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IS FAMILY LAW TEACHING IN INDIA PREJUDICED?

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ABSTRACT

This paper examines the teaching methodology for family law in contemporary Indian law schools. We draw from the experiences of teaching family law as a core subject to the second year B.A., LLB classes. What are the main themes that we teach under family law and what are the perspectives that we impart within these thematics? As many of the premier law schools now adopt the Langdell method of learning legal principles through case law, we evaluate the main recurring cases that we teach in the Family Law I course, and propose that the contents and the course structure must reflect a constitutional morality instead of a familial ideology and dominant societal outlook.

I. INTRODUCTION

What are we teaching students of law in law schools? Duncan Kennedy argued that legal education can be seen as training for hierarchy as law schools prepare their students for future hierarchies in the legal profession, by presenting unjust solutions as legal thinking and hierarchical gender, race and class relations as normal.[1] It has been argued that a law school's ethos prioritizes corporate jobs, thus focuses on corporate law training which turns social science subjects into unwanted add-ons.[2] Yet we teach various law subjects in law schools and non-legal core courses and a detailed study and discussion around teaching methodology of these subjects as a knowledge base, as well as discourse creation, must be undertaken. We attempt to do the same with regard to the family law.

What kind of perspective of family and family law do we impart in law schools? Do we demonstrate to students an unjust archaic legal system or an equality oriented futuristic system? We study cases of bigamy

[1] Duncan M. Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEG. ED.591,593 (1982).
[2] *Id.*

such as *Bhaurao Lokhande v. State of Maharashtra*[3] and *Navalkar v. Meena Arun Navalkar*[4] which shows that despite the Hindu Marriage Act, 1955 prohibiting a second marriage, Hindu men continue to have more wives and that the first or the second wife has very little recourse in law. We see that Hindu marriage Act, 1955 illegalizes child marriage and even prescribes imprisonment[5] but does not invalidate such marriages.[6] The arrests under this provision have not only been low but the provision has also failed to curb child marriages. 1,785 child marriage cases were registered across India between 2014 and 2016 and 4,777 people were arrested. While the arrests were in large numbers, only 274 were convicted.[7] As future female citizens of India and women lawyers, what are our students learning from us?

This paper considers the course structuring and framework of family law courses in contemporary Indian law schools in order to evaluate the dominant narratives and perspectives imparted through the Socratic method of learning principles through case law. We analyze some of the main themes that students study in a semester of Family Law I in the second year of the B.A., LL.B. degree, which focuses on matrimonial laws dealing with marriage, divorce, maintenance, guardianship, and adoption. In this investigation, we highlight not only the development and regression of family law jurisprudence, but also the kind of perspectives - benign or critical, familial or feminist – that guide our teaching of such jurisprudence in Indian law schools.

It is found that external hierarchies are often reinforced in legal education which may play a significant role in influencing state action and societal outlook. This paper argues that the contents and the teaching pedagogy in law schools must reflect a constitutional morality instead of a familial ideology and dominant societal outlook. Instead of only discussing constitutional principles in courses dedicated to constitutional law, an integrationist approach should be adopted in engaging with these narratives in courses like Family Law-I so as to inculcate a critical approach towards the law, and underpin legal education with values that the Constitution represents and seeks to preserve

II. THEORETICAL FRAMEWORK

[3] Bhaurao Lokhande v. State of Maharashtra, AIR 1965 SC 1564.

[4] Navalkar v. Meena Arun Navalkar, AIR 2006 Bom 342.

[5] Hindu Marriage Act, 1955, § 18, No. 25, Acts of Parliament, 1955 (India).

[6] Venkataramana v. State, AIR 1977 AP 43. *See also* Ravi Kumar v. The State, 124 (2005) DLT 1.

[7] INDIA TODAY, https://www.indiatoday.in/mail-today/story/child-marriage-national-commission-for-the-protection-of-child-rights-ministry-of-women-and-child-development-1036790-2017-09-03 (last visited Nov. 20, 2019).

"*Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only top dressing on an Indian soil, which is essentially undemocratic.*"[8]

The primacy and transformative potential of the constitutional values must be cultivated in the society by the State organs and its citizens. The role of the law and legal education in the same is very crucial. The legislations, cases, legal principles and legal reasoning must reflect the constitutional values and principles. However, we witness a stray from these principles and instead we see a reinforcement of familial ideology and dominant normative structures. In this paper, we illustrate the deviation from constitutional morality in the field of Family Law and the need for the constitutional values to be entrenched in classrooms and course frameworks. In this section we examine the tools of analysis we employ in this paper, namely, the concept of a) constitutional morality and b) familial ideology, the latter takes precedence and the former is necessary in State action, including judicial decisions.

(A) CONSTITUTIONAL MORALITY

The concept of constitutional morality, while innately important draws great significance in India in its invocation by Dr. B.R. Ambedkar in the Constituent Assembly.[9] A symbol of strength for backward classes, and an architect of contemporary constitutional order, Ambedkar's remarks on constitutional morality draw immense importance not just for minorities but for all Indians alike.

"The diffusion of 'constitutional morality', not merely among the majority of any community, but throughout the whole is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendance for themselves."[10]

What does Constitutional Morality mean? A definitive understanding of the same was provided by a judgment of the Ontario Court of Appeal[11]:

[8] This is a quote from B.R. Ambedkar's speech on November 4, 1948 while introducing the draft constitution for debate. A.G. Noorani, *Dynasty in Democracy,* FRONTLINE https://frontline.thehindu.com/the-nation/dynasty-in-democracy/article7002829.ece (last visited Apr. 3, 2015).

[9] Andre Béteille, *Constitutional Morality*, 43 ECONOMIC AND POLITICAL WEEKLY, 35, 42(2008).

[10] For easy access to the two Ambedkar speeches referred to in this text, see the selection, *The Constitution and the Constituent Assembly Debates*. Lok Sabha Secretariat, Delhi, 1990, pp. 107-131 and pp. 171-183. GEORGE GROTE, A HISTORY OF GREECE 93 (Routledge 2000).

[11] Gautam Bhatia, *Equal Moral Membership: Naz Foundation and the Refashioning of Equality*, SSRN (June 5, 2017), https://ssrn.com/abstract=2980862.

"When governments define the ambit of morality, as they do when they enunciate laws, they are obliged to do so in accordance with constitutional guarantees, not with unwarranted assumptions."

This was further invoked and expanded in the Delhi High Court judgement of *Naz Foundation v. NCT of Delhi.*[12] The Court held constitutional morality to mean "morality derived from constitutional values", distinct from "popular morality...based on shifting and subjective notions of right and wrong".[13] The Court held that the justification for a law should be based on constitutional morality and not public morality, while striking down section 377 of the Indian Penal Code. The Supreme Court of India has further entrenched the significance of constitutional morality in the landmark judgement of *Navtej Singh Johar v Union of India*[14]. While the judges on the bench had a different understanding about what the values were, it can be broadly conceived from both the Delhi High Court and Supreme Court judgement that the preamble and Part III of the constitution forms the foundation of constitutional morality.[15]

However, the development of jurisprudence in India regarding the place of constitutional morality in personal laws has been turbulent. In the case of *Harvinder Kaur v. Harmander Singh*[16], the Delhi High Court while upholding the constitutionality of restitution of conjugal rights held:

"*Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Article 21 nor Article 14- have anyplace.*"

This judgment was upheld by the Supreme Court in the case of *Saroj Rani v Sudershan Kumar*[17] without discussing the role of the Constitution in Family Law matters. Even in *Shayara Bano v Union of India*[18], the bench was divided on whether uncodified personal law would be subject to Part III scrutiny. In the case of *Indian Young Lawyers Association v State of Kerala*[19] ('Sabrimala'), the bench was also divided on the need of a

[12] Naz Foundation v. NCT of Delhi, 160 DLT 277 (2009).
[13] *Id.*
[14] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 .
[15] *Id.*
[16] Harvinder Kaur v. Harmander Singh, AIR 1984 Del 66.
[17] Saroj Rani v. Sudershan Kumar, AIR 1984 SC 1562.
[18] Shayara Bano v. Union of India, (2017) 9 SCC 1.
[19] Indian Young Lawyers Association v. State of Kerala, (2017) 9 SCC 1.

doctrine such as essential religious practices and whether the doctrine served any purpose in determining whether religious practices are subject to Article 14, Article 15, Article 19 and Article 21 of the Constitution of India. It is important to understand that the adoption of the concept of constitutional morality in Indian jurisprudence is still nascent and requires conciliation with other juridical creations such as essential religious practices.

(B) FAMILIAL IDEOLOGY

The feminist pedagogy following an integrated approach discussed subsequently aims to challenge the separation between the public and private sphere that is rooted in the liberal paradigm. However, it is important to understand how the separation operates in legal education. Ratna Kapur and Brenda Cossman suggest that this separation and isolation of the domestic sphere is a product of the State's adoption of familial ideology within the legal framework. Kapur and Cossman[20] propose that family is the primary instrument of patriarchal ideology. They say:

"*Family, does not, simply describe the empirical reality of kinship or household structures, but has additional ideological dimension: it is a discourse through which certain relationships are given meaning; through which this meaning is naturalized and universalized and through which unequal power relations are obscured and legitimated.*"

They further assert that familial ideology is founded to serve the naturalization of the allocation and distribution of gender roles. The normalization of women's roles as mothers and wives in the domestic sphere due to their reproductive function is a product of this familial ideology. The state has a very important role in entrenching familial ideology in society and public life. Kapur and Cossman suggest:

"*This dominant familial ideology has both shaped and reinforced the public/private distinction, and the construction of the family as private. This understanding of the family as private, and beyond state intervention has operated to both immunize the oppression of women within this domestic sphere, as well as to obscure the extent to which this private sphere is itself created and protected by state regulation."*[21]

While teaching these State regulations, familial ideology is established in legal education as well. While teaching, it is important for both students and the tutor to be aware of the operation of this ideology. With

[20] RATNA KAPUR ET. AL., SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA (Sage 1996).
[21] *Id.*

a dominant understanding that positive law is objective, it is important that a critical approach is adopted in challenging this innate and pervasive paradigm. While it is important that the aforesaid method is adopted in all subjects, it becomes crucial to use the same in subjects like Family Law- I to introduce and reinforce this ideology in the legal framework.

The classroom being hierarchical often resembles a patriarchal family with a teacher/instructor as the head of the family. However, it is important to note that the flow of power is dynamic in nature. Power is not always exercised in a unidimensional manner. The various constituents in a classroom, the instructor, the teaching assistant and the students do not belong to a homogenous socio-economic category. The difference in their socio-economic status determines the flow of power. Thus, the hierarchies in the classroom render the perceived objectivity in teaching pedagogy also illusory. Legal education and courses such as Family Law - I are not immune to this illusion.

III. METHODOLOGY

In this paper, as we examine the pedagogy of teaching Family Law-I, we analyze the curriculum in contemporary law schools in India. This paper provides a course review with an emphasis on the need to inculcate constitutional morality based on both a quantitative and qualitative study. The paper includes insights of both a family law teacher and her Teaching Assistants; thereby providing a plurality in perspective. In doing so, we will explore four themes in the Family Law-I course namely-1) Cruelty, 2) Caste, 3) Religion, and 4) Custody and Guardianship. The scrutiny of these themes will be based on cases listed in course manuals and statutes (bare Acts). We have used course manuals from five law schools in India- Jindal Global Law School, National Law University Delhi, National Academy of Legal Studies and Research (NALSAR), Gujarat National Law University and Symbiosis Law School. The cases analyzed are taught commonly in all or most of the aforementioned law schools.

IV. THEMES IN FAMILY LAW

(A) CRUELTY

While India has seen a remarkable shift in the discourses and awareness around sexuality issues in the past decade, domestic abuse of women has received sparse attention. From the societal and legal response to the 2013 *Nirbhaya rape case*, we moved from 'victim blaming' in sexual assault to trying to bring perpetrators of assault against women to justice, at least to some extent. The bloom of MeToo campaign in 2017 saw a striking move in understanding of sexual harassment at workplace- in media, films, academia and so on.

Violence against women has taken a political centre-state. Yet, it seems, all this development of violence against women has been focused on the public arena. There has been very little discussion forthcoming on the violence against women within the domestic sphere. The Protection of Women from Domestic Violence Act was passed in 2005 but adequate empirical research has been undertaken to evaluate its outcomes. This trend continues in teaching of law as we notice in family law class. The most recurring cases in the course manuals of top law schools represent the same.

Cases of cruelty that we teach are [22] *('Dastane')*, *Naveen Kohli v. Neelu Kohli*[23], and *Bhagat v. Bhagat.*[24] These cases are striking in their similarity since they are all mental cruelty cases and of that of cruelty committed against the husbands by the wives. The *Dastane* case is a landmark case of 1950s in which a well to do, educated couple had marital discord for years and the husband had charged the wife with mental cruelty. The Court surmised that constantly nagging the husband, locking him out of the home, threatening to burn the house and herself, ill-treating and beating the children amounts to cruelty. But the Court could have also commented in this case that the husband was equally irrational and unreasonable- he gave minute domestic instructions to the wife, wrote long and incessant letters and generally mistrusted her. Martial disputes can be shades of grey rather than mere black and white.

Many vital legal points emerged in this case which are pertinent, for students, to understand matrimonial cruelty in law: Firstly, though cruelty is called a "matrimonial offence", it does not refer to an offence as described in criminal statutes, and is rather a civil wrong. Hence the standard of proof doesn't have to be beyond reasonable doubt and is through preponderance of evidence. Secondly, to judge if cruelty took place, the court would not ask if a reasonable man would interpret an action as cruelty. The court realizes the diversity in humans and hence cruelty will be judged on an individual standard. Thirdly, the court clarifies that a marriage will face some wear and tear and hence that should not be treated as cruelty. Cruelty will be something graver and more than usual friction in a relationship. Fourthly, the court holds that that the educational and socio- economic standard of the people have to be taken into account while deciding cruelty. Lastly, the court holds that having sexual intimacy with your spouse does amount to condonation of cruelty. Condonation means forgiveness of the matrimonial offence and the restoration of the offending spouse to the same position as he or she occupied before the offence was committed. These points have remained relevant till now in thinking about mental cruelty within a marriage.

[22] Dastane v. Dastane, AIR 1975 Bom 1534.
23 Naveen Kohli v. Neelu Kohli, AIR 2004 All 1.
[24] Bhagat v. Bhagat, (1994) 1 SCC 337.

While mental cruelty must be defined and made relevant to the matrimonial disputes, the cases of physical, sexual, financial cruelty – the sheer battering and butchering of wives, deprivation of women and children through denial of food, medicine and other necessities so common to our society is missing from the auspices of cruelty in family law.

The National Family Health Survey 2015-2016 [25](NHFS-4) released by the Ministry of Health and Family Welfare states that one in every three women, above the age of 15, has faced domestic violence in different forms in India. The husbands have mostly been the perpetrators of domestic violence in a matrimonial home. Statistics suggest that thirty-one per cent (31%) of married women have been subject to physical, sexual, or emotional violence by their husbands. This narrative remains absent in cases like *Dastane* and in the classrooms where the course manual only highlights the aforementioned cases. In fact, it is reported that the most common form of violence by a husband is physical violence (27%), and then followed by emotional violence (13%). The reportage of the same is also worrisome as only 14 per cent of women who are subject to this violence seek help.[26]

The Constitution of India guarantees every individual right to life and right to live with dignity under Article 21. Furthermore, it also guarantees right to equality and right to non-discrimination under Article 14 and 15, respectively. In the case of *Francis Coralie Mullin v. Union Territory Delhi, Administrator*,[27] the Supreme Court stated:

"*Any act which damages or injures or interferes with the use of any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21.*"

The celebrated case of *Vishaka and Ors v. State of Rajasthan*[28] emphatically held that violence against women including sexual violence is an infringement on her right to life and liberty. However, the cases taught under cruelty and the neglect of cases dealing with physical and sexual abuse of women by their husbands does not reflect the constitutional ethos. The cases of cruelty discussed above further reiterate familial ideology

[25] IIPS http://rchiips.org/nfhs/NFHS-4Reports/India.pdf (last visited Oct. 30, 2019).
[26] NEWS18, https://www.news18.com/news/india/the-elephant-in-the-room-every-third-woman-in-india-faces-domestic-violence-1654193.html (last visited Jan. 20, 2019).
[27] Francis Coralie Mullin v. Union Territory Delhi, Administrator, (1981) 2 SCR 516.
[28] Vishaka and Ors v. State of Rajasthan, AIR 1997 SC 3011.

in designating roles to men and women. Women are always seen as the nagging, unreasonable, irrational hysterics. These cases further entrench these stereotypes in students while discarding possible violence by husbands. The patriarchal nature of designating emotional cruelty as a tool of violence by women against men and ignoring and thereby normalizing violence by men against women, the Family Law I course as taught in law schools today abandons constitutional morality and upholds familial ideology.

(B) CASTE

While caste is not directly part of the family law syllabus, it appears in ways that it reinforces the dominant discourse. A discussion of caste is imperative to Indian family law as Indian marriage, not only for Hindus but also for other religious communities, operates within the logic of caste patriarchy wherein marriages are mostly arranged by elders of the family within the same caste and sub-caste. Family law course instruction tends to make references to gender, position of women within family but without due intellectual orientation on caste patriarchy i.e. how women's position within family is connected to caste discourses. To elucidate this point, we refer to cases in course manuals as well as the bare act.

1. *Leelamma v. Dilip Kumar*[29]

In this case, the wife had consented to marry the husband on the assumptions that:

i. The husband was Christian;
ii. His parents were Christian; and
iii. They belonged to an ancient Christian family.

All of these were false. The husband was a recent convert. In fact, he converted only after the wife had consented to marry him. When she went to live in the husband's family home, she realized that his parents were Ezhava and not Christian. Further, he took her jewelry and made her have sexual relations with his friends. Among all the marital offences of the husband, this is paid the least attention to. Forcing your wife to have sexual relations with others could constitute serious offences under penal provisions like Immoral Traffic Prevention Act, 1986 and abetment to rape under Section 109 of the Indian Penal Code, 1860.

But the case mainly focuses on who is a Christian and where to place the husband on the purity status ladder. For instance, converts are considered socially inferior in status and members of the ancient families do not

[29] Leelamma v. Dilip Kumar, AIR 1993 Ker 57.

marry converts. With this case, we are imparting to the students that even within the law, ascribed status of an individual i.e. something he inherits rather than earns himself, is vital to a valid marriage.

2. *Velusmay vs. Pachai Ammal*[30]

The judgement states that not all live-in relationships will amount to a relationship in the nature of marriage to fall within the ambit of the Protection of Women from Domestic Violence Act, 2005 ("**PWDVA**") . The conditions discussed above must be satisfied and the same must be corroborated by appropriate evidence. If a man has a *'Keep'* who he uses mainly for sexual purposes and/ or as a servant and merely provides financial support, it would not be a relationship in the nature of marriage.

The Court explains that this view would exclude many women who have had a live-in relationship from the benefit of the PWDVA. But it is not for the court to legislate or amend the law. The Parliament has used the words, '*in the nature of marriage*' and not live-in relationship. The court under the garb of interpretation cannot change the language of the statute.

However, looking at the language of the PWDVA itself, we see that the other interpretation is equally possible. The domestic relationship is defined as a relationship between two persons who live or have, at any point of time, lived together in a shared household, and 'Shared Household' is defined as a place where the aggrieved person lives, or has lived at some point, with the respondent in a domestic relationship.

Even in the case of *Indra Sarma v. V.K.V.Sarma*[31], the Supreme Court held that the woman was in the status of a concubine or a mistress, who cannot enter into a relationship in the nature of marriage and thereby, she is not entitled to various reliefs available under the PWDVA. The Court further observed that despite the relationship with a concubine or a mistress being of long duration, the same cannot be in the nature of marriage. In this particular case, the woman not having any independent source of income was not entitled to any maintenance.

[30] Velusmay v. Pachai Ammal, (2010) 10 SCC 469.
[31] Indra Sarma v. V.K.V. Sarma, 2014 (1) RCR (Crl) 179 (SC).

By a cursory read of the definitions, one can see that any woman could fit into the legal intent of protection- even if she was just "used" for sexual services and domestic work, as the factum of living together is more important than the intention of the man. In fact, whether or not the man intended to give the woman the status of 'wife' ought to be irrelevant for this law that tries to offer financial security to an extended number of women living in a variety of relationships with men. Further the legal conception of marriage itself can be construed as being focused on sexual and domestic services by wife to the husband and in return being maintained by him financially. Case laws on 'restitution of conjugal rights' and on 'maintenance' show evidence of this.

The constitutionality of the concept of restitution of conjugal rights as enshrined in section 9 of the Hindu Marriage Act, 1955 was challenged in the case of *T. Sareetha v. T.Venkata Subbaih*[32], in which the court held that:

"*Sexual cohabitation is an inseparable ingredient of a decree for restitution of conjugal rights. It follows, therefore, that a decree for restitution of conjugal rights passed by a civil court extends not only to the grant of relief to the decree-holder to the company of the other spouse, but also embraces the right to have marital intercourse with the other party.*'

While in the case of *Harvinder Kaur v. Harmander Singh*[33], the court held that the right to cohabit was different from the right to resume sexual intercourse, sexual intercourse is still considered to be of paramount importance in a marriage. The Harvinder Kaur judgement was later upheld by the Supreme Court. Further in the case of *Kailash Wati*, it was held that it is the duty of the husband to earn and provide for the family while it is the duty of the wife to cohabit with him. The duty of the husband to provide financial security is also reiterated in many maintenance cases and in the Special Marriage Act, 1954, however, wife is not required to provide any maintenance under Section 36 and 37. This further entrenches familial ideology instead of constitutional values such as equality and liberty.

Why then does the Court make a difference between a woman who is kept for 'service' and a woman who is kept for marriage? The difference is of caste and class of the woman- between a service class/ caste woman as against a middle or upper caste/ class woman. Marriage in a caste patriarchy is not between two individuals who share a household, responsibility and bed. It is 'kanyadan' where a virgin daughter is 'gifted' to a suitable

[32] T. Sareetha v. T.Venkata Subbaih, AIR 1983 AP 356.
[33] Harvinder Kaur v. Harmander Singh, AIR 1984 Del 66.

groom arranged by clan elders within caste, outside gotra etc[34]. The purpose of marriage is to produce progeny of pure blood. Hence while sexual liaison is possible, even desirable with lower caste women, marriage and legitimate children is possible only with the woman of the same caste[35]. If the court applies the same logic of caste patriarchy to contemporary conjugal cases, apparently a 'service class' woman cannot be assumed to be in a 'marriage like relationship'. Even where the legislation is specifically meant for expansion of protection to women in obscure, 'not fully legal' conjugal relationships, the discourse of caste patriarchy that guides the perspectives of judges makes it difficult to obtain protection of law.

(C) RELIGION

Following the colonial practice of non-interference in the domestic sphere, the Indian state, post-independence, has avoided the enactment of uniform matrimonial laws and enabled the existence of plurality of religious laws in matrimonial matters. In a country like India, where there is a clear religious majority, it is important that a course like Family Law- I is taught with an understanding of the political context in which the laws were enacted and the cases were decided. A reading of the course manuals suggests that most law schools do not teach Christian Law, Parsi Law or the Goan Civil Code. The preference given to the majoritarian Hindu Law is evident. While Muslim law is taught in most law schools, there is an emerging need to teach the same with a critical perspective in the current political environment.

The popular public narrative is that Islamic laws are misogynistic and regressive. The same rhetoric was employed by right-wing groups during the case of *Shayara Bano v. Union of India*[36] (popularly known as the triple talaq judgement) and the Triple Talaq bill. Sylvia Vatuk, in discussing the development of Islamic Feminism, suggests that Muslim women are using the Qu'ranic principles and not the Indian Constitution or universal gender equality principles to ensure gender equality within Muslim personal law. Muslim personal law or Sharia law has embedded within it certain constitutional values and principles. In this section, we showcase the innate constitutional morality in Muslim personal law and how the same must be highlighted in the course. We do so, using the concepts of mehr, option of puberty and divorce rights.

[34] Ambedkar calls this superimposition of exogamy on endogamy – where you must marry within caste i.e. Endogamy but must marry outside of Gotra or a particular group i.e. Exogamy. As Uma Chakravaty states, Honour and respectability of the caste depends upon its women and is protected by guarding their bodies. The upper caste women are the object of moral panic in this scheme, as the purity of the caste depends on them. Endogamy, i.e. marriage within caste and sub-caste, is crucial, along with total control of women's sexuality. This is ensured through rituals, mythology and ideology. UMA CHAKRAVARTI, GENDERING CASTE: THROUGH A FEMINIST LENS (Stree 2003).

[35] ANUPAMA RAO, THE CASTE QUESTION: DALITS AND THE POLITICS OF MODERN INDIA 235 (University of California Press, London).

[36] Shayara Bano v. Union of India, 2017 SCC Online SC 963.

1. *Mehr*

The trajectory of events surrounding the granting of maintenance to a Muslim wife under §125 CrPC paints a picture that Muslim law is not amicable to change and continues to be regressive. Most Family Law- I courses trace this trajectory to the judgement of the Supreme Court in the case of *Mohd. Ahmed Khan v. Shah Bano Begum* [37]granting Muslim women the right to maintenance under Section 125 of the CrPC and the reversal of the same vide the enactment of The Muslim Women (Protection of Rights on Divorce) Act, 1986. However, the concept of Mehr which preceded the positive law's concept of maintenance has granted women the financial support not as benevolence of the State but as a right and as consideration in the contract of marriage.

Mehr or Dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage. The sum to be paid maybe fixed before, at the time or after the marriage has taken place. Even if the mehr sum is not fixed, the wife is entitled to the same by law. In fact, in the case of *Mohd. Ahmed Khan v. Shah Bano Begum,* it was held by the Supreme Court that:
"*These Aiyats [verses of the Quran] leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teachings of the Quran.*"[38]

As stated by Lucy Carroll:

"*[The court] Having already held that section 127(3)(b) did not indemnify the Muslim husband against a maintenance order under section 125 if his ex-wife were in need and unable to maintain herself, and that the provisions of the Criminal Procedure Code would take precedence over the rules of Muslim law if the two were in conflict, the conclusion that Muslim law obliged the husband to maintain his ex-wife merely meant that there was no conflict between the terms of the Code and the rules of Muslim law.*"[39]

[37] Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945.
[38] *Id.*
[39] LUCY CARROLL AND HARSH KAPOOR (EDS), TALAQ-I-TAFWID: THE MUSLIM WOMAN'S CONTRACTUAL ACCESS TO DIVORCE 200 (WLUML, 1996).

In the case of *Abdul Kadir v. Salima And Anr*[40], it was held the right to payment of mehr was not inferior to the right to cohabit that arises from marriage. The right to payment of mehr is a fundamental right that arises from the contract of marriage.

2. *Option of Puberty*

The Prohibition of Child Marriage Act, 2006 renders child marriages voidable at the option of the party who was a child at the time of marriage. This gives the party agency once she has attained majority in choosing to be in the marriage. It also prevents desertion which would be rampant in case the child marriages were held to be void. This progressive, secular positive law was adapted from the concept of option of puberty in Muslim law. If a Muslim minor has been married during minority by a guardian, the minor has the right on attaining majority to repudiate such marriage. This is called *Khiyar-al-bulugh* (Option of puberty). Clause (vii) of Section 2 of Dissolution of Muslim Marriages Act 1939 codifies this right for Muslim women. In *Batoolan v. Zahoor Shah Roshan*[41], the court explained the importance of the option of puberty under Muslim Law:

"*On one hand, it encouraged the principle of mutual liking, which is regarded as a sure foundation of a happy married life, and on the other hand it puts a curb on the tendency prevalent in ancient society to perpetuate child marriage for fear if it's repudiation by either party on attaining majority.*"

It is also interesting to observe that the Hindu Marriage Act, 1955 was amended in 1976 with the addition of a new ground for divorce under § 13 giving a Hindu wife the right to seek divorce under § 13(2)(iv) if "her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years." As noted by Caroll, this amendment is clearly borrowed from the concept of Option of Puberty. In the case of *Tara Bano v. Iqbal Mohd.*[42], it was held:

"*…it is not necessary for Muslim lady to obtain a decree for dissolution of her marriage after she exercises her option of puberty (Khyar-ul-Bulugh) upon attaining the age of puberty i.e. 15 years.*"

[40] Abdul Kadir v. Salima And Anr , (1886) ILR 8 All 149.
[41] Batoolan v. Zahoor Shah Roshan, AIR 1952 MP 30.
[42] Tara Bano v. Iqbal Mohd, AIR 2009 Raj 82.

Thus, it is recognized on par with a divorce granted by the judiciary. The agency given to women through the option of puberty is revolutionary even in contemporary times.

3. *Divorce*

While many religions do not recognize the right to divorce or do so in a restricted manner, Sharia law has given women the right to divorce their husbands. Women's right to divorce in Sharia law is supplemented by statutory provisions, however it maybe pertinent to note that the uncodified personal law has been an egalitarian precursor to secular modern law. Following are the main forms of divorce by women recognized under Sharia law:

i. Delegated divorce or *Talaq-i-Tawfid*: In this form of divorce, the husband has the power to delegate his own right of pronouncing divorce to his wife. The popular way of doing the same is through an agreement by which the husband authorizes the wife to divorce herself from him based on conditions stipulated in the contract such as upon the husband taking a second wife. This gives the woman the same rights as the Muslim man to divorce without the interference of a court of law even though based on a contract.
ii. *Khula*: This form of divorce is loosely based on contractual principles, where the contract of marriage can be terminated by the wife in lieu of sacrifice on her part. The wife may for example choose to renounce a part of the mehr payable to her in lieu of divorce.
iii. *Mubarat*- This form of divorce is similar to present day understanding of mutual consent divorce wherein both the parties to a marriage want a divorce and the same can be initiated by either party.
iv. *Li'an*- It refers to the right of a Muslim woman to divorce her husband if he falsely accuses her of adultery. The Sharia law has provided a potent tool in the hands of woman to live with dignity as guaranteed by the Indian constitution.

(D) CUSTODY AND GUARDIANSHIP

The Guardians and Wards Act, 1890 was an introduction of the colonial regime in the India. This Act gave the district courts power to appoint guardians and custodians of children. It is important to keep in the mind that custody and guardianship are two distinct concepts. These concepts play an important role in familial ideology as they ascribe certain roles to the men and women in the family. The present legal regime further solidifies these gender roles in their statutes and judicial precedents. The concept of natural guardian maybe

scrutinized to decipher how the familial ideology has played an important role in enacting the concerned legislation.

