



COMPARATIVE CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW QUARTERLY

VOLUME I

NOVEMBER 20, 2013

ISSUE III

**A Global Administrative Law Approach To Regulating Transnational Corporations
With Respect To Human Rights Violations In Developing Countries**

- Akshaya Kamalnaath

**'Due Process' v. 'Procedure Established by Law' framing and working the Indian
Constitution**

- Shivangi Gangwar

State Expenditure on Religion: A Comparative Constitutional Analysis

- Sohini Chatterjee & H.R. Vasujith Ram

**A Constitutional Analysis of the Restrictions on Prediction of Voters' Preferences by the
Media.**

-Amrita Vasudevan & Bhanu Partap Singh Sambyal

**CENTER FOR COMPARATIVE CONSTITUTIONAL LAW
AND ADMINISTRATIVE LAW**

NATIONAL LAW UNIVERSITY, JODHPUR

CONTENTS

FOREWORD	1
A GLOBAL ADMINISTRATIVE LAW APPROACH TO REGULATING TRANSNATIONAL CORPORATIONS WITH RESPECT TO HUMAN RIGHTS VIOLATIONS IN DEVELOPING COUNTRIES - <i>Akshaya Kamalnaath</i>	3
‘DUE PROCESS’ V. ‘PROCEDURE ESTABLISHED BY LAW’ FRAMING AND WORKING THE INDIAN CONSTITUTION - <i>Shivangi Gangwar</i>	15
STATE EXPENDITURE ON RELIGION: A COMPARATIVE CONSTITUTIONAL ANALYSIS - <i>Sohini Chatterjee & H.R. Vasujith Ram</i>	36
A CONSTITUTIONAL ANALYSIS OF THE RESTRICTIONS ON PREDICTION OF VOTERS’ PREFERENCES BY THE MEDIA - <i>Amrita Vasudevan & Bhanu Partap Singh Sambyal</i>	61

FOREWORD

Being a novel advent with only the penultimate issue of the first volume in sight a broad criterion was adhered to thematically, resulting in diverse range of topics bearing weight in the field Constitutional Law and Administrative Law. However, the journal being conceptualized to lend a comparative colour to the discourse in the field by providing a forum for the interplay of various legal systems, majority of the work brought forth in this issue seeks to reflect this purpose.

The opening piece by Akshaya Kamalnaath provides a global administrative law solution to the trouble of unimpeded or insufficiently redressed human rights violations committed by transnational corporations. It seeks to analyse how coordination and integration between global and national regulatory mechanisms can provide a way out of this grave problem.

On a different contour, in the next article, Shivangi Gangwar studies the reasons and implications of the omission of the framers of our nation's Constitution to adopt the 'due-process' clause. Various important concepts underlying the Indian Constitution can be traced to have been borrowed from Constitutions around the world. The study therefore sparks interest in the intention of the framers at the time of non-adoption of the clause, as viewed from a comparative perspective.

Any discourse relating to religion and fundamental rights in India strikes at many a sensitive nerve. Sohini Chatterjee and Vasujith Ram in their contribution 'State Expenditure on Religion: A Comparative Constitutional Perspective', has touched upon one such nerve by modestly limiting their scope to the much debated 'Haj' subsidy in their elucidation upon the Indian scenario. Also dwelling upon the preservation of fundamental rights, Amrita Vasudevan and Banu Pratap Singh in the final piece have brought to focus the importance of exit polls through a constitutional analysis of the restrictions on prediction of voters'

preferences by the media. With election bells ringing in the country, it forms an interesting deliberation upon whether free and fair elections, and in turn the free flow of information making a voter *informed* could be extrapolated to form part of the basic structure of the Constitution.

In as much as we are pleased with the reach of the journal over the course of just eleven months, the volumes of manuscripts received have been overwhelming, and the mammoth efforts of the editorial team cannot be left unacknowledged. For this, and the support and encouragement of our Chief Patron Prof. Poonam Saxena, our Director, Prof. I P Massey and our Faculty Advisor Prof. K L Bhatia, I express my sincere gratefulness.

Anusha Ramesh

[*Editor-in-Chief*]

**A GLOBAL ADMINISTRATIVE LAW APPROACH TO REGULATING
TRANSNATIONAL CORPORATIONS WITH RESPECT TO HUMAN RIGHTS
VIOLATIONS IN DEVELOPING COUNTRIES**

-Akshaya Kamalnaath*

ABSTRACT

The problem that is sought to be addressed herein is the issue of transnational corporations (“TNCs”) slipping through the gaps of human rights regulations at the domestic level as these entities transcend boundaries. Consequently, victims of human rights violations by these TNCs are denied redress. This problem is compounded by the fact that governments of states where these violations occur, even where the law provides for it, (a) might not have the wherewithal to go after the errant TNCs or (b) might be disincentivised to do so due to the substantial foreign investment brought in by them. The solution that this essay puts forth is a global regulatory mechanism that integrates and works with national mechanisms. This would overcome the hurdle of international law not being able to impose obligations directly on TNCs as they are not subjects of international law.

States however, being subjects of international law, will be more compliant to an international law solution. The global regulatory body must follow procedural principles of Global Administrative Law, at the same time making room for national regulatory bodies to retain local procedural safeguards. Ideally, the coordination between the global and national bodies must eventually lead to homogenization of administrative principles.

* Graduate, New York University (LLM)

INTRODUCTION

On December 2nd 1984, in the dead of night, methyl isocyanate, a deadly gas, escaped from the chemical plant belonging to Union Carbide in Bhopal, Madhya Pradesh in Central India. This plant belonged to Union Carbide India Limited, a subsidiary of the American corporation, Union Carbide.¹ The winds then blew large quantities of this gas all through the city of Bhopal, causing several thousand deaths, many more injuries and destruction of local crops, cattle and nearby water sources.² Apart from being, in itself, one of the worst industrial tragedies ever, the attempted redress that followed was so inadequate that the victims have been, in Upendra Baxi's words, undergoing a 'ceaseless process of revictimage'.³ While one of the basic principles of Indian administrative law states that public decisions must be taken in consultation with affected interests, the Bhopal victims never benefit from this maxim.⁴ They were not only denied the right to be heard but also were not consulted before a settlement with Union Carbide was entered into, the terms of which extinguished all claims and cases against both the parent and the Indian subsidiary corporations, within and outside India.⁵

Cases like these make one question whether developing countries might be adequately incentivised to regulate transnational corporations (hereinafter referred to as "TNCs") in the first instance and also to hold them liable in case of wrong doing. On the one hand, these

¹ Abhi Raghunathan, *The Grand Trunk Road from Salomon to Mehta: Economic Development and Enterprise Liability in India*, 100 GEO. L.J. 2, available at

<http://georgetownlawjournal.org/files/2012/01/Raghunathan1.pdf> at p. 572, 573.

² *Id* at 573.

³ Upendra Baxi, *The Myth and Reality of the Indian Administrative Law*, in ADMINISTRATIVE LAW., 13 (I.P. Massey, 6th ed., 2007).

⁴ *Id*.

⁵ *Id.*; see also Usha Ramanathan, *Business and Human Rights: The India Paper*, at 5, available at

<http://www.ielrc.org/content/w0102.pdf>; *Judgment extinguishing all claims. available at*

<http://cseindia.org/userfiles/scbhopal.pdf>.

states seek to increase foreign investments by creating an investor-friendly environment for transnational companies and on the other hand, it is the very same state government that is charged with regulating and monitoring these TNCs and enforcing human rights laws when they are violated.⁶ In addition to this, TNCs are also uniquely situated inasmuch as the theory of limited liability applicable to corporations shields them from liability in the home state for violations on the part of subsidiaries in the host state.⁷ The economic might of TNCs is another factor that might dis-incentivise developing countries to regulate them. Further, many instances of human rights violations by TNCs involve complicity with the governments of the host state. Attempts in the TNCs' home country to address extra-territorial transgressions by TNCs usually run into issues of it not being the appropriate forum (forum non conveniencie) or separate legal entity status of the parent and subsidiary corporations.⁸

HUMAN RIGHTS OBLIGATIONS OF TNCs UNDER INTERNATIONAL LAW

Presently there is no consensus about whether international law lays out the human rights obligations of TNCs.⁹ While there are non-binding codes of conduct, (examined in section 2. of this note), in place, TNCs themselves cannot be made liable under international law because they are not 'subjects' of international law and hence lack 'legal personhood'.¹⁰ The

⁶ International law makes it the obligation of states to regulate and redress all human rights obligations within the state.

⁷ The country in which the holding company of the TNC is incorporated is referred to as the home state (typically a developed country) and the country in which the subsidiary is incorporated is referred to as the host state (typically a developing country).

⁸ Marion Weschka, *Human Rights and Multinational Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad?* available at http://www.zaerv.de/66_2006/66_2006_3_a_625_662.pdf at p.630.

⁹ Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: RECENT CHANGES AND RECURRING CHALLENGES*, available at: <http://www.law.northwestern.edu/journals/jihr/v6/n2/2/Duruigbo.pdf>.

¹⁰ This has been criticized by many as an outdated understanding of international law. See Philip Alston, *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in NON-

conventional definition of a ‘subject’ of international law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims.¹¹ However, recent cases under Alien Tort Claims Act (ATCA) in the United States show a tendency of understanding corporations as subjects of international law.¹²

International law only imposes obligations on States which must in turn regulate corporations under their jurisdiction. Voluntary codes of conduct for TNCs have largely been ineffective so far because, as the name suggests, they lack enforceability. International law therefore does not fully address the issue of TNCs falling through the gaps of home state and host state laws. Further, TNCs are under-regulated under domestic law due to the disincentives in regulating them for both the host state and the home state as mentioned above. What is required then is a global regime that can impose obligations on corporations thus providing individuals with access to redress.

STATE ACTORS AND HUMAN RIGHTS, Series of the Collected Courses of the Academy of European Law, Oxford Univ. Press, 2005 at p. 3 cited in Olivier De Schutter, *Transnational Corporations and Human Rights: An Introduction*, Global Law Working Paper 01/05 Symposium - ‘Transnational Corporations and Human Rights’ available online: https://docs.google.com/viewer?a=v&q=cache:Bb9S0s51KUIJ:www.law.nyu.edu/idcplg%3FIdcService%3DGET_FILE%26dDocName%3DECM_DLX_015825%26RevisionSelectionMethod%3DLatestReleased+&hl=en&gI=in&pid=bl&srcid=ADGEESiJvnovODjZnmeApbsOtUK85yOIGJgVKakkZc9oAvqRaiingFAWGZifldG7N0yTqMdwW2qoA2iFitr1fyKa61GINBwAWhmpty9TxdHvcz0HT8jtwGtoUkUCNeFRp_RIqRTXWUaO&sig=AHIEtbRme-LAya6C7IykJSZgahelMpyx4g.

¹¹Reparation for Injuries Suffered in the Service of the United Nations (Reparation Injuries Case), 1949 I.C.J. 179, cited in IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 7th ed. 2008, at 57.

¹² See *Wiwa v. Royal Dutch Petroleum (Shell)* 2002 U.S. Dist. LEXIS 3293, 28/02/2002 [Hereinafter “Shell Case”, available at

<http://www.earthrights.org/files/Legal%20Docs/Wiwa%20v%20Shell/distr-court-opinion-Feb-2002.pdf>.

(Weschka, 630). But see Jose Alvarez, *Are corporations subjects of international law?* Available at

<http://digitalcommons.law.scu.edu/scujil/vol9/iss1/1>, where he argues with that while attributing legal

personhood to corporations may be useful to impose liability on corporations for human rights violations, it may also lead to undesirable consequences like for instance in the context of the investment regime.

INTRODUCTION TO GLOBAL ADMINISTRATIVE LAW

The principles of global administrative law are not only informative in understanding the working of such a global regime but are also essential for its legitimacy and efficacy. Kingsbury, Krisch and Stewart, in their seminal work on global administrative law explain that global administrative law is a natural extension of the increase in the reach and forms of trans-governmental regulation and administration designed to address the consequences of globalized interdependence.¹³ The regulation of TNCs with respect to human rights is one such issue emerging out of globalized interdependence. International organizations and informal groups of experts or officials usually implement global regulation, thus performing administrative functions, necessitating a set of global administrative law rules to ensure their accountability.¹⁴ Kingsbury, Krisch and Stewart in defining global administrative law, crystallize its principles as comprising of adequate standards of transparency, participation, reasoned decision, legality and finally effective review of rules and decisions made.¹⁵

THE ROAD AHEAD

This paper makes the case for an integrated global regime that presupposes cooperation from nation states in order to function as an effective regulatory and redressal mechanism. In other words, it proposes an international law solution that will need cooperation at the domestic level in order to be effective. This presents two problems. First, both states and TNCs have to subscribe to this mechanism and one part of this note will look at what factors might motivate them to do so. Second, even if adequately incentivised to buy into this framework, both states and TNCs might worry about the procedural functioning of this body and legality of its

¹³ Kingsbury, Krisch and Stewart, *The Emergence of Global Administrative law*, 68 LAW & CONTEMP. PROBS. 15, 16, 15-61 (2005) available at

<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1361&context=lcp>.

¹⁴ *Id.*

¹⁵ *Id.* at 17.

decisions. Therefore, in requiring states to cooperate and participate in this global regulatory mechanism, it is important to identify the relevant administrative law principles which engender sufficient unanimity amongst states including third world countries, to make these principles binding upon them. Further, it would be important to incorporate measures specific to each state at the national level to support global efforts. At the same time, as it inevitably happens, the principles of administrative law that have largely gained universal acceptance must also trickle down to mechanisms in the national level albeit, gradually. Also, to address situations like the Bhopal Gas Case in India where the problem was not the absence of principles of administrative law but rather the failure to give effect to them, watchdogs (such as NGOs) must be assigned to monitor whether these principles are given effect.

Thus, it is not enough to formulate a global mechanism, but also to incentivise participation by states and TNCs to make it workable, and finally to integrate the top-down approach with the bottom-up approach with respect to principles of global administrative law in this context. Amongst other things, this would require the participation of governments of states, TNCs, and NGOs, especially those of developing countries, in the formulation and functioning of such a global regime in order to incorporate the differing realities in these countries.

REGULATION OF TNCs WITH RESPECT TO HUMAN RIGHTS UNDER INTERNATIONAL LAW

The International Labour Organization (ILO) adopted the ‘ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy’ providing guidelines pertaining to conditions of work, life and industrial relations to governments, workers’ organizations, employers’ organizations and multi-national enterprises (TNCs to use the terminology in this proposal).¹⁶ However, it provides for no implementation mechanism

¹⁶ MNE Declaration 1977, 4th edition, *available at*
http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm.

although the underlying ILO convention is binding on states.¹⁷ The UN Global Compact, a voluntary initiative open to businesses, provides for businesses to support and respect the protection of internationally proclaimed human rights and ensure that they are not complicit in human rights abuses.¹⁸ Here too, there is no monitoring or implementation mechanism in place even for participating corporations.¹⁹ The ‘OECD Guidelines for multi-national enterprises’, a code of conduct addressing TNCs operating in or from the adhering states, although voluntary, provides for establishment of National Contact Points (hereinafter referred to as “NCP’s”) in member states.²⁰ Although these NCPs provide for conciliation and mediation, the proceedings are kept confidential and thereby lack in transparency.²¹ The ‘UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ do provide for implementation mechanisms in their text but requires TNC’s as an initial step to incorporate these norms in their internal policies and also in their contracts with third parties.²² No real method of redress has been provided in case of infringement of these norms. Thus, international law only imposes obligations on States which must in turn regulate corporations under their jurisdiction; and voluntary codes have not proved to be very effective so far.

TOWARDS AN INTEGRATED GLOBAL REGIME – A GLOBAL ADMINISTRATIVE LAW SOLUTION

Since regulation by the host state or the home state is not effective in isolation and since the numerous efforts in international law are lacking in terms of mechanisms for implementation,

¹⁷ See Weshka, *supra* note 8 at p.645.

¹⁸ Principles 1 and 2, *available at*: <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/>.

¹⁹ See *supra* note 8 at p.651.

²⁰ Guideline 11, *available at*: <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

²¹ Procedural Guidance C(4), *available at* <http://www.oecd.org/daf/inv/mne/48004323.pdf>;

See Weshka, *supra* note 8 at 648.

²² ¶¶15, 17, *The 2003, Working Group on the Working Methods and Activities of Transnational Corporations*, (2003) E/CN.4/Sub.2/2003/12 *available at*: <http://www1.umn.edu/humanrts/links/NormsApril2003.html>. See Weshka, *supra* note 8 at p.653.

there is a need to harmonise and implement these efforts. In suggesting a global regulatory mechanism, this note draws from and seeks to lend itself to the emerging global administrative law jurisprudence. It proposes a global regulatory mechanism that presupposes cooperation from domestic administrative agencies to implement its decisions. The note will first consider and examine the possible ways to give effect to this. One option would be the creation of a dedicated international organization for this. A second option is for a body under the aegis of the United Nations to take this up to give effect to and expand its current human rights conventions. Alternatively, the existing OECD system could be modified to provide for state participation with the NCP's being controlled jointly by the state and the OECD. Further research is necessary to determine what body would be most suitable for this. Whichever body is entrusted with this role, it must incorporate the principles of global administrative law to gain legitimacy and hence acceptance and participation by states.

