8 of the Human Rights Code of Canada. The case concerned the shutdown of a Diagnostic Centre providing remedial instruction and in the absence of any alternative arrangements, Jeffrey's parents obtained specialized private education The Court was considering the divergent findings of the fora below- the Human Rights Tribunal found a violation of Section 8, whereas the Supreme Court of British Columbia and the Court of Appeals thereafter did not agree with this finding. Therefore, the Canadian Supreme Court had the opportunity to consider whether the appellant faced discrimination in *accessing a service customarily available to the public* on the basis of a prohibited ground.[75] The Court determined that the service being considered here was education (rather than special education, which was just a means to education), and the State had an obligation to ensure education for all children, irrespective of levels of disability.[76] In doing so, the Court cited *Brown v. Board of Education* (*supra)* to hold that to consider special education a distinct class of service was an untenable 'separate but equal' approach, that perpetuates the existing marginalization sought to be remedied by the guarantees of the right to equality.[77] In light of this, the Court also refused to accept the argument that the *comparator* in the analysis of discrimination required the Court to compare the child with other similarly placed children i.e. a *comparator group* analysis was found to be unjustifiable. The Court also made reference to the goals of public education in British Columbia as being "*to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy*."[78] Therefore, even though the claim was on the basis of the right to equality, the goals of education, as set out in the Preamble to the relevant school legislation, become relevant to establish the parameters of the non-discrimination claim.

The Court found that there was *prima facie* discrimination as the service was inaccessible on the basis of a protected ground. The State could meet the non-discrimination requirement not by mere desegregation, but through

[75] Moore v. British Columbia*,* (2012) 3 SCR 360, ¶ 26.
[76] *Id.,* ¶29.
[77] *Id.,* ¶¶ 30-31.
[78] *Id.,* ¶¶ 37, 39.

steps to ensure that the access to education is *meaningful.*[79] This was because practices that are neutral on their face but have an unjustifiable adverse impact based on prohibited grounds will be subject to a requirement to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them.[80] Therefore, the denial of remediation, as well as the failure to ensure early detection of disability, is contrary to the right to equal access in terms of public education.[81]

ASSESSMENT OF PROGRESSIVE REALIZATION

Similarly, the European Committee of Social Rights has had occasion to examine systemic discrimination against children with intellectual disabilities. In *International Association Autism-Europe v. France,*[82] in considering education access for children with autism, the Committee observed that "*indirect discrimination arises as a result of failure to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.*"[83] The Committee considered evidence of the proportion of education access among children with autism in comparison with other children to find that insufficient measures were taken to ensure they have access to education.[84] A similar exercise was carried out by the Committee in *Mental Disability Advocacy Centre v. Bulgaria,*[85] which made reference to the substantive equality standards and considered data regarding access to education among children with a mental disability who were in institutional homes and didn't have access to the common educational system.[86] The Committee found discrimination in access to education on the basis of this data. Furthermore, while desegregation was subject to progressive realization, it found that the State failed to demonstrate that it met the

[79] *Id.* ¶¶ 33-36.
[80] *Id., ¶62, citing* Meiorin and British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), (1999) 3 SCR 868, ¶19.
[81] *Id.,* ¶¶ 40, 70.
[82] International Association Autism-Europe v. France, Collective Complaint No. 13/2002 (4 Nov 2003).
[83] *Id.,* ¶ 52.
[84] *Id.,* ¶ 54.
[85] Mental Disability Advocacy Centre v. Bulgaria*,* Collective Complaint No. 41/2007 (3 Jun 2008).
[86] *Id.,* ¶¶ 35-36, 50.

standards of such progressive realization i.e. reasonable timeframe, measurable progress and financing in line with maximum utilization of resources.[87] The Court also found that in the case of children who had access to mainstream schools, the State failed to ensure reasonable accommodation through variation in the curriculum and appropriate teacher training.[88]

INDIAN CONSTITUTIONAL COURTS

The equality clauses of the Indian Constitution, like in many other Constitutions, does not account specifically for discrimination persons with disability.[89] However, it is worth considering that developments in international human rights law have been read into the rights accorded by the Constitution.[90] Furthermore, the purpose of the protected classes under the constitutional obligation of non-discrimination in Article 15 was to correct historical disadvantages. This was considered by the Supreme Court in *Navtej Singh Johar v. Union of India* in giving a broad interpretation to the term *sex* within Article 15.[91] Malhotra J. noted that the common characteristic of the protected categories under Article 15 that they occurred as a result of immutable status at birth and therefore, discrimination on this ground affected the right of personal autonomy.[92] The opinion also found support for a reading of Article 15 in light with other such analogous categories.[93]

This interpretation finds favour implicitly in the decision of *Def Employees Welfare Association v. Union of India,*[94] wherein the Hon'ble Court considered that discrimination *inter se* persons with disabilities without any rational basis is violative of Article 14 of the Constitution of India as well as Article

---

[87] *Id.,* ¶¶ 39, 47.
[88] *Id.,* ¶¶ 43-45.
[89] *See generally* INDIA CONST. Art. 41.
[90] Justice KS Puttaswamy v. Union of India, (2017) 10 SCC 1, at 422, ¶ 148-154 (Chandrachud, J.); Kesavanada Bharti v. Union of India, (1973) 4 SCC 225, at 232, ¶ 148-152 (Sikri, C.J.); People's Union for Civil Liberties v. Union of India, (1997) 3 SCC 433, ¶ 10-13; Kapila Hingorani v. State of Bihar, (2003) 6 SCC 1, at 22, ¶ 41-60.
[91] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[92] *Id.,* ¶ 638.
[93] *Id., citing* Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal For All Minorities,* 2 NUJS LAW REVIEW, 419 (2009); Egan v. Canada, (1995) 2 SCR 513; Vriend v. Alberta, (1998) 1 SCR 493.
[94] Def Employees Welfare Association v. Union of India, (2014) 3 SCC 173.

21, considering the *inherent dignity* of *deaf and dumb persons*, which is harmed when the State marginalizes them. Thereafter, the applicability of Article 14 to persons with disabilities was emphatically upheld in *Jeeja Ghosh v. Union of India*[95] with reference to international human rights law, even prior to the enactment of the RPWD Act. The contours of the right to equality in this context were explained as follows:

> *"40. In international human rights law, equality is founded upon two complementary principles: non-discrimination and reasonable differentiation. The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of persons with disabilities, it leads to exclusion and denial of rights. Equality not only implies preventing discrimination (example, the protection of individuals against unfavourable treatment by introducing anti-discrimination laws), but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation. The move from the patronising and paternalistic approach to persons with disabilities represented by the medical model to viewing them as members of the community with equal rights has also been reflected in the evolution of international standards relating specifically to disabilities, as well as in moves to place the rights of persons with disabilities within the category of universal human rights."*

Therefore, the Court emphatically rejected the medical approach to disability and recognized *reasonable accommodation* as a facet of the fundamental right to equality.

Equally, in context of education, the Supreme Court has referred to the mandate of Article 21-A of the Constitution and found that the right to education is an *inalienable right* available to all children in *all places.*[96] Even prior to the enactment of Article 21A of the Constitution, the right to education was read into Article 21 by the Courts.[97] In considering the

---

[95] Jeeja Ghosh v. Union of India, (2016) 7 SCC 761.

[96] Avinash Mehrotra v. Union of India, (2009) 6 SCC 398, ¶30-37. *See* Ashok Kumar Thakur v. Union of India, (2006) 8 SCC 1.

[97] Unni Krishnan v. State of Andhra Pradesh, (1993) 1 SCC 645.

contour of this right, the Court in *BandhuMuktiMorcha v. Union of India*[98] recognized the goals of education as enabling the participation of children in civic life, promoting tolerance and stressed the significance of inclusion. The Court noted, in particular, the significance of ensuring education for children from educationally deprived sections i.e., the poor, weaker sections, Dalits, tribals and minorities. Furthermore, it noted that providing compulsory education to such children was essential to the "*stability of the democracy, social integration and to eliminate social tensions."* Therefore, the recognition of education as a site of social justice was recognized even prior to the enactment of Article 21A.

Furthermore, prior to the RPWD Act, the Delhi High Court in *Social Jurist v. Government of NCT of Delhi*[99] considered that, on the basis of the RTE Act, children with disabilities had the right to access all schools, whether aided or unaided by the Government. Therefore, considering Sections 12 and 19, as discussed in the previous section, the Court directed that all aided and unaided schools must make provisions for special educators and barrier-free access, irrespective of whether the school had already admitted a child with a disability. The Court acknowledged that the absence of such facilities creates a "vicious cycle", where children with disabilities don't seek admission due to the absence of such facilities, thereby rendering their right to education meaningless. [100] Thereafter, in *Pramod Arora v. Governor of Delhi,* the Court considered that the fact that "children with disabilities" faced even greater marginalization than other groups of children from disadvantaged groups and therefore, their inclusion within the education set up only created a higher burden of affirmative action by the Government, in view of the right to equality under Article 14 and the statutory scheme, to ensure meaningful inclusion within the education set up.[101] The Court therein proposed a reporting mechanism which allowed for admission for children with disabilities in line with information on aided and unaided schools which had the facilities to cater to them. However, it is clear that after the RPWD Act came into force, all schools are required to meet the conditions of reasonable accommodation. At the same time, Courts continue to refer to the provisions of the old Act in

[98] Bandhu Mukti Morcha v. Union of India, (1997) 10 SCC 549, ¶¶ 9-11.
[99] Social Jurist v. Government of NCT of Delhi, 2012 SCC OnLine Del 4651.
[100] *Id.,* ¶¶14-15.
[101] Pramod Arora v. Governor of NCT of Delhi, (2014) 5 HCC (Del) 215, ¶ 24-35.

interpreting the scope of education for children with disabilities even after the Act came into force.[102]

The scope of the obligations under the RPWD was thereafter considered by the Delhi High Court in *Syed Mehedi v. Government of Delhi,*[103] wherein the Court conducted, to an extent, the exercise referred to it Part III of this paper i.e. the recognition that the duty cast by Sections 16 and 17 of the RPWD is binding.

> *"**19 [....].** A statutory duty has been cast upon the respondents to ensure that all educational institutions, funded and recognised by them, provide inclusive education to children with special needs and raise the requisite infrastructure to serve that purpose. The respondents have, in fact, been directed to ensure that this process of inclusivity of disabled children begins by ensuring that they are admitted in educational institutions without discrimination, and are granted equal opportunities to partake in activities with other children. The respondents are also obligated to put in place and promote adequate measures in furtherance of the objective to attain inclusive education for children with special needs by inter alia facilitating research to improve the methodology adopted to teach them and monitoring their overall progress within the existing educational system."*

While the Court read the obligations of the RTE Act and RPWD Act together, the obligations under Section 16 of the RPWD Act require reading into the norms and standards under the RTE Act to ensure substantive compliance by all schools as per the legislative intent of the RPWD Act.

A rights-based judicial approach will require continuous monitoring of the right to inclusive education- the content of the right is likely to evolve in terms of developments in international human rights law and advancements in teacher training and education, and the existing prejudice of the ableist State is equally likely to consistently push back against such obligations. For instance, a pending appeal from an order of the Karnataka High Court,[104] which upheld a State Amendment that provided that education could be sought within the quota in unaided schools under

---

[102] Kamal Gupta v. State of Uttarakhand, 2018 SCC OnLine Utt 677 (Uttarakhand High Court).
[103] Syed Mehedi v. Government of NCT of Delhi, 2019 SCC OnLine Del 9015.
[104] Education Rights Trust v. Government of Karnataka, 2019 SCC Online Kar 567.

Section 12(1)(c) of the RTE Act only if there are no *neighbourhood schools*, requires immediate course correction in consideration of not just the inclusive aims of education laws but also the particular impact on categories other than economically weaker sections such as children with disabilities and other children with particular socio-cultural barriers to education. Their presence in unaided schools is premised on equity, social inclusion and as an antidote to their marginalization and invisibilization. It is also likely that online education due to the pandemic, which is not contemplated under the present statutory scheme governing primary education, will raise fresh concerns regarding access of children with disabilities, including access to the internet and availability of assistive technology.[105] The manner in which Courts respond to these challenges would determine the meaningful inclusion of children with disabilities.

CONCLUSION

Maintenance of segregated education settings is antithetical to the commitments of India in international human rights law as well as Constitutional law and statutory frameworks. While the quality of meaningful inclusion will be *progressively* realized through innovations in technology and teacher training, the rights to education in a *neighbourhood school* and the right to non-discrimination are immediately realizable. In adopting Article 21A, the State accepted the constitutional obligation to ensure primary education of *all children*. There is no basis for the exclusion of children with disabilities. As seen above, segregated education also deprives children with disabilities from access to their communities. The State has the obligation to provide access to the common education environment as well as to ensure *reasonable accommodation* of the common environment to ensure that access to education is meaningful. While the quality of *reasonable accommodation* improves, the child or their parents have the *choice* to opt for specialized education- a choice of school, in fact, being a right that remains available to children without disabilities.

[105] Good Governance Chambers v. Union of India, W.P. (c) 08/11/2020, a petition pending before the Supreme Court raises concerns relating to the right to education amidst India's digital divide and its disparate impact on children from disadvantaged groups and weaker §s, including children with disabilities.

Jurisprudence on the education of children with disabilities requires foremost a re-imagining of disability. The social model of disability views disability as a result of social and environmental barriers as a result of ability-centred environments rather than medical barriers. In this view, the interim judicial order in *Rajneesh Pandey* presuming that categories of disability are uneducable itself may be viewed as the source of the disability. Thereafter, once access to education in common environments is granted, the failure of the common education system to accommodate this diversity is also a function of its ableist bias and deepens disability. This is recognized in that children with disabilities in the RTE Act are classified along with other categories who face varied social, education or cultural barriers to education- such as children from Scheduled Castes to, in some cases, children of HIV+ parents.

At another level, it is clear that the acceptance of inclusive education has required an assessment of the goals of education itself. The education system, even when controlled or managed by private entities, provides a public function and is the first forum of public participation, enabling children for further public participation in the workplace, in their communities, and in civic and political life. These goals are implicit in the universalization of primary education as a right available to all children. Within the Indian education law framework, as seen above, there is a recognition that inclusion is one of the goals of education and therefore, inclusive education is intrinsic to the right to education of all children- with or without disabilities. Such an education system not only views children as carriers of rights and enables public participation, but also provides an education system that is individualized- judicial systems adjudicating on inclusive education have recognized that the goals of education are not a set of pre-requisites for all children to uniformly attain, rather it is to enable each child to make their public participation effective.

The consideration of *educability* is itself to be refuted as it shifts the burden to the child with a disability to prove that they 'deserve' the common education system. The history of the right to equality and education show that these arguments have patronizingly been applied to other forms of social injustice- Roma children in Europe, Black children in the United States, Scheduled Castes and Tribes and other categories of children- as listed above- who face systemic education exclusion. In folklore, this history can be traced as far back as to *Eklavya*- a marginalized student who

gets caught teaching himself archery by observing a teacher instruct a prince. The teacher in that story asks for the price of that education- Eklavya is asked to cut his thumb off, a sacrifice that preserves the caste privilege of the prince to be viewed as the world's best archer and the teacher's worldview of a homogenous classroom. The interim order in *Rajneesh Pandey* is the proverbial sacrifice of the thumb, presuming that children with disabilities are unable to demonstrate the ability to adjust to the classroom. Such an approach places the burden of adjustment on the marginalized and is antithetical to a rights-based approach to both disability and education. However, the persistence of such approaches is rooted equally in the invisibilization and marginalization of persons with disabilities. The social prejudice regarding disability is maintained by persons without a disability who occupy key positions in the judiciary[106] and have little interaction with persons with disability in the public space- a marginalization that directly emanates from *special schools* suggested by the order. Meaningful inclusion is therefore essential to enable persons with disabilities to participate in issues that impact them and counter presumptive decision-making.

[106] *See* V Surendra Mohan v. State of Tamil Nadu, 2019 SCC OnLine SC 53, wherein the Court upheld exclusion of persons with severe disability from holding the post of a Civil Judge.

QUEERS IN COMBAT: ANALYZING THE INDIAN ARMED FORCES' LGBT EXCLUSIONARY POLICY

ALLEN BENNY MATHEWS [1] & SAMARTH SINGH[2]

The Indian Armed Forces' exclusionary policy against homosexuals in light of the Navtej Singh Johar v. Union of India laments the existence of the Victorian stance of the Indian Armed Forces. The opposition to the recruitment of homosexuals in the Indian military is based on the belief that knowledge of homosexual peers would decrease the interpersonal bond among troops and go against the ethos of the military. What these opponents fear and suspect is that if those from the LGBT community are openly allowed to represent their country in arms, it may prove to be disconcerting for their heterosexual counterparts. This will cause diminished morale and hinder discipline, thereby destroying "troop cohesion" which is essential for effective soldiering. However, contrary to these claims, countries around the world have proactively passed policies to allow homosexuals to volunteer in the forces, policies from which India can gain insights and further look to adopt and enact its own. This article enumerates the hurdles cited by the military for their inclusion and balances them against the concerns of the Armed Forces. It also recommends for effective induction of the LGBTQ community amongst its rank and file, along with the economic, sociological and psychological benefits that supplement said induction. These are factors that have been largely overlooked by the Forces, which have continued to come down hard upon the idea. This paper conclusively seeks to set forth potential policy changes and certain implementations in such a setup.

Keywords: Armed Forces, Exclusionary Policy, LGBTQ Community, Policy Changes, Victorian Stance.

INTRODUCTION

* Cite it as: Mathews & Singh, *Queers in Combat: Analysing the Indian Armed Forces' LGBT Exclusionary Policy*, 5(1) COMPARATIVE CONST. L. ADMINISTRATIVE L. QUARTERLY (2021).

[1] Allen Benny Mathews is a student at School of Law, CHRIST (DEEMED TO BE UNIVERSITY), Bengaluru, India. The author may be reached at <allenbenny08@gmail.com>.

[2] Samarth Singh is a student at School of Law, CHRIST (DEEMED TO BE UNIVERSITY), Bengaluru, India. The author may be reached at <singhsamarth1601@gmail.com>.

The Indian LGBTQ** community witnessed its plights emerging victorious in its long-standing battle with the judicial system. A five-judge bench of the Supreme Court of India (SCI) in *Navtej Singh Johar v. Union of India*[3] unanimously struck down part of the draconian Section 377 of the Indian Penal Code (1860) and held it to be unconstitutional. The provision had earlier criminalized all '*carnal intercourse against the order of nature*'.[4] With the judgement, all consensual intercourse, even homosexual intercourse among adults has been decriminalised. Elements of the section relating to sexual intercourse with minors, non-consensual sexual activities such as rape, and bestiality, however, still remain intact. Exemplifying the prevalence of colonial hangovers in the statutory setup of the nation, J. Nariman analysed that historically, the rationale of *'Victorian Morality'* behind Section 377 has withered and that there was no reason for the continuance of the law either.[5]

Although the decision certainly opened new doors and avenues for the community, deep-rooted social taboos continue to pose challenges to their societal acceptance. One of these challenges lies with one of India's most imperative organizations, i.e., the armed forces. Shortly after the court's ruling, Gen. Bipin Rawat (then Chief of Army Staff) in a press conference made the Indian Army's stand clear, stating that cases of homosexuality and adultery are not acceptable in the force and will be dealt with under the Army Act.[6] The Act charges personnel (proven guilty) of the Army in cases of homosexuality and adultery to termination of service, and in some extreme cases even detention/imprisonment in the Armed Forces. It has been a steep climb for this colonial attitude carved out of the Victorian ideology to show signs of fading away.

** For the purposes of this paper, the terms 'LGBT' and 'Homosexuals' are used interchangeably.

[3] Navtej Singh Johar & Ors. v. Union of India & Ors., AIR 2018 SC 4321.

[4] PEN. CODE, 1860, §. 377.

[5] *Id.*

[6] The Army Act, 1950, No. 46, Acts of Parliament, 1950 (India).

Recent developments such as the permanent commissioning of women in the forces,[7] induction of women pilots as fighter pilots[8] and combat roles[9] have given an indication to the direction in which the forces are planning their future. However, the unfolding of these changes also shed light on how it has taken an excruciatingly long period for the Indian Armed Forces to keep up with the changing times of the 21st century.

Steering into the modern era, the Indian Armed Forces find themselves facing several institutional challenges like keeping the Armed Forces outside policy-making organizationally, monumental delays in equipment procurement, and lack of transparency and interference in senior military promotions, which are some of the glaring weaknesses that are working to the detriment of the capability and morale of the Armed Forces.[10] Among them also lies the induction of homosexuals into the military which continues to be a thorn in the side of India's military leadership, who have over the years rejected the idea of their inclusion into the Armed Forces. Laterally, some of the questions raised and policies adopted in the process of integrating women have led to wider acceptance of women in the workplace as compared to a few decades ago.[11]Such advancements have also catalysed major changes in how the Indian society views and interacts with the military as well. The same may be expected in relation to the induction of homosexuals as well.

If not addressed properly and at the earliest, these changes could turn out to be detrimental to both the military and the nation it serves. In any case, the integration of homosexuals in the Indian Armed Forces is an issue which is bound to create societal friction. Thus, in this article, the authors

---

[7] *Govt issues order for permanent commission of women officers in Army*, THE INDIAN EXPRESS, (July 23, 2020) https://indianexpress.com/article/india/govt-issues-order-for-permanent-commission-of-women-officers-in-army-6519988/.

[8] Suresh Krishnamoorthy, *First batch of three female fighter pilots commissioned*, THE HINDU (Oct. 18, 2016) https://www.thehindu.com/news/national/First-batch-of-three-female-fighter-pilots-commissioned/article14429868.ece.

[9] *Role of women officers in Indian Armed Forces*, THE HINDUSTAN TIMES (Feb. 18, 2020) https://www.hindustantimes.com/india-news/women-officers-in-combat-and-command-roles-ht-explainer/story-3xloWIhE5E98WikO5vij4H.html.

[10] B.D. Jayal, *Institutional Challenges Confronting the Indian Armed Forces: The Moral and Ethical Dimension*, 7(2) J., DEF. STUD. 69 (2013).

[11] Anne Witz, *Patriarchy and Professions: The Gendered Politics of Occupational Closure*, 24 (4) SOC.,675, (1990).

shall examine and propose mechanisms to effectively induct homosexuals into India's armed forces. In this effort, first, the authors discuss the history of homosexuality and their exclusion in the Indian military and the fears expressed over them in the pre-independence era that have continued to materialize even in recent times. Second, the archival underpinnings and the evolution of the inclusivity of LGBT personnel in Armed Forces around the globe in light of the Indian context shall also form a segment of it. The comparative analysis of international armed forces in the Indian context is dealt with in the next section. The paper also seeks to highlight lessons that India may be able to derive from prevailing military regimes and recommendations that may be adopted to effectively induct homosexuals into the military by analysing the supposed military and psychological concerns surrounding homosexuality. The article conclusively proposes recommendations for the integration of homosexuals in the Indian Armed Forces.

HISTORICAL BACKGROUND

19TH CENTURY EUROPE

In common parlance, the word 'homosexuality' is commonly used and has become part of everyday vocabulary. Nevertheless, it was only in the late 19th century Europe that the word came into existence when discussions within scholarly circles on the various conceptions of sex and sexuality became important.[12] Michel Foucault, the historian and philosopher, proposed that homosexual and heterosexual roles did not emerge until then. The word was confined to define only behaviours before that time and not identification.[13] In 1870, Foucault cited Carl Westphal's influential essay entitled 'Contrary Sexual Feeling'[14] as the 'birthdate'[15] of the categorization of sexual orientation, where the word has been used to describe "morbid sexual attraction between same-sex individuals."

Colonial laws that regarded even casual sexual intercourse between individuals of the opposite sexes; not intended for conception as 'immoral'

[12] VERN L. BULLOUGH AND JAMES BRUNDAGE, HANDBOOK OF MEDIEVAL SEXUALITY 1 (1996).
[13] MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 1 (1992).
[14] Carl Westphal, *Contrary Sexual Feeling*, 2 ARCHIV FÜR PSYCHIATRIE UND NERVENKRANKEITEN (1870).
[15] Michel, *supra* note 13.

and 'unnatural', surely could not fathom sexual intercourse between individuals of the same sexes and the reality of homosexuality.[16]

Via imperial force, the term 'homosexuality' and the laws banning 'unnatural' intercourse were enforced in the Commonwealth countries from the 1860s.[17] Though they exercised a strong impact on the behaviours that followed, they were neither universal nor timeless. It must be borne in mind that the creation of minds was profoundly conditioned by the Christian Bible's stance which defined sex as an equivalent to sin.[18]

ANCIENT INDIA

Among the scenes of epics and legends in Hindu temples of eastern and southern India such as Puri[19] and Tanjore,[20] one inevitably finds eroticism which is now deemed immoral by modern law and indecent by its society.[21] There is a wide range of wall carvings: from dignified couples to orgies depicting soldiers, wise men, and courtesans exchanging provocative gazes. Occasionally, hidden in some niches like those in Khajuraho, one often sees photographs of either woman erotically embracing other women, or men exposing their genitals to each other, the former being more common, indicating a tilt in favour of the male voyeur.[22] These images should not easily be discarded as the perverted fantasies of an artist or his patron, regardless of the spiritual and religious significance attached to these shrines. For these images, various explanations have been given, from the apologetic to the ridiculous. Some believe that there is a divine ritualistic design hidden in such images; the individual's personality may either be disconnected from reality by the beauty of the images or illustrated by

---

[16] Enze Han & Joseph O'Mahoney, *British Colonialism and the Criminalization of Homosexuality*, 27 CAM. REV. INTL. AF. 268 (2014).

[17] Enze Han & Joseph O'Mahoney, *How Britain's Colonial Legacy Still Affects LGBT Politics Around the World*, THE CONVERSATION (May 15, 2018), https://theconversation.com/how-britains-colonial-legacy-still-affects-lgbt-politics-around-the-world-95799.

[18] 1 COR. 7:2, NIV, HOLY BIBLE (2013).

[19] SURYANARAYAN DAS, LORD JAGANNATH, 13 (2010).

[20] S.R. BALASUBRAHMANYAM, MIDDLE CHOLA TEMPLES: RAJARAJA I TO KULOTTUNGA I (A.D. 985–1070) 241 (1975).

[21] MICHAEL RABE, SECRET YANTRAS AND EROTIC DISPLAY FOR HINDU TEMPLES 435-446, (2000).

[22] GILLES BEGUIN, KHAJURAHO: INDIAN TEMPLES AND SENSUOUS SCULPTURES (2017).

interpreting their granularity.[23] Such images are found by one school of thought to either represent practises or rites of fertility. Another suggests that these were consequences of psychopathic minds fascinated with sex in a warped time in Indian culture.[24]

COLONIAL MILITARY IN INDIA AND HOMOSEXUALITY

Tracing the history behind homosexuality in India in the context of military law analyses the unfolding of the current setup of the Indian Armed Forces in a vacuum first, in relation to its attitude towards offences of an 'unnatural' kind which find ground in their colonial background. Subsequently, such an analysis establishes the operation of *'Victorian Morality'*[25] espousing sexual restraint and a strict social code of conduct, prior to finally moving towards the judicial and statutory response towards homosexuality in a general sense of the term in India.

The British Raj, once the crown jewel of the British Empire, on 15th of August, 1947 ceased to exist as a British colony and a democratic India was born. However, it was not until February of 1948 that the final departures took place.[26] It was India's last viceroy Lord Mountbatten that had desired to transfer power from the British Government to the Indian Government in an efficient manner. The British Indian Army, the Royal Indian Air Force and the Royal Indian Navy were divided between India and Pakistan. In the weeks leading up to independence, the responsibility for maintaining law and order was handed over to the respective nation's Armed Forces.[27] The modern Indian Armed Forces have their colonial lineage in most forms and shapes, still intact and rigidified, often observed in their regimentation, recruitment and the structural aspects of the current day. Given this colonial background of the forces, it becomes necessary to observe the values imbibed within the erstwhile British military forces in matters of sexuality, masculinity and moral uprightness.

