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CONTENTS

FOREWORD

It is with great pleasure that we bring forth the third installment of the third volume of Comparative Constitutional Law and Administrative Law Quarterly. Three of the articles in this volume relate to constitutional law, and two to administrative law. Incidentally, all three constitutional law articles centre around the judiciary. Interestingly, two of these discuss the Cassation Courts model as solutions to certain dilemmas-though in different contexts. Another common theme we see in this edition is calls for greater judicial accountability, in line with the doctrine of checks and balances, as opposed to a watertight separation of powers. The administrative law articles relate to the oft discussed topics of delegated legislation and bias in administrative decision making, however, putting forward new analysis that makes for compelling reading in light of recent developments, as shall be highlighted below.

While India debates the appointment of judges through the controversy surrounding the National Judicial Appointments Commission, similar questions are being raised as Bangladesh debates their impeachment. In the first piece, *Advocate Asaduzzaman Siddiqui v Bangladesh: Bangladesh's Dilemma with Judges' Impeachment*, M Jashim Ali Chowdhury and Nirmal Kumar Saha discuss the much publicized tussle between the executive and judiciary in the matter of impeachment of judges in Bangladesh. This article is a critique on the 2016 Apex Court verdict that held void the 16th Amendment, which empowered Parliament to dismiss Supreme Court judges in case of proved allegations of incapacity or misconduct. The decision under critique was recently upheld by the Appellate Division. The immense contemporary relevance of the issue is reflected perhaps in the speed of the developments in the case – reportedly, the government is already looking for ways to restore the Amendment.

In *Reforming the Rule Against Bias in Administrative Law*, Sanjayan Rajasingham, focusing on the Sri Lankan jurisprudence, along with references to the position in the UK as well as India, argues for a flexible approach when considering the choice between the 'reasonable suspicion' and 'real likelihood' tests rather than choosing one of these. This, it is contended, is necessary in order to achieve a balance between fairness and efficiency, and each of the tests, as the author demonstrates, stands for a different one of these values.

In *The Henry VIII Clause: Need to Change the Color of Our Shades*, Priya Garg and Amrita Ghosh take on the 'Removal of Doubt or Difficulty' or 'Henry VIII' clause. The authors argue that being instruments of necessity in India, it would not be desirable for any variant of the Henry VIII clause to be declared illegal or void *per se*. Rather, a case-by-case approach should be adopted. The authors put forth fresh analysis on the judicial dicta on the issue and explore the reasons behind the negative connotations associated with the Henry VIII clause. This discussion assumes special significance in light of the debate surrounding the Great Repeal Bill in the United Kingdom, as well as the Indian legislative scenario where statutes which are skeletal, in that they leave a lot of room for the Executive to 'fill in the gaps' are passed.

In *The Judiciary as 'State': To Be or Not to Be,* Sharad Verma examines Article 12 and the understanding of 'State', which for litigants makes the difference between dismissal of a case and achieving a remedy. With reference to the Constitutional Assembly Debates and comparative jurisprudence from the USA and the UK, and drawing on the experience in the recent *Shahid Balwa* case, the author argues that 'State' must be interpreted to include the judiciary despite its not being included in Article 12 explicitly. Drawing attention to the curious position in Indian jurisprudence whereby Courts have taken on the role of 'State' for the purpose of giving effect to Part IV (Directive Principles), but not Part III (Fundamental Rights), the author makes a compelling argument in favour of the inclusion of the judiciary in 'State,' along with a proposed solution seeking to avoid either extreme: fundamental rights violations by courts going unaddressed, or infinite litigation.

In *The Supreme Court: To Change or Not to Change? An Analysis of the Proposed Idea of National/Regional Court of Appeal,* Akshata Kumta and Naman Lohiya discuss a concept elaborated in the 229th Law Commission Report, as one of the potential solutions to reduce the burden on the judiciary-there being a backlog of more than three crore cases in courts across the country, and 65,000 in the Supreme Court alone: the National and Regional Courts of Appeal. Interestingly, as the authors have pointed out, this was also recommended by the Supreme Court itself, in the *Bihar Legal Support Society* case. The authors, in their critique as to the feasibility of this model, draw on the experience from other jurisdictions where such a system has been implemented, the Irish Superior Court system as well as the German Cassation Courts.

We are extremely grateful to the authors for their contributions, and also for their cooperation throughout the entire editorial process. We also thank our Vice Chancellor and Chief Patron, Dr Poonam Pradhan Saxena, as well as our Director, Dr. I.P. Massey, for their continued support. CALQ is a relatively young journal, and we hope to continue to carry rich analysis, reach out to more jurisdictions and foster debate on contemporary constitutional and administrative law issues. To this end, we are keen to receive any comments or criticism and look forward to hearing from anybody who may have something to share with us in this regard.

Ragini Gupta

(Editor in Chief)

ADVOCATE ASADUZZAMAN SIDDIQUI V. *BANGLADESH*: BANGLADESH'S DILEMMA WITH JUDGES' IMPEACHMENT

- M Jashim Ali Chowdhury[*] & Nirmal Kumar Saha[#]

ABSTRACT

Like the major constitutional systems of the world, Bangladesh had a parliamentary removal process for the judges of the highest court. The system was however changed by the military rulers of late 1970s. Very recently, the parliament of Bangladesh attempted to revive the original system and the Sixteenth Amendment to the Constitution of Bangladesh, was passed in 2014. The case at hand, Asaduzzaman Siddiqui v. Bangladesh is a challenge to this Amendment. This case comment analyzes the arguments and reasoning of the case and argues that the judges and counsels concerned have wasted a chance to analyze this Amendment from its proper perspective. Therefore, a very high profile constitutional litigation ended in adding virtually nothing to the constitutional jurisprudence of Bangladesh.

INTRODUCTION

The executive, legislature and judiciary constitute the principle organs of a modern body politic. Constitutions thrive to demarcate each organ's place and limits through creative articulation of separation of power, and checks and balances. Keeping the democratic sovereignty of the people as a foundation, the three organs continue to struggle and co-operate with each other in managing the affairs of State. In the overall framework, the elected executive remains answerable to the legislature, and the legislature to the people. The judiciary, on the other hand seeks to ensure the

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due observance of the law of the land – the Constitution by the executive and legislature. Participation of the legislature in judges' appointment and removal from the higher judiciary is a well-established trend across the world's leading constitutional system; the judiciary being an unelected organ giving a further justification for participation of the executive and legislature. In the U.K., judges are removed by the Crown after both the Houses pass a resolution indicting him for corruption or offences involving moral turpitude.[1] In the U.S., judges of the Supreme Court are removed through the combined efforts of House of Representatives and the Senate.[2] The Indian Parliament also enjoys this privilege.[3] The Constitution of Bangladesh (hereinafter referred to as "the Constitution") originally provided for parliamentary removal of a Supreme Court judge found guilty of 'gross misconduct' and physical or mental incapacity to perform the functions of his/her office.[4]

This provision was later amended by the Martial Law Proclamation in 1977.[5] The new system established a Supreme Judicial Council (hereinafter "the Council") comprising the Chief Justice of Bangladesh and the two other senior judges in the Appellate Division of the Supreme Court.[6] Under the new system, the President would write to the Chief Justice to initiate an investigation by the Council into any allegation communicated to him against a judge from any reliable source. Even the Council itself may communicate to the President any such information or allegation of misconduct. Upon receipt of such information or allegation, the President would need to satisfy himself that he has reasons to 'apprehend' that a judge is physically or mentally incapacitated or has committed gross misconduct.[7] Until and unless the President was so satisfied and he formally authorised the Council, no investigation would start. If, after the investigation,

[1] The Act of Settlement, 1701, The Supreme Court Act. 1981. Sec. 11(3)

[2] THE CONSTITUTION OF THE UNITED STATES OF AMERICA, art. I, Sec. 3, Cl.6 and 7

[3] THE CONSTITUTION OF INDIA. Jan. 26.1950, art.124(4), The Judges (Inquiry) Act, 1968 and The Judges (Inquiry) Rules, 1969

[4] THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH, Nov. 4, 1972, art. 96(3) (Bang.).)

[5] The Proclamations (Amendment) Order, 1977 (Proclamations Order No. I of 1977)

[6] THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH, Nov. 4, 1972, art. 96(3) (Bang.).

[7] *Id.*, art. 96(5).

the Council found the allegation proved and recommended that the judge concerned be removed, it was provided that the President 'shall' by order remove the judge from office.[8]

Tailored to suit the temper of a military run presidential government, the Council system raised significant concerns over the efficiency and integrity of the whole process. Experiences also indicate that the executive being the dominant arbiter of things, the Council remained grossly dysfunctional and ineffective over the years.[9] The ineffectiveness may be attributed primarily to the successive political executives' reluctance to trigger the Council proceedings against judges appointed by the same government.[10] The ineffectiveness is further coupled with the reluctance shown by the executive in instances where there had been apprehension that the Supreme Court judges would favor their colleagues during the investigation process.[11] However, the system had been used once for the removal of a High Court Judge.[12]

[8] ,*Id*.,art.96(6).

[9] S.M. Masum Billah, *Faith, hope and promise*, Dhaka Tribune, Aug. 28, 2014; Anisur Rahman, *16th Amendment of the constitution: Another view*, The Daily Star, Sep.23, 2014.

[10] Justice Latifur Rahman of the High Court Division was allowed to resign and silently leave the country on the face of a substantiated allegation of collision with a former president in relation to a corruption allegation pending against him. Editors of the newspapers covering the scandal were however punished for contempt of court (State v. Chief Editor, Manabjamin, 57 DLR (2005) 359). On another occasion, Supreme Judicial Council was not triggered against Justice Faisal Mahmud Faizee against whom there was a well-founded allegation of forging his LL.B. certificate. In this occasion as well, the Editors of the newspaper covering the scandal was punished for contempt of court (*Md. Faiz* v. *Ekramul Haque Bulbul and others* 57 DLR 670). On a third occasion, an allegation of misconduct against the sitting Chief Justice by one of his colleague in the Appellate Division Justice Shamsuddin Haider Manik was not paid heed to (http://bdnews24.com/bangladesh/2015/09/13/justice-shamsuddin-choudhury-seeks-chief-justice-sk-sinhas-removal; Accessed on June 1, 2017)

[11] Several of the Supreme Court judges were invited to "tea" in the presidential palace during the military backed caretaker government of 2007. Some of them actually resigned after the tea and two of them, including the current Chief Justice Mr. Surendra Kumar Sinha, declined to resign (http://zeenews.india.com/news/south-asia/ex-bangladesh-president-tried-to-remove-judges_547820.html?pfrom=article-next-story; Accessed on: May 30, 2017).

[12] Mr Shahidur Rahman, a High Court Division Judge, was removed by the President on recommendation of the Supreme Judicial Council in 2004. This incident was triggered by a litigant of the Supreme Court lodging a complaint to the Bar Council against Mr Shahidur Rahman for taking bribe to secure a favorable judgment which he ultimately failed to secure. President of the Bar Council then wrote to the Chief Justice and the matter got immediate attention of media. The decision to trigger the Council process too was motivated by the serious political repercussions it created for the ruling party (*See* – Anisur Rahman , Citizens' concern over appointment of judge in Supreme Court)

Interestingly, the judges in the higher judiciary remained self-content with this system as the actual investigation of an allegation and recommendation of the removal of a judge rested with the court itself – the Chief Justice and two other of his senior colleagues. This perhaps was the most plausible explanation for the Appellate Division acceding to this change in the original Article 96 of the Constitution, though almost all other changes brought by the military regime in the Constitution were invalidated through the celebrated Fifth Amendment Judgment of 2009. The Appellate Division found the Council system more transparent and pro-judiciary than the original one involving the Parliament.[13] The 15th Amendment of 2011, which brought almost the whole of the original Constitution back, left the Council system intact.[14] The Parliament, however, changed its mind shortly. Accordingly, parliamentary involvement in the judges' removal procedure was resurrected through the 16th Amendment of 2014.[15]

Opinion on the parliamentary removal of judges is divided in Bangladesh. Some commentators have argued that parliamentary removal of judges is more in line with the doctrine of separation of power and checks and balances.[16] However, others have emphasized that the local specificities of Bangladesh coupled with the members of parliament being enchained within strict party

[13] Khandker Dlewar Hossainv. Bangladesh Italian Marble Works Ltd, 15 MLR (AD) 249-368: "This substituted provisions being more transparent procedure than that of the earlier ones and also safeguarding independence of judiciary, are to be condoned" at p 177 of the Full Text Available at http://www.dwatch-bd.org/5th%20Amendment.pdf (Accessed on June 2, 2017)

[14] Bang. Const., amend. XV, § 31.

[15] Bang. Const., amend XVI, 2014 has revived the original Article 96. Article 96 as it stands currently is:

> "96. (1) Subject to the other provisions of this Article, a Judge shall hold office until he attains the age of sixty-seven years.
>
> (2) A Judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of Members of Parliament, on the ground of proved misbehaviour or incapacity.
>
> (3) Parliament may by law regulate the procedure in relation to a resolution under clause (2) and for investigation and proof of the misbehaviour or incapacity of a Judge.
>
> (4) A Judge may resign his office by writing under his hand addressed to the President."

The Sixteenth Amendment Bill is available online at: http://www.loc.gov/law/foreign-news/article/bangladesh-sixteenth-amendment-to-constitution-empowers-parliament-to-impeach-justices/ (Accessed on April 30, 2017)

[16] Anisur Rahman, *16th Amendment of the constitution: Another view*, THE DAILY STAR, Sep. 23, 2014.

affiliation pursuant to Article 70 of the Constitution,[17] do not give rise to an ideal position to show adequate respect to the independence of judiciary.[18] The Supreme Court's recent invalidation of the 16th Amendment Act in *Advocate Asaduzzaman Siddiqui* v. *Bangladesh* resides primarily on this apprehension.[19]

THE SIXTEENTH AMENDMENT CASE

Nine practicing advocates of the Supreme Court, affiliated with a NGO named Human Rights and Peace for Bangladesh (HRPB), filed a writ petition before the High Court Division of the Supreme Court challenging the constitutionality of 16th Amendment. The High Court Division declared the amendment unconstitutional[20] and the Appellate Division upheld the same.[21]While the constitutional challenge provided significant scope for the lawyers and judges to re-examine the entire fabric of the constitutional system of Bangladesh, the line of submission and reasoning adopted by the petitioners, respondents, *amicus curie,* the majority and dissenting opinion were disappointing. A thorough reading of the judgments of the High Court Division and Appellate Division in this case reveals that both the bar and bench failed to rise up to the occasion. Most of the arguments were based on a purely literal understanding of key constitutional principles, or were rather polemic, and insufficiently backed by sound constitutional analysis and reasoning.

[17] Article 70, popularly known as the anti-defection clause of the constitution of Bangladesh, restricts the parliament members voting rights in the House by requiring the vacation of a member's seat who would decide to go against the party decision.

[18] Md Yasin Khan Chowdhury, *Removal of Judges under 16th Amendment: A Euphemism to Curb on Judiciary*, 3, DIU Journal of Humanities and Social Science, 89, 89 – 102, (July 2015)

[19] *Bangladesh High Court scraps 16th amendment to constitution*, THE DAILY STAR, May 06, 2016.

[20] *Advocate Asaduzzaman Siddiqui* v. *Bangladesh* (Writ Petition No. 9989/2014). Full text of the High Court Division judgment is available at: http://www.supremecourt.gov.bd/resources/documents/783957_WP9989of2014_Final.pdf (Accessed on - December 28, 2016). Pages referred to in subsequent footnotes correspond to the page number of the High Court Division judgment downloaded from the Supreme Court website cited here.

[21] The case reached the Appellate Division as *Bangladesh v. Advocate Asaduzzaman Siddiqui* (Civil Appeal No. 06/2017). Full text of the Appellate Division judgment is available at: http://www.supremecourt.gov.bd/resources/documents/1082040_C.A.6of2017_Final_3.8.2017.pdf (Accessed on - August 10, 2017) Pages referred to in subsequent footnotes correspond to the page number of the Appellate Division judgment downloaded from the Supreme Court website cited here.

A. Independence of Judiciary and Separation of Powers as Basic Structures of the Constitution

In Bangladesh, the doctrine of Basic Structure is a widely used tool for litigants as well as courts. Relying on Articles 7, 7B and 22 of the Constitution,[22] it was argued that the Amendment would lead to legislative intervention in judicial business, thereby destroying the basic structure components of judicial independence and separation of power.[23] While these two constitutional precepts were overtly relied upon in the judgment, the doctrine of check and balance was neither argued by the petitioner nor the *amici curiae*. Therefore, the majority opinion at the High Court Division left aside a very important doctrine. While Article 22 of the Constitution deals with separation of the judiciary from the executive, an *amicus curie* interpreted it as contemplating a judiciary free from the "interference" of the other two organs of the State.[24] Neither the petitioner, nor the *amicus curie* and not even the majority, attempted an interpretation of "interference" *vis a vis* "check and balance". Though the Attorney General Mahbubey Alam explained why and how the parliamentary removal process will not be an "interference" rather an institutional participation in the overall accountability structure,[25] the majority view did not accommodate this. Rather the majority opinion found "no earthly reason to disagree"[26] with the petitioners' views.

Further, the lead counsel of the petitioner's side, Advocate Manzill Murshid, took a strict view of separation of executive, legislative and judicial functions. Unaccompanied by any substantial analysis of the constitutional scheme of separation of power and checks and balances, Mr. Murshid claimed that the Constitution contemplates a watertight separation between Executive, Legislature and Judiciary, and investigation into judges was a power of judicial nature

[22] Article 7 of the Constitution is about the supremacy of the Constitution and Article 7B is about certain provisions (including Article 22 of the Constitution)being unamendable. Article 22 of the Constitution reads as: "The State shall ensure the separation of the judiciary from the executive organs of the State".

[23] Manzill Murshid, *supra note* 20, 24-25.

[24] *Ibid,* Dr. Kamal Hossain at 39.

[25] *Ibid,* Attorney General Advocate Mahbubey Alam at 28.

[26] *Ibid,* Justice Moyeenul Islam Chowdhury at 130.

unsuitable for parliamentary exercise.[27] While the Constitution clearly rejects a watertight separation of power[28] the majority agreed with Mr. Murshid, without highlighting any specific article of the constitution that contemplates such a watertight separation.[29]

At the Appellate Division, Chief Justice Surendra Kumar Sinha endorsed the majority view of the High Court Division by re-stating that "Under the Constitution, the higher judiciary is entirely separated from the Executive and Legislature and is absolutely independent."[30] Interestingly, an unusual dimension of the doctrine was considered in the High Court Division when Justice Moyeenul Islam Chowdhury, posed a question regarding the 16th Amendment affecting the independence of judiciary, component of the basic structure of the Constitution, "in public perception?" According to him:

> .. [A] billion-dollar question has arisen: whether the Sixteenth Amendment has infringed upon the independence of the Judiciary in public perception? My answer is obviously in the affirmative. In public perception, the independence of the Judiciary has been curbed by the Sixteenth Amendment. We must attach topmost importance to public perception when it comes to the question of independence of the Judiciary. If

[27] *Ibid*, Manzill Murshid, at 24. Advocate Murshid argued, "[T]he Constitution [of Bangladesh] does not allow or contemplate any judicial role by the Parliament and the role of each organ of the State is clearly defined and carefully kept separate under the Constitution to maintain its harmony and integrity and to maximize the effectiveness of the functionality of the 3(three) organs of the State, that is to say, the Executive, the Legislature and the Judiciary and the assumption of the judicial role by the Parliament in the matter of removal of the Judges of the Supreme Court derogates from the theory of separation of powers."

[28] THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH,Nov. 4, 1972Arts. 62(2), 78(2), 93(1), 107, 115, 133 (Bang.): would confirm that installing a Westministerial parliamentary form of government Bangladesh Constitution invites a fusion of power rather than a watertight separation propagated by Mr Manzill Murshid. Advocate Mahmudul Islam, the leading constitutional authority of Bangladesh has termed the Bangladeshi scheme of separation of powers as one of "fusion of power". To him, "What the constitution has done can very well be described as "assignment"; assignment of powers of the Republic to the three organs of the Government and it provides separation of power in the sense that no one organ can transgress the limit set by the Constitution or encroach upon the powers assigned to the other organs." (MAHMUDUL ISLAM, CONSTITUTIONAL LAW OF BANGLADESH, 65, (2nd Ed, Mullick Brothers, Dhaka, 2003)).

[29] Justice Moyeenul Islam Chowdhury, *supra note* 20, at 131.

[30] Justice Surendra Kumar Sinha, *supra note 21* at 239

> according to public perception, the Judiciary is not independent, then it cannot be sustained at all.[31]

While "public perception" is hard to determine and is never a logical determiner of constitutionality, it is even harder for a judge on the Bench enter an assessment of public perception on a pure legal question.[32] Interestingly, Justice Moyeenul Islam Chowdhury concedes at a later stage that courts "do not administer justice by plebiscite."[33]

B. Questions into the suitability and desirability of parliamentary involvement

The second question in the case was whether Parliament's participation in the judges' removal would constitute an infringement of judicial independence. Seen in this light, the desirability and permissibility of Parliament's institutional participation in judges' removal process was expected to be questioned, supported or tested by the parties and the judges. The case in hand, however, ended in some disappointingly misdirected arguments and reasoning.

Firstly, Dr. Kamal Hossain, an important *amicus curie* in the case has argued that since Parliament is not entitled to reduce the salaries of the judges as per Articles 88 and 89 of the Constitution, it is also not entitled to remove them from their office.[34] Like India, Articles 88 and 89 of the Constitution, consider the salaries and financial benefits of the higher court judges during their tenure, a charge upon the Consolidated Fund and the Parliament is prohibited from changing it to the judges' disadvantage. However, Dr. Hossain failed to explain how this could preclude a parliamentary participation in the removal of a judge who is facing an allegation of misconduct and gross violation of the Constitution. Without much inquiry into the contextual and situation difference between these two cases, the majority opinion in the High Court Division felt

[31] *Supra note* 20, p 139.

[32] *Bangladesh Italian Marble Works Limited v. Bangladesh* 2006 (Special Issue) BLT (HCD) 1 at p 204.

[33] GEOFFREY RIVLIN, UNDERSTANDING THE LAW 84 (Oxford, 6th ed. 2012).

[34] Dr Kamal Hossain, *supra note* 20, at 43.

"at one with" Dr Hossain.[35] In the Appellate Division, Barrister Fida M Kamal took up the argument in a similar fashion and the Chief Justice endorsed the point.[36]

Secondly, Dr. Hossain argued that transfer of the removal power from the Council to the parliament would constitute a "disadvantageous" change in the terms of service of the sitting judges and therefore violate the Article 147(3) of the Constitution.[37] This too was "palpably clear" to the majority opinion in the High Court Division.[38] In the Appellate Division, Chief Justice Surendra Kumar Sinha adopted a similar reasoning.[39] Interestingly, neither Dr. Hossain nor the majority opinion in the High Court Division clarified or explained in what sense a change in the removal procedure of a judge would constitute a disadvantageous variation in the terms and condition of his/her service. Had there been any disadvantageous change in the proposed law in relation to the grounds of removal, right of hearing, self-defence, salaries, amenities, privileges and retirement benefits etc of the judges concerned, there might have been a possibility of arguing along these lines. It remains arguable as to whether a mere change of procedure is harmful if its substantive entitlements are kept intact.[40] Apart from a generalized mistrust in the Parliament as an institution "poking its nose"[41] into the judges' removal process, there seems to be no other substantive harm contemplated even by the petitioners and the *amicus curie*.

[35] *Ibid,* Justice Moyeenul Islam at 121.

[36] Barrister Fida M Kamal, *supra note* 21, at 321

[37] THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH,Nov. 4, 1972art. 147(3) Bang.: the remuneration, privileges and other terms and conditions of service of a person holding or acting in any office to which this Article applies shall not be varied to the disadvantage of any such person during his term of office.

[38] Justice Moyeenul Islam Chwodhury, *supra note* 20, at 122.

[39] Justice Surendra Kumar Sinha, *supra note* 21, at 491.

[40]*Muhibur Rhaman Manik* v *Bangladesh & ors* 23 BLD (HCD) 264 (Gist of the decision is that one does not incur any constitutionally objectionable harm merely for a change in the forum dealing with his case, unless and until the guarantees of adequate defence and procedural fairness in maintained (Para 15 of the judgment)). See also - *Sheikh Hasina v Bangladesh* (2008) 60 DLR (AD) 90 (Gist of the decision is that one is not harmed by mere change in the procedure of dealing with an accusation or trial, if the substantive guarantees of fundamental rights and procedural fairness is maintained by the change).

[41] Justice Moyeenul Islam Chowdhury, *supra note* 20, at 144.

