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EDITORIAL

> *"We are well aware that the review takes very seriously its role as judge of judges - and to that, we say, more power to you. By your criticisms, your views, your appraising cases, your tracing the trends, you render the making of new law a little easier. In a real sense, you thus help to keep our system of law an open one, ever ready to keep pace with changing social patterns".* [*]
>
> ***Justice Stanley Flug***

Looking forward with a vision that law journals are critical to the proper development of law and an eminent source of research for the students, academicians and the Bar & the Bench the inaugural issue of Rajasthan University Law Journal describes in depth, the current state of the law, and offers analysis of legal policies, rules and history. The Journal is an annual peer reviewed journal which seeks to provide a forum for engaging in discussions on constitutional law.

Constitution is not only law but goes beyond. People regard it as an expression of their aspirations from the State constituted by them. Constitution therefore, is rightly regarded as a living law. Aspirations of the people change from one generation to another generation. Therefore, constitutions across the nations are accordingly amended and enriched by the experiences gained by people over generations.

Our attempt to instigate a spirit of enquiry about several constitutional issues has been duly supported by researchers from all over the country with inputs ranging from students to academicians and even practicing lawyers in this issue. These wide varieties of contributions have indeed motivated us to work hard towards excellence and have also expanded our knowledge base for a better

[*] Justice Stanley Flug, *A Judge Looks at the Law Review*, 28 New York University Law Review, 918 (1953).

understanding of the nuances of public law. Though we have selected few articles from the abundant submissions sent to, we were greatly impressed with the quality of research work put in by the students and their interest in this field.

We express our gratitude to the support and guidance extended by our Chief Patron Justice P.C. Jain, Patrons - Sh. Hanuman Singh Bhati (Vice Chancellor), Dr. Mahesh Koolwal (Dean), Prof. Manju Koolwal (Director) and all the faculty advisors.

We hope that the articles included in the journal would develop better understanding of the subjects discussed and turn out to be helpful to readers from every corner of legal fraternity.

(EDITORIAL BOARD)

CONSTITUTIONAL PROVISIONS AND ENVIRONMENT PROTECTION IN INDIA : A LEGAL INSIGHT

ATRAYEE DE*

Our constitution is not an inert but has grown and evolved over the years. In the Indian scenario, environment protection, has not only been raised to the status of fundamental law of the land, but it has also been webbed with human rights approach and is now considered as a well-established fact that it is the basic human right of every individual, to live in a pollution free environment with complete human dignity. The preamble to our constitution provides for a socialist society which promotes environmental protection. The fundamental duties again clearly impose duty on all citizens to protect environment. The Directive principles further are directed towards ideals of building welfare state. Healthy environment is one of the essential elements of a welfare state. Article 47 states that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health which includes the protection and improvement of environment as a part of its primary duties. Article 48 deals with organization of agriculture and animal husbandry. Article 48-A of the constitution states that the state shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country. Part III guarantees fundamental rights which are essential for the development of an individual. A citizen cannot carry on business activity, if it is health hazards to the society or general public. Public Interest Litigation under Article 32 and 226 has resulted in a wave of environmental litigation and establishment of environmental courts. The constitution encapsulates the framework of protection and preservation of nature without which life cannot be enjoyed. The knowledge of these provisions is necessary to bring greater public participation, environmental awareness amongst the masses.

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1. INTRODUCTION

In the Indian scenario, environment protection, has not only been raised to the status of fundamental law of the land, but it has also been webbed with human rights approach and is now considered as a well-established fact that it is the basic human right of every individual, to live in a pollution free environment with complete human dignity. The Supreme Court of India has opined that the essential features of sustainable development such as the "precautionary principles" and also the "polluter pay's principle" are also part of the environmental law of the country.[1] The Constitution of India imposes an obligation on the "state" as well as its "citizens" to protect as well as improve the environment.[2] The provisions contained for environmental protection by the Indian Constitution has been followed by other nations in the world. One such nation is South Africa. Similar provisions for environmental protection have been incorporated by the framers of the South African constitution. In this article an attempt has been made to analyze the various constitutional mandates that helps in promoting the cause of environmental protection, we shall analyze each of these mandates in details, under the following sub-heads:

2. PREAMBLE

At the very outset, the preamble establishes that our country is based on the "socialistic"[3] pattern of society, in which the state pays more attention to social problems than on individual problems. The basic idea behind the concept of socialism is to promote "decent standard of living for all" which is only possible in a pollution free environment. Pollution is considered as one of the social problems. The state is thus compelled by the Constitution to pay attention to this social problem to establish a just social order.[4] This objective of the preamble is vividly reflected and in specific terms in Part IV of the Constitution, which deals with the directive principles of state policy. The preamble further declares India to be a "Democratic Republic". In such a setup,

[1]See Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647at 659-660 (This case is popularly known as T.N. Tanneries Case).
[2]See Article 48-A and 51-A(g) of the Const. of India.
[3] The word "socialist" was added to the preamble by the Constitution (Forty-second Amendment) Act, 1976 vide (w.e.f. 3-1-1977). However, the "socialism" has always been the goal of the Indian Constitution, even prior to the amendment of 1976, as is evident from the directive principles of the state policy. See Sanjeev Coke Mfg. Co.v. Union of India, AIR 1983 S.C. 239 at 251.
[4]Article 38 of the Const. Of India mandates the State to secure a social order for the promotion of welfare of the people.

people have the right to know and to participate in the governmental policies and access information of environmental policies which is extremely important for the success of governmental policies. Other objectives of the preamble include justice, liberty and equality which finds its place in the Part III of the Indian Constitution that deals with fundamental rights.

3. FEDERAL SYSTEM OF GOVERNMENT

Problem of the environment can be primarily tackled with the help of various statutes. Thus, if we consider the scenario from the environmental point of view, allocation of legislative authority becomes extremely important. The Indian setup, has adopted a federal form of government whereby, the governmental power is shared between the central and state governments. Part XI of the Constitution (Articles 245-263) regulates the legislative and administrative relations between the union and the states. Article 245 empowers the parliament to make laws for whole of India whereas the state legislatures on the other hand, have been awarded with powers to legislate for their respective states. Article 246 further divides the subject matters of legislation between the Union and States under 3 distinct lists, i.e., the Union list which contains 100 items (though last item is numbered 97), the State list which contains 61 items (Initially there were 66 items in the list) and the Concurrent list which contains 52 items (though the last item is numbered 47). Under the Union list only the parliament can make laws, along with this the parliament has also been awarded with "residuary powers" on any matter which is not covered under the 3 lists.[5] The subjects mentioned under the Union list, inter alia include, atomic energy, mineral resources, defense, UNO, development of oilfields, mineral resources and other items including inter-state rivers, fishing[6] etc. The items having an inter-territorial environmental impact are also under the legislative authority of the parliament as for e.g. items of the State list inter alia, include public health, sanitation, agriculture, ponds, water supply, irrigation, drainage[7] etc. and related environmental impact is precisely local, and are left to be tackled at the local level. On the Concurrent list, both the Union and State are empowered to make laws for the inter alia which include, forests, protection of wildlife, population control, family planning etc. Items in this list sometimes have a local and sometimes a national implication; these are left to be

[5]See entry 97 in the Union List.
[6]See entries No. 6,7,9,12,13,14,22 to 30 and 52 to 57 of the Union List.
[7]See entries No. 5,6,14,16,17 and 24 of the State List.

tackled by both the Centre as well as by the State legislatures. Article 254, talks about cases where inconsistency may occur between the laws made by the parliament and the legislatures of different states, it provides that if the central law conflicts with the state law on any item of the Concurrent list then the Central law shall prevail over the state law (doctrine of repugnancy applies), if it has received the assent from the president. Thus, if we consider the distribution scheme of the legislative power between the center and the states under the federal setup we find that it is evident that there are ample of provisions to make laws dealing with the various environmental problems at both the local as well as the national level. The government controls the finances largely, it may happen when an industrial project is to be allocated in a particular state, it may have certain environmental impact in the state, so maybe it will be opposed by the environment and planning department of the concerned state. On the other hand, the central government may threaten to withdraw the project from a particular state, if it results into a conflict between development and the environment. Such type of conflict is taken care by the Environmental Impact Assessment (EIA) which is basically an effort to anticipate measure and weigh the socio-economic and ecosystem changes which may be the end product of the proposed project. The need for EIA, has been recognized even by the planning commission in its seventh five year plan. However, the present system of administrative framework which has centralized environmental appraisal sometimes leads to conflict between the project authorities and environment authorities.[8] Thus, it has been suggested that the project authorities should be compelled to consider all the environmental factors before incorporation of the project and any conflict between development and environment should be avoided by taking into consideration environmental costs and benefits analysis.

4. OBLIGATION TO IMPLEMENT INTERNATIONAL AGREEMENTS

The objectives of the international agreements can be only achieved if all the relevant countries become parties to them. India is a signatory to a number of international treaties and agreements relating to regional and sometimes global environmental issues. India has played a leading role from 1972 UN Conference on Human Environment at Stockholm to 1992 UN

[8]The conflict between environment and development was highlighted by the environmentalists in the Silent Valley Project and the Tehri Dam Project.

Conference on Environment and Development at Rio de Janerio and also in the Earth summit Plus 5 of 1997 at New York. India is therefore under an obligation to translate the contents and decisions of the international conferences, treaties & agreements into the stream of its national laws. Article 51 (c) states that "the state shall endeavor to foster respect for international law and treaty obligations in the dealings of organized people with one another". Article 253 of the Constitution empowers the parliament "to make any laws for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country / countries/ any decision made by any international conference, association or other body". Entries number 13 and 14 of the Union list includes items on which parliament can make laws provides "participation in international conferences, associations and other bodies, implementing of decisions made thereat"[9] and "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries"[10]. Thus, Article 253 is read with entries 13 & 14 of the Union list, we can conclude that the parliament can pass any law including laws on environmental protection and the same cannot be challenged before the courts on the ground that the parliament lacks legislative competency[11] to do so. These provisions served as potent weapons in the armory of the courts to uphold any parliamentary legislation if it is in pursuance of Article 253 read with entries 13 & 14 of the Union list. Parliament has made use of this power to enact Air (Prevention and Control of Pollution) Act, 1981 and Environment (Protection) Act, 1986. Preambles of both the laws clearly indicate that that these laws were enacted to implement the decisions reached at the United Nations Conference on Human Environment held at Stockholm in 1972.

5. ENVIRONMENT PROTECTION ACT, 1986

The decisions were taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972, in which India participated and agreed to take appropriate steps

[9]Entry number 13 in the Union List in the VII Schedule.

[10] See entry number 14 in the Union List in the VII Schedule.

[11] In India, the judiciary has the power of judicial review under Articles 32 and 226 and they can strike down any parliamentary legislation if it is enacted without any legislative competence. The Supreme Court has nullified five Constitutional amendments which sought to diminish judicial power either directly or indirectly. See Kesvananda Bharti v. State of Kerela, A.I.R 1973 S.C.1461; Indira Gandhi v. Raj Narain, A.I.R 1975 S.C. 2299; Minerva Mills Ltd. v. Union of India, A.I.R. 1980 S.C. 1789; Waman Rao v. Union of India, A.I.R 1981 S.C. 271; and P. Sambamurthy v. State of A.P. , A.I.R 1987 S.C. 663.

for the protection and improvement of human environment and the prevention of hazards to human beings, other living creatures, plants and property. In People's Union for Civil Liberties v. Union of India[12], the Supreme Court held that the provisions of the international covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our constitution, can certainly be relied upon by the courts as facets of those fundamental rights and hence, enforceable as such. Thus, the Indian Constitution puts an obligation and authorizes our parliament to implement the decision of any international treaty, agreement or convention with other country or other associated bodies.

6. FUNDAMENTAL DUTIES

The 42nd Amendment in 1976 added a new part IV-A dealing with Fundamental Duties in the Constitution of India.[13] Article 51-A of this part enlists 11 fundamental duties. This part was added on the recommendations of the Swarn Singh Committee bringing the Constitution of India in line with Article 29(1) of the Universal Declaration of Human Rights.[14] Article 51-A (g) specifically deals with the fundamental duty with respect to environment. It provides: It shall be the duty of every citizen of India to protect and improve the natural environment including the forests, lakes, rivers and wildlife, and also to have compassion for living creatures. Article 51-A (j) further provides: It shall be the duty of every citizen of India to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher level of endeavor and achievements. The basic motive behind the fundamental duties is to inculcate a sense of responsibility among the people and to promote their participation in restructuring and building a welfare society. The protection of the environment is a constitutional priority and it is the concern of every citizen. Article 51-A (g) is the fundamental duty of every citizen to protect and improve natural environment. But, in the present scenario pollution is not only caused by exploiting the natural environment but otherwise also. In modern industrialized civilization such a concept may seem to be a misnomer. It is submitted that the word natural before the word environment is to be understood in a broad sense. Nature gave us the environment pollution free.

[12](1997) 3 SCC 433 at 422.
[13]See Section 11 of the Constitution (Forty-second Amendment) Act, 1976 (w.e.f. 3-1-1977).
[14]See Article 29(1) of the Universal Declaration of Human Rights. It provides "Everyone has duties to the community in which alone the free and full development of his personality is possible".

The fundamental duty of every citizen is not only to protect the environment from any kind of pollution but also to improve the environmental quality if it has been polluted. Thus, the underlined emphasis of this fundamental duty is that every citizen has a duty to make an endeavour to preserve the environment in the same way as it was given to us by nature. Now, we come to the question of ensuring the compliance of these fundamental duties. When they were incorporated in the Constitution in the year 1976, it was considered that the fundamental law of the land reminds the citizens of their constitutional obligations. They cannot be directly enforced. However, in due course of time, the judicial activism provides an impetus to achieve the underlined objectives of the fundamental duties, particularly, Article 51-A (g) relating to the environment. The interrelationship between Articles 48, 48-A and 51-A (g) of the constitution has been explained by the Supreme Court in the State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat.[15]

7. DIRECTIVE PRINCIPLES OF STATE POLICY

Part IV of the Constitution deals with directive principles of State policy. These directive principles represent the socio-economic goals which the nation is expected to achieve. The directive principles form the fundamental features and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles.[16] These directive principles are designed to guide the destiny of the nation by obligating three wings of the State i.e. legislature, judicature and executive to implement these principles. Article 47 of the Constitution is one of the directive principles of State policy and it provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of health as its primary duties. The improvement of public health also includes protection and improvement of the environment without which public health cannot be assured. The 42nd Amendment of the Constitution in 1976 added a new directive principle in Article 48-dealing specifically with the conservation and improvement of the environment. It goes as under:

The state shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country.

[15](2005) 8 SCC 534 at 567.
[16]See State of Kerala v. N.M. Thomas, (1976) 2 SCC 310 at 379.

Thus, Indian Constitution became one of the rare constitutions of the world where specific provisions were incorporated in the Suprema Lex putting obligations on the State as well as citizens to protect and to improve the environment. This certainly is a positive development of Indian law. The State cannot treat the obligations of protecting and improvising the environment as mere pious obligation. The directive principles are not mere show-pieces in the window-dressing rather they are fundamental in the governance of the country and being a part of the supreme law mandatory to implement.

Article 37 of the constitution provides:

The provisions contained in part IV shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws. The court cannot directly enforce the directive principles by compelling the state to apply them in making the law but only when the state commits a breach of its duty by acting in a way which is contrary to these principles The directive principle serves the courts as a code of interpretation. They now stand as elevated to inalienable fundamental human rights. Even they are justiciable by themselves. In M.C. Mehta v. Union of India[17], the court observed that Articles 39(e), 47 and 48-A by themselves and collectively cast a duty on the state to secure the health of the people or to, improve public health and to protect and improve the environment.

8. FUNDAMENTAL RIGHTS

The essence of Principle 1 of the Stockholm Declaration can be seen in our constitution in Articles 14, 19 and 21 dealing with the Right to Equality, Freedom of expression and the right to life and personal liberty respectively.[18] The permanent people's tribunal regards the anti-humanitarian effects of industrial and environmental hazards not as an unavoidable part of the existing industrial system, but rather as a pervasive and organized violation of the most fundamental rights of humanity. Most important among these are the right to life, health,

[17](2002) 4 S.C.C. 356.

[18]Principle 1 of the Stockholm Declaration provided that man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well being, and he bares a solemn responsibility to protect and improve the environment for present and future generations.

expression, association and access to justice.[19] All these rights are present in Part III of the Indian constitution which deals with fundamental rights. A constitutional provision is never static it is ever evolving and ever changing and, therefore, never admit of a narrow, pedantic or syllogistic approach. The fundamental rights are intended to serve one generation after another. The provisions of part III and part IV dealing with fundamental rights and directive principles respectively are supplementary and complementary to each other. The basic idea behind fundamental rights is to achieve the goals mentioned in directive principles and must be construed in the light of the directive principles.[20] A right can be recognized as a fundamental right even though it is not expressly mentioned in the constitution. Thus, we can say that there are many unenumerated fundamental rights in Part III and judicial activism in India has taken a lead in interpreting various unenumerated rights in Part III of the Constitution.[21] Environment protection is one of them. Specific provisions are only provided in the part dealing with Directive Principles and Fundamental Duties, yet right to live in a healthy environment has been interpreted by the judiciary into various provisions of Part III dealing with fundamental rights. Thus, the judiciary in India has provided impetus to the Human Rights approach for the protection of the environment.

9. RIGHT TO LIFE AND RIGHT TO LIVE IN HEALTHY ENVIRONMENT

Article 21 guarantees a fundamental right to life- a life of dignity, to be lived in a proper environment, free of danger of disease and infection. We all are aware of the fact that there exists a close link between life and environment. The right to life would be meaningless if there was no healthy environment. The judicial interpretation has made Right to live in a healthy environment as the *sanctum sanctorum* of Human Rights. In M.C. Mehta v. Union of India[22], the Supreme

[19]Asia' 92 Permanent peoples tribunal, findings and judgements- Third Session on Industrial and Environmental Hazards and Human Rights: 19-24 October, Bhopal to Bombay (India) at 14 (1992).
[20]See Unni Krishnan v. State of A.P. (1993) 1 SCC 645 at 730.
[21]Right to free legal assistance was recognised in Khatri v. State of Bihar, A.I.R 1981 S.C. 928; the right of prisoners to be treated with human dignity was recognised in Charles Sobraj v. Superintendent, Central Jail, Tihar, A.I.R 1978, S.C. 1514; Right to live with human dignity, free from exploitation was recognised in Bandhu Mukti Morcha. v. Union of India, AIR 1986, S.C.180.
[22]A.I.R. 1987 S.C. 1086.

Court impliedly treated the right to live in pollution free environment as a part of the fundamental right of life under Article 21 of the constitution.

10. RIGHT TO LIVELIHOOD

The Judicial interpretation has further broadened the scope and ambit of Article 21 and now "right to life" includes "right to livelihood". Even the right to earn livelihood is considered as part of the right to life under Article 21. This broad interpretation is very helpful as it helps in checking the governmental action which has an environmental impact that threatens the poor people of their livelihood by dislocating them from their place of living or otherwise depriving them of their livelihood. In the last few years many people have been protesting against the construction of large dams as they generally displace thousands of tribal people and forest dwellers and thus deprive them of their livelihood.

Fundamental Freedom of Speech and Expression Article 19(1) (a) gives every citizen a fundamental right of speech and expression. In India most of the environmental jurisprudence has evolved from judicial activism. Most of the cases have come before the court as Public Interest Litigation or PIL in which the people exercised their freedom of speech and expression by writing letters to the court or otherwise by filing petitions before it, highlighting the violation of the rights of the people to live in a healthy environment in one way or the other.

11. RIGHT TO KNOW

The Right to know is also implicit in Article 19(1) (a) and it has a close link with Article 21 of the Constitution, particularly in environmental matters where the secret government decisions may affect health, life and livelihood of the people. The Right to know or access to information is the basic right for which people of a democratic country like India aspires. Secrecy erodes the legitimacy of elected governments.

Freedom to Carry on Trade or Business Article 19(1) (g) guarantees all citizens the right "to practice any profession, or to carry on any occupation, trade or business". However, this right of citizens is not absolute. Its exception is subject to Article 19(6) according to which reasonable restrictions which are in the interest of general public can be imposed. Thus, environment can be protected from any business which is hazardous.

12. RIGHT TO EQUALITY

The Right to Equality in the Indian Constitution is provided under Article 14. It strikes at "arbitrariness" of governmental action because "an action that is arbitrary must necessarily involve a negation of equality. Whenever there is arbitrariness in State action, whether of the legislative or of the executive or of an authority under Article 12, Article 14 springs into action and strikes down such action.[23] In fact, the absence of arbitrary power is the essence of rule of law upon which our whole constitutional system is based. In such a system, discretion when conferred upon execution authorities must be confined within defined limits.

In D.D. Vyas v. Ghaziabad Development Authority[24], the grievance of the petitioner was that the respondents had not taken any steps to develop the area reserved for park. On the otherhand, respondents were making time to carve out plots on such open space dedicated for public park in the plan and alienate the same with a view to earning huge profits. The Allahabad High Court followed the dictum of the Supreme Court in Bangalore Medical Trust and held that authority or state cannot amend the plan in such a way so as to destroy its basic feature allowing the conversion of open space meant for public park.

13. REMIDIES FOR THE ENFORCEMENT AND WRIT JURISDICTION

According to Doctor B.R.Ambedkar, Article 32 is the backbone of the Indian Constitution. He regarded this article as the most important article in our constitution. It is the most innovative part of the Indian Constitution as fundamental rights can be enforced in the Supreme Court under this article by filing a writ. It is also conferred upon the 24 High Courts of the country under Article 226 of the Constitution. Under these provisions the Supreme Court and High Courts have the power to issue any direction or orders or writs in the nature of *Habeas corpus, mandamus, prohibition, quo warranto and certiorari,* whichever is appropriate. The only difference between the writ jurisdictions of the two is that one can move the Supreme Court only for the enforcement of fundamental rights, whereas in High Courts, it may be for the enforcement of fundamental rights or for any other purpose. From this point, the writ jurisdiction of the High Court is wider in scope. But it's a fact that "the law declared by the Supreme Court shall be binding on all Courts

[23]See K.T. Plantation (P) Ltd. v. State of Karnataka, (2011) 9 SCC 1.
[24]AIR 1993 All. 57.

within the territory of India"[25], also the Supreme Court in exercise of its jurisdiction may pass any decree or make any order which is necessary for providing justice in any matter pending before it. Generally Environmental law is regulated by specified statues but, in India the Environmental law jurisprudence has mostly developed through writ jurisdiction. Judicial activism and the concept of Public Interest Litigation under writ jurisdiction have brought about a mutation in the procedural jurisdiction and it has played a pivotal role in developing and providing impetus to environmental jurisprudence with Human Rights approach. The remedy is preferred over torts action or public nuisance because it is relatively speedy, cheaper and provides direct approach to the higher judiciary thereby reducing the chances of further appeals. The relaxed rules of *locus standi* and evolution and recognition of epistolary jurisdiction by the Supreme Court and High Courts has further ensured the public participation in matters like environment protection. The remedy under writ jurisdiction also provides flexibility to the courts The judiciary has been very cautious in its approach. It has refused to interfere on imaginary apprehensions of environmental pollution and in those cases where the government has arrived at a decision after considering relevant facts and application of its mind without any extraneous considerations. However, the court has always issued directions for strict compliance with Environment Protection Act, 1986.The court has been ensuring the compliance of its orders by granting costs against the parties for non-compliance. The number of times the court has appointed monitoring committees to see that the courts order are duly complied with. The Court has also used the affidavits, commissions, panel of experts and took judicial notice for ascertaining the factual matrix.

CONCLUSION

From the perusal of various judgments, it is evident that the Indian judiciary has used the potent provisions of the constitutional law to develop a new "environmental jurisprudence". The courts have not only created public awareness regarding environmental issues but also it has brought about urgency in executive lethargy, if any, in any particular case involving environmental issues.

[25] supremecourtofindia.nic.in/jurisdiction.htm (last visited 12/1/15).

REVISITING THE DEBATE ON INDIAN FEDERALISM: A THEORETICAL AND COMPARATIVE PERSPECTIVE

AMBUJ DIXIT*

*F*ederalism is a concept of sharing of power between two governments that the governments should work in close co-ordination with each other, without imposing the will of one on the other. U.S Constitution and Australian Constitution are certainly good examples of such an actual federal scheme of power distribution. Our Constitution is certainly a so-called example of a federal constitution. But this federal feature of the Constitution of India has been subjected to a lot of debate, argument and unending litigation. There has always been a doubt in the mind of the inferior or state governments over the question of federal distribution of powers, and the case is all the same with various jurists, judges and law practitioners. Though, a lot of papers and books have been written about this feature of Indian Constitution, and one of them comes from a well known Indian jurist and former member of the Law Commission of India, P.K Tripathi. Tripathi in his article *'Federalism: A Myth or Reality'* which was published in the Journal of Bar Council of India in August 1974 concluded that Indian Constitution is anything but a federal constitution. The article will try to prove that India is indeed a federalism but with less powers to the states. This present article will try to analyze the federal structure of the Indian Constitution by means of a comparative study of the best models of federal constitutions. The article will also try to analyze the feature in question in light of landmark judgments, Constitutional provisions, and writings of eminent jurists on the subject and also in the light of the basic characteristics of a federal distribution of power. This article aims to prove with reference to aforementioned authorities that Indian Constitution is Centre Oriented Federation as our Constitution makers have given a blend of federalism to the Constitution while concentrating the final decision making authority in the Central government.

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1. UNDERSTANDING THE CONCEPTS OF FEDERATION AND UNION

Federalism constitutes a complex government mechanism for governance of a country. The basic idea behind federalism is to bind into one political union several autonomous units known as states (in the United States and Australian Constitution) or provinces (as in Canadian Constitution). It is necessary feature of a federal constitution that it provides independent area of power utilization to the autonomous units by whatsoever name they are known, and keeps that area untouched by the supremacy of the Centre, thereby, providing these self autonomous units their independent areas of legislation, execution and adjudication. The federal principle according to Professor K.C Wheare is "the method of dividing powers so that the general and the regional governments are each, within a sphere, co-ordinate and independent."[26] They will be co-ordinate only if they operate, with respect to the matters assigned to them under the constitution, directly upon the citizens and none of them has to operate through the other or by virtue of the authorization of the other.[27] In *State of West Bengal v. Union of India*[28], Sinha C.J., speaking for the bench envisaged the following characteristic of a federal constitution:

1. *Agreement between independent units*: A truly federal form of government envisages a compact or agreement between independent and sovereign units to surrender partially their authority in their common interest and vesting it in a Union and retaining the residue of the authority in the constituent units. Ordinarily each constituent unit has its separate Constitution by which it is governed in all matters except those surrendered to the Union, and the Constitution of the Union primarily operates upon the administration of the units. Our Constitution was not the result of any such compact or agreement.
2. *Supremacy of the Constitution*: It cannot be altered except by the component units. Our Constitution is undoubtedly supreme but it is liable to be altered by the Union Parliament alone and the units have no power to alter it.
3. *Distribution of powers*: Distribution of powers between the Union and the regional units each in its sphere coordinate and independent of the other. The basis of such distribution of power is that in matters of national importance in which a uniform policy is desirable

[26] Wheare, K.C., *FEDERAL GOVERNMENT*, at p. 10, Fourth Edition (1963), Oxford University Press, London.
[27] Tripathi, P.K, *Federalism: The Reality and the Myth*, Journal of The Bar Council of India, Aug. 1974, pg. 258.
[28] AIR 1963 SC 1241

in the interest of the units, authority is entrusted to the Union, and matters of local concern remain with the State.

4. *Supreme Authority of the Courts*: In order to interpret the Constitution and to invalidate actions against the provisions of the Constitution. A federal Constitution, by its very nature, consists of checks and balances and must contain provisions for resolving conflicts between the executive and legislative authority of the Union and the regional units.

As contradistinguished with the federal constitution, there is the unitary constitution in which the Central Government is supreme.[29] This kind of government may also consist of a local government, and such government may also be liable to discharge a few functions and may have some powers but those powers are subject to the whims and caprices of the Union Government. In a unitary system the central government commonly delegates authority to sub-national units and channels policy decisions down to them for implementation. A majority of nation-states are unitary systems. They vary greatly. Great Britain, for example, decentralizes power in practice though not in constitutional principle. Others grant varying degrees of autonomy to sub-national units. In France, the classic example of a centralized administrative system, some members of local government are appointed by the central government, whereas others are elected.[30]

Thus, from the above two concepts it becomes quite clear that the basic difference between a federation and a union is that:

A federal government doesn't delegates any power to the units and these units are quite independent and supreme to operate in their own sphere without being subject to any restriction from the federal government *whereas* a unitary government delegates power to its constituent units but they are subordinate to the Union and the exercise of the power depends upon the directions given by the union.