A guardian is a person who has rights and duties with respect to the care and control of a minor's person or property. Guardianship includes the right to make decisions about the minor's upbringing, disposal of his/her property, etc. The natural guardian of a minor is the person who is legally presumed to have a natural right of guardianship over the child. Personal laws dictate who will be natural guardian of a minor.

The Hindu family is a patriarchal unit with considerable powers resting with the head of the family. Infants are considered to be the property of the father. This entrenched Brahmanical familial ideology continues to root itself in contemporary times. Ignoring other matriarchal practices in certain regions, the Hindu Minority and Guardianship Act, 1956, states that the father is the natural guardian of a legitimate child's person and property; after him, the guardianship vests in the mother. In the celebrated case of *Gita Hariharan v. Reserve Bank of India,*[43] the Supreme Court of India held that "*after him*" did not mean after the death of the father, but the mother was the natural guardian in the absence of the father. The court held:

" In our opinion the word `after' shall have to be given a meaning which would sub-serve the need of the situation viz., welfare of the minor and having due regard to the factum that law courts endeavor to retain the legislation rather than declaring it to be a void, we do feel it expedient to record that the word `after' does not necessarily mean after the death of the father, on the contrary, it depicts an intent so as to ascribe the meaning thereto as `in the absence of `- be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise and it is only in the event of such a meaning being ascribed to the word `after' as used in Section 6 then and in that event the same would be in accordance with the intent of the legislation viz. welfare of the child."

While this judgement is celebrated widely, it is still worthy to note that the mother does not have the same decisional rights of the property and person of her child as the father does. The mother is required to prove the absence of the father to be declared as the child's natural guardian. While the mother has the custody of the child till the age of five as she is considered to secure the best interests of the child, she is not considered capable enough to take decisions on behalf of the child. The Constitution of India would however require that both the mother and father must be natural guardians simultaneously.

[43] Gita Hariharan v. Reserve Bank of India, (1999) 2 SCC 228.

In the case of *Vivek Singh v. Romani Singh*[44], the Supreme Court while granting custody of minor child to the mother reiterated the presumption of custody in favour of the mother and stated the same was rebuttable. The Supreme Court in this case observed that:

"*The role of the mother in the development of a child's personality can never be doubted. A child gets the best protection through the mother. It is a most natural thing for any child to grow up in the company of one's mother. The company of the mother is the most natural thing for a child. Neither the father nor any other person can give the same kind of lover, affection, care and sympathies to a child as that of a mother. The company of a mother is more valuable to a growing up female child unless there are compelling and justifiable reasons, a child should not be deprived of the company of the mother. The company of the mother is always in the welfare of the minor child.*"

The Supreme Court upheld this presumption however with a caveat that it is rebuttable. This rebuttable presumption ipso facto is unconstitutional as it is based on gender roles and stereotypes. In the case of *National Legal Service Authority v. Union of India*[45], the Supreme Court of India held that the right against discrimination on the basis of sex under Article 15 provides for prevention of "*direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders.*"

These cases along with the statute illustrate the notion of familial ideology within personal laws and secular laws in the country.

V. LITERATURE REVIEW

Legal education has been seen to have an important role to play in the establishment of a law abiding and just society. As the mother source of legal practice, law schools have a major influence on the practice of law and the legal system, as a whole. All the future litigating advocates, drafters of legislations, judges, are being trained in law schools. Here is where they learn the legal doctrine, understand their contract law, constitution, civil procedure and criminal procedure. However, law schools also train students into the language, ethos and philosophy of law. As stated above, Indian legal education in contemporary times borrows heavily from the teaching pedagogy followed in the United States of America (USA). This section aims to illustrate the nature of legal education in the United States of America and in India. In doing so, it

[44] Vivek Singh v. Romani Singh, (2017) 3 SCC 231.
[45] National Legal Service Authority v. Union of India, (2014) 5 SCC 438.

will also highlight the position critical theory and feminist jurisprudence has occupied within the curricular framework.

(A) LEGAL EDUCATION IN USA

As Duncan Kennedy[46] argues, law schools prepare students for future hierarchies in life and the legal profession. For over a century, American legal education followed in the footsteps of Christopher Columbus Langdell who was the Dean of Harvard Law School from 1873 onwards. He successfully turned law into a positivist science by using the 'case law' method wherein general principles of law were derived from cases, and then applied to hypothetical situations. Law education was imparted in the law schools in the same uncritical, authoritarian manner as the hegemonic justice was imparted in the Courtrooms.

Both these have been challenged since. The legal realists of the 1920s-40s abhorred the Supreme Court judgements and found it preposterous that judges could make appropriate rules and apply them, devoid of value judgement.[47] They argued that there cannot be a neutral, value-free, mechanical process from precedent to rule to a correct decision. In the 1970s and 80s, Critical Legal Theorists, a group of Leftist American law professors challenged mainstream jurisprudential traditions as well as legal scholarship. They insisted that law is politics and sought to expose the political presuppositions behind seemingly neutral legal procedures and methods of adjudication. For instance, Mark Tushnet stated that legal rules and principles are formed as a result of the broader ideological battles in society[48]. Since politics is a dominant motivator of judicial decisions, there is no meaningful distinction between 'legal reasoning' and political debate. This political nature of law was extended to the legal education. Duncan Kennedy showed how law schools were intensely political spaces that trained law students to accept their own place within the legal hierarchies by imbibing a fallacy called 'legal reasoning,' which carries the logic of 19th century laissez-faire capitalism.[49] Roberto Unger attacked 'objectivism' of the traditional legal scholarship. He argues that the privileging of one dominant principle in the work of legal scholarship reflects a conscious or unconscious suppression of an alternative principle or explanation which can be equally supportable. What justifies this privileging of one principle over another is ideology or political choice rather than objective requirement of legal reasoning.[50]

[46] Duncan M. Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEG. ED. 591, 593 (1982).

[47] Elaine D Ingulli, *Transforming the Curriculum: What Does the Pedagogy of Inclusion Mean for Business Law?*, 28, AMERICAN BUSINESS LAW JOURNAL, 605, 647 (1991).

[48] Mark, Tushnet, *Critical legal studies: A political history*, YALE LAW JOURNAL 1515, 1544 (1991).

[49] Duncan M. Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Leg. Ed. 591 (1982).

[50] Roberto Unger, *The critical legal studies movement*, HARVARD LAW REVIEW, (1983) 561-675.

The subjects taught are organized by an ideological ranking. The core subjects are contracts, torts, law of property, criminal and civil procedure as they form the foundation of the laissez-faire system. The core subjects are often taught uncritically with the assumption of an innate logic in the legal principles. Policy analysis and critical scholarship play a minor role in the teaching pedagogy of the core subjects. Following the core subjects, ancillary law subjects like family law, administrative law, interpretation of statutes are more policy-oriented than the core subjects. While teaching these subjects the teacher has scope to inculcate a more critical approach. Finally, there are peripheral subjects like legal theory, jurisprudence, law and social transformation which are either taught as electives in many law schools or are taught as "soft" subjects that do not demand the rigor of the core subjects. Critical thinking and feminist jurisprudence is often relegated to this realm and remains absent from the core curriculum.

Critical legal theory branched out into Feminist Legal Theory and Critical Race Theory, both of which are standpoint theories that assert that knowledge stems from social position and those at the bottom of the social ladder are at a unique standpoint to understand the world from a nuanced perspective and generate knowledge thereof.

Margaret Thornton, while discussing the engagement of feminist jurisprudence with the law school curriculum suggested that there are two possible ways in which feminist jurisprudence is inculcated in legal education namely, separatism and integration. The separatist methodology includes dedicated electives such as Gender and Law, Sexuality and Law, Feminist Jurisprudence etc. Essentially feminist perspectives are ghettoized and treated as separate peripheral subjects that have negligible engagement with the core subjects. These subjects remain optional and often preach to the converted. The Integration method is alternative pedagogy where feminist jurisprudence is not treated as optional but becomes integral to mainstream subjects. In this method, all students learn feminist perspectives and are subsequently sensitized to the operation of gender in law, public life and society. This also gives hostile students and teachers an opportunity to engage with the interplay of law and gender. As gender is not relegated to an elective which is opted by students who have an interest in the same, the integrationist approach gives all students an opportunity to participate in discussions on gender while learning a particular core course like contracts. Concepts such as free consent in contract law can be approached using a critical lens; thereby students who are schooled in new-liberal thought can also engage on discussions of choice.

The integrationist approach challenges the objective, neutral and rational understanding of core subjects like contracts and property law, thereby entrenching critical discourse in legal education.

The separatist and integrated method were discussed by Thornton in the context of feminist jurisprudence, however the same can be applied to caste, race, religion, class and other critical perspectives. As demonstrated earlier, such critical perspectives remain absent in the Family Law-I course designed by educational institutions and the burden is on the teacher to adopt an integrated approach in teaching Family Law-I.

(B) LEGAL EDUCATION IN INDIA

While efforts at inclusive legal education have seen mixed outcomes in the West, India has been grappling with trying to make legal education a meaningful pursuit since the 1950s, when the newly independent nation started forming itself into a democracy.[51] With an objective to address the issues of legal education, the National Law School of India Act 1986 was passed in Karnataka and the first National Law School opened in Bangalore in 1986. In a striking move to rewrite the format and scope of legal education in India, National Law Universities were opened in 15 states in the next two decades as autonomous universities authorized to confer their own degrees under the UGC guidelines.[52] With their novel pedagogies of teaching how law works in practice, their investment into Moot courts, and mandatory internships in law firms and with NGOs and judges, they offer a unique learning and teaching ethos.[53]

These universities opened admissions to students after class twelve and started tutoring them into social science and law subjects in through five years at law school, instead of three years at the Masters' level in the earlier pattern.[54] Law at the NLS would be a joint, five-year B.A., LL.B. program, each year being divided into three trimesters, with students required to take no fewer than sixty courses in order to graduate. Rather than the pure lecture method, teachers would encourage student participation and insist on writing, research and analysis. Subjects would be taught in an interdisciplinary manner, with a particular focus on the intersectionality of social science and empirical research with law. To promote the idea of serving the needy,

[51] In 1958, the Law Commission of India published a report that declared every aspect of the country's legal education extremely defective, 'not calculated to produce either jurists or competent legal practitioners.'

[52] Arpita Sengupta et. al., *Modernization of Legal Education in India: The Interdisciplinary Approach to Education*, 2, ASIAN JOURNAL OF LEGAL EDUCATION, 57, 61 2015.

[53] The NLS concept is hailed for transforming Indian legal education, while other South Asian legal education practices lag behind. Siddique argues that Pakistani legal education is dominated by practicing lawyers and judges, with little stakes in and experience of the sphere of education. He states that Pakistan might find the Indian model National Law Schools, spearheaded by critical legal scholars more useful than any alien transplant from other jurisdictions or the current top down approach of Pakistani law schools.

Osama Siddique, *Legal Education in Pakistan: The Domination of Practitioners and the "Critically Endangered" Academic*, 63, JOURNAL OF LEGAL EDUCATION, 499, 511 (2014), at 499 – 511.

[54] Where students would do an LLB for three years after three years of a Bachelor's degree in science, commerce or social science and humanities.

all students would be required to take a series of clinical and legal aid courses through the five years.[55] The same could be considered as a separatist approach in relegated the "soft" subjects to electives or clinical courses.

Currently, we have two modes operating at the same time. The new five-year law school model followed by the National Law Schools and other new institutions[56], alongside the older one of a three-year LLB degree after graduation. Most law colleges in India follow the 'learning by rote' pattern of imparting education. Most law graduates then become lawyers on the job once they enter legal practice and become litigators in Courts, legal officers in companies, or lawyers in corporate law firms. The problems of this model – crowded classrooms, a lack of rigor in teaching, a lack of understanding of socio-economic problems and a lack of preparation for practice – still persist.

Apart from preparing lawyers for practice through clinical courses and internships, imparting socially relevant legal education was the key to this new 'National Law University' model. Despite this noble and ambitious beginning, social justice lawyering does not seem to be dominant in national law schools. Students are geared to preparing for the job market, which is dominated by corporate firms. For instance, Nick Robinson finds that corporate law firms heavily influence the legal education in elite law schools in the USA. Student expectations and delivery by law schools are both guided by the employment criteria of the corporate law firms and thus affect the type of education and skills students cultivate during their time in law school.[57] Heavy fees that some elite law schools charge reiterate this by creating the expectation of a job that justifies the monetary investment put into education.[58] As a result, career and placement opportunities after graduation as well as internships during the course are mostly geared towards the corporate sector. Very few possibilities of working with human rights lawyers, policy organizations or think tanks are offered to students, and as serious career options.[59] Moreover, such opportunities are not particularly valued. Thus, a

[55] Jayanth K. Krishnan, *Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India*, 46 AM. J. LEGAL HIST. 447, 489 (2004).

[56] These include Jindal Global Law School in Haryana or Symbiosis Law School in Pune and Noida.

[57] Jonathan Gingerich et. al., *Responding to the Market: The Impact of the Rise of Corporate Law Firms on Elite Legal Education in India*, SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398506 (last visited Nov. 20, 2019).

[58] The National Law Schools charge around 1.5 lakh rupees per year, 7.5 lakh rupees for five years. Apart from the fees, 80 percent of students in the top five NLUs attend expensive coaching, costing around one lakh, to prepare for the Common Law Application Test (CLAT) to enter these law schools.
Venkatasubramanian, *Abolish Three-Year Law Degrees: Judge*, INDIA LEGAL ONLINE http://indialegalonline.com/abolish-three-year-law-degrees-judge/ (last visited Aug 8, 2016).

[59] Legally India, a prominent Indian magazine that writes law school-related news, mostly reports law school graduates being placed at corporate law firms and some litigation firms. The following links show the reception of graduates from different national law schools. Prachi Shrivastava, *NLIU Bhopal places 48 out of 89 in class of 2015,* http://www.legallyindia.com/law-schools/nliu-bhopal-places-48-out-of-89-in-class-of-2015, LEGALLY INDIA (last visited Aug. 17, 2016); Prachi Shrivastava, *2015*

student who manages to get a job with a top human rights lawyer does not have the same glory as a student who lands a contract with Amarchand.[60] Online publications like Legally India, in their articles on pre-placement offers, only talk about corporate law firm placements and some litigation firms, at most.

Thus, even in NLUs and similar institutions, the objective of creating socially conscious lawyers takes a backseat when forced to face the job market and the question of careers of students. Subjects in disciplines of social sciences and humanities, including politics, sociology, history, while taught, are perceived as almost unnecessary must-dos before the 'real' law subjects such as Law of Crimes, Civil Procedure, and Company Law. In this ethos, the study of caste and gender within the doctrine and practice of law seems like an irrelevant and far-fetched demand. The idea of globalization and change in education speaks of quality but does not make clear what subjects or attitudes are different. As a result, the difference is in teaching pedagogy, while the subjects and their contents remain the same.

VI. CONCLUSION

Granville Austin in *The Indian Constitution-Cornerstone of a Nation* suggests that the Constitution of India is a social document. The major provisions are "*either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement.*" He states that Parts III and IV are the conscience of the Constitution. The rights enshrined in Article 14, 15, 19 and 21 of the Constitution form the basic constitutional values the State should strive to achieve.

NUJS batch of 106 secures 100% placements, 'overwhelming' 78 jobs through RCC, http://www.legallyindia.com/Law-schools/2015-nujs-batch-of-106-secures-overwhelming-78-jobs-through-rcc LEGALLY INDIA(last visited Aug. 17, 2016); Fawaz Shaheen, *NLSIU bags 29 Big Six jobs, 4 foreign jobs, 100% campus success for class of 2015,* http://www.legallyindia.com/Law-schools/nlsiu-bags-29-big-six-jobs-4-foreign-jobs-100-campus-success-for-class-of-2015 (last visited Aug. 17, 2016); Prachi Shrivastava, *HNLU 2015 batch wins jobs for 58 students out of 146: 3 Cyril Amarchand, Trilegal, Wadia G; 2 Khaitan,* LEGALLY INDIA http://www.legallyindia.com/Law-schools/hnlu-2015-batch-wins-jobs-for-58-students-out-of-146-3-cyril-amarchand-trilegal-wadia-g-2-khaitan (last visited Aug 17, 2016); Kian Ganz and Prachi Shrivastava, *Nalsar 2015 final campus recruitments: RCC gets jobs for all 52 out of 74, half go to BigLaw,* LEGALLY INDIA http://www.legallyindia.com/Law-schools/nalsar-2015-final-campus-recruitments (last visited Aug 17, 2016); Prachi Shrivastava, *CNLU scores 17 jobs for 2015 batch of 64, LPOs are primary drivers*, LEGALLY INDIA http://www.legallyindia.com/Law-schools/efgh (last visited Aug 17, 2016); Kian Ganz, *Nalsar 2015 Day Zero: 'New academic model' reaps 29 jobs, including two Rs 90 lakh foreign job packages*, LEGALLY INDIA http://www.legallyindia.com/201404204621/Law-schools/nalsar-2015-day-zero-new-academic-model-reaps-29-jobs-including-two-rs-100-lakh-foreign-jobs (last visited Aug. 17, 2016); Fawaz Shaheen, *NLU Delhi dished out 44 jobs for 2015 grads; 15 with Big Six; in house preference grows*, LEGALLY INDIA http://www.legallyindia.com/Law-schools/nlu-delhi-dished-out-44-jobs-for-2015-grads-15-with-big-six-in-house-preference-grows (last visited Aug. 17, 2016).

[60] A corporate law firm name Shardul Amarchand Mangaldas. Some other top law firms most coveted by law students are Luthra and Luthra, Zia Modi and Associates, JSA

For Ambedkar, the fundamental right to equality was not merely a reflection of political ideals. These rights, according to him, were a legal arsenal that would ensure an ethical revolution to entrench true democracy in India. The Hindu Code Bill for him was instrumental in helping realize the rights of the Constitution in everyday life. However, not just the codified Hindu Laws but other personal laws have been applied by lower courts with no representation of constitutional principles. They have discarded values such as equality, freedom and liberty. However, the Supreme Court of India has now tried to revive these values in cases such as the constitutionality of triple talaq, constitutionality of Section 377 of the Indian Penal Code, entry of women in Sabrimala and the right to marry a person of one's choice.

The role of legal education in ensuring that these values are imbibed in judgements and society is immense. As stated earlier while external hierarchies are reinforced in legal education, critical legal education can also play a role in influencing state action and societal outlook. Instead of discussing constitutional principles in just courses dedicated to constitutional law, an integrationist approach should be adopted in engaging with these narratives in courses like Family Law-I. It is insufficient in studying social sciences in the five year legal education curriculum, but a broader critical approach in all courses is required to absolve the objective, rational identity of law and legal principles.

ARTICLE

AN ARGUMENT FOR ESTABLISHMENT OF INSTITUTIONALISED ARBITRATION IN INDIAN SPORTS DISPUTE RESOLUTION MECHANISM

Aman Gupta and Ashutosh P. Shukla***

I. INTRODUCTION

Over the last two decades, sports governing bodies worldwide have experienced a metamorphosis: from being private associations and clubs in the early 19th and 20th centuries, to behemoths with international socio-economic impact in the 21st century. This transformation has also resulted in changes in the internal regulatory framework of the sport, with sporting bodies attempting, and in certain aspects, succeeding, to maintain independence from external interference by arguing that governance and regulation of sport are autonomous activities. The proponents of this viewpoint argue that interference by the State may adversely impact sport, given the State's lack of expertise and knowledge of sporting matters. This being the case, it is argued that the functioning of sport (and sporting bodies) is best left to sporting bodies themselves. However, more recently, the legislature and judiciary have found themselves actively engaging in the regulation of sport. Legislations laying down norms for the functioning of sporting bodies have been enacted in several countries.

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Additionally, judicial organs have found scope for oversight on the grounds of (a) contractual obligations[1] and (b) sporting bodies exercising public functions (as distinct from their private functions).[2]

In India, the extent of judicial scrutiny aimed towards sporting bodies and their activities has steadily increased since the early 2000s. An important reason for the same has been an emerging jurisprudence via various decisions by the courts holding that actions of sporting bodies fall within the ambit of writ jurisdiction provided under Article 226 of the Constitution. Consequently, sportspersons, administrators, and persons interested in the well-being of accountability and transparency have moved the court. The extent of the phenomenon reached a peak in 2018, with multiple petitions filed in respect of athlete selection for the Asian Games, 2018.[3]

The exercise of such power by the judiciary has been a source of criticism for multiple reasons. It has been argued that courts are not equipped to deal with such matters due to lack of expertise in sporting disputes; courts should not interfere in such disputes as it affects the autonomy of sport; courts are unable to give remedy within a time-bound manner; different courts (and benches) have taken different approaches whilst dealing with such disputes, which has led to an inconsistency in the doctrinal and policy norms of sport governance.[4]

The proponents of this viewpoint argue that a specialised body is needed to holistically deal with sports disputes in India, which, in theory, should alleviate the problems that exist in the present structure.[5] The argument finds favour due to international and comparative practices, where sport disputes are resolved by recourse to the Court of Arbitration for Sport, which is an independent specialised arbitration tribunal. The entrenched nature of this argument can be seen from the fact that the establishment of a specialised body has been envisaged at multiple points in the past by the Government of India.

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[1] Amateur Sports Act, 36 U.S.C. § 2205 (1978); CODE DU SPORT [SPORTS CODE] (Fr.).

[2] Saurabh Bhattacharjee, *Private and Yet Public: The Schizophrenia of Modern Sports and Judicial Review*, 8 NUJS L. REV. 153 (2015) [hereinafter Bhattacharjee].

[3] Sharda Ugra, *India's 2018 Asian Games is already a record breaker... in the courts*, ESPN (Aug. 10, 2018), http://www.espn.in/espn/story/_/id/24338369/sharda-ugra-confusion-final-size-india-asian-games-contingent-points-urgent-need-national-sports-tribunal (last visited Dec. 14, 2019) [hereinafter 'SHARDA UGRA'].

[4] Satchit Bhogle, *Amenability of Indian Domestic Sports Governing Bodies to Judicial Review*, 27 MARQ. SPORTS L. REV. 153 (2016) [hereinafter 'BHOGLE'].

[5] *Id.*; Event Report, The Sports Law and Policy Symposium, Prof. Jack Anderson's discussion on Model for Sports Dispute Resolution in India (Aug. 17-18, 2018) (On file with the authors).

In this paper, the researchers follow the line of criticism and argue, via an examination of the decisions of the Supreme Court of India and the various High Courts along with the functioning of the ADDP and ADAP, that a change is required in the manner in which sporting disputes are presently resolved in India. In furtherance of (and agreeing with) the argument made by various scholars, the researchers propose that the resolution of disputes will be better served by resolution via a permanent arbitral body in light of the experiences of the Court of Arbitration for Sport and also practices arising from Canada and the U.K.

II. STRUCTURE OF GLOBAL SPORTS GOVERNANCE

From a simplistic viewpoint, sport is organised in a pyramidal structure of hierarchy of private sports governing bodies ("**SGBs**").[6] The international sports federations manage sport at the global level. These bodies are responsible for laying down the rules and regulations of the sport, organising international sporting events, and recognising national sports bodies who will govern and regulate the sport at the national level. Below them, the national sports federations govern the sport at the national level, in consonance with the principles and rules established by the international federation. They are responsible for managing and developing the sport at the national level and selecting teams to represent the country at the international events. It may be noted that only one national federation is recognised per nation by the international federation.[7] Below the national federations, the state federations exist who manage the sport at the state level. Like the recognition enjoyed by the national federations from the international federations, only one state federation is recognised per state by the national federation. Lastly, there are local level sports federations along with clubs.

The international SGBs are usually limited liability companies incorporated in a favourable jurisdiction, such as Switzerland.[8] Given that these bodies are private in nature, the pyramidal

[6] GARDINER ET AL., SPORTS LAW 165 (2nd ed. 2001).

[7] J. MUKUL MUDGAL & VIDUSHPAT SINGHANIA, LAW AND SPORT IN INDIA: DEVELOPMENTS, ISSUES AND CHALLENGES 24 (2nd ed. 2016) [hereinafter J. MUKUL MUDGAL].

[8] MICHAEL J. BELOFF ET AL., SPORTS LAW 18 (1999) [hereinafter BELOFF]. For example, the headquarters of the International Olympic Committee (IOC), Fédération Internationale de Football Association (FIFA), and Union of European Football Associations (UEFA) are all based in Switzerland.

structure exists through a web of contractual relations, *via* the rules and regulations of the international SGBs which other bodies in the hierarchy must adhere to in order to gain and maintain recognition.[9] These contractual relations also extend to the athletes, coaches and other individuals who, in various capacities, participate in the sport.[10] For example, the athletes agree to adhere to the rules and regulations of the governing bodies in order to be able to participate in the sport in a professional manner. The contractual relations ensure that the international SGBs are able to maintain their supremacy in governing the sport and are able to demarcate the role and responsibilities of the other bodies existing in the pyramidal structure.

Inherent in the pyramidal structure is the concept of autonomy for SGBs. This concept has existed since the Victorian era, as a reward granted for the 'civilising process'.[11] This reward included withdrawal of the threat of overt legal regulation and intervention and the autonomy to self-regulate their sport.[12]

Another reason as to why sporting bodies were granted this broad autonomy was the argument that the administrators of these bodies managed the sport in an efficient manner due to their expertise. Force of this argument can be felt in the case of *Enderby Town Football Club v. The Football Association*,[13] wherein the Court of Appeals, while rejecting the claim that act of the Football Association prohibiting legal representation at its tribunal was contrary to principles of natural justice, noted the importance of the autonomy of sport and the expertise that the persons appointed to the tribunals possessed.[14]

Additionally, since most of the SGBs were private in nature, courts did not interfere in their functioning beyond the claims of breach of contract.[15] It was assumed that the persons agreeing to participate in sport had agreed to be bound by the rules and regulations of the SGBs. Since these were private bodies, it was further assumed that the exclusion of persons by the SGBs was beyond the jurisdiction of courts.

[9] J. MUKUL MUDGAL, *supra* note 7.
[10] *Id.*
[11] Jack Anderson, *Abbot v Weekly (1665) 83 ER 357; 1 Lev 176*, *in* LEADING CASES IN SPORTS LAW 5 (Jack Anderson ed., 2013).
[12] *Id.*
[13] Enderby Town Football Club v. The Football Association, [1971] Ch 591.
[14] *Id.*
[15] R v. Football Association Ltd ex p Football League, [1993] 2 All ER 833.

III. 'JURIDIFICATION' OF SPORTS

The position changed post several legal challenges to actions by the sporting bodies in the late 80s and early 90s.[16] One of the major reasons was the rise of increasing commercialisation and media interest in sport.[17] Further, the states started recognising that, SGBs despite being private in nature, took decisions having a public character.[18] Thus, their actions affect the rights of a number of persons, such as the right of livelihood of the athletes.[19] This intervention took two forms: first, regulatory intervention through legislative means. Second, court involvement which arose in the form of litigations relating to breach of contractual duty and judicial review due to SGBs exercising public functions.[20]

In the European Union, this change became evident through a series of decisions involving the challenges to the internal regulations of sport. In the case of *Walrave and Koch*,[21] the European Court of Justice had held that the European Union law would not apply to rules made by SGBs that were purely sporting in nature.[22] Thus, even if a rule did affect the economic interests of an athlete, they would not be subject to the Community law, if the object was purely sporting in nature.[23] This was understood as a 'sporting exception' in the context of EU law, wherein the EU would not obstruct the functioning of a sporting rule so long it was proportionate and limited to its stated objective. This position changed post the *Meca-Medina* decision,[24] in which the ECJ held that a sporting rule having an economic impact would not be excepted merely because it was sporting in nature, and noted that often 'sporting' and 'commercial' overlapped.[25] Thus, in order to ascertain whether a regulation was subject to the Community law, a case-by-case examination

[16] J. MUKUL MUDGAL, *supra* note 7, at 6; Ken Foster, *Global Sports Law Revisited*, 17(1) ENT. & SPORTS L. J. 4 (2019) [hereinafter Ken Foster].
[17] Richard Parrish, *The Helsinki Report on Sport: A Partnership Approach to Sport*, 3(3) SPORTS LAW BULLETIN 16 (2000).
[18] Nagle v. Feilden, [1996] 2 QB 633; Eastham v. Newcastle FC, [1963] 3 All ER 139.
[19] *Id.*
[20] Bhattacharjee, *supra* note 2.
[21] Case C-36/74, Walrave and Koch v. Association Union cycliste international, 1974 E.C.R. 1405.
[22] *Id.*
[23] *Id.*
[24] Case T-313/02, Meca-Medina and Majcen v. Commission, 2004 E.C.R. II-3291.
[25] *Id.*

would be required.[26] Additionally, the *Bosman* ruling,[27] which affirmed freedom of movement of the sportspersons in the European Union, held that the autonomy enjoyed by the SGBs was conditional upon them respecting the exigencies of the EU law.[28]

In the United States, the series of litigations by Harry 'Butch' Reynolds against doping sanctions imposed on him by the International Amateur Athletic Federation ("**IAAF**") also highlighted that domestic courts would interfere in the decisions of the SGBs if they were found against the rights of the athletes.[29]

In light of these developments, the SGBs realised that they were ill-equipped to deal with the scenarios brought about by the legal challenges.[30] Therefore, SGBs sought to make themselves less vulnerable to externalities. This involved rewriting of the constitutions, rules and regulations of SGBs by lawyers, increased scrutiny of the legal standards being followed and ensuring that concepts such as due process, proportionality *etc.* were implemented in decision making.[31] Beloff has termed this process as the rise of 'legalism' in sport.[32]

An important facet of juridification was the emergence of Court of Arbitration for Sport ("**CAS**") as a permanent arbitral body for the resolution of sporting disputes.[33] Though it has been established in 1983 itself, for the initial period of its history, its services were not usually relied upon. However, after the *Gundel* case,[34] the International Olympic Committee **("IOC")** converted CAS into a 'global arbitration institution' by ensuring mandatory acceptance by the SGBs to its jurisdiction as a condition precedent to inclusion in the Olympics,[35] and by the athletes as a

[26] *Id.*

[27] Case C-415/93, Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman, [1995] E.C.R. I-4921.

[28] *Id.*

[29] David McArdle, *Reflections on the Harry Reynolds Litigation*, 2(2) ENT. & SPORTS L. J. 6 (2003) [hereinafter David McArdle].

[30] For example, Diane Modahl's legal challenge to her suspension from sport following a doping ban led to the insolvency of the British Athletics Federation, which, at that point of time, governed the athletics sports in the U.K. Hazel Hartley, *Modahl v British Athletic Federation (1994-2001)*, *in* LEADING CASES IN SPORTS LAW 155-174 (Jack Anderson ed., 2013).