Another important area that needs to be examined is how states and TNCs may be incentivised to participate in this global framework. From the perspective of TNCs, one huge advantage would be *ex ante* certainty about the liabilities it might be subjected to and the obligations it has with respect to human rights. TNCs would also have access to an international forum for dispute resolution whose rules and procedures are credible and known.²³ Also, through such a mechanism, TNCs can avoid the possibility (however remote) of being held liable in both the home and the host state. States too would benefit from this as it would ensure a system for the uniform regulation of TNCs in all countries. By participating in and cooperating with such a global process, each state would ensure that its interests are

²³ A case in point is that of the Chevron dispute in Ecuador where local courts imposed liability in the billions on the company based on a very dubious process and quite possibly fabricated evidence. *See Dow Jones, U.S. Judge Issues Injunction In Chevron-Ecuador Dispute to Block Enforcement of Judgment*, available at <http://www.theamazonpost.com/in-the-news/dow-jones-u-s-judge-issues-injunction-in-chevron-ecuador-dispute-to-block-enforcement-of-judgment>.

protected. Thus, in proposing a global regulatory mechanism and integrating national mechanisms with the same, the different political and social realities in each country will be accounted for. What must also be borne in mind is that there could and most likely will be TNCs in the future which are incorporated in developing countries and doing business in developed countries and that the same global framework would apply to these TNCs. Finally, giving NGOs and welfare groups a role in the system will ensure that the rights of the marginalised and the poor in developing countries will be upheld.

The next issue to be dealt with is the prescriptive role, if any, of this global regulatory body. While Kingsbury *et.al.* define global administrative law as procedural rules and exclude substantive law from its ambit, Chimni argues that such a strict exclusion is not possible.²⁴ Pascale Hé lè ne Dubois and Aileen Elizabeth Nowlan argue in the context of the World Bank, which has had to synthesise different national laws in varied disciplines for its sanctions procedures that a global administrative law approach would help the Bank develop substantive norms independent of whether they are in line with particular national systems.²⁵ Similarly, any regulatory body dealing with liability of TNCs with respect to their conduct affecting human rights in developing countries must not only follow the procedural principles of global administrative law but also develop substantive norms with respect to attribution of liability. This would call for, at least to a limited extent, a synthesis of principles of principles from different national laws. Thus this note argues, at least in this context, that global administrative law must include a substantive component.

²⁴ B.S. Chimni, *Co-option and Resistance: Two faces of global administrative law*, available at <http://www.iilj.org/GAL/documents/CO-OPTIONANDRESISTANCETWOFACESOF.pdf>, at 804.

²⁵ Pascale Hé lè ne Dubois and Aileen Elizabeth Nowlan, *Global administrative law and the legitimacy of sanctions regimes in international law*, 36 YALE J.INT'L L.15 (Fall 2010) available at <http://www.yjil.org/docs/pub/o-36-dubois-nowlan-global-administrative-law-sanctions.pdf> at 16.

Last but not least, it is imperative to examine concerns raised from various quarters about global administrative law having an imperial character. Susan Strange too conceives of inter-governmental organizations as being perceived by citizens of weaker states as “instruments of a new kind of colonialism that preserve capitalist hierarchies of power” at the cost of individuals.²⁶ If these concerns are true, as Chimni argues, it would lead to dominant actors like TNCs using global administrative law to their advantage.²⁷ This would make the whole exercise of developing a global regime futile and as David Kennedy puts it, “*improving the machinery of government makes no sense if scoundrels rule—or if the entire global architecture has a substantive skew against the poor, ...against the developing world,...*”²⁸ Since the focus of this note is to address human rights violations of TNCs in developing countries, it especially addresses voices from the developing world in the formulation of the global regulatory mechanism in this context. However, as the Bhopal tragedy shows us, governments of developing countries might themselves be participants in the conspiracy against its poor. This note therefore argues that while it is true the global framework must consciously ward against incorporating capitalist power hierarchies, it is not just necessary to consult with the governments of developing countries but it is also essential to provide for the participation of local NGOs and affected individuals.

To give teeth to the global regulatory framework, it is worthwhile to examine the possibility of a dispute resolution forum that, to comply with standards of administrative law, is transparent, accountable, envisages the participation of TNCs, affected citizens and non-governmental organizations, and subject to review.²⁹ Another option is to borrow a pre-

²⁶ SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* 93 (1996) .

²⁷ Chimni,, supra note 24.

²⁸ David Kennedy, *The Mystery of Global Governance*, available at

http://www.law.harvard.edu/faculty/dkennedy/publications/Kennedy_GlobalGovernance.pdf at. 843.

²⁹ Kingsbury and Casini, *Global Administrative Law Dimensions of International Organizations Law*, available at at 324.

existing international organization's services for over-sight and dispute resolution.³⁰ Once a global level decision is adopted by the dispute resolution structure, it may be implemented against private parties through implementing measures at the national level.³¹ Where implementation at the national level is concerned, it would be useful to allow the unique experience of each state to inform the implementation mechanism. This is to ensure that it is accessible to affected individuals in those states. For instance, in the Indian context, as seen in the Bhopal case, access to judicial review of administrative rule and decisions is not practicable for a vast majority and this possibly holds true for most third world countries.³² Finally, a system of coordination between courts and administrative agencies at the international and domestic levels must be established to avoid conflicts in this regard.³³ Thus one must work towards an integration of the state and international regimes through a global regime that accommodates differing legal and administrative principles in the developing world.

CONCLUSION

This note has tried to add to the scholarship around holding TNCs responsible for human rights violations in developing countries and has proposed a solution in international law integrated with domestic law to address the issue. Although this has been identified in

³⁰ For instance, the International Centre for Settlement of Investment Disputes, instituted for the resolution of controversies regarding World Bank investments, also decides conflicts regarding the North American Free Trade Agreement, the Energy Charter Treaty, the Cartagena Free Trade Agreement, and the Colonial Investment Protocol of Mercosur. Cited in Sabino Cassese, *Global Administrative law: An Introduction*, available at <http://www.iilj.org/GAL/documents/CassesePaper.pdf> at p. 16.

³¹ See Kingbury *supra* note 13 at 16.

³² Chimni suggests assignment of watchdogs in such cases to ensure compliance. See B.S. Chimni, *Global Administrative Law: Winners and Losers*, available at: <http://www.iilj.org/GAL/documents/ChimniPaper.pdf>, at 17.

³³ Fabrizio Cafaggi, *Enforcement of Transnational Regulation: Ensuring compliance in a Global World*, available at subscribing libraries at 7.

previous works as one area where global administrative law could develop, there is no work that specifically examines its use and functioning in the area and. This note has tried to fill that void while at the same time attempting to find a solution to the problem of TNCs going unregulated especially in the context of human rights violations.

‘DUE PROCESS’ V. ‘PROCEDURE ESTABLISHED BY LAW’

FRAMING AND WORKING THE INDIAN CONSTITUTION

- Shivangi Gangwar*

ABSTRACT

The Constitution of India is known for borrowing key concepts and provisions from constitutions all over the world. Being the fundamental law of the land, the judiciary has relied upon its creative and unconventional interpretations to introduce and establish substantive rights jurisprudence, contrary to the known intent of the framers. This article seeks to study whether the emergence of this jurisprudence was inevitable, especially since the framers specifically sought to prevent it by not adopting a ‘due process’ clause. It lays out the reasons and implications of the non-adoption of the ‘due process’ clause and proceeds to see, using a case-study method, whether such choice made a difference to the emergence of substantive ‘due process’ rights in the Indian context.

* Graduate; NALSAR Hyderabad, B.A., LL.B. (Hons.), University of Chicago, LL.M.

INTRODUCTION

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

- Article 21, Constitution of India

“...nor be deprived of life, liberty, or property, without due process of law...”

- Amendment V, Constitution of the United States

Long before India gained its independence in August 1947, work had begun on creating a Constituent Assembly for the future nation. The initial membership of this body was to be 389 but was subsequently reduced to 299 after the partition that led to the birth of two nations instead of one. The first meeting of the Constituent Assembly took place on December 9, 1946 and the last on November 26, 1949 when the Constitution of India was adopted. From August 14, 1947 onwards the same body of people served both as the Constituent Assembly and the Legislative Assembly, charged with the dual task of managing affairs and drafting a new constitution for an independent India.¹

The Drafting Committee was set up on August 29, 1947, with Dr. B.R. Ambedkar as its chairman, and was charged with the task of preparing this constitution for an ‘*independent, sovereign republic*’, keeping in mind Pandit Jawaharlal Nehru’s Objectives Resolution.²The other six members of the Drafting Committee were all renowned lawyers and politicians of the likes of A.K. Ayyar, K.M. Munshi, B.L. Mitter, D.P. Khaitan, N. Gopaldaswami Ayyangar

¹ Some Facts of Constituent Assembly, available at <http://parliamentofindia.nic.in/ls/debates/facts.htm> (Last visited March 23, 2013).

² Resolution Re: Aims and Objects,1, CONSTITUENT ASSEMB. DEB. (Dec 13, 1946), available at <http://parliamentofindia.nic.in/ls/debates/vol1p5.htm> (last visited March 23, 2013).

and the lone Muslim League member Saiyid Mohd. Saadulla.³ A few replacements were made to this committee due to reasons of resignation and death; T.T. Krishnamachari and Madhav Rao later joined as members of the committee.

It is a fact well known in the realm of Indian constitutional history that the members of the Drafting Committee of the Constituent Assembly freely borrowed concepts from the constitutions of various countries, regardless of their dissimilarity with the Indian social milieu. For example, the idea of parliamentary democracy was borrowed from England, the concept of non-justiciable socio-economic rights or ‘Directive Principles of State Policy’ as enshrined in Part IV of the Constitution from Ireland, and the concepts of judicial review, separation of powers, bill of rights, and the establishment of the Supreme Court from the United States of America (hereinafter referred to as “U.S”). What is then surprising is that the Indian framers specifically chose not to adopt the ‘due process clause’, one that was derived from and used in the Anglo-American tradition that the Indian Constitution resembles the most.

Considerable scholarship exists on the reasoning employed by the constitution drafters in deciding to choose one way over the other. The answer generally given is that the Indian framers wanted to avoid the reading in of substantive rights into the Constitution, believing that the judicial branch of the government would use this part of the provision to place obstacles on the path of the legislative branch as it tried to build the nation.⁴ This article seeks to consider both previous scholarship as well as the constitutional history of the Supreme Court of India post 1950 to see whether these fears were well founded and the strategy chosen to deal with them was effective. In essence, the question asked is *whether choosing*

³ 1, CONSTITUENT ASSEMB. DEB. (Aug 29, 1947), available at <http://parliamentofindia.nic.in/ls/debates/vol5p10a.htm> (Last visited March 23, 2013).

⁴ See generally 7, CONSTITUENT ASSEMB. DEB. (Dec. 6 and 13, 1948).

the ‘procedure established by law’ clause over the ‘due process’ clause had a negative impact on the development of substantive fundamental rights in the Indian context? Given the highly activist nature of the Supreme Court since the 1980s, it is worthwhile to see whether this choice was successful in preventing a substantial rights regime. Part II of the article juxtaposes the two clauses and examines the reasons why the framers chose one over the other. Part III plays out the practical application of the ‘procedure established by law’ clause in the Indian context by examining landmark decisions of the Indian Supreme Court. Part IV of the article concludes with a possible reason as to why things played out the way they did despite the best laid plans and intentions.

DELIBERATIVE HISTORY OF ‘PROCEDURE ESTABLISHED BY LAW’

The Advisory Committee on Minorities and Fundamental Rights presented its interim report on fundamental rights to the Constituent Assembly on April 23, 1947. In that report, Clause 9, which was later to become Article 21 of the Constitution read as follows-

“No person shall be deprived of his life, or liberty, without due process of law, nor shall any person be denied the equal treatment of the laws within the territories of the Union:

Provided that nothing herein contained shall detract from the powers of the Union Legislature in respect of foreigners.”⁵

On April 30, 1947 the Constituent Assembly amended and adopted Clause 9 to read as follows-

⁵ 3, CONSTITUENT ASSEMB. DEB. (Apr. 29, 1947) (Justiciable Fundamental Rights, Annexure) available at <http://parliamentofindia.nic.in/ls/debates/vol3p2.htm> (Last visited March. 23, 2013).

*“No person shall be deprived of his life, or liberty, without due process of law, nor shall any person be denied equality before the law within the territories of the Union.”*⁶

When the Drafting Committee finally completed and submitted the draft constitution in February 1948, Clause 9 or draft Article 15 read the way the present Article 21 reads today except that the word ‘*personal*’ had been included before ‘*liberty*’ and ‘*without due process of law*’ had been substituted with ‘except according to procedure established by law’.

A. Reasons put forth for this change

There were mainly two reasons given for this change. *First*, for the former, absence of the word ‘*personal*’ before ‘*liberty*’ would mean that rights protected by Article 19,⁷ granted only to citizens at that time, would be extended to non-citizens as well. The constitutional framers wanted these two sets of rights to be treated separately. *Secondly*, the ‘*due process of law*’ clause was not as definite and specific as the one borrowed from Article 31⁸ of the Japanese Constitution of 1946.⁹ There was considerable opposition to and debate about this amendment but it was passed nevertheless. Dr. Ambedkar, in his reply, compared the

⁶3, CONSTITUENT ASSEMB. DEB. (Apr. 30, 1947), *available at* <http://parliamentofindia.nic.in/ls/debates/vol3p3.htm> (Last visited March. 23, 2013).

⁷INDIA CONST. art. 19, cl.1.(Protection of certain rights regarding freedom of speech, etc.-

(1)All citizens shall have the right-

(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
(f) omitted

(g) to practise any profession, or to carry on any occupation, trade or business.)

⁸NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 31, (Japan). (No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.)

⁹7, CONSTITUENT ASSEMB. DEB. (Dec. 6, 1948) *available at* <http://parliamentofindia.nic.in/ls/debates/vol7p20b.htm> (Last visited March. 23, 2013).

situation to “sail[ing] between Charybdis and Scylla” and declined to take a stand, though hinting that the question revolved around whether the legislature could be trusted enough not to make bad laws.¹⁰

The real reason behind the change, however, seems to be the nature of the relationship between the legislature and the judiciary. Abuse of substantive due process by the U.S. Supreme Court¹¹ led B.N. Rau¹² to point out, long before any draft was presented to the Constituent Assembly, that a due process clause would get in the way of beneficial social legislation.¹³ The famous interaction that took place between B.N. Rau and Justice Felix Frankfurter was the last nail in the coffin.¹⁴ Justice Frankfurter persuaded Rau to believe that the power of judicial review implicit in the due process clause was undemocratic and burdensome on the judiciary.¹⁵ Rau was finally able to convince the Drafting Committee and the due process clause was omitted, though not without considerable opposition.

Another factor put forth for this change was the very real problem of communal violence facing the country in the aftermath of partition. It was believed that preventive detention policies used during the British colonial rule without constitutional guarantees of due process would be the most effective in checking communal violence.¹⁶ Govind Ballabh Pant opined, in this regard, that there would be no end to communal disorders if mischief makers couldn't

¹⁰7, CONSTITUENT ASSEMBLY DEB. (Dec. 13, 1948), *available at*

<http://parliamentofindia.nic.in/ls/debates/vol7p25a.htm> (Last visited March. 23, 2013).

¹¹DURGA DAS BASU, *SHORTER CONSTITUTION OF INDIA*, 693 (13th ed.2001).

¹² B. N. Rau was not a member of the Constituent Assembly, but served in the capacity of a ‘Constitutional Advisor’.

¹³GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION*, 102 (1966).

¹⁴K. M. MUNSHI, *PILGRIMAGE TO FREEDOM (1902-1950)* 298 (1967) (K. M. Munshi opined, in this context, that had Justice Black been consulted in place of Justice Frankfurter, Rau could have possibly received advice to the contrary).

¹⁵AUSTIN, *supra* note 13, at 103.

¹⁶Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 *Berkeley J. Int'l L.* 216, 223 (2010).

be put into jails and that anarchy would be the sure result of restraining the legislature's discretion.¹⁷

The opposition to deletion of the '*due process*' clause was primarily in relation to preventive detention and the necessity of protecting individual liberty from the excesses and arbitrariness of executive actions.¹⁸ This problem was partly solved by the introduction of draft Article 15A which later became Article 22¹⁹ of the Indian Constitution.