2. EVOLUTION OF FEDERALISM IN INDIA

There had always been some kind of federal element in the Indian governance, even during the rule of Mughal Empire or Delhi Sultnate. The kings appointed some local landlords

[29] Jain, M.P, *INDIAN CONSTITUTIONAL LAW*, Lexis Nexis Butterworths Wadhwa, Sixth Edition Reprint, p.527.
[30] http://www.britannica.com/EBchecked/topic/615371/unitary-system (Accessed on 25/2/2015).

who acted as local governments and were answerable to the king only. Later, during the British rule a systematic blend of parliamentary monarchy and federalism was introduced in India by the Government of India Act 1858 which appointed Lieutenants for North-West Provinces, Bengal, Punjab and Burma.[31] But of all these the major federal developments were made by the Government of India Act, 1935, which came with the objective of uniting the Indian States into federation, but that could not be achieved. For diverse reasons the Indian states never joined the proposed federation and the part dealing with federation never became effective.[32] The major failure of the GOI Act 1935 lies in the fact that it had undertaken a task of creating a federal system for which no historical precedent ever existed. In the history of the concept of federalism we see there were always some independent states that by their agreement formed a federation. But the task bestowed upon The Joint Parliamentary Committee was to first create self-autonomous units and then again give them the independence to operate in their own sphere without being subject to the control of Governor General in Council, as the provinces were subject to legislative, adjudicative and executive authority of the British Government.[33] The basic source of Indian federal scheme is also the Government of India Act, 1935 and also the acts of constitution passed by the British government for Canada and Australia.[34] However, the Indian Constitution has also made several departures from the Government of India Act 1935. The departures were made on the points which were not suitable to the contemporary Indian constitution and also due to which the GOI Act 1935 tasted failure.

3. INDIAN FEDERALISM: A COMPARATIVE STUDY

As they have been called the best models of a federal constitution are the United States of America and Australia. A comparison between Indian Constitution will show how federal the constitution of India is. The article will move forward by comparing the basic characteristics of a federal system of government as given in *State of West Bengal v. Union of India*.[35] The

[31] Pylee, M.V, *CONSTITUTIONAL HISTORY OF INDIA 1600-2010*, S. Chand Publications, p.21.
[32] Bakshi, P.M, *COMMENTARY ON THE CONSTITUTION OF INDIA: Enlarged Edition*, Universal Law Publishing Co., pp. 17, 18.
[33] Basu, D.D, *INTRODUCTION TO THE CONSTITUTION OF INDIA*, Lexis Nexis Publications, 20th Edition Reprint 2012, p.54.
[34] Sridhar, Madabhushi, Evolution and Philosophy behind the Indian Constitution, *For Reference See* *http://www.hrdiap.gov.in/87fc/images11/4.pdf* (Accessed on 26/02/2015).
[35] *Supra at* 3.

comparison will focus on three Constitutions namely: The Constitution of the United States of America; The Constitution of Australia; and The Constitution of India. As the initial and most prominent modern example of federalism, the United States is often considered as first among the equals and also the prototype for a model federal constitution[36] so this comparative study will focus more on American federalism but bringing in the Australian constitutional perspective on federalism as and when needed.

Agreement between independent units

This first characteristic can be divided in two parts; one being the agreement between constituent units to form a Union and the other being the surrendering of powers to the union. As is known to all the Constitution of the United States of America was not a document formed by whims and caprices of some great independence leaders. The Constitution was a product of year's long process of meetings in a confidential room and hours of discussion, as is the Indian Constitution. Thus, by the virtue of the number of representatives and the duration of debates both the Indian Constitution and the U.S Constitution are great masterpieces. But what makes the Constitution of United States more federal in nature was the compulsory ratification of the Constitution by the states. The adoption of the Constitution was subjected to ratification of at least Nine out of Thirteen states failing which it could not have been brought into force or let's say even adopted.[37] Thus, American federation was a result of a confederate structure coming into picture and then turning federal. But contrary to it the scenario in India was totally different as there was never any such agreement between the Indian states and the Union Parliament. Some of the states willingly joined the Union, some on persuasion of Sardar Patel and some were forced to join (as in the case of Hyderabad). But amidst all this the State of Jammu & Kashmir joined the Indian Union under a contract and that contract even got a constitutional status.[38] So, one may definitely say that the relationship between J & K and UOI is federal in nature but certainly there is no agreement between other Indian states to form a federation.

[36] Choudhry, Sujit and Hume, Nathan, *Federalism, devolution and secession*: from classical to post conflict federalism, *COMPARATIVE CONSTITUTIONAL LAW*, Edward Elgar Publication, p. 358.
[37] Article 7, United States Constitution.
[38] Article 370, The Constitution of India 1950.

In *State of West Bengal v. Union of India* the Hon'ble Supreme Court also opined that the states must surrender some of their authority to the Union to form a federation and may retain the residue. While the power of legislation under Article 246(1) read with List I of the 7th Schedule of the Constitution may be thought of as the powers which the states have surrendered to the Union. However, the residue which according to the basic principles of federalism should have been left with the states to legislate upon also has been surrendered to the Union under Article 248 of the Constitution and also under Article 246(1) read with Entry 97 of the List I of the 7th Schedule. However, under the American Constitution all the powers in residue are left at the discretion of the States and not that of the Union.[39] The case is all the same with Australia as there also all the residuary powers are given to the states and not the Union.[40] Thus, yet again the Constitution of India makes a departure from the most critically acclaimed models of federal constitution, thereby strengthening the suspicion of it not being federal. Thus, the first federal character as enunciated in the case is found missing in the Indian Constitution but is found in the American Constitution and Australian Constitution.

Supremacy of the Constitution

The Constitution of India is indeed the *suprema lex* or supreme law of the land. It prevails over any other law. The Constitution was directly adopted, enacted and given by the people of India.[41] The Constitution is the document which prescribes the powers of all the organs of the Indian state. However, this feature of a federation demands that the supremacy of the Constitution cannot be altered or amended except without the authority of the constituent units. The United States Constitution also proves fit on these criteria as any amendment to the Constitution cannot be made except with the authority of at least two thirds of the states.[42] In Australia also the states have the power to influence the alteration of the Constitution.[43] Whereas, under Article 368(1) of the Constitution of India the Parliament is sufficiently empowered to make any amendments and change the nature and substance of the Constitution subject to the

[39] Amendment X (1791), The United States Constitution.
[40] Shukla, V.N, *CONSTITUTION OF INDIA*, Eastern Book Company, 12th Edition (2013), p.803.
[41] Preamble, The Constitution of India.
[42] Article 5, United States Constitution.
[43] Section 128, Constitution of Australia.

basic structure doctrine.[44] The irony is such that the states even for their existence depend upon the will of the Parliament.[45] Though it may seem that *proviso* to Article 368(2) comes to the rescue of the states as it mandates ratification of amendments relating to specific clauses and chapters by one half of the states, hence maintains the federal character of Indian Constitution. However, if we really examine the scope of these amending powers given to the states we will learn that these powers are just in words and mean nothing, *for example* we may examine a few provisions mentioned in the *proviso* to article 368(2). Article 54 and 55 are the very first articles mentioned in the *proviso* relating to the appointment of President of India and the manner of his election respectively. But this power means nothing as the President howsoever appointed by the states has to work in accordance with the aid and advice of the Council of Ministers.[46] Thus, it stands proved that the states may have a bit of say in amendment of the Constitution but still these powers are not up to the federal standards as set by the United States Constitution, so we should conclude that albeit the constitution of India satisfies this character of federalism, still it is far behind in being a true federation and obviously not a distinguished federation as that of United States or Australia.

Distribution of powers

This character of a federal Constitution is certainly the most debated feature of the Indian Constitution and as this is the most important aspect of a federal Constitution so this feature must be dealt under two distinct heads, the first one being, *Distribution of Legislative Power.* General Legislative powers of the States and the Parliament are dealt with in Article 245 and 246 which deals with extent of legislative powers of the union and the state and subject matters of the union and the state laws respectively. Article 246 make it clear that the law making power of the states is restricted to matters enumerated in the state list *i.e.* List II Schedule 7 and concurrent list *i.e.* List III Schedule 7. But the concurrent lawmaking powers of the state legislature is subject to Article 254, that means Parliament can easily overrule any law made by state legislatures *whereas* the Parliament may even make laws over the matters enumerated in state list if it feels

[44] *Keshavnanda Bharati v. State of Kerala*, AIR 1973 SC 1461.
[45] Article 2 and Article 3, The Constitution of India 1950.
[46] Article 74, The Constitution of India 1950.

that it is necessary in the national interest to do so.[47] Also, the Parliament may make laws on state matters under Article 353 and 356 if an Emergency is declared under Article 352 or a state's constitutional machinery has been declared as failed under Article 356 respectively.

Under Indian Constitution the *Executive Power* of the States extends to the subjects on which State Legislature is empowered to make laws.[48] This power in its very substance is subordinate to the Union as already proved above the power of state legislatures to make law is subordinate to the Union. Moreover, the Executive power of the state is further restricted by the *proviso* to Article 162 as it is subject to the executive power of the Union and legislative power of the Parliament. However, under the United States Constitution as already shown the powers of the Federal government are restricted to those mentioned in the Constitution and the residue is upon the states to legislate. Thus, yet again the Indian Constitution proves to be less federal in nature when the question of distribution of powers is considered.

Supreme Authority of the Courts

Though, the Indian Constitution is weak in other federal characters but when comes the question of the supremacy of the courts, it is always answered in positive. Just like in United States where it was in the case of *Marbury v. Madison*[49] the doctrine of judicial review was given thereby declaring the supremacy of the Supreme Court, in India also the power of judicial review as given under Article 32 is an important and integral part of the basic structure of the Constitution and no Act of Parliament can abrogate it or take it away.[50] Thus, the Constitution very well satisfies this necessary feature of a federation.

4. FEDERAL SHARING OF POWERS BETWEEN THE INDIAN UNION AND THE STATE OF JAMMU & KASHMIR

Irrespective of the defaults that we tend to find in our federal structure, there is one area in which the Constitution is totally federal. Article 370 of the Constitution of India declares that no law relating to the State of Jammu & Kashmir can be made by the Parliament except without the

[47] Article 249, The Constitution of India 1950.
[48] Article 162, The Constitution of India 1950.
[49] 5 U.S. 137 (1803).
[50] *I.R Coelho v. State of Tamil Nadu*, AIR 2007 SC 861.

prior consultation to the state government and reference to the document of accession. The state also does not depends upon the Parliament or the Union for its continued existence, for any such purpose a Constituent Assembly of the state must be convened. The state of J&K is independent in its sphere to make laws relating to its territory. There exists an agreement between Union of India and the State of J&K. Thus, the relationship that our Constitution creates between the state of Jammu & Kashmir and the Union is federal in all its aspects and the powers of the State are independent of the Union. This relationship satisfies the model of federation as envisaged under the United States Constitution.

CONCLUSION: IS INDIAN CONSTITUTION REALLY FEDERAL

In light of the above study we must conclude that though India is not truly federal in nature, but this cannot be denied that some federal characteristics do exist which distinguish us from a unitary polity. Several names have been given to the Indian political structure since due course of time such as "constitution with a unitary bias" or "quasi federal" etc. But in my opinion it should be called "Centre oriented federation" as it cannot be in any way termed as Unitary. The term unitary denotes that all the power rests with the centre. However, in Indian system the power is not vested just with the centre. The states are given their due status, even where the states are not given direct say their representatives in the Council of States do have a say in all the matter ranging from declaration of Emergency to Constitutional Amendments. Moreover, the executive power of the Union to promulgate ordinances under Article 123 is also subject to approval by Parliament and the Parliament means both the houses. Under Article 80 the members of the Council of States are chosen by the state legislatures by means of proportional representation in form of single transferable vote. Thus, indeed the states do not have much say in the working of the Union or Parliament directly, but they do have representation by means of the elected members from states just like Article 3 of the United States Constitution. One may assume that after partition the makers of the Constitution gave extraordinary powers to the Centre but they were aware of the difficulty which may arise and that is why they envisaged a unique method of checks and balances. Thus, it is argued that India is a "Centre oriented federation" as it possesses the qualities to qualify as a model of federalism and characteristics of federalism are not totally absent. The Indian constitution presents a unique model of a federal

constitution for the first time in the world's political history and represents the real will of *"We the People"* to empower the states and maintaining the Union as the real sovereign.

WRITTEN CONSTITUTION AS A LIMITATION: COMPARATIVE STUDY BETWEEN U.S.A. AND INDIA

KARAN GEHLOT*

The motive forces, which led to adoption of a written constitution, have varied in different parts of the world, the basic assumption underlying them broadly in the same (being derived from the American Constitution), namely, that a written Constitution is a legal instrument which sets up and limits the powers and functions of the different organs of the state. Since the organs of the state, including the legislature or ordinary law making body itself are this set up by the constitution, it is natural to regard the written constitution as a higher law with reference to which the powers of the different branches of the body politic have to be tested or circumscribed.

1. UNWRITTEN CONSTITUTION

Under an unwritten Constitution, such as that of England rules of constitutional law at best operate as rules of "constitutional morality"[51] or usage because they are not enforceable by the courts like other laws. A court or lawyer would have nothing to do with the rules of morality, whether founded on the unwritten constitution or usage or otherwise. It follows, there is no legal limitation to the sovereignty of the legislature even though a Parliament may not, in practice intend to violate these rules of constitutional morality. In other words of Dicey:[52]

> *"A modern judge would never listen to a barrister who argued that an Act of Parliament was invalid because it was immoral or because it went beyond the limits of Parliamentary Authority."*
>
> *"If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal, but the legislatures must go mad before they could pass such law."*[53]

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[51] Maitland, Constitutional History of England, p.398.

[52] Dicey (10th EDITION), p.63.

[53] Leslie Stephen's Science of Ethics, quoted in Dicey (10th Edn.), p. 81.

2. WRITTEN CONSTITUTION

Since the powers of all organs of the State are defined by the Constitution, it follows that under a written constitution, no organ or branch of the government can claim omnipotence of sovereignty in English sense. Under a written constitution, all the organs are non-sovereign. It means that none of them can exercise unlimited power, but it is limited and restrained by superior law and that if any of those constitutional limits are transgressed, the relevant act of the government whether executive, legislative or judicial, shall be ultra vires or unconstitutional. It is because in absence of any arbitrary power in the body politic, which is governed and restrained by higher law, that Americans call their political system as a government of laws and not men.

The Privy Council establishes two prepositions:

a) That in the absence of any constitutional limitations, the law making or legislative organ of a State possesses the plenary power of making any laws, substantive or procedural, unfettered by any restriction which is called by Dicey legal 'sovereignty'.[54] Hence, even when there is written constitution, but the constitution does not impose any limitation, prohibition or restriction as to a particular matter, the legislative authority of the legislature to deal with that matter that cannot be questioned in any manner.

b) Where, however there is written constitution and that constitution provides that the legislature must not do a particular thing or can do it only in the manner prescribed by that constitution, the legislature cannot transgress that limitation, if it does, its act must be void.

3. KIND OF LIMITATIONS

Different kinds of limitations may be imposed upon the organs of the State by a written constitution by creating them:

An overall limitation may be imposed (substantive as well as procedural) in the matter of amending the constitution itself. Limitations may be imposed upon all the organs of the State by guaranteeing certain rights of the individual in a Bill of Rights or list of fundamental rights, which, when violated would render the relevant state act null and void. Limitations may be imposed upon the legislative body in the matter of enacting ordinary legislation.

Such limitation may be:

[54]Kilbourn v. Thompson, (1880) 103 US 168 (199).

- Procedural, i.e., as to the mode of making a law. Such limitation may exist not only in federal but also in unitary constitutions.
- Substantive, i.e., as to the subject matter regarding which a law may be made, such limitation exist in federal constitutions which distribute legislative powers between the federal and State Legislature.

Since the States are territorial units, the jurisdictions of the various States Legislatures, under a Federal Constitution are also limited within their respective territories. Substantive or procedural limitation may also be imposed upon the various organ of the State by other mandatory provisions of the constitution, which stand apart from the fundamental rights or the distribution of legislative powers. Such provisions either exclude certain matters (other than human rights) from the powers of the Legislature or other specified organ, or subject it to certain restrictions.

The essence of different kinds of limitations as aforesaid is the same, namely, that provision of the constitution, in regard to these entrenched or excluded matters are intended to be mandatory or legally binding as limitation upon the Legislature (or some other organ which is sought to be limited by the provision concerned).

4. AN ANALYSIS OF THESE DIFFERENT KINDS OF LIMITATIONS UPON A COMPARATIVE LEVEL

Procedural Requirements Regarding Ordinary Legislation

The constitution may lay down a procedural requirement not only regarding process the process of amendment of the constitution itself but also as regards ordinary legislation.[55] Presently in this sphere, a distinction is usually made between the irregularity or unconstitutionality.[56] Where it is regarded as mandatory condition precedent to making the law its breach would be regarded as an illegality or unconstitutionality. Otherwise a procedural irregularity is usually regarded as not affecting the validity of the legislation itself.

This may illustrated with reference to constitutional provision requiring a special procedure for the passage of Bill. Can the validity of enactment be challenged before the court

[55]Vide Arts. 107-117, 196-207 of the Indian Constitution, Art.I ss 7-10 of the Constitution of U.S.A.
[56] Ref. No. 1 of 1964, AIR 1965 SC 745 (para.62).

on the ground that the requirement of the relevant constitution provision was not complied with and consequently the statute though passed by the legislature was void?

1) U.S.A.: A similar view has been taken in the U.S.A. Though it is acknowledge that the Legislature has power to describe its own procedure, it cannot while regulating its proceedings or in making rules in that behalf, "ignore constitutional restrains.[57]" Hence, though ordinarily a court would not invalidate an Act of Congress on the ground of any defect in procedure or look into the journals of the Houses to determine whether an Act which has been signed by the presiding officers of the two Houses and by the President has been duly passed[58], it will interfere if some constitutional provisions going to the root of the power of the Legislature to make the law has been violated e.g. when a Bill, relating to a revenue measure, has been passed without originating in the House of representatives, or where a Bill has been passed without the special majority required by the Constitution.[59]

The power to interpret the constitutional requirement to determine whether it has been violated, of course, belongs to the court.

2) INDIA: In India, there is a specific constitutional provision {Arts. 122(1), 212(1)}, barring the jurisdiction of a call in question any proceedings on Parliament (or a State Legislature) "on the ground of any alleged irregularity." Notwithstanding such barring provisions, however, the court has held that it does not prevent the court from inquiring whether the Legislature in question had the power or competence to do that thing under the Constitution from which it derives its power, e.g., where the Bill had been passed by a Legislature which had not been properly summoned {Arts. 85(1), 174(1).}[60]

But before invalidating a law on the ground of a procedural provision of the constitution, the court has to interpret the provision in question and determine whether it would hold the provision to be mandatory or directory.

A**.** It will be interpreted as mandatory if the requirement of that provision goes to the root of the jurisdiction or power of the legislature to act under the Constitution.[61] In this case the court will

[57]U.S. v. Ballin, (1982) 144 US 1 (5).
[58] Flint v. Stone Tracy Co., (1991) 220 US 107.
[59] U.S. v. Smith (1932) 286 US 6.
[60] Cf. Powell v. McCormack, (1969) 395 US 486.
[61] Cf. Sharma v. Sri Krishna (II), AIR 1960 SC 1186 (1190).

invalidate the statute, which has been passed in violation of the mandatory requirement of the constitution.

B**.** On the other hand many, of the procedural provision of the Constitution have been held to be director, so that their violation would not render invalid the resultant act of the legislature. The principle upon which the court has determined such a provisions to be directory is that they merely regulate the manner of exercise of the jurisdiction of the legislature and not the existence of the jurisdiction itself. There is specific provision in our Constitution-Art. 255, which render some of the other procedural provisions directory.[62]

Limitations Arising From Constitutional Distribution Of Legislative Powers

The Constitution of U.S.A. makes the division of the powers between the federation and states by provision of four classes:

I. The Federal Congress has no general powers to make laws for the people it has got only enumerated powers. These powers are enumerated in Art. I, s. 8, e.g. to declare war, raise armies, coin money, regulate foreign commerce. The 10th amendment makes it clear "the powers not delegated to the United States by the Constitution, nor prohibited by it to the State, are reserved to the States respectively, or people.[63]

II. Though all powers not expressly given to the Union were reserved to the States (10th Amendment), the Constitution at the same time imposed certain limitations upon the exercise of those reserved powers so that their exercise might not interfere with the exercise of the powers conferred upon the National Government.

III. There is no concurrent List in the American Constitution. Nevertheless, a concurrent sphere has resulted from the judicial interpretation there is a sphere where a state can legislate so long as congress does not occupy the field or the state legislation does not conflict with a federal legislation.[64]

As in the United States, the Commonwealth Parliament (of Australia) has only enumerated or selected legislative powers and no general power[65] to make laws for the peace, order and good

[62] Manglore Bedi Works v. State of Mysore, AIR 1963 SC 589 (para. 5).
[63]Gibbons v. Ogden, (1942) 9 Wh 195.
[64] O Sullivan v. Noarlunga Meat Ltd., (1956) 3 ALL ER 177.
[65]Melbourne Corporation v. Commonwealth, (1974) 74 CLR 31 (47).

government of the people as the Canadian Parliament has. The enumeration is not double, only the powers of Commonwealth Parliament are enumerated.

India: Distribution System In Three-Fold

The system of distribution of legislative power between the Union and State Legislature under the Indian Constitution is unique in so far as enumeration of subjects in the 7th schedule is three-fold-list I specifies the exclusive powers of the Union Legislatures, List II similarly gives an exclusive jurisdiction to a State Legislature over the subject enumerated in that list III , on the other hand, specifies certain subject as concurrent .

Several outstanding features mark this system:

- By enumerating as many as 211 subjects in 3 lists, it aims at exhaustion, in order to minimize litigation over conflict of jurisdiction between the union parliament and a state legislature.
- *Secondly*, wherever any conflict could be anticipated, the institution has given pre dominance to the union jurisdiction, so as to give the federal system as a strong central bias. Thus:
  i. In case of overlapping of a matter as between the three list, pre dominance as being given to the union legislature, as under the government of India Act, 1935. Thus the power of state legislature to legislate with respect to the matter enumerated in the state list has been made subject to the power of the union parliament to legislate in respect of matter enumerated in the union and concurrent list, and the entries in the state list have to be interpreted accordingly.
  ii. In the concurrent sphere, in case of repugnancy between union and a state law relating to the same subject, former prevails. If however, the state law was reserved for the assent of the president and has received such assent, the state law may prevails not withstanding such repugnancy but it would still competent for parliament to over ride such state law by subsequent legislation (Art.254 (2)[66].
  iii. The vesting of residual power under the constitution follows the precedent of Canada, for it's given to the union instead of the states. The constitution of India vest

[66]Zverbhai v. State of Bombay AIR 1954 SC 752.

the residuary power, i.e., the power of legislated with respect to any matter not enumerated in any one of the three list,- in the union legislature [Art 248][67], and the final determination as to whether a particular matter falls under the residuary power or not is that of the courts.

- *Thirdly*, even part from the central bias in the foregoing normal distribution of powers, there are certain extra ordinarily provision in the Indian constitution which provide for expansion of the federal power in cases of emergency or other pre dominating national interest, instead of leaving it to be judicial interpretation as in the USA, Australia or Canada, as we have noticed. These provision, therefore, constitute additional limitation upon the power of the state legislature. This exceptional circumstances are –
    i. "In the national interest. A law made by parliament, which parliament would not but for the passing of such resolution have been competent to make, shall, to the period of six months after the resolution has ceased to be in forced except as respect thing done or omitted to be done before the expiration of the said period [Art .249]. The resolution of the counsel of the state renewed for a period of one year at a time."
    ii. Under a proclamation of Emergency, while a proclamation of 'Emergency' made by the president is in operation, parliament shall have similar power to legislate with respect to state subject [Art. 353(b)].A law made by parliament, which parliament would not but for the issue of such proclamation have been competent to make, shall, to the extent of incompetency, cease to have effect on the expiration of a period of a six month after the proclamation has ceased to operate, except as respect things done or omitted to be done before the expiration of said period[Art. 250].
    iii. By agreement between the state. If the legislature of two or more state resolves that it shall be lawful for parliament to make laws with respect in any matter included in the state list relating to those states, parliament shall have such power as regards such state. It shall also be open to any other state to adopt such union

[67] Zaverbhai v. State of Bombay, AIR 1954 SC 752.

legislation in relation to union itself by the resolution passed in that behalf in the legislature of the state. In short this is an extension of the jurisdiction of union parliament by consent of the state legislature [Art. 252].[68]

5. IMPLIED LIMITATION

Judicial Interpretation

It constituted by express provision of the constitution i.e., the bill of rights , the distribution of under federal constitution or other specific provision which curb the power of legislature to deal with particular subject which could otherwise have been dealt with it.

It shall deal other with other limitation which are not be found expressly mention in the text of the constitution but have yet be acknowledged to constitute imitation not only upon the legislature but also upon the executive and the judiciary, as if they had been laid down in the constitution itself. Before proceeding to take up such implied limitation in particular, we should refer to the process in which such implied limitation had their origin.

The first thing to be noted is that such implied limitations have been judicially evolved. But we have already seen that when a written constitution is adopted, the court cannot refer to extraneous material either as a source of constitutional power or limitation except by way of interpretation of the express provision of the constitution. The USA and India that the court cannot draw any power or limitation from any supposed "spirit of the constitution".

How could then a court assume a power to add implied limitation to the express provision of the written constitution?

The court power lies to interpret the express provision. In those countries which treat its written constitution as a legal instrument, the function of interpreting the constitution, as in case of other legal instrument,(like Deeds, indentures, testaments), belongs exclusively to the court. In India, this is enjoining by the constitution itself, - by Art. 367. Once it is acknowledge, it becomes the function and duty of its constitutional court or courts to determine whether any action of any branch of Government has transgressed the limits imposed upon it by the constitution, as interpreted by the Court itself.

[68]UOI v. Basaviah AIR 1972 SC 1415.

Scope For Implication

More controversial is the scope for the Judges to add to the contents of a written Constitution by the judicial process of implication.

I**.** We have seen that a court is entitled through its process of interpretation of an express provision to include within its ambit, which may held to have been included in it by necessary implication. An express limitation by way of a fundamental right may be amplified by this process to include some unremunerated right, which may be said to be an integral part of enumerated right.

II. But there are certain doctrines, which the courts in various countries have evolved not out of any express constitutional limitation, but upon a reading of several provisions or their scheme as a whole. This process is markedly reflected, in the evolution of the doctrine of Separation of Powers and corollaries emanating from it, such as doctrine against delegation of constitional functions, deference of one organ for the practice of the other organs and the like which are judicially acknowledged as constitutional limitations in addition to those expressly provided in the written Constitution.

6. LIMITATAION ON THE EXECUTIVE

I**.** The function of the executive being to execute laws it cannot assume the power of making laws, which function belongs to the legislature.[69]

II. THE Executive cannot make even subordinate legislation, such as rules or regulations, unless authorized by legislature itself, within the constitutionality permissible limits of delegation.[70]

III. Arbitrary action on the part of the Executive is checked by the judiciary applying the principle of rule of law, namely, that any act of the Executive which interferes with the liberties of an individual would be illegal and void if it is not authorized by the Constitution or by a law made by the Legislature or by some authority empowered by Parliament in this behalf. This limitation obtains in all democratic countries, irrespective of the nature of the Constitution, such as the U.K, U.S.A, India. IV. It is the duty of the Executive, to enforce judgments of competent courts and not to defy them.

[69] Youngstown v. Sawyer 1952, 343 US 579.
[70] U.S. v. Eaton 1982, 144 US 677.

In the Steel Seizure Case, - in December, 1951, in order to avert a nation-wide strike in the Steel Industry, President Truman issued an executive order (not backed by any law) to seize and continue the operation of the steel mills, on the ground that the strike would seriously jeopardies the national defense as American troops were then fighting in Korea.

The question brought before the court was whether the order, which amounted to a legislative act, could be issued by the President in exercise of his executive power under Art. II, s.1 (1) or of his power as 'Commander-in-Chief' [Art. II, s(1)] Prima facie, the Constitution itself did not impose any limits to the aforesaid powers of the President.

