CONTENTS

FOREWORD

It brings me immense pleasure to introduce the third instalment of the second volume of the Comparative Constitutional Law and Administrative Law Quarterly. The Journal has been committed to highlighting critical issues in the fields of Constitutional Law and Administrative Law, lending a comparative flavour across contributions.

We have strived to bring forth fresh perspectives in tandem with the organic nature of the Constitution and the present issue is a fitting example of this. The opening article titled '*Federal Roadblocks in Proposed Motor Vehicle Law'* discusses the Road Transport and Safety Bill, 2014 and the amended version introduced in 2015 which seek to comprehensively crystallize road safety as a right. However, the authors argue that the Bill is not constitutionally sound since it dilutes the powers of the states in favour of the Union without constitutional backing.

The second piece is a critique of the judgment of the Apex Court in *Pramati Educational and Cultural Trust v. Union of India*. The author explores the issue regarding reservations in private higher educational institutions and minority institutions through the lens of the constitutional provisions and the Right of Children to Free and Compulsory Education Act, 2009 and concludes that the Court has adopted an erroneous path to reach the decision it has.

The third piece, "*Hindi as the National/Official Language: Arguments for Repealing Part XVII of the Indian Constitution*", revisits Article 343 of the Constitution, arguing against granting the status of "Official Language" to Hindi in *Devanagari* script. Giving a historical background of the provision, the piece provides the rationale behind its drafting while also elaborating on the anti-Hindi sentiments of various communities and their manifestations in the recent times.

Being a quarterly, we constantly endeavour to adopt strict standards of selection despite the paucity of time. The success of the journal in this regard has to be traced to the monumental effort of the Editorial Board which ensures that the contributions are polished to perfection. We also express our gratitude to the support and guidance extended by our Chief Patron Prof. Poonam Saxena, our Director, Prof. I P Massey and our Faculty Advisor Prof. K L Bhatia. We hope to continue providing a platform which synthesises varying opinions and perspectives regarding Constitutional Law and Administrative Law in the global realm.

Pooja Menon

[Editor-in-Chief]

FEDERAL ROADBLOCKS IN PROPOSED MOTOR VEHICLE LAW

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ABSTRACT

Road safety counts among those socio-legal issues that is oft neglected in theory and practice, yet seamlessly poses dangers to life and economy. To tackle this long standing menace, the Central Government has come up with ideas for a complete overhaul of the current road laws in India. However, in its impatience, the Government has overlooked key constitutional process. By not respecting the compartmentalization of legislative issues in the Seventh Schedule of the Constitution, we raise questions about the constitutionality of the new road laws. We even discuss the piquant issue of declarations of expediency legitimizing the bypassing of the strict categorizations of the entries mentioned in the three lists of the Seventh Schedule. We conclude with a couple of suggestions to right these imminent wrongs such that a strong road safety law, one that does not disregard constitutional methods, is passed.

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A modified version of the ideas in this article was presented at the Rajasthan Police Academy, Jaipur on October 1, 2014. Authors would like to thank Rajesh Nayak for his prescient advice. The usual disclaimer applies.

PART I - INTRODUCTION

On September 13, 2014, the Ministry of Road Transport and Highways unveiled its draft Road Transport and Safety Bill, 2014 [hereinafter Bill of 2014] as an overhaul to the existing Motor Vehicles Act, 1988 [hereinafter MV Act].[1] Ostensibly, the Bill of 2014 was conceived as a reaction to Gopinath Munde's tragic death in an unfortunate car accident on the streets of New Delhi.[2] However, in its efforts to herald the Bill with public memory of Munde's death still afresh, and perhaps to gain political mileage and stir political will across the divide, the Bill of 2014 had overlooked nuanced legal issues that have grave constitutional ramifications.[3]

The Bill of 2014 is also seen as a first of Prime Minister Modi's major legislations. In characteristic style, it examines the economic 'development' aspects of road safety as well, claiming a 4% Gross Domestic Product improvement on account of increased efficiency and a projected creation of ten lakh jobs as a result of much needed investment in the sector.[4]

Sometime in April 2015, the Ministry of Road Transport and Highways tweaked a few sections, to avoid any controversy and perhaps ensure safe passage through the rigours of Parliament. The new Road Transport and Safety Bill, 2015[5] [hereinafter "Bill"] seeks to right the wrongs of the Bill of 2014. However, on a detailed examination of the subject matter of

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[1] *New Road Safety Bill Proposes Long Jail Terms, Heavy Fines for Offenders*, TIMES OF INDIA, Sept. 13, 2014, http://timesofindia.indiatimes.com/india/New-road-safety-bill-proposes-long-jail-terms-heavy-fines-for-offenders/articleshow/42397119.cms.

[2] *Motor Vehicle Bill to be Re-drafted in a Month: Nitin Gadkari*, FIRSTPOST, June 5, 2014, http://indianexpress.com/article/india/politics/motor-vehicle-bill-to-be-re-drafted-in-a-month-nitin-gadkari/#sthash.4VplYnoV.dpuf.

[3] As a side note: the Ministry, in its hurry, has also put professionalism in the backseat by committing several trivial errors in its internal cross-referencing and duplicating provisions.

[4] *See generally*, MINISTRY OF ROAD TRANSPORT AND HIGHWAY, ROAD TRANSPORT AND SAFETY BILL – HIGHLIGHTS, http://morth.nic.in/writereaddata/linkimages/Road%20Transport%20and%20Safety%20Bill%202014%20Draft-0068086402.pdf..

[5] The Road Transport and Safety Bill, 2015 [*hereinafter* "**The Bill**"].

the final draft, an appreciable number of provisions from the old draft have been retained. Many of these provisions continue to confer debatable powers on the Centre. Part II of this Article analyses these draft provisions in light of the constitutional foundations including the crucial principle of federalism.

In both these Bills, many statutory issues have been identified by various interest groups, though one constitutional issue has been seldom discussed. This concern arises from a broader federal-framework aspect – an apprehension that the Union is encroaching upon the jurisdiction of the states by introducing the Bill without appropriate constitutional amendments. Over the course of this Article, we argue that the Bill has the character of a comprehensive legislation on road safety, one that is not recognised in the present federal setup to be within the domain of the Parliament either under the Union List or the Concurrent List. Yet, by persisting on the Parliamentary legislative route devoid of necessary constitutional backup, the Bill falls prey to unconstitutionality.

Another worrisome aspect of the Bill of 2014, though extinguished [6] in the new Bill, was a declaration of expediency by Parliament. Section 2 of the Bill of 2014 gave the Union the power to take "road transport" under its control. This led to some debate regarding the power distribution between the Centre and the states. To avoid controversy, the government, in its final draft of the Bill, omitted this provision. This was done to avoid the creation of "any wrong impression" that the states' authority is getting diluted under the new legislation.[7] While the issue is dead rubber, we have deliberated on the constitutional validity of the declaration as it serves a useful reference point for any similar actions by the government. We find that this ploy could not have passed constitutional muster.

[6]Ruchika Chitravanshi, *Road Safety Bill: States' Power not Diluted in Final Transport Draft*, THE ECONOMIC TIMES, Apr. 30, 2015, http://articles.economictimes.indiatimes.com/2015-04-30/news/61689273_1_road-safety-bill-road-transport-road-ministry.

[7]*Id.*

This Article traces the evolution of the constitutional debate that has haunted the lifecycle of this Bill. It is feared that even though the government seems to have addressed some important legal issues in the final draft, these alterations may be inadequate. As we would establish in the following sections, disrespect for constitutional conventions and concern regarding the bad precedent set would deeply hinder the credibility of the Bill.

In Part I, after providing a brief background of the circumstances surrounding the birth of the Bill, we lay down the current federal setup with respect to road safety laws in India. Part II explores the usurpation of powers by the Union Government of entries within the State List under the Seventh Schedule in the context of this Bill. Part III explores the validity of a declaration of expediency of public interest as contemplated in the Bill of 2014. Part IV concludes with suggestions of possible courses of correction to legitimise the Bill.

The federal system revolves around the basic idea of distribution of powers.[8] Accordingly, the distribution of legislative powers between the Centre and the states is a primary characteristic. As an elementary primer, the Indian Constitution envisages three functional areas for distribution of legislative power in the Seventh Schedule - the Union List (List I) reserved exclusively for the Centre, the State List (List II) reserved exclusively for the states, and the Concurrent List (List III), which is a common domain where both the Centre and the states may operate simultaneously, subject to the overall supremacy of the Centre.[9]

On a bare perusal of the Seventh Schedule, it is observed that there are several fragmented entries on various aspects of roads across the three lists. For greater analysis, they are reproduced verbatim below.

Entry 23 of the Union List provides for "Highways declared by or under law made by Parliament to be national highways."

[8]MP JAIN, INDIAN CONSTITUTIONAL LAW 482 (5th ed. 2008) [hereinafter "**M.P. Jain**"].

[9]*Id.*

Entry 13 of the State List states "*Communications, that is to say, roads*, bridges, ferries, and other means of communication not specified in List I; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; *vehicles other than mechanically propelled vehicles*." (emphasis supplied)

Another entry in the State List, Entry 57 provides for "Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III."

Entry 35 of the Concurrent List provides for "Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied."

An examination of the above entries draws the following observations:

1. National Highways fall within the Union List.
2. Mechanically propelled vehicles fall within the Concurrent List. Accordingly, both the Parliament and the states may legislate on matters concerning said vehicles.
3. The broad entry of roads (apart from national highways) and vehicles other than mechanically propelled vehicles fall within the domain of the State List.

PART II – WHERE THE BILL FAILS CONSTITUTIONAL MUSTER

The Parliament functions within the bounds of federal polity as established by the Constitution. As noted above, it can only legislate on matters enshrined in the Union List and Concurrent List. In this respect, based on the above observations, Parliament may only legislate upon issues related directly either to national highways or mechanically propelled vehicles (including the principles of taxation). Indeed, the existing MV Act has its basis exclusively in Entry 35 of the Concurrent List.