---

[23] RUTH VANITA & SALEEM KIDWAI, SAME-SEX LOVE IN INDIA: READING FROM LITERATURE AND HISTORY (2001).

[24] 14 MICHAEL MEISTER, HINDU TEMPLE, IN THE ENCYCLOPEDIA OF RELIGION, 370 (1987).

[25] SEAN BRADY, MASCULINITY AND MALE HOMOSEXUALITY IN BRITAIN, ed.1 (2005).

[26] *The British Withdrawal from India*, 93 J. ROYAL UNITED SER. INSTITUTION, 355 (1948).

[27] RICHARD HEAD AND TONY MCCLENAGHAN, THE ARMIES OF THE INDIAN PRINCELY STATES (1998)

Not only were the British armed powers in India bisected by caste, but they were split into the three British Presidencies of Bengal, Madras and Bombay until 1858.[28] In 1903, the official Indian Army being raised alongside these presidency armies incorporated the latter.[29] Hence, to assume that these forces were homogenous would be incorrect. The military law documents, catechisms, and training manuals that prescribed the army's understanding of the moral effects of the sexual acts of its soldiers is one degree of associated proof of how the Army viewed such activities. However, most court-martial documents have been lost, with certain instances, such as sodomy trials, never even reported considering the severity of the crime. Sodomy being declared to be an 'offence of a still greater malignity – the infamous 'crime against nature', an 1827 surviving case, one of the rare accounts of documented evidence, illustrates the case of Lt. McKenzie of the 2nd Foot Regiment who faced a court-martial, his crime being "too familiar" with a number of enlisted men and spending too much time with them and even sometimes allowing them to spend the night in his quarters. None of the charges specifically accused him of sodomy; however, it was certainly implied.[30] After the charges were dismissed, the commander-in-chief, Lt. General Lord Combermere castigated the court for handling it in such a clumsy manner and failing to collect enough evidence.[31]

Another hindrance was seen in the interpretation of these codes and their application. The charge of 'disgraceful conduct' could also imply 'confirmed vice and all unnatural propensities'.[32] Brigadier John Jacob cautioned that they would lose 'half of the manhood of the Anglo-Saxon character' unless officers cultivated their 'Englishness' and stood firm against the wealth and sensuality of the East.[33] It would have meant accepting the presence of homosexuality within its ranks, which proved counter to one's Anglo-Saxon British expectations, to register and deal with cases of sodomy inside its powers. Masculinity was later taken up by Indians as one of the deciding factors guiding recruiting. For instance,

---

[28] GAUTAM DAS, UNLEARNED LESSONS: AN APPRAISAL OF INDIA'S MILITARY MISHAPS 87 (2007).
[29] 4 IMPERIAL GAZETTEER OF INDIA, vol. IV, 1908 (India).
[30] WILLIAM HOUGH, PRECEDENTS IN MILITARY LAW, 223 (1855).
[31] Naval and Military Magazine, II, 294-6 (1827).
[32] Hough, *supra* note 30.
[33] *Id.*

because the residents of Bengal were automatically rejected as effeminate, the word 'Bengal Army' of the time was in itself a misnomer and most of the recruits were drawn from the 'martial races' of north-central India.[34] Homosexual partnerships were not accepted by the army, which would challenge the 'masculinity' attributed to these powers and thus to the military, like the Navy and later the Air Force. Court-martial was not publicly released for trials of sexual offences such as sodomy along with bestiality and rulings were not given out in general orders. Despite the popularity of lashing those who were accused of sodomy, those accused of homosexuality were often taken to countries like Australia.[35] Transportation simply got rid of the offenders which suited the army's interests which did not intend to reform men guilty of unnatural offences neither did it want to exemplify, let alone tolerate such a form of sexual activity.[36] The army, thus, did not repress homosexuality as much as it isolated and removed homosexuals themselves. Such situations in the colonial era shaped the moral fabric of its forces and set up the fault lines which dictated how homosexuality was dealt with along the rank and file of the forces. Amongst others, concepts such as regimentation and recruitment of infantry units based on the theory of martial races are still loosely observed within the present-day Indian Army, although such factors are not prohibitory or restrictive on a potential recruit.

HOMOSEXUALITY IN THE MODERN ERA

Although it is hard to determine an exact figure, at least 71 nations across the world still criminalize consensual homosexual activity.[37] However, nearly none of the laws doing so, address "homosexuality" or "homosexual acts"; the language varies within legal systems and is often hard to read. Egypt, for example, is often excluded from lists because its legislation[38] punishes the "custom of debauchery (fujur)", while domestic jurisprudence

---

[34] SEEMA ALAVI, THE SEPOYS AND THE COMPANY: TRADITION AND TRANSITION IN NORTH INDIA 1770–1830 (1995); DOUGLAS M. PEERS, BETWEEN MARS AND MAMMON, COLONIAL ARMIES AND THE GARRISON STATE IN INDIA, 1819-1835, 87-90 (Tauris Publishers (1995).

[35] WILLIAM HOUGH, MILITARY LAW AUTHORITIES, (1839).

[36] Douglas Peers, *Privates off Parade: Regimenting Sexuality in the Nineteenth-Century Indian Empire*, 20 (4) INTL. HIS. REV. (2010).

[37] LUCAS RAMON MENDOS, STATE-SPONSORED HOMOPHOBIA 527 ed. 13th (2019).

[38] Law No. 10 of 1961, *On the Combating of Prostitution*, 1961 (Egypt).

has clarified since the 1970s that this term applies to consensual sex between men.

As of late, discussions have developed around whether and how militaries ought to permit, recognize, and induct homosexuals into their forces. These discussions to a great extent occur in social orders that connect great significance to human rights. Cultural perspectives towards the LGBT community are evolving quickly, particularly in liberal democracies. Pride parades consistently pull in a great many members, including many from the military, who advocate more prominent acknowledgement of homosexuality.

The induction of homosexuals in the Armed Forces remains in public discourse around the globe. A majority of the countries that induct the LGBT in their militaries belong to the first world. Drawing attention to the Indian standpoint, the legal status of homosexuality in the Indian Armed Forces under Sections 45 and 46 of the Army Act[39] follows the model set by Sec. 377 of IPC.[40]

COMPARATIVE ANALYSIS OF INTERNATIONAL ARMED FORCES IN THE INDIAN CONTEXT

The Netherlands became the first country to officially ban discrimination against homosexuals in the military.[41] Given the voluminous differences, structural, social, economic, political, demographic et cetera, the comparison between India and Netherlands would be far-fetched. The aforementioned factors must be considered to effectively analyse the stand of the Armed Forces of India in the quantum of LGBT tolerance.

On one instance, a comparison may be drawn out by way of looking at the structural makeup of the forces of different nations, i.e., the foundation of these Armed Forces. For the purposes of this paper, commonwealth nations have been taken as an appropriate area of comparison, given the element of British legacy preceding them, which have established themselves as leaders on the combat front internationally, in terms of involvement and participation, defence

[39] The Army Act, 1950, No. 46, Acts of Parliament, 1950 (India).
[40] *Supra* note 4.
[41] KARIN DE ANGELIS, INTERNATIONAL HANDBOOK ON THE DEMOGRAPHY OF SEXUALITY 363-381 (2013).

systems and armoury, or combat efficiency and readiness. How the sociological factors precede the working of a nation's forces, such as the populace's degree of acceptance towards homosexuality, also have to be given due weightage to correctly place India at an appropriate footing thereof. Countries such as Israel and South Africa may be taken up as examples which have seen their fair share of diverging interests, beliefs and hindrances in administration due to the societal makeup of their population as well.

THE UNITED KINGDOM

Despite its Victorian roots, the British military since the 2000s openly recruits homosexual men and women and all the three services have dedicated teams deployed to invite recruitment from the LGBT community as well.[42] The policy was implemented at the lower levels of its rank and file first and subsequently support at the senior level has also seen growth. In 2008, General Sir Richard of the British Army, while addressing a conference on homosexuality, said that respect for personnel belonging to the LGBT community, at both the cadres of officers and soldiers, was now a "command responsibility" and was vital for all "operational effectiveness".[43]

The United Kingdom ("**U.K.**") followed a discriminatory policy towards the inclusion of homosexual personnel in its Armed Forces which manifested itself in military practice or regulation. A similar scenario had been prevalent in other European nations which were often backed by legislation prior to the European Court of Human Rights' judgement in *Lustig-Prean & Beckett v. the United Kingdom,*[44] which ruled in opposition to the British policy of barring homosexual personnel from service and declared that such a practice is violative of the right to private life and subsequently the right to equality, which are protected as fundamental rights under the European Convention of Human Rights. The Court also opined that the evidence provided by the government fell short in justifying

---

[42] *UK Gays Win Military Legal Battle*, BBC NEWS (SEPT. 27, 1999), http://news.bbc.co.uk/2/hi/uk_news/458714.stm.

[43] Sean Rayment, *Army's Top General Makes History by Addressing Conference on Homosexuality*, THE TELEGRAPH (2008), https://www.telegraph.co.uk/news/newstopics/onthefrontline/3179261/Armys-top-general-makes-history-by-addressing-conference-on-homosexuality.html.

[44] Lustig-Prean & Beckett v. The United Kingdom, (2000) 29 ECHR 548.

an assessment that participation of homosexuals in the forces would damage morale and fighting power.

The position of the aforementioned case stood as the causal link which triggered a domino effect causing the European countries to formulate new inclusive policies which lifted the concerned ban on homosexuals serving in the forces. A notable factor that has to be taken into consideration is that the Court was not oblivious of the difficulties that might follow, since such obstacles are commonly anticipated as a result of any alteration to long-standing policies. Simultaneously negative attitude and stereotypes cannot be considered sufficient justification for discriminatory policies to persist. The U.K. government introduced the Armed Forces Code of Social Conduct in 2000, to effectively regulate personal behaviour of the personnel and to provide diverse and inclusive guidance. Subsequent revisions[45] to the guidelines were brought forward in order to comply with the Equality Act of 2010[46].

The prima facie societal aspects in various commonwealth nations in other parts of the world are different than those in the west to an exponential degree. A point of relevance comes into play when it is established that legislatively and judicially, some factors did play into the genesis of the current systems that these nations follow, based on the fact that they were under the umbrella of the same rule, i.e., the British Crown. In India, the current legal system to an enormous extent relies on the statutes and provisions that were set up by the British in order to govern Indians. These pieces of legislation have found their way into the present-day Indian conglomerates of society, law and justice, despite being synthesized by forces foreign to that of Indian interests. How these commonwealth nations currently function, especially in terms of their attitudes towards sexuality in their Armed Forces, is the imperative link while analysing the subject matter.

AUSTRALIA

The Australian Defence Forces ("**ADF**"), prior to 1992, followed both formal and informal policies which discouraged homosexuals from openly serving in the forces. In 1992, the Defence Forces issued directives which

[45] 1 MINISTRY OF DEFENCE, JSP 887 Diversity Inclusion & Social Conduct., Pt.1 (V.1 Nov 14).

[46] The Equality Act 2010, c. 15, (U.K.).

essentially lifted the ban thereof, via enumerating the appropriate policies of sexual conduct which were to be applied uniformly to all interactions, regardless of gender or orientation.[47] Such a shift from the status quo was met by untamed opposition from the Australian Defence chiefs as well as other organizations who were of the view that induction of homosexuals openly would compromise recruitment, troop cohesion and combat efficiency while encouraging predatory behaviour and the escalation in the number of AIDS cases.[48] The reaction to the changed policy was similar to that of the Indian scenario in the present day. However, in the months that followed, the issue faded from the discourse.

The ADF now sees the participation of homosexuals a "non-issue". Isolated incidents of harassment and discrimination, nonetheless, undoubtedly persist, with a few service branches being less dynamic in their policies than others. These instances, from the standpoint of these soldiers, signify the failure of the forces to extend equitable benefits, standing as a partially-fulfilled mission.[49] Nonetheless, the debate over sexuality in the military has indeed seen a shift from the question of whether the sexuality of a soldier undermines his/her military performance and sense of duty towards his/her nation along with being a witness to the success such inclusion.

SOUTH AFRICA

The events in South Africa in terms of homosexual tolerance within its forces are of particular interest to India on two levels: First, South Africa, like India is a commonwealth nation where the legislative makeup of South Africa finds its relevance, and second, the sociological circumstances have also seen their fair share of turbulence and obstacles in the form of the practice of apartheid, economic disparity, institutionalized discrimination and policy concerns, much like India which has also been burdened with

[47] Ross Peak, *Uproar as Govt Ends Forces' Ban on Gays*, THE CANBERRA TIMES, Nov. 24, 1992, at 1.

[48] Kenny Agostino, *Masculinity, Sexuality, and Life on Board Her Majesty's Royal Australian Ships*, 2(1) JOU. INT. GEN. STU., (1997).

[49] Hough Smith, *The Dynamics of Social Change and the Australian Defence Force*, 21(4) ARMD. FOR. SOC., (1995).

its own socio-economic problems and the complexities of diversified interests, social, religious, economic and political alike.[50]

Moreover, one key region where the analysis gets further peculiar is the 'Aversion Project'. The Aversion Project was essentially a medical torture program in the country during the apartheid wherein gay conscripts were put as witnesses and victims to the suffering of constant humiliation, aversion shock therapy, chemical-induced castration, hormonal and drug treatments and other abusive manoeuvres to treat their 'deviant' preferences and behaviourism.[51] These series of events took place between 1971 and 1989, which institutionalized policies enforcing the persecution of its homosexuals in the forces, in a nation which now ranks 20th in the 2014 LGBT Military Index report[52] by The Hague Centre for Strategic Studies ("**HCSS**") in 2014, this factor exemplifies what a nation may be able to achieve through policy reforms regardless of the established precedent.

Amongst the numerous research projects undertaken by Aaron Belkin, his take on the South African chapter of relations between the LGBT community and the military in collaboration with Morgot Canday justly promulgates the current attitudes of inclusivity and tolerance.[53] During the apartheid period, the South African forces instituted a binary policy on homosexuality by prohibiting it amongst members of the permanent force while customarily tolerating it in the conscript force in order to avert malingering. However, this official tolerance was coupled with aversion shock therapy and chemically-induced castration, amongst other human rights abuses against its homosexual personnel which has only lately come to light in present-day South Africa. Having roots in the practice of conscription, the military feared that a total ban might end up catering to age-qualified, white South African males as an easy path to avoid conscription. Hence, a two-fold policy on homosexuality was promulgated

---

[50] DAVID BREWSTER, INDIA'S OCEAN: THE STORY OF INDIA'S BID FOR REGIONAL LEADERSHIP, 90 (Routledge, 2014).

[51] MARK GEVISSER AND EDWIN CAMERON, DEFIANT DESIRE: GAY AND LESBIAN LIVES IN SOUTH AFRICA (1995).

[52] JOSHUA POLCHAR ET AL., LGBT MILITARY PERSONNEL: A STRATEGIC VISION FOR INCLUSION, 55, 58 (The Hague Centre for Strategic Studies , 2014).

[53] Aaron Belkin and Margot Canaday, *Assessing the Integration of Gays and Lesbians Into the South African National Defence Force, Scientia Militaria*, 38(2) SOU. AFR. JOU. MIL. STU. (2010).

not long after conscription was officially adopted in the 1960s. Although such extreme 'treatments' may not have been a systemic policy at the time, the possibilities of them taking place in certain scenarios certainly exemplifies the attitude towards homosexuals at the time.[54]

Homosexual conscripts were deemed to have a 'behavioural disorder' and were not furnished to posts of leadership and neither were they entrusted with sensitive information. In the permanent force, homosexuality was strictly forbidden and applicants to the force were constantly questioned about homosexuality. If their responses supposedly indicated that they might be closeted or open homosexuals, their recruitment was nullified. Personnel who indulged in homosexuality were punished, in some cases, with a court-martial whereas those who had not committed said acts but possessed homosexual inclinations were sent for rehabilitation.[55] Homosexual conscripts were victimized to somewhat of a "hidden terrorism" which permeated across every stratum of the military environment.[56] Studies on the Aversion Project[57] note several conscript accounts which follow that during basic training, humiliation and mortification of gays was extremely common. They were addressed with humiliating monikers and were often beaten up by the residue of the unit or platoon "to build cohesion". There were also reported incidents of sexual harassment and assault, amongst other excesses. In the same report, one account follows:

"At Maritzkop camp, an officer forced servicemen to drop their trousers and commit 'indecent sexual acts' with each other". Another captain suspected of homosexuality was "stripped of his medals with a bayonet, and his troops had to trample on them". Homosexual conscripts were sent to psychiatric wards, wherein medical practitioners would perform aversion therapy on 'patients', who, except for

[54] *Id.*

[55] Lindy Heinecken, *The Silent Right: Homosexuality and the Military*, 8(5) AFR. SEC. REV. 43, 43–55 (1999).

[56] Mark, *supra* note 51.

[57] MIKKI VAN ZYL ET AL., THE AVERSION PROJECT: HUMAN RIGHTS ABUSES OF GAYS AND LESBIANS IN THE SADF BY HEALTH WORKERS DURING THE APARTHEID ERA (1999).

the fact that they were homosexual, were otherwise, healthy. According to the Aversion Project report[58]:

"Electrodes were strapped to the arms of the subject, and wires leading from these were in turn connected to a machine operated by a dial calibrated from one to ten. The subject was then shown black and white pictures of a naked man and encouraged to fantasize. The increase in the current would cause the muscles in the forearm to contract – an intensely painful sensation. When the subject was either screaming with pain or verbally requested that the dial be turned off, the current would be stopped and a colour Playboy centrefold substituted for the previous pictures. People subjected to this therapy experienced long periods of disorientation afterwards".

In 1996, the nation adopted the new Constitution which contained an equality clause. After effecting the Constitution, both the state and the unofficial stakeholders attempted to align different state arrangements, policies and laws in accordance with the Constitution. To bring the governing principles into action, the Ministry of Defence initiated a defence assessment process in which public inputs were taken into account on all matters of its operating procedures and policies. Despite some initial concerns, the Department of Defence adhered to the factor that the integration of homosexuals was now an accomplished and established fact. Thus, such an alteration here was pitted from within the Department of Defence, taking inspiration from the provisions of the Constitution.[59] The policy on sexual orientation was thus included as part of the Department Of Defence's "Policy on Equal Opportunity and Affirmative Action", which was initially promulgated in 1998, then reviewed and readopted in 2002.[60]

It stands as an example of how far South Africa has reached by practically illustrating what proper policy reforms and correct implementation work for the sociological betterment of sections which are marginalized and discriminated against. In a precedential setting of severe prejudice, ill-treatment, humiliation, non-acceptance and downright torture, South Africa has successfully emerged as a leader in LGBT rights and socio-economic equity. South Africa has epitomized policy reforms which precede sociological standings in order to pave way for equality, regardless

[58] *Id.*
[59] Aaron, *supra* note 53.
[60] Lindy, *supra* note 55.

of factors historically prejudiced against. India can certainly draw some inspirations from the case of South Africa insofar as it concerns policy change at the national level which only recently decriminalized carnal homosexual intercourse and correctly implements the same attitude within its Armed Forces' functioning to truly follow the essence of the reform.

ISRAEL

Israel is one such nation which is similar to India in combat experience and tactical strategy, in the context that both are surrounded by strategic hostile enemies on its borders and have seen their fair share of skirmishes and war-time participation with these enemies and have emerged victorious in a majority of them while at it. This has contributed to the accumulation of near unparalleled combat experience. Societal aspects in both the nations in terms of homosexuality also exhibit general notions of non-acceptance and intolerance. Israel only recognizes same-sex marriages which are solemnized abroad and only 40% of its population believe that homosexuality should be accepted in society.[61] However, Israel, despite its population not particularly being favourable towards homosexuality, ranks 9th in the HCSS LGBT Military Index. The report categorizes this as a case where military inclusion leads to societal acceptance, where a few Armed Forces score relatively higher on the index regardless of the fact that negative civilian attitudes toward the LGBT community persist in the commonplace.[62] In these countries, the report suggested that the Armed Forces could be ones to set the pace for a rather greater LGBT inclusion in the societal makeup as a whole.

Since the inception of the Israeli Defence Forces ("**IDF**") in 1948, it has engaged in five major wars, conducted several operations against hostile neighbours and the people of Israel seek reliance on a strong military makeup to secure their safety as a nation and as citizens, thus, the forces have become pioneers to their mission of the reconditioning of their Jewish homeland. Military service is compulsory for Jewish males and females at the age of 18. The Israeli military has never fully or formally prohibited homosexuals from entering into service, due to the manpower needs of it

---

[61] Special Eurobarometer, *Discrimination in the EU in 2012*, 393 TNS OPINION & SOCIAL 41–42, 60–61 (2012); ANDREW KOHUT, THE GLOBAL DIVIDE ON HOMOSEXUALITY: GREATER ACCEPTANCE IN MORE SECULAR AND AFFLUENT COUNTRIES (2013).

[62] Joshua, *supra* note 52.

being a nation which is constantly at war. Thus, the IDF has comprehensively trailed a rather inclusive conscription policy. Nonetheless, prior to 1980, recognized homosexuals were generally laid off. In 1983, however, the forces in a maiden enumerated regulations related to homosexuality in the form of the regulation 'Service of Homosexuals in the IDF[63] which was notified by standing order. It asserted that solely due to their sexual orientation, homosexuals shall not be constricted in their official positions or discharged from their services in the forces. However, it did put up certain constraints on homosexuals and prohibited those from the LGBT community from serving in highly classified and intelligence positions and mandated officers to refer homosexuals for a mental evaluation. This evaluation determined if these personnel were a security lapse and if they possessed the required "mental strength and maturity" for an effective tenure. Given the consequences of the assessment thereof, the Field Security Department could choose to sit idle, extinguish the soldier's service, limit their stationing, or lead a broad security examination. The IDF did not regulate any guidelines that were explicit to homosexual conduct as standard military procedure precluded all sexual relations, regardless of orientation, on army installations just as sexual relations among officials and their subordinates.[64]

In 1993, Professor Uzi Even, the chairman of the chemistry department in Tel Aviv University, bore witness that he had been divested of his rank as an officer during the 1980s due to the sole factor of his sexual orientation. This created a huge uproar in addressing the issues related to the LGBT community in Israel. The military panel in this regard drafted revisions to the 1983 order that authoritatively perceived that homosexuals are qualified for service in the military as are others and announced that sexual minorities would be adjudged on their fitness for service in accordance with the standards and criteria in place for all contenders for the services.

Currently, there has been no published evidence that enumerates data to support that the said amendments and participation of homosexuals in the IDF has compromised Israeli military performance and functioning,

---

[63] Service of Homosexuals in the IDF, Manpower Division Standing Order K-31-11-01.
[64] Clyde Haberman, *Homosexuals in Israeli Army: No Official Discrimination, But Keep It Secret*, N.Y. TIMES, (Feb. 21, 1993), https://www.nytimes.com/1993/02/21/world/homosexuals-in-israeli-army-no-official-discrimination-but-keep-it-secret.html.

cohesion, readiness or troop morale. The IDF does not hold any special orientation capsules related to sexuality issues either. To the contrary, the Israeli military readily conducts instruction procedures on sexual abuse of women and harassment of new immigrants.[65]

The extremely diversified Indian scenario has only recently made amends to grant homosexuals what is rightfully theirs, i.e., a dignified life of individuality without prejudice. There are instances wherein the law and its implementation shape societal morality, and others, where it is the law which is moulded to suit the confines of societal morality. This is similar to the categorization in HCSS's report where inclusion may either trail, lead or match societal acceptance. In India, it may be argued that the law and judiciary are attempting to bring a shift in the status quo and lead the way to societal inclusivity and a commonplace of non-discrimination, much like Israel. It is now up to the decision of the forces and the Ministries concerned thereof, to lead the way such that it ensures justice to these forces, and at the same time, to the sociological factors that surround such decisions.

INDUCTION OF HOMOSEXUALS IN THE INDIAN ARMED FORCES: LEGISLATIVE, MILITARY, & PSYCHOLOGICAL CONCERNS

The HCSS's report on LGBT Military Personnel[66] derives considerably high degrees of correlation between a nation's LGBT Military Index and its ranking the Human Development and Democracy indices (0.69 & 0.71 respectively). Analysing such an instance evidently supports the rationale that any nation which is seeking to improve its human development and aspires to steer towards democracy, cannot let such correlations lose persuasive value. This may be a separate or distinct area of research as well, especially in the context of India being the world's largest democracy.

Military policy dealing with homosexual service members has come under increasing public scrutiny after the Supreme Court delivered its 377 ruling.[67] Since the landmark judgement, no change in policy has come about in the Armed Forces relating to their induction in service. If the

---

[65] Stacy Feldman, *The Gender Battlefield*, THE JER. REP. (2000).
[66] Joshua, *supra* note 52.
[67] *Supra,* note 3.

matter ever reaches the Supreme Court, the Ministry of Defence ("**MoD**") and the Central Government can argue that allowing homosexuals into the army is a matter of policy. It is based on an evaluation of the inherent dangers involved in serving in the Armed Forces. Adverse conditions of service include an absence of privacy in the field and insurgency-laden areas along with the fact that these provisions have the protection of Article 33 of the Constitution.

All the laws governing the three arms of the Indian Armed Forces are worded in the same manner through euphemisms rather than literal construction, bar homosexuality, ruling it a punishable offence. Under the Army Act, 1950[68], the following provisions essentially deal with cases of homosexual deviations within the rank and file of the Indian Army[69]:

> ***"Section 45: Unbecoming conduct.***
>
> *Any officer, junior commissioned officer or warrant officer who behaves in a manner* ***unbecoming his position and the character expected of him*** *shall, on conviction by court-martial, if he is an officer, be liable to be cashiered or to suffer such less punishment as is in this Act mentioned; and, if he is a junior commissioned officer or a warrant officer, be* ***liable to be dismissed or to suffer such less punishment*** *as is in this Act mentioned.*"
>
> ***"Section 46: Certain forms of disgraceful conduct****.*
>
> *Any person subject to this Act who commits any of the following offences, that is to say, —*
>
> *(a) is guilty of* ***any disgraceful conduct*** *of a cruel,* ***indecent or unnatural kind****; or*
> *(b) malingers, or feigns, or produces disease or infirmity in himself, or intentionally delays his cure or aggravates his disease or infirmity; or*
> *(c) with intent to render himself or any other person unfit for service, voluntarily causes hurt to himself or that person;*

[68] Similar provisions exist in the Air Force Act, 1950 and Navy Act, 1957.
[69] *Supra,* note 4.

> *shall, on conviction by court-martial, be liable to* ***suffer imprisonment*** *for a term which may extend to* ***seven years or such less punishment*** *as is in this Act mentioned."*

In contrast to the general arguments against the induction of homosexuals, the findings discussed further have been conclusively drawn out through various studies and judgements rather than prejudiced and preconceived assumptions without concrete foundations.

MILITARY PROWESS IS NOT DETERMINED BY THE GENDER IDENTITY OF SOLDIERS

Allan Millett, an expert on military performance, alludes to the exhibition of military units in direct contact with the enemy.[70] Military performance applies to a more extensive assortment of utilitarian, political, and other key components, including the articulation of legitimate public security arrangements, obtaining powerful battle frameworks, the accessibility of capable manpower, and the formation of suitable strategies. Although examination of safeguards and military performance covers various determinants of authoritative achievement, servicemen who advocate lower military capability because of the acceptance of the LGBT community in the Armed Forces will generally disregard such determinants. 'Military productivity' alludes to union and trust between individuals within units in the military, general military assurance, and enlistment. A successful model might be Canada wherein the months following the choice to lift the gay boycott in the Canadian military, early reports recorded a couple of issues concerning military adequacy. Scientists at Research and Development ("**RAND**") Corporation[71] led interviews with Canadian military faculty a while after the expulsion of the boycott and found no proof that the policy change had any huge impact on military performance. RAND found 'no occurrences of individuals recognizing or contemplating their gay connections, no difficulties or brutal occasions, no

[70] Allan R. Millett, *Combat effectiveness*, THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY 161 (1999).