Nevertheless, the court held that under no situation could the President claim to exercise a legislative function, which had been vested by the Constitution in the Congress, because of the doctrine of Separation of Powers. DOUGLAS, J., in his concurring opinion, observed:

- "The doctrine of separation of powers was adopted by the Convention of 1787...to preclude the exercise of *arbitrary power*. The purpose was not to avoid friction, but by means of...friction incident to the distribution of the governmental powers among three departments, to *save the people from autocracy"*[71]

The court held that *seizure of property* was a legislative function under Art. I, when read with the Fifth Amendment, according to which no person can be deprived of his property "without due process of law". Hence, the President cannot, even in war emergency, seize property without the authority of law or otherwise then in accordance with the procedure lay down by law.

Even those powers which are vested in the President by the Constitution are subjected to the "necessary" law making power of Congress, by Art I, s.8(18), to make laws which shall be necessary for carrying into execution...all other powers vested by this Constitution in the Government of the United States. Of course in emergent circumstances, the President may take action in anticipation of legislative sanction; but where in the Steel Seizure case, the Congress had already occupied the field, by enacting laws as to how property might be seized in

[71]Fischery v. Sec. of State (1808) 22 MAD 270.

emergencies, the President could not override that statutory procedure, in the purported exercise of an inherent power.[72]

Any restraint on publication would violate the First Amendment, Freedom of Expression. The court, in the exercise of its judicial power, issue an injunction to restrain a publication but only on the Executive, satisfying the court that the disclosure of any such information "will surely result in direct, immediate, and irreparable damage to our nation or its people." The Executive cannot assume any power, which is vested in the Congress or the courts.

As to the power of Congress, in this behalf, it was observed:

> *"Undoubtedly, Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. It would, however, be utterly inconsistent with the concept of Separation of Powers for this court... To prevent behavior that Congress has specifically declined to prohibit... The Constitution... did not provide for government by injunction in which the courts and the Executive branch, "make law" without regard to the action of Congress."*[73]

7. LIMITATION ON LEGISLATURE

Like the application of the doctrine of Separation of Powers in the U.S.A. in relation to the Executive organ. It is similarly applicable to other organs. Since it is not possible to exhaust all its ramifications within this short compass, we can refer only to its broad principles in relation to the Legislature:

I. The Legislature cannot make any law interfering with the exercise of the President those executive powers which are vested by the Constitution in the President, example-
   (a) Conduct of military operations or of foreign affairs.[74]
   (b) The power to appoint "all officers of the United States" whose appointment is not otherwise provided for in the Constitution (Art. II s.2 (2).[75]

[72] Youngstown v. Sawyer 1952, 343 UDS 579.
[73] N.Y. Times v. U.S. (1971) 403 US 713.
[74] Cf. Luther v. Borden (1849) 7 How 1.
[75] Buckley v. Valeo, (1976) 424 US 1.

(c) It follows that unless a power of appointment has been granted to Congress by the Constitution, Congress cannot engraft executive duties or powers upon officers of the Legislature, as distinguished from appointees of the Executive.

II. *In the recent case of Chadha*[76], a majority of the American Supreme Court (7:2) has held that by Art. I, s.1, the legislative power has been vested in Congress, composed of two Houses, and that this power was to be exercised in the manner laid down in the other provisions of the Constitution. Thus, under S.7 of Art. I, the legislative power was to be exercised by means of a Bill, passed by both Houses, and assented to by the President. The President had a power of Veto, which again, could be overcome by Congress in the specified manner. Any attempt to short circuit this procedure by Congress, would be to override the principle of separation of powers. Hence an executive decision, even though it had been made in exercise of power delegated by Congress itself, could be altered only by making a law passed by both Houses and assented to by the President and not by resolutions by either of both Houses, otherwise than what is required by Art .I s.7(2-3). Consequently, where this result was provided for by a provision in a Statute made by Congress, such provision itself would be unconstitutional as offending the principle of separation of powers, by which a balance was sought to be achieved by the framers of the Constitution between the executive and legislative powers.

III. The function of the Legislature is to make laws or general rules applicable to public in general and not to decide particular cases, by making ad hoc legislation or a bill of attainder. The Indian Parliament, to illustrate, cannot direct that an accused in a pending case, be acquitted or that a suit shall stand decreed.[77]

IV. It follows that the Legislature cannot pass judgments and, consequently, cannot directly override a judicial decision.

In short, while exercising its legislative power, the Legislature cannot violate either the Constitutional powers of the Executive or of the courts, to decide a cause in a particular way.

[76] Statesman Calcutta dated 28-7-1983.
[77] Loan Assocn v. Topeka 1875.

India

The Indian Constitution differs from the American and Australian Constitutions, in so far as there is no attempt at any express introduction of the doctrine of Separation of Powers by vesting the executive, legislative and judicial powers in different organs. Of course, our Constitution vests the executive powers in the President (Art. 53(1)) but there is no corresponding "vesting" provision as regards the legislative and judicial powers. From this, it is evident that the framers didn't intend to introduce any rigid application of the doctrine of Separation of Powers into our Constitution as would tend to divide them into watertight compartments. As we shall see just now, at least as between the Legislature and the Judiciary, there is no such rigid Separation of Powers under our Constitution as debars the American Legislature to "set aside judgments of courts", compel them to grant new trials, order the discharge of offenders or direct what steps shall be taken in the progress of a judicial inquiry; or as between the judiciary and the Executive, in the matter of appointment, transfer and the like.[78]

Nevertheless, whatever doubt might have existed at the time of early case of the Delhi Laws Act References, the essence of the doctrine of Separation of Powers between the Legislature, Executive and the Judiciary, has been placed on the highest pedestal in the Full Bench decision in the Keshavananda Case, by some of the Judges ascertain that it is one of the basic or essential features of the Constitution which cannot be taken away even by exercising the power of Constitutional Amendment vested by Art. 368 of the Constitution.

Of course, the doctrine has been imported into India, not in the original American sense of preventing the Union of different kinds of powers in the same hands. The Constitution itself deviates from that sense by placing the legislative powers in the hands of the Executive, example, to make Ordinances (Art.123,213) or of the Union Executive to legislate for a State during Emergency (Art.357(a)). Hence it would not be legitimate to contend that to extent the Ordinance making power into the sphere of life and liberty under Art.21 would destroy the basic structure of the Constitution.[79]

The process by which the principle of Separation of Powers has been imported into India has been two fold:

[78] Gupta v. UOI, AIR 1982 SC 149.
[79] Kesavananda v. State of Kerala, AIR 1973 SC 1461.

Firstly, it has been held that the Constitution being written, any power claimed by any organ of the State must be found from the provision of the Constitution itself.

Secondly, once it is ascertained that the Constitution intends that a particular function shall be discharged by a specific organ, it would be a violation of the Constitution if another organ attempts to assume that function or power.

Of course, a distinction has been made between the essential and non-essential or ancillary powers of each organ and it is only when the essential functions of one organ are usurped by another that there shall be a breach of Constitution. This distinction has been made even in the U.S.A., which strictly adheres to the doctrine of Separation of Powers. It is founded on the obvious reason, that under modern conditions of government dealing with complicated problems, it is not possible to separate the three departments of administration into watertight compartments. While exercising its proper function, one organ may necessarily have to incidentally assume or encroach upon the functions belonging to another organ, without a breach of the principle if Separation of Powers. For instance, though investigation partakes of a judicial nature, this power may be exercised by the Legislature when necessary for effectively exercising its legislative function or by administrative or executive bodies, while exercising their power to execute a statute. On the same principle, it is constitutionally permissible for the courts to make rules regulating procedure, which are legislative in nature.

In the Delhi Laws Act case, it was pointed out that though the functions (other than the executive) were not vested in particular bodies, the Constitution, being a written one, the power and the functions of each must be found in the Constitution itself. Thus, subject to exceptional provisions like Arts. 123, 213, 239B (power to make ordinances during the recess of Legislature) and Art. 357 (exercise of legislative powers by president in case of breakdown of constitutional machinery in the States), it is evident that the constitution intends that powers legislation shall be exercised exclusively by Legislature created by the constitutions, i.e., by the parliament in the case of Union.

As expressed by Mahajan, J., as regards the judicial power thus:

> *"The Constitution trusts to the judgment of the body constituted in the manner indicated in the Constitution and to exercise of its discretion by the following procedure prescribed therein. On the same principle the judges are not allow to*

> *surrender their judgment to others. It is they alone who are trusted with decision of a case. They can, however, delegate ancillary powers to others, for instance, in a suit for accounts and in a dissolution of partnership, commissioners can be entrusted with powers authorizing them to give decision on points of difference between parties as to items of account."*

The majority of Supreme Court proceeded to this conclusion upon the ordinary rule of statutory construction:

> *"If a statute directs certain acts to be done in a specified manner by certain persons, their performance in any other manner than that specified or by any other person than is there named is impliedly prohibited."*[80]

Thus, notwithstanding the refusal of the framers of our Constitution to introduce a rigid separation of powers in the Constitution, there is a differentiation of functions between Executive, Legislature and Judiciary and that no organ can constitutionally assume the powers that essentially belong to another organ, has come to be confirmed by the observations of the Supreme Court in the Delhi Laws Act case, and thereafter.[81] But, since the doctrine of Separation of Powers has not been imported into India to the same extent as in the U.S.A., in view of special features of the Indian Constitution, it would be necessary to point out broad differences in approach, under various issues:

Pre-Constitution India

Since the constitutional set up in India under the Government of India Act, 1935 was similar to that in Canada or Australia, it was natural for judges of our Federal Court to look at vires alone and hold that if a matter was within the legislative competence of a Legislature, it could enact a law, validating an illegal administrative act or subordinate legislation, with retrospective effect.

Post-Constitution India

The foregoing principle has been applied by the Supreme Court in a number of decisions, but it seems that the court is still wavering between the two propositions—

[80] Crawford, Statutory Construction, p. 334.
[81] Ram Jawaya v. State of Punjab, (1995) 2 SCR 225 (236).

(a) The Legislature cannot directly nullify a decision; but

(b) It can amend the law retrospectively so as to declare what the law shall be deemed to have been, so as to render ineffective the decision which would otherwise have been binding as the final pronouncement of the court.

The niceties of the interplay between the two propositions may be illustrated with reference to the Chhindwara case:

In 1963an increase in the rate of local cess was struck down by the Supreme Court on the ground that it contravened Art. 277 of the Constitution. In 1964, the state Legislature made an act to validate such increase, by providing as follows:

> *"Notwithstanding anything contained in any judgment, cesses imposed, assessed on collected by the board of pursuance of the notifications specified in the schedule shall, for all purposes, be deemed to be, and to have always been, validly imposed."*

The court struck down this provision on the ground that it was a direct attempt to overrule or set aside the judgment of the court, which was beyond the competence of any legislature in India:

> *"It is not open to the Legislature to say that a judgment of a Court properly constitute and rendered in exercise of its power in a matter brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the court."*

The court also observed:

"It is open to Legislature within certain limits to amend the provision of an Act retrospectively and to declare what the law shall be deemed to have been ..." Though this latter proposition has been established by a plethora of age-old decisions, the Author is constrained to enter his caveat against its importation into constitutional sphere, since all these decision rest on the assumption that a 'sovereign Legislature ' is competent to enact retrospective legislation to the same extent as prospective legislation.

CONCLUSION

The blunder is that in post-Constitution India, the legislature is not, in fact, sovereign, but is limited by the fundamental rights and other mandatory limitations imposed by the Constitution. The question is, if a law which prospectively overrides these limitations would be void [Art. 13(2)], can the Legislature retrospectively enact that, even where the court has invalidated a law on the ground that it has violated a Fundamental Right, that statute or anything done there under shall be valid, notwithstanding anything held by the highest tribunal of the land?

It cannot be overlooked that by and by the Supreme Court has been obliged to acknowledge that the Legislature cannot make a law retrospective where such retroactivity would take away vested rights guaranteed by fundamental rights, e.g., Art. 14, 19 or 31(2).

The query is-why should not the court strike down a validating Act as unreasonable within the purview of Cls. (2)-(6) of Art. 19 where it seeks to revive a law which has been struck down by the court as violate of a constitutional limitation?

If the American precedents be instructive in India on this point, as it should, the answer is clear enough, because if a judgment of court be revised, overturned or modified by another organ of the State, there would not only be a violation of the doctrine of Separation of Powers, but also violation of the guarantee of Due Process in as much, as it would take away vested private rights which had been created by the judgment, unless the Constitution itself authorizes the subsequent legislation.

In my view, when a validating Act seeks to validate an Act which had been held void by a competent court on the ground of contravention of a fundamental rights the validating Act directly offends Art. 13(2). Secondly, now that the spirit of 'due process 'has been instilled into the 'reasonableness' concept in Cls. (2)-(6) of Art. 19 it should be held that a validating Act of the aforesaid description category would constitute an unreasonable restriction upon the affected individuals' fundamental rights.

RELIGIOUS CONVERSIONS VERSUS RIGHT TO FREEDOM OF RELIGION

KUSH KALRA*

Religious change has turned into the subject of energetic open deliberation in contemporary India. From the early twentieth century onwards, it has surfaced over and over in the political domain, in the media and in the courts. Amid the last few decades the question has accomplished another peak in the plenty of daily papers, diaries, and books whose pages have been committed to the inquiry of conversions in India. There is no all around satisfactory definition in respect to what precisely "religion" is. There has all the earmarks of being close unanimity that religion, for the most part, is a conviction or confidence in the presence of a Supernatural Being and the statutes which individuals take after for accomplishing salvation.

1. MEANING OF RELIGION

Religion may be viewed as conviction and examples of practices by which human attempt to manage what they see as essential issues that can not be illuminated through the application of known innovations and strategies of association. To defeat these impediments individuals turn to the control of powerful creatures and forces.

Each individual has a regular qualification of religious confidence and opportunity of still, small voice, a privilege to receive or relinquished any confidence he could call his own decision. In this sense flexibility of religion and opportunity of inner voice is basic right both intrinsically and traditionally. The flexibility of religion and opportunity of soul has been perceived under the global law. The General Assembly of united countries received without disagreeing vote on tenth December,1948 the Universal Declaration on Human Rights perceiving truth that the whole mankind appreciates certain alienable rights which constitute the establishment of flexibility, equity and piece on the planet.

With a specific end goal to offer impact to the Universal Declaration of human rights the parts of the united countries of likewise received the two traditions in 1966 in this worry:-

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1. Universal Covenant on Economic, Social and Cultural Rights.
2. Universal contract on Civil and Political rights.

The Government of India by its presentation dated 10.4.1979 had acknowledged Universal Declaration of Human Rights and the two worldwide agreements with specific reservations which don't cover the privilege to flexibility of religion. It has likewise been expressed in the Constitution of India that one of the essential privileges of the populace of India is the flexibility of religion. In 1947 India got freedom and the Constitution in 1950 pronounced India as a mainstream State. As per secularism, each resident of the nation has a central right to practice his or her religion gently.

Then again, we have been listening to various occurrences of religious narrow mindedness that have prompted mobs and roughness in our nation from quite a while. The late news of Muslims being changed over to Hindus in Agra has truly loaded a lot of contention. Everybody has a privilege to take after his religion according to his introduction to the world or according to his wish. It's the established right to pick his or her own particular religion, however rolling out individuals persuasively improvement their religion or attracting individuals to change their religion ought to be considered as wrongdoing.

2. INDIA HAS FIVE NOTEWORTHY RELIGIONS

India has five noteworthy religions – Hinduism, Islam, Jainism, Buddhism and Sikhism, where Hindus structure 80% of the populace and others are the minorities. There are likewise States in India with greater part populaces of different religions like in J&k, where we have Muslim lion's share, Punjab with Sikh greater part, and Mizoram, Nagaland and Meghalaya with Christian dominant part et cetera.

3. FREEDOM TO PROFESS AND PRACTISE RELIGION OF ONE'S CHOICE

The freedom of conscience and the right to profess, practice and propagate religion is enshrined in Art.25 of the Constitution. The equality of all religions is expressly recognized by Art.25 thereby emphasizing the cherished ideal of secularism. The expression 'practice' is concerned primarily with religious worship, ritual and observations. Propagating the religion connotes the right to communicate the religious beliefs to others by expounding the tenets of that religion. Of course, in the name of propagation, no one has a right to convert a person to another

religion under pressure or inducement (vide Rev. Stainislaus v. State of Madhya Pradesh, AIR 1977 SC 908). Religious practices are as much a part of religion as religious faith or doctrines (vide The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thiratha Swamiar of Shirur Mutt, AIR 1954 SC 282). The fundamental right to freedom of conscience and the right to profess, practise and propagate a religion is subject to the considerations of public order, morality and health. Clause (2) of Art.25 preserves the power of the State to make a law regulating any economic, financial, political or other secular activity which may be associated with religious practice. Art.26 gives effect to the concomitant right of the freedom to manage religious affairs and this right is again subject to public order, morality and health. Articles 25 and 26 undoubtedly extend to rituals also and not confined to doctrine. It is well-settled that the freedom of conscience and the right to profess a religion implies freedom to change the religion as well. It is pertinent to mention that Art. 18 of the Universal Declaration of Human Rights specifically lays down that the freedom of conscience and religion includes freedom to change the religion or belief. The right to freedom of conscience thus implies the individual right of a person to renounce one's religion and embrace another voluntarily.

The change from one religion to another is primarily the consequence of one's conviction that the religion in which he was born into has not measured up to his expectations – spiritual or rational. The conversion may also be the consequence of the belief that another religion to which he would like to embrace would better take care of his spiritual well-being or otherwise accomplish his legitimate aspirations. At times it may be hard to find any rational reason for conversion into another religion. The reason for or propriety of conversion cannot be judged from the standards of rationality or reasonableness.

Any discussion on conversion generates thoughts on religion and religious faith. There is no precise definition of religion. 'Religion', it is said, is a matter of faith and belief in God is not essential to constitute religion. In Shirur Mutt case (AIR 1954 SC 282), Mukherjee, J made the following pertinent observations on religion and Hindu religion in particular:

> *"Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are*

regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances might extend even to matters of food and dress."

The saint and great philosopher Swami Vivekananda said:

"Religion as it is generally taught all over the world is said to be based upon faith and belief and in most cases consists only of different sets of theories and that is the reason why we find all religions quarrelling with one another. These theories are again based upon faith and belief."

Sri M.N. Rao, former Chief Justice of H.P. High Court, after referring to the above thoughts in his article on 'Freedom of Religion and Right to Conversion' (2003) made the following pertinent observations:"Right to conversion connotes individual right of a person to quit one religion and embrace another voluntarily. This kind of change from one religion to another religion must necessarily be in consequence of one's conviction that the religion in which he was born into has not measured up to his expectations, spiritual or rational. Sometimes it may also be the result of losing faith in one's own religion because of the rigidity of its tenets and practices. Sometimes one may even lose total faith in the very concept of the existence of God and turn to Atheism. A change of religion, a consequence of any of the above reasons, falls within the ambit of the "Right to Conversion".

4. RELIGIOUS TRANSFORMATION/CONVERSION

Religious transformation means embracing another religion, a religion that is unique in relation to his past religion or religion by his introduction to the world. There are different purposes behind which individuals proselyte to distinctive religion:

• conversion by unrestrained choice or free decision

• conversion because of progress of convictions

• conversion for accommodation

• conversion because of marriage

• conversion by energy

Religious Conversion is multifaceted and multi dimensional wonder. Indian culture is a pluralist and heterogeneous society with multitude of races, religious social, ranks and dialects and so forth.

On account of Sarla Mudgal versus Union of India, AIR 1995 SC 1531 a married Hindu male converted in to Islam for the sake of solemninising another marriage as polygamy is permitted in Islam. The Hon'ble SC held that conversion in to another faith Ipso-facto does not dissolve the first marriage because no one is allowed to take the benefit of his own wrong. Moreover the court held that the married person converting into Islam is not entitle to marry another woman after conversion. It was held to be an act of bigamy prohibited U/S 17 of Hindu Marriage Act, 1955 and punishable U/S 494 of IPC and it was further observed that the second marriage is void.

In Vilayat Raj versus Smt. Sunita, AIR 1983 Delhi 351 it was observed by the court that if both the parties to the marriage were Hindu at the time of marriage , pre-nupital law i.e. Hindu Marriage Act applied even after conversion in Islam.

In *Lilly Thomas versus Union of India,* (2013) 7 SCC 653 it was watched that a defector spouse is liable of plural marriage U/S 494 of IPC in the event that he marriage an alternate lady in the wake of changing over into Islam. It was watched that holding such individual blameworthy of polygamy is not infringement of flexibility of religion under Article 25 of the Constitution, henceforth, Section 17 of Hindu Marriage Act, 1955 is appropriate.

From the above it is clear that after the profession of the previously stated legal verdicts, polygamy is no more an esteemed individual for religious transformation into Islam.

A person does not ceases to be Hindu nearly because he declares that he has no faith in his religion. A person will not cease to be Hindu even if he does not practice his religion till he does not renounces his religion or starts living and behaving like an atheist or agnostic or starts eating beef or insulting God or Goddesses. He does not ceases to be member of the religion even if he starts expressing his faith in any other religion , he continuous to be a Hindu was held in Chandra Shekharan v. Kulundurivalu, 1963 AIR 185.

On the off chance that an individual believers from Hindu religion to Sikh ,Budhism or Jainism he doesn't stop to be Hindu since all these religions don't fall past the meaning of "Hindu" in the significant area of Hindu Marriage Act . He stops to be Hindu in the event that he changes over into Islam Christianity or Jews or Zoroastrain, change into these religion is a ground for devastation of marriage for the other life partner and not for the mate who changes over into any such religion (under section 13 Hindu Marriage Act).

Under Section 80 of the Hindu Adoption and Maintenance Act, 1956 if the spouse gets changed over into Non-Hindu confidence wife is qualified for live Separately without relinquishing her privilege of support yet in the event that she herself additionally stops to be Hindu, she looses her claim of upkeep under the area, But she is entitled under segment 24 of Hindu Marriage Act in 1955 for pedente-lite and perpetual divorce settlement.

Extraordinary Marriage Act 1954 reflects the genuine sprit of Indian Secularism as it is in consonance with India 's heterogeneity and multitude of religious confidence. Change does not make any impact on marital ties as the Act is the mainstream enactments and itself think about entomb station and bury religious relational unions.

The Indian Divorce Act, 1869- If the spouse gets changed over into non Christian confidence, wife is entitled for separation however the other way around is impractical. In the event that wife gets changed over into non Christian confidence spouse can not seek separation.

Under Dissolution of Muslim Marriage Act, 1939 Section 4 says if a wife disavows Islam, the marriage does not Ipso-facto disintegrate unless the circumstances warrant generally.

Conversion –Nature Of And Essentials To Be Proved

Conversion like a marriage is a solemn act. Conversion from one religion to another has far reaching consequences –social and legal. It affects succession, marital status and also the right to seek elective office. Divorce can be granted on the ground that the spouse has changed the religion (vide Section 13(1)(ii) of the Hindu Marriage Act). `Upon conversion a person may be governed by a different personal law. The right to contest in elections from a constituency reserved from SCs / STs might be lost if the person who has changed the religion happened to be a member of Scheduled Caste or Tribe. Thus, the event of conversion is of critical importance from the point of view of rights and disabilities of a convert. Conversion cannot be treated as an

event which can be achieved through a mere declaration – oral or writing. At the same time, no particular formalities or ceremonies are required according to the law declared by Supreme Court. In fact, no such ceremonies are specifically prescribed in any religious texts or precepts, though certain ceremonies like 'Suddhi' (in the case of Arya Samajists) and baptism (in the case of Christians) are gone through in practice in some cases. Credible evidence of the intention to convert followed by definite overt acts to give effect to that intention is necessary. The subsequent conduct of the convertee is also important in reaching the conclusion that a conversion in its true sense had taken place and there was genuine conversion. The evidentiary facts which establish conversion have been time and again stated by the Supreme Court, while observing that no specific ritual or ceremony is required. Satisfactory evidence of conversion which has always been insisted upon by the Courts is necessary especially when we hear plethora of complaints of manipulated conversions for extraneous reasons or as a result of undue pressures.

5. MAJOR EVENTS OF CONVERSION

Major events of conversion are not reported unless they are highlighted by media or a hue and cry is made by Hindu Organization. Following are the major incidents of religious:

The Constitution of India aims at securing freedom of religion and freedom of conscience under Article 25 ,26,27,28,30 and at the same time it seeks to create a harmony among all religions. Being suitable to the pluralistic society and historical lineage. Such freedom needs to continued. Any other policy will not be unconstitutional but also extremely harmful and suffocative for the public. It. However, need to be realized that an incessant process of transformation and change is also going on as change is the rule of nature. The ideas , faith, psyche, behavior and attitude of people have always been subject to change, though, the factors of change are spatial and temporal. An important aspect with respect to change of faith is the state of One's awareness and ignorance. More awareness and enlightenment does definitely have an impact on the thought, belief and action of a person, faith and elements of conscience. Thus as regards conscience , state of knowledge is itself under a constant process of change and every human being is undergoing a metamorphosis of understanding with continuing with continuing

process of experience of life and learning . Therefore, it is advisable to tie up someone to a particular faith for all the times.

But in Indian perspective, an aspect of freedom of conscience which has attained a problematic dimension, is the right to propagate faith. The meaning of propagation is to promote , spread and publicize one's relating to his own faith for the edification of others. The term propagation implies persuasion and exposition without any element of fraud, coercion and allurement. The right to propagate one's religion does not give a right to convert any other person to one's own religious faith. It may be pointed out that the right to convert other person to one's own religion is distinct from and individual right to get convert to any other religion on his own choice. The later is undisputedly is in conformity with the freedom of religion and freedom of conscience under Article 25 of the constitution while the former is the subject of long prevailing controversy with reference to propagation of faith.

Religious conversion has always been a very sensitive social issue not only because of the reasons that it has psychological concerns of religious faith but also because it has wider socio-legal and socio-political implications. It has also been revealed by the recent incident of conversion in Haryana, Madhya Pardesh , Tamil Nadu, Gujarat , Orissa and in Delhi (in Delhi according to official sources around 20,000 dalits got converted in to Buddhism in the year 2002 under the nation a wide call for conversion by Udit Raj , the leader of Justice party). On the one hand due to these recent incidents of conversion the Hindu Safforn Organizations like R.S.S., V.H.P., Shiv Sena ,Bajrang Dal. etc. have made a lot of hub-bub and not only this Mr. AtalBihari Vajpayee, the former prime minister call for a nationwide debate on conversion.

The legislative history relating to the issue of conversion in India underscores the point that the authorities concerned were never favorably disposed towards conversion. While British India had no anti-conversion laws, many Princely States enacted anti-conversion legislation: the Raigarh State Conversion Act 1936, the Patna Freedom of Religion Act of 1942, the Sarguja State Apostasy Act 1945 and the Udaipur State Anti-Conversion Act 1946. Similar laws were enacted in Bikaner, Jodhpur, Kalahandi and Kota and many more were specifically against conversion to Christianity. In the post-independence era, Parliament took up for consideration in 1954 the Indian Conversion (Regulation and Registration) Bill and later in 1960 the Backward Communities (Religious Protection) Bill, both of which had to be dropped for lack of support.

The proposed Freedom of Religion Bill of 1979 was opposed by the Minorities Commission due to the Bill's evident bias.

However, in 1967-68, Orissa and Madhya Pradesh enacted local laws called the Orissa Freedom of Religion Act 1967 and the Madhya Pradesh Dharma Swatantraya Adhiniyam 1968. Along similar lines, the Arunachal Pradesh Freedom of Religion Act, 1978 was enacted to provide for prohibition of conversion from one religious faith to any other by use of force or inducement or by fraudulent means and for matters connected therewith. The latest addition to this was the Tamil Nadu Prohibition of Forcible Conversion of Religion Ordinance promulgated by the Governor on October 5, 2002 and subsequently adopted by the State Assembly. Each of these Acts provides definitions of `Government', `conversion', `indigenous faith', `force', `fraud', `inducement' (and in the case of Arunachal, that of `prescribed and religious faith'). These laws made forced conversion a cognizable offence under sections 295 A and 298 of the Indian Penal Code that stipulate that malice and deliberate intention to hurt the sentiments of others is a penal offence punishable by varying durations of imprisonment and fines.

As early as 1967, it became evident that the concern was not just with forced conversion, but with conversion to any religion other than Hinduism and especially Christianity and Islam. In the Orissa and Madhya Pradesh Acts, the punishment was to be doubled if the offence had been committed in respect of a minor, a woman or a person belonging to the Scheduled Caste or Scheduled Tribe community.