[31] Ken Foster, *supra* note 16.

[32] BELOFF, s*upra* note 8, at 6.

[33] *History of CAS*, COURT OF ARBITRATION FOR SPORT, https://www.tas-cas.org/en/general-information/history-of-the-cas.html (last visited Dec. 14, 2019) [hereinafter *History of CAS*].

[34] Elmar Gundel v. FEI, CAS 92/A/63.

[35] Ken Foster, *supra* note 16.

condition precedent to participation in the sport.[36] This has meant that CAS decisions have led to the rise and establishment of a significant sports-related legal jurisprudence and precedents which the SGBs must follow.[37]

IV. INDIAN SCENARIO

While the Constituent Assembly did not foresee sports or SGBs assuming the role that they presently have in the society,[38] the Assembly did explicitly list sports in Entry 33 of the State list of the Seventh Schedule as an area on which the State Governments can legislate.[39] Additionally, courts have interpreted the Central Government's right to regulate the sport and SGBs arising out of the residuary power of the Central Government enumerated in Entry 97 of the Union List.[40] Based on this, the Central Government established the Ministry of Youth Affairs and Sports ("**MYAS**"), which is tasked with the responsibility of, inter alia, supporting the SGBs and ensuring that they promote sports to the best of their capacities.[41] The Central and State governments have also formulated several sports policies for the development and encouragement of sport.[42] While the country lacks a sports-specific legislation, despite several attempts,[43] the National Sports Development Code, 2011 ("**Code**") regulates the conduct and functioning of the national SGBs.[44] The Code provides for, inter alia, the manner in which an SGB can be recognised by the Government of India;[45] the manner in which it can avail funding;[46] its responsibilities as a recognised SGB;[47] *etc.* Thus, the State exercises regulatory control over the functioning of the SGB to the limited extent provided in the Code.

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[36] *Id.*

[37] Antoine Duval, *Not in My Name! Claudia Pechstein and the Post-Consensual Foundations of the Court of Arbitration for Sport* (MPIL Research Paper Series No. 2017-01), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920555 (last visited Dec. 14, 2019).

[38] Indian Olympic Association v. Union of India, 212 (2014) DLT 389, ¶ 41-52.

[39] *Id.*

[40] *Id.*

[41] J. MUKUL MUDGAL, *supra* note 7, 42-43.

[42] National Sports Policy (2001); Kerala Sports Policy (2015).

[43] Kushal Phatarpekar, *Crucial in BCCI Restructure, National Sports Bill Still on the Back Burner*, HINDUSTAN TIMES (July 27, 2016), https://www.hindustantimes.com/cricket/crucial-in-bcci-restructure-national-sports-bill-still-on-the-back-burner/story-iXCQ8wuoto7jdOBlmiaR1O.html (last visited Dec. 14, 2019).

[44] J. MUKUL MUDGAL, *supra* note 7, at 81-84.

[45] National Sports Development Code of India, 2011, ¶ 8.

[46] *Id.* ¶ 9, 10.

[47] *Id.* ¶ 6.

With regards to the context of judicial review, courts in England, U.S. and continental Europe have struck down the outright arbitrary processes of the sports bodies while at the same time recognising that, post juridification of sport, courts have a limited supervisory role in the governance and functioning of the sport.[48] These interactions of the internal regulations, rules and customs of the SGBs with decisions of domestic courts have aided in legitimisation of the autonomy of the SGBs.[49] However, this has not been the position in India, where the judiciary has increasingly found grounds for intervening in the functioning of SGBs.

The trend of the Indian judiciary adjudicating on disputes arising out of and/or associated with the functioning of the SGBs must be understood in light of the fundamental rights jurisprudence in India. Part III of the Indian Constitution provides for fundamental rights to individuals. These rights can be enforced against the 'State' by virtue of the writ jurisdiction of the Supreme Court and the High Courts under Article 32 and 226 of the Indian Constitution respectively. It may be noted that the writ jurisdiction of the High Courts under Article 226 is wider as the High Courts are allowed to issue a writ not only for the enforcement of a fundamental right, for which the remedy lies against the State, but also for 'any other purpose', which includes enforcement of duties by public bodies.[50]

The question of amenability of SGBs to the writ jurisdiction under Article 226 was initially answered by the Delhi High Court in *Ajay Jadeja v. Union of India.*[51] The Court held that a writ could be issued against the BCCI as it deemed that BCCI had been instilled with public functions. However, the Court warned that writ jurisdiction should not be exercised in each and every case of dispute. As per the Court, it was only when the actions infringed upon a fundamental right or were "*so shocking and arbitrary so as to be unconscionable in addition to having wide ramifications of a public nature, that the writ Court may interfere.*"[52]

[48] For a discussion on the comparative trends of judicial reaction and intervention in sport, see Bhattacharjee, *supra* note 2; Ken Foster, *supra* note 16.
[49] Ken Foster, *supra* note 16.
[50] INDIA CONST. art. 226.
[51] Ajay Jadeja v. Union of India, 95 (2002) DLT 14.
[52] *Id.* ¶ 33.

This position was further reiterated by the Delhi High Court in the case of *Rahul Mehra v. Union of India*,[53] where the Court held that while certain actions of the BCCI would be subject to the writ jurisdiction of the court, not every act of the BCCI would be subject to the same. According to the Court, it was only actions having a public character that would be subject to review by the Court.[54]

The argument of the amenability of SGBs to the writ jurisdiction of the Supreme Court was first raised in the case of *Mohinder Amarnath v. BCCI*,[55] wherein several cricketers who had been banned by the Board of Control for Cricket in India ("**BCCI**") for participating in an unauthorised cricket match challenged the action under the writ jurisdiction of the Supreme Court. However, the Court did not rule on the maintainability of the writ petition as BCCI withdrew from the petition and the question had become academic in nature.[56]

The question was finally answered in the negative by the Supreme Court in the case of *Zee Telefilms v. Union of India*.[57] The Court, by a majority, after applying the principles laid down in *Pradeep Kumar Biswas* case,[58] held that BCCI was not an instrumentality of the state. In doing so, the Court was guided by the following facts: (i) BCCI is a private body registered under the Tamil Nadu Societies Registration Act and is not created by a statute; (ii) its share capital was not held by the government; (iii) the monopoly to regulate cricket was not conferred by the state; (iv) there was no deep and pervasive control exercised by the state; and (v) all functions performed by the BCCI were not public or governmental in nature.[59]

The Court noted that if in the absence of any authorisation, if a private body discharges a public function, it would not make it an instrumentality of the State.[60] Further, the power exercised by the government of India over BCCI was merely regulatory and would not amount to administrative control.[61] Additionally, the Court reaffirmed that BCCI would remain amenable to the writ

[53] Rahul Mehra v. Union of India, (2004) 114 DLT 323.
[54] *Id.*
[55] Mohinder Amarnath v. BCCI, C.W. No. 632/89.
[56] J. MUKUL MUDGAL, *supra* note 7.
[57] Zee Telefilms v. Union of India, (2005) 4 SCC 649 [hereinafter Zee Telefilms].
[58] Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111.
[59] Zee Telefilms, *supra* note 57, at 694.
[60] *Id.* at 681.
[61] *Id.*

jurisdiction of the High Court under Article 226.[62] The decision was further reaffirmed in the case of *Board of Control for Cricket in India v. Cricket Association of Bihar*.[63]

With the writ jurisdiction of the court under Article 226 firmly established, along with the proceedings in the 'ordinary course of law', SGBs are increasingly facing legal challenges in respect of their actions. The subject matters of the challenges are varied in nature: athlete selection, electoral disputes, recognition of national and state SGBs, *etc.* More recently, the writ courts appear to be taking a proactive approach regarding the internal private functions of the SGBs. Eg. In the orders passed against the BCCI, the Supreme Court held that all actions taken in the course of discharging public functions are open to judicial review.[64] It also established a committee, under the chairmanship of the former Chief Justice of India, Justice Lodha, to redraft and suggest reforms in the internal rules and regulations of the BCCI.[65]

V. CRITICISM OF JUDICIAL INTERVENTION

The act of the judiciary interfering in the disputes has been a source of criticism for various reasons. These various criticisms will be discussed below. It may be noted that while the researchers have primarily relied on cases pertaining to athlete selection disputes, the same concerns remain valid with regards to other sports disputes pertaining to electoral issues, governance and functioning of sports bodies, *etc.*

(A) SPEED

While courts are the primary organs in the judicial system, they are beset with delays and complex procedure. Indian courts are notorious for the ever present delays and backlogs, which has been evidenced on numerous occasions.[66] As of December 2, 2019, the Supreme Court of India had 59,535 pending matters.[67] The situation only becomes worse when one takes into account

[62] *Id.*
[63] Board of Control for Cricket in India v. Cricket Association of Bihar, (2015) 3 SCC 251.
[64] *Id.* at 305.
[65] *Id.* at 326.
[66] Law Commission of India, *Arrears and Backlog: Creating Additional Judicial (wo)manpower*, Report No. 245 (July 2014), http://lawcommissionofindia.nic.in/reports/Report_No.245.pdf.
[67] Information as per the website of the Supreme Court of India. SUPREME COURT OF INDIA, https://main.sci.gov.in/statistics (last visited Dec. 14, 2019).

pendency at the level of the subordinate judiciary, with more than three crore cases pending.[68] Additionally, the pace of the disposal is also a matter of concern. As per PRS, twenty-three percent of the cases before the High Courts have been pending for more than ten years.[69]

Contrast this to the timelines arising in sports sphere, which are usually extremely short due to the constraints provided by the deadlines of the international SGBs and the nature of the sport itself. For example, if a national SGB fails to send the list of participants for an international sporting event within the deadline provided by the international SGB, it will not be accepted by the international SGB.[70] Given this scenario, domestic courts cannot provide adequate remedy to athletes in a time bound manner.

This concern has been realised in several cases pertaining to athlete selection disputes. First of these is the *Kirandeep v. Chandigarh Rowing Association*,[71] in which the athlete had challenged the manner and the haste in which the athlete selection trials had taken place. Despite the Court holding that the element of malice was apparent in the selection process,[72] the decision came much after the event for which the selections were conducted had taken place.[73] Thus, the athlete was denied any effective remedy in her favour.

Another example is the case of *Amit Kumar Dhankar*,[74] where in similar circumstances, given the timelines involved, the Delhi High Court refused to interfere with the selection process and instead gave the petitioners INR 25,000 (Indian Rupees twenty five thousand) as costs.[75] It is highly doubtful if such a limited sum covers the efforts and costs of an athlete preparing for international sports events.

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[68] Shailesh Gandhi, *Judicial Backlogs Can Become History*, LIVELAW (Apr. 1, 2019), https://www.livelaw.in/columns/judicial-backlogs-can-become-history-143978 (last visited Dec. 14, 2019); Roshni Sinha, *Pendency of cases in the Judiciary*, PRS LEGISLATIVE RESEARCH (July 25, 2018), https://www.prsindia.org/policy/vital-stats/pendency-cases-judiciary (last visited Dec. 14, 2019).

[69] Roshni Sinha, *Pendency of cases in the Judiciary*, PRS LEGISLATIVE RESEARCH (July 25, 2018), https://www.prsindia.org/policy/vital-stats/pendency-cases-judiciary (last visited Dec. 14, 2019).

[70] Amit Kumar Dhankar v. Union of India, W.P.(C) 3914/2014 & CM No. 7890/2014 (Arguments advanced by the respondents).

[71] Kirandeep v. Chandigarh Rowing Association, AIR 2004 P&H 278.

[72] *Id.* ¶ 12.

[73] *Id.*

[74] Amit Kumar Dhankar v. Union of India, W.P.(C) 3914/2014 & CM No. 7890/2014.

[75] *Id.* ¶ 46.

Similarly, in the matter pertaining to the selection dispute of the kabaddi team in Asian Games, 2018, the Court had to innovate and come up with a judicial solution since the deadline for sending the team had already passed.[76] The Court ordered a kabaddi match to be arranged for the claimants. This led to further confusion where the post-selection match did not take place in a proper manner due to a misinterpretation of the Court's orders.[77]

It may be noted that the situation does appear to be improving, as the courts have made efforts in order to ensure timely hearing of the cases. For example, the Kerala High Court held proceedings till 6:45 p.m. to hear the petition filed by Aparna Balan.[78] However, the concern remains valid as this practice has not been institutionalised and may not recur given the regular workload on the judiciary.

It may be noted that the aspect of courts hearing sports disputes expeditiously has been criticised from a different perspective. Given the huge backlog of cases, critics have questioned the importance accorded by the courts to the sporting disputes over other matters.[79] Clearly, whether this criticism is accepted or not depends on the importance one accords to sporting events and the rights of athletes over other disputes.

(B) AUTONOMY

Another factor which highlights the limitation of the traditional court-based litigation is that international SGBs do not adhere to the decisions of the national courts. Since SGBs are incorporated in jurisdictions other than that of the persons filing the litigation, even if the courts

[76] Shahid Judge & Pritam Pal Singh, *Delhi High Court to monitor kabaddi match for alleged selection wrongdoing*, INDIAN EXPRESS (Sept. 14, 2018), https://indianexpress.com/article/sports/sport-others/kabaddi-asian-games-amateur-kabaddi-federation-of-india-delhi-high-court-5355514/ (last visited Dec. 14, 2019).

[77] *Kabaddi trails left in confusion as Delhi High Court's order is misinterpreted*, INDIA TODAY (Sept. 15, 2018), https://www.indiatoday.in/sports/other-sports/story/kabaddi-mishap-new-delhi-trials-delhi-high-court-order-134-0627-2018-09-15 (last visited Dec. 14, 2019).

[78] Nihal Koshie, *Courting trouble before the Asian Games 2018*, INDIAN EXPRESS (Aug. 10, 2018), https://indianexpress.com/article/sports/asian-games/courting-trouble-before-the-asian-games-2018-5299842/ (last visited Dec. 14, 2019) [hereinafter Koshie].

[79] Swarajya Staff, *With Scores of Cases Pending, Delhi High Court Takes Interest in Kabaddi Team Selection*, SWARAJYA (Sept. 14, 2018), https://swarajyamag.com/insta/with-scores-of-cases-pending-delhi-high-court-takes-interest-in-kabaddi-team-selection (last visited Dec. 14, 2019).

do order re-trials or ask the domestic SGB to include the athlete's name in the list of participants, the international SGBs can simply refuse to follow the decision without adverse consequence.

The series of litigation between Butch Reynolds and the International Association of Athletics Federation in the U.S. highlights the futility of domestic courts passing any decisions against the international SGBs.[80] While Reynolds had the domestic courts on his side, the international body simply refused to acknowledge the decision. At the same time, it demonstrated the fact that it could simply bar other bodies and persons from competing in the sport internationally if they went against its dictates. If a similar situation arose in India, it is doubtful the outcome would be any different.[81]

(C) EXPERTISE

The third criticism arising out of courts adjudicating on sporting disputes is the issue of expertise, especially in adjudicating non-contractual disputes in relation to the technical aspects of the sport viz. rules of the games, selection procedures, eligibility criteria, *etc.* Judges and lawyers representing the athletes, are often unaware of the complexities associated with the sports governance structures. Thus, it is likely that a significant duration is spent in the litigation process while explaining the complexities and nuances to the judges and the appearing counsel.[82] This creates delays in the process of adjudication and also leads to decisions which do not strike a balance between the autonomy of the SGBs and the rights of the athletes.[83]

At the same time, the judiciary may become too deferent to the decisions of the SGBs and not protect the rights of the petitioners in an adequate manner. This can be termed as the 'expertise' ground, in which the courts invoke the concept that the persons running SGBs are best suited to determine the functioning of the sports bodies.[84] However, this has the potential downside of courts overlooking the biases of the persons running the said bodies.

[80] David McArdle, *supra* note 29.

[81] It would be pertinent to note that even the Code was drafted in discussion with the IOC. Indian Olympic Association v. Union of India, 212 (2014) DLT 389, ¶ 24.

[82] Koshie, *supra* note 78.

[83] For a comment on the concerns with regards to the autonomy of SGBs, see Bhattacharjee, *supra* note 2.

[84] Sushil Kumar v. Union of India, 230 (2016) DLT 427 (Arguments advanced by the respondents).

Thus, in conclusion, it can be seen that the rulings of the Indian writ courts coupled with the constitutional structure make it possible for the disputes to be brought before judicial bodies. However, if the criticisms discussed hereinabove are correct, it raises the question of why have the courts become the preferred mode of dispute resolution.

In the opinion of the researchers, the answers to this question can be found if one takes a step back in the chain of events. One finds that the challenges arise due to two linked phenomena. First is the lack of efficacious internal dispute resolution mechanism ("**DRM**") within the framework governing SGBs. Secondly, in the event of such DRMs existing, a lack of trust in these bodies to provide desired processes and solutions.

VI. SPORTS DISPUTE RESOLUTION MECHANISMS IN INDIA

As noted hereinabove, globally, the SGBs responded to increased scrutiny from State actors by reforming their internal structure and bringing in fairness and transparency in their functioning. It can be argued that until recently, the Indian SGBs, with the arguable exclusion of the BCCI, did not face such scrutiny and therefore did not undergo the juridification process in a manner comparable to their global counterparts. One such area where the reforms lag are the internal DRMs in the constitutions of the SGBs which allow internal settlement of disputes without approaching the courts.

Nancy Welsh has noted that courts provide an 'experience of justice' to the litigants.[85] Not only are they required to resolve disputes, but also provide "*something special in how they resolve those disputes*".[86] She lists these experiences as civil behaviour, reason-based decision making and thoughtful solutions.[87] Additionally, the procedural aspects followed by courts, such as standards of neutrality of the judges, open-trial procedure, *etc.* add to this experience.[88] For the parties to be able to trust the process, any DRM will have to provide a similar experience. However, it appears

[85] Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 629-38 (2004).
[86] Nancy A. Welsh, The *Current State of Court-Connected ADR: (Caught In/Living Through/Hoping for the End Of) the Ugly Duckling Phase*, 95 MARQ. L. REV. 873 (2012).
[87] *Id.*
[88] Jean M. Landis & Lynne Goodstein, *When Is Justice Fair? An Integrated Approach to the Outcome versus Procedure Debate*, 11(4) AM BAR FOUND RES. J. 675, 675-707 (1986).

that, at present, the internal DRMs in India do not appear to provide confidence to athletes. Prior to discussing the flaws in the present sports DRMs in India, a brief discussion on the present state of sports DRMs is necessary.

VII. THE SPORTS CODE REQUIREMENTS

The Code, in an attempt to prescribe good governance practices and to ensure that sporting disputes could be resolved internally within the structure of SGBs, requires that SGBs are required to give essential consideration for the establishment of impartial machinery for the redressal of player's grievances.[89] The SGBs are also required to ensure that the said machinery contains appellate mechanism.[90, 91]

Two cases adjudicated before the Delhi High Court in the year 2016 further highlight the existing problems. The first of these cases is the case of *Sushil Kumar v. Union of India*,[92] which was a litigation surrounding selection dispute for the 2016 Olympics. Sushil Kumar had argued that since quotas for appearing in Olympic Games are allotted to countries and not athletes, the WFI was mandated to hold selection trials for the Olympic Games.[93] On the other hand, the WFI argued that it had an unwritten policy of providing the quotas to the athletes who had earned the berth.[94] It was only in cases of the athlete suffering an injury or drop in performance level when other athletes would be nominated.[95]

The Court in its decision held that the policy adopted by the WFI was not contrary to the Code, and thereby rejected Sushil Kumar's petition.[96] However, in the course of the decision the Court expressed its displeasure to the frequent challenges made to the selection for international sports competitions.[97] At the same time, the Court also noted its limitations in granting a decision due to

[89] National Sports Development Code, 2011, ¶¶ 14.7(v), 15.1(a).
[90] *Id.* ¶ 15.1(a).
[91] For an excellent comment on the state of various sports DRM models in India, see Bhogle, *supra* note 4.
[92] Sushil Kumar v. Union of India, 230 (2016) DLT 427.
[93] *Id.* ¶ 3.
[94] *Id.* ¶ 12.
[95] *Id.*
[96] *Id.* ¶ 70.
[97] *Id.* ¶ 69.

the nature of the sport with regards to the deadlines stipulated by the SGBs and the training of the athletes.

The second case was *Rajiv Dutta v. Union of India*,[98] which was a public interest litigation arising out of the ban imposed on Sarita Devi Laishram. Laishram had refused to accept her bronze medal after losing the semi-final match in the 2014 Asian Games in a controversial manner.[99] Due to her actions, the International Boxing Association banned her for a year.[100] Subsequently, she was unable to file an appeal against the decision due to the Boxing India having no such provision in its constitution to challenge the decisions of the International Boxing Association.[101] Given the scenario, Mr. Rajiv Dutta, a senior lawyer, filed a public-interest litigation before the Delhi High Court upon her being banned. In his petition, Mr. Dutta asked the court to direct the MYAS to direct the NSFs to incorporate a clause for appeal to CAS against the actions of international SGBs in their rules and regulations.[102] While the Court did not pass any affirmative orders, it did ask the government to provide a hearing to Mr. Dutta.[103]

VIII. 2016 ADVISORY BY THE MINISTRY OF YOUTH AFFAIRS & SPORTS

The combined effect of the Sushil Kumar case and the hearing provided to Mr. Dutta led to the MYAS, on June 17, 2016, issuing an advisory ("**Advisory**") to all National Sports Federations.[104] The Advisory asked the SGBs to consider establishing an internal grievance redressal mechanism for resolution of disputes and a specific provision in their constitution/regulations to allow athletes and support personnel to raise a dispute before the CAS.[105] However, the Advisory was criticised on multiple grounds.

[98] Rajiv Dutta v. Union of India, W.P. (C) 8734/2014 [hereinafter Dutta].
[99] Indo-Asian News Service, *Sarita Devi Gets One-Year Ban for Refusing Asian Games Bronze*, NDTV (Dec. 17, 2014), https://sports.ndtv.com/boxing/sarita-devi-banned-for-one-year-by-aiba-1508047 (last visited Dec. 14, 2019).
[100] *Id.*
[101] Dutta, *supra* note 98, ¶ 3.
[102] *Id.*
[103] *Id.* ¶ 15.
[104] Ministry of Youth Affairs and Sports, *Safeguarding the interests of sportspersons and provision of effective Grievance Redressal System in the Constitution of National Sports Federations*, PRESS INFORMATION BUREAU (June 17, 2016).
[105] *Id.*

First, the Advisory did not prescribe any time-period within which the SGBs were required to incorporate the mechanisms within their constitution.[106] Critics have pointed out that despite a significant period of time elapsing since the Advisory, no action was taken by the SGBs in adherence of the same.[107] Second, it may be noted that the Advisory did not prescribe any action which would be taken against the SGBs for failure to incorporate DRMs. As has been noted hereinabove, while SGBs can be refused recognition on the ground of failing to adhere to the Code, such action had not been taken up in a stringent manner by the Government, which made the Advisory a mere paper tiger.[108] Another major flaw with the Advisory is that it silent on the structure of the internal mechanism. This lack of explicitness leads to concerns relating to lack of uniformity in the mechanisms and the functional independence of the mechanisms.

IX. IOA DISPUTE SETTLEMENT MECHANISM

In addition to the aforementioned directive, the Indian Olympic Association ("**IOA**"), which is the Indian affiliate of the International Olympic Committee, has certain requirements for all bodies seeking to affiliate with it in order to participate in the Olympics. The IOA requires all National Sports Federations, State Olympic Associations, Union Territory Olympic Associations, Services Sports Control Board and National Federation of Indian Sport Kho-Kho (affiliated to the IOA) to include a provision in their constitution which provides that all unresolved disputes are to be settled by the Arbitration Commission of the IOA.[109] The rules governing the Arbitration Commission are provided in Annexure-B of the Memorandum of Association of IOA.[110] Given that all SGBs, which seek participation of their sport in Olympics, are required to adhere to the

[106] Aahna Mehrotra & Purvasha Mansharamani, *The need for better dispute resolution systems in Indian sport and the Government's new Guidelines*, LAWINSPORT (Nov. 21, 2016), https://www.lawinsport.com/topics/articles/item/the-need-for-better-dispute-resolution-systems-in-indian-sport-and-the-government-s-new-guidelines (last visited Dec. 14, 2019) [hereinafter Mehrotra].

[107] *Id.*; Sarthak Sood, *Asian Games, 2018 and The Futility of Courts in Selection-Trial Disputes*, SOCIO-LEGAL REVIEW (Oct. 24, 2018), http://www.sociolegalreview.com/asian-games-2018-and-the-futility-of-courts-in-selection-trial-disputes/ (last visited May 29, 2019).

[108] While adherence to the Code is a pre-requisite to be recognized as a National Sports Federation by the Ministry of Youth Affairs and Sports, there have been examples of SGBs being given recognition without compliance with the Code in certain circumstances. Feroz Mishra, *Ministry extends EFI's recognition till March 31*, NEW INDIAN EXPRESS (Dec. 5, 2019), https://www.newindianexpress.com/sport/other/2019/dec/05/ministry-extends-efis-recognition-till-march-31-2071786.html (last visited Dec. 13, 2019); Press Trust of India, *Archery, Golf, Gymnastics, Taekwondo Fail To Get Recognition From Sports Ministry*, THE OUTLOOK (Feb. 4, 2019), https://www.outlookindia.com/website/story/archery-golf-gymnastics-taekwondo-fail-to-get-recognition-from-sports-ministry/324883 (last visited Dec. 13, 2019).

[109] Memorandum and Rules and Regulations, Indian Olympic Association, Rule 22.

[110] Memorandum of Association, Indian Olympic Association, Clause V.

IOC (and thereby the IOA at the national level). This aims to ensure an internal resolution of dispute through a centralised mechanism.

It may be worthwhile to address the concerns which entail as a result of having such a dispute resolution mechanism. At the outset, one of the commentators has pointed to the fact that despite having been in existence since 2013, the details of the Arbitration Commission have only been published on the website of the IOA in September 2018.[111] In addition, it appears that the athletes and NSFs were unaware of the availability of the arbitral process given the adjudication of selection disputes pertaining to the Asian Games, 2018, by various High Courts.[112] At present, with regards to internal disputes between rival factions within national and state level SGBs, it does appear that the Disputes Commission and Arbitration Commission are being utilised for the resolution of disputes.[113]

In addition to the aforementioned issues, scholars have also pointed to the structural concerns existing in the Arbitration Commission. These concerns can be enumerated as follows:

(A) CONSENT

Consent forms the bedrock on which arbitration and other form of private DRMs build upon. As has been noted by the author Jan Paulsson in his book 'The Idea of Arbitration',

> "*The idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers.*"[114]

The decision of the Supreme Court in *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*[115] sets a good precedence in understanding the importance of consent in arbitral proceedings wherein the Court has held that the court cannot ask the parties to arbitrate the dispute without the consent of the parties.

[111] Sharda Ugra, *supra* note 3.
[112] Koshie, *supra* note 81.
[113] INDIAN OLYMPIC ASSOCIATION, https://olympic.ind.in/arbitration-commission (last visited Dec. 15, 2019).
[114] J. PAULSSON, THE IDEA OF ARBITRATION 1 (2013).
[115] Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24.

The consent of the parties is evidenced through a voluntary arbitration agreement, upon which parties voluntarily waive their right to pursue their claim in the ordinary courts. The courts are required to mandatorily refer the disputes for arbitration in face of a *prima facie* valid arbitration agreement.[116]

Given the importance of consent, it is necessary to examine whether the arbitration rules of IOA adhere to this condition. The consent must be examined at two levels: first, at the level of the bodies affiliating themselves with the IOA; and second, at the level of the athletes participating in the sport.

As has been noted, the IOA Memorandum of Association explicitly provides that all SGBs affiliated with the IOA are required to resolve their disputes through the Arbitration Commission of the IOA.[117] Since the rules are to be accepted in their entirety, any SGB wishing to align itself to the IOA would be required to this condition.[118] Thus, the consent can be presumed to be present from the SGB affiliating itself with the IOA. However, there appears to be concerns over the issue of explicit consent and reference to the IOA Arbitration Commission in the constitutions and memorandum of associations of the SGBs.[119]

With regards to the arbitrability of disputes involving athletes (such as the selection disputes discussed previously), the provisions contained in the IOA Memorandum do not explicitly refer to athletes. Instead they refer to the SGBs and their members, which presumably only includes their state and local SGBs, and not the athletes who participate in events organised by the SGBs. However, at the same time, the Arbitration Rules mentions that disciplinary, selection or other selection disputes arising out of actions of the SGBs, clubs, associations, *etc.* can be referred to the Arbitration Commission provided that regulations of the relevant body or specific arbitration agreement provides for the dispute to be heard under the IOC rules.[120] Thus, it appears that IOA

[116] Arbitration and Conciliation (Amendment) Act, 2015, § 4, No. 3, Acts of Parliament, 2015 (India) [hereinafter Arbitration and Conciliation (Amendment) Act, 2015].
[117] Model for Sports Dispute Resolution in India, *supra* note 5, Rule 22.
[118] Daniel Mathew, *Arbitration and Sports Disputes in India*, *in* SPORTS LAW IN INDIA: POLICY, REGULATION AND COMMERCIALISATION 171 (Lovely Dasgupta & Shameek Sen eds., 2018) [hereinafter Daniel Mathew].
[119] *Id.*
[120] Arbitration Rules of IOA Arbitration Commission, Indian Olympic Association, Rule 21 [hereinafter Arbitration Rules of IOA].

Arbitration Rules *can* assume jurisdiction in the event of the specific agreement/rules due to athletes' participation in sporting events, instead of making the same mandatory on athletes.

(B) APPOINTMENT OF ARBITRATOR

The concept of '*nemo judex in sua causa*' *(no-one can be a judge in his own cause)* has been considered as a vital principle of legal systems across the globe. In the context of arbitration, this principle is understood in ensuring independence of the arbitrator from the parties to the dispute. The Arbitration & Conciliation Act, 1996,[121] provides for stringent conditions of independence which must be adhered to by the arbitrators. For instance, Section 12 of the said Act provides the grounds of the appointment of the arbitrator. It provides that when a person is approached to be an arbitrator, they are required to disclose all circumstances which can give rise to justifiable doubts as to their independence or impartiality.[122]

In this context, the rules contained in the IOA Memorandum and Arbitration Commission make for an interesting reading. It is within the mandate of the Executive Council of the IOA to appoint all committees.[123] The Executive Council consists of all IOC members.[124] Further, whenever a dispute is referred to arbitration, it is the President of the Arbitration Commission who shall appoint the arbitrator(s) to decide the dispute.[125] It is not open for the parties themselves to pick the arbitrator. Whilst the present members of the Arbitration Commission are retired judges, senior advocates, and ex-government officials,[126] which shows a high standard of experience for appointment, the rules do not appear to explicitly provide for any qualification of the members of the Arbitration Commission with regards to experience in sporting matters. Further clarity on these matters would be highly desirable to make the processes more clear.