Preamble and its wordings

The preamble to the MV Act refers to itself as "[a]n Act to consolidate and amend the law relating to motor vehicles". In *Marine and General Insurance v. B R Nayan*,[10] Mridul J. of the Bombay High Court in his concurring opinion found that,

> The [Motor Vehicles] Act is an Act 'to consolidate and amend the law relating to Motor Vehicles'. As a Consolidation Act, it therefore, merely reduces into a systematic form the whole of the law that existed prior to its enactment. A Consolidation Act by itself cannot be said to intend a change in the pre-existing law, but the Act is not merely a Consolidated Act. *It is also an Act which seeks to amend the law relating to motor vehicles*. The controversies in this appeal therefore will have to be determined by interpreting the relevant provisions of the Act read within the setting of the scheme, intendments and purposes thereof. (Emphasis supplied)

Two caveats accompany these remarks in the context of this Article. First, this case was decided in 1976, i.e., before the enactment of the MV Act, 1988. It was accordingly governed under the Motor Vehicles Act, 1939. However, the Preamble to both those Acts are in *pari materia* to each other,[11] preserving the applicability of the above opinion. Second, these observations were made by Mridul J. in the context of liabilities under the Motor Vehicles Act, 1939, and not with any intention to cast doubt in the constitutional propriety of the enactment of the said Act. However, what is of particular relevance here is the Court's consistent determination that the Motor Vehicles Act, 1939 is an Act that seeks to amend the law relating to 'motor vehicles'. It does not go a step further and extend the ambit of that Act

[10]Marine and General Insurance Company Ltd. v. Balkrishna Ramchandra Nayan, A.I.R. 1977 Bom 53, 67.

[11]*Cf.* The Motor Vehicles Act, 1939, No. IV of 1939 *available at* http://lawmin.nic.in/legislative/textofcentralacts/1939.pdf.

to other matters, for instance, regulation of road usage by the motor vehicles and accordingly facilitation of road safety.

On the other hand, it would be misleading to state that the Bill is a proposed legislation on *only* regulation of mechanically propelled vehicles. The Preamble to the Bill is very instructive in this regard. It begins by characterizing itself as "A Bill to provide for a scientifically planned framework for the *safety of all road users*; enabling the seamless development of a secure, efficient, cost-effective and inclusive transport system …"[12] It is observed straightaway that the Bill places critical importance on the "safety of all road users in India" and the "development of a secure, efficient, cost-effective and inclusive transport system." While the latter arguably falls under the Union List,[13] there is no entry in the Union or Concurrent Lists that reconciles "safety of all road users". In fact, safety of road users is inseparable from "roads" as mentioned in Entry 13 of the State List.

True Character and Constitutional Corroboration

> While the preamble to any legislation plays an important role in expressing how the legislation identifies itself, in any examination of the vires of a legislation, its "true character" must be ascertained.[14] For this, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such examination it is found that the legislation is in substance, one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence.[15]

[12]The Bill, pmbl.

[13]INDIA CONST. sched. VII (Entry 42 of the Union List provides for inter-state trade and commerce).

[14]A. S. Krishna v. State of Madras, (1957) S.C.R. 399, 410.

[15]*Id*; Shreya Singhal v. Union of India, Writ Petition (Criminal) No. 167 of 2012, Mar. 24, 2015 (Supreme Court)

After this deconstruction of the legislation threadbare, its substantive pieces must be tested against the various entries in the Seventh Schedule (and their interpretation thereof) to corroborate the validity of the legislation. Over the next few paragraphs, we shall provide a comparison of certain substantive facets of the Bill with the established law.

Road Safety: a pervasive character

A breakthrough conception of the Bill is the establishment of a National Authority, formally known as the National Road Safety and Traffic Regulation Authority, under Section 3. This National Authority is a centrally constituted body to regulate and monitor several facets of road use. A large chunk of these powers are devoted towards the larger objective of securing the safety of people on roads. In this respect, the National Authority has been entrusted with the direct responsibility to regulate and monitor the formulation of standards for road safety, road infrastructure and control of traffic,[16] the facilitation of safe and sustainable utilisation of road transport ecosystem,[17] safety of vulnerable road users,[18] and the determination of costs of safety equipment.[19]

In addition to this responsibility, the National Authority is also mandated to undertake certain ancillary activities in the realm of securing road safety. These include

1. promoting good practices in road safety and traffic management, undertake road safety and traffic education programmes;[20]
2. co-ordinating with other agencies, such as education boards and institutions, health services and non-government organisations in matters relating to road safety and traffic management;[21]

[16]The Bill, § 10(2)(c).

[17]The Bill, §10(2)(e).

[18]The Bill, § 10(2)(h).

[19]The Bill, §10(2)(i).

[20]The Bill, § 10(3)(e).

[21]The Bill, § 10(3)(h).

3. conducting research to improve road safety and traffic management;[22]

4. preparing and implementing such plans as may be necessary to improve road safety;[23]

Finally, an entire Chapter (Chapter IX) in the Bill is dedicated to road safety and traffic management, the extent of which is more comprehensive than the limited Chapter VII on Control of Traffic in the MV Act which is restricted largely to motor vehicles. Importantly, Section 121 under Chapter IX of the Bill gives extensive powers to the Central Government to "make rules for road safety and traffic management and for regulating pedestrians, non-motorised transport and motor vehicles."

A brief reading of the constitutional provisions on the various aspects of roads has already been laid down at the end of Part I. The Law Commission provides a more telling observation of the consequential meaning of the positioning and wordings of these entries. In its 234th Report,[24] it stated,

> Roads are used not only by the motorized transport, but also by the non-motorized transport as well as pedestrians. There is no comprehensive Central legislation to effectively and holistically regulate all kinds of traffic on the roads. The Motor Vehicles Act, 1988 is relatable to Entry 35 of the Concurrent List and the National Highways Act, 1956 is relatable to Entry 23 of the Union List. The subject-matter of roads, traffic thereon, and vehicles other than mechanically propelled vehicles falls under Entry 13 of the State List, and, therefore, outside the purview of Parliament.[25] (Emphasis supplied)

[22]The Bill, § 10(3)(l).

[23]The Bill, §10(3)(m).

[24]LAW COMMISSION OF INDIA, LEGAL REFORMS TO COMBAT ROAD ACCIDENTS, Report No. 234 (2009) [hereinafter "**Law Commission Report**"].

[25]*Id* at pp. 79-80.

In similar terms, as recently as April 2014, the Supreme Court in *Rajaseekaran*[26] affirmed this proposition of divorced domains of competent jurisdiction, reaffirming that *only* national highways fall under the legislative capacity of Parliament. In the Court's own words:

> *It is over these national highways that the executive power of the Union extends whereas in respect of the State highways and other State roads the Executive power of the State runs. That apart, roads, traffic thereon and vehicles other than those mechanically driven are covered by relevant entries in List II of the Seventh Schedule giving jurisdiction to the States both in matters of legislation and exercise of executive power.*[27]

Both these observations are critical and can prove to be a potential red flag to the passing of the Bill, as they delve deep into the malaises affecting non-mechanically propelled vehicles, beyond the Parliamentary mandate. If roads, traffic and non-motorised vehicles are not within the purview of Parliament, the powers of the National Authority will be largely stunted. More importantly, however, as we have seen, a purposive construction of the Bill shows that it perceives itself as the central law on road safety, applicable to motorised and non-motorised transport. In addition, provisions in the Bill on pedestrian rights give a flavour to the Bill that cannot be described as merely incidental to regulation of motor vehicles, which could have been argued earlier with the MV Act. In sum, the true character of the Bill would fall outside the mandate of Parliament.

Section 208: An Instrument of Aggrandizement

Perhaps the coup de grâce on this exposition is Section 208, an all-inclusive, all-powerful sword accompanied by an irresistible shield that is finality. It would be apposite to reproduce the substantive aspects of this provision below:

[26] S. Rajaseekaran v. Union of India & Ors., (2014) 6 S.C.C. 36.

[27] *Id* at ¶27.

> 208. Directions by Central Government - (1) Without prejudice to the foregoing provisions of this Act, the National Authority or the National Transport Authority or the State Authority or the State Transport Authority … shall … be bound by such directions on questions of policy … as the Central Government may give in writing to it, from time to time:
>
> …
>
> (2) The decision of the Central Government, whether a question is one of policy or not, shall be final.

It is almost tempting to let this argument remain self-explanatory. The Central Government, through this provision, has accorded to itself the power to override any authority given to the State Governments under this Bill and has claimed supremacy in formulating directions. In doing so, any counter-argument in defence of the Bill on the grounds of power-sharing between the Centre and the State through the creation of State Road Safety and Traffic Regulation Authority and State Road Transport Development Authority is futile. The finer legal question of whether the decision of the Central Government on a matter being policy under sub-section 2 is final or amenable to judicial review will be interesting to observe. However, what is obvious is the Central Government's consistent accumulation of powers under this Bill with no constitutional backing.

Constitutionality of Road Safety under the MV Act

A question may then arise as to the constitutional validity of the various existing mechanisms of road safety under the present MV Act. A purposive reading of the MV Act would lead one to the inexorable conclusion that it was constructed with the sole intention of governing motor vehicles. Every chapter in the MV Act directly relates back to the regulation and governance of motor vehicles. 'Motor vehicle' itself is defined in Section 2(28) of the MV Act to mean "any *mechanically propelled vehicle* adapted for use upon roads …" (Emphasis

supplied). This further gives jurisdictional credibility to Parliament to enact the said law as "mechanically propelled vehicles" forms part of the Concurrent List.

The Rules of the Road Regulations, 1989 enacted by the Central Government delineate the principal laws of road safety under the MV Act. The jurisdictional basis of the Central Government to do so may be traced back to Section 118 of the MV Act, which empowers the Central Government to make regulations for the driving of motor vehicles.

They are strictly restricted to the driving of motor vehicles and their passage by the Central Government is thus, justified.[28] It is trite proposition that express words employed in an entry would necessarily include incidental and ancillary matters so as to make the legislation effective.[29] It is submitted that these regulations of road safety are merely incidental and ancillary to the larger law on motor vehicles, and thus, do not merit a separate legislation for want of jurisdiction.

If Parliament desires to legislate specifically with the motive of road safety, then it may do so only within the fields that it specifically has jurisdiction to do so, i.e., with "mechanically propelled vehicles" under the Concurrent List or "national highways" under the Union List. As noted above, it has already made provisions for road safety under the former, vide the Rules of the Road Regulations. In 2010, Parliament attempted to legislate in the latter field as well by introducing the National Road Safety and Traffic Management Bill, 2010. As stated in its preamble, its objective was to

> provide for the establishment of the National Road Safety and Traffic Management Board for the purpose of orderly development, regulation, promotion and optimisation of modern and effective road safety and traffic

[28]The Rules of the Road Regulations, 1989, S.O. No. 439 (E), pmbl ["[I]n exercise of the powers conferred by section 118 of the Motor Vehicles Act, 1988 (59 of 1988), the Central Government hereby makes the following regulations for the driving of motor vehicles, namely:-"].

[29]Hindustan Lever v. State of Maharashtra, (2004) 9 S.C.C. 438.