Moreover, Jayalalitha government in Tamil Nadu has gone to the extent of enacting ant-conversion legislation (Tamil Nadu prohibition of forcible conversion ordinance 2003) to put a check on the incidence of religious conversion. In April 2006 The Rajasthan Dharma Swatantrata (religious freedom) Bill, introduced by the BJP government, was passed by a voice vote. The Chattisgarh Government passed an anti-conversion bill in form of Chattisgarh Religion Freedom (Amendment) Act, 2006 providing for a three-year jail term and a fine of Rs.20,000 for those indulging in religious conversion by force or allurement. The Madhya Pradesh Government also passed a controversial bill to amend the state's Freedom of Religion Act of 1968 to prevent religious conversion by force or allurement.

The contention of the Hindu organization is that most of the minority religious organization, especially, Christian Missionaries are actively involved in the activities of mass

religious conversion in the name of social service. According to them the target groups of these Christian missionaries are generally illiterate and poor Dalits and Poor tribes.

On the other hand many dalit organizations and Dalit thinkers have perceived these recurrent incidents of religious conversions as great events of Dalit emancipation from the clutches of the vicious Hindu Caste System which is and has been a constant stigma on the face of Indian society. According to them, Hindu Caste System is founded on rigid and the stringent Caste hierarchy . Due to this inhuman and hate worthy Caste system Dalits and Shudras (Untouchables) have always been treated inhumanly, they have been subjugated, oppressed and persecuted by the so called upper caste Hindus or Manu vadis in the name of caste. Dalit thinkers also allege that Hindu Soceity could not make a adequate reforms in Hindu religion during last more than 3000 years , so that a lower caste Hindu could not live with human dignity in Hindu religion. According to them majority of Dalits and shudras (untouchable) are illiterate deplorably poverty stricken and living in sub- human conditions. They have been denied basic human rights even after 59 years of independence, Moreover, in day today life they often to face atrocities and exploitation at the hands of upper caste Hindus in the name of caste. Hindu religion does not treat its all follower alike, Hinduism discriminates against one segment of its followers vis-à-vis the other and does not treat all of them equally. It has failed to provide social dignity to dalit and shudras. Therefore, they think that it is better to kick our such an obnoxious and suffocating religion from one's life and to convert in a religious which does not discriminate against them in the name of caste and which given them equal treatment and dignified human life. That is why Dalits and other progressive minds have supported the incidence of mass religious conversion and consideration them to great events.

CONCLUSION

We can conclude from the above discussion that any protest against religious conversion is always branded as persecution, because it is maintained that people are not allowed to practice their religion, that their religious freedom is curbed. The truth is entirely different. The other person also has the freedom to practice his or her religion without interference. That is his/her birthright. Religious freedom does not extent (sic) to having a planned programme of conversion. Such a programme is to be construed as aggression against the religious freedom of others.

Finally, as far as Hinduism is concerned, besides it being vindicated as a way of life, efforts must be made to augment its role as a form of religion, that is, Hinduism must be practiced as a religion that upholds the principles of personal freedom, self-dignity, social equality and economic security. This will reduce the chances of transgression by way of conversion in any manner. Scriptures like the Vedas, Upanishads and the Gita should gather larger weight age and reach the necessary quarters for sufficient lobbying to match the access and emotional respect gained by the Bible and the Koran. The image of a Hindu will go up not by blaming others for conversion but by creating conditions that will make conversion by and large unnecessary for the fellow members of his religion.

AFFIRMATIVE ACTION ACROSS COMMON LAW COUNTRIES: A COMPARATIVE APPROACH

PITAMBER YADAV*

One of the most difficult public policy issues facing any society is how to deal with a historical legacy of discrimination and exclusion based on racial, ethnic, or hereditary categories. One natural response to entrenched inequality is to implement affirmative action policies which explicitly favour historically disadvantaged groups. The trust is to level the playing field in the transient and to influence a more extended term conversion whereby social order inevitably no more needs governmental policy regarding minorities in society.

Affirmative action refers to "the set of public policies and initiatives" intended to help get rid of past and present discrimination based on race, colour, religion, sex or national origin, or it means "ethno racial preferences in the allocation of socially valuable resources".[82]

The four jurisdictions that will be examined share English as a common language as well as, in varying degrees, a common law legacy. In the United States the clause regarding equality has been fundamentally influenced due to its history of slavery. Whereas India one of the primary reasons has been a history of caste system. South Africa has it in order to resolve the wounds of apartheid. And Canada has it due it's linguistic and First Nation minorities.

It is important to note that each of these jurisdictions has statutory protection against discrimination. On analyzing these jurisdictions, we note that common law courts have authority to make law where no legislative statute exists, and to interpret the particular legislations. Judges base their decisions on prior judicial verdicts or precedents and the court's decision would be a binding authority. The freedom to interpret and insight of judges is compared in order to dig deep in affirmative action.

1. CANADA

All throughout Canada's history, numerous groups have been the subject of racial segregation, either through official, government-underpinned methods, or in a more casual way

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[82] Marquita Sykes, "The Origins of Affirmative Action", in Notional Organization for Women (1995).

through social conditions and customs. Section 15 of the Canadian Charter, Canada's primary constitutional document dealing with individual rights and freedoms, addresses gender equality and affirmative action. It states, "Every individual is equal before the law and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".[83]

In *Eaton* v. *Brant County Board of Education*, the Supreme Court of Canada found that a decision by an authoritative board and Tribunal to place a child in a special instruction classroom did not intrude upon Section 15.[84]According to the Court, Section 15 has two main purposes, to prevent discrimination by "the acknowledgment of stereotypical characteristics to individuals," and to enhance the positions of different groups in the Canadian society.

Section 15(2) states, "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".[85] This section permits affirmative action.

In *Lovelace* v. *Ontario*, the Supreme Court of Canada established the precise legal effects of Section 15(1) and 15(2) upon race-based affirmative action programs.[86] It is one of the landmark cases where the Supreme Court clarified the relationship between Section 15(1) and Section 15(2). Justice Iacobucci in the present case categorized race-based government affirmative action programs as being, first and foremost, about "an expression of equality, rather than an exception".[87] Justice Iacobucci further said that it is important to analyse and focus upon what the program is achieving. The court held that one of the main aims of Section 15(1) is to protect individuals from violation of essential human dignity.[88]

On deciding on the relationship between Section 15(1) and 15(2), section 15(2) was read as clarification to Section 15(1) rather than being an exception.[89] In *R* v. *Kapp*the Court held that

[83]CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1).
[84] Eaton v. Brant County Bd. of Educ., [1997] S.C.R. 241.
[85] CAN. CONST. (Constitution Act, 1982) pt.I (Canadian Charter of Rights and Freedoms), § 15(2).
[86]Lovelace v. Ontario, [2000] 1 S.C.R. 950, 987.
[87]*Id.* at 1008.
[88]*Id.* at 985.
[89]*Id.* at 1010.

'Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies'.[90]

In Canada, affirmative action is also at times known as 'employment equity', where the first affirmative action was relating to keeping certain positions for minorities. Provisions in the Charter protect the minority communities from discrimination. The Court has clarified that Section 15(2) acts as a clarification to Section 15(1) and thereby permits affirmative action.

2. UNITED STATES OF AMERICA

In both the United States of America and South Africa, issues of isolation also segregation is not new. In these matters, both nations have a relative history as both accomplished government-authorized racial discrimination and isolation. Both the United States of America, throughout the slavery period to 1865 also that of Reconstruction after 1876 matching the Civil War, and South Africa, throughout the politically-sanctioned racial segregation time, passed laws obliging or allowing the isolation of races in everyday life.

In March 1961, President John F. Kennedy issued Executive Order 10925, calling for affirmative action to displace the then widespread practices of discrimination. The Order required federally funded employers to "take affirmative action to ensure that applicants are employed . . . without regard to their race, creed, colour, or national origin".[91] This was the first time that the word affirmative action was used. Jim Crow was the name of a racial caste system which was used to describe the segregation laws, rules and customs. The Jim Crow laws existed from 1880's to 1960's.

In 1856 the first Supreme Court case on the issue of slavery was decided. In *Dred Scott* v.*Sandford*, Scott, a black slave in Missouri, asserted that as a native of the USA, he was qualified for his freedom when his master took him on a journey to non-slave regions and to the free state of Illinois. The Supreme Court chose that Scott was a negligible property who was being taken by his master to a spot where subjugation was prohibited and that provided for him no only claim to manumission.[92]The Court held that African Americans whether slave or free,

[90] 2008 S.C.C. 41.
[91] John F. Kennedy, "Statement by the President Upon Signing Order Establishing the President's Committee on Equal Opportunity Employment," March 7, 1961.
[92] Dred Scott v. John F. A. Sandford, 60 U.S. 393.

could not be American citizens. This is one of the landmark judgments. The Judicial Clerk didn't know that such will be the reception that the actual name of the respondent was Sanford and not Sandford, which was the mistake made by the clerk. Approved by Title VII of the Civil Rights Act of 1964, the Courts began to order affirmative action as a remedy in cases of past discrimination that were proved.

In *Brown* v. *Board of Education*[93]the Court declared state laws establishing separate public schools for black and white students unconstitutional. The decision overturned the *Plessy* v. *Ferguson*[94] decision of 1896, which allowed segregation that was sponsored by the state.

Affirmative action programs made their successful entry into many walks of life in the United States during 1970's. In 1978, the first affirmative action case that came up before the U.S. Supreme Court was the *Bakke case*[95], which led to the landmark decision of the Court that prohibits fixed quota in college admissions.But what the court did was that it allowed the institutions to have 'race' as one of the factors to make admission in the institution. Justice Powell's "tie-breaking opinion" centredupon the constitutionality of "diversity" in the student body and the benefit that it will bring to the nation. It was due to this argument that was made by Judge Powell relating to diversity that allowed race as a ground for admission. According to Justice Powell, the diversity would further "academic freedom," which was a "special concern of the First Amendment".[96] In *Fullilove*v.*Klutznick*[97], Chief Justice Burger joined by Justice Powell stated specifically that practical reverse discrimination is necessary in order to achieve equal economic opportunities. In another case of*Adarand* v.*Pena*[98], the Court decided by a majority of 5:4 that even in cases of racial classification, the standard of strict scrutiny should be applied.

In 2003 the cases *Gratz* v. *Bollinger*[99] and *Grutter* v. *Bollinger*[100] brought clarity that would further the *Bakke* decision in the 21st century. In *Gratz* v. *Bollinger*, the undergraduate affirmative action policy of Michigan University was challenged. The University of Michigan

[93] 347 U.S. 483 (1954).
[94] 163 U.S. 537.
[95] Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
[96]*Id.* at 311-313.
[97] 448 U.S. 448.
[98] 515 U.S. 200.
[99] 539 U.S. 244.
[100] 539 U.S. 306.

used a 150-point scale to rank applicants, with 100 points required to guarantee admission. The University gave some ethnic groups, including African-Americans, Hispanics, and Native Americans, an automatic 20-point bonus towards their score, while a perfect SAT score was worth 12 points.[101] The Supreme Court ruled in a 6-3 decision that the particular policy violated the Equality clause of the Fourteenth Amendment as the policy gave points increase to minorities automatically rather than making an assessment which assess candidates individually. In the other case of *Grutter* v. *Bollinger*,Justice Sandra O'Connor ruled on behalf of majority thatthe narrow use of race for admission does not violate United States constitution. According to the opinion, affirmative action should not be allowed permanent status and that eventually a "colourblind" policy should be implemented. The opinion read, "race-conscious admissions policies must be limited in time." The decision allowed admissions where race was considered but also focuses on considering other individualised factors during the admission process.

The income gap between the rich and the poor in communist China has surpassed that of the United States by a big margin, a new study said, and warning of increased social disturbance.[102] On comparing United States with China, China has one of the oldest and largest sets of state-sponsored preferential policies for ethnic minorities. Although the preferential policies program in People's Republic of China ("PRC") dates from the inception of the state in 1949. The Chinese government established "education preferential policies" for minorities (somebody who fits in with one of 55 ethnic aggregations other than the larger part Han group) to make up for the monetary and instructive separation between country areas and Chinese urban communities. At present more than 88 percent of minorities live in rural zones, where educational infrastructure is generally rare.[103]

According to a study which was consequently upheld by China's National Social Science Foundation, the number of minority students that have taken admission in higher education institutions expanded from 36,000 in 1978 to 1.367 million in 2008, (though the percent of

[101]"Gratz v. Bollinger". Regents of the University of Michigan.
Available at: http://www.vpcomm.umich.edu/admissions/legal/gratz/gratsumj.html
[102]Rich-poor divide in China surpasses US, Times Of India,
http://timesofindia.indiatimes.com/world/china/Rich-poor-divide-in-China-surpasses-US-study-finds/articleshow/34437206.cms?utm_source=facebook.com&utm_medium=referral
[103]Siyu Hu, Affirmative Action Meets Challenges in U.S. and China, Washington Monthly, http://www.washingtonmonthly.com/college_guide/blog/affirmative_action_meets_chall.php#

college students who are ethnic minorities, 6.7, is still lower than the minority percentage in the total population, 8.4).[104]

China's preferential policies apply to areas containing minorities and as well as to individuals who constitute the minorities. Lower-level minority areas receive infrastructural subsidies from higher jurisdictions.[105] Budgetary grants, disproportionate investment in public works and the provision and training of personnel are common features of preferential policies.[106]

Unlike other constitutions, the constitution of People's Republic of China has a cut out provision[107] that states that the rights of minorities will be protected by the state and the state will ensure that the minorities are economically backed. Article 4 supports the preferential policies that the States makes towards minorities and thereby approves of affirmative action.

On comparing the two countries we see how both of them are working towards the betterment of minorities in the respective countries though the minorities are not present in such a number in United States. United States are working towards reduce the disparity between the racially discriminated blacks whereas the Han group in China has been uncannily supported by keeping the minorities calm with the help of these provisions.

Supporters of affirmative action regarding minorities in society contend that the diligence of such differences reflects either racial separation or the persistence of its effects. Governmental policy regarding minorities in society is a piece of a technique to finish racial domination that might overall proceed unchallenged. Affirmative action regarding minorities in society, in this manner, speaks to a reaction to, and is not the reason for, the racial incongruities that rise up out of a standard of favored whiteness. In both the cases of United States and China we see how affirmative action policies are used and to what extent can they bring about peace in the society.

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[104] *Id.*

[105] Low Interest Loans, Tax Breaks, and Subsidies to Help Ethnic Minority Millions, S. CHINA MORNING POsT, Nov. 16, 1997, at 6.

[106] China's Policy to Boost Ethnic Minority Regions, BBC/Sunmmary of World Broadcasts, Jan. 27, 1996.

[107] Article 4 of the Chinese constitution states - All ethnic groups in the People's Republic of China are equal. The state protects the lawful rights and interests of the minority ethnic groups and upholds and develops a relationship of equality, unity and mutual assistance among all of China's ethnic groups. Discrimination against and oppression of any ethnic group are prohibited; any act that undermines the unity of the ethnic groups or instigates division is prohibited. The state assists areas inhabited by minority ethnic groups in accelerating their economic and cultural development according to the characteristics and needs of the various minority ethnic groups.

3. INDIA

The Constitution of India is a constitution to expressly include provisions for affirmative action, in the form of 'reservations'. Special provisions have been made in the Constitution for two of the very important categories of disadvantaged groups. The origins of India's caste system can be found in the Hindu tradition. All Hindus born in India enter the caste system upon birth.[108]

One of the categories of disadvantaged groups is known as 'Schedule Castes and Schedule Tribes'. These are the groups that have to be specified by the President.[109] The other categories of disadvantaged groups are 'socially and educationally backward classes of citizens'[110], or other 'backward classes'.[111] In one of the leading cases, the Supreme Court of India has held that affirmative action is a feature of the principle of non-discrimination rather than an exception, a likely means of achieving equality rather than supporting inequality.[112] In the pivotal case of *Indra Sawnhney*, where the majority made it clear that Article 14 did not necessitate the removal of classifications or formal, symmetric equality.[113]'Article 15(4) and 16(4) are not exceptions to Article 15(1) and Article 16(1) but independent enabling provision[s]'.[114]

The Constitutional Court of Slovak Republic concluded that the adoption of positive action measures is in conflict with the principles of equality and non-discrimination.[115] This ruling is considered extremely significant, as it is in conflict from the for the most part distinguished standards of International Law and European Human Rights Law.

The decision of the Slovak Constitutional Court pronouncing insurrection of the positive activity guideline held in the Anti-Separation Act with the Slovak Constitution will, in conclusion, have deterring results on the security of minorities in the Slovak Republic by and

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[108] O'Neill, Tom. "Untouchable." National Geographic Magazine. June 2003. http://magma.nationalgeographic.com/ngm/0306/feature1/

[109] IND. CONST. art. 341 & art. 342

[110] *Id.* art. 15(4).

[111] *Id.* art. 16(4).

[112] State of Kerala v. N.M. Thomas, A.I.R. 1976 S.C. 490.

[113] Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477.

[114] Ashoka Kumar Thakur v. Union of India, Writ Petition (civil) 265 of 2006

[115] Paul Belien, Slovakia Bans Positive Discrimination Legislation, http://www.brusselsjournal.com/node/381; RenataGoldirova, Slovakia bans positive discrimination, http://euobserver.com/justice/20123

large, and more specifically on the Roma minority. The provision with positive action was ruled to be violating the Slovak Constitution.[116]

The Constitutional Court has ruled against positive discrimination in order to ensure that no person is being discriminated against or advantaged. The Court has taken the particular provision in its strict sense. On comparing the social conditions, the particular decision by the Constitutional Court of Slovakia will have a negative effect on the minorities in Slovakia; whereas the decision favouring the castes aims to empower them.

4. SOUTH AFRICA

A significant authoritative advancement in South Africa occurred with the coming into existence of the Employment Equity Act, 1998 (EEA). The Act looks to execute the wide fairness targets of the Constitution of the Republic of South Africa.

One of the expressed points of governmental policy regarding minorities in society in South Africa is to kill economic dissimilarity among individuals. This is an excellent objective, as South Africa is one of the nations with the most unequal conveyance of riches on the planet. Throughout the last decade or thereabouts, this bias has just declined. The crevice between the rich and poor people is consistently extending. It is consequently basic that neediness must be reduced.

Second on the list of ANC policy objectives adopted at their National Conference in May 1992 was the question of addressing inequality: "to overcome the legacy of inequality and injustice created by colonialism and apartheid in a swift, progressive and principled way".[117]

Affirmative action in South Africa was first thought of by the ANC in the 1980s in order to be able to deal with inequality that has plagued the society since apartheid. Section 9(2) of the South African Constitution provides: 'To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'.[118]The meaning of this provision was elaborated in *Van*

[116] Article 12(2) of the Slovak Constitution states: "Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds."
[117] Available at http://www.info.gov.za/speeches/1994/230994009.htm
[118] SOUTH AFRICAN CONST., s. 9(2).

Heerden where Justice Mosenekestressed, instead of being an exception to equality, compensatory measures are an essential part of it.[119] In the same case it was held by the Court that S. 9(1) and S. 9(2) are complementary and both contribute to achieving equality and ensure full and equal enjoyment of rights.

Also, Section 6(2) of the EEA clearly states that it is not unfair discrimination to take affirmative action measures, which will be consistent with the purposes of the Act. Affirmative action in South Africa is justified by its purpose. At the end of the apartheid era in 1995 whites accounted for 13% of the population and earned 59% of personal income; whereas Africans constituted 76% of the population.[120] Section 15(1) of the Employment Equity Act (EEA) has provisions for affirmative action.[121] According to the Act, 'designated groups' meanblack people, women and people with disabilities.[122]'Black people' is a wider concept and it includes Africans, Coloureds and Indians.[123]In *Stoman* v.*Minister of Safety & Security*it was held that affirmative action benefits groups.[124]

In *President of the Republic of South Africa* v. *Hugo*[125], Justice Goldstone vouched for system of unbiased and unfair discrimination, as in order to achieve equality of freedom and opportunity cannot solely be achieved identical treatment.

It is hence of fundamental vitality that social conversion through frameworks of work value be brought inside the standardizing system of the Constitution itself. Along these lines the constitution keeps up its capacity of adjusting the need to impact key socio-political change with the needs of security, congruity and also national integrity.

[119] Minister of Justice v. Van Heerden, 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (South African Constitutional Court).
[120]Human Development Report '*Bringing Multicultural Societies Together'* 70.
[121] S. 15(1) states- Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer
[122] S. 1 of the EEA.
[123]*Id.*
[124] (2002) 23 I.L.J. 1020 (T).
[125]1997 (6) B.C.L.R. 708.

CONCLUSION

Regardless of the talk on strengthening of the SC's, the ST's, other minorities and the presence of broad laws and procurements, very little has been accomplished in real terms. What has been the effect of reservation arrangements? While a little proceed to address the requirement for reservations, it ought to be seen that the strategy has never been completely executed from the time of its origination. Another major question that has not been answered is, whether the policy concerning affirmative action is the only answer to inequality.

In all the jurisdictions that have been analyzed, we have noticed as to how in certain cases judges have interpreted different provisions that have been laid down in the constitutions. It is important to analyze affirmative action policies because of the relevance they hold in our society. Affirmative action policies are difficult to bring in any state because of its controversial character. While dealing with topics such as affirmative action, it is not only important that we look into the history of the state and also what the current situation demands. There have been strong criticism of the policy but in the end it is important to note that not only these policies are important for supporting the minorities and bring the sense of equality. The debate regarding its validity is existing since time immemorial but it depends upon the social situation and conditions present at the time.

RESEARCH ARTICLE- THEORISING SPECIAL CATEGORY STATUS: QUESTION OF ASYMMETRIC FEDERALISM

RAHUL MOHANTY*

1. INTRODUCTION: DEBATE OVER SPECIAL CATEGORY STATUS

In recent times in India, especially after the rise of regional and coalition politics since 1990s, there is growing clamour and demand for Special status with several states like Bihar, Rajasthan, and Odisha among others.[126] In the backdrop of such renewed focus on Special Category Status in India, which had its roots in Gadgil Report of 1969, look to offer a theoretical analysis of the same keeping in mind the principles of federalism. Herein I seek to examine the larger implications of such special status and politics behind the same upon the way federalism is conceived and practiced in India.

For this purpose, I have briefly discussed Federalism and Asymmetric Federalism in particular, which is later used to examine the question of special status. Then I briefly examine the practice of asymmetric federalism in India and offers a comparative perspective with such practices elsewhere in the world and tries to draw some generalised lessons. I note here that asymmetric federal arrangements can be justified by reference and analogising the same to substantive equality. Theorising Special category status in terms of Asymmetric Federalism, I conclude by stating the scenario in which it can bolster the federal principles in India and the situations in which it can undermine the same.

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[126] PTI, *Opposition demands Special Status for six states*, Available at: http://www.thehindu.com/news/national/opposition-demands-special-status-for-six-states/article5713271.ece (Last Accessed om: 04-04-2015); *NDA non-committal on Special Status for Odisha*, Available at: http://www.newindianexpress.com/states/odisha/NDA-Noncommittal-on-special-Status-for-Odisha/2015/01/09/article2610945.ece (Last Accessed om: 04-04-2015).

2. UNDERSTANDING THE CONCEPT OF FEDERALISM

An analysis of special status of some states and its effect on federalism requires firstly, a conceptual clarity as to scope and meaning of federalism. Hence it is imperative to examine some of the most popular definitions of federalism.

SP Aiyer, in one of the most critically sound definitions, defines federalism as *"a voluntary union of a number of originally independent states, formed with a view to realising certain common advantages—a union in which there is a set of parallel governments, that of the central or the national government and those of the states, each independent in its own sphere of authority".*[127]

Similar to this 'common advantages' theory is Riker's theory that to federalism essentially springs out of rational bargain (for political or economic ends) among various constituent units.[128]However during this politico-economic bargain the states also try to retain their identities—leading to formation of a federation, without absolute unity. Others have differently defined the concept. For instance Prof. KC Wheare considered that federalism can be seen as a mode of dividing powers so that each of the governments-whether central or the state, are 'coordinate and independent'.[129] Others like Vile and Birch emphasise that division of powers between authorities and subsequent coordination between them, unlike Wheare who focuses on independent status of the federal units coming together[130] (thus excluding what are commonly known as 'federation by holding out'). Some others talk about the concept of "cooperative federalism" entailing interdependence and cooperation between the federal units and the centre rather than an antagonistic competition or legal barriers between them.[131] In my opinion, talk of cooperative federalism is redundant and tautologous as any federal system, as Aiyer notes is

[127]SP AIYER, FEDERALISM AND SOCIAL CHANGE, *The Nature of Federal Government,* Asia Publishing House, 1961.
[128]WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, MAINTENANCE, Little Brown,1964; Craig Volden, *Origin, Operation, and Significance: The Federalism of William H. Riker,* Conservative Perspectives on American Federalism, Vol. 34, No. 4, (Autumn, 2004), 89-107.
[129]K C WHEARE, FEDERAL GOVERNMENT, Oxford University Press, 4th ed., 1963.
[130]MICHEAL BURGESS, COMPARATIVE FEDERALISM: THEORY AND PRACTICE, Routledge, 2006; A.H. BIRCH, FEDERALISM, FINANCE AND SOCIAL LEGISLATION IN CANADA, AUSTRALIA AND THE UNITEDSTATES, Oxford-Clarendon Press, 1955.
[131]M. GOVINDA RAO AND NIRVIKAR SINGH, THE POLITICAL ECONOMY OF FEDERALISM IN INDIA, *Chapter 1*, Oxford University Press, 1st ed., 2005; Harpreet Kaur, *Role of inter-governmental agencies in Indian federalism,* (2012), Available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/3541/7/07_chapter%201.pdf (Last Accessed on: 04-04-2015).

form for realising common advantages and therefore must necessarily entail cooperation, without which the federation will fail. So analytically, a 'cooperative federalism' is no different than federalism simpliciter.

However what is key to a federation is along with this interdependence and cooperation there must be independence as well, for there cannot be any true cooperation except equals. As many scholars like Wheare, Dicey notes and M. Venkatarangaiya agrees that each government must legally independent in its sphere of competence and must be able to exercise their competence without encroachment (or by encroaching into others' sphere) by the other party to the federal contract.[132]

Even others, refuse to recognise federalism as an analytical category having certain defined attributes, and adopting a realist tone, exhort that federalism lies in how it is practiced and not in how it is legally moulded. Reagon thus concludes that federalism lies in action than structures and hence is dynamic rather than a static constant.[133] This approach is quite useful while trying to understand constitutional practice, especially in countries like Canada where the constitutional practice over decades have led scholars to term it federal though the constitution is more unitary. William S. Livingston sees federalism as a creation of social, cultural and political factors and their interactions, rather than being a matter of legal and constitutional terminology.[134] He pointed out, rightly to an extent, that federalism does not survive on basis of structures formed by the constitution, rather than such structures will have to be themselves based upon a social, cultural and economic factors and the operative centripetal and centrifugal forces.[135]This approach helps understand the politics of federation and recognises that balance of centripetal and centrifugal forces underlying any federation may change with sometimes centripetal forces holding sway leading to unitary practices and sometimes centrifugal forces dominate leading to increasing power to federal units. However, analytically, this approach has little to offer to those (say, drafters of constitutions) trying to decide between different forms and

[132] M. Venkataragaiya, *Federalism in Government,* Waltaire, 1953, 169; *ibid.*

[133]Anirudh Prasad and Justice D.A. Desai, *Centre and State Powers under Indian Federalism,* Deep and Deep Publications, 1981, 20-24.

[134]W.S. Livingston, *A Note on the Nature of Federalism,* Political Science Quarterly, vol. 67 (1952), 81–95; W.S. LIVINGSTON, FEDERALISM AND CONSTITUTIONAL CHANGE, Oxford University Press, 1956.

[135]*Ibid.*

degree of federalism and trying to design institution to embed federalism in a polity. Livingston's insight is helpful to understand what makes a federation success—that it must be structured keeping in mind its peculiar social forces. However this does not mean that the constitution has no role to play in shaping these social forces. As SA Barber argues, Constitutional Law and politics is never a one way interaction. Constitution influences politics and society as much as it is influenced by it.[136] A poignant example of the same would be India, whose origin as a federation and evolution of regional politics shows that even the same federal structure over the years can yield different results as per politics of the age. However the structures keep these forces in a check and acts as important safeguard and as an articulation of regional autonomy in constitutional politics.

However, Livingston's contribution helps us to examine the worth of the concept of 'quasi-federalism'. Aiyer points out that concept of quasi-federalism is a matter of practice and degree of federalism and this does not however have any conceptual and analytical worth.[137] Only two conceptual categories could be unitary (in which there is no autonomy of constituent units) or a federal system (having autonomy). There could be nothing in between. Although the spectrum of federal system is wide and can encompass a wide and different degrees of division of powers and autonomy. Seeing federalism as a creature of socio-political forces of the society helps locating 'quasi-federalism' (as federal in form but unitary in practice or vice versa), not as a conceptual category, but as a matter of analytical worth. Such quasi-federalism can conceptually fall either in camp of the federal or the unitary, but analytically their existence shows the interaction of social forces and evolution of polity of a federation/nation. If not anything, quasi-federalism, thus becomes a strong indicator of a society and polity in transition, towards either of these camps and acknowledges their dynamism.