X. DISPUTE RESOLUTION MECHANISMS IN SPORTS GOVERNING BODIES

While the IOA mechanisms are now established and functioning, the position regarding individual SGBs is more complex. In the following section, the position of the Dispute Resolution

[121] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India) [hereinafter Arbitration and Conciliation Act, 1996].

[122] Daniel Mathew, *supra* note 118.

[123] Memorandum and Rules and Regulations, Indian Olympic Association, Rule 7.

[124] *Id.* Rule 3.3.

[125] Arbitration Rules of IOA, *supra* note 120, Rule 5.1.

[126] ARBITRATION COMMISSION, INDIAN OLYMPIC ASSOCIATION, https://olympic.ind.in/arbitration-commission (last visited Dec. 15, 2019).

Mechanisms (**"DRMs"**) in two national SGBs has been discussed. This section does not profess to be an exhaustive study of the DRMs across the SGBs in India but does highlight the need for further clarity in the structure and functioning of the internal DRMs of the SGBs.

The Wrestling Federation of India is the recognised SGB for the sport of wrestling,[127] and is affiliated with the International SGB for the sport of wrestling i.e. The United World Wrestling. As on December 14, 2019, the constitution of the WFI provides for the establishment of a Disciplinary Committee, comprising of members from its Executive Committee to deal with "*all matters pertaining to disciplinary regulations*".[128] These regulations appear to pertain only to the member units, i.e. State Wrestling Associations, Union Territory Wrestling Associations, Services Sports Control Board, Railway Sports Promotion Board, and the FILA Bureau Members.[129] The Executive Committee of the WFI consists of the office bearers of WFI and twelve members elected by its General Council consisting of representatives from its member units.[130] The reference to 'disciplinary regulations' appears to be a reference to the regulations listed in Article XVII of its constitution.[131] Thus, in the disciplinary proceedings, it appears that there are no external members or judicial members present. This aspect appears to be present even at the appellate stage, where the affiliated units can only appeal to the President of the WFI.[132]

With regards to the athletes, Article XXII provides for sanctions against athletes, officials and coaches for un-sportsman conduct.[133] The appropriate penalty is to be decided by a committee appointed by the President or any other senior office bearer of the WFI.[134] However, the WFI constitution does not appear to provide guidance on who shall be appointed to the committee or the manner in which the said committee is to operate. Additionally, the constitution is also silent on any committee to which the athletes or other persons can make representation to in the event of any dispute with the WFI. The WFI website does not appear to provide any other documents pertaining to the said information on its website.

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[127] *List of Recognised National Sports Federations for the Year 2019*, MINISTRY OF YOUTH AFFAIRS AND SPORTS, https://yas.nic.in/sites/default/files/Listof%20RecognizedSports%20Bodies.pdf (last visited Dec. 15, 2019) [MINISTRY OF YOUTH AFFAIRS AND SPORTS].

[128] Rules and Regulations, Wrestling Federation of India, art. XIX.

[129] *Id.* art. III.

[130] *Id.* art. V.

[131] *Id.* art. XVII.

[132] *Id.* art. XXI.

[133] *Id.* art. XXII.

[134] *Id.*

The rules of the Equestrian Federation of India, which is the recognised body for equestrian sports in India,[135] are similar in nature. The Equestrian Federation of India ("**EFI**") has an Executive Committee which nominates a three member Dispute Resolution and Disciplinary Committee for the resolution of all disputes in relation to the violation of statutes, disciplinary cases arising in course of events held under the aegis of EFI, *etc.*, excluding those, which can be referred to respective technical committees constituted for their resolution.[136] It may be noted that the members of the Dispute Resolution and Disciplinary Committee are not to be members of the Executive Committee.[137] The Committee is to call on-record the necessary documents and is to afford the parties a reasonable opportunity to be heard, subsequent to which it is to render its reasoned decision with sixty days.[138] The decision is appealable to the Executive Committee and the decision given thereby is final and binding on the parties.[139] It may be noted that the Executive Committee is a twenty-two member body consisting of persons including the President of the EFI, Vice-Presidents, members responsible for various sporting disciplines, regional members.[140]

In both the aforementioned examples, arguments can be made for the need for further clarity within the statutes of the SGBs in the manner in which the mechanisms are to operate, the appointment process, the manner in which the proceedings are to take, functional independence of the members of the panels and the appeal processes in order to avoid any further litigation by participants. While these are the only two examples which have been discussed, the arguments with regards to further elucidation and clarity may be valid regarding several other national SGBs.[141]

It is evident that the government has recognised the need for adequate DRMs in the sporting context. In addition to the Advisory of 2016, as discussed previously, there have been prior attempts to establish such a mechanism. Both the Draft National Sports Development Bill, 2011,

[135] MINISTRY OF YOUTH AFFAIRS AND SPORTS, *supra* note 127.
[136] Statutes, Equestrian Federation of India, art. 14.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.* art. 2.
[141] Bhogle, *supra* note 4; Mehrotra, *supra* note 106.

and the Draft National Sports Development Bill, 2013, envisaged the establishment of a Sports Dispute Settlement and Appellate Tribunal ("**Proposed Tribunals**").[142]

However, despite much fanfare, the Bills were never enacted. Another proposed legislation, the National Code for Good Governance in Sports, 2017, is presently undergoing finalisation as per the orders of the Delhi High Court.[143] It is not possible to comment if the proposed legislation contains similar provisions as the 2011 and 2013 Bills. However, given the present state of administrative tribunals in the country, it is doubtful that the Proposed Tribunals would have provided effective remedy in the present scenario.[144]

XI. ARBITRATION-BASED DISPUTE RESOLUTION

In the previous chapters, attempts have been made to establish that traditional court-based processes are not adequate venues for resolving sports disputes. The issues regarding the clarity in the structures of the internal DRMs and of the SGBs have also been highlighted. This section attempts to make a case for resolution of sporting disputes through arbitration. It is pointed out that institutionalised arbitration can be considered as a viable alternative for the resolution of sporting disputes, taking on from the global practices in sport.

(A) ARBITRATION IN INDIA

The scheme of arbitration in India is presently governed by the Arbitration and Conciliation Act, 1996 ("**1996 Act**") which was inspired by the UNCITRAL Model Law on International Commercial Arbitration, 1985. The 1996 Act sought to combine all aspects of arbitration under a single legislation and repealed the Arbitration (Protocol and Convention) Act 1937, the Arbitration Act 1940, and the Foreign Awards (Recognition and Enforcement) Act, 1961.

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[142] Draft National Sports Development Bill, 2011, Chapter VII, Ministry of Youth Affairs and Sports, 2011 (India); Draft National Sports Development Bill, 2013, Chapter VIII, Ministry of Youth Affairs and Sports, 2013 (India).

[143] Qaiser Mohammed Ali, *Delhi High Court Furious At Sports Ministry For Not Filing Affidavit*, OUTLOOK (Dec. 9, 2019), https://www.outlookindia.com/website/story/sports-news-delhi-high-court-furious-at-sports-ministry-for-not-filing-affidavit/343850?utm_source=amp&utm_medium=tw&utm_campaign=amp (last visited Dec. 14, 2019).

[144] Law Commission of India, *Assessment of Statutory Frameworks of Tribunals in India*, Report No. 272 (Oct. 2017), http://lawcommissionofindia.nic.in/reports/Report272.pdf; VIDHI CENTRE FOR LEGAL POLICY, *The State of Nation's Tribunals I* (Jun. 15, 2014), https://vidhilegalpolicy.in/reports/2015/4/15/th-e-state-of-the-nations-tribunals-i (last visited Dec. 14, 2019).

The 1996 Act does not explicitly bar any category of dispute as 'arbitrable' or 'non-arbitrable'. However, Section 34 of the 1996 Act lays down the grounds on which a court may interfere with an arbitral award and Section 34(2)(b)(i) states that the court may set aside any award if it finds that the subject matter of the dispute is "*not capable of settlement by arbitration*".[145] Thus, it is essential to ensure that the subject matter of a dispute is arbitrable, lest the award rendered would be liable to be set aside under Section 34(2)(b)(i) of the 1996 Act.

In the absence of explicit criteria to decide arbitrability, the courts in India dealt with the question on a case-to-case basis until the legal position was settled by the Supreme Court in *Booz Allen v. SBI Home Finance*.[146] In this case, the Supreme Court enumerated certain disputes that cannot be referred to arbitration:

> "*The well-recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters;(v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.*"[147]

The Supreme Court reasoned that disputes arising out of rights *in rem* (right in property) are conventionally non-arbitrable, whereas actions arising out of rights *in personam* (right directed toward other person) can be subject to arbitration. This is because any remedy awarded in an action *in rem* would lie against the whole world at large, and the arbitral tribunal, being a creature of the contract (and by extension consent) between the parties, would not be empowered to award a remedy enforceable against the world. On the other hand, an action *in personam* is for determination of rights and obligations of the parties *vis-à-vis* one another.[148]

The Court further clarified that this is not a strict or rigid classification, as often actions *in personam* may arise out of rights *in rem*, and in such cases the subject matter of the dispute may be

[145] Arbitration and Conciliation Act, 1996, *supra* note 121, § 34(2)(b)(i).
[146] Booz Allen v. SBI Home Finance, (2011) 5 SCC 532.
[147] *Id.* ¶ 36.
[148] *Id.* ¶ 37.

arbitrable.[149] To illustrate, a dispute involving the validity of copyright is an action *in rem*, and consequently cannot be adjudged by an arbitrator. But a dispute regarding licensing of the same copyright is an action *in personam* arising out of the licensing agreement, and hence, arbitrable under the 1996 Act.

(B) WORKING STRUCTURE OF THE COURT OF ARBITRATION FOR SPORT

Globally, CAS has become the primary venue for resolution of sporting disputes. Though it offers a variety of Alternate Dispute Resolution services,[150] it primarily uses arbitration as the mode of resolution of sporting disputes. In the present section, the researchers shall explain the structure of CAS and the manner in which it has emerged as an independent body for the settlement of sporting disputes.

As per its own Code, CAS has the jurisdiction to resolve disputes "*matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or development of sport and may include, more generally, any activity or matter related or connected to sport*".[151] This is subject to a valid arbitration agreement between the parties giving CAS the requisite jurisdiction.[152]

CAS functions through a closed-system of selected arbitrators, around 400 in number,[153] who are appointed for duration of four years at a time.[154] They are nominated by SGBs, such as the IOC, International SGBs and National Olympic Committees.[155] At the same time, ICAS ensures that it appoints arbitrators with a view of safeguarding athletes' interests.[156] The CAS also provides for a comprehensive set of rules governing its arbitration mechanism, which is aimed at ensuring consistency in procedure.[157]

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[149] *Id.* ¶ 38.

[150] At present, CAS Code provides for four procedures which the parties can utilize to resolve their disputes: (a) ordinary arbitration procedure; (b) appeals arbitration procedure; (c) advisory procedure; and (d) mediation procedure. J. MUKUL MUDGAL, *supra* note 7, at 408.

[151] Code of Sports-related Arbitration, Court of Arbitration for Sport, (2019), art. R27 [hereinafter Code of Sports-related Arbitration].

[152] *Id.*

[153] Rustam Sethna, *A Data Analysis of The Arbitrators, Cases and Sports at The Court of Arbitration For Sport*, LAWINSPORT (Jul. 4, 2019), https://www.lawinsport.com/topics/item/a-data-analysis-of-the-arbitrators-sports-and-cases-at-the-court-of-arbitration-for-sport (last visited Dec. 14, 2019) [hereinafter Sethna].

[154] *Id.*

[155] *History of CAS*, *supra* note 33.

[156] *Id.*

[157] Code of Sports-related Arbitration, *supra* note 151.

Historically, CAS was heavily reliant on the IOC. However, with the passage of time, it has become increasingly independent and transparent in its functioning. These changes have been driven by a number of court-based decisions which have forced CAS to reform its internal structure and the hearing procedures. One of the foremost is the *Elmar Gundel* decision rendered by the Swiss Federal Supreme Tribunal.[158] Gundel had argued that CAS award could not be considered as a valid international arbitral award as it was not sufficiently independent and impartial.[159]

While the Swiss court held that the CAS was a 'true' arbitral tribunal, it pointed out areas of concern in the functioning of CAS, especially its linkages with the IOC.[160] At that time, IOC provided exclusive financing to CAS. Vested with the power to modify the CAS statute it also had other powers relating to appointments and procedures to be followed by CAS.[161] In short, "*CAS had to be made more independent of the IOC both organizationally and financially*".[162]

The primary change brought about by the decision was that attempts were made to separate CAS from IOC. The CAS Statutes were revised in order to make it more efficient and independent.[163] The most primary change was the creation of a body called the 'International Council of Arbitration for Sport' (ICAS), which became responsible for the functioning and funding of CAS.[164] CAS also created two separate divisions: one for hearing cases in the first instance; and another for hearing appeals. The modified CAS Code came into effect in 1994 with the signing of the Paris Agreement.[165]

The CAS Code was further modified in 2004 in light of the *Danilova and Lazuntina v. IOC and FIS* case.[166] The effect of the amendment was that no member of the ICAS could participate in CAS

[158] *Judgement of 27 May 2003*, 3 (2003) Digest of CAS Awards 649. For a discussion on the history leading up to the changes, see Ian Blackshaw, *CAS 92/A/63 Gundel v FEI*, *in* LEADING CASES IN SPORTS LAW 65-76 (Jack Anderson ed., 2013).
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] IAN BLACKSHAW, THE COURT OF ARBITRATION FOR SPORT: 1984-2004 34 (2006) [hereinafter Blackshaw].
[163] J. MUKUL MUDGAL, *supra* note 7, 408.
[164] *Id.*
[165] *Id.*
[166] Blackshaw, s*upra* note 162.

proceedings as an arbitrator or a counsel.[167] Further, the amendment provided that none of the CAS arbitrators could act as a counsel for any party before CAS.[168]

More recently, changes in the functioning of the CAS have come about due to the *Pechstein and Mutu*[169] decision. The European Court of Human Rights ("**ECHR**") has recognised that arbitration in CAS can be deemed to be 'forced' arbitration in the event it is made mandatory on the athlete to participate in an athletic competition.[170] Additionally, the ECHR held that CAS arbitration proceedings must comply with the procedural rights guaranteed by Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[171] This involves publicity and transparency in the hearing process.[172] The effects of the decision can be seen from the public nature of the proceedings on the doping charges against Sun Yang.[173] While there is an ongoing discussion and criticism with regards to CAS and its functioning,[174] it has been noted that the "*IOA rules concerning the [Arbitration Commission] seem rather primeval*"[175] as compared to the CAS, specifically in comparison to the changes made in the structure of the CAS after the *Gundel* case. It is possible that the IOA mechanism of dispute resolution through the Arbitration Commission may lead to arguments pertaining to arbitration bias, especially as the appointments to the IOA Arbitration Commission is directly made by the IOA Executive Committee. It is desirable that the IOA evolve rules wherein a de-linking of the IOA with the Arbitration Commission is effectuated, which has by and large been done in the relation between IOC and CAS. Similar arguments can be made regarding the SGBs and their DRMs.

[167] Daniel Mathew, *supra* note 118.
[168] *Id.*
[169] Mutu and Pechstein v. Switzerland, App. Nos. 40575/10 & 67474/10, 324 Eur. Ct. H.R. (2018).
[170] *Id.* ¶¶ 109-113; Antoine Duval, *The "Victory" of the Court of Arbitration for Sport at the European Court of Human Rights: The End of the Beginning for the CAS*, ASSER INTERNATIONAL SPORTS LAW BLOG (Oct. 10, 2018), https://www.asser.nl/SportsLaw/Blog/post/the-victory-of-the-court-of-arbitration-for-sport-at-the-european-court-of-human-rights-the-end-of-the-beginning-for-the-cas (last visited Dec. 15, 2019) [hereinafter Duval].
[171] *Id.* §§ 170-191.
[172] Duval*, supra* note 170.
[173] Jack Anderson, *A detailed analysis of the legal arguments in WADA v Sun Yang & FINA – a very public hearing*, LAWINSPORT (Nov. 28, 2019), https://www.lawinsport.com/topics/item/a-detailed-analysis-of-the-legal-arguments-in-wada-v-sun-yang-fina-a-very-public-hearing (last visited Dec. 14, 2019).
[174] Sethna, *supra* note 153.
[175] Daniel Mathew, *supra* note 118. It may be noted that the comment appears to have been made prior to the amendments made to the structure of IOA Arbitration Commission in 2018.

XII. CONCLUSION

In the discussion above, the limitations arising out of traditional court-based litigation have been discussed, and how despite its limitations, it is doubtful that that the situation with regards to courts being the preferred venue for dispute settlement is going to change in the recent future. Given this scenario, the IOA DRM is indeed a welcome step in the right direction.

The creation of an independent specialised institutional arbitration mechanism dedicated to sports can also be explored as a possibility in order to provide the participants a forum for resolution of disputes. It may be noted that this suggestion is a part of an increasing trend to establish arbitral tribunals in multiple jurisdictions, such as Canada and the U.K.

Sports Resolutions is an independent, private DRM body responsible for ensuring resolutions of sporting disputes in the U.K. It offers services which are similar in nature to the CAS.[176] As per Anderson, the disputes (approximately 250 in number) have ranged from disciplinary issues to selection disputes.[177] More recently, it has also been allotted resolution of doping-related disputes,[178] highlighting its effectiveness and the trust it commands in the sports sector in the U.K. According to scholars, it offers an expertise and cost advantage as instead of creating and maintaining "*their own quasi-independent appeals committee, [sports bodies] can, on ad-hoc basis, draw upon the pre-vetted expertise of Sports Resolutions UK panellists*…".[179] It may be noted that Prof. Anderson has discussed the possibility of establishing a Sports Resolutions style solution as an alternative to the existing structure in India.[180]

Similarly, in Canada, sporting disputes are resolved through the Sport Dispute Resolution Centre of Canada. It is a statutory body, funded by the Government of Canada, which provides for arbitration and mediation of sporting disputes at all levels of Canadian sport.[181] In order to avail

[176] In addition to arbitration and mediation, Sports Resolutions also offers assistance in appointment of members in internal sports DRMs and administration of the same. SPORTS RESOLUTIONS, https://www.sportsresolutions.co.uk (last visited Dec. 15, 2019) [hereinafter SPORTS RESOLUTIONS].

[177] **ANDERSON, MODERN SPORTS LAW: A TEXTBOOK** 96 (2010) [hereinafter ANDERSON].

[178] SPORTS RESOLUTIONS, *supra* note 176.

[179] **ANDERSON**, *supra* note 177.

[180] Model for Sports Dispute Resolution in India, *supra* note 5.

[181] Paul Denis Godin, *Sport Mediation: Mediating High Performance Sports Disputes*, NEGOTIATION JOURNAL (Jan. 2017), https://onlinelibrary.wiley.com/doi/pdf/10.1111/nejo.12172 (last visited Dec. 15, 2019).

funding from the Canadian government, the Canadian SGBs are required to provide that appeals from the internal DRMs of the SGBs shall lie to the Sport Dispute Resolution Centre of Canada.[182] Similar to Sports Resolutions, it is also the designated body of resolution of doping-related claims in Canada.[183] The Sport Dispute Resolution Centre of Canada ensures that the arbitrators and mediators enlisted with it possess necessary experience and expertise in the area of sport and ADR mechanisms.[184] Furthermore, it also ensures that the membership is "*a fair representation of the different regions, cultures, genders and bilingual character of Canadian society*".[185]

Even in comparable socio-economic jurisdictions attempts are being made to establish independent sports DRMs. In South Africa, National Sport and Recreation Amendment Bill, 2020, was recently introduced with the aim to amend the National Sport and Recreation Act, 1998 (hereinafter referred to as the "**NSR Act**") and to establish, *inter alia*, Sport Arbitration Tribunal for the country.[186] This was subsequent to the Portfolio Committee on Sports and Recreation being informed of the need for a sports arbitration tribunal,[187] and a previous lapsed bill in 2018 proposing the same.[188] The said Tribunal is to adjudicate on matters pertaining to, *inter alia*, prohibited acts under NSR Act and/or appeals from, or review any decision of sporting bodies under the terms of the NSR Act.[189] While the Tribunal is to contain at least five members appointed by the Minister of Sport and Recreation,[190] norms pertaining to participation by public in the nomination, transparency and openness, and experience is to be taken into account in the appointment.[191] Section 13J of the 2020 Bill also prescribes procedures with respect to conflict of interest and disclosures by the members of the Tribunal, which requires immediate and full

[182] *Id.*
[183] *Id.*
[184] Nick Davis, Marinka Teague & Sonia Ogier, *Dispute Resolution in the Sport and Recreation Sector and the Role of the Sports Tribunal*, SPARC (May 2009), http://www.sportstribunal.org.nz/assets/Uploads/Sports-Tribunal-files/Report-into-Sports-Dispute-Resolution-and-Sports-Tribunal.pdf (last visited Dec. 15, 2019).
[185] *Id.*
[186] National Sport and Recreation Amendment Bill of 2020, Statement of Objects and Reasons (S. Afr.) [hereinafter National Sport Amendment Bill S.A.].
[187] Felicia Lombard, *Committee Told That Sport Arbitration Tribunal Is Much Needed*, PARLIAMENT OF REPUBLIC OF SOUTH AFRICA (Nov. 21, 2018), https://www.parliament.gov.za/news/committee-told-sport-arbitration-tribunal-much-needed (last visited Dec. 14, 2019).
[188] National Sport and Recreation Amendment Bill, 2018 (S. Afr.).
[189] National Sport Amendment Bill S.A., *supra* note 186, § 13E.
[190] *Id.* § 13D.
[191] *Id.* § 13D.

disclosure of the conflict and a bar from participation in further proceedings.[192] Further, the compensation and salaries payable to the members shall be determined by the Minister.[193]

Building on these experiences, the establishment of a permanent arbitral institution for the resolution of sporting disputes seems imperative. The constituting structure and experience of the aforementioned models can be used as guidance to establish an arbitral institution which will be responsible for the resolution of sporting disputes. By making necessary modifications in the Code, the submission of disputes at the first instance shall be referred to the institution itself, in order to save time and costs. The funding to the institution may be provided by the government, in order to create structural independence in the mechanism. The proposed institution shall contain a pool of arbitrators, which the parties shall be at a liberty to appoint. Having an independent or legislatively established body resolve disputes makes its procedures more independent and less questionable during legal challenges which may arise regarding the independence of the decision makers. Additionally, the existence of a permanent arbitral body, such as the CAS, Sports Resolutions and the Sport Dispute Resolution Centre of Canada, has also given rise to a body of case laws which has been used as soft precedents to ensure that similar cases are treated similarly.[194] This becomes vital in ensuring that the rights of the athletes and other persons using such mechanisms are protected. With regards to the arbitrators enlisted with the institution, the government should ensure adequate knowledge and experience of sports related disputes and an inclusive linguistic and gender-based representation in order to allow the parties a wider choice. Additionally, with the creation of the tribunal, the functions presently performed by the ADDP and ADAP may be shifted to it over a period of time.

Although similar attempts had been made in India in the past, which have failed,[195] the circumstances have changed considerably since then. Firstly, not only have the athletes become more aware about their rights, they have also become more proactive in defending and enforcing

[192] *Id.* § 13J.
[193] *Id.* § 13L.
[194] L.V.P. de Oliveira, *Lex sportiva as the contractual governing law*, 17 INT'L SPORTS L. J. (2017); ANDERSON, *supra* note 17.
[195] Press Trust of India, *IOA constitutes Indian Court of Arbitration for Sports*, TIMES OF INDIA (Jul. 25, 2011), http://timesofindia.indiatimes.com/articleshow/9360502.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited Dec. 15, 2019).

the same.[196] This can be attested from the multiple litigations surrounding Asian Games, 2018, which, as has been noted, forms the backdrop in which the article was written.

Secondly, post 2015, attempts have been made by the Indian government to make India more arbitration friendly in order to attract international arbitrations. The amendments made to the Arbitration Act in 2015 have strengthened the position and practice of arbitrations in India by reducing the judicial interference and bringing in clarity on certain areas of the Arbitration Act.[197] Additionally, following the report of Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India,[198] the government of India appears to be making further changes in the present legal landscape in order to strengthen institutionalised arbitration. These changes have led to the enactment of the New Delhi International Arbitration Centre Act, 2019, and the Arbitration and Conciliation (Amendment) Act, 2019, which serve to strengthen the institutionalised arbitration processes. Several pronouncements of the Supreme Court have also appeared to endorse the use of ADR-mechanisms over traditional court-based processes.[199] It is hoped that these pronouncements will translate into more disputes being resolved through ADR-based mechanisms and signal a shift from constant interference by courts in the ADR-processes.

The aforementioned Arbitration and Conciliation (Amendment) Act, 2019 ("**Amendment Act**") is a huge step towards promotion of institutional arbitration.[200] The Amendment Act has inserted the definition of "*arbitral institutions*"[201] by the addition of S. 2(1)(ca) and has introduced provisions to grade arbitral institutions by the proposed Arbitration Council of India.[202] The proposed Arbitration Council of India has been given wide-ranging powers of supervision and control over the arbitral institutions in India, but the appointment of members to the Arbitration Council of

[196] Sharda Ugra, *supra* note 3.
[197] JUSTICE B.N. SRIKRISHNA, REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA 60 (2017), http://legalaffairs.gov.in/sites/default/-files/Report-HLC.pdf (last visited Dec. 15, 2019).
[198] *Id.*
[199] Mridul Godha & Kartikey M., *The New-Found Emphasis on Institutional Arbitration in India*, KLUWER (Jan. 7, 2018), http://arbitrationblog.kluwerarbitration.com/2018/01/07/uncitral-technical-notes-online-dispute-resolution-paper-tiger-game-changer/ (last visited Dec. 15, 2019).
[200] Arbitration and Conciliation (Amendment) Act, 2019, *supra* note 116.
[201] *Id.* § 2
[202] *Id.* § 10.

India is done by the Central Government.[203] This does lead to concerns of independence wherein the control of a body having supervision of arbitration institutions is with an entity which is often party to such arbitrations. However, the push towards institutional arbitration can be effective in order to yield more efficient and effective resolution of sporting disputes.

The advantages of having such a mechanism over the present structure existing in the country has already been discussed at length. Given the state of previous sports related legislative reforms, it is likely that the present structure may continue for the foreseeable future. Regardless, at the minimum, it can be argued that it is desirable that further reforms are made in the structure of the internal DRMs of the national SGBs so as to bring them to similar levels to their counterparts internationally. If not, it is very likely that the courts will again be faced with a spate of litigations when the next international sporting event comes around.

[203] *Id.* § 43C.

ARTICLE

ADOPTION OF POLLUTER PAYS PRINCIPLE BY THE INDIAN SUPREME COURT FOR DELIVERY OF ENVIRONMENTAL JUSTICE

*Arup Poddar**

ABSTRACT

In India, there is no dearth of environmental legislations, for example, the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986, the Wild Life (Protection) Act, 1972, the Forest (Conservation) Act, 1980, et cetera, enacted with objectives of addressing environmental pollution and protecting and preserving natural resources. Under these legislations, the polluting industry can be imposed with fine or with imprisonment or by both. However, the abovementioned legislations are silent in terms of fixing responsibility against the polluter or polluting industries for bearing the cost of compensation to the environmental victims and also to bear the cost for restoring the degraded environment. In 1991, the Public Liability Insurance Act was enacted to involve the third party to bear the cost of compensation to the victims on behalf of the owner of the hazardous industry which is producing and handling hazardous chemicals. But this Act was applicable only to hazardous chemical industries. In this regard, the Bhopal Gas Tragedy was an eye-opener for all of us that in spite of having a legislation to control the atmospheric pollution, there was no such provision under the Air Act, 1981 to fix responsibility against the polluting industry, so that such industry could have paid the cost of compensation to the victims. Although the Indian Supreme Court in 1986 categorically explained the scope of application of absolute liability against the hazardous industries, the application was limited because of the critical definition of liability regime. Polluter pays principle is the principle which applies against the polluter in a simple mechanism. In India, Supreme Court redefined the ambit of Article 21 of the Indian Constitution in 1991, classifying that the right to get pollution-free water and air is within the domain of Article 21. To redefine the polluting industries, it was the Indian Supreme Court, who, for the first time in 1996, brought the idea of polluter pays principle while exploring the concept of sustainable development. The present article discusses

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the struggle of the Supreme Court and successful implementation of the polluter pays principle for fixing appropriate liability against the polluter.

Keywords: Polluter Pays Principle, Absolute Liability, Supreme Court, Sustainable Development, Precautionary Principle, Right to Pollution Free Environment

I. INTRODUCTION

The Indian Supreme Court[1] ["The Court"] has played a major role in delivering environmental justice,[2] not only by controlling the pollution[3] to the environment, which could be directly related to the health issues[4] of the people, but also provided relief by way of preserving and protecting various environmental resources of the country.[5] India made its presence at the Stockholm Declaration, 1972[6] and also explained the position about the future activities that India will be taking to protect the human environment. India had two effective environmental legislations, such as the Wildlife (Protection) Act, 1972[7] and the Water (Prevention and Control of Pollution) Act, 1974,[8] which were not influenced by the Stockholm Declaration. These environmental legislations were enacted under the provisions of Article 252 of the Indian Constitution.[9] The Indian Parliament enacted a law to control the atmospheric pollution, for example, the Air (Prevention and Control of Pollution) Act, 1981,[10] under the significant influence of the Stockholm Declaration, 1972. This legislation was made while following the mandates of Article 253 of Indian

[1] J. Mijin Cha, *A Critical Examination of the Environmental Jurisprudence of the Courts of India*, 10 ALB. L. ENVTL. OUTLOOK 197 (2005) [hereinafter Cha].

[2] Deepa Badrinarayana, *The "Right" Right to Environmental Protection: What we can discern from the American and Indian Constitutional experience*, 43 BROOKLYN J. INT'L L. 75 (2017) [hereinafter Deepa Badrinarayana].

[3] Armin Rosencranz & Michael Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 COLUM. J. ENVTL. L. 223 (2003) [hereinafter Rosencranz & Jackson].