B. Implications of this change

The ultimate goal to be served by the Constitution was to bring a "*social revolution, of national renaissance*"²⁰ and the agencies chosen to fulfill this noble goal were the legislature and the executive, not the judiciary. The judiciary was expected to defer to the other branches of the government, to such an extent that even the principle of judicial independence was not to elevate its status to a body that acted as a "*super-legislature or super-executive*".²¹ Thus, it can be seen that the political system envisioned by the framers was one based on the traditions of British legal positivism and parliamentary supremacy. The Indian judiciary was not designed to be a strong institution that would challenge legislations on the basis of substantive due process, had such a clause even existed.²²

By replacing the 'due process' clause with the 'procedure established by law' clause, the constitutional framers wanted to foreclose the possibility of the judiciary giving more significance to individual rights over beneficial social legislations. Great pains seem to have

¹⁷AUSTIN, *supra* note 13, at 85.

¹⁸*Supra* note. 9.

¹⁹INDIA CONST. art. 22. (Protection against arrest and detention in certain cases- (1) No person who is arrested shall be detained without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice).

²⁰AUSTIN, *supra* note 13, at 27.

²¹A.S. Anand, *The Indian Judiciary in the 21st Century*, 26 INDIA INT'L CENTRE.Q. 61, 63 (1999).

²²MATE, *supra* note 16, at 217-20.

been taken to strictly separate the rights granted by Articles 14, 19 and 21. Since the word ‘reasonable restrictions’ has been used only in the text of Article 19 and no link was envisioned between the separate rights granted by the Constitution in Articles 14, 19 and 21, it was not possible for the judges to extend the concept of judicial review from Article 19 to Article 21.²³ It was not open for judges to look into the reasonableness of the provisions that deprived a person of her/ his life and liberty unlike the situation where s/he was being deprived of the right of expression or movement. Transporting the language from one clause to another and reading in an equal standard of reasonableness in the three Articles would result in the introduction of the ‘due process’ clause into the Indian system; a clause which, the Supreme Court repeatedly ruled in its early years, found no place in constitutional interpretation.²⁴

In all probability, this fear was inspired by events that had taken place across the globe in the U.S. The U.S. Supreme Court began reading in substantive due process rights in the realm of liberty to contract and economic regulation. *Lochner v. New York*²⁵ marks the conceivable beginning of the doctrine of economic substantive due process when it was held that the ‘due process’ clause protected private property and liberty to contract from unwarranted and excessive governmental interference. During the *Lochner* era (1905 to 1934), the Supreme Court struck down around 200 economic regulations, dealing with the subjects of labor, price regulation, minimum wages and business entry, among others.²⁶ Though the emphasis was on the field of economic regulations, the seeds of modern substantive due process rights were also sown during this period. Both *Meyer v. Nebraska*²⁷ and *Pierce v. Society of Sisters*²⁸

²³Charles Henry Alexandrowicz-Alexander, *American Influence on Constitutional Interpretation in India*, 5 AM. J. COMP. L. 98, 100 (1956).

²⁴H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 485 (3d ed., 1983).

²⁵198 U.S. 45 (1905).

²⁶STONE (ET. AL.), CONSTITUTIONAL LAW 724 (4th ed. 2001).

²⁷262 U.S. 390 (1923).

dealt with the liberty rights of parents to educate and bring up their children as they saw fit. With the progression of time however, the ‘*due process*’ clause was “*emptied of its controversial economic content*” and became the “*center of a civil liberty storm*”.²⁹

The framers were apprehensive that American history would repeat in the Indian context. Alladi Krishnaswamy Iyer stated that the Indian Supreme Court would create uncertainty by fluctuating between liberal and conservative interpretations, and obstruct social control.³⁰

It was pointed out by K.M. Munshi during the deliberations that a substantive ‘*due process*’ clause in the Indian context would not apply to liberty of contract but only to liberty of person due to the addition of ‘*personal*’ before ‘*liberty*’ in clause 9/draft Article 15.³¹ It is also apposite to note that the new nation of India, under the leadership of socialist Nehru, was never meant to be built using the tools of capitalism. There was no possibility of *laissez-faire* economics, with *due process* as its constitutional handmaiden, overwhelming the bar and the bench.³² It thus seems perplexing why the framers chose to consider and then reject the ‘*due process*’ clause because of its operation in the field of economic regulation rather than in the sphere of individual civil-political or socio-economic rights. What is also interesting to see is whether this fear was justified and whether it could possibly be eradicated by a little wordplay given that the ‘*due process*’ clause was initially envisioned as a procedural clause in the U.S., same as the one finally adopted by the Indian framers.

²⁸268 U.S. 510 (1925).

²⁹Wallace Mendelson, *Foreign Reactions to American Experience with “Due Process of Law”*, 41 VA. L. REV. 493, 503 (1955).

³⁰MUNSHI, *supra* note 14, at 299.

³¹AUSTIN, *supra* note 13, at 105.

³²Mendelson, *supra* note 29, at 502.

EVOLUTION OF SUBSTANTIVE RIGHTS JURISPRUDENCE

The Constituent Assembly Debates make it clear, as do some of the first judgments delivered by the Indian Supreme Court (discussed in the next sub-section), that the framers had absolutely no intention of introducing the American doctrine in the Indian context. Yet we see the emergence of an activist Supreme Court in the 1970s and continuation of this trend till date. Manoj Mate³³ addresses this conundrum of how the Supreme Court was able to found substantive due process jurisprudence within the realm of a Constitution that specifically excluded it, doing so in the face of long held traditions of parliamentary sovereignty and legal positivism. He concludes the cause to be a gradual shift towards a Universalist approach of interpretation, brought about by an increased borrowing of U.S. and other foreign precedents, institutional changes in the Court and the effects of the Emergency.³⁴ The present article addresses the simple question of how this shift occurred and traces the evolution of due process jurisprudence in India, treating the Emergency³⁵ period as the watershed. Supreme Court decisions under this study are categorized under the three heads of-

a) Early years

b) Emergency period

c) PIL jurisprudence

³³MATE, *supra* note 16.

³⁴MATE, *supra* note 16, at 217-218.

³⁵INDIA CONST. art. 300 (A national emergency, under Article 352 of the Constitution, was declared on June 26, 1975, barely a fortnight after the decision of the Allahabad High Court holding Indira Gandhi, then Prime Minister of India, guilty on two counts of election malpractice and thereby rescinding her election to the Central legislature. Countless members of the Opposition party were detained and imprisoned during this period and the 39th amendment to the Constitution (wresting jurisdiction from the Supreme Court to hear this particular appeal) was passed on August 10, 1975, just one day before the Supreme Court was to start hearing the appeals in this case, forcing it to adjourn the hearings till the end of the month. The Emergency period was generally marked by large scale human rights violations and was finally lifted in March 1977, after being in operation for nearly two years.).

A. Early Years

*A. K. Gopalan v. State of Madras*³⁶ was one of the first cases to be decided under the newly minted Article 21. Gopalan challenged his detention under the Preventive Detention Act, 1950 as being violative of Arts. 13, 19, 21 and 22, claiming that ‘personal liberty’ included the freedoms guaranteed under Article 19 as well. The majority decision, authored by Chief Justice Kania, did not accept the argument that Articles 19 and 21 should be read together as the former dealt with substantive rights and the latter with procedural rights. It was emphatic in ruling that ‘procedure established by law’ did not mean ‘due process of law’. Article 19 did not apply to laws dealing with preventive detention even though the rights guaranteed by the provision would be in a way abridged by such detention.

It can be seen that the Supreme Court held the rights guaranteed under Arts. 14, 19 and 21 (which later came to be referred as the ‘*golden triangle*’) as mutually exclusive and used a formalist approach of construction to interpret the right guaranteed by Article 21.³⁷ Justice Mukherjea referred to the Constituent Assembly Debates in his opinion to hold that the obvious intention behind qualifying liberty with ‘personal’ was to exclude the contents of Article 19 from that of Article 21.³⁸ Chief Justice Kania also referred to the Debates to show how the idea of legislative prescription was brought out by the omission of the word ‘due’ and qualification of ‘procedure’ by the word ‘established’.³⁹ The Constitution clearly gave the legislature the power of final determination of law as a result of which Chief Justice

³⁶ 1950 S.C.R. 88 (India) [Hereinafter “Gopalan v. Madras”].

³⁷ SEERVAI, *supra* note 24, at 701-2 (Seervai differs on this point. According to him, the majority did not hold these rights to be mutually exclusive and in fact rejected the contention that Article 21 guaranteed only procedural rights. Article 21 guaranteed both substantive and procedural rights because this was the only understanding that demonstrated that Arts. 19(1) and 21 could not be read together).

³⁸ Gopalan v. Madras, *supra* note 36, at 262-63.

³⁹ *Id.* at 108.

Kania arrived at this narrow interpretation of Article 19 and limited the scope of judicial function, apparently using both tools of original intent and textual analysis.⁴⁰

The sole dissent in this case was issued by Justice Fazl Ali who opined that preventive detention directly infringed the right guaranteed by Article 19(1)(d) and even by a narrow construction of this provision, preventive detention laws would be subject to the limited judicial review provided therein.

*Kharak Singh v. State of Uttar Pradesh*⁴¹ is widely construed to mark the beginnings of the right to privacy in India.⁴² Since a right embodying privacy is not expressly mentioned in either Article 19 or Article 21, its only possible genesis lies in a substantive due process reading of Article 21. Uttar Pradesh Police Regulation 236, which allowed for night domiciliary visits and police surveillance of a suspect's home, was challenged as being violative of Articles 19(1)(d) and 21. The majority decision of the Court readily held that the impugned regulation was not passed under the authority of any law and thus open to challenge. However, it struck down as unconstitutional only that provision of Regulation 236 which dealt with the domiciliary visits as being violative of Article 21. It went on to hold that the right to privacy was not one guaranteed under the Constitution and that an infringement of the rights under Part III must be both direct and tangible. While the majority opinion deemed it unnecessary to determine the precise relationship between Articles 19 and 21, it did hold that Article 21 comprised the residue of the rights not specifically covered under Article 19, thus taking a view different than the one taken by the *Gopalan* bench.⁴³

⁴⁰MATE, *supra* note 16, at 232.

⁴¹ 1964 S.C.R. (1) 332 (India) [Hereinafter *Kharak Singh v. U.P.*].

⁴²REPORT OF THE GROUP OF EXPERTS ON PRIVACY, *available*

at http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf (Last visited October. 29, 2013).

⁴³SEERVAI, *supra* note 24, at 705.

The dissenting opinions of Justices Subba Rao and Shah did find a constitutional right to privacy in Article 21, stating that such a right was an essential ingredient of personal liberty.⁴⁴ They also held that though Articles 19 and 21 dealt with two distinct and independent fundamental rights, there was considerable overlap between the two. Thus, the impugned law or regulation had to satisfy that both of these rights were not infringed.

It is interesting to note that both the majority and the minority opinions cited the American cases of *Munn v. Illinois*⁴⁵ and *Wolf v. Colorado*⁴⁶ to determine the nature of the right to liberty. While the majority opinion extended this analysis to only hold that domiciliary visits impinged upon the said right, the minority opinion went steps further to read a substantive due process right into Article 21. This dissenting opinion of then Justice Subba Rao went on to become the majority opinion in *Satwant Singh Sawhney v. Assistant Passport Officer*⁴⁷, a case that dealt with the infringement of the right to travel by virtue of impounding of passports. Chief Justice Subba Rao again relied on the American decisions in *Kent v. Dulles*⁴⁸ and *Aptheker v. Secretary of State*⁴⁹ to hold that ‘liberty’ in the Indian Constitution bore the same comprehensive meaning as given to it in the 5th and 14th amendments of the U.S. Constitution.⁵⁰

Though the *Bank Nationalisation case*⁵¹ dealt with the right to property, it is apposite in this context as it considered and held as incorrect the reasoning in *Gopalan*⁵² about the mutual exclusivity of rights. Petitioner in the present case was a shareholder of one of the 14

⁴⁴Kharak Singh v. U.P. *supra* note 41, at 359.

⁴⁵94 U.S. 113 (1877).

⁴⁶338 U.S. 25 (1949).

⁴⁷ 1967 (3) S.C.R. 525 [Hereinafter Sawhney v. Passport Officer].

⁴⁸357 U.S. 116 (1958).

⁴⁹378 U.S. 500 (1964).

⁵⁰ Sawhney v. Passport officer, *supra* note 47, at 526.

⁵¹ R. C. Cooper v. Union of India, 1970 S.C.R. (3) 530, [Hereinafter Cooper Case]

⁵²Gopalan v. Madras, *supra* Note. 36.

commercial banks that were acquired and nationalized by the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969. The main issue, as was the case in all right to property cases, was one of compensation and petitioner contended that his fundamental rights under Arts. 19(1)(f) and 31(2) were infringed. The majority opinion considered the correlation between the two articles as well as the dicta in *Gopalan*⁵³, which was the source of the understanding that the extent of protection against infringement of fundamental rights was determined by the object of the state action and not by its operation on the individual's rights. This reasoning was transferred from the realm of preventive detention and personal liberty into that of property rights to result in a long line of cases that divorced the rights guaranteed by separate Articles, leading the Court to consider it. The majority opinion went on to hold this understanding as inconsistent with the scheme of the Constitution, in effect laying the groundwork for linking up and mutual inclusivity of rights and also overruling the ratio in *Gopalan*.⁵⁴

Seervai has severely criticized this decision as an unjustified display of judicial power, stating that there was absolutely no need for the *Cooper*⁵⁵ bench to consider these questions as they were well settled in law and also because *Gopalan*⁵⁶ dealt with a completely different sphere of preventive detention and not property rights.⁵⁷ Nevertheless, this decision was cited by subsequent benches in their judgments⁵⁸ and proved instrumental in turning the initial understanding of the internal relationship of the fundamental rights on its head. Slowly but

⁵³*Ibid.*

⁵⁴*Ibid.*

⁵⁵Cooper Case, *supra* note 51.

⁵⁶Gopalan v. Madras, *supra* note 36.

⁵⁷SEERVAI, *supra* note 24, at 717-19.

⁵⁸*See generally* Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461; Maneka Gandhi v. Union of India, 1978 S.C.R. (2) 621; Unni Krishnan v. State of Andhra Pradesh, A.I.R. 1993 S.C. 2178.

surely the Supreme Court was moving away from a Positivist interpretation and towards a Universalist interpretation of fundamental rights.

B. Emergency Period

Undoubtedly the most important (and infamous) decision pronounced during the Emergency period was *A.D.M Jabalpur v. Shivkant Shukla*⁵⁹. Seervai considered it as the “most glaring instance in which the Supreme Court... suffered most severely from a self-inflicted wound” borrowing the language of Chief Justice Charles Evans Hughes⁶⁰ while most people, including former Supreme Court justice V. R. Krishna Iyer, refer to this judgment as the darkest hour in the history of the Supreme Court.⁶¹

This decision disposed of a bunch of habeas corpus petitions filed by numerous people, including well known political opponents of Indira Gandhi, challenging their preventive detention. The majority decisions held that in light of the Presidential order dated June 27, 1975, no person had any locus standi to file a writ petition, for habeas corpus or otherwise, challenging the legality of the order of preventive detention on the ground that it was not in accordance with the Maintenance of Internal Security Act, was illegal or vitiated by malafides or extraneous considerations. Article 21 was the “*sole repository*” of the right to life and personal liberty against state action and since Part III of the Constitution was suspended during the Emergency, any claim for the enforcement of this right was barred by the Presidential order. An exchange between Justice Khanna and the government counsel reveals that even the right to life didn’t exist while the Emergency was in operation and the

⁵⁹ (1976) Supp. S.C.R. 172 (hereinafter “A.D.M. Jabalpur Case”).

⁶⁰ SEERVAI, *supra* note 24, at 1048.

⁶¹ V.R. Krishna Iyer, *Emergency—Darkest hour in India’s judicial history*, Indian Express June 27, 2000, available at <http://expressindia.indianexpress.com/news/ie/daily/20000627/ina27053.html> (last visited March 30, 2013).

courts were helpless even when life was taken away illegally.⁶² No rule of law existed outside the Constitution and when the Constitution, or the law passed under it, itself extinguished the right, no remedy existed.

Justice Khanna delivered the sole dissent wherein he held that Article 21 cannot possibly be the sole repository of any right as “*the principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution*” but existed well before it came into force.⁶³ Even in the absence of Article 21 no person could be deprived of his life or liberty without the authority of law as no court in any country of this world, in its pre- or post- Constitution days, would accept such a claim.

While the majority opinion reversed the fledgling trend towards reading substantive due process rights in Article 21, albeit still holding that it contained both procedural and substantive aspects, Justice Khanna’s dissent marched along this path of Universalist construction of the right to life and personal liberty that went beyond the mere text of the Constitution.

