Constitution Amendment – An Analysis of Amendment Process

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Abstract

Our Constitution is a dynamic document. Although this Constitution is as strong and enduring as we want it to be, there is no longevity. What we can do today might not be entirely applicable tomorrow. Government pattern must change, and the constitution must adapt itself to the economic and social development of the nation. The proposed constitution abolished complex and daunting processes such as a convention or referendum decision. Amendment powers are left to the central and provincial legislature. It is the approval of the state legislatures that are needed for modifications to particular matters and there are very few. The other clauses of the Constitution are left to the Parliament to amend. The main restriction is that it is made by a vote of not less than two-thirds of the members present and voting in each House and by a vote of the overall membership of each house. The world is not static; it goes on changing. The social, economic and political circumstances of the people go on changing and the constitutional law of the nation must, therefore, adapt in order to the changing needs, changing the lives of the people. If no arrangements were made for modification of the constitution, the people would have recourse to extra-constitutional processes including insurrection to reform the constitution. The Indian constitution's framers were keen to create a text that could evolve with a rising population, adapting itself to a rising people's shifting circumstances. The Constitution needs to be updated in every period. No-one may say this is the finish.

Introduction

The Constitution of a country is the fundamental law of the land— the basis on which all other laws are made and enforced. It has been described as a "superior or supreme law"[2] with "perhaps greater efficiency and authority", and "higher sanctity",[3] and more permanence than ordinary legislation. Nevertheless, an adequate provision of its amendment is considered implicit in the very nature of a constitution. A democratic Constitution has to be particularly responsive to changing conditions, since a government founded on the principle of popular sovereignty, "must make possible the fresh assertion of the popular will as that will change"[4]

Rigid or Flexible Constitution

Constitutions are usually classified as 'flexible' or 'rigid' depending upon the process through which they can be amended. Prof. A.V. Dicey defines two types of Constitutions—the flexible as 'one under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body', and the rigid Constitutions as 'one under which certain laws generally known as constitutional or fundamental laws, cannot be changed in the same manner as ordinary laws'.[5]

The United Kingdom having an unwritten Constitution, is the best example of an extremely flexible Constitution as there is no distinction between the legislative power and the constituent power. The British Parliament has the power to change the Constitution by the ordinary process of legislation. As opposed to the U.K. system, the constitutional amendment has an important place under a written Constitution like that of the U.S.A. Its importance increases where the system is Federal. In most of the written Constitutions, the power to amend the Constitutions is either vested in a body other than the ordinary Legislature or it is vested

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[2] K.C. Wheare: Modern Constitutions, London, 1951, p. 91; Also see Haward Lee Mc. B. in: The Living Constitution, New York, 1948, pp. 7-10.

[3] J. Quick and B.R. Garran: The Annotated Constitution of the Australian Commonwealth, Sydney, 1991, p. 316.

[4] Encyclopaedia of Social Sciences, New York, 1951, Vol. II, p. 21.

[5] A.V. Dicey: Introduction to the Study of the Law of the Constitution, London, 1952, p. 127.

in the ordinary Legislature, subject to a special procedure. In a federal system, additional safeguards like the involvement of Legislatures at the State level, are also provided for with a view to ensure that the Federal set-up does not get altered only at the will of the Federal Legislature.

Need for Flexibility in the Constitution

Explaining why it was necessary to introduce an element of flexibility in the Constitution, Pandit Jawaharlal Nehru observed in the Constituent Assembly:

While we want this Constitution to be as solid and as permanent a structure as we can make it, nevertheless there is no permanence in Constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop a nation's growth, the growth of a living, vital, organic people. Therefore, it has to be flexible.. . .

In any event, we should not make a constitution, such as some other great countries have, which are so rigid that they do not and cannot be adapted easily to changing conditions. Today especially, when the world is in turmoil and we are passing through a very swift period of transition, what we may do today may not be wholly applicable tomorrow. Therefore, while we make a constitution which is sound and as basic as we can, it should also be flexible. . . .[6]

Constituent Assembly and the Constitution Amendment in India

The makers of the Indian Constitution were neither in favour of the traditional theory of Federalism, which entrusts the task of constitutional amendment to a body other than the Legislature, nor in prescribing a rigid special procedure for such amendments. Similarly, they never wanted to have an arrangement like the British set-up where the Parliament is supreme and can do everything that is humanly possible. Adopting the combination of the 'theory of fundamental law', which underlies the written Constitution of the United States with the 'theory of parliamentary sovereignty' as existing in the United Kingdom, the Constitution of India vests constituent power upon the Parliament subject to the special procedure laid down therein.

During the discussion in the Constituent Assembly on this aspect, some of the members were in favour of adopting an easier mode of amending procedure for the initial five to ten years. Dr. P.S. Deshmukh was of the view that the amendment of the Constitution should be made easier as there were contradictory provisions in some places which would be more and more apparent when the provisions are interpreted. If the amendment to the Constitution was not made easy, the whole administration would suffer. Shri Brajeshwar Prasad was also in favour of a flexible Constitution so as to make it survive the test of time. He was of the opinion that rigidity tends to check progressive legislation or gradual innovation.

On the other hand, Shri H.V. Kamath was in favour of providing for procedural safeguards to avoid the possibility of hasty amendment to the Constitution.[7]

Dr. B.R. Ambedkar, speaking in the Constituent Assembly on 4 November 1948, made certain observations in connection with the provisions relating to amendment of the Constitution. He said:

It is said that the provisions contained in the Draft make amendment difficult. It is proposed that the Constitution should be amendable by a simple majority at least for some years. The argument is subtle and ingenious. It is said that this Constituent Assembly is not elected on adult suffrage while the future Parliament will be elected on adult suffrage and yet the former has been given the right to pass the Constitution by a simple majority while the latter has been denied the same right. It is paraded as one of the absurdities of the Draft Constitution. I must repudiate the charge because it is without foundation. To know how simple the provisions of the Draft Constitution in respect are of amending the Constitution one has only to study the provisions for amendment contained in the American and Australian Constitutions. Compared to them those contained in the Draft Constitution will be found to be the simplest. The Draft Constitution has elimi-

[6] C.A. Deb., Vol. VII, 8 November 1948, pp. 322-323.
[7] Ibid., Vol. IX, 17 September 1949, pp. 1644-1667

nated the elaborate and difficult procedures such as a decision by a convention or a referendum. . . .

It is only for amendments of specific matters—and they are only few—that the ratification of the State Legislatures is required. All other Articles of the Constitution are left to be amended by Parliament. The only limitation is that it shall be done by a majority of not less than twothirds of the members of each House present and voting and a majority of the total membership of each House. It is difficult to conceive a simpler method of amending the Constitution.

What is said to be the absurdity of the amending provisions is founded upon a misconception of the position of the Constituent Assembly and of the future Parliament elected under the Constitution. The Constituent Assembly in making a constitution has no partisan motive. Beyond securing a good and workable Constitution it has no axe to grind. In considering the Articles of the Constitution it has no eye on getting through a particular measure. The future Parliament if it met as Constituent Assembly, its members will be acting as partisans seeking to carry amendments to the Constitution to facilitate the passing of party measures which they have failed to get through Parliament by reason of some Article of the Constitution which has acted as an obstacle in their way. Parliament will have an axe to grind while the Constituent Assembly has none. That is the difference between the Constituent Assembly and the future Parliament. That explains why the Constituent Assembly though elected on limited franchise can be trusted to pass the Constitution by simple majority and why the Parliament though elected on adult suffrage cannot be trusted with the same power to amend it.[8]

Procedure for Constitution Amendment in India

The Constitution of India provides for a distinctive amending process as compared to the leading Constitutions of the world. It may be described as partly flexible and partly rigid. The Constitution of India provides for a variety in the amending process—a feature which has been commended by Prof. K.C. Wheare for the reason that uniformity in the amending process imposes "quite unnecessary restrictions" upon the amendment of parts of a Constitution.[9]

The Constitution of India provides for three categories of amendments.[10] Firstly, those that can be effected by Parliament by a simple majority such as that required for the passing of any ordinary law—the amendments contemplated in articles 4,[11] 169,[12] para

[8] Ibid, Vol. VII, 4 November 1948, pp. 43-44

[9] Prof. Wheare: op. cit., p. 143

[10] Shankari Prasad vs. Union of India, A.I.R. 1951 S.C. 455.

[11] Article 4 provides that laws made by Parliament under article 2 (relating to admission or establishment of new States) and article 3 (relating to formation of new States and alteration of areas, boundaries or names of existing States) effecting amendments in the First Schedule or the Fourth Schedule and supplemental, incidental and consequential matters, shall not be deemed to be amendments of the Constitution for the purposes of article 368. Thus, for example, the States Reorganisation Act, 1956, which brought about reorganisation of the States in India, was passed by Parliament as an ordinary piece of legislation. It has been held that power to reduce the total number of members of Legislative Assembly below the minimum prescribed under article 170 (1) is implicit in the authority to make laws under article 4 (Mangal Singh vs. Union of India, A.I.R. 1967 S.C. 944)

[12] Article 169 empowers Parliament to provide by law for the abolition or creation of the Legislative Councils in States and specifies that though such law shall contain such provisions for the amendment of the Constitution as may be necessary, it shall not be deemed to be an amendment of the Constitution for the purposes of article 368. The Legislative Councils Act, 1957 is an example of a law passed by Parliament in exercise of its powers under article 169. The Act provided for the creation of a Legislative Council in Andhra Pradesh and for increasing the strength of the Legislative Councils in certain other States

[13] The Fifth Schedule contains provisions as to the administration and control of the Schedule Areas and Scheduled Tribes. Para 7 of the Schedule vests Parliament with plenary powers to enact laws amending the Schedule and lays down that no such law shall be deemed to be an amendment of the Constitution for the purposes of article 368.

[14] Under Para 21 (Sixth Schedule), Parliament has full power to enact laws amending the Sixth Schedule which contains provisions for the administration of Tribal Areas in the States of Assam, Meghalaya, Tripura and Mizoram. No such law,

7(2)[13] of Schedule V and para 21(2)[14] of Schedule VI fall within this category and are specifically excluded from the purview of article 368 which is the specific provision in the Constitution dealing with the power and the procedure for the amendment of the Constitution; Secondly, those amendments that can be effected by Parliament by a prescribed 'special majority'; and Thirdly, those that require, in addition to such 'special majority', ratification by at least one half of the State Legislatures. The last two categories being governed by article 368.

In this connection, it may also be mentioned that there are, as pointed out by Dr. Ambedkar, "innumerable articles in the Constitution" which leave the matter subject to law made by Parliament.[15] For example, under article 11, Parliament may make any provision relating to citizenship notwithstanding anything in article 5 to 10.[16] Thus, by passing ordinary laws, Parliament may, in effect, provide, modify or annul the operation of certain provisions of the Constitution without actually amending them within the meaning of article 368. Since such laws do not in fact make any change whatsoever in the letter of the Constitution, they cannot be regarded as amendments of the Constitution nor categorised as such.

In so far as the constituent power to make formal amendments is concerned, it is article 368 of the Constitution of India which empowers Parliament to amend the Constitution by way of addition, variation or repeal of any provision according to the procedure laid down therein, which is different from the procedure for ordinary legislation. Article 368, which has been amended by the Constitution (Twenty-fourth Amendment), Act, 1971[17] and the Constitution (Forty-second Amendment) Act, 1976, reads as follows:

368 : Power of Parliament to amend the Constitution and Procedure therefor:

1. Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.
2. An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and

however, is to be deemed to be an amendment of the Constitution for the purposes of article 368.

[15] C.A. Deb., Vol. IX, 17 September 1949, p. 1660

[16] Other examples include Part XXI of the Constitution—"Temporary, Transitional and Special Provisions" whereby "Notwithstanding anything in this Constitution" power is given to Parliament to make laws with respect to certain matters included in the State List (article 369); article 370 (1) (d) which empowers the President to modify, by order, provisions of the Constitution in their application to the State of Jammu and Kashmir; provisos to articles 83 (2) and 172 (1) empower Parliament to extend the lives of the House of the People and the Legislative Assembly of every State beyond a period of five years during the operation of a Proclamation of Emergency; and articles 83(1) and 172 (2) provide that the Council of States/Legislative Council of a State shall not be subject to dissolution but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

[17] Before its amendment by the 24th Amendment Act and 42nd Amendment Act, article 368 stood as follows: Art 368, Procedure for amendment of the Constitution: An amendment of the Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in: (a) article 54, article 55, article 73, article 162, or article 241, or (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of the Part XI, or (c) Any of the Lists in the Seventh Schedule, or (d) The representation of States in Parliament, or (e) The provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one-half of the States by resolution to that effect passed by these Legislatures before the Bill making provision for such amendment is presented to the President for assent.

by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in:

1. Article 54, article 55, article 73, article 162 or article 241, or
2. Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
3. Any of the lists in the Seventh Schedule, or
4. The representation of States in Parliament, or
5. The provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States[18]... by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

3. Nothing in article 13[19] shall apply to amendment made under this article.
4. No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article [whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976] shall be called in question in any court on any ground.
5. For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

An analysis of the procedure prescribed by article 368 for amendment of the Constitution shows that: 1. an amendment can be initiated only by the introduction of a Bill in either House of Parliament. 2. The Bill so initiated must be passed in each House by a majority of the total membership[20] of that House and by a majority of not less than two-thirds of the members of that House present and voting.[21] There is no provision for a joint sitting in case of disagreement between the two Houses; 3. when the Bill is so passed, it must be presented to the President who shall give his assent to the Bill; 4. where the amendment seeks to

[18] The words and letters "specified in Part A and B of the First Schedule" were omitted by the Constitution (Seventh Amendment) Act, 1956, s. 29 and Schedule.

[19] Clause 3 was inserted by the Constitution (Twenty-fourth Amendment) Act, 1971 which also added a new clause (4) in article 13 which reads, "Nothing in this article shall apply to any amendment of this Constitution made under article 368"

[20] Total membership in this context has been defined to mean the total number of members comprising the House irrespective of any vacancies or absentees on any account vide Explanation to Rule 159 of the Rules of Procedure and Conduct of Business in Lok Sabha.

[21] "Abstentions" in any voting are not taken into consideration in declaring the result of any question. A member who votes "abstention" either through the electronic vote recorder or on a voting slip or in any manner, does so only to indicate his presence in the House and his intention to abstain from voting; he does not record his vote within the meaning of the words "present and voting". The expression, "present and voting" refers to those who vote for "ayes" and for "noes" Lok Sabha Rules Committee Minutes, dated 8-9 September 1970, (Practice and Procedure of Parliament, 2001, by M.N. Kaul and S.L. Shakdher, p. 604).

[22] These provisions relate to certain matters concerning the federal structure or of common interest to both the Union and the States viz., (a) the election of the President (articles 54 and 55); (b) extent of the executive power of the Union and the States (articles 73 and 162); (c) High Courts for Union territories (article 241); (d) The Union Judiciary and the High Courts in the States (Chapter IV of Part V and Chapter V of Part VI); (e) distribution of legislative powers between the Union and the States (Chapter I of Part XI and Seventh Schedule); (f) representation of States in Parliament; and (g) the provision for amendment of the Constitution laid down in article 368.

[23] The Constitution (Third Amendment) Act, 1954; the Constitution (Sixth Amendment) Act, 1956; the Constitution (Seventh Amendment) Act, 1956; the Constitution (Eighth Amendment) Act, 1960; the Constitution (Thirteenth Amend-

make any change in any of the provisions[22] mentioned in the proviso to article 368, it must be ratified[23] by the Legislatures of not less than one-half of the States; 5. such ratification is to be by resolution passed by the State Legislatures; 6. no specific time limit for the ratification of an amending Bill by the State Legislatures is laid down; the resolutions ratifying the proposed amendment should, however, be passed before the amending Bill is presented to the President for his assent;[24] 7. the Constitution can be amended:

(1) only by Parliament; and

(2) in the manner provided.

Any attempt to amend the Constitution by a Legislature other than Parliament and in a manner different from that provided for will be void and inoperative.[25]

Whether the entire Constitution Amendment is void for want of ratification or only an amended provision required to be ratified under proviso to clause (2) of article 368, is a very significant point. In a case decided in 1992, this issue was debated before the Supreme Court in what is now popularly known as Anti-Defection case,[26] in which the constitutional validity of the Tenth Schedule of the Constitution inserted by the Constitution (Fifty-second Amendment) Act, 1985 was challenged. In this case, the decisions of the Speakers/Chairmen on disqualification, which had been challenged in different High Courts through different petitions, were heard by a five-member Constitution Bench of the Supreme Court. The Constitution Bench in its majority judgement upheld the validity of the Tenth Schedule but declared Paragraph 7 of the Schedule invalid because it was not ratified by the required number of the Legislatures of the States as it brought about in terms and effect, a change in articles 136, 226 and 227 of the Constitution. While doing so, the majority treated Paragraph 7 as a severable part from the rest of the Schedule. However, the minority of the Judges held that the entire Constitution Amendment Act is invalid for want of ratification.

Legislative Procedure and Constitution Amendment

Article 368 is not a "complete code" in respect of the legislative procedure to be followed at various stages.

ment) Act, 1962; the Constitution (Fourteenth Amendment) Act, 1962; the Constitution (Fifteenth Amendment) Act, 1963; the Constitution (Sixteenth Amendment) Act, 1963; the Constitution (Twentysecond Amendment) Act, 1969; the Constitution (Twenty-third Amendment) Act, 1969; the Constitution (Twentyfourth Amendment) Act, 1971; the Constitution (Twenty-fifth Amendment) Act, 1971; the Constitution (Twenty-eighth Amendment) Act, 1972; the Constitution (Thirtieth Amendment) Act, 1972; the Constitution (Thirty-first Amendment) Act, 1973; the Constitution (Thirty-second Amendment) Act, 1973; the Constitution (Thirty-fifth Amendment) Act, 1974; the Constitution (Thirty-sixth Amendment) Act, 1975; the Constitution (Thirty-eighth Amendment) Act, 1975; the Constitution (Thirty-ninth Amendment) Act, 1975; the Constitution (Fortysecond Amendment) Act, 1976; the Constitution (Forty-third Amendment) Act, 1977; the Constitution (Forty-fourth Amendment) Act, 1978; the Constitution (Forty-fifth Amendment) Act, 1980; the Constitution (Forty-sixth Amendment) Act, 1982; the Constitution (Fifty-first Amendment) Act, 1984; the Constitution (Fifty-fourth Amendment) Act, 1986; the Constitution (Sixty-first Amendment) Act, 1988; the Constitution (Sixtysecond Amendment) Act, 1989; the Constitution (Seventieth Amendment) Act, 1992; the Constitution (Seventythird Amendment) Act, 1992; the Constitution (Seventy-fourth Amendment) Act, 1992; the Constitution (Seventy-fifth Amendment) Act, 1994; the Constitution (Seventy-ninth Amendment) Act, 1999; the Constitution (Eightyfourth) Act, 2001; the Constitution (Eighty-eighth Amendment) Act, 2003 were thus all ratified by the State Legislatures after they were passed by both Houses of Parliament before they were presented to the President for assent.

[24] With regard to the corresponding provision in the U.S. Constitution viz. Article V which also does not prescribe any time limit for ratification, the U.S. Supreme Court has held that the ratification must be within a reasonable time after the proposal (Dilllon vs. Gloss 65, Law Ed. 9945) but that the Court has no power to determine what is a reasonable time (Coleman vs. Miller, 83, Law Ed. 1385). It has further held that the question of efficacy of ratifications by State Legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of amendment (Coleman vs. Miller, 83, Law Ed. 1385)

[25] Abdul Rahiman Jamaluddin vs. Vithal Arjun, A.I.R. 1958 Bombay, 94.