[4] Naznen Rahman, *A Comparative Analysis of Air Pollution Control in Delhi and Beijing: Can India's Model of Judicial Activism Affect Environmental Change in China?*, 27 TUL. J. INT'L & COMP. L. 152, 155 (2018) [hereinafter Naznen Rahman].

[5] David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVTL. L.J. 711 (2008).

[6] Emily R. Atwood, *Preserving the Taj Mahal: India's Struggle to Salvage Cultural Icons in the Wake of Industrialization*, 11 PENN ST. ENVTL. L. REV. 101 (2002).

[7] Milan Dalal, *Tiger, Tiger Flickering Light*, 31 B.C. INT'L & COMP. L. REV. 103 (2008).

[8] Kelly D Alley, *Legal Activism and River Pollution in India*, 21 GEO. INT'L ENVTL. L. REV. 793 (2009).

[9] Arjun Krishnan & Vishnu Vardhan Shankar, *Cooperative Legislation and Article 252: Implications for Indian Federalis*t, 16 STUDENT BAR REVIEW 68-94 (2004).

[10] Rosencranz & Jackson, *supra* note 3.

Constitution.[11] The Stockholm Declaration, 1972 is one of the international environmental documents which provides the scope of protection regime of environmental resources, not only for present but also for future generations.[12] Similarly, the Environment (Protection) Act, 1986[13] was also enacted by following the constitutional provisions under Article 253 of the Indian Constitution. It is also true that given the wider range of powers under Section 3 and Section 5 of the said Act, the Government of India is empowered to take any such measures, even not defined under the statute, for the purpose of protecting and preserving the natural environment.[14] At the same time, this declaration also promotes the avenues under which environmental liability regime can be appropriately fixed against the polluter.[15] At that time, the environmental legislations as mentioned above were sufficient to fix responsibility against the polluter in a punitive form, such as, either imposing fine to the polluter or sending the person behind the bar responsible for such pollution by way of imprisonment.[16] Therefore, those environmental legislations, as mentioned above became the part of criminal minor Act.[17] The massive environmental accident, such as the Bhopal Gas Tragedy,[18] revealed the extreme weakness[19] in the environmental legislations which were prevailing at that time, to the extent that no law had any specific provision under which compensation amount could be imposed against the polluter, not only to be paid to the victims of such massive environmental accidents,[20] but also to award the amount of compensation to the polluter for the purpose of restoring the degraded environment.[21] The Court in the *M.C. Mehta (Absolute Liability)* case[22] discussed the ambit of strict liability and brought forward the concept of

[11] Shraddha Kulhari & Sujoy Chatterjee, *Is India's Federalism a Threat to Its WTO Obligations: Through the prism of Article 253*, 1(1) INDIAN L. REV. 69-82 (2017).
[12] Burns H. Weston, *Climate Change and Intergenerational Justice: Foundational Reflections*, 9 VT. J. ENVTL. L. 375 (2007-08).
[13] Cha, *supra* note 1, at 200-1.
[14] Sanjay Jose Mullick, *Power Game in India: Environmental Clearance and the Enron Project*, 16 STAN. ENVTL. L.J. 256 (1997).
[15] M.C. Mehta, *Book Excerpt: The Accountability Principle: Legal Solutions to Break Corruption's Impact on India's Environment*, 21 J. ENVTL. L. & LITIG. 141 (2006) [hereinafter M.C. Mehta: Book Excerpt].
[16] Irene Villanueva Nemesio, *Strengthening Environmental Rule of Law: Enforcement, Combatting Corruption, and Encouraging Citizen Suits*, 27 GEO. INT'L ENVTL. L. REV. 321, 338 (2015) [hereinafter Nemesio].
[17] Michael Faure, *Effectiveness of Environmental Law: What Does the Evidence Tell Us?*, 36 WM. & MARY ENVTL. L. & POL'Y REV. 293, 323-33 (2012) [hereinafter Faure].
[18] Sheila Jasanoff, *The Bhopal Disaster Approaches 25: Looking Back to Look Forward: Bhopal's Trials of Knowledge and Ignorance*, 42 NEW ENG. L. REV. 679 (2008).
[19] *Id.*
[20] Arya Hariharan, *India's Nuclear Civil Liability Bill and Supplier's Liability: One Step Towards Modernizing the Outdated International Nuclear Liability Regime*, 36 WM. & MARY ENVTL. L. & POL'Y REV. 223 (2011).
[21] Alon Tal & Jessica A. Cohen, *Bringing "Top-Down" to "Bottom-Up": A New Role for Environmental Legislation in Combating Desertification*, 31 HARV. ENVTL. L. REV. 163 (2007) [hereinafter Tal & Cohen].
[22] M.C. Mehta v. Union of India, AIR 1987 SC 1086 [hereinafter M.C. Mehta].

absolute liability having no exceptions to be enjoyed by the polluter.[23] However, the discussion went to cover only the hazardous industries against which the absolute liability can be applied.[24] Meanwhile, it was also revealed by the Court that the right to pollution-free environment is not a fundamental right nor a part of statutory right, ever explained expressly under any environmental legislation.[25] Subsequently, the Court in the year 1991 in the case of *Subhash Kumar v. State of Bihar*,[26] while rejecting the public interest litigation, categorically explained that under Article 21 of Indian Constitution, the expression right to life also includes right to get pollution free water and air.[27] An environmental report developed by the National Environmental Engineering Research Institute (NEERI), was seriously considered by the Supreme Court in India in *Indian Council (Bichhri)* case[28] and redefined the concept of liability regime against the polluting industries in a new look with greater responsibility and proactive stand for the preservation of environment and protection of environmental rights to the people in India.[29] In India, because of drastic but reasonable venture made by the Supreme Court introduced the polluter pays principle in the year 1996.[30] However, historically, its origin dates back to 1970s.[31]

II. ORIGIN OF THE CONCEPT OF POLLUTER PAYS PRINCIPLE

The presence of the concept of polluter pays principle can be traced back from 1960 when for the first time Paris Convention effectively channelised the scheme of compensation to be borne by those who would be responsible for environmental harm and it is to be paid to the environmental

[23] Deepa Badrinarayana, *The Jewel in the Crown: Can India's Strict Liability Doctrine deepen our Understanding of Tort Law Theory?*, 55 U. LOUISVILLE L. REV. 25 (2017) [hereinafter Deepa Badrinarayana 2017].

[24] David Dodds, *Breaking Up is Hard to Do: Environmental Effects of Shipwrecking and Possible Solutions Under India's Environmental Regime*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 207 (2007) [hereinafter Dodds].

[25] Oren Perez, *Reflections on an Environmental Struggle: P&O, Dahanu, and the Regulation of Multinational Enterprises*, 15 GEO. INT'L ENVTL. L. REV. 1 (2002) [hereinafter Oren Perez].

[26] Subhash Kumar v. State of Bihar, AIR 1991 SC 420.

[27] Deepa Badrinarayana, *supra* note 2.

[28] Indian Council for Enviro-Legal Action v. Union of India, AIR 1996 SC 1446 [hereinafter Indian Council for Enviro-Legal Action].

[29] J. Michael Angstadt, *Securing Access to Justice Through Environmental Courts and Tribunals: A Case in Diversity*, 17 VT. J. ENVTL. L. 345 (2016).

[30] *Id.*, at 354.

[31] John C. O'Quinn, *Not-So-Strict Liability: A Foreseeability Test for Rylands v. Fletcher and Other Lessons from Cambridge Water Co. v. Eastern Counties Leather Plc*, 24 HARV. ENVTL. L. REV. 287, 299 (2000) [hereinafter John C. O'Quinn].

victims.[32] Similarly, the Convention on Civil Liability for Nuclear Damage, otherwise known as the Vienna Convention 1963, also brought forward the environmental liability regime and also stated that compensation to the environmental victims will be paid by those who would be responsible for causing such environmental damage.[33] The absolute form of liability for bearing the cost of compensation was relaxed under the International Convention on Civil Liability for Oil Pollution Damage of 1969. It was further stated that unless there is a real fault of the shipowner, responsibility on environmental damage cannot be fixed.[34] The polluter pays principle can be traced from the documents of Organisation for Economic Cooperation and Development (OECD).[35]

(A) CONTRIBUTION BY OECD

In the year 1972, the first official mentioning of polluter pays principle can be witnessed from the resolution of OECD.[36] The resolution became a matter of guideline that whoever will be using environmental resources for developmental purpose and for one's economic benefit the same developer shall have the responsibility for pollution control and prevention keeping in mind that every environmental resource has an economic value and the developer will have to use wisely the environmental resources for developmental purpose.[37] In case, there is environmental harm because of such developmental process, the cost of pollution control and prevention will rest upon the developer/polluter.[38] This guideline was accepted as anti-trade distortion under international trade and investment regime.[39] In the year 1974, there was another guideline adopted by the OECD Council that finance to develop a new technology for pollution control and scientific development

[32] Jeremy Suttenberg, *Who Pays? The Consequences of State versus Operator Liability Within the Context of Transboundary Environmental Nuclear Damage*, 24 N.Y.U. ENVTL. L.J. 201, 206 (2016).

[33] Sherry P. Broder, *International Environmental and Nuclear Law (Panel 2): Responsibility and Accountability for Harm Caused by Nuclear Activities*, 35 HAWAII L. REV. 575, 594 (2013).

[34] Mans Jacobsson, *The International Liability and Compensation Regime for Oil Pollution from Ships - International Solutions for a Global Problem*, 32 TUL. MAR. L. J. 1 (2007).

[35] Candice Stevens, *Trade and the Environment: The OECD Guiding Principles Revisited*, 23 ENVTL. L. 607 (1992).

[36] Candice Stevens, *Interpreting the Polluter Pays Principle in the Trade and Environment Context*, 27 CORNELL INT'L L.J. 577, 581 (1994).

[37] Jonathan Remy Nash, *Too Much Market? Conflict between Tradable Pollution Allowances and the "Polluter Pays" Principle*, 24 HARV. ENVTL. L. REV. 465, 468 (2000).

[38] Boris N. Mamlyuk, *Analyzing the Polluter Pays Principle through Law and Economics*, 18 SOUTHEASTERN ENVTL. L.J. 39, 46 (2009).

[39] Charles S. Pearson, *Testing the System: GATT + PPP = ?*, 27 CORNELL INT'L L.J. 553, 564 (1994).

of pollution control devices are to be considered as an integral part of polluter pays principle.[40] Regarding the application of the polluter pays principle to the installer of hazardous items, in 1989, the OECD Council resolved that any environmental harm witnessed from the company which is installing hazardous items should bear the cost of reasonable measures for pollution control and prevention.[41] The cost which is required to eliminate the pollution in the environment to be borne by the polluter, can be found under European Union law as well.[42]

(B) PRESENCE OF POLLUTER PAYS PRINCIPLE UNDER EUROPEAN LAW

In 1973, the European Union inculcated the polluter pays principle in the first programme of action on the environment.[43] In 1975, the European Council made a recommendation on cost allocation and action to be taken by public authorities on environmental degradation matters and stated that the polluter pays principle should be applied by the European Union at the union level and the Member States should apply the principle in their national environmental legislation.[44] The principle of polluter pays will not only be applicable to natural persons, but also to artificial legal persons which are regulated by either private law or by public, provided that the pollution is caused by them.[45] Therefore, the polluter will have to bear the cost of undertaking measures which will be essential to remove that pollution or reduce pollution to such an extent which will meet with the standards specified by public authorities.[46] It is also clearly visible that recommendation relating to applicability of polluter pays principle is wider as stated by the European Council in comparison to that of the OECD recommendations.[47]

[40] Eric Thomas Larson, *Why Environmental Liability Regimes in the United States, the European Community, and Japan have grown synonymous with the Polluter Pays Principle*, 38 VAND. J. TRANSNAT'L L. 541, 562 (2005) [hereinafter Larson].

[41] Margaret Rosso Grossman, *Agriculture and the Polluter Pays Principle: An Introduction*, 59 OKLA. L. REV. 1, 9 (2006) [hereinafter Grossman].

[42] Carol S. Comer, *Federalism and Environmental Quality: A Case Study of Packaging Waste Rules in the European Union*, 7 FORDHAM ENVTL. L. J. 163, 188-190 (1995).

[43] Daniel W. Simcox, *The Future of Europe Lies in Waste: The Importance of the Proposed Directive on Civil Liability for Damage Caused by Waste to the European Community and Its Environmental Policy*, 28 VAND. J. TRANSNAT'L L. 543, 568 (1995).

[44] Grossman, *supra* note 41, at 15.

[45] Larson, *supra* note 40, at 550-1.

[46] John F. Casalino, *Shaping Environmental Law and Policy of Central and Eastern Europe: The European Union's Critical Role*, 14 TEMP. ENVTL. L. & TECH. J. 227, 238 (1995).

[47] Paolo Turrini, *Just Dipping a Toe in the Water? On the Reconciliation of the European Institutions with Article 9 of the Water Framework Directive*, 31 GEO. ENVTL. L. REV. 87 (2018).

In this regard, the European Council recommendations cannot be considered as legally binding.[48] However, under the same recommendations, the public authority shall enjoy ample power to specify and identify standards for controlling pollution and can declare certain acts of the natural person and artificial legal person to be considered as not contrary to the polluter pays principle and also write down exceptions to such principle.[49]

European Economic Commission (EEC) Treaty was amended in 1986 to make a provision for European Union that any action to be taken for the purpose of protection and preservation of the environment should be based on the principle of polluter pays.[50] It is also interesting to note here that member countries of European Free Trade Association (EFTA) and European Union members agreed in 1992 that environmental action should be based on the principle that the polluter should pay.[51] It is also found that occasionally, the European Court of Justice realised the practical applicability of the polluter pays principle.[52] The state aid provided by the European Commission, there is also presence of polluter pays principle in its action.[53] Finally, the secondary legislations[54] of the European Union also incorporate the principle of polluter pays for better administration of environmental matters.[55]

(C) OTHER INTERNATIONAL ENVIRONMENTAL INSTRUMENTS

[48] Iciar Patricia Garcia, *"Nunca Mais!" How Current European Environmental Liability and Compensation Regimes are Addressing the Prestige Oil Spill Of 2002*, 25 U. PA. J. INT'L ECON. L. 1395, 1416, 1427 & 1428 (2004).

[49] Gerrit Betlem & Michael Faure, *Environmental Toxic Torts in Europe: Some Trends in Recovery of Soil Clean-Up Costs and Damages for Personal Injury in the Netherlands, Belgium, England and Germany*, 10 GEO. INT'L ENVTL. L. REV. 855, 860 (1998).

[50] Pablo M.J. Mendes de Leon & Steven A. Mirmina, *Protecting the Environment by use of Fiscal Measures: Legality and Propriety*, 62 J. AIR L. & COM. 791, 815-6 (1997).

[51] Linda O'Neil Coleman, *The European Union: An Appropriate Model for a Precautionary Approach?*, 25 SEATTLE U. L. REV. 609, 615 (2002).

[52] Michael Cardwell, *The Polluter Pays Principle in European Community Law and its Impact on United Kingdom Farmers*, 59 OKLA. L. REV. 89, 92 (2006).

[53] Andrew O. Guglielmi, *Recreating the Western City in a Post-Industrialized World: European Brownfield Policy and an American Comparison*, 53 BUFFALO L. REV. 1273, 1293-4 (2005).

[54] For example, EU secondary legislation is made by the EU institutions. The five EU legal instruments specifically provided for in the Treaties are: Binding in nature-Regulations, Directives, Decisions and Non-binding in nature-Recommendations and Opinions. Oxford LibGuides, *European Union Law: Secondary legislation*, https://ox.libguides.com/c.php?g=422926&p=2888217 (last visited Aug. 06, 2019).

[55] Luis A. Avilés, *RIO+20: Sustainable Development and the Legal Protection of the Environment in Europe*, 12 SUSTAINABLE DEV. L. & POL'Y 29, 32-3 (2012).

The expression 'polluter pays principle' can be found in Rio Declaration of 1992, in which Principle 16 clearly mentions that the participating nation should devise an economic instrument which will ensure the internalization of environmental cost while fixing responsibility against the polluter to bear the cost of causing pollution.[56] However, Principle 16 is particular about the scope that such fixing financial liability should be in public interest and under no circumstances should come in the way of international trade and investment.[57] The other international environmental instruments, such as Stockholm Declaration, 1972,[58] World Charter for Nature, 1981,[59] World Commission on Environment and Development, 1987,[60] et cetera, indirectly mention that polluter pays principle in a rather vague form.

In India the necessity of having the polluter pays principle was felt for the first time when there was a leakage of Methyl isocyanate gas at Bhopal, which took away several human lives and degrade the environment with the potency to cause a future birth defect in the concerned area.[61]

III. BHOPAL GAS TRAGEDY AND NECESSITY OF POLLUTER PAYS PRINCIPLE

In India, the environmental liability regime was not very strong, because of the fact that at that time, no laws were available to fix the responsibility to the polluter for environmental damage and loss of human life, in order to pay the compensation to the environmental victims and also award the amount to be expended for restoring the degraded environment.[62]

[56] Steve Charnovitz, *Trade and Climate Change: Reviewing Carbon Charges and Free Allowances Under Environmental Law and Principles*, 16 ILSA J. INT'L & COMP. L. 395, 408 (2011).
[57] Shae Yatta Harvey, *The Vitality of the Rio Declaration in Light of Hardin's Theory of the Commons*, 42 HOW. L.J. 347, 362 (1999).
[58] Lauren Sanchez-Murphy, *Economic Development and Environmental Threats: Tipping the Balance in Venezuela*, 7 LOY. U. CHI. INT'L L. REV. 73, 90 (2009) [hereinafter Lauren Sanchez-Murphy].
[59] Prue Taylor, *The Business of Climate Change: Challenges and Opportunities for Multinational Business Enterprises: The Business of Climate Change: What's Ethics Got to Do with it?*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 161, 170 (2007).
[60] John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. 1, 19 (1998).
[61] Joseph P. Mikitish, *Achieving Sustainability Through Existing Environmental Regulations*, 43 ARIZ. ST. L. J. 835, 843 (2011).
[62] Anonymous, *Developments in the Law – International Environmental Law*, 104 HARV. L. REV. 1609, 1618 (1991).

The Government of India initiated the process with the Union Carbide Corporation to negotiate for compensation amounts to be paid to the environmental victims and families and this was merely a negotiation without the support of any internal law, as there was no law.[63]

It was the need of the situation that India should have adopted the polluter pays principle immediately after the Stockholm Declaration, 1972, so that this kind of massive environmental accidents could have been controlled and mitigated with the help of the same principle.[64] As I have already discussed earlier, simple meaning of the polluter pays principle was that the polluter will have to bear the economic cost for any environmental damage, which happened because of the polluter's action and also will have to bear the economic cost for the amount of compensation that is to be paid to the victims of such environmental degradation.[65]

In this regard, it is to be mentioned that the amount which was negotiated by the Government of India was only meant for compensation amount for environmental victims and their families, though there was aspersion that whether the amount so collected was sufficient to meet with the compensation amount as required by the situation, but there was no negotiation regarding collecting the amount for restoring the degraded environment.[66] Hence, there was an extreme necessity for adopting the principle of polluter pays by India to avoid this kind of environmental hazard and subsequent repercussion.[67]

IV. POLLUTER PAYS PRINCIPLE AND LIABILITY REGIME

It is true that the polluter pays principle became the best example of fixing environmental liability against the polluter at the international level, however, in India, the environmental liability is best understood as per the provisions of the core environmental legislations, such as, the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution)

[63] Faure *supra* note 17, at 688.
[64] Sudhir K. Chopra, *Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity*, 29 VAL. U.L. REV. 235, 260 (1994).
[65] Lauren Sanchez-Murphy, *supra* note 58.
[66] Tal & Cohen, *supra* note 21.
[67] Mary Elliott Rolle, *Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases*, 15 GEO. INT'L ENVTL. L. REV. 135 (2003).

Act, 1981, the Wildlife (Protection) Act 1972, the Biological Diversity Act, 2002, et cetera.[68] The authorities constituted under these environmental legislations, such as, Pollution Control Board, Chief Wildlife Warden and National Biodiversity Authority are responsible for fixing the liability against the polluter or to the person who degrades the environment, but fixing liability in comparison to that of polluter pays principle under these laws will be negligible, because of the fact that under these environmental legislations either the polluter will be directed to pay the fine, irrespective of the turnover of the company and proportionate compensation or the polluter would be responsible to be sent to jail or both.[69]

Therefore, it is clear from the above paragraph that the fixation of environmental liability regime by way of awarding the amount of compensation keeping in mind about the turnover of the company/polluter as specified under the principle of polluter pays is magnificent and serves the purpose of economic responsibility of the polluter against the environmental victims and resources.[70] Whereas, the environmental legislations are specific against the polluter to take punitive action against the polluter, there is no such provision under these legislations by which the environmental victims and the restoration environmental resources can be possible by way of fixing compensation.[71]

The third party involvement in order to bear the amount of compensation on behalf of the owner of the hazardous chemical industries, was for the first time noticed under the Public Liability Insurance Act, 1991,[72] which was enacted for the purpose of fixing responsibility to the owner of any hazardous industries, producing and handling hazardous chemicals to bear the compensation to the victims for any accident, even if the owner is at no fault. The Supreme Court in *Tamil Nadu Pollution Control Board vs. Sterlite Industries (I) Ltd. and Ors.*[73] mentioned the importance of section 15 of the National Green Tribunal Act, 2010 and stated that the Tribunal will have all necessary powers to award for compensation to the victims and can even award the compensation for

[68] Elizabeth Fata, *Actions and Reactions: The Evolution of Environmental Common Law and Judicial Activism in India and the United States*, 23 U. MIAMI INT'L & COMP. L. REV. 215 (2005) [hereinafter Fata].

[69] Air (Prevention and Control of Pollution) Act, ch. VI, No. 14, Acts of Parliament, 1981 (India); Water (Prevention and Control of Pollution) Act, ch. VII, No. 6, Acts of Parliament, 1974 (India); Wildlife (Protection) Act, ch. VI, No. 53, Acts of Parliament, 1972 (India); Biological Diversity Act, § 55-58, No. 18, Acts of Parliament, 2002 (India).

[70] Nicholas S. Dufau, *Too Small to Fail: A New Perspective on Environmental Penalties for Small Businesses*, 81 U. CHI. L. REV. 1797-99 (2004).

[71] Alyssa Carroll, *Have a Coke and a Smile: Is the Aqueduct Alliance Coca-Cola's Solution to Escape Future Liability for Groundwater Depletion?*, 26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 475 (2013).

[72] Deepa Badrinarayana 2017, *supra* note 23.

[73] Tamil Nadu Pollution Control Board v. Sterlite Industries (I) Ltd. & Ors., 2019(3) SCALE 721.

restoration of the degraded environment in addition to the compensation under the Public Liability Insurance Act, 1991.

After 2010, under the Environment (Protection) Act, 1986 many rules were framed, particularly, Hazardous and Other Waste (Management and Transboundary Movement) Rules, 2016, Solid Waste Management Rules, 2016, E-Waste (Management) Rules, 2016, Biomedical Waste Management Rules, 2016, et cetera, which are also concerned with the fixing of liability to the polluter by awarding compensation.[74]

In India, the environmental liability regime of the polluter for compensation and for restoration started by protecting the principle of polluter pays by the Supreme Court of India in the year 1996.[75] Therefore, in India, not only the environmental legislations would be applicable for providing punitive action to the polluter, but also the polluter can be held economically responsible to bear the cost of compensation and restoration. In environmental history, it can be clearly recognised that the concept of absolute liability was brought forward to give a new dimension of environmental liability regime.[76].

(A) A JOURNEY OF LIABILITY REGIME FROM ABSOLUTE LIABILITY TO POLLUTER PAYS PRINCIPLE

Immediately after the Bhopal Gas Tragedy, there was another oleum gas leakage which occurred at New Delhi in 1985, because of which the Supreme Court had to intervene to provide a better and unique way of fixing environmental liability against the polluter in the year 1986.[77] The Supreme Court explored the idea of 'Absolute Liability' against the polluter and stated that although India is influenced by the common law, the situation regarding the environment and its degradation is different from other European countries, where common laws are applicable, hence,

[74] Ministry of Environment, Forest and Climate Change, *Hazardous Substance Management*, http://moef.gov.in/rules-and-regulations/environment-protection/hazardous-substances-management/ (last visited Aug. 06, 2019).

[75] Jona Razzaque, *Linking Human Rights, Development, And Environment: Experiences from Litigation in South Asia*, 18 FORDHAM ENVTL. LAW REV. 587 (2007).

[76] Jamie Cassels, *Outlaws: Multinational Corporations and Catastrophic Law*, 31 CUMB. L. REV. 324 (2000-2001).

[77] Anjali D. Nanda, *India's Environmental Trump Card: How Reducing Black Carbon Through Common but Differentiated Responsibilities Can Curb Climate Change*, 39 DENV. J. INT'L L. & POL'Y 549 (2011).

the application of 'Strict Liability' as per *Rylands*[78] case will not be possible here in India, because the polluter will make excuses under the exceptions[79] available to it.[80]

The Supreme Court in *M.C. Mehta*[81] (absolute liability) case clearly stated that it is the absolute liability of the hazardous industries to bear the economic responsibility for remedying the damage caused to the environment because of its own action. The apex court further stated that the quantum of economic responsibility for environmental damage will be dynamic to the extent that bigger the corporation and its turnover, larger the compensation amount. But, the principle of absolute liability will be applicable to only those industries which are hazardous in nature.[82]

Therefore, as per the principle of absolute liability, every polluter will not fall under the clutches of this principle and fixing economic responsibility against every polluter will be considered as myth but not a reality.[83] The Supreme Court had to explore a unique mechanism, which would give best reply to environmental protection against any polluting entity and ultimately the struggle ended when the apex court adopted the international sound principle 'Polluter Pays Principle' while deciding the *Sludge* case.[84]

It is also important to note here that unless the polluting industries are affecting the people's right to pollution-free environment by their activities, the application of principles, such as, absolute liability, precautionary principle, intergenerational equity, polluter pays principle, et cetera may not come in real picture for their operation.[85]

V. RIGHT TO POLLUTION-FREE ENVIRONMENT AND POLLUTER PAYS PRINCIPLE

[78] Rylands v. Fletcher, (1868) LR 3 HL 330.

[79] For example, plaintiff's own fault, consent given by the plaintiff, act of third-party, act of God, common benefit to plaintiff and defendant and statutory authority.

[80] Abhi Raghunathan, *The Grand Trunk Road from Salomon to Mehta: Economic Development and Enterprise Liability in India*, 100 GEO. L.J. 571 (2012).

[81] M.C. Mehta, *supra* note 22.

[82] Meredith Dearboaawa, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CALIF. L. REV. 229 (2009).

[83] Gary M. Bowman, *Judicial Ordering of Intergovernmental Roles in Hazardous Materials Transportation*, 18 TRANSP. L. J. 31 (1989).

[84] Indian Council for Enviro-Legal Action v. Union of India, AIR 1996 SC 1446.

[85] Josh Gellers, *Righting Environmental Wrongs: Assessing the Role of Legal Systems in Redressing Environmental Grievances*, 26 J. ENVTL. L. & LITIG. 461 (2011).

Right to a pollution-free environment was not established under any statutory provisions of environmental legislations in India even until today.[86] The Indian Constitution was amended in the year 1976 and at the time two important Articles were inserted, for example, Article 48A and Article 51(a)g, which not only bestowed obligatory duties upon the state to preserve and protect the environment and resources, but also imposed a fundamental duty to citizens of India to take all necessary measures for the purpose of protecting and preserving the natural environment.[87]

When the Supreme Court decided the *Absolute Liability*[88] case in India, there was no declaration of the right to pollution-free environment under Article 21 of Indian Constitution. However, the right to receive pollution-free water and air, got declared by the Supreme Court while deciding the *Subhash Kumar*[89] case in the 1991.[90] This decision and its finding got mileage for fixing economic responsibility against the polluter.[91] Now, if the polluter pollutes the environment and thereby affects the fundamental right of the Indian citizen, then the polluter shall not only be absolutely liable for paying the amount of compensation but also to bear the cost of restoring the degraded environment.[92]

Therefore, the violation of fundamental rights by the polluting industries because of its rough action will attract the liability which is absolute in nature and in the name of polluter pays principle.[93] The Supreme Court while discussing the larger ambit of Article 21 of Indian Constitution mechanised the procedure for bringing out a very sensitive principle of polluter pays in India.[94]

VI. SIGNIFICANT ROLE OF INDIAN SUPREME COURT TO MECHANISE THE POLLUTER PAYS PRINCIPLE

[86] Nemesio, *supra* note 16 at 338.
[87] Vahbiz P. Karanjia, *Why India Matters: The Confluence of a Booming Economy, An Activist Supreme Court, and a Thirst for Energy*, 20 VILL. ENVTL. L.J. 49 (2009).
[88] M.C. Mehta, *supra* note 22.
[89] Subhash Kumar v. State of Bihar, AIR 1991 SC 420.
[90] Erin Daly, *Environmental Constitutionalism in Defense of Nature*, 53 WAKE FOREST L. REV. 680 (2018) [hereinafter Erin Daly].
[91] Janelle P. Eurick, *The Constitutional Right to A Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions*, 11 INT'L LEGAL PERSP. 192 (2001) [hereinafter Janelle P. Eurick].
[92] Faure *supra* note 17, at 332-333.
[93] Shubhankar Dam, *Green Laws for Better Health: The Past that was and the Future that may be -- Reflections from the Indian Experience*, 16 GEO. INT'L ENVTL. L. REV. 593 (2004).
[94] Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT'L L. REV. 447 (1998).