Thirdly, as regards the parliament's alleged unsuitability for participation in judges' removal process, the petitioners, most of *amici curiae* and the majority judges in the High Court Division have drawn heavily upon 'experience rather than logic'.[42] The experiences as emphasized are that around 70 percent of the members of Parliament are businessmen, they are unmindful of their legislative responsibilities,[43] quality of their legislative performance is of 'low standard'[44], a lot of them have criminal records,[45] they are severely restrained by Article 70 of the Constitution and partisan directives will rule the show.[46] The 'experience' therefore leads the majority and others to the conclusion that the 16th Amendment would cause a violent blow to the independence of judiciary and separation of power –the two important aspects of the basic structure of the constitution.[47]

Likewise, the entire edifice of the Appellate Division judgment is based on exactly the same line of perception as regards Article 70:

> "We find no infirmity in the view taken by the High Court Division on construction of article 70; and that in view of article 70, the members of Parliament must toe the party line in case of removal of any Judges of the Supreme Court. Consequently, the Judges will be left at the mercy of the party high command. We find nothing wrong in taking the above view."[48]

It appears that 'experience' based arguments like the above would not stand the test of appropriate and sound legal reasoning expected of any ordinary constitutionality challenge. Primarily, Bangladesh does not yet have any single 'experience' of Parliament removing a Supreme Court judge because of a corrupt motive. Secondly, if we assume the "experience test"

[42] *Ibid,* Barrister M Amirul Islam at 45.

[43] *Ibid.*

[44] *Ibid,* Justice Moyeenul Islam Chowdhury at 146.

[45] *Ibid,* Barrister Ajmalul Hossain at 50.

[46] *Ibid,* Dr Kamal Hossain at 39 and Justice Moyeenul Islam Chowdhury at124.

[47] *Ibid,* Manzill Murshid at 23.

[48] Justice Surendra Kumar Sinha, *supra note* 21. at 281-82

as adopted to resemble something such as the American "living constitutionalism"[49] discourse, it leads us nowhere. In the U.S. constitutional jurisprudence, living constitutionalism or loose constructionism refers to an interpretative tendency where the court takes a pragmatist approach to constitutional interpretation and claims that sometimes adhering strictly to the original meaning would be unacceptable as a matter of policy. These loose constructionists claim that drastic changes in the socio-legal ecology would often call for an evolving interpretation of the fundamental law of the land.[50] To this end, they benefit from the broadly and flexibly drafted texts of the Constitution to achieve the desired outcome.[51] Understandably that is not what the *amicus curie* and majority opinion were trying to achieve here in *Asaduzzaman* case. They were, rather, nullifying a system clearly and unequivocally endorsed and adopted by the framers of the original the Constitution as being inconsistent with the original Constitution itself (!) Thirdly, the 'experience test' as used earlier by the Supreme Court of Bangladesh itself in the Thirteenth Amendment case[52] is contextually different, and hence unsuitable to be applied in this case. While nullifying the caretaker government system as introduced through the Thirteenth Amendment, the then Chief Justice A.B.M Khairul Hoque relied heavily on the unpleasant "experiences" the system caused to the judiciary.[53] Some of the retired Chief Justices leading an election time government led to extreme politicisation of the appointment of Supreme Court judges, their elevation to Appellate Division and the ultimate selection of the Chief Justices. Justice Hoque and his colleagues, however, based their decision principally on the undemocratic

[49] Jack M Balkin, *Alive and Kicking: Why no one truly believes in a dead Constitution*, (Aug. 29, 2005); http://www.slate.com/articles/news_and_politics/jurisprudence/2005/08/alive_and_kicking.html (last visited June 28, 2017).

[50] *Missouri v. Holland* 252 U.S. 416 (1920) at p 433; Justice Holmes wrote: "[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether [252 U.S. 416, 434] it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved."

[51] *Trop v. Dulles*, 356 U.S. 86 (1958) at p 101.

[52] Abdul Mannan Khan v. Bangladesh,, 26 DLR (AD) 44.

[53] *Ibid,* A.B.M. Khairul Hoque at 288 (The judgment is in *Bangla*).

nature of the caretaker government and its pervasive attack on several basic structures of the original Constittution.[54] The bitter experiences with appointment in the judiciary were rather used as corroborative facts substantiating their basic structure arguments. Unlike the Thirteenth Amendment case, the later experiences unrelated to the specific question in hand (the process of removal of judge itself) are sought to be used as nullifying tools in this case. It is our perception that the focal point of the case lies somewhere else.

If one seeks to test the constitutionality of a procedural device related to an institution like the Parliament, one must talk and argue from an institutional point of view. Judging the character traits of individuals comprising the institution (here the members of parliament) cannot be considered ideal judicial reasoning. When constitutional law academicians, lawyers and judges refer to constitutional institutions they usually refer to the relevant institutional dynamics, process and safeguards related to that. Therefore, the question for determination in this case was whether the Parliament as an institution was constitutionally and legally capable of possessing the power, which it was seeking to have. The question here was not how good or bad the individual parliamentarians were. Quite disturbingly, this was the approach both the High Court Division and Appellate Division were overwhelmed with. The Appellate Division was particularly tough in the rejecting an institutional approach. Posing a big question mark over the caliber of the parliamentarians[55] the Appellate Division held:

> There is no chance of resting the matter in the 'safe' hands of purely institutional virtuosity. The working of democratic institutions, like all other institutions, depends on the activities of human agents in utilizing opportunities for reasonable realisation....[56].

A important point for consideration in this case was overlooked by the High Court Division and counsels of both the sides. The doctrine of popular sovereignty that constitutes the basis of the democratic constitutionalism was not tested for or against either of the propositions. The

[54] *Ibid,* pp 291-295.

[55] Justice Surendra Kumar Sinha, *supra note* 21 at 223 (Before assuming the powers the members of Parliament should have considered as to whether they are capable of dealing with such responsibility.)

[56] *Ibid,* at 229

Preamble, which has been identified as the "Pole Star" of the constitutional system of Bangladesh,[57] coupled with Article 7 of the Constitution, which has been considered the foundation of all the basic structures,[58] places the democratic sovereignty of the people on top of the whole body politic. In Bangladesh, it is considered that there is neither unfettered parliamentary sovereign nor a judicial supremacy. The essence of the constitutional structure is that of a limited government – executive, legislative and judicial power limited by the appropriate constitutional norms. While the Supreme Court, as the perceived "guardian of the Constitution"[59], claims a right to circumscribe the exercise of executive and legislative powers, it appears a bit unprincipled for the Supreme Court to be reservationist in its own case and refuse to be subject to popular scrutiny ensured through the primary representative body of the Republic – the Parliament.

Though the government tried to press the point before the Appellate Division, Chief Justice Surendra Kumar Sinha drove the argument to a completely untenable position. Justice Sinha framed the question from a wholly misdirected point. He asked whether the representatives of the people could exercise their power to destroy the independence of judiciary, as the Basic Structure of the Constitution,[60] whereas the question for determination was whether the representatives of the people could constitutionally have a say in the judges' removal process. Justice Sinha framed the issue as if it was whether the representatives of the people could violate the constitution in the peoples' name. While answer to Justice Sinha's issue is in the negative, it does not necessarily mean that answer to the actual issue pressed by the government would also be in the negative. Justice Sinha thereby bypassed a substantially important argument placed before the Appellate Division.

Also in our opinion, the arguments relating to Article 70 of the Constitution lack relevance in this case. Article 70 of the Constitution being placed in the original Constitution itself, it is now

[57] *Anwar Hossain Chowdhury* v. *Bangladesh,* 1989 BLD (Spl) 1 at para 443 per Justice Habibur Rahman.

[58] *Khandker Dlewar Hossain* v. *Bangladesh Italian Marble Works Ltd,* (2010) 15 MLR (AD) 249;*Siddique Ahmed* v *Bangladesh,* (2013) 65 DLR (AD) 8.

[59] *Jamil Huq* v. *Bangladesh,* 34 DLR (AD) 125.

[60] Justice Surendra Kumar Sinha, *supra note* 21. at 482-82.

inconsistent for Dr. Hossain, the principle author of the Constitution, to argue that the framers of the original Constitution provided for parliamentary removal on the 'premise' that the MPs will exercise their power free from party directives.[61] Moreover, if MPs' mechanically obeying their party decision is a serious defect, then the similar problem lies with the Supreme Judicial Council as well. There the initiation of removal procedure and finally the actual decision to remove the judge concerned is in the hands of the President who, as per Article 48(3) of the Constitution, is more strictly bound by the party chief – the Prime Minister. While the evident mischief of the Prime Minister's upper hand in the Supreme Judicial Council process ensured by Article 48(3) of the Constitution was not considered at all, the perceived mischief of Article 70 of the Constitution in the parliamentary removal process received substantial attention in the judgment. Further, operation of the Article 70 of the Constitution could have been easily avoided in cases of removal of judges by adopting some procedural devices like secret ballot voting and prohibition of official announcement of any party's decision on a judge's removal incident. This could have been achieved by the proposed subordinate law.[62] In our opinion, the Supreme Court could have upheld the constitutionality of 16th Amendment and, at the same time, issued suitable directives on any such or other procedural devices that could be adopted in the subordinate law contemplated by Article 96(3) of the Constitution. Given the history of the 12-point directives in *Masder Hossain* case,[63] issuing directives or judicious opinions in this fashion is not quite unusual in our jurisdiction. Attorney General Mahbubey Alam urged the court to wait to see how the power is actually going to be used as per the proposed subordinate law. The author judge in the High Court Division Justice Moyeenul Islam Chowdhury, however, was convinced that waiting for the subordinate law was not necessary. The 16th Amendment 'in itself' was violative of the basic structure of independence of judiciary and separation of power.[64] It kept the

[61] Dr Kamal Hossain, *supra note* 20, at 43.

[62] A draft law on investigation of an alleged misconduct or incapacity cleared by the Cabinet and waiting to be laid before the parliament was placed before the Court. The law provided for a 10 member investigation committee into the allegation on receipt of whose report the floor will vote on the ultimate removal.

[63] *Secretary, Ministry of Finance* v. *Masdar Hossain*, 52 DLR (AD) 82. In this case the Supreme Court of Bangladesh issued 12 point directives upon the government of Bangladesh as regard the way in which rules may be framed to assure separation of subordinate judiciary from the executive without amending the constitution itself.

[64] *Supra* note 20, Justice Moyeenul Islam Chowdhury at 67.

President's responsibility of removing the judges intact but made it subject to a parliamentary super majority decision. However, whether it has deprived the Appellate Division judges of their role in the investigation of an allegation against any of their colleagues or not is uncertain. Though the draft Bill[65] that was presented before the High Court Division conveyed such an indication, it was a mere draft and as afore-mentioned; the High Court Division could very well pass some comments on that draft.[66] Justice Moyeenul Islam Chowdhury, however, did not opt to suggest any modification there. Rather he was focusing on the 16th Amendment "in itself". To him, the draft Bill was only "corroboration" of the 16th Amendment's unconstitutionality.[67]

Unfortunately, the Appellate Division also refused to think differently from Justice Moyeenul Islam of the High Court Division. Justice Surendra Kumar Sinha, in fact, mocked the argument by terming it "absolutely bereft of any logic and legal substance".[68] Appellate Division was of the opinion that waiting for a subordinate law pursuant to a "void Act would be like the phrase *"the doctor came after the patient had died".*"[69]

Fourthly, the petitioner, *amici curiae* and the majority opinion in the High Court Division appeared to rely heavily on some hypothetical "could be" considerations most of which were loosely tailored and not based on appreciation of the over-all body politic and accountability structure. Mr. Monjil Murshid feared that Parliament may harass innocent judges or the judges may be left at the mercy of Parliament.[70] Dr. Hossain feared that the removal process may be

[65] The Supreme Court Judges Misconduct and Incapacity (Inquiry and Proof) Act, (2016) (Proposed), as cleared by the Cabinet opted for the formation of a 10 member investigation panel into the allegation of misconduct. The author judge, Moyeenul Islam Chowdhury has found the non inclusion of Supreme Court judges in the panel "very stunning, mind-boggling and astounding"" (*Supra* note 20 ,at 143).

[66] In this regard, the 2016 opinion of the Law Commission and the Draft Law prescribed by the Commission (The Supreme Court Judges Misconduct and Incapacity (Inquiry and Determination of Liability) Act, 2016) could have been given detailed attention and the court could have suggested necessary amendments and adjustments into the proposed law.

[67] Justice Moyeenul Islam Chowdhury, *supra note* 20,at 143.

[68] Justice Surendra Kumar Sinha, *supra note* 21. at 478

[69] *Ibid,* at 479

[70] *Ibid,* Manzill Murshid at 32.

influenced by "political clout and pressure."[71] Likewise, the author judge of the majority view assumed that the members of Parliaments may try to bring judges into parliamentary discussion on a retaliatory motive and character-assassinate the higher court judges.[72] Going one step further, the Appellate Division attempted a large list of possible parliamentary abuses that may threaten the highest court if the amendment is not struck down immediately.[73]

If we accept, for the sake of argument, that the Parliament will harass and vilify a Supreme Court judge on a given case, how likely it is that they would be able to do so on a consistent basis? From an institutional point of view, the parliament and parliamentarian being more exposed and vulnerable to public deliberation and criticism,[74] fear of gross abuse of legislative process to harass the judges' on light excuses appears to be a far-fetched one.

C. A Modestly Comparative Appraoch

Another striking feature of the majority judgment is the relatively modest comparative analysis of the parliamentary removal vis-à-vis the Council system. The focus has been on the numerical superiority of the Council system over the parliamentary removal system. The bottom line of the analysis of the majority judges is that around 63 per cent of the former British colonies have either the system of independent body free from parliamentary and executive influence or the system of ad hoc or permanent disciplinary council for removal of judges. Countires like Bahamas, Barbados, Botswana, Fiji, Jamaica, Ghana, Guyana, Kenya, Lesotho, Malaysia, Mauritius, Papua New Guinea are included in this category.[75] Parliamentary removal on the

[71] *Ibid,* Justice Moyeenul Islam Chowdhury quoting Dr Kamal Hossain at 123.

[72] *Ibid,* Justice Moyeenul Islam Chowdhury at 126 and 132.

[73] *Supra note* 21, at 473-74

[74] *Kudrat-E-Elahi Panir v. Bangladesh,* 44 DLR (1992) (AD) 347: Justice Mustafa Kamal emphasized the vulnerability of parliament to popular criticism as a check on a possible abuse of its process in "…[S]uppose Parliament is struck with a madness, is the High Court Division in exercise of its writ jurisdiction only light at the end of the tunnel? What public opinion, political parties and election do if Parliament goes berserk?"

[75] *Supra note* 20, 76.

other hand is preferred in only 33 percent of the common law jurisdictions which include Australia (federal), Bangladesh, Canada, India, South Africa, Sri Lanka, and the United Kingdom.[76] Relying on this numerical superiority of the favored system, Justice Moyeenul Islam Chowdhury in the High Court Divison has drawn a conclusion that the parliamentary removal mechanism has not been preferred by the majority Commonwealth jurisdictions "obviously for upholding the separation of powers among the 3(three) organs of the State and for complete independence of the Judiciary from the other two organs of the State."[77]

The fallacy of this blind numerical approach to an important constitutional and sturctural issue related to the original fabric of the Constitution [78]is that the majority opinion of the High Court Division has failed to appreciate the contextual unsuitability of the Council system introduced by a martial law based presidential system installed in late 1970s with the Westminister parliamentary system of government installed by the original revolution of 1971 and resurrected by a subsequent mass upcharge in early 1990s. The conclusion drawn upon a grossly insufficient analysis into the question of familiarity and unfamiliarity of the constitutional systems of the apparent majority (63 percent) of ex-British colonies to the constitutional system of Bangladesh has made the judgment a modestly comparative one. On the other hand, the deeply rooted familiarity of Bangladeshi system with the constitutional systems of India and Britain (though belonging to minority 33 percet) was simply bypassed. If the constitutional scheme of Bangladesh is highly simliar to that of India and also if the doctrine of basic structure happens to be the cornerstone of both the jurisdictions, then how could a parliamentary removal system violate the basic structure in Bangladesh, while it does not do the same in India?

[76] *Ibid*, at 75.

[77] *Ibid*, at 76.

[78] (*Supra note* 17, at 16-17), There has been an argument that the Parliamentary removal system being part of the original constitutional structure of the constitution, amendments restoring a original provision would be beyond judicial review. Since the Supreme Court does not reserve a right to declare the original constitution invalid, it may not adjudge the constitutionality of an amendment that seeks to restore an original set up the majority opinion however bypassed the argument altogether.

The Appellate Division confined its version of comparative study within the statistical figures presented in the High Court opinion.[79] It however attempted some analysis into the removal systems of India, USA and UK only to come to conclusion that a solution must be searched within "our constitutional scheme":

> "Mechanisms of other countries, which destroys the constitutional scheme of independence of the judiciary and separation of power as engrained in our Constitution, cannot be accepted simply because it is prevalent in some other countries.[80]"

D. Judicial Entrenchment of constitutional provisions?

A so far unheard argument was made in relation to the 5th Amendment judgment in the *Bangladesh Italian Marble Works v. Bangladesh*.[81] It was claimed by the petitioner, and accepted by the majority opinion at the High Court Division,[82] that condonation of the Supreme Judicial Council system by the Court in the 5th Amendment judgment has made the system permanently entrenched and the Parliament is not entitled to amend or change it a fresh. Mr. Murshed relied on an Indian case,[83] which was not related to an electoral law amendment, and actually a constitutional amendment, to argue that the Parliament cannot nullify a decision of the Supreme Court by subsequent legislation to the contrary.[84] The gist of the argument is that if the Parliament wishes to reenact an invalidated law, it must remove the unconstitutionality found by the Court and then go for a new enactment that does not contain the unconstitutional element. In

[79] *Supra note* 21, at 164-166.

[80] *Ibid*, at 4

[81] *Khandker Dlewar Hossain* v. *Bangladesh Italian Marble Works Ltd*, 15 MLR (AD) 249.

[82] Justice Moyeenul Islam Chowdhury, *supra note* 20, at 142, 148.

[83] *People's Union For Civil Liberties v. Union of India*, (2003) 4 SCC 399.

[84] *Supra note* 20, 26-27.

the Appellate Division, Chief Justice Surendra Kumar Sinha[85] and Justice Syed Mahmud Hossain[86] endorsed the view without any further explanation.

It is perhaps for the first time we see that a statutory principle is pressed as a constitutional principle. Under this new formulation, the judiciary now will not only decide what are the basic structures within the Constitution, but also determine what should or should not be in the Constitution itself. Once the judiciary adjudges a constitutional amendment as valid or condones any change therein, it becomes permanently entrenched with no possibility of further amendment in any circumstances in the days ahead.

Quite curiously, the caretaker government system was introduced by the Parliament after a judgment of the High Court Division declaring the unsuitability of the concept of caretaker government "within the four corners" of the Constitution.[87] The 13th Amendment was declared constitutional in a subsequent case[88] and it was declared unconstitutional in yet another subsequent case.[89] Does the court amend the Constitution every time it delivers a judgment? Does such judicial amendment become permanently entrenched in the Constitution? Neither 'experience' nor 'logic' confirms such a stiff proposition.

CONCLUDING REMARKS

From an overall analysis of the majority judgment in the 16th Amendment case, it is apparent that a generalized mistrust in the political forces and politicians and also the reservationist tendencies of the judicial folk and reluctance to move out of the judges' natural comfort zone, have dominated the arguments and reasoning of the verdict. All of the petitioners, *amicus curies* and, to some extent, the majority in the High Court Division and the Full Bench of the Appellate Division failed to overcome the populist tendencies in legal reasoning and to take an institutional

[85] *Supra note* 21, 499

[86] *Ibid*, at 547

[87] Syed Muhammad Mashiur Rahman v Bangladesh, [1997] BLD 55(Bangl.).

[88] Anwar Hossain Khan vs. Speaker Jatiya Sangsad, [1995] 47 DLR 42 (Bangl.), ¶ 36.

[89] M. Saleem Ullah v Bangladesh, [2005] 57 DLR (HCD) 171 (Bangl.).

approach in the dispute at hand. While the Court could have raised specific objections on the draft Bill submitted before it and suggested the obligatory inclusion of judicial personnel in the investigating body and process, the 16th Amendment in itself could have been upheld.

Any commonsense appraisal of the issue will support the proposition that a system of judicial participation in the investigation of allegations, peoples' representatives voting on a possible removal and the Prime Minister finally removing a Supreme Court judge via the President is much better, fair and transparent than a system that only involves the President, Prime Minister and Supreme Court judges themselves. No amount of basic structure arguments can sufficiently dislodge this proposition. Let us not forget that only one judge was actually removed by the Supreme Judicial Council since its inception. We have instances of controversial judges successfully avoiding the Supreme Judicial Council in the past. As said at the beginning, while some were permitted to silently leave the country, some others were simply invited to "tea" in the presidential palace and forced to resign. These we think are enough lessons for us to learn that a removal process whose beginning and ending lies with the sole discretion of the political executive is more "influenced by political clout and pressure" than a removal process that involves public deliberation in the open floor of the House.

One of the unfortunate features of this case is that the dissenting opinion in the High Court Division is more disappointing than the majority one. In the voluminous 125 page judgment, the dissenting judge Mr. Ashraful Kamal did not touch any single argument of the parties and *amicus curies*. He had only to hold that the Supreme Judicial Council system being introduced by a military ruler was illegal and therefore 16th Amendment is constitutional[90] and secondly, the original formulation of Article 96 of the Constitution (involving parliamentary removal system) was in line with independence of judiciary and hence constitutes a basic structure of the constitution.[91] Apart from these two simple points, the dissenting judges colossally wasted an opportunity of coming out with powerful rebuttal of the majority opinion and providing the Appellate Division with some tools to work with in the appeal.

[90] Justice Ashraful Kamal, *supra* note 20, at 287.

[91] *Id.* ¶289.

While the Appellate Division has decisively invalidated the Sixteenth Amendment, the exact status of the Amendment in the Constitution remains somewhat obscure. Inspite of sealing the debate, the verdict has reopened a fiercely debated but unresolved constitutional question as to how to execute the highest court verdict. On two earlier occasions, 8th Amendment (1989) and 13th Amendment judgements (2011), the Ministry of Law and Justice simply went for a reprint of the Constitution, without the amendments that have been invalidated by the Appellate Division.[92] A substantial number of experts however questioned the desirability of such a course of action and emphasised the requirement of parliamentary intervention in making the change effective. The Chief Justice Surendra Kumar Sinha, however, called for a meeting of the "reinstated" Supreme Judicial Council within two days of the publication of the full text verdict and adopted a 39 point Code of Conduct for the higher court judges.[93] In reaction, the offended law makers are vehemently refusing to incorporate the Appellate Division verdict in the Constitution and some are arguing for reenactment of the 16th Amendment.[94] Given the situation, it appears that the 16th Amendment, though remains in the Constitution in ink and pen, currently stands ineffective. Though the Chief Justice has "reinstated" the Supreme Judicial Council, it is not in the Constitution either. It would effectively mean that Bangladesh is currently facing a serious dilemma on judges' removal. On the bottom line, which of the two systems would ultimately prevail depends on how far the Parliament and the Supreme Court of Bangladesh would be willing to negotiate their stance.

[92] M Jashim Ali Chowdhury, *Dilemma of Constitution Reprint*, The Daily New Age, Dhaka. April 15, 2011. Aailable Online: http://mjashimalichowdhury.blogspot.com/2011/06/dilemma-of-constitution-reprint-m.html (Accessed August 10, 2017)

[93] Supreme Judicial Council reinstated, SC judges get their own code of conduct, The Dhaka Tribune, Dhaka, August 03, 2017, http://www.dhakatribune.com/bangladesh/court/2017/08/03/supreme-judicial-council-reinstated-sc-judges-get-code-conduct/)Accessed on August 11, 2017)

[94] JS Will Again Pass 16th Amendment, The New Nation, Dhaka. August 5, 2017 http://thedailynewnation.com/news/143137/js-will-again-pass-16th-amendment.html (Accessed on August 10, 2017)

REFORMING THE RULE AGAINST BIAS IN ADMINISTRATIVE LAW

- Sanjayan Rajasingham[*]

ABSTRACT

The rule against bias is an essential component of modern administrative law. Unfortunately, however, the test for apparent bias is surrounded by uncertainty. Should the test of "real likelihood of bias" control, as it does in India? Or should a modified version of the "reasonable suspicion" test be used, as in the United Kingdom? This essay focuses on Sri Lanka's jurisprudence on the rule in the light of that of India and the United Kingdom to consider how courts in the country have approached the different tests. It concludes that the position in all three jurisdictions is unsatisfactory, as it does not strike an effective balance between the two values that underlie the rule: efficiency and public confidence in the administration of justice. Drawing from the courts' approach to the right to a fair hearing, and on the practice of courts in applying the rule against bias in administrative contexts, this paper argues that courts should adopt a two-pronged, context-based approach. That is, a different test should be used in different, pre-defined, decision-making contexts. Where efficiency is of greater importance, the real likelihood test should be adopted; where public confidence in the administration of justice is of greater value, the reasonable suspicion test should be used. This approach will ensure that the rule against bias is clear, contextualised and ensures fairness in the modern administrative State.

INTRODUCTION

The rules of natural justice are fundamental to administrative law. They are the key to fair administration, involving the right to a fair hearing, *audi alteram partem* and the rule against bias, *nemo judex in causa sua*. However, the principles governing the application of the rule against bias are unclear. In particular, there is no firm position on which of the two tests for

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apparent bias – "real likelihood" or "reasonable suspicion" – should be used by the courts. India uses the "real likelihood" test, whereas the United Kingdom favours a form of the "reasonable suspicion" test.

This paper begins by examining the rule against bias and the two tests for apparent bias in the light of this problem. It then surveys the key Sri Lankan cases on the rule and compares them with decisions in India and the United Kingdom. Finally, it proposes that courts do not necessarily need to choose *one* of the two tests, but rather that *each* test has its place in different contexts.