> management system and practices in relation to the national highways and improved safety standards in highway design, construction, operation and regulate high standards in production and maintenance of mechanically propelled vehicles and for matters connected therewith or incidental thereto. (Emphasis supplied)

Thus, the extant provisions of road safety clearly fall within the demarcated line of constitutional correctness. Either they are incidentally related to mechanically propelled vehicles, and thus motor vehicles, accordingly falling under the shared domain of the Concurrent List, or are restricted to national highways, which is the exclusive domain of the Union.

Conclusion

The above discussion highlights the muddy water the Bill has riddled itself in. In its core fundamentals, the Bill is one that attaches much premium on the safety of all road users, especially the most vulnerable ones. Stunned into action by Gopinath Munde's tragic death, the Bill obviously considers road safety a top priority. However, in its haste, the Central Government has evidently put the horse before the cart. It should have amended the Seventh Schedule to provide road safety as either an express entry or a companion entry to a relatable, existent one under the Union or Concurrent List. In not doing either, the Bill evidently lacks any constitutional basis to erect an institution at the national level that essentially seeks to formulate plans of action in a domain reserved exclusively for the states.

PART III - DECLARATION OF EXPEDIENCY INVALID

The Bill of 2014 included a very controversial provision. Section 2 of the Bill of 2014 read "*It is hereby declared that it is expedient in the public interest that the Union should take road transport under its control.*" This provision was a subject of debate on power distribution between Union and States. By its very insertion, this clause authorizes the

Parliament to legislate on a subject which is not ordinarily within its domain. Due the aforementioned fragmented entries pertaining to road safety and transport, this could have had serious implications for the constitutional division of legislative power between the Union and the States. In the Bill of 2015, this section was dropped. However, we have gone on to examine the constitutionality of this provision as if it were still a part of the present Bill. While this issue is dead rubber now, one cannot rule out similar tactics being deployed by the Government in the future. Thus, this issue deserves academic literature.

Before proceeding to the merits of instituting a provision to this effect, an introductory implication must be recognized. It is submitted that this declaration is an implicit admission by Parliament that 'road transport', and by extension 'road safety', does not fall under its control. There lies no reason in inserting this provision otherwise.

But beyond logical implications, by the creation of such a provision, Parliament seeks to subvert the constitutional division of legislative power and encapsulate state powers within its fold. Indeed, certain matters in the State List can *become* the subject of exclusive Parliamentary legislation when Parliament makes a declaration of "public interest" or "national interest" by law (which requires a resolution by two or more states).[30] However, the current bill does not satisfy the abovementioned conditions. It must be admitted here that the Indian federal setup is heavily in favour of the Union. According to the Sarkaria Commission,[31] the Parliament may legislate on matters outlined in the State List if the following conditions are satisfied:

a. Certain entries in List II have been made subject to entries in List I.
b. Certain entries in List II have been made subject to laws made by Parliament.

[30] INDIA CONST. art. 249.

[31] *See* R. S. SARKARIA COMMISSION, REPORT ON CENTRE STATE RELATIONS (1988), ch 2 *available at* http://interstatecouncil.nic.in/Sarkaria/CHAPTERII.pdf [hereinafter "**Sarkaria Commission Report**"].

c. Certain matters in List II can *become* the subject of exclusive Parliamentary legislation when Parliament makes a declaration of "public interest" or "national interest" by law.[32]

For an assessment on how the above conditions play out, a table is provided below examining central legislations that fall within the three categories and have expressly incorporated the Declaration of Expediency and Control.

ACT	**DECLARATION AS TO EXPEDIENCY OF CONTROL BY THE UNION**	**CORRESPONDING LIST IN SCHEDULE VII (CONSTITUTION OF INDIA)**	**ENTRY**
Rubber Act, 1947	Section 2: It is hereby declared that it is expedient in the public interest that Union should take under its control the rubber industry.	List I	52. Industries, the control of which by the Union is declared by Parliament by law to be *expedient in the public interest.*
Food Safety & Standards Act, 2006	Section 2: It is hereby declared that it is expedient in the public interest that the Union should take under its control the food industry	List III	18. Adulteration of foodstuffs and other goods.
Mines And Minerals	Section 2: It is hereby declared that it is expedient in		54. Regulation of mines and mineral

[32]M.P. JAIN, *supra* note 8 at 559.

(Development And Regulation) Act, 1957	the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent hereinafter provided.	List I	development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be *expedient in the public interest.*
The National Waterway (Talcher-Dhamra Stretch Of Rivers Geonkhali-Charbatia Stretch Of East Coast Canal, Charbatia-Dharma Stretch Of Matai River And	Section 3: It is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation and development of Talcher-Dhamra stretch of Brahmani-Kharsua-Dhamra rivers, Geinkhali-Charbatia stretch of East Coast Canal, Charbatia-Dhamra stretch of Matai river and Mahanadi delta rivers between Mangalgadi and paradip for purposes of shipping and navigation on the national	List I	24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels; the rule of the road on such waterways. 13. Communications, that is to say, roads, bridges, ferries, and other means of communication not

Mahanadi Delta Rivers) Act, 2006	waterway to the extent provided in the Inland Waterways Authority of India Act, 1985.	List II	specified in List I; municipal trams ways; ropeways*; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways*; vehicles other than mechanically propelled vehicles.

Each Act mentioned above corresponds to only those Entries in Schedule VII of the Constitution which authorise the Parliament to legislate on the subject matter so provided. It is evident that the subject matter of each legislation in the Table corresponds to an entry which either authorises the Parliament by law to legislate in public interest or corresponds to two (or more) entries in different lists of the Constitution where the state's law making power in one entry is *subject to* a related entry either in the Union or Concurrent List. It is observed from this legislative trend that only in the aforementioned two circumstances, the Declaration of Expediency can validly authorise a Central legislation to encroach upon certain legislative powers of the State.

The Constitutional position is that when Parliament by law declares under Entry 52, List I that Union control over a particular field is expedient in the public interest and passes a legislation pursuant to such declaration, such field, to the extent laid down in the declaration and the legislation, becomes the exclusive subject of legislation by Parliament, with

corresponding denudation of the competence of the State Legislatures.[33] However, it is felt that mere declaration of expediency when the subject matter of the legislation is highly fragmented and has been envisaged by two separate lists of the Constitution, neither of which is subject to the other or in express conflict, is not by itself an instrument of authorisation to the Parliament to exclusively legislate on such matter.

PART IV - CONCLUSION

After appreciation of all propositions, it is found that the objectives and the true character of the Bill indicate the creation of a comprehensive central legislation on *inter alia* road safety, acting as a unifying framework for the several extant laws. As noted in the beginning, the entries in the Seventh Schedule to road safety are fragmented. The law on road safety has hitherto developed in a scattered manner. Any central legislation would, therefore, necessarily require amending the Seventh Schedule. Indeed, the Law Commission was prescient when it concluded in its 234th Report,

> The Seventh Schedule of the Constitution will be required to be amended for such a comprehensive Central legislation. The Law Commission feels that there is a need of a comprehensive Central road traffic law.[34]

There are a couple of options at the Parliament's disposal on how best to amend the Seventh Schedule. Parliament may include 'road safety' within the Concurrent List by amending Entry 35 or the Union List by amending Entry 13. Another option is that Parliament may modify Entry 13 of the State List to make it subject to a law passed by it.

Here, the mere passing of the Bill by the Parliament will derogate the state powers under the respective entry. While the objectives behind the Bill are well thought out and noble, it lacks constitutional backing. It therefore, runs the risk of falling afoul and by the wayside if it is

[33] SARKARIA COMMISSION REPORT, *supra* note 31 at ¶2.10.52, *available at* http://interstatecouncil.nic.in/Sarkaria/CHAPTERII.pdf.

[34] LAW COMMISSION REPORT, *supra* note 24 at pp. 79-80.

challenged in Court. The Parliament must think long and hard on how it must legitimise this Bill, especially keeping in mind the degree to which it has captured the public's imagination and the legislative process. The ball is in Parliament's court.

PRAMATI EDUCATIONAL AND CULTURAL TRUST V. UNION OF INDIA: A CRITICAL ANALYSIS

Raveena Sethia*

"We are free only if we know, and so in proportion to our knowledge. There is no freedom without choice, and there is no choice without knowledge - or none that is not illusory. Implicit, therefore, in the very notion of liberty is the liberty of the mind to absorb and to beget."[1]

ABSTRACT

This paper seeks to critique the rationale behind the judgment in Pramati Educational and Cultural Trust v. Union of India [(2014) 8 SCC 1]. The author's approach will be to question the rationale behind the relevant articles of the Constitution and the Right of Children to Free and Compulsory Education (RTE) Act, 2009. The two pronged analysis deliberates on why private higher educational institutions must provide for reservation under Article 15(5) and why minority institutions must be exempted from reservations under the Right to Education Act. As concluding remarks, the author will also explore alternative arguments in support of the exemption provided to minority institutions in terms of reservations for historically backward classes.

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[1] Benjamin N. Cardozo, THE PARADOXES OF LEGAL SCIENCE 104 (Greenwood Press 1982) (1928).

INTRODUCTION: FACTS AND ISSUES RAISED IN THE JUDGMENT:

The reference in *Pramati Educational and Cultural Trust v. Union of India*[2] ("*Pramati*") lies from an order passed by a three-judge bench in 2010 in *Society of Unaided Schools v. Union of India*[3] *(*"*Unaided Schools"*) to judge the constitutional validity of Articles 15(5)[4] and 21A.[5]

In *Pramati*, the two issues raised before the apex court were regarding the insertion of Articles 15(5) and 21A and whether they violated the basic structure of the Constitution.

The Judgment affirms the validity of Article 15(5) on the ground that it does not violate the 'golden triangle'[6] of Articles 14, 19 and 21. The Court reasoned that since education is an implied right under Article 21,[7] guaranteeing the same under the charitable nature of educational institutions would not violate the fundamental rights of such institutions as they would continue to exercise their powers under Article 19(1)(g).[8] Additionally, the Court assumed that any law made to further education as a right would keep in mind the distinctions between various institutions, aided and unaided.[9] This seems to be an application of an argument provided by Ronald Dworkin, whereby an 'is' statement is derived from an 'ought'

[2](2014) 8 S.C.C. 1.

[3] (2012) 6 S.C.C. 102.

[4] INDIA CONST. art. 15(1) [Article 15(5): Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.]

[5] INDIA CONST. art. 21A

[6]*Supra note 2* at para 5; Minerva Mills v. Union of India, A.I.R. 1980 S.C. 1789.