As I have discussed in the previous part of this article that the Supreme Court was making all possible efforts to fix the financial responsibility against the polluting industries for damaging human life and environment and in this regard the first innovative step was taken by the apex court in *M.C. Mehta*[95] case, and developed the principle of absolute liability to be applicable against hazardous industries.[96] But, in that case, the principle of absolute liability was not invoked, because the petitioner did not mention anything in the petition about fixing responsibility against the polluting industry. In this regard, one of the important legislations were enacted by the Government of India in the name of Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 to facilitate the scope of claiming compensation[97] for the victims of the environmental accident, which happened because of the leakage of Methyl isocyanate gas.[98]

The major development regarding the acceptability of the principle of polluter pays can be witnessed from the decision of the Supreme Court while deciding the *Indian Council case*[99] of 1996. Few villages in the Udaipur district of the State of Rajasthan got seriously affected by the remnants of the sludge industry, manufacturing hazardous acids. In this case, it was found that because of the stringent application of environmental laws in the developed countries, the manufacturing industries of those countries depend on the developing countries to collect the by-product and import the same to the respective abroad countries for business purposes. Though India is a developing country, there is no dearth of strict environmental legislations. However, implementation of the effective provisions always became a matter of controversy in India. This kind of manufacturing, which has huge potency to degrade the environment with the magnitude of affecting the rights of the future generation as well.[100]

The Supreme Court in this *Indian Council* case relied heavily on the report submitted by the National Environmental Engineering Research Institute (NEERI), not only to ensure the quantum of environmental damage that has happened because of the running of the chemical industries in the area, but also looked into the feasible option of awarding compensation to victims. The Court took notice of the general rule of negligence that has been proved against the chemical industries,

[95] M.C. Mehta v. Union of India, AIR 1987 SC 1086.
[96] Deepa Badrinarayana 2017, *supra* note 23.
[97] Union Carbide Corporation v. Union of India, (1991) 4 SCC 548.
[98] Nehal A. Patel and Ksenia Petlakh, *Gandhi's Nightmare: Bhopal and the Need for a Mindful Jurisprudence*, 30 HARV. J. RACIAL & ETHNIC JUST. 151 (1998).
[99] Indian Council for Enviro-Legal Action, *supra* note 28.
[100] Deepa Badrinarayana, *supra* note 2.

but in order to be sure before fixing the financial liability against the chemical industries working in the State of Rajasthan, the court relied on two important judgements from the common law countries.[101]

First, in *Cambridge water company's case*[102] the simple rule of negligence was not approved. In this case, the tanneries industry located near the Cambridge water company stored harmful chemicals in the concrete tank constructed below the surface of the earth. When the Cambridge Water Company realized that the water of the borewell is contaminated with such harmful chemicals, they filed the case against the tanneries industry on the ground of negligence, nuisance and the rule of *Ryland*. The court clarified its position regarding common resources and stated that one cannot degrade the quality of the common resource, because the resources not belonging to him exclusively for exploitation. Any degradation of the quality of the common resource done by one person will affect the rights of many others who are depending on the same common resource and the degradation of the quality of such common resource property will violate the rights of the commons. The court relied on this principle from the *Ballard*[103] case and made a very clear point that in order to prove the action of the tanneries industry is negligent one, the prior requirement is that the plaintiff will have to prove that there was established reasonable foreseeability of the defendant that because of storing such harmful chemical might be leaked and could contaminate groundwater. Since, the same was not proved, the court did not award the amount of compensation against the tanneries industry. The court also mentioned the reason for lack of reasonable foreseeability on the ground that the tanneries industry had stored the harmful item 1.3 miles away from the Cambridge water company in underground place.[104]

The Supreme Court of India also relied on *Burnie Port authority's case*[105] and observed that the rule of *Ryland* cannot be applicable to prove the general rule of negligence, because there are more exceptions than the application of the principle of strict liability. In the present case, the general rule of negligence was proved against the port authority. It was held that even if the authority has hired an independent contractor for extension of the building, but since has allowed the defendant company 'General Jones Private Limited' to store the frozen vegetables within its building in the

[101] Oren Perez, *supra* note 25.
[102] Cambridge Water Co. v. Eastern Counties Leather, [1994] 1 All ER 53.
[103] Ballard v. Tomlinson, (1885) 29 Ch D 115.
[104] David Howarth, *Muddying the Waters: Tort Law and the Environment from an English Perspective,* 41 WASHBURN L.J. 469 (2002)
[105] Burnie Port Authority v. General Jones Pty Ltd., (1994) 68 Aus LJ 331.

rented part, therefore, the reasonable foreseeability of certain damage to the property of another can be expected very well when the independent contractor is using highly inflammable insulating material for extension of the port authority's building. It is not the responsibility of the independent contractor to have the reasonable foreseeability, but the real owner of the port authority will have the foreseeability test to qualify.[106]

Thus, even in common law countries, the reliance on the *Ryland* principle is not meticulous because of its various exceptions and accordingly, the general rule of negligence is examined in determining the amount of compensation to the victims.[107]

Similarly, the Supreme Court of India in the *Indian Council* case did not rely on *Ryland's* case and with the findings of NEERI's report, finally, the apex court held the chemical industry in a particular district in Rajasthan as absolutely liable to pay the compensation amount to the victims and also bear the cost of restoration of the degraded environment and clean-up cost.[108] The apex court further added that the polluter pays principle is a sound principle which makes the polluter absolutely liable to bear the cost of compensation and cost required for restoration of the degraded environment.[109] The Supreme Court in this case accepted the principle of polluter pays as part of the law of the land, particularly under Article 21 of Indian Constitution.[110] Which has another dimension also that if the polluter while polluting the environment violates the fundamental rights of the citizens in India, will be absolutely liable to pay the compensation to victims of such pollution for such violation.[111]

Subsequently, the Supreme Court of India decided a number of environmental cases,[112] applied the polluter pays principle not only to restore the lost environmental resources, but also for delivering environmental Justice to the victims, consequence of such environmental degradation.[113]

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[106] John C. O'Quinn, *supra* note 31.

[107] Timothy G. Richard, *Master and Servant -- Liability for Injuries to Third Parties: Employers' Vicarious Liability to Employees of an Independent Contractor Fleck v. Ang Coal Gasification Co., 522 N.W.2d 445 (N.D. 1994)*, 72 N.D. L. REV. 181 (1996).

[108] M.C. Mehta: Book Excerpt, *supra* note 15, at 155.

[109] Dodds, *supra* note 24, at 226.

[110] Naznen Rahman, *supra* note 4, at 157.

[111] Janelle P. Eurick, *supra* note 91, at 445.

[112] Vellore Citizens Welfare Forum v. Union of India, AIR 1996 SC 2715; S. Jagganath v. Union of India, AIR 1997 SC 811; M.C. Mehta v. Union of India, AIR 1997 SC 734; Narmada Bachao Andolan v. Union of India, AIR 2000 SC 3751, M.C. Mehta v. Kamlnath, (2000) 6 SCC 213; KM Chinnappa v. Union of India, AIR 2003 SC 724; Intellectuals Forum, Tirupathi v. State of A.P. AIR 2006 SC 1350; Karnataka Industrial Areas Development Board v. Sri. C. Kenchappa, AIR 2006 SC 2038; Forum, Prevention, of Envn. and Sound Pollution, AIR 2005 SC 3136; Lafarge Umiam Mining Pvt. Ltd v. Union of India, 2011 (7) SCALE 242.

[113] Fata, *supra* note 68, at 235- 236.

VII. FEW SELECT CASES DECIDED BY INDIAN SUPREME COURT ON DIFFERENT DIMENSION OF POLLUTER PAYS PRINCIPLE

In India, from the year 1996 the principle of polluter pays has been accepted as the law of the land and thereafter many environmental cases have been decided by the Supreme Court imposing polluter pays principle as the main guideline for fixing liability of the polluter in its absolute form[114]. Few select cases would be worth mentioning below, to look into the different dimensions of the polluter pays principle as decided by the Supreme Court.

In *Calcutta Tanneries case*,[115] the Supreme Court not only imposed the pollution fine based on the principle of polluter pays, but also imposed the financial liability against the tanneries industries to deposit the fund, which will be required for reversing the degraded environment. Such fund shall be deposited to environment protection fund.

In *Research Foundation for Science, Technology and Natural Resource Policy vs. Union of India (UOI) and Ors.*,[116] the Supreme Court analysed the situation of hazardous waste oil which was imported to India by the sea and based on the recommendation of the monitoring committee the court directed for disposal of waste oil by selecting the method of incineration as required under the polluter pays principle. The apex court also mentioned that as soon as there is a violation of any provisions of Basel Convention and Hazardous Waste (Management and Handling), Rules, 1989, the principle of polluter pays will come into operation to rescue the environment from the exposer of such hazardous activity.

In *M.C. Mehta v. Kamal Nath and Ors.*,[117] not only the Supreme Court mentioned the essentialities of the public trust doctrine, but also stated that if the developer/polluter changes the course of the river by some construction work or otherwise, for its own benefit, then such action be considered as degradation of the environment and thereby the court as per the requirement of the principles of polluter pays will impose on the developer/polluter financial liability, which will be required for reversing the damaged environment.

[114] Erin Daly*, supra* note 90, at 606-607.
[115] M.C. Mehta v. Union of India, (1997) 2 SCC 411.
[116] Research Foundation for Science, Technology and Natural Resource Policy vs. Union of India (UOI) & Ors., AIR 2012 SC 2627.
[117] M.C. Mehta v. Kamal Nath & Ors., (2002) 3 SCC 653.

In *Tirupur Dyeing Factory Owners Association v. Noyyal River Ayacutdars Protection Association and Ors.*,[118] the Supreme Court categorically mentioned that the polluter pays principle and the precautionary principle are to be read along with the doctrine of sustainable development. The apex court directed to the appellate industry under the principle of polluter pays that as per this principle the industrial activity cannot lead to pollution of the River water. If any such pollution occurs by such industrial activity, then as per the requirement of the principle of polluter pays the concerned industry would be financially liable to bear the cost for reversing the damaged environment.

In *Deepak Nitrite Ltd. v. State of Gujarat and Ors.*,[119] the Supreme Court made an interesting link between the turnover of the company and the imposition of financial liability under the principle of polluter pays. The apex court stated that for fixing compensation against the polluting industries the practical application of the polluter pays principle would be to look into the turnover of the company.

In *M.C. Mehta vs. Union of India (Aravalli Hills)*,[120] the Supreme Court clarified the position of polluter pays principle and stated that the principle of polluter pays is a wholesome principle and is universally accepted. However, in the present case the damage that was caused to Aravalli Hills, some are reversible and some are irreversible, therefore, the apex court directed that the polluting industry should bear the cost for reversing the damaged environment in the Aravalli Hills region.

In *Hanuman Laxman Aroskar and Ors. vs. Union of India (UOI) and Ors.*,[121] the Supreme Court while indicating the importance of Section 20 of the National Green Tribunal (NGT) Act, 2010, clearly mentioned that it is a mandate for NGT that while passing the orders will consider the principle, such as the polluter pays principle.

In *State of Meghalaya and Ors. v. All Dimasa Students Union, Dima-Hasao District Committee and Ors.*,[122] the Supreme Court stated that NGT is empowered to fix the amount of compensation as per the requirement of polluter pays principle against the coal mining industries. In this case, the NGT apart from fixing loyalty also directed the State Government to collect extra 10% of the total market value of Coals and fund so collected is to be deposited in Meghalaya Environment

[118] Tirupur Dyeing Factory Owners Association v. Noyyal River Ayacutdars Protection Association and Ors., (2009) 9 SCC 737.

[119] Deepak Nitrite Ltd. v. State of Gujarat and Ors., (2004) 6 SCC 402.

[120] M.C. Mehta v. Union of India (Aravalli Hills), 2018 (11) SCALE 50.

[121] Hanuman Laxman Aroskar and Ors. v. Union of India (UOI) and Ors., 2019 (5) SCALE 484.

[122] State of Meghalaya and Ors. v. All Dimasa Students Union, Dima-Hasao District Committee & Ors., MANU/SC/0877/2019.

Protection and Restoration Fund (MEPRF). On appeal, the Supreme Court did not quash this finding and stated that NGT is empowered to do so. However, the Supreme Court further clarified that the fund so deposited in MEPRF, from which rupees one hundred crore to be deposited in the main Environment Protection Fund.

VIII. CONCLUSION

It is clear from the above discussion that the concept of polluter pays principle was not available under any Indian environmental legislation, though, regarding imposing fine for causing pollution, such provisions were available in those legislations. It is also clear that the Environment (Protection) Act, 1986, empowers the Central Government to take any measures for improving the quality and for the preservation of the environmental resources. However, because of lack of express provision on the polluter pays principle under any environmental legislation in India, there was difficulty in fixing the amount of compensation to be paid to victims or for reversing the damaged environment.

The origin of the concept of polluter pays principle was also discussed in this article and can be traced back from Paris Convention of 1960 with Vienna Convention 1963 and through Convention on Civil Liability for Oil Pollution Damage of 1969. Though, the first official appearance of the principle of polluter pays can be found in the OECD document. The European Union documents also another set of examples, where the origin of the polluter pays principle can be found well mentioned. Few other international environmental documents, such as Stockholm declaration, 1972, World Charter for Nature, 1981, World Commission on Environment and Development, 1987, et cetera where the indirect mentioning of the polluter pays principle can be established. However, it is only the Rio declaration, 1992, which specifically mentions the importance of polluter pays principle expressly and so that participating nations can adopt this principle to their municipal laws.

Previously, India has felt the necessity of having principle in the line of polluter pays principle, during the Bhopal gas tragedy incident, for fixing the financial liability against the polluting industries not only for fixing compensation to the victims of the environmental accidents, but also to collect the money for reversing the damaged environment. Though, the legislature brought the statute in the name of Bhopal Gas leak Disaster (Processing of Claim) Act, 1985, but that was applicable to the Bhopal Gas Leak incident and was not an overall one.

The Supreme Court in India wanted to bring a liability in its absolute form and accordingly experimented the concept of absolute liability from the version of strict liability while deciding the *M.C. Mehta (Absolute Liability)* Case (1987), though, did not apply the principle of absolute liability in the present case. But, the apex court clarified the position that any hazardous industry polluting the environment should be held absolutely liable for good the loss and the amount of compensation shall be fixed by looking at the turnover of the company.

The first official acceptance of the polluter pays principle was possible because of the innovative steps taken by the Supreme Court of India while deciding the *Indian council (Bichhri)* case (1996), where the apex court clearly stated that polluter pays principle is the part of the law of the land. After awarding this principle as a sound principle for fixing the amount of compensation against the polluting industry, there was no looking back for fixing the polluter with absolute liability not only for fixing compensation to be paid to victims but also the raising the cost to be utilised for restoring the degraded environment. As I have already discussed in the previous part of the article that there are a number of environmental cases decided by the Supreme Court covering this polluter pays principle for the award of appropriate compensation. This adoption of polluter pays principle by the Supreme Court of India became a very important tool for delivering appropriate environmental Justice in India.

ARTICLE

NON-ACCOUNTABILITY IN THE GARB OF FREEDOM?

Kartikey Sanjeev Bhalotia & Shaivi Nihal Shah[*][1]

I. INTRODUCTION

This paper is an attempt at establishing the importance of a judiciary which is independent of ***fear or favour***, but at the same time accountable and answerable for exceeding its independence. This paper is an attempt to show how a judicial body can be independent and accountable at the same time, provided that certain mechanisms are put into place. The paper starts by firstly defining the concepts of Judicial Independence and Accountability in principle. It then asserts that both of these principles are intertwined and, that the absence of the latter outweighs the advantages of the former by taking reference to the observations made by various scholars on the issue of interdependence of independence and accountability, and the importance of coexistence of these principles for the proper functioning of the judiciary, which is the third pillar of the Indian democracy.

In order to appreciate the ability of the judiciary to be an institution which is independent as well as accountable for its actions, the paper examines its transition from a strictly positivist court during the 1950s to an activist one during the 1980s. The above transition has been traced by specific reference to certain instances which if read in a timeline, maps out how the judiciary of independent India established itself as a completely positivist institution on one extreme and transitioned into an institution criticised for its unaccounted activism converted adventurism. Examining this transition, the authors argue that how this adventurism, which started as much-hailed activism can cause more harm than good to the principle of checks and balances, which is a fundamental aspect of constitutionalism, in the absence of proper measures of accountability. Coming to this observation, the authors attempt to recommend certain mechanisms which in their view, can and should be adopted to foster accountability in the Indian Judiciary in order to fully realise the value of independence and having the third pillar of democracy in the first place.

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The authors after taking into consideration the authorities and instances referred to in the paper, conclude their argument by observing that a court can be judicially independent and can, at the same time, be held accountable for its actions without causing an impediment to its independence, provided that certain checks and regulations are present within the course of its functioning.

II. INDEPENDENCE OF THE JUDICIARY

For any democratic country to function in keeping with its core institutional values, judicial independence is an absolute necessity. The most pertinent feature of any adjudicatory body is its impartiality in the discharge of justice. In order to achieve this impartiality, the adjudicator must be free of all external influences and internal biases, which can only occur if it functions in an independent manner.[2] Only an independent judiciary will be able to secure the individual rights of the citizens of a democratic country and evenly dispense justice without any fear or prejudice.[3] The Constitution of India provides for the doctrine of separation of powers whereby the judiciary is independent of the executive as well as the legislature. Taking reference from the judgment of the Supreme Court in the case of *A.C. Thalwal vs High Court of Himachal Pradesh*[4] - *"The constitutional scheme aims at securing an independent judiciary which is the bulwark of democracy".*

In order to truly achieve the establishment of an independent judiciary, the independence of the judiciary must be considered from the point of view of the institution as well as the individual members it is comprised of.[5] In terms of independence of the judiciary as an institution in India, by virtue of the provision of judicial review, the courts oversee the administrative and legislative acts of the centre and the states to ensure that they are in line with and within the confines of the provisions of the constitution.[6] Courts are thus, because of their independence, able to act as protectors of the constitution. While judicial independence in India is ensured in the constitution, it is also given authority via conventions, legislation, and other suitable norms and practices. The constitution provides the higher judiciary, the Supreme Court and High Courts, power of complete autonomy in order to manage their affairs[7] as well as power to punish wrongdoers for contempt of the court.[8]

[2] SB Burbank, *What do We Mean by Judicial Independence?*, 64 Ohio State Law Journal 323, 332 (2003).
[3] Santosh Kumar Pandey, *Independence of Judiciary in India*, 4 International Journal of Law 95, 95 (2018).
[4] AC Thalwal v. State of Himachal Pradesh, (2000) 7 SCC 1, ¶ 15.
[5] Frank Cross, The Oxford Handbook of Law and Politics 99 (Oxford OP, 2008).
[6] Udai Raj Rai, Constitutional Law-I (Eastern Book Company 2016).
[7] India Const. art.145, 146, 229.
[8] India Const. art.129, 215.

In India in terms of independence of the individual members that make up the judiciary, i.e., the judges, the first step is to make the judges take an oath. The oath contains implicit recognition of the doctrine of constitutional sovereignty whereby the judges swear to *"faithfully perform their duties without fear, favour, affection, ill-will and defend the constitution of India"*.[9] Further, there is security to the office of a judge as they can only be removed on the grounds of proven misbehaviour or incapacity, or till they reach the age of 65. For this too, the procedure is extremely deliberative and stringent.[10] Additionally, the salaries and allowances of judges cannot be reduced during their tenure, with the exception of a situation of financial emergency as per Article 360 of the Indian constitution.

The last factor that must be considered in order to establish a truly independent judiciary is the independence of the judges comprising the judiciary from their own leanings and internal prejudices. To counter this, firstly, the adversarial system of delivering justice has been established whereby the judge's role is limited simply to that of a moderator. The only basis for his judgment can be the pleadings and evidence produced by the lawyers. Secondly, the provision of multi-member benches was put into place whereby several judges are required to decide a particular case on the basis of majority rule. Thus, there is less chance for a singular outlook to colour the decision of a case owing to internal prejudices.

III. JUDICIAL ACCOUNTABILITY

"*Only virtuous people are capable of freedom*" [11]

-Benjamin Franklin

Accountability in all organs and institutions of any democracy is the key to successful governance.[12] The judiciary is not exempted from this and in fact, the provision of accountability in the judiciary is particularly pertinent as citizens consider the judiciary to be their last bastion of hope when it comes to redressing their grievances when their elected and executive authorities have failed in performing their duties in a satisfactory manner.[13] The credibility and image of the judiciary are dependent on the manner and functioning of the judges. Only when the judiciary holds the faith of the people can it be deemed to

[9] Constitution Society, https://www.constitution.org/cons/india/shed03.htm (Mar. 26, 2019).
[10] Santosh Kumar Pandey, *Independence of Judiciary in India*, 4 Int'l. J. of Law 95, 96 (2018).
[11] BENJAMIN FRANKLIN, TO THE ABBES CHALUT AND ARNOUX (Jared Sparks 1840).
[12] Sachar & Rajindar, *Judicial Accountability*, PUCL BULLETIN, (2002).
[13] Dr. Jetling Yellosa, *Judicial Accountability in India: A Myth or Reality*?, Int'l J. Of Law 48, 48 (2017), http://www.lawjournals.org/archives/2017/vol3/issue3/3-3-18.

be independent.[14] This faith can only be enforced when we have a judiciary that is responsible for its actions and explains to them when necessary. Judges can be held accountable for their actions via the process of impeachment by two-thirds of the members of each parliamentary house on the ground of proven misbehaviour or incapacity.[15]

IV. JUDICIAL INDEPENDENCE & JUDICIAL ACCOUNTABILITY AS TWO SIDES OF THE SAME COIN

Judicial independence and judicial accountability must be considered as complementary provisions of our constitution, or simply put, may be considered to be two sides of the same coin.[16] Judicial independence is granted to the judges by means of ensuring their salary, security of tenure, supremacy in decision making, etc. in order to facilitate the efficient working of the judiciary, free from the influence of the executive and legislature.[17] However, this independence must not be capable of being used as a shield by the judges to cover up potential corruption or prejudiced decisions. Thus, in order to prevent this from happening, while still facilitating the independence of the judges, the concept of judicial accountability comes into the picture. In essence, the creation of a provision to provide for greater accountability in the judiciary leads to the prevention of a prejudiced adjudicator from passing unjust decisions and getting away with it under the guise of judicial independence. The real stakeholders in the Indian system of justice are the citizens and their wellbeing is the essential objective of the framers of the constitution. Thus, to provide surety to them that the judicial system was saved from the influence of the executive and the legislature, as well as the influence of the judge's own prejudices and inclinations towards passing corrupt judgments, the provisions for judicial independence and judicial accountability, were created.[18] An assertion made by the Supreme Court adequately sums up the matter at hand, *"A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system."*[19]

[14] Legal Service India, http://www.legalservicesindia.com/article/214/Ethics-of-Judges-&-Judicial-Accountability.html (Mar. 28, 2019).
[15] Nicholson, B.D., *Judicial Independence and Accountability: Can they Co-exist*? 61 ALJ. (1993).
[16] V. Venkatesan, *Of Accountability to the People*, THE HINDU (Sept. 30, 2019), https://frontline.thehindu.com/static/html/fl2619/stories/20090925261903300.htm.
[17] D PANNICK, JUDGES 133 (Oxford University Press, 1987).
[18]Shoma Chaudhury, *Half of the Last 16 Chief Justices were Corrupt*, TEHELKA (Sept. 30, 2019), http://bharatiyas.in/cjarold/files/Tehelka%20interview%20with%20Prashant%20Bhushan.pdf.
[19] Anil Divan, *Judicial Integrity: Lessons from the Past*, The Hindu (Sept. 30, 2019), https://www.thehindu.com/opinion/lead/Judicial-integrity-Lessons-from-the-past/article16887900.ece.

Thus, if not for judicial independence, the judicial mechanism of our country would not be able to function in keeping with the true ideals of democracy.[20] However, too much independence of the judiciary might lead to the creation of an autocratic institution within our democracy and to prevent that, judicial accountability must be considered.

V. UNCHECKED JUDICIAL ACTIVISM: THE MOST IMPORTANT FACET OF NON-ACCOUNTABILITY

"There is no difference between the Judge and the Common Man except that one administers the law and the other endure it... We (Judges) have indeed a 50 per cent chance of being right in any case we try, and of course, the usual chance of not being found out if we are wrong. The last chance is something else we share with the Common Man."[21] - Justice McKenna

"While the unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."[22]

"Judicial Activism" in general refers to the decisions of the court, that go beyond the rigid interpretation of the statutory provisions passed by the legislature of a country, and comes with the flavour of the individual judge's personal wisdom or political affiliations to ensure answers to the problems of the masses and upheld his sense of right and just.[23] According to Paul Mahoney, "*Judicial activism exists where the judges modified the law from what was previously stated to be the existing law which often leads to substituting their own decisions from that of the elected representatives of the people*."[24]

The above statements clearly display the horizon of judiciary's reach. In recent years, the Supreme Court of India has turned many eyes towards itself in the process of obtaining vast importance in the nation's political discourse.[25] In the due course of its unaccountable decisions, the Supreme Court has brought to its fists unprecedented power without even citing the authority which bestows such power on it, be it in the matter of reviewing constitutional amendments or appointment of judges.[26] Judicial overreach has

[20] Udai Singh and Apoorva Tapas, *Judicial Accountability: The Eternal Dilemma*, 1 Christ University Law Journal 69, 75 (2012).
[21] *The Judge and the Common Man*, 32 Mod L R 601, 601.
[22] United States v. Butler, 287 US 1 (1936).
[23] CHRISTOPHER WOLFE, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY (Rowman & Littlefield Publisher Enc 1997).
[24] Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 YALE HUMAN RIGHTS & DEVELOPMENT LAW JOURNAL 57, (1990).
[25] Madhav Khosla, *Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate*, 32 HASTINGS INT'L & COMP L REV 55, 55 (2009).
[26] Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. DEMOCRACY 70, 72-79 (2007).

gotten so rampant that it cannot go unnoticed even by an owl in the broad daylight.[27] Courts are doing things because they can do it and not because they are right or just.[28]

It has also been said that, observing the actions of the Supreme Court the *Basic Structure* doctrine has taken a new meaning to mean that *"unelected judges have assumed vast political power not given to them by the constitution."*[29]

Upendra Baxi a renowned legal scholar has dealt with "judicial activism" and the issues circumventing it in his two books – *The Indian Supreme Court and Politics*,[30] and *Courage, Craft and Contention: The Indian Supreme Court in the Eighties.*[31] Baxi, rather than asking as to whether judicial activism is problematic or not, focuses on the question as for whom such activism may prove problematic.[32] According to him, judicial activism is a problem for certain elite of the society who are responsible to manage the general public, as judicial activism is an answer to the problems of the people who are managed.[33]

Though, over the years this positive side of the concept has been overshadowed by its overreach. Baxi opined that *"if India... furnishes an exemplary archive of judicial activism, it also provides extraordinary narratives of the failure, as it were, of the adjudicatory nerve, in those very arenas where activist adjudicatory power should be felt most at home"*[34] The increase of constitutional faith in the Supreme Court, which is the result of its overreaching action of intended public welfare, overloads the power of adjudication resulting in great amount of expectations by the people and this is something which is not quite easily and efficiently manageable, thereby leading to chaos and disenchantment.[35]

Judicial Activism was born in the 1980s to tackle lawlessness of the state.[36] But this *Activism* when goes uncontrolled may convert into *Adventurism*, which poses great problems. As stated by Chief Justice J. S. Verma, "Judicial activism is appropriate when it is in the domain of legitimate judicial review. It should

[27] *Id.*

[28] Pratap Bhanu Mehta, *With Due Respect, Lordships*, INDIAN EXPRESS (Sep. 30, 2019), http://archive.indianexpress.com/news/with-due-respect-lordships/25375/.

[29] Raju Ramchandran, *The Supreme Court and the Basic Structure Doctrine,* in SUPREME BUT NOT INFALLIBLE 107-108 (B. N. Kirpal, ET AL. eds., 2000).

[30] UPENDRA BAXI, THE INDIA SUPREME COURT AND POLITICS (Eastern Book Company 1980).

[31] UPENDRA BAXI, COURAGE, CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES (N M Tripathi 1985).

[32] *Id.* at 15.

[33] *Id.*

[34] Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of Injustice*, *in* FIFTY COURT YEARS OF THE SUPREME OF INDIA: ITS GRASP AND REACH 157 (2000).

[35] *Id.* at 159.

[36] Madhav Khosla, *Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate*, 2 HASTINGS INT'L & COMP L REV 55, 64 (2009).

neither be judicial adhocismn or judicial tyranny."[37] The supervisory power vested in the judiciary is not unlimited and cannot be taken as a prerogative to make good of all types of hardships that exist, this power must be used only in such cases wherein there is a *prima facie* abuse of fundamental principles of law and justice of a precarious nature.[38] The Supreme Court's power as a guardian of the constitution is limited to its interpretation without interfering in policy-making.[39] It is clear from the constitutional framework that the parliament alone is entrusted with making laws, and the judiciary is expected not to encroach upon the powers of the legislator.[40]

Judicial Activism in India has witnessed a gradual wave from the strictly positivist court during the 1950s to an enthusiastically activist court in the years 1980s to the present.[41] Judicial Activism can be identified in various areas of the constitutionalism in India. We in our analysis of the activism in the Indian Judiciary shall ***firstly***, look into the Judiciary's transition from a *Positivist* court to an *Activist* court, with regards to the judiciary's changing take on the adoption of *"Due Process of Law"* while interpreting *"Personal Liberty"* present in the Part III of Constitution; ***secondly***, we shall analyze judiciary's tussle for power with the legislature w.r.t judicial appointments; ***thirdly***, we shall argue that judiciary's defensive mode as to include the institution within the definition of *"State"* under Article 12 of the Constitution limits accountability, and ***fourthly***, we shall prove how a lack of judicial accountability has given rise to judicial hypocrisy in terms of RTI.

VI. DUE PROCESS & THE TRANSITION OF POSITIVIST VIEWS TO ACTIVIST VIEWS

"*If Parliament may take away life by providing for hanging by the neck, logically there can be no objection if it provides a sentence of death by shooting by a firing squad or by guillotine or in the electric chair or even by boiling in oil."*[42]

These were the words of Justice Sudhi Ranjan Das while delivering his concurring opinion in the Gopalan[43] case in the year 1950. While interpreting the words "procedure established by law" under

[37] R Shunmugasundaram, *Judicial activism and overreach in India*, AMICUS CURIAE (Sep. 30, 2019) https://core.ac.uk/download/pdf/112282.pdf.
[38] DURGA DAS BASU, CONSTITUTIONAL REMEDIES AND WRITS 38 (2nd ed., Kamal Law House 2009).
[39] State of West Bengal v. Anwar Ali Sarkar, [1952] AIR 75 (SC), ¶ 96.
[40] All India J A v. UOI, [1992] 1 SCC 119.
[41] S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 Wash. U. J.L. & Pol'y 29, 40 (2001).
[42] A.K. Gopalan v. State of Madras, AIR 1950 SC 27. ¶ 238 (Sudhi Ranjan Das, J., concurring).
[43] *Id.*

Article 21 of the Indian Constitution, the court went too far in accepting the complete authority of the Parliament and limiting the role of the Supreme Court as a mere interpreter of law.