[26] Kihota Hollohon vs. Zachilhu and others, (1992) 1 S.C.C. 309.

There are gaps in the procedure as to how and after what notice a Bill is to be introduced, how it is to be passed by each House and how the President's assent is to be obtained.[27] This point was decided by the Supreme Court in the Shankari Prasad's case. Delivering the judgment of the Court, Patanjali Sastri J. observed:[28] Having provided for the constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rules made by each House (article 118), the makers of the Constitution must be taken to have intended Parliament to follow that procedure, so far as it may be applicable consistently with the express provisions of article 368, when they entrusted to it power of amending the Constitution.

Hence, barring the requirements of special majority, ratification by the State Legislatures in certain cases, and the mandatory assent by the President, a Bill for amending the Constitution is dealt with the Parliament following the same legislative process as applicable to an ordinary piece of legislation.

In Lok Sabha, the Rules of Procedure and Conduct of Business make certain specific provisions with regard to Bills for amendment of the Constitution. They relate to:

(*a*) the voting procedure in the House at various stages of such Bills, in the light of the requirements of article 368; and

(*b*) the procedure before introduction in the case of such Bills, if sponsored by Private Members.

Although the 'special majority', insisted upon the article 368 is prima facie applicable only to the voting at the final stage, the Lok Sabha Rules prescribed adherence to this constitutional requirement at all the effective stages of the Bill, i.e., for adoption of the motion that the Bill be taken into consideration; that the Bill as reported by the Select/Joint Committee be taken into consideration, in case a Bill has been referred to a Committee; for adoption of each clause or schedule or clause or schedule as amended, of a Bill; or that the Bill or the Bill as amended, as the case may be, be passed.[29] This provision, which represents the position arrived at after consultation with the Attorney-General and detailed discussions in the Rules Committee, is evidently ex-abundanti cautela. It not only ensures, by a strict adherence to article 368, the validity of the procedure adopted, but also guards against the possibility of violation of the spirit and scheme of that article[30] by the consideration of a Bill seeking to amend the Constitution including its consideration clause by clause being concluded in the House with only the bare quorum present. Voting at all the above stages is by division.[31] The Speaker may, however, with the concurrence of the House, put any group of clauses or schedules together to the vote of the House, provided that if any member requests that any of the clauses or schedules be put separately, the Speaker shall comply to do so.[32] The Short Title, Enacting Formula and the Long Title may be adopted by a simple majority.[33] For the adoption of amendments to clauses or schedules of the Bill, a majority of members present and voting in the same manner as in the case of any other Bill, will suffice.[34]

A Bill for amendment of the Constitution by a Private Member is governed by the rules applicable to Private Members' Bills in general. So, the period of one month's notice applies to such a Bill also. In addition, in Lok Sabha, such a Bill has to be examined and recommended by the 'Committee on Private Members' Bills before it is included in the List of Business.[35]

[27] Shankari Prasad Singh Deo vs. Union of India, A.I.R. 1951 S.C. 458.
[28] Ibid.
[29] Rules 155 and 157, Rules of Procedure and Conduct of Business in Lok Sabha (Eleventh Ed.) Lok Sabha Secretariat, New Delhi, 2004, p. 67.
[30] Second Report of the Rules Committee, April 1956, Lok Sabha Secretariat, New Delhi
[31] Rule 158, Rules of Procedure, op.cit.
[32] 1 Rule 155, Ibid.
[33] Ibid
[34] Rule 156, op. cit.
[35] Rule 294, op. cit.

The Committee has laid down the following principles as guiding criteria in making their recommendations in regard to these Bills:[36]

1. The Constitution should be considered as a sacred document— a document which should not be lightly interfered with, and it should be amended only when it is found absolutely necessary to do so. Such amendments may generally be brought forward when it is found that the interpretation of the various articles and provisions of the Constitution has not been in accordance with the intention behind such provisions and cases of lacunae or glaring inconsistencies have come to light. Such amendments should, however, normally be brought by the Government after considering the matter in all its aspects and consulting experts and taking such other advice as they may deem fit.
2. Sometime should elapse before a proper assessment of the working of the Constitution and its general effect is made so that any amendments that may be necessary are suggested because of sufficient experience.
3. Generally speaking, notice of Bills from Private Members should be examined in the background of the proposal or measures which the Government may be considering at the time so that consolidated proposals are brought forward before the House by the Government after collecting sufficient material and taking expert advice.
4. Whenever a Private Member's Bill raises issues of far-reaching importance and public interest, the Bill might be allowed to be introduced so that public opinion is ascertained and gauged to enable the House to consider the matter further. In determining whether a matter is of sufficient public importance, it should be examined whether the particular provisions in the Constitution are adequate to satisfy the current ideas and public demand at the time. In other words, the Constitution should be adapted to the current needs and demands of the progressive society and any rigidity which may impede progress should be avoided.

In Rajya Sabha, the Rules of the House do not contain special provisions with regard to Bills for amendment of the Constitution and the Rules relating to ordinary Bills apply, subject of course, to the requirements of article 368.

Scope of Parliament's Power to Amend the Constitution

Until the case of L.C. Golak Nath vs. State of Punjab,[37] the Supreme Court had been holding that no part of the Constitution was unamendable, and that the Parliament might, by passing a Constitution Amendment Act in compliance with the requirements of article 368, amend any provision of the Constitution, including the Fundamental Rights and article 368.[38] But in Golak Nath's case, the Supreme Court (by a majority of 6:5) reserved its own earlier decisions.

In Golak Nath's case, the Court held that an amendment of the Constitution is a legislative process. A Constitution amendment under article 368 is "law" within the meaning of article 13[39] of the Constitution and therefore, if a constitution amendment "takes

[36] First Report of the Committee on Private Members' Bills, December 1953, Lok Sabha Secretariat, New Delhi.

[37] A.I.R. 1967 S.C. 1643.

[38] In Shankari Prasad Singh Deo vs. The Union of India (A.I.R. 1951 S.C. 458), the Supreme Court unanimously held: The terms of article 368 are perfectly general and empower Parliament to amend the Constitution without any exception whatever. In the context of article 13, "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that article 13 (2) does not affect amendments made under article 368. In Sajjan Singh vs. The State of Rajasthan (A.I.R. 1965 S.C. 845), the Supreme Court (by a majority of 3:2) held: When article 368 confers on Parliament the right to amend the Constitution, the power in question can be exercised over all the provisions of the Constitution. It would be unreasonable to hold that the word "Law" in article 13 (2) takes in Constitution Amendment Acts passed under article 368.

[39] Article 13(2): The State shall not make any law which takes away or abridges the right conferred by this Part and any law made in contravention of this clause shall, to the extent of contravention, be void.

away or abridges" a Fundamental Right conferred by Part III, it is void.

The Court was also of the opinion that Fundamental Rights included in Part III of the Constitution are given a transcendental position under the Constitution and are kept beyond the reach of Parliament. The incapacity of Parliament to modify, restrict or impair Fundamental Freedoms in Part III arises from the scheme of the Constitution and the nature of the freedoms.

As a result of the judgment of the Supreme Court in Golak Nath's case, the Parliament passed the Constitution (Twenty-fourth Amendment) Act, 1971. This Act has amended the Constitution to provide expressly that Parliament has power to amend any part of the Constitution including the provisions relating to Fundamental Rights. This has been done by amending articles 13 and 368 to make it clear that the bar in article 13 against abridging or taking away any of the Fundamental Rights does not apply to Constitution amendment made under article 368.

In His Holiness Kesavananda Bharati Sripadagalvaru vs. State of Kerala,[40] the Supreme Court reviewed the decision in the Golak Nath's case and went into the validity of the 24th, 25th, 26th and 29th Constitution Amendments. The case was heard by the largest ever Constitution Bench of 13 Judges. The Bench gave eleven judgements, which agreed on some points and differed on others. Nine Judges summed up the 'Majority View' of the Court thus:

1. Golak Nath's case is over-ruled.
2. Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.
3. The Constitution (Twenty-fourth Amendment) Act, 1971 is valid.
4. Section 2(a) and 2(b) of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid.
5. The first part of section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid. The second part namely "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" is invalid.
6. The Constitution (Twenty-ninth Amendment) Act, 1971 is valid.

The majority of the Full Bench upheld the validity of the Constitution (Twenty-fourth Amendment) Act and overruled the decision of the Golak Nath's case holding that a Constitution Amendment Act is not "law" within the meaning of article 13. Upholding the validity of clause (4) of article 13 and a corresponding provision in article 368(3), inserted by the Twenty-fourth Amendment Act, the Court settled in favour of the view that Parliament has the power to amend the Fundamental Rights also. However, the Court affirmed another proposition also asserted in the Golak Nath's case. The Court held that the expression 'amendment' of this Constitution in article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles. Applied to Fundamental Rights, it would be that while Fundamental Rights cannot be abrogated, reasonable abridgement of Fundamental Rights could be effected in the public interest. The true position is that every provision of the Constitution can be amended provided the foundation and structure of the Constitution remains the same.

The theory of basic structure of the Constitution was reaffirmed and applied by the Supreme Court in Smt. Indira Nehru Gandhi vs. Raj Narain case[41] and certain amendments to the Constitution were held void.[42]

[40] A.I.R. 1973 S.C. 1461.

[41] A.I.R. 1975 S.C. 2299.

[42] In this case, article 329 A inserted by the Constitution (Thirty-ninth Amendment) Act, 1975, came up for challenge. Article 329A put Prime Minister's and Lok Sabha Speaker's election outside the purview of the Judiciary and provided for determination of disputes concerning their elections by an authority to be set up by a Parliamentary law. The Supreme Court struck down clauses (4) and (5) of the article 329A which made the existing election law inapplicable to Prime Minister's and Speaker's election and declared the pending proceedings in respect of such elections null and void.

Subsequently, based on the Court's view in Kesavananda Bharati's case, upholding the concept of the basic structure, the Supreme Court in Minerva Mills Ltd. vs. Union of India[43] declared section 55[44] of the Constitution (Forty-second Amendment) Act, 1976 as unconstitutional and void. It held: Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and, therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.

The concept of basic structure has since been developed by the Supreme Court in subsequent cases, such as Waman Rao case,[45] Bhim Singhji case,[46] Transfer of Judges case,[47] S.P. Sampath Kumar's case,[48] P. Sambamurthy's case,[49] Kihota Hollohon case,[50] L. Chandra Kumar case,[51] P.V. Narsimha Rao case,[52] I.R. Coelho case,[53] and Cash for Query case.[54] The basic features of the Constitution are not finite. So far about 20 features[55] described 'basic' or 'essential' in numerous cases, have been incorporated in the list of basic structure. In Indira Nehru Gandhi vs. Raj Naraian popularly known as Election case[56] and in Minerva Mills[57] it has been observed that the claim of any particular feature of the Constitution to be a 'basic' feature would be determined by the Court in each case that comes before it.

The power and procedure for constitutional amendment in India has some special points of interest:

1. There is no separate constituent body for the purposes of amendment of the Constitution; constituent power also being vested in the Legislature.

[43] A.I.R. 1980 S.C. 1789.

[44] Section 55 of the Constitution (Forty-second Amendment) Act, 1976 inserted sub clauses (4) and (5) in article 368 of the Constitution providing that there shall be no limitation on the constituent power of the Parliament and that the validity of any Constitution Amendment Act, including those amending the Part III, shall not be called in question in any court on any ground.

[45] Waman Rao vs. Union of India, A.I.R. 1981 S.C. 271.

[46] Bhim Singhji vs. Union of India, A.I.R. 1981 S.C. 234.

[47] S.P. Gupta vs. President of India, A.I.R. 1982 S.C. 149

[48] S.P. Sampath Kumar vs. Union of India, A.I.R. 1987 S.C. 386.

[49] P. Sambamurthy vs. State of A.P., A.I.R. 1987 S.C. 663.

[50] Kihota Hollohon vs. Zachilhu and others, (1992) 1 S.C.C. 309.

[51] L. Chandra Kumar vs. Union of India and others, A.I.R. 1997 S.C. 1125.

[52] P.V. Narsimha Rao vs. State (CBI/SPE), A.I.R. 1998 S.C. 2120.

[53] I.R. Coelho vs. State of Tamil Nadu and others, (2007) 2 S.C.C. 1.

[54] Raja Ram Pal vs. The Hon'ble Speaker, Lok Sabha and others, JT 2007 (2) S.C. 1.

[55] The basic features of the Constitution have not been explicitly defined by the Judiciary. However, Supremacy of the Constitution; Rule of law; The principle of Separation of Powers; The objectives specified in the Preamble to the Constitution; Judicial Review; Articles 32 and 226; Federalism; Secularism; The Sovereign, Democratic, Republican structure; Freedom and dignity of the individual; Unity and integrity of the Nation; The principle of equality, not every feature of equality, but the quintessence of equal justice; The 'essence' of other Fundamental Rights in Part III; The concept of social and economic justice—to build a Welfare State: Part IV in toto; The balance between Fundamental Rights and Directive Principles; The Parliamentary system of government; The principle of free and fair elections; Limitations upon the amending power conferred by Article 368; Independence of the Judiciary; Effective access to justice; Powers of the Supreme Court under Articles 32, 136, 141, 142; Legislation seeking to nullify the awards made in exercise of the judicial power of the State by Arbitration Tribunals constituted under an Act, etc., are termed as some of the basic features of the Constitution.

[56] A.I.R. 1975 S.C. 2299 (p. 2465, per Chandrachud J.).

[57] A.I.R. 1980 S.C. 1789 (Para 88, per Bhagwati J.).

2. Although Parliament must preserve the basic framework of the Constitution, there is no other limitation placed upon the amending power, that is to say, there is no provision of the Constitution that cannot be amended.

3. The role of the States in Constitution amendment is limited. The State Legislatures cannot initiate any Bill or proposal for amendment of the Constitution. They are associated in the process of Constitution amendment by the ratification procedure laid down in article 368 in case the amendment seeks to make any change in the any of the provisions mentioned in the proviso to article 368. Besides, all that is open to them is (1) to initiate the process for creating or abolishing Legislative Councils in their respective Legislatures[58] and (2) to give their views on a proposed Parliamentary Bill seeking to affect the area, boundaries or name of any State or States which has been referred to them under the proviso to article 3[59] a reference which does not fetter the power of Parliament to make any further amendments of the Bill.[60]

Conclusion

One point that stands out before us in the process set down in Article 368 is that the Parliament seems to have the exclusive right in any direction to change the Constitution. But it is incorrect to say that the Parliament is independent, so as long as there is a mechanism under Article 368. Parliament cannot be the deciding authority of the constitutional scheme since the procedure itself restricts the use of the power to amend the Constitution on the Parliament. The Indian Constitution has been made as a dynamic statute that retains validity over years without being obsolete and also takes care of the needs of the various classes within the Indian society. It can be seen to have been drafted considering the best features of the Constitutions around the world. The doctrine of the Basic Structure proposed by the honourable Supreme Court is the guiding principle for safeguarding those values and keeping intact the essence of the Constitution. The contrast with other countries further demonstrates the strong difference in the amount of complexity and bureaucratic effort needed to change the Constitution in India, rendering it one of the strongest.

[58] Article 169 (1): Notwithstanding anything in article 168, Parliament may by law provide for the abolition of the Legislative Council of a State having such a Council or for the creation of such a Council in a State having no such Council, if the Legislative Assembly of the State passes a resolution to that effect by a majority of the total membership of the Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting.

[59] The proviso of article 3 provides that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States****, the Bill has been referred by the President to the Legislature of the State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.

[60] See Ruling by the Speaker in Lok Sabha—L.S. Deb., (II) 7 August 1956. The same view was taken by the Supreme Court in Babulal vs. State of Bombay (A.I.R. 1960 S.C. 51).

Teaching Criminal Law With Latest Developments : A Case for Inclusion of Corporate Crimes and Corporate Manslaughter

Benarji Chakka[1]

Abstract

Teaching criminal law in a law school is a unique experience to a teacher must have the required skills to teach the subject in a most unique manner. Teaching and learning criminal law gives a very fascinating experience by involving the students actively in a classroom environment. However, today in a law school set up most of the teachers are equipped to teach the subject based on the syllabus prepared or prescribed by the university authorities and Bar Council of India's model syllabus. In this context, it is an important question whether the prescribed syllabus gives a space and opportunity for the law teacher to teach in an innovative manner while keeping abreast with the challenges and development, which are posed by society. It is perceived that teachers do not have space and opportunity to include the on going developments and challenges to teach the subject in a more contemporary manner. This may involve various factors, which may include a lack of opportunity for the teachers to prepare the syllabus by themselves while engages to teach the students. Lack of expertise on the subject and not having an opportunity to teach the same subject continuously. Some of these are only indicative, and many other reasons are available in the Indian legal education system. The current essay is an attempt to study some of the pertinent issues and suggest teachers of criminal law to be more innovative and adoptive to the changes, which are taking in society.

1. Teaching Criminal Law – An Introduction

Teaching criminal law in law schools is a unique and interesting experience for a law teacher. For Students, learning criminal law in a law school is a fascinating experience, because most of the students come with some basic ideas, preconceived notions and real-time experiences based on the day to day events witnessed by them, general reading of news papers and watching some movies. In the midst of having a basic and pre-knowledge, teaching criminal law to the students is certainly a challenging task and the teacher has to play a key role in imparting knowledge and realising the dreams of students. Further, the task of a teacher is to prepare students to become committed lawyers, law teachers, judicial officers, civil servants and political leaders. Once a committed teacher imparts comprehensive knowledge, better and informed ideas of criminal law to the students of law, they may not go away from the ideals, which have been taught in the classroom. Therefore it is a challenge for the law teacher to teach and impart the knowledge of criminal law in a law school. Further, the prime object and purpose of teaching substantive criminal law are to produce students capable of representing clients and practising with social commitment in order to translate the ideals of the constitution into practice. Sanford H. Kadish, the American Criminal Law jurist describes that "the aim of teaching criminal law as to produce 'good, sensitive, aware, socially conscious' citizens".[2] It is also worth mentioning the words of Andrew E. Taslitz, professor of criminal law that "the joy of teaching is part of what makes a law professor's life so fulfilling".[3]

2. Teaching Techniques and methodologies

As stated above teaching criminal law to undergraduate students is a unique experience, first we need to question us, what is unique about the teaching of criminal law? It is unique because it has relevance in everyday life, while dealing with the uniqueness of the

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[2] Angela P. Harris and Cynthia Lee, "Teaching Criminal Law from a Critical Perspective", *Ohio State Journal of Criminal Law,* Vol. 7 (2009), p. 264.

[3] Andrew E. Taslitz, *Strategies and Techniques for Teaching Criminal Law,* Wolters Kluwer Law & Business, New York, 2012

criminal law; it is not an attempt to underrate or undermine the importance and relevance of other subjects or to overrate the criminal law. The uniqueness of the criminal law teaching can be easily related to each and every aspect of human life and bring on going development and contemporary challenges to the classroom discussion while teaching criminal law and make more interesting to the students. This subject can easily create interest among the students in a classroom learning process by analysing and critically examining with the participation of students. Apart from that, a law student can think and relates the subject easily to their real-time experiences and take good practices by reading of the subject seriously, which eventually facilitate them to become an outstanding criminal lawyer. Further students can critically examine the scientific and technological developments and their influence in society and the role of criminal law.