FAIRNESS AND THE RULE AGAINST BIAS

A violation of either of the rules of natural justice renders a decision void.[1] They are of wide application, applying to every tribunal or body with the authority to adjudicate upon matters involving civil consequences to individuals.[2] They require public officials to follow a fair procedure when making decisions that affect individuals.

The rule against bias ensures fair procedure by excluding decision-makers who are tainted by bias. Under the rule, actual bias is disqualifying – even though it is prohibitively difficult to establish. Moreover, certain interests, whether financial[3] or non-financial,[4] can automatically disqualify a decision-maker.

In cases not involving actual bias or automatic disqualification, however, the issue revolves around *apparent bias*. The question then becomes: "is the decision maker's interest in a certain matter sufficient to disqualify him, on the basis of apparent bias, from making a decision on that

[1] Anisminic Ltd v. Foreign Compensation Commission, [1969] 2 AC 147 (United Kingdom).

[2] Dissanayake v. Kaleel, (1993) 2 SLR 135, 181 (Sri Lanka); Ridge v. Baldwin, [1964] AC 40 (United Kingdom); Gullapalli Nageswara Rao v. APSRTC, AIR 1959 SC 308 (India).

[3] Dimes v. The Proprietors, Grand Junction Canal, (1852) 3 HLC 759 (United Kingdom).

[4] R v. Bow Street Magistrate ex. p. Pinochet Ugarte, (No. 2) [2000] 1 AC 119 (HL) (United Kingdom).

same matter?"[5] The courts have developed two tests to decide if a decision maker's interest in a matter is *sufficient* to amount to apparent bias.

THE TESTS FOR APPARENT BIAS

The first is the "real likelihood" test. This asks whether the facts, as seen from the perspective of the court, would give rise to a real likelihood of bias.[6] It focuses on the court's assessment of the situation rather than the public's perception of it. Moreover, it requires a probability, rather than a possibility, of bias. In the words of Lord Bingham MR: "[if] despite the appearance of bias the court is able to examine all the relevant material and satisfy itself that there was no danger of the alleged bias having in fact caused injustice, the impugned decision will be allowed to stand."[7]

The second test is one of "reasonable suspicion". This is founded on the famous dictum by Lord Hewart CJ that "justice should not only be done but manifestly and undoubtedly be seen to be done...".[8] The test looks for the mere possibility of bias and focuses on appearances – whether the facts give rise to a reasonable suspicion of the possibility of bias.[9] Unlike the real likelihood test, it takes the perspective of the reasonable observer. This change in perspective is grounded in a desire to ensure public confidence in the administration of justice.[10]

In India, the courts have come down in favour of the first test.[11] The United Kingdom's obligations under the European Convention on Human Rights have led it to adopt a form of the

[5] HWR WADE AND CF FORSYTH, ADMINISTRATIVE LAW 382 (10th ed. Oxford University Press 2009) [hereinafter "WADE"].

[6] *Id.*

[7] R v. Inner West London Coroner ex. p. Dallagio, [1994] 4 AER 139, 162 (United Kingdom).

[8] R v. Sussex Justices ex. p. McCarthy, 1 (1924) 1 KB 259 (United Kingdom).

[9] WADE, *supra* note 5, at 381, 382.

[10] *Id.* at 384.

[11] Jiwan K. Lohia v. Durga Dutt Lohia, AIR 1992 SC 188 (India); Ranjit Thakur v. Union of India, 1987 AIR 2386 (India); State of Uttar Pradesh v. Mohd Nooh, AIR 1958 SC 86 (India); AK Kraipak v. Union of India, AIR 1970 SC 150 (India).

"reasonable suspicion" test – the "fair-minded observer" test.[12] That is, courts ask whether "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias?"[13] Lord Hope noted the important place of public perception under this test when he said that:

> "[the] fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal members who are under scrutiny."[14]

Or, in the words of Lord Bingham in *Lawal*, "Public perception of the possibility of unconscious bias is the key."[15]

DIFFERENT BURDENS, DIFFERENT PERSPECTIVES

There are two key differences between these tests.[16] The first is with regard to the burden of proof for establishing apparent bias. The real likelihood test is concerned with whether there was a probability of bias. The reasonable danger test has a lower burden – it only asks if there was a *possibility* of bias. The second difference is with regards to perspective. The real likelihood test assesses the probability of bias from the court's perspective, armed with the court's knowledge

[12] European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, art. 6(1), Nov. 4, 1950, 1950 ETS 5. *See* WADE, *supra* note 5, at 384.

[13] Porter v. Magill, [2001] UKHL 67 (United Kingdom); Lawal v. Northern Spirit Ltd, [2003] UKHL 35 (United Kingdom). This applies generally to all decisions in the United Kingdom per R v. Secretary of State for the Environment and William Morrison Supermarkets Plc ex. p. Kirkstall Valley Campaign Ltd, [1996] 3 AER 304 (United Kingdom).

[14] Gillies v. Secretary of State for Work and Pensions, [2006] UKHL 2 ¶ 17 (United Kingdom).

[15] *Lawal*, [2003] UKHL 35 ¶ 14 (United Kingdom).

[16] Despite opinion to the contrary, *see, e.g.,* PAUL JACKSON, NATURAL JUSTICE 48 (2nd ed. 2006).

of procedure and statutory context. Public perception of bias is irrelevant. By contrast, the reasonable suspicion test assesses the possibility of bias from the perspective of the public.[17]

Since the real likelihood test has a higher burden of proof and uses the perspective of a more informed body, it is harder to establish bias under this than under the test of reasonable suspicion. The latter rules out any decision-making procedure that raise the possibility of bias from the perspective of the public. The use of this test, then, ensures that only decisions and decision-makers that are "bias-free" from the public's perspective will stand. As a result, public confidence in the administration of justice will be higher under this test than under the test of real likelihood.[18]

The advantage of the real likelihood test, however, is that it improves the efficiency of administrative procedures. Since it requires a *probability* of bias, and that from the court's perspective, informal means of investigation and inquiry, which may appear biased to a reasonable member of the public even if they were *in fact* fair, would be acceptable under this test. This reduces inhibitions to decision-making processes. However, it could leave the public feeling that the system of administrative justice is unfair – and appearances, while not everything, certainly count for *something* in a legal system.[19]

The section below demonstrates that Sri Lanka's jurisprudence does not take a clear stance on which test applies. It will analyse the relevant case law as a first step towards suggesting what this stance ought to be.

THE SRI LANKAN JURISPRUDENCE

[17] WADE, *supra* note 5 at 382, 383.

[18] Endicott has argued persuasively that raw public opinion can be deeply misguided and predisposed to assuming bias in certain contexts. It is important, therefore, that the test only takes note of *reasonable* public perceptions. *See* TIMOTHY ENDICOTT, ADMINISTRATIVE LAW 157 (Oxford University Press 2009).

[19] John McMillan has noted the efficiency gains of a lower standard of natural justice with respect to the right to a fair hearing in Australia. His argument applies, *mutatis mutandis*, with respect to the rule against bias. *See* John McMillan, *Natural justice: too much, too little or just right?*, 58 AIAL Forum 33 (2008).

De Mel v De Silva is one of the earliest cases on the rule against bias.[20] The petitioner came before the Supreme Court seeking writs of *certiorari* and prohibition against the respondent for, *inter alia*, bias. The respondent was appointed to a Commission of Inquiry to investigate allegations of corruption among certain members of the Colombo Municipal Council. When investigating instances where two Councilors were implicated, with one as the corrupt giver and the other as the corrupt receiver of the bribe, the respondent chose to interview each party separately. The petitioner claimed that this not only violated the procedure set out in the Act,[21] but had also led the respondent to come to a biased conclusion regarding his guilt.

There was no evidence for the latter allegation, however, and the application was dismissed. In coming to this decision, Justice Gratien said that the test for bias was one of "*reasonable likelihood*" of bias – a terminological combination of both tests.[22] Later in the judgment, however, he made an oblique reference to the reasonable suspicion test, noting that the real question was "whether a reasonable man might apprehend that the tribunal may not be impartial and unbiased."[23] Interestingly, however, public perception did not feature in Gratien J's analysis: he looked at the matter solely from the Court's perspective. The Court, therefore, did not make a clear statement about which test applied.[24]

Re Ratnagopal,[25] before the Supreme Court was another case on apparent bias. It concerned a charge of contempt against a witness, a British citizen, who had refused to be sworn and give evidence before a Commission of Inquiry on the basis that the Commissioner was biased against

[20] [1949] 51 NLR 282 (Sri Lanka).

[21] See Commissions of Inquiry (Act No. 17/1948) (Sri Lanka). The Act did not specify procedure except to provide, in § 14, that where any person was the subject of an inquiry he had to be allowed to be legally represented at the whole inquiry.

[22] *De Mel* [1949] 51 NLR 282, at 283.

[23] *Id*.at 287.

[24] *Id*. at 287: "Whether this is the ideal procedure to be adopted in such a case, it is not for me to say but for the respondent to decide in the exercise of his discretion. All that I need to hold, and all that I do hold, is that I cannot see how this procedure can be held to violate the principles of natural justice which the respondent is bound by law and by the dictates of his own conscience to observe."

[25] [1968] 70 NLR 409 (Sri Lanka).

him. While the case was decided on other grounds, the Court's comments on the rule against bias have had a lasting impact.[26]

Justice Fernando began by stating that a subjective test of bias – that is, whether a party to the proceedings had an apprehension of bias – was incorrect. Rather,

> "[t]he proper test to be applied is, in my opinion, an objective one, and I would formulate it somewhat on the following lines: would a reasonable man, in all the circumstances of the case, believe that there was a real likelihood of the Commissioner being biased against him?"[27]

This appears, once again, to be a combination of the two tests. There must be a "real likelihood" of bias, yet it must be based on the perspective of a "reasonable man", not from that of the Court. The decisive question, however, is how the Court, *in fact*, assessed the situation under review. Did it consider public perception or did it decide based on its own view of the matter?

The allegations of bias made by the witness were prompted by a series of actions taken by the Commissioner to ensure that the latter, who was abroad, and his wife, who was in Sri Lanka, came before the Commission. Some of these acts – for instance attempting to serve summons on the witness while he was abroad and attempting to prevent the witness, a British subject, from leaving the country – were patently illegal. Others – such as seeking the suspension of the passport of the witness's wife, and threatening to issue a "commission" on a medical officer to examine her when she did not attend a sitting of the Commission – seem to amount to harassment.

These acts would probably suggest to most reasonable members of the public that the Commissioner was predisposed against the witness and his wife. This was not Fernando J's impression, however. In a judgment that did not refer to public perception, he argued that these acts were merely manifestations of the Commissioner's desire to fulfil his commission. In

[26] *Id* at 425-27. The Court held that while a refusal to answer a question put to a witness *once he was sworn* admitted of a defence, a bare refusal *to be sworn* amounted to contempt. Since the witness had refused to be sworn, his guilt was established regardless of the Court's decision on the issue of bias.

[27] *Id*. at 435, 436.

practice, then, the Court looked at its own assessment of the facts – that is, it used the real likelihood test.[28]

Another important decision is *Hassen v Peiris*.[29] This involved a challenge of bias against a decision of a Rent Board before the Court of Appeal. In an improvement on the previous cases, the Court took explicit note of the difference between the two tests, stating that the real likelihood test looked mainly at outward appearances while the reasonable suspicion test looked at a court's own evaluation of the facts.[30] Unfortunately, it went on to base its decision on the following confusing *dicta* of Lord Denning in *Metropolitan Properties Co (FGC) Ltd v Lannon*:

> "The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think, that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand… The Court will not inquire whether he in fact, favoured one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'[31]

This passage mixes the focus on public perception of the reasonable suspicion test with references to a "real likelihood of bias". Eventually, Lord Denning made his decision based on the information available to the Court – that is, from the perspective of the real likelihood test. It therefore, did not make a clear statement of principle.[32]

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[28] This was the reading of the case in Simon and Others v Commissioner of National Housing and Others, [1972] 75 NLR 471, 477, 478 (Sri Lanka) which also accepted that the relevant test was that of real likelihood of bias.

[29] [1982] 1 SLR 195 (Sri Lanka).

[30] *Id*. at 198.

[31] [1969] 1 QB 577 (United Kingdom).

[32] See Hannam v. Bradford Corporation, [1970] 1 WLR 937 (United Kingdom); R v. Altrincham JJ ex. p. Pennington, [1975] QB 549 (United Kingdom).

In terms of its actual approach in the case, however, the Court asked whether the facts would lead to the "probable conclusion" of a real likelihood of bias – a correct use of the burden of proof of the real likelihood test. Yet, despite quoting Lord Denning's statement about appearances, the judgment did not refer to public perception. It appears, then, that despite insisting on the importance of public perception, the burden and perspective adopted in the case were those of the real likelihood test.

In *Kumarasena v Data Management Systems Ltd*,[33] the Court of Appeal took a different view. The case concerned an allegation of bias against a District Court judge for his decision to increase the security drastically that was required of one of the parties for it to maintain an interim injunction. In agreeing with the allegation of bias, the Court went against previous authority and held that there was *no real distinction between the two tests*. The only question was whether there was "such likelihood of bias that entitled the Court to interfere?"[34] This meant asking if "there are circumstances from which a reasonable man (weighing these circumstances) would think it likely or probable that the Judge did on this occasion or would in the future favour one side unfairly at the expense of the other."[35] The case, then, is yet another example of the courts' tendency to confuse the requirements of probability and possibility and to adopt its own assessment of the facts rather than those of the public.

This conflation of the two tests was reversed, however, in *Geeganage v Director General of Customs*.[36] A Deputy Director of Customs had imposed a penalty on the petitioner for failing to inspect a batch of imported cargo properly. The petitioner challenged this decision based on, *inter alia*, bias. The Court found that during the inquiry that preceded the decision the Deputy Director had ignored the relevant facts; failed to inform himself of the standard of proof; originally called the petitioner as a witness in the investigation against the importer of the cargo and then made him a suspect; failed to give the petitioner reasonable time to prepare his defence;

[33] [1987] 2 SLR 190 (Sri Lanka).

[34] *Id*. at 200. This view was imported into an administrative law context in Shell Gas Lanka Ltd v All Ceylon Commercial and Industrial Workers Union, (2000) 3 SLR 170 at 178, 183(Sri Lanka).

[35] *Kumarasena*, [1987] 2 SLR 190, at 202.

[36] [2001] 3 SLR 179 (Sri Lanka).

and involved himself in the evidence-gathering process. These acts clearly amounted to bias, and the decision was quashed.

In coming to this decision, Justice De Z. Gunawardena clearly explained the difference between the two tests:

> "On the one hand, there is an investigation of the real likelihood of bias. This test addresses the particular case in hand and inquires whether, in the given circumstances, there was a real chance that the alleged bias might have had some effect on the decision-making process that, in fact, took place. On the other hand, reasonable suspicion puts the test onto a somewhat higher pedestal. The idea here is that if any reasonable person would suspect so much that bias might arise, then this will be enough to satisfy the test."[37]

De Z. Gunawardena J also noted that "justice must be seen to be done" and that "appearances are everything" in cases such as these.[38] Surprisingly, however, he went on to say that "whatever test that one may adopt one has no choice, in the circumstances of this case, but to hold that the decision complained of is destitute of all force and is a nullity as it is vitiated, also, by bias."[39] That is, he did not make a decision about which test applied.

The most recent case on bias in Sri Lanka was the Supreme Court's decision in *Nawarathne v Fonseka*.[40] The case was brought by a captain who had been dismissed from the army. His dismissal, interestingly enough, was based on his refusal to honour an undertaking he gave to the colonel of his regiment that he would marry his long-term partner within a period of six

[37] *Id*. at 200

[38] *Id*. 199, "I think appearances are everything. This perhaps explains why it is very often said that justice 'must be seen to be done' … it is crucial that justice should not be compromised by the least suspicion of impropriety in the decision - making process for 'justice is the most sacred thing on earth'". Similar views were put forward by the same judge in Neidra Fernando v. Ceylon Tourist Board and Others, [2002] 2 SLR 169 (Sri Lanka).

[39] *Geeganage*, [2001] 3 SLR 179, at 200.

[40] [2009] 1 SLR 190 (Sri Lanka).

months.[41] On hearing of this refusal, the colonel convened an Army Court of Inquiry, held a summary trial, determined that the captain's actions were contrary to military discipline and discharged him from the army. The Court held that this decision was vitiated by apparent bias because the question of whether a refusal to honour an undertaking to marry amounted to a breach of military discipline was decided by the same person who had demanded that the undertaking be given.

Unfortunately, however, the Court did not clarify the legal position with respect to the rule against bias. It made reference to both tests, cited the passage in *Lannon* critiqued above, and then held that "reasonable men having regard to all the circumstances" would agree that there was apparent bias on the part of the colonel. There was, yet again, no decision about which particular test applied, or why.[42]

A CRITIQUE

I respectfully submit that these cases demonstrate serious shortcomings in Sri Lanka's jurisprudence. The first is a lack of conceptual clarity. The judgments often suggest that there is no real difference between the tests – this may be why they do not choose one test or the other. This misconception ignores the crucial differences that exist between the tests – between a possibility and probability of bias and between the different perspective that each takes.[43] It also obscures the different values that each test promotes.

Second, the decisions largely ignore public perceptions of bias. These are either referred to cursorily and discarded in practice, or discarded altogether. Instead, the Courts asks, "would the

[41] The colonel demanded the undertaking on the basis that the involvement of an officer of the army in a long-term, intimate relationship that did not end in marriage would damage the Army's reputation. *Id*. 192, 193.

[42] A similar assessment can be made of the case of Fernando v. Ratnayake, [2007] 1 SLR 124 (Sri Lanka).

[43] This lack of clarity is not unique to Sri Lanka but is found in jurisdictions such as India as well. *See, e.g.*, Jiwan K Lohia v. Durga Dutt Lohia (above) (India) where the Indian Supreme Court held that "the test of real likelihood of bias is whether a reasonable person, in possession of the relevant information, would have thought that bias was likely and whether the person concerned was likely to be disposed to decide the matter only in a particular way." It is uncertain whether a possibility or a probability of bias is being referred to here. It is also unclear as to whose perspective is being adopted.

reasonable man consider, based on the facts, that there was a real likelihood of bias?" and then replace the "views of the reasonable man" with the Court's own assessment of the facts.[44]

Finally, the precedential value of these decisions is unclear. In terms of authority, *Re Ratnagopal* was decided by a three-judge bench of the Supreme Court, yet its statements on bias were *obiter*.[45] *Nawarathne* was by a bench of equal authority but did not explicitly endorse either test. *De Mel* was by a single judge of the Supreme Court, but its *ratio* did not decide on one test. *Hassen* and *Kumarasena* were by two-judge benches, and *Geeganage* by a single judge, of the hierarchically-lower Court of Appeal. Given that there are contradictions between these cases on the burden of proof and the relevant perspective for determining bias, there is no way for a prospective litigant to know which test applies. That is, there is no legal certainty.[46]

How should courts respond? Sri Lanka's courts tend to swing between *bold innovation* and *easy deference* when developing the administrative law. They have used a constitutional provision that frees the courts from the restrictions of the traditional limitations of the grounds of review,[47]

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[44] *See generally* Matthew Groves, *Rule Against Bias*, 39 HONG KONG LAW JOURNAL 485 (2009).

[45] They were adopted in *Simon*, which was a two-judge bench of the Supreme Court. Given that the test was not part of the *ratio* of *Re Ratnagopal*, however, the value of the approach remains in doubt.

[46] Interestingly, while the Indian courts have come down decisively in favour of the real likelihood test, there *are* cases where public perception is still said to be of great importance. *See, e.g.*, in Manak Lal v. Dr. Prem Chand, 1957 SCR 575, 580 (India) where the Court stated that "[i]n such cases the test is not whether in fact bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done." The focus on the *litigant* and on justice appearing to be done leans towards the reasonable suspicion test. *See also* International Airport Authority v. K.B. Bali, 1988 SCR (3) 370, 371 (India) where the Court stated "But we agree with the learned Judge of the High Court that it is equally true that it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person." Once more, this is a reference to the perspective of the *litigant* with "suspicion" and "apprehension" being the essential factors. This points towards a possibility of bias as per the reasonable suspicion test, rather than a probability of bias as per the real likelihood test.

[47] CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA Jul. 21, 1978, art. 140 provides that: "Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution and grant and issue, according to law, orders in the nature of writs of *certiorari*, prohibition, *procedendo*, *mandamus* and *quo warranto* against the judge of any Court of First Instance or tribunal or other institution or any other person". The words "full power and authority" have been used by the courts to move away from the traditional doctrines that restricted the grounds of review. See Heather Therese Mundy v. Central Environment Authority and Others, (2004) SC/58/03 (Sri Lanka).

to recognise two new grounds of judicial review – fundamental rights and the public trust doctrine.[48] Yet they have also, for example, accepted proportionality as a ground of review without any significant discussion on its value and purpose in the scheme of administrative law.[49] In this case, they must strike a middle path and adopt a position that best suits the different contexts in which the rule against bias applies.

FAIRNESS AND FLEXIBILITY

A. A Different Approach

I propose that the courts should adopt a two-pronged, contextualised approach. That is, in a certain defined class of cases – such as the proceedings of courts, tribunals and arbitral tribunals – courts should rely on the reasonable suspicion test. In another defined class of cases – such as ministerial decisions, it should be based on departmental policy and decisions by local authorities – they should use the real likelihood test. Such an approach is supported by strong reasons of principle and policy.

B. Drawing from the Right to a Fair Hearing

The main reason to follow this approach is that it enables a meaningful choice between the two competing values of efficiency and public confidence in the administration of justice. Courts already ensure a proper balancing of competing principles through the flexible approach that characterises their decisions on the right to a fair hearing.[50] I suggest that a modified form of this flexible approach can be adapted for the rule against bias.

[48] DINESHA SAMARARATNE, PUBLIC TRUST DOCTRINE: THE SRI LANKAN VERSION (ICES 2010).

[49] *See, e.g.*, Premawathie v. Fowzie, [1998] 2 SLR 373 (Sri Lanka).

[50] The flexible approach has also influenced the rule against bias, but to a lesser extent. *See* Sanjayan Rajasingham, *Balancing Fairness and Efficiency in Administrative Law*, 4 NEETHAM LAW JOURNAL 170 (2013)

When adjudicating on the right to a fair hearing, courts decide on the concrete requirements of the right based on the type of decision being made and the decision-maker who is making it.[51] For decisions that require determinations of fact and law, and cause serious consequences for individuals, greater levels of procedural protection are required. However, as one moves from decisions by, for example, tribunals, towards those by decision-makers considering policy-oriented questions, the content of procedural fairness gradually declines in severity and can even disappear completely.[52]

C. The Logic of Flexibility

The logic behind this approach is based on the need to balance two competing values: fairness and efficiency. The different aspects of the right to a fair hearing – whether the right to oral hearings, to legal representation, to cross-examine witnesses, or to know the case one must meet – ensure procedural fairness when administrative decisions are made. However, efficiency is also an important factor. If these procedural rules were made a part of every administrative decision, there would be deadlock, a denial, through procedural barriers, of a government's power to implement social legislation, and ultimately, injustice to the people. Eventually, the courts would lose credibility.[53]

A flexible approach means that one does not need to choose between these values. Instead, a judgment is made by the court about which value – efficiency or fairness – should predominate in each decision-making context.[54] The seriousness of a decision's consequences,[55] the nature of

[51] *See, e.g.,* Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 (Canada) and Lloyd v. MacMahon, [1987] AC 625, 702 (United Kingdom) which have listed similar criteria for differential procedural protection.

[52] Rees v. Crane, [1994] 1 All ER 833, 845 (United Kingdom); MARIO GOMEZ, EMERGING TRENDS IN PUBLIC LAW (Vijitha Yapa Bookshop 1998); DJ Mullan, *Fairness: The New Natural Justice?*, 25 U. TORONTO L.J. 281 (1975).

[53] Martin Loughlin, *Procedural Fairness: A Study of the Crisis in Administrative Law Theory,* 28 U. TORONTO L.J. 215 (1978).

[54] Rajasingham *supra* note 53.

[55] R v. Secretary of State for Health ex. p. United States Tobacco International Inc, [1992] 1 QB 353 (United Kingdom).

the decision-making body, and the statutory framework[56] are key factors here. Based on this, the court determines what level of procedural protection is required.

As we have seen, the rule against bias also involves two competing values – efficiency and public confidence in the administration of justice. Each of the two tests for apparent bias favours a different value. The real likelihood test requires a probability rather than a possibility of bias, and looks to the assessment of the court. This will allow for decision-making processes which are fair to stand, even if they might appear biased to members of the public. Thus, it allows for efficient decision-making that is uninhibited by public misconceptions. The reasonable suspicion test, by looking at possibilities, and the assessment of the public results in a stricter approach to bias – an approach which might inhibit decision-making, but would, at the same time, promote public confidence in the administration of justice.