Harpreet Kaur, examining these manifold approaches to federalism concludes that in the traditional model the essence of federalism is independence of units and centre from each other and freedom to act within their own sphere of competence without interference—an articulation

[136]Sotirios A Barber, *Constitutional Failure: Ultimately Attitudinal,* in THE LIMITS OF CONSTITUTIONAL DEMOCRACY, (Jeffrey Tulis and Stephen Macedo, eds.), Princeton University Press, 2010.

[137]S P AIYER, FEDERALISM AND SOCIAL CHANGE, *The Nature of Federal Government,* Asia Publishing House, 1961.

similar to what Aiyer sees as 'autonomy' being key to the concept of federalism.[138] Others like Daniel Elagara and Ronald L Watts have defined federal system and federation (as opposed to federalism in abstract) as mechanism based on distribution of power, which have internal autonomy but constitute a political unity—thus sharing sovereignty.[139]

Dicey elaborates that a federal state can come into existence only if two conditions are fulfilled: firstly, there must be some minimum commonality between the peoples of the federal constituent units to be able to forge into a nation and secondly, such peoples of the units though "must desire union, but not desire unity", i.e. coming together for common purposes but yet retaining a distinct identity and autonomy.[140]

3. THEORISING ASYMMETRIC FEDERALISM: A TOOL TO UNDERSTAND SPECIAL TREATMENT OF CERTAIN FEDERAL UNITS

As discussed in previous section, federalism is necessarily based upon equality, independence and autonomy of federal constituent units in a federation. However despite this formal equality, there will always be a difference in real terms between the punches different states can throw. As can be seen in international relations, despite formal equality between the countries, some are more equal than others when it comes to politics. Similarly, politics and economics often determine the relative importance of a federal unit vis-à-vis others. It becomes laughable to expect perfect equality in all spheres between the states and their treatment by the centre. Herein comes the argument of special status, which seeks to nullify, or at least minimise inequality, especially in economic terms that certain states face. Govind Rao and Nirvikar Singh define asymmetric federalism as a form of federalism based upon "*unequal powers and relationships in political, administrative and fiscal arrangements spheres between the units constituting a federation."*[141]It has been also defined as *"a situation in which one region of the country enjoys a distinct form of autonomy, and often a distinct constitutional status, from other*

[138]Harpreet Kaur, *Role of inter-governmental agencies in Indian federalism,* (2012), Available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/3541/7/07_chapter%201.pdf (Last Accessed on: 04-04-2015).
[139]DIVERSITY AND UNITY IN FEDERAL COUNTRIES: A GLOBAL DIALOGUE ON FEDERALISM, (Luis Moreno *et al.* eds.) Vol.7, 2010.
[140]*Ibid.*
[141] M. Govinda Rao and Nirvikar Singh, *Asymmetric federalism in India,* UC Santa Cruz International Economics Working Paper 04-08 (2004).

parts".[142]Ronald Watts defines it as a system where there is "*differentiation in the degrees of autonomy and power among the constituent units."*[143]Asymmetrical federations have also been described variously as 'federacies', 'partial federalization', 'asymmetrical decentralisation' and 'cantonisation'. These asymmetry can be either vertical (between centre and state) or horizontal (between one state and another).In Asymmetric federation, there is usually more than one distribution system, because there are several kinds of constituent units vested with different levels of powers.[144]

However, the question arises that is whether such asymmetric federalism is a true for of federalism at all? As noted earlier autonomy within their defined spheres and equal power to states is the essence and the *grundnorm* of federalism. In that light, how can unequal treatment of different federal units be reconciled with principles of federalism? It can be easily be seen as the political stick and carrot policy in form of Union's discretionary funding to states in garb of asymmetric federalism can easily undermine states' autonomy and authority. In my opinion, asymmetric federalism can be justified as a facet of federalism only as only as it does not affect the autonomy of the States. The states' autonomy within their sphere of competence and the fiscal resources they need to carry out such functions have to be secured in a symmetrical and equal way and there can be no asymmetry as regards them. However, just as substantive equality demands special affirmative action for the disadvantaged, similarly many backward states (or states having special needs) may need additional finance and powers to match up to the level of other States—there helping them attain actual, not just, formal equality with them. Hence a substantive conception of state equality can in fact be invoked to justify asymmetric federalism as a strong measure to achieve a federal polity where the units are truly equal.

It is important to understand the purpose of federalism, in order to examine desirability of asymmetry in federal relations. Karmis and Norman rightly point out that one of the key

[142]John McGarry, *Asymmetrical Federalism and the Plurinational State,* in THIRD INTERNATIONAL CONFERENCE ON FEDERALISM: TURNING DIVERSITY INTO HARMONY – SHARING BEST PRACTICES (F. Geerkens ed., Dept. of Foreign Affairs: Brussels, 2006): 302-325.

[143]Ronald L. Watts, *A Comparative Perspective on Asymmetry in Federations,* Institute of Intergovernmental Relations, School of Policy Studies, Queen University, 2005, Available at: http://www.queensu.ca/iigr/WorkingPapers/asymmetricfederalism/Watts2005.pdf (Last Accessed at: 04-04-2015).

[144] Peter Pernthaler, *Asymmetric Federalism as a Comprehensive Framework of Regional Autonomy,* in HANDBOOK OF FEDERAL COUNTRIES, (Ann L. Griffiths ed., 2002)472.

objectives is that different communities may share states in which they have multiple identities and affiliations and conduct their affairs with each other at peace, while at the same time preserving their identities.[145] Asymmetric relations can no doubt help in his preservation of identities and conduct of affairs with each other on an equal footing. For instance, the tribal regions definitely need special institutions and greater autonomy for preservation of their cultural identity. As Thomas Heuglin notes, one of the very purpose of federalism is to accommodate *"asymmetrical diversity within a single polity".*[146]However still this concept has proved highly controversial. Heuglin three major challenges to idea of asymmetric federalism: first is that it is antithetical to norms of liberal equality—this arguably shallow argument can be easily be dispatched by the above argument of substantive equality. Secondly, historical compromise resulting in federalism is said to require same level of economic and monetary and other powers given to all constituent units equally. This argument again is historically incorrect because incorporation of constituent units may not be made on equal terms in all cases. Kashmir in India and Quebec in Canada are cases in point. Thirdly, a more pragmatic objection is that even is asymmetry is acknowledged as necessary there will be considerable tension regarding determination of what is a proper balance between "*desirable symmetry and unavoidable asymmetry*" in a particular case.[147] This is a major point and any asymmetry must strike this balance, lest the whole federation be undermined. However in my opinion, there cannot be many general principles to strike this balance and it must depend upon situation and needs of every particular federation. Only principle that can be formulated is that a minimum level of autonomy must be symmetrically ensured.

Others have underlined the fears that asymmetrical arrangements may lead to secessionist or separatist tendencies. For instance Charles Tarlton (credited with coining the phrase

[145]DMITRIOSKARMIS AND WAYNE J. NORMAN, THEORIES OF FEDERALISM: A READER, Palgrave Macmillan, 2005; Lloyd I. Rudolph and Susanne Hoeber Rudolph, *Federalism as State Formation in India: A Theory of Shared and Negotiated Sovereignty*, International Political Science Review, 31(5) 1–21.

[146] Thomas O. Hueglin, *Lived but not Loved: Asymmetrical Tensions in Canadian Federalism*, Available at: http://www.forumfed.org/en/pubs/conference/rome/Hueglin%20-%20Assymetrical%20Federalism%20Canada.pdf(Last Accessed on: 04-04-2015).

[147]*Ibid.*

'asymmetric federalism' in 1965), in the context of Indian federal system opines that these asymmetrical federal arrangements are highly prone to separatist and secessionist tendencies.[148]

However, John McGarry, in his extensive comparative study of asymmetrical federalism concludes that such arrangement per se need not lead to secession. Whether accommodation or secession ensues depend on lot of external factors such as contingency of politics and how the constitution is actually worked, motivations of the parties involved, and in the details of the arrangements or autonomy. Just as Consociational power sharing can be important to preserve the unity in conflict ridden states; similarly McGarry concludes that asymmetric federalism can be very important in containing and managing conflicts in culturally diverse states. Thus there can be in fact a 'necessity' for asymmetrical federal arrangements in certain cases.[149] The need for asymmetric arrangements is most acute in cases of "plurinational states"[150] where the cultural minority communities want greater recognition of their culture and nationality and hence demand for asymmetry.[151]Rekha Saxena in her comparative article, emphasizing on performance of India, Belgium and Canada concludes that the political experience of all multinational federations shows that some degree of constitutional asymmetry is in fact essential for enduring federations.[152]

Some other argue that constitutional asymmetry is a must to achieve equity in context of multicultural and multinational countries for the community protection and politics of recognition. Michael Burgess, taking a contrary view to Tarlton, and a view similar to McGarry, concludes that asymmetric federalism cannot be said to be leading to secessionist movements in

[148]Charles D. Tarlton, *Symmetry and asymmetry as elements of federalism: A theoretical speculation*, The Journal of Politics, Vol. 27, no. 04 (1965), 861-874.

[149]Katharine Adeney, *The "Necessity" of Asymmetrical Federalism?,*Ethnopolitics: Formerly Global Review of Ethnopolitics, 6:1, 117- 120 Available at: https://www.academia.edu/736432/Comment_The_Necessity_of_Asymmetrical_Federalism(Last Accessed on: 04-04-2015).

[150]John McGarry, *Asymmetrical Federalism and the Plurinational State*, in THIRD INTERNATIONAL CONFERENCE ON FEDERALISM: TURNING DIVERSITY INTO HARMONY – SHARING BEST PRACTICES (F. Geerkens ed., Dept. of Foreign Affairs: Brussels, 2006): 302-325.

[151]*Ibid.*

[152]RekhaSaxena, *Is India a Case of Asymmetrical Federalism?*, Economic & Political Weekly,Vol 47, Issue 2 (2012), 70-75.

all cases and historical and cultural factors determine whether the accommodative tendencies or secessionist tendencies have greater sway.[153]

Rao and Singh, rightly distinguish asymmetry into one in which the asymmetry is regulated by transparent and fair rules (sometimes built in into constitutional arrangement or by conventions) and the other one in which asymmetry is discretionary and non-transparent.[154] The former is the kind of asymmetric arrangement which can strengthen federalism (though not always—rule based asymmetry unless linked with questions of substantive equality and entrench a feeling of exclusion and undermine federalism). However, the latter is a result of real politik and political arm-twisting and often can lead to feeling of being ignored or left out by certain states and undermine federalism.

Riker's analysis shows, as Rao and Singh point out, that demand for special status and asymmetric treatment can bear out from several objectives, most common being, greater economic opportunities; preserving special group identities (like in certain North Eastern states of India); preserving freedom and autonomy vis-à-vis other larger and powerful states; maximising the political influence of the state.[155] They rightly note that even bargaining by certain states, for their inclusion into the federation can lead to asymmetry. Example of this is Jammu and Kashmir, whose inclusion into India was preceded by political bargaining and the instrument of accession laid down special conditions which are now reflected in Article 370[156] of Indian Constitution.

The above is an example of asymmetry designed at the institutional level of the Constitution. However, most common asymmetries are not a result of constitutional design, rather than political and economic exigencies. Central Funding as per the recommendation of planning commission, greater funding to naxal-affected states, funding for poverty-stricken regions within a state are all instances of this. It also suggest that in such exigencies, discretionary asymmetry can be useful tool to achieve a balanced development of the country—

[153] *Ibid;* MICHEAL BURGESS, COMPARATIVE FEDERALISM: THEORY AND PRACTICE, Routledge, 2006.
[154] M. Govinda Rao and Nirvikar Singh, *Asymmetric federalism in India*, UC Santa Cruz International Economics Working Paper 04-08 (2004).
[155] *Ibid;* WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, MAINTENANCE, Little Brown,1964.
[156] Constitution of India, 1950.

both intra state and interstate. However, such "De facto asymmetry"[157] however must be clear and transparent for not to degenerate into inter-state squabbling and politicking.

4. A COMPARISON OF ASYMMETRIC FEDERATIONS ACROSS THE WORLD

Canada, India, Malaysia and Belgium are most commonly cited as example of constitutional asymmetric federations.[158]Ronald Watts enumerates the examples of Canada, Belgium, India, Malaysia, Russia and Spain in his examples of federations with strong asymmetric elements. He criticises the notion that just because the classical cases of federalism—United States, Switzerland and Australia are largely symmetrical is nature, federalism as a rule must be symmetrical.[159]

He describes two different approaches to constitutional asymmetry found within world constitutions.[160] First approach is to increase the distribution of federal powers in favour of certain states. This approach, he notes, are found in India; in Malaysia, in the Borneo states of Sabah and Sarwak; in Belgium, in terms of recognition of different kinds of constitutional units and different jurisdictions of Regional Council and Community Councils. Example of Quebec in Canada, which has its own civil law conforms to this pattern. The second approach is where there is formal symmetry for all constituent units, but creates a framework which enables certain states to exercise asymmetric power. Examples of this includes Spain where in case of Autonomous Communities there is provision for recognizing variations in form of Statute of Autonomy, that is allowed to each Autonomous Community. These Statues can be tailor made as per negotiations between the Central and the Regional leaders. Similarly, Russia after the fall if Soviet Union, concluded treaties with over 40 out of 89 constituent units providing for different scope of their legislative and executive power. Even in otherwise unitary countries like UK, now

[157]*Id.*

[158]Ronald L. Watts, *A Comparative Perspective on Asymmetry in Federations,* Institute of Intergovernmental Relations, School of Policy Studies, Queen University, 2005, Available at: http://www.queensu.ca/iigr/WorkingPapers/asymmetricfederalism/Watts2005.pdf (Last Accessed at: 04-04-2015); RekhaSaxena, *Is India a Case of Asymmetrical Federalism?*, Economic & Political Weekly,Vol 47, Issue 2 (2012), 70-75.

[159] Ronald L. Watts, *A Comparative Perspective on Asymmetry in Federations,* Institute of Intergovernmental Relations, School of Policy Studies, Queen University, 2005, Available at: http://www.queensu.ca/iigr/WorkingPapers/asymmetricfederalism/Watts2005.pdf (Last Accessed at: 04-04-2015).

[160]*Ibid.*

elements of asymmetric federalism can be found, such as different legislative powers in Scotland, Wales and Northern Ireland. Similarly, Italy has 5 special regions, along with 17 ordinary regions.[161]

Heuglin notes that in Canada, asymmetric federalism is practiced, especially in case of Quebec, keeping in mind commitment to tax harmonization and equity in access to public services.[162] However he emphasises that asymmetric federalism has been practiced in such a way which does not threaten vital interests of other constituent units, and nothing has been done which would undermine national cohesion and special status that has been given to Quebec is done in such a way as to not give it an unfair advantage and rather help driver development of rest of the country.[163]This goes to serve that asymmetric federalism will be most successful if it is done in spirit of accommodation and without sacrificing the interest of others.

However, Watts' study also shows that Asymmetry need not be success in all cases. Failure of Federations like West Indies, Rhodesia and Nyasaland, Yugoslavia, Pakistan (pre-1971); Czechoslovakia Nigeria also serve to provide a cautionary tale and need to tailor federation carefully towards local needs and without disadvantaging others gravely. Watts also makes an important observation that pressures for constitutional asymmetry can induce counter pressures for constitutional symmetry and the tension between them can become an important question in political dynamics of the federation. The truth of this statement is amply displayed in case of India, where regional and coalition politics breeds asymmetry on one hand, whereas on other hand renewal of national parties like BJP also show a trend towards symmetry.

5. PRACTICE OF ASYMMETRIC FEDERALISM IN INDIA

In India this asymmetry can be similarly understood in two parts: one that is constitutionally designed and other that is politically practiced. Ronald L. Watts believes that there is distinction between 'political asymmetry,' (or de facto asymmetry) which is found in practically all federations (this comes from relative power and influence, different constituent

[161]*Id.*

[162] Thomas O. Hueglin, *Lived but not Loved: Asymmetrical Tensions in Canadian Federalism*, Available at: http://www.forumfed.org/en/pubs/conference/rome/Hueglin%20-%20Assymetrical%20Federalism%20Canada.pdf (Last Accessed on: 04-04-2015).

[163]*Ibid.*

units wield within a federation) and 'constitutional asymmetry' (de jure asymmetry), a rarer form, in which constitution itself designs and assigns different powers to some special constituent units.[164] The instance of latter is Canada, where Quebec had special powers regarding language, education and the civil law of Quebec.

Watts' formulation seems to discount political asymmetry as an analytical category of asymmetric federalism. I argue that it is not the case. It is true that some form of political asymmetry can be found in all federations, but beyond a threshold even practice of political asymmetry can affect federal structure and spirit in a significant way. So when does sustained practice of political asymmetry become a federal issue, is at the end a threshold question, depending upon the political economy of the concerned federation. Adopting Watts' categories of political and constitutional asymmetries, it is clear that both kind of asymmetries are found in India.

6. ASYMMETRY OF CONSTITUTIONAL DESIGN

Rekha Saxena, applying these categories gives example of Rajya Sabha which is based upon principle of population rather than formal equality of states (resulting in states like UP having 31 seats while other states like Meghalaya, Goa, Miozoram having just one seat each) and concludes that the same is an example of political asymmetry.[165] In my opinion, Rajya Sabha example is more in nature of constitutional asymmetry as it has been formed in such asymmetric way as a matter of constitutional design, rather than political practice.

In India, Asymmetry of constitutional design can be found scattered across the constitution. Special position of Kashmir vide Article 370 is the most prominent example. Article 370 (bii) is worthy of special mention which limits the law making power of Indian Parliament over the state to only foreign affairs, communication and defence.

Apart from Kashmir states with large tribal population, such as in the north east have greater administrative and legislative autonomy vide Article 244 and 244A read with fifth and

[164]Centre for Constitutional Studies, University of Alberta, *Asymmetrical Federalism*, Available at: http://ualawccsprod.srv.ualberta.ca/ccs/index.php/constitutional-keywords/491-asymmetrical-federalism (Last Accessed on: 04-04-2015); Ronald Watts, *AsymmetricalDecentralization:FunctionalorDsyfunctional,* IndianJournalofFederal Studies, 2004.

[165]RekhaSaxena, *Is India a Case of Asymmetrical Federalism*?, Economic & Political Weekly,Vol 47, Issue 2 (2012), 70-75.

sixth schedule,[166] for preservation of their cultural identity and greater development. Under Article 371 A and E consent from legislatures of Nagaland and Mizoram is required to extend a parliamentary statute to those states if it affects religious and social practices of Nagas and Mizos respectively or their customary law or administration of civil/criminal justice concerning these customary laws, or land ownership or transfer in these states.[167]Tillin agrees that the constitutional position of north east states exhibit true asymmetrical federalism.[168]

The lesson that may be drawn from these instances is that identity, backwardness or similar objective criteria based asymmetry is less problematic and can further the federal project. However, asymmetry granted on sole basis of political bargain can lead to dissatisfaction and make federalism difficult to sustain. The example of Kashmir is instance of the long lasting discontent and controversy that arises due to giving one state a special status without adequate link to questions of substantive equality, and merely due to political bargaining. The fact that special status of Kashmir is so controversial, as opposed to other special status of other federal units such as that in the North-east (Article 371A to E; 244, 244A) or under fifth and sixth schedule, suggests clearly that special status arising from needs of special identity, development or similar substantive equality questions furthers the federal project, while special status granted merely due to political reasons often leads to discontent among other federal units and may sometimes undermine federal project.

India has several different other kinds of asymmetries such as the unique concept of union territories and asymmetries between them (with Delhi and Puducherry having their own legislatures with powers over concurrent jurisdiction and having their chief ministers).

There are other specific asymmetries[169] as well, especially with regard to administration of tribal areas, intra-state regional disparities, law and order situation etc.[170]For example the governors of Maharashtra and Gujarat have been assigned with "special responsibility" to create developmental boards backward regions of those states with a view to equitable allocate

[166]Constitution of India, 1950, Part X: Scheduled and Tribal Areas.

[167] Constitution of India, 1950, Part XXI: Temporary, Transitional and Special Provisions.

[168] L. Tillin, *United in Diversity? Asymmetry in Indian Federalism,*Publius, 37(1), (2007) 1–25.

[169]RekhaSaxena, *Is India a Case of Asymmetrical Federalism?,* Economic & Political Weekly,Vol 47, Issue 2 (2012), 70-75.

[170]Constitution of India, 1950, Part XXI: Temporary, Transitional and Special Provisions, Article 371, 371B, 371C, 371D, 371E, 371F, 371H and 371 I.

resources for their development and to make them par with other regions of the state.[171] This shows a special status given to parts within a same state and could act as a normative basis of giving special category status to some states. Similarly, the President has constitutional obligation to ensure "equitable opportunities and facilities" for certain communities in Andhra Pradesh and to set up a committee of the legislative assembly in Assam and Manipur consisting of members elected from tribal areas to ensure their welfare.[172] Similarly, Governor of Arunachal Pradesh has "special responsibility with respect to law and order" in exercise of this he has to exercise his personal judgment.[173]It is noteworthy that most of these provisions are in the Part XXI of the Constitution dealing with "Temporary, Transitional and Special Provisions". This suggests that once the substantive equality of these regions is attain and their special interests safeguards, these asymmetries may be removed and these states may be brought on equal footing as other states.

7. ADMINISTRATIVE AND POLITICAL 'DE FACTO' ASYMMETRY: QUESTION OF SPECIAL CATEGORY STATUS

The most contentious kind of asymmetry is the asymmetry in distribution of national and central resources and the so-called grant of 'special category' to the states. It is a well-known fact that in terms of development the Indian States are nowhere on equal basis. Without giving facts and figures to illustrate this (which are unnecessary to this paper) let it suffice to say that while certain states like Kerala, Andhra Pradesh etc. have been high on human development and economic growth, other states like Bihar, Odisha etc. have sorely lagged behind and there is consensus to tackle these pockets of high-backwardness in a targeted manner.

At this juncture it is useful to examine the history and concept of 'special category states' in India. It is noteworthy that this category is not of constitutional design; rather it is a result of Indian Planning system. Origins of special category can be seen in DR Gadgil report, as per which 3 states—namely Assam, Nagaland and Jammu & Kashmir were granted special category status. This Special category was adopted for 4th and 5th five year plans. Persistent demand for transparent formula based allocation of resources between states led to the Gadgil formula,

[171] Constitution of India, 1950, Part XXI: Temporary, Transitional and Special Provisions, Article 371.
[172] Constitution of India, 1950, Part XXI: Temporary, Transitional and Special Provisions, Article 371A-C.
[173]Constitution of India, 1950, Part XXI: Temporary, Transitional and Special Provisions, Article 371-H.

showing the need for rule based asymmetry in a federation.[174]The Gadgil Formula gave weight to factors like population; adequacy of States' Taxation effort; fiscal performance; per capita income of the state; irrigation and power project and special problems.[175]A modified Gadgil formula was accepted by National Development Council in 1980 post the 5th five year plan. Later in 1991, this formula and the weights attached were revised and was renamed "Gadgil-Mukerji Formula".[176] The Gadgil Mukerji formula has been in use since 8th five year plan. Based upon criteria of harsh terrain, backwardness and social problems, the aforementioned 3 states were given special category status.[177] Now the special category status has been extended to total 11 states—the seven sisters in North East, Sikkim, J&K, Himachal Pradesh and Uttarakhand. The special category states get significantly higher budgetary support from the Centre. Especially, in realm of planned expenditure, these states get 30% earmarked of Centre's gross budgetary support. They get Normal Central Assistance (NCA—of the 3 categories of central assistance formulated by planning commission) in form of 90% grant and 10% loan (whereas other non-special states get the same in 70:30 ratio).[178] They also get important tax concessions like that on central excise helping them attract investment and improving their manufacturing base. Currently, Chhattisgarh, Jharkhand, Odisha, Rajasthan and Bihar are demanding the special category status.

The Criteria behind determining special state status such as harsh terrain, extreme backwardness, strategic location, provide a semblance of objectivity in its determination.[179]Still, as evident, these criteria could be subjectively interpreted and leave a lot of room for discretion.

[174]Hemanta Kumar Nayak, *Conceptual Clarity on Special Category Status,* Odisha Review, May 2013, Available at:http://odisha.gov.in/e-magazine/Orissareview/2013/may/engpdf/54-56.pdf(Last accessed on: 04-04-2015).

[175] The Gadgil Formula takes into account: (i) Population [60%] (ii) Per Capita Income (PCI) [10%] (iii) Tax Effort [10%] (iv) On-going Irrigation & Power Projects [10%] and (v) Special Problems [10%].

[176]Components of this formula are: population (25%), area (10%), fiscal capacity (47.5%) and fiscal discipline (17.5%).

[177]Hemanta Kumar Nayak, *Conceptual Clarity on Special Category Status,* Odisha Review, May 2013, Available at: http://odisha.gov.in/e-magazine/Orissareview/2013/may/engpdf/54-56.pdf (Last accessed on: 04-04-2015).

[178]Virendra Singh Thakur, *States with Special Category Status in India: Concept and Benefits,* Available at:http://gnlu.ac.in/bc/States%20with%20Special%20Category%20Status%20in%20India%20Concept%20and%20Benefits%20VT.pdf(Last Accessed on: 04-04-2015).

[179]*Ibid;* Hemanta Kumar Nayak, *Conceptual Clarity on Special Category Status,* Odisha Review, May 2013, Available at: http://odisha.gov.in/e-magazine/Orissareview/2013/may/engpdf/54-56.pdf (Last accessed on: 04-04-2015).

Although many have raised doubts over soundness of this formula and pressed for a better and more objective criterion.

The story of federalism is a paradox. SP Aiyer has rightly noted that India is a unitary constitution exhibiting federal practice.[180] Theorising federalism in terms of autonomy, he rightly notes that either the constitution grants the federal units autonomy or it does not. There cannot be any middle grounds. So he rightly rejects quasi federalism as a conceptual category, rather he views it as a transitional phase—a matter of practice—a phase in which Indian polity is in right now. On one hand the Supreme Court has declared in State of West Bengal v. Union of India[181] that the sovereignty rests with the Union alone (which is antithetical to federalism, which must necessarily share sovereignty), essentially confirming to the view that India is essentially unitary. The court opined rightly, in my opinion, that India is not a traditional federation, rather is one where the Union is primary and the states are secondary—in other words, India is no federation at all. The unitary view of Indian Constitution were affirmed again in State of Karnataka v. Union of India,[182] (which explicitly held that *"our constitution has, despite whatever federalism may be found in its structure, so strongly unitary-features also in it"*) and State of Rajasthan v. Union of India,[183] which made satisfaction of President for imposing emergency etc. beyond judicial review and upheld Union's power to issue directives to state. This case was a grievous blow against even a semblance of division of power and federalism in India. Thankfully that proposition in state of Rajasthan has been overruled in SR Bommai v. Union of India.[184] Interestingly SR Bommai holds that the federal structure of the Constitution is part of our Basic Structure which cannot be amended and further made aid and advice to a limited extent subject to Judicial Review. However even then Justice Ahmedi, emphasising on absence of use of the word federal in our Constitution and strongly unitary provisions like Article 2 and 3 (by virtue of which even the federal units are not indestructible) to raise doubts our Constitution is truly federal and rather described it as quasi federal or unitary.[185] This raises an interesting situation

[180] S P AIYER, FEDERALISM AND SOCIAL CHANGE, *The Nature of Federal Government,* Asia Publishing House, 1961.
[181] State of West Bengal v. Union of India, A.I.R. 1963 S.C. 1241.
[182] State of Karnataka v. Union of India, A.I.R. 1978 S.C. 68.
[183] State of Rajasthan v. Union of India, A.I.R. 1977 S.C. 1361.
[184] S.R. Bommai v. Union of India, A.I.R. 1994 S.C. 1918.
[185] *Ibid,* opinion of Ahmedi J.

where although India is strictly speaking not a federation, but the federal structures that are found are not subject to change for being Basic Structure. This is not the place for me to elaborate further on nature federalism under Indian Constitution, (that has been done by many others, including Sarkaria Commission and Rajamannar Commission) for paucity of space. However the purpose behind this brief examination of Indian federalism to understand why special status and asymmetric federalism can both be a matter of importance for states and yet be highly controverted. States' perennial dependence on Union for adequate funds has left states vying with each other for funds, if necessary by special status. These questions have led to 'politics of complaint' against Centre. For example, Mr. Naveen Patnaik, Chief Minister of Odisha has been crying hoarse against what he calls 'step-motherly treatment' of Centre against the State by denying it funds.[186] Most states have the same complaint. In this era of increased regional politics, to grow as one nation and achieve inclusive growth for all states, less unitary tendencies and more federal cooperation is required. For this, a skilful and objective distribution of Central funds, special status based on truly objective criteria is needed. In short, asymmetric federalism of the sort practiced in Canada—that is, based upon actual special needs of States and without sacrificing vital interests of others is needed. Then only can India stay one as one Country, despite being plurinational.