In the light of this background, this current essay focuses to suggest the law teachers who are teaching criminal law to bring some of the on going challenges and developments in society while teaching criminal law in law schools. The current development may vary from corporate manslaughter or corporate homicide, sedition laws, the law relating to limiting freedom of speech and expression, criminalising expression of art forms, socio-economic crimes, crimes committed online using cyberspace, growing crimes like mob-lynching and many others. These developments have to be brought to the classroom while teaching criminal law to the students. It is very important to note that the Indian Penal Code was adopted in 1862, since then not many developments and changes are brought to the Penal Code, except the Criminal Law Amendment act of 2013, which was made substantial changes in the criminal law in the wake incidents, which took place in Delhi.

However, criminal law requires keeping abreast with changes taking place in the wake of economic globalisation. These changes are prompted by the developments, which took place in 1995. In the post liberalised economic world, big corporations and multinational companies are expanding their business across the shores. The business and investment activities are facilitated by various bilateral and multilateral agreements, which give concessions and subsidies to the corporation while they are establishing their entities. Whereas, these corporations during their operations in third world countries, they work directly with the local communities and they do involve in the exploitation of natural resources. In some places, while engaging in exploitation by the corporations they experience resistance from the local populations. During such circumstances, the company or corporation may involve in using force to the extent of violating the basic rights of people, killing and abuse of people. It is not only limited to it but also includes environmental violations and pollutions of the environment and climate in the region, fuelling the conflict by directly sponsoring the non-state armed actors and many others. These may lead to committing crimes, which are otherwise prohibited by the laws. However, in circumstances, criminal law and other domestic law are silent in third world countries including India. It is warranted that the Indian criminal must look into it and take the issues and circumstances which lead to the violations of the rights of the people which happened in the Bhopal gas leak tragedy and other industrial disasters.

Now the argument is that it is very important to look into these challenges in changing circumstances and include them in the teaching of criminal law in the classroom. It is an urgent necessity the Indian academia must focus on these aspects and take steps to address and engage the students and make them aware of these issues.

2.1 Teaching General principles of Criminal law in relation to other public law subjects

As we are all aware, most substantive law for that matter teaching of public law discussion revolves around elements of law, in the case of teaching criminal law, it should start by imparting ideas about the general principles of criminal law or elements of a crime. Because, most of the students tend to take interest in learning criminal law due to several reasons. Teaching elements of a crime or general principles of criminal law play a more critical role in learning criminal law, these rules explain applicable rules to all crimes and the general nature of the major crimes. This discussion also

reveals around the critical linkages between public law domains such as criminal law and constitutional law. For that matter, most of the offences in criminal law have been designated where the offenders violate the substantial rights of the people and the state has the duty to protect the basic fundamental rights of the citizens. Once the basic right is violated and it will take a convenient place in criminal law. It is important here to recollect the definition of crime provided by Blackstone, he defines crime as "an act committed or omitted in violation of public law forbidding or commanding it" this definition will cover the constitutional or political offences.

This definition attracted several criticisms, in response to which, he developed a modified version of the definition, he provides, "a crime is a violation of the public rights and duties of the own community". According to the improved version of the definition, "crime is a violation of public right or duty". This definition makes it clear that criminal law is designed to punish the offenders who violate the public rights of the people. It is also important to note that the state represents the victims in the criminal justice system, since state has an obligation to protect the rights of individuals in the society.

Based on the above definition and analysis it is pertinent that a law teacher while teaching criminal law necessarily bring the relevance of constitutional law. Without teaching the close linkages between the protections of constitutional rights in the light of criminal law mechanisms, students may not appreciate the efforts and relevance of the study of criminal law in law schools. Hence, it is an important duty of the law teacher to impart the criminal law knowledge to suits the requirements of the constitutional law obligation. Further, it equips and prepares the students adequately for practice in criminal law.

2.2 Teaching Criminal law in broader perspectives

There is no uniform set pattern in teaching criminal law. It is depending upon the background in which one person comes from and the skill, which the person possesses, makes the teaching difference. The methodology also differs from culture to culture and country to country. However, one useful style or method could be providing coherence and logical progression makes a big difference in understanding of the criminal law in general. It should be substantiated by providing or discussing some issues, which includes, the relevance of criminal law, purposes and object of criminal law in a legal system, steps in the criminal justice system, the purposes and object of sentencing in the legal system and teaching criminal law keeping abreast with the latest changes and challenges.

If we take the Indian criminal law or Indian Penal Code into consideration in the light of the above discussion, it is very important to see the emergence of the Indian Penal Code (IPC) and its relevance in contemporary society. As we know that IPC was adopted in 1860 during the British colonial regime to suits the requirements and political needs. This step was hailed and glorified as the unification of criminal law in India to render effective criminal administration of the justice system to the Indian masses. Since, 1862 the IPC applied and followed without making any changes or amendments until this day, except in the case of the criminal law amendment act of 2013 as illustrated above in the earlier paragraphs. In this situation, it is very pertinent to see the relevance of IPC in contemporary use. It is also warranted to see the application of certain rules, which have been there in IPC to the free and independent India, where free, and Independent India is governed by the principles and rules of the Indian Constitution. As we are aware, the Indian Constitution is based on the fundamental principles of Rules of Law and Democratic Governance.

Further, the governance in India has been changed drastically since its independence, due to changes in the international economic climate and onward march to globalisation. In the 1990s, when India has signed and ratified World Trade Organisation, the ideals on which Indian Constitution is based were more or less compromised. In the age of neo-liberalism, corporations and private business houses have dominated the governance and they are having direct contact with the people in certain areas. In such circumstances, if corporations have committed certain crimes or if they are found involved in certain industrial disasters, what

would be the ideal mechanism and solution to address the situation?

Since 1980s India has been witnessing industrial disasters along with it, on going rights violations of people by the corporations in certain areas. These rights violations and industrial disasters have not been addressed either by the general laws or by the criminal law mechanism in India. There is a conspicuous gap existed in this situation. Otherwise, in some developed economies these incidents have been termed as "Corporate Manslaughter or Corporate Homicide" and legal regulations are designed to address them effectively. The other issue along with corporate homicide or corporate manslaughter, there are mass killings and mass murders of innocent individuals in communal riots, which have been widespread in India since its independence. People who are victims of mass murders and communal riots are still languishing to seek justice in the administration of the criminal justice system in India.

Therefore, the law teacher while teaching criminal law to their students such kind of gaps has to be identified and address them in an effective manner. It is also required to encourage the students to conduct advanced study and research in such areas in order to address the existing gaps and challenges. Now, here we will discuss issues relating to corporate manslaughter or corporate crimes and the requirement of amendments in Indian criminal law.

3. Corporate Crimes[4] and Corporate Manslaughter

The general principles of criminal law with regard to offences against the human body provide serious homicide offences against the human body are murder and manslaughter. As we know the unjustified killing of another human being has traditionally been regarded as the most serious offence known to the law. Manslaughter is an unlawful killing that does not involve malice aforethought (blameable mental condition). The absence of malice aforethought means that manslaughter involves less moral blame than either first or second degree of murderThus, manslaughter is a serious crime, the punishment for manslaughter is generally lesser than it would be for murder.

Further, we are aware that 'murder is an intentional killing that is unlawful (in other words, the killing is not legally justified), andcommitted with "malice aforethought" (intent to harm or kill or reckless disregard towards life). The offence of murder and manslaughter have a common physical act *(actus reas)* which is the unlawful killing of another human being.

Therefore, based on the above principles if a natural person commits an act which is intentional or reckless disregard towards life it would be prosecuted. In such circumstances, if a legal or juridical person commits the same offence how should they be treated under law or not. Should that be treated as an offence equal to that of murder or manslaughter. As it is discussed, if there is blameable mental conditions and there is an unjustified killing of another human or reckless disregard to human life, that should be treated as manslaughter. In Indian criminal law, there is no such provision to deal with an offence of manslaughter, hence, there is an urgent need to address this problem by amending criminal law.

As we all know that globalisation has accelerated economic growth by permitting unbridled access to multinational companies or corporations to boost the economy. These multinational companies act across borders with ease due to development in technology as well as favourable, trade and investment laws, they exercise significant power and influence in the countries where they operate. Sometimes they do get contacted directly with people and commit wrongful acts which, normally, go unnoticed and sometimes the legal system may not have sufficient rules to bring them

[4] Corporate Crime means, "An illegal conduct that is linked to a human rights abuse, including conduct that should be criminalized in order to meet requirements under international law even if the state has failed to do so." See Justice Ian Binnie and Anita Ramasastry, Advancing Investigations and Prosecutions in Human Rights Cases: A Report of the Members of the Independent Commission of Experts, Amnesty International and International Corporate Accountability Roundtable. `http://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf` Available accessed on 18th June 2018

to justice. This situation arises due to various reasons based on legal and non-legal issues. These issues may include, legal personality, limited shareholder liability and accountability, origin and registration of corporations in offshores and operating through a local subsidiary or joint venture in the host states. This conspicuous governance gap has created rather facilitated an environment in which the corporate actors commit serious human rights abuses with little or no accountability and with impunity.[5]

3.1 Nature of Corporate Homicide or Manslaughter

In developing countries like India, there is no such efforts have been made to define the offence of corporate homicide or manslaughter. However, the developed and industrialised countries have adopted laws to address the problems of corporate homicide or manslaughter. The common law country like the United Kingdom has adopted in 2007 the corporate manslaughter and corporate homicide act. The acts explain the offence:[6]

> An organisation is guilty of an offence if the way in which its activities are managed or organised causes a person's death, and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.
>
> The organisation to which this section applied are: a corporation, a department or other body listed in its schedule or a police force apartnership or a trade union or employers associations that is an employer.
>
> An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach

This definition offer a comprehensive analysis of corporate crimes or homicide and which may range from industrial disasters such as Bhopal gas incidents, to abuse of child labour, human trafficking, abduction, arbitrary detention, beating and violence, complicity, death threats, denial of freedom of expression, denial of freedom of movement, disappearances, displacement, genocide, injuries intimidation and threats, rape, sexual abuse and sexual harassment, torture and ill-treatment. The list of the crimes provided above is not an exhaustive but to name a few crimes.

Some of the crimes, which are listed above, have been included in special legislation but enforcement requires the will of the state to cooperate and coordinate with international actors. For example in transnational human trafficking, cybercrimes, transnational organised crimes, money laundering and corporate manslaughter needs international cooperation and also it is important states must comply with the obligations of the international treaty mechanism. In absence of international cooperation prosecution of the crimes of the above nature becomes challenge. These are some of the issues that must be brought to the knowledge of the students in the classroom while teaching in criminal law.

3.2 Corporate Crimes and Possible Legal Solutions

The commission of the above-mentioned crimes such as corporate homicide and corporate manslaughter have witnessed by the international community during the World War II. During wartime, some of the senior officials of business houses and corporations were heavily involved in helping the Nazi regime to commit some of the worst crimes by supplying poisonous gas to concentration camps. Some of the corporations actively promoted and engaged in slave labour to work in their factories, some of them have ill treatment of slave workers and accumulated and enriched their companies by plundering property in occupied territories.

[5] Justice Ian Binnie and Anita Ramasastry, *Advancing Investigations and Prosecutions in Human Rights Cases: A Report of the Members of the Independent Commission of Experts,* Amnesty International and International Corporate Accountability Roundtable. Available `http://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf`
accessed on 18th June 2018

[6] Corporate Manslaughter and Corporate Homicide Act 2007, available at `http://www.legislation.gov.uk/ukpga/2007/19/pdfs/ukpga_20070019_en.pdf`, accessed on 19th June 2018

This sort of criminal activities committed by corporations did not stop or limited to the World War II, it resurfaced in the age of neo-liberalism where transnational companies have committed brutal atrocities and knowingly assisting governments, and rebel armed groups and other non-state armed groups to commit gross human rights abuses.[7] Oil, mining companies from the advanced countries that seek concessions and security from the third world countries have been allegedly involved in supplying arms, ammunition, money, vehicles to the government as well as armed rebel forces. These state actors and non-state armed actors with the help of transnational corporations committed systematic violence and killed civilians and were involved in the disappearance of civilian populations. These abuses are keeping on happening in most of the third world countries including India.

In the current economic climate of interdependence, social, political and cultural aspects are heavily impacted by the behaviour of business entities. The empirical evidence reveals that there exists a complex relationship between businesses, individuals, communities and governments. Further, it is understood this is the kind of nexus between government and multinational corporations greatly affecting the lives and rights of individuals. As described above, the companies mostly enjoy the culture of impunity, due to the considerable political influence, which they have on the host government. Many of the corporations have developed close political relationships with those in power, including governments or nonstate armed groups that perpetuate human rights abuse and commit criminal activities against the local population and innocent people.

In this background, it is pertinent to understand the close nexus between the multinational corporations and the political corridors in the country. It is also pertinent to understand the operation of the legal framework, which can offer better protection to the individual those who are victims of the current system. Hence it is urged that the criminal law teacher must be aware of the current and on going challenges and to provide space for the student to debate and discuss them in the classroom. It is also warranted that the teachers should motivate themselves and students to conduct advanced research on these areas, which is very pressing and to locate solutions to the emerging challenge in order to fill the gaps in the existing criminal law mechanisms.

Further, the criminal law teacher is expected to clarifying the legal and policy meaning of new age crimes such as mass murders, corporate manslaughter and corporate homicide to the students. It is also expected that to explain to the students that the complicity on part of the governments and corporations in addressing these crimes within the legal framework. Along with the governments, business groups enjoy the culture of impunity and this aspect needs to be informed to the students and encourage them to engage in research to address the measures, which can end the culture of impunity within the jurisdictions. If it possible engage students to the extent of writing research briefs and policy documents, so that these briefs and documents may be submitted to the appropriate forums to undertake necessary changes in the legal system or amendments which are required.

4. The way forward

As elucidated above, the Indian criminal legal system is not providing many solutions to emerging and new challenges. As we have witnessed since 1980s, the Bhopal gas victims still waiting for justice, along with that victims of the state perpetrated violence in places like Chhattisgarh, victims are knocking on the door of the apex court, but their voices have not been heard and justice has not been done to them within the constitutional mechanisms. Now the time has come for the law teachers and students to start thinking on these lines to conduct advanced study and research to provide justice to the victims of corporate crimes. Further, it is the role of a teacher to make aware of the students to such kinds of gaps, which are existed in the criminal law subject and encourage them to look for alternatives in order to strengthen the criminal legal system. Finally, research blended teaching would help the teacher to update their knowledge and to pro-

[7] A Report of the International Commission of Jurists Expert Legal Panel on *Corporate Complicity in International Crimes: Facing the Facts and charting a Legal Path,* vol. 1, International Commission of Jurists, Geneva, 2008.

vide and to disseminate the advanced knowledge to the students. This would certainly make students and new generations of individuals and professionals aware of the new challenges and also provide a platform to think and equip them to fight for the rights and justice to the victims. It is also important to note that criminal law teachers must updates their knowledge and contribute research articles in order to create awareness among the legal fraternity. This may lead to a greater debate among law students, legal scholars and judiciary and policymakers. These debates may eventually help in the inclusion of the above-mentioned acts in the discourse and pedagogy of criminal law.

Custody of A Child -Its Legal Aspects

Dr. Heena Ghanshyam Patoli[1]

Abstract

In modern society divorce has become rampant and the bad effects of that is that where do the children go or with whom do the children live with. During any breakdown of marriage, the custody of children is an important question to be resolved. It is said "the child needs a mother the most, but it needs a father too". The question that arises is does the Indian law believes this? Is it that the law believes that the child has a good future just with the mother? Is it possible that the mother can always be the right person in the life of the child? There are instances when both the parents want the custody of the children and also when none of the parents want the custody of the children. There have been cases where the Supreme Court has decided that even when mother is carrying on illicit, illegal profession the custody is given to her. Issues also arise when there are foreign jurisdictions and foreign Court judgements involved. Further, there are matters where the spouse is facing the criminal charges for the murder/ abetment of murder of the other, then who should be handed over the custody. The Courts have also look into the aspect of working mothers while deciding on the custody as they may not have time for the children. The Courts while granting the custody has to look into second marriages of one or both the partners. Many times the child prefers to alienate himself from both the parents as he is fed up of the fights. Then, there is a bigger issue of ego clashes between the parents and where they both are harming the child without realizing it.

This paper remaps the different legal aspects of custody of a child. The paper discusses the Indian laws regarding the child custody. The custody of the child affects the child emotionally and psychologically. The child is caught up in between the parents, its difficult for him/her to choose one over the other. In the quarrels the couple forgets that the child is suffering. The paper explores the legality of custody of a child in India. It brings out the hardships of the parents who have become slaves of the law and therefore research paper asks a simple question are we even able to give basic human rights or justice to the parents. Justice can be done to either the father or mother but not to both and hence justice can be done to just of them and other one is deprived of it. This paper looks into the laws regarding the custody of the child in India, the amendments required to remove the superiority of one parent over the other and the kind of impression that is left by the law on the child. And finally the paper discusses the factors considered by the Courts when granting custody. Children many times become very aggressive because of the fights of the parents over the custody issue and many criminals are born, they take into drugs and other vices and innocent children become criminals after facing the hardships. It becomes very difficult for such children to survive in the society. The children are also not accepted in the society easily.

Introduction

In modern society divorce has become rampant and the bad effects of that is that where do the children go or with whom do the children live with. During any breakdown of marriage, the custody of children is an important question to be resolved. It is said "the child needs a mother the most, but it needs a father too". The question that arises is does the Indian law believes this? Is it that the law believes that the child has a good future just with the mother? Is it possible that the mother can always be the right person in the life of the child? There are instances when both the parents want the custody of the children and also when none of the parents want the custody of the children. There have been cases where the Supreme Court has decided that even when mother is carrying on illicit, illegal profession the custody is given to her. Issues also arise when there are foreign jurisdictions and foreign Court judgements involved. Further, there are matters where

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the spouse is facing the criminal charges for the murder/ abetment of murder of the other, then who should be handed over the custody. The Courts have also look into the aspect of working mothers while deciding on the custody as they may not have time for the children. The Courts while granting the custody must look into second marriages of one or both the partners. Many times, the child prefers to alienate himself from both the parents as he is fed up of the fights. Then, there is a bigger issue of ego clashes between the parents and where they both are harming the child without realizing it.

Legal Aspects

This paper remaps the different legal aspects of custody of a child. The paper discusses the Indian laws regarding the child custody. The custody of the child affects the child emotionally and psychologically. The child is caught up in between the parents, its difficult for him/her to choose one over the other. In the quarrels the couple forgets that the child is suffering. The paper explores the legality of custody of a child in India. It brings out the hardships of the parents who have become slaves of the law and therefore research paper asks a simple question are we even able to give basic human rights or justice to the parents. Justice can be done to either the father or mother but not to both and hence justice can be done to just of them and other one is deprived of it. This paper investigates the laws regarding the custody of the child in India, the amendments required to remove the superiority of one parent over the other and the kind of impression that is left by the law on the child. And finally, the paper discusses the factors considered by the Courts when granting custody. Children many times become very aggressive because of the fights of the parents over the custody issue and many criminals are born, they take into drugs and other vices and innocent children become criminals after facing the hardships. It becomes very difficult for such children to survive in the society. The children are also not accepted in the society easily.

The law regarding custody finds its place in Sec 26 of the Hindu Marriage Act, Sec 38 of the Special Marriage Act, The Guardians & Wards Act 1890, Sec 6 (a) of Hindu Minority and Guardians Act 1956. The Christians and the Muslims also have their own laws for the custody of the child. Christian law per se does not have any provision for custody but the issues are well solved by the Indian Divorce Act which is applicable to all the religions of the country. The Indian Divorce Act, 1869 contains provisions relating to custody of children. Under Muslim Law, the first and foremost right to have the custody of children belongs to the mother and she cannot be deprived of her right so long as she is not found guilty of misconduct.