[71] A Non-profit global policy think tank.

renunciations no selecting issues, and no decrease in solidarity or profound quality[72]

The United States[73] ("**U.S.**") and its allies, including the U.K.,[74] Canada,[75] Israel,[76] and Australia,[77] which also allow homosexual, transgender, and bisexual individuals to participate in the military, rank amongst the strongest armies in the world. Their instance indicates/ reflects that the induction of other sexual orientations other than the conventional ones does not negatively impact military readiness or discipline.[78] As of today, approximately 52 countries across the world allow for some queer representation in the Armed Forces, with varying degrees of restrictions being placed in respect to specific identities, such as homosexual, trans, etc.

Many studies conducted on the inclusion of the homosexuals in the U.S. military have proven to have negligible or no adverse repercussions on the morale or working of the Armed Forces. In fact, during the Persian Gulf War a stop-loss policy prohibited homosexuality discharges, clearly implying that the U.S. military claimed that service by openly gay or bisexual individuals during wartime had no danger to military effectiveness. Some analysts agree that military effectiveness is related to the mutual responsibility of members of the armed force to a collective mission that motivates them to work together to accomplish the objective.[79] Although

---

[72] NAT'L DEF. RES. INST., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT 29 (Rand , (1993).

[73] Nathaniel Frank, *The President's Pleasant Surprise: How LGBT Advocates Ended Don't Ask, Don't Tell*, 60 J. HOMOSEXUALITY, 159-213 (2013).

[74] EQUALITY AND HUMAN RIGHTS COMMISSION, *Your rights under the Equality Act 2010*,. https://equalityhumanrights.com/en/advice-and-guidance/your-rights-under-equality-act-2010#h3.

[75] Aaron Belkin & Jason McNichol, *Homosexual Personnel Policy in the Canadian Forces: Did Lifting the Gay Ban Undermine Military Performance?*, 56(1) INTL. J., 73–88 (2000).

[76] Brian Schaefer, *Israeli Military One of the World's Most LGBT Friendly, Report Says*, HAARETZ (Feb. 22, 2014), https://www.haaretz.com/.premium-idf-one-of-worlds-most-lgbt-friendly-1.5325060.

[77] *Australia Ends a Prohibition On Homosexuals in Military*, NEW YORK TIMES (Nov. 24, 1992). https://www.nytimes.com/1992/11/24/world/australia-ends-a-prohibition-on-homosexuals-in-military.html.

[78] Aaron Belkin, *The Pentagon's Gay Ban is Not Based on Military Necessity*., 41 J. HOMOSEXUALITY, 103-130 (2001).

[79] Robert J. MacCoun et al., Elizabeth and Aaron, *Does Social Cohesion Determine Motivation in Combat? An Old Question with an Old Answer*, 32(4) ARMD. FOR. SOC., 646-654 (2006).

comparisons based on such studies may not be conducive to the military in the Indian context in its entirety, findings of such research in relation to psychological and sociological implications on military culture and troop faculties are of persuasive importance nonetheless.

SCOPE AND LIMITATIONS OF ARTICLE 33

With the Apex court decriminalizing homosexual intercourse amongst consenting adults,[80] it would apparently devolve upon the forces to reflect the same within its structure. However, Article 33[81] of the Indian Constitution confers on the Parliament, the power to abrogate or modify to an extent, any of the rights mentioned under Part III of the constitution which provides for fundamental rights of the individual, limiting the enforcement of certain rights and liberties of a particular group of persons, including representatives of the Indian Armed Forces and intelligence organizations. The provision seeks to ensure the proper discharge of duties and the maintenance of discipline among them[82]. At the time of its framing, the provision did not invite substantial scrutiny around it under constitutional debates.

Accordingly, it enables the government to limit and abrogate the rights that Armed Forces personnel may enjoy in pursuit of maintaining combat efficiency and military discipline. This Article grants legitimacy to the exclusionary practices within Armed Forces. Their stance is derived from the prohibition imposed by the laws governing the various Armed Forces, which prohibits soldiers from arguing that the restriction on homosexuals infringed their rights.

In *Lt. Col. Prithi Pal Singh Bedhi v Union of India,*[83] the court ruled that even though no specific fundamental right is explained and the extent to which it can be curbed is not defined in the statute, each provision must be deemed to have an impact on every fundamental right:

"Article 33 confers power on the Parliament to determine to what extent any of the rights conferred by Part III shall, in their application to the members of the Armed Forces, be

[80] *Supra* note 3.
[81] INDIA CONST. art. 33; Lt. Col. Prithi Pal Singh Bedhi v. Union of India & Ors., (1982) 3 SCC 140 (India).
[82] *Id.*
[83] Lt. Col. Prithi Pal Singh Bedhi v. Union of India & Ors., (1982) 3 SCC 140 (India).

restricted or abrogated so as to ensure the proper discharge of duties and maintenance of discipline amongst them. Article 33 does not obligate that Parliament must specifically adumbrate each fundamental right enshrined in Part III and to specify in the law enacted in the exercise of the power conferred by Article 33 the degree of restriction or total abrogation of each right. That would be reading into Article 33 a requirement which it does not enjoin. Therefore, every provision of the Army Act enacted by the Parliament, if in conflict with the fundamental rights conferred by Part III, shall have to be read subject to Article 33 as being enacted with a view to either restricting or abrogating other fundamental rights to the extent of inconsistency or repugnancy between Part III of the Constitution and the Army Act."

A similar stance is reiterated by the apex court in the *Suk Das case*.[84] It becomes evident from a plain perusing of the constitutional provision, alongside pertinent judgments, that Article 33 cannot be utilized as a generally useful shield of exclusion for the Armed Forces to guard themselves in cases involving infringement of basic fundamental rights. This article additionally does not concede to the law-making body, a free permit to limit any benefits to agents of the Armed Forces, nor does it make individuals from the Armed Forces as those with no rights. Unmistakably such restrictions and repeals exist to enable them to carry out their duties properly and to maintain discipline.[85]

Nations like the U.K. have devoted enrolment drives pointed towards welcoming the selection of workforce from LGBT groups. Because of the criticality of guaranteeing that the right individual is assigned his duties accordingly, a few militaries give more weightage to the traits of planning, execution, and battle efficiency than to one's sexual orientation. Appropriately, it ought to be noted in the decisions in the *Suk Das case* and *Bedhi case* that the court has focused on the significance of order and solidarity inside the Armed Forces while tending to Article 33. Limitations on the rights must be with the end goal that they are important to protect order and comity within the Armed Forces. Given the above conditions, Article 33 holds insofar as to facilitate modification or abrogation based on the objectives of guaranteeing the legitimate discharge of obligations and maintenance of discipline.

---

[84] Suk Das & Anr. v. Union Territory of Arunachal Pradesh, AIR 1986 SC 991 (India).
[85] Gregory M. Herek, *Sexual Orientation And Military Service: A Social Science Perspective*, AMERICAN PSYCHOLOGIST, 538–49 (1993).

MORALE AND TROOP COHESION

Morale is 'the enthusiasm and persistence with which a member of a group engages in the prescribed activities of the group'.[86] Others have indicated that leaders of the patriarchal service may be disconcerted by the involvement of homosexuals culminating in their efficiency being compromised.[87] The documented involvement of peers of various sexual orientations or gender roles should not have an inherent impact on the work ethics of a military member. The motivation of service personnel can be measured by the encouragement they provide, the level of leadership, the expectation that they make a meaningful difference, and alignment with the aims of the organization.[88]

Cohesion refers to 'an attribute which enables individuals to form a group, prevents people from leaving the group, and motivates a group to actively cooperate'.[89] As opposed to morale, which is an individual characteristic, cohesion is an aggregate dynamic. Cohesion is viewed as one of the most significant attributes of the Armed Forces. Significant parts of cohesion incorporate certainty and trust among associates, powerful correspondence, and responsibility to the forces' viable working.[90]

Studies overwhelmingly presume that task cohesion is more applicable and critical to military execution than social cohesion. Various factors uphold this end: above all, in many settings, the military is a working environment and not a social setting. Second, certainty and trust between colleague's dependent on passionate ties are hard to ensure and can set aside a long effort to frame. Certainty and trust dependent on people's capacities and demonstrable skills are a lot simpler to guarantee.[91] Third, task cohesion

---

[86] FREDERICK J. MANNING, MORALE AND COHESION IN MILITARY PSYCHIATRY, (1995).
[87] Aaron, *supra* note 78.
[88] Alexander A. Cox, *Unit Cohesion and Morale in Combat: Survival in a Culturally and Racially Heterogenous Environment* 39 (Fort Leavenworth: United States Army Command and General Staff College, 1995). https://apps.dtic.mil/dtic/tr/fulltext/u2/a309830.pdf
[89] Bojan Langerholc, Cohesion in Multinational Military Units 10 (Master's Thesis, University of Ljubljana, 2010). http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA536832
[90] ROBERT J. MACCOUN & WILLIAM M. HIX, UNIT COHESION AND MILITARY PERFORMANCE, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND'S 1993 STUDY (Santa Monica: RAND, 2010).
[91] Moradi & Miller, *Attitudes of Iraq and Afghanistan War Veterans toward Gay and Lesbian Service Members*, 36 ARMD. FOR. SOC. 397, 399-418 (2010); BOJAN LANGERHOLC,

seems to profit social cohesion more than the other way around: the accomplishment of a group in accomplishing its objectives has been found to loosen social bonds between colleagues.[92] Fourth, sometimes, excessive social cohesion has even been found to sabotage military execution, by advancing fraternization, oblivious compliance, and revolts.[93]

Exclusion of qualified personnel from military service based on sexual orientation cannot be justified under the garb that their inclusion will disturb morale and troop cohesion. As previously enumerated, such arguments have no scientific or sociological backing but are the products of long-standing prejudicial beliefs crystallised by archaic regulations and limitations. A military setting which penalises its troops based on their sexual preferences, despite them being qualified in their duties, creates an apprehension of uncertainty and fear in the minds of its personnel, which deters such morale and troop cohesion. The military certainly has to maintain battle efficiency at all times, but outright rejection of faculties which have no direct bearing on the elements of military order and discipline need not be accorded with such treatment backed by the objects of morale and troop cohesion.

PSYCHOLOGICAL EFFECTS AND THE ECONOMICS OF COST AND BENEFIT

Spending valuable resources like manpower and money per year to prosecute and discharge eligible and proud soldiers who want to represent their country does not represent any useful purpose. After the U.S. military adopted the "Don't Ask, Don't Tell" ("**DADT**") policy in 1993, approximately 12,000 homosexuals, gay and bisexual service members were discharged purely because of their sexual identity, despite at least 8 per cent among them possessing mission-critical abilities. In the U.S. 2005 Government Accountability Office ("**GAO**") report, implementing the

COHESION IN MULTINATIONAL MILITARY UNITS 10 (Master's Thesis, University of Ljubljana, 2010). http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA536832; Mark, *supra* note 51.

92 Hough, *supra* note 30.

93 ROBERT J. MACCOUN, WHAT IS KNOWN ABOUT UNIT COHESION AND MILITARY PERFORMANCE, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT, 283–331 (1993).

DADT policy was estimated to cost U.S. taxpayers at least 200 million dollars.

The military can be a highly stressful setting, especially in times of war. To support their well-being and efficiency, it is necessary to allow military personnel to pursue mental health care, where applicable. Nonetheless, for at least three reasons the current legislation of the Armed Forces operates against meaningful mental health care for the LGBT service members. First, there is a strong correlation between workplaces that do not support non-heterosexual orientations and stress and depression.[94] Second, because the admission of sexual identity discharges them from service, most gay, lesbian and bisexual service members live a double life and refuse exposure to mental health care when they are in need,[95] which in most cases leads to severe psychiatric illness. Third, it is fair to presume that forced secrecy, as well as the fear of exposure as gay, lesbian or bisexual resulting in discharge from service, are likely to increase anxiety disproportionately and disrupt optimal performance. It has been the contention of many militaries in the world that allowing retention and recruitment of homosexuals within the forces will give way to discipline and integrity being undermined. Cases of personnel being honey-trapped and blackmailed are increasingly rising in numbers and in the midst of a situation like this, secrets about sexual orientation and gender identity have enabled blackmail to take place in the Armed Forces. Thus, one may say that it becomes crucial for the forces to foster an environment which does not put sanctions on LGBT members for revealing their orientation to diminish the risk of blackmail. Closeted homosexuals serving in forces are always going to be susceptible to these factors due to the vulnerabilities they impose, thereby undermining the integrity of the forces. The Australian Air Force, for instance, gives the following guidance:

The security clearance process is designed to ensure members do not hold any 'secrets' that may compromise the member or be used in blackmail/coercion situations. For this

---

[94] Nathan G. Smith and Kathleen M. Ingram, *Workplace Heterosexism and Adjustment Among Lesbian, Gay, and Bisexual Individuals: The Role of Unsupportive Social Interactions*, J. COU. PSY., 51, 57-67 (2004).

[95] Brad W. Johnson and Robin A. Buhrke, *Service delivery in a "Don't Ask, Don't Tell" World: Ethical Care of Gay, Lesbian, and Bisexual Military Personnel*, 37(1) PROF. PSYCHOL., 91-98 (2006).

reason, a reluctance to come out, or being dishonest during security interview may have implications on your ability to obtain some high-level security clearances.[96]

Consistent with a long-standing body of socio-psychological research centred on Allport's Contact Hypothesis,[97] scientists have constantly found evidence of decreased levels of bias to gays, lesbians or bisexuals among heterosexuals who are familiar with openly gay, lesbian or bisexual members of society.[98] The authors of a systematic meta-analysis over the last six decades of studies and research reveal that the relationship of interaction between heterosexuals and gay and lesbian people with lower rates of sexual bias is substantially higher than the reduction of discrimination linked to interaction with any other subject group, e.g., race, religion or caste.[99]

The armed forces which have recently started demonstrating their willingness, ability and effectiveness in attacking race and gender-based biases and discrimination within its ranks, should use the same experience to improve efforts to eliminate barriers based on sexual orientation as well.

POTENTIAL RECOMMENDATIONS AND PROSPECTIVE APPROACH

Along with highlighting the stance of the LGBT community, the court in the *Navtej Singh Johar case*[100] submitted that Section 377, despite being a pre-constitutional law, was retained post the Constitution coming into effect by virtue of Article 372.[101] However, if retained in its form, it would involve the violation of several fundamental rights of the LGBTs such as the right

---

[96] Air Force Diversity Handbook: Transitioning Gender in Air Force (Air Force Workforce Diversity), 2012, (Australia) http://defglis.com.au/guides/AF_LGB_A4booklet.pdf.

[97] GORDON W. ALLPORT, THE NATURE OF PREJUDICE, . (1954) (1988) https://faculty.washington.edu/caporaso/courses/203/readings/allport_Nature_of_prejudice.pdf

[98] Gregory M. Herek and John P. Capitanio, *Some of My Best Friends: Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22(4) PERS. SOC. PSY. BULL., 412, 422 (1996).

[99] Thomas F. Pettigrew and Linda R. Tropp, *A meta-analytic test of intergroup contact theory*, J. PERSONALITY AND SOC. PSYCHOL., 751-783 (2006).

[100] *Supra* note 3.

[101] INDIA CONST. art. 372.

to equality, liberty, privacy, dignity and the freedom of expression. Sexual orientation, a natural corollary of gender identity, is protected under Article 21[102] of the Constitution; therefore any discrimination meted out on the basis of sexual orientation would run counter to the mandate provided under the Constitution.[103] Subsequently, questions were raised in relation to the Armed Forces' policies regarding the matter and whether or not it planned to implement the same. The reaction invited from the officials of the forces, retrospectively, was unfavourable towards the essence of the ruling, regardless of whether such a stand stemmed from certain prejudices or merely professional battle concerns.

Such circumstances strengthen the need for increased awareness of alternate sexual orientations and genders which can benefit from political debates pertaining to regulatory changes that affect their community. There exist numerous precedents that pave way for discriminatory policies, which is due to the fact that policies are made by taking into consideration the societal framework and in the Indian context, this societal framework does not generally embrace such inclusion and identification.[104] Acknowledging that LGBTs are not a common group is often important for such awareness-raising undertakings. Advocacy for LGBT rights has to be sustained for several decades since a majority of them are not conscious of their rights as residents and subsequently, as of the armed forces.

In 2018, Shri Jagdambika Pal, a Member of Parliament, introduced the Armed Forces (Amendment) Bill in Lok Sabha, which sought to amend the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950 with a view to give equal rights and opportunities to members of the LGBT community to dedicate their lives for the nation and serve in the Armed Forces.[105] The Bill puts forward amendments to Sections 45, 46 and 63 of the Army Act[106] of 1950, Sections 53, 54 and 74 of the Navy Act[107] of 1957 and Sections 45, 46 and 65 of the Air Force Act[108] of 1950 by inserting the

---

[102] INDIA CONST. art. 21.
[103] *Supra* note 3.
[104] Roger Mathew v. South Indian Bank Limited & Ors., (2020) 6 SCC 1 (India).
[105] The Armed Forces (Amendment) Bill, 2018, Bill No. 251 of 2018.
[106] *Supra*, note 5.
[107] The Navy Act, 1957, No. 62, Acts of Parliament, 1957 (India).
[108] The Air Force Act, 1950, No. 45, Acts of Parliament, 1950 (India).

following explanation after each of the aforementioned sections of the respective Acts:

"Nothing in this section shall apply to consensual sexual acts committed between adults, whether of the same gender or of different genders"

The Bill certainly indicates the zeal of the administering authority to provide an equal stand to the LGBT community insofar as the Armed Forces are concerned. The Bill in its statement of objects and reasons states that the members of the LGBT community have for long been persecuted and discriminated against. Not only did they encounter societal exclusion and ostracization, but the State as well has punished them for their identity. The apex court stated in unequivocal terms that respect for individual choice is the very essence of liberty under law and noted that archaic legal provisions from the colonial era criminalizing homosexuality were a weapon in the hands of the majority to seclude, exploit and harass the community.[109] The bill states that even the Armed Forces treated differently and adversely, those who did not adhere to normative standards and definitions of sexual identities and orientations. The court also that each and every individual has a constitutional right to equal citizenship in all its manifestations, therefore, a person, irrespective of gender or sexual orientation, shall have the opportunity to serve their nation by joining the Armed Forces (subject to established mental/physical standards), which is an essential and a core civilizational institution.[110] This Bill sought to make it clear that a person's sexual identity or orientation cannot form the grounds for disciplinary action of any kind under the Act. Thus, the proposed amendments to the Army Act, 1950, Navy Act, 1957 and the Air Force Act, 1950 were formulated with a view to give equal rights and opportunities to members of the LGBT community.

While recommending the induction of the LGBTQ community into the Armed Forces, the authors also conclude that some problems may arise due to the systemic differences which may not be satisfactorily addressed by minor administrative changes, or by increased funding. Insofar as to mitigate the problems that may occur, it may be advocated that in addition to the above-mentioned changes provided in the bill, all the three Armed

[109] *Supra* note 3.
[110] *Supra* note 5.

Forces' Act must be amended in a manner such that it makes discrimination against any personnel of the Armed Forces a punishable offence to uphold the dignity not just of the LGBTQ community but all personnel facing discrimination in the Armed Forces on the basis of their gender, caste, colour, sex and religion.

CONCLUSION

The field of law and legal reasoning is one which is in a state of constant flux, keeping in view the sheer factor of societal dynamism, along with other sociological factors. It was, therefore, not absurd for Roscoe Pound to describe law and judiciary as tools of social engineering, aimed to build an efficient structure of society resulting in the maximum satisfaction of wants with minimum friction.[111] In a complex setting that governs human relations and their behaviour within a society, there are bound to exist certain ill elements which undermine the interests of a minority, in favour of the majority. The law operates in order to rectify and eliminate these instances in a way which seeks to benefit those undermined while giving due consideration to the interests of the general populace as well. The lion's share of laws is shaped according to the sociological factors of the society, while there are only rare occasions where the law moulds the societal makeup into a just and equitable society. It is, therefore, a necessary prerogative on part of the legislature to set the latter on the correct path. The degree of homosexual inclusivity in the military can be one rare instance wherein the legislature has the ability to mould the society into that of a just and equitable one.

The area of complexity that strikes the question of induction or tolerance of homosexuality within the Armed Forces' of India is the element of immunity granted by Article 33. It may justify the forces' stand as necessary to carry out duties efficiently and maintain discipline. However, as previously enumerated, there is no concrete evidence or study that points towards the fact that induction of homosexuals affects the overall combat effectiveness of the battalion or disrupts the ethos of the forces. There has neither been any documentation of a surge in the number of sexual harassment cases upon induction of homosexuals in the forces. To the contrary, the existence of sanctions upon revealing the fact of

[111] ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY, 149–50 (1923).

homosexuality of the personnel makes the system vulnerable to blackmail and duress which may compromise the integrity of these forces. It, therefore, raises the question, as to what real purpose does the prohibition serve if it does not affect discipline and duties while in service.

There are numerous examples in ancient Indian history which point towards the existence of same-sex relations amongst both men and women. It was in 19th century Europe that homosexuality became associated with criminality at an official level, in the sphere of discourses emphasizing on sexuality. Such policies were implemented via brute force in the dominions of the colonial powers accordingly, which inevitably made way down to their militaries. These attitudes were sure to trickle down into the reflections of the future nations that would be born out of the numerous independence revolutions across the European colonies. India is one such example, where a 2018 Supreme Court judgement decriminalised consensual homosexual relations across all genders. However, the same implication is under scrutiny in the context of the Indian Armed Forces.

Internationally, a fair share of commonwealth countries have policies that do not limit homosexual participation in their forces and it is evident that India, in its military progression, has to accommodate for inclusivity of homosexuals if it seeks to implement the letter of the law in its essence. The U.K. dropped the legal sanction on homosexuality in 1967 with the Sexual Offences Act 1967,[112] with a similar fate following its Armed Forces in 2000. A number of nations such as Israel and South Africa which reflected repressive attitudes towards homosexuality in the general sociological sphere have moved on to be more inclusive and tolerant of homosexual participation in their militaries, which exemplifies the effects of correct policy regulation and proper implementation. With India suffering from the same multi-dimensional constraints on homosexuality, such international experience needs to be given its due weightage to analyse the feasibility of such a proposal within its forces.

Military leaders may appropriately say that the Armed Forces cannot be used as a tool for social reform, but that should not and cannot be a defence to foster any change that may improve the capabilities and ensure the

[112] Sexual Offences Act, 1967 c. 60 (U.K.).

protection of their soldiers from bias. It is evident from the shift in jurisprudence that an approach of discrimination against homosexuals is no longer legally tenable. Years of accumulated military experience coupled with exhaustive interdisciplinary research have shown the absence of deterrent correlatives between military discipline and order and sexual orientation of their troops. Thus, it serves no basis for such deprivation of equal rights to qualified soldiers in their service to the nation.

No organization can circumvent their duty to protect community citizens on the grounds that they have a relatively conservative mechanism. Down to brass tacks, the Armed Forces certainly form an imperative arm of the government and therefore must abide by the same principles enshrined under fundamental rights as applicable to any other. It thus, becomes necessary that proper legislation and policies be put in place and that the defence forces, in accordance with their oath (shapath) and affirmation (pratigya), bear true faith and allegiance to the Constitution of India as by the law established and that, as in duty bound, honestly and faithfully serve the Union of India in both letter and spirit.

FROM THE POLLING BOOTHS TO THE COURTROOMS: CHALLENGES OF STRICT APPLICATION OF TIME FRAME IN JUDICIAL CONTESTATION OF ELECTION DISPUTES IN NIGERIA

M. A. ETTI[1] & M. A. LATEEF[2]

After her longest military interregnum spanning almost two decades since 1984, Nigeria returned to a democratic system of government in May 1999. By May 2019, five presidential and other national and sub-national elections were held in the country. Virtually all of these elections were characterized by intense political strives and electoral malpractices of varying degrees, leading to the challenging of elections in the election petition tribunals and other courts, long after the conclusion of the polls. This challenge has heightened the spate of judicialization of politics - the practice of excessive utilization of the courts for adjudication of core political matters in the country. But a significant by-product of judicialization of politics in Nigeria is the apparent relegation of substantial justice and possible miscarriage of justice arising from a resort to a technicality in the strict interpretation and enforcement of time frame for such adjudications. This paper, using a doctrinal research methodology of relying on primary and secondary sources of information, shows that the current strict interpretation of the constitutional provisions on the time limit for adjudication of electoral disputes defeats the essence of substantial justice and impacts negatively on the role of the judiciary in social engineering. For comparative constitutional purposes, the paper also juxtaposes the practice in Kenya, another country in Africa with electoral disputation experiences, with the practice in

*Cite it as: Etti & Lateef, *From the Polling Booths to the Courtrooms: Challenges of Strict Application of Time Frame in Judicial Contestation of Election Disputes in Nigeria*, 5(1) COMPARATIVE CONST. L. ADMINISTRATIVE L. QUARTERLY (2021).

[1] B. Sc (Econ) Ed, LLB, B.L, ACIArb, a magistrate and coroner in the Lagos State Judiciary and formerly a member of the Local Government Election Tribunal, Lagos State, Nigeria. <bolaetti@gmail.com>.

[2] LL.B. (OAU, Ife); B.L.; LL.M (UNILAG); M.Phil. (OAU, Ife); Ph.D. (OAU, Ife). Faculty member, Department of Jurisprudence & Private Law, Faculty of Law, Obafemi Awolowo University (OAU), Ile-Ife, Osun State, Nigeria. Visiting Scholar, Columbia Law School (Summer 2018), New York, United States of America. E-mails: <malateef@oauife.edu.ng>; <mal2322@columbia.edu>.

**Authors are grateful to Professor Olanrewaju Fagbohun, Ph.D., then of the Nigerian Institute of Advanced Legal Studies (NIALS), Lagos, for his comments on the draft of this paper and to Ayinde Sanni & Co for permission to use its library.

Nigeria. The paper concludes that a review of the law is imperative and then makes some recommendations.

INTRODUCTION

In a democracy, elections and electoral institutions are very crucial components of the democratic process. Thus, a country cannot be said to be truly democratic until it can guarantee credible electoral practices and institutions through which its citizens can exercise the right to choose their representatives in elections that are free and fair. Since her return to democracy in 1999, after a long military interregnum that took off in 1984 following a military coup *d'état*[3], Nigeria has held several national and sub-national elections within its federation. These elections have been largely characterized by intense political strives and electoral malpractices of varying degrees,[4] thereby leading to contestations of their outcomes in the election petition tribunals and other courts, several years after the conclusion of the polls. In other words, instead of concluding the elections and determining winners and losers at the polls as is customary with electoral processes in a democracy, a culture of resorting to the election petition tribunals and other courts for adjudication of electoral disputes is common in Nigeria. This has therefore promoted the use of the judicial process of the courts, instead of the actual electorates at the polls, to determine the winner or loser of an election.[5] Yet, an important measure

[3] Starting with the first military coup *d'état* of 15 January 1966 which truncated the first republic, to the last one of 17 November 1993, when General Sani Abacha staged a palace coup to unseat the Interim National Government led by Chief Ernest Shonekan, Nigeria has had a total of nine (9) military coups since her independence on 1 October 1960. *See generally*: MAX SIOLLUN, OIL, POLITICS AND VIOLENCE: NIGERIA'S MILITARY COUP CULTURE 1966-1976 (Algora Publishing 2009); MAX SIOLLUN, SOLDIERS OF FORTUNE: NIGERIAN POLITICS UNDER FROM BUHARI TO BABANGIDA 1983-1993 (Cassava Republic Press 2013); James Francis, *The History of Coup D'état In Nigeria*, INFO-NAIJA (Mar. 29, 2009, 10:12 AM) <http://info-naija.blogspot.com/2009/03/history-of-coup-detat-in-nigeria.html>.