To simply choose one of the tests, as courts in India or the United Kingdom have done, suggests that *one* of these values should predominate in *every* decision-making context. I respectfully submit that this is simply not the case. The proceedings of courts, tribunals or arbitral tribunals, since they involve determinations of fact and law, greater consequences to individuals, and result in greater publicity, are contexts where public confidence in the administration of justice should be the decisive factor. Here, the real likelihood test should be used. This is particularly important in Sri Lanka where there is an acute lack of public confidence in the judiciary. This is rooted in a history of judicial abuse of power, executive overreach, and, most recently, the controversial impeachment and reinstatement of Sri Lanka's 43rd Chief Justice.[57] While the situation has improved following the recent change of government, there remain, in the words of the United Nations Special Rapporteur on the independence of lawyers and judges, "credible

[56] Nanayakkara v. University of Peradeniya, [1985] 1 SLR 174 (Sri Lanka); Lloyd v. MacMahon, [1987] AC 625, 702 (United Kingdom).

[57] Judicial abuse of power was at its height during the tenure of former Chief Justice Sarath Silva (1999-2009). His misconduct on the bench, his problematic relationship with the executive arm of government and his abuse of his powers of transfer, dismissal and disciplinary control of members of the lower judiciary are well-documented, *see, e.g.* INTERNATIONAL BAR ASSOCIATION HUMAN RIGHTS INSTITUTE, JUSTICE IN RETREAT: A REPORT ON THE INDEPENDENCE OF THE LEGAL PROFESSION AND THE RULE OF LAW IN SRI LANKA 28-37 (2009). On executive overreach and the impeachment (2013) and reinstatement (2015), *see* Special Rapporteur on the independence of lawyers and judges, *Report of the Special Rapporteur on the independence of lawyers and judges on her mission to Sri Lanka*, U.N. Doc. A/HRC/35/31/Add.1 (Mar. 23, 2017) (by Mónica Pinto) ¶31-51

concerns relating to the independence, impartiality and competence of the judiciary."[58] Increasing confidence in the judiciary, then, is crucial at this juncture.

There are, however, other types of decisions – such as ministerial decisions and decisions involving questions of departmental policy – where efficiency is more important than public confidence. These should be decided based on the reasonable suspicion test. This is because public perceptions of bias in such cases are more likely to be mistaken due to a lack of awareness, and because efficiency is of essence if a government is to implement its program of action effectively. The court, with its greater familiarity with administrative procedures, should be the body that assesses bias here.

The approach outlined above, then, encapsulates *both* the values of these tests, allowing the decision-making context to determine which is to be used. It draws on the flexible approach used with regards to the right to a fair hearing, but modifies it by requiring a clear demarcation of the situations in which each test applies.

D. Legal Certainty and the Rule against Bias

Some may argue that the courts already adopt a contextual approach, whatever test they may claim to employ. For instance, courts consistently refuse to intervene in administrative decision-making contexts which the public, from its vantage point, might consider tainted by bias. Examples include: where a decision-maker is a Minister and has previously made strong statements about a matter that has come up to be decided by him;[59] where administrative decisions are influenced by the party-political views of an elected decision-maker;[60] and where the ministerial or departmental policy of the decision-maker is shown to favour a certain outcome.[61] In the United Kingdom, moreover, the courts have often held that there was no bias

[58] *Id.* ¶32.

[59] Fitzgerald v. Director of Public Prosecution and Others, [2003] IESC 43 (United Kingdom); Hari v. Deputy Commissioner of Police, [1956] INSC 39 (India).

[60] R v. Waltham Forest LBC ex. p. Baxter, [1988] 1 QB 419 (United Kingdom).

[61] R v. Amber Valley District Council ex. p. Jackson, [1984] 3 All ER 501 (United Kingdom) (the prior support of the members of a political party controlling a local authority for a given planning application does not count as bias).

by attributing detailed knowledge of procedural and substantive law to the "fair-minded observer".[62] If a contextual approach is already in operation, then why should courts adopt a two-pronged approach?

I would argue that the latter is required because of the importance of legal certainty. Currently, courts *claim* to be using a particular test and vantage point, and then *in fact* use a different test and vantage point. As a result, the affected parties are never sure about what the law requires of them. They cannot plan their future conduct because they do not know the precise basis on which it will be assessed. The position in the United Kingdom is unsatisfactory for this reason. I submit that the position in Sri Lanka, where courts sometimes suggest that *both* tests are being used, or that both are the same, is no better.

A transparent, open, reasoned, decision about which test to use is better than the covert use of different tests. A two-pronged approach would involve a clear judicial statement about the nature of each test, the values embodied in them, and the type of contexts to which each applies. This would then result in judgments that take context more seriously, allow for the smooth, efficient running of the administrative apparatus, result in greater legal certainty and ensure public confidence in the administration of justice.

CONCLUSION

Administrative law has always developed in response to the growth of the modern State. The rule against bias is one of the safeguards against abuse of the State's complex administrative apparatus by decision-makers. The two tests for apparent bias embody two important values. The real likelihood test, by requiring a probability of bias from the court's perspective, favours efficiency. The reasonable suspicion test, by requiring a mere possibility of bias from the public's perspective, favours public confidence in the administration of justice. The balance between these two values is distorted where, as in Sri Lanka, there is a lack of clarity regarding the content and application of the two tests for apparent bias, or, as in India and the United Kingdom, where one test is chosen over the other.

[62] Taylor v. Williamsons (A Firm), [2002] EWCA Civ 1380 (United Kingdom); Hart v. Relentless Records Ltd., [2002] EWHC 1984 (United Kingdom); Groves *supra* note 47.

In this paper, I have argued for a context-specific application of the different tests. Where efficiency is essential, as in ministerial decisions and matters of departmental policy, the real likelihood test should apply. Where public confidence is vital, as in the proceedings of courts and tribunals, the reasonable suspicion test should apply. This approach draws on the flexibility that already characterizes the courts' application of the right to a fair hearing. It promotes legal certainty through a clear statement of which the two tests applies in different contexts. It also makes sure that the courts' credibility is maintained: they will build public confidence in the administration of justice while ensuring that an elected government's agenda is not derailed by excessive fears of bias. It is, in short, an approach to natural justice that effectively responds to the needs of fairness and efficient administration in the modern State.

THE HENRY VIII CLAUSE:

NEED TO CHANGE THE COLOUR OF OUR SHADES

- Priya Garg[*] & Amrita Ghosh[#]

ABSTRACT

The legality of and the need for the Removal of Doubt or Difficulty Clause, also known as Henry VIII clause, has been a bone of contention in multiple jurisdictions, one of the recent controversies being the presence of the Henry VIII clause in the 'Great Repeal Bill' of Britain. In the Indian context, the legality of the broad Henry VIII clause remains an ambiguous issue while the issue of legality of the narrow Henry VIII clause is a decided one. The case laws upon the former aspect of the Henry VIII clause have been incorrectly analysed to a substantial extent both by scholars and in reputed legal commentaries. Hence, the authors wish to put forth the correct legal interpretation of the judicial dictum upon the matter. Further, as per the political environment that exists at present in the Indian set up, given the rising complexities and sheer number of legislations that the Parliament is required to deal with and the complex composition of population of India, the narrow as well as the broad Henry VIII clause become matters of necessity even though they may be viewed with suspicion. Therefore, be it the narrow or the broad Henry VIII clause, these clauses should not be per se declared as void in the eyes of law; rather, the legality of any Henry VIII clause present in the main statute should be assessed by the Indian judiciary on a case to case basis.

INTRODUCTION

Recently, in March, 2017, a great debate began regarding the Great Repeal Bill in the United Kingdom that seeks to 'copy and paste' EU laws as they already exist under the law of Britain on

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the day when Britain separates from the EU.[1] Moreover, the existence of the Henry VIII clause in the Bill has been one of the most controversial aspects of the Bill.[2] With this, once again the debates surrounding the need for and the appropriateness of the Henry VIII clause as a form of delegated legislation comes into limelight.

Henry VIII clause is a provision under a parent legislation empowering the Executive to amend or repeal one or more statutes by way of the latter's enactment of delegated legislation.[3] It is due to this liberating nature of the Henry VIII clause for the Executive that this clause has been an eye sore for the judiciary and other stakeholders in countries,[4] including India.[5]

In the Indian context, the background picture that explains the need for the Henry VIII clause is that for instance, recently, the winter session of the Parliament was rendered nearly non-functional due to the protests of the opposition against the government at Centre for its

[1] Ben Riley-Smith, *Theresa May to unveil plans for converting EU law via 'Henry VIII clauses' later this month*, THE TELEGRAPH (Mar. 18, 2017), http://www.telegraph.co.uk/news/2017/03/18/theresa-may-unveil-plans-converting-eu-law-via-henry-viii-clauses/.

[2] Patrick Daly, *Brexit: Are the secondary 'Henry VIII clauses' a step too far?*, GRIMSBY TELEGRAPH (April 5, 2017), http://www.grimsbytelegraph.co.uk/brexit-are-the-secondary-henry-viii-clauses-a-step-too-far/story-30249117-detail/story.html; Andrew Sparrow, *Labour to oppose 'Henry VIII powers' being used to rewrite EU laws*, THE GUARDIAN (Mar. 26, 2017), https://www.theguardian.com/politics/2017/mar/26/labour-opposes-henry-viii-powers-rewrite-eu-laws-great-repeal-bill; Stephen Castle, *Britain, Breaking up with E.U., Looks to an Expert: Henry VIII*, THE NEW YORK TIMES (Mar. 30, 2017), https://www.nytimes.com/2017/03/30/world/europe/brexit-king-henry-european-union-laws.html?_r=0; Jon Rogers, *Theresa May set to use 500-year-old 'Henry VIII clauses' to convert EU law post-Brexit*, Express (Mar. 20, 2017), http://www.express.co.uk/news/politics/781048/Theresa-May-Henry-VIII-convert-EU-law-Brexit.

[3] Press Trust of India, *BJP MPs Protest Disruption Of Parliament By Congress Members*, THE INDIAN EXPRESS (05/12/2014), http://indianexpress.com/article/india/india-others/bjp-mps-protest-disruption-of-parliament-by-congress-members/.

[4] Countries such as Australia, the UK, New Zealand, the US also share the same experience.

[5] See *Delegating Legislative Power*, Australian Law Reforms Commission, available at https://www.alrc.gov.au/sites/default/files/pdfs/publications/fr_129ch_17._delegating_legislative_power.pdf, last seen on 10/02/2017; See Gerald Ng, *Slaying The Ghost of Henry VIII: A Reconsideration of The Limits Upon The Delegation of Commonwealth Legislative Power*, 38 Federal Law Review 205, 228 (2010), available at https://flr.law.anu.edu.au/sites/flr.anulaw.anu.edu.au/files/flr/Ng.pdf, last seen on 10/02/2017.

demonetisation decision.[6] Similarly, in the recent past, there have been frequent instances of interruptions and stalling of the Parliament's work,[7] be it due to the insensitive comments of some prominent leader of the ruling party against the minority communities,[8] or the suicide of a student (Rohith Vemula).[9] Further, prior to this ongoing term of the Lok Sabha, the Parliament's operations continued at a lukewarm pace because of the fragile coalition set-up under the United Progressive Alliance (UPA) government.[10]

Therefore, amidst these circumstances in India, the role of delegated legislation becomes more prominent. It is one of the most crucial topics under the Administrative Law of any country, including India, to correctly identify the thin line that demarcates the divide between permissible and excessive delegated legislation. It is within this larger issue of the permissible scope of delegated legislation, that the legality of the Henry VIII clause has been a bone of contention.

This paper first elaborates upon the attributes of the Henry VIII clause and explains how the clause is distinct from other instances of excessive delegated legislation [Part II]. Further, it explains the different forms in which this clause can be located [Part II] and also, the reasons for viewing the Henry VIII clause with suspicion in Indian context [Part III]. In Part IV, the authors analyse the landmark judicial verdicts under Indian Administrative Law in relation to the validity of the Henry VIII clause, thereby elaborating upon the stance taken in India regarding the *vires*

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6 PTI, *Parliament Continues To Be Stalled*, DECCAN HERALD (Dec. 05, 2016), http://www.deccanherald.com/content/584928/parliament-continues-stalled.html; HT Correspondent, *Parliament: Oppn steps up attack over demonetisation, govt. retaliates*, HINDUSTAN TIMES, (Nov. 16, 2016), http://www.hindustantimes.com/india-news/parliament-day-1-live-winter-session-begins/story-9kxkvfmkDP5BqaJm8VX6EM.html.

[7] Kaushiki Sanyal, *Who Gains From Parliamentary Disruptions*, 50:35 Economic and Political Weekly (2015), http://www.prsindia.org/media/articles-citing-prs/who-gains-from-parliamentary-disruptions-4002/ (last visited on 10/02/2017).

8 *See supra* note 3.

9 *Rohith Vemula Case A 'Virtual Murder', Probe Into Suicide 'Farce': Opposition On Smriti Irani's Reply*, ZEE NEWS (Feb. 26, 2016), http://zeenews.india.com/news/india/live-opposition-seeks-iranis-apology-bjp-demands-discussion-over-chidambarams-remark-on-afzal-guru_1859642.html.

[10] Harish Khare, *An opportunity, not a crisis*, THE HINDU, (Sept. 20, 2012) http://www.thehindu.com/opinion/lead/an-opportunity-not-a-crisis/article3915471.ece; Meghnad Desai, *Collusive Conflict*, THE INDIAN EXPRESS, (Sept. 26, 2012), http://archive.indianexpress.com/news/collusive-conflict/993157/.

of extraordinary clause. The analysis shall highlight how the judicial position upon this matter of legality of the Henry VIII clause has been hitherto partly misunderstood [Part V]. Further, the authors also highlight the scope for improvement that exists for the judiciary in this regard. In this part itself, the authors explain the crucial role that the Henry VIII clause plays or can play, specifically in the present political surroundings. In Part VI, the conclusion to this paper is presented.

AN IN-DEPTH UNDERSTANDING OF THE HENRY VIII CLAUSE

A. Attributes of the Henry VIII clause

A Henry VIII clause refers to the provision in a primary Act which empowers the Executive to make secondary legislation which are inconsistent or can amend, repeal with the primary legislation/legislations.[11]

A historical analysis of the Henry VIII Clause tells us that it was originally contained in the Statute of Sewers. At the time, the clause vested in the Commissioner of Sewers (the Executive), the powers to enact rules having the effect of legislation, to levy taxes and to impose penalties for contravention.[12] Later, the Statute of Proclamations provided for the King (the Executive) to issue proclamations having the force of a statute.[13] Both the statutes were in prevalence during the reigns of an autocratic ruler, King Henry VIII.[14] The King asserted his powers in a purely authoritarian manner & 'modified' the provisions as per his subjective understanding.[15]

[11] *See Henry VIII Clauses*, UK PARLIAMENT, http://www.parliament.uk/site-information/glossary/henry-viii-clauses/.

[12] *Henry VIII Clauses & The Rule of Law*, RULE OF LAW, Institute of Australia, http://www.ruleoflaw.org.au/wp-content/uploads/2012/08/Reports-and-Pres-4-11-Henry-VIII-Clauses-the-rule-of-law1.pdf.

[13] *Id.*

[14] *Id.*

[15] N.A.K. Sarma, *Henry VIII Clause in India*, 15 Journal of the Indian Law Institution, 460, 461 (1973).

Resultantly, even at present, whenever such wide powers are conferred upon the Executive, these are termed as the Henry VIII powers.[16]

The Henry VIII clause is different from the situation where the Executive is conferred by the Legislative with the authority to extend the statute already in operation in one area to another area along with the power of modification which allows for making necessary adjustments to the existing law to better suit the requirements of the new territory.[17] This is because in such cases, modifications are made to the fresh operation of the parent Act in the new area instead of altering the original statute.[18] However, under the Henry VIII clause, the Executive is armed to modify the original statue.[19] Further, the Henry VIII clause is also different from the clause present in the parent legislation vesting the Executive with rule making powers in order to give effect to the parent statute.[20] Moreover, the delegation of legislative authority which takes place by virtue of the Henry VIII clause needs to be distinguished from several other instances of excessive delegated legislation. This is because sometimes it is mistakenly presumed that any clause present in the parent statute, conferring upon the Executive,unguided rule making powers is a Henry VIII clause; or that any and every instance of excessive delegated legislation constitutes the Henry VIII clause.[21] For example, it has often been misunderstood in cases such as *WB Electricity Board*[22] and *Central Inland Water* v. *Brojo Nath Ganguly*,[23]that the conferment of

[16] *Id*.

[17] M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, 70 (6th ed., 2007).

[18] *Id*.

[19] *Id*.

[20] C.K. TAKWANI, *Lectures on Administrative Law*, 82-83 (3rd ed., 1998); D.D. BASU, *Administrative Law*, 42 (5th ed., 1998); Jain, *supra* note 17, at 48-49.

[21] See Central Inland Water, AIR 1986 SC 1571 (this case represents a wrong reading of the meaning of the Henry viii clause) ("*No apter description of Rule 9(i) can be given than to call it "the Henry VIII Clause". It confers absolute and arbitrary power upon the Corporation. It does not even state who on behalf of the Corporation is to exercise that power*."); Dr Ketan Govekar, *Delegated Legislation in India*, Kare College of Law 1, 10, http://www.grkarelawlibrary.yolasite.com/resources/FM-Jul14-LT-2-Ketan.pdf.

[22] (1958) 3 SCC 116.

[23] AIR 1986 SC 1571.

arbitrary powers upon the Executive officials due to the presence of a Regulation, makes the Regulation the Henry VIII clause.[24] It is necessary to note that Henry VIII clause is neither equivalent to excessive delegation nor is it always an instance of excessive delegation; though it may, as a clause, be more prone to being an instance of excessive delegation.

Henry VIII clause often exists in the form of 'Removal of Doubt or Difficulties' clause.[25] The clause can be located across a plethora of statutes in India,[26] including in the Indian Constitution[27].

B. Different forms of the Henry VIII clause

In several scholarly writings and legal commentaries, two types of the Henry VIII clause have been identified: broad and narrow clause.[28] The narrow Henry VIII clause permits the Executive to enact delegated legislation so long such legislation does not contravene or derogate from the provisions in the parent Act.[29] However, in case of broad Henry VIII clause, the Executive is permitted to enact delegated legislation which derogates from the provisions under the parent statute.[30]

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[24] M. S. RAMA RAO, ADMINISTRATIVE LAW, 20. ("*W. B. Electricity Board v. Ghosh, the Regulation of removal of permanent employee with 3 months notice or pay in lieu thereof was held arbitrary & void, such a Henry VIII clause has no place, the Supreme Court held.*"); Dr Ketan Govekar, *supra* 18 ("*This hire & fire rules of regulation 34 is parallel to Henry VIII clause. Similar position was held by the court in the case of Central Inland Water Transport Corporation Limited v. Brojo Nath Ganguly..wherein rule 9 of the service rules of the CIWTC conferred power to terminate on similar lines as in the case of Desh Bandhu Ghosh the court went on to say that No apter description of Rule 9(i) can be given than to call it "the Henry VIII clause". It confers absolute and arbitrary power upon the Corporation and therefore invalid.*").

[25] *Supra* note 12, at 460-61.

[26] Eg., S. 128, The State Reorganization Act, No. 37 of 1956; *supra* note 12, at 462, 485-86.

[27] Art. 372, the Draft Constitution of India, 1949; Art. 392, The Constitution of India, 1950.

[28] *Supra* 14, at 68-69 & 94 (7th ed., 2007); Pratik Datta, *Amendments by Stealth MCA Resurrects Henry VIII's Legacy*, 49 EPW. 19, 20 (2015).

[29] Eg., S. 128, The State Reorganisation Act, No. 37 of 1956; S. 470, Indian Companies Act, 2013; S. 29, The Consumer Protection Act, No. 68 of 1986; S. 41, The Pondicherry University Act, No. 53 of 1985.

[30] Jain, *supra* note 17, at 68-69, 94; Datta, *supra* note 28.

However, authors suggest that for a better understanding of the Henry VIII clause, a three tier system of classification should be followed: broader, broad and narrow Henry VIII clause. Broad Henry VIII clause should imply situations where the clause present in the parent Act empowers the Executive to make delegated legislation not only in contravention of the provisions of the parent statute, but also of any other law in operation at a place; with the only limitation upon the rule making power being that the policy and the essence of the parent law or any other law so derogated from is kept unamended. An example of such clause can be located in the India's Constitution under Article 372.[31]

Furthermore, there are other criteria to identify the different forms of the Henry VIII clauses.

[31] "372. Continuance in force of existing laws and their adaptation—

(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law

(3) Nothing in clause (2) shall be deemed

(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause Explanation I The expression law in force in this article shall include a law passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas Explanation II Any law passed or made by a legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra territorial effect Explanation III Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force Explanation IV An Ordinance promulgated by the Governor of a Province under Section 88 of the Government of India Act, 1935 , and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of Article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period."

If objective of delegation is taken as a criterion, the Henry VIII clause may have the objective of facilitating transition from an old legislation to a new law upon the same matter.[32] Further, the Henry VIII clause may also have the objective of allowing flexibility in bringing any new law in its full operation.[33] As a third category, the Henry VIII clause might be a general clause which exists under the parent law in perpetuity to remove 'doubts or difficulties' that may arise at any time after the enactment of the parent law while it remains in force.[34]

Further, if existence of time limit is taken into consideration, then the Henry VIII clause can be of the type limited by time duration: mostly in the initial few years of the enactment of the parent statute.[35] These types of the Henry VIII clauses are also referred to as the sunset provisions.[36] On the other hand, the Henry VIII clauses can have no pre-defined temporal limitations.[37]

If finality accorded is taken as a parameter, then there is one type of the Henry VIII clause that excludes the scope of judicial review of delegated legislation enacted in pursuance of the powers conferred by it,[38]while the other type leaves scope for judicial scrutiny.[39]

Additionally, in some cases, the Henry VIII clause defines the procedure to be followed by the Executive while exercising the powers of delegated legislation conferred by the Henry VIII clause.[40] However, in other instances, no such procedural guidelines are laid down by the Henry

[32] INDIAN CONST. Art. 392.

[33] *Supra* note 12, at 460.

[34] Eg. S. 34, The Administrative Tribunals Act, No. 13 of 1985.

[35] MIRKO PICARIC, *An Old Absolutist Amending Clause as the 'New' Instrument of Delegated Legislation*, 4 THE THEORY AND PRACTICE OF LEGISLATION (2016).

[36] *Supra* 9, at 3; S. 29, The Consumer Protection Act, No. 68 of 1986; S. 41, The Pondicherry University Act, No. 53 of 1985; S. 27, The Delhi Common Effluent Treatment Plants Act, No. 7 of 2000.

[37] *Supra* note 12, at 475-77.

[38] Art. 372, the Draft Constitution of India, 1949.

[39] See S. 34, The Administrative Tribunals Act, No. 13 of 1985; S. 34, The Indian Contract Labour (Regulation and Abolition) Act, No. 37 of 1970.

[40] For example, the requirement of consent of a certain number of people and of the people specific designation in the Executive before passing any instruction by way of delegated legislation.

VIII clause.[41] Moreover, there exists, on one hand, the Henry VIII clause which requires the laying of the delegated legislation made in exercise of the powers conferred by the Henry VIII clause, before each of the House of the Parliament;[42] and on the other hand, the Henry VIII clause which does not contain such requirements of presentation before each house of the Union legislature.[43]

Lastly, there is another basis to classify Henry VIII clause which shall be discussed in part V of the paper.

REASONS FOR VIEWING THE HENRY VIII CLAUSE WITH SUSPICION

Lord Mayor once stated the following regarding the validity of Henry VIII clause—

"*You can be sure that when these Henry VIII clauses are introduced they will always be said to be necessary. William Pitt warned us how to treat such a plea with disdain. Necessity is the justification for every infringement of human liberty: it is the argument of tyrants, the creed of slaves*."[44]

Several reasons have been identified explaining the need for and justification behind viewing the Henry VIII clause with suspicion.

Firstly, the power to amend or repeal any statute is considered to be an essential legislative function and hence the delegation of such power is considered as legally unjustified.[45] This is because delegating the powers to amend or repeal any statute to the Executive may be an unhealthy practice in a democracy, for it is only by way of Parliamentary debates and discussions

[41] S. 41, The Pondicherry University Act, No. 53 of 1985; S. 65, The Competition Act, 2002, No. 12 of 2003.

[42] Eg., S. 29, The Consumer Protection Act, No. 68 of 1986.

[43] Art. 372, the Draft Constitution of India, 1949.

[44] Standing Committee on Justice and Community Safety, Legislative Assembly, Formal Op. (2017) (discussing Henry VIII Clauses), http://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

[45] *Id.*

that amendments or repeals should be introduced to any legislation.[46] Further, it is believed that the Executive should not be given the powers to amend or repeal because unlike the Parliament, it is not directly accountable to public and does not have, instilled within it the fear of loss of public support.[47] Besides, apprehension also exists against the existence of the Henry VIII clause in the parent legislation because the Parliament lacks the authority to directly modify any delegated legislation that has been enacted; nor can the Parliament decide the duration or the commencement of operation of such delegated legislation.[48] Parliament can only disallow the continued operation of any delegated legislation; the Parliament cannot amend/rectify it. Consequently, by the time such decision of discontinuance is taken by the Parliament, much harm would already have accumulated.[49] Moreover, the frequency at which the Henry VIII clause is revoked by the Executive is another matter of concern.[50] Hence, it is opined that the Henry VIII clause should not be allowed as a tool of excuse in the hands of the Executive to perform the work of law-making in a shoddy manner, and thereafter go scot free despite bringing poorly drafted legislations into force.

These are the reasons hitherto identified to justify the opposition against the existence of the Henry VIII clause in parent law.