'Child custody' is a term used in family Law Courts to define legal guardianship of a child under the age of 18. During divorce or marriage annulment proceedings, the issue of 'child custody' often becomes a matter for the Court to determine. In most cases, both parents continue to share legal child custody but one parent gains physical child custody. Family Law Courts generally base decisions on the best interests of the child or children, not always on the best arguments of each parent.

Divorce has become very common in Indian society these days. When two people cannot get along maybe it's the right thing to do, to get separated and live their lives in peace. But the question arises about the future of children. The custody of the child is an important issue and needs greater attention by the parents, law and of course the society. According to me the will of the child should be taken into consideration and should be of paramount importance. Though the child always wants to stay with both and do not have preference for one parent over the other, the actual physical custody can be given to just one parent and is generally given to the mother though the natural guardian is considered as the father and after him the mother. The will of the child should be taken into consideration and is of paramount importance is mentioned in the Hindu Minority and Guardians Act, 1956.

In general, Courts tend to award physical child custody to the parent who demonstrates the most financial security, adequate parenting skills and the least disruption for the child. Both parents continue to share legal child custody until the minor has reached the age of 18 or becomes legally emancipated. Legal custody means that either parent can make decisions which affect the welfare of the child, such as education, career, reli-

gious practices, medical treatments, decision on marriage etc. Physical child custody means that one parent is held primarily responsible for the child's housing, educational needs and food apart from other basic needs. In most cases, the noncustodial parent still has visitation rights. But these are judicial statements of general nature and there is no hard and fast rule which is fair, as having a hard and fast rule may not be appropriate remedy for the child. As to the children of tender years it is now a firmly established practice that mother should have their custody since father cannot provide that maternal affection which is essential for their proper growth. It is also required and accepted for proper psychological development of children of tender years which makes the mother indispensable.

The laws governing child custody in India are mentioned in the Guardians and Wards Act 1890, the Hindu Minority and Guardians Act 1956, Sec 26 of Hindu Marriage Act, Section 38, of the Special Marriage Act 1954, Section 41 of the Indian Divorce Act, 1869 contains provisions relating to custody of children and of course the custody of Muslim children are governed by their personal laws.

The Guardians & Wards Act (GWA) 1890 is a secular law for appointment and declaration of guardians and allied matters, irrespective of caste, community or religion, though in certain matters, the Court will give consideration to the personal law of the parties. The provisions of the HMGA (and other personal laws) and the GWA are complementary and not in derogation to each other, and the Courts are obliged to read them together in a harmonious way. In determining the question of custody and guardianship, the paramount consideration is the welfare of the minor. The word 'welfare' has to be taken in its widest sense, and must include the child's, moral as well as physical well-being, and also have regard to the ties of affection.

Let us look into what the Hindu Marriage Act says about the custody of the child, Sec 26 of Hindu Marriage Act says the Court may make provisions regarding the custody, maintenance and education of the minor child consistently with the wishes of the child whenever possible. So most of the times the Courts look into the wishes of child but it also takes into consideration the interest and well-being of the child and sometimes it may be contradictory and in such cases the Court gives more importance to the interest of the child. At times the mother may not be willing to keep the child as she may want to remarry or that the job of the mother may require lot of travelling and taking care of the child may not be possible or that the mother is involved in illicit trade, in such cases the custody of the child is given to the father.

Section 38, of the Special Marriage Act 1954; speak of almost the same thing as mentioned in the Hindu Marriage Act. It says the Court may make provisions regarding the custody, maintenance and education of the minor child consistently with the wishes of the child whenever possible. The decision of the Courts is based on the term "Just and proper" with respect to the custody of the child. What may be just and proper in one case may not be just and proper in another case and hence the decision of the Court differs from case to case.

The laws governing child custody in India are mentioned in the Guardians and Wards Act 1890 and the Hindu Minority and Guardians Act 1956. Coming to Section 6 (a) of the Hindu Minority and Guardians Act, [2] which says the natural guardian of a Hindu minor in case of a boy and an unmarried girl is father and after him the mother, but it also says the custody of the minor who has not completed 5 years shall be ordinarily be with the mother. The Act differentiates between legitimate child and illegitimate child, it says the guardian will be father in case of legitimate child but natural guardian will be mother in case of illegitimate child. So the Act does not thrust on primary responsibility on the father in case of an illegitimate child. In case of a married girl again the Act differs, it says the natural guardian is the husband. The right which was there before marriage ceases on her marriage and husband naturally becomes her guardian. Again there is a difference of natural guardianship and custody in case of step father and step mother. The

[2] Hindu Minority and Guardians Act, 1956, Sec 6(a) the natural guardian of a Hindu minor in respect of his person or his property, in case of a boy and an unmarried girl is father and after him the mother,

Act also says that the person ceases to be a natural guardian of a minor if he ceases to be a Hindu and if he has completely and finally renounced the world. The natural guardianship of an adopted son, who is a minor, passes to adoptive father and after him the adoptive mother on adoption.

The Act also specifies that the natural guardian of a Hindu minor has power to do all such acts which are necessary or reasonable and proper for the benefit of the minor for the realization, protection or benefit of the minor's estate, but the guardian cannot bind the minor by a personal covenant. The guardian cannot transfer any property without the previous permission of the Court.

The Act clarifies that the interest of the child will be of paramount consideration. Section 13 of the Act says in deciding a natural guardian and in custody of the child the welfare of the child will be of prime consideration and importance.

There are another set of laws in Muslim law for the Custody of the children. Under Muslim Law, the first and foremost right to have the custody of children belongs to the mother and she cannot be deprived of her right so long as she is not found guilty of misconduct. Mother has the right of custody so long as she is not disqualified. This right is known as right of hizanat and it can be enforced against the father or any other person. The mother's right of 'hizanat' was solely recognized in the interest of the children and in no sense it is an absolute right. Son among the Hanafis, it is an established rule that mother's right of 'hizanat' over her son terminates on the latter's completing the age of 7 years. The Shias hold the view that the mother is entitled to the custody of her son till he is weaned. Among the Malikis the mother's right of 'hizanat' over her son continues till the child has attained the age of puberty. The rule among the Shafiis and the Hanabalis remains the same. The mother is entitled to the custody of her daughters, among the hanafis, till the age of puberty and among the Malilikis, Shafiis and the Hanabalis the mother's right of custody over her daughters continues till they are married. Under the Ithna Ashari law the mother is entitled to the custody of her daughters till they attain the age of 7. The mother has the right of custody of her children up to the ages specified in each school, irrespective of the fact whether the child is legitimate or illegitimate. Mother cannot surrender her right to any person including her husband, the father of the child. Under the Shia school after the mother the right of 'hizanat' belongs to the father. In the absence of both the parents or on their being disqualified the grandfather is entitled to custody. Among the Malikis the custody of the child, in the absence of mother goes to the maternal grandmother, maternal great grandmother, maternal aunt and great aunt, full sister, uterine sister, consanguine sister, paternal aunt i.e. Father's sister. All the schools of Muslim law recognize father's right of 'hizanat' under two conditions that are on the completion of the age by the child up to which mother or other females are entitled to custody. In the absence of mother or other females who have the right to 'hizanat' of minor children. Father undoubtedly has the power of appointing a testamentary guardian and entrusting him with the custody of his children. Other male relations entitled to right to 'hizanat' are nearest paternal grandfather, full brother, consanguine brother, full brother's son, consanguine brother's father, full brother of the father, consanguine brother of the father, father's full brother's son father's consanguine brother's son Among the Shias hizanat belongs to the grandfather in the absence of the father.

Christian law per se does not have any provision for custody but the issues are well solved by the Indian Divorce Act which is applicable to all of the religions of the country. The Indian Divorce Act contains provisions relating to custody of children. Section 41 of the said Act provides with the powers to make orders as to custody of children in suit for separation. -In any suit for obtaining a judicial separation the Court may from time to time, before making its decree, make such interim orders, and may make such provision in the decree, as it deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of such suit, and may, if it think fit, direct proceedings to be taken for placing such children under the protection of the said Court.

There are numerous connotations this can take, some of these are that the law reflects our patriarchal so-

cial structure and that small children are always better off with the mother. Matters are also complicated by a legal process that does not view legal guardianship to be coterminous with physical custody of a child. The Supreme Court of India has consistently held that in deciding the cases of child custody the first and paramount consideration is the welfare and interest of the child and not the rights of the parents. The Supreme Court has several times has held that no statute on the subject can ignore or obliterate the vital factor of the welfare of the child. In a landmark judgment,[3] the petitioner, Ms Githa Hariharan and Dr Mohan Ram were married in Bangalore in 1982 and had a son in July 1984. In December 1984 the petitioner applied to the Reserve Bank of India (RBI) for 9% Relief Bond to be held in the name of the son indicating that she, the mother, would act as the natural guardian for the purposes of investments. RBI returned the application advising the petitioner either to produce an application signed by the father or a certificate of guardianship from a competent authority in her favour to enable the bank to issue bonds as requested. This petition was related to a petition for custody of the child stemming from a divorce proceeding pending in the District Court of Delhi. The husband petitioned for custody in the proceedings. The petitioner filed an application for maintenance for herself and the minor son, arguing that the father had shown total apathy towards the child and was not interested in the welfare of the child. He was only claiming the right to be the natural guardian without discharging any corresponding obligation. On these facts, the petitioner asks for a declaration that the provisions of S. 6(a) of the Hindu Minority and Guardianship Act of 1956 along with S. 19(b) of the Guardian Constitution and Wards Act violated Articles 14 and 15 of the Constitution of India. The Supreme Court brings to fact the equality of the mother to fulfil the role of a guardian held that gender equality is one of the basic principles of our Constitution and therefore the father by reason of dominant personality cannot be ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category. It was like saying gender was not a consideration in deciding matters of child custody and guardianship interest of the child was more important.

In Re Kamal Rudra Das J.[4] expressed the same view vividly that the mother's lap is God's own cradle for a child of this age, and that as between father and mother, other things being equal, a child of such tender age should remain with mother. But he also said that a mother who neglects the infant child as she does not want to sacrifice the type of life she is leading can be deprived of custody. In respect of older children, the Courts take the view that the male children above the age of sixteen years and female children above the age of fourteen years, should not ordinarily be compelled to live in the custody to which they object. However, even the wishes of the mature children will be given consideration only if they are consistent with their welfare. **In the case of Rukmangathan v J. Dhanalakshmi[5] it was laid down that the** male above 16 years and female child above 14 years cannot be compelled to live in the custody where are do not wish to live. In Venkataramma v. Tulsi,[6] the Court disregarded the wishes of the children as it found that it was done wholesale persuasion and were even tortured. Ordinarily, custody to third persons should not be given except to either of the parents. But where welfare so requires, custody may be given to a third person. In Baby Sarojam v. S. Vijayakrishnan Nair [7] granting custody of two minor children to maternal grandfather, the Court observed that even if the father was not found unfit, custody might be given to a third person in the welfare of the child.

In the case of Rosy Jacob v. Jacob A. Chakramakkal[8] the Court held that all Orders relating to the custody of the minor wards from their very nature must be considered to be temporary Orders made in the existing

[3] Ms. Githa Hariharan & Anr v. Reserve Bank of India & Anr, 1999
[4] 1949 2 I.L.R. 374
[5] 16 December, 1997, (1998) 1 MLJ 628], Madras High Court
[6] (1949) 2 MLJ 802
[7] AIR 1992 Ker 277, I (1994) DMC 79
[8] 1973 AIR 2090, 1973 SCR (3) 918

circumstances. With the changed conditions and circumstances, including the passage of time, the Court is entitled to vary such Orders if such variation is considered to be in the interest of the welfare of the wards. Orders relating to custody of wards even when based on consent are liable to be varied by the Court, if the welfare of the wards demands variation. The Court after a decree of judicial separation, may upon application (by petition) for this purpose make, from time to time, all such Orders and provision, with respect to the custody, maintenance and education of the minor children, the marriage of either of the parents is the subject of the decree, or for placing such children under the protection of the Court. The Court may from time to time, before making its decree absolute or its decree make such interim Orders.

In a habeas corpus, in Punjab and Haryana High Court[9], case regarding custody of the child the Bench of Anupinder Singh Grewal, J. refused to consider extra-marital affair as a ground to deny custody of child to the mother. The Bench was of the opinion that extra marital affair cannot be the reason to deny custody to the mother. The court emphasized that the mother is the natural guardian of the child till the age of five years in terms of Section 6 of the Hindu Minority and Guardianship Act, 1956, and that the child would require love, care and affection of the mother for her development in the formative years. Similarly, the support and guidance of the mother would also be imperative during adolescence. The Bench remarked that it is common to make allegations on the moral character of a woman. Therefore, allegations against the petitioner being wholly unsubstantiated were not considered relevant to adjudicate the issue of custody of the minor child. Furthermore, the petitioner had permanent residency in Australia. She was earning Rs 70,000/- Australian dollars per annum and a handsome sum would be payable to her for the maintenance of child as well by the Australian authorities. The father was also an Australian citizen but right now had come to India and so the child would be doing better with mother.

In the facts of the case the mother/wife had sought the issuance of a writ in the nature of habeas corpus for the release of her minor daughter who was alleged to be in the custody of her husband. The husband was an Australian citizen and the petitioner later joined him in Australia. Out of the wedlock, a girl was born. Later on, the couple developed matrimonial differences which led to their separation. The parties arrived in India and by a foul play the child was taken away by husband/father when the petitioner had gone to her parental village. It was further contended by the petitioner that the husband, instead of acceding to the request of the petitioner to handover the child, started threatening her and the petitioner fearing her safety, fled back to Australia. She filed a petition for the custody of the minor child in the Federal Circuit Court, Australia and the court had passed an interim order directing the husband /father to return the minor child to Australia. On the other hand, the husband submitted that the petitioner was involved in a relationship with his brother-in-law which had led to marital discord between the parties. The local Panchayat intervened, and it was agreed that as the petitioner had permanent residency in Australia, the custody of the child would be handed over to the husband. He further submitted that after her return to Australia, the petitioner had preferred an application for the custody of the child and in the application, the Australian address of the husband had been mentioned although she knew that he along with their child was in India. Relying on the judgment *Ranbir Singh v. Satinder Kaur Mann*,[10] the husband submitted that a decree, which had been obtained from a foreign court on the basis of a fraud would not be enforceable in India.

According to the Bench the principle of comity of courts had been followed by the Courts in India to honour and to show due respect to the judgments obtained by the Courts abroad. However, the judgment of a foreign court could not be the only factor while considering the issue of custody of a child to a parent. The Court referred on the decision of Supreme Court in *Yashita Sahu v. State of Rajasthan,* wherein the bench had held that *in the fast changing world*

[9] Mandeep Kaur v. State of Punjab, 2021 SCC OnLine P&H 1060, decided on 10-05-2021
[10] 2006(3) RCR (Civil) 628

where adults marry and shift from one jurisdiction to another there are increasing issues of jurisdiction as to which country's courts will have jurisdiction. In many cases the jurisdiction may vest in two countries, though here also the interest of the child is extremely important and is, in fact, of paramount importance, the courts of one jurisdiction should respect the orders of a court of competent jurisdiction even if it is beyond its territories. When a child is removed by one parent from one country to another, especially in violation of the orders passed by a court, the country to which the child is removed must consider the question of custody and decide whether the court should conduct an elaborate enquiry on the question of child's custody or deal with the matter summarily, ordering the parent to return the custody of the child to the jurisdiction from which the child was removed, and all aspects relating to the child's welfare be investigated in a court in his/her own country.

Accordingly, the custody of the girl child was handed over to the petitioner. However, the petitioner was directed to arrange interaction of the child with the father regularly through video conferencing and the parties were directed to abide by the orders of the Federal/Family Court in Australia. The statute indicates a preference for the mother, so far as a child below five years is concerned.

In another case[11] a petition was filed for a writ of habeas corpus, instituted by Master Anav's mother, the first petitioner, asking the Court to liberate the minor from his father's custody by entrusting the minor into hers, is about a young child's devastating world. Petitioner 1 states that during her stay with her husband, she was tortured physically and mentally, both. Her mother even gave dowry. Later, petitioner 1 realised that her husband had an amorous relationship with her sister-in-law and another girl from the village to which she objected in vain. She was even forced to abandon the marriage and go back to her mother's home. The discord between parties was mediated and finally ended in mutual divorce. Further, it was stated that the 1st petitioner after the above settlement went back to her mother's home along with her young son. After some time petitioner 1 claimed that there was an unholy alliance between her brother and her estranged husband to oust her minor son from her mother's home. The 1st petitioner was beaten up and son was taken away because he thought that she may claim a share for her son in her ancestral property.

The court decided that since the child was of tender years, he is not capable of expressing an intelligent preference between his parents, in whose custody, he would most like to be. Also, the Court noticed is the fact that the father is not, particularly, interested in raising the minor. The above-stated discloses the disinclination of the father to bear a whole-time responsibility for the minor's custody and the complementary inclination of the mother to take that responsibility.

The Supreme Court Decision in *Ratan Kundu v. Abhijit Kundu,*[12] wherein it was held that A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. But the general rule about custody of a child, below the age of five years, is not to be given a go-by. If the mother is to be denied custody of a child, below five years, something exceptional derogating from the child's welfare is to be shown. It was noted that nothing on record was placed where it could be stated that the mother was unsuitable to raise the minor. But since the child needs both the parents, he must have his father's company too, as much as can be, under the circumstances. The Court must, therefore, devise a suitable arrangement, where the minor can meet his father and have sufficient visitation while the minor stays with his mother.

In an Allahabad High Court judgment,[13] it was decided that the minors not be given into the father's custody who has instituted the instant petition. Even if the father is a natural guardian but faces criminal charges relating to death of spouse, the custody of chil-

[11] Meenakshi v. State of U.P., 2020 SCC OnLine All 1475, decided on 02-12-2020
[12] (2008) 9 SCC 413
[13] Shaurya Gautam v. State of U.P., 2020 SCC OnLine All 1372, decided on 10-11-2020.

dren or visitation rights cannot be granted to the natural guardian. In the present matter, Court stated that the custody which is given currently cannot be termed as unlawful. The custody is with the grandmother of the minors' who has been given custody in the presence of the Station House Officer. The father of the minors' could say that being the natural guardian of the two minors' he has the right to seek their custody from the grandmother.

It is precisely this right which the father asserts, by virtue of Section 6 (a) of the Hindu Minority and Guardianship Act, 1956. He says he is the sole natural surviving guardian, and therefore, entitled to the minors' custody. It is, no doubt, true that the father is the minors' natural guardian under Section 6 (a) of Act, 1956, but the issue about the minors' custody is not so much about the right of one who claims it, as it is about the minors' welfare.

The issue of welfare of the child cannot be mechanically determined. It is to be sensitively approached, taking into consideration both broad and subtle factors that would ensure it best. The totality of the circumstances on record shows that unless acquitted, it would not be appropriate to place the two minor children in their father's custody.

Bench held that the father is not entitled to the minors' custody when he is facing criminal charges. Once he is acquitted, it would be open to him to make an appropriate application seeking their custody to the Court of competent jurisdiction under the Guardians and Wards Act, 1890. In the totality of the circumstances obtaining for the present, this Court did not find it appropriate to grant any visitation rights to the father.

In Sashanka v. Prakash case[14] it was decided by Bombay High Court that Welfare of child as paramount consideration and the custody given to father of minor for mother not being able to take care of the child.