The majority in Gopalan held that the words "procedure established by law" must mean procedure which is established by the laws enacted by the state, and that there was no need to interpret the words provided under Article 21 outside black and white words used by the constitution-makers.[44] The majority further went onto hold that the words under Article 21 clearly limits the jurisdiction of the courts in the country to determine whether the procedure so established by law is "due" or "undue", in other words it held that it was not within the powers of the court to test the "justness" of the procedure established by the legislature within its legislative powers, and the legislature has the final word to determine what procedure should be established and what not.[45]

The majority in Gopalan clearly establishes the strong positivist nature of the Supreme Court during the 1950s, wherein the procedure established by the legislature that might go to the extent of providing a death by boiling in oil cannot be questioned by the Supreme Court. The Constituent Assembly designed the Indian Court to be a relatively weak institution in a system in which the parliament and the executive were supreme,[46] and most justices of the Court in its early years operated in the British traditions of legal positivism and deference to Parliament.[47]

However, the authors believe that the dissenting opinion by Justice Fazal Ali in the case was the first glimpse of the activist character that existed within the Supreme Court in the year of 1950 itself, though in minority. Justice Fazal Ali while dissenting from the majority and holding that the words 'procedure established by law' must be interpreted with the sieve of 'procedural due process'. [48] He further held that the "law" used in article 21 does not mean only State-made law and that this is clear from the fact that even without the specific mention of the requirement for arguments in certain cases, it is commonly followed due it being "just" and basic essential of "natural justice".[49]

This activist interpretation of Article 21 of the Indian Constitution by Justice Fazal Ali, was accentuated in Maneka Gandhi v. Union of India,[50] by forming it as the majority opinion of the seven-judge bench in the year 1978.

[44] *Id.* at ¶18.
[45] *Id.* at ¶ 19.
[46] S P SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (2002).
[47] Burt Neubome, *The Supreme Court of India*, 1 INT'L J. CONSTITUTIONAL LAW 476, 480 (2003).
[48] *Id.* at ¶ 77.
[49] *Id.*
[50] Maneka Gandhi v. Union of India, AIR 1978 SC 597.

The law must, therefore, now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held applicable.[51] While laying down the court's believes with regards to the ambit of the rights falling within Article 21, Justice Bhagwati in the majority opinion observed that:

"There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. ***No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude."***[52]

The above observation, in explicit terms, set the tone for not only the concerned judgement but also for the further times to come. The Court held that Article 21 consists of a vast variety of rights within it, and Article 22 considers only some of these several rights. The Court termed the rights lying outside the purview of Article 22 as "unoccupied" rights, and said that these rights could be restricted only by following the "due process of law".[53] The Court did not restrict itself to the black and white letters of law while interpreting "procedure established by law" and expanded the meaning of "law" to be a law which ensures the basics of natural justice, by providing for procedures that ensure "fair play in action".[54] The Court thus, incorporated substantive due process into Article 21,[55] holding the State action as arbitrary and adding the right to travel abroad as another right under Article 21 of the Constitution.[56]

The authors do not want themselves to be a part of the often-repeated debate with a side that support the embodiment of due process under the part III of the fundamental rights of India, and the other side that oppose the same on the grounds that the 'due process' doctrine lacks its boundaries and it is most likely to extend to substantive due process from being merely a procedural one. Rather, they comment upon the views of various scholars that find the latent intention of the Supreme Court in taking such activist stance, to be an atonement for the Court's earlier acquiescence to the Emergency regime in cases like Shiv Kant Shukla.[57] Scholars have also assessed that the Court's activism in the Maneka Gandhi case

[51] *Id.* at ¶ 63.
[52] *Id.* at ¶ 56 (emphasis added).
[53] *Id.* at ¶ 12.
[54] *Id.* at ¶ 59.
[55] Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 BERKELEY J. INT'L L. 216, 252 (2010).
[56] Nuebome, *supra* note 52, at 500.
[57] BAXI, *supra* note 29, at 153.

was an attempt by the majority judges attune to the changed political context following the elections of 1977,[58] and reinstate their legitimacy in such an environment.[59]

The above observations raise a very serious question with regard to the judicial accountability in India, the question being, does the Indian Constitution intend to arm the judges of the Hon'ble court with so much of authority to switch between their positivist stance and activist stance in order to tune themselves and reinforce their presence with the changing political scenario? The answer to this question according to the authors should be 'NO'. Though the current state of things and the judicial developments have armed the judges with such autonomy, we believe that such powers defy one of the basic principles of constitutionalism, i.e. internal checks and balances.[60] There is an instant need to introduce laws which revitalize the now numb accountability measures in the Indian higher judiciary.

VII. JUDICIAL APPOINTMENTS: A TUSSLE FOR POWER

Article 124(2)[61] of the Indian Constitution provides for the appointment of the Judges of the Supreme Court of India by the executive head i.e., the President. The president, while appointing the Chief Justice of India has a consultation with the Judges of the Supreme Court and High Courts as he deems appropriate. While, in the case of appointing Judges other than the Chief Justice of India, the President is required to consult the Chief Justice of India, though alongside he may choose to consult such other judges as he deems appropriate, in addition to the Chief Justice.[62]

In Great Britain, the judges are appointed directly by the Crown, which prior to the year 2005 meant the Executive of the day, without any restrictions imposed on it whatsoever.[63] However, the power of the Executive wing was significantly curtailed in the year 2005, by the passing of the Constitutional Reform Act, 2005.[64] On the other hand, in USA, the President appoints the Judges to the Supreme Court of the Country with the consent of the Senate.

[58] Mate, *supra* note 60, at 258.
[59] S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 50 (2002).
[60] Priyadarshini v. The Director of Elementary, [2005] 3 CTC 449, ¶ 54.
[61] INDIA CONST. art.124, cl. 1.
[62] INDIA CONST. art.124, cl. 2.
[63] LORD CHANCELLOR AND SECRETARY OF STATE FOR JUSTICE, 'THE GOVERNANCE OF BRITAIN JUDICIAL APPOINTMENTS 3.2 (2007).
[64] *Id.*

The framers of the Indian Constitution found certain shortcomings in the process of appointment of Judges prevailing at that time in Great Britain and the USA.[65] The system of appointments in Great Britain before 2005 appeared to give unprecedented power to the Executive, while the system prevailing in the USA was found to be a bit complex and cumbersome having a possibility of political influence on judicial appointments.[66] Thus, the makers provided for a method, as laid down in Article 124(2),[67] which neither gives absolute unrestrained power to the Executive wing of the state nor does it allow for the Parliament to infiltrate political motives in the process of judicial appointments.[68] The Executive is required to consult the people who can *ex hypothesi* be considered to the most qualified to give advice as to the appointment of judges.[69]

The question as to who shall have the final authority in the appointment of judges is a very crucial matter to be looked into, to maintain the independence of the judiciary. But there is no denying the fact that over independence can invariably lead to lack of accountability.[70] Thus, the parameters considered while appointing the Judges as well as the manner in which such Judges are removed, are very important aspects that have a very significant impact on both Judicial Independence and Judicial Accountability.[71]

The major debate on Judicial Appointments in India has been centred on the requirement of the consultative process as mentioned under Article 124(2) of the Constitution of India. Over the course of this debate, a severe stir in the interpretation of the consultative process prescribed under the constitutional framework has been witnessed.[72] The most debated proposition in this entire issue has been the weight which is supposed to be given to the opinion of the Chief Justice in the decision of appointing the Judges.[73] The long-standing history of the appointment process is dominated by the

65 M P JAIN, INDIAN CONSTITUTIONAL LAW 195 (8th ed. 2018).
66 *Id.*
67 INDIA CONST. art.124, cl. 2.
68 JAIN, *supra* note 24.
69 THE LAW COMMISSION OF INDIA, 18TH REPORT ON THE METHOD OF APPOINTMENT OF JUDGES (1979).
70 C Raj Kumar, *Accountability and Independence*, THE HINDU (Sept. 30, 2019) https://www.thehindu.com/opinion/op-ed/accountability-and-independence/article6309524.ece.
71 J Clifford Wallace, *An Essay on Independence of the Judiciary: Independence from What and Why*, 58 N.Y.U. ANNUAL SURVEY OF AMERICAN LAW 241, (2003).
72 Dr. Rangin Pallav Tripathy, *A Comparative Analysis of the Consultative Process in Appointment of Judges in Higher Judiciary*, 7 RMNLUJ 94, (2015).
73 Santosh Paul, *The Eternal Debate on Judicial Appointments*, *in* CHOOSING HAMMURABI: DEBATES ON JUDICIAL APPOINTMENTS (1st ed. 2013).

constant battle of power between the Judiciary and the Executive.[74] This has been a very important question of consideration and the Supreme Court has taken this question in several cases.

This question was first referred to by the Supreme Court in the case of ***S.P. Gupta v Union of India***.[75] The majority[76] adopted a literal meaning of the word *"consultation"* as provided under Article 124(2) of the Constitution of India. The majority held that the opinions of the Chief Justice of India and Chief Justice of High Courts were merely *consultative* in nature and that the real power of appointment has been bestowed upon the Central Government which is overriding upon the Chief Justices of India as well as High Courts.[77]

The decision of the court in the case of *SP Gupta* came to be criticized in the following judgment of the Supreme Court itself in ***Subhash Sharma v Union of India***[78]. The court while observing that being consistent with the constitutional purpose and process *"it became imperative that the role of the institution of the Chief Justice of India be recognized as of crucial importance in the matter of appointments to the Supreme Court and the High Courts of the States"*.[79] The bench, however, did not give any final verdict as to this question and suggested the issue for reconsideration by a larger bench.[80]

The above recommendation was taken up by the Supreme Court in ***Supreme Court Advocates on Record Association v Union of India***[81] and in ***Re Special Reference***[82]. As a result of these decisions of the Supreme Court, the process of appointment of Judges was significantly modified. The Chief Justice of India and the four-member collegium[83] had been given almost exclusive power in the appointment of Judges.[84] Thus, the position of the Chief Justice form being only a consultative authority has been transformed into a position that is at the centre of things[85] and the Executive element has been reduced to a minimum.[86] Further, the Collegium has been given exclusive power of initiating the proposals for

[74] Arvind P Datar, *Judicial Appointment: The Indian Perspective*, *in* CHOOSING HAMMURABI: DEBATES ON JUDICIAL APPOINTMENTS (1st ed. 2013).
[75] Gupta v. UOI, AIR 1982 SC 149.
[76] J Bhagwati, J Fazal Ali, J Desai and J Venkataramaiah.
[77] JAIN, *supra* note 24, at 401.
[78] Sharma v. UOI, AIR 1991 SC 631.
[79] *Id.* at 641.
[80] *Id.* at 645.
[81] Supreme Court Advocates on Record Association v. UOI, AIR 1994 SC 268.
[82] Re Special Reference, AIR 1999 SC 1.
[83] *Id.* at 16.
[84] Supreme Court Advocates on Record Association v. UOI, AIR 1994 SC 268, ¶ 188.
[85] *Id.* at ¶ 180.
[86] *Id.* at ¶ 157 - ¶ 183.

appointments, with the final say.[87] The pronouncements in these decisions in some way switched the roles of the Executive and the Judiciary, and the Executive was provided with a consultative role by giving a meagre power to object to any name recommended by the collegium based on a positive material to be disclosed to the Chief Justice.[88] The court also held that the Collegium may consult such judges of the Supreme Court who may be in a close knowledge of the High Court from which a recommendation has been made.[89] Moreover, the opinion of the Chief Justice is not justiciable in the grounds of merits of the opinion, only the decision-making process can be subject to review by the court.[90]

The move of the Supreme Court was justified to have ensured freedom from political influence and establishing the independence of the judiciary.[91] Yet, the actual freedom from such influence and pressures also depend upon the personal character of the selectors coupled with the fact that there was a lack of public scrutiny to the decisions of the collegium, has led to the rising of recent debate and rethinking on this issue.[92] Consequent to this rising concerns, the National Commission to Review the Working of the Constitution in its report of 2002[93] suggested that a National Judicial Commission should be formed in order to make recommendations as to the appointments of judges to all superior courts.[94] Following the recommendation of the commission, the Central Government framed the National Judicial Appointmen4ts Commission (NJAC) vide the 99th Constitutional (Amendment) Act[95] and the NJAC Act.[96]

This attempt of the government was thwarted by the Supreme Court when it quashed the NJAC Act and the 99th Amendment in the case of ***Supreme Court Advocates-on-Record Association v UOI,***[97] and upheld the constitutionality of the collegium system on the grounds that the primacy of judiciary extends not only to rejection of unwanted recommendations but also to selection of the desired candidates.[98] It

[87] T R Andhyarujina, *Judicial Accountability: India's Method and Experience*, *in* JUDGES AND JUDICIAL ACCOUNTABILITY 115 (1st Indian Reprint ed., Universal Law Publishing 2004).
[88] *Id.*
[89] Supreme Court Advocates on Record Association v. UOI, AIR 1994 SC 268.
[90] Kannadasan v. Khose, [2009] 7 SCC 1, 51.
[91] JAIN, *supra* note 24, at 200.
[92] *Id.*
[93] NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION, REPORT 2002.
[94] Sharma v. UOI, AIR 1991 SC 631.
[95] The Constitution (Ninety-ninth Amendment) Act, 2014, § 3, No. 49, Acts of Parliament, 2014 (India).
[96] The National Judicial Appointments Commission Act, 2014, No. 40, Acts of Parliament, 2014 (India).
[97] Supreme Court Advocates-on-Record Association v. UOI, [2016] 5 SCC 1.
[98] JAIN, *supra* note 24, at 195.

further asserted that under Articles 124, 217 and 222 of the constitution the "aid and advice" of the Chief Justice is mandatory and primary in nature.[99]

However, this judgement triggered the national debate as to the accountability of judiciary in appointment of judiciary and the lack of transparency prevailing in the collegium system, which led the Government the Judiciary to seek to develop a Memorandum of Procedure (**"MOP"**) for the working of the collegium in appointing of judges which is yet to see the light of the day.[100] There is a dire need for this MoP to be implemented as soon as possible to ensure some amount of transparency in this very critical aspect of judicial accountability.

VIII. JUDICIAL HYPOCRISY: THE RTI REGULATIONS

"The independence of the Judiciary is not the property of the Judiciary, but a commodity to be held by the Judiciary in trust for the public."[101]

The RTI Act, 2005 was enacted in order to further the goal of facilitating transparency and accountability in the functioning of all public offices. It empowers the common man with the tool of information and seeks to reinstill his faith in the working of all such public offices. The judiciary has played a crucial role in the evolution and declaration of the right to information as a fundamental right under Article 19.[102] Time and again, the judiciary has emphasised the importance of transparency in the workings of public offices in order to truly capture the true essence of democracy.[103] Therefore, it was quite paradoxical to see the Supreme Court, the Apex Court among our judicial system, resisting the application of RTI enquiries to its own workings.[104]

The Supreme Court, along with being the principal judicial institution of our country, can also be classified as a public office under the RTI Act, 2005. As a result of the same, information regarding its

[99] *Id.*

[100] Rangin Pallav Tripathy & Surya Prakash, *Appointment of Judges to Higher Courts Governed by Instrument Lacking Democratic Scrutiny*, THE PRINT, June 20, 2018, https://theprint.in/opinion/appointment-of-judges-to-higher-courts-governed-by-instrument-lacking-democratic-scrutiny/72469/ (March 15, 2019).

[101] Justice J.S Verma, *Judicial Independence: Is it Threatened*? TAMIL NADU STATE JUDICIAL ACADEMY(Oct.2,2019, 3:56 PM), http://www.tnsja.tn.gov.in/article/Judicial%20Independence%20JSVJ.pdf.

[102] Mr. Kulwal v. Jaipur Municipal Corporation, AIR 1988 Raj 2.

[103]Tania Khurana, *Transparency of Judiciary under Right to Information*, CIC (Oct. 4,2019, 1:35 PM), https://cic.gov.in/sites/default/files/Transparency%20in%20%20Judiciary%20under%20RTI%20by%20Tania.pdf.

[104] *Should the Supreme Court Come under RTI?*, LIVEMINT (Oct. 2, 2019, 10:20 AM),https://www.livemint.com/Politics/wktNC40449U4ACuMkNi1AI/Should-the-Supreme-Court-come-under-RTI.html.

working and the decisions must be made available to the public. However, over the past decade, various applications for information to the Central Public Information Officer (**"CPIO"**) of the Supreme Court, the Attorney General of India, had gone unanswered on various grounds.[105] Some of these were stated to be that the opening up of the confidential discussion of the collegium would make the judges reluctant, to be frank, and honest, the discussions may include courtroom corridor gossip and judges' private lives, the examination of fairly invasive government intelligence reports and the expression of judges' personal opinions. It was the opinion of the CPIO that judges hold their integrity very dear to them and even the slightest doubt of it would have prevented them from performing their duties to the best of their abilities.[106] Another reason put forth specifically to defend not releasing the discussion of the collegium regarding the appointment of judges was that there may be judges who were rejected for elevation to a particular post but continued to hold their current posts. In such a situation, disclosing the reason for withholding their elevation could hamper the confidence of the public in the decisions of the judge in question and subsequently, hamper him from performing his duties. While these reasons are understandable from a layman's point of view, they have no meritorious legal or constitutional backing.[107]

However, there have been a few cases of applications seeking information about the working of the judiciary which has made their way to the Supreme Court. Over the past 10 years, specifically, five cases were adjudicated upon by the Supreme Court regarding disclosure of information related to the judiciary. Of these, three were referred to a specially constituted constitutional bench and the other two were dismissed at the stage of admission by the court. The latter two cases were regarding the retrieval of information in cases where arguments had been put forward to the court, however, judgement had been reserved, and the expenditure incurred by individual judges on medical necessities for which they had been reimbursed by the Supreme Court.[108] The three cases that were deliberated upon by the court were the cases of *Subhash Chandra Agarwal v. Supreme Court of Delhi* (January 2009),[109] *Subhash Chandra Agarwal v. Supreme Court of India* (November 2009),[110] and *Secretary-General, Supreme Court of India v. Subhash Chandra*

[105] *Demanding Transparency: Bringing Judiciary under RTI,* WBNUJSCLS (Oct. 3, 2019, 9:12 PM), https://wbnujscls.wordpress.com/2019/02/12/demanding-transparency-bringing-judiciary-under-rti/.

[106] Kushal Garg, *Dealing with Opaqueness of the Collegium*, SCC ONLINE(Oct.3, 2019, 9:25 PM), https://www.scconline.com/blog/post/2016/01/19/dealing-with-the-opaqueness-of-the-collegium/#_ftn11.

[107] Tarika Jain and Vadehi Misra, *Provision in RTI Act allowing transfer of application to appropriate department gives authorities easy escape route*, VIDHI LEGAL POLICY (Oct 3, 2019, 12.24 AM), https://vidhilegalpolicy.in/2019/04/30/provision-in-rti-act-allowing-transfer-of-application-to-appropriate-department-gives-authorities-easy-escape-route-firstpost/.

[108] Arpan Chaturvedi, *Does RTI cover office of Chief Justice of India, Collegium? Supreme Court starts hearing*, BLOOMBERGQUINT (Oct.4, 2019, 3.26 PM),https://www.bloombergquint.com/law-and-policy/does-rti-cover-office-of-chief-justice-of-india-collegium-supreme-court-starts-hearing.

[109] Subash Chandra Agarwal v. Supreme Court of Delhi, [2009] CIC 164.

[110] Subash Chandra Agarwal v. Supreme Court of India, [2009] CIC 13827.

Agarwal (March 2010).[111] In the first case, an RTI application sought to retrieve information on the question of whether the Supreme Court or High Court judges had ever filed a declaration of their assets, their spouse's assets and any of their dependent's assets to the Chief Justice of India.[112] This was asked in view of the 1997 resolution by the Supreme Court which requires disclosure of assets by judges to the CJI. The information was denied on the grounds on section 8(1)(j) of the RTI Act, 2005 which states that personal information is exempted from the purview of the Act. In the second case,[113] the applicant sought information regarding the correspondence between the collegium in deciding the elevation of Justices H.L. Dattu, A.K. Ganguly and R.M. Lodha as Supreme Court judges, suppressing the seniority of Justices A.P. Shah, A.K. Patnaik and V.K. Gupta.[114] The last case was involving an RTI Application seeking information of the attempted bribing of a Madras High Court judge by a union minister. The correspondence between the CJI and the Madras High Court judge was sought for as well as the name of the union minister in question. In all these cases, the CPIO of the Supreme Court denied providing the information, however, this decision was overturned by the Chief Information Commissioner (**"CIC"**). [115] The Supreme Court, in a last-ditch attempt, directly appealed to itself in all three instances, surpassing the High Court, hoping for a change in the verdict.[116] The three cases were clubbed together and collectively referred to a constitutional bench consisting of 5 judges. The following questions of law were framed[117] –

(i) Whether the information sought in the three cases would hamper the independence or working of the judiciary?

(ii) Whether seeking information via RTI applications would lower the credibility or prevent the expression of honest and frank opinions by the collegium in the appointment of judges and subsequently, hamper the efficiency of the decision-making process?

[111] Secretary General, Supreme Court of India v. Subash Chandra Agarwal, Civil Appeal No. 2683 of 2010.

[112] *RTI and Judicial Independence*, SUPREME COURT OBSERVER (Oct.7, 2019, 7:45 PM),https://www.scobserver.in/court-case/rti-act-and-judicial-independence.

[113]Krishnadas Rajagopal, *Opening Collegium to RTI will destroy Judicial Independence*, THE HINDU (Oct. 5, 2019, 6:30 PM), https://www.thehindu.com/news/national/opening-collegium-to-rti-will-destroy-judicial-independence/article26727170.ece.

[114]Krishna Das Rajagopal, *RTI Integral, says Supreme court but refuses to come under it*, THE HINDU (Oct.6, 2019, 4:55PM), https://www.thehindu.com/news/national/rti-integral-says-supreme-court-but-refuses-to-come-under-it/article26283856.ece.

[115] Yogesh Pratap Singh and Ashit Kumar Srivastava*, Judiciary's Tryst with the RTI Act*, NEW INDIAN EXPRESS(Oct.8,2019, 5.54 AM),http://www.newindianexpress.com/opinions/2019/may/06/judiciarys-tryst-with-the-rti-act-1973162.html.

[116] SATARK NAGARIK SANGATHAN,http://snsindia.org/rti-assessments/ (last visited Oct. 6, 2019).

[117]Prachi Bhardwaj, *Judicial Independence versus RTI: 5 judge bench reverses verdict*, SCC ONLINE (Oct. 4, 2019, 2:54 AM),https://www.scconline.com/blog/post/2019/04/04/judicial-independence-versus-rti-5-judge-bench-reserves-verdict/.

(iii) Whether the information asked for in these cases amount to personal information and can thus be exempted under section 8(1)(j) of the RTI Act, 2005?

In view of these questions and as a result of the elaborate measures taken by the CPIO of the Supreme Court, to deny the furnishing of information sought, pertinent questions regarding judicial accountability were raised, such as, why did the Supreme Court need to negate the orders, and question the veracity of the decisions of the CIC, an independent tribunal specifically formulated to decide matters relating to RTI? Why, when the Judiciary constantly preaches transparency in the working of other public offices, does it go too far lengths to prevent the same from happening in its own office? These questions highlight very pertinent issues concerning the debate on judicial independence and accountability, which were required to be addressed by the Hon'ble Supreme Court of India at the earliest possible instance.

IX. SOLUTIONS

The authors in this section lay down their suggestions with regard to fostering the mechanisms of judicial accountability in the Indian Judiciary. The two target areas that are in a serious need for changes are, ***first***, declaration of assets by a judge and ***second***, the procedure for removal of judges.

(A) DECLARATION OF ASSETS BY A JUDGE

"The responsibility of officials to explain and to justify their acts is the chief safeguard against operation and corruption"[118]

For an institution that bases its foundation in the faith and trust of the citizens it serves, the credibility of the Indian judiciary is at an all-time low. The problem with the lack of transparency in the name of independence has started to reflect in the frustration of litigants, lawyers and ordinary citizens alike. Thus, the need of the hour is to restore the faith of the country in the judiciary by asking for a disclosure of the assets of judges.

Recognizing the importance of the declaration of assets and liabilities of judges' attempts to secure the same has taken place ever since 1997 when the then CJI, Justice Verma passed a resolution dated 7th May 1997 of the Full Court of the Supreme Court.[119] The resolution, the essence of which was also reiterated in the Re-statement of Values of Judicial Life (Code of Conduct), 1999, stated that judges must declare their assets as well as the assets of their spouses and dependants to the CJI after a reasonable time has passed since their appointment. These resolutions, however, were not followed sincerely and there was no mechanism to keep a check on the same. The Judges (Declaration of Assets and Liabilities) Bill

[118] State of U.P. v. Raj Narain, AIR 1975 SC 865, ¶ 74.

[119] RAJASTHAN JUDICIAL ACADEMY, http://bharatiyas.in/cjarold/files/restatement_of_values_jud_life.pdf(last visited Oct. 10, 2019).

2009[120][121] introduced in the Parliament can be considered to be the first concrete step taken towards the disclosure of assets of judges, however, owing to various controversial clauses, the bill was aborted.[122] Following from this, the Judicial Standards and Accountability Bill, 2010[123] also recommended the disclosure of assets by the judges and their spouses, however owing to the dissolution of the 15th Lok Sabha, the bill lapsed and no fresh proposal was put forward.

As of now, there exists no compulsory requirement for judges to declare their assets and so far, the CJI and the Supreme Court have gone to great lengths to ensure that the same prevails. [124] A plethora of reasons have been given as to why the disclosure of assets of judges would hamper the working of the judiciary,[125] the prime one being that such information is the personal information of the Judges, and thus, exempted from being made public.[126] However, the Supreme Court itself had rejected this argument when it deliberated on the issue of disclosure of assets and liabilities of candidates running for an electoral office by saying, *"citizens who elect MPs and MLAs are entitled to know that their representative has not misconducted himself in collecting wealth after being elected."*[127] Thus, such information would not come under personal information and was part of the citizens' right to know.

Apart from this, the reasons given by the judges include the fact that judges may not be able to carry out their duty efficiently if they are trying a litigant for disproportional assets, and the litigant, in turn, accuses the judge of the same after referring to his disclosed assets.[128] Other arguments made were that disgruntled litigants could misuse the information regarding disclosed assets and indulge in maligning the reputation of judges, judges did not have the ability to defend themselves in the press and to the public unlike other politicians and government servants, and lastly, that there was no clear format or procedure for such declaration.[129]

[120] RAJASTHAN JUDICIAL ACADEMY, http://rajasthanjudicialacademy.nic.in/docs/3_s1.pdf (last visited Oct. 9, 2019).
[121] Judges (Declaration of Assets and Liabilities) Bill, 2009, No. 4, Bills of Parliament, 2009 (India).
[122] *Strengthening Judicial Integrity through financial disclosure system for judges*, UNODC (Oct. 4, 2019, 4:55 PM),https://www.unodc.org/dohadeclaration/en/news/2017/02/strengthening-judicial-integrity-through-financial-disclosure-systems-for-judges.html.
[123] Judicial Standards and Accountability Bill, 2010, No. 136-C, Bills of Parliament, 2010 (India).
[124] Anirudh, *Will Judges have to Declare Assets under the New Bill on Judicial Accountability*?, PRS INDIA (Oct.9 ,2019, 4:32 PM),https://www.prsindia.org/theprsblog/will-judges-have-declare-assets-under-new-bill-judicial-accountability.
[125] RAJASTHAN JUDICIAL ACADEMY, http://rajasthanjudicialacademy.nic.in/docs/3_s1.pdf (last visited Oct. 9, 2019).
[126] RTI Act, 2005, §. 8(1)(j), No. 22, Acts of Parliament, 2005 (India).
[127] Union of India v. Association for Democratic Reforms, AIR 2002 SC 2112, ¶ 50.
[128] J. Kannan, *Declaration of Assets by Judges*, JUSTICE KANNAN'S LEGAL SPEAK(Oct.5,2019, 7:23PM), http://mnkkannan.blogspot.com/search/label/Assets%20of%20Judges.
[129] Prashant Bhushan, *Judicial Accountability : Assets Disclosure and Beyond*, 44, EPW 17, 8-11 (2009),https://www.jstor.org/stable/pdf/25663532.pdf?refreqid=excelsior%3Ade4659cd35783baa75dc499f46de6dac

These reasons, while valid, have no legal backing and are simply not sound enough to justify the immunity of judges from declaring their assets. Firstly, the reputation of judges cannot be said to be marred merely due to false and baseless allegations by someone who has apparently been wronged due to their decisions. Their reputation depends on their actions, conduct and fairness. If allegations against judges truly are baseless, this would amount to civil and possibly criminal defamation, for which there exist sufficient remedies. Moreover, the judges have the ability to easily bring miscreants to task under the Contempt of Courts Act, 1971,[130] a remedy which is not afforded to other public servants for whom disclosure of assets is mandatory. So far as the question of format and procedure of declaring the assets is cited as a reason for non-disclosure, it is the opinion of the authors that the same rigorous procedure formulated by the Supreme Court for the declaration of assets of election candidates may be adopted by the judiciary, with the required amendments.

Finally, considering a cost-benefit analysis, a marginal and rare infringement on the independence of a judge would result in much lesser damage to the public interest that the potential increase in judicial corruption owing to a lack of transparency and measures for accountability. The cost must be weighed against the benefit of preventing the aforementioned corruption, and a practical analysis would reveal an outcome very much in favour of the disclosure of assets by the judiciary.

(B.) PROCEDURE FOR REMOVAL OF JUDGES 9

An independent judiciary is one of the fundamental facets of separation of powers which essential for the protection of the constitutional spirit in a democratic polity.[131] An independent judiciary is entrusted with the responsibility of protecting people's rights[132] and enforcing the 'rule of law'[133] in a country. This essential independence is ensured by putting in place certain mechanisms that create a foreclosing barrier for protecting the judicial organ from manipulating interventions from the legislature and executive. One of such mechanisms is ensuring the security of tenure for the justices of a court because a precarious and controlled tenure might lead to manipulation and thus a failure of 'rule of law'.[134] This being the

[130] Contempt of Courts Act, 1971, No. 70, Acts of Parliament, 1971 (India).

[131] Rebecca Welsh, *A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality*, 39 MONASH U. L. REV. 66, 68 (2012).

[132] J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independence from What and Why,* 58 N.Y.U. ANNUAL SURVEY OF AMERICAN LAW 241, 241 (2001-2003).

[133] Gretchen Carpenter, *Judiciaries in the Spotlight*, 39 THE COMP. & INT'L J OF SOU. AFR. 361, 363 (2006).