Viewed through the lens of asymmetric federalism, the practice of special category status to certain states can indeed by justified by reference to principle of substantive equality and special needs of different regions. As Heuglin's analysis of asymmetric federalism in Canada shows, such practices can be sustained only if it does not violate the vital interests of other constituent units not unfairly privileges the special states. A more objective criteria is required for formulation granting of special category status. The dissatisfaction with current formula is evident from many states calling for its revision, most prominently Odisha and Bihar. Also use of special category status to achieve inclusive development and addressing special needs to certain states seems to be frustrated when as many as 11 out of 29 states are given this status. Hence it is need of the hour to have a reasoned debate and discussion with all federal units and

[186]Debabrata Mohanty, *Odisha CM Naveen Patnaik accuses Centre of 'step-motherly' treatment,* Available at: http://indianexpress.com/article/india/india-others/odisha-cm-naveen-patnaik-accuses-centre-of-step-motherly-treatment/ (Last Accessed on:04-04-2015).

states and create consensus around a new objective formula for granting special category. Another solution also would be do away with this category all together and rather rationalise the federal budgetary support to states on basis of a more detailed set of criteria than Gadgil-Mukerji formula with less room for backdoor politics affecting federal grants. Then only the federation will be strengthened.

CONCLUSION

Exploring the many varied understandings of the concept of Federalism and Asymmetric federalism in particular it can be safely concluded that asymmetry in federations can help bridging the gaps between different federal constituent units. However, if not done keeping every State's interest it can hurt the federal project more than it can help. Special Category Status, a form of Political 'De-facto' Asymmetry in India, has to be kept as a form of asymmetry only if it is granted on very specific objective basis to further the federal project. Other alternative is to remove this category altogether and make every federal funding objective and rule based, with the rules themselves accounting for special needs of certain states. Funding is the most important part of federalism, without which no state can carry out its functions nor exercise its powers. So a formal division of powers is meaningless without fiscal federalism safeguarding sources of income for states. Without going into debate of fiscal federalism, state taxes and GST, it will be enough to say that need for Central funding will never be obviated and hence the same should be based on clear, objective and fair principles, which alone will build the country into a smooth working federation.

EUTHANASIA – A DEBATE OVER DEATH

AGREEMENTS & CONTRADICTIONS

SONAL VYAS*

In India, a country of beliefs and customs the issue of life and death is of great significance and a debate over its importance is still a taboo which left the issue of euthanasia un-discussed and ignored. However, the growing awareness and debate over its repercussions and effects all over the world and the demand of the terminally-ill patients throw the light to the need to ponder over this sensitive topic as its not merely a matter of legislation but an issue of life and death for, capable of liberating the prolonged suffers to a peaceful death. In the context of its growing significance it is important to fully understand its meaning and move back to the incidents which hold the future of its acceptance in the coming era of advanced technology and development.

I'm not afraid of being dead. I'm just afraid of what you might have to go through to get there."

— Pamela Bone (A reputed Journalist)

One of the most important public policy debates today revolves around the issue of euthanasia and assisted suicide. This ultimate source of pain relief today is not merely related to its significance but has turned into a tool to change and affect lives either in a positive way or the way other. Before analyzing what implications it has on the present life and medical system lets go into what it's all about.

Euthanasia is an act intended to cause a painless and merciful death to a person who is suffering from an incurable and painful disease or an irreversible coma. The term 'Euthanasia' is derived from the Greek words which literally means "good death" (Eu= Good; Thanatos=Death). The first recorded use of the word euthanasia was by Suetonius, a Roman historian, to describe the death of Augustus Caesar.

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Complexity of the term is more apparent when we encounter that it's a term with several varied implications. We have *voluntary* euthanasia (Euthanasia conducted with the consent of the patient), *non-voluntary* euthanasia (Euthanasia conducted where the consent of the patient is unavailable), *involuntary* euthanasia (Euthanasia conducted against the will of the patient), *passive* euthanasia (withholding of common treatments, such as antibiotics, necessary for the continuance of life) and *active* euthanasia (the use of lethal substances or forces, such as administering a lethal injection, to kill). These terms are no doubt misleading.

The main reason behind its being one of the most debated issues is its use or misuse. Many medical practitioners, social workers, researchers and even some patients hold varied and opposed view over its significance and legality. The question of its legality is very sensitive and many countries have enacted different laws concerning assisted suicide or euthanasia.

1. EUTHANASIA'S STATUS IN COUNTRIES AROUND THE WORLD

In 20th century the efforts of legalization of euthanasia began in the USA. The New York State Medical Association recommended gentle and easy death. Even more active euthanasia proposals came to Ohio and Iowa state legislatures in 1906 and 1907 but these proposals were rejected. In this book, authors Alfred Hoche, M.D., a professor of psychiatry at the University of Freiburg, and Karl Binding, a professor of law from the University of Leipzig, also argued that patients who ask for "death assistance" should, under very carefully controlled conditions, be able to obtain it from a physician. Alfred Hoche also wrote an essay, which he published as "Permitting the Destruction of Life Not Worthy of Life." It embraced euthanasia as a proper and legal medical procedure to kill the weak and vulnerable so as not to taint the human gene. In 2000, The Netherlands approved voluntary euthanasia. The Dutch law allowing voluntary euthanasia and physician-assisted suicide took effect on the 1st of February, 2002. For twenty years previously, it had been permitted under guidelines. In 2002 Belgium passed a similar law to the Dutch, allowing both voluntary euthanasia and physician-assisted suicide. Belgium moved a step further to extent the effect of euthanasia to children. While in India the issue of euthanasia has received various cold responses and the legality is restricted to the passive euthanasia only.

Euthanasia policies have also been developed by a variety of NGOs, most notably medical associations and advocacy organizations. As of 2015, euthanasia in its complete form is legal only in the Netherlands, Belgium, and Luxembourg.

Assisted suicide is legal in Switzerland, Germany, Albania, Colombia, Japan and in the US states of Washington, Oregon, Vermont, New Mexico and Montana. Euthanasia was criminalized in Mexico, Thailand, the Northern Territory of Australia and the US State of California.

2. ARGUMENTS CONCERNING EUTHANASIA

To put things in right perspective it is necessary to evaluate the arguments of both the sides – advocating and opposing the need and issue of legality of euthanasia.

Before the industrial and scientific revolution, the scientists had not invented the artificial ways of keeping a terminally ill patient alive, like ventilators, heart lung machines, artificial feeding, etc. Such patients would have naturally died during the ordinary course of nature. With the scientific revolution, there was better and in-depth understanding of the human body. Simultaneously there was advent of new technology and machines, through which it is possible to prolong the life. Even though the patients are kept alive, often they will be in extreme physical pain and suffering (emotional, social and financial). At this stage let's reiterate that these advanced intensive care procedures which we are referring here, will by no means cure/control the disease, but it will only prolong the agony as well as existence of terminally ill patients.

According to The Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill 2006, 'terminal illness' means – (i) such illness, injury or degeneration of physical or mental condition which is causing extreme pain and suffering to the patients and which, according to reasonable medical opinion, will inevitably cause the untimely death of the patient concerned, or (ii) which has caused a 'persistent and irreversible vegetative' condition under which no meaningful existence of life is possible for the patient. Thus according to it, the patient must be suffering some ailment causing extreme pain and suffering, which according to equitable and unbiased medical opinion, will lead to his death sooner or later. Second scenario is when the patient has slipped into Irreversible Permanent Vegetative State. These patients without active lifesaving mechanisms or life prolonging procedures will die a

natural death. Thus one would like to ask would it be reasonable to simply keep the patient alive if he is suffering from intractable pain, psychological and emotional distress just for the sake of keeping him alive. And in a place like India where most of its citizens meet their health expenses from their own pockets, continuing such expensive treatments results in considerable financial burden on poor households, often pushing them deeper into poverty. Even if the patient is having medical insurance it is usually inadequate. Poignantly our government health sector spending is perilously inadequate and is over burdened by huge population putting strain on the limited government resources. The WHO Report mentioned that in India about 87% of total health expenditure is from private spending, out of this, 84.6% is out-of-pocket expenditure. Thus one cannot disagree from the fact that there is genuine need for Passive Euthanasia with definitive, unbiased protocols and safeguards.

On the one side of the debate, there is a strong argument that people should have the right to terminate their lives, whenever, and however they may wish. Many supporters of voluntary euthanasia believe that everyone has the right to control their body and life, and should be free to decide at what time, and in which manner they will die. The idea behind this is that unnecessary restraints on human rights should be avoided. It was said in an article in the Independent newspaper in March 2002, that; "In cases where there are no dependants who might exert pressure one way or the other, the right of the individual to choose should be paramount. So long as the patient is lucid, and his or her intent is clear beyond doubt, there need be no further questions." Since the right to life gives a person the right to not be killed if they do not want to, proponents of euthanasia argue that respect for this right will prevent euthanasia being misused, as killing a patient without their permission would violate their human rights. It can also be argued that because death is a private matter, if there is no harm to any other people, there is no right to deny someone's wish to die. Supporters of this believe that if euthanasia promotes the best interests of all the parties concerned, and no human rights are violated, then it is morally acceptable for voluntary euthanasia to take place. Some supporters of the legalization of euthanasia have put forward point, they argue that, People generally avoid death because they enjoy and value being alive, but in the case of a terminally ill patient, they may be in a lot of discomfort and pain, and are unable to enjoy their life. This may cause the patient to devalue their life, and the patient may decide that they do not wish to endure their suffering any longer.

A strong ethical argument against the use of euthanasia is that it could soon become a slippery slope, with the legalization of involuntary euthanasia following it. Lord Walton, the chairman of a House of Lords committee on medical ethics looking into euthanasia spoke on the subject: "We concluded that it was virtually impossible to ensure that all acts of euthanasia were truly voluntary and that any liberalisation of the law in the United Kingdom could not be abused." Since involuntary euthanasia is indistinct from murder it would be impossible to regulate, causing the danger of murderers not being brought to justice, due to their crimes being passed off as involuntary euthanasia. There is also concern that doctors could end up killing very sick patients without asking for their permission, and in the worst case scenario, begin to kill off patients to free up beds in hospitals, or to save money. These situations show how dangerous it could be to let the legalization of euthanasia lead into the legalization of involuntary euthanasia.

3. SOME PROPOSED SAFEGUARDS

Many people are opposed to legislation that would allow "end of life" choices. But our concerns relating to abuses and protection of the vulnerable can be addressed by ensuring that certain objective safeguard conditions are met prior to allowing a terminally ill individual from exercising his or her right to die with dignity. Some of the safeguards include the following:

- The patient must be terminally ill.
- The patient must be an adult.
- The patient must be mentally competent.
- The patient must be in severe pain.
- Two independent physicians must be satisfied that the above conditions are present.

In conclusion, the only humane choice is to allow individuals who are suffering to choose to end their suffering. Further, the discrepancies in the laws as they exist and how they are being enforced have led to uncertainty. This uncertainty leaves the doctors, their patients and patient's loved ones unprotected. If we do not address these issues openly and head-on, we will have continued uncertainty and unregulated practice of euthanasia or assisted suicide with the fear of prosecution hanging over the heads of all concerned. The goals of the medical profession should continue to remain one of saving lives but this should not be at the expense of compassion and a terminally ill individual's right to choose to end his or her life and die with dignity.

A renowned Colombian novelist Gabriel García Márquez once wrote:

"*That is not true, but we lack the moral authority to endorse them (acts of euthanasia). What we do instead is what you have just seen. We commend the dying to Saint Hubert and tie them to a pillar in order to prolong and intensify their suffering.*"

Euthanasia's legal status in India

The law, though active in many countries, has been a sleeping giant in India, as euthanasia goes on behind closed doors. The law awoke from its slumber in 1994 by way of a petition filed by P. Rathinam directed against the constitutional validity of Section 309 IPC, which deals with punishment for attempt to commit suicide. (Incidentally, suicide is legal in all states of USA.) The Supreme Court ruled in favor of the petitioner, thereby legalizing suicide and rendering as unconstitutional punishment for abetting of suicide. In this case a corollary was drawn (as a passing reference or in legal terms an obiter dictum) between euthanasia and suicide. The judgment stated that in cases of passive euthanasia, the consent of the patient (if he be in sound mental condition) is one of the pre-requisites. So, if one could legally commit suicide, he could also give consent for being allowed to die. It went on to say that if suicide was held to be legal, the persons pleading for legal acceptance of passive euthanasia would have a winning point. This judgment came as a shot in the arm for people supporting euthanasia.

However, whatever progress was there came to a grinding halt in 1996, and the state of confusion returned. The same court now upheld the constitutional validity of Sections 309 and 306 thereby legalizing the same and thus criminalizing suicide and euthanasia in complete sense. Euthanasia and suicide are different, distinguishing euthanasia from suicide, Lodha J. in *Naresh Marotrao Sakhre* v. *Union of India*[187], observed:

> *"Suicide by its very nature is an act of self-killing or self-destruction, an act of terminating one's own act and without the aid or assistance of any other human agency. Euthanasia or mercy killing on the other hand means and implies the intervention of other human agency to end the life. Mercy killing thus is not suicide and an attempt at mercy killing is not covered by the provisions of Section*

187 1995 Cri L J 96 (Bom)

309. The two concepts are both factually and legally distinct. Euthanasia or mercy killing is nothing but homicide whatever the circumstances in which it is affected."

Legally speaking voluntary euthanasia is illegal as it can be interpreted as attempt to commit suicide which is punishable under Indian Penal Code section 309. The same was advocated by the judgment from the Constitution Bench of the Apex Court in the year 1996 in *Gian Kaur vs. State of Punjab*[188] where it stated that the right to life guaranteed by Article 21 of the Constitution does not include the right to die. Passive euthanasia is legal in India. On 7 March 2011 the Supreme Court of India legalised passive euthanasia by means of the withdrawal of life support to patients in a permanent vegetative state. The decision was made as part of the verdict in a case involving Aruna Shanbaug, who has been in a vegetative state for 37 years at King Edward Memorial Hospital.

Aruna Ramachandra Shanbaug Case

Miss Aruna Shanbaug was working as Junior Nurse in King Edward Memorial (KEM) Hospital, Mumbai, where in the year 1973, she was sexually assaulted by a ward boy. He strangulated her with a dog chain and sodomized her. The resultant asphyxiation caused irreversible injury to the brain causing Permanent Hypoxic Ischemic damage to her brain and since then, she has been in a persistent vegetative state. After some time her family abandoned her, but the nurses at the KEM hospital continued to take care of her. On 17th December 2010, Pinki Virani claiming to be Aruna's friend (a social activistcum-journalist) made a plea in Supreme Court for permitting euthanasia on Aruna Shanbaug. The Honorable Supreme Court sought a report about Shanbaug's medical condition from the Govt. of Maharashtra. Three member Expert Committee subsequently examined and opined that she was in a Permanent Vegetative state. On 7th March 2011, the Apex Court, while rejecting Pinki Virani's plea for active euthanasia, the court observed that "the general legal position all over the world seems to be that while active euthanasia is illegal unless there is legislation permitting it, passive euthanasia is legal even without legislation provided certain conditions and safeguards are

188 (1996) 2 SCC 648

maintained". The court also formulated guidelines for the passive euthanasia. This is important in a country like India with its vast and culturally diverse population where unfortunately the ethical standards of our society have descended to new low (as evidenced by social evil like rampant sex selective abortions, honor killings, gang rapes etc.); there is an impending possibility that people might misuse passive euthanasia in order to inherit the property etc.

Basic Guidelines issued by the Hon'ble Court for Passive Euthanasia in *Aruna Ramachandra Shanbaug vs. Union of India*[189]:

Whenever there is a need for passive euthanasia for some patient, permission has to be obtained by the concerned High Court before life prolonging measures can be withheld. Here the court will act as '*parens patriae*', a doctrine that grants the inherent power and authority of the state to protect persons who are legally unable to act on their own behalf. The idea behind *parens patriae* (father of the country) is that the King as the father of nation has a sacred duty to take care of those who are unable to look after themselves. This is essential as in most cases where the question of passive euthanasia arrives; the patients are often unconscious or otherwise unable to communicate their intensions. Thus in order to prevent any sort of criminality by the patient's relatives/friends or even treating doctors, courts will oversee and take the decision on behalf of the patient. It is ultimately for the Courts to decide, as to what is in the best interest of the patient, though the wishes of close relatives and next friend, and opinion of medical practitioners should be given due weight age in formulating the decision. Hon'ble Court also laid down procedure to obtain such permission in detail. It also appreciated the entire staff of KEM Hospital, Mumbai (including the retired staff) for their noble spirit and outstanding, exemplary and unprecedented dedication in taking care of Aruna for so many long years. Having never developed a single pressure sore or fracture, in spite of the fact that she was bedridden for almost three and half decades is the standard testimonial of the same. It also opined that KEM hospital staff members are her 'true friends' and not Ms. Pinki Virani who has only visited her on few occasions and written a book on her. Hence the decision to withhold life prolonging measures rests on the hospital staff and not Ms. Pinki Virani. KEM staff members have expressed their

189 (2011) 4 SCC 454

wish that Aruna Shanbaug should be allowed to live. However in future if they change their mind, they will have to follow this procedure established by the Hon'ble Apex Court.

On 11th August 2011, Law Commission submitted their report to Government of India titled '*Passive Euthanasia- A Relook*'. In the modified and revised Bill proposed by 19th Law Commission, the procedures laid down are in line with the directions of the Supreme Court in Aruna Ramachandra case. Salient features of these are as follows: 'Best interests' include the best¬ interests of a patient : (i) who is an incompetent patient, or (ii) who is a competent patient but who has not taken an informed decision, and are not limited to medical interests of the patient but include ethical, social, moral, emotional and other welfare considerations. 'Incompetent patient' means a¬ patient who is a minor below the age of 18 years or person of unsound mind or a patient who is unable to – (i) understand the information relevant to an informed decision about his or her medical treatment; (ii) retain that information; (iii) use or weigh that information as part of the process of making his or her informed decision; (iv) make an informed decision because of impairment or a disturbance in the functioning of his or her mind or brain; or (v) Communicate his or her informed decision (whether by speech, sign, language or any other mode) as to medical treatment. 'Competent patient' means a patient¬ who is not an incompetent patient. 'Informed decision' means the¬ decision as to continuance or withholding or withdrawing medical treatment taken by a patient who is competent and who is, or has been informed about- (i) the nature of his or her illness, (ii) any alternative form of treatment that may be available, (iii) the consequences of those forms of treatment, and (iv) the consequences of remaining untreated.

4. THE INDIAN REALITY AND EUTHANASIA'S FUTURE

It can be argued that in a country where the basic human rights of individuals are often left unaddressed, illiteracy is rampant, more than half the population is not having access to potable water, people die every day due to infections, and where medical assistance and care is less, for the few people, issues related to euthanasia and physician-assisted suicide (PAS) are irrelevant. However, India is a country of diversities across religious groups, educational status, and cultures. In this background, the debate on euthanasia in India is more confusing as there is also a law in this land that punishes individuals who even try to commit suicide. Medical science is

progressing in India as in the rest of the world, and hence currently we are having devises that can prolong life by artificial means. This may indirectly prolong terminal suffering and may also prove to be very costly for the families of the subject in question. Hence, end-of-life issues are becoming major ethical considerations in the modern-day medical science in India. The proponents and the opponents of euthanasia and PAS are as active in India as in the rest of the world. However, the Indian legislature does not seem to be sensitive to these. The landmark Supreme Court judgment has provided a major boost to pro-euthanasia activists though it is a long way to go before it becomes a law in the parliament. Moreover, concerns for its misuse remain a major issue which ought to be addressed before it becomes a law in our country.

In the words of Mahatma Gandhi:

> "*Death is our friend, the truest of friends. He delivers us from agony. I do not want to die of a creeping paralysis of my faculties — a defeated man.*"

CONCEPTION OF CONSTITUTIONALISM AND FUNDAMENTAL RIGHTS IN INDIA: AN ANALYTICAL PERSPECTIVE

SUNKLAN PORWAL*

1. INTRODUCTION

Constitutionalism is the idea, often associated with the political theories of John Locke and the founders of the American republic, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations. This idea brings with it a host of vexing questions of interest not only to legal scholars, but to anyone keen to explore the legal and philosophical foundations of the state[190].

Constitutionalism compels and constrains all dimensions of our everyday lives in ways large and small that we often do not fully appreciate, perhaps because constitutions take many forms that we do not generally associate with constitutionalism. Yet whether in the arts, sports, trade, entertainment, politics, or war, constitutionalism is both the point of departure and the port of call.[191]

It is seen that the main concern of the American constitutionalism is in the area of human rights. In the American idea of rights, "rights are not gifts from government." This theory places the fundamental rights of the individual beyond the government's reach. Fundamental rights are protected against legitimate authority and elected representatives of the people, even when these act in good faith and in the public interest. As antecedent to government, fundamental rights are not granted to individuals by a constitution. Rather, a constitution protects fundamental rights from infringement by government. The structure necessary for protection of fundamental rights is a key element in constitutionalism. In the U.S. Constitution, the most important means provided for protection of human rights is judicial review. The American idea of rights denotes a distinctive relationship between the individual and society. The rights themselves, and the way these are granted, reveal a philosophy of individualism connected to a guarantee of restricted

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[190] Constitutionalism , *available at*: http://plato.stanford.edu/entries/constitutionalism/ (Last Visited on April 25, 2014)

[191] Richard Albert, "The Cult of Constitutionalism" Vol. 39 *Florida State University Law Review* 373

government intervention. The American idea of rights as fundamental and beyond the government's reach, is achieving recognition in other nations. Scholarly opinions differ, however, on which rights are truly fundamental and the scope thereof[192].

That aftermath effect of constitutionalism was can be witnessed in Indian scenario through various landmark judgments which laid down literature behind formulation of Fundamental rights, for example in *Moti Lal and Ors. Vs. The Government of the State of Uttar Pradesh and Ors*[193], Hon'ble Court of Allahabad held that the insertion of fundamental rights in the Constitution is thus a deliberate departure from British concepts and it is necessary to seek the reasons for it, particularly as they limit the sovereignty assigned to Parliament. The history of the evolution of thought on the rights of man takes us back into the seventeenth century or even earlier. From the time of Tom Paine's Rights of Man, Jefferson's Declaration of Bights, Rousseau, and the French Revolution, schools of thought have existed down to H. G. Wells and the U. N. O. discussions on human rights which assert that man has certain natural or inalienable rights and that it has made the function of the state to preserve human liberty and free play to rights of man. Fundamental rights were practically to be found in every constitution that came into existence after world war-I. After world war-II, as a result of the discussions on the proposed United Nation Charter of Human Rights, they have become even more visible in most constitution framed after War.

2. THE PURPOSE OF FUNDAMENTAL RIGHTS

The word "liberty" is given a very wide connotation by American decisions as including not only freedom from bodily restraints but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen[194].

[192] Cuban Constitutionalism and Rights: An overview of the Constitutions of 1901 and 1940, *available at* http://www.ascecuba.org/publications/proceedings/volume6/pdfs/49sanchroi.fm.pdf (Last Visited on April 20, 2014)
[193] AIR 1951 ALL 257: ILR(1951) 1 ALL 269 (FB)
[194] (1943) 319 US 624(638)

The leading feature of the conception of fundamental rights as developed under American Constitution may be said to be the doctrine of "due process of law". Under Amendment V to the American Constitution which is directed against the Federal Government it is provided inter alia that "no person shall be deprived of his life, liberty or poverty without due process of law. This signifies that the framers of the American Constitution did not attempt to define the expression with result that it has a vague and indefinite content. Evidently, the framers of American constitution preferred flexibility to certainty when they chose the phrase the phrase "due process of law". The upshot of constitutionalism on advancement of fundamental rights can be observed from multifaceted constitutions of nations like America, England and India as enumerated below:-

America

It is seen that during the commencement of the 17th century people, scholars, political philosopher urbanized their perceptive on individual rights and had developed philosophy that the man by birth had certain which are universal and in alienable, and he could not be deprived of them. The declaration of American Independence 1776, state that all man are created equal, that they endowed by their creator by certain inalienable right among those: life, liberty and the pursuit of happiness and allow them to play freely, so that human liberty may be preserved, human personality developed and an effective cultural , social and democratic life promoted. The modern trend of guaranteeing fundamental rights to the people may be traced to the constitution of USA drafted in 1787. The U.S. Constitution was the first modern constitution to concrete shape to the concept of human rights by putting them in to the constitution and making them justifiable and enforceable through the instrumentality of the courts.

It was astonishing to see that the original U.S. Constitution did not contain any fundamental rights. There was trenchant criticism of the constitution on this score. Consequently, the bill of rights came to be incorporated in the constitution in 1791 in the form of ten amendments which emody the Lockeian idea about protection of life, liberty and property.

Britain

There is no formal deceleration of people's fundamental rights in Britain. The orthodox of the sovereignty of parliament prevailing there does not envisage a legal check on the power of

parliament which is, as a matter of legal theory, free to make any law even though it abridges, modifies or abolishes any basic civil right or liberty of the people[195]. The power of the executive is however limited in the sense that it cannot interfere with the rights of the people without sanction of law[196].

The constitution of England is unwritten. No code of fundamental right exists. The object here is deferent way to protect the fundamental right not on the constitutional guarantee but on public opinion, good sense of the people, strong common law and individual liberty and the parliamentary form of government.[197]

Britain witnesses several historical events which were of immense significance and observance that Britain should also have a written bill of rights, subsequently Britain accepted European charter on Human Rights but it did not bind parliament, it can only be used in interpretations of local law. Henceforth taking all these chronological events in consideration, ultimately Britain parliament enacted Human Rights Act, 1998. The purpose of the Act is to give effect to the rights and freedoms guaranteed under European convention on Human rights.

3. EVOLUTION OF FUNDAMENTAL RIGHTS IN THE CONSTITUTION OF INDIA

In India evolution of Fundamental Rights were based on struggle faced by people against oppression and arbitrariness of British colonialism. During the British rule in India, human rights were violated by the rulers on a very wide scale. Therefore framers of the constitution, many of whom had suffered long incarceration during British regime, had a very positive attitude towards these rights.

Though democracy was being introduced in India, yet democratic traditions were lacking and there was a danger that the majority in the legislature may enact laws which may be oppressive to individuals or minority groups, and such a danger could be minimized by having a bill of rights in the constitution. That the need to have the fundamental rights was so very well accepted on all hands that in the constituent assembly, the points was not even considered

[195] *Liversidge v. Anderson*, 1942 AC 206
[196] *Eshugbayi v. Govt. of Nigeria*, 1931 AC 662
[197] Fundamental Rights in Indian Constitution, *available at*: http://www.lawyersclubindia.com/articles/Fundamental-Rights-in-Indian-Constitution-3770.asp#.U1yehPldX5M (Last visited on April 24, 2014)

whether or not to incorporate such rights in constitution. In fact, the fight all along was against the restriction being imposed on them and the effort all along was to have the fundamental rights on as broad and pervasive a basis as possible[198].

As regard India Simon Commission and Joint Parliamentary Committee had reject the idea of enacting declaration of Fundamental right on the ground that the abstract declaration is useless. Although the demand of the people was not met by the British Parliament under the government of India Act 1935 yet the enthusiasm of the people to have such right in the constitution was not impaired. The recommendation of the Nehru Committee was included in the constitution in 16 May'1946 by the cabinet mission.

Part-III of the constitution contains a long list of fundamental rights. This chapter of the constitution of India has very well been described as Magna Carta of India. It is seen that when constitution of India was being framed the background of the incorporation of Bill of Rights was already present. The framers took inspiration from this and incorporated full chapter in the Constitution dealing with Fundamental Rights. The aim of having a declaration of fundamental rights is that certain elementary rights, such as right to life, liberty, freedom of speech, freedom of faith and so on, should be regarded as inviolable under all conditions and that the shifting majority in Legislature of the country should not have a free hand in interference with these fundamental rights[199].

In *West Virginia State Board of Education Vs. Barnet,* Jackson[200], J. explaining the nature and purpose of the Bill of Rights observed: "The very purpose of a Bill of Right was to withdraw certain subjects from vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by Courts. One's right to life, liberty and property, to free speech, free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote, they depend on the outcome of no elections".