[7]*See*, Islamic Academy v. State of Karnataka & Ors., (2003) 6 S.C.C. 697 *(*hereinafter, "*Islamic Academy"); Supra note* 3 at 15.

[8]*Supra note* 2 at para 14-15.

[9]*Supra note 2* at para 24-26.

statement.[10] In other words, it may be argued that private institutions ought to engage in charity, and therefore they will abide by the doctrine enshrined in Article 15(5).

Second, the Court held it to be constitutionally valid since it fulfils the aims of Article 45.[11] The Court opined that since the Statement of Objects and Reasons of The Constitution (Eighty-Sixth Amendment) Act, 2002 rejects the possibility of exclusion of private institutions; it was the intention of the Legislature to apply Article 21A across the board.[12] On the other hand, with respect to minority institutions, the judges, in this case, go a step further from *Unaided Schools* to hold that both aided as well as unaided minority institutions are exempted from providing reservations since it would tamper with their identity, expanding the scope of the principles laid down in the previous opinion.[13]

However, these conclusions have been not been founded on detailed reasoning. While the judgment has upheld the validity of Article 21A, it has *"simultaneously weakened it by making it subject to Article 30."*[14]

Therefore, the concern arising from this judgment is the lack of analysis while dealing with two matters: a) Allowing for reservations in private educational institutions in light of Articles 15(5) and 21A; and b) Including minority institutions within the width of these two Articles.

This case comment is divided into three parts. Part I and Part II deal with the critique of the judgment pertaining to private unaided institutions and minority institutions respectively. Part

[10]*See* VON WRIGHT, GEORG HENRIK. "IS AND OUGHT" FACTS AND VALUES 31-48 (Ed. Springer Netherlands, 1986); Ronald Dworkin Tex. L. Rev 60, 527(1981)

[11]*Supra note* 2 at para 39

[12]*Id.*

[13]*Supra note* 2 at para 46.

[14]Alok Prasanna Kumar, *Right to Education: Neither free nor compulsory*, The Hindu (May 9, 2014), http://www.thehindu.com/todays-paper/tp-opinion/right-to-education-neither-free-nor-compulsory/article5991271.ece (last visited August 1, 2015).

III tries to provide alternative modes of reasoning that the judges could have used to arrive at the same conclusion.

PART I- CRITIQUE OF THE JUDGMENT- PRIVATE UNAIDED INSTITUTIONS

I. Violation of Article 19(1)(g) of the Constitution by enforcing Article 15(5) against private unaided institutions

The learned counsel for the Petitioner, in *Pramati,* argued that the imposition of Article 15(5) would lead to nationalization of seats and, in turn, would violate Article 19(1)(g) of the Constitution.[15] The Court admits, in the course of its observations, that private unaided institutions (hereinafter, "private institutions") should be granted complete autonomy with respect to admitting students. It also admits that forcing reservations on higher educational institutions, especially private ones, would lead to nationalization of seats, which has been condemned in the cases of *T.M.A. Pai v. State of Karnataka (*hereinafter, *"T.M.A. Pai")*[16] and *P.A. Inamdar. v. State of Maharashtra* (hereinafter, "*Inamdar*").[17]

Considering the tenor of the Court's reasoning, one would expect it to continue along the same lines and declare Article 15(5) violative of the 'basic structure' doctrine. However, in a rather dichotomous manner, it goes on to hold that Article 15(5) was inserted to supersede the restrictions imposed by fundamental rights. The Court concluded that admitting a small number of students would not annihilate the identity of the institution and that the width of the provision ensures that it can only be exercised for specific purposes, making its application non-arbitrary. Thus, Article 15(5) was held as constitutionally valid and falling within the purview of Article 19(6). This deduction though seems erroneous, considering the lack of analysis by the Court in order to justify the superseding nature of Article 15(5).

[15]INDIA CONST. art. 19(1)(g); *Supra note 2*, ¶¶ 6-7.

[16](2002) 8 S.C.C. 481, ¶38.

[17](2005) 6 S.C.C. 537, 601.

The Supreme Court's verdict in *T.M.A. Pai* clearly held that the right to establish an educational institution is a fundamental right and that it falls within the purview of Article 19(1)(g).[18] The Court emphasised on the right to admit students as being an essential aspect of "establish and administer" as provided in the Article. Further, the Court held that private schools should also be granted maximum autonomy with respect to admitting students of their preference. These schools boast of a higher standard as compared to government schools. By curtailing their income through the imposition of reservations, the government is reducing the overall quality of education imparted by them.[19]

The Supreme Court, in *Inamdar*, held that the solution is for the States to improve their facilities in public schools.[20] The apex court went on to state that the right to establish and administer an educational institution was a fundamental right and that reservations imposed on private higher-educational institutions would lead to an unreasonable restriction on Article 19(1)(g).[21]

Further, in *Ashoka Kumar Thakur v. Union of India,*[22] the Court left the question of the validity of the 93rd Amendment open, with respect to private unaided institutions. It however, did note that, "The State cannot force any private sector unit to implement affirmative action."[23]

Thus, it may be concluded that the Court in *Pramati,* has erred in holding that private unaided higher educational institutions must account for reservation under Article 15(5). Applying the principle laid down in *Pramati* would lead to the induction of less meritorious candidates,

[18]*Supra note 3*, 141-144**;** *Supra note* 17**:** *Inamdar,* 99**.**

[19]*Supra note 16,* ¶61.

[20]*Supra note 17,* ¶60.

[21]*Supra note* 17, ¶157.

[22]A.I.R. 1996 S.C. 75; also *see* M.P. Singh, *Ashoka Thakur v. Union of India: A Divided Verdict on an undivided social justice measure*, 1 NUJS L.REV. 193 (2008).

[23]*Id; Ashoka Kumar Thakur,* ¶60.

thereby putting the development of the nation at stake while denying technical education to a more competent candidate in an attempt to fulfil an obligation that the State took upon itself.

A case in point is that of the Tata Institute of Social Sciences, where reservations have diluted the standards of education. Higher education requires more self-study and personal resources to achieve merit and the students belonging to the Scheduled Castes/Scheduled Tribes /Other Backward Classes [SC/ST/OBCs] being unable to facilitate for the same, have not been able to do well through these reservations. This has caused a drop in the overall performance of the institute.[24] Forcing private unaided institutions to induct people based on reservations goes against the discourse provided by *T.M.A. Pai* and *Inamdar.*

This analysis, in *Pramati,* is based on the premise that since private educational institutions *should* engage in charity, they *ought* to be implementing the doctrine enshrined in Article 15(5).[25] However, what is ignored is the fact that private educational institutions are not state-run entities and thus, if the State is unable to facilitate the provisions for education, private entities are not obligated to aid the State in this respect. The rationale provided by the Court, in imposing such an obligation on these entities, is insufficient and comes across as a massive leap from what the Court believes the private institutions ought to be doing to it finding a legal authority in mandating the same.

Thus, this has led the Court to arrive at the indigestible conclusion that the right of such institutions is not abrogated and highlights the sudden change in the position of law from *T.M.A. Pai and Inamdar* to the present case.

II. Enforcing Article 21A against private institutions

The Petitioners argued that Article 21A was enacted to ensure that the State provided children with free and compulsory education up to 14 years. Further, they argued that fundamental

[24]Weisskopf, Thomas E., *Impact of Reservation on admissions to higher education in India* ECONOMIC AND POLITICAL WEEKLY (2004) 4339-4349.

[25]*Supra note 10*

rights are only enforceable against the State under Article 12.[26] In response, the Union of India contended that Article 45 had not been enforced for 50 years after gaining independence, which necessitated that the State enact Article 21A.[27] The Union of India also pointed out that, for the purpose of implementation of Article 21A, the Right of Children to Free and Compulsory Education Act, 2009 was enacted and this statute ensured that private unaided institutions would also admit children from the weaker sections of the society, beginning from Class I. The Court, in *Pramati,* conceded that while it was the State's duty to provide for education, and not that of the private institutions, however under Article 21A the State is enabled to fulfil its constitutional mandate through private entities if it wishes to.[28] Conversely, the Court held that the fundamental right to education guaranteed under Article 21A can be enforced against the State only.[29] This conclusion creates a dichotomy.

It does come to question that by this rationale does the Court imply that only State run institutions will be held responsible for a breach of Article 21A and not the private entities? Or, does it mean that a claim must be brought against the State who will then enforce it against the private body concerned? Or does it mean that the enforcement of fundamental rights will eventually come down to claims against private entities? The latter possibility has far-reaching consequences.

Reference ought to be made to Justice Shah's opinion in *Rajasthan State Electricity Board v. Mohan Lal.*[30] In deciding whether the State Electricity Board was within the ambit of "State" under Article 12, Justice Shah expressed his apprehension against the same. In considering whether a statutory body is State, one must bear in mind whether fundamental rights can absolutely be enforced against that body and also whether it was "intended by the

[26] *Supra note* 2, ¶32

[27] *Supra note* 2, ¶36

[28] *Supra note* 2, ¶¶ 40, 42

[29] *Supra note* 2, ¶40

[30] AIR 1967 SC 1857.

Constitution makers that the authority be vested with the sovereign power to impose restrictions on very important and basic fundamental freedoms."[31]

In *Unaided Schools,*[32] Justice Radhakrishnan, in his minority opinion, contends that the text of Article 21A would have expressly included institutions other than the State if it was so intended. Thus, reading into the text of Article 21A and including private institutions within its ambit would be unfair to the spirit of the Constitution.

Applying the same to the present case, it should be noted that the Legislature did not intend to enforce fundamental rights against private institutions vide Article 21A. Fundamental rights can only be enforced against the State and State instrumentalities. For example, an individual can move the Court through a writ petition if his fundamental rights have been violated by a State-administered, funded and established institution as it is established that the State has "deep, pervasive" control over that body[33] due to which it is directly responsible for the violation. In contrast, a private institution is not regarded as an instrumentality of the State since the latter has limited powers to ensure that the former is not being mal-administered and is complying with basic educational standards.

The conclusion of *Pramati,* may end up allowing individuals to approach the Court against private entities alleging violation of Article 21A. If that happens, the entity will *ipso facto* be regarded as falling within the ambit of Article 12. It will then have the power to impose restrictions on the fundamental rights of citizens at par with State run institutions. This is a rather dangerous proposition since a private entity, *prima facie*, is not a part of the State machinery. Allowing it to make arbitrary constraints in the name of "reasonable restrictions" would lead to dilution of any universal mechanism in making or applying guidelines relating

[31]*Cf.* Sukhdev Singh, v. Bhagat Ram, A.I.R. 1975 S.C. 1331, ¶187.