[4] ADENIYI AKINTOLA, REFLECTIONS ON THE NIGERIAN ELECTORAL SYSTEM 67-85 (Abiodun I. Layonu & Akeem A. O. Adekunbi eds., First Law Concept 2012).

[5] The Policy and Legal Advocacy Centre of the Nigeria Civil Society Situation Room, in conjunction with the *Open Society Initiative for West Africa (OSIWA), in a 2017 Report on the 2015 General elections in Nigeria, indicated there were over six hundred (600)* elections petitions

of the democratisation process in a polity is the number of post-election contestations that end up in the courts. Thus, the fewer the post-election disputations, the more consolidated a democracy may be regarded.

However, the perennial challenge of electoral disputations in Nigeria has heightened the spate of Judicialization of politics - the practice of excessive utilization of the courts for adjudication of core political matters.[6] But a more significant problem, arising from such Judicialization is an apparent miscarriage of justice[7] and relegation of substantial justice to the whims of technicality in the strict enforcement of time frame for such adjudications. Without a doubt, time is an essential factor in all human endeavours where planning and management are inevitable. Judicial time frame, therefore, means the time limit within which a judicial act is to be done[8]. Legal time frame manifests in various forms — limitation law, estoppel, *res judicata*, laches and acquiescence among others. After all, there must be an end to litigation as the right of action is not eternal. But, should substantial justice be sacrificed at the expense of a time limit? Furthermore, what should be the limit of strict application of time limit to the resolution of electoral disputes submitted to the courts? These are some of the issues that this paper seeks to examine.

An election petition refers to a judicial process by which the outcome of an election is challenged before a court or an election petition tribunal established by law. When a petition is presented against a return made in an election, there are four possible outcomes. Firstly, the election petitioned against may be declared void or null in which event the result is

filed in courts, post-2015 general elections. *See* Nigeria Civil Society Situation Room, *2015 General Election in Nigeria: Compendium of Petitions*, POLICY AND LEGAL ADVOCAY CENTRE (Oct, 10, 2020, 12:12 AM), http://www.placng.org/situation_room/sr/wp-content/uploads/2017/07/Compendium-of-Election-Cases-inNigeria.pdf; John E. Irem, *An Overview of the 2015 General Elections Report*, INEC NIGERIA (June 17, 2019, 10:45 PM), https://inecnigeria.org/wp-content/uploads/2019/02/AN-OVERVIEW-OF-THE-2015-GENERAL-ELECTIONS-REPORT..pdf.

[6] Ran Hirschl, *The Judicialization of Mega - Politics and the Rise of Political Courts,* 11 ANNUAL REVIEW OF POLITICAL SCIENCE 65, 94. (2008).

[7] The phrase "miscarriage of justice" has been variously defined but its essence is that it is the decision or outcome of legal proceedings that is prejudicial or inconsistent with substantial rights of a party. *See* Ojo v Anibire, (2004) 5 SC (Pt.1) 1 (Nigeria); Larmie v. D.P.M.S. Ltd., (2005) 12 SC (Pt.1) 93 at 107 (Nigeria).

[8] PDP v CPC, [2011] 17 NWLR (pt. 1277) 485 [507] (Nigeria).

quashed, and a new election ordered.[9] Secondly, a return may be found to have been unduly made in which case the original return is quashed, and another candidate (the petitioner) is declared to have been elected, usually by a majority of lawful votes.[10] Thirdly, the election may be upheld, the petition dismissed, as the candidate returned is found to have been duly elected.[11] Fourthly, the petition may be struck out. This may occur when the petitioner abandons the petition or fails to prosecute it diligently, or when a preliminary objection is upheld.[12] While only a person duly elected as expressed through the ballots should occupy an elected office, it is also understandable that a person who feels sufficiently aggrieved that an election has not been properly conducted is entitled to resort to judicial adjudication. Sometimes, as experiences in Nigeria have shown, the legal battle to determine who won or lost an election at the polls may drag on till the end of the tenure of the office itself.[13] Where a petitioner succeeds, two possibilities arise: he starts a new tenure as was in the case of governorship election petition of Mr Peter Obi of Anambra State[14] or he merely completes the tenure wrongfully begun by his opponent as in the case of Mr Rotimi Amaechi of Rivers State[15]. Such are the scenarios that have played out in Nigeria's democratic journey thus far.

---

[9] Electoral Act (2010), § 140 (1) - (2); *See Electoral Act 2010*, POLICY AND LEGAL ADVOCAY CENTRE (Oct. 12, 2020, 12:12 AM), http://placng.org/wp/wp-content/uploads/2016/08/Electoral-Act-2010.pdf ; Daggash v Bulama [2004] 4 NWLR (pt, 892) 144 (CA) (Nigeria).

[10] *Id.* s 140 (3); Ngige v Obi, [2006] 14 NWLR (pt. 999) 1 (Nigeria).

[11] Buhari v Obasanjo, [2005] 2 NWLR (pt. 910) 241 (CA) (Nigeria).

[12] Electoral Act (2010), § 140 (4). In a case, although the trial tribunal voided the election and ordered a bye election after hearing the petition on merits, the Court of Appeal on a preliminary objection set aside the decision and struck out the petition for having been filed out of time. *See* Mala v Kachalla, [1999] 3 NWLR (pt. 594) 309 (Nigeria). *See also* Eseduwo v INEC [1999] 3 NWLR (pt. 594) 215 (CA) (Nigeria).

[13] Ogboru v Uduaghan, [2011] 17 NWLR (pt. 1277) 727 (Nigeria), where an appeal heard by the Supreme Court on 17 November 2011 was in respect of the 2007 election and the tenure of office in dispute had expired on 28 May 2011.

[14] Ngige v Obi, [2006] 14 NWLR (pt 999) 1 (CA) (Nigeria).

[15] Amaechi v INEC, [2008] 5 NWLR (pt 1080) 227 [316] (SC) (Nigeria) where Mr. Amaechi was to continue the tenure begun by Mr. Omehia because they belonged to the same political party which won the election.

Using a doctrinal research methodology by relying on primary and secondary sources of information to indulge in case law analysis, this paper discusses the negative implications of a strict interpretation of the provision of Section 285 of the Constitution of Nigeria, 1999 ("**Constitution**")[16] which places limitations on the time within which an adjudicating authority may adjudicate on an election petition either at the trial or the appellate level. The authors of this paper show that in the attempt to strictly adhere to the stipulated time frame for adjudication of election disputes, substantial justice is often sacrificed. To be sure, this paper appreciates the necessity for some time frame for judicial adjudications generally; however, given the peculiarity – *sui generis* – nature of election petitions, the authors of this paper believe that there must be a balance between the need for expediting the adjudication of election petitions and the overriding need for delivery of substantial justice.

This paper is divided into nine parts. Part one provides this background introduction. Part two overviews the historical background of legislative efforts to set a time limit for adjudication of election disputes in Nigeria. Part three examines the interpretative attitudes of the courts in the cases decided on the constitutional provisions providing for such time limits and the divergent views that emerged therefrom. Part four explains the paradox of the allotted time frame to an election petition and the implication of the concept of not pausing the time in interlocutory matters. Parts five, six and seven examine the negative implications of the timeframe concept. For comparative constitutional purposes, Part eight of the paper does a brief overview of the practice in Kenya, another African country with electoral disputation experiences. Part nine discusses the importance of amending the time frame provisions in the Constitution by providing suggestions in that regard.

HISTORICAL BACKGROUND

[16] 4th Alteration Act No. 21 of 2017. Mohammed A. Oyelade, *Pre-Election Dispute in Nigeria: Appraisal of the Fourth (4th) Alteration No 21 Act, 2017 of the 1999 Constitution of the Federal Republic of Nigeria (Part II),* LAW AXIS 360° (Oct.10, 2020, 12:15 AM), https://lawaxis360degree.com/2019/11/22/pre-election-dispute-in-nigeria-appraisal-of-the-fourth-4th-alteration-no-21-act-2017-of-the-1999-constitution-of-the-federal-republic-of-nigeria-part-ii/.

Protracted litigations on pre and postelection disputes gave rise to the need to introduce a certain time frame for adjudication of election disputes in Nigeria. One of the earliest legislative attempts to resolve the problem of protracted litigation of election petitions was the enactment of the Electoral Act, 1982. Section 129 (3) of the Act provided for a maximum limit of 30 days from the date of the election, for the disposition of election petitions at the High Court. Furthermore, Section 140 (2) provided that any election petition that is not disposed of within the specified time frame, shall be time-barred and thus become null and void. For the hearing of an appeal from the High Court to the Court of Appeal, Section 130(1) also provided that "… *and the decision of the Court of Appeal on the appeal shall be given not later than seven days from the date on which the appeal was filed."*[17] Subsequently, the constitutionality of the aforementioned provisions of the Electoral Act of 1982 was tested in the courts of Nigeria. In *Unongo v. Aku*[18] and *Kadiya v. Lar,*[19] a full panel of the Supreme Court of Nigeria declared each of the above provisions as unconstitutional, for being *ultra vires* the legislature and a contravention of the right of the citizens to a fair hearing.[20] The Supreme Court in the case of *Unongo v. Aku* particularly held that the powers of the National Assembly under Section 73 of the Constitution to legislate in respect of election petitions did not extend to prescribing or limiting the time frame within which the Courts must hear and determine election petitions.[21]

Until the enactment of the First Alteration Act in 2010 which incorporated the judicial time frame, the Supreme Court followed *Unongo's case* without exception once it was established that an Act had so restricted the exercise of the judicial function to a time limit[22]. About nineteen years after *Unongo's case*, the legislature enacted the Electoral Act,2001. Section 25 (10) of the Act of 2001 provided thus:

---

[17] ELECTORAL ACT (1982), § 130 (1).
[18] Unongo v. Aku, (1983) JELR 46429 (SC) (Nigeria).
[19] [1983] 14 NSCC 591 (NIGERIA)
[20] Abbott v. Sullivan, 905 F.2d 918 (6th Cir. 1990).
[21] *Ibid.*
[22] Obih v. Mbakwe, [1984] 1 SC 325 (Nigeria).

"The decision of the commission as to the qualification or disqualification of a candidate for an election may be challenged by a candidate. Any legal action challenging decision of the commission shall commence within five working days and be disposed of not later than one week before the election."

On 28 March 2002, a full panel of the Supreme Court in *A-G., Abia State v A-G., Fed.,*[23] declared no fewer than nineteen sections of the Electoral Act, 2001 *ultra vires* the National Assembly and struck them out for being an unconstitutional attempt to amend the Constitution.[24]

FROM A SPECIFIC TIME FRAME TO ACCELERATED HEARING

By the time the above decision of the Supreme Court was made, it was already apparent to the legislature that no Act could dictate a time frame to the judiciary. Therefore, neither the Electoral Act, 2002 which succeeded the judicially dismembered Electoral Act, 2001, nor any subsequent Electoral Act had any provision that dictated a time frame to the judiciary.[25] Instead, these acts saw the incorporation of new provisions that called for an *accelerated hearing* of election petitions. Accelerated hearing is a hearing that is accorded priority and timely disposition in the court's dockets through avoidance of undue adjournment, delay, or resorts to technicalities. Section 148 of the Electoral Act 2006 provided that:

"… An election petition and an appeal arising therefrom under this Act shall be given accelerated hearing and shall have precedence over all other cases or matters before the Tribunal or Court."[26]

As time passed by, the judiciary began to receive criticism for prolonged litigation on election matters as the citizens waited for too long to know what would become of their ballot expression.[27] For example, in Edo,

[23] [2002] 6 NWLR (pt 763) 264 (Nigeria).
[24] *Ibid* at 370.
[25] *See*, for example, Electoral Acts 2006. National Legislative Bodies, *Electoral Act 2006*, REFWORLD (Oct. 9, 2020, 10:10 PM), https://www.refworld.org/docid/4c3dcbb82.html.
[26] Electoral Act (2010), § 142.
[27] Aregbesola v Oyinlola, [2009] 14 NWLR (pt. 1162) 429 (Nigeria).

Ekiti,[28] Osun and Anambra[29] States it took up to three years and in some cases from half to three-quarters of the four-year tenures before the election petitions were finally disposed of. In Ekiti and Osun States, two years after the election, the Court of Appeal ordered a trial *de novo* and supplementary elections respectively.[30]

FROM ACCELERATED HEARING TO SPECIFIC TIME FRAME

The discussions surrounding the need to enforce a judicial time-frame resurfaced again. The arguments in favour of re-enactment of judicial time frame border on wastage of public funds; justice delay; poor time management; poor case management; frequency of unnecessary and long adjournments[31]; frequency of unnecessary interlocutory applications; useless petitions or arguments[32]; unnecessary preliminary and trial objections[33]; laziness on the part of the adjudicators; corruption; and frustration of the litigants.[34]

Following the infamous 2007 general elections in Nigeria, the Electoral Reform Committee (Uwais Panel) was set up to look into the issues plaguing elections in the country.[35] This committee recommended the

---

[28] Fayemi v Oni [2009] 7 NWLR 223 (Nigeria) (the Court of Appeal on 17 February 2009 set aside the return of Oni on the basis of unconcluded election of 14 April 2007 and ordered INEC to conduct supplementary elections. The supplementary elections were conducted and on 15 October 2010 in Fayemi v Oni [2010] NWLR (pt 1222) the Court of Appeal set aside the majority decision of the Tribunal and nullified the return of Oni and declared Fayemi as the duly elected Governor of Ekiti State. It took three and half years to finally dispose of the petition).

[29] Ngige v Obi [2006] 14 NWLR 1 (CA) (the petition against the Governorship election of Anambra State held on 19 April 2003 was disposed of on 15 March 2006).

[30] Aregbesola, *supra* note 25.

[31] Ngige v Obi [2006] 14 NWLR (pt. 999) 1 (Nigeria).

[32] Ogboru v Uduaghan [2011] 17 NWLR (pt. 1277) 727 [752] - [3] (Nigeria) (the appeal was heard by the Supreme Court on 17-11-2011 over the election of 2007. The Supreme Court eventually dismissed it on 16-12-2011 on the ground that at the time the cause of action arose the Court of Appeal was the final court on governorship elections).

[33] SPDCN Ltd v Amadi, [2011] 14 NWLR (pt1266) 157 [187] (the Supreme Court described a Notice of Preliminary Objection as an abuse of judicial process).

[34] *Ibid.*

[35] At the onset of his administration in August 2007, late President Umar Musa Yar'adua took the widely applauded bold decision to set up what later became known as Justice

limitation of time for the hearing and determination of election petitions, which was later incorporated into the constitution via Section 29 of the First Alteration Act, 2010. Section 286 (6) of the Constitution provides that an election petition tribunal shall deliver its judgment in writing within 180 days of the filing of a petition. Section 285 (7) of the Constitution prescribes a maximum of 60 days for hearing and disposition of appeals by the Court of Appeal and the Supreme Court from the date of the delivery of the judgment appealed against.

Section 285 (6) and Section 285 (7) of the Constitution has been interpreted literally by the Courts without discussing earlier decisions like *Unongo's case*, *Kadiya's case,* and *A-G., Abia State's case.* The aforementioned constitutional provisions have therefore been applied in the following cases: *Shettima v. Goni,*[36] *PDP v. CPC,*[37] *Abubakar v. Nasamu,*[38] *Amadi v. INEC,*[39] *PDP v Okorocha*,[40] *Ugba v Suswan,*[41] *Udenwa v Uzodinma,*[42] *ANPP v Goni*,[43] *ACN v INEC.*[44]

EMERGENCE OF DIVERGENT VIEWS

The stance of the Supreme Court in its interpretation of Section 285 of the Constitution can be viewed through two major perspectives. First is the *ultra vires* perspective which posits that the legislature lacks the vires to enact a time limit for a judicial function. This perspective finds support in the *Unongo*'s case[45] and the cases that followed it (hereinafter referred to as the *earlier cases*). Second is the perspective which postulates that the

'Uwais Report'. The President had during his inauguration in May that year acknowledged that the 2007 elections that produced his presidency was flawed and characterized by electoral malpractices that require reforms. See MOJEED A. OLUJIMI ALABI & OMOLOLU TOLUWANIMI OMOLOLU, UWAIS REPORT, ELECTORAL ACT 2010, AND THE FUTURE OF DEMOCRATIC ELECTIONS IN NIGERIA 54 (Abiodun I. Layonu & Akeem A. O. Adekunbi eds., First Law Concept 2012).

[36] [2011] 10 MJSC 53 (Nigeria).

[37] PDP, *supra* note 6.

[38] [No.1] [2013] 17 NWLR (pt 1330) 407 (SC) (Nigeria).

[39] [2013] 4 NWLR (pt 1345) 595 (SC) (Nigeria).

[40] [2012] 15 NWLR (pt 1323) 205 (SC) (Nigeria).

[41] [2013] 4 NWLR (pt 1345) 427 (SC) (Nigeria).

[42] [2013] 5 NWLR (pt 1346) 94 (SC) (Nigeria).

[43] 2012] 7 NWLR (pt 1298) 147 (SC) (Nigeria).

[44] [2013] 13 NWLR (pt 1370) 161 (SC) (Nigeria).

[45] Unongo, *supra* note 15.

court only must interpret the constitution. Thus, since Section 285 is a constitutional provision, the court can do nothing but to apply it strictly. This perspective also finds support solace in the *Shettima*'s case[46] and other cases decided along that line (hereinafter referred to as the *later cases*).

The two perspectives are on common ground that election petitions should be timely disposed of. However, they both conflict on whether or not the legislature is entitled to decide a time limit for the judiciary. Despite the criticisms that followed the case of *Awolowo v. Shagari,*[47] it demonstrated the possibility of concluding an election petition within a short time frame before the swearing-in of the President. In that case, the election to the office of the President was conducted on 11 August 1979 and the final judgment of the Supreme Court in the election petition that followed was delivered on 26 September 1979.

In *Abubakar's* case[48]*,* the Kebbi State Governorship Election Tribunal on 13 November 2011 nullified the result of the election and ordered a fresh election. The Court of Appeal delivered its decision on 29 December 2011 but gave its reasons on 23 January 2012, amounting to a period of 71 days from the date of nullification of the election. The Supreme Court considered Section 285 (6) and Section 285 (7) of the Constitution and held *inter alia* that, failure of the Court of Appeal to give reasons for its earlier decision in the case within the specified time limit amounted to no decision at all, in the case. It, therefore, concluded that there was no need for the Supreme Court to go into the merit of a judgment that was already in nullity.[49]

In *Shettima's* case involving three consolidated interlocutory appeals before the Supreme Court,[50] one of the issues was whether the appellate courts still had jurisdiction to hear the appeals given section 285 (7) of the Constitution. The Supreme Court held that neither it nor the Court

[46] Shettima, *supra* note 33.
[47] [1979] 12 NSCC 87 (Nigeria).
[48] Abubakar, *supra* note 36.
[49] [No.1] [2013] 17 NWLR (pt 1330) 407 (SC) (Nigeria).
[50] SC.332/2011, SC.333/2011 and SC.352/2011.

of Appeal had jurisdiction to continue to hear the appeal again. The Supreme Court reached this conclusion after accepting the fact that the time spent by the litigants in pursuing interlocutory appeals at the appellate courts had already exhausted the maximum time limit to prosecute the substantive petition from the election petition tribunal up to the appellate courts.

In *PDP v CPC*[51] the Court of Appeal sitting as the Presidential Election Tribunal refused to grant a preliminary objection that the petition was incompetent because it was filed on a Sunday. At the Supreme Court, the issue turned on whether the appeals were still valid having regard to when the decision appealed against was delivered. The facts and circumstances of the case introduced another episode to the debate in that the period of 60 days within which the Supreme Court was to hear and determine the case fell within the court vacation. In construing Section 285 (5), (6) & (7) of the Constitution the Supreme Court held *inter alia* that, it is not the function of the court to pander to sentiment or sympathy in constitutional interpretation;[52]and that computation of the 60 days allotted to the Court for disposition of election petition appeals includes Saturdays, Sundays, public holidays, and the periods of court vacation, except where the last day of the specified time fell on a Sunday or Saturday or a publication holiday whereupon the next following working day may be accepted.[53]

In our considered view, with due respect, the reasoning of the court concerning the last day of the time frame being a Sunday or public holiday is unimpressive. If Sundays, public holidays and court vacations are not reckoned with in the computation of the time limit under Section 285 of the Constitution, the fact that the last day of the time limit happens to be a Sunday or public holiday would not matter. This is because Section 285 makes no distinction among the beginning, middle and last days of the time limit. That view can only find support in Section 15 (2) (b) and (3) of the Interpretation Act and the authorities that interpreted it.

In *Amadi's* case,[54] the decision of the tribunal was delivered on 7 October 2011. The appeal against it was struck out on 7 December 2011 for having

[51] [2011] 17 NWLR (pt 1277) 485 (SC) (Nigeria).
[52] *Ibid*, at 520.
[53] *Idbi*. at 506-7.
[54] Amadi, *supra* note 37.

lapsed. The court held *inter alia* thus:

> *"… the appeal in question had lapsed by one day as of 7th December 2011 when same was listed for hearing … it was dead in the eyes of the law and constitution"*[55] *(emphasis supplied)*

In *ACN v INEC*[56] an appeal against the judgment of the election petition tribunal was filed at a time that the Court of Appeal was on annual vacation and no panel was constituted to hear it. The 2nd appellant subsequently filed an application seeking accelerated hearing of the appeal. The Respondents filed a counter-affidavit and a motion seeking the dismissal of the appeal because 60 days within which to hear it had lapsed. Both the Court of Appeal and the Supreme Court held that the appeal had lapsed.

JUDICIAL TIME THAT NEVER STOPS

In any judicial process, justice is the end and fair hearing is the highest norm and most valuable means to it. In *Newswatch Comm. Ltd v Attah*,[57] the Court closed the case of the Defendant because of its dilatory antics and it lost the case without adducing evidence. His appeal to the Supreme Court was also dismissed. If this case had been an election matter, the Plaintiff would have lost the case to the frightful time limit manipulated by the contrivance of the defence.

The implication of the strict interpretation that time never stops to run was put to test in *ANPP v Goni*[58] where at the time the Court of Appeal ordered a retrial of the petition, 180 days from the date of filing the petition had lapsed. The Supreme Court held that the retrial order was wrong and reversed it on the ground that the time within which the petition is to be heard and determined had lapsed. That is, the interlocutory appeal was filed and prosecuted while the 180-day period was running. The Supreme Court has followed that decision in subsequent cases such as *Akpanudoedehe v*

[55] [2013] 4 NWLR (pt 1345) 595 (SC) (Nigeria).
[56] [2013] 13 NWLR (pt 1370) 161 (Nigeria).
[57] [2006] 12 NWLR (pt 993) 144(Nigeria).
[58] [2011] 10 MJSC 53 (Nigeria).

Akpabio[59] and *Ugba v Suswam* [60] to the effect that time within which to hear and determine a petition continues to run while an interlocutory appeal is being prosecuted, whether or not the appeal is on a decision which struck out the petition and the trial tribunal no longer hears it and whether or not the appeal succeeds.

The stance in above cases just gave victory to the Respondent right from home because he was at the liberty to prolong the proceedings beyond the time frame by filing interlocutory appeals and employing various tactics to delay the hearing. Ironically, an average tribunal is usually saddled with several election petitions at a time than a 180 days' time frame may be sufficient to accommodate all at once. Where ten aggrieved candidates file ten petitions in respect of the same election, the time available to a petition is 180 days divided by ten petitions. Therefore, in reality, each of the petitions has 18 days to be heard and disposed of. By procedure, documents tendered from the bar lack probative value unless witnesses are called to tender them.[61] In February 2013, the Election Petition Tribunal in Ondo State had the following frontloaded witnesses in just two petitions: 1,700 witnesses for Action Congress of Nigeria; 4523 witnesses for Labour Party; 2,224 witnesses for Mr Mimiko.[62]

RIGID TIME FRAME VERSUS FLEXIBLE TIME FRAME: JUDICIAL TIME FRAME IS NOT *MALUM IN SE*

As we have earlier noted, there is nothing fundamentally wrong with having a time frame for adjudication of electoral disputes. However, everything is wrong wherein the application of such a judicial time frame technicality is allowed to trump substantial justice. This exactly, in our view, is what the *later cases* have done. These cases as we have demonstrated by references to some of the above have all exhibited the pattern to sacrifice substantial justice for speed and technicality. For clarity, these *later cases* can be divided into two categories viz:

[59] [2013] 7 NWLR (pt 1354) 485 (Nigeria).
[60] [2013] 4 NWLR (pt 1345) 427(Nigeria).
[61] Kubor v Dickson [2013] 4 NWLR (pt 1345) 534 SC (Nigeria).
[62] Akeredolu v Mimiko (2013) LPELR-20889(CA).

a) Petitions in which the parties did not conclude their respective cases within the time frame as in the *Shettima's* case, supra.[63]

b) Petitions in which the time expired owing to no fault of the parties, such as where parties concluded their respective cases within time but the tribunal or court or the appellate court did not give its decision within the time limit as in the *CPC's* case, supra,[64] or the court did not sit because it is on vacation as in the *ACN's* case, supra.[65]

What should the tribunal do if parties conclude their cases on the last day or a day after the time limit? Should the tribunal pronounce that its time is up and cannot review the evidence and deliver its judgment? What should the tribunal do if the petitioner closes its case on the last day of the time limit so that neither the Respondent has time to present its defence nor does the tribunal have time to give its decision? In an attempt to address these challenges, the tribunals now divide the time so that each party is allotted several days to present its case. But what happens if the allotted days to a party are not sufficient for that party? It should be noted that in presenting its case a party is not totally in control of its time as the opposing party has a right to a part of that time via cross-examinations[66] and reasonable trial objections.[67]

In *Falae v Obasanjo*[68], the relevant law provided that an election petition must be determined within 21 days from its filing. The Court of Appeal which was the trial tribunal noted that the court had had to sit long hours up to 9:00 PM on some occasions and that longer days up to 42 days

[63] Shettima, *supra* note 33.
[64] CPC, *supra* note 34.
[65] ACN, *supra* note 41.
[66] Counsels under the garb of testing the witnesses' credibility do tend to ask unnecessary, extraneous questions.
[67] Nwobodo v Onoh [1984] 15 NSCC 1 (Nigeria); Omoboriowo v Ajasin [1984] 15 NSCC 81 (Nigeria); Torti v Ukpabi [1984] 15 NSCC 141 (Nigeria).
[68] Per Oguntade, JCA, [1999] 6 NWLR (pt 606) 283 [290] (Nigeria).

instead of the prescribed 21 days, would have been more appropriate to allow a thorough hearing and attainment of justice required of each case.

A common thread observed from the *later cases* is the lack of sufficient time for petitioners as well as adjudicating authorities, to present their cases and to deliver judgments respectively. What is required, therefore, is sufficient time or flexibility of time and a tribunal that is in control of the proceedings with a view to the quick dispensation of cases.

BEATING THE TIME FRAME

To beat the time frame, many a party has adopted a method of tendering several documents at once and from the bar, but the court has always refused to act on such documents on the ground that they were not tested by cross-examination. In *Sa'eed v Yakowa,* the learned counsel for the petitioner tendered 1,376 documents from the bar without objection. In holding that the method adopted by the learned counsel for the petitioner squeezed probative value out of the documents, the Supreme Court concluded that such apparent labour and desperation of the counsels should not coerce the court into sacrificing the constitutional need to attain substantial justice for speed.[69]

It is submitted that wherein a proceeding which has a time frame such as an election petition, documents tendered from the bar without objection or documents tendered by a party which are corroborated by other undisputed documents or documents tendered by an uninterested party such as copies tendered by the police, should be accorded probative value.