The Indian Constitution guarantees essential human rights in the form of fundamental rights under part-III, freedom guaranteed under part III have been liberally constructed by

[198] D.D.Basu, *Constitution of India* 1191 (Lexis Nexis India, New Delhi, 14th edn, 2011)
[199] *A.K.Gopalan's Case*, AIR 1950 SC 27
[200] 319 US 624:87

various pronouncements of the Supreme Court in the last half century, keeping in view the International Covenants to which India is party. The object has been to place citizen at a centre stage and make state accountable[201]. Speaking about importance of Fundamental Rights in the historic judgments of *Maneka Gandhi Vs. Union of India*[202], Bhagwati, J., observed: *"These Fundamental Rights represent the basic values cherished by people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a 'pattern of guarantee' on the basic structure of Human Rights, and impose negative obligation on the state not to encroach on individual liberty in its various dimensions".*

These rights are regarded as fundamental because they are most essential for the attainment by the individual or his full intellectual, moral and spiritual status. The negation of these rights will keep the moral and spiritual life stunted and his potentialities undeveloped. The declaration of the fundamental rights in the constitution serves as reminder to the Government in power that certain liberties, assured to the people by the constitution are to be respected. The danger of encroachment on citizens' liberties is particularly great in a parliamentary system in which those who form the government are leader of the majority party in the legislature and can get laws made according to their wishes. The advocates of inclusion of these rights in the Indian Constitution emphasize that their incorporation in the Constitution vest them with sanctity which legislators dare not to violate so easily[203].

The object behind the inclusion of chapter of Fundamental Rights in Indian Constitution is to establish a Government of law and not of man, a government system where tyranny of majority does not oppress the minority. In short, the object is to establish Rule of Law and it would not be wrong to say that the Indian Constitution in this respect goes much ahead than any other constitutions of the world. They were intended to make all citizens and person appreciate that the paramount law of the land has swept away privileges and has laid down the paramount

[201] *People's Union for Civil Liberties v. Union of India*, (2005) 2 SCC 436
[202] AIR 1978 SC 597
[203] Dr.J.N.Pandey, *Constitutional law of India* 52(Central Law Agency, Allahabad, 41st edn., 2004).

perfect equality between one section of the community and another in the matter of all those rights which are essential for the material and more perfection of Man[204].

There are seven Fundamental Rights enshrined Constitution of India. Though right to property was removed from the list of Fundamental Rights by the 44th Amendment Act of the Constitution in the year 1976, since then, it has been made a legal right henceforth Article 19(1) (f) and article 31 has been omitted. Recently by the 86th Amendment Act, the Right to Education has been included in the list of Fundamental Rights as part of the Right to Freedom by adding Article 21(A).

4. BALANCING FUNDAMENTAL RIGHTS

Absolute and unrestricted individual rights do not, and cannot exist in any modern state. Unrestricted liberty becomes a license and jeopardizes the liberty of others. "Civil Liberties as guaranteed by the Constitution imply the existence of an organized society maintaining public order without which liberty would be lost in excess of unrestrained abuses".[205] The Indian constitution attempt to do it by enumerating what are fundamental rights and by setting limits within which they can be curtailed. The Constitution permits reasonable restrictions to be imposed on individual's liberties in the interest of society. In this connection Hon'ble Apex Court in *A.K.Gopalan Vs. State of Madras*[206] quoted:-

> ***"****There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. The possession and enjoyment of all rights, as was observed by the Supreme Court of America in Jacobson v. Massachusetts 197 U.S. 11, are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, general order and morals of the community. The question, therefore arises in each case of adjusting the conflicting interests of the individual and of the society. In some cases, restrictions have to be placed upon free exercise of individual rights to safeguard the interests of the society; on the other hand, social control which exists for public good has got to be restrained, lest it should*

[204] Supra 5
[205] *Fox vs. Nrew Hampshire*, (1941) 312 US 569 at Pg 574
[206] AIR 1950 SC 27

be misused to the detriment of individual rights and liberties. Ordinarily, every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand for the very protection of these liberties the society must arm itself with certain powers. No man's liberty would be worth its name if it can be violated with impunity by any wrong-doer and if his property or possessions could be preyed upon by a thief or a marauder. The society, therefore, has got to exercise certain powers for the protection of these liberties and to arrest, search imprison and punish those who break the law. If these powers are properly exercised, they themselves are the safeguards of freedom, but they can certainly be abused. The police may arrest any man and throw him into prison without assigning any reasons; they may search his belongings on the slightest pretext; he may be subjected to a sham trial and even punished for crimes unknown to law. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control."

5. WHEN THERE IS CONFLICT BETWEEN TWO FUNDAMENTAL RIGHTS

Apart from the question of validity of restrictions being imposed upon the fundamental rights, a question may arise as to the interpretation that Court should adopt when the application of one fundamental right would conflict with another. In *Mohammad Yasin Vs. Town Area Committee*[207], the learned Judge rightly took the view that all parts of Constitution must be raised together moreover when two fundamental rights come into conflict, and one is sought to be extended to its extreme logical conclusion at the expense of other, a Court would be slow to recognize and uphold such an extension of a fundamental Rights which infringe and violates another fundamental right.

[207] 1952 SCR 572

The Bombay High Court in *Damodar Ganesh and Ors. Vs. State*[208] has in the same way observed *"A restriction which fractionally interferes with the right of freedom of movement of one section of the public in the interest of the only way in which another section of the public can exercise its right of pursuing its occupation, cannot be said to be unreasonable."*

That the Hon'ble Judge brilliantly quoted that:

> "*When the question of adjusting such mutually conflicting rights arises, it is obviously the duty of the State to adjust the rights under different heads, so far as possible to avoid conflicts between them and to reconcile those rights. Such police powers must be deemed to be implicit in the right of the State in enacting legislation to adjust and to reconcile such conflicting rights. To what extent these rights can be restricted has been laid down in Clauses (2) to (5) of Article 19. Under the American Constitution, the Courts have had to resort to the doctrine of "police powers" in order to bring about a regulation between conflicting fundamental rights. In the case of our Constitution the doctrine of police powers need not be invoked as an attempt has been made in the Constitution itself to define the extent to which and the purposes for which the fundamental rights enumerated in Clause (1) may be restricted. The question as to whether the restriction placed on any fundamental right is a reasonable restriction or not must be determined with reference to Clauses. (3) to (6) of that article so far as the rights enumerated in Sub-clauses (b) to (g) of Clause (1) of Article 19 are concerned. With reference to the restriction on the freedom of speech and expression mentioned in Clause (a) of Article 19(1), the validity of that restriction has to be tested with reference to certain matters with respect to which laws may be made in abridgment of the right to freedom of speech and expression. It is open to the Court in any particular case to pronounce whether under Clauses (3) to (6) of Article 19, any particular restriction embodied in any law is a reasonable restriction or not.*"

[208] AIR1951Bom459

6. CONSTITUTIONALISM AND FUNDAMENTAL RIGHTS IN THE EYES OF INDIAN JUDICIARY

The nine judges' Bench presided by Mr. Justice Y.K. Sabharwal, the then C.J.I. delivered a unanimous verdict on 11.1.2007 in I.R. Coelho (Dead) By LRs. v. State of Tamil Nadu and Ors[209], upholding the 'Basic Structure Doctrine', and the authority of the judiciary to review any such laws, which destroy or damage the basic structure as indicated in Art.21 read with Art.14, Art.19 and the principles underlying there under, even if they have been put in 9th Schedule after 14th April, 1973. This case is popularly known as The Ninth Schedule Case[210].

That the Supreme Court of India brilliantly after considering the entire landmark Judgments likes A.K Gopalan v. The State of Madras, Additional District Magistrate, Jabalpur v. Shivakant Shukla, His Holiness Kesavananda Bharati, Sripadagalvaru v. State of Kerala and Anr., I.C. Golak Nath and Ors. v. State of Punjab and Anr., Keshavananda Bharati v. State of Kerala, Menaka Gandhi v. Union of India, Minerva Mills Ltd. and Ors. v. Union of India and Ors, S.R. Bommai and Ors. v. Union of India and Ors., Sambhu Nath Sarkar v. The State of West Bengal and Ors. , Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar, which reflects mechanism involved in enforceability of Fundamental Rights enumerated in part III of Our constitution, aspects concerning stirring of basic structure of our constitution. Through I.R. Coelho v. State of Tamil Nadu[211], Hon'ble Apex Court depicted the conception of constitutionalism, Constitutionality, Fundamental Rights and Judicial Review, it laid down that:

> "*The Constitution is a living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law. The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic*

[209] AIR2007SC861: 2007(1)ALLMR(SC)944
[210] I.R. Coelho v. State of Tamil Nadu: A Judicial Challenge, *Available at*: http://www.legalserviceindia.com/article/l382-I.R.-Coelho-v.-State-of-Tamil-Nadu-A-Judicial-Challenge.html (Last visited on April 25, 2014)
[211] Supra 22

principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.

CONCLUSION

It is extremely intricate to predict India's constitutional-political future and silhouette of fundamental rights after ten or twenty years. The Supreme Court has even enunciated the doctrine of implied Fundamental Rights. The court has asserted that in order to treat a right as Fundamental Right, it is not necessary that it should be expressly stated in the Constitution as a Fundamental Right. Political, social and economical changes concurring in the country may entail the recognition of new rights and law in its eternal youth grows to meet social demands.[212] The Indian Constitution is a marathon effort to translate philosophical rule of law into practical set up divided into three significant estates checking each other exercising parallel sovereignty and non-egoistic supremacy in their own way. Apart from excellent separation of powers to avoid the absolute concentration, the Constitution of India envisages a distinct distribution of powers between two major levels of Governments- central and provincial with a fair scope for a third tier – the local bodies. However, the operation of the system came in contrast with men and their manipulations leading to different opinions and indifferent options. Whatever may be the consequential aberrations, the system of rule of law is perfectly reflected in framing of the Constitutional norms codifying the best governing mechanisms tested and trusted in various democratic societies world over.[213]

[212] *Unni Krishnan, J.P. v. State of Andhra Pradesh*, AIR 1993 SC 2178
[213] Evolution and Philosophy behind the Indian Constitution, *available at:* http://www.hrdiap.gov.in/87fc/images11/4.pdf (Last visited on April 20,2014)

HUMAN TRAFFICKING: A SOCIO-LEGAL FACET OF MODERN WORLD

TANAY JAIN & NIMISH M. BHAGWATI*

"They may use my body but my mind is free. In my mind I Escape"

- *Gladys Lawson*

The purpose of this paper is to enlighten the society about human trafficking[214] which is the fastest increasing criminal industry in today's world after illegal drug trade. This paper focuses that up to which extent human trafficking is spreading in India and all over the world. It also covers the area where human trafficking has been banished. The role of government, courts and NGO in rescue, care, support, protection, prevention and rehabilitation of victims has also been discussed in the paper. It also includes interview of some speakers about human trafficking. The statistical data of human trafficking is also included in this paper. The laws made by the government, their validity, amendments and implementation of those laws. The conclusion of this paper is that what amendments should be there in the laws to eradicate this problem fully with some recommendations. Rigorous evaluation of policies and programs are needed to identify the most effective counter trafficking strategies and most appropriate care for the people affected.

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[214] Art. 3 Para (a) of The Protocol to Prevent, Suppress and punish Trafficking in persons.

1. DEFINITION, CAUSES AND EFFECT OF HUMAN TRAFFICKING

Definition

The human trafficking simply means trafficking in persons. It means the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of the payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[215]

On the basis of the definition given it is evident that it contains 3 elements- the act (what is done), the means (how it is done) and the purpose (why it is done). The recruitment, transportation, transfer, harboring or receipt of persons are the acts. When threat, coercion, abduction, fraud, deception, vulnerability, giving benefits to a person in control of the victim then these are the means of trafficking. The purpose of the trafficking is to exploit the prostitution, slavery, forced labor, sexually, organ removal and similar practices. The definition of trafficking should be of that extent that it is not only for exploiting sexually but for all the ranges of exploitation. When we talk about human trafficking in India we come to see that mostly children and women are trafficked this means that child labor is mostly active in India. Transnational crime is an important part of the rise in human trafficking as criminals are drawn by the enormous supply of the people and the demand for cheap domestic servants, agricultural workers and laborers for dangerous industries. The rise of sexual exploitation has been rapid and a truly global phenomenon, drawing increasing numbers of children and young women into the sphere. The growth of this crime has been very rapid because neither there is certainty nor severity of punishment.[216]

Causes of Human Trafficking

The root cause of trafficking in persons differs from one country to another. Human trafficking is a complex phenomenon. It is influenced by social, economic, cultural and other factors. Some of the common factors are local conditions that make populations want to migrate in search of better conditions: poverty, oppression, lack of human rights, and lack of social or

[215] Art. 3 Para (a) of The Protocol to Prevent, Suppress and punish Trafficking in persons available at: www.ohchr.org (Visited on September 24, 2014).

[216] Interview of Louise Shelly on Human Trafficking: A global perspective available at: www.rorotoko.com (visited on September 26, 2014).

economic opportunity, dangers from conflict or instability and similar conditions. Political instability, militarism, civil unrest, internal armed conflict and natural disasters may result in an increase in trafficking. The destabilization and displacement of populations increase their vulnerability to exploitation and abuse through trafficking and forced labor. War and civil strife may lead to massive displacements of populations, leaving orphans and street children extremely vulnerable to trafficking.

Some of the common factors are poverty, oppression, lack of human rights, and lack of social or economic opportunity. These factors exerts pressure on victim to migrate and hence in the control of the traffickers.[217] Poverty and wealth are relative concepts which lead to both migration and trafficking patterns in which victims move from conditions of extreme poverty to conditions of less-extreme poverty. Some parents sell their children, not just for the money, but also in the hope that their children will move to a place where they will have a better life and more opportunities. In some States, social or cultural practices also contribute to trafficking.
Causes of Human Trafficking can be divided in 2 factors[218]:

- **Local Factor**

In the area of local factors, poverty especially among women, a lack of political, social and economical stability are the few factors in the area of local factors. Gender discrimination is also the causes that make another gender that is male or female to be stressed out with the situation that happens among them. Lack of access to education and information is when the individual not concerns about how important other human beings to another.

- **Universal Factor**

Universal factors imposes more limits and obstacles to legal migration channels to countries with stronger economies and regions with better prospects, a lack of public awareness of the dangers of trafficking. A lack of effective anti-trafficking legislation and if such legislation exists there is a lack of effective enforcement. A lack of effective enforcement by the authority gives us a major problems and this will not give a full stop to this problems. Government and the society should be united to solve this sophistic issue. Malaysia is a destination country for number of men women, and children who are trafficked from Indonesia, Thailand, the Philippines, Cambodia, India, and so many Asian countries for sexual and labor exploitation.

[217] Tool 9.2 from Toolkit-files of Human Trafficking available at: www.unodc.org (Visited on September 26, 2014).
[218] Causes of Human Trafficking available at: www.biusvspa.blogspot.in (Last Modified March 2, 2011.

Effects of Human Trafficking

The social impacts of human trafficking are rather universal. This does not denote them as being not a serious matter, nonetheless. Those who have truly experienced human trafficking are the ones who must cope with the majority of the social impacts. Although, HIV and AIDS can be spread because of human trafficking, this can affect any and all of the population. If a person has had to experience human trafficking, they have known a life worse than death itself. The conditions those are forced to live in the brothels are thoroughly atrocious[219]. Victims of human trafficking have absolutely no freedoms, and experience horrors such as abuse, violence, deprivation, and torture.

The direct impact on the family and community left behind cannot be easily quantified but nevertheless should not be ignored. Trafficking undermines extended family ties, and in many cases, the forced absence of women leads to the breakdown of families and neglect of children. Children trafficked into forced labor or sexual exploitation has their development as a person 'irreparably damaged'. Survivors often suffer multiple traumas and psychological problems. Victims who return to communities often find themselves stigmatized and shunned, and are more likely to become involved in substance abuse and criminal activity.[220]

. According to the International Labor Organization (ILO), human trafficking generates $31.6 billion estimated illicit profit worldwide. As calculated by the CIA, a trafficker earns up to $250,000 per victim of the sex trade in a year. Of this the victim is clearing up his debts and paying for food, clothing and lodging. The victims of slavery are also paid very meager wages for strenuous physical labor which prevents them from fleeing. Availability of cheap labor gives employment opportunities and reduces per capita income of the nation[221].

2. NEGATIVE IMPACT OF HUMAN TRAFFICKING.

As a major component of organized crime, with all its financial power, trafficking in persons has a complex and interlocking negative impact across human, social, political and economic spheres. The destabilizing and dangerous consequences of human trafficking range from readily recognized violence, direct economic loss and major migration concerns to the less

[219] Social Impacts of Human Trafficking available at: htia.weebly.com (Visited on September 27, 2014).
[220] Helpdesk Research Report: The impact of human trafficking on people and countries available at: www.gsdrc.org (Visited on September 23, 2014).
[221] Article on Effects of Human Trafficking available at: http://www.buzzle.com/articles/effects-of-human-trafficking.html (Visited on October 1, 2014).

easily quantified, equally serious, but more complex effects of risks and harms to environmental, social, health and safety, and violations of human rights. Trafficking in persons directly challenges the development of stable, more prosperous societies and legitimate economies, and works strongly against the reconciliation of political interests with humanitarian and human right obligations[222]. As a criminal act, trafficking violates the rule of law, threatening national jurisdictions and international law. Organized crime is one of the most important mechanisms for unlawful redistribution of national wealth, influencing markets, political power and societal relations.

The act of trafficking and the human rights violations can have very serious consequences for the victim. Women who have been trafficked may suffer from serious health problems, including physical health, reproductive health and mental health problems. Service providers who work with victims should be aware of the severe and interrelated health consequences that result from trafficking. Sexual assault is a traumatic event with physical and emotional effects on the victim. After experiencing sexual assault, a woman may experience a range of physical consequences and emotional reactions, including severe stress and depression[223]. In certain cases after being trafficked the women is not accepted by her family members. The mental stress and depression after trafficking can also take life of women. The uncontrollable expansion of the sex and pornography industry has created increased demand for child and women trafficking not only from developing countries to developed countries.

3. LAWS AND CONVENTIONS RELATED TO HUMAN TRAFFICKING

Laws related to Human Trafficking in India

- Under Indian Constitution

Article 23[10] and 24[224] given under part III of the Indian constitution that is fundamental rights which deals with Right against Exploitation. In this Article 23 is prohibition of traffic in human beings.

Now, Article 23 protects the individual not only against the state but also private citizens. It imposes a positive obligation on the state to take steps to abolish evils of "traffic in human

[222] Initiatives, Anti trafficking available at: www.shaktivahini.org (Visited on September 30, 2014).
[223] Effects and Consequences of Trafficking in women available at: http://www1.umn.edu/humanrts/svaw/trafficking/explore/4effects.htm (Visited on October 1, 2014).
[224] J.N. Pandey, The Constitutional Law of India (Central Law Agency, Allahabad, 49th edition, 2012).

beings" and beggar and other similar forms of forced labor wherever they are found. It also prohibits the system of 'bonded labor' because it is a form of forced labor within the meaning of this article.

And**,** Article 24 of the constitution prohibits the employment of children below 14 years of age in factories and hazardous employment, this provision is certainly in the interest of public health and life of children.

There is a leading case on both the articles that is People's Union for Civil Liberties v. Union of India[225].

Meanwhile, Article 39[226](f) imposes a duty on the State to direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

- **Under Indian Penal Code, 1860**

There are 25 provisions regarding trafficking significant among them are Section 366A – procuration of a minor girl (below 18 years of age) from one part of the country to another is punishable. Section 366B – importation of a girl below 21 years of age is punishable. Section 374 – provides punishment for compelling any person to labor against his will.

- **Immoral Traffic (Prevention) Act, (ITPA) 1956**[227] [renamed as such by drastic amendments to the **Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA)** which deals exclusively with trafficking; objective is to inhibit / abolish traffic in women and girls for the purpose of prostitution as an organized means of living; offences specified are:

✓ Procuring, including or taking persons for prostitution;
✓ Detaining a person in premises where prostitution is carried on;
✓ Prostitution is or visibility of public places;
✓ Seducing or soliciting for prostitution;
✓ Living on the earnings of prostitution;

[225] AIR 1982 SC 1943.
[226] P.M. Bakshi, The Constitution of India (Universal Law Publishing Co., New Delhi- India, 12th Edition, 2013).
[227] Immoral Trafficking Prevention Act, 1956 available at: www.protectionproject.org (Visited on September 28, 2014).

- ✓ Seduction of a person in custody;
- ✓ Keeping a brothel or allowing premises to be used as a brothel.

4. INTERNATIONAL LAW RELATED TO HUMAN TRAFFICKING

The United Nations have made some laws for the prevention of trafficking in persons. The conventions are also made by them for protecting children from human trafficking. International laws lay down standards that have been agreed by all the countries. By ratifying an international law or convention a country agrees to implement the same. To ensure implementation, the standards set in these international conventions are to be reflected in domestic law. Implementing procedures are to be put in place as needed and the treaties must be properly enforced. The laws and Conventions are as follows:

- **The Convention on the Rights of the Child, 1989**[228].

This convention of United Nations provides fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom.

- **SAARC Convention on Regional Arrangement for the Promotion of Child Welfare, 2002**[229].

  This convention emphasizes that the evil of trafficking in women and children for the purpose of prostitution is incompatible with the dignity and honor of human beings and is a violation of basic human rights.

- **The Convention on the Elimination of All forms of Discrimination against Women, (CEDAW) 1979**[230].

  This convention is for women and prevents women from any type of discrimination. It is the distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women.

- **The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children**[231].

[228] Convention on right of child, 1989 is available at: www.unicef.org.uk/documents/publication-pdfs/UNCRC_PRESS20091oweb.pdf (Visited on September 28, 2014).
[229] SAARC Convention on Regional Arrangement for the Promotion of Child Welfare, 2002available at: www.saarc-sec.org (Visited on October 3, 2014).
[230] CEDAW, 1979 available at: www.un.org/womenwatch/daw/cedaw (Visited on October 2, 2014).

The preamble of this protocol states that effective action required a comprehensive international approach in the countries of origin, transit and destination to prevent such trafficking including by providing international rights given by law.

5. PROSTITUTION: A REASON FOR HUMAN TRAFFICKING

Whoever sells, lets to hire, or otherwise disposes of any sold, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution[232]. And in the world prostitution is at the highest level of trafficking. And in this the victims especially children and women are transferred from one country to another country's third world countries.

The *Immoral Traffic Prevention Act* (1956) (*ITPA*) is the main legal instrument addressing the trafficking of human beings in the country. It is supplemented by provisions in certain other domestic laws, including the *Indian Penal Code* (*IPC*, 1860). The *ITPA* is focused on trafficking for the purpose of prostitution. Accordingly, it outlaws the running of a brothel; living on the earnings of a prostitute; procuring, inducing or taking a person for the sake of prostitution; and detaining a person in a place where prostitution is carried on[233]. The Act also provides for the rescue and rehabilitation of victims/survivors of trafficking, action against exploiters and increased punishment for trafficking offences involving children.

The prohibition of prostitution in children is given in Section 372, Section 373 of IPC[234], 1860. The selling of minor for purposes of prostitution, etc is given in Section 372 of IPC and buying minor for purposes of prostitution is given in Section 373 of IPC & are prohibited or we can say banned by India.

Does legalizing prostitution protect Women and girls?

- **Findings from countries and states where prostitution is legal**

Millions of women and girls around the world are exploited in the commercial sex industry (i.e. the buying and selling of sex), which is often the end destination of sex trafficking. While

[231] Protocol to prevent, suppress and punish trafficking in persons, especially Women and Children available at: www.ohrcr.org (Visited on October 1, 2014).
[232] Indian Penal Code, 1860 available at: www.advocatekhoj.com (Visited on October 1, 2014).
[233] Immoral Traffic Prevention Act, 1956- Section-3, 4, 5, 6 available at: www.protectionproject.org (Visited on September 28, 2014).
[234] IPC, 1860 available at www.advocatekhoj.com (Visited on October 1, 2014).

human rights activists, government officials and the United Nations all agree that the trafficking of women and girls for prostitution is a serious – and growing – problem, there is disagreement as to the best way to prevent trafficking and exploitation. Some believe that targeting the demand for commercial sex that fuels sex trafficking while decriminalizing those exploited in prostitution is the most effective way to curb sex trafficking, while others argue that legalizing or decriminalizing the commercial sex industry is the best way to weed out and prevent exploitation and trafficking.

The legalization of prostitution includes legalizing the activities involved in and surrounding prostitution, and often imposing regulations specific to the sex industry. Countries and states that have legalized prostitution include: Senegal (1969), states in Australia including Victoria (1994) and Queensland (1999), the Netherlands (2000) and Germany (2002). The decriminalization of prostitution includes repealing all laws or provisions against prostitution, and not imposing prostitution-specific regulations. Countries and states that have decriminalized prostitution include the Australian state of New South Wales (1995), and New Zealand (2003).

But it was not successful in some countries like- Germany, In 2007 government report stated that the law has "not been able to make actual, measureable improvements to prostitutes' social protection" and that "hardly any measureable, positive impact has been observed" regarding their working conditions.[235] The government also stated there are "no viable indications that the [law] has reduced crime.[236]

6. PROSTITUTION AS TRAFFICKING WORLDWIDE

Prostitution is a multibillion dollar business that employs millions of women worldwide. A recent study by the International Labor Office estimated that in Indonesia, Malaysia, the Philippines, and Thailand, between 0.25 and 1.5 percent of the female population work as prostitutes and that the sex sector accounts for between 2 and 14 percent of the gross domestic product (Lim 1998). Prostitution is more common in less *developed* countries but far from absent in developed ones The 1992 National Health and Social Life Survey (NHSLS) found that about 2

[235] German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)*, July 2007, pg. 79.

[236] Does legalizing prostitution protect women and girls? Available at: www.equalitynow.org/sites/default/files/doeslegalizingprostitutionprotectprotectwomenandgirlsEN.pdf (Visited on October 1, 2014).

percent of American women had ever sold sex. A government estimate put the number of prostitutes in Germany at 150,000 (Morell 1998), and Amsterdam is believed to have about 25,000 prostitutes[237]. Prostitution has an unusual feature: it is well paid despite being lowskill, labor intensive, and, one might add, female dominated. Earnings even in the worst-paid type, streetwalking, may be several multiples of full-time earnings in professions with comparable skill requirements.

- ✓ ***Market Structure through Prostitution***

Prostitution has been organized according to similar principles across different times and cultures. At the bottom we find street prostitution, followed by brothels, bars, and clubs. Call girls and escort agencies occupy the middle to high slots and kept women the top rungs. Higher end prostitutes are better looking, younger, and healthier; charge more per client; and spend more time with each[238]. Typically, both earnings and working conditions are better more up market: clients are fewer, venues more agreeable, and client screening more selective.

7. CHILD TRAFFICKING

Child Trafficking in India

Trafficking in human beings, especially in women, and children has become a matter of serious national and international concern. Women and children – boys and girls – have been exposed to unprecedented vulnerabilities commercial exploitation of these vulnerabilities has become a massive organized crime and a multimillion dollar business. Nations are attempting to combat this trade in human misery through legislative, executive, judicial and social action. Trafficking of children is a worldwide phenomenon affecting large numbers of boys and girls every day. Children and their families are often lured by the promise of better employment and a more prosperous life far from their homes.

Others are kidnapped and sold. Trafficking violates a child's right to grow up in a family environment and exposes him or her to a range of dangers, including violence and sexual abuse.[239]

[237] Editorial, "Prostitution" Financial Times, October 27, 1999.

[238] For instance, higher-end prostitution may involve socializing with the client, whereas lower-end prostitution tends to be more narrowly focused (e.g., Ramseyer 1991).

[239] Child Trafficking in India available at: mecon.nomadit.co.uk (Visited on September 27, 2014).

- ***Indian Law related to child trafficking***
  - **Child Labor (Prohibition and Regulation) Act, 1986**[240]

This act prohibits employment of children in certain specified occupations and also lays down conditions of work of children.

  - **Karnataka Devadasi (Prohibition of Dedication) Act, 1982**[241]

This Act of dedication of girls for the ultimate purpose of engaging them in prostitution is declared unlawful – whether the dedication is done with or without consent of the dedicated persons.

  - **Andhra Pradesh Devadasi (Prohibiting Dedication) Act, 1989**[242]

Penalty of imprisonment for three years and fine are stipulated in respect of anyone, who performs, promotes, abets or takes part in Devadasi dedication Ceremony.