[32]*Supra note 3*, ¶27-38.

[33]Ajay Hasia v. Khalid Mujib, A.I.R. 1981 S.C. 487, ¶82.

to education and will de-corroborate the importance of universal standards in State-run educational institutions.

PART II: CRITIQUE OF THE JUDGMENT- MINORITY INSTITUTIONS

I. Minority Rights under Article 30(1) not violated

The Court held that reservations are not applicable in the case of minority institutions since granting admission to individuals belonging to a community, other than that of the minority in question, could jeopardize the minority institution's character under Article 30(1) and that the said Article grants them special protection.[34]

The conclusion reached by the Court is rather unfounded and not based on any analysis. There is no logical basis to conclude that admission to SC/ST/OBC students should not be granted in minority institutions since they belong to communities other than the minority community running the institution. If individuals belonging to other communities were a threat, Courts would have emphasized on complete exclusivity of the minority to admit students from within their ethnicity or linguistics. On the contrary, the Courts aim to achieve an integration of sorts between the minority community and other communities.

This perspective has been highlighted in the case of *St. Stephens College v. University of Delhi.*[35] The Court held that *"the administration of educational institutions of their choices under Article 30(1) means management of the affairs of the institutions."*[36] This was expanded further to mean that minority educational institutions had the right to prefer their community's candidates to maintain the minority character of the institution. However, the Court added a caveat that the percentage of reservation for minority candidates shall not exceed 50 percent.[37] This view was clarified in *T.M.A. Pai* to imply that the number of seats

[34] *Supra note* 2, ¶¶26, 46

[35] A.I.R. 1992 S.C. 1630

[36] *Id.* at ¶54.

[37] *Id.* at ¶¶ 50-54.

reserved by minority institutions for their own candidates shall not exceed a reasonable percentage.[38] The Court reasoned that fixing a number would be unreasonable since specific, case by case circumstances must be considered while imposing an upper limit to reserve seats.[39]

Therefore, in *Pramati* the Court was unable to justify why providing admission to non-minority members of disadvantaged communities poses a greater threat to a minority institution as opposed to any other individual from non-minority communities.

II. The right to establish and administer in Article 30(1) is similar to that of Article 19(1)(g)

Article 30(1) of the Indian Constitution provides that every religious or linguistic minority shall have the right to establish and administer educational institutions of its choice. The Supreme Court has held that the phrases "establish" and "administer" used in Article 30(1) are to be read conjunctively[40] to mean that the institution in question is to have been established by a minority community[41] and is being administered by the members of that community.[42] The Court further clarified in *S.P. Mittal v. Union of India* that a community must show that it is a minority with respect to a particular state[43] and that the institution was established by it in order to administer it.[44]

[38] *Supra note* 16 at ¶329

[39] *Id.*

[40] It also clarified that the Court did not imply that the two words be read disjunctively, In Re: TheKerala Education Bill, 1959 S.C.R. 995.

[41] *See e.g.,* Sidharji Bhai v. State of Bombay, (1963) 3 S.C.R. 837; G.D.F. College v. University of Agra, A.I.R. 1975 S.C. 1821.

[42] *Id.* GDF College.

[43] A.I.R. 1983 S.C. 1 at 734. *; See,* D.A.V. College v. State of Punjab, A.I.R. 1971 S.C. 1731.

[44] *Supra note* 3 at 805.

Interestingly, the phrase "establish and administer", under Article 19(1)(g), has been interpreted similarly with respect to private educational institutions.[45] In other words, apart from the fact that there is an added privilege to reserve seats for the minority community in question, Article 19(1)(g) (with respect to establishment of educational institutions) advocates minimal government interference in terms of management and only allows it to check abuse of power by the authorities in specific cases of mal-administration and when minimum teaching standard are not met.[46] This is in a nutshell is the true meaning of "establish and administer" under both the Articles 19(1)(g) and 30(1).

The learned academician, Dr. M.P. Singh has summarised the position of law by stating that:

> *"In T.M.A. Pai and Inamdar the Court equated the right of citizens under Article 19(1)(g) with that of the minorities under Article 30(1) "to establish and administer educational institutions of their choice" and read within the former the same rights of admission as guaranteed to the minorities under the latter. An unspecified right of every citizen, which was not even known or recognized until Pai, could not have the same scope and content as the specified right of the minorities alone."*[47]

The rationale behind allowing a small number of seats to be reserved for historically backward groups in private unaided institutions is that it does not alter the character of the institution and only helps further the goal of social inclusion.[48] Thus, the same must be applied to minority institutions. The minority institutions are permitted to reserve a certain number of seats for their own community. However, reservation can be allowed to a

[45]SHUBHA TIWARI, EDUCATION IN INDIA (2006).

[46]Modern Dental College and Research Centre and Ors. v. State of Madhya Pradesh and Ors., A.I.R. 2009 S.C. 2432 at ¶¶30-32; *See*, Unni Krishnan, J.P. Vs. State of A.P. [1993] 1 S.C.R. 594.

[47]*Supra note* 22.

[48]*Supra note* 2 at 141-142.

reasonable extent within the remaining seats for the general category[49] as was done in the case of *St. Stephen's College.*[50]

To conclude, since the private institutions and minority educational institutions are being interpreted similarly with respect to State intervention, one cannot enforce the mandate of affirmative action without doing so in the other category. If reservation is imposed on private institutions, which were promised autonomy for the purpose of admission of students, then the same must be applied to minority institutions.

Thus, minority institutions should reasonably allow reservations in such proportion that their character isn't annihilated or in the alternative, the Court ought to allow private institutions to be exempted from the reservations clause as well. In the opinion of the author, that would be the correct interpretation.

PART III: ALTERNATIVE MODES TO REACH THE SAME CONCLUSION WITH RESPECT TO MINORITY INSTITUTIONS

The Court uses the excuse of jeopardy to the minority character of institutions to ban reservations in these institutions.[51] However, as explained above, a small percentage of seats reserved for the socially backward classes would not annihilate the minority character of the institution. If the Court wanted to differentiate between private institutes and minority ones, with respect to reservations, then it ought to have used the following grounds to carve out an exception for minority institutions:

I. Merit

One way of justifying the lack of reservations in minority institutions is to claim that it would jeopardize the efficiency of the institution. In the *St. Stephens* case, it was held that although

[49]Government of India, National Commission for minority educational institutes, Guidelines for determination of Minority Status, Recognition, Affiliation and other related matters in respect of Minority educational Institutions under the Constitution of India., http://ncmei.gov.in/writereaddata/filelinks/c296efcb_Guidelines.pdf (last visited August 1, 2015).

[50]As reported in T.M.A. Pai, *supra note 16* at ¶155

[51]*Supra note* 2 at ¶46

50% of the seats could be reserved for Christians to keep the character of the minority institution intact, the remaining seats must be allotted solely on the basis of merit.[52] This was further affirmed in *T.M.A. Pai* wherein it was mandated that a merit-based process for admission to higher educational institutions be followed.[53] The rationale behind it being that it is implicitly agreed among courts that minority groups are unable to meet purely merit-based selection criteria. Thus merit is anyway compromised to a certain extent to maintain the minority character of the institution.[54] If the remaining seats also allow for reservation for historically backward classes it would greatly hinder the overall performance of the institution. Thus, if for example, 50% seats are reserved for the minority community and 25% is reserved for backward classes, only 25% of the applications would be merit based, thereby decreasing the efficiency of the institution.[55]

[52]*Supra note* 35 at ¶54.

[53]*Supra note* 16 at ¶152.

[54]Supra *note* 16 at ¶152**;** Saurabh Chaudri & Ors v. Union Of India, A.I.R. 2004 S.C. 2212 citing Islamic Academy and following Pradeep Jain v. Union of India, A.I.R. 1984 S.C. 1420 held: "For the purpose of achieving excellence in a professional institution, merit indisputably should be a relevant criterion. Merit, as has been noticed in the judgment may be determined in various ways (Para 59). There cannot be, however, any fool-proof method whereby and where under the merit of a student for all times to come may be judged. Only, however, because a student may fare differently in a different situation and at different point of time by itself cannot be a ground to adopt different standards for judging his merit at different points of time. Merit for any purpose and in particular for the purpose of admission in a professional college should be judged as far as possible on the basis of same or similar examination. In other words, inter se merit amongst the students similarly situated should be judged applying the same norm or standard. Different types of examinations, different sets of questions, different ways of evaluating the answer books may yield different results in the case of the same student. Selection of students, however, by the minority institutions even for the members of their community cannot be bereft of merit. Only in a given situation less meritorious candidates from the minority community can be admitted vis-à-vis the general category; but therefore the modality has to be worked out. For the said purpose de facto equality doctrine may be applied instead of de jure equality as every kind of discrimination may not be violative of the equality clause."

[55] PANDEY, BHRIGU NATH, SOCIO-LEGAL STUDY OF CULTURAL AND EDUCATIONAL RIGHTS OF THE MINORITIES (2000)

II. Special purpose

Another argument against reservations in minority institutions is that these institutions do not meet the exact aim of Article 15(5) or Article 21 since they have been established for a special purpose apart from imparting secular or technical education.

The case of *Ahmedabad St. Xaviers v. Gujarat*[56] held that minority institutions were established to meet a specific aim and impart special education to those communities who seek to preserve their culture,[57] under Article 28. Similarly, the case of *Islamic Academy v. State of Karnataka,*[58] established that the needs of the minority community should supersede merit since Article 30(1) was inserted to enable them to be at par with non-minority institutions while preserving their own culture.

The purpose clause of the Right of Children to Free and Compulsory Education Act, 2009 or The Constitution (Eighty-sixth Amendment) Act, 2002 makes it clear that the aim of the minority institutions is to provide for basic education to uplift the socially backward classes, to bring them at par with other communities[59] and not to impart any special education to them. For example, the purpose of Article 21A does not mandate teaching of Christian scriptures to a child to preserve the culture. Rather, its aim is to impart basic knowledge to all children uniformly. Thus, minority institutions and their mode of imparting education with a specific lens to protect culture fall outside the ambit of this provision.

[56] Mr. Divan relied on the decision of this Court in The Ahmedabad St. Xavier's College Society and Another v. State of Gujarat and Another, (1974) 1 S.C.C. 717 to submit that the whole object of conferring the right on the minority under Art. 30 of the Constitution is to ensure that there will be an equality between the majority and the minority

[57] *Id at* page 192-3 , *See, Supra note* 35 at ¶¶20, 55.