In an another case, the Court decided in Faisal Khan v. Humera[15] that Second marriage of a mother is by itself not sufficient to deprive her of custody of her biological child.

In S.K. Rout v. Ministry of Health and Family Welfare, Union of India,[16] the SC in this case has coined a new term 'mirror Order'[17] which stresses on inter-jurisdictional child custody matters. Mirror orders are passed to safeguard the interest of the child who is in transit from one jurisdiction to another. The primary jurisdiction is exercised by the court where the child has been ordinarily residing for a substantial period of time and has conducted an elaborate enquiry on the issue of custody. The court may direct the parties to obtain a "mirror order" from the court where the custody of the child is being shifted. Such an order is ancillary or auxiliary in character, and supportive of the order passed by the court which has exercised primary jurisdiction over the custody of the child. In international family law, it is necessary that jurisdiction is exercised by only one court at a time. These orders are passed keeping in mind the principle of comity of courts and public policy.

Factors Considered by the Courts when Granting Custody.

The welfare of the minor is very broadly defined and includes many diverse factors, notably:

1. Apart from the age, sex and religion of the minor, Courts consider the personal law of the father. The welfare of younger children is generally regarded as being in the mother's custody.
2. The character and capacity of the proposed guardian, Courts usually reject baseless allegations against mothers. The wishes, if any, of a deceased parent, for example specified in a will is taken into consideration.

[14] 2020 SCC OnLine Bom 3497, decided on 27-11-2020.
[15] 2020 SCC OnLine Del 572, decided on 1-5-2020.
[16] 2020 SCC OnLine Del 575, 05-05-2020
[17] "The mirror order is passed to ensure that the courts of the country where the child is being shifted are aware of the arrangements which were made in the country where he had ordinarily been residing. Such an order would also safeguard the interest of the parent who is losing custody, so that the rights of visitation and temporary custody are not impaired."

3. Any existing or previous relations of the proposed guardian with the minor's property, Courts do not look kindly on guardians seeking custody just in order to have control over the minor's property. But if, for example, the minor's property is shared with the mother and she is otherwise a suitable guardian, the Court will regard the property relationship as an additional factor in the mother's favor.

4. The minor's preference if she/he is old enough to form an intelligent preference, usually accepted as about 9 years old. Courts prefer to keep children united and award custody of both to either the mother or the father.

5. Whether either/both parents have remarried and there are step-children, Although the mother's remarriage to someone who is not the children's close blood-relative often means the Court will not grant her custody, this rule is not strictly followed. Although the father's remarriage usually denies him custody, sometimes the Courts agree to grant him custody especially when the children's step-mother cannot or will not have her own children.

6. Whether the parents live far apart, Courts sometimes do not give the mother custody because she lives very far away from the father who is the natural guardian. But in 1994 an Uzbek woman living in Uzbekistan was given custody; the judge said modern transport had shortened distances and meant that the father could depart from his home in the morning and return by evening.

7. The child's comfort, health, material, intellectual, moral and spiritual welfare this very broad category includes the adequate and undisturbed education of the child.

8. However, the mere fact that the mother is economically less secure than the father, or that she suffers from ill-health or a disability is not usually reason enough to deny her custody because maintenance is the father's responsibility irrespective of who holds custody.

9. The mental and psychological development of the minor should not be disturbed and the parents and the courts must maintain status quo; Courts will take into account the likely impact of a change in guardians and the child's reaction to this change.

Conclusion

The legislation has not changed much when considering the 'custody of children' provisions. but its good that the Supreme Court has given new dimensions to the child custody matters. It is righteous that the mothers are not looked by the Courts from the lens of character, financial stability, distance, career-oriented mothers, we have come a long way from Geeta Hariharan case. The supreme is expanding its arenas and delving into new facets and incorporating the new socio and legal changes happening in the society. The custody is given to mothers inspite of issues relating to extramarital affairs, issues of long distance or mothers with financial stability. The fathers have also been given custody inspite of what law says.[18] The only consideration now stands is 'interest of child' and not much law has been looked into.

References:

1. The Hindu Marriage Act 1955
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3. The Guardians & Wards Act 1890
4. The Hindu Minority and Guardians act 1956.
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Dynamics of Constitutionalism in India - An Appraisal

Mahantesh G. S[1]

Abstract

Constitutionalism is a concept having the spirit of abiding the rules enshrined in the Constitution. What is the constitution? Is it a prerequisite of every State or Nation? How much importance does it have for the Government? Is it possible to govern a State without a Constitution? What are the main attributes of a constitution? Does it provide solution to every administrative problem? Can it ever be changed? Who has the power to change, amend, or expedite the Constitution? How much extent can it be changed, amended, or expedited up to? Is it the supreme law of the land? Does it treat every person equally? All the questions abovementioned or other than these questions come in the mind when the term 'Constitution' comes in debate. There is a great controversy over this topic in the world and there are some dissents or disagreements but many of the jurists are seen to be unanimous in this respect. We the students of law are obliged not to accept the opinion or approach without any appropriate contention otherwise it will be 'the bone of contention'. Perhaps, this is the beauty of the legal field that everything is measured here by some wellestablished rules. The first and the main rule is that there should be any reasonable cause to make any law. We will see the controversy and then decide whether the Constitutionalism exists in India or not? After that we will be able to decide whether it is in existence or not.....

Introduction

A constitution consists of a set of norms creating, structuring, and possibly defining the limits of, government power or authority. Hence, it is very clear that most of the states have adopted their own constitutions, and these states are recognized as constitutional states. To be recognized as a state, it must have some fundamental means of constituting and specifying the limits placed upon the three cardinal forms of government power i.e., legislative, executive, and judicial power.[2]

Modern political thought tries to draw a clear-cut difference between 'Constitutionalism' and 'Constitution'. A state may have the 'Constitution' but need not necessarily be 'Constitutionalism'. For example, in the case of an absolute monarch, Rex, exercising unlimited power in all three domains. Suppose it is widely acknowledged that Rex has these powers, as well as the authority to exercise them at his pleasure, the constitution of this state might then be said to have only one rule, which permits unlimited power to Rex. He is not legally accountable for the wisdom or morality of his decrees, nor is he obliged by procedures, or any other kinds of limitations or requirements, in exercising his powers. Thus, Rex decrees is constitutionally valid.[3] 'Constitutionalism' implies in essence limited Government or a limitation on the Government. Constitutionalism is the antithesis of arbitrary powers.[4]

Prerequisites of Constitutionalism

A written Constitution, independent judiciary with powers of judicial review, the doctrine of rule of law and separation of powers, free elections to legislature, accountable and transparent democratic government, fundamental rights of the people, federalism, decen-

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[2] Stanford Encyclopaedia of Philosophy; 'Constitutionalism'. First published on Wed. Jan.10, 2001; substantive revision Tue. Sep.11, 2012.

[3] See supra note 1.

[4] Charles H. Mcilwain, Constitutionalism: Ancient and Modern, 21; S. A. De Smith, Constitutional and Administrative Law, 34(1977); Giovanni Sartori, Constitutionalism: a preliminary discussion. (1962)56 am. Pol.Sc.Rev. 853. Recited in Indian Constitutional Law by M. P. Jain, fifth edition, 2006 at p.5.

[5] See supra note 2 at p. 6.

tralisation of power are some of the principles and norms which promote constitutionalism in a country.[5] Besides these, there is the most important prerequisite of the Constitution whereby it becomes expedient according to the need of the hour; that is: 'the amenability'.[6]

There are many characteristic features indicating that the Constitution of India has a real and great spirit of Constitutionalism. Some of them are as follows:

1 - Rule Of Law

The Constitution of India by and large through many of its provisions seeks to upheld rule of law. For example, Parliament members and State Legislatures are democratically elected based on adult suffrage.

Further, The Constitution through its many of the provisions declare independence of the judiciary. In fact, Judicial review has been ensured through several constitutional provisions. In Minerva Mills Ltd v. U.O.I,[7] The Supreme Court has characterised judicial review as a 'basic feature of the Constitution'. Article 14 of the Constitution guarantees right to equality before law. This Constitutional provision has now assumed great significance as it is used to control administrative powers.[8]

The Supreme Court of India has upheld the rule of law several times in its judgments to emphasise upon certain constitutional values and principles. For example, in Bachan Singh v. State of Punjab,[9] **Justice Bhagawati** has emphasized that rule of law excludes arbitrariness and unreasonableness. To ensure this, he has opined that it is necessary to have a democratic legislature to make laws, but its power should not be unfettered, and that there should be an independent judiciary to protect the citizen against the excesses of executive and legislative power.

In **Yusuf Khan v. Manohar Joshi,**[10] the Supreme Court has ruled that it is the duty of the state to preserve and protect the law and the constitution and that it cannot permit any violent act which may negate the rule of law.

In **P. Sambamurthy v. State of Andhra Pradesh,**[11] the Honourable Supreme Court has made it very clear that a provision authorising the executive to interfere with tribunal justice as unconstitutional, characterising it as "violative of the rule of law which is clearly a basic and the essential feature of the constitution".

The two great values which emanate from the concept of rule of law in modern times are:

1. No Arbitrary Government; and
2. Upholding Individual Liberty.

Realising upon these values, **KHANNA, J.,** observed in **A.D.M. Jabalpur v. Shivakant Shukla,**[12] that "Rule of Law is the most antithesis of arbitrariness.....Rule of Law is now the accepted norm of all civilised societies.... everywhere it is identified with the liberty of the individual. It seeks to maintain a balance between the opposing notions of individual liberty and public order. In every state, the problem arises of reconciling human rights with the requirements of public interest. Such harmonising can only be attained by the existence of independent courts which can hold the balance between citizen and the state and compel Governments to conform to the law."

2 - Separation of Powers

The Doctrine of separation of powers in a broader way deal with the mutual relations among the three organs of the Government namely, Legislature, Executive and Judiciary. The origin of this principle goes back to the period of Plato and Aristotle. It was Aristotle, who for the first time classified the functions of the Govern-

[6] Author's view after analysis of the provision of the amendment to the Constitution of India.
[7] AIR 1980 SC 1789 :(1980) 2 SCC 591.
[8] M. P. Jain, A Treatise of Administrative Law, I, Ch. XVIII; M.P. Jain, Indian Administrative Law Cases, and Materials, II, Chapter XV
[9] AIR 1982 SC 1325 :(1982) 3 SCC 24.
[10] (1999) SCC (Cri.) 577.
[11] AIR 1987 SC 663: (1987) 1 SCC362.
[12] AIR 1976 SC 1207 at 1254

ment into three categories viz., Deliberative, Magisterial and Judicial.[13]

Renowned French **Jurist Montesquieu** in his work, **"Spirit of Laws"** published in 1748, for the first time enunciated the principle of separation of powers. That is why he is known as modern exponent of this theory. Montesquieu's doctrine implies the fact that one person or body of persons should not exercise all the three powers of the Government i.e., Legislative, Executive and Judiciary. In other way, each organ should restrict itself to its own sphere and refrain from transgressing the province of the other. In the words of Montesquieu, "When the legislative and executive powers are united in the same person, or in the same body or Magistrate, there can be no liberty."

The Doctrine of separation of powers has no place in strict sense in Indian Constitution, but the functions of different organs of the Government have been sufficiently differentiated, so that one organ of the Government could not interfere with the functions of another.

In Constituent Assembly Debates, Prof. K. T. Shah (a member of Constituent Assembly) laid emphasis to insert by amendment a new Article 40-A concerned with doctrine of separation of powers. This Article reads as "There shall be complete separation of powers as between the principal organs of the State, viz. the legislative, the executive and the judicial."[14]

In **Udai Ram Sharma v. Union of India,**[15] The Supreme Court held that "The American doctrine of well-defined separation of legislative and judicial powers has no application to India."

In **Kesavananda Bharti v. State of Kerala,**[16] Hon'ble **Chief Justice Sikri** observed "separation of powers amongst the legislature, executive and judiciary is a part of the basic structure of the constitution; this structure cannot be destroyed by any form of amendment".

In **Smt. Indira Nehru Gandhi v. Raj Narain,**[17] **Hon'ble Justice Chandrachud** observed: "The **American Constitution** provides for a rigid separation of governmental powers into three basic divisions: the executive, legislative and judicial. It is essential principle of that Constitution that powers entrusted to one department should not be exercised by any other department. Even, the **Australian Constitution** follows the same pattern of distribution of powers. Unlike these Constitutions, the **Indian Constitution** does not expressly vest the three kinds of power in three different organs of the State. But the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict ambit of their functions."

In **Sri Ram v. State of Bombay,**[18] it was held that the absolute separation of powers is not possible by any form of Government. In view of the varying situations, the legislature cannot anticipate all the circumstances to which a legislative measure should be extended and applied. Therefore, legislature is empowered to delegate some of its functions to executive authority. But one thing is here to note that the legislature cannot delegate its essential legislative power.[19]

In **Asif Hameed v. State of J&K,**[20] the Supreme Court observed that "Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary must function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution

[13] From the Article 'Principle of Separation of Powers and Concentration of Authority' written by Tej Bahadur Singh, Dy. Director (Administration), I.J.T.R., U.P., Lucknow, Published in the I.J.T.R. Journal-Second year issue 4&5, March 1996.
[14] Constituent Assembly Debates Book No. 2, Vol. No. VII Second Print 1989, p.959.
[15] AIR 1968 SC 1138 at p. 1152.
[16] AIR 1973 SC 1461 at p.1535.
[17] AIR 1975 SC 2299 at 2470.
[18] AIR 1959 SC 459, 473,474.
[19] Sri Ram v. State of Bombay,
[20] AIR 1989 SC 1899.

trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs."

The Government (State) cannot escape from its prime duty (i.e., rendering services for the welfare of the citizens) showing that it is over-burdened with day-to-day functioning. The functions of a modern state unlike the police, states of old are not confined to mere collection of taxes or maintenance of laws and protection of the realm from external or internal enemies. A modern state is certainly expected to engage in all activities necessary for the promotion of the social and economic welfare of the community.[21]

History proves this fact that if there is a complete separation of powers, the Government cannot run effectively and smoothly. Smooth running of Government is possible only by co-operation and mutual adjustment of all the three organs of the government. Prof. Garner has rightly pointed out that, "the doctrine is impracticable as working principle of Government." It is not possible to categorise the functions of all three branches of Government on mathematical basis. The observation of Frankfurter is notable in this connection. According to him, "a rigid conception of separation of powers would make Government impossible."[22]

3 - Federalism

Federalism in essence is a form of government in which sovereign powers are constitutionally divided between a central government and geographically defined, semi-autonomous regional governments.[23] In the Indian context, Austin says, "Federalism is an idea and a set of practices, the variety of which depends upon the goals of the citizenry and its leaders, the consequent definition of the term, and the conditions present in the would-be federation."[24]

Federalism's commitment to justice and democracy imposes obligation upon power holds to act with a sense of responsibility to avoid disparities in access to positive rights and welfare. The features of economic and social asymmetry are to be tackled by the benevolent goal of equal liberty of all. Effective utilization of the centrally sponsored welfare schemes by the states, fiscal federalism's focus on development of backward states and equitable apportionment of inter-state water by using the principle of non-disparity do expand equal rights. The question of diversity of jurisdiction versus rights can neither be dealt mechanically nor in obstructing the way of social justice and multiculturalism.

Cooperative federalism in the matter of combating organised crimes or in rectifying state inaction tends to create an atmosphere supportive of rights. Asymmetry by special status is prone for egalitarian influence.[25]

Federalism, as a type of state, is an enduring expression of the principle of constitutionalism that retains the unity of federal units and effectuates the constitutional goals through mutual cooperation and coordination amidst central and state governments.

By considering federalism as a part of the basic feature of the Constitution[26] and supremacy of the Constitution as a key to the success of federalism, Indian Judiciary has laid emphasis on normative character of federalism's functioning towards equal rights and welfare in addition to mutual checks and balances of powers.

There are some institutions like Inter-state Council, Finance Commission, Zonal Council, National Development Council etc. to promote the federalism and the

[21] Ram Jawaya v. State of Punjab, AIR 1955 SC at p.554.
[22] Frankfurter-The Public and its Government (1930) quoted by B. Schwartz, in American Constitutional law, 1955 Page 286.
[23] 47 JILI (2005).
[24] G. Austin, Working a Democratic Constitution. The Indian Experience 555(1999).
[25] Taken from "Why and how federalism, matters in elimination of disparities and promotion of equal opportunities for positive rights, liberties and welfare" by 'P. Ishwara Bhat' in 54 JILI 2012 at 324.
[26] C. Rossiter (Ed.), The Federalist Papers XII (New York: The New American Library, 1961; Recited in 54 JILI 2012 at p.327).

spirit of co-operation and solve the disputes between two states or among many states. Some like Finance Commission have constitutional status and some do not have. Whether be it a constitutional institution or not, but it helps the preservation of the federalism.

4 - Amendability of Indian Constitution[27]

Several Articles of the constitution make provisions of a tentative nature, and the Parliament has been given power to make laws making provisions different from what these Articles provide for. Such a law can be made by the ordinary legislative process and is not to be regarded as an amendment of the Constitution and is not subject to the special procedure prescribed in Art. 368. In most of the cases, the constitutional text remains intact, but Parliament makes different provisions. These Articles of the Constitution are as follows:

(1) When Parliament admits a new State under Art. 2, it can affect consequential amendments in Schedules I and IV defining territory and allocating seats in the Rajya Sabha amongst the various states, respectively.

(2) Under Article 11, Parliament is empowered to make any provision for acquisition and termination of, and all other matters relating to, citizenship despite Articles. 5 to 10.

(3) Article 73(2) retains certain executive powers in the States and their officers until Parliament otherwise provides.

(4) Arts. 59(3), 75(6), 97, 125(2), 148(3) and 221(2) permit amendments by Parliament of the Second Schedule dealing with salaries and allowances of certain officers created by the Constitution.

(5) Art. 105(3) prescribes parliamentary privileges until it is defined by Parliament.

(6) Article 124(1) prescribes that Supreme Court shall have a Chief Justice and seven Judges until Parliament increases the strength of the Judges.

(7) Article 133(3) prohibits an appeal from the judgment of a single Judge of a High Court to the Supreme Court unless Parliament provides otherwise.

(8) Article 135 confers jurisdiction on the Supreme Court (equivalent to the Federal Court), unless Parliament otherwise provides.

(9) Under Art. 137, Supreme Court's power to review its own judgments is subject to a law made by Parliament.

(10) Article 171(2) states that the composition of the State Legislative Council as laid down in Article 170(3) shall endure until Parliament makes a law providing otherwise.

(11) Article 343(3) provides that Parliament may by law provide for the use of English even after 15 years as prescribed in Article 343(2).

(12) Article 348(1) provides that English as the language to be used in the Supreme Court and the High Courts and of legislation until Parliament provides otherwise.

(13) Schedules V and VI deal with administration of the Scheduled Areas and Scheduled Tribes and Tribal Areas in Assam which may be amended by Parliament by making a law.

There are certain other Articles in the Constitution which make tentative provisions until a law is made by the Parliament by following the ordinary legislative process, but before Parliament can act, the States must take some action. Thus, Art. 3 provides for the reorganisation of the States. Parliament may pass a law for the purpose and effect consequential amendments in the I and IV Schedules. Before doing so, however, it is necessary to ascertain the views of the states concerned.