  - **Goa Children's Act, 2003**[243]

Trafficking is specially defined as- Every type of sexual exploitation is included in the definition of sexual assault;

- Responsibility of ensuring safety of children in hotel premises is assigned to the owner and manager of the establishment;

- Photo studios are required to periodically report to the police that they have not sought obscene photographs of children.

Stringent control measures established to regulate access of children to pornographic materials children.

Statistical Data of Child Trafficked

Trafficking in children is on rise, and nearly 60% of the victims of trafficking are below 18 years of age (NCRB, 2005).

According to NHRC Report on Trafficking in Women and Children, in India the population of women and children in sex work in India is stated to be between 70,000 and 1 million of these,

[240] Child Labor (Prohibition and Regulation) Act 1986 available at: www.childlineindia.org (Visited on September 27, 2014).
[241] Karnataka Devadasi (Prohibition of Dedication) Act, 1982 available at: dpal.kar.nic.in (Visited on September 27, 2014).
[242] Andhra Pradesh Devadasi (Prohibiting Dedication) Act, 1989 available at: www.advocatekhoj.org (Visited on September 27, 2014).
[243] Goa Children's Act, 2003 available at: www.childlineindia.org (Visited on September 27, 2014).

30% are 20 years of age. Nearly 15% began sex work when they were below 15 and 25% entered between 15 and 18 years (Mukherjee & Das 1996).[244]

International Law on Child Trafficking

UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially for Women and Children 2000[245] under the UN Convention against Transnational Organized Crime (UNTOC). This Convention has been signed by the government of India.

Article 3 of this protocol defines a) trafficking which has been discussed earlier:

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor services, slavery, servitude or the removal of organs;

b) The consent of a victim of trafficking in persons to the intended exploitation set forth in above definition of this article shall be irrelevant;

c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in sub paragraph (a) of the article;

d) Child shall mean any person less than eighteen years of age.

What are Children trafficked for[246]?

- Labor
- Bonded labor
- Domestic work
- Agricultural labor
- Construction work
- Carpet industry, garment industry, fish shrimp export as well as other sites of work in the formal and informal economy.

[244] Statistics Data available at: www.slideshre.net (Visited on September 26, 2014) .

[245] Art. 3 of The Protocol to Prevent, Suppress and punish Trafficking in persons available at: www.ohchr.org (Visited on September 24, 2014).

[246] Child Trafficking in India available at: mecon.nomadit.co.uk (Visited on September 27, 2014).

8. ROLE OF COURTS, GOVERNMENT, NGOS REGARDING PROTECTION, CARE AND REHABILITATION OF VICTIMS

The courts play very important role in eradicating human trafficking from India as well as from other countries where it has not banned. As the courts help the victims of human trafficking by giving them legal aid and assistance to approach the court. This can be widely explained further through a case of-

Bachpan Bachao Andolan Vs UOI[247]- This petition brings to the notice of the Supreme Court the plight of children working in Indian circuses. The petition seeks guidelines specifically prohibiting the engagement of children below 18 years of age in any form. It also requests that the CBI be directed to investigate the gross violation of fundamental rights of children in circuses. The case was pending for some time. But on 10th may 2013 the court gave its judgment which was a landmark judgment.

***Subrata Mukherjee Vs The State Of West Bengal*[248]-**

This PIL (2007) was filed in the Calcutta High Court for implementation of Juvenile Justice Act in West Bengal. The litigation demanded that JJBs and child welfare committees and special juvenile police units be established in all districts. The state government has taken initiative to form JJBs, CWCs and SJPUs in the state.

This means that before this case there was no implementation of Juvenile Justice Act, 2000 in some states including West Bengal. After this case Special Juvenile Police Units were established in all the districts.

The Supreme Court has sought Kerala's response to a petition raising serious concern about child care centers citing recent discovery of over 600 children trafficked illegally to the state.[249]

High courts are also working for rehabilitation of victims of human trafficking.

There is a leading case of *Kalpana Pandit Vs. State Of Nct Of Delhi*[250]- In this case the court has gone in the role of illegal placement agencies operating in Delhi and who are also

[247] (2011) 5 SCC 1.
[248] AIR (1982) Cal 430, (1982) 2 Complj 244 cal.
[249] Editorial, "Supreme Court notice to Kerala Govt. on rampant child trafficking" Times of India, Aug. 31, 2014.
[250] Kalpana Pandit vs. NCT of Delhi available at: www.nlrd.org/childrightsinitiatives/highcourtlatestjudgments (Visited on September 25, 2014).

involved in trafficking. The court directed the Administration at the highest level in Delhi Police shall reconsider the feasibility of implementation of the instructions contained in the law.

Vishaka V. State Of Rajasthan[251]

The SC held that the sexual harassment of working women amounts to violation of right of gender equality and right of life and personal liberty. It also amounts to the violation of right to practice any profession, occupation or trade. The SC lays down certain guidelines to be observed at all workplaces until legislation is enacted for the purpose. These guidelines would be treated as law by SC under Article 141.

9. ROLE OF NGO's IN PROTECTION AND CARE OF VICTIMS

The NGOs help the victims of trafficking to rehabilitate by providing the facilities to approach the Police and courts to complain about such acts. NGOs around the globe are engaged in combating trafficking engaged in variety activities including prevention, prosecution, protection, raids, and reintegration.

a) NGO awareness campaign through MEDIA[252]

NGO to counter attack human trafficking should campaign for awareness through media. As this problem is an issue in some countries which is often unnoted or given little attention.

This is true for a variety of reasons: a complete lack of understanding, the unwillingness of governments to acknowledge that the problem exists in the countries; unavailable laws or lack of resources to truly combat the problem. Now, we believe that the media is a great place to heighten the consciousness of general public, and raise funds for NGOs and hopefully provide more direct services to victim. There are some points which should be followed by NGOs to combat with this problem-

- It should use major media outlets to run public service announcements. The information regarding this can be posted on Facebook, twitter free social networking sites; buses can also be used, television, radio.
- NGO should concentrate on large media outlets like BBC and CNN
- Celebrities have a particular ability to bring the human trafficking issue to the forefront

[251](1997) 6 SCC 241: AIR 1997 SC 3011.

[252] Values of NGOs in countering human trafficking available at: www.naag.org/value-of-non-governmental-organizations-in-countering-human-trafficking.php (Visited on September 30, 2014).

- Working with private companies to both promote awareness and ensure that their own supply channels are not involved in human trafficking is another way for NGO to tackle the issue.

b) What should NGOs do?

In particular NGOs should play a watch dog role. NGOs should monitor the process of development and implementation of international legislation and national policies. NGO should check the impact of measures and actions taken (do no harm) and NGOs should be as critical towards them and partner NGOs as towards authorities.

The community should be sensitized about trafficking. The community members should be motivated to keep a watch in the community for irregular movement of child victims to and from area their possible traffickers and hideouts. NGOs working in the rural areas should ensure that parents are aware of safe migration practices.[253]

Role of Media[254]:

- The media should transmit appropriate message to ensure that the victims learn that they are not alone.
- Victims can be made aware of places and institutions where they can seek help.
- Create awareness that human trafficking is inappropriate and illegal and has negative consequences.
- Wide publicity should be given regarding the legal, penal provisions against trafficking and the modus operandi of the traffickers through radio, television etc.

Human Trafficking: Chhattisgarh first State to implement placement agency act[255]- One of the vital steps towards restricting trafficking of women and children to metro cities, Chhattisgarh becomes the first state to launch Private Placement Agencies (Regulation) Act with the formation of required rules against placements agents. This act will bar any person, agent or agency to take minor girls out for domestic or any sort of work, without having license, says the act.

[253] Child Trafficking in India available at: mecon.nomadit.co.uk (Visited on September 27, 2014).
[254] Child Trafficking in India available at: mecon.nomadit.co.uk (Visited on September 27, 2014).
[255] Rashmi Drolia "Human Trafficking: Chhattisgarh first State to implement placement agency act" The Times of India, August 4, 2014.

10. ROLE OF GOVERNMENT IN HUMAN TRAFFICKING

Government is the primary key to combat Human Trafficking.

- Government at local level and source areas should create compulsory high quality education, employment opportunities and income generation program.
- Government should produce relevant IEC materials; promote sensitization program for teachers in government schools, parents and community workers.
- Government should include gender centered education curricula in schools and introduce subjects of child sexual abuse and trafficking.
- The government of different nations must share the information with each other to evolve a program that will help both the countries in preventing trafficking.

Government to stop human trafficking[256]- the government understands that human trafficking is a serious social issue. We are also aware of the fact that if human trafficking is checked totally only then there will be all-round development of the state. This statement was given by Social Welfare minister Parveen Amanullah in Bihar.

Sex workers must not be allowed to operate, Centre tells Supreme Court[257]-Court agrees to examine the whole issue at length that sex workers should not be allowed to operate in the country under the cloak of working with **dignity** as suggested by a panel to prevent human trafficking.

[256] Editorial "Govt to stop human trafficking: Minister" Times of India September 22, 2011.
[257] Editorial "Sex workers must not be allowed to operate, Centre tells the court" The Hindu Friday July 13, 2012.

CONCLUSION

The ending of this paper is that human trafficking is big business with a substantial turnover, and corruption in institutions and bodies with responsibility for combating it is often widespread. Therefore, there should be concerted and genuine efforts at successfully combating of trafficking in persons and the reintegration of victims should resolve an entire range of problems faced by the victims and their families, and in particular the root cause of human trafficking, poverty, has to be addressed. The main problem of human trafficking is poverty, lacking of education in rural areas. Mostly the people who are poor cannot afford to education. So, the result is unawareness of the causes and effects of Human Trafficking. The laws are made by the government to prevent trafficking and new laws are also being framed. The courts are giving legal assistance to the victims. Rigorous evaluation of policies and programs are needed to identify the most effective counter trafficking strategies and most appropriate care for the people affected.

Recommendations for future measures—

- The laws related to human trafficking are required to be implemented properly by the government officials.
- Poverty should be eradicated by providing all the basic facilities to the poor people mainly- education, healthy food, employment. If this problem is solved then I think there should be some decrease in human trafficking
- The individuals should be given the education of their human rights so that they can know what they can do if their rights are violated.

CONSTITUTION WITH RESPECT TO FLOW OF WATER

ARNABI DUTTA*

*T*he importance of water being one of the most important and primary natural resource can never be denied, fulfilling the basic human needs and also for country's development, stands as an precious asset of life. India being a federal state, makes it essential to provide and construct an efficient and equitable mechanism for allocating river flows, so as to avoid the inter-state friction, because federalism does not only mean, equitable distribution of power between centre-state, but also equality between two states. Before independence, the matters related to irrigation and water was a provincial subject, but due to the frequent friction between two provinces, B.R. Ambedkar, when drafting the Constituion proposed an amendment for the necessity of setting up a permanent body to deal with the water-dispute conflicts, and thus, Art. 262 was adopted in the light of the considerations. However, it is noticeable, that the Constitution did not provide any mechanism or procedure for solving the disputes, rather it has conferred the responsibility on the Parliament to decide and take action in the concerned matter. Inter-state river water disputes in India have long been recognized as an important federal issue. The 'Sarkaria Commission' on center-state relations (Government of India, 1988) presented an entire chapter to the problem, and made a series of recommendations. In this article, an attempt has also been taken to discuss the most recent Cauvery case which went to Supreme Court with the question of maintainability of the orders and awards issued by the Tribunals, and its present stance. India's scenario in water-disputes occurring and re-occurring in every occasion calls for a quick settlement through arbitration or adjudication, but it has its own impediments for it, not working out in India.

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1. INTRODUCTION

We say 'Water is life', and we say it time and again. The importance of water being one of the most important and primary natural resource can never be denied, fulfilling the basic human needs and also for country's development, stands as an precious asset of life. Though India is blessed with plenty of water resources, India's case seems to be quite peculiar, as she has to sustain around 17% of world's population having just around 4% of world's renewable water resources and 2.6% of world's total land area. Therefore planning, management and development of such calls for attention. Most of the larger rivers in India meanders through the administrative boundaries of the Indian federal system. Sometimes river itself is a boundary and sometimes, a river bifurcates itself into two tributaries across boundaries. India is a federal democracy, and because rivers cross state boundaries, constructing efficient and equitable mechanisms for allocating river flows has long been an important legal and constitutional issue. The regulation of these river and river valleys continues to be a source of inter-state friction.

The history and origin of legislative action in this area dates back to pre-independence era. In GOI, 1919, the matters relating to irrigation was made a provincial subject, while on the other hand, matters which results in conflicts between two provinces were in the hands of central legislation. GOI, 1935 gave attention to the river disputes between two provinces, which in turn lead to the draft article of 239-242 of the draft of Constitution of India. During the consideration of Draft constitutional provision, Dr. B.R Ambedkar proposed an amendment for the necessity of setting up a permanent body to deal with the water-dispute conflicts, and thus, Art. 262 was adopted in the light of the considerations.

2. CONSTITUTIONAL PROVISIONS

However, it is noticeable, that the Constitution did not provide any mechanism or procedure for solving the disputes, rather it has conferred the responsibility on the Parliament to decide and take action in the concerned matter by virtue of Entry 56 of list I. States have been given power to legislate in respect of water supplies, irrigations and canals, drainage and embankments, water storage and water power under Entry 17 of List II but is subjected to legislative power of Union. With regards to the adjudication of dispute relating to waters of inter-state rivers, Parliament is empowered to make law in this regard under Article 262 of the Constitution. The debate which revolves in this regard is, whether water is a state subject or a

central. It is argued that Inter-state River and power sharing should be a state subject and supremacy should be envisage to them. However, since several princely states joined the Indian Union on conditions of certain amount of autonomy and many of these States were agrarian economies, they refused to part with regulatory powers over water thus the Constitution had to acknowledge this. States being quasi-sovereign bodies cannot be treated as ordinary entities involved in property disputes. This is perhaps the rationale for the Article 262, enabling the Parliament to make separate laws for adjudication of water disputes between States.[258]

Centre's role and jurisdiction with regard to water is reinforced by the use of circuitous route through the provisions of Entry 20 in the Concurrent List, namely, 'economic and social planning' by virtue of which major and medium irrigation, hydro-power, flood-control and multi-purpose projects have been subjected to the requirement of Central clearance for inclusion in the national plan. This has been questioned by some State governments, but the clearance requirement remains, and there is of course the requirement of Central clearances under the Forest Conservation Act and the Environmental Protection Act. This leads to a plausible conclusion that even without any constitutional amendments the centre can do a great deal in relation to water.[259]

3. SARKARIA COMMISSION ON CENTRE-STATE RELATION

In the light of federalism and water resource management, the aspect of inter-state water disputes is of prime importance. Considering the number of such disputes in the country, the impact of those disputes on our federal scheme cannot be ignored, because real federalism does not envisage a relationship between Centre and states but also between different states. In fact inter-state river water disputes in India have long been recognized as an important federal issue. The 'Sarkaria Commission'[260] on center-state relations (Government of India, 1988) presented an entire chapter to the problem, and made a series of recommendations. This commission paid attention to the issue of enforcement of tribunal awards. Section 6 of The Inter-State Water Dispute (ISWD) Act, 1956 says, The Union Government shall publish the decision of the

[258] Udita Saraf, *Inter-State river water dispute*, (March 31,2015), http://www.lawctopus.com/academike/inter-state-river-water-disputes/

[259] Shahbaz Ahmad, *Federalism In India with respect to flow of water*, (April 1,2015), http://www.lawyersclubindia.com/articles/FEDERALISM-IN-INDIA-WITH-RESPECT-TO-FLOW-OF-WATER-1482.asp#.VR04ufmUfOE

[260] Sarkaria Commission Report, Published BY GOVERNMENT OF INDIA, REPORT OF THE COMMISSION ON CENTER STATE RELATIONS 487-93 (1988).

Tribunal in the Official Gazette and the decision shall be final and binding on the parties to the dispute and shall be given effect by them. The commission report went on to suggest that the centre cannot enforce the tribunal award if a state government refuses to implement the award. It notes that the amendment of the act in 1980, inserting section 6A, which provides for an agency to implement a tribunal award, is not sufficient because such an agency cannot function without the cooperation of the states concerned. The Sarkaria Commission's recommendation is, therefore, that a water tribunal's award should have the same force and sanction behind it as an order or decree of the Supreme Court. Furthermore, the ISWD Act, Section 11 states that 'Notwithstanding anything contained in any other law, neither the Supreme Court nor any other court shall have or exercise jurisdiction in respect of any water dispute which may be referred to a Tribunal under this Act.'

One possible interpretation of this provision is that it does implicitly give water tribunals broadly an equivalent status to the Supreme Court, and their decisions must have the same force. Hence the centre can theoretically deal with a recalcitrant state by dismissing the state government. However, this penalty, the only one seemingly available, is so great that it is hard to imagine it being used solely for a water dispute, although it has been used extensively under other pretexts. Once again, the resolution of water disputes is complicated by being tangled in the general difficulties of centre-state federal issues. Thus the recommendation to amend the act might not get to the crux of the problem.[261] The Sarkaria Commission's other two recommendations related to placing time limits on constituting tribunals and having them deliver decisions. It says, it should be mandatory for the Union government to constitute a Tribunal within a period of one year from the date of receipt of the application of any dispute. These merely echoed the recommendations of the Administrative Reforms Commission nearly 20 years before. Another recommendation was that the centre could appoint a tribunal without being asked to do so by a state government, *suo moto*. A final recommendation was for the establishment of a national level data bank and information system. But none of these recommendations has been carried out yet.

[261] Alan Richard & Nirvikar Singh, University Of California, *Water and Federalism: India's Institutions governing Inter-State River Waters*, (April 1, 2015) , http://people.ucsc.edu/~boxjenk/waterdom.pdf

Over the years, there have been plenty of inter-state water disputes, which after a period of time lead to an agreement or an award. The awards of Krishna, Godavari, and Narmada tribunals are the examples of conflict resolution. And subsequently there have been post- awards disputes too, like the Telgu- Ganga project. One instance in which the conflict-resolution have not worked is the case of Ravi- Baes waters. In this case, Canal irrigation was extensively used in the Indus basin. By 1919, several projects were on the verge of being finalized, including the Sutlej project, the Sukkur Barage project and the Bhakra project. But despite the Bahawalpur's objections, the Sutlej Valley Project was completed by 1932. This lead to the appointment of Anderson committee, to make reports about the dispute. The committee made unanimous recommendations which were accepted by the State parties and GOI. Later the Sindh's even complained and Rau Committee was appointed in 1941. But, the contestants, Punjab and Sindh, rejected the recommendations. By 1945, an agreement was reached , but before a final decision could be taken, the country was partitioned.

Also, several inter-state water dispute came up before the Supreme court with reference of competence of Tribunal, non-implementation of order of Tribunal, failure on the environment and rehabilitation fonts, etc. In each case what went before the Supreme court was more than the water-sharing issue, but some other legal and constitutional issue. Analysing the decisions of Supreme Court, we see that Supreme court has pointed to the constitutive tension between "we the people" and "sovereign socialist secular democratic republic" of India. Inter-state disputes over water are of two types. One type of dispute relates to the rights of states and scope of their rights within the Union. With the exception of reopening the terms of unification, the states may apply to the Supreme Court to resolve questions of rights flowing from the constitution. Inter-state rivers; on the other hand do not involve questions of rights flowing from the constitution itself.[262]

4. THE CAUVERY CASE

The most recent controversial water-dispute is the one between Karnataka and Tamil Nadu regarding the Cauvery waters. Though Kerala and Pondicherry are also parties to the dispute, but because of the intractable stance taken by Karnataka and Tamil Nadu, the dispute is primarily

[262] Udita Saraf, *Inter-State river water dispute*, (April 2, 2015), http://www.lawctopus.com/academike/inter-state-river-water-disputes/

between these two states. The whole dispute revolves around the issue of re-sharing of waters that are already being fully utilized. The Cauvery has been an important matter since 1947 after the collapse of 50 years old agreement between Madras Presidency and princely Mysore state. The Cauvery Basin is an Inter-State basin covering areas in Kerala, Karnataka, Tamil Nadu and Karaikal region of Union Territory of Pondicherry. Use and development of Cauvery Waters were regulated by agreements of 1892 and 1924 between the erstwhile Princely State of Mysore and Province of Madras. In 1947, India won independence from the British. This changed the equation massively. Tamil Nadu was carved out of the Madras Presidency and Mysore province along with other Kannad speaking areas became the State of Karnataka. Further in 1956, the reorganisation of states took place and state boundaries were redrawn. Coorg (the birth place of Kaveri) , became a part of Mysore state. Huge part of Hyderabad state and Bombay presidency joined with Mysore state. Parts of Malabar which was earlier a part of Madras Presidency went to Kerala. Pondicherry became an Union territory by 1954. These changes lead to Kerala and Pondicherry, jumping into the fray and complicated the matters greatly. By 1960s, both the states, Karnataka and Tamil Nadu, and the Central Government began to realize the gravity of the situation, as the tenure of agreement was approaching its end. Consequently, negotiations were held, but did not result into any fruitful decision. From 1972-1990,there was ayacut development and change in inter-state utilization of Cauvery waters, and claims from riparian states became divergent. Thus, the state of Tamil Nadu requested the government of India to constitute a Tribunal under ISWD act, 1956. Consequently, the Tribunal gave an Interim order. Firstly, Karnataka was directed to ensure that 205 TMC feet of water was made available at Metter, from its reservoirs in a twelve-month period from June to May until the final adjustment of the dispute by the Tribunal. Secondly, Karnataka was directed not to increase its area of irrigation from the Cauvery waters beyond 11.2 lakh acres. Following the interim order, Karnataka witnessed its worst anti- Tamil riot, and the State of Karnataka rejected the interim order, and issued an ordinance seeking to annul the Tribunal's award. However, Supreme Court struck down the ordinance issued by Karnataka and upheld Tribunal's award. In 1995, again with the bad monsoon, Karnataka found itself unable to fulfil the interim order. Tamil Nadu approached the Supreme Court demanding the immediate release of at least 30 TMC, which the apex refused to entertain. The Cauvery Water Disputes Tribunal examined the case and recommended that Karnataka release only 11 TMC, which was again rejected by Karnataka.

Tamil Nadu went back to the Supreme Court demanding that Karnataka be forced to obey the Tribunal's order. Yet again the mechanism failed and a series of controversy continued for over a long span of time. In 2007, final award was given by the tribunal after holding many discussion and debates for almost 17 years. It was decided that Tamil Nadu will get 419 thousand million cubic ft(against the demand for 562); Karnataka 270 thousand million cubic; Kerala 30 and Pondicherry 7 thousand million cubic ft. Karnataka will have to release 192 thousand million cubic ft on a yearly basis and from that 7 thousand million cubic ft will be diverted to Pondicherry. Also, some quantity of water was reserved for the purpose of environmental protection and inevitable escapade into the sea. The order was accepted by Tamil Nadu and Pondicherry but the government of Karnataka was not satisfied with it and it lead to massive protest in the state. In pursuance of the 2007 award, Cauvery Water (Implementation of the Order of 2007) Scheme, 2013 a temporary body was introduced by the government which is given the responsibility of implementation of the decision of the Cauvery Water Dispute Tribunal. However, the order is yet to be implemented as a Special Leave Petition on the matter remains pending in the Supreme Court.

5. DISCUSSION AND DEBATE

The ISWD Act, Section 11 states that notwithstanding anything contained in any other law, neither the Supreme Court nor any other court shall have or exercise jurisdiction in respect of any water dispute which may be referred to a Tribunal under this Act. Clearly, disputed issue is whether the federal courts should have power to hold federal laws, and laws of the nations (or states) in the federal union, void for inconsistency with the federal constitution. It is believed that a deep understanding of the matter along with the constitutional provisions will show that this is essential. The varieties of mechanisms available under the Constitution of India for the settlement of inter-State disputes are Article 262, 263 and Article 131. Article 262 of the Constitution starts with a marginal note “Adjudication of disputes relating to waters of inter-State rivers or river valleys”. It empowers the Parliament to enact any law for the adjudication of any dispute with respect to the use, distribution or control of the waters of, in any inter-State river or river valley. Under this Provision ISWD Act,1956 was enacted but the result of it, as we have seen, is complete failure in the present case. Article 263 contemplates for Inter-state council to be constituted by the President for the settlement of dispute but this provision has been rarely

used. Article 131 provides for another alternative mechanism for inter-state water dispute. The article is based largely on its antecedent i.e. section 204 of the Government of India Act, 1935. It provides for the dispute settlement among the states and between the union and the states. But the proviso of 131 excludes the Court's jurisdiction in respect of certain treaties, etc. Article 131 can only be invoked if so far as the dispute involves any question on which the existence of a legal right which has been elaborately construed by the Supreme Court in various cases. The two levels of government created in essence by federalism, make river dispute a complex one.[263] Article 262 of the Constitution and the ISWD Act 1956 enacted under it are important components of our federal structure. In terms of these provisions the award of a tribunal set up under the ISWD Act is final and binding on the states concerned, and there can be no appeal to Supreme Court against such an award, though there is a procedure for reference back to the tribunal within a limited period of time. The intention of this kind of legislation was to obviate recurring and prolongated inter-state disputes. The award granted by the Tribunal is virtually a decision of Supreme Court. However, if the decision by the Tribunal is permanent and binding then, there can be no question of it being rejected, as we saw it in the Cauvery case. The Karnataka govt sought to nullify the interim order through Ordinance. Though the Supreme Court rejected and established the ordinance as unconstitutional, still there emanates a danger for the future of federalism.

Article 262 would also have been better if the constitution provided a machinery for dispute resolution, and it would not be left to the parliament to provide the same. 5 years passed before the Inter-State Water Disputes Act was passed in 1956. Article 262 grants power to make a law; it does not impose a duty, for no court can issue a mandamus to the legislature to make a law.[264] Also no provision of the Constitution can be held ultra-vires, but any law, or part of law made under Article 262 can be held ultra-vires.[265]

It is also possible to express doubts in the constitutional provisions regarding it. Entry 17 in the State list specifically mentions the uses of water such as water supply, irrigation, etc.

[263] Mr. Naresh Pareek , *Cauvery Dispute: An Instance of Judicial Fallacy*, Manupatra, (April 3, 2015), http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=de3747ec-c2c9-4d14-a75a-a7df26347aa2&txtsearch=Subject:%20Environment.
[264] Seervai H.M., Constitutional Law of India, Vol.3 (4th Edition) pp. 3243
[265] Ibid

The word 'water' may doubtlessly includes groundwater, but there is no reference of the latter. The centre has been given a role in relation to inter-state rivers and river valleys, but it is conceivable that the intervention by one state in the flow of water, may cause social and environmental consequence in other state. Constitution has not recognized any such consequences. Though under 42nd Amendment of 1976, reference to protection of environment, forest, wildlife were introduced in Articles 48A and 51A, and thus two entries were added to the Concurrent List. But there is no explicit evidence of awareness of water being a natural resource or awareness of traditional community managed systems of rain-water management, or the role of civil society in this regards. However , some of these perceptions and concerns being very recent, the constitution makers cannot have possibly foreseen these lacunas and developments. It cannot be possible on the part of Constitution makers to spell out sectoral policies in details.

CONCLUSION

The Inter-state water disputes basically is resolved and settled either through negotiations or though legal adjudication. But in the pure-conflict situation, which is very relevant in India's inter-state dispute scenario, a search for negotiation may be futile, and a quick move to arbitration or adjudication may be more efficient. However, in India this process is slow as well as binding arbitration does not exist. The threat of rejecting an argument, has been the source of various post-award disputes. This has cause inconvenience in several levels of water sharing framework. Inefficient levels of investment by the individual, non-agreeing states, generating a diversion of scarce investment resources, as well as inefficient use of the water itself are some of the cons[266]. Extreme delays in constituting Tribunals has also been a costly feature in the process of water disputes. The Narmada Tribunal was constituted in 1969 while Gujarat had lodged a complaint in 1968 but the dispute itself dates back to 1963. Tribunals have taken long periods of time to give their awards. It took nine years from reference in the case of the Narmada Tribunal, four years in the case of the Krishna Tribunal and ten years in the case of the Godavari Tribunal. All these together, can have an negative impact in the economic condition of the country, as well as the centre-state federalism. The present constitutional position with relation to water is not promising. Thus, we would argue that these impacts can be reduced by a more efficient design of

[266] Alan Richard & Nirvikar Singh, University Of California, *Water and Federalism: India's Institutions governing Inter-State River Waters*, (April 1, 2015) , http://people.ucsc.edu/~boxjenk/waterdom.pdf

mechanisms for negotiating interstate water disputes, some of the possibilities include a national water commission independent of daily political pressures, a federated structure incorporating river basin authorities and water user associations, and fixed time periods for negotiation and adjudication.[267]

[267] Ibid