However, there is another factor that the authors seek to highlight to explain the skepticism that exists against the presence of the Henry VIII clause. The reason has its basis in psychology. The fault lies in the nomenclature 'Henry VIII clause' used for the clause present in the parent legislation and which gives broad discretionary powers to the Executive to amend or repeal any provision in parent statute. This is because given the history of the rule of King Henry VIII, not only does the usage of the term 'Henry VIII clause' invoke an inadvertent negative bias but also is misleading. The nomenclature is misleading primarily due to three reasons. Firstly, when

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See supra* note 9 ("*The clauses should only be used exceptionally, not routinely.*").

Henry VIII was conferred the broad Executive powers to amend or repeal the statute to execute his own will, such powers were wide enough to repeal any or all of the statutes enacted within his jurisdiction.[51] On the other hand, the so called 'Henry VIII clause' within the confines of present day administrative law, does not usually provide such broad ranging powers to the Executive.[52] Secondly, in his times, King Henry VIII was not barred from amending even the policy or essential features of the parent statute or any other statute in force.[53] However, such limitation ordinarily exists in the so called Henry VIII clause of the present times. Thirdly, King Henry VIII's wide ranging powers during his reign could not solely be attributed to his powers to amend any statute; instead it happened due to the simultaneous conferment of judicial powers upon him as well.[54] On the other hand, today's so called Henry VIII clause does not usually confer such adjudicative powers upon the Executive.[55] Therefore, an analogy of the clause which gives broad powers to the Executive to amend or repeal any statute to the tyranny that King Henry VIII exercised during his rule, through this clause, would be misplaced.

THE VALIDITY OF THE HENRY VIII CLAUSE:EXAMINING CASE LAW

Since the Henry VIII clause exists in the parent Act in the form of 'Removal of Doubt or Difficulty Clause', the *vires* of this clause has been contested multiple times in the courts of law. It is widely perceived that the Indian judiciary has accepted the legality of both the narrow and the broad Henry VIII clauses.[56] However, according to the authors, the judiciary has unambiguously accepted the validity of the narrow Henry VIII clause while clouds of ambiguity reign over the validity of the broad Henry VIII clauses. In support of their contention, the authors, in this Section, analyse the landmark verdicts delivered upon this issue.

[51] *Supra* note 12.

[52] *Id.*, at 461.

[53] *Id.*

[54] *Supra* note 13, at 1.

[55] *See* S. 34, The Indian Contract Labour (Regulation and Abolition) Act, No. 37 of 1970.

[56] *Supra* note 14, at 69.

The first of the landmark cases upon the matter has been *Jalan Trading* v. *Mill Mazdoor Union*[57] wherein Section 37 of the Payment of Bonus Act, 1965 was challenged on the ground that it was a Henry VIII clause and hence an instance of excessive delegated legislation.[58] Section 37[59] conferred powers upon the Central Government to make provision, not inconsistent with the 'purposes of the Act', for the removal of difficulties or doubts, and such exercise of Executive powers could not be subject to judicial scrutiny. Since Section 37 permitted the Executive to go to the extent of amending the parent statute, Section 37 is an example of broad Henry VIII clause.

The majority (3:2) decided in the case that Section 37 was not valid as it was an instance of excessive delegated legislation.

The judgment on behalf of the majority was written by Justice Shah. He stated that:

"*Condition of the applicability of s. 37 is the arising of the doubt or difficulty in giving effect to the provisions of the Act. By providing that the order made must not be inconsistent with the purposes of the Act, s. 37 is not saved from the vice of delegation of legislative authority…. Power to remove the doubt or difficulty by altering the provisions of the Act would in substance amount to exercise of legislative authority and that cannot be delegated to an executive authority. Sub-section (2) of s. 37 which purports to make the order of the Central Government in such cases final, accentuates the vice in sub. s. (1), since by enacting that provision the Government is made the sole judge whether difficulty or doubt had arisen in giving effect to the provisions of the Act, whether it is necessary or expedient to remove the doubt or difficulty, and whether the provision enacted is not inconsistent with the purposes of the Act.*"[60]

[57] 1967 SCR (1) 15.

[58] *Supra* note 12, at 470.

[59] Section 37 gave power to the Central Government to make orders, not inconsistent with the purposes of the Act as may have been necessary or expedient for the removal of any difficulty or doubt and the order was made final.

[60] Jalan Trading Co v. Mill Mazdoor Union, AIR 1967 SC 691, ¶ 24.

This implies that in *Jalan Trading* case, the broad Henry VIII clause was declared as non-permissible on account of it being an instance of excessive delegated legislation by its sheer existence.

Later, in *Gammon India* v. *Union of India* (hereinafter 'Gammon India' case),[61] Section 34[62] of the Indian Contract Labour (Regulation and Abolition) Act, 1970 was challenged arguing that it amounted to excessive delegated legislation. Section 34 (Removal of Doubt or Difficulty Clause) was an instance of a narrow Henry VIII clause because it did not confer upon the Central Government the power to amend the provision of parent statute, on the pretext of removing the doubt or difficulty. The Court while upholding the validity of Section 34 distinguished the facts of the case from the case of *Jalan Trading* stating that unlike in the former case, Section 34 in this case neither contained the finality clause nor did it allow the alterations to be made to the provisions of the parent Act or any other statute.[63]

Therefore, two things demand attention regarding the decision in the *Gammon India case.* First, despite the Bench pronouncing the verdict being the Constitutional Bench itself, it did not overrule the decision of the *Jalan Trading* case; rather, it applied the ratio of the *Jalan Trading case* and distinguished the *Gammon India* case on its facts.[64] Second, it partially misread the *Jalan Trading* case suggesting that the latter case declared Section 37 of Payment of Bonus Act as invalid for two reasons; one that it conferred finality upon the decision of the Executive's rule making powers and second that it permitted the Executive to alter the statutory provisions. This is because the Court in *Gammon India* meant that as per the ratio of *Jalan Trading* case, mere existence of the broad Henry VIII clause does not *per se* render the clause as invalid, for it to be an instance of excessive delegated legislation; rather, it is only when such clause is coupled with other aggravating factors such as the condition of finality attached to the broad Henry VIII clause

[61] (1974) 1 SCC 598.

[62] "34. Power to remove difficulties.- If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act, as appears to it to be necessary or expedient for removing the difficulty."

[63] *Id.*

[64] Gammon India Ltd v. Union of India, AIR 1974 960, ¶ 38.

that the clause becomes invalid on account of being an instance of excessive delegated legislation.[65] However, in sharp contrast to the interpretation of the majority's judgment in *Gammon India* case, the Court in *Jalan Trading* case said "*Power to remove the doubt or difficulty by altering the provisions of the Act would in substance amount to exercise of legislative authority and that cannot be delegated to an executive authority. Sub-section (2) of s. 37 which purports to make the order of the Central Government in such cases finally* ***accentuates*** *the vice in sub. s. (1).*"

A careful reading of the quoted portion from the *Jalan Trading* verdict would reveal that any conferment of power to remove the doubt or difficulty by allowing the alteration of the provisions of the Act in itself is impermissible and that the presence of finality clause under Section 37 in that Case was only an 'accentuating' matter instead of it being a 'causation' of the decision in the case.[66] Therefore, the correct interpretation of *Jalan Trading* case would be that the broad Henry VIII clause is *per se* void for it being an instance of excessive delegated legislation.

After *Gammon India* case, another landmark case upon the issue of legality of Henry VIII clause is identified as *Bengal Iron Corporation* v. *Commercial Tax Officer*[67](hereinafter, 'Bengal Iron Corporation'). In this case, Section 42 of the A.P. Act was challenged and it was contested that it paved way for excessive delegated legislation.

Section 42[68] (Removal of Doubt of Difficulty Clause) provided that if difficulty arises in relation to the transition from the old Act to the new law, then the Executive can make rules to remove

[65] *See supra* note 12, at 470.

[66] *Id.*

[67] 1993 SCR (3) 433.

[68] "42 Power to remove difficulties:-

(1) If any difficulty arises in giving effect to the provisions of this Act in consequence of the transition to the said provisions from the corresponding provisions of the Acts in force immediately before the commencement of this Act, the State Government may, by order in the Andhra Pradesh Gazette, make such provisions as appear to them to be necessary or expedient for removing the difficulty.

the difficulty and can derogate from the provisions of the parent (new) law. However, in every other instance where removal of difficulty is required, the Executive can make rules not inconsistent to the provisions of the parent Act. This implies Section 42 is an example of both the broad and narrow Henry VIII clauses.

The Court while upholding the validity of the Section stated that:

"*However, in a subsequent decision in Gammon India Limited.., it has been explained..that the decision in Jalan Trading was influenced by the words occurring at the end of Section 37 of the Payment of Bonus Act to the effect that the direction of the Government issued thereunder was final..It is meant "for giving effect to the provisions of the Act", it was held. Sub-section (2) of Section 42 of the A.P. Act does no doubt not contain the aforesaid offending words, and cannot therefore be characterised as invalid.*"[69]

Therefore, this showcases that the Court in *Bengal Iron Case* read *Gammon India Case as if it* sought to imply that it was 'solely' the finality clause in the 'Removal of Doubt or Difficulty Clause' that influenced the decision of the Court in *Jalan Trading* case, which due to the reasons stated by the authors in the preceding analysis of the *Gammon India* case, is a fallacious legal interpretation.[70] Therefore, the Court in *Bengal Iron* case misread not only the *Jalan Trading case*[71] but also the interpretation of the *Jalan Trading* case in the *Gammon India* case.

However, it has been laid down in cases such as *Punjab Land Development*[72], that the *ratio decidendi* of a previous case can be subsequently broadened by the judge before whom the case

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(2) If any difficulty arises in giving effect to the provisions of this Act (otherwise than in relation to the transition from the provisions of the corresponding Act in force before the commencement of this Act), the State Government may, by order make such provisions, not inconsistent with the purposes of this Act, as appear to them to be necessary or expedient for removing the difficulty."

[69] *Id.*

[70] Though the Court in *Bengal Iron case* reads down the scope of Section 42 of the A.P. Act to be stating it cannot permit the amendment to the provision of the statute, nevertheless, it did not explicitly base this assertion on any of the precedents.

[71] *Supra* note 12.

[72] Punjab Land Development and Reclamation Corporation Ltd., Chandigarh v. Presiding Officer, Labour Court, Chandigarh, 1990 (3) SCC 682.

is cited as precedent and in such cases the broadened interpretation holds till any further development in law occurs.[73] However, there is no easy answer to the issue as to what extent such expansion is possible. Fidelity to text and *stare decisis* would require that such reinterpretation of the previous verdict does not deviate too far from the original judgment.[74]

Given these rules regarding *stare decisis* and *ratio decidendi* and the interpretation adopted by *Gammon India* case[75] and *Bengal Iron* case[76] of the reasoning given in the *Jalan Trading* case[77], two distinct conclusions are possible regarding the validity of the broad Henry VIII clause in the Indian context. First, that till the time the Supreme Court in any subsequent case correctly reinterprets the reasoning given in the *Jalan Trading* case behind holding the broader Henry VIII clause as invalid, the reasoning of the *Jalan Trading* case re-interpreted in *Gammon India* and *Bengal Iron* case prevails due to which it can be stated that the broader Henry VIII clause is legal in India.[78] Second, it can be stated that the interpretations of the reasoning given in *Jalan Trading* case to hold the broader Henry VIII clause as invalid in *Gammon India* and *Bengal Iron* are merely *obiter*. This is because in the latter two cases, legality of the broader Henry VIII clause was not an issue; instead in both cases, the issue revolved around the legality of only the narrow Henry VIII clause.[79] Upon the adoption of the second interpretation, inference would follow that broader Henry VIII clause is illegal in India. Several legal commentaries have mostly adopted the former approach though by an extremely superficial,[80] and sometimes an incorrect,[81] analysis.

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[73] *Id*., ¶ 43.

[74] 1990 (3) SCC 682.

[75] *Supra* note 12.

[76] *Supra* note 68.

[77] *Supra* note 12.

[78] Applying the principle of validity of broadened or narrowed interpretation of ratio decidendi by subsequent bench, as laid down in Punjab Land Development Case.

[79] Central Inland Water Transport Corporation v Brojo Nath Ganguly, AIR 1986 SC 1571; West Bengal State Electricity Board v Desh Bandu Das, (1958) 3 SCC 116.

[80] *See* TAKWANI, *supra* note 20; JAIN, *supra* note 17, at 48-49.

Further, under the Henry VIII clause, power can be exercised by the Executive only in order to 'remove doubts or difficulties' wherein such doubts or difficulties arise in relation to the parent statute and not de *hors* it;[82] and existence of such doubts and difficulties should be objectively verifiable.[83]

LESSONS FOR THE JUDICIARY AND FOR OTHER STAKEHOLDERS

However, this discussion regarding the permissibility or impermissibility by the Indian judiciary to incorporate broad Henry VIII clause in the parent Act has become largely academic. This is because the legislature has discovered some indirect ways to enforce the broad Henry VIII clause. This is being done in two ways. Firstly, the legislature drafts the main statute in a skeletal manner.[84]Therefore, the individual provisions are broadly termed.[85] This way the Legislature ensures that Executive gets to exercise significant amount of discretion despite using the narrow Henry VIII clause in the main law in the form of 'Removal of Doubts and Difficulties' provision. Secondly, these days, the subtle and newly emerging manifestation of the broad Henry VIII clause is the power under the parent Act to allow the Executive to clarify or interpret the meaning of the provisions given in the parent Act.[86] The clarification clause thereby indirectly empowers the Executive to amend the provisions of the main Act wherever the existence of ambiguity in the parent law provides such scope.[87]

In effect the power that the broad Henry VIII clause could possibly confer upon the Executive is practically being exercised by the Executive, irrespective of the ambiguity that continues to

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[81] *See* TAKWANI, *Id*., at 20; See JAIN, *supra* note 17.

[82] *Supra note* 12, at 465.

[83] JAIN, *supra* note 17, at 68.

[84] HOVEYDA ABBAS, RANJAY KUMAR & MOHAMMED AFTAB ALAM, INDIAN GOVERNMENT AND POLITICS 225 (1st ed. 2011).

[85] *Id*.

[86] Securities And Exchange Board Of India (Settlement Of Administrative And Civil Proceedings) Regulations, 2013, Regulation 22 (Oct. 2013).

[87] *See* Seema Ray, *FAQs and Clarifications*, India Corp Law Blog, 2014.

prevail regarding the judicial stance taken with regard to the legality of the broad Henry VIII clause. Hence, it is suggested that the judiciary should unambiguously accept the *prima facie* validity of broad Henry VIII clause. Further, the judiciary should instead adjudicate upon the validity of the broad Henry VIII clause on a case to case basis wherein the decision upon the validity should be influenced by factors, such as nature of the law wherein the Henry VIII clause is incorporated, the form of Henry VIII clause so enacted and the scope of the Henry VIII clause.

Moreover, it is crucial that the validity of the broad Henry VIII clause is recognised, since if the discretion conferred by the Henry VIII clause is not broad enough to permit the Executive to amend the provisions of the law (provided the essence or the purpose of the law remains unamended) then, there is independent utility of the Henry VIII clause will be wholly absent. This is because the narrow Henry VIII clause is in effect similar to 'Power to make rules to bring the provisions of the Act into force'.[88] It is due to this nature of the narrow Henry VIII clause that some scholars refuse to accord the status of Henry VIII clause to the so called narrow Henry VIII clause.[89]

Furthermore, the primary rationale behind incorporating the Henry VIII clause in the parent Act is to provide for contingencies of lack of foresight by the legislature despite it exercising all reasonable care and enquiries[90] and contingencies of technicalities and complexities involved in the new legislation.[91] Therefore, the broad Henry VII clause is a necessary evil to ensure flexibility.[92]

Presently, the Parliament has a variety of issues to enact laws upon and is overburdened with the job of enactment and amendment. It must be borne in mind that the disruptions in the Parliament

[88] *See* S. 30 & 31, The Haryana Ceiling On Land Holdings Act, No. 26 of 1972.

[89] DATTA, *supra* note 28, at 20.

[90] Zee News, s*upra* note 9, at 2; Madeva Upendra Sinai and Ors. v. Union of India, AIR 1975 SC 797.

[91] TAKWANI, *supra* note 20, at 80.

[92] RT. HON. THE LORD RIPON, *Henry VIII Clauses*, 10 STATUTE LAW REVIEW 205 (1989); CHRISTOPHER FORSYTH, *The Constitution and Prospective Henry VIII Clauses*, 9 JUD. REVIEW 17 (2004).

have become a common landscape,[93] and coalition politics is on rise due to which arriving at the consensus which is required for making or amending laws has become difficult.[94] In the light of these circumstances, the Court ought to unambiguously accord legal recognition to the broad Henry VIII clause.

CONCLUSION

Ambiguity regarding the validity of broad Henry VIII clause in India continues to prevail. However, the authors opine that no form of the Henry VIII clause should be declared as *ipso facto* invalid by the judiciary. The negative stereotypes related to the Henry VIII clause need to be done away with. The change can begin by amending the nomenclature of the clause in the first place.

Ideally, the Henry VIII clause should have certain limitations regarding its scope imposed upon it. These constraints can exist in the form of temporal restrictions, procedural guidelines, impermissibility to amend the essence or the underlying policy of the parent statute, requirement of laying the delegated law so enacted before the Parliament and/or limiting the power of amendment of provisions in the Act upto one or a few statutes, among other possibilities. Most importantly, the authority which can exercise the powers under the Henry VIII clause on the behalf of the Executive ought to be carefully chosen.[95]

Therefore, the debate under the realm of Indian Administrative Law must shift from asking the elementary question regarding the legality of the narrow and broad Henry VIII clause to adjudicating upon the validity of such clause on case to case basis. This is because deciding upon

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93 Baijayant Jay Panda, *Has The Indian Parliament Lost Its Relevance?*, BBC (Jan. 7, 2015), http://www.bbc.com/news/world-asia-india-34992800; G. Pramod Kumar, *Parliament logjam: Can the Congress beat BJP's record of disruption?*, First Post (Jul. 25, 2015), http://www.firstpost.com/politics/parliament-logjam-can-congress-beat-bjps-record-of-disruption-2361104.html; PTI, *Oppn continue protest seeking PM'S presence in Rajya Sabha*, Deccan Herald (Nov. 29, 2016), http://www.deccanherald.com/content/583771/oppn-continue-protest-seeking-pms.html.

94 *Supra note* 84.

95 The General Council of the Bar, *Bar Council Response To The Constitution Committee Inquiry: The Legislative Process Call For Evidence On The Delegation Of Powers Consultation Paper*, THE BAR COUNCIL (Jan. 18, 2017), http://www.barcouncil.org.uk/media/516127/bar_council_response_to_constituion_committee_inquiry-delegated_powers.pdf

the *vires* of the Henry VIII clause without looking at the context of its application is like reading the label on a pickle bottle which has no meaning on its own unless attached to the bottle on which the label is placed.

THE JUDICIARY AS 'STATE': TO BE, OR NOT TO BE

- Sharad Verma*

"*Judicial decisions can be rich in unintended consequences…*"[1]

ABSTRACT

In the relatively recent case of Shahid Balwa, the Supreme Court of India in the exercise of its 'plenary' powers under Art.142 of the Constitution asserted that it could take away the constitutionally conferred jurisdiction of a High Court in a criminal trial, and ordered the accused to forego the right to appeal before the High Court, to instead approach the Supreme Court immediately from the court of first instance, if appellate remedies were sought. This was done in the pursuit of 'speedy justice'. However, it is important to note that the right to appeal to the High Court has been recognised as a fundamental right in Madhav Haskot, considering which the Supreme Court in Shahid Balwa has not only impaired the constitutionally conferred jurisdiction of a High Court, but also the accused person's right to appeal to it.

Every fundamental right claim invites the theoretical inquiry as to whether the alleged violator qualifies as 'State' under Art.12 of the Constitution or not. The locus classicus pertaining to the status of the judiciary vis-à-vis Art.12 remains the case of Naresh Mirajkar, wherein the Court established a presumption of sorts for the absolute exemption of its adjudicatory functions, holding that it is inappropriate to assume that a "…judicial decision pronounced by a Judge of competent jurisdiction can affect the Fundamental Rights."

Taking Shahid Balwa as an example of incidental, or unintended violations that courts may lead to while adjudicating a case, the author will conduct a chronological examination of the judiciary's position vis-à-vis Art.12, and analyse the theoretical underpinnings of 'state action' in the US, along with the new position in the UK, to exhibit the doctrinal necessity of recognition of judicial actions as 'state action'. In this process, the author will further attempt to

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[1] Richard A. Posner, The Rise and Fall of Judicial Self-Restraint, 100 CAL. LAW REV. 519, 553 (2012).

analyse the Supreme Court's apprehensions in recognising judiciary as 'state', exhibit the constitutional conundrum that adherence to Mirajkar continues to pose, and finally, suggest the narrow manner in which fundamental rights-challenges to judicial actions can be permitted under Art.32, without giving into the 'floodgates' argument.

INTRODUCTION

The judiciary in India does not find express mention in Art.12 of the Constitution which defines the 'State' for the purposes of Part III. However, no stranger to the concept of 'state action', the Supreme Court has applied the theory extensively to evolve tests for the determination of 'instrumentalities' of the State.[2] The doctrine remains the dividing line between the public sector, which is controlled by the constitution, and the private sector, which is not.[3]

A. The 'functional' origins of State Action:

Originating in the US, the doctrine of 'state action' had to be evolved primarily because of the word 'state' in the 14th Amendment[4] to the Constitution which reads as follows:

> *"...nor shall any state deprive any reason of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."*[5]

The object of the guarantee would have been defeated if it could not bring within its sweep all the organs of the State – *executive, legislative or judicial* – and all the agencies and instrumentalities through which the State acts in a modern political system.[6] So far as the US is concerned, there is little doubt that the corresponding provisions of the American Constitution operate as a limitation upon the judiciary, and that the 'Bill of Rights' is a limitation upon all

[2] Ramana v. I.A.A.I, AIR 1979 S.C. 1628 (India).

[3] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 359 (1974).

[4] BOB BLAISDELL, THE UNITED STATES CONSTITUTION, 98 (1st ed., Dover Publications, 1999).

[5] U.S. CONST. amend XIV.

[6] Beck v. Washington, (1962) 8 L Edn., (2d) 102 (110).

branches of government, including the judiciary.[7] Specifically in relation to the courts, the American principle has been expressed in the following words:

> *"...it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the government."*[8]

The comprehensiveness of the operation of the constitutional rights included in the 14th Amendment against all forms of state action was formulated in the early case of *Ex Parte Virginia*[9] in the following words:

> *"A State acts by its legislative, its executive or its judicial authorities. The constitutional provision (14th Amendment) therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws."*[10]

In India too, it has been historically understood that "*...the whole object of Part III of the Constitution is to provide protection to the freedoms mentioned therein against arbitrary invasion by the State.*"[11] The Court has observed that the framers of our Constitution were to an extent influenced by these principles borrowed from the US constitutional law.[12] The same conception has played a role in the application of the fundamental rights in the Indian Constitution, though some of them are expressly applicable to non-state or 'private' action, and some are not expressly confined to state action.[13]

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[7] ANNALS OF CONGRESS, THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, 439 (1789-1824).

[8] Shelly v. Kraemer, (1948) 334 US 1.

[9] (1880) 100 US 339.

[10] *Id.* at 361.

[11] State of West Bengal v. Subodh Gopal Bose, AIR 1954 SC 92 (India).

[12] Basheshar Nath v. Income Tax Commissioner, AIR 1959 SC 119 (138) (India).

[13] INDIA CONST. arts. 17, 23 and 24.

B. The 'textual' limits of Art. 12 of the Constitution:

A significant controversy surrounds the status of the judiciary *vis-à-vis* Art.12.[14] In considering whether the judiciary is a limb of the 'State' for the application of Art.12, the Supreme Court has expressly preferred the erstwhile British principles relating to judicial decisions over American precedents on 'state action'.[15] Whereas, in the provision, the meaning of 'other authorities' has been left to be developed almost entirely by the courts without much content in the provision itself, and this ambiguity can be said to be purposive.[16] The authorities and instrumentalities not specified in it may also fall within its purview if they otherwise satisfy the characteristics of 'State' in this Article. Therefore, it is inclusive, and not exhaustive.[17]

The proceedings of the Constituent Assembly of India record that when a few members objected to the omnibus clause of 'other authorities', Dr. Ambedkar insisted on its retention so that the fundamental rights could be claimed against anybody or authority exercising power over the people.[18] The standard for recognizing whether the exercise of power constitutes 'state action' and the actor qualifies as a 'state authority' is therefore a 'functional' one. H.M. Seervai explains that in enacting fundamental Rights in Part III of our Constitution, the founding fathers showed that they had the will, and were ready to adopt the means to confer legally enforceable fundamental rights. By defining 'the State' in Art.12 and 'law' in Art.13 widely, the framers

[14] INDIA CONST. art. 12:

1. The Government and Parliament of India;
2. The Government and the Legislature of each of the States;
3. All local authorities;
4. Other authorities within the territory of India or under the control of the Government of India.

[15] Naresh Mirajkar v. State of Maharashtra, (1966) 3 SCR 744 (India). ("Naresh")

[16] Durga Das Basu, Comparative Constitutional law, 80 (3rd Ed., Lexis Nexis, 2014).

[17] V.N. Shukla, Constitution of India, 378 (11th Ed., Eastern Book Company, 2010).