[58] *Supra note* 7 at ¶¶169-172

[59] Report on the RTE Act, Odisha Primary Education Programme Authority available at: http://www.opepa.in/website/Download/Framework_finalapproved.pdf (last visited: August 1, 2015)

III. Intention of lawmakers

As stated in *Inamdar:*[60]

> *"Notwithstanding the fact that the right of a minority to establish and administer an educational institution would be protected by Article 19(1)(g) yet the Founding Fathers of the Constitution felt the need of enacting Article 30. Article 30(1) is intended to instill confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institution of their choice. Article 30(1) though styled as a right, is more in the nature of protection for minorities. But for Article 30, an educational institution, even though based on religion or language, could have been controlled or regulated by law enacted under Clause (6) of Article 19, and so, Article 30 was enacted as a guarantee to the minorities that so far as the religious or linguistic minorities are concerned, educational institutions of their choice will enjoy protection from such legislation."*

The Court, in *Inamdar,* noted that Article 30 was enacted by the Legislature despite it being aware of the generic nature of Article 19(1)(g). In other words, the Legislature enacted a special provision in the nature of Article 30 to explicitly provide protection to these minorities and instill confidence in them with regard to the fact that their institutions would be protected from reasonable restrictions in the nature of Article 19(6). Thus, imposing such a policy of reservations on them under the garb of Article 19(6) through this judgment would be going contrary to the intention of lawmakers, who enacted Article 30 to ensure protection from such a situation.

CONCLUSION

Thus, in the light of the above reasoning it is the opinion of the author that, the Court has greatly erred in its judgment in *Pramati*. Without providing any substantial analysis, it has left

[60] *Supra note* 17 at 99.

immense scope for confusion in applying its principles. It has also widened the net for protections secured to minority institutions without any reasonable justification.

As Amartya Sen states, *"Development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency."*[61] How far is it fair to encroach on the freedom of private entities to meet the socialistic promises of the welfare state? *Pramati puts* private institutions at a loss in this scenario.

The judgment may have the effect of unleashing a Pandora's Box wherein multiple institutions will now seek to acquire minority status to become autonomous. Autonomy remains a central theme of any private entity and the State must now provide for a logical basis to explain its curtailment. The Court in the instant case of *Pramati* fails to do so.

Several states have issued new RTE Guidelines to deal with the issue of minority institutions sidestepping the implementation of the right to education mandate, while at the same time maintaining a semblance of merit based admissions in these institutions. For instance, the Maharashtra Minority Development Department has specified that aided religious minority institutes offering higher and technical education should admit minimum 50% students on the basis of merit under the minority quota. However, if seats are not filled under the religious minority quota, then admissions should be given to students from linguistic minority. If seats are still lying vacant, then students from a non-minority background can be given admissions after taking prior permissions from the government. Implementing the state government reservations and open category students then can fill the remaining 50%. The same policy will be applicable for unaided minority institutions, but they have to fill a minimum of 51% of

[61] AMARTYA SEN, DEVELOPMENT AS FREEDOM xii (1999) as cited in Kumar, C. Raj. *International Human Rights Perspectives on the Fundamental Right to Education-Integration of Human Rights and Human Development in the Indian Constitution*, TUL. J. INT'L & COMP. L. 12 (2004) 237.

seats under the minority quota.[62] Similarly, Karnataka has reduced the total percentage of students belonging to the minority community from 75 to 25, for implementing the Right to Education Act in primary education.[63]

This move by several States indicates a step back from *Pramati's* overarching holding *vis-à-vis* minority institutions, thereby promoting a higher meritorious threshold for inducting students. However, this wave of change still requires a longer timeframe to be tested and has already been challenged in Karnataka.[64] Thus, the future of Indian minority institutions still rests in the manner states accede to the judgment and public acquiescence to the same.

[62] Notification dated May 15, 2014, Department of School Education and Sports, Government of Maharashtra, available at: http://rterc.in/wp-content/uploads/2015/05/RTE-NOTIFICATION-15-05-2014.pdf (last accessed: August 10, 2015)

[63] Notification dated May 8, 2012, Department of Education, Government of Karnataka, available at: http://righttoeducation.in/sites/default/files/karnataka-notification-regarding-section-12.pdf (last accessed: August 10, 2015)

[64] "PIL Challenges 25% criterion", Times of India, Sept. 11, 2014, available at: http://timesofindia.indiatimes.com/city/bengaluru/PIL-challenges-25-criterion/articleshow/42212217.cms (last accessed: August 10, 2015)

HINDI AS THE NATIONAL/OFFICIAL LANGUAGE: ARGUMENTS FOR REPEALING PART XVII OF THE INDIAN CONSTITUTION

Pragalbha Priyakar*

ABSTRACT

With adverse linguistic scrim which adorns the Indian cultural continuum, it is an even more strenuous challenge for the constitutional regime in place to address the varied socio-political issues of the nation. Balancing integrity with diversity, the Indian constitution has safely omitted a prescription of a national language. However, Hindi, considered the most widely spoken tongue across the country, got recognized as the Official language of the Indian state. The attempts at national integration by way of declaring one language as the official one, by the founding fathers of the Indian Constitution, were seen as threats to the ethnic heritage and identities of several groups. The threat of ethnic violence on linguistic grounds still lingers on in the present times and evidence of the same is fresh in public memory. Part XVII of the Indian Constitution, though aiming to foster peace and order in the Indian social fabric, accidently becomes its own antidote. The article argues that constitutional provisions such as these, due to socio-political reasons have been rendered absolutely redundant – whether a priori or a posteriori. It seeks to explore the varied arguments for repealing Part XVII of the Indian Constitution by analysing the constitutional doctrines of equality, justice and fraternity to seek an environment for the promotion of peace, stability and progressive development of the nationalist spirit.

HINDI AS THE OFFICIAL LANGUAGE: RESISTANCE WITHIN

Language qualifies to be one of the most crucial elements of a cultural system which bears the potential of both – unifying the masses and pitting them against each other. The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity.[1] The intricacies of the existence of the diverse linguistic groups in a nation have been best captured by Rudyard Kipling in the following lines-

"The stranger within my gate,

He may be true or kind,

But he does not talk my talk –

I cannot feel his mind.

I see the face and the eye and the mouth,

But not the soul behind.

The men of my own stock,

They may do ill or well,

But they tell the lies I am wanted to,

They are used to the lies I tell;

And we do not need interpreters

When we go to buy and sell."[2]

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[1]Natasha Dubé, *Minority Language Rights in Canada*, CENTRE FOR CONSTITUTIONAL STUDIES, (Aug. 1. 2008), http://ualawccsprod.sr

v.ualberta.ca/ccs/index.php/constitutional-issues/the-charter/official-languages-of-canada-sections-16-22/51-minority-language-rights-in-canada

[2]Rudyard Kipling, *The Stranger*, *in* THE WORKS OF RUDYARD KIPLING (Delphi Classics, Series Two, version 5, 2015); *see also* Rosina Lippi-Green, *Accent, Standard Language Ideology, and Discriminatory Pretext in the Courts*, LANGUAGE IN SOCIETY, 23-2, 163-198 (1994).

The Indian society being multi-cultural and multi-ethnic in nature, can suffer from integration and division, if the diversities are not reconciled efficiently through the constitutional and political machinery.[3] Over the ages, the Indian parlance has witnessed the emergence of diverse ethnic groups manifesting their aspirations through institutions established by them,[4] whose interests at times, may be conflicting. The significance of native languages in India can be judged from the fact that the provinces/states were formed on linguistic basis, post-independence.[5]

The factors contributing to the resistance against accepting Hindi as an official language or granting it any sort of stature above other languages, were not only political, but also historical. For instance, the Tamil speaking masses have inhabited the southern part of peninsular India for over 3,000 years.[6] Thus, if it is considered that the status of official language to 'Hindi' was offered in lieu of its pristine development in the sub-continent, the analogical conclusion as to a proclivity of our political system towards Hindi remains unjustified.[7] To the Tamil speaking masses, the acceptance of Hindi, even in the school system was a form of religious or political bondage that was symbolically associated with Brahmanical priesthood and Sanskritic authority.[8] Both Brahmin *'domination'* and Hindi

[3]THOMAS HYLL AND ERIKSEN, ETHNICITY AND NATIONALISM, ANTHROPOLOGICAL PERSPECTIVES 17 (Pluto Press, London 1993).

[4]Lynette Singer,, *Ethnogenesis and Negro- Americans Today*, SOCIAL RESEARCH, 29: 419,32 (1962). (The phenomenon has been termed as *'ethnogenesis'*)

[5]Ramachandra Guha,, *Hindi Chauvinism*, THE HINDU, JAN. 18, 2004 *available at* http://ramachandraguha.in/archives/hindi-chauvinism.html, (last Accessed: Aug. 3, 2015).

[6]G. L. Hart, *Women and the Sacred in Ancient Tamilnad*, JOURNAL OF ASIAN STUDIES, 32, 233-250 (Feb, 1973);s*ee also* THE POEMS OF ANCIENT TAMIL: THEIR MILIEU AND THEIR SANSKRIT COUNTERPARTS (UNIVERSITY OF CALIFORNIA PRESS, BERKELEY, 1975).

[7]Thirunavukkarasu, K., The son who named his mother, KALACHUVADU MAGAZINE (2008), http://kalachuvadu.com/issue-105/page44.asp, (last accessed Aug. 10, 2015).

[8]V. Geetha & S.V. Rajadurai, TOWARDS A NON-BRAHMIN MILLENNIUM: FROM IYOTHEE THASS TO PERIYAR, (SAMYA, CALCUTTA, 1987) 481; *see also* INTERNATIONAL TAMIL LANGUAGE FOUNDATION, TIRUKKURAL/ THE HANDBOOK OF TAMIL CULTURE AND HERITAGE (ITLF, CHICAGO, 2000) 1346.

(northern) *'domination'* implied the oppression of *'Dravidians'* by *'Aryans'*.[9] Thus, the elevation of Hindi to the status of an official language symbolised the acceptance of the rule of outsiders.[10] A manifestation of this sentiment was seen during the Anti-Hindi agitations when Indira Gandhi had invited the agitating student leaders to hear out their concerns. She was told by them to choose between Hindi and Unity.[11]

Soon after *'Hindi'* was declared to be the official language of India under the Constitution, a widespread nationalistic spirit in various ethnic communities towards their respective mother tongues brought about a period of instability, chaos and violence.[12] This danger has not yet been averted. For instance, the impact of the Dravidian *'ethnocentricism'* came to the fore when the name of one of the southern states was changed from Madras to Tamil Nadu.[13] More recently, in 2014, the southern states saw another anti-Hindi movement when the Home ministry issued an order in the past that makes use of Hindi 'compulsory' for use in social media by the government and its officials.[14]

The resistance to the imposition of Hindi has been immense in the north-eastern states owing to their complete unfamiliarity of the language coupled with the general sentiment of

[9]Jacob Pandian, RE-ETHNOGENESIS- THE QUEST FOR A DRAVIDIAN IDENTITY AMONG THE TAMILS OF INDIA, 545-552 (1998, ANTHROPOS, BD. 93, H. 4/6).