UBI JUS IBI REMEDIUM

The age-long Latin maxim *Ubi jus, ibi remedium* – meaning 'where there is a right, there is a remedy', postulates that where the law has established a right there should be a corresponding remedy for its breach. This is no doubt an age-long principle that is well respected in all legal systems.[70] Applying this age-long principle of law to litigation of disputes arising from electoral processes, it must be acknowledged that factors responsible for

[69] [2013] 7 NWLR (pt 1352) 124 [151] Per Oguntade, JCA.
[70] Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach,* 76 WASHINGTON LAW REVIEW 67 (2001).

delay or waste of time in the prosecution of electoral disputes in court are not always voluntary or that of the litigants. Some of the voluntary and involuntary factors responsible for delay or waste of time in the prosecution of electoral cases can be put in three categories under the abbreviation L.C.M., namely:

a) **Logistics factors**: power outage; social unrest; strike such as the Fuel Subsidy Removal Protest of January 2012; security challenges such as what forced the Tribunal in *Shettima's case* to relocate from Maiduguri to Abuja;
b) **Case related factors**: the complexity of the case, for example, the nature of the allegations; the number of witness and documents; workload and caseload such as in *Falae v Obasanjo*[71] which made the tribunal to sit till 9:00 P.M.
c) **Man (human) factors***:* unnecessary interlocutory applications, objections, long cross-examination and a large number of witnesses as in *Ngige's case* where 486 witnesses were called, and thousands of exhibits tendered.

The Supreme Court in the case of *Nnajiofor v Ukonu*[72] had long recognized and explained some of the foregoing factors when it noted that different cases are by their nature short or lengthy, thereby requiring or yielding to such considerations as different time frame, the volume of documents, number of witnesses, all of which may reasonably cause a delay or prolonged proceedings.[73]

Arising from the above reality and given the challenges that the judicial time frame in the adjudication of electoral disputes are now known to pose, *Twelve Possibilities* or scenarios in the time frame regime can be observed as follows:

i. Commencement of hearing within or on the last day of the time limit.[74]

---

[71] [1999] 6 NWLR (pt 606) 283 (Nigeria).
[72] [1985] 2 NWLR (pt 9) 686 [694]-[5] (Nigeria).
[73] *Ibid.*
[74] Unongo, *supra* note 15 (See the exposition of Uwais JSC)

ii. Commencement of hearing after the time limit.
iii. Closure of hearing or both parties closing their cases within or on the last day of the time limit.
iv. Closure of hearing or both parties closing their cases after the time limit.
v. The petitioner concludes within the time limit, but the respondent does not.
vi. The petitioner concludes shortly before or on the last day of the time limit so that only a few days or one day is left for defence and judgment.
vii. The tribunal delivers its judgment (including reasons) within the time limit.
viii. The tribunal hears the petition within the time limit but delivers its judgment (including reasons) after the time limit.
ix. The appellate tribunal or court delivers its judgment (including reasons) within the time limit.
x. The appellate tribunal or court hears the appeal within the time limit but delivers its judgment after the time limit
xi. The appellate tribunal or court hears the appeal and delivers its decision within the time limit but gives its reasons after the time limit[75]
xii. The appellate tribunal or court hears the appeal after the time limit[76]

In all of the foregoing possibilities or scenarios, the need for a fair hearing and substantial justice become an inevitable issue. And once a right has been established, the need to provide a requisite remedy must not be sacrificed for speed.[77]

A fair hearing is the bulwark of justice before the law. It is best appreciated in the phrase *Ubi Jus Ibi Remedium.*[78] The *later cases* contradict and violate this time-honoured foundation of justice which enjoins the courts to provide a remedy whenever the litigant has established a right.[79] According to Oputa, JSC, law and all its technicality should only serve as a handmaid

[75] PDP, *supra* note 6.
[76] Ogboru, *supra* note 11 (This may occur—during the tenure of the office in dispute or after the tenure of the office in dispute).
[77] [2008] 3 NWLR (pt 1073) 156 [177] (Nigeria).
[78] Saleh v Monguno, [2006] 15 NWLR (pt 1001) 26 (SC) (Nigeria).
[79] Bello v A.G (Oyo), [1986] 5 NWLR (pt 45) 828 [871] (SC) (Nigeria).

of justice but not to the extent that the court will be slavishly constrained by it in such a way as to sacrifice the justice of a case because of the error or ignorance of the counsel.[80]

What is to be said where a judgment is held to be a nullity by the failure of the court to deliver its judgment within time and the case is lost forever? It should be noted that, as in the limitation law, it does not require good faith to avail a Respondent in an election petition to blow the whistle of time up nor does it require malice to deprive the Respondent of such a refuge or sword.[81] In *LPDC v Fawehinmi*,[82] Karibi-Whyte, JSC held thus: *"fair hearing is an entrenched provision of the Constitution which cannot be displaced by legislation however unambiguously worded."*

In our view, the Supreme Court should consider the Constitutionality of Section 29 of the First Alteration Act No. 1 (2010). Since the First Alteration Act is not a constitutional provision but an Act of the Legislature, it is subject to the judicial test.[83]

By the doctrine of constitutional supremacy any law or Act which is inconsistent with the constitution is null and void to the extent of its inconsistency.[84] A legislative Act may be *substantial ultra vires* or *procedural ultra vires*. This is the limit on the legislative power to enact a law or amend the constitution.[85] It follows that the Supreme Court has the power to consider whether an amendment to the constitution is itself constitutional. The Supreme Court can declare the process of amendment wrongful and unconstitutional (that is, *procedural ultra vires*) or declare the Act itself unconstitutional (*that is, substantial ultra vires*).[86]

---

[80] *Ibid* at 870 – 1.
[81] Fajimolu v. Unilorin, [2007] 2 NWLR (pt. 1017) 74(Nigeria).
[82] [1985] 2 NWLR (pt 7) 300 (Nigeria).
[83] A.G. Abia *supra* note 21.
[84] CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (1999) § 1.
[85] Att Gen [Bendel] v Att Gen [Fed], [1981] All NLR 85 SC (Nigeria); Att Gen [Ondo] v Att Gen [Fed], [2002] 9 NWLR (pt.772) 222 (Nigeria); Imonikhe v Att Gen (Bendel), [1992] 6 NWLR (pt. 248) 130 (Nigeria).
[86] [2002] 6 NWLR (pt. 763) 264 [370] (Nigeria).

Indeed, the Supreme Court in *Amadi's case*[87] alluded to the possibility of considering the constitutionality of the controversial provisions by suggesting that the Appellants had not invited the Court to examine the constitutionality or otherwise of Section 285 (7) of the 1999 Constitution.[88]

It is trite that in any matter where fair hearing is involved, the Court being the last hope of the common man must feel concerned.[89] The provisions under consideration were indeed enacted to avoid delays in election petitions, but they were not enacted to shut out the litigant or punish him for the sin of the court. An issue of fair hearing occurs in different forms including the following:

a) When a court raises an issue *suo moto* and decides the same without hearing parties.
b) Where the Court decides the issue(s) before it without hearing one of the two parties to the case.
c) Where the judge descends into the arena by showing undue support, sympathy or leaning towards one of the parties.
d) Where the time limit within which the Court is to hear and determine the case of the litigant is not sufficient for it.

The common line amongst those instances is the lack of opportunity to be heard. And in this case, there is no '*half-hearing*'. The right to a fair hearing must be available in full. Rejecting the argument that the strict application of Section 285 of the Constitution amounts to the denial of fair hearing, the Supreme Court equated it to the limitation law by holding thus:

> *"The provisions of Section 285 (7) are in the mould of a statute of limitation but with a constitutional flavour … If for whatever reason the appeal is not heard within the allotted time frame it cannot be said that an appellant affected thereby has been denied his right to fair hearing."*[90]

In our view, the above position cannot be right. Limitation of action is not only tied to time as prescribed by Statute of Limitation but must of

[87] [2013] 4 NWLR (pt. 1345) 595 [626] - [627] (Nigeria).
[88] *Ibid.*
[89] [2008] 6 NWLR (pt. 1082) 1 (Nigeria).
[90] Amadi, supra note 3, at [626]-[627].

necessity relate to acts of the party.[91] In other words, the litigant must be at fault before a limitation law operates against him. Regrettably, in the *later cases*, the litigant is not at fault but the court itself! In letter and spirit, there is no significant difference between Section 29 of the First Alteration Act, 2010 and the provisions considered in the *earlier cases* such as Sections 129 (3) and 140 (2) of the Electoral Act, 1982 and Section 25 (10) of the Electoral Act,2001. The only difference is that Section 29 of the First Alteration Act, 2010 is a constitutional amendment.

Right to Court is generally a constitutional right which should not necessarily be curtailed by time limit within which to prove one's case. If there is one thing more than another that is an antithesis to equity, fair play, public policy, fair hearing and substantial justice, it is that a Court or tribunal should close its doors to litigants while they are still presenting their cases or dismiss their cases because the lower court or tribunal failed to give its decision and reason within a time frame. The end of public policy is never served when a judgment delivered on its merits after hearing the parties is nullified by the appellate Court on grounds that the trial Court or tribunal delivered its judgment out of time. Substantial justice is public policy. It is the judicial policy, and it is not achieved when technicality reigns. This point agitated the minds of the legislature over the issue of whether a judgment delivered outside of the 90 days provided by Section 294 (5) of the Constitution should be nullified and the legislature amended it by a proviso that unless *"the party complaining has suffered a miscarriage of justice by reason thereof*".

In *Ariori v Elemo*,[92] Obaseki JSC succinctly put the point thus: "*fair hearing means a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties".*[93] Perhaps the *locus classicus* on fair hearing is *Mohammed*

---

[91] AMADI J., LIMITATION OF ACTION: STATUTORY & EQUITABLE PRINCIPLES 3 (1s ed. 2011); Horsfall v. Rivers State Polytechnic, Bori & Anor, (2018) LPELR-45954(CA) (Nigeria).

[92] [1983] 1 SC 23 at 24 (Nigeria); Atano v A.G (Bendel) [1988] 2 NWLR (pt. 75) 201 [227] (SC) (Nigeria).

[93] *Ibid.*

v. Kano Native Authority[94] where Ademola, CJN held thus: *"The true test of fair hearing … is the impression of a reasonable person who was present at the trial, whether from his observation, justice has been done in the case."*[95]

What can be said to be the impression of a reasonable man in the *later cases*? As long as substantial justice remains the public policy of the judiciary, any enactment that prevents it from doing substantial justice is null and void. A situation where party A gets a judgment in his favour against party B, but party B's appeal against that judgment is struck out or dismissed on grounds of time limit to dispose of the appeal is serious indeed. Meanwhile, in *Amaechi v INEC*[96] the Supreme Court restated the duty of all courts in Nigeria to ensure that citizens, high and low, get the justice which their case deserves.[97]

Can it be said that the litigants in the *later cases* got the justice which their cases deserved? In *Abubakar's* case, the Supreme Court recommended an amendment of Section 285 of the constitution in the following words

> *"The National Assembly may however in the circumstances of this case and those of similar nature consider amending the constitution by providing a similar provision to Section 294 (5) of the 1999 constitution (as amended) in Section 285 of the said constitution"* [98]

EXPERIENCES FROM OTHER JURISDICTIONS IN AFRICA

In the preceding paragraphs, we have, in line with the primary focus of this paper, critically analysed the legal contestation of electoral disputes in Nigeria. However, for comparative constitutional purposes, we now intend to briefly overview the practice in another African country, particularly Kenya. But before we proceed, it must be pointed out that there seems not to be another country in Africa with the unique Nigerian experience we have discussed thus far. That said, there are peculiar issues of stipulations of the time frame for judicial disposition of electoral disputes in different countries of Africa.

---

[94] [1968] 1 All NLR 424 [428]; [1968] 5 NSCC 325 (Nigeria).
[95] *Ibid.*
[96] [2008] 5 NWLR (pt 1080) 227 [324] (Nigeria).
[97] *Ibid.*
[98] [No.1] [2013] 17 NWLR (pt 1330) 407 (SC) (Nigeria).

In Kenya[99], the period for filing of election petitions before the court will depend on the nature of the elections being disputed. That is counties and national elections. However, Section 87 (1) of the Constitution of Kenya, 2010 provides generally that the Parliament shall enact legislation to establish mechanisms for the timely settling of electoral disputes.[100] Subsection 2 of the same provision further provides that, petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission. To determine the validity of the election of a county governor, Section 75 of the Electoral Act No 24 of 2011[101] provides generally that such an election shall be decided by a High Court within a maximum of six months of the presentation of the petition. Thereafter, an appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie finally to the Court of Appeal on matters of law only, and shall be determined within a maximum of six months.[102] This is in sharp contrast with the case in Nigeria, where further appeals from the election tribunal or the Court of Appeal shall lie to the Supreme Court and must be decided by the Supreme Court within 60 days from the date of delivery of the judgment of the tribunal or the Court of Appeal.[103]

For presidential elections in Kenya, there is a sharp contrast with the practice in Nigeria, where such a petition will proceed from the Court of Appeal and up to the Supreme Court. In Kenya, petitions concerning the election of the President commence and end at the Supreme Court alone

---

[99] KENYA: THE CONSTITUTION OF KENYA 27 Aug. 2010, § 87, 140 (In the Republic of Kenya, a federal and multi-party democratic state like Nigeria, the relevant laws concerning resolution of electoral disputes are the Constitution of Kenya 2010 (sections 87, 140) and the Electoral Act No 24 of 2011 (section 75). In Kenya, unlike in Nigeria where there are election petition tribunals, election disputes pertaining to the election of County Governor, National Assembly and Senate are heard by the High Courts.)

[100] *Ibid.*

[101] *Ibid.*

[102] *Supra* note 100.

[103] CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (1999) Section 285 (7).

under Section 140 of the Constitution of Kenya, 2010. For clarity, the provisions are hereby reproduced below:

> *"140. (1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.*
>
> *(2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.*
>
> *(3) If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination."*

Now, not only are there timelines under the above provisions of the Constitution and Electoral Act in Kenya, but they also appear shorter than what is applicable in Nigeria. However, it is also glaring from the letters of the Constitutions, the Electoral Act, and judicial dispositions of cases, that their emphasis is more on the justice of the cases rather than the mechanical application of time frame that has characterised judicial adjudications in Nigeria. Perhaps it was this sense of justice and urgency that was demonstrated by the Chief Justice of Kenya and the other Justices of the Kenyan Supreme Court in the determination of the recent presidential election dispute between Uhuru Kenyata and Raila Odinga in Kenya.[104] In an unprecedented exercise of judicial courage and independence, their Lordships wasted no time in nullifying the re-election of an incumbent president whereupon they ordered the conduct a new election within 60 days in "strict conformity with the constitution and applicable election laws."[105] It is hoped that in future, other judicial arms in Africa would emulate the Kenyan Justices in this regard.

The position in the Republic of Ghana is somewhat similar to that of Kenya noted above. In Ghana, it is the judiciary that is constitutionally mandated to adjudicate all electoral disputes about presidential and parliamentary elections. Thus, the High Court and the Supreme Court of

---

[104] Raila Amolo Odinga v Independent Electoral and Boundaries Commission, [2017] eKLR (Kenya).
[105] *Ibid.*

Ghana are empowered by law to determine election disputes.[106] In Ghana and Kenya, both countries have provisions in their respective Constitutions for presidential election petitions to be filed in the Supreme Court to challenge the election of the President.[107] It is observed that the prevalent practices in both Kenya and Ghana are the timeous determination of disputes without undue consideration for mechanical computation of times for adjudication. For us, this, in addition to a focus on the justice of the cases, should be the approach of every court and tribunal saddled with the responsibility to adjudicate on disputations arising from the conduct of elections.

CONCLUSION

Winners and losers of elections in a democracy are supposed to be determined at the polls by the electorates and not at the courts by the judiciary. Resorting to the courts for adjudication of electoral disputes is, therefore, an exception that should never become the norm in a democracy. Where resorts are made to the courts to determine political matters or any dispute at all, there is also no doubt that there must be some time frame within which parties may approach the court and when the court may determine and resolve such disputes. However, application and interpretation of the law on time frame should never subjugate or relegate the ultimate need to deliver substantial justice required of each case at the altar of technicality. In this paper, we have demonstrated how judicial strict interpretation of the requirement of a time frame in the adjudication of electoral disputes in Nigeria led to consequences that are usually at variance with what the electorates actually or supposedly determined at the polls. We have shown that continuing the trend of strict application of the time frame provisions is capable of undermining the need to deepen democratisation processes in Nigeria.

Also, we have demonstrated that while the *earlier cases* supported the postulation that enacting a time limit for a judicial function is *ultra vires* the

---

[106] CONSTITUTION OF THE REPUBLIC OF GHANA 7 Jan.1993, art. 64(1)
[107] *Ibid* (Note that the Constitution of Ghana was further amended in 2019 with elaborate constitutional reforms).

legislature and hinders the right of citizens (litigants) to a fair hearing, the *later cases* that departed from them were decided on a tripod philosophy namely: that a time limit is a constitutional provision which is binding on '*all and sundary*';[108] that the words of Section 285 of the Constitution are in *'clear and unambiguous terms'*;[109] and that the lawmakers intend to stop the inordinate delay in hearing and determining election petitions and that goal must be achieved howsoever difficult it may be.[110] Sadly, however, rather than curing the intended mischief, the *later cases* would seem to be compounding it as an unintended perpetuation of injustice, at the altar of technicality, now reigns supreme. However, it is trite that where a rule perpetuates injustice, it is time to amend or replace it. For this reason, even the Supreme Court, which is bound by its previous decisions, will overrule any previous decision that perpetuates injustice.[111]

We are of the view that nullifying the decision of a court by an appellate court merely because reasons for such a decision were not given within a time limit is tantamount to saying that failure to comply strictly with Section 285 of the Constitution without more has occasioned a miscarriage of justice – which, as we have observed, is not true.

Having regard to the foregoing, some suggestions for reforms are imperative. We are of the view that the Supreme Court should consider the constitutionality of Section 29 of the First Alteration Act No. 1 (2010). As done to Section 294 (5) of the Constitution, we recommend that the legislature may amend the said Section 29 to now read thus:

> *"The decision of a court or tribunal shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of subsections (6) and (7) of this section, unless the court or tribunal exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof."*[112]

---

[108] Per Onnoghen, JSC in Amadi*, supra* note 36, at 595.
[109] PDP, *supra* note 6.
[110] Per Onnoghen, JSC in PDP*, supra* note 6, at 507.
[111] Etti M.A., *The Rule in OKAFOR vs. NWEKE: Court Process Is Incompetent If Signed in a Firm's Name*, AYINDE SANNI & CO (Aug. 20, 2020, 11:33 PM), http://www.ayindesanni.com/r.php.
[112] These are our own suggested words for necessary legislative drafting for amendment.

In other words, non-strict adherence to the time frame in the doing or undoing of something in the adjudication of electoral disputes should be treated generally as mere irregularity unless doing so will occasion a miscarriage of justice to the petitioner or respondent. This way, the focus of the tribunal or court will be on the substance of each case (substantial justice) and not its form (technicality). In all, a decision affirming or setting aside the outcome of any election should never be set aside or declared a nullity solely because of strict application of the time frame stipulation without more.

Furthermore, necessary reforms should be undertaken to address the following: unreasonable preliminary and trial objections should be adequately penalized with costs to be paid on or before the next adjourned date; undisputed documents should be admitted *en bloc* without cross-examination; interlocutory rulings should be short and given instantly except where impracticable; workload should be reduced by reducing the number of members of the Tribunal to three and appointing of more panels; time frame must be realistic, flexible, measurable and enforceable; provision of means to promptly diagnose delays and mitigate their consequences; monitoring and dissemination of data regarding the course of proceedings; regular supply of power and use of Information and Communication Technology (ICT); use of procedural and case management policies and practices; involvement of different actors and stakeholders in the system; provision of competent staff with appropriate and sufficient tools; definition of goals and standards (to identify best practices and to share ideas of the tribunals with one another); and constant review of Practice Directions and continuous education and training on their use. Once these or some of these are achieved, the wheel of justice will not only speed up but also safeguard the cause of attaining the substantial justice deserving of each case.

COMPETING CHALLENGES OF PUBLIC MORALITY TO CONSTITUTIONAL MORALITY: COMPARATIVE STUDY OF MOB JUSTICE IN SUB-CONTINENT COUNTRIES

ADITYA RAWAT[1] & DIVYANSHU CHAUDHARY[2]

Recent news of a police encounter of four alleged rape accused in the Hyderabad vet case and public celebration over the heroic deed of the police force has once again prompted the contemporaneous and frequently debated conflict between public morality and constitutional morality. Through this paper, the authors enquire into constitutional designs of subcontinent countries which are often in direct confrontation with public morality. For the purpose of this paper, the countries taken into consideration are India and Pakistan. The authors have used the context of religious lynchings such as the lynching of Mashal Khan in Pakistan over alleged blasphemy and the lynching of Mohd. Akhlaq in India to examine constitutional address or abeyance over it. The authors argue that as long as constitutional morality is not in sync with public morality, its imposition will face stiff resistance and the project in itself would be a manifest failure.

The authors also intend to touch upon the argument that perhaps it is time to revisit our constitutional designs to look at public morality as an effective marker of the legal system. Therefore, the paper examines, while taking into consideration the incidents of mob lynching, the concept of constitutional morality and contextualizes it in accordance with the Constitutions of subcontinent countries. The authors further analyse the constitutional response or silence to mob lynching and critically engage with the conflict between constitutional and public morality.

INTRODUCTION

* Cite it as: Rawat & Chaudhary, *Competing Challenges of Public Morality to Constitutional Morality: Comparative Study of Mob Justice in Sub-Continent Countries*, 5(1) COMPARATIVE CONST. L. ADMINISTRATIVE L. QUARTERLY (2021).

[1] Aditya Rawat is a Ph.D. Scholar at the NALSAR University of Law, Hyderabad. The author may be reached at <aditya.rawat013@gmail[dot]com>.

[2] Divyanshu Chaudhary is a Ph.D. Scholar at the Gujarat National Law University, Gandhinagar and currently working as an Assistant Professor of Law at Geeta Institute of Law, Affiliated to Kurukshetra University. The author may be reached at <devch032@gmail[dot]com>.

** We would like to thank the Editorial Board for their invaluable comments on the earlier drafts of the paper. All errors remain ours.

COMPETING CHALLENGES OF PUBLIC MORALITY TO CONSTITUTIONAL MORALITY: COMPARATIVE STUDY OF MOB JUSTICE IN SUB-CONTINENT COUNTRIES

"The Pathways of justice are not linear nor without obstacles. But we have, as a people, chosen the routes of democracy and the Constitution, so we really have no option but to school ourselves in constitutional morality". - Dr. B.R. Ambedkar

There are different structures which exist within a nation-state. Societies and communities are two of the most important structures of the state which are imperative for the existence of the state.[3] The people living within these structures are the reason for the ultimate existence of the state as an instrumentality.[4]

The society being a diverse entity also involves anti-social elements; crime being one of such elements has always been challenging the instrumentality of the state in its duty to protect the rights of people. As the interests and notions of public morality of the individuals differ, conflict arises in various forms, some of such conflicts result in the commission of crimes and therefore there is no society in the world which can claim to be free from crimes.[5] Hence, the state is responsible for maintaining law and order in the society thereby protecting the basic rights of the people.[6] Consequentially, the state engages various institutions to formulate and implement laws.[7]

In our context, it is the Constitution which lays down various ideals and values. The basic idea enshrined under the Constitution forms the basis of constitutional morality which has to be taken into consideration by people while forming their public morality[8]; that is to say, the people are required to act in conformity with the basic principles laid down in the Constitution. Mob justice or lynching is committed by a group of people who are essentially motivated by their constitutionally unguided public morality; it challenges the very idea of constitutional morality that is ideally applicable

---

[3] R.M. Maclver, *Society and State*, 20(1) THE PHIL. REV. 30, 40 (1911).
[4] JEAN JACQUES ROUSSEAU, G.D.H. COLE, ET.AL., THE SOCIAL CONTRACT AND DISCOURSES 142 (Dent 1973).
[5] MICHAEL NEWTON, CRIME AND CRIMINALS 7 (1st ed. Chelsea House Publications 2010).
[6] KARABI KONCH, CRIME AND SOCIETY (1st ed. Notion Press 2017).
[7] JOHN HARRISON WATTS & CLIFF ROBERSON, LAW AND SOCIETY: AN INTRODUCTION 7 (1st ed. CRC Press 2013).
[8] Navtej Singh Johar & Ors. v. Union of India & Ors., AIR 2018 SC 4321, ¶ 121, 149, 256 (v).

to all.[9] Lynching being one of the forms of both, conventional crimes[10] and hate crimes,[11] has, in recent times, gained significance due to an unprecedented increase in the number of cases. The concept of lynching cannot be restricted to a standard definition as the evil can take place out of distinct factors based on one's religion, race, caste, sex etc.[12] Even though the evil of lynching emerges from a sense of public morality, it needs serious deliberation in the light of constitutional morality. What needs to be seen is the extent to which the idea of public morality can be sustained and when it amounts to the breach of constitutional morality.

In subcontinent countries of India and Pakistan, lynching has become a routine phenomenon. That raises alarming questions when on one hand, it adversely affects the human rights of the victims while on the other hand, the perpetrators engage in it as a matter of their constitutional right.

Hence, the authors make a conscious attempt to discuss the conflict between public morality and constitutional morality that is pertinent to the discussion on increased instances of mob violence in nations such as India and Pakistan. The paper is divided into four sections—firstly, the paper discusses religious lynching in the Indian context and how constitutional morality opposes it; secondly, the paper goes on to discuss the epidemic of lynching in the context of Pakistan along with its constitutionality; thirdly, the authors engage in the discussion of public and constitutional morality and how should the two be reconsidered; and lastly, the authors conclude by suggesting that the authoritarian and majoritarian outlook that had precipitated in the context of interpreting constitutional morality has to be outrightly rejected.

RELIGIOUS LYNCHING IN INDIA

India as a nation-state consists of different societies that cherish and preserve different religions, languages, cultures, and traditions.[13] Such

[9] Naz Foundation v. Govt. of NCT, (2009) 160 DLT 277 ¶ 75, 79.
[10] BLACK'S LAW DICTIONARY 409 (9th ed. 2009), "customary, traditional". Therefore, the conventional crimes would include such as murder, theft, rape etc.
[11] *Id.*, at 428, "a crime motivated by the victim's race, color, ethnicity, religion, or national origin".
[12] *Id.*
[13] JAWAHARLAL NEHRU, THE DISCOVERY OF INDIA 55 (Penguin India 2008).

immense diversity strengthens the idea of '*Vasudhaiva Kutumbakam'* (the world is one family)[14], however, it, also augments community conflicts emerging out of individual interests.[15] Religious lynching in India is one such example of these conflicts; however, mob lynching not being a new[16] phenomenon in India has recently taken the shape of an epidemic.[17]

This instantaneous growth in religious mob lynching shows how the people belonging to the Muslim community are being targeted in different states in the name of *inter alia* cow vigilantism[18], love jihad[19] and religious conversion[20] as a consequence of which, human rights of citizens are being trampled upon. Mob lynching therefore not only challenges the very fundamental rights of the people but also affronts the constitutional fabric of India which preserve, promote and protect such rights.

INCIDENTS OF RELIGIOUS LYNCHING

The National Crime Record Bureau ("**NCRB**") which is responsible for the collection and consolidation of crime data does not separately collect the figures for religious mob lynching.[21] However, data from Amnesty

---

[14] B.P. SINGH, BAHUDHA AND POST 9/11 WORLD INDIA'S CULTURE: THE STATE, THE ARTS AND BEYOND 51 (Oxford University Press 2009).

[15] Girjesh Shukla, *Hate Crime: Politico-Legal Dimension of Hate Speech in India*, J. OF PARL. AND CONST. STUD. 1 (2011).