[18] CONSTITUENT ASSEMBLY DEBATES, (Vol. 7), 607-8, (Lok Sabha Secretariat 1986).

intended that fundamental rights operated over the widest field.[19] It is against the Constituent Assembly's 'functional' standard that the current conceptions of the Court are to be juxtaposed.

C. The 'contextual' dissonance of the Supreme Court:

According to the contemporary view taken by the Supreme Court regarding whether the judiciary is meant to be included in the concept of the 'State', the answer depends upon the distinction between the 'judicial' and the 'non-judicial' functions of the Court. In the exercise of the non-judicial functions, for example purely administrative functions, the courts fall within the definition of 'State'.[20] Wherefore, it has been held that when the Supreme Court, in the exercise of its statutory rule-making powers under Art.145, makes rules, which contravene the fundamental rights of the citizens, appropriate remedy under Arts.32 or 226 can be sought.[21] However, the exercise of judicial functions will not occasion the infringement of the fundamental rights and, therefore, the question of bringing the courts within the definition of 'State' does not arise.[22]

Yet, as pointed out by Dr. Basu, there is nothing in the proceedings of the Constituent Assembly or the Drafting Committee to indicate that while incorporating the American concept of 'state action' in Art.12, the judiciary was deliberately intended to be excluded.[23] On the contrary, Dr. Ambedkar had clarified that 'authority' for the purposes of Art.12 subsumed within its scope "*every authority which has got either power to make laws or the power to have discretion vested in it.*"[24]

While considering this 'functional' standard to define the 'state', which requires a determination of the nature and scope of the functions catered to by an authority, it must be

[19] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, 406 (Vol 1, 4th ED., 2014 reprint).

[20] Riju Prasad Sarmah v. State of Assam, 2015 (7) SCALE 602, 61 (India). ("Sarmah")

[21] P.C. Garg v. Excise Commissioner, AIR 1963 SC 996 (India).

[22] Naresh, *Supra* note 15.

[23] DURGA DAS BASU, LIMITED GOVERNMENT AND JUDICIAL REVIEW, 267 (1ST ED., Lexis-Nexis, 2016)

[24] CONSTITUENT ASSEMBLY DEBATES, (Vol. 7), 610, (Lok Sabha Secretariat 1986).

assumed that the makers of the Constitution were aware that many of the constitutional guarantees would be meaningless if not available against judicial actions, such as the rights against conviction under an *ex post facto* law, double jeopardy and self-incrimination in Art.20; the "procedure established by law" under Art.21; and protection against detention under Art.22(1).[25]

'<u>STATE ACTION' IN INDIA: THEN AND NOW</u>

A clear enunciation as to whether the judiciary figures in Art.12 was given by the Supreme Court in *Naresh Mirajkar*[26]. The matter arose out of a libel case, *Thackersey* v. *Karanjia*[27] before the Bombay High Court. The appellant contended that his evidence should not be allowed to be reported, because the reports of his evidence earlier had injured his business. Although the trial continued to be held in public, TARKUNDE J. orally directed that the appellant's further evidence should not be reported. This led to petitions being filed by journalists before the Supreme Court, contending that the order violated their right to freedom of speech and expression guaranteed under Art.19(1)(a), and a writ should be issued to quash the High Court's order. The major question before the Court was whether Art.19 could be violated by a judge acting in his judicial capacity.[28]

The majority having held that there was no violation of Art.19, the lone dissent was expressed by HIDAYATULLAH J., wherein he held that the judiciary is subject to fundamental rights, and went on to consider several other Articles in Part III to better understand the prospect of judicial-violations of constitutional guarantees.[29] He exemplified "purposeful discrimination" as well as invasion of freedom of expression by a judicial order, thus:

[25] SEERVAI, *supra* note 19, at 396.

[26] Naresh, *Supra* note 15.

[27] Appeal No. 20 of 1965 and Suit No. 319 of 1960, D/- 22 -7 -1969.

[28] SEERVAI, *Supra* note 19, at 393.

[29] McDougall v. Knight, (1889) 14 App. Cas. 194.

> *"If a Judge, without any reason, orders the members of one political party out of his court, those so ordered may seek to enforce their fundamental rights against him and it should make no difference that the order is made while he sits as a judge."*[30]

However, an earlier vestige of the majority view in *Mirajkar*[31] may be gathered from the earlier case of *Amirabbas*[32]. SHAH J., speaking for the Court in dismissing the writ petition in this case, made the following observations:

> "*... denial of equality before the law or the equal protection of the laws can be claimed against executive or legislative process, but not against the decision of a competent tribunal."*[33]

This astounding assertion runs counter to the basic principles of constitutional jurisprudence which we have imported from the US[34], by adopting verbatim the 'equal protection' clause of the American Constitution.[35] This is further aggravated by the limitation imposed by SHAH J. in support of this proposition, that:

> *"The remedy for a person aggrieved by the judicial tribunal is to approach for redress a superior tribunal, if there be one."*[36]

The same approach was maintained by the majority in *Mirajkar* [37] , wherein GAJENDRAGADKAR J., speaking for the majority, observed:

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[30] Mirajkar, *Supra* note 15, see Hidayatullah J.'s dissenting judgment, at 29.

[31] *Id.*

[32] Amirabbas v. State of Madhya Bharat, (1960) 3 SCR 138 (India). ("Amirabbas")

[33] *Id.* at 142.

[34] BASU, *Supra* note 23, at 96.

[35] BASU, *Supra* note 16, at 87.

[36] Amirabbas, *Supra* note 32, at 142.

> *"The argument that the impugned order affects the fundamental rights of the petitioners under Art.19, is based on a complete misconception about the nature and character of the judicial process and of judicial decisions... It is singularly inappropriate to assume that a judicial decision pronounced by a judge of competent jurisdiction in or in relation to a matter before it can affect the fundamental rights of the citizens under Art.19."*[38]

It is since this case that the judiciary's unwillingness to include itself within the purview of Art.12 has been staunch, choosing to adhere instead to a purely literal interpretation of the provision, concentrating upon the conspicuous lack of express mention of the judiciary in it, and the supposedly unique nature of judicial process, which deem it immune from the enforcement of Part III rights. This has led to the formation of an obscure precedent in law which has disabled the enforcement of constitutional rights against incidental violations by the courts acting in judicial capacity, with no exception.

It would be pertinent to recall that this view is contrary to the 'functional' approach explained by Dr. Ambedkar during the Constituent Assembly.[39] The current position in law is based upon an uncertain legal premise, to such an extent that the Supreme Court has precluded access to justice even against quasi-judicial authorities in *Ujjam Bai.*[40] This is without considering that from a functional perspective, a 'quasi-judicial' decision is "nearer the administrative decision in terms of its discretionary element, and nearer the judicial decision in terms of procedure and objectivity of its end-product"[41], possessing the element of discretion to which constitutional limitations must apply. As will be highlighted further in this paper, if the judiciary is keen to perform an activist role, especially through the all-encompassing Art.142 of

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[37] Naresh, *Supra* note 15.

[38] *Id.* at 765.

[39] Naresh, *Supra* note 15.

[40] Ujjam Bai v. State of Uttar Pradesh & Anr., AIR 1962 SC 1621 (India).

[41] GRIFFITH AND STREET, PRINCIPLES OF ADMINISTRATIVE LAW, 144 (5TH ED., 1973).

the Constitution[42], it is only prudent that constitutional limitations operating upon the express 'state' authorities must also limit discretionary judicial actions.

Continuing the cases discussed, it must be noted that the *Mirajkar*[43] view of 1967 continues to be the law in force. In as recently as 2015, in the case of *Riju Sarmah*[44], the Supreme Court has found it fit to continue with the view formulated in *Mirajkar*[45], albeit for reformed reasons. In this case, the petitioners had challenged a custom relating to election of the *Doloi* (head priest), to the extent that it excludes the participation of women, and thus violates Art.14.[46] They further contended that though fundamental rights under Arts.14 and 15, unlike rights such as the right against untouchability, are guaranteed only against 'state action' and not against private customs or practices, the Judiciary is as much a part of "State" as the Executive and the Legislature, and hence it cannot allow perpetuation of discrimination which constitutes violation of Art.14.[47]

While choosing to adhere to the established principle of non-inclusion of the judiciary within the definition under Art.12, the division bench of KALIFULLA J. and SHIVA KIRTI SINGH J. referred to *Mirajkar*[48] and upheld the ratio of that case. Referring to a catena of decisions of the Supreme Court, beginning from *Mirajkar* and stretching to the elaborate decision of the Court in *Pradeep Kumar Biswas*[49], it was held that:

> *"...judgments of High Courts and Supreme Court cannot be subjected to writ jurisdiction, and for want of requisite governmental control, Judiciary cannot be*

[42] *See* Krishnadas Rajagopal, *SC converts ban on diesel cabs to 'gradual phase-out'*, THE HINDU, May 10, 2016.

[43] Naresh, *Supra* note 15.

[44] Samrah, *Supra* note 20.

[45] *Id.*

[46] *Id.* at 3.

[47] *Id.* at 44.

[48] Naresh, *Supra* note 15.

[49] Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111 (India).

> *a State under Art.12, we also hold that while acting on the judicial side the courts are not included in the definition of the State."*[50]

An important question which arose in *Riju Sarmah's*[51] case, regarding the proposed inclusion of the judiciary and the consequences thereof, can be extrapolated from the contention of the petitioner, contending that the word 'State' comprehends all the three organs specifically including the judiciary, and hence the Court must not permit perpetual discrimination in violation of Art.14.[52] The primary reason for the Court's categorical aversion to this proposition was that:

> *"The judicial forum will then lose its impartiality because petitioners, like in the present case, will make a demand that court itself should act as the State and deliver all reliefs in a dispute where the executive or the legislature is not at all involved as a party."*[53]

The ratiocination of the Court appears justified, but it may be singularly attributed to the structure and purport of the petitioner's argument, and the way in which the submission before the Court was designed, *i.e.*, by simply hearing a writ petition, the Court becomes privy to the matter at hand with the same duties and responsibilities as the State, and must positively ensure perseverance of equality.[54] Such a conception does not take into account that the Court cannot afford to lose its impartial and completely objective position in matters before it.

However, it must be noted that constitutionally, the Supreme Court is bound to enforce fundamental rights not because of its inclusion within the meaning of 'state' in Art.12, but because of Art.32 of the Constitution. Unlike the other provisions in Part III, Art.12 is neither a 'positive', nor a 'negative' fundamental right, even though it is the very provision with

[50] Samrah, *Supra* note 20, at 61.

[51] *Id.*

[52] *Id.* at 44.

[53] *Id.* at 64.

[54] *Id.*

which Part III begins.[55] It is a determining provision, which is necessary because "*the whole object of Part III is to provide protection for the freedoms and rights mentioned therein, against arbitrary invasion by the State.*"[56]

This exposes a further dimension as to the apprehended consequence of inclusion of the judiciary within the meaning of State under Art.12: Will the *positive* responsibility of facilitation of fundamental rights also bind the judiciary if it is read as 'state' under Art.12? The classification of enumerated rights can be based on who they are directed against, and whether they involve a 'duty of restraint' or a 'duty to facilitate entitlements'.[57] This distinction between the notions of 'negative' and 'positive' rights in legal theory was prominently discussed by Hohfeld.[58] The language of a substantive right usually indicates whether it is directed against state agencies, private actors or both. For instance, in the Indian Constitution civil-political rights such as 'freedom of speech, assembly and association' are directed against the 'state', as the text expressly refers to the 'state's' power to impose reasonable restrictions on the exercise of the same.[59]

That being the case, the inclusion of the judiciary within the meaning of 'other authorities' in Art.12, against the apprehensions of the Court in *Riju Prasad*[60], would not impose a 'positive' duty upon the judiciary to facilitate enforcement of Part III rights, which would admittedly compromise with the impartial position of the judiciary. Such inclusion would only make the 'negative' limitations of Part III provisions, specifically Art.32 available against incidental violations during the judicial process.[61] Wherefore, the apprehensions of the

[55] Mahendra P. Singh, *Are Articles 15(4) and 16(4) Fundamental Rights?*, 3 SCC L.J. (1994).

[56] State of West Bengal v. Subodh Gopal, AIR 1954 SC 92 (India).

[57] Justice K.G. Balakrishnan, *The Constitutional Guarantees of Rights and Political Freedoms*, working paper presented at the 40th Anniversary of the founding of the Constitutional Judicature of Egypt, 27 (March 2009).

[58] *See* W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 (8), YALE L.J., 710-726 (1916).

[59] Jenna McNaughton, *Positive Rights in Constitutional Law*, 3 U. PENN. J. CONST. L. 750, 766 (2001).

[60] Samrah, *Supra* note 20, at 64.

[61] M. Nagaraj and Others v. Union of India and Others, (2006) 8 SCC 212 (India).

Supreme Court may appear initially agreeable, however the outcome completely missed an opportunity to reconsider incidental violations that may be given effect to by the judiciary's particularly activist ambitions at times, whilst retaining its impartiality had the negative-positive distinction been recognized.

THE JUDICIARY AND PART IV OF THE CONSTITUTION

The consistent stance of the Supreme Court regarding the exclusion of the judiciary from Art.12 is entirely reversed in cases that consider the judiciary's role in advancing the goals set in Part IV.[62] This curious approach has led to a situation wherein the judiciary is 'state' for the purpose of Part IV, but not so for Part III, which is not in tune with the constitutional arrangement in India.

In *N.M. Thomas*[63], the majority held that Part IV goals must "inform and illuminate" the Court's interpretational task. Notably, this aspiration was pegged on view that the courts are 'state' within Art.12:

> *"Not only is the directive principle embodied in Art.46 binding on the law-maker as ordinarily understood, but it should equally inform and illuminate the approach of the Court when it makes a decision as the Court also is 'state' within the meaning of Art.12 and makes law even though interstitially, from the molar to the molecular."*[64]

The initial account of this view held by MATHEW J., can be derived from his earlier exposition in *Kesavananda Bharati*[65], expressing that:

> *"If convicting and punishing a person twice for an offence by a judgment is equivalent to the 'State passing a law in contravention of the rights conferred by*

[62] State of Kerala v. N. M. Thomas, 1976 SCR (1) 906 (India). ("Thomas")

[63] *Id.*

[64] *Id.* at 89.

[65] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (India). ("Kesavananda").

> *Part III' for the purpose of enabling the person to file a petition under Art.32 to quash the judgment, I can see no incongruity in holding, when Art.37 says 'It shall be the duty of the State to apply these principles in making laws', that judicial process is 'state action' and that the judiciary is bound to apply the Directive Principles in making its judgment."*[66]

While the earlier views of the Supreme Court in *Mirajkar*[67] and the *Amirabbas*[68] refuse inclusion based on the "nature of judicial process" being essentially *sui generis*, to the contrary, MATHEW J. was of the firm view that the enforcement of Part IV provisions is as much a judicial function, as it is incumbent upon the other two organs of 'state'. The view has been the guiding principle in the subsequent cases in which the Supreme Court has held it incumbent upon itself to ensure the realization of the constitutional directives of Part IV. A relatively recent Constitution bench decision of the Supreme Court in *Harjinder Singh* v. *Punjab Warehousing Corporation* [69] goes one step further. The authoritative pronouncements in *N.M. Thomas*[70] and *Kesavananda Bharati*[71] led the Court in this case to conclude that courts are 'state'. It was expressed that:

> *"Judges, and especially the judges of the highest court, have a vital role to ensure that the promise is fulfilled. If the judges fail to discharge their duty in making an effort to make the 'Preambular' promise a reality, they fail to uphold and abide by the Constitution which is their oath of office."*[72]

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[66] *Id*. at 1718.

[67] Naresh, *Supra* note 15.

[68] Amirabbas, *Supra* note 32.

[69] AIR 2010 SC 1116.

[70] Thomas, *Supra* note 62.

[71] Kesavananda, *Supra* note 65.

[72] *Supra* note 69, at 27.

Curiously, the Court has essentially expressed that for the enforcement of Part IV principles, the judiciary is 'State', as conceived under Art.12. However, it will prudent to recall the *sui generis* conception of judicial decision-making that became the basis of judicial non-inclusion as 'state' in the first place. In sum, the obscure judicial stance is that the judiciary assumes the role of 'state' in advancing Part IV goals, yet judicial orders are an exception, not subject to a challenge on Part III grounds.[73] It is interesting to note, however, that in relation to this proposition, there exists a constitutional provision directly pertaining to this point, *i.e.* Art.36 in Part IV of the Constitution, which to the contrary provides thus:

> In this Part, unless the context otherwise requires, "the State" has the same meaning as in Part III.[74]

Reference to Art.36 exhibits a paradox in the judicial approach towards its own position in context of 'state action', which dubiously swings between Part III and Part IV, despite there being absolute clarity in terms of the constitutional position regarding the same.[75] Constitutionally though, the same meaning of 'state' as provided under Art.12 which is a provision within Part III, must also be applied for construing 'state' in context of Part IV, aggravating the contextual dubiety of the current approach.

DEVELOPMENTS IN THE UNITED KINGDOM

The *Mirajkar* view favours the erstwhile British conception of State granting a virtual immunity of judicial decisions or actions, over the American conception of state action.[76] Considering that not much has changed in the stance of the Indian judiciary since 1967[77] till 2015[78], it is pertinent to take note of certain drastic changes that have occurred in the British legal system overtime.

[73] Naresh, *Supra* note 15.

[74] INDIA CONST. art. 36.

[75] Kesavananda, *Supra* note 65.

[76] BASU, *supra* note 16, at 80.

[77] Naresh, *Supra* note 15.

[78] Samrah, *Supra* note 20.

Britain has been bound by the European Charter of Human Rights since 1953. Although many of ECHR's guarantees reflect rights long protected in the UK, for example the common law right of *habeas corpus*, they were not formally incorporated into domestic law until the Human Rights Act 1998 came into force in 2000.[79] Formal incorporation of guarantees in the law is an important aspect to be considered in context of the utility of 'state action'.

The UK Human Rights Act makes it unlawful for 'public authorities' to act in breach of the rights and freedoms set out in the European Convention on Human Rights. It allows those who believe their rights have not been respected by public authorities to seek vindication and redress in the courts of the United Kingdom.[80] §6 of the Act defines two types of 'public authority' to which these obligations apply — 'pure' public authorities, which must act compatibly in everything they do, and those authorities which come under this obligation only when discharging a "public function"[81]. Under §6(3)(a), it is expressly provided that "pure" public authorities include a court or tribunal, which is required to comply with Convention rights in all their activities, both when discharging intrinsically public functions and when performing functions which could be done by any private body.[82]

Dr. Basu refers to the Supreme Court's adherence to erstwhile British principles over American conceptions as an "obvious blunder"[83], considering the formal incorporation of rights in the Indian Constitution is akin to the US[84]. Now however, even in the United Kingdom, upon the adoption of codified legal guarantees, it was realized that it is an institutional necessity to include the judiciary within the purview of enforcement of the guaranteed rights, to ensure that no violation of such entrenched rights, direct or incidental, goes unchecked merely because the

[79] Her Majesty's Government Report, 2014, *Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights*, at 1.24.

[80] *Id.* at 1.3.

[81] §6, UK Human Rights Act, 1998.

[82] Courts and tribunals are specifically stated to be public authorities, in all their activities, under §6(3)(a).

[83] BASU, *Supra* note 16, at 80.

[84] *Id.*

acting authority is judicial or quasi-judicial, or that the function being exercised is adjudicatory in nature[85]. That being the case, so far, the rigid stance of the Supreme Court of India regarding the position of the judiciary is unique, and lacks a theoretical foundation.

PRACTICAL IMPLICATIONS OF NON-INCLUSION

Aside from the doctrinal quandary that the Supreme Court has engaged in relation to its own position, a related cause for concern is the errant trajectory of the power, as well as the Court's zeal, to do 'complete justice' in relation to the enforcement of fundamental rights and incidental violations thereof. This can be exemplified through the case of *Shahid Balwa* v. *Union of India*[86], exhibiting how the 'plenary' approach towards the scope of Art.142(1)[87] may have eclipsed the enforcement of fundamental rights of certain accused persons in an ongoing criminal trial.

In *Shahid Balwa*, the Supreme Court of India was called upon to examine whether an interim-order passed by the Court in the exercise of powers under Arts.136[88] and 142(1) of the Constitution is liable to be recalled, *de hors* the rights guaranteed to the petitioners to invoke the jurisdiction of the Supreme Court under Arts.32 and 136 of the Constitution of India, in the 2G corruption trials. The Court directed as follows:

> *"...any prayer for staying or impeding the progress of the Trial can be made only before this Court and no other Court shall entertain the same. The trial must proceed on a day-to-day basis."*[89]

Against the order of the Court, the petitioners maintained that it violates their right under §482 of the Code of Criminal Procedure[90], and Arts.226[91] and 227(1)[92] of the Constitution for moving

[85] Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley v. Wallbank, [2003] UK HL 37. See also, YL v. Birmingham City Council and Others, [2007] UK HL 27 at 12, in which the House of Lords held that there is 'no single test of universal application' in determining whether a body is a public authority, and that the courts should adopt a factor-based approach to this question (per Lord Mance at 91).

[86] (2014) 2 SCC 687.

[87] INDIA CONST. art. 142(1).

[88] INDIA CONST. art. 136(1).

[89] Interim order passed on 11.04.2011 in Civil Appeal No. 10660 of 2010.

the High Court[93]. It was further maintained that the 'right to fair trial' is a right guaranteed to the accused under Arts.14 and 21 and the impugned orders has the effect of negating those rights, by shutting out all remedies available to the parties to move the High Court.[94]

Dismissing these submissions, the Court upheld the argument of the CBI that the order had been passed in the "larger public interest" under Art.142, for the following reasons:

1. Prolonged litigation undermines the public confidence and public interest demands timely resolution of cases relating to 2G scam.[95]

2. The criminal justice system's procedures, guarantees and elaborateness sometimes create openings for abusive, dilatory tactics and confer unfair opportunities on better heeled litigants to cause delay to their advantage.[96]

In reaching this activist-spirited conclusion, it appears that the Court failed in upholding the fundamental rights of the petitioners. Though the impugned interim order was passed in the exercise of Art.142, the power to do complete justice is not a power that can be exercised arbitrarily, especially considering the law since *Maneka Gandhi* v. *Union of India*[97], holding that every power must be exercised reasonably, and every exercise of power can be tested on the anvil of Art. 14 to find out whether it is just, reasonable and fair.

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[90] §482 CODE CRIM. PROC. "Saving of inherent powers of High Court, nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

[91] INDIA CONST. art. 226.

[92] INDIA CONST. art. 227(1): Every High Court shall have superintendence over all courts and tribunals throughout the territories interrelation to which it exercises jurisdiction.

[93] *Supra* note 84, at 15-16.

[94] *Id.* at 19.

[95] *Id.* at 24.

[96] *Id.* at 28.

[97] (1978) 2 SCR 621.

The Supreme Court justified taking away the jurisdiction of the High Court to ensure a 'speedy trial', since a "*large backlog of cases in the Courts is often an incentive to the litigants to misuse of Court's system by indulging in unnecessary and fraudulent litigation, thereby delaying the entire trial process...*"[98] In doing so, the Court completely overlooked that it has been clarified in *Antulay*[99] that proceedings taken by either parties in good faith, to vindicate their rights and interests, as perceived by them, must not be treated as "delaying tactics", nor can the time taken in pursuing such remedies be counted towards delay.[100] Reference may also be taken of the 6th Amendment to the US Constitution which provides the right to 'speedy trial', regarding which is was explained in *Ewell*[101] that the "right to speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than mere speed, as its essential ingredient."

The necessary purport of the view taken by the Court, that doing away with the jurisdiction of the High Court will not affect the process of criminal trial, since the appellate discourse before the Supreme Court is still available, is also misconceived. In *Madhav Haskot*[102], the right to appeal to the High Court has been held to be a Fundamental Right under Art.21 of the Constitution. There being a vast difference in the scope of the writ jurisdiction of the Supreme Court under Art.32, and that of the High Court under Art.226[103], in a criminal trial, impinging upon the right to move the High Court for the violation of a statutory right under the Code of Criminal Procedure, the Penal Code, the Evidence Act, etc. essentially nullifies the 'procedural due process' right guaranteed under Art.21[104] of the Constitution.

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[98] *Id.*

[99] (1988) 2 SCC 602 at 730, at ¶206.

[100] *Id.* at 56.

[101] U.S. v. Ewell, 383 U.S. 116 (1966).

[102] Madhav Haskot v. State of Maharashtra, AIR 1978 SC 1548 (India).

[103] Poonam v. Sumit Tanwar, AIR 2010 SC 1384, 7 (India).

[104] INDIA CONST. art. 21.

It is indubitable that the existence of the power under Art.142 is a constitutional necessity, especially considering that frequent guidelines of the Supreme Court have formed the basis of progressive legislation in India, which has only been possible due to the exercise of Art.142 by the Supreme Court, clear examples being *Vineet Narain*[105] and *Vishka*[106]. However, in contemplation of such cases wherein there can be doubts raised against the reasoning and actions of the Court as having the effect of possibly violating constitutional guarantees, the imposition of some form of remedy is imperative. A prudent way to limit this power within constitutional bounds is by reading the 'judiciary' into the meaning of 'state' under Art.12, thereby subjecting the discretionary exercise of such power to the scrutiny of incidental, unintentional violations of constitutional rights under Part III.