C. PIL JURISPRUDENCE

The turning point of substantive due process rights jurisprudence came in the form of *Maneka Gandhi v. Union of India*⁶⁴, the first case that dealt with personal liberty in the post-Emergency period. It was the beginning of an era of judicial populism which can be explained by a variety of factors ranging from attempts to mend the reputation of the Court, atone for the *Jabalpur*⁶⁵ decision, and to legitimize judicial power.⁶⁶

⁶²GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* 339 (1999).

⁶³A.D.M. Jabalpur Case, *supra* note 59, at 268.

⁶⁴1978 S.C.R. (2) 621, [Hereinafter Maneka Gandhi Case].

⁶⁵A.D.M. Jabalpur Case, *supra* note 59.

⁶⁶Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 *THIRD WORLD LEGAL STUD.* 107, 113 (1985).

The petitioner in the *Maneka*⁶⁷ case happened to be the younger daughter-in-law of Indira Gandhi, who challenged the order of the Janata government impounding her passport as violative of Arts. 14 and 21 because she wasn't provided with a notice or prior hearing. The six judge majority opinion expanded the scope of Article 21 by reading the right to travel abroad as flowing from the right of personal liberty. Another break from the *Gopalan*⁶⁸ approach occurred when the bench held that the procedure envisioned by Article 21 must be just and fair, and not arbitrary, fanciful or oppressive, thus reading in the principles of natural justice. The golden triangle of Articles 14, 19 and 21 rights was created by holding that procedures depriving a person of life or personal liberty must be non-arbitrary, reasonable and in accordance with law.

This reasoning was a far cry from the formal, black letter of the law approach taken by the Court in its early years, and in the *Jabalpur*⁶⁹ decision, wherein it stressed on the mutual exclusivity of the various Articles and law of the Parliament rather than the rule of law. Both Justices Bhagwati and Krishna Iyer, who formed the majority in the *Maneka*⁷⁰ decision, went on to spearhead the Public Interest Litigation (hereinafter referred to as "PIL") movement in India that was the true product of the substantive due process jurisprudence.

One of the first PIL cases was that of *Hussainara Khatoon v. Home Secretary, State of Bihar*⁷¹ which dealt with numerous under trial prisoners languishing in the jails of Bihar, some having been imprisoned for periods longer than the maximum sentence their charge carried. Apart from considerably relaxing the standing requirements by letting Kapila Hingorani, a journalist appearing as counsel for the petitioners, file habeas corpus petitions

⁶⁷Maneka Gandhi Case, *supra* note 64.

⁶⁸Gopalan v, Madras, *supra* note 36.

⁶⁹A.D.M. Jabalpur Case, *Supra* note 59.

⁷⁰Maneka Gandhi Case, *Supra* note 64.

⁷¹ 1979 S.C.R. (3) 532.

on behalf of the undertrial prisoners, the Court formulated and used a ‘continuing mandamus’ which allowed it to issue relief through orders and directives, and not dispositive judgments, so that it could continue to retain jurisdiction. Justice Bhagwati authored the Court’s opinion and held that fairness under Article 21 is infringed upon when the state does not provide for speedy trial of the accused, his pre-trial release on bail and free legal aid if he is indigent. It was not open to the state to deny the constitutional right to speedy trial of the accused on the ground of scarcity of resources.

The bench headed by Justice Bhagwati also introduced the concept of epistolary jurisdiction (a term coined by Upendra Baxi)⁷² by instituting a PIL in response to a letter sent to the Court by a social reform group leader. In *Bandhua Mukti Morcha v. Union of India*⁷³, the Court held that the right to life under Article 21 included the right of a person to not be subject to ‘bonded labor’ and the right of bonded laborers to rehabilitation after release. It is noteworthy that the Court read this right under Article 21 in spite of Article 23⁷⁴ and the Bonded Labour System (Abolition) Act, 1976, probably due to the failure of the latter to provide any respite and the increasing power and importance of substantive due process rights.

The petitioner in *Parmanand Katara v. Union of India*⁷⁵ was a human rights activist who submitted newspaper reports dealing with a specific hit-and-run case to the Court and asked that the state be directed to give medical aid to all injured citizens brought to government

⁷²Maneka Gandhi Case, *Supra* note 61, at 118.

⁷³ (1984) 3 S.C.C. 161.

⁷⁴INDIA CONST. art. 23. (Prohibition of traffic in human beings and forced labour—

(1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.).

⁷⁵ 1989 S.C.R. (3) 997.

hospitals. Justice Ranganath held that Article 21 casts a “*total, absolute and paramount*” obligation on the state to preserve life and rules of procedure must give way to it. It is not open to the state to insist on the police being contacted and the proper procedure related to negligent deaths being followed when a person’s life was at stake. The Court had come far beyond the question it asked in its early years- whether the procedure causing the loss of life/ liberty was by law- to hold that Article 21 contained both negative and positive rights; individual entitlements and state obligations.

A host of PIL petitions instituted by M.C. Mehta, a man sometimes described as a “*One Person Enviro-Legal Brigade*”⁷⁶, successfully led to the reading in of environmental rights in Article 21. Various benches of the Supreme Court have held private corporations, having the potential to affect the life and health of people, liable for violations of Article 21 by polluting the environment⁷⁷, that positive obligations exist on the state to eliminate water and air pollution⁷⁸ and also that the people of India have a right to breathe air unpolluted by the carcinogens present in diesel exhaust.⁷⁹

*Vishakha v. State of Rajasthan*⁸⁰ was a PIL filed to enforce the fundamental rights of working women under Articles 14, 19 and 21. The bench lamented the absence of a law dealing with and prohibiting the sexual harassment of women at the workplace, holding that each such incident violated the rights of life, liberty and gender equality guaranteed under Arts. 14, 15 and 21 of the Constitution and went ahead to lay down guidelines to be followed by each and every office throughout the country. These guidelines still remain the governing law on this subject as the Parliament is yet to legislate on this topic.

⁷⁶Manoj Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT’L L.J. 175, 202 (2010).

⁷⁷ M. C. Mehta v. Union of India, 1987 S.C.R. (1) 819.

⁷⁸ M. C. Mehta v. Union of India, (1987) 4 S.C.C. 463.

⁷⁹M.C. Mehta v. Union of India, (1998) 2 Supp. S.C.R. 24.

⁸⁰ A.I.R. 1997 S.C. 3011.

The list of the decisions expanding the substantive scope of the right to life and personal liberty is indeed ongoing and endless. On the basis of the decisions mentioned above and the numerous ones not studied in this article, it can now be evaluated whether absence of the ‘due process’ clause in the text of the Indian Constitution had an effect on the development of human rights.

CONCLUSION

The U.S. Constitution having inspired many nations during their constitution framing exercises, yet not one of these countries adopted the ‘due process’ clause, despite its English origins.⁸¹ It would be interesting to see in how in many of these nations such a move prevented the development of a substantive human rights regime.

Framers of the Indian Constitution were very secure in their understanding of why they chose to follow the Japanese Constitution rather than the U.S. Constitution in this regard. They wanted to avoid the vagueness of the ‘due process’ clause as well as a strong judiciary that thwarted their efforts in bringing about a social revolution in India by way of their socialist and distributive land policies. Hence, the double precaution of removing both ‘due process’ and ‘property’ from the ambit of Article 21. In hindsight their apprehensions do seem justified given the prolonged right to property debate between the legislature and the judiciary, with each judicial decision being countered by a constitutional amendment, until the issue was deemed moot by divesting the right to property of its fundamental status.

It seems to be a combination of various factors that led to the rise of an activist judiciary including legislative and executive excesses during the Emergency period; increased borrowing and use of foreign, especially U.S. precedents; or merely the judiciary’s search for a new project after its previous one was wrested away. Nevertheless, in one decision after

⁸¹Mendelson,*supra* note 29, at 493.

another, the Supreme Court expanded the substantive rights under Article 21 and its own jurisdiction and role as the protector of the poor and underprivileged. And the legislature let it gain its strength instead of attacking and curtailing it as it had done previously.

The question asked at the beginning of this article—*whether choosing the ‘procedure established by law’ clause over the ‘due process clause’ had a negative impact on the development of substantive fundamental rights in the Indian context*, must be answered in the negative. Mere language of the constitutional text did not restrain the judges from interpreting it the way they thought it should be interpreted. The judiciary gradually worked its way from a Formalist understanding of law to a Universalist and substantive understanding and transformed the system from one of parliamentary supremacy to constitutional supremacy, with itself at the helm of India’s future.

ABSTRACT

State expenditure on religion has always been a sensitive and contentious subject. However, it is often observed that even secular states indulge in one or more forms of the same. This leads to a conflict between State action and the provisions of a secular Constitution. In India, Haj subsidy is one of the controversial forms of state expenditure. Although opposed from many corners, the subsidy policy has still not been struck down by the Supreme Court of India. The liberal approach followed by the Supreme Court has been discussed in this article, followed by a comparison of the position of state expenditure on religion in the United States of America and Japan. In the comparison with the U.S.A., the authors have analyzed the development of case laws over the years, which have laid down various tests such as The Lemon Test and The Private Choice Test. In the comparison with Japan, the inconsistency between the Japanese constitutional provisions and the judicial interpretation of the same has been scrutinized.

* WB National University of Juridical Sciences, Kolkata

* WB National University of Juridical Sciences, Kolkata

INTRODUCTION

Freedom of religion is one of the foundational stones on which a secular state is built. Secularism, in its strictest sense, means separation of religion and state. The purpose of secularism is to ensure that the state neither glorifies nor vilifies any religion. However, an attempt to adhere to an absolute separation of state and religion proves to be problematic in practice. Is it practical or desirable for the state to abstain from any and all religious activities? Is there a degree, if any, of state interference which can be deemed to be permissible in religion? Who is to decide this permissible limit? Is secularism an end in itself or merely the means to the end of creating an environment of equal respect for all religious groups?

This article intends to resolve the aforementioned issues. However, the authors wish to limit the scope of this article to one specific issue in which religion and state overlap in the public sphere, i.e. state expenditure of public money on religion. In order to facilitate a better understanding of the nuances of the issues, this article will include a comparative study of the positions of state expenditure on religion in the United States of America (hereinafter referred to as US) and Japan. Our reason for choosing US and Japan is the similarities shared by the two countries with India, which provide for a common point of departure. The Establishment clause of the First Amendment of the US Constitution has been used to challenge government taxation and expenditure on religion, similar to what is prohibited by Article 27 of the Indian Constitution. The United States has grappled with the issue of state expenditure on religion for several decades and the US Supreme Court has over the years interpreted the Establishment clause in myriad, often conflicting, ways. Interesting parallels were observed, leading to the authors' choice of the US jurisprudence.

The two provisions of the Japanese Constitution that concern religion, namely Articles 20 and 89, have been principally shaped by the American religious jurisprudence. The

aforementioned provisions share similarities with the Indian constitutional provisions on secularism, *albeit* with one crucial difference. Unlike the Indian Constitution, the Japanese Constitution mandates a strict wall of separation between religion and the State. However, the excessively liberal interpretation accorded to Articles 20 and 89 by the Japanese Supreme Court has led to problematic issues in the Japanese jurisprudence on state expenditure on religion. The existence of striking parallels, along with complications caused by divergent judicial interpretation, led us to our next choice of study as Japan for a comparative study.

The article is divided into three parts. The first part will deal with the position in India. In order to enable a detailed analysis, we will restrict the scope of this part to analyzing one particular avenue of Government expenditure on religion, i.e. the Haj subsidy. We will review the history and politics of the Haj subsidy, the secularism debate surrounding the subsidy and the two landmark cases of *Prafull Goradia v. Union of India*¹ and *Union of India v. Rafique Sheikh Bhikan*². The second part scrutinizes the jurisprudence in the US. *Inter alia*, the influential cases of *Everson v Board of Education of Ewing*³, *Lemon v Kurtzman*⁴ and *Zelman v Simons-Harris*⁵ are discussed. The third part analyzes the constitutional provisions and the celebrated case of *Kakunga v. Sekiguchi*⁶ in Japan.

¹ (2011) 2 S.C.C. 568 [Hereinafter “Prafull v. UOI”].

² (2012) 6 S.C.C. 265 [Hereinafter “UOI v. Rafique”].

³ 330 U.S. 1 (1947). [Hereinafter “Everson v. Ewing”].

⁴ 403 U.S. 602 (1971). [Hereinafter “Lemon v. Kurtzman”].

⁵ 536 U.S. 639 (2002). [Hereinafter “Zelman v. Harris”].

⁶ 31 Minshu 533 (G.B. 13 July 1977). [Hereinafter “Kakunga case”].

INDIA

A. Introduction

A week after the new moon rises in *Dhu'l-Hijjah*, the final month of the Muslim lunar calendar- approximately three million Muslim pilgrims travel to the city of Mecca.⁷ Haj, often referred to as the fifth pillar of Islam, constitutes one of the five essential tenets of Islam along with *shahadah*, *salat*, *zakat* and *sawm*.⁸ Every sane, financially stable and adult Muslim has the duty to perform Haj at least once in his or her lifetime.⁹ The annual five-day pilgrimage, which takes place in the plain of Mount Arafat, is the world's largest yearly gathering.¹⁰

The Ministry of External Affairs of Government of India, which handles the administration of Haj affairs through its Haj Cell, provides an airfare subsidy on chartered flights to Indian Muslim Haj pilgrims, which is known as the 'Haj subsidy.' In the past, Haj pilgrims used to both sail and fly to Jeddah.¹¹ However, the former has stopped after 1995 pursuant to a

⁷ Zahra Jamal & Rizwan Mawani, *Hajj Diaries: The Multiple Dimensions of Muslim Pilgrimage*, HUFFINTON POST (July 11, 2011), available at http://www.huffingtonpost.com/dr-zahra-n-jamal/hajj-diaries-muslim-pilgrimage_b_1077913.html.

⁸Encyclopaedia Britannica, *Pillars of Islam*, available at <http://www.britannica.com/EBchecked/topic/295625/Pillars-of-Islam>.

⁹Berkley Center for Religion, Peace & World Affairs, Georgetown University, *Hajj*, available at <http://berkeleycenter.georgetown.edu/resources/essays/hajj>.

¹⁰*Hajj Pilgrimage 2011: By Numbers*, THE TELEGRAPH (November 3, 2011), available at <http://www.telegraph.co.uk/news/worldnews/middleeast/saudiArabia/8867639/Hajj-pilgrimage-2011-by-numbers.html>.

¹¹*Haj Operations in India*, MINISTRY OF CIVIL AVIATION PRESS RELEASE (December 22, 2006) available at <http://www.pib.nic.in/newsite/erelease.aspx?relid=23577>. (Hereinafter PRESS RELEASE, CIVIL AVIATION MINISTRY)

Cabinet decision and Haj travel is now restricted to air.¹² While the number of pilgrims has been rising¹³, the amount of subsidy per pilgrim has also been observing an upward trend.¹⁴

B. History and Politics of Haj Subsidies

The total expenditure that the government has incurred on providing Haj subsidies has been estimated at Rs. 600 crores for 2010, Rs. 692 crores for 2011 and Rs. 835 crores for 2012.¹⁵ In May 2012, the Supreme Court in *Union of India v. Rafique Sheikh Bhikan*¹⁶ directed the Central government to steadily diminish the meting out of Haj subsidies “so as to completely eliminate it” within ten years, and ensure that the money is used for the “upliftment of the community in education and other indices of social development.”¹⁷ However, the Bench noted that the subsidy *per se* is constitutionally valid.¹⁸

In order to glean a clearer understanding of the issues of secularism associated with Haj subsidies, it is essential to examine its history. The policy of providing Haj subsidy is not recent. In 1959, instead of repealing the redundant Port Haj Committee Act of 1932, which had been enacted by the British to appease the Muslims and gain their favour, Nehru enacted the Haj Committee Act of 1959.¹⁹ This Act began providing subsidized airfares to Haj

¹² PRESS RELEASE, CIVIL AVIATION MINISTRY, *supra* note 11. (While there were 71,924 pilgrims in 2000, the number rose to 99,926 in 2006).

¹³ PRESS RELEASE, CIVIL AVIATION MINISTRY, *supra* note 11.

¹⁴ See *UOI v. Rafique*, *supra* note 2.

¹⁵ Unstarred Question 1140:Subsidy for Haj Quota, MINISTRY OF EXTERNAL AFFAIRS, GOVERNMENT OF INDIA, <http://www.fsi.mea.gov.in/rajya-sabha.htm?dtl/21296/Q+1140+SUBSIDY+FOR+HAJ+QUOTA>.

¹⁶ *UOI v. Rafique*, *supra* note 2.

¹⁷ *UOI v. Rafique*, *supra* note 2.

¹⁸ *UOI v. Rafique*, *supra* note 2.