[134] F. Andrew Hanssen, *Is There a Politically Optimal Level of Judicial Independence?*, 94 THE AMER. ECO. REV. 712 (2004).

underlining reason, modern constitutional States like Australia[135] and India[136] provide for the removal of the judges of the higher judiciary only on the grounds of proven misbehaviour.

As it has already been shown that almost every protection or power bestowed on the judiciary to ensure its independence has a competing call for judicious use of such protections and powers in order to secure accountability. In the context of the provisions dealing with the removal of judges, there exists an inherent imbalance in the process of removing judges. While the high standards to be met before removing a judge of the higher judiciary has done its part in ensuring independence, the inherent reason for having a removal process in the first place has utterly failed in its part of securing accountability of judges. This can be clearly seen from the fact the in the constitutional history of the United States, England, India, Australia and South Africa took together, not a single judge of the highest judicial body of these countries has been removed from office.[137] This fact in no way shows that there existed not a single judge in the history of these countries, who committed misbehaviour of the standard which is required for a removal; rather, it directly highlights the inefficiency of the processes followed to remove the judges against whom strong allegations of misbehaviour exist.[138]

Sikkim High Court Chief Justice P D Dinakaran's resignation on the face of the removal proceedings initiated against him[139] can act as a good example to put things into perspective as to the ineffective process of removal of judges in India. Dinakaran was facing serious charges before the three-member enquiry committee constituted to probe the charges against him which included corruption, land encroachment, tampering with evidence, abuse of judicial office, the impropriety of conduct, acquisition of disproportionate assets and violation of human rights of Dalits and the poor.[140] Dinakaran's resignation came on the eve of the removal proceedings started by the aforementioned three-member committee.[141] The most significant factor for the present discussion is that, following the resignation of Dinakaran, the whole proceedings initiated against him became infructuous.[142] Consequently, the investigation of the

[135] TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW AND THEORY: COMMENTARY AND MATERIALS (The Federation Press 2010).
[136] INDIA CONST. art. 124, 217.
[137] Rangin Pallav Tripathy, *Defining Misbehaviour for Removal of Judges: The Logical Fallacy and Necessary Politicisation*, 5 NULJ 1, 5 (2015).
[138] *Id.*
[139] J Venkatesan, *Justice Dinakaran Resigns*, THE HINDU (Jul. 29, 2011, 8:49 PM), https://www.thehindu.com/news/national/Justice-Dinakaran-resigns/article13799237.ece
[140] *Justice P D Dinakaran Resigns as Sikkim Chief Justice*, OUTLOOK (Jul. 29, 2011, 8:28 PM), https://www.outlookindia.com/newswire/story/justice-p-d-dinakaran-resigns-as-sikkim-chief-justice/729420.
[141] *Facing impeachment, Dinakaran resigns as Sikkim HC Chief Justice*, INDIA TODAY (Jul. 29, 2011, 10:03 PM), https://www.indiatoday.in/india/north/story/dinakaran-resigns-sikkim-hc-chief-justice-138446-2011-07-29.
[142] J Venkatesan, *supra* note 131.

charges against Dinakaran was quashed and the truth behind such allegations never came out officially. This meant Dinakaran was entitled to the same privileges and retirement benefits as a member of the higher judiciary, which he would not be entitled to if he stood impeached.[143]

According to the authors, Dinakaran's resignation raises a very significant question for the purposes of our discussion as to the interplay of independence and accountability, i.e. *whether such a room for resignation on the face of impeachment proceedings offers an easy way out to the judges of the higher judiciary?* And if so, *whether this leads to a complete ineffectiveness of provisions of removing judges under the Indian Constitution, in ensuring judicial accountability?*

The authors believe that the answer to both of the above questions has to be affirmative. The quashing of the removal proceedings and the complete investigation process against Dinakaran, merely on the grounds of his resignation, set a very bad precedent for the future. Any and every judge against whom such a proceeding is initiated would submit his/her resignation, where he has a reasonable belief that the outcome of the investigation of the charges alleged against him is in most likely circumstances lead to his removal. Such a judge would be entitled to all the privileges and benefits as any other member of the higher judiciary. Assuming that the resigning judge was, in fact, guilty of the charges raised against him, his resignation would leave no difference between him and any other judge who has acted without any fear or favour throughout his tenure as a member of the higher judiciary. This easy way out dilutes to a great extent, the deterrent effect that removal proceedings are expected to cause, and therefore leaves this very essential facet of judicial accountability ineffective in its objective.

The authors recommend that where an impeachment proceeding has begun against a judge after clearing all the stringent pre-requisites laid down to ensure the independence of the judiciary, a judge should not be allowed to resign until such proceedings culminate. This would go a long way in arming the accountability part of a removal proceeding, and strike a much-required balance between independence and accountability. Where this is done, judges which are in fact guilty of misbehaviour would not be able to take an easy way out and entitle themselves to the same stature as that of any other member of this extremely important position. This step might go ahead and create some amount of deterrence which is essential to instil accountability of the supremely powerful judiciary of our country.

X. CONCLUSION

The questions arising out of the judiciary's exclusion from the reach of the RTI Act was finally taken up by the Supreme Court of India, as recently as 13th November 2019. The Supreme Court by holding that

[143] *Dinakaran's Resignation*, 46 ECONOMIC AND POLITICAL WEEKLY 8, 8 (2011).

"Transparency does not undermine judicial independence."[144], has explicitly agreed to the proposition laid down by the authors that judicial independence can not only coexist with judicial accountability but in fact, both are essential for the effectiveness of each other.

The Hon'ble Court reiterated the stance that independence is a responsibility and not a privilege. By bringing the office of the CJI under the ambit of a public authority as per section 2(h) of the RTI Act, the Court has attempted to instil a sense of accountability in the functioning of the Judiciary of this country. However, certain conditions were put forward in the application of the RTI enquiries to the CJI's office. It was held that the right to privacy as per Article 21 of the Constitution and the right to information as per Article 19(1)(a) of the Constitution were to be balanced against each other. The Public Information Officer (**"PIO"**) of the CJI's office will be required to apply the test of proportionality in order to balance the two fundamental rights while answering the queries. This is also provided for as per section 8(1)(j) of the RTI Act, which clearly states that enquiries that are extremely invasive into the lives of others and are not of public importance will be considered exceptions to the RTI Act and will not be required to be answered.

Thus, the RTI Ruling as on 13th November 2019, is the perfect example to show that the judiciary can be both, independent as well as accountable. Transparency in the working of the judiciary being one of the facets of its accountability, the ruling can have the effect of instilling greater accountability in its functioning.

Taking the examples and instances cited w.r.t to the ability of the Indian judiciary to exceed the bounds of judicial activism and transform it into judicial adventurism/ overreach, it becomes sufficiently clear that the current scenario lacks proper measures of accountability in the functioning of the Indian judiciary. Moreover, the aforesaid decision of the Supreme Court, w.r.t to the inclusion of the office of the Chief Justice of India in the ambit of the RTI Act establishes the fact that independence and accountability are principles which can and should coexist in order to accentuate the basic principles of constitutionalism in India. Therefore, the authors finally conclude that the constitutional structure of India requires a judiciary which is not only independent from all influences, but is also responsible and accountable for the actions taken in the course of its independent functioning. The authors also suggest certain mechanisms/ solutions that can be discussed and formulated in order to foreground the structure of the judiciary which is constitutionally provided for.

[144] Central Public Information Officer, Supreme Court of India v. Subash Chandra Agarwal, 2019 SCC OnLine SC 1459.

ARTICLE

DESCENDING FROM THE DISSENT: WALKING THROUGH JUSTICE MALHOTRA'S VERDICT WITH HER PEERS

*Rahul Mohan**

ABSTRACT

The Sabarimala case[1] draws a distinction between the revolutionary and reformist aims of the Constitution. The former conception desires liberation of the individual from shackles imposed by societal mores. This is instrumental in realizing the ideals enshrined within the preamble. Here, the state isn't necessarily commenting on the nature of the practices which degrade or bind individuals, but the mere fact that there is discrimination due to a facet of their personhood compels the state to intervene. The latter aim is solely concerned with governing the relationship between the citizen and the state. It believes that the ideals espoused by the preamble (and couched within the term constitutional morality) will be best realized if we change the structure of governments and their institutions. The configuration and practices of our society (barring a few egregious examples like caste-based untouchability) are largely left untouched. This ensures that the state doesn't enforce its conception of the moral at the expense of its citizens' freedom to discover and abide by values either individually or in groups. In the Sabarimala verdict,[2] Justice Chandrachud's concurring opinion nestles in the first vision, while Justice Malhotra's takes refuge in the second. By contrasting the two (with sprinklings from the majority and the other concurring opinion) I aim to answer two inter-connected questions – first, does the Constitution root for the individual capable of wearing multiple identities, or for groups stitched around a specific identity of that individual? The second being the legitimacy (and desirability) of the state's intervention in internal affairs of religious groups on accord of the kind of secularism practised in India.

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[1] Indian Young Lawyers Association v. State of Kerala, W.P. (C) No. 373 of 2006.

[2] *Id.*

I. BACKGROUND TO THE CONTROVERSY

The Kerala government had enacted a legislation[3] for allowing all Hindus to access public places of worship. The Government had crafted rules[4] under Section 4 of the Act,[5] one of which, Rule 3(b), prohibited women aged 10 to 50 from accessing the shrine. This arrangement was challenged through a Public Interest Litigation[6] (PIL) in the Kerala High Court in 1992. The High Court upheld the exclusion as a valid exercise of the religious freedom of the denomination administering the shrine. A subsequent reference was filed in front of a bench comprising of three judges of the Supreme Court, who passed the matter for consideration by a constitutional court.

(A) CAVEATS

I will be refraining from discussing whether devotees praying at the Sabarimala shrine constitute a religious denomination or not. While this is an important consideration for deciding the case, the question involves a substantial factual inquiry. Out of the five judges, only Justice Malhotra had affirmed the Kerala High Court's finding in Mahendran[7] that the Ayyappans are a religious denomination. Conversely the majority and concurring rulings opined that the devotees failed to satisfy the tests laid down in *S.P. Mittal v. Union of India*[8] for qualifying as a religious denomination. Another query that has been omitted is whether the deity is a bearer of fundamental rights. Only Justice Chandrachud grappled with this contention and dismissed the claim.

With these contentions out of the way, I shall first delve into Justice Malhotra's reservations. Then I will compare her reasoning with that employed in the majority and concurring opinions to answer the questions posed in the abstract.

(B) THIS STATE SHALL NOT PASS- DEIFYING THE DEVOTEE

[3] Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965, No. 7 of 1965, INDIA CODE (1993), http://indiacode.nic.in [hereinafter Kerala Hindu Places of Public Worship Act].
[4] Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 (India).
[5] Kerala Hindu Places of Public Worship Act, *supra* note 3, § 4.
[6] S. Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthpuram & Ors., AIR 1993 Ker 42 [hereinafter Mahendran].
[7] *Id.*
[8] S.P. Mittal v. Union of India, (1983) 1 SCC 51 [hereinafter S.P. Mittal].

Justice Malhotra contended that the petitioners weren't aggrieved devotees and hence lacked necessary standing to invoke the court's writ jurisdiction through a PIL. She cited numerous instances where it's always either been the state or a member of the concerned religious group who had challenged a religious practice in the past. She opined that the court should be circumspect while entertaining such petitions; otherwise they may endanger the freedom of religious groups. The courts could irredeemably alter the character of a religion by testing its tenets and practices on the basis of its own morality. Her reasoning seemed anchored in the inability of the courts to reconcile varied interests in poly-centric issues,[9] a frequent occurrence with PILs. In PILs, norms for showing grievances are relaxed which promotes unaffected interlopers to call on the court. This coupled with the interminable nature of the orders (continuing mandamus) delivered during their lifespan derails any possibility of a swift and substantive resolution of the original dispute. This can steer the adjudication in unforeseen directions which can threaten the sanctity of the relationship between the devotee and the divine. Article 25(1) of the Indian Constitution recognises the freedom of all persons to equally practice, profess and propagate their religion. This freedom can be curbed by the state for preserving public order, morality or health. Additionally, Article 25(2)(a) of the Indian Constitution allows the state to regulate or restrict secular activities associated with religion. Article 25(2)(b) of the Indian Constitution empowers the state to enact laws for social welfare and reform. Justice Malhotra deemed Article 25(2)(b) to be a mere enabling provision for the state without conferring any substantive right on any citizen. She held that it only aids the state in uprooting social injustices through legislation without reforming religions out of their existence.

It also contains a second disjunctive part which opens Hindu temples to previously excluded classes. This is a form of reparation for past indiscretions, without commenting upon the importance of the practice to the faith. Justice Malhotra adjudged the 1965 Act[10] to be a legitimate expression under Article 25(2)(b). Rule 3(b) emanating from the Act[11] which curtailed the entry of women was deemed vital for respecting the age-old custom being practised at the shrine. She further examined the application of the phrase "equally entitled to profess, propagate and practice religion" under Article 25(1), to the present case. She eventually ruled that the equal entitlement is

[9] ANUJ BHUWANIA, COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA 120 (2017).
[10] Kerala Hindu Places of Public Worship Act, *supra* note 3.
[11] *Id.*

constrained by the need to preserve the essence of the religion. Hence, the worshippers' right to pray to a specific manifestation of their deity can't be trammelled by a plea for equality. This meant her refusal to test the enactment on the doctrine of manifest arbitrariness laid down by Justice Nariman in *Shayara Bano v. Union of India*.[12] She strongly urged the courts to refrain from testing the importance of a practice within the religious fold by applying the essential religious practices test. She, however, conceded that religions have an inviolable core. From her reasoning, one can deduce that religious denominations can act as closed systems. Their assessment of the importance of a practice to the same system will be final and unquestionable. This may forsake intra-group diversity by allowing the collective to discipline dissidents, even to the extent of complete ouster. This echoes the reasoning used by Justice Ayyangar in *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*[13] for invalidating a legislation outlawing excommunication by religious bodies. There the revocation (effect) of the civil rights of an individual, alienated to preserve the nature and purity of religion by its custodian, was considered immaterial. This explains why Justice Malhotra failed to countenance the application of the impacts test crafted in *Bennett Coleman & Co & Ors. v. Union of India & Ors.*[14] In the same Saifuddin case,[15] the dissenting judge, Justice Sinha, had excoriated excommunication as a form of untouchability under Article 17 of the Constitution. Following his lead, some petitioners had raised the same contention in the present case. They argued that exclusion of women on the basis of a physiological feature like menstruation amounted to them being labelled as untouchable pariahs. Yet, Justice Malhotra refused to stretch the concept of untouchability beyond caste-based discrimination.[16] She held that the provision was inserted following the temple entry movement for Dalits. Here "social reform preceded statutory changes" and the provision couldn't be interpreted literally but instead, had to be read in its historical context.

(C) RESTATING THE PRIMACY OF INDIVIDUAL: HOW THE STATE INTERACTS WITH THE CITIZEN AND THE SUPPLICANT

Both Justice Nariman and Justice Chandrachud disregarded technicalities and admitted the matter raised through a PIL because it raised issues of grave constitutional importance. They deemed the

[12] Shayara Bano v. Union of India, (2017) 9 SCC 1 [hereinafter Shayara Bano].
[13] Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, [1962] Suppl. 2 SCR 496 [hereinafter Saifuddin].
[14] Bennett Coleman & Co & Ors. v. Union of India & Ors., (1972) 2 SCC 788.
[15] Saifuddin, *supra* note 13.
[16] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1067 (Revised by Justice Ruma Pal and Samaraditya Pal, 6th ed. 2010).

evidence to be sufficient for trial.[17] Justice Chandrachud held that the High Court in Mahendran[18] had neglected the evolution of the essential religious practices test since Devaru.[19] This implored the Supreme Court to intervene.

All three opinions (including the CJI) asserted that both individual rights (under Article 25(1)) and group rights (under Article 26) are controlled by Article 25(2). They cited Devaru[20] to show that Article 25(2)(b) and 26(b) of the Indian Constitution were in conflict and needed to be reconciled harmoniously. Otherwise, an unfettered freedom for denominations would destroy the right of the state to legislate for social welfare and reform under Article 25(2)(b). Hence, Article 26(b) is subject to Article 25(2) and the state can regulate temple entry without eroding the essence of the concerned religion. Justice Chandrachud further ruled that restrictions in the contingency clause of Article 25(1) remain unaffected by the sweeping call for social reform under Article 25(2). Also, the reformatory obligation on the state in Article 25(2) isn't abridged by the freedom guaranteed under Article 25(1). The phrase equal entitlement in Article 25(1) was read as strengthening claims of intra-group diversity by allowing members of all hues the same right to worship their deity. Justice Nariman's rejection of the alternative of women praying at other temples reinforced this claim. As for rule 3(b) of the 1965 Act,[21] the CJI and Justice Chandrachud deemed it ultra vires the parent act, in so far as it violated Section 4 of the Act. This was because it validated an improper restriction on women, who fell within the definition of class and could access the temple despite any custom to the contrary. Justice Nariman held the rule to be unconstitutional for violating Article 14 and Article 15(1). Justice Chandrachud went a step further and analysed the practice as stemming from an immemorial custom and not a legislation. He held that despite the equivocal ruling of two judges in Narasu,[22] customs and usage would fall under the definition of laws in force under Article 13(3)(b) of the Indian Constitution. This would subject them to scrutiny for violation of fundamental rights under Article 13(1) of the Indian Constitution. He also opined that governments can't enact customs and usage and their inclusion under definition of law under Article 13(3)(a) of the Indian Constitution appears misplaced. An expansive reading of the term

[17] Daryao & Ors. v. State of U.P. & Ors., AIR 1961 SC 1457.

[18] Mahendran, *supra* note 6.

[19] Sri Venkatramana Devaru v. State of Mysore & Ors., AIR 1958 SC 55.

[20] *Id.*

[21] Kerala Hindu Places of Public Worship Act, *supra* note 3, Rule 3(b).

[22] State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.

"includes" in laws in force under Article 13(3(b) of the Indian Constitution would contain elements of law defined under Article 13(3)(a). This will open custom to challenge on grounds of manifest arbitrariness used by Justice Nariman to strike down the practice of Triple Talaq in Shayara Bano.[23] We now focus on possible refutations to the assertion that in the absence of an express limitation, denominational rights (under Article 26) can't be restricted by other provisions of Part III of the Constitution.

Chandrachud J. began this inquiry by noting that our constitutional democracy rests on three pillars –equality, liberty and fraternity. The question that follows is for whom they exist and for what purpose. Chandrachud J. answered this by declaring the individual as the most integral element of the polity and protecting her dignity as the most vital aim of the republic. According to him, liberty, equality and fraternity enmesh to create a just constitutional fabric in which nestles the individual's dignity. They inform, protect and promote the fundamental rights of an individual, which aren't separate entitlements but siblings cohabiting in peaceful harmony. But why then have groups been granted fundamental rights? Can they exercise them even at the cost of depriving their own members of their fundamental rights? Chandrachud J. expounded upon the anti-exclusion principle enunciated by Sinha J. in Saifuddin (*supra*) to resolve this conflict. Sinha J. had in his dissent ruled that excommunication can't merely be an exercise of religious freedom because it hampers civil rights of those declared outcasts. This made it a secular activity accompanying those religious. Hence, the act of excommunicating dissenters won't be shielded from state intervention under Article 26(b). Chandrachud J.'s submission points to the conclusion that groups are vehicles for individuals to attain self-fulfilment through acquisition of basic goods. The communities (or groups) are bound by this obligation and their freedoms can't supersede the rights of their inhabitants. This vision foresees a wider scope for horizontal application of fundamental rights which will require a state sensitive to the discrimination against individuals within a group of their choice. Next Chandrachud J. dealt with the question of whether the exclusion of women from the shrine constituted untouchability under Article 17 of the Indian Constitution. He grounded his study in a textual and historical inquiry of the said provision. The article in its current form bans untouchability in any form, and puts the term in quotation marks for a varied application. According to him this signified the framers' intent to demolish the notions of purity and pollution which anchor the concept of untouchability. In the past this manifested in caste-based

[23] Shayara Bano, *supra* note 12.

discrimination. The present sees women as a class being ostracised because of taboos associated with menstruation. The article isn't solely concerned with lifting the restriction on Dalits from entering temples. It confronts and abolishes the stigma attached with those shunned on basis of physiological or biological features that subordinates them for perpetuity. This reading restores and preserves the dignity of oppressed individuals which is the ultimate aim of a transformative constitutionalism.

II. RESETTING THE CONSTITUTIONAL DIAL: TIME TO SCRAP THE ESSENTIAL RELIGIOUS PRACTICES TEST?

We know that Article 25(1) allows individuals to equally profess and practice their religion to satisfy their conscience. This is subject to public order, health and morality, with the state adjudging when and the extent to which the right can be curtailed when either of the concerns arise. Article 25(2)(a) of the Indian constitution allows the State to enact laws for regulating or restricting the secular activities accompanying religious rites. This right appears absolute as the section begins with the term 'nothing'. Since the state can legislate only with respect to secular practices, someone will have to differentiate between them and religious practices. Here the essential religious practices test may seem like an attractive proposition.

The ensuing question is who decides what's essential to a religion? If the right is left to the denominations then they may irrationally exclude certain individuals based on another facet of their person-hood (like gender). If the court is the supreme arbiter, then individuals (and the groups they inhabit) may be deprived from demonstrating their faith according to their wishes. Initially the court deferred to the wisdom of the denominations who had full autonomy in deciding what constituted a religious practice.[24] This allowed the court to regulate only those practices left out of the religious fold by the denominations themselves. The court then proceeded to usurp the power of judging the importance of a practice to a religion post Devaru (*supra*). Now only those practices escaped judicial scrutiny which were integral (*i.e.* whose prohibition would render the religion obsolete) to the religion. Despite becoming the superior adjudicator, the court still treads

[24] Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt, 1954 SCR 1005.

cautiously when evaluating a religious ceremony on the touchstone of the Constitution. It seems hesitant to classify a practice as a fundamental part of the religion before determining its compatibility with the Constitution. Even Sinha J.'s much vaunted dissent in Saifuddin (*supra*) struck down excommunication for trampling the civil rights of the adherent only after labelling it as a secular activity. It's also extremely strict while conferring denominational status on religious groups in order to exercise its judicial review. This exacerbates the confrontation between a state aiming for reformation and a denomination desiring preservation. By crystallising the essence of their religion and hobbling splinter groups from charting a new course, the court restrains adherents from evolving a new meaning or direction for their religion. This theological expedition sometimes hinders individuals from attaining self-fulfilment through religious practices, which are deemed as mere accretions by a patronising judiciary.[25] Thus the essential religious practices test neither preserves plurality nor safeguards individual dignity and needs to be scrapped.

III. THE FINAL HYMN: LIBERTY THROUGH FRATERNITY FOR EQUALITY

Before we proceed to answering the two questions framed in the abstract, let us revisit the context in which they originate. Post Sabarimala, we need to re-examine the relationship between the state, the individual and the community, at large. We also need to pay attention to the constitutional provisions and the judicial doctrines which mediate these interactions. Under the classic conception of constitutional liberalism, it is only the individual who is supposed to enjoy fundamental rights. What then could be the rationale for vesting fundamental rights with religious, cultural and linguistic groups? The answer could lie in the importance of groups in helping individuals lead a fuller life, as explicated by Chandrachud J., and discussed earlier. Under this conception, both denominational and individual rights spring from the same source, *i.e.*, Article 25(1) of the Indian Constitution. Hence the collectives' rights become tethered to other fundamental rights enjoyed by individuals. However, the scope of the freedom conferred on denominations under Article 26(b) of the Indian Constitution is quite wide. They enjoy immunity (theoretically) from undue interference by the state. Denominations (and small sects) also needn't fear encroachment by other larger religious groups. This is because their rights can be fettered by the state only after a reasonable appraisal on the basis of defined criteria. These factors combine to promote the liberty of an individual populating these groups to exercise her religious rights.

[25] Durgah Committee, Ajmer v. Syed Hussain Ali, (1962) 1 SCR 383.

Hence the status of religious denomination should be granted to groups liberally in order to protect and promote plurality and diversity.[26] Yet what about instances when the individual is oppressed within its own group? Here it will be salient to discuss Malhotra J.'s opinion in Navtej Johar.[27] There she had cited Prof. Khaitan[28] to show that discrimination on the basis of both immutable characteristics (like sex) and fundamental choice (religion) effaces the personal autonomy of an individual. One can reconcile her present stance with that in Johar (*supra*) by holding that an individual is free to leave a religious group if they feel suffocated by its policies. She considers this pivotal for protecting the adherent's fundamental choice to practice their religion, as they see fit. But this fails to recognise that those quitting (or forced to quit) can't express a fundamental choice (to remain and practice), because of their immutable feature. Prof. Khaitan (*supra*) describes those characteristics as immutable over which the individual doesn't have effective control. Hence the individual is tied to the perception that society holds about these characteristics. This dissuades them from either embracing an alternative identity (*e.g.* undergoing sex reassignment) or an identity intrinsic to them but which becomes a source of their marginalisation (*e.g.* homo-sexuality). Besides, leaving a religious group doesn't always augur well for the person departing the community.[29] Those advocating expulsion or voluntary exit misconstrue religion (and its practice) as a private compact between an individual and their group. This presupposes that religion has no bearing on the wider status of the individual within their society and a larger polity. This is far from true since religion is an integral part of our social fabric which can't be divorced from other spheres of our life. An example would be how the Hindu law of succession was discriminatory towards women before the reformations ushered in by the state.[30] This poses a significant question: what if a group's particular mode of professing its religion deprives an individual from enjoying his civil rights? Can the state guard against the individual being denied access to basic goods which can even stretch to the point of complete ostracization? Is this justifiable under the model of secularism followed in our nation? Chandrachud J. attempted to answer these questions by invoking the idea of transformative constitutionalism.[31] This theory propounds that the adoption

[26] S.P. Mittal, *supra* note 8.

[27] Navtej Singh Johar v. Union of India, W.P. (Crl.) No. 76 of 2016.

[28] Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for All Minorities*, 2 NUJS L. REV. 419 (2009).

[29] THE OXFORD HANDBOOK OF SECULARISM 295 (Phil Zuckerman & John R. Shook eds., OUP 2017) [hereinafter THE OXFORD HANDBOOK OF SECULARISM].

[30] Hindu Succession (Amendment) Act, 2005, No. 39, Acts of Parliament, 2005 (India).

[31] Gautam Bhatia, *Freedom from community: Individual rights, group life, state authority and religious freedom under the Indian Constitution* 5(3) **GLOB. CONST.** 351-382 (2016).

of our constitution heralded a break from systemic colonial oppression. It ushered in a new dawn of emancipation for the individual suffering under egregious mores. The enduring values of our democracy are reflected in the preamble and encapsulated within the pithy term- constitutional morality. The three pillars of this ethos are liberty, equality and fraternity. All three need balancing so that both erstwhile colonial subjects and pariahs can become equal moral members of our society.

In this arrangement the state has to govern with the sovereign's (*i.e.* the citizen's) consent without oppressing them with impunity. It has to be circumspect while curtailing individual (and group rights) without retreating when the group threatens to assail an individual's rights. The latter reflects the demands placed on the state due to how secularism functions in our country. We follow neither the American model with limited say for the state (establishment clause), nor the French model with over-reaching powers for the state which prohibits display of religiosity in the public sphere. Hence the state can't put blinkers and idealise neutrality while allowing religious groups to violate the fundamental rights of an individual citizen. The state has to facilitate every individual's engagement with the fluidity of their religion, without succumbing to the hegemony of charlatans. Within this framework citizens are required to prioritise public reasoning[32] for mutual accountability and respect. These conditions help stave off the freezing of concepts (*e.g.* marriage being a hetero-normative union) due to a unilateral viewing of religions themselves. Hence the individuals not subscribing to majoritarian definitions of these institutions can aspire to their membership. This will ensure an emphatic reaffirmation of Rawls 'justice as fairness.' It is this fine balance (in the context of religion) that the court has tried to restore through the Sabarimala verdict. It is still debatable whether it should have waited for a petition from an aggrieved insider and granted a denominational status to the Ayyappans**.** In the recent review petition[33] of this judgment, Justice Nariman in the dissenting opinion rejected the claim that the petitioners were meddlesome intruders. He also deemed that the original plea had raised issues of public importance which merited adjudication by a constitutional court.[34] This also prompted him to reject the request for the review petition being barred by res-judicata due to the decision of the

[32] THE OXFORD HANDBOOK OF SECULARISM, *supra* note 29.

[33] Kantaru Rajeevaru v. Indian Young Lawyers Association through its General Secretary and Ors., Review Petition (Civil) No. 3358 of 2018.

[34] State of Uttaranchal v. Balwant Singh Chaufal and Ors., (2010) 3 SCC 402.

Kerala High Court in Mahendran (*supra*). This is because res-judicata is merely a procedural device to limit litigation. It can't chain the Supreme Court from inquiring into and correcting a wrongful interpretation of the substantive law by the High courts. As for ascertaining the status of the devotees as a religious denomination under Article 26, even those rejecting the review petition raised doubts about a rigid formulation. They stated that the rejection of the claim for classification had been settled conclusively in the previous verdict and need not be agitated again. They also affirmed that the fundamental nature of a religious place will not be altered if it is frequented by people from other faiths. This appears to be a precursor to a looser interpretation of the parameters laid down in SP Mittal (*supra*) for designating an outfit as a religious denomination. Reverting back to the 2018 judgment, one feels that the court should have disavowed the essential religious practices test. Chandrachud J.'s invocation of constitutional morality bound to the salutary principles encoded within the preamble for testing vires of a religious act is an improvement on the redundant test. However, it may not be sufficient and may even lack the ability to comprehend the peculiarity of rituals of a certain sect.[35] It wouldn't also be amiss to state the banishment Narasu (*supra*) which cloaks personal law from the constitutional eye by the majority would have also been welcome. Finally the preceding analysis leaves us with the tantalizing question: Is the adoption of a Uniform Civil Code (provided for under Article 44 of the Indian Constitution) which liberates personal laws from the pincers of religion (thus reducing it to a personal affair accompanied by some merely performative rituals) an inevitable consequence of the majority opinion in the present case? Or will judicial wisdom ordain the seclusion of faith from reason, so that its followers can unite against an enforced equality, even at the cost of some individual estrangement?

That is a secret that will be revealed when the seven judges hear the referral on the back of the acceptance of the review petition against the present judgment.

[35] P.B. Mehta, *Death and the Sovereign*, THE INDIAN EXPRESS (Dec. 28, 2019, 6:45 PM), https://indianexpress.com/article/o-pinion/columns/death-and-the-sovereign/.