[10]Robert L. Hardgrave, THE RIOTS IN TAMIL NADU: PROBLEMS AND PROSPECTS OF INDIA'S LANGUAGE CRISIS: ASIAN SURVEY 399-407 (UNIVERSITY OF CALIFORNIA PRESS, 1965).

[11]*Ibid.*

[12]RAO, KODANDA & PANDU, RANGI, LANGUAGE ISSUE IN THE INDIAN CONSTITUENT ASSEMBLY: 1946–1950: RATIONAL SUPPORT FOR ENGLISH AND NON-RATIONAL SUPPORT FOR HINDI, at 44-46 (INTERNATIONAL BOOK HOUSE, 1969).

[13]Ramasami Periyar, DECLARATION OF WAR ON BRAHMINISM, (Ed. 3d., CHENNAI, 1998) 19.

[14]Alok Rai, HINDI NATIONALISM 110 (ORIENT BLACKSWAN, 2001); *see also* Aman Sharma, *Home Ministry Asks Bureaucrats to use Hindi on Social Networking Sites*, THE ECONOMIC TIMES, (Jun. 17, 2014, 04:07 a.m.) http://articles.economictimes.indiatimes.com/2014-06-17/news/50651316_1_home-ministry-prime-minister-narendra-modi-government-officials (pursuant to protests against this measure, it was clarified that the order applied only to Hindi-speaking states); *See (*Jun. 21, 2014, 03:00 a.m.), http://articles.economictimes.indiatimes.com/2014-06-21/news/50756374_1_hindi-official-languages-act-social-media.

exclusion from the rest of the country. For instance, in 2013, the Ministry of Human Resource and Development saw a protest by students from the north-eastern regions under the aegis of North-East Forum for International Solidarity (NEFIS) against Delhi University's proposal to introduce Hindi or a modern Indian language as a compulsory subject, claiming it would lead to their exclusion.[15] The protesters claimed that the move was nothing short of 'cultural chauvinism',[16] discriminatory and anti-national.[17] The issue has now become threateningly serious with reports that for the past decade, insurgent groups in the North-East choose to specifically target Hindi-speaking people settled in those regions to attract attention from the Centre to issues that have been avoided or ignored for ages. This violence stemming from a difference of language is rooted in the sentiment that Hindi-speaking settlers symbolise oppression by the Hindi-speaking masses on the North-Eastern minorities.[18]

Keeping these isolated but interlinked events in mind, a call to reverse and repeal Part XVII of the Indian Constitution brims up, so as to establish an atmosphere of peace, stability and a progressive development of the nation.

Another aspect of the resistance is based on religion. The battle for installing Hindi in the Courts and in government offices which began in the last decades of the nineteenth century and succeeded in 1901 - was fought specifically on the matter of script. The task of propagating the Nagari script and Hindi in the last years of the nineteenth century was linked with the Arya Samaj movement thereby rendering Hindi as one of the crucial symbols for the

[15]Press Trust of India, *NE students protest against compulsory Hindi/MIL course in DU*, BUSINESS STANDARD , (Apr. 5, 2013, 20:25), http://www.business-standard.com/article/pti-stories/ne-students-protest-against-compulsory-hindi-mil-course-in-du-113040500460_1.html

[16]*Ibid.*

[17] Satya Prakash, *Compulsory Hindi or MIL in DU angers NE students*, HINDUSTAN TIMES, (Apr. 2, 2013, 23:28), www.hindustantimes.com/newdelhi/compulsory-hindi-or-mil-in-du-angers-ne-students/article1-1036388.aspx

[18] Prasanta Mazumdar, *Hindi Speakers are Sitting Ducks in the Northeast Again*, THE NEW INDIAN EXPRESS: THE SUNDAY STANDARD, (Aug. 2, 2015, 09:28) http://www.newindianexpress.com/thesundaystandard/Hindi-Speakers-are-Sitting-Ducks-in-the-Northeast-Again/2015/08/02/article2952712.ece

pan-Arya Samaj identity.[19] Furthermore, the status of linguistic usage became even more significant when the Indian populace was clutching the ground against the Divide and Rule policy of the British government.[20] As a protectionist measure, it seems, the identities became stricter thereby, enabling Hindi to be identified with Hindu ethnicity as the Mohammedans exhibited their proclivity on the sides of Urdu.[21] Hindustani was considered combination of the two. Thus, the choice of Hindi over Hindustani may also be viewed as a measure that favoured the Hindus unfairly.

In light of such historic interactions between the various ethnic and religious communities and their languages, the opposition to Hindi as the official Indian language must be analysed. Complementing this, we must not forget that the convenience, in fact the necessity, of having one or more languages as the official (not national, as all languages spoken in a country can claim to be national) language or languages for Centre-State and inter-state communication for political, economic, legal and even social reasons cannot be disputed.

STORMY DELIBERATIONS: TRACES FROM THE CONSTITUENT ASSEMBLY DEBATES

It must be noted that the Constituent Assembly, while deliberating upon the crucial issue of the declaration of a National Language, reconsidered the entire scenario once again and after three years of debate, arrived at a compromise at the end of 1949,[22] which was termed as the Munshi-Ayyangar formula. Though this rule aspired to bring about a balance between all the linguistic groups by eliminating the need to award any particular language the status of the *'National Language,'*[23] but even a stipulation of Hindi as the official language of the Union and the diplomatic scheme of Part XVII in relation to the language to be used in courts, was

[19]*Supra* note 5.

[20]Ramasami Periyar, RELIGION AND SOCIETY: SELECTIONS FROM PERIYAR'S SPEECHES AND WRITINGS 28 (EMERALD PUBLISHERS, MADRAS, 1994).

[21]*Ibid*.

[22]Paul R. Brass, THE POLITICS OF INDIA SINCE INDEPENDENCE 164 (CAMBRIDGE UNIVERSITY PRESS, 1994).

[23]CONSTITUENT ASSEMBLY DEBATE (PROCEEDINGS), Vol. IX (NEW DELHI, LOKSABHA SECRETARIAT, 1949).

not considered as a positive move of the government by the non-Hindi speaking population.[24] During the debates on Part XVII, the entire Assembly was divided into the Hindi speaking Block and the Non-Hindi speaking Block,[25] with the latter pressing on the need not to have Hindi as the backbone of the Indian administrative system by refusing to award it the status of the *'official language'*.[26] In his speech, T. T. Krishnamachari once spoke:

"We disliked the English language in the past. I disliked it because I was forced to learn Shakespeare and Milton, for which I had no taste at all. If we are going to be compelled to learn Hindi, I would perhaps not be able to learn it because of my age, and perhaps I would not be willing to do it because of the amount of constraint you put on me. This kind of intolerance makes us fear that the strong Centre which we need, a strong Centre which is necessary will also mean the enslavement of people who do not speak the language at the Centre. I would, Sir, convey a warning on behalf of the people of the South for the reason that there are already elements in South India who want separation..., and my honourable friends in U.P. do not help us in any way by flogging their idea of 'Hindi Imperialism' to the maximum extent possible. So, it is up to my friends in Uttar Pradesh to have a whole India; it is up to them to have a Hindi-India. The choice is theirs."[27]

Even, in the All India Language Conference organised by Rajaji in 1958, it was declared that *'Hindi is as much foreign to non-Hindi speaking people as English is to the protagonists of*

[24]Sumit Ganguly, Larry J. Diamond & Marc F. Plattner, THE STATE OF INDIA'S DEMOCRACY 51 (THE JOHNS HOPKINS UNIVERSITY PRESS AND THE NATIONAL ENDOWMENT FOR DEMOCRACY, 2007)..

[25]GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 277 (CLARENDON, 1966).

[26]ANNAMALAI, E., LANGUAGE MOVEMENTS AGAINST HINDI AS AN OFFICIAL LANGUAGE, LANGUAGE MOVEMENTS IN INDIA 53 (1979, CENTRAL INSTITUTE OF INDIAN LANGUAGES).

[27]CONSTITUTION ASSEMBLY DEBATES, OFFICIAL REPORT 235 (NEW DELHI: LOK SABHA SECRETARIAT, 1988), VOL. VII.

Hindi'.[28] In spite of this fact well known to the drafters, Hindi was awarded the status of the official language under Part XVII.

The central issue, therefore, is the dual position of the place of Hindi or English in independent India as an *'official language'*, which was linked with the fact that while Hindi was the regional language of one part of the country, English was more widely used among the middle classes of the bulk of the non-Hindi speaking regions.[29]

However, the scenario would have been different had Hindustani taken the position as the official language of India. Although it would have been devoid of any literary or academic standing or a fixed region-bound home of its own, it had the potential of it being developed *de-novo* as a literary language with all sections of the people and all languages of the country taking part in its development. The proposal for Hindustani in the pre-independence period was even backed by visionary leaders of India including Nehru and Gandhi, where the former referred it as a '*golden mean*' between Hindi and Urdu and stressed for it to be used for inter-provincial communications without infringing in the least on the domain of other provincial languages.[30] But, soon after India's partition, the carpet for Hindustani more or less got rolled up with the Constituent Assembly debates shifting their references from Hindustani to Hindi. Even the Fundamental Rights Sub-Committee of the Constituent Assembly, while deliberating on the Language Formulae initially did suggest Hindustani, written either in Devanagri or the Persian script, to be adopted as the national language of the Union.[31] However, owing to apprehensions that it would create discontent and would cause damage to

[28]*Supra* note 33, 94.

[29]Rao, V. K. R. V., *Many Languages, One Nation: Quest for an All-India Language*, ECONOMIC AND POLITICAL WEEKLY, VOL. 13, NO. 25 1025-1030 (JUN. 24, 1978).

[30]*Supra note* 5.

[31]CONSTITUENT ASSEMBLY OF INDIA DEBATES (PROCEEDINGS) (VOL. 5) 11. However, this question was held over as the matter was under consideration by the Union Constitution Committee and as the Constituent Assembly was already seized of the subject.

the foundational principles of the Constitution, it was concluded that the Fundamental Rights should not be burdened with any amendment being proposed to this effect.[32] However, it was Hindi and that too in the Devnagari Script which was adopted as the official language of India.