¹⁹ P. B. Menon, *Meaning of Secularism*, THE HINDU (January 30, 2001), available at <http://hindu.com/2001/01/30/stories/13300612.htm>.

pilgrims. In 1992, P.V. Narasimha Rao increased the subsidy considerably, both in terms of money and the number of pilgrims.²⁰

The government has maintained that Muslims are among the poorest sections of Indian society and need financial assistance, as they would not be able to afford the Haj pilgrimage without it.²¹ However, it is ironic that the subsidy is being paid without considering the economic position of the pilgrim.²² Also, the Koran does not impose a compulsory obligation on every Muslim to undertake Haj. Only those Muslims who can afford to pay for the journey through their own means are enjoined to undertake the pilgrimage.²³ It is interesting to note that some of the most vociferous critics of the Haj subsidy have been Muslims themselves, as they opine that it is violative of the tenets of Islam.²⁴

C. The Secularism Debate

According to the eminent Indian jurist M.C. Setalvad, the importance of the concept of secularism was revealed by the bloodstained partition India was witness to.²⁵ During the Constituent Assembly Debates, Pandit Lakshmi Kanta Maitra elucidated the meaning of

²⁰ Swaraj Thapa, *Phasing Out Haj*, THE INDIAN EXPRESS (May 17, 2012), available at <http://www.indianexpress.com/news/phasing-out-haj/950173>. See also, Rashtriya Swayamsevak Sangh (R.S.S.), *Haj Subsidy: Phase it out faster*, ORGANIZER, available at <http://organiser.org/Encyc/2012/5/12/EDITORIAL.aspx?NB=&lang=4&m1=&m2=&p1=&p2=&p3=&p4=> (last updated Dec. 5, 2012).

²¹ Vibhuti Agarwal, *Does the Haj Subsidy Undermine Secular India?*, WALL ST. J. (April 16, 2010), available at <http://blogs.wsj.com/indiarealtime/2010/04/16/does-the-haj-subsidy-undermine-secular-india/>.

²² *Id.*

²³ Berkley Center for Religion, Peace & World Affairs, Georgetown University, *Hajj*, available at <http://berkeleycenter.georgetown.edu/resources/essays/hajj>.

²⁴ The Indian Express, *Muslim MPs welcome SC order on Haj subsidies* (May 8, 2012), available at <http://www.indianexpress.com/news/muslim-mps-welcome-sc-order-on-haj-subsidies/946848/>. See also, The Hindu, *Mixed reaction to gradual elimination of Haj subsidy* (May 10, 2012), available at <http://www.thehindu.com/news/cities/Hyderabad/mixed-reaction-to-gradual-elimination-of-haj-subsidy/article3401673.ece>.

²⁵ *Ismail Faruqui v. Union of India* AIR 1995 SC 605, ¶ 33.

secularism to mean that “no particular religion in the State will receive any State patronage.”²⁶ It is crucial to note that Indian secularism is of a distinct mould, insofar as it differs from the French and the American model of secularism. Instead of a rigid wall of separation between the church and the state, it is the responsibility of the Indian State to ensure equal religious freedom for all.²⁷

In *S.R. Bommai v. Union of India*,²⁸ the nine-judge Bench laid down six ingredients of secularism. For the purpose of the present discourse, three relevant ingredients have been referred to. First, not only is the State prohibited from adopting a State religion, it is also prohibited from “*identifying itself with*” or “*favouring any particular religion*”, because it is “*enjoined to accord equal treatment to all religions.*”²⁹ Second, secularism under the Indian Constitution means equal status for all religions, without any preference in favour of or discrimination against any of them.³⁰ Third, secularism is a basic feature of our Constitution.³¹

Article 25(1) of the Constitution of India guarantees to every person “freedom of conscience” and the right to freely profess, practice and propagate any religion. In *Commissioner of Police v. Acharya Jagadishwarananda*,³² the Court said that the protection guaranteed under this Article is not confined to matters of doctrine or belief only, but extends to acts done in pursuance of religion and, therefore contains a guarantee for rituals, observances, ceremonies and modes of worship which are an essential or form an integral part of a religion.³³ Since

²⁶ *S.R. Bommai v. Union of India* AIR 1994 S.C. 1918 at ¶ 28. [Hereinafter “*Bommai v. UOI*”].

²⁷ P. ISHWARA BHAT, *FUNDAMENTAL RIGHTS: A STUDY OF THEIR INTERRELATIONSHIP* 418 (2004).

²⁸ *Bommai v. UOI*, *supra* note 26.

²⁹ *Bommai v. UOI*, *supra* note 26 at 146.

³⁰ *Bommai v. UOI*, *supra* note 26 at 194.

³¹ *Bommai v. UOI*, *supra* note 26 at 124.

³² (2004) 12 S.C.C. 770, p. 782 ¶ 9.

³³ *Id.*

Haj is a compulsory obligation on the part of every sane, able-bodied and financially sound Muslim³⁴, it can be called “*an act done in pursuance of*” Islam. Therefore, it falls within the ambit of Article 25(1). Moreover, Article 25(1) reads that the freedom of religion is “*subject to other provisions*” of Part III of the Constitution. Therefore, the freedom of religion is, *inter alia*, subject to Articles 14, 15 and 27.

Haj subsidies have raised two key issues: first, the existence of discrimination on the basis of religion and second, the Constitutional validity of using the general revenue of the State to support religious activity. Both these issues were raised in the landmark case of *Prafull Goradia vs. Union of India*.³⁵The petitioner’s arguments rested on Articles 14, 15 and 27 of the Constitution. His grievance was that the Haj Committee Act, 2002 is unconstitutional and that he being a Hindu “*has to pay direct and indirect taxes, part of whose proceeds go for the purpose of the Haj pilgrimage, which is only done by Muslims.*”³⁶ Article 14 of the Constitution provides for equality before the law and the equal protection of the laws.³⁷ Article 15 complements Article 14 by prohibiting precise forms of discrimination. In the instant case, in order to satisfy Article 15(1) the petitioner was required to show (i) the existence of discrimination and (ii) that the discrimination is only on the basis of religion or one of the prohibited grounds in Article 15(1).³⁸ Article 27 guarantees the freedom from being compelled to pay any taxes for the promotion or maintenance of any particular religion or religious denomination.

³⁴ Berkley Center for Religion, Peace & World Affairs, Georgetown University, *Hajj*, available at <http://berkeleycenter.georgetown.edu/resources/essays/hajj>.

³⁵ *Prafull v. UOI*, *supra* note 1.

³⁶ *Prafull v. UOI*, *supra* note 1.

³⁷ INDIA CONST, Art. 14.

³⁸ Manavi Belgaumkar & SudhirKrishnaswamy, *Prafull Goradia vs. Union of India*, (2011) 2 S.C.C.. 568, 3 J.IND.L.SOCIETY, 337 (2012), available at <http://jils.ac.in/wp-content/uploads/2012/11/manavi-sudhir1.pdf>.

The Court in the aforementioned case held that Haj subsidy is constitutional and it did not violate Articles 14, 15 and 27. This is because similar “*facilities are given and expenditures are incurred*” by the government for other religious groups as well. Absolute equality cannot be insisted upon in a situation of diverse contingencies.³⁹ With regard to Article 27, the Court held that “[I]n our opinion Article 27 would be violated if a substantial part of the entire income tax collected in India, or a substantial part of the entire central excise or the customs duties or sales tax, or a substantial part of any other tax collected in India, were to be utilized for promotion or maintenance of any particular religion or religious denomination. In other words, suppose 25 per cent of the entire income tax collected in India was utilized for promoting or maintaining any particular religion or religious denomination that, in our opinion, would be violative of Article 27 of the Constitution.”⁴⁰

The authors opine that the judgment in the *Prafull Goradia case*⁴¹ is inadequate due to two reasons. *Firstly*, it restricts itself to Article 14, and does not provide elaboration on the relation between religious subsidies and Article 15(1). The Government’s assertion only sustains the conclusion that the policy of utilising State funds to finance religious pilgrimages satisfies the Article 14 requirement of equality before the law.⁴² It does not address the requirements of Article 15(1) that the State cannot discriminate against any citizen on the ground of religion alone.⁴³ It is a fact that only Muslims can claim the Haj subsidy while only Hindus can claim the Manasarovar subsidy.⁴⁴ Hence, in both the cases the State is distinguishing between persons on the basis of their religion. This is violative of the essence of Article 15(1) and cannot be justified on the basis that while discriminating, the State is

³⁹Prafull v. UOI, *supra* note 1.

⁴⁰ Prafull v. UOI, *supra* note 1 at ¶ 6.

⁴¹ Prafull v. UOI, *supra* note 1.

⁴² BELGAUMKAR & KRISHNASWAMY, *supra* note 38.

⁴³ BELGAUMKAR & KRISHNASWAMY, *supra* note 38.

⁴⁴ BELGAUMKAR & KRISHNASWAMY, *supra* note 38.

maintaining uniformity of discrimination among religions.⁴⁵ The core question before the Court was whether *all* such religious subsidies and state support to specific religions amounted to discrimination between citizens on the ground of religion. However, the Court failed to tackle this crucial issue. *Secondly*, Katju J.'s interpretation of Article 27, where he holds that Article 27 will be violated only if a '*substantial*' portion of the general tax is utilized for religious purposes, is problematic. In spite of his insistence on not interpreting the Constitution in a narrow or pedantic manner,⁴⁶ he held that Article 27 had not been violated because the petitioner had failed to mention in his Writ Petition exactly what percentage of any particular tax was being utilized for the Haj subsidy.⁴⁷ Also, he ended up giving an excessively broad interpretation to Article 27 by not laying down the parameters of what will constitute a '*substantial*' portion of a tax.⁴⁸

In *Union of India v. Rafique Sheikh Bhikan*,⁴⁹ which is the most recent decision on Haj subsidies, the Supreme Court held that it sees no justification in the Haj subsidy and it is "*something best done away with.*" The Central government has been directed to progressively reduce the amount of subsidy so that it is completely eliminated within a period of 10 years. However, the Court did not touch upon issues of secularism in this case.

At this juncture, it is essential to distinguish between State policy for giving subsidies, and State policy for facilitating travel. There might be certain special cases when it is essential for the government to spend state funds for the benefit of a religious group. A case in point is the Amarnath Yatra. In *Court On Its Own Motion v. Union of India*⁵⁰ the Supreme Court took *suo moto* action against the Union of India, in light of the rising number of deaths of Amarnath

⁴⁵ BELGAUMKAR & KRISHNASWAMY, *supra* note 38.

⁴⁶ Prafull v. UOI, *supra* note 1 at ¶ 4.

⁴⁷ Prafull v. UOI, *supra* note 1 at ¶ 5.

⁴⁸ BELGAUMKAR & KRISHNASWAMY, *supra* note 38.

⁴⁹ UOI v. Rafique, *supra* note 2.

⁵⁰(2012)12 S.C.C. 503.

Yatris. The Court noted that the “*lack of necessary facilities, essential amenities and the risk to the lives of the yatris was leading to a loss of lives.*”⁵¹ Accordingly, the court issued guidelines to the Centre and the State of Jammu and Kashmir to ensure that there are adequate health facilities so that religious freedom is ensured effectively. Here, the government is not conferring an exclusive benefit on the Amarnath yatris, but merely facilitating their travel, to effectuate their right to life under Article 21 and religious freedom under Article 25. This case does not hit Article 15(1) of the Constitution. But in case of Haj and Kailash Manasarovar subsidies, the State funding of pilgrimages does violate Article 15(1).

D. Conclusion

Haj subsidy has been one of the most controversial forms of state expenditure on religion in India. While some accuse the government of indulging in religious populism, others accuse it of violating the well-established constitutional principles of secularism. Haj subsidies have raised two primary issues; first, the practice of discrimination on the basis of religion and second, the constitutional validity of using the general revenue of the State to support religious activity. In the *Prafull Goradia case*,⁵² the Supreme Court held Haj subsidies to be constitutional. More recently, in the *Rafique Sheikh Bhikan case*⁵³, the Supreme Court has ordered the Central government to phase it out by 2022. In our opinion, religious subsidies like Haj subsidy and Mansarovar subsidy are violative of Article 15(1) of the Constitution as they are tantamount to the State discriminating between persons on the basis of religion. Politicians have started using religious subsidies as a tool of religious populism to gain votes.

⁵¹*Id.*; See also *Amarnath Yatra: SC shocked over increasing number of pilgrims' death*, THE TIMES OF INDIA (July 23, 2012), available at http://articles.timesofindia.indiatimes.com/2012-07-23/india/32803333_1_amarnath-pilgrims-amarnath-yatra-shri-amarnath-shrine-board.

⁵² *Prafull v. UOI*, *supra* note 1.

⁵³ *UOI v. Rafique*, *supra* note 2.

What remains to be seen is whether the Supreme Court's direction in *Rafique Sheikh Bhikan*⁵⁴ is implemented or not.

THE POSITION IN THE UNITED STATES OF AMERICA

A. The Landmark Judgment in *Everson v Board of Education of Ewing*

In the celebrated case of *Everson v Board of Education of Ewing*⁵⁵, a New Jersey taxpayer challenged the state's statute which provided for the reimbursement for transportation of students attending public and not-for-profit private schools. This had led to establishment of an education board authorizing reimbursement for transportation to public and Catholic schools. The Catholic schools, it is important to note, were providing secular as well as religious education.

The Establishment Clause of the First Amendment to the US Constitution states that "Congress shall make no law respecting an establishment of religion". Pursuant to this, the US Supreme Court upheld that statute by a slim 5-4 majority. Justice Black's majority opinion interpreting the Establishment Clause is worth quoting:

The "establishment of religion" clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called,

⁵⁴ UOI v. Rafique, *supra* note 2.

⁵⁵ *Everson v. Ewing*, *supra* note 3.

or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."⁵⁶ (emphasis supplied by author)

This is in complete contrast to Justice Katju's observations in *Prafulla Goradia*⁵⁷ where he laid down the substantiality test, holding that the Haj subsidy is constitutionally valid as the amount of subsidy as a portion of the general revenue of the State is not 'substantial'. The majority opinion in *Everson v Board of Education of Ewing*⁵⁸ clearly states that a tax, large or small, cannot be levied for any religious purpose. Even his minority opinion, Justice Rutledge states that:

Madison and his co-workers made no exceptions or abridgments to the complete separation they created. Their objection was not to small tithes. It was to any tithes whatsoever. [...] "If it were lawful to impose a small tax for religion, the admission would pave the way for oppressive levies" [...] In view of this history, no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises.⁵⁹

Rutledge noted that the purpose of the amendment was to ban *any and every form of public aid or support* for religious purposes.⁶⁰

⁵⁶ *Everson v. Ewing*, *supra* note 3.

⁵⁷ *Prafull v. UOI*, *supra* note 1.

⁵⁸ *Everson v. Ewing*, *supra* note 3.

⁵⁹ *Everson v. Ewing*, *supra* note 3.

⁶⁰ *Everson v. Ewing*, *supra* note 3.

Overall, Justice Black in his majority opinion upheld the statute by holding that the reimbursement was offered to all students irrespective of their religion and that the payment was made to the parents and not to the institutions. The strong dissenting opinions of Justice Jackson and Rutledge, while agreeing with the definition and explanation of the Establishment Clause, opined that the definition ought to invalidate the law, arguing that the funds are raised by taxation and it in turn aids the students in a substantial way in receiving religious instruction. The case is famous as the First Amendment was applied for the first time to state law through the Due Process Clause (Fourteenth Amendment). It was applied previously only to Federal laws.

Subsequent cases in the US have allowed aid and support programmes if the aid is generic in nature and is neutral with respect to all citizens who can by their independent choice, choose to direct the aid for religious schools or institutions.⁶¹ If there is an incidental encroachment into the field of religion due to individual choices, it is constitutionally valid.⁶²

B. The Lemon Test

In *Lemon v Kurtzman*⁶³, two Acts were challenged including the Rhode Island's Salary Supplement Act, 1969, which provided for a 15% salary supplement to teachers in non-public schools where the average per pupil expenditure on secular education is below the average in public schools. The eligible teachers had to teach only secular materials as taught in public schools. The lower Court had found that out of the 25% who attended non-public schools, 95% were attending Roman Catholic schools and 250 teachers of Roman Catholic affiliated schools were the sole beneficiaries. The other was Pennsylvania's Non-public Elementary and Secondary Education Act, 1968, which permitted the state Superintendent of Public

⁶¹ See *Muller v Allen* 463 U.S.388 (198) and *Zelman v Harris*, *supra* note 5.

⁶² *Id.*

⁶³ *Lemon v. Kurtzman*, *supra* note 4.

Instruction to reimburse non-public schools (the vast majority of which were Catholic) for instructors' salaries, textbooks, etc., this being limited to secular teaching in secular subjects approved by the superintendent.

In order to strike down the law, the Court evolved, based on previous cases, three tests which are now cumulatively known as the '*Lemon test*', which lays down the requirements of a legislation concerning religion. Laid down by Chief Justice Warren Burger, it reads as follows:

1. The government's action must have a secular legislative purpose;
2. The government's action must not have the primary effect of either advancing or inhibiting religion;
3. The government's action must not result in an "*excessive government entanglement*" with religion.⁶⁴

The Court held that the impugned legislations resulted in "*excessive government entanglement*" and hence, struck down both the laws.