[16] *E.g.*, Sikhs riots in 1984, Bombay riots in 1992, Gujarat in 2002, Muzaffarnagar in 2013; *See also*, Sandipan Bakshi & Aravindham Nagarajun, *Mob Lynchings In India: A Look at Data and the Story Behind the Numbers*, NEWS LAUNDRY (Jul. 4, 2017), https://www.newslaundry.com/2017/07/04/mob-lynchings-in-india-a-look-at-data-and-the-story-behind-the-numbers.

[17] *India: Massive rise in hate crimes*, GULF NEWS (Jul. 26, 2017), https://gulfnews.com/world/asia/india/india-massiverise-in-hate-crimes-1.2064850.

[18] *How cow vigilantism is undermining the rule of law in India*, AL JAZEERA (Jan. 3, 2019), https://www.aljazeera.com/indepth/opinion/cow-vigilantism-undermining-rule-law-india190102143126368.html.

[19] *India: Hate crimes against Muslims and rising Islamophobia must be condemned*, AMNESTY INTERNATIONAL (Jun. 28, 2017), https://www.amnesty.nl/actueel/india-hate-crimes-against-muslims-and-rising-islamophobia-must-becondemned.

[20] Shuriah Niazi, *India's Christians, Muslims bear brunt of hate crimes*, AA (Dec. 31, 2017), https://www.aa.com.tr/en/asia-pacific/indias-christians-muslims-bear-brunt-of-hate-crimes/1019421.

[21] M. Mohsin Alam Bhat, *The Case for Collecting Hate Crimes Data in India*, 4(9) LAW. & POL'Y BRIEF (2018).

International's 'Halt the Hate' initiative shows an unparalleled growth in the incidents of mob lynching based on religion.[22] After the change in political power in 2014, India has seen significant growth of forty-one per cent in hate crimes including mob lynching.[23] In 2015, India witnessed one of the most gruesome acts of the mob; a Muslim man, Mohammad Akhlaq, was attacked in the name of killing and eating a cow; he was dragged out of his house by the villagers and lynched until his death.[24] The said incident took place on the mere suspicion of such an act on the part of Mohammad Akhlaq.

In another incident, in June 2019, a young Muslim man named Tabrez Ansari of Jharkhand was caught by a mob; he was inconsiderately beaten up and forced to chant '*Jai Shree Ram'* and *'Jai Hanuman*' (Glory to Lord Rama and Lord Hanuman).[25] Consequently, the man succumbed to the injuries and died. In the same week, a Muslim teacher named Hafeez Mohammed Haldar was asked to chant '*Jai Shree Ram*' and thrown out of a moving train.[26] Similarly, a Muslim cab driver in Mumbai was beaten up and forced to chant the same slogan.[27]

Most of the perpetrators in these incidents belong to various non-state groups including Gau Rakshak dals, Bajrang Dal, Karni Sena, Vishwa Hindu Parishad etc., that not only promote religious violence but also further the idea of religious intolerance and a Hindu Nation, [28] in contravention of a secular idea as envisioned by the framers of our Constitution. These incidents clearly establish that these acts of violence,

---

[22] *Mob Lynching*, AMNESTY INTERNATIONAL, http://haltthehate.amnesty.org.in/.
[23] *Supra* note 17.
[24] *Dadri Beef Rumour: Hindu Mob Lynches Muslim Man Suspected of Killing and Eating A Cow*, HUFFINGTON POST (Sept. 30, 2015), https://www.huffingtonpost.in/2015/09/30/beef-killing-up_n_8219828.html.
[25] *USCIRF Statement on Mob Lynching of Muslim Man in India*, USCIRF (Jun. 26, 2019), https://www.uscirf.gov/news-room/press-releases-statements/uscirf-statement-mob-lynching-muslim-man-in-india.
[26] Rana Ayyub, *What a rising tide of violence against Muslims in India says about Modi's second term*, TIME (Jun. 28, 2019), https://time.com/5617161/india-religious-hate-crimes-modi/.
[27] *Id.*
[28] *RSS Chief Bhagwat declares India a Hindu Nation*, THE CITIZEN (Aug. 18, 2014), https://www.thecitizen.in/index.php/en/NewsDetail/index/2/173/RSS-CHIEFBHAGWAT-DECLARES-INDIA-A-HINDU-NATION.

have found ground in religion, a constitutionally protected right inherent to one's consciousness.[29]

LEGAL FRAMEWORK IN INDIA

Now the question arises- what is the legal framework in India to tackle the menace of mob lynching? To address the same, it is imperative that we discuss the provisions of Indian Penal Code, 1860 ("**IPC**") which lays down different categories of crimes and their respective punishment. However, it does not deal with the crimes which are specifically committed on the pretext of one's religion and profession. Though there are certain provisions including Sections 141,[30] 146,[31] 153A,[32] and 153B[33] in IPC, they categorically fail to identify lynching that concerns the public at large as a separate crime.[34]

Provisions envisaged in Chapter XV such as Sections 295A[35] and 298[36] too do not entertain the specific targets of lynching and hate crimes, they instead provide for a general approach.[37] Such a gap negates the fact that the crimes committed on religious grounds infringe the constitutional rights of the victim, which is why they need to be dealt with by a different mechanism altogether. This is one of the reasons as to why the NCRB does not have any recorded data for crimes based on religious lynching.[38] Such a legal vacuum has, in a way, worked as a catalyst for promoting these crimes in the absence of any legal provision or sanction.

RECENT INITIATIVES TOWARDS LEGAL FRAMEWORK

Steps by states/individuals

---

[29] INDIA CONST. art. 25.
[30] Indian Penal Code, 1860, (Act no. 45 of 1860), § 141.
[31] *Id.*, § 146.
[32] *Id.*, § 153A.
[33] *Id.*, § 153B.
[34] RATANLAL & DHIRAJLAL, THE INDIAN PENAL CODE, 311 (34th ed., 2014).
[35] Indian Penal Code, 1860, § 295A, "Deliberate and malicious acts, intended to outrage reli-gious feelings of any class by insulting its religion or reli-gious beliefs."
[36] *Id.*, § 298, "Uttering, words, etc., with deliberate intent to wound the religious feelings of any person."
[37] DHIRAJLAL, *supra* note 34.
[38] BHAT, *supra* note 21.

Recently, the Legislative Assembly of the state of Rajasthan passed the Rajasthan Protection from Lynching Bill, 2019[39] that is one of its kinds in India and clearly categorizes lynching as a separate crime. It inculcates a broad definition of lynching emphasizes its impact on basic constitutional rights, makes it a cognizable and non-bailable offence, provides a procedure for its investigation, enhanced punishment and at the same time recognizes the duties of public officials working in the local areas.

Similarly, the Legislature of West Bengal passed the West Bengal (Prevention of Lynching) Bill, 2019[40] that enshrines a comprehensive definition of 'mob' and 'lynching' and enlists provisions stating the duties of officials, investigation procedure, trial and provides for enhanced punishment as well.

Furthermore, Rajya Sabha MP Husain Dalwai also introduced a bill in the House which sought to amend the IPC so as to prevent hate crimes on the basis of bias and prejudice.[41] However, the same was never passed.

Steps Taken by Judiciary

Being the guardian and custodian of the Constitution, the Supreme Court of India has also taken some positive steps. In the matter of *Tehseen S. Poonawalla v. Union of India & Ors.,*[42] while dealing with the incidents of mob lynching, the Supreme Court came down heavily upon the role of the state[43] and termed lynching as an affront to the rule of law and to the exalted values of the Constitution.[44] The Apex Court passed a number of

---

[39] Rajasthan Protection from Lynching Bill, No. 22 of 2019 (Rajasthan, India), https://prsindia.org/files/bills_acts/bills_states/rajasthan/2019/Bill%2022%20of%202019%20RJ.pdf.

[40] West Bengal (Prevention of Lynching) Bill, No. 22 of 2019 (West Bengal, India), https://prsindia.org/files/bills_acts/bills_states/westbengal/2019/Bill%2021%20of%202019%20WB.pdf.

[41] Rosamma Thomas, *MP Husain Dalwai introduces Bill to amend IPC to prevent hate crimes*, TIMES OF INDIA (Aug. 5, 2017), https://timesofindia.indiatimes.com/india/mp-husain-dalwai-introduces-bill-to-amend-ipc-to-prevent-hate-crimes/articleshow/59934472.cms. *See also*, The Indian Penal Code (Amendment) Bill, 2017, No. 24 of 2017 (Ind.), http://164.100.47.4/billstexts/rsbilltexts/AsIntroduced/ipc-4817-E.pdf.

[42] (2018) 9 SCC 501.

[43] *Id.*, ¶ 19.

[44] *Id.*, ¶ 18.

guidelines under three major heads—preventive, remedial and punitive measures.

It also emphasized upon the responsibility of state officials including Superintendent of Police, Deputy Superintendent of Police rank officers to take such measures which ensure prevention of mob violence and lynching.[45] Moreover, as a welcome move, the Court also directed the state governments to prepare a lynching/mob violence victim compensation scheme.[46] The Court finally observed that "*the State cannot turn a deaf ear to the growing rumblings of its People*"[47] and therefore recommended Parliament to create a separate offence for lynching and provide adequate punishment for the same.[48] However, it is unfortunate that no concrete steps have been taken in pursuance of the same.

FUTURE ROADMAP FOR EFFICIENT LEGAL FRAMEWORK

In addition to the above-mentioned initiatives which can be taken into consideration, India as a nation, to do away with all the existing hurdles in preventing these hate crimes including of mob lynching, must also undertake a comparative exercise so as to look into how other jurisdictions tackled similar issues in their jurisdictions. The experience of United States of America ("**USA**") and United Kingdom ("**UK**") can also be taken into consideration wherein drastic changes were introduced to the legal framework so as to curb the menace of crimes committed on the basis of religious bias and prejudice. The introduction of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, 2009[49] in the USA and the Criminal Justice Act, 2003[50] in the UK, clearly, indicates to their relevance as a deterrent[51] if not as the preventer of hate crimes including lynching in

[45] *Id.*, ¶ 36.
[46] *Id.*, ¶ 40.
[47] *Id.*, ¶ 42.
[48] *Id.*, ¶ 43.
[49] Matthew Shepard and James Byrd,Jr., Hate Crimes Prevention Act, 2009, http://files.pfaw.org.s3-websiteuseast1.amazonaws.com/pfaw_files/shepardbyrdact.pdf.
[50] Criminal Justice Act 2003, https://www.legislation.gov.uk/ukpga/2003/44/pdfs/ukpga_20030044_en.pdf.
[51] Incidents and Offences, 2007, https://ucr.fbi.gov/hate-crime/2007; *See also*, Incidents and Offences, 2017, https://ucr.fbi.gov/hate-crime/2017/topic-pages/incidents-andoffenses.pdf.

their jurisdictions. Furthermore, the example of South Africa is also important to be considered; it introduced Prevention and Combating of Hate Crimes and Hate Speech Bill[52] that is intended to criminalize acts on the basis of bias, prejudice and intolerance.

As to how far such changes, if introduced in India, will be an effective remedy to the Indian problem remains uncertain and requires a separate discourse altogether. India being a country of distinct traditions, cultures and languages has unique domestic issues that need to be dealt with. However, it can also not be denied that such a comparative exercise will certainly help India analyse their problem and its intended solution.

CONSTITUTIONAL MORALITY IN INDIA: THE ESSENCE OF SECULARISM

The preamble to the Constitution of India, 1950 ("**COI**") is reflective of what 'We, the People of India', intend to constitute India into—a *secular* state,[53] which not only refers to state's neutrality to a specific religion but is also a basic feature of the COI.[54] Therefore, India being a secular nation endorses what is known as secular constitutional morality that is devoid of any special preference to religion.[55] Following which, the fundamental rights under Articles 25-28 also strengthen the idea of equality of profession, practice and propagation among all religions.[56]

This implies that every individual is free to engage with the religion of his choice and practice and profess it until it is not in conflict with similar rights of others. The exceptions relating to public order, morality and health carved in Article 25 do not relieve one of violating others' similar right rather imposes an obligation on the enjoyer to exercise the right within the limits of constitutional morality.[57]

Therefore, forcing someone to chant '*Jai Shree Ram*' and '*Jai Hanuman*' is not only a violation of one's consciousness but it results in gross disregard

[52] Prevention and Combating of Hate Crimes and Hate Speech Bill, 2018, https://www.justice.gov.za/legislation/hcbill/B9-2018-HateCrimesBill.pdf.
[53] INDIA CONST. preamble.
[54] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[55] S.P. Mittal v. Union of India, (1983) 1 SCR 729.
[56] *Supra* note 28.
[57] T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481.

of Indian constitutional morality. The definition of public morality under Article 25 and the idea of secularism as enshrined in the preamble clearly establish that the freedom of enjoying one's religious freedom is within the constitutional limits. The Supreme Court of India in *St. Stephen's College v. University of Delhi*[58] defined India as a land of diversity in all aspects— be it social, religious or cultural. In *Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi and others v. State of U.P. and others,*[59] the Court emphasized as to how each religion respects other religion in India and that religious tolerance is our ethos. Moreover, in the *State of Karnataka and another v. Dr. Praveen Bhai Thogadia,*[60] the Court reminded that India is committed to the higher ideas of secularism and socialism.

The above discussion clears the picture as to the constitutional idea of secularism and religious freedom in India. However, the present-day statistics showing the application of force against people on the basis of their own religious understanding says otherwise. The majoritarian outlook resulting in lynching seems to take over the constitutional morality envisaged in religious freedom which has certainly affected the social and constitutional fabric of India.[61]

RELIGIOUS LYNCHING IN PAKISTAN

INCIDENTS OF RELIGIOUS LYNCHING

An incident that stirred a controversy globally and shook the conscience of people around the world is that of Asia Bibi (also known as Asia Noreen), a Pakistani Christian and a peasant worker. While on work one day, she dared to take a sip of water from a jug which got her conservative Muslim co-workers furious, as they believed and considered people of other faith as impure and refrained from the practice of eating or drinking with them. The incident was followed by heated arguments. Some days later, police came knocking at her door and subsequently dragged her

---

58 (1992) 1 SCC 558.
59 (1997) 4 SCC 606.
60 (2004) 4 SCC 684.
61 *See*, *E.g.*, *RSS Leader Boasts of Hindus Killing 2,000 Muslims in Gujarat, Wants Kerala CM Beheaded*, THE WIRE (Mar. 02, 2017), https://thewire.in/communalism/rss-behead-kerala-cm-gujarat-killed-2000-ranawat.

outside for the purpose of arrest. However, outside her house, a mob caught her and began to beat her, right in front of the police.[62]

She was later arrested and charged with blasphemy. Chapter XV of Pakistan Penal Code ("**PPC**") mentions about offences relating to Religion.[63] The relevant section is stated as below:

> *"295-C. Use of derogatory remarks, etc., in respect of the Holy Prophet: Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine."*

Since the beginning of the trial, Asia Bibi categorically denied making blasphemous remarks. It is unfortunate that while the trial was in progress, her family was subjected to attacks from a mob. In 2010 she was sentenced to death. People advocating for her rights also met resistance and, in some cases, hostility resulted in death. For instance, the Governor of Punjab, Salman Taseer who met Asia Bibi in prison and requested that she be pardoned, was later assassinated by his own security guard, Malik Mumtaz Hussain Qadri.[64] Ironically, Qadri is celebrated by a conservative Muslim section as a martyr. During the trial, there was huge support for his release and even a mosque is named after him.[65] Amidst nationwide protest, he was given the death penalty which was later upheld by the Supreme Court. On appeal, the High Court upheld her conviction and consequently confirmed the death sentence awarded to Asia.

In 2019, the three-judge bench of the Supreme Court of Pakistan unanimously reversed the judgments of the High Court and the trial court

---

[62] Shumaila Jaffery, *Asia Bibi Pakistan's notorious blasphemy case*, BBC, https://www.bbc.co.uk/news/resources/idt-sh/Asia_Bibi.

[63] Pakistan Penal Code, XLV of 1860.

[64] *Salman Taseer murder: Pakistan hangs Mumtaz Qadri*, BBC (Feb. 29, 2016), https://www.bbc.com/news/world-asia-35684452.

[65] Aamir Yasin, *Suburban mosque named after Salman Taseer's assassin*, DAWN (Apr. 30, 2014), available at, www.dawn.com/news/1103232.

and set aside the conviction.[66] The court reappraised the evidence and set aside the conviction because the prosecution did not prove its case beyond a reasonable doubt. The court explained multiple grounds for questioning the credibility of the prosecution's story. First, the delay in filing FIR was without reasonable explanation, and in such cases, a delay should be considered fatal.[67] Secondly, there were glaring discrepancies and contradictions in the statement of prosecution witnesses concerning almost all facts before the court. Lack of clarity in relation to questions such as who informed the complainant about the alleged act of blasphemy, how many people were present in the initial gathering outside, where did the gathering took place, etc. undermined the prosecution's story.[68] Thirdly, the investigation conducted by the sub-inspector was in violation of Section 156A of Code of Criminal Procedure, which prescribed such investigation to be done by an officer, not below the Superintendent of Police rank. Lastly, reliance placed upon extra-judicial confession by High Court was considered as a fragile piece of evidence, especially in case of confession before a large public gathering. The court stated that such confession can't be termed as a voluntary statement.[69]

The court deliberated upon the concept of blasphemy and cautioned about the misuse of the provision and touched upon various instances of mob lynching.[70] It invoked the constitutional values of the equality before law[71] and duty of the state to provide justice[72] to emphasize that only the State Court is the constitutional machinery to try the offence of blasphemy.[73] It is interesting to note that both the judges consistently cited the verses and passages from the Holy Quran and Islamic jurisprudential work. For example, Justice Asif Saeed Khan Khosa cited the covenant signed by Prophet Mohammed called 'The Promise to St.

---

[66] Mst. Asia Bibi v. The State, Crl. A. No. 39-L of 2015, ¶ 50, https:// web.archive.org/ web/ 20181031151312/ http:// www.supremecourt.gov.pk/ web/user files/ File/Crl.A._39_L_2015.pdf.
[67] *Id.*, ¶ 24.
[68] *Id.*, ¶ 32.
[69] *Id.*, ¶ 44.
[70] *Id.*, ¶ 12.
[71] PAKISTAN CONST. art. 4.
[72] *Id.*, art. 37(d).
[73] *Id.*, art. 175(2).

Catherine' to trace the protection of freedom of religion of people of other faith.[74] This pronouncement is a manifest expression of the impact of Islamic jurisprudence in the constitutional morality of Pakistan. The landmark ruling was followed by large scale demonstrations demanding that Asia Bibi be put to death for insulting the official religion.[75] Even the judges, who acquitted Asia, were given death threats.[76]

In March 2011, Pakistan's Minister of Minority Affairs Shah Bhati, the only Christian in the cabinet, was assassinated on his way to work. Shah Bhati was championing the cause for reforming blasphemy laws and had received multiple death threats for it. It is reported that pamphlets by al-Qaeda and Tehran-i-Taliban Punjab, a branch of the Taliban in Pakistan's most populous province, were found on the crime scene which is illustrative of offence dipped in the ink of religious hatred. Tehran-i-Taliban took the responsibility for the shootout in their interview to BBC Urdu.[77]

> "*This man was a known blasphemer of the Prophet (Muhammad),"* said the group's deputy spokesman, Ahsanullah Ahsan. "*We will continue to target all those who speak against the law which punishes those who insult the prophet. Their fate will be the same.*"[78]

The year 2013 saw coordinated attacks on Christian dominated localities. It is reported that such attacks across Pakistan resulted in wide-scale destruction of property and life. As an example, Ahmad Raza who was leading rescue operation in Joseph colony massacre wherein Christians were targeted stated that the attack resulted in the destruction of one hundred and seventy-eight houses, eighteen shops and two churches.[79] The mentioned event resulted in four hundred families fleeing their

---

[74] *Supra* note 66, ¶ 24.
[75] *Supra* note 62.
[76] *Id.*
[77] *Pakistan Minorities Minister Shah Bhati shot dead*, BBC (Mar. 2, 2011), https://www.bbc.com/news/world-south-asia-12617562.
[78] *Id.*
[79] Declan Welsh & Waqar Gilani, *Attack on Christians Follows claims of Blasphemy in Pakistan*, N. Y. TIMES (Mar. 9, 2013), https://www.nytimes.com/2013/03/10/world/asia/explosion-rips-through-mosque-in-peshawar-pakistan.html.

homes and neighbourhood.[80]

A summary discussion of the much-publicized lynching of Mashal Khan is essential for the conclusion of this section. Mashal Khan was a Pashtun studying in Abdul Wali Khan University, Pakistan. On 13 April 2017, he was dragged out of his room by university students. He was miserably beaten before being shot and his body was mutilated. Khan's lynching was captured on mobile phone cameras and widely circulated on social networking platforms. While the lynching ensued, it was reported that police present inside the campus premises did nothing to prevent the mob.[81] Consequently, this event not only shook the conscience of the citizens of Pakistan but also gathered the attention of international media leading to tremendous pressure targeted towards removing the blasphemy laws from Pakistan. The police after a thorough investigation concluded that Mashal's lynching was a form of premeditated murder and there was no conclusive evidence of Mashal committing blasphemy. With regard to Mashal's case, the courts of Pakistan sentenced one man to death and handed life terms to five others. While twenty-five others were convicted of lesser offences in the case and twenty-six people were acquitted.[82] The trial in itself was a significant event and heavy security forces were deployed on the day of the verdict. South Asian Terrorism Portal (Institute of Conflict Management) is an online database and conducts research and analytics on extremist movements in SAARC countries. A cursory reading of its findings on sectarian violence in Pakistan from last three decades presents the grim reality of lynching under the legitimacy of blasphemy laws.[83] There are more than five thousand deaths and ten thousand injuries owing to the sectarian violence

[80] Amalendu Mishra, *Life in Brackets: Minority Christians and Hegemonic Violence in Pakistan*, 22 INT'L J. ON MINORITY RIGHTS AND GROUP RIGHTS, 157-81 (2015).
[81] Zaidi Mubashir, *Pakistani student killed over alleged blasphemy*, THE HINDU (Apr. 13, 2017), https://www.thehindu.com/news/international/pakistani-student-killed-over-alleged-blasphemy/article17992006.ece.
[82] *Mashal Khan Case: Death sentence for Pakistan 'blasphemy' murder*, BBC (Feb. 07, 2012), https://www.bbc.com/news/world-asia-42970587.
[83] *Report on Sectarian Violence in Pakistan*, South Asia Terrorism Portal (SATP), https:// www.satp.org/ satporgtp/ countries/ pakistan/ database/ sect-killing.htm.

in Pakistan in the past three decades.[84]

LEGAL FRAMEWORK IN PAKISTAN

As noted in the previous section, instances of religious lynching in Pakistan have remarkably increased. It becomes imperative to unpack the legal framework often used to perpetrate violence in the name of religion. The legal history of blasphemy in Pakistan owes its origin to common law heritage. British Government in 1860 promulgated laws regarding offences on religious grounds under Chapter XV in the PPC. The chapter had only four sections and protected all religions from defilement, insult, etc.[85] It imposed a two-year prison sentence, plus a fine on the offence. When the Islamic Republic came into being, they adopted IPC and retained the chapter on blasphemy in the PPC. The provisions regarding offences on religious grounds were not amended and remained unchanged until 1980.

In 1980, General Zia Ul Haq, credited with Islamisation of Legal Framework in Pakistan added Section 298-A. It was followed by a series of additions of 295-B, 295-C, 298-B and 298-C in the 1980s.[86] These amendments are at the centre of discourse regarding blasphemy in Pakistan. They are briefly summarized below.

Section 298-A was added through the amendment in 1980.[87] It prescribes a punishment of imprisonment of maximum three years or fine or both for the offence of using derogatory remarks in respect of holy personages (wife or family members or caliphs or companions of the Holy Prophet). It is argued that the provision was introduced to persecute Shia minority because of the difference of importance given to the role and status of companions of the holy prophet.[88] Sections 298-B and 298-C were added through the amendment in 1984.[89] According to the provisions if a person of the Quadiani group or Ahmadiyas group calls themselves or practice Islam shall be punished with imprisonment of either description for a term

---

[84] *Id.*
[85] *Supra* note 63, § 295.
[86] Raza Rumi, *Unpacking the Blasphemy Laws of Pakistan*, 49(2) ASIAN AFF. 319-39 (2018).
[87] Pakistan Penal Code (Second Amendment) Ordinance, XLIV of 1980.
[88] RUMI, *supra* note 86, at 326.
[89] Anti-Islamic Activities of Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, XX of 1984.

which may extend to three years and shall also be liable to fine.[90] The provisions have made a profession of Islam by Ahmadiyas a criminal offence. It is to be noted that Ahmadiyas believe themselves to be Muslim and are followers of a late 29th-century religious reformer, Mirza Ghulam Ahmad Qadiani.[91] Another legislative endeavour for Zia Ul Haq came in form of addition of Section 295-C.[92] This provision prescribed the death penalty or life imprisonment for insulting the holy prophet. The definition was dipped in the ink of sectarian ideologue and it was apparent that the legislation has the potential of opening a pandora's box which was susceptible to being misused. The Nawaz Sharif government in 1992 removed the provision for life imprisonment from Section 295-C leaving only mandatory death penalty as a prescribed punishment for blasphemy and the same was affirmed by the court.[93]

This provided an impetus to those who wished to use this law to suppress anti-Islamic voices.[94] One of the prominent arguments against exploitation of blasphemy laws is centred on lacunas in Pakistan's criminal justice system. Amnesty International in its paper argued that many individuals are convicted of blasphemy offences based on the proof which are at a lower pedestal than "beyond a reasonable doubt".[95] A similar sentiment was echoed by the honourable Supreme Court of Pakistan in its verdict on Asia Bibi case.[96]

CONSTITUTIONAL MORALITY IN PAKISTAN: THE ESSENCE OF ISLAM

The larger question arises whether constitutional morality of Pakistan permits for a legal framework that penalizes blasphemy. It is important to

---

[90] *Id.*

[91] RUMI, *supra* note 86, at 326.

[92] The Criminal Law (Amendment) Act, No. 111 of 1986, § 2.

[93] Federal Shariat Court, Muhammad Ismail Qureshi v. Pakistan through Secretary, Law and Parliamentary, Shariat Petition No.6/L of 1987, (1990), http://khatm-e-nubuwwat.org/lawyers/data/english/8/fed-shariat-court-1990.pdf.

[94] MATHEW JOSEPH C. (ED.), UNDERSTANDING PAKISTAN: EMERGING VOICES FROM INDIA (Routledge New York 2017).

[95] Amnesty International, *As Good as Dead: The Impact of Blasphemy Laws in Government*, AMNESTY INTERNATIONAL (Feb. 15, 2020), https://www.amnesty.org/download/Documents/ASA3351362016ENGLISH.PDF.