What was perhaps overlooked, was the fact that nationalism in a multi-lingual society is such a delicate plant, especially when the common, foreign ruler with his unifying effect on his multi-lingual subjects has disappeared, that if one wants a common language for promoting emotional identity and national integration, it is easier to do so with a non-region bound and under-developed language, as it would have both the negative advantage of equal disability for all and the positive advantage of opportunity towards inclusive participation by all linguistic groups in its development.[33]

Here, it might be pertinent to note Lenin's contention that a polyglot nation does not need a compulsory national language. In his words, *'We, of course, are in favour of every inhabitant of Russia having the opportunity to learn the great Russian language. What we do not want is the element of coercion.'*[34] On similar lines, Shyama Prasad Mookerjee, who later founded the Jan Sangh, had stated in a Constituent Assembly Debate, *'If it is claimed by any one that by passing an article in the Constitution of India one language is going to be accepted by all by a process of coercion, I say, Sir, that will not be possible to achieve. Unity in diversity is India's keynote and must be achieved by a process of understanding and consent.'*[35]

Moreover, India still continues to be a dualistic society in so many ways, by being subject to class domination rather than mass rule. This may essentially be traced to the fact that in the

[32]*Ibid.*

[33]*Ibid.*

[34]*Supra* Note 24.

[35]34 CONSTITUENT ASSEMBLY OF INDIA DEBATES (PROCEEDINGS), VOL. IX; *see also* Bipin Chandra, INDIA AFTER INDEPENDENCE 96 (PENGUIN BOOKS, 1989)..

past, there has been no linguistic integration among the masses of the different regions nor has there been any use of Hindi for the linguistic integration of the ruling upper classes.[36]

A CRITIQUE ON ARTICLE 343 OF THE CONSTITUTION

The purpose of a Constitution is to create a political system which can foster law, order and peace in the state and when the constitution itself moves forward to defeat its objective, the provision calls for repeal. It aims at contributing towards the processes of reviving, reformulating, re-emphasising and reinventing ethnic heritage. However, it fails in its very objective to reconcile the conflict of the diverse multi-ethnic and multi-cultural Indian society. Article 343 provides for the establishment of a Commission by the President which shall make recommendations regarding the progressive use of the Hindi language for official purposes in India and restrictions on the use of the English language for all or any of the official purposes.[37]

At the time of the drafting of the Constitution, abandoning the use of English in an absolute sense in a day was neither a practical nor a feasible recourse since it had been in prevalence in the Indian administrative structure for the previous 190 years. The very reason for the Indian constitution having adopted a federal structure was to nurture the multi-diversified Indian society with sufficient autonomy and independence so as to make them a part and parcel of the political and administrative system.

Keeping this objective in mind, giving special autonomy to Hindi and thus, to the Hindi speaking population seems unjustified. It portrays an irony, whereby on one hand, the Constitution endeavours under Part III to preserve the interests of minority and on the other, sanctions for the majority a spacious ground to exercise and manifest its dominance over the

[36]Rohit Wanchoo & Mukesh Williams, REPRESENTING INDIA: LITERATURES, POLITICS, AND IDENTITIES 73 (OXFORD UNIVERSITY PRESS, 2007).

[37] INDIA CONST., art. 344 (*Commission and Committee of Parliament on official language*).

marginal ones by sacrificing their rights.[38] Further, the Constitution prescribes it to be the duty of a State to promote the spread of the Hindi language and to develop it so that it may serve as a medium of expression.[39]

Further, these constitutional provisions may thus be interpreted to foster the pan-Indian identity by ruling out the colonial British legacy of the prior times. However, even this hypothesis cannot stand long as we delve deeper into the roots of Part XVII, which stipulates that all the proceedings of the High Court and Supreme Court as well as all acts passed by Parliament shall be in English Language.[40] This is where the constitutional scheme as carved out in Article 343 onwards, appears to be defeated by its own existence.

JUDICIAL OUTLOOK ON THE ISSUE

The issue of the official language was much analysed in a matter before the Gujarat High Court where a Public Interest Litigation petition was filed seeking directions to Central and State governments to make it compulsory for the manufacturers to print details of goods like price, ingredients and date of manufacture in Hindi. To this, the Court ruled,

"*Normally, in India, majority of people have accepted Hindi as a national language and many people speak Hindi and write in Devanagari script but there is nothing on record to suggest that any provision has been made or order issued declaring Hindi as a national language of the country*."[41]

The Court also deliberated over Article 343 of the Indian Constitution which prescribes Hindi as the official language of the Union and safely omits any reference to a national language.[42]

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[38]*Cf.* Virendra Kumar, COMMITTEES AND COMMISSIONS IN INDIA, 53-66 (CONCEPT PUBLISHING COMPANY, 1993).

[39] INDIA CONST. art. 351, *Directive for the development of the Hindi language.*

[40]*Ibid*, art. 348(1), *Language to be used in the Supreme Court and in the High Courts and for Acts, Bills, etc*.

[41]Sureshbhai B Kacchadia v. Union of India & Ors. (MANU/GJ/0006/2010).

[42]*Supra note* 40, INDIA CONST., art. 343(1) reads, *"The Official language of the Union shall be Hindi in Devanagari script."*

The issue also found mention in the apex Court in a matter where Presidential orders issued in 1960 compelled the attendance of government employees in '*Hindi in service*' training as a part of the duty along with a provision for penal consequences in cases of non-attendance. These orders were being contended to be violative of the Official Languages Act of 1963. However, the Court rejected this stand and emphasised that the desired change from English to Hindi as the official language must to be a gradual one. Recognising that the Act of 1963 was *in sync* with the spirit of Article 343, as it specifies both Hindi and English as the appropriate languages for official use, the court held:

"*Article 343(3) provides merely for extension of time for the use of English language after the period of 15 years. The progressive use of the Hindi language is thereby not to be impaired … The orders confers an additional qualification on those who learn Hindi and does not take away anything from the Government employees ... The measures taken for enforcement of provisions for learning Hindi by providing for absence from classes as breach of discipline and insisting on appearance at the examinations are steps in aid of fulfilling the object of what is described as in service, training in Hindi-language."*[43]

LOOKING AT THE REFERENCES: A COMPARATIVE ANALYSIS

To this issue, the Constitution of Ireland – one of the reference models for the Indian Constitution, can prove to be the best illustration. It provides for accommodation of any other language; other than Irish and English, as the Official language, if it has been authorised under a law by the Irish parliament.[44] The relevance of an official language varies with context. For instance, in European countries like France and England, where the linguistic diversities are not so wide and do bear a high allegiance to linguistic majority, adoption of '*unilingualism'* is justified. As opposed to this, the extension of a similar policy to the Indian

[43]Union of India v. MurasoliMaran, A.I.R. 1977 S.C. 225.

[44] IRELAND CONST., art. 8(3) reads -*"Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof".*

socio-political context can prove disastrous. Similarly, an investigation into the constitutional framework of Canada suggests that it should also be applauded for its visionary policy. Similar to Ireland as far as the framework goes, but opposed to it with respect to the social structure, Canada declares both English and French as its official languages. They have been elevated to a status where they '*have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and Government of Canada*'.[45] In order to draw analogies and a firm conclusion, it's imperative to revisit the structure of Canadian society.[46] In Canada, nearly 95% of Quebecers can speak French, but only 40.6% speak English. In the rest of the country, 97.6% of the population is capable of speaking English, but only 7.5% can speak French.[47] Personal bilingualism is most concentrated in southern Quebec and a swath of territory sometimes referred to as the *'bilingual belt'*, which stretches east from Quebec through northern and eastern New Brunswick and west through Ottawa and that part of Ontario lying to the east of Ottawa, as well as north-eastern Ontario.[48]

In addition, it can be analysed that institutional bilingualism in various forms predates the Canadian Confederation since 1867. However, for many years English occupied a *de facto* privileged position, and French was not fully equal. The two languages have gradually achieved a greater level of equality in most of the provinces, and full equality at the federal level.[49] Thus, the foundations of the Hindi bias of the Indian Constitution seem fully

[45] THE CONSTITUTION ACT, 1982, Sec.16(1), http://www.pch.gc.ca/ddp-hrd/canada/guide/offcl-eng.cfm. (*See*,Sec. 16 of the Canadian Charter of Rights and Freedoms)..

[46]Statistics Canada, 2006 CENSUS PROFILE OF FEDERAL ELECTORAL DISTRICTS (2003 REPRESENTATION ORDER): LANGUAGE, MOBILITY AND MIGRATION AND IMMIGRATION AND CITIZENSHIP 6 (2007, Ottawa)

[47]STATISTICS CANADA, 2006 CENSUS PROFILE OF FEDERAL ELECTORAL DISTRICTS (2003 REPRESENTATION ORDER): LANGUAGE, MOBILITY AND MIGRATION AND IMMIGRATION AND CITIZENSHIP 2, 6 (2007).

[48]Statistics Canada, POPULATION BY KNOWLEDGE OF OFFICIAL LANGUAGE, BY PROVINCE OR TERRITORY (2006 CENSUS), http://www40.statcan.gc.ca/l01/cst01/DEMO15-eng.htm.

[49]Official Languages Act of 1985, C.31 (4TH SUPP.), DEPARTMENT OF JUSTICE, http://laws.justice.gc.ca/eng/O-3.01/page-1.html.

unjustified and uprooted from the practical experiences which are present in the illustration from Canada.[50]

CONCLUSION

Thus, it is submitted that there should be no national language in India and as far as the question of an Official Language is concerned, it should depend upon the factors of ease and convenience. Further, steps such as formulating Hindi into the Roman script can further solve the problem of a pan-Indian ethnic identity being associated with it. As under the present socio-economic circumstances, English would be learnt anyway whether or not it is accorded the status of Official Language. In addition to this, since we acknowledge the legacy of a majority of political structures of our country to those in English territory, adoption of English as one of the Official Language permanently should no longer serve as a sore on the back. From the deliberations above, we can identify two-fold objections to Hindi's status as an official language. First, that there was a difference of communities where there was a fear of Aryan dominance and second, that the difference in languages also came from differences in religion. Both of them required the attention of the law drafters for a much fairer constitutional policy. However, contrary to this, by including Hindi under the umbrella of Article 343, the Indian Constitution eventually fails to provide for either of the nuances. The debate regarding Hindi as Official Language, therefore, deserves legislative deliberation.

[50] REPORT OF THE ROYAL COMMISSION ON BILINGUALISM AND BICULTURALISM, BOOK I (GENERAL INTRODUCTION) XXVIII (OTTAWA: QUEEN'S PRINTER).