This was followed by cases like *Mueller v Allen*⁶⁵ where the US Supreme Court examined whether state tax deduction (for taxpayer parents) for public and private school expenses was constitutional. The petitioner contended that the tax was in fact subsidizing religious education, as religious schools included tuition fee but public schools did not, resulting in larger deductions for religious schooling. The petitioner claimed, based on the *Lemon test*,

⁶⁴ The Lemon test has been in multiple cases. See for example, *Texas Monthly v Bullock* 489 U.S. 1, where the Supreme Court struck down a tax exemption for religious publications, *Van Orden v Perry* 545 U.S. 677, where the display of the Ten Commandments on a monument was held to be constitutional, as it had historical value in addition to purely religious value, and *McCreary County v ACLU of Kentucky*, 545 U.S. 844, where religious displays were held to be unconstitutional. Incidentally, *McCreary County* was decided on the same day as *Van Orden*. In *McCreary County*, the judges also declined to overrule the Lemon test.

⁶⁵ *Muller v. Allen*, *supra* note 61.

that the tax deduction had a ‘*primary effect*’ of advancing religion. By a 5-4 majority, the Court held that the law passed the primary effect test as well as the other two tests, as the subsidy was available to all parents and the benefits did not go directly to the religious institutions, but to the parents. The dissenting opinion however strongly criticized this stand and embarked on an empirical analysis to show that the law in substance was made for students of religious schools and that there were no safeguards preventing the use of deduction for religious purposes.

The Court in *Muller v Allen* and *Bowen v Kendrick*⁶⁶ can be said to have taken the ‘total subsidy’⁶⁷ position, where, as G. Sidney Buchanan argues⁶⁸, the aid must be only for secular activities of religious institutions and the same aid must be offered under the same or similar conditions for non-religious public and private institutions.

Post *Muller v Allen*, it is important to note that when the law or government aid was religiously unbiased and was available to all equally, the Court generally ruled in favour of the law, if the direct benefit accrued to the people or individuals rather than religious institutions or interests.⁶⁹

C. The Private Choice Test

In the case of *Zelman v Simons-Harris*⁷⁰, the issue was the constitutionality of a voucher program which was introduced due to the failing public school system. Vouchers were given to parents of students for attending participating public and non-public schools. Ultimately, however, the schools that participated were mostly private schools, a large number being

⁶⁶ *Muller v. Allen*, *supra* note 61.

⁶⁷ G. Sidney Buchanan, *Governmental Aid to Religious Entities: The Total Subsidy Position Prevails*, 58 *Fordham L. Rev.* 53 (1989).

⁶⁸ *Id.*

⁶⁹ *Zelman v. Harris*, *supra* note 5.

⁷⁰ *Zelman v. Harris*, *supra* note 5.

private religious schools. The issue being whether this violated the Establishment Clause of the First Amendment, the US Supreme Court by a 5-4 majority upheld the law, and developed the ‘*Private Choice test*’ after analyzing several precedents. In this regard, the opinion of the Court delivered by Justice Rehnquist sums it up best:

*In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice.*⁷¹

Since the voucher program satisfied all the elements of the test and fulfilled the criteria of neutrality and availability of private choice, the program’s constitutionality was upheld. In this case, the funding was given to the parents, whereas in *Lemon v Kurtzman*⁷² the funding was given to the schools directly, and therefore this case highlights the importance of the legislative intent.

In the dissenting judgement, it was opined that the precedent in *Everson*⁷³ has not been followed, and that even though the choice is private and voluntary, the government was paying for religious instruction which is constitutionally impermissible.

D. Issue of Locus Standi

Article III of the US Constitution grants Federal Courts the jurisdiction to hear ‘cases’ and ‘controversies’. Thus the interpretation has been that the petitioner or the person bringing a suit has to show ‘standing’. Thus the particular person (or a group of persons) has to show injury to himself/ herself (or to the group) in particular.

⁷¹ Zelman v. Harris, *supra* note 5.

⁷² Lemon v Kurtzman, *supra* note 4.

⁷³ Everson v. Ewing, *supra* note 3.

In one of the earlier cases, *Frothingham v Mellon*⁷⁴, it was held that a taxpayer does not have the standing to challenge government expenditure only on the ground that it is unconstitutional, unless ‘direct injury suffered or threatened’ is shown. Later in *Flast v Cohen*⁷⁵, an exception was carved out for the establishment clause of the first amendment, as the primary purpose of the clause was to *specifically limit* government taxing and spending for religious purposes. However *Flast v Cohen* has been read narrowly in subsequent cases. For example, in the popular *Hein v Freedom from Religion Foundation*⁷⁶, the foundation was held not to have standing to sue, and the plurality opinion ruled that constitutionality of expenditure by the executive branch cannot be challenged by taxpayers. This generated much public attention the expenditure challenged was used to fund President Bush’s ‘Faith-Based and Community Initiative’. This was seen as a case that closed the door for taxpayers to bring establishment clause lawsuits against the executive branch. In *Arizona Christian School Tuition Organization v Winn*⁷⁷, taxpayers challenged a law which gave ‘tax credits’ to people or residents who funded charities that in turn funded non-public education, including religious education. The Supreme Court held that the taxpayers did not have standing, as tax credits did not ‘extract and spend’ taxpayers’ money on religion.

It is interesting to draw a parallel with the petitioner in *Prafull Goradia*. As the judgment explains, the petitioner contended that “he is a Hindu but he has to pay direct and indirect taxes, part of whose proceeds go for the purpose of the Haj pilgrimage, which is only done by Muslims”⁷⁸. The locus standi issue did not arise in this case. It known however that our superior courts have relaxed norms for *locus standi* and even in this judgment the *locus*

⁷⁴ 262 U.S. 447.

⁷⁵ 392 U.S. 83 (1968).

⁷⁶ 551 U.S. 587 (2007). [Hereinafter “Hein v. Foundation”].

⁷⁷ 131 S.Ct. 1436. [Hereinafter “Arizona v. Winn”].

⁷⁸ Prafull v. UOI, *supra* note 1.

standi issue is not discussed. In being different from the decision of the US Courts, this is a positive difference in India, as *any* taxpayer can challenge the constitutionality of state action on the grounds of violation of Article 27. Strict restrictions would lead to difficulties for challenging violation of Article 27, as seen in the US jurisprudence. It will be difficult for a taxpayer to show a direct injury as well as a direct extraction of that particular taxpayers' money on an impugned government spending.

THE POSITION IN JAPAN

A. Articles 20 and 89 of the Japanese Constitution

Japan's contemporary post-war Constitution contains two provisions that concern religion, namely Articles 20 and 89, both of which have been largely influenced by the American jurisprudence on religion. Article 20 of the Constitution of Japan guarantees freedom of religion to all. *Inter alia*, it separates religion from the State and mandates that no religious organization “shall receive any privileges from the State, nor exercise any political authority.”⁷⁹ Article 89 further fosters the freedom of religion by stating that public money or property shall not be utilized for the benefit or maintenance of any religious institution or association.⁸⁰ On a comparison of Article 20 of the Japanese Constitution with Article 25 of the Indian Constitution, it is noticed that while the latter carves out exceptions and restrictions in the form of public order, morality, health and contents of other Fundamental Rights in Part III, the language of the former does not reflect any restrictions or exceptions. On a textualist reading of Article 20, the Japanese Constitution appears to grant absolute

⁷⁹NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 20(“ Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority. No person shall be compelled to take part in any religious act, celebration, rite or practice. The State and its organs shall refrain from religious education or any other religious activity”).

⁸⁰NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 89 (“No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority”).

religious freedom.⁸¹ A rigid wall of separation between religion and the State has been constructed through the language of these two Articles in the *Kenpo* (Constitution), which seems to strictly exclude religion from the public arena.⁸²

B. The decision in Kakunga v. Sekiguchi

On an examination of the relevant case laws, it is noticed that the interpretation given to Articles 20 and 89 of the Constitution by the Supreme Court of Japan has resulted in the violation of the legislative intent outlined in the said provisions. *Kakunaga v. Sekiguchi*⁸³ was the first case in which the issue of constitutional separation of the church and the State came to the fore in Japan. The dispute in that case arose when the mayor of Tsu City expended public money on a *Shinto* ceremony for purifying the building site of a gymnasium. It was alleged that this amounted to contravention of Articles 20 and 89 of the Constitution of Japan because the former establishes freedom of religion by separating religion and State and the latter, *inter alia*, forbids the use of public money for the benefit or maintenance of any religious institution or association. While the appellate court held the action of the mayor unconstitutional, the Supreme Court adopted a more lenient approach and held that the action did not contravene the provisions of the Constitution.

The Supreme Court agreed with the stance that the language of Articles 20 and 89 of the Japanese Constitution reflects the notion of total separation between the religion and the State.⁸⁴ However, the Court found such a watertight separation to be both detrimental and

⁸¹ Andrew B Van Winkle, *Separation of Religion and State in Japan: A Pragmatic Interpretation of Articles 20 and 89 of the Japanese Constitution*, 21 Pac. Rim. L. Poly. J. 363 (2012).

⁸² Hiroaki Kobayashi, Religion in the Public Sphere: Challenges and Opportunities in Japan, 2005 BYU L. REV. 3.

⁸³ Kakunga case, *supra* note 6.

⁸⁴ Kakunga case, *supra* note 6.

unattainable and therefore, chose not to abide by strictly. In an attempt to secure a balance, the Court developed the “*purpose and effects test*” and held that when state action:

exceeds reasonable limits and which has as its purpose some religious meaning, or the effect of which is to promote, subsidize, or conversely, to interfere with or oppose religion [It is not enough that the procedure of the activity is] set by religion. The place of conduct, the average person's reaction to it, the actor's purpose in holding the ceremony, the existence and extent of religious significance, and the effect on the average person, are all circumstances that should be considered to reach an objective judgment based on socially accepted ideas.

Relying on a modified adaptation of the *Lemon v Kurtzman*⁸⁵ “*purpose and effects*” test, the Supreme Court held that the mayor’s action was constitutional as it neither had the purpose nor the effect of promoting religion.⁸⁶ This decision was challenged and opposed by several liberal constitutional scholars on the ground that it virtually rewrote Articles 20 and 80 of the Japanese Constitution.⁸⁷

The decision in *Kakunaga v. Sekiguchi*⁸⁸ has been largely affirmed and followed in subsequent decisions like the *Self-Defense Forces Enshrinement*⁸⁹ case and the *Daijo Sai*⁹⁰ case. It has not been overruled and the “*purpose and effects*” test constitutes the law of the land with regard to the interaction between the religion and the State in general, and state expenditure on religion in particular. The said test has been criticized as being impractical

⁸⁵ *Lemon v. Kurtzman*, *supra* note 4.

⁸⁶ Brent T White, *Reexamining Separation: The Construction Of Separation Of Religion And State In Post-War Japan*, 22 UCLA Pac. Basin L.J. 29 (2004).

⁸⁷ *Id.*

⁸⁸ *Kakunaga case*, *supra* note 6.

⁸⁹ Saiko Saibansho [Sup. Ct.] June 1, 1988. [Hereinafter “Self-defence case”].

⁹⁰ Saiko Saibansho [Sup. Ct.] July 9, 2002. [Hereinafter “Daijo case”].

and ad-hoc due to its usage of the “*average Japanese person*” as a yardstick for deciding cases involving religion and the State.⁹¹ The Court bases the outcome of a case on whether “*the average Japanese person*” is offended by the said religious practice and views it as a religious act or not. This is problematic due to its excessive subjectivity.

On a comparison between the Japanese and the Indian positions on state expenditure on religion, remarkable similarities come to the fore. While both the Constitutions mandate a secular state, in reality the States do spend public money on religious activities. We are of the opinion that the constitutional command of secularism has been diluted and tempered in both the countries. The Haj subsidy discussed in the preceding part of the article has been consistently held constitutional by the Supreme Court of India and *intra vires* Articles 14, 15 and 27. Public spending on religion has also been largely held constitutional in Japan, in spite of the explicit constitutional mandate to the contrary. However, it is essential to distinguish the positions in India and Japan on one count. While the Indian Constitution does not provide for absolute and unfettered religious freedom, the Japanese Constitution does. Therefore, it is justifiable to affix a more severe standard of review while examining the manner in which the Japanese Supreme Court has interpreted Articles 20 and 89.

CONCLUSION

Even though it violates the strict and puritan definition of secularism, State expenditure on religion is a common thread binding several ‘secular’ States. This article has analyzed the position relating to State expenditure on religion prevalent in India, U.S.A. and Japan. In India, while Articles 15(1), 25 and 27 mandate a secular State, the State has been spending public money on religion, the most controversial of which has been discussed in detail in this

⁹¹ Andrew B Van Winkle, *Separation of Religion and State in Japan: A Pragmatic Interpretation of Articles 20 and 89 of the Japanese Constitution*, 21 Pac. Rim. L. Poly. J. 363.

article. In the *Prafull Goradia*⁹² case, the Supreme Court of India upheld the Haj subsidy and ruled that it did not violate Articles 14, 15 and 27 of the Constitution. However, the Court's decision was not based on sound legal reasoning as it condoned State expenditure on the Haj subsidy on the ground that the State was incurring expenditure for other religious groups too. The correct reasoning would have been to hold that in light of the constitutional provisions on religion, State expenditure on any and every religious group cannot be condoned. The Supreme Court's decision in the *Rafique Sheikh Bhikan*⁹³ case is laudable as it rules that the Haj subsidy is unjustified and should be abolished by 2022.

In the US, the Establishment clause of the First Amendment governs the issue of State expenditure on religion. The jurisprudence has evolved since the early cases such as *Everson v Board of Education*⁹⁴, where the Supreme Court explained the Establishment clause with respect to State funding on religion, to latter cases such as *Lemon v Kurtzman*⁹⁵ wherein a law was struck down due to excessive entanglement with religion. More recently, in *Zelman v Simons-Harris*⁹⁶, the Supreme Court decided to follow a policy of non-interference when there is firstly, neutrality of a subsidy/aid with respect to religion, and secondly, the presence of a private choice.

The authors opine that, despite the recent decision of *Rafique Sheikh Bhikan*⁹⁷ in India, it is useful to adapt some of the important principles laid down by US case laws. In the cases of *Prafull Goradia*⁹⁸ and *Rafique Sheikh Bhikan*⁹⁹, it is acknowledged that Article 27 does not

⁹² Prafull v. UOI, *supra* note 1.

⁹³ UOI v. Rafique, *supra* note 2.

⁹⁴ Everson v. Ewing, *supra* note 3.

⁹⁵ Lemon v Kurtzman, *supra* note 4.

⁹⁶ Zelman v. Harris, *supra* note 5.

⁹⁷ UOI v. Rafique, *supra* note 2.

⁹⁸ Prafull v. UOI, *supra* note 1.

⁹⁹ UOI v. Rafique, *supra* note 2.

have precedents which analyze or discuss the Article in depth. In light of the lack of precedents, it will be useful to compare some of the observations of the US Supreme Court. In *Everson v Board of Education*¹⁰⁰, Justice Katju's observations in *Prafull Goradia*¹⁰¹ are directly contradicted, and the points of conflict between the two are worth considering. The authors submit that the Supreme Court of India has lost a valuable opportunity to lay down tests or criteria to reduce the scope for subjectivity in future cases. This has been the endeavour of the US cases, which have laid down the 'Lemon test', and 'Private Choice test' *inter alia*.

Another interesting parallel is that of 'standing' before the Courts. The U.S. Courts have long restricted the scope for challenging state expenditure by maintaining strict norms for *locus standi*. *Fronthingham v Mellon*¹⁰² first laid down that a taxpayer will not have standing unless a direct injury is shown. The landmark case of *Flast v Cohen*¹⁰³ carved out an exception to this rule with respect to Establishment Clause cases. However in subsequent cases, like the recent popular cases of *Hein v Freedom from Religion Foundation*¹⁰⁴ and *Arizona Christian School Organization v Winn*¹⁰⁵ have read *Flast v Cohen*¹⁰⁶ narrowly, thus reducing the scope of challenges under the Establishment Clause. The issue of *locus standi* has no mention in the Indian cases like *Prafull Goradia*¹⁰⁷, which is interesting as the petitioner probably did not have a direct injury. The norms of *locus standi* have been relaxed in the Indian courts.

¹⁰⁰ *Everson v. Ewing*, *supra* note 3

¹⁰¹ *Prafull v. UOI*, *supra* note 1.

¹⁰² *Fronthingham v. Mellon*, *supra* note 74.

¹⁰³ *Flast v. Cohen*, *supra* note 75.

¹⁰⁴ *Hein v Foundation*, *supra* note 76.

¹⁰⁵ *Arizona v. Winn*, *supra* note 77.