[96] *Supra* note 66.

mention that like India, the concept of constitutional morality is of recent origin in Pakistan courts. The Apex Court of Pakistan has recently started deliberating upon issues of constitutional morality such as the judgment on the amendments to the Election Act, 2017 or the Panama papers scandal cases.[97] Some of the instances are briefly enumerated to illustrate the judicial interpretation of the concept. The Court in the case of *Ishaq Khan*, dealing with the interpretation of constitutional provision for qualification criteria of a member of the Majlis-e-Shoora Parliament observed that there is a clear disconnect between constitutional morality and political ethos.[98]

Similarly, the Court in *Panama leaks* case relating corruption and amassing assets by the incumbent Prime Minister and his family members while emphasizing on the supremacy of rule of law stated:

"*The solution lies not in bypassing but in activating the institutions by having recourse to Article 190 of the Constitution. Political excitement, political adventure or even popular sentiments real or contrived may drive any or many to an aberrant course but we have to go by the Law and the Book. Let us stay and Act within the parameters of the Constitution and the Law as they stand till the time they are changed or altered through an amendment therein*."[99]

Former Chief Justice Mian Sadiq Nisar in *Zulfiqar Ahmed Bhutta* explained how the morality of the Constitution could be traced to Islamic principles. He cited an excerpt from the preamble emphasizing the overt impact of Islam on the constitutional design of the country.[100] The Preamble of Pakistan's Constitution expressly endorses Pakistan to establish as a democratic state wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed.[101] The influence of Islam finds further expression through Article 2 of the Constitution of Pakistan declaring Islam to be a state religion.[102] The definitional clause in the Constitution of Pakistan provides another

---

[97] Zulfiqar Ahmed Bhutta v. Federation of Pakistan, 2018 SCC OnLine Pak SC 55; Imran Khan v. Mian Muhammad Nawaz Sharif, 2017 SCC OnLine Pak SC 1; Ishaq Khan Khakwani v. Mian Muhammad Nawaz Sharif, PLD 2015 SC 275.
[98] *Id.*
[99] *Id.*
[100] Zulfiqar Ahmed Bhutta v. Federation of Pakistan, 2018 SCC OnLine Pak SC 55.
[101] PAKISTAN CONST., preamble.
[102] *Id.*, art. 2.

expression of the importance of Islam in constitutional values of Pakistan.[103]

Pakistan's first Constitution in 1956 was drafted primarily by a catholic, Justice A Cornelius. It is pertinent to note that the right to religious freedom was central to the struggle of Pakistan. Freedom from Hindu domination was one of the foundational premises for two-nation theory. Mohammad Ali Jinnah, popularly known as Quaid–e–Azam, reiterated this vision in his presidential address to the first Constituent Assembly on 11 August 1947:

> "*You are free; you are free to go to your temples, you are free to go to your mosques or to any other place of worship in this state of Pakistan. You may belong to any religion or caste or creed — that has nothing to do with the business of the State*."[104]

However, the record of the state in last seven decades with respect to the severe persecution of Christians, Shias, Ahamadiyas and other minorities owing to the country's sectarian laws and policies reflects the emptiness of Jinnah's promise. The slogans '*kafir kafir jo na mane who bhi kafir*' (infidels, infidels those who are not believers are infidels too) and consequently, '*wajibulqatl*' (these infidels are deserving of legitimate killing) have become a sad reality and require pressing safeguard measures for human rights violations.

Hegemonic violence further takes its strength from the existing legal framework in the form of blasphemy laws and the state religion's constitutional endorsement. Islamisation of the legal structure in the 1980s exacerbated the increase in religious nationalism. Rumi argued that the addition of blasphemy laws resulted in the acceptance of a narrative that blasphemy should be avenged at any cost because Muslims, Islam, and Pakistan are under threat from 'non-Muslims'.[105] International Commission of Jurists prepared a report on the blasphemy laws in

---

[103] *Id*., art. 260(3)(b).

[104] MOHAMMAD ALI JINNAH, QUAID–I–AZAM MOHAMMAD ALI JINNAH SPEECHES AS GOVERNOR GENERAL OF PAKISTAN 1947–1948 (Feroz Sons Ltd. 1962).

[105] RUMI, *supra* note 86.

Pakistan.[106] In its report, it found out that out of twenty-five cases reviewed, a majority of cases (fifteen cases) contained frivolous complaints and fabricated testimonies of the witnesses. The report strongly expressed that blasphemy laws contradict Pakistan's international obligations and completely disregard the foundational principles of constitutional democracy. The report also concluded that blasphemy laws are breeding the culture of religious nationalism and urged all state machineries to urgently address the manifest defects in blasphemy laws as well as the shortcomings prevalent at every level of governance. Unfortunately, the dissenting discourses pertaining to the necessity of the blasphemy laws in Pakistan are discouraged and are subject to persecution. The fleeing of the Islamic scholar, Javed Ahmad Hameidi from Pakistan is one of many such examples.[107]

The landmark ruling in the *Asia Bibi* case also did not offer much respite. Though the Supreme Court issued a landmark verdict in the *Asia Bibi* case, there was nothing to cheer. The court has spoken nothing about the dangers of the blasphemy law. On the contrary, it has emphasized the importance of blasphemy laws. This is one of the recurring critiques directed towards the Supreme Court vis-à-vis the protection of minorities from false blasphemy cases.[108] There is ample literature on the criticism of blasphemy laws and the pressing need for reconfiguring the legal system. However, legal reforms will be futile if they are not conjointly read with the constitutional morality notion of secularism. PEW Research Centre study of 2013 pointed out that ninety-eight per cent of the population of Pakistan believes that religion is essential for morality.[109] Therefore, it becomes inevitable that any legal reform, including an arsenal of

---

[106] International Commission of Jurists (ICJ), *On Trial: The Implementation of Pakistan's Blasphemy Laws,* ICJ, https://www.icj.org/wp-content/uploads/2015/12/Pakistan-On-Trial-Blasphemy-Laws-Publications-Thematic-Reports-2015-ENG.pdf.

[107] Declan Walsh, Islamic Scholar Attacks Pakistan's blasphemy laws, THE GUARDIAN, https://www.theguardian.com/world/2011/jan/20/islam-ghamidi-pakistan-blasphemy-laws.

[108] Zia Ullah Ranjan, *A Critical Review of Asia Bibi Case*, 5 LUMS L. J. (2017).

[109] Pew Research Centre, *Worlwide, many see belief in God as essential to* morality, PEW RESEARCH CENTRE, https://www.pewresearch.org/global/2014/03/13/worldwide-many-see-belief-in-god-as-essential-to-morality/.

constitutional morality, must align with religious morality to be a worthwhile reformation design.

PUBLIC MORALITY NEEDS TO BE IN SYMBIOTIC UNDERSTANDING WITH CONSTITUTIONAL MORALITY

For better intersectional analysis of law and morality discourse, it is important to understand that the societies that we live in are going through a constant change—be it in terms of values, ethics or morals.[110] Therefore, something that was considered wrong earlier may now be considered as right.[111] Undeniably, a change in public morality is also not an exception to this established rule of evolution and thus is always open to revision. Public morality changes and modifies in response to a change in the law; It is therefore the morality of law which influences the public morality and vice-versa.[112] Therefore, the law must assume as one of its primary functions to maintain this public morality.[113]

It is pertinent to note that every society has a different sense and standard of morality; sometimes even if the idea of a particular morality is accepted by a dominant group of that society, it may not extend its protection to all the people of society equally.[114] In such a case, an important question can be asked as to what and whose morality is accepted by law? Is it mandatory for the law to uphold the accepted standard of morality of the dominant group that applies it on an unequal basis and excludes some classes of people of benefits? or, must the law uphold the morality of those who advocate equal treatment and respect for all?[115]

This is where constitutional democracy comes into the picture. The Constitution plays an important role as it not only provides for equal rights

---

[110] Lira Goswami, *Law and Morality: Reflections on the Bearer Bonds Case*, 27(3) J. OF IND. L. INST. 496-510, 505 (1985).
[111] Indian Penal Code, 1860, § 377.
[112] A. Raghunadha Reddy, *Role of Morality in Law-Making: A Critical Study*, 49(2) J. OF IND. L. INST. 194-211, 199 (2007).
[113] *Id.*; *See also*, LORD DEVLIN, THE ENFORCEMENT OF MORALS (Oxford University Press 1965).
[114] HART, CONCEPT OF LAW 196 (Oxford University Press 1961).
[115] *Id.*, at 201.

for all but also rejects the concept of majoritarian morality by sticking to its arsenal of the rule of law. Such eternal principles which form the idea of constitutional morality can never be changed. However, if the state engages with those dominant groups and moulds the constitutional morality thereby excluding those at lower strata, the individuals who are morally progressing must resist the same to uphold the natural morality of the Constitution.[116]

The alarming reality relating to mob justice in India makes it imperative to understand India's approach towards public and constitutional morality. As discussed earlier, the Indian Constitution, by equally providing all persons with the freedom of conscience and free profession, practice and propagation of religion all persons, clearly postulates religious constitutional morality under Article 25[117] and therefore, public morality must be conducted in accordance with such constitutional morality. A pertinent question that now arises is as to why communities are still being targeted in the name of religion. Dr. B. R. Ambedkar can be rightly quoted for answering this very question: "*Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people are yet to learn it.*"[118]

Certainly, it is the state which is obligated for ensuring that the masses realize and acknowledge constitutional morality. It can therefore be questioned as to whether the state has failed in its duty? The current situation when there is no legal framework to prevent lynching and to control the public morality of people answers this question affirmatively. It is for this reason that the applicability of a Constitution in absence of constitutional morality turns out to be one that is arbitrary, erratic and capricious.[119] In India, the double standard exercise of constitutional morality by political parties can also not be negated which is also one of the reasons for bringing confusion and uncertainty to the ultimate result of public morality.[120]

---

116 Vishwanath Prasad Varma, *State and Morality*, 18(3) IND. J. OF POL. SCI. 200-09, 207 (1957).
117 *Supra* note 28.
118 VII, *Constituent Assembly Debates*, 1989.
119 Andre Beteille, *Constitutional Morality*, 43(40) ECON. & POL. WKLY 35-42, 36 (2008).
120 *Id.* at 41. *E.g.*, Their approach to the constitutional morality differs as soon as they assume and leave the political power.

While understanding the principle of morality in the context of Pakistan, what can be appreciated is the state's acceptance of a particular religion that is Islam;[121] such formal recognition of Islam as a state religion directly impacts the very formation of constitutional morality which ultimately endorses the public morality.[122] However, it opens a can of worms and the reality of hate crimes and blasphemy legal structure in Pakistan is knocking the doors of rule of law and seeking a response from the Constitution. Applying the earlier principle, it can be inferred, implied that public morality is destined to follow the constitutional morality and the state is under an obligation to fulfil it.

Therefore, to fulfil the obligations of constitutional morality, the state in Pakistan has enacted various laws under PPC[123] which specifically endorse Islamic principles and do not include any other religion in case of blasphemy laws. The incidents of mob violence on the basis of religion in Pakistan are one of the outcomes of religious constitutional morality which the people are unmindfully adhering to. Citizens are expected to adhere to the constitutional morality to which the state subscribes.[124] Citizens of Pakistan seem to strictly follow this idea of preferring one religion over others. The Blasphemy laws are also based on the constitutional morality of Pakistan which protects only one religion and not all.

What is therefore missing in the constitutional morality of Pakistan is the element of civility. Civility being one of the most important, crucial components of constitutional morality requires tolerance, restraint and mutual accommodation of diversity.[125] Its concentration on one religion is one of the greatest reasons for the present situation of violence against religious minorities. It can, hence, be compiled and gathered that the constitutional morality in India presents a wider outlook by making the state a secular one, opting for a secular state; however, what it lacks is the proper realisation of this secular idea by the masses. Whereas in Pakistan, the scenario is just the opposite; there, the state itself is endorsing one

121 *Supra* note 102.
122 *Supra* note 112.
123 *Supra* note 63.
124 *Supra* note 119, at 42.
125 EDWARD SHILS, THE VIRTUE OF CIVILITY (Liberty Fund Inc., 1997).

religion, thereby shaping the public morality within the narrower sense of constitutional morality.

What is required, hence, is that in order to prevent an epidemic such as religious mob violence, the state cannot afford to have a biased outlook, either on the basis of religion or public morality; it has to go along with the best practice of constitutional morality; that is to further notions of equality and justice, and that is what the public morality should adopt. Neither the dominant authoritarian public morality nor the biased or dominant religious constitutional morality can be sustained.

Therefore, in a constitutional democracy, constitutional morality should neither bow down to the 'majoritarian' morality nor be divorced entirely from public morality. Despite being opposite to each other, approaches to constitutional morality in India and Pakistan have not proven to be a successful design. Therefore, the doctrine of constitutional morality requires urgent recasting in both countries by harnessing religious morality's reformative force.

CONCLUSION

Be it in the context of public morality or constitutional morality, the role of the state as a regulator cannot be neglected. This role is therefore to be sincerely performed while keeping constitutional ethos in mind. What the scenario at hand, describes is the dominance of public morality over constitutional morality. Both, in the context of India and Pakistan, the state seems to succumb to majority morality irrespective of whether constitutional design contradicts or endorses such majoritarian morality. India, though a secular state is failing in its obligation to protect the constitutional morality and certainly the public morality has taken over the constitutional sense of secularism. Therefore, the dominant Hindu forces have asserted to be righteous in their acts of mob-violence against the religious minorities and the state has been consistently failing in its duty to protect the minorities. India in the twenty-first century though has its own distinct sense of secularism yet is trudging a dangerous path wherein public morality attributable to majoritarian regime might suppress the morality envisioned by constitutional makers.

Similarly, when we talk about Pakistan the problem gets manifested in its constitutional values tied to its religion. In the twenty-first century, it must reflect upon the long-term futility, as opposed to short-term utility, of using Islam as foundational nation values disregarding value pluralism which demographically exists in the state, and introspection is required in a way we should look at blasphemous laws. It should be noted that when Pakistan started its constitutional design, it was dipped in morals of U.S. concept of Secularism i.e., of a strict wall of separation between the church and state. However, over course of time, Islamisation of legal framework resulted in the evolution of constitutional morality that is attributable to Islamic legal tradition which accelerated the persecution and mob lynching via the concept of Islamic morality. Therefore, it is a pressing need of this hour that value pluralism is respected.

As a departing note, we would comment that the subcontinent with its religious diversity is the epicentre of endless deliberations of contesting relationship between religious morality and human rights and unfortunately human rights are always at the receiving end of these contestations.

CURBED APPLICATION OF OUSTER CLAUSE IN INDIAN LEGAL FRAMEWORK: THE UNSETTLED CONFLICT BETWEEN LEGISLATURE AND JUDICIARY

ANITA BHARATHI[1]

The ouster clause is a provision in any statute that bars other courts from reviewing decisions of the administrative agency or tribunal of that statute. This clause is applied when there are certain provisions inserted in a statute that intentionally exclude judicial review. Such a clause that ensures the tribunal or any administrative authority's decision as final is called a finality clause and the process is called as statutory finality. The intention of the clause in both English and Indian laws is to protect the parliamentary intention. In India, the word, final refers to the finality under that particular act and does not stop any intervention by higher courts if an appeal is filed under Article 32, 226 or 227 of the constitution. This clause, though clear on its meaning, creates its own ambiguity in cases where the intention of the clause is not clearly interpreted. On one hand, the clause ousters judicial intervention, while on the other hand, the statute allows the judicial intervention by the High Court which again disturbs the point of establishing tribunals. On this aspect, Article 31 of the Indian Constitution and the ninth schedule play a huge role. This paper tries to reconcile this ambiguity existing with reference to the intention of the clause in the statutes in India with the help of case laws. This paper thus discusses the role of the privative or ouster clause in India in detail and the conflict between the legislative and judiciary in this regard.

INTRODUCTION

An ouster clause[2], also known as a privative clause, is a clause that excludes the jurisdiction of civil courts from interfering in any matter that falls under the particular statute containing such clause. Even though ouster and finality clauses are often considered to be synonymous, there is a thin line of difference between the two - while the former refers to the ousting of the judicial intervention; the latter refers to the decision of the relevant authority or tribunal being final. However, both refer to the proposition

* Cite it as: Bharathi, *Curbed Application of Ouster Clause in Indian Legal Framework: The Unsettled Conflict between Legislature and Judiciary*, 5(1) COMPARATIVE CONST. L. ADMINISTRATIVE L. QUARTERLY (2021).

[1] Anita Bharathi is a fourth year B.A., LL.B student at Tamil Nadu National Law University, Tiruchirappalli. The author may be reached at < anitaarul0@gmail.com>.

[2] *Ouster Clause*, Collins Dictionary of Law, (3rd ed. 2006).

that ousting of judicial intervention takes place when statutory finality occurs. The origins of the ouster clause can be traced back to English jurisprudence.[3] In English constitutional law, the power of judicial review refers solely to the courts' authority to review acts of administrative agencies to ensure that they operate within the scope of their authority as delegated by Parliament. English courts possess this authority so that they can effectuate the Parliament's intentions by ensuring that the agencies act only in accordance with the power which Parliament intended them to possess.

The ouster clause was introduced with an aim to give primacy to arbitration, decisions of administrative tribunals and to reduce the burden of appellate courts.[4] The ouster clause involves all three organs of the constitutional framework, namely the judiciary, executive and legislature. The ouster clause was introduced by the legislature to grant to administrative authorities complete privilege over a statute.[5] The Constitution of India has nevertheless vested power in the High Courts through Article 226 to issue writs[6], and consequently, the jurisdiction to entertain actions for the issuance of writs.[7] In addition to this, the judicial approach towards Article 31 and especially the Ninth Schedule *vis-à-vis* fundamental rights is a prominent determining factor of the validity of ouster clauses in the Indian legal system.[8] While this proposition to an extent limits judicial intervention in cases, it is not strict in nature as the Constitution of India has the provision of writs by which any appeal can be made to the higher judiciary.

TOTAL OUSTER CLAUSE AND PARTIAL OUSTER CLAUSE

[3] Edlin E. Douglas, *A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States*, 57 AM. J. COMP. 67, 68-70 (2009).
[4] *See* Luke Sizer, *Privative Clauses: Parliamentary Intent, Legislative Limits and Other Works of Fiction*, 20 AUCKLAND U. L. REV. 148 (2014).
[5] *Id.*
[6] M.P. JAIN, INDIAN CONSTITUTIONAL LAW, 191 (6th ed. 2010); M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, 324 (2011).
[7] Maharashtra Chess Association v. Union of India, 2019 SCC OnLine SC 932 (India).
[8] M.P. JAIN AND S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, 324 (2011).

The ouster clause is of two types, one is the total ouster clause and the other is partial ouster clause. In order to understand the difference between the total ouster clause and partial ouster clause, a deeper understanding of both has to be drawn. However, it must be kept in mind that the legislative intent behind both the clauses is at par with each other.[9] The total ouster clause refers to the finality clause in particular, where judicial review is completely ousted. This finality clause was analysed in a different manner in the landmark case of *Anisminic Ltd. v. Foreign Compensation Committee*[10] ("**Anisminic**"), wherein it was held that *"the ouster clause is subject to judicial review when the deciding authority has committed an error of law and the judicial intervention will be restricted to the jurisdiction of the ouster clause only."*[11]

Anisminic further held that this particular decision applies only when the adjudicating authority is a public body acting in the capacity of the executive. This distinction provides that the former refers to channelling the supervisory jurisdiction by means of time limits or requirements to pursue alternative remedies is one legitimate thing, and the latter means excluding the ouster clause altogether.[12] Furthermore, this case introduced the channelling and excluding the distinction of judicial review. This particular distinction plays a vital role in determining the scope of the ouster clause which is then followed by the implementation.

Partial ouster clause can be considered as a limited privative clause.[13] This clause does not outrightly reject the court's intervention or supervision; rather it imposes certain limits to it.[14] Partial ouster clauses are mostly of two types, first being a time limit clause and second being an alternative remedy under the statute.[15] In the Indian context, time limits are imposed in numerous statutes like the Arbitration and Conciliation Act, 1996 [16] and

[9] Regina (Cart) v. Upper Tribunal [2012] 1 AC 663 at 100.
[10] Anisminic Ltd. v. Foreign Compensation Committee [1969] 2 AC 147.
[11] *Id.* at 393.
[12] *See* JAIN, *supra* note 6.
[13] *See* WILLIAM WADE AND CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW, 620 (10th ed. Oxford University Press 2009); PHILIP A JOSEPH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND, 907-08 (4th ed. Thomson Reuters, Wellington 2014).
[14] *See* Smith v. East Elloe Rural District Council [1956] AC 736 (HL) at pp. 750-51; Cooper v. Attorney-General [1996] 3 NZLR 480 (HC) at 493-94.
[15] Sizer, *supra* note 4.
[16] The Arbitration and Conciliation Act, 1996, §§ 20, 34 and 36 (India).

Code of Civil Procedure, 1908[17]. Such legislation provides for a certain time limit in the form of a deadline within which an individual can approach the court and seek remedy, failing which the remedy would be time-barred. Alternative remedies can be seen in statutes like the Industrial Disputes Act, 1947[18] and Companies Act, 2013.[19] These statutes provide for alternate remedies for any disputes arising under the given legislations, to be prioritized over court procedure. But there have been common instances wherein courts have entertained petitions that did not follow these alternative remedies owing to exceptional circumstances.[20]

From the above discussion, the differences between the partial and total ouster clauses can be spotted. A total ouster clause is unconditional, while a partial ouster clause is conditional towards the judicial review. Moving on to the incorporation of both, the driving factor is the matter of substance. An ouster clause is validated by examining whether issues of legality, rationality and procedural propriety can be addressed by the independent and impartial tribunal set by ouster clause. Applying this factor to both clauses, we can see that the partial ouster clause does not have a huge role to play since it acts as a referring or directing element in a statute rather than being a determinant element of the statute. In essence, total ouster clause is considerably a determining and inevitable element of a statute since it decides the recourse of that particular legislation whereas partial ouster clause limits its role to directing the beneficiary towards the alternate remedies or stipulating the time. However, ignoring the role of partial ouster clause is illegitimate enough to justify recourse to Anisminic-style reasoning.[21]

INTENTION OF THE OUSTER CLAUSE *vis-a-vis* INTERPRETATIONAL CONTRADICTIONS

Ouster clause in plain context showcases that the role of the executive is highly promoted and the decision of the same is considered to be final.

[17] CODE CIV. PROC., § 20(c) (India).
[18] The Industrial Disputes Act, 1947, § 10 (India).
[19] The Companies Act, 2013, § 241 (India).
[20] Subhash Chand v. Govt. of NCT & Anr., 117 (2005) DLT 527.
[21] *See* R (Privacy International) v. Foreign and Commonwealth Secretary [2017] EWCA Civ 1868, ¶ 38.

This further emphasizes the parliament's intention to give importance to specialist tribunals or the executive at par with civil courts.[22] However, the problem is that of ousting of the jurisdiction of the appellate courts from reviewing decisions of tribunals or executive authorities. By prohibiting the interference of appellate jurisdiction, tribunals become the final decision-making authority, causing excessive power to be vested on such tribunals.

Indian courts have often accepted the ouster clause in its fullest sense in agreements and contracts to decide the jurisdiction.[23] The stance taken by the court[24] while deciding the application of ouster clause to decide the jurisdiction of courts mentioned in an agreement is "*When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other courts should avoid exercising jurisdiction*". This approach has been adopted in other decisions of courts to decide the jurisdiction of courts as mentioned in the ouster clause of an agreement. Therefore, the hierarchy of court powers on taking up judicial review can be observed in the context of the ouster clause.

In furtherance of this discussion, it is pertinent to take into consideration the constitutional structure of the United States ("**US**"). "*The existence and jurisdiction of the Supreme Court of the United States derive, without question, from the text of the Constitution, but the existence and jurisdiction of that Court are not therefore wholly removed from their creation within the Anglo American common law tradition."*[25] In the nineteenth century, the Supreme Court interpreted this language of the US Constitution to mean that since Congress has the authority to create lower federal courts; Congress must likewise have the authority to limit the jurisdiction of lower federal courts.[26] This particular statement brings out the constitutional approach to ouster clause where the legality in limitation of jurisdiction is put forth by the Supreme Court.

---

[22] Douglas, *supra* note 3.

[23] Globe Transport Corpn. v. Triveni Engg. Works, (1983) 4 SCC 707; R.S.D.V. Finance Co. (P) Ltd. v. Shree Vallabh Glass Works Ltd., (1993) 2 SCC 130; Angile Insulations v. Davy Ashmore India Ltd., (1995) 4 SCC 153; Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd., (2004) 4 SCC 671.

[24] Rajasthan State Electricity Board v. Universal Petrol Chemicals Ltd., (2009) 3 SCC 107.

[25] *See* JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM, 7 (1992).

[26] Sheldon v. Sill, 49 U.S. (8 How.) 441, at 448-49 (1850).

The ambiguity of the clause arises when the exact meaning of the clause is not defined in clear words and thus the scope of the applicability of the clause is completely left to the judiciary or the executive. With all these actions existing contrary to the intention, the judicial decisions regarding the intention of the clause are equally contradictory. In a United Kingdom ("**UK**") judgment[27], the court held that "*binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction*". In this case, the court stated the same after observing that the wording of the clause was not clear. But in another UK judgment[28], the court observed that "*when Parliament enacts a remedy with the clear intention that this should be pursued in place of judicial review, it is appropriate to have regard to the considerations giving rise to that intention*". These two opinions of the clause's intention are repeated in a few other judgments as well.[29]

As mentioned earlier, a partial ouster clause is considered to be valid in most cases since it extends to ousting the judicial review only after a specified time period. However, voiding a decision after the time period has lapsed can cause considerable hardship to third parties.[30] When a lower court's decision is voided after the lapse of the time period stated in the respective statute, it affects the third parties who are respondents in the appeal. Indian courts have often carved out certain exceptions to these time limits, which eventually renders the partial ouster clause moot.[31] In a situation where an individual lapses the time limit laid down, he can still plead for an allowance. However, this is again subject to error of law by the deciding authority irrespective of the time period mentioned.

INDIAN COURTS' CONSTRUAL OF THE OUSTER CLAUSE

[27] R (on the application of Privacy International) v. Investigatory Powers Tribunal & Ors. [2019] UKSC 22.
[28] R (Cart) v. The Upper Tribunal [2011] UKSC 28.
[29] O'Reilly v. Mackman [1983] 2 AC 279; Nagaenthran a/l K Dharmalingam v. Attorney-General [2018] SGHC 112; Lee Hsien Loong v. Review Publishing Co. Ltd. [2007] SGHC 24 at 98.
[30] PETER LEYLAND AND GORDON ANTHONY, TEXTBOOK ON ADMINISTRATIVE LAW, 246 (7th ed. Oxford University Press 2012).
[31] CODE CIV. PROC., § 20(c) (India).

In India, the total ouster clause is rarely considered to be valid, unlike the partial ouster clause.[32] This stance is taken as the basic structure of the Constitution guarantees judicial review in all cases which would impliedly include the ouster clause as well. The most common method used for the purpose of excluding a courts' jurisdiction is to state that in the concerned statute, the decision of a specified tribunal or a body shall be 'final'.[33] However, it is to be noted that no statutory provision excluding judicial review can affect the power of the High Courts to issue a writ, certiorari in most cases.[34] Hence anything that abstains from the judicial review becomes invalid irrespective of the intention. This was reflected in the case of *Minerva Mills Ltd. & Ors. v. Union of India & Ors.*,[35] where the Supreme Court held that "*the judicial review is an integral part of the constitutional system and a part of the basic structure, hence the power of judicial review cannot be abrogated either by the legislation or the constitutional amendment*"[36].

Therefore, it can be inferred that the ouster clause is void in India owing to the fact that it contradicts the basic structure by ousting the power of judicial review by the courts. Ouster clause when seen through the lens of *Minerva Mills*' decision is out rightly void for infringing the basic structure of Indian Constitution. However, the ratio in *Minerva Mills* cannot be considered as the conclusion. In *A.B.C. Laminart Pvt. Ltd. & Anr. v. A.P. Agencies, Salem*.[37], the Supreme Court observed that "*in case an ouster clause restricts the jurisdiction to two courts when there are three courts, then the clause will be valid since the aggrieved party still has an option to claim for the relief*"[38]. Drawing from this decision, it can be agreed that a partial ouster clause is rarely accepted in India. Whenever a finality clause is inserted in any act, it excludes in terms of a challenge to the various things therein mentioned, in any other manner or by any other authority than is provided in the Act.[39]

---

[32] Hakam Singh v. Gammon (India) Ltd. (1971) 1 SCC 286; New Moga Transport Co. v. United India Insurance AIR 2004 SC 2154; Salem Chemical Industries v. Bird & Co. AIR 1979 Mad 16; Harshad Chimanlal Modi v. DLF Universal Limited (2005) 7 SCC 791; Inter Globe Aviation Limited v. N. Satchidanand (2011) 7 SCC 463.