Under Art. 169, Parliament may abolish a state legislative council, or create one in a State not having it, if the legislative assembly passes a resolution to that effect by most of its total membership and by a majority of not less than two-thirds of the members present and voting. The Parliamentary law enacted for the purpose may contain such provisions amending the constitution as may be necessary to give effect to it and it is not

[27] S.R. Bommai v. Union of India, AIIR 1994 SC 1918; Kuldip Naya v. Union of India, AIR 2006 SC 3127; State of West Bengal v. Committee for Protection of Democratic Rights, AIR 2010 SC 1476.

to be regarded as an amendment of the constitution for the purposes of Article 368. Corresponding to Articles 75(6) and 105(3), there are Arts. 164(5) and 194(3) which make tentative provisions until a State Legislature makes other provisions. They relate respectively to salaries of Ministers in a state and privileges of the Houses. These are the only Articles in the Constitution which enable a state legislature to make provisions different from what the constitution prescribes in the first instance.

The process to amend and adapt other provisions of the Indian Constitution is contained in Article 368. The phraseology of Article 368 has been amended twice since the inauguration of the constitution. However, the basic features of the amending procedure have remained intact despite these changes. These basic features are:

(i) An amendment of the Constitution can be initiated only by introducing a Bill for the purpose in either House of Parliament.

(ii) After the Bill is passed by each House by most of its total membership, and a majority of not less than two-thirds of the members of that House present and voting, and after receiving the assent of the President, the Constitution stands amended in accordance with the terms of the Bill.

(iii) To amend certain constitutional provisions relating to its federal character, characterised as the 'entrenched provisions', after the Bill to amend the Constitution is passed by the Houses of Parliament as mentioned above, but before being presented to the President for his assent, it has also to be ratified by the legislatures of not less than one-half of the States by resolutions. Leading cases regarding amendment of the Constitution are:

(a) Shankari Prasad Singh:

In **Shankari Prasad Singh v. Union of India,**[28] the first case on amendability of the Constitution, the validity of the Constitution (First Amendment) Act, 1951, curtailing the right to property guaranteed by Article 31 was challenged. The argument against the validity of the First Amendment was that Article 13 prohibits enactment of a law infringing or abrogating the fundamental rights that the word 'law' in Article 13 would include any law, even a law amending the Constitution and, therefore, the validity of such a law could be judged and scrutinised with reference to the fundamental rights which it could not infringe. The Supreme Court held, "We are of the opinion that is the context of Article 13 law must be taken to mean rules and regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power with the result that Article 13 (2) does not affect amendments made under Article 368."

The Court also held that the contents of Article 368 are perfectly general and empower the Parliament to amend Constitution without any exception. The fundamental rights are not excluded or immunised from the process of constitutional amendment under Article 368. These rights could not be invaded by legislative organs by means of laws and rules made in exercise of legislative powers, but they could certainly be curtailed, abridged, or even nullified by alterations in the constitution itself in exercise of the constituent power.

(b) Sajjan Singh:

For the next 13 years following Shankari Prasad Singh, the question of amendability of the fundamental rights remained dormant. The same question was raised again in 1964 in **Sajjan Singh v. Rajasthan,**[29] when the validity of the Constitution (Seventeenth Amendment) Act, 1964, was called in question. This Amendment again adversely affected the right to property. By this amendment, several statutes affecting property rights were placed in the Ninth Schedule and were thus immunised from our review.In the instant case, the Court was called upon to decide the following questions:

(1) Whether the amendment of the constitution insofar as it purported to take away or abridged the

[28] Indian Constitutional Law by M. P. Jain, Fifth Edi. 2006 at p. 1617-1618.
[29] AIR 1951 SC 458.

Fundamental Rights was within the prohibition of Article 13(2); and

(2) Whether Articles 31A and 31B (as amended by the XVIIth Amendment) sought to make changes to Articles 132, 136 and 226, or in any of the lists in the VIIth Schedule of the Constitution, so that the conditions prescribed in the proviso to Art. 368 had to be satisfied.

One of the arguments was that the amendment in question reduced the area of judicial review it thus, affected Article 368 for amending the 'entrenched provisions', that is, the concurrence of at least half of the states ought to have been secured for the amendment to be validly effectuated. Such an argument had also been raised in the Shankari Prasad Singh case but without success. The Supreme Court again rejected the argument by a majority of 3 to 2. The majority ruled that the **'pith and substance'** of the amendment was only to amend the Fundamental Right to help the state legislatures in effectuating the policy of the agrarian reform. If it affected Article 226 in an insignificant manner, that was only incidental; it was an indirect effect of the Seventeenth Amendment and it did not amount to an amendment of Article 226. The impugned Act did not change Article 226 in any way.

The conclusion of the Supreme Court in Shankari Prasad Singh as regards the relation between Articles 13 and 368 was reiterated by the majority, it felt no hesitation in holding that the power of amending the constitution conferred on Parliament under Article 368 could be exercised over each provision of the Constitution. The majority refused to accept the argument that Fundamental Rights were "eternal, inviolate, and beyond the reach of Article 368."

The Court again drew the distinction between an 'ordinary' law and a 'constitutional' law made in exercise of 'constituent power' and held that only the former, and not the latter, fall under Article 13.

(c) Golak Nath:

Perhaps, encouraged by the above stated remarks of the two Judges, the question whether any of the Fundamental Rights could be abridged or taken away by Parliament in exercise of its power under Article 368 was raised again in **Golak Nath**[30] in 1967. Again, the constitutional validity of the Constitution (Seventeenth Amendment) Act was challenged in a very vigorous and determined manner. Eleven Judges participated in the decision, and they divided 6 to 5. The majority now held, overruling the earlier cases of Shankari Prasad and Sajjan Singh that the Fundamental Rights were non-amendable through the constitutional amending procedure set out in Article 368, while the minority upheld the line of reasoning adopted by the Court in the two earlier cases.

It is true that Article 368 suffers from an anomaly. While for amending certain provisions, characterised as the 'entrenched clauses', consent of at least half of the State Legislatures is stipulated in addition to the special majority in Parliament, it is not so with respect to the Fundamental Rights.[31]

5- Preamble

Unlike the Constitutions of Australia, Canada or the U.S.A., the Constitution of India has an elaborate Preamble. The purpose of the Preamble is to clarify who has made the Constitution, what is its source, what is the ultimate sanction behind it; what is the nature of the polity which is sought to be established by the Constitution and what are its goals and objectives.

The Preamble does not grant any power, but it gives a direction and purpose to Constitution. It outlines the objectives of the whole Constitution. The Preamble contains the fundamentals of the constitution. It serves several important purposes, as for example.

(1) It contains the enacting clause which brings the Constitution into force.

(2) It declares the great rights and freedoms which the people of India intended to secure to all its citizens.

(3) It declares the basic type of government and polity which is sought to be established in the

[30] AIR 1965 SC 845.
[31] Golak Nath v. State of Punjab, AIR 1967 SC 1643: 1967(2) SCR762.

country.

(4) It throws light on the source of the Constitution, viz. the People of India.

Conclusion

Based on the above observation, it is very clear that Constitutionalism, being a vast subject cannot be confined to some principles only. Its essence is in every nation where the government's objective is not only to rule but the empowerment, development, and equal opportunities for all. But to understand the meaning and importance of it, we must analyse some pre-established doctrines as we have seen above. By analysis of all these contentions in support of Constitutionalism, we can consider its importance in enhancing nation's integrity, fraternity, and unity. Rule of law, Separation of Powers are the principles which usher our legislature and judiciary to provide us a unique, antique, and ever updated or expedited Constitution which is the base of the democracy which is known as the best democracy of the world.

Media Debates, Asymmetrical Argumentation, and the Nature of Violence in Indian Politics

Keerthiraj[1]

Abstract

Dialogue is often considered as a solution to reduce violent conflicts between different competing parties. Applying this logic of dialogue to reduce the possibility of violence holds validity. On the other hand, empirical evidence show that dialogues also resulted in violent conflicts, instead of ameliorating the situation. This paper focuses on this unique problem of applying dialogue as a remedy to violent conflicts in India with a special reference to media debates. Extended media including both mainstream and social media provided large space for dialogues regarding issues in the contemporary world. India is no exception to this fact. This paper critically analyses this entire discourse of media debates on contentious issues in India to test the hypothesis regarding the validity of dialogue as a remedy to prevent violence and chaos in Indian political context.

Key Words: Dialogue, Media, Indian Politics, Conflict, Violence, Post-colonial

Introduction

Contemporary society has a strong conviction that the dialogue is the finest solution to any kind of difference. There is a flaw in this general perception of dialogue as an effective remedy to violence in social, political, or cultural domains. This paper considers empirical evidence from the socio-political and cultural experiences in India to show the ineffectiveness of dialogue in addressing the problem of violence. Majority of the examples prove that dialogues not only fail to resolve conflict/violence but also act as a complementary force to provide a space to violence. The general claim that dialogue produces remedies to conflicts or claims that process of dialogue itself as the solution of violence etc. should be verified with objective inquiry. This paper specifically considers media debates to verify this hypothesis regarding the relationship between dialogue and violence. To understand this contradiction, one needs to frame conceptual understandings regarding the core issues involved in this area like nature and presumptions of dialogue, nature of violence in Indian socio-political setup, perception shaping in India, nature of media dialogues in India and other related issues.

Research Problem & Research Question

Generally, dialogue is an effective solution to prevent violence in any socio-political setup. But the empirical evidence from Indian socio-political reality shows that dialogues not only failed to establish peace but also worked to reinforce the elements of violence among competing parties. In this context, this paper examines the question, **why media debates increase the possibility of violence in India, even though dialogue is much paraded solution to violence?**

Hypothesis

Intense media debates directly contributed to the increase in violence as dialogue in Indian society fails to provide space for symmetrical argumentation.

Objectives of the Study

- To understand the effectiveness of dialogue in settling violence in Indian society.
- To analyze the nature of violence in Indian socio-political system.
- To evaluate the role of media debates in Indian public discourse.

Scope of the Study

This research paper deals with the media debates and its impact on Indian society with a special inquiry of the effectiveness of dialogue in settling violence in Indian socio-political scenario. Even though the paper deals with the larger issues like 'media' and 'Indian Socio-political scenario', focus of the study will be limited to investigate the relevance of dialogue in

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preventing violence as applicable to these larger discourses.

Methodology

This research paper will make efforts to test the hypothesis and to achieve the objectives of the study through different methods. Primarily, the proposed study will adopt theoretical, historical, descriptive, and analytical study design. The study depends on secondary sources of data, information, and literature.

Discussion

The discussion part of this paper is organized into four parts to address the research problem and to verify the hypothesis offered by this paper. The first part 'Understanding the nature of Dialogues in India' deals with the basic conceptual understandings about the nature of dialogue in India. Second part, 'Asymmetrical argumentation and the Source of Violence' shows the core problem within the process of dialogue which makes obvious space for conflict. Third part, 'Flaws of Universal Rationality and the Problems of Attribution' critically throw light on the problematic use of reason in dialogue and the unjustifiable imposition of attributions, which leads to an asymmetrical dialogue. Finally, 'Media Debates and the Myth of Preventing Violence' focuses on contemporary media debates to justify the claims made by earlier parts of this discussion.

1. Understanding the Nature of Dialogues in India

The empirical evidence on Indian socio-political scenario makes it clear that dialogues in different forms increased the probability of violence, instead of reducing conflict/violence. In this case a serious academic research consideration is very much necessary to analyze this contradictory situation. Particularly, the origin of 'dialogue' traces back to the emergence of liberal political values in European society. This idea of rational dialogue originated and evolved with the events like enlightenment, reformation etc. in European history. Many scholars considered that violence can be reduced only with the help of critical reasoning and rational dialogue. On the other hand, Indian socio-political context is witnessing contradictory results as debates go hand in hand with conflicts and violence. At the very outset, one can assume that the reason for this unique experience of India is that scholars without having the original experience of India studied and built knowledge on Indian socio-political realities. But this assumption fails to explain the situation because one cannot guarantee a different outcome even if an Indian scholar studies Indian society, as he will be using the same tools to explain Indian society, the results tend to be the same. Now the problem lies with the tools used to understand Indian society, to be precise Freudian psychoanalysis involved in dialogues to understand the psyche of Indian society. (Balagangadhara, 2012)

Academicians or scholars are trying to initiate a dialogue about 'Hindu traditions', 'culture', 'practices' etc. through their writings, speeches, or any other form of expression. But these expressions quickly attract a violent rebuttal from the respondent and the further dialogue fuels more conflict. For example, Paul Courtright's portrayal of Ganesha in his book 'Ganesa: Lord of Obstacles, Lord of Beginnings' (Courtright, 1989) received harsh responses from Hindu community (Singh A. , 2009). Academia and scholars termed this response as inimical to academic freedom connecting it to the rising Hindu Fundamentalism. But the question of dialogue remains unanswered, if academia thinks Courtright's effort is to initiate a dialogue with the respondent community i.e., Hindu, why dialogue created so much of violent results? We cannot simplify this phenomenon as it is the problem of outsider studying Indian culture, as there won't be any difference in the outcome even if an Indian studies about the same case using the same set of psychoanalytical tools. Other set of arguments limit this phenomenon within the domain of Hindu fundamentalism also fail to describe the phenomenon, as it questions the whole effectiveness of dialogue as a panacea to violence/conflict between two competing parties.

Any effort by academicians, journalists, or artists to interpret an Indian phenomenon becomes a controversial domain. Religious and cultural domains are specifically more sensitive than other areas, where a dialogue seems almost impossible. In fact, a comment on

Sabarimala issue, Triple Talaq article 370, JNU, CAA or any other issue is an attempt to initiate the dialogue with the other party. But, in reality this attempts to initiate a dialogue ends up with death threats, violent conflicts, chaos etc. These aggressive and violent reactions cannot be and should not be easily labeled as fundamentalist, anti-academic freedom forces. As this attitude of looking at different phenomena in a binary vision of black and white yielded us no or negative results in most of the cases. Now this is the time to relook into the nature of dialogues in India with a critical understanding about how they work in nonwestern societies.

2. Asymmetrical Argumentation and the Source of Violence

Dialogue has a basic structure of argumentation with loaded assumptions. When western scholar or even an Indian scholar is initiating a dialogue regarding a phenomenon in Indian context, they inquire the status with some interrelated cognitive moves. These interrelated set of cognitive moves, psychoanalysis etc. make the argumentation imbalanced between the scholar and subject of his/her inquiry. In the process of using psychoanalytical tools, the scholar ignores the fact that the rationality of those tools evolved in a particular context in western philosophical domain and they are alien to Indian context.

The paper illustrates this with an example of dialogue between 'Party A' (Scholars/academicians initiating a dialogue about Indian polity/society) and 'Party B' (The people who are expected to answer the claims of 'Party A' i.e., Indians). Here 'Party A' tries to invoke rational logic of the other party by attributing some assumptions on the other party through explanations and interpretations. Dialogue requires several assumptions from one party on the other party to keep the dialogue alive. Interestingly, the party attributing these assumptions (i.e., Party A) is not accountable to the assumptions made by it. But on the other hand, 'Party B' will be burdened with the responsibility to prove its actions by continuing the process of dialogue without knowing the assumptions attributed by 'Party A'. This uneven distribution of responsibility/ accountability leads dialogue to the violent end.

Logical reason and psychoanalytical tools might be appropriate to understand western psychology, but they appear inappropriate to deal with non-western societies. But logical reason and psychoanalytical tools become inevitable to have a dialogue. This contradiction in intercultural encounters make dialogue more problematic with attributed assumption on nonwestern societies (Party B) with an additional burden on them to justify their actions without understanding nature of assumptions attributed on them. On the other hand, attributor of these assumptions (Party A) has no onus of providing evidence to their assumptions. In other words, 'Party A' escapes from the onus of providing evidence as it can switch between explanation and interpretation, but 'Party B' must stick on to explanation to justify their cause. This asymmetric argumentation puts 'Party B' in an unfavourable situation, as it cannot defend its stand/action within the dialogical discourse. The situation makes it clear that the dialogue increases the frustration and anger of 'Party B' leading to violence. In this context of violence, a demand for more dialogue will only bring more violence.

3. Flaws of Universal Rationality and the Problems of Attribution

Asymmetric relationship between two parties in the dialogue makes it difficult to 'Party B' to remain within this discourse of dialogue. This cognitive asymmetric relation enables the 'Party A' to defend their point in the name of psychoanalytical analysis, as this analysis has been used to understand different issues and religions including Christianity. In this established situation, any set of argumentations will be inclined in favour of 'Party B'. This process of attributing assumptions to the practice of 'Party B' makes the dialogue possible, but such attributions won't make such sense to 'Party B'. So, this process also makes sure that 'Party B' is not intellectually fit for dialogue. In this way, tools evolved in a particular context of western history concludes non-western societies like Africans or Indians as inferior species without even having a basic understanding of their own socio-political experiences. Thus, 'Party B' must counter and question this core logic of psychoanalysis and the universality of logical reasoning.

Psychology has an established assumption that rationality is universal, which has its roots in enlightenment and reformation phases in European history. This psychoanalysis firmly believes in the relationship between reasons and actions, beliefs, and behaviour etc. Most importantly these theories of rationality are paraded as universal beyond their philosophical context, where they really originated. But the failure of dialogue to prevent violence in societies like India has something significant to say regarding this phenomenon. A reasonable discussion or a rational dialogue is only possible when two parties stand on the symmetrical position sharing common sense and common folk psychology. This is true when rational dialogue happens within the domain of western culture, but it fails miserably in intercultural encounters. Reasonable discussion will not remain as a neutral mechanism when west is dealing with non-western societies. In this unique context much celebrated liberal idea of 'reason' fails to acknowledge one more celebrated liberal idea i.e., 'pluralism'.

4. Media Debates and the Myth of Preventing Violence

Contemporary media debates in India regarding various issues are getting complex day by day attributing a binary view of Indian society based on the claim of rationality. Media debates and discussions are representing the conceptual issues of dialogue discussed in the earlier three sections. Media is on the frontline along with other driving forces like literature, social sciences etc. in suggesting dialogue among contesting parties to reduce the possibility of violence/conflict. With the advent of internet media/ social media platforms, the space for dialogue is increasing than ever before.

No one can deny the space produced by media and especially by internet media in facilitating dialogue among different communities in India. Internet media played an important role in increasing the mass participation media in the place of elitism. This also brought a claim of objectivity to the discussions happening around, but unfortunately increasing the violence. Again, it is not the elite media, not surely the mass participation in media, nor is the access of internet the reason for the escalation of violence. Background ideas of different communities involved in a particular dialogue are producing a black and white binary vision to look at the issues in India neglecting the original experience.

There is no dearth of debates as Indian socio-political discourse provides a rich list of debates to analyze the problems of dialogue. A close observation on media behavior and media debate on recent contentious issues on Indian society proves the Hypothesis of this paper right. Debates on Citizenship Amendment Act, National Register of Citizens, National Population Register, women entry to Sabarimala temple, academic freedom of JNU and other universities, Section 377 of the Indian Penal Code and many other issues were still being debated pushing communities towards more hostility. Each of the issues raised here, despite of the differences in their nature meets up at common point i.e., two communities opposing each other. A focused concentration on these media debates will tell us one more important fact that the parties involved in these debates are busy in defending their stand and not really interested in the facts or the actual process and outcome of that issue. Even when facts are used in such dialogue, such use will have mere purpose of supporting the stand of respective competing parties. Such debates and dialogues help nothing but in escalating the violence/conflicts.