TOWARDS INCLUSION: THE WAY FORWARD

Since the prospect of inclusion of the judiciary within the Constitution's definition of 'State' is solely aimed at access to justice in specific cases, an analysis of the nature of remedies to be made available in such cases is also necessary. If judicial orders are taken to be capable of offending Part III rights, will that mean that such orders can be infinitely challenged by way of Art.32 petitions? To certain commentators, the 'Review' mechanism under Art.137 may also appear to be an appropriate remedy. However, what must be considered is the policy of the Indian Constitution as to fundamental rights violations, and the prospect of 'hearing' which is a matter of right, not privilege.

The provision for 'review' under Art.137[107] exists, and has been given due credence to by the Court in remedying "miscarriage of justice"[108]. Yet, it must be noted that Art.137 does not confer a "*right to seek review of any judgment of this Court in any person. On the other hand, it*

[105] Vineet Narain v. Union of India, (1998) 1 SCC 226 (India).

[106] Vishaka and Ors. v. State of Rajasthan and others, AIR 1997 SC 3011 (India).

[107] INDIA CONST. art. 137: Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

[108] For example, the petitions pending before the Supreme Court challenging the judgment in Suresh Kaushal v. Naz Foundation, (2014) 1 SCC 1; Curative Petition (C) Nos.88-102 of 2014, in Review Petition (C) Nos.41-55 of 2014.

only recognizes the authority of the Court to review its own judgments."[109] The provision in its purport is discretionary, whereas the policy of the Constitution in relation to Part III rights is that the very right to enforce them is itself a constitutional right, guaranteed under Art.32.[110] Therefore, the Court "*cannot consistently, with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights.*"[111]

It is apparent that the provision for 'review' is not a remedy *per se*, because it merely offers a recourse which is contingent upon the discretion of the Court. Further, the Court has judicially devised the remedy of 'curative petitions' in the celebrated case of *Rupa Hurra* v. *Ashok Hurra*[112], which holds that such a petition may be filed against a final order or judgment of the Court, if it is "*vitiated by the non-observance of the principles of natural justice, or on account of abuse of the process of the Court.*"[113] However, the even narrower scope of a 'curative petition' fails to make it, along with review under Art.137, an 'efficacious' remedy in cases of incidental violation of Fundamental Rights by a court, far from a matter of 'right'.

To be precise, the kind of cases focused upon in this paper are those that are conceived against the actions of the adjudicatory authority, and not necessarily the opposite party, which may well be a private entity, not bound by the mandate of Part III. Wherefore, an elaborate remedy in the form of an appeal in such cases will be superfluous, undue and time-consuming. A remedy in the form of 'cassation' would be more suitable for judicial violations of fundamental rights, since in such cases, the role of the court should be limited solely to examine the legality of the decision in question, circumscribed to those specific aspects which the aggrieved party claims as constituting a violation.[114]

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[109] Mohd. Arif v. Registrar, Supreme Court of India, (2014) 9 SCC 737, ¶24 (India).

[110] P.C. Garg v. Excise Commissioner, AIR 1963 SC 996, at 999 (India).

[111] Romesh Thapar v. State of Madras, 1950 SCR 594, at 597 (India).

[112] AIR 2002 SC 1771.

[113] *Id.* at 1779.

[114] *See* J.A. Jolowicz, *Appeals and Review in Comparative Law: Similarities, Differences and Purposes*, 15 MEL. U. L. REV. 618 (1986).

'Cassation' sharply differs from 'appeal' in terms of no 'devolutive effect'[115], *i.e.*, cassation does not provide for a re-trial of the earlier outcome on merits of the case, which on the other hand is intrinsic to appellate remedies.[116] An example of the operation of cassation, limited only to questions of constitutional violation, may be found in the Mexican Constitution[117], which provides the 'writ of *amparo*'[118]. An '*amparo*' may be used when the 'individual guarantees' have been violated by: (1) laws or decrees enacted by the Federal Congress or by the State legislatures; (2) Judicial resolutions in civil or criminal suits; or (3) acts of whatever nature, of any other authority[119], effectively subsuming judicial actions within the purview of scrutiny[120]. The judgments pronounced in *amparo*-proceedings only concern the parties that have been part of the procedure and limit the relief and protection, if any, to the special case for which it has been demanded[121].

Judicial incorporation of a limited remedy against judicial actions, without opening the floodgates of second-appeals not pertaining to Part III violations, is possible because the right to move the Supreme Court to enforce fundamental rights can itself be made subject to 'reasonable

[115] Claudia Rosu, *The limits of the Devolutive Effect of the Appeal in a Civil Suit*, 59 JUDICIAL CURRENT 204, 215 (2014) (the devolutive effect refers to the fact that an appeal brings about retrial of the merits of the case).

[116] *Id*. at 207.

[117] MEXICO CONST. art. 1: "Individual Guarantees" (garantias individuales) - In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself.

[118] Axel Tschentscher, *The Latin American Model of Constitutional Jurisdiction: Amparo and Judicial Review*, (July 19, 2013). *A*vailable at SSRN: https://ssrn.com/abstract=2296004 ("The 'amparo' has spread from its Mexican origin to all other Latin American states with the exception of Cuba. Early on the Central American states El Salvador (1886), Honduras, and Nicaragua (1894) as well as Guatemala (1921) adopted the instrument. The last countries to implement amparo procedures were Colombia (1991) and the Dominican Republic (1999)".)

[119] Carlos Sánchez Mejorada, *The Writ of Amparo: Mexican Procedure to Protect Human* Rights, 243 THE ANNALS OF THE AM. AC. OF POL. AND SOC. SC., (1946), 107, 109. *A*vailable at http://www.jstor.org/stable/1025063 (Last accessed: June 17, 2017).

[120] Hector Fix Zamudio, *The Writ of Amparo in Latin America*, 13 U. MIAMI INTER-AM. L. REV. 361, 367 (1981).

[121] MEXICO CONST. art. 107, Number II Section 1.

restrictions'[122], since Art.32 only guarantees the right to move the Supreme Court "by appropriate proceedings."[123] This phrase is capable of being interpreted as an inherent restriction on the scope of that Art.32. It has also been the consistent view that the Supreme Court may exercise its discretion to not entertain petitions under Art.32 when the alternative remedy is available.[124] However, as I have attempted to exhibit, there does not appear to be an alternative remedy to incidental judicial violations of Part III rights unless it possesses the virtues of Art.32.

Wherefore, the most suitable form of precedential limitation which can be imposed by the courts in allowing judicial decisions to be tested upon the touchstone of Part III, should be based upon a differentiation between the scope of an appeal[125], a limited and more desirable remedy in the form of 'cassation'[126], and their respective 'devolutive effects'.[127] Through 'cassation', the Court will not be re-trying the decision referred to it, but specific aspects of the decision for constitutional claims only.

CONCLUSION

A major portion of this paper is committed to analysing the doctrinal notions still held by the Supreme Court, as against the theoretical requirement of inclusion of the judiciary within the definition of 'state' in a written constitutional setup. The presumption that judicial actions can never violate fundamental rights because courts do not find mention in Art.12 rests on an over-simplified understanding of Part III and the nature of judicial functions. The particularly

[122] Krishnaprasad K.V., *Judicial Accountability and Fundamental Rights – II*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (January 10, 2014). *A*vailable at https://indconlawphil.wordpress.com/2014/01/10/guest-post-judicial-accountability-and-fundamental-rights-ii/ (Last accessed: May 10, 2017).

[123] INDIA CONST. art. 32(1): The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

[124] State of West Bengal v. Ratnagiri Engineering Pvt. Ltd., AIR 2009 SC 405.

[125] BLACK'S LAW DICTIONARY 113 (9th ed. 2009), 'Appeal': To seek review from a lower court's decision by a higher court.

[126] *Id.* at 246, 'Cassation': A quashing.

[127] *Supra* note 112.

'activist' identity that the judiciary in India has earned for itself is unquestioned, but should not be unquestionable as far as the constitutional rights are concerned.

Cases like *Shahid Balwa* and the American experience[128] exhibit that incidental violations of Part III rights may take place consequent to an action in judicial capacity. It therefore creates an unsustainable paradox when an 'activist' judiciary lends itself to be inspired by Part IV of the Constitution in the progressive realization of these constitutional directives, yet closes its doors to litigants aggrieved by its own actions in pursuit of such activism. The view that a legally valid act cannot offend a fundamental right, offends against the very foundation of constitutional jurisprudence, since a written constitution with justiciable provisions rests on the theory of 'higher law', which stands above ordinary law.[129]

Notably, in furtherance of the intention of the Constitution's framers, and the legal developments in the UK, the National Commission to Review the Working of the Constitution headed by VENKATACHALIAH J. had also recommended the following explanation to be added to Art.12:

> "Explanation – In this Article, the expression 'other authorities' shall include any person in relation to such of its functions which are of a 'public nature'."[130]

The hope that a constitutional amendment, in pursuit the NCRWC's recommendation would efficiently provide the much-needed clarity regarding the enforcement of Fundamental Rights is still precarious. The Supreme Court's unwillingness even in the present times to accept responsibility and maintain constitutional propriety in its own actions spells an uncertain fate for any such prospective legislative or constituent measure to reform Art.12. Interestingly, on May 9, 2017, the Court played another "*Mirajkar*", this time by ordering journalists against publishing

[128] *See* generally Ex Parte Virginia (1880) 100 US 339; Shelly v. Kraemer, (1948) 334 US 1; Rogers v. Richmond, (1961) 365 US 534.

[129] BASU, *Supra* note 16, at 81.

[130] Justice Venkatchalaiah, *Enlargement of Fundamental Rights with focus on Civil and Political Rights*, National Commission for Review of the Working of the Constitution (2000), at 20.

any statement made by Karnan J., the recipient of judicial ire for his contemptuous conduct.[131] It is considering such knee-jerk reactions that in India too, the judiciary must recognize itself within the ordinary meaning of 'State', giving effect to the true purport of 'other authorities' in Art.12.[132]

[131] *See* Gautam Bhatia, *Judicial Censorship, Prior Restraint, and the Karnan Gag Order*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (June 11, 2016). *A*vailable at https://indconlawphil.wordpress.com/2017/05/09/judicial-censorship-prior-restraint-and-the-karnan-gag-order/ (Last accessed: May 10, 2017).

[132] SEERVAI, *Supra* note 19, at 393.

THE SUPREME COURT: TO CHANGE OR NOT TO CHANGE? AN ANALYSIS OF THE PROPOSED IDEA OF NATIONAL/ REGIONAL COURT OF APPEAL

- Akshata Kumta* & Naman Lohiya#

ABSTRACT

The apex Court of the Indian judiciary was principally established to adjudicate over matters relating to the Constitution and gross miscarriage of justice, however it currently finds itself in a position where over 55,000 cases are pending pertaining to appeal, amongst other cases. The jurists have described the system as a 'lenient' process of acceptance of cases, specifically appeals, under Article 136 of the Constitution. The liberal attitude of Supreme Court has resulted in multiple cases going un-adjudicated year after year in corollary to inefficiency in meting out justice to people from remote parts of India who could not afford to travel to New Delhi, where the Court is seated.

Through this piece, we seek to float the idea of establishment of a National/ Regional Court of Appeal, principally recommended by the 229th Law Commission Report and the V. Vasanthakumar v. H.C Bhatia case, which is sub judice. The Report suggested the establishment of a Cassation Court model in India which would constitute a National/ Regional Court of Appeal. The Court of Appeal would take over the appellate jurisdiction of the Supreme Court and reduce the burden of the Supreme Court, prescribed under Article 132-136. It would allow the Supreme Court to be a court of pure Constitutional interpretation and adjudicate solely upon Constitutional matters, thereby upholding the prestige of the said Court.

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This paper seeks to analyze the feasibility of such a model within the present Constitutional regime ranging from Article 132-136 and to analyze the barriers which could possibly disrupt the working of such a model. The paper further seeks to put forth the divergent views taken by the Supreme Court with regard to the scope of the Court under Article 136 of the Constitution dealing with Special Leave Petition. It further elucidates upon and seeks to clarify the mechanism which might be adapted to distribute cases and segregate cases of constitutional nature from those pertaining to ordinary legislation, based on certain precedents. Finally, it scrutinizes the working model of judicial setup of other countries in order to obviate the advantages and risks of such a model within India.

INTRODUCTION

The scope and functions of the Indian judiciary are consistently evolving. It is based on an adversarial system of legal procedure whereby the judges are expected to act as neutral arbitrators balancing the contentions of the rival parties, and not involving themselves in the substantial debate.[1] The principles of natural justice entitle all the parties to get their contentions be heard completely, thereby leading to prolongation of matters.

The Supreme Court is the apex court of the country and is the highest arbitrator, which is primarily supposed to adjudicate upon constitutional matters, although appeals may be entertained under Article 132-136 from the High Court and other statutory tribunals. By the purview of its stature, it enjoys the unmatched authority to exercise its discretion in accepting cases.

Although there exists original, appellate and advisory jurisdiction of the Supreme Court, it is meant to exercise its power only when there is 'supreme need'[2] to do so, and not under normal circumstances. It is expected to limit acceptance of appeals to remedy instances of grave

[1] B. N. Srikrishna, *The Indian Legal System*, 36 INTERNATIONAL JOURNAL OF LEGAL INFORMATION 65, 56-78, (2009).

[2] DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA: BEING A COMPARATIVE TREATISE ON THE UNIVERSAL PRINCIPLES OF JUSTICE AND CONSTITUTIONAL GOVERNMENT WITH SPECIAL REFERENCE TO THE ORGANIC INSTRUMENT OF INDIA 5754 (4th ed. 2005).

injustice. Despite such limitation in theory, the Supreme Court has been leniently and regularly accepting appeals in practice, thereby significantly changing its original purpose. Eminent jurists such as K.K. Venugopal and D.D. Basu have analyzed that the Supreme Court was not established to be a regular court of appeal but one that would solely be dedicated to interpret the Constitution.

The Supreme Court's liberal attitude in accepting appeals doesn't seem to have solved any problem with the Indian judicial system. There is a backlog of over three crore cases in courts across the country.[3] Multiple reports at the state and the national level have demonstrated the frightful urgency for combating the problem of overload and arrears.[4] The Supreme Court alone had about 65,000 pending cases in the dying months of 2014.[5]

With regard to this scenario, there have been proposals to establish a National/Regional Court of Appeal. Its purpose would be to reduce the burdening of cases pertaining to appeal pending before the Supreme Court and to regain the lost sanctity of the Supreme Court as the apex Court of the country built for a specific purpose of dealing with matters only of national importance.

A National/ Regional Court of Appeal is an off-shoot of the 'Cassation Court' model which operates largely in Europe. The model in India context would involve regional courts[6] located at various places to regularly and conclusively deal with appeals from the High Court regarding civil, criminal matters including matters regarding tax and service. This model, proposed by the Law Commission, seeks to reduce the burden of cases and improve the accessibility of courts of higher authority to the people, thereby adequately effectuating justice-rendering mechanisms.

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[3] *More than 3 crore court cases pending across country*, PRESS TRUST OF INDIA (Dec. 7, 2014), http://www.ndtv.com/india-news/more-than-3-crore-court-cases-pending-across-country-709595.

[4] UPENDRA BAXI, THE CRISIS OF THE INDIAN LEGAL SYSTEM. ALTERNATIVES IN DEVELOPMENT: LAW 32 (1st ed. 1982).

[5] See *supra* note 3.

[6] LAW COMMISSION OF INDIA, Report No. 229: Need for division of the Supreme Court into a Constitutional Bench at Delhi and Cassation Benches in four regions at Delhi, Chennai/ Hyderabad, Kolkata and Mumbai, (Aug. 5, 2009), http://lawcommissionofindia.nic.in/reports/report229.pdf.

This article is divided into three Parts. Part I analyses the scope of the Supreme Court in accepting appeals under Article 136 of the Indian Constitution. Part II analyses the plausibility of setting up a National/ Regional Court of Appeal for all matters which are not related to the Constitution or Constitutional interpretation. Part III seeks to analyze the various models of Cassation Courts established in foreign jurisdictions. Through the Conclusion, the authors intend to present the anomalies between the various models analyzed in the article and identify and suggest a model that would function in the Indian context.

SUPREME COURT'S SCOPE TO ACCEPT APPEALS UNDER ARTICLE 136 OF THE INDIAN CONSTITUTION: IS IT WIDE OR NARROW POWER?

Article 136 of the Constitution provides the Supreme Court with the right to accept petitions as a form of appeal from any Court or Tribunal in the country.[7] While, prima facie, it appears that this provision is one that shall provide a balm to any individual who believes that he has been denied justice, the question with regard to its application is still one which plagues the Indian Judiciary. The application of the Supreme Court's power under Article 136 can be bifurcated into two divisions- a broad interpretation and a narrow interpretation.

A. The broad interpretation of Article 136 taken by the Supreme Court

D.D. Basu, in his commentary on the Constitution of India, states that Article 136 is framed in the widest terms possible.[8] This view of D.D. Basu, on the power of the Supreme Court under Art 136 was observed in one of the most recent cases, *Mathai v. George*[9], where a Constitution

[7] INDIA CONST. art. 136, "Special leave to appeal by the Supreme Court:

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India,

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

[8] See *supra* note 2.

[9] Mathai v. Joby George and Anr., (2016) 7 SCC 700 (India). ("Mathai")

Bench of the Supreme Court, deliberated upon the matter passed to them vide the division bench of the same Court. The Division bench had contemplated the exact narrowing of the scope of accepting cases under Article 136 that fell under the following categories:

i. All matters involving a substantial question of law relating to interpretation of the Constitution of India

ii. All matters of national or public importance

iii. Validity of laws : Central and State

iv. After Kesavananda Bharti,[10] the judicial review of Constitutional Amendments

v. To settle differences of opinion on important issues of law between High Courts

vi. Cases where the Court is satisfied that there has been grave miscarriage of justice

vii. Where there is a prima facie violation of the Fundamental Right of a person[11]

The Constitution Bench ultimately held:

"*Upon perusal of the law laid down by this Court in the aforesaid judgments, in our opinion, no effort should be made to restrict the powers of this Court under Article 136 because while exercising its powers under Article 136 of the Constitution of India, this Court can, after considering facts of the case to be decided, very well use its discretion. In the interest of justice, in our view, it would be better to use the said power with circumspection, rather than to limit the power forever."*

The Court held that nothing could limit the wide scope of powers that had been conferred on it under Article 136 to accept petitions and the only bar that the Court suggested in order to prevent backlog of cases was to accept all future case with circumspect power as opposed to limiting its inherent power.

[10] Kesavananda Bharti v. State of Kerala, (1973) 4 SCC 225 (India).

[11] Mathai, *supra* note 10, ¶6.

In order to arrive at this view, it took the aid of the ratio held in *Union Carbide Corporation v. Union of India.*[12]

Considering the aforementioned views, it is evident that Supreme Court hasn't settled upon whether the scope of the Court under Article 136 is to be interpreted widely or to have its scope reduced. The same would act as a bar to the establishment of the proposed Regional/ National Court of Appeal.

B. **The narrow interpretation of Article 136 given by the Supreme Court.**

As early as 1950, the Supreme Court has held that while it has been given the extraordinary jurisdiction to grant special leave to appeal under Article 136 of the Constitution, this power must be exercised 'sparingly' and in 'exceptional cases'.[13] This was done for the following purposes:

I. To interfere whenever it found that the law was not correctly appreciated or applied by the lower courts or tribunals.

II. To correct any substantial and grave miscarriage of justice.[14]

After the caveat announced by the Court in Pritam Singh, that its jurisdiction was not to be used in ordinary cases to redeem individual justice in the matters of controversy between individuals,[15]a constitutional bench of the SC in *Secy. Of State v. Umadevi*[16]has been cited as

[12] Union Carbide Corporation. v. Union of India, (1991) 4 SCC 584, Justice Venkatachalliah stated, "[that] this Court had occasion to point out that Article 136 is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing of appeals by granting special leave against any kind of judgment or order made by a Court or Tribunal in any cause or matter and the powers can be exercised in spite of the limitations under the specific provisions for appeal contained in the Constitution or other laws. The powers given by Article 136 are, however, in the nature of special or residuary powers which are exercisable outside the purview of the ordinary laws in cases where the needs of justice demand interference by the Supreme Court."

[13] Pritam Singh v. State of Punjab, AIR 1950 SC 169 (India).

[14] See *supra* note 13.

[15] Ibid. ¶9.

[16] Secretary Of State v. Umadevi, AIR 2006 SC 1806 (India).

holding unequivocally that the system of 'invidualized justice' would cause judicial chaos at the apex level.

Furthermore, on a similar note, this view has been reiterated in the *Bihar Legal Support Society v. Chief Justice and Others*[17], the Supreme court, while carefully analyzing the petition of the appellant with regard to delivery of speedy justice to the weaker and disadvantaged sections of society, declared that it was never intended to be a regular court of appeal against orders made by the High Courts and the Sessions Courts or the Magistrates. It is not a fifth court of appeal but the final court of the nation.[18] The Court was sanctioned to deal primarily with issues concerning rights of the people at large and to remedy injustice, and hence the threshold to accept cases is high as intended by the framers. Even if legal flaws may be electronically detected, the Supreme Court cannot interfere sans manifest injustice or substantial question of public importance.[19]

The discretionary power, which is a special power, was given to the Supreme Court to be used only under exceptional circumstances.[20] Article 136 does not confer any right of appeal upon the party, but vests discretion in the Supreme Court to interfere in exceptional cases, which is to be used for furthering the ends of justice.[21]

C. <u>The Supreme Court determination of the 'exceptional' quality of appeals</u>.

The principle of application of Article 136 in 'exceptional' matters has been strengthened over the years by the Court. The Court clearly in *Ashish Chadha v. Asha Kumari* stated that the primary rule would be that "though the discretionary power vested in this Court under Article

[17] Bihar Legal Support Society v. Chief Justice and Others, (1986) 4 SCC 767 (India).

[18] *See supra note 2***.**

[19] *See also* Baigana v. Deputy Collector of Consolidation, AIR 1978 SC 944 (India).

[20] See *supra* note 13.

[21] Zahira Habibullah Sheikh v. State of Gujarat, AIR 2004 SC 3467 (India); *See also* Bengal Chemical & Pharmaceutical Works Ltd. v. Employees, AIR 1959 SC 633, 635 (India).

136 is apparently not subject to any limitations, it has to be used sparingly and in exceptional cases."[22]

Most recently, in *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.* [23] the Court inconspicuously frowned down upon the liberal exercise of jurisdiction with respect to Article 136 of the Constitution. The Court was hesitant to expressly declare anything on the matter however, it did analyze whether Statutory appeals from the orders of Tribunals lay directly to the SC with respect to matters which were not of national or public interest. The Court relied on an article [24] by Shri T.R. Andhyarujina, the former Solicitor General of India to emphasize the "constitutional importance" of matters involving substantial questions of law of national importance, as the 'exceptional' quality under which statutory appeals from orders of the Tribunals would lie.

The Court noted how the 'original character' of the Supreme Court had been rapidly deteriorating. This, it held, was a result of the Supreme Court having become a general court of appeal by entertaining and deciding cases which do not involve important constitutional issues or issues of law of national importance, post the year 1990.

The adverse effect of the SC's 'post-1990' pattern of allowing appeals is that matters of constitutional importance which are relevant to public interest and of national regard are not getting due priority and remain pending for decades.

D. The result of the confusion caused by the narrow interpretation contrary to the wide interpretation given to the acceptance of appeals under Article 136.

[22] Ashish Chadha v. Asha Kumari, (2012) 1 SCC 680 (India).

[23] Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2016) 9 SCC 103 (India).

[24] Shri T.R. Andhyarujina, *Restoring the Character and Stature of the Supreme Court of India*, 9 SCC J-43 (2013), "When the Supreme Court was established in 1950, the Constitution conferred on it limited but important functions of deciding cases involving fundamental rights, cases of Constitutional importance and substantial questions of law of general importance. The Supreme Court was given a residuary power to grant special leave to appeal, in its discretion from any judgment of any Court or Tribunal (Article 136 of the Constitution) sparingly and in exceptional cases. The Supreme Court was not to be the apex court to decide ordinary disputes between litigants. Only exceptionally, such disputes between litigants would be decided by the Court. The lower courts and the High Courts were considered as generally competent and adequate for the dispensation of justice between litigants."

The Supreme Court, held in *V. Vasanthakumar v. H.C. Bhatia & Ors*, (hereinafter 'Vasanthakumar') that the intention of the framers of the Constitution was to create the Supreme Court to be the apex court for the purpose of laying down the law for the entire country, and for that purpose it was to be given the extraordinary jurisdiction to interfere whenever it found that the law was not correctly appreciated or applied by the lower courts or tribunals.[25]

Interestingly however, in light of the recent narrow interpretation of the scope of acceptance of appeals under Article 136, it appears that the application of wide discretionary power by the Supreme Court has meant that it has been extremely lenient with acceptance of the cases. This has led to the gradual diversion from the basic purpose of allocation of such authority. Therefore, the over- docket of cases which line the walls of the Court is a direct result of the confusion which has been caused by the interplay of the narrow and wide powers to accept appeals under Article 136.