¹⁰⁶ *Flast v. Cohen*, *supra* note 75.

¹⁰⁷ *Prafull v. UOI*, *supra* note 1.

In Japan, Articles 20 and 89 of the *Kenpo* are couched in absolute terms and mandate a rigid wall of separation between religion and the State. However, in *Kakunga v. Sekiguchi*¹⁰⁸ and subsequent cases like the *Self-Defense Forces Enshrinement*¹⁰⁹ case and the *Daijo Sai*¹¹⁰ case, the Supreme Court has attempted to dilute the strict mandate by creating a contrasting legal trajectory in the form of the “*purpose and effects test*”. Particularly problematic is the Court’s reliance on the ad-hoc rubber yardstick of whether the “average Japanese person” views the said act as a religious act or not. At this juncture, the authors would like to point out that though most of the literature on this topic is severely critical of the Japanese Supreme Court’s stance, it is important to appreciate the motive behind the Japanese Supreme Court’s liberal interpretation. In *Kakunga*¹¹¹, The Court has emphasised that a strict separation between religion and State is not only unachievable, but also undesirable. This is because state regulation will inevitably overlap with religious practices in certain circumstances. This has prompted the Court to arrive at a practical middle ground by evolving the “*purpose and effects*” test. The authors opine that in order to arrive at a reasoned conclusion in the controversial question of whether a secular State should spend on religion, it is important to appreciate the contours of the Japanese debate on the same due to the intricate social and legal issues involved.

¹⁰⁸ Kakunga case, *supra* note 6.

¹⁰⁹ Self-defence case, *supra* note 89.

¹¹⁰ Daijo case, *supra* note 90.

¹¹¹ Kakunga case, *supra* note 6.

- Amrita Vasudevan* & Bhanu Partap Singh Sambyal*

ABSTRACT

'Exit Polls' rest on unstable constitutional tectonic plates eager to erupt without notice. It has equal and opposite forces, pulling at it, as its proponent as well as opponent lie in the Constitution. Conduct of free and fair elections has been the focus of the Election Commission from its conception, but fulfilling its constitutional function reached a roadblock when the Apex Court held that it was overreaching its powers. Hence, the Parliament cleverly took over, and amended the Representation of People's Act, 1951 to add Section.126A. The section imposes a complete ban on exit polls and makes it impossible to legitimately collect any data through the same. Exit polls reveal some unique information which may aide in the casting of an informed vote. An informed voter is a necessary pre-condition for a robust democracy, functioning of the principle of free and fair elections and thus to uphold the basic structure of our Constitution, exit polls or any other method of information extraction or dissemination is necessary.

Besides the above a complete ban on exit polls may well be challenged under Art. 19(1)(a); though, whether this freedom functions dually for the media as well as the citizen, shall be considered. Further, the paper analyses whether exit polls can be legally or logically read into any of the restrictions under 19(2) without 'statutise-ing' the Constitution, a document which lays down basic principles and not nuanced modalities. A modest effort has been made in this behalf to compare the forms of fundamental rights that may be used to protect exit polls, in

* School of law, Christ University Bangalore , BA.LL.B(Hons.)

* School of law, Christ University Bangalore , BA.LL.B(Hons.)

India as well as America. The same, it is noted, is a reflection of the kind of freedom the press is guaranteed by their respective Grundnorms.

INTRODUCTION

A democratic way of life achieved through the instrument of elections is not alien to Indian culture. Taking decisions to run their affairs, be they at the level of individual families or at the community level, collectively and with the consensus of all concerned, has been the pervading philosophy of Indian way of life from times immemorial.¹ In recognition of the above, elections have been time and again been established by Indian Courts to be essential to any legitimate democracy.

The crux of the paper lies in the proposition that since democracy is a sub-sect of the basic structure, and free and fair elections a sub-sect of democracy, by extrapolation free and fair elections be a part of the basic structure and thus un-amendable.

The make-up of free and fair elections is essentially free flow of information and as a consequence an informed voter. Thus, right to information and alternatively the right to know and freedom of speech and expression of the press and citizen are preconditions to free and fair elections and under whose nurturing exit polls too may be protected.

For the modalities of achieving free and fair elections, the founding fathers of the Constitution devoted a separate part, Part XV, containing Arts. 324 to 329 of the Constitution to elections², it also gave rise to the Election Commission of India (hereinafter referred to as “E.C.I.”), whose role was to aide in the materialization of the goals of Part XV. While referring to E.C.I as the mode of achieving these goals, the court in the *Mohinder Singh Gill case*³ in exercise of its powers two limitations can be imposed. First, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the

¹ V.S. RAMA DEVI & S.K. MENDIRATA, HOW INDIA VOTES ELECTION LAWS, PRACTICE AND PROCEDURE 2 (2006).

² DEVI & MENDIRATA, *supra* note 1 at 2.

³ *Mohinder Singh Gill v. Chief Election Commissioner*, [1978] 2 S.C.R. 272. [Hereinafter “*Mohinder v. CEC*”].

Commission, shall act in conformity with such and secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice. The Parliament has as a consequence introduced s.126 A to the Representation of Peoples Act, 1951(hereinafter referred to as “R.P. Act 1951”) which is yet to be challenged. If challenged, exit polls may be defended on the ground that they are protected under the basic structure doctrine.

Apart from being protected under the particular analysis of the basic structure doctrine, it may more simply be protected by the fundamental rights mentioned above. Inter alia, the relationship that exists between exit polls and its implications on the sanctity of secret ballot has been studied. In conclusion the paper suggests methods through which the legitimate concerns about exit polls, like biased or fabricated results may be addressed in conformity of the above elucidated principles.

AN INFORMED VOTER AND FREE AND FAIR ELECTIONS

Exit polls are essentially polls taken on the eve of elections and on polling days, including when all parts of the country have not voted.⁴ Apart from giving the voter an estimate of the tentative results of an election, it also reveals the thought process involved in the casting of a vote. Exit polls provide unique data on the socio-economic composition of the voting population. Media and academic experts use the poll information to study voting behavior, political trends, and the influence of current events on voters' choices. They merit indispensable appreciation since they generate important research data which is otherwise not attainable.⁵ It is deducible from the above that exit polls reveal invaluable information that

⁴ S. Aarthi Anand & Celia Joanne Jenkins, *Exit Polls: Debating Freedom or Fairness*, 39 No. 46/47 ECO. AND POL. WEEKLY, Nov. 20 - 26, 2004, <http://www.jstor.org/stable/4415792> (last visited Aug. 19, 2013). [Hereinafter “Debating Freedom or Fairness”].

⁵ Ronald J. Busch and Joel A. Lieske, *Does Time of Voting Affect Exit Poll Results?* 49 No. 1 PUB. OPINION Q. 94-104 (Spring, 1985), available at <http://www.jstor.org/stable/2748933> (last visited Aug. 19, 2013) (the

may aide the casting of a vote. An informed voter is essential for a robust democracy, which upholds the principles of free and fair elections, without which it is pretence. Therefore, it is imperative to ensure the availability of the right to a citizen to receive the information so essential for casting his vote.⁶

The media has been recognised to be the conveyer of such “*essential*” information.⁷ In fact, it is deemed so important that it has been given the status of the Fourth Estate in a democracy. The media aids in the moulding of public opinion through the transmission of ideas and facts. Thus specific rights such as the right to be informed and the right to inform are indispensable.⁸

The court has previously acknowledged the importance of an informed vote when it held in the case of *People’s Union for Civil Liberties v. Union of India*⁹ that the voter has the right to know the antecedents of a candidate standing for elections. Thus it is but logical to extend the above rationale to include exit polls.

However, defying the above logic time and again, the E.C.I has come down upon conduct and publication of opinion and exit polls, branding them as potential influences on the electors “*when they are in the mental process of making up of their minds to vote or not to vote for a certain political party or a candidate.*”¹⁰ In 1999, the E.C.I.’s order to restrict the publication of opinion and exit poll results was overturned by the Supreme Court, which

essence of exit polls is that you catch respondents fresh from their voting experience and that you can use realistic sample ballots that should more readily represent their actual behaviour a minute or two earlier.).

⁶ Union of India v. Association for Democratic Reforms and Another, (2002) 5 S.C.C. 294; See also DEVI & MENDIRATA, *supra* note 1.

⁷ De Haes and Gijssels v. Belgium, (1997) 25 E.H.R.R. (¶ 39); See also ACHARYA DR.DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 2559 (2011).

⁸ JAGDISH SWARUP & DR. L.M. SINGHVI, CONSTITUTION OF INDIA 831 (2013).

⁹ A.I.R. 2003 S.C. 2363. [Hereinafter “PUCL v. UOI”].

¹⁰ GUIDELINES FOR PUBLICATION AND DISSEMINATION OF RESULTS OF OPINION POLLS/EXIT POLLS, ELECTION COMMISSION OF INDIA, Order ECI/MCS/09/01/20.

stated that the E.C.I. did not have such authority and was overreaching its powers.¹¹ Again in 2004, the E.C.I. proposed similar guidelines and recommended that the R.P. Act, 1951 be amended so as to ban exit polls.¹² A writ petition filed in 2004 seeking the prohibition of exit and opinion polls is pending in the Supreme Court.¹³

Subsequently the R.P. Act, 1951 was amended by way of insertion of s.126A which banned conduct of exit polls and publishing these results from the time as notified by the E.C.I.¹⁴

The Section is clearly violative of Part III of the constitution and the same has been elucidated as under:-

FREEDOM OF SPEECH AND EXPRESSION OF THE MEDIA

The strength of a democracy can be judged by the extent of freedom granted to the press.¹⁵ The Press impresses upon the public by moulding public opinion by the entry of ideas and information into the public space.¹⁶ It aids the 'little man' conduct a 'social audit' of the parliament when he marks his vote.¹⁷ Justice Hidayatullah equated a free and thus fearless

¹¹ R. Rajgopal v. Union of India, W.P. No. 80 of 1998; *see also* S.C. refuses ban on opinion, exit polls, THE TRIBUNE, Sept. 15, 1999, *available at* <http://www.tribuneindia.com/1999/99sep15/head.htm>.

¹² ELECTORAL REFORMS, ELECTION OF INDIA, 2004. (this Brief has been developed on the basis of The Representation of the People (Second Amendment) Bill, 2008, which was introduced in Rajya Sabha on Oct. 24, 2008 and referred to the Standing Committee on Personnel, Public Grievances, Law and Justice), *available at* http://www.google.co.in/url?sa=t&rct=j&q=prs%20exit%20poll&source=web&cd=3&ved=0CDMQFjAC&url=http%3A%2F%2Fwww.prsindia.org%2Fuploads%2Fmedia%2FRepresentation%2Flegis1228369557_Legislative_Brief__Representation_of_the_People_Second_Amendment_Bill.pdf&ei=uLYIUtyCGI_QrQejqYFw&usg=AFQjCNF_xLXm0ttjRdZ0iOZj7MMdVaQSUA&bvm=bv.51495398,d.bmk

¹³ *Id.*

¹⁴ REPRESENTATION OF THE PEOPLE ACT, 1951 § 126A.

¹⁵ BASU, *supra* note 11 at 2559.

¹⁶ Paul H Weaver, *The New Journalism and the Old Thoughts After Watergate, the Public Interest*, 67 (SPRING, 1975); *see also* SWARUP & SINGHVI, *supra* note 12 at 834.

¹⁷ Mohinder v. CEC, *supra* note 6.

press with strong public opinion in the maintenance of equality and the rule of law,¹⁸ the essentials of any bona fide democracy. However, in order to formulate such public opinion, unobstructed access to information is required for the press.¹⁹

India's experience with the contentious idea of 'freedom of press' began from the time of the Constituent Assembly debates. On 1st December 1948, Shri Dhamodar Swarup Seth stated with much clairvoyance that Art.13²⁰ of the Draft Constitution has one 'significant omission' that is the freedom of the press.²¹ Consequently, an attempt was made to amend the draft to include "*the freedom of press and publication*".²² Although it was a failed attempt, it was significant in as much that the freedom was recognized as an essential ingredient of the freedom of speech and expression.

Agreeing with Shri Dhamodar Swarup Seth, Prof. K. T. Shah, a member of the Constituent Assembly, admitted to being bewildered at the 'omission', whether deliberate or by oversight, in Art.13 and found the above amendment necessary. He vehemently held,

*"The freedom of the press is one of the items round which the greatest, the bitterest of constitutional struggles have been waged in all constitutions and all countries in which liberal constitutions prevail. They have been attained with considerable sacrifice and suffering and have now been achieved and enshrined in those countries...In those(Countries) which have written constitutions they have ... expressly included the freedom of press".*²³

¹⁸ LALA LAJPAT RAI MEMORIAL LECTURES, DEMOCRACY IN INDIA AND JUDICIAL PROCESS, 1963.

¹⁹ SWARUP & SINGHVI, *supra* note 12 at 828-829.

²⁰ Freedom of Speech and Expression, finally became Art.19(1)(a) of the Constitution of India.

²¹ 7, ASSEMB. DEB. 712, (Nov. 4, 1948 to Jan. 1, 1949).

²² 7, ASSEMB. DEB. 715, (Nov. 4, 1948 to Jan. 1, 1949).

²³ 7, ASSEMB. DEB. 716, Amendment 421 (1949).

Later in *Maneka Gandhi v. Union of India*,²⁴ the Supreme Court drew a direct connection between “*free and open debate*” in a democracy with “*the freedom of press*”. The press acts as the “eyes” and “ears” of the general public. As held by Lord Donaldson, “Their right to know and their right to publish are neither more or less than the general public for whom they are *trustees*”.²⁵

In India, predictably, since the Constitution did not mention any specific freedom of Press, the onus was on the judiciary to interpret Art. 19 (1)(a) in a way to keep the fourth estate alive and active, which it indeed did so. This includes the liberty of publication and circulation, which is essential in the “*functioning of a democracy*”.²⁶ In *Life Insurance Corporation v. Manubhai Shah*,²⁷ the Supreme Court held that freedom of speech and expression is the lifeline of any democracy. It is thus, unnecessary to add it as a separate specific freedom. Any unreasonable restriction to fetter this freedom is ostensibly unconstitutional and ‘*cannot be held ransom to an intolerant group of people*’.²⁸

Dr. B.R. Ambedkar in response to repeated clamouring for the specific freedom of the press to be entered into the Constitution stated that the Press and the Citizens’ freedom are coextensive.²⁹ Further the word ‘*expression*’ is said to envelop within its folds the ‘*freedom of press*’.³⁰

²⁴ A.I.R. 1978 S.C. 640.

²⁵ A.G. v. Guardian, (1988) 3 All E.R. 545.

²⁶ Romesh Thapper v. Madras 1950 S.C.R. 594; *see also* 1, H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY 709 (2006).

²⁷ A.I.R. 1993 S.C. 171.

²⁸ M Hassan v. Government of Andhra Pradesh, A.I.R. 1998 A.P. 35.

²⁹ The same view was suggested by the court in Arundhati Roy, In re, A.I.R. 2002 S.C. 1375.

³⁰ BASU, *supra* note 11 at 2573.

THE DEFENCE OF EXIT POLLS VIS-A-VIS FREEDOM OF SPEECH AND EXPRESSION

The kind of constitutional acknowledgement that freedom of press gets has a direct bearing on the kind of defence which may be used to protect exit polls. To establish the same, a comparative approach between the American and Indian constitution has been taken.

The American Constitution expressly confers freedom to the press via the First Amendment.³¹ Although worded in absolute terms, the judiciary has from time to time made inroads into this right on various grounds.³²

This express freedom makes the defence of conduct and dissemination of information received from exit polls much simpler.³³ First, the “*laws that restrict the collection or dissemination of exit poll data infringe on the First Amendment guarantee of freedom of speech, not only is the dissemination of exit poll results a form of speech, but exit polling itself involves discussions between willing participants on the political issues of the day.*”

³⁴Second, the conduct of exit polls is defensible under freedom of press,³⁵ that is the right to gather news.³⁶ Because of this explicit mention of freedom of press there is no need for special interpretation so as to include conduct.³⁷

³¹ BASU, *supra* note 11 at 2560.

³² BASU, *supra* note 11 at 2564.

³³ U.S. CONST., amend. I.

³⁴ The Harvard Law Review Association, *Exit Polls and the First Amendment*, 98 No. 8 HARV. L. REV. 5 (Jun., 1985), available at <http://www.jstor.org/stable/1341071> (last visited Aug. 19, 2013). [Hereinafter “Exit Polls”].

³⁵ *Id.*

³⁶ *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).- Opinion of the Court by MR. JUSTICE WHITE, announced by THE CHIEF JUSTICE “ We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection”, available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=408&invol=665> (last visited Sept.28, 2013)

³⁷ Exit Polls, *supra* note 38.