This problem is much bigger than it seems to be. Generally accepted accusations against media like corporate control, political influences, TRP ambitions can give a temporary relief to the questions raised here. These reasons look impressive as there are huge communities to believe in these allegations, when they are made against the media which is on the opposite camp. Right, Left, Centre, liberal, conservative, feminist, theist, atheist or any other group is not an exception to this. Media seems objective to a particular group when it suits their narrative and the allegations mentioned above will be reserved for the media, which contradicts their narrative. But these allegations are only help us to show media as a self-aggrandizing selfish parasite and nothing else. Only deeper understandings of background ideas which work behind media narratives help us to go beyond the age-old allegations

against media. Otherwise, a push for more dialogue comes with an increased amount of violence.

Conclusion

This paper is an attempt to explore the contradictory complex phenomena of the interrelation between dialogue and violence rather than offering a solution to the problem of violence in Indian socio-political setup. With one voice, academic scholarships, political system, in fact the whole public discourse suggested dialogue as the solution to violence in India. On the other hand, it is also true that India failed to achieve its objective through dialogue, as they became more problematic with the passing time. Even though, this paper lacks enough space, both in technical and intellectual level to provide concrete solutions to this problem, it provides an abstract if not a concrete base to relook this phenomenon with new academic rigor. This paper concludes by opening a vast research gap on the appropriateness of dialogue in media studies, public policy and other socio-political discourses of India.

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Public Policy A Hurdle Under the Indian Arbitration Law: Critical Analysis

Vishal Ranaware[1] *and Amol Shelar*[2]

Abstract

The traditional role of public policy was to limit the scope of foreign law, recognition, and enforcement of foreign judgments or awards. Sometimes domestic courts use this doctrine to strike down the foreign arbitral awards. Though the disputing parties are free to choose applicable laws in international commercial arbitration, when it comes to the recognition and enforcement of an award they rely on the domestic laws and courts. If the court thinks that an award before them deals with a matter violates public policy, the court may refuse to recognise and enforce it. There is no uniformity in public policy notion among the states, it has been interpreted in different ways in different jurisdictions so it becomes very difficult to say which award will be allowed and which will violate the principle. Therefore, it becomes a big hurdle in the way of international commercial arbitration. To deal with this issue Indian judiciary took a step to define it and limit the scope doctrine of public policy. Finally, in 2015 Indian Parliament amended the Arbitration and Conciliation Act, 1996, and clarified the term 'public policy'.

Keywords

Public Policy, International Commercial Arbitration, the Arbitration and Conciliation Act 1996, party autonomy, arbitral award, Renusagar.

Introduction

Alternative dispute resolution mechanism brings hope for the disputing parties as it is flexible and informal compared to the judicial system, also have other advantages. Arbitration is one of the ways to resolve the dispute outside the court. It gives autonomy to the parties on certain aspects, like appointing arbitrators, deciding their qualification, place, date, and time, and most importantly finalising a set of procedural rules and laws applicable to the dispute. Also, the international and national laws provide for minimum intervention of the judiciary. In the arbitral proceedings, the judiciary can intervene only under the limited grounds provided by the Arbitration and Conciliation Act, 1996[3] (the Act). It is to protect the rights of the parties to resolve their dispute through arbitration, a recognised mode of dispute resolution, as per the agreement and this should not be hampered by unwelcome judicial intervention. However, this autonomy is not absolute, there are certain provisions that work as a limitation on the concept of party autonomy given by national and international law. Here, in this research paper researcher has discussed the concept of 'public policy' which works as a limitation on party autonomy. However, in 2015, Section 34[4] and 48[5] have amended to limit the scope of 'public policy'.

Finality of Arbitral Award

As per the national and international laws, the decision of an arbitral tribunal is final and binding on parties and persons claiming under it. Judicial intervention is allowed in defined circumstances; therefore, if aggrieved party wants to set aside an arbitral award it can be done by the court 'only' on the grounds defined under Section 34, Part I of the Act. According to Section 34(2)(a), the party has to establish that:

a. the party is under some incapacity,

b. the arbitration agreement is invalid under the laws applicable,

c. the arbitrator has appointed without giving due notice to the party,

d. the constitution of the arbitral tribunal is not as defined by parties, unless otherwise,

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[4] The Arbitration and Conciliation Act, 1996, § 34, No. 26, Acts of Parliament, 1996 (India).
[5] The Arbitration and Conciliation Act, 1996, § 48, No. 26, Acts of Parliament, 1996 (India).

e. the dispute or the matter covered by an arbitral award is not within the scope of arbitration according to the submission agreement,

f. the arbitral tribunal has not followed the procedure defined by parties, unless otherwise.[6]

Apart from the above mentioned, there are two more grounds on which the court may set aside an arbitral award; arbitrability and public policy.[7] This provision is based on Article 34 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 which is the first recourse against an award at the seat of arbitration.

Part II of the Act gives effect to the New York Convention 1958 (NY Convention), the Geneva Protocol 1923, and Geneva Convention 1927 which deals with the recognition and enforcement of foreign arbitral awards under the Act. Sub-section (1) and (2) of Section 48 of the Act based on Article V of the NY Convention define more or less similar grounds stated under Section 34 of the Act on which a local court where the recognition and enforcement sought may deny it.

Among all grounds, the principle of public policy gives scope for interpretation also works as a limitation on party autonomy.[8] Let's see how!

Doctrine of Public Policy

The term 'public policy' has not been defined under the Act nor under any convention which makes it difficult to interpret and this gives an opportunity to judge to decide its course. It has been defined in different ways in different jurisdictions across the globe. The House of Lords in 1853 defined public policy as the legal principle which forbids the subject from doing something which is injurious to the public or against the public good.[9] It means the things which are injurious to the public, against the good morals or public good are not allowed to do in that particular jurisdiction. So, if an arbitral award deals with such matters, contrary to laws or standards, violate the notion of morality and justice prevail in the court's jurisdiction such awards will be vacated by the domestic court. For example, there is a dispute between parties over casino profit. The disputing parties may resolve it through arbitration. Now, some states will consider it as a commercial dispute and will allow its enforcement. However, the states with strict rules against gambling may not be enforced on the ground of public policy as it is illegal in that particular jurisdiction. A similar approach has been adopted by the US Second Circuit Court of Appeals in Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de I'Industrie du Papier[10] while affirming the arbitral award against an American Company. The court stated that the term public policy should be interpreted narrowly and the enforcement of foreign awards under the NY Convention may be denied if it goes against the basic idea of morality and justice.[11]

The Supreme Court of Korea stated that the basic tenet of the public policy principle is to protect the fundamental moral beliefs and social order of the country where recognition and enforcement are sought from being harmed.[12] Here, the Korean court gave a narrow interpretation and on the same note, the Swizz court in K S AG v. CC SA[13] upheld the constrained approach of the public policy principle. Apart from international commercial arbitration, in the US, courts from states like Ohio, South Carolina, and North Carolina consider that the binding arbitration agreements between parents to resolve child support disputes violates public policy.[14]

[6] The Arbitration and Conciliation Act, 1996, § 34(2)(a), No. 26, Acts of Parliament, 1996 (India).
[7] The Arbitration and Conciliation Act, 1996, § 34(2)(b), No. 26, Acts of Parliament, 1996 (India).
[8] The Arbitration and Conciliation Act, 1996, § 34 (2)(b)(ii), No. 26, Acts of Parliament, 1996 (India).
[9] Egerton v. Brownlow, (1853) 4 HLC 1.
[10] Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de I'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974).
[11] Id.
[12] Adviso NV (Netherlands Antilles) v. Korea Overseas Construction Corp., XXI YBCA 612 (1996).
[13] K S AG v. CC SA, XX YBCA 762 (1995).
[14] Cohoon v. Cohoon, 770 N. E. 2d 885.

Indian Legal System and Doctrine of Public Policy

Section 34(2)(b)(ii) and 48(2)(b) states that the court may set aside and refuse to enforce an arbitral award, respectively, if it contradicts with the notion of 'public policy' prevailed in the state.[15] The Act is silent on its meaning however, the judiciary has taken an initiative to decode. It denotes the fundamental policy of law, justice, and morality.[16] The Supreme Court discussed this issue in a number of cases. In Renusagar Power Co. Limited v. General Electric Company[17] (Renusagar), the Apex Court interpreted the term 'public policy' defined as the ground for setting aside an award under the Foreign Awards (Recognition and Enforcement) Act, 1961.[18] The Court held that the term used in a very restricted sense, therefore an arbitral award cannot be barred under public policy principle merely on the ground of violation of Indian laws. The judges have to look for something more to apply the bar of public policy to foreign arbitral awards. It observed that to refuse the enforcement of foreign awards on the ground of public policy the court should find that award contrary to:

(*a*) Fundamental policy of Indian Law; or

(*b*) The interest if India; or

(*c*) Justice or morality.

In furtherance of the above observation, the Indian judiciary has expanded the scope of the term 'public policy' by adding few more grounds to it. In 2003, in Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd[19] (ONGC) the Supreme Court observed that the role of the court under Section 34 of the Act is appellate/revision court therefore, the vast powers are conferred by the Act. It stated that the 'patent illegality' could be a valid ground to set aside an arbitral award. As per the decision, to call an award 'patently illegal' has to disregard the substantive provisions of law or contradict the terms of the contract. If the given condition is satisfied, the court can intervene and pass an order under Section 34 of the Act. The court further added that the narrow approach would make some provisions of the Act insignificant, so an extensive interpretation is a prerequisite of the statute to vacate 'patently illegal' awards.[20]

There was a difference between Renusagar[21] and ONGC[22] as the earlier one was dealing with enforcement of an award under Section 7 of Foreign Awards (Recognition and Enforcement) Act, 1961[23] (since it is repealed Section 48 of the Act govern this field) and later with validity under Section 34 of the Act. However, it increases the burden of the Indian judiciary. Now, every award with an error of application of legal provisions could be challenged under Section 34 of the Act by virtue of newly added ground. Indian courts re-heard the awards on merits which defeated the very basic purpose of the arbitration.

In 2011, one more case related to the 'public policy' under Section 48 of the Act was filed before the Supreme Court. In Phulchand Exports Ltd. v. OOO Patriot[24] (Phulchand) the Supreme Court held that the test given in ONGC[25] must be followed for foreign awards as the expression 'public policy' under Section 34 and 48 of the Act are the same. The Supreme Court brought foreign awards and domestic awards on the same page without specifying reasons for ignoring the difference between these two drawn by the Act. It expands the meaning of the term 'public policy' in India.

[15] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[16] Bharti Airtel Limited v. Union of India, 231 (2016) DLT 71.
[17] Renusagar Power Co. Limited v. General Electric Company, 1994 Supp (1) SCC 644.
[18] The Foreign Awards (Recognition and Enforcement) Act, 1961, § 7(1)(b)(ii), No. 45, Acts of Parliament, 1961 (India).
[19] Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd, (2003) 5 SCC 705.
[20] Id.
[21] Renusagar Power Co. Limited v. General Electric Company, 1994 Supp (1) SCC 644.
[22] Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd., (2003) 5 SCC 705.
[23] The Foreign Awards (Recognition and Enforcement) Act, 1961, § 7, No. 45, Acts of Parliament, 1961 (India).
[24] Phulchand Exports Ltd. v. OOO Patriot, (2011) 10 SCC 300.
[25] Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd., (2003) 5 SCC 705.
[26] Phulchand Exports Ltd. v. OOO Patriot, (2011) 10 SCC 300.

However, Phulchand[26] ruling had a short span, it was overturned in Shri Lal Mahal Ltd. v. Progetto Grano Spa[27] ("Lal Mahal"). The Apex Court held that the term 'public policy', defined as ground under Section 48 of the Act, doesn't cover the 'patent illegality. This decision restored the position held in Renusagar[28] with respect to enforcement of the foreign award and ceased application of ONGC[29] to Section 48 cases. It ended strikes on the foreign awards on the ground of 'patent illegality' by narrowing down the scope of the term 'public policy' in India. The court observed that an application of the term 'public policy' under Section 48 of the Act is restricted to the arbitral awards contradicting the fundamental policy of India, the interest of India, and justice and morality. Section 48 of the Act doesn't give an opportunity to review the awards on the merits.

Further, it was expected from the highest judicial forum that ONGC v. Western Geco International Ltd.[30] (Western Geco) will review the explanation of the term 'public policy' under Section 34 of the Act and override the ONGC.[31] However the Apex Court broadened the scope of 'public policy' and observed that the term 'public policy' must include all such fundamental principles as providing a basis for the administration of justice and enforcement of law in this country. According to the court, the fundamental policy of Indian law includes three distinct and fundamental juristic principles, those are:

a) the adjudicating authority must adopt a judicial approach while defining the rights of the citizens,

b) the adjudicating authority must follow the principles of natural justice and consider relevant facts of the case to determine the rights and duties of parties,

c) the court should not allow the enforcement of perverse or irrational awards.

These are the judgments that widened the scope of the expression 'public policy' referred under Sections 34 and 48 of the Act. To limit the scope of interpretation of the term 'public policy', the legislature added explanation to Section 34 and 48 through the Arbitration and Conciliation (Amendment) Act, 2015.[32]

The 246th Law Commission Report and the 2015 Amendment

The Law Commission of India (the Law Commission) responded to these judgments in February 2015 by issuing a supplement to the 246th Law Commission Report, published in August 2014. The Law Commission criticised the Supreme Court decisions in ONGC[33] and Western Geco[34] for broadening the scope of the term 'public policy' and "opening the floodgates". The Law Commission highlighted that the exhaustive list of grounds defined under Section 34 and 48 of the Act are related to the procedural issues and the courts are not supposed to go into the substantive problem. The Law Commission recommended the definition of public policy given by the Supreme Court in Renusagar.[35]

Considering the recommendations of the Law Commission on this particular issue, the Parliament amended the Act through the Arbitration and Conciliation (Amendment) Act, 2015.[36] It adds explanation to the Section 34 and 48 of the Act. According to the amended provision, the court may set aside an arbitral award or deny enforcement if it conflicts with the public policy of India, only if:

[27] Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433.
[28] Renusagar Power Co. Limited v. General Electric Company, 1994 Supp (1) SCC 644.
[29] Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd., (2003) 5 SCC 705.
[30] ONGC v. Western Geco International Ltd., (2014) SLT 564.
[31] Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd., (2003) 5 SCC 705.
[32] The Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2016 (India).
[33] Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd., (2003) 5 SCC 705.
[34] ONGC v. Western Geco International Ltd., (2014) SLT 564.
[35] Renusagar Power Co. Limited v. General Electric Company, 1994 Supp (1) SCC 644.
[36] The Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2016 (India).

1. The making of the award was induced or affected by fraud or corruption or was in violation of section 75[37] or section 81;[38] or
2. It is in contravention with the fundamental policy of Indian law; or
3. It conflicts with the most basic notions of morality or justice.

This amendment limits the scope of 'public policy' and reduced the scope of judicial intervention.

Conclusion

Arbitration is one of the ways of alternative dispute resolution. It has been preferred by the parties for commercial disputes especially international because of its unique features, like, party autonomy and minimal court intervention. Parties to an arbitration agreement are permitted to select the applicable laws to the subject matter of dispute as well as procedural aspects of the arbitration. However, the doctrine of 'public policy' limits the party autonomy as ultimately the finality and enforcement of the arbitral award depend on the laws prevailing at the seat of arbitration and place the party seeking enforcement. Interpretation of the term 'public policy' varies from state to state, time to time as stated by the Supreme Court in Murlidhar Agarwal and another v. State of U.P. and others.[39] It was observed by the court that the notion of public policy changes with time, generation, community, and state. Even in one generation, it may change its course. It never remains the same or static. It became useless it didn't change or remain in fixed moulds. So, an award finalised in one state may be denied its enforcement at another. The term 'public policy' gives power to the court to decide its future course and the same was observed in India since Renusagar[40] to Western Geco.[41]

This issue has been resolved by the Arbitration and Conciliation (Amendment) Act, 2015 which is giving a positive result. Since the amendment, the courts have refused to examine the Section 34 and 48 cases on the merits, act as an appellate authority, or give a wide interpretation to expression 'public policy'. In Venture Global Engineering LLC and Ors v. Tech Mahindra Ltd. and Ors,[42] the Hon'ble Supreme Court held that the grounds specified under Section 34 of the Act are the 'only' grounds on which the court can set aside the awards. While dealing with Section 34 cases the court should not act like an appellate court, they are not supposed to examine the legality of an award on merits of claims by entering into a factual arena.[43] The same approach has been adopted by the judiciary in other cases like Sutlej Construction v. The Union Territory of Chandigarh.[44] Now, the courts are realising that they have to intervene in the arbitral process 'only' in specified conditions and grounds defined by the Act and give some free-way so an arbitration can achieve its intended objectives.

[37] The Arbitration and Conciliation Act, 1996, § 75, No. 26, Acts of Parliament, 1996 (India).
[38] The Arbitration and Conciliation Act, 1996, § 81, No. 26, Acts of Parliament, 1996 (India).
[39] Murlidhar Agarwal and another v. State of U.P. and others, 1974 (2) SCC 472.
[40] Renusagar Power Co. Limited v. General Electric Company, 1994 Supp (1) SCC 644.
[41] ONGC v. Western Geco International Ltd., (2014) SLT 564.
[42] Venture Global Engineering LLC and Ors v. Tech Mahindra Ltd. and Ors, (2018) 1 SCC 656.
[43] Id.
[44] Sutlej Construction v. The Union Territory of Chandigarh, (2017) 14 SCALE 240 (SC).

Medical Negligence and Evolving Judicial Activism

Laxmish Rai[1]

Introduction

Medical negligence has become one of the most serious and debatable issues in the country in the last few decades. The medical profession is one of the noblest profession, not immune to negligence which often results in the death of the patient or permanent/partial disablement or any other unhappiness which has adverse effects on the patient's health. Out of an estimated 52 lakh medical injuries in India, 98,000 people lose their lives because of medical negligence every year. It is a serious issue for the country that 10 people fall victim to medical negligence every minute and more than 11 people die every hour due to medical error in India. It is not a surprise that even the smallest error committed by a doctor have a life-altering impact on the patients.

Medical Jurisprudence deals with legal responsibilities, particularly those arising out of doctorpatient relationships such as Negligence, Rights and Duties of a doctor, Consent, Professional misconduct, and medical ethics. Medical jurisprudence is applying medical knowledge to the legal field to provide justice in civil and criminal cases. It provides key legal guidelines which should be followed by a medical practitioner. As the field grew, it gave immense power to the medical practitioner as they were now playing a very important role by having an expert opinion in the cases. The area of medical jurisprudence is very ancient but with the advent of technology and the reforms being added to the legal system, this branch is always under development.

The legal system in India follows the common law regime originated in England, which comprises statutes and precedents, which form part of the law of the land. The Indian judiciary is very much active when it comes to sensitive topics like medical malpractice and negligence. Over the years Indian judiciary has given progressive interpretation to laws on medical negligence and tried to safeguard the patients along with protecting doctors from vicious claims. Beginning with the efforts of the judiciary to include medical services within the ambit of the consumer protection act to providing directions about doctor's liability and quantum of compensation, the judiciary has tried to fill all the shortcomings of the legislation. The Indian Judiciary relying on the constitution of India strives to ensure that every citizen of India gets "complete justice". Article 142 grants power to the Supreme Court for awarding any decree to do "complete justice". In the last few years, Article 142 has become a gigantic part of the Supreme Court which is invoked several times to decide the case on medical malpractice to do "complete justice".