[33] M.P. Jain, *Judicial Response to Privative Clauses in India*, 22 J.I.L.I. 1, 1-37 (1980).

[34] Raja Jagdambika Pratap Narain v. Central Board of Direct Taxes, AIR 1975 SC 1816.

[35] (1981) 1 SCR 206.

[36] *Id.* at 240.

[37] AIR 1989 SC 1239.

[38] *Id.* at 12.

[39] Douglas, *supra* note 3 at 959.

But even in this case, the judicial review is not ousted rather interpreted harmoniously. Furthermore, the harmonious interpretation of the clause often results in providing exceptions to the clause.[40] However, this decision by an implied denial of the legislative intention fails the ultimate purpose of the ouster clause.

QUALIFIERS OF THE CLAUSE AS LAID DOWN BY THE COURTS

The ouster clause is considered valid by examining the adequacy of the deciding authority. For example, when the jurisdiction of the civil court is ousted in the clause, then the deciding authority or the final statutory body as per the finality clause must possess the adequacy to do that. This is considered as the qualifying factor of the clause. In India, qualifiers were laid down in the case of *Dhulabhai and Others v. State of Madhya Pradesh and Another*.[41] Herein, the court observed that whenever the finality or ouster clause is inserted in a statute, the adequacy of the remedies provided must be examined.[42] This case also provided that the provisions of the statute that are challenged as ultra vires cannot be brought before tribunals under the clause. Thus, the court denoted two qualifiers that the clause has to satisfy to prove that it is valid to provide remedies and also efficient enough not to be challenged. These qualifiers, however, do not provide a clear understanding since the first rule suggests the adequate check of remedies, while the second rule rejects the adequacy of the tribunals which are the alternative for courts under the act. This leads to an ambiguity as there is no point of a statute with ouster clause qualifying the first rule and cancelling the second. Such ambiguity can be cleared when either rule is upheld, rather than by providing a contrast set of qualifiers.

OVERVIEW OF THE CONSTITUTIONAL PARADOX OF THE CLAUSE

[40] *See* cases cited *supra* note 32.
[41] AIR 1969 SC 78.
[42] *Id.*

In India, the applicability of the ouster clause is minimal. This is due to the conflict between the application of fundamental rights and finality of the legislature which is averred by this clause.

Article 31B of the Indian Constitution that states *"No legislation or provision of any law in the Ninth Schedule shall be deemed to be void, for being inconsistent with, or takes away or abridges any of the Fundamental Rights"*[43]

This essentially stipulates that no legislation or provision of law in the Ninth Schedule shall be deemed to be void, for being inconsistent with, or for taking away or abridging any of the Fundamental Rights.[44] The Ninth Schedule of the Constitution is the core pillar of the ouster clause in India. It lists out certain central and state laws that are classified as outside the scope of judicial review. 284 laws that have gained this privilege, to date. Hence, the Ninth Schedule serves as a protective umbrella for definite laws.[45]

The intention of the Ninth Schedule differs slightly from the ouster clause as it is aimed at reducing the burden of the judiciary and conferring greater power and responsibility on the legislature. However, the intention also refers to provisions providing finality of the clauses in the statutes. This has been constantly debated as the Constitution also guarantees fundamental rights under Part III that should not be abridged or taken away by any law and also mandates that laws inconsistent with the Part III of the constitution cannot be challenged in Courts if they fall under Ninth Schedule.[46] This brings us to the factual non-acceptance of the ouster clause for the same reasons. "*Another view is to see the mechanism as an appropriate compromise formula which sorts out the dichotomy between judicial review and legislative power.*"[47]

At this juncture, the judiciary has two options to deal with the ouster clause as it did with the Ninth Schedule of the Constitution. First, to abide by

---

[43] INDIA CONST. art. 31B.
[44] *Id.*
[45] *See* N. K. JAYAKUMAR, JUDICIAL PROCESS IN INDIA: LIMITATIONS AND LEEWAYS (APH Publishing Corporation 1997).
[46] *See* Baldev Singh, *Ninth Schedule to the Constitution of India: A Study*, 37 J.I.L.I. 457, 464 (1995).
[47] P. Ishwara Bhat, *Limits of Ninth Schedule's Openness*, 19 C.U.L.R. 232, 236 (1995).

legislative instruction, uphold the finality of a statute and deny the judicial entry. Second, to refuse entry into forbidden areas that would otherwise evolve in its judicial method to break the legislative outline. Here, the second option though followed in a series of cases has only resulted in cutting out the power of the legislature to give efficient legal structure. However, the first option brought here has to be observed along with its advantages. Herein, the advantages of the same are increasing the importance and seriousness of specialist tribunals and other executive bodies and at the same time lessening the burden of the judiciary. Thus, it is clear that the option of abiding by the legislative instruction and upholding finality of statutes has to be resorted to by the judiciary, at least in times to come to uphold legislative intent in the best possible manner. To achieve the same and to maintain a harmonious balance, the judiciary has to pacify with vesting powers on the other two organs of the Constitution

CONCLUSION

In India, many bills contain the ouster clause such as the civil liability for Nuclear Damages Bill, 2010 and Educational Tribunals Bill, 2010. An act that exhibits partial ouster clause is the Industrial Disputes Act, 1947, in which the clause provides that if an industrial dispute is related to any right or duty mentioned in the same act, then the suitor should resort to adjudication only. However, even this is subject to the review of civil court since it is the suitor that chooses adjudication over the civil court. In a plethora of cases where the Ninth Schedule entries and Part III are challenged, the courts tend to carry out the legislative intention by immunising the Ninth Schedule entries.[48]

[48] State of West Bengal v. Naba Kumar, AIR 1961 SC 16; Gopalakrishna Yachendra v. Krishna Yachendra, AIR 1963 SC 842; Ram Kissen v. Divisional Forest Officer, AIR 1965 SC 625; Latafat Alikhan v. State of U.P., AIR 1973 SC 2070; Dattatrey Govind Mahajan v. State of Maharashtra, AIR 1977 SC 915; State of Maharashtra v. Mansingh Padvi, AIR 1978 SC 916; Ambalal Golakbhai v. State of Gujarat, AIR 1982 SC 1090; Sanwal Ram v. Addl. District Magistrate, AIR 1982 Raj. 139; Nityanand Guru v. State, AIR 1983 Ori. 54; Lingappa Appelwar v. State of Maharashtra, AIR 1985 SC 389; Dattatrya Shankarbhat Ambalgi v. State of Maharashtra, AIR 1989 SC 1796.

At this point, it should be noted that other than Article 31B, two articles in the Indian Constitution also provide for the existence of ouster clauses, namely Article 31A[49] and Article 31C[50]. Omni potently, Article 31B saves an uncatalogued number of laws from a challenge based on all or any of the fundamental rights, if such laws are included in the Ninth Schedule.[51] By examining these provisions of the law through bills and acts, it is evident that the rule of ouster clause or doctrine of ouster clause is not followed in India and not in a strict sense. The partial ouster clause is validated when the jurisdiction is not completely ousted but there are options as the adequate remedies. We should also remember that the amending power of the Parliament has been a bone of contention right from the beginning.[52]

Though High Courts and other courts intervene in the decisions of tribunals to provide the people with more remedies, this intervention erodes the legislative intention behind the setting up of tribunals and adjudicatory bodies in India. At the outset of complete institutionalization of arbitration tribunals as a result of the Arbitration and Conciliation Act, 2019, the possibility of ousting judicial power seems possible in India. Thus, to establish the ouster clause's role both in a total and partial sense, the judiciary's scope must be restricted and the executive should be given a broader ambit of functions. This will simultaneously uphold the division of power which was one of the fundamentals of the preamble of the Indian Constitution.

[49] INDIA CONST. art. 31A.
[50] INDIA CONST. art. 31C.
[51] Sandhya Ram S A, *Ouster Clause: Legislative Blaze and Judicial Phoenix*, 2 C.U.L.J. 21, 21-51 (2013).
[52] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA (4th ed. 1993).

A COMPARISON OF JUDICIAL OPINIONS DEFINING FEDERAL STRUCTURE AND STATE AUTONOMY: CONTRASTING S. R. BOMMAI V. UOI WITH MCCULLOCH V. MARYLAND

PREETHAM CORREA[1]

Striking a balance between federal structure and state autonomy in a constitutional democracy has always been akin to walking a tightrope, be it in the Republic of India or the United States of America. The Supreme Courts of both these countries, as the interpreters of the Constitution, found themselves adjudicating these disputes whenever they ensued. Having to weigh what was written in the Constitutions of these countries against what the Founding Fathers had intended for them, the Courts examined the powers expressly allotted to the states and the powers implicitly vested with the Union.

Two landmark decisions have emanated from these instances—S. R. Bommai v. Union of India and McCulloch v. Maryland—which have demarcated the line between the Union and the states vis-à-vis the division of political and legislative powers. This case comment explores the nuances of these decisions in a comparatively analytical manner while examining the far-reaching effects they have on federal and state relations in the world's largest and oldest democracies.

INTRODUCTION

The relationship between the federal government and the states, as seen historically in the Union of India and the United States of America, has always been one fraught with conflict. The constant tug-of-war between the two, in the quest — by each side — for a greater apportionment of constitutional power for themselves, has led to many flashpoints over the years. In India, it was in *S.R. Bommai v. Union of India,* and in the United States *McCulloch v. Maryland*. Both of these cases, though bearing differing principles and constitutional ideals, have contributed immensely to the

* Cite it as: Correa, *A Comparison of Judicial Opinions defining Federal Structure and State Autonomy: Contrasting S.R. Bommai V. Maryland*, 5(1) COMPARATIVE CONST. L. ADMINISTRATIVE L. QUARTERLY (2021).

[1] Preetham Correa is a fifth year B.A., LL.B student at Symbiosis Law School, Pune. The author may be reached at < preethamcorrea13@gmail.com>.

development of constitutional law—on the relationship between the Union and state legislatures—through hallowed judicial pronouncements.

S. R. BOMMAI V. UNION OF INDIA[2]

THE GENESIS

The dismissal of the governments in the state of Meghalaya, Nagaland, Karnataka, Madhya Pradesh, Himachal Pradesh and Rajasthan (between August 1988 and December 1992), along with the dissolution of their legislatures, laid the groundwork for one of India's landmark constitutional cases that came about as the result of a challenge to the power of President's Rule under Article 356 of the Constitution of India.

In Karnataka in April 1989, 19 letters withdrawing support from the state government—led by S. R. Bommai—were presented to the state's Governor, P.Venkatasubbaiah. Citing defections in the ruling party, the Governor wrote to the then President of India, R. Venkataraman—urging him to exercise his power under Article 356(1) of the Constitution and impose *President's Rule*—proffering that it was constitutionally inappropriate for the state to be governed by a Council of Ministers that did not possess a majority in the state assembly. Bommai, with his Law Minister, approached the Governor and sought a floor test maintaining that he could prove that his government still possessed a majority. While denying Bommai this recourse, the Governor simultaneously reiterated his advice to the President and urged him to issue a Proclamation assuming governance of Karnataka.

The President issued the requested Proclamation under Article 356(1) which was then ratified by the Parliament, in accordance with Article 356(3), and the Centre thereby assumed governance of the state. Challenging this, Bommai approached the High Court of Karnataka (which dismissed his petition) and, subsequently, the Supreme Court of India.

THE EVOLUTION

[2]AIR (1994) SC 1918.

The intent of the framers of the Constitution was that Article 356 would be exercised in a situation where the state government is not able to govern the state in accordance with set constitutional mores—when the discharge of constitutional duties by the state's constitutional functionaries does not seem possible,[3] this being an exceptional circumstance necessitating an urgent and remedial measure.[4]

Should the need for such a drastic measure arise, the first step requires the Governor to order a floor test[5]—a procedure in which the ruling party tries to prove its majority on the floor. The President can also rely on 'other materials' to 'satisfy himself' regarding the necessity of a Proclamation and then proceed with issuing it.[6]

As regards the dissolution of the State Assembly, the Supreme Court held that the status quo would be maintained until Parliamentary approval was granted as dissolution is an irreversible action and cannot be undone if Parliament disapproves the Proclamation. In line with the intent and spirit of the Constitution, this would be the method to follow.[7]

Leaning towards the federal character of the Indian Constitution, the Supreme Court upheld the unitary feature of our nation—individual state governments reigning within their boundaries, with the Union government exercising greater power overall. It is a well-grounded principle in the Constitution, that the states wield substantive power in their domains. In consideration of the recommendations of the *Sarkaria Commission*,[8] two of the judges on the bench concurred with the views expressed therein.

While accepting that the decision of the President to issue a Proclamation under Article 356 would be politically based and judicially inscrutable, the majority opinion held that the basis could be questioned on three main grounds.[9]They are:

---

[3]INDIA CONST. art.356, cl. 1.
[4]Sarkaria Commission, Chapter IV, *Role of the Governor*, http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERIV.pdf.
[5] Report of the SarkariaCommisson, 1983, Chapter 4: Role of the Governor.
[6]INDIA CONST. art.74, cl, 1.
[7]INDIA CONST. art. 356, cl. 3
[8]*Supra* note 3.
[9]*Supra* note 1, ¶ 2(per Pandian, J.), ¶ 153 (per Sawant and Kuldip Singh, JJ.) and ¶ 434 (per Jeevan Reddy and Agrawal, JJ.)

- The existence of material as the foundation for the Proclamation.
- The relevance of the material.
- The occurrence of mala fide use of power.

As regards the advice proffered by the Council of Ministers,[10] it must be in tandem with the power of the Supreme Court to pass decrees and enforce them,[11] and not opposed to it. It thus stands to reason that advice proffered cannot be questioned, but the basis on which it is done can be. The majority opinion was of the view that administrative principles do not apply to constitutional authorities and hence freed the government from the same burden.

MCCULLOCH V. MARYLAND[12]

THE GENESIS

The Second Bank of the United States, chartered by the United States Congress in 1816—in furtherance of the goal of having a national bank to regulate American currency and bolster the nation's economy—grew to operate nationwide, with one branch in the city of Baltimore in the State of Maryland. Maryland's legislature, in 1818, passed a law taxing all banks operating in Maryland but not chartered by the State.

The law, naturally, covered the only out-of-state bank operating within the borders of Maryland: The Second Bank of the United States. James W. McCulloch, the head of the branch, refused to pay the tax. Seeking to collect half of the tax amount—a tipoff incentive—specified in the governing statute, John James (an informer), filed a lawsuit against the bank.

This touched off a case that would see the United States Supreme Court define the scope of the U.S. Congress' legislative power in comparison to

[10]INDIA CONST. art.74, cl. 2.
[11]INDIA CONST. art 142.
[12]McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

the powers of the American state legislatures and the relationship between the federal government and the states.

THE EVOLUTION

The Supreme Court of the United States (SCOTUS), in weighing the power of Congress to charter a bank against its ability to exercise powers that are not expressly enumerated in the Constitution, looked at the '*Necessary and Proper Clause*'[13] which grants Congress the power to pass laws that are 'necessary and proper' — to enable the accomplishment of constitutional changes by Congress even though the Constitution has not specifically authorized it to act in this regard — for it to be able to execute its 'enumerated powers'. These powers extend to the borrowing of money, tax collection, and interstate commerce regulation. Deciding whether or not the founding of the bank itself was constitutional, the Court agreed that the setting up of this financial institution was within the ambit of Congress' power to do so.[14]

Nowhere does the Constitution expressly vest the power to establish a bank in Congress, but—by virtue of the '*Commerce Clause*'[15]— it does delegate to it the ability to tax and spend. A bank, generally being the institution providing such services would be the ordinary resort of a government looking to carry out such commercial functions. The '*Supremacy Clause*',[16]—setting federal laws hierarchically above state laws—would therefore limit the scope of Maryland's legislative ability to tax this bank. The question of '*constitutional sovereignty*' also arose, and with whom this sovereignty was vested. The answer: '*the people of the nation, not the individuals comprising it*'. Therefore, it was held that such sovereignty rests with the people who created and are governed by the Constitution—the populace of the nation.

The Maryland tax was in conflict with this principle: it was a levy on some people accountable to only a certain state, and not to the whole of the Union. This, in effect, was in violation of the federal nature of the Constitution and the Union.

---

[13]U.S. CONST. art.I, § 8.
[14]*McCulloch, supra* note 10.
[15]U.S. CONST. art.I, § 8, cl. 3.
[16]U.S. CONST. art.IV.

Chief Justice Marshall, authoring the judgment, determined that Congress had the power to charter the Bank, and based his opinion on the following four pillars:

- First, he invoked the charter of the First Bank of the United States as authority for the constitutionality of the second bank and averred that historical practice established Congress' power to issue such charters.
- Second, regarding the issue of individual state sovereignty, he held that since the people of the nation ratified the Constitution, they, and not the states, would be sovereign.
- Third, admitting that the Constitution did not explicitly establish the power to create a national bank, he said that this did not preclude Congress from possessing an inherent power to do so. Addressing the operation of the Necessary and Proper Clause, he went on to define the scope of Congress' authority under Article I of the Constitution.
- Fourth, he liberally interpreted the Necessary and Proper Clause, observing that it was listed within the powers of the Congress and not under its limitations. Relying on a literal reading of the text of the Clause, he allowed Congress to pursue an objective through the exercise of its enumerated powers to the extent that the objective sought was not forbidden by the Constitution.

Finally, holding Maryland's tax to be violative of the Supremacy Clause of the Constitution, he determined it to be unconstitutional as it was an attempt by a state to impede the functioning of a federal institution.

EVALUATING THE PRINCIPLES ENSHRINED IN BOTH CASES

In the *Bommai* judgment, there was no explanation of the doctrine of 'political question' and its relevance in Indian law. The test of '*Judicially Manageable Standards*' hasn't been clearly defined either. It is visible that the power of judicial review was not clearly set out with regard to a Presidential Proclamation under Article 356.

While there has been no further addition to Article 74(2), the Supreme Court tried to expand its reach by tying its functioning with Article 142

so as to override the immunity given to the Council of Ministers to withhold production of the advice tendered for consideration by the court.[17] By clubbing the executive power of both, the President and the Union, the Court deviated from its earlier decision which bifurcated the executive power of the President from that of the Union.[18] In refusing to apply the principles of administrative law that finds its basis in Article 14, it curtailed the reach of this article with regard to the exercise of constitutional power. Considering the letter and spirit of Part III of the Constitution, the existence of such a limitation is an anathema in a constitutional democracy.

The incorporation of the condition that Parliament must approve the President's dissolution of an assembly is tantamount to a judicial amendment of the constitution. The approval of Parliament is a condition that is subsequent to the issuance of a proclamation and not a condition for it. As far as dissolution is concerned, this seems to be an issue that framers of the Constitution did not foresee. It can be seen that the Supreme Court overstepped its bounds in laying down this principle.[19]

It is heartening to see how this decision justified the exercise of governmental and executive power, rather than invalidating it against the touchstone of the Basic Structure Doctrine. In doing so, the Court expanded its power to review political decisions relating to state elections. After *Kesavananda Bharati*,[20] this case has come to be one of the most significant decision in the arena of politics as the Court expanded the power of review to include the power of the President under Article 356 of the Constitution and thus actively challenged the President's power in regulating state politics and government.

When comparing the decisions of *Bommai and McCulloch v. Maryland*, one can infer they took a progressive stance in the interpretation of their founding book. In analyzing the operation and intent of the word 'necessary' in *McCulloch v. Maryland*, the SCOTUS did not view the Constitution as a set of rules that demanded absolute conformity to an intent that had far changed since its conception. It was important to view

[17] *Supra* note 1, ¶ 205 (per K. Ramaswamy, J.)
[18] Jayanthilal Shodhan v. F.N. Rana, AIR 1964 SC 648.
[19] *Supra* note 3.
[20] KesavanandaBharati v. Union of India, AIR 1973 SC 1461.

the issue comprehensively, taking into account the literal text, the intent of what was decided, and the context in which this was done.

The Constitution was never intended to be a dead document, but rather a living and ever-progressive instrument of change. In this light, the laws laid down cannot be shackled but must be set free to achieve the purpose for which they were set out. The Constitution must be interpreted in such a manner as to truly enable Congress to work towards fulfilling the intended objectives of the Constitution.

The SCOTUS decided that the Union legislature had an implied power to achieve the objectives of the Constitution through legitimate means. Should the means be so, the Union could overrule the state in matters of law. The Preamble of the Constitution clearly states 'We the People' and this applies to the nation, not restrictively to one state. Congress was given great powers as the Founding Fathers of the nation deemed fit since they believed that it would enable the fulfilment of their constitutional intent.

'*Let the end be legitimate, let it be within the scope of the Constitution*' decreed the Court, saying that '*all means which are appropriate, which are adapted to that end, which arenot prohibited, but consist with the letter and the spirit of the Constitution, are constitutional*'.[21] The Court believed that as long as all the boxes of constitutionality were ticked—in addition to there being furtherance of constitutional ideals by the legislature and the executive in the discharge of their functions so as to fulfil the aims of the Constitution—both the means and the end would be constitutional. This was indeed the standard laid down which would be used, henceforth, to adjudge the constitutionality of any Act of Congress. In laying down the law as it did, the SCOTUS gave the legislature great powers to achieve the objectives of the Constitution and their fulfilment therein.

Both these cases, though decided continents and nearly two centuries apart are bound by a common defining principle: the power of the Supreme Court, which it gave to and reserved unto itself, to decide on the Constitutionality of an act of the legislature, and which set in stone

[21] *Supra* note 11.

the stature and ability of the judiciary to interpret the Constitution apropos the exercise of power by the executive in fulfilment of the objectives of the Constitution.

CONCLUSION

In the United States of America, the supremacy of the Congress has come about as a result of the decisions of the judiciary, whereas in India, the Constitution has clearly set out this brand of federalism as Centre-oriented.

The framers of the U.S. Constitution had intended to set up a limited government where the Constitution was the result of an agreement of the states to join together. Contrast that with the Union of India, where the Constitution was framed to bind the states together to prevent the disintegration of the Union. In India, we see a clear listing of the subject matters for the States and the Union — as in Schedule VII of the Constitution—unlike in the U.S.

Be that as it may, the rationale for the supremacy of the Union in both these countries differs. In India, it was to ensure that the Union did not break up based on provincial states; in the U.S. it was to bring together conflicting states under a common agreement—different means to the same end. As a result of this cohesion of constituent states, it is imperative to have a Union that is representative of all them together.

Both apex courts, in this regard, have upheld the Constitution while giving life to the intended objectives that were envisioned in it. In both these cases, while balancing the federal structure with the autonomy of the states, the Courts have established themselves as the guardians of what is permissible and what is not. While this approach has been criticized, it is an essential obstacle—nay—a safeguard regulating the power of the unit over that of its constituent parts.

BOOK REVIEW: SIXTEEN STORMY DAYS BY TRIPUDAMAN SINGH

HARTEJ SINGH KOCHHER[1]

Tripudaman Singh's book, *Sixteen Stormy Days: The Story of the First Amendment to the Constitution of India*, is an exercise to trace the politico-socio-legal background of the incidents, which forced the hand of the caretaker government under Prime Minister Jawaharlal Nehru, to amend the nascent Constitution of India, for the first time.

The author traces the decisions of the High Courts and the Supreme Court, and how they became an impediment in the post-independence reform agenda of the ruling Congress party at the centre and state governments at large. These reforms pertained to the abolition of zamindari and legitimising reservations in education and employment opportunities. Immediately after coming in force of the Constitution, most of the laws to this end were held to fall foul of the constitutional guarantees to the citizens and were hence struck down as unconstitutional. The Government was heavily invested in land reforms and this was to be its major plank to seek election in the first general elections scheduled for late 1951.

The courts also upheld the wide freedom of speech and expression guarantees of the Constitution, and all attempts to scuttle any criticism of Nehru, his Government or his party were also deemed ultra vires of the Constitution. The ruling dispensation was shocked as it was facing a barrage of criticism from all political spectrums for its handling of the economy, the refugee crisis fuelled by migration from Pakistan and its general policy towards Pakistan.

All these decisions though on diverse subjects, had a cascading effect on the attempts of the government of a nation already enfeebled by the colonial rule, to bring forth its promised social justice reformation on the road.

* Cite it as: Kochher, *Book Review: Sixteen Stormy Days by Tripudaman Singh*, 5(1) COMPARATIVE CONST. L. ADMINISTRATIVE L. QUARTERLY (2021).

[1] Hartej Singh Kochher is an Assistant Professor of Law at ICFAI Law School, Hyderabad. The author may be reached at <hartejsinghkochher@gmail.com>.

The courts upheld the right to freedom of speech and expression, in cases of attempted censorship of media by the Executive, as enshrined in the Constitution. One is reminded that the original Constitution had a largely unfettered right to free speech to which '*reasonable restrictions*' could be imposed after the first amendment was made to the Constitution.

Furthermore, in the cases of land acquisition Acts in states like Uttar Pradesh and Bihar, the decisions of the respective High Courts to strike down the laws as unconstitutional were enough to infuriate the political executive and the amendment route to overcome these decisions was finalised at without even waiting for the decision of the Supreme Court!

The exasperation of the Prime Minister can be sensed from the statement made by him while moving the Constitution (First Amendment) Bill to a standing committee of the Parliament – "*somehow, we have found that this magnificent Constitution that we had framed was later kidnapped and purloined by lawyers*". A government comprising of members from the Constituent Assembly, elected on a limited franchise, which was still not democratically elected (the first elections were scheduled for after the amendment process), in an attempt to free themselves from being held to ransom by the courts and the lawyers, they had decided that the very Constitution most of them helped draft, was in need of changes.

The main targets of the First Amendment were three Articles in Part III of the Constitution. Amendments were made to Article 15, Article 19, and Articles 31A and 31B were inserted. These amendments paved way for reservations in employment and education, added curbs on free speech and the addition of the notorious Ninth Schedule to the constitution respectively. The Ninth Schedule was operationalised to make all the laws contained therein beyond the scope of judicial scrutiny. The state laws which were passed to abolish zamindari were incorporated in it.

The author showcases how even the proverbial 'founding fathers', the drafters of the constitution, were inclined to undo their own handiwork to meet political ends. To have 'something to show' before going to the electorate in the first general elections mattered more than the constitutional framework they themselves signed into force sixteen months earlier.

It is also a story of gaining of ascendancy by the Legislature and Executive combine on the specious reasoning that the 'elected representatives' should determine the 'wider social policy' of the country. The decisions of the Constitutional courts needed to be 'respected', but they could not become an obstruction otherwise it would be a denial of democracy. One is again reminded by the author that this democracy was on a footing that was provided through the limited franchise.

Prof. Upendra Baxi's comments, cited by the author, about the amendments made being described as 'the second constitution' or 'the Nehruvian constitution', makes one ponder. It brings forth the basic debate about what merits a constitutional amendment? Whether strong leaders can rally through amendments, to push their agenda and leave their imprint forever in order to gain political brownie points or the Constitution is meant to be above such motivated tinkering?

The ramifications of these amendments are being felt till date. For example, under the original Constitution, the freedom of speech and expression was a very wide fundamental right, which was severely curtailed, by way of the first amendment. An offence like Sedition under Section 124A of the Indian Penal Code would have been held to be unconstitutional and much of the repression carried out through its enforcement today, could not have been possible.

Extremely well researched and beautifully written, the book is a breezy read which does not burden the reader with jargons or technicalities. Eloquent expression laced with facts makes the book qualitatively brilliant, without being voluminous. Tripudaman Singh paints no heroes and villains. That interpretation is left to the reader's discretion.

A background of the underlying factors, leading to an amendment is as important to be understood and appreciated as the very amendment itself. It helps put events and happenings in perspective, at the same time making one aware of the rationale behind the alterations and enabling the reader to come to a complete and resolute understanding. *Sixteen Stormy Days* by Tripudaman Singh does this succinctly.