In India while publication of exit poll data may be protected under Art.19 (1) (a), the absence of an express freedom of press is an impediment. To overcome the same , as indicated in the previous section, the freedom of press to conduct an exit poll may be recognized to be a facet of Art.19(1)(a). In the alternative, to overcome this impediment, one may use the interpretation lent to Art 21 by the Supreme Court, which is ‘*right to know*’.³⁸ As suggested earlier, the media aids in the moulding of public opinion through the transmission of ideas and facts. The media have a right to impart information³⁹ in order to support the ‘*right to know*’. Therefore, exit polls reveal important information, which the public have a right to know.

FREEDOM OF SPEECH AND EXPRESSION OF AN ELECTOR

Exit polls may also be protected by looking at the same from the perspective of the voter. Exit polls are an opportunity for the citizen to voice his or her opinion, to give expression to thought.

In *Kuldip Nayar v. Union of India*,⁴⁰ the question that arose was whether the right to vote was a Constitutional or Fundamental right? The court answered this drawing a fine line between the right to vote and freedom of voting, as species of freedom of expression.

The right to vote on account of numerous precedents was held to be a mere statutory right.⁴¹ On the other hand in light of *Union of India v. Association for Democratic Reforms*,⁴² wherein it was held that the voter’s speech or expression in case of election would include

³⁸ *Reliance Petrochemicals v. Indian Express* A.I.R. 1989 S.C. 190; Sabyasachi Mukharji, J’ right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution’

³⁹ *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India* A.I.R. 1986 S.C. 515

⁴⁰ (2006) 7 S.C.C. 1.

⁴¹ *Jyothi Basu v. Debhi Ghosal*, A.I.R. 1982 S.C. 986.

⁴² (2002) 5 S.C.C. 294.

casting of votes, that is to say, voter speaks out or expresses by casting vote, the court chose to hold freedom to vote as a sub-sect of freedom of expression.⁴³

The case is limited in its scope as the elections in question were that of Council of states⁴⁴, however, it still raises the all important proposition of freedom to vote and Art. 19(1)(a). The most recent recognition of the same by the Supreme Court was the right to a negative vote.⁴⁵

An exit poll seeks to simulate the process of voting where the voter is asked about the vote cast and by declaring so he/she is merely giving rise to an expression, protected under Art. 19(1)(a).

Further by voluntarily declaring one's vote, the elector does not violate secrecy of ballot. Secrecy of ballot has become one of the prerequisites of free and fair elections, and on which a democratic country may be judged.⁴⁶ In *People's Union for Civil Liberties (PUCL) v. Union of India*,⁴⁷ the Court held that:

“It ...requires to be well understood that democracy based on adult franchise is part of the basic structure of the Constitution.”

The Supreme Court took this proposition a step further and held, *“free and fair election is a constitutional right of the voter, which includes the right that a voter shall be able to cast, the vote according to his choice, free will and without fear, on the basis of information*

⁴³ *Kuldip Nayyar v. UOI* (2006) 7 S.C.C. 1. [Hereinafter referred to as “Kuldip v.UOI”].

⁴⁴ Rajeev Kadambi, *Prevailing Debate Regarding: Right to Vote as a Fundamental Right: ‘Mistaking the Woods for Trees.’ P.U.C.L. v Union of India*, available at <http://ssrn.com/abstract=1631767>. (last visited Sept. 28, 2013).

⁴⁵ 27 September, 2013, available at <http://indiankanoon.org/doc/58263027/> (last visited Oct. 28, 2013)

⁴⁶ Robert A. Dahl, *What Political Institutions Does Large-Scale Democracy Require?*, POLITICAL SCIENCE QUARTERLY, 195, Vol. 120, No. 2 (Summer, 2005).

⁴⁷ *PUCL v. UOI*, *supra* note 13.

received.”⁴⁸ Courts have continued to hold that secrecy of the ballot is “*considered sacrosanct in a democratic process of election and it cannot be disturbed lightly*”.⁴⁹

To strengthen the foundation of this right, the parliament in its wisdom, through legislation, provided for the secrecy of ballot so that the voter may be free from any political pressures.⁵⁰ The R.P. Act, 1951 and the relevant rules⁵¹ contain provisions for the preservation of the sanctity of the secret ballot.

The few words that s.94 contain provides profound implications on the kind of democracy India wishes to lead. In *Raghubir Singh Gill v. Gurcharan Singh Tohra & Ors*⁵², while trying to resolve the conflict between secrecy of ballot and free and fair elections, the Supreme Court unravelled the intent of the section. The court backed many earlier Supreme Court decisions which held that legitimate democracies conduct free and fair elections based on adult suffrage. This particular constitutional disposition must be kept in mind, while interpreting the section, so as to propel and not retard the above process.

The question of vital importance which was answered by the court was whether s.94, “*enacted with a view to ensuring total secrecy of ballot as an integral part of free and fair election vouchsafed by the Constitution, puts a complete embargo on the disclosure for which the vote was cast?*”⁵³ The court reasoned that the phrase “*shall be required*” has an element of compulsion and on a pure grammatical construction it means that the voter cannot be compelled against his will to disclose how he has voted. However, if wished to voluntarily

⁴⁸ *Kuldip v. UOI*, *supra* note 47.

⁴⁹ *P.H. Pujar v. Kanthi Rajashekhar Kidiyappa and Others*, (2002) 3 S.C.C. 742. *P.H. Pujar v. Kanthi Rajashekhar Kidiyappa and Others*, (2002) 3 S.C.C. 742.

⁵⁰ *Kuldip v. UOI*, *supra* note 47.

⁵¹ CONDUCT OF ELECTION RULES, 1961.

⁵² A.I.R. 1980 S.C.1362.

⁵³ *Id.*

disclose for whom he cast his vote, he may do so. S.94, as the court suggested, is a privilege given to the voter that may be waived.⁵⁴

Thus a voter revealing his vote in an exit poll is only exercising his/her freedom of speech and expression and it is not antithetical to secrecy of the ballot.

RESTRICTIONS ON FREEDOM OF SPEECH AND EXPRESSION

The First Amendment of the American Constitution ‘enacts a prohibition so heavy that there lies a heavy burden on the person transgressing it to justify it’ and that exceptions evolved are the acts of the judiciary.⁵⁵ On the other hand, in India, reasonable restrictions are allowed in those matters enlisted in Art 19(2)⁵⁶, which is an exhaustive provision.⁵⁷

As pointed out by J. Douglas in *Kingsly Corp v. Regents of the University of New York*,⁵⁸ the difference between the First Amendment and Art 19(1) (a) is that the latter provides for censorship on reasonable and listed grounds.⁵⁹ Reasonable implies intelligent care and deliberation that is the choice of a course which reason directs.⁶⁰ Thus, the Press’ freedom is only to the extent that it does not invade into the rights of a citizen, sovereignty of the state, public order, decency and morality.⁶¹

⁵⁴ *Id.*

⁵⁵ H.M. SEERVAI, *supra* note 30

⁵⁶ H.M. SEERVAI, *supra* note 30 at 710.

⁵⁷ *Sharma v. Sri Krishna*, A.I.R. 1959 S.C. 395.

⁵⁸ 360 U.S. 684; *see also* 1 H.M. SEERVAI, *supra* note 30 at 710.

⁵⁹ INDIA CONST. art. 19, § 2; Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

⁶⁰ BASU, *supra* note 11 at 2157; *see also* *Janath Mosque v. Vakhon Joseph*, A.I.R. 1955 T.C. 227 (FB).

⁶¹ *Prabhu Dutt (Smt) v. Union of India*, A.I.R. 1983 S.C. 6; *see also* SWARUP & SINGHVI, *supra* note 12 at 835.

It seems rather farfetched to include Exit Polls under the heading of Sovereignty, Public order, and Security of State (all related grounds). Defamation too may not be appropriate enough ground, as the exit polls project facts, which in most cases are the truth and truth is the best defence to allegations of defamation. The Court's commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression.⁶² To fulfil the said test a material relation which is direct and proximate⁶³ and not remote must be established⁶⁴ and in this case as illustrated above it does not.

Adding a new ground through amendment specific to exit polls is amusing as it would result in the “*statutise-ation of the Constitution, a document which lays down basic principles and not nuanced modalities*”.⁶⁵

Mr Soli Sorabjee⁶⁶ while objecting to the Commission's proposal for a ban on the publication and telecast of opinion and exit polls during elections back in 2004 argued that, “*the proposed restrictions in the form of prohibition of publication or opinion or exit polls are clearly outside the permissible heads under Article 19(2) and, consequently, the proposed legislation would be clearly in breach of Article 19(1) and, hence, unconstitutional.*”⁶⁷

⁶² S. Rangarajan v. P. Jagjivan Ram & Ors., (1989) 2 SCC 574

⁶³ M.R.F. Ltd. v. Inspector Kerala Government, (1998) 8 S.C.C. 227.

⁶⁴ Superintendent District Jail v. Lohia A.I.R. 1960 S.C. 633.

⁶⁵ Debating Freedom or Fairness, *supra* note 8.

⁶⁶ Former Attorney-General for India from 1998 to 2004.

⁶⁷ THE HINDU, available at <http://www.hindu.com/2004/04/10/stories/2004041005910100.htm> (last visited Sept. 2, 2013).

CONCLUSION

“*I disapprove of what you say but I will defend to death your right to say it.*”⁶⁸ –this is the core of our argument defending exit polls. It is safe to conclude that there are no lawful methods by which exit polls may be banned completely.

As identified and elucidated in the course of this paper, right to speech is primary and an exception ought to be construed purposefully. This epitomizes the spirit that pervades the Indian Constitution, a document rich in moderation.⁶⁹

It follows that if the ban on the conduct and publication of exit polls data goes unchecked, then other information can also be brought under the radar of the same. A frightening development of the above maybe observed in the discussions of the motion for consideration of the Representation of the People (Amendment) Bill, 2009 when many Members of *Lok Sabha* wanted a ban on opinion polls too. Opinion polls have undeniable free speech elements; by ensuring more periodic feedback than that provided by the ballot alone and also by encouraging public debate on governance and coalescing public opinion.⁷⁰ The Election Commission has even written to the Centre to explore the possibility of bringing in the ban, if necessary by means of an ordinance.⁷¹ The possibility of restriction in the future on editorial pieces or opinions made via the Media, which may influence the voter’s decision, is not farfetched.

The then Attorney General, Soli J Sorabjee when asked to opine on the Election Commission's proposal for an Ordinance to ban publication of opinion and exit polls during the period of election in the year 2004, submitted a report in support of the Media’s

⁶⁸ EVELYN BEATRICE HALL, *THE FRIENDS OF VOLTAIRE* (1906)

⁶⁹ Debating Freedom or Fairness, *supra* note 8.

⁷⁰ Debating Freedom or Fairness, *supra* note 8.

⁷¹ J. Venkatesan, Parties seek ban on opinion polls from the date of notification, *THE HINDU* Apr. 8, 2004, available at <http://www.hindu.com/2004/04/08/stories/2004040807240100.htm> (last visited Aug. 30, 2013).

fundamental right to free speech.⁷² “A citizen may or may not vote for a particular party or its candidate or may not vote at all depending upon his assessment of the weight to be attached to the opinion and exit polls. It needs to be emphasized that there is more than one opinion and exit poll and the citizen can decide which of them is credible and reliable for making his informed electoral choice just as he or she will assess the weight to be attached to the editorials and articles projecting different views in several newspapers”.⁷³

The media however is allowed to run rampant unchecked. The public, on which the media runs, acts a check on its powers. Every individual and every institution in our society enjoys a certain reservoir of goodwill. There is, however, a limit to the amount of goodwill that any individual or institution enjoys. If the media abuses its power, say to distort the results of an exit poll, which the public finds out, it inflicts harm upon itself. That is, it depletes its goodwill. A person or institution such as the media must use its reservoir of goodwill judiciously in order not to run out of it.⁷⁴ Self-regulation by media houses is the best and most legally compliant method to keep itself in check.⁷⁵ These regulations could include:-

1. Exit polls conducted for public consumption should be impartial and non-partisan.

⁷² No Ordinance to ban exit polls: Sorabjee, THE TIMES OF INDIA, Apr 9, 2004, available at http://articles.timesofindia.indiatimes.com/2004-04-09/india/28324946_1_exit-polls-parties-general-soli-j-sorabjee (last visited Aug. 30, 2013).

⁷³ Ban on opinion, exit polls unconstitutional: Soli Sorabjee, THE HINDU, Apr. 10, 2004, available at <http://www.hindu.com/2004/04/10/stories/2004041005910100.htm> (last visited Aug. 30, 2013).

⁷⁴ Burns W. Roper, *Early Election Calls: The Larger Dangers*, in *Early Calls of Election Results and Exit*, available at <http://www.jstor.org/stable/2748928> (last visited Aug. 19, 2013).

⁷⁵ In Germany, while it is not illegal, the polling organizations voluntarily restrict polling immediately prior to elections (Marsh 1984): Vicki G. Morwitz and Carol Pluzinski, *Do Polls Reflect Opinions or Do Opinions Reflect Polls? The Impact of Political Polling on Voters' Expectations, Preferences, and Behavior* 23 No. 1 J. CONSUMER RESEARCH 53-67 (Jun., 1996), available at <http://www.jstor.org/stable/2489665> (last visited Aug. 19, 2013).

2. Methods should be transparent, public, and well-documented. These goals can be achieved by publicly describing the methods prior to conducting the exit poll and by adhering to the standards of minimal disclosure delineated in this document.
3. Data collectors must adopt study designs for their exit polls that are suitable for producing accurate and reliable results and that follow specific procedural and technical standards stipulated in this document.
4. When reporting results from exit polls, data collectors and analysts must be careful to keep their interpretations and statements fully consistent with the data. Speculation and commentary should not be labelled as data-based reporting. Limitations and weaknesses in the design of an exit poll, its execution, and the results must be noted in all reports and analysis. Results should be released to the public and other interested parties through the general media and simultaneously made accessible to all.
5. The identity of respondents in exit polls must be protected.⁷⁶

However, the only way the legislature may rightly interfere while still maintaining some semblance of constitutional values, is to mandate certain information to be provided to the Public while releasing exit poll data. During the discussion on the motion for consideration of the Representation of the People (Amendment) Bill, 2009 most arguments favouring a ban on the Media's conduct and dissemination of exit polls result was that, "*A major part of the Press has surrendered themselves either to the industrialists or to some ruling party*".⁷⁷ In order to avoid partisan influences and to make the whole process more transparent, along with the publication of exit poll data the law can insist the following data to be released by

⁷⁶ WAPOR GUIDELINES FOR EXIT POLLS AND ELECTION FORECASTS.

⁷⁷ SHRI KALYAN BANERJEE (SREERAMPUR): Discussion on the motion for consideration of the Representation of the People (Amendment) Bill, 2009, as passed by Rajya Sabha, *available at* <http://www.indiankanoon.org/doc/454661/> (last visited Aug. 19, 2013).

media houses- the name of the sponsor of the survey; the name of the person or organization that conducted the survey; the date on which, or the period during which, the survey was conducted; the population from which the sample of respondents was drawn; the number of people who were contacted to participate in the survey; and if applicable, the margin of error in respect of the data obtained.⁷⁸

There are ancillary advantages to exit polls, in fact, it has been advocated that Exit polling may actually promote and guarantee honest elections,⁷⁹ due to the presence of reporters near the polling booth which may discourage any “*government impropriety in collecting and counting ballots*”.⁸⁰ In fact, a survey conducted by major networks concluded that there is a much larger chance of government fraud than that of the media fabricating poll data to influence elections. This is so, owing to the fact that there are several news organizations conducting exit poll data, whereas the government has a monopoly on the tabulation of official returns.⁸¹

Constitutional support for exit polls, either as freedom of speech of the media and the citizens or the citizen’s right to know are concepts known and utilized by the Indian Judiciary. Extending the same to protect exit polls is but natural and logical.

Although there may be many identifiable faults in exit polling and publication of such data, these are curable defects, as illustrated above. All that remains is a challenge to s.126A, and

⁷⁸ Article 19 Global Campaign for Free Expression, *Comparative study of laws and Regulations Restricting the Publication of Electoral Opinion Polls*, available at <http://www.article19.org/data/files/pdfs/publications/opinion-polls-paper.pdf> (Last visited Sept 28, 2013)

⁷⁹ Exit Polls, *supra* note 38.

⁸⁰ Exit Polls, *supra* note 38. (*the possibility of government fraud is greater than the possibility that the media might fabricate poll data to influence elections or to cast doubt on official returns because several news organizations now vie to gather exit poll data, whereas the government has a monopoly on the tabulation of official returns. The major networks, the Associated Press, the New York Times, and other newspapers have all taken exit surveys*); see also *Daily Herald Co. v. Munro*, 747 F.2d 1251 (8th Cir. 1984).

⁸¹ Exit Polls, *supra* note 38.

one may expect with reasonable certainty that the fourth estate as well as the citizen will not go unprotected.