Primarily, such power is granted in furtherance of benefitting the public at large by accepting cases relating to general public importance. However, due to such leniency and lack of appropriate mechanism to effectively dispose cases, there has been an undue delay in delivery of justice which is an essential feature of the judiciary in India.[26]

Secondly, the Supreme Court, by accepting a variety of civil and criminal cases which do not satisfy the high threshold laid down for acceptance of appeals to the Court and further aren't constitutional matters, often sidetrack the main purpose behind creation of the Supreme Court, which is to ensure that the country is ruled according to the provisions of the Constitution and timely evolution and interpretation of provisions in the Constitution. The Supreme Court, due to the acceptance of a variety of cases, often end up emphasizing less upon its primary task, which is to interpret, safeguard and evolve rights and provisions as guaranteed by the Constitution.

Thirdly, the Supreme Court is the court of supreme need. By such casual acceptance of cases, the Supreme Court is harming its sanctity as the apex court of the country, thereby harming its

[25] V. Vasanthakumar v. H.C. Bhatia & Ors, (2016) 7 SCC 686 (India) ("Vasanthakumar").

[26] FALI S NARIMAN, INDIA'S LEGAL SYSTEM: CAN IT BE SAVED? 58-64 (1st ed. 2017).

reputation. Such charitable grant of leave might damage the prestige of the highest court of the country. Hence the current trend of leniently accepting cases is not only delaying the delivery of justice, but is also affecting the stature of the Supreme Court on other fronts.

TRACING THE CONCEPTION OF THE PROPOSED NATIONAL/ REGIONAL COURT OF APPEAL IN INDIA

The proposal for a division of authority of the Supreme Court intending to separate the appellate jurisdiction[27] from the original jurisdiction as intended by the framers of the Constitution has been in the works for a significant amount of time since the making of the Constitution. The Law Commission of India since as early as 1984, has floated the idea of a bifurcation between the original jurisdiction and the appellate jurisdiction of the Supreme Court due to the overburdening of dockets.[28] The 229th Law Commission Report stretched the contours of this preceding Report, and specifically focused on the 'Need for division of the Supreme Court into a Constitutional Bench at Delhi and Cassation Benches in four regions at Delhi, Chennai/ Hyderabad, Kolkata and Mumbai.'[29] The judiciary has, in corollary, been active in the endeavor to evaluate the feasibility of a National Court of Appeal.

A. The conception of idea of setting up National/ Regional Court of Appeal in the Supreme Court

In 1986, a late night bail was granted to two industrialists by the Court in furtherance thereof, the petitioner questioned the apex Court on the differential treatment accorded to 'big men' and 'poor men'. The petitioner prayed before the Court that special leave petitions against anticipatory bails *must* be taken up by the Supreme Court equally for everybody.

[27] For the purpose of this paper, we are including appeals disguised as special leave petitions under Article 136 towards which the Supreme Court has taken a lenient position in practice.

[28] LAW COMMISSION OF INDIA, Report No. 95: "Constitutional Division of the Supreme Court- A proposal for", (Mar.1, 1984) http://lawcommissionofindia.nic.in/51-100/report95.pdf.

[29] LAW COMMISSION OF INDIA, Report No. 229: Need for division of the Supreme Court into a Constitutional Bench at Delhi and Cassation Benches in four regions at Delhi, Chennai/ Hyderabad, Kolkata and Mumbai, (Aug. 5, 2009), http://lawcommissionofindia.nic.in/reports/report229.pdf.

In *Bihar Legal Support Society v. Chief Justice and Others*[30], the Supreme Court prima facie after hearing the contention of the petitioner pointed out that it was never intended to be a regular court of appeal against orders made by the High Court or the Sessions Court or the Magistrate. It was created for the purpose of laying down law for the entire country and exercise extraordinary jurisdiction whenever there is grave miscarriage of justice.

A Constitutional bench of the Supreme Court for the first time recommended the setting up and institution of a judicial body known as the National Court of Appeal. The Court of Appeal would be in a position to entertain appeals by special leave from the decisions of the High Court and the Tribunals in the country in civil, criminal, revenue and labour cases. The purpose was not only speedy disposal of cases, but the separation of original and appellate jurisdiction of the Supreme Court was also intended to narrow the Supreme Court's jurisdiction to entertain cases that involve questions of constitutional law and public law.

This decision of the Supreme Court was a step towards introducing a 'measure of certainty' in judicial response to appeals and special leave petitions, seeking to reduce the mounting burden on the dockets of the Court.

It is pertinent to note that the Supreme Court in this case shifted the onus of establishment of such a case on the Government by the means of a 'policy' decision, stating that the Court would not be instituted until the Government establishes it. Till such decision is taken, the Supreme Court would interfere only in a limited class of cases where substantial question of law is involved which needs to be finally laid at rest by the apex court for the entire country or where there is grave, blatant and atrocious miscarriage of justice.[31]

B. Determining the constitutional validity and feasibility of National/ Regional Court of Appeal through contemporary sources

The Court in *Bihar Legal Support Society* left the establishment of the National Court of Appeal on Government through a 'policy' decision, however the 229th Law Commission of India Report

[30] Bihar Legal Support Society v. Chief Justice and Others, (1986) 4 SCC 767 (India).

[31] See *supra* note 30.

went a step ahead. The Report, while strongly recommending the institution of National/ Regional Court of Appeal, brought another dimension to ease the establishment of National/Regional Court of Appeal through a judicial action.

It proposed the setting up of Cassation Courts through a liberal interpretation of Article 130 of the Constitution that allows to Chief Justice to establish seats at places apart from New Delhi. The provision is an enabling provision and if power is exercised in furtherance to it, there is no requirement for a policy decision in the form constitutional amendment by the Government to establish a National/ Regional Court of Appeal. While recommending a liberal interpretation of Article 130, the Report also recommended that if liberal approach is not possible, alternatively a policy decision must be taken.

Soon after the Report, the questions of possible structural reforms at the highest echelons of the Indian judicial system were raised before the Supreme Court. In *Vasanthkumar*[32], the petitioner sought for a writ of mandamus directing the Respondents to consider his representation in taking steps for implementation of the suggestion of the Constitution Bench of the Court in *Bihar Legal Support Society* case by establishing a National/ Regional Court of Appeal.

The Court reiterated its stance taken in previous decisions in the case of *Mathai v. Joby George and Anr.*, wherein the view was that Supreme Court, under Article 136, was not simply a regular court of appeal.[33]The jurisdiction of the Supreme Court under Article 136 is discretionary, and there is no vested right of appeal to a party in litigation. The Court analyzed concerns primarily pertaining to speedy disposal of cases to ensure efficient justice were raised.

The arguments in favour of the establishment of a National/ Regional Court of Appeal are summed up as follows:

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[32] See *supra* note 26.

[33] Mathai, *supra* note 10. ¶ 3; Vasanthkumar, *supra* note 26. ¶8; *See also* Bengal Chemical and Pharmaceutical Works Ltd v. Employees, AIR 1959 SC 633; Kunhayammed v. State of Kerala (2000) 6 SCC 359; State of Bombay v. Rusy Mistry, AIR 1960 SC 391; Municipal Board, Pratabgarh v. Mahendra Singh Chawla, (1982) 3 SCC 331; Ram Saran Das and Bros. v. CTO, AIR 1962 SC 1326; Pritam Singh v. State, AIR 1950 SC 169; Tirupati Balaji Developers (P) Ltd. v. State of Bihar, (2004) 5 SCC 1; Jamshed Hormusji Wadia v. Port of Mumbai, (2004) 3 SCC 214; Narpat Singh v. Jaipur Development Authority, (2002) 4 SCC 666; Ashok Nagar Welfare Assn. v. R.K. Sharma, (2002) 1 SCC 749.

I. The Supreme Court has strayed from its original character as a Constitutional Court and has merely converted itself as a regular court of appeal. It was shown that there was a cumulative annual growth of 6.8% every year, the trend signifies that the cases before Supreme Court almost doubles itself every year.[34]

II. The difficulty and adversity of litigants was highlighted by showing the hardships faced by those staying far off from Delhi, where the Supreme Court is located. It leads to denial of justice and calls for serious attention to be given to setting up National/ Regional Court of Appeal.[35]

III. With the growing legal literacy, the number of cases presented before the Supreme Court is going to increase. [36]

A restrained approach, however, was preferred by the Attorney General. His arguments are as follows:

1. The primary contention was that the establishment of National/ Regional Court of Appeal was neither constitutionally permissible nor otherwise feasible. Article 136 gives the power to citizens to invoke extraordinary power of the Supreme Court and being a part of the basic structure of the Constitution, it could not be diluted.[37]

2. There is a need for exercising self-restraint in acceptance of cases. There was no need to correct every error committed from a decision by the High Court or the Statutory Tribunals.[38]

The Court finally referred the entire matter to a higher bench through a comprehensive list of 11 questions to be answered. In the interim period, the Court simply reiterated the view taken by it

[34] Vasanthakumar, *supra* note 26, ¶15.

[35] Vasanthakumar,,*supra* note 26 ¶16.

[36] Vasanthakumar, *supra* note 26 ¶18.

[37] Vasanthakumar, *supra* note 26 ¶19.

[38] *Ibid*.

in the previous cases of *Pritam Singh*[39] and *Penu Balakrishna Iyer and Ors*.,[40] that the power of the Supreme Court to review cases under Article 136 pertained only to cases that comprised of a substantial question of law which had been grossly violated.

However, an important question pertaining to division of cases on the basis of its appellate nature or constitutional nature was neither brought up, nor addressed in any judicial decision.

C. Determination of the appropriate court in Constitutional matters.

The National/ Regional Court of Appeal appears to be an answer to a variety of questions pertaining to burdening of cases and delivery of justice. However, keeping in mind that the Supreme Court and the Court of Appeal may be the final courts for constitutional and public law matters, and appeals respectively, there is no specifically identified mechanism allowing appropriate distribution of cases. Often appeals are disguised as petitions for original jurisdiction or appeals appropriately presented may touch upon key questions pertaining to constitutional law. In those circumstances, a case must be sent to appropriate forum in order to render adequate justice.

A mechanism to distribute such cases between the Supreme Court and the Courts of Appeal is still a bone of contention which may hamper the establishment of Court of Appeal. However, an attempt was made by the Law Commission of India in its 95th Report dated 1st March, 1984[41] wherein the Commission proposed the setting up a Constitutional Division in the Supreme Court. Although the idea of Court of appeal wasn't conceived the, but the mounted pressure of burdening of cases has been a problem ever since. The Commission report opined that a favourable bifurcation would be to let the Constitutional Division deal with-

i. Every case involving a substantial question of law as to the interpretation of the Constitution or an order or rule issued under the Constitution, and

[39] Pritam Singh v. State of Punjab, AIR 1950 SC 169 (India).

[40] Penu Balakrishna Iyer and Ors. v. Ariya M. Ramaswami Iyer, AIR 1965 SC 195 (India).

[41] LAW COMMISSION OF INDIA, Report No. 95: "Constitutional Division within the Supreme Court- A proposal for", (Mar. 1, 1984), http://lawcommissionofindia.nic.in/51-100/report95.pdf.

ii. Every case involving a question of constitutional law, not falling within (i) above.

The report identified that a blanket distribution would not solve all problems; the implementation of the scheme of distribution also needs to be identified. The Report suggested that the Legal division of the Supreme Court may use its judicial mind in order to bifurcate the cases.

An analogy could be drawn to the proposed division in light of National/ Regional Court of Appeal and the Supreme Court of India. In case the constitutional nature of the matter is interlinked with ordinary legislation, it shall depend upon the influence of constitutional aspects on the determination of the rights of the parties. In case the rights of the parties can be determined by the interpretation and usage of ordinary legislation without substantial reliance on the Constitution, then the Supreme Court shall not entertain the case. However, in the event that the Regional/ National Court of Appeal is set up, who decides if a case is fit to approach the Supreme Court i.e. whether the interpretation of Constitution will have a greater bearing on the rights of the parties?

It shall depend upon the type of model that is chosen to establish National Court of Appeal.

The cases shall from the High Court reach the Regional Court of Appeal, in case they are established. The Regional Court of Appeal shall determine if the case is to be referred to the Supreme Court, by using its judicial mind. Upon its satisfaction, a certificate of fitness may be granted allowed the parties to refer the matter to the Supreme Court for final adjudication.

A COMPARATIVE ANALYSIS OF THE CO-EXISTENCE OF THE CONSTITUTIONAL AND CASSATION SYSTEMS IN IRELAND AND GERMANY

During the analysis of the Constitutional feasibility of the National Court of Appeal, in Vasanthakumar, the Supreme Court took into consideration the arguments of Senior Advocate, KK Venugopal which were in favour of the creation of a National Court of Appeal.[42]One of his arguments was centered around the premise that, in Ireland, a separate Court of Appeal had been

[42]Vasanthkumar, *supra* note 26, ¶ 17.

set up to deal with the problem of over-burdening of cases with the Supreme Court and to mete out the expedient disposal of cases for the efficient delivery of justice.[43]

In a problem which was meticulously similar to the problem faced by the Indian Courts, the Supreme Court and the Government of Ireland, in 2014, took note of the colossal over-burdening of cases in the Courts, which they found were barring the speedy and efficient disposal of justice.[44]

To combat this problem they remembered that the Hon'ble Mr. Justice Susan Delham, Chief Justice of Ireland had once noted the massive burden which had fallen upon the Irish Supreme Court. The prospective solution she provided in a working group was the following:

"The concept of a Court of Appeal in Ireland is not new. It was considered during the time of Finlay C.J., and indeed I understand that a Bill was drafted. It was considered again in the mid 1990's. At that time it was thought that in the future the Court of Criminal Appeal should be amalgamated into the Supreme Court. Subsequently the number of judges in the Supreme Court was extended to eight, partly to enable this proposal. This amalgamation has not taken place. Ten years down the line it is clear that this is not the appropriate approach. I propose that a permanent Court of Appeal be established, which would have both a Civil and Criminal Jurisdiction. It should be composed of permanent full time judges appointed to that court and include a President and ordinary Judges of the Court of Appeal. Such a court is usually found in other common law jurisdictions."[45]

This very proposal was introduced by Shri KK Venugopal on the basis of the reasoning that since both India and Ireland had faced similar problems with respect to a massive back-log of cases, an effective solution thought of by Ireland could possibly be equally effective in India

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[43] *Ibid.*

[44] *See also An Roinn DLi Agus Cirt Agus Comhionannais Department of Justice and Equality*, Court of Appeal Bill 2014, Second Stage, Seanad Éireann (16 July 2014), http://www.justice.ie/en/JELR/Pages/SP14000195 (Speech by Ms Frances Fitzgerald, T.D. Minister for Justice and Equality).

[45] Susan Denham, *Proposal for a Court of Appeal*, (2006) 6 JUDICIAL STUDIES INSTITUTE JOURNAL 1, available at http://www.jsijournal.ie/html/Volume%206%20No.%201/6%5B1%5D_Denham_Proposal%20for%20a%20Court%20of%20Appeal.pdf

Therefore, to understand the paradigm of such a prospective solution and its possible effect on the Indian Legal System, the Irish model of judicial hierarchy has been examined. Furthermore, a comparative analysis of the German Legal system has also been included in this paper. This is substantiated on the ground that, Germany, is a prime exhibit of the co-existence of a Constitutional and Cassation Court system in a concurrent manner. The German Constitutional system provides a sound basis to understand the Constitutional feasibility of such a model within the Indian paradigm.

A. Analysis of the Irish Superior Court System: The Irish Model of the co-existence of Supreme Court and Court of Appeal

The Court of Appeal which was established on the 28th October in the year 2014 enjoys the space of an appellate jurisdictional tier between the Supreme Court and the High Court. The Court of Appeal Act, 2014 was enacted under the Constitutional mandate of paragraph (ii) of Article 34.2 of the Irish Constitution.[46] This Court was set up to function as a superior court of record with such appellate jurisdiction as is prescribed by the Constitution.[47]

To ensure that the Supreme Court and the Court of Appeal would not be weighed down by the number of cases in precisely the same way as the Supreme Court was burdened prior to the establishment of the Court of Appeal, the judges of both Courts were encouraged to adhere to the doctrine of Judicial Restraint. This could be a means short of using statutory reforms to reduce the burden of the Court.[48] An example could be that the courts' would be obligated to only address issues raised by the parties on record as opposed to analyzing such issues which were not raised at trial. Moreover, by adhering to a more rigorous process of limitation, the burden of the Courts could be reduced by refusing to allow late appeals which are filed after the filing time has elapsed.

[46] IRISH CONST. art. 34.2 ¶ (ii).

[47] Court of Appeal Act of 2014, § 7A (1).

[48] *See* Seth Barrett Tillman, *Court of Appeal just a new version of Supreme Court – only more costly*, THE IRISH TIMES (May 10, 2017), http://www.irishtimes.com/news/crime-and-law/court-of-appeal-just-a-new-version-of-supreme-court-only-more-costly-1.1874746.

Even though the Court of Appeal is subordinate to the Supreme Court, this system establishes its importance and significance to the three-tiered system. The following three aspects of the Act show how the Supreme Court of Ireland functions congruently with the Court of Appeal:

A.1 ***The Court of Appeal works mostly as the court of final decision except under exceptional circumstances where an appeal shall lie to the Supreme Court***

Prior to the Thirty-Third Amendment of The Constitution (Court of Appeal) Act 2013, the Supreme Court would have had the jurisdiction to have heard all matters of civil nature. However, upon the passing of the Thirty-third Amendment Act, the Court of Appeal has jurisdiction to hear appeals in civil proceedings from the High Court.[49]

This Court may also hear appeals from cases heard in the High Court regarding the subject matter of whether or not a law is constitutional. The Constitution has strictly provided that no laws may be passed which shall restrict the Court of Appeal's jurisdiction to hear such matters. Furthermore, as per the mandate of the Act of 2014, the Court also has also been given the appellate jurisdiction which had been previously exercised by the Court of Criminal Appeal.[50]

The Act, has made it feasible in principle to make an appeal from the Court of Appeal to the Supreme Court. However, such an appeal would lie only in exsanguinating circumstances exist and the threshold criteria for the same are met. The threshold criteria in this case will require the Supreme Court to certify that it is satisfied that:

[49] Thirty- third Amendment to the Constitution (Court of Appeal) Act of 2013, art. 34 A: "1) The Court of Appeal referred to in paragraph ii of Article 34.2 hereof ("the Court of Appeal") shall be established in accordance with this Article.

2) As soon as practicable after the enactment of this Article, a law providing for the establishment of the Court of Appeal shall be enacted.

3) That law shall require the Government to appoint by order a day ("the establishment day") on which the Court of Appeal shall be established by virtue of that law; an order of the Government as aforesaid shall operate to have that effect accordingly.

4) This Article shall be omitted from every official text of this Constitution published after the establishment day."

[50] Court of Appeal Act, 2014, §7A (3).

a) the Court of Appeal decision involves a matter of general public importance, or

b) in the interests of justice it is necessary that there be an appeal to the Supreme Court. If a case does not meet the threshold criteria for a leapfrog appeal, it is unlikely that it will meet the threshold criteria for a third instance appeal after it has been decided by the Court of Appeal.[51]

A.2 ***Present appeals which are pending before the Supreme Court may be transferred to the Court of Appeal***

S. 7A of the Court of Appeals Act, 2014 mandates that with the establishment of this Court,

"Subject to the provisions of Article 64 of the Constitution and Section 78 (*3)* of the *Act of 2014*, there shall be vested in the Court of Appeal all appellate jurisdiction which was, immediately before the establishment day, vested in or capable of being exercised by the Supreme Court."[52]

Therefore, from the day which shall be designated as 'establishment day' as per s.2 of the Act, the Court of Appeal, would have the jurisdiction to hear all matters which do not meet the 'threshold criteria' and had been pending before the Supreme Court, which had been initiated before establishment day, which had not been heard by it fully or partially.

B. The German Model of co-existence of Constitutional and Cassation Courts.

The German Constitutional Court, the 'Bundesverfassungsgericht', was one of the first of its times after the post-war era in Europe. Initially, it faced a lack of precedent and there was conflict in terms of procedure for judicial review, however, its establishment after a ten year period solidified its powers and jurisdiction.[53]

This judicial complexity was established by two means:

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[51] *See* **Ruadhán Mac Cormaic**, *Supreme Court transfers 250 cases to appeals court as nine judges appointed*, THE IRISH TIMES, (October 29, 2014), available at https://www.irishtimes.com/news/crime-and-law/supreme-court-transfers-250-cases-to-appeals-court-as-nine-judges-appointed-1.1981060

[52] Court of Appeals Act, 2014, § 7A.

[53] JUSTIN COLLINGS, DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT, 1951-2001, 20-30 (1st ed, 2015).

i. Asserting its structural independence with reference to the executive

ii. Doing the same, with respect to the Cassation courts

However, in doing so, an integrated system was formed whereby there was 'Constitutionalisation' of the whole system. This meant that the Constitutional and Cassation Courts duties would overlap in certain cases, in the event that matters of constitutional interpretation of statutes was brought before the Cassation court.[54]Once the Cassation Court correctly identified the constitutionality of the matter brought before it, it may refer the same to the Constitutional Court.

The following elements have been noted to be characteristic features of a constitutional appeal:

a. A system of prior selection which allows the Constitutional Courts to sift out potentially unsuccessful appeals by procedure established by law.

b. The subject matter of such appeals generally tends to be centered around constitutional rights and freedoms which are guaranteed to all citizens of the nation.**[55]**

As per the German Constitutional Court system, the Constitutional Court is the highest organ of judicial authority in the country. It protects the constitutionality and legality of every administrative decision, protects human rights and fundamental freedoms. The Constitutional Court's jurisdiction is however, restricted to the investigation of merely constitutional questions and the legal determination thereof to a complex set of facts to and evidence.[56]

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[54]Robert Alexy, *Constitutional Law and simple legal - Constitutional Jurisdiction and Specialized Jurisdiction*, PUBLICATIONS OF THE ASSOCIATION OF THE GERMAN CONSTITUTIONAL LAWYERS 15-30, 7-30 (2002), cited by Lech Garlicki, *Constitutional courts versus supreme courts*, 5(1) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 51, 44-68, (2007). Available at https://doi.org/10.1093/icon/mol044.

[55] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, THE PROTECTION OF FUNDAMENTAL RIGHTS BY THE CONSTITUTIONAL COURT: PROCEEDINGS OF THE UNIDEM SEMINAR ORGANISED IN BRIONI, CROATIA, ON 23-25 SEPTEMBER 1995, IN CO-OPERATION WITH THE CROATIAN CONSTITUTIONAL COURT AND WITH THE SUPPORT OF THE EUROPEAN COMMISSION AND THE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS OF THE OSCE, 210 (1st ed, 1996).

[56]The status of the Constitutional Court is thus defined in paragraph 1 of Article 1 of the Law on the Constitutional Court of the RS, Official Gazette RS, no, 15/94.

In corollary to this basis, the concurrent cassation function of the procedure of constitutional complaint which may possibly be admitted to a Cassation Court is less stringent. The Cassation Court may adjudicate on the 'interpretation' and 'application' of a certain fundamental right. This function in no way hampers the specialized jurisdiction of the Cassation Court. Therefore, the application of the Constitution remains prevalent in every Court in Germany. The Constitutional Courts do not claim a monopoly over the application of the Constitution, however, they do act as coordinators of the Constitutional mandate.[57]

Since, this function of the German Courts has resulted in a form of ultimate 'Constitutionnalisation' for Germany, it is evident that this model is a highly successful one. It is suggested that this model or a similar one could be used as a guideline while analyzing the 'Constitutionality' of setting up a National Court of Appeal, from the Indian perspective.

CONCLUSION

The Division Bench of the Supreme Court of India, constituted in the *V. Vasanthkumar v. H.C Bhatia*, decided, after initial analysis of the feasibility of setting up The National/Regional Courts of Appeal and the scope of Article 136, that the matter should be referred to a Constitutional Bench of the same Court for consideration. The extent of constitutional change, if the jurisdiction of the number of benches are not increased, would be required to take place to incorporate such a system of separate Constitutional and Cassation courts, would, no doubt, be rigorous and on a large scale.

After due consideration of the Irish and the German Model, the authors are of the opinion that a system of Courts of Appeal could co-exist with a Supreme Court and the same could be coherently accommodated within the broad scope of the Indian Constitution with the requisite liberal approach of Article 130, or with a policy decision.

[57] *See, e.g.,* Gerhard Robbers, *Fur ein neues Verhaltnis zwischen BVerfG und Fachgerichtsbarkeit [Toward a new relationship between the Federal Constitutional Court and the jurisdiction over specific subject matter*], 51 NEUE JURISTISCHE WOCHENSCHRIFT, 938-945 (1998).

However, in contrast to the aforesaid view, a possible glitch in the proposed system is the scope of Article 136 and whether it would allow for the incorporation of a separate judicial entity that does not impede the jurisdiction of the SC but reorganizes it by bifurcation, in order to deliver speedy and efficient justice to all the citizens of India.

While it is known a successful working system of a Regional or National Court of Appeal would be complex and would require utmost precariousness in its initial years, it can be certain that it would go a long way in solving the problems of over-burdening of cases at the Supreme Court level due to what has recently been described by eminent jurists such as K.K. Venugopal, as a lack of caution exercised by the Supreme Court in allowing appeals from Article 136. Moreover, this would also enable people from different corners of India to avail the justice that it enshrined by the Constitution in a speedy and efficient manner.

All of the aforementioned is contingent upon the adjudication of the constitutional bench of the Supreme Court in *V. Vasanthkumar* case, which has not been listed for hearing as of yet.