While going through the judgments that have been passed by the Supreme Court under Article 142, one can found that the Court has readily intervened in most of the complex issues related to the environment, health, and religion where the existing laws were found insufficient for the current scenario. Sabyasachi Mukharji C. J expressed the view that we must do away with the 'childish fiction' that law is not made by the judiciary in C. Ravichandran Iyer v. Justice A. M. Bhattacharjee.[2] The court further stated that the role of the judge is not only to interpret the law but also to lay new norms of law and to mould the law to suit the changing socio-economic scenario to make the ideals enshrined in the Constitution meaningful and a reality. Society expects active judicial roles which formerly were considered exceptional but now routine. The court also went onto say that "law does not operate in a vacuum. It is therefore intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate. It is here that the Judge is called upon to perform an artistic function. He has to inject flesh and blood into the dry skeleton provided by the legislature.

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From the above statement, it is clear that not only constitutional interpretation but also statutes have to be interpreted with the changing times and it is here that the creative role of the judge appears, thus the judge clearly contributes to the process of legal development. The courts must not shy away from discharging their constitutional obligation to protect and enforce the human rights of the citizens and while acting within the bounds of law must always rise to the occasion as 'guardians of the constitution', criticism of judicial activism notwithstanding.

Doctor – Patient Relationship: An Analysis

The relationship between doctors and patients is prima facie a healthy one that does not involve any frictions because it is normally the patients who select the doctor for their illness based on the reputation and skills of a doctor. Besides, when treatment is successful, patients are thankful to the doctor even though they have paid the fee. On the other side, medical professionals too thankful to their patients for the trust and confidence placed by their patients in them. However, this relationship has been commercialized during the past few decades and as a result, patients expect over-the-top treatment for their illnesses from doctors. Patients, being more conscious than before, now consider any side effects or issues in treatment as negligence on the part of their doctors. Similarly, doctors, have found alternative sources for their income, do not provide much attention to their patients and are often accused of showing apathy in the course of treatment. Both these instances added to the increase in unnecessary medico-legal cases being filed against doctors. To control such nuisance and discourage litigant mentality, the Supreme Court has laid down guidelines for the criminal prosecution of medical professionals. These guidelines have resulted in a downward trend in the filing of false medico-legal cases and reduced the harassment of doctors.

Doctor's prosecution can be initiated for various reasons other than negligence or deficiency of service. Statutes such as the Transplantation of Human Organs Act [3] provides for liabilities of doctors who carry out illegal transplantation. However, the Supreme Court has clarified that litigations must not be brought against doctors which are aimed at maligning the reputation of the doctor. The Court has instructed the Central and State governments to frame essential guidelines in consultation with the Medical Council of India to safeguard the medical professionals and prevent malicious litigation. The Court has also held that complaints against medical professionals shall be brought only with some prima facie evidence to support the allegation against them.

Right to Health: Judicial Approach

The right to health of an individual has been cited by the judiciary in various cases. All these cases have contributed to the development of the medico-legal system in India over the years. In Parmananda Katara v. Union of India,[4] it was held by the Supreme Court of India that medical professionals, whether they are working in the public or private sector, have the obligation to provide medical aid to persons who are sick and injured without insisting on completion of legal formalities or procedure established under the Cr.P.C. It recognized that the State is under an obligation to protect life under the Constitution. The Court noted that this obligation is delegated to those who are responsible to provide treatment for saving lives, which includes medical professionals.

Further clarity on right to health was given by the Court in Paschim Banga Khet Mazdoor Samity v. State of W. B, [5] wherein the government hospitals cite the non-availability of beds as a reason for not providing treatment, violate Article 21 of the Constitution. In Kirloskar Brothers Limited. v. Employees State Insurance Corporation,[6] the Court held that workmen also have the fundamental right to health. It further expanded the obligation of the state to ensure the right to health from the State to the employer, making employer responsible to observe the right to health of their workmen.

[3] The Transplantation of Human Organs and Tissues Act, 1994, $ 18, No. 42, Acts of Parliament, 1994 (India).
[4] Pt. ParmanandKatara v. Union of India, AIR 1989 SC 2039.
[5] Paschim Bang KhetMazdoorsamity v. State of West Bengal, (1996) 4 SCC 37.
[6] Kirloskar Brothers Ltd. v. Employees' State Insurance Corporation, (1996) 2 SCC 682.

In the area of medico-legal cases, the law, which is not quite developed in comparison to Western countries, the burden has mostly been on the Courts of the country to lay down guidelines to regulate the course of such cases. The decisions of the Courts in India play a most important role in medico-legal cases as they provide better clarity than existing legislation in medical law. The Court's decisions are based on any existing statute, principles of natural justice and the opinions of experts appointed by the Courts as amicus curiae.

Judicial Activism in the Arena of Medical Negligence: A Case Survey

Dr. Laxman Balkrishna Joshi vs. Dr. Trimbak Bapu Godbole

In this case, [7] the respondent son suffered an injury in his left leg. The accused doctor while putting the plaster used manual traction with excessive force with the help of three men, although such traction is never done under morphia alone but done under proper general anaesthesia. This gave a tremendous shock causing the death of the boy. On these facts, the Supreme Court held that the doctor was liable to pay damages to the parents of the boy.

On appeal filed by the appellant before the Supreme Court, held that when a patient arrives before such a person for treatment, a duty of care is owed to the patient. The duty of care concerns deciding whether to undertake the case, what treatment is to be given and how the treatment is to be administered. The Court held that a breach of even one of the duties could give rise to the institution of medico-legal proceedings by the patient against the medical practitioner.

Indian Medical Association vs. V.P. Shantha

One of the most important judgments concerning medico-legal cases of India came about in the year 1995. Indian Medical Association v. V P Shantha[8] brought the medical profession within the ambit of 'service' as defined in the Consumer Protection Act, 1986. It defined the relationship between patients and medical professionals as contractual. Patients who had sustained injuries during the course of treatment could now sue doctors in 'procedure free consumer protection courts for compensation. The Court held that even though services rendered by medical practitioners are of a personal nature they cannot be treated as contracts of personal service. They are service contracts, under which a doctor too can be sued in Consumer Protection Courts. A 'contract for service' means a contract whereby one party undertakes to render services to another, in which the service provider is not subjected to a detailed direction and control. A 'contract of service' implies a relationship of master and servant which involves an obligation to obey orders in the work to be performed as well as the mode and manner of performance. The Consumer Protection Act will also cover if some people are charged, and some are exempted from charges because of their inability of affording such services will be treated as a consumer under Section 2 (1) (d) of the Act. The Supreme Court observed that medical practice is a profession than an occupation and medical professionals provide a service to the patients and thus they are not immune to the claim from damage on the ground of medical negligence.

Paschim Bengal Khet Mazdoor Samity & Ors. vs. State of Bengal

The duty of care owed to the patient is not only by the doctor or medical practitioner but also by the medical institution or hospital where the patient is undergoing treatment, including Government hospitals.[9] The question addressed by the Court in this case, whether the nonavailability of appropriate facilities for providing treatment to the serious injuries suffered by the petitioner in various State hospitals would amount to infringement of his fundamental right to life. The Court held that the right to life upheld by the Constitution under Article 21 imposes obligations on the State to protect the right to life of all persons. Protection of the right to life includes the preservation of the life of persons. Therefore, the State must do everything in its power to provide adequate medical infrastructure to

[7] Dr. LaxmanBalkrishnaJoshi v. Dr. TrimbakBapuGodbole, AIR1969 SC 128.
[8] Indian Medical Association v. V.P. Shantha, AIR 1996 SC 550.
[9] Paschim Bang KhetMazdoorSamity v. State of West Bengal.,(1996) 4 SCC 37.

treat patients. In this regard, the Court held that denial of timely medical treatment amounted to a violation of an individual's right to life.

Suresh Gupta vs. Government of NCT & Another

In this case,[10] the appellant a doctor by profession accused under Section 304A of IPC of causing the death of his patient. The surgery performed was for removing the patient nasal deformity. The Magistrate in his order opined that the appellant while conducting the operation for removal of the nasal deformity gave incision in a wrong part and due to that blood seeped into the respiratory passage and because of that the patient collapsed and died. The Supreme Court held that from the medical opinions adduced by the prosecution the cause of death was stated to be 'not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage.' The court further held that if this act attributed to the doctor, even if accepted to be true, can be described as a negligent act as there was a lack of care and precaution. But for this act of negligence, he was held liable in a civil case and it cannot be described to be so reckless or grossly negligent as to make him liable in a criminal case. For conviction in a criminal case, negligence and rashness should be of such a high degree which can be described as totally apathetic.

Jacob Mathew VS. State of Punjab & Anr

In Jacob Mathew v State of Punjab & Anr,[11] the Supreme Court thoroughly dealt with the law relating to (i) negligence as a tort (ii) negligence as a tort as well as crime, (iii) negligence by medical professionals, (iv) medical professionals and criminal law, (v) reviewed Indian judicial precedents on criminal negligence and thereafter reached certain conclusions and framed guidelines regarding the prosecution of medical professionals. The complainant father who was admitted to the hospital developed breathing difficulty and called the doctor for a diagnosis. It took more than 25 minutes for the doctor to arrive. The doctor instructed the provision of oxygen to the patient through an oxygen mask. The patient, however, continued to experience discomfort and tried to get up from his bed but was restrained by the staff. It was found that the oxygen cylinder was empty and before arranging a different oxygen cylinder, the patient died due to his inability to breathe.

FIR filed against the doctor accusing of criminal negligence and the doctor approached the High Court for quashing the FIR but the same was rejected. The appellant then approached the Supreme Court and argued that his arrest was arbitrary and there was no instance of criminal negligence on his part in providing treatment to the patient. In its final judgment, the Supreme Court observed that:

"A private complaint shall not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a probable opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigation officer should obtain an independent and competent medical opinion preferably from a doctor in government service, who can normally be expected to give an unbiased and impartial opinion."12[12]

With the aforesaid observations, the Court ruled that unless the arrest of the medical professional is necessary to collect evidence or for further investigation or unless the investigating officer opines that the medical professional will not make himself available for prosecution, arrest of the medical professional cannot be made. This case demonstrates the procedure need to be followed in cases where medical professionals are accused of criminal negligence.

Poonam Verma VS.Ashwin Patel & ORS.

In this case,[13] a registered medical practitioner entitled to practice Homoeopathy only prescribed an allopathic medicine to the patient. The patient died and the wife of the deceased filed case for the death of her husband on the ground that the doctor was entitled to practice

[10] Suresh Gupta v. Government of NCT., (2004) 6 SCC 422.
[11] Jacob Mathew v. State of Punjab., (2005) 6 SCC 1.
[12] Id.
[13] PoonamVermav.Ashwin Patel, (1996) 4 SCC 332.

homoeopathy only. In an appeal before the Supreme Court, the Court, in its assessment of the facts of the case, addressed the question of negligence and its manifestations. It observed that "negligence may be active negligence, collateral negligence, concurrent negligence, continued negligence, gross negligence, hazardous negligence, criminal negligence, comparative negligence, active and passive negligence, willful or reckless negligence or Negligence per se."[14] The Court held that where a person is guilty of negligence per se, there is no need for any further proof. The judgment identified that the act of the respondent who was a qualified homoeopathy doctor, practicing and prescribing allopathic medicine amounts to negligence per se. No further evidence required to be produced by the appellant to establish the respondent's negligence.

V. Kishan Rao VS. Nikhil Super Speciality Hospital & Another

The principle of 'res ipsa loquitur' being applied in cases of medical negligence was upheld in V. KishanRao v. Nikhil Super Speciality Hospital & Another,[15] wherein the appellant got his wife admitted as she was suffering from fever. When the treatment did not have any effect on the appellant's wife, he shifted her to a different hospital, where she died within hours. On appeal before the Supreme Court, it was observed that the patient was shifted from the respondent hospital to another hospital in a 'clinically dead' condition. The Court made an important note that no expert evidence was needed to prove medical negligence. The principle of res ipsa loquitur will operate, which means that the complainant will not have to prove the negligence where the 'res' (thing) proves it. Instead, it is for the respondent to prove that he/she had acted reasonably and taken sufficient care to negate the allegation of negligence.[16]

Balram Prasad VS. Kunal Saha & Ors

Balram Prasad v. Kunal Saha & Ors,[17] the respondent along with his wife Anuradha Saha, came from the USA on a visit to their home town. The respondent, a doctor himself, noticed that his wife had a sore throat and low-grade temperature. Within no time, Anuradha's condition became worse and she continued suffering from high fever. On consultation with the opposite party doctor again, it was found that Anuradha was suffering from Angio-neurotic Oedema with Allergic Vasculitis. She was administered depomedrol as a treatment for the same. However, Anuradha's condition had deteriorated to a point where no treatment could save her, and she died after a few days.

The Supreme Court made an important observation that there was an increasing trend of medicolegal cases concerning negligence on the part of doctors, meaning that there was a need for strict rules in the conduct of doctors and appropriate penalties for negligent treatment. The Court stated that the compensation, which is the highest amount awarded in a medico-legal case in India, should act as a "deterrent and a reminder" to those doctors and hospitals who do not take their responsibility towards patients seriously.[18] This is important because it was the first time the Court awarded compensation as a deterrent to other medical practitioners. The case also saw the first time when the potential income of the deceased was calculated up to 30 years in deciding the compensation instead of the normal practice of taking account of 10-18 years. Thus, the Kunal Saha case continues to be a landmark case in the medico-legal arena as it sets new standards of determination of compensation for medical negligence.

Paramanand Katara VS. Union of India & Ors

A report titled 'Law helps the injured to die' published by the Hindustan Times told the story of a hit and run case where the victim was denied treatment by the nearest hospital for the reason that, they are not authorized to handle medico-legal cases and asked to approach another hospital situated 20 km away. The petitioner, who came across the article, filed a writ petition before the Supreme Court. The petition re-

[14] Id. para40.
[15] V. KishanRao v. Nikhil Super Speciality Hospital, (2010) 5 SCC 513.
[16] Id. para47.
[17] Balram Prasad v. KunalSaha, (2014) 1 SCC 384.
[18] Id. para149.

quested the issuance of an order to the Union of India to assure spontaneous medical aid to those injured in an accident.

The Supreme Court held that the right to life was predominant and would supersede medical and legal formalities in the case of medical help during an emergency. There can be no second opinion that the preservation of human life is of paramount importance. That is so because once life is lost, the status quo ante cannot be restored as resurrection is beyond the capacity of man. There are no provisions in the Indian Penal Code, Criminal Procedure Code, Motor Vehicles Act etc. which prevent doctors from attending seriously injured persons and accident case. Serving individuals during a medical emergency is the duty of the public as well as the doctors and legislators. No legislation can block a person's right to receive medical treatment under Article 21 and no doctor can be subjected to harassment in the name of the protocol. [19]

Samira Kohli VS. Dr. Prabha Manchanda & Ors

In this case,[20] the Appellant visited the Respondent clinic as she was suffering from prolonged menstrual bleeding. Ultrasound was done and thereafter laparoscopy test as directed. Appellant signatures were taken in all documents including consent for surgery. During the laparoscopy test, the Appellant fell unconscious. Subsequently, the respondent's assistant rushed out of the operation theatre and asked Appellant's mother to sign the consent form for hysterectomy under general anaesthesia, and thereby her reproductive organs were removed.

The Apex Court held that consent given for diagnostic and operative laparoscopy and "laparotomy if needed" does not amount to consent for a total hysterectomy with bilateral salpingo-oophorectomy. The appellant was neither a minor nor incapacitated or mentally challenged. As the patient was a competent adult and of sound mind, there was no question of someone else giving consent on her behalf. The appellant was temporarily unconscious due to anaesthesia, and as there was no emergency. The respondent could have waited until the appellant regained consciousness and gave proper consent. The question of taking the patient's mother's consent does not arise in the absence of an emergency. Consent given by her mother is not valid or real consent. The question was not about the correctness of the decision to remove reproductive organs but failure to obtain consent for removal of the reproductive organs as the surgery was performed without taking consent amounts to an unauthorized invasion and interference with the appellant's body. The court believed that it is the duty of the state to safeguard the right to life of every person. Further, there is no common law in India for consent and Indian courts have to rely on the Indian Contract Act.

Analysis of Judgments

The medical profession undoubtedly a noble profession and medical professionals occupy responsible positions in society.[21] However, both civil, as well as criminal legal proceedings, can be initiated against medical professionals for acting negligently. The above-cited cases have produced path-breaking judgments and set the standards which doctors, patients, hospitals, lawyers and courts must follow during the hearing of medico-legal cases. However, to establish an appropriate legal regime that addresses medico-legal cases, it is necessary to analyze the judgments and identify those aspects of the judgments that are truly novel and pioneering. An analysis of the judgments brings about certain important principles, which are as follows:

1. All doctors owe a duty of care to their patients. Hence, doctors shall be held liable for negligence when there is a breach of duty of care.
2. Negligence is a subjective issue and should be assessed on a case to case basis. To prove negligence, it must be shown that a medical professional, who is expected to be working skillfully in providing his medical treatment and owes a

[19] Pt. ParmanandKatara v. Union of India, AIR 1989 SC 2039.
[20] Samira Kohli v. Dr.PrabhaManchanda, AIR 2008 SC 138.
[21] Meera T, Medicolegal cases: What every doctor should know, 30 J. MED SOC 132, 134 (2016).

duty of care to persons who depend on his/her skills, causes loss and suffering by exercising his skill without reasonable care.

3. Though the medical profession is a skilled profession and involves a great amount of risk, the standard of care is generally higher and should be taken into consideration in medico-legal cases.
4. Negligence can arise not only from positive acts of providing incorrect treatment to patients but also from negative acts such as not maintaining the patient's case file, not informing the patient about consequences of risky medical procedures and not entertaining the patient's request to receive a second opinion.[22]
5. Where a doctor provides free medical treatment to all patients, his/her treatment cannot be classified as 'service' as defined under the Consumer Protection Act. However, where a doctor provides free service to a certain class of patients but charges other patients, such doctors shall be classified as 'service' as defined under the Act.
6. Misrepresentation by doctors regarding their qualification in a particular field of medicine also attracts the charge of negligence along with other criminal charges.
7. A medical professional cannot be held liable where he/she has performed his/her duty with utmost care taking all necessary precaution regardless of the outcome of the treatment.
8. Medical professionals should not be unnecessarily harassed or subjected to unwarranted treatment and threats of criminal prosecution unless necessary. The opinion must be sought by the investigating officer from a doctor working in a government hospital and unless there is a possibility that the accused will not turn up during prosecution, he/she should not be arrested.
9. As per the Latin maxim "qui facit per alium facit per se", meaning that anyone who acts through another does the act himself, hospitals, nursing homes and even the State can be held vicariously liable for the negligent acts of doctors employed by them.
10. Criminal negligence requires a higher standard of negligence on part of medical professionals in medico-legal cases. The medical professional should have acted with 'gross negligence or 'recklessness' to such an extent that his behaviour can be considered a threat to society.
11. Where the facts of the case demonstrate that there was negligence per se on behalf of the doctor, no further evidence was required to be produced to prove the medical professional's negligence.
12. The burden of proof generally lies on the complainant. However, where the maxim 'res ipsa loquitur' is applicable, the burden of proof shifts on the opposite party to demonstrate that there was no negligence.
13. Compensation awarded in medico-legal cases can not only be ordinary in nature but also exemplary to act as a deterrent or reminder to medical professionals to take their profession seriously.

The aforesaid principles evolved from the judgments passed by the Supreme Court of India prove that the medico-legal regime of laws has been developed to a great extent by the judiciary. This has mostly been due to the lack of attention that the medico-legal regime has received from the legislature. The Courts have often been forced to establish a law about medico-legal cases.

Conclusion

In conclusion, the decisions provide a detailed account of the method in which the law established by Courts in medico-legal cases has evolved over the years. The judiciary in India has been the pioneer in the establishment of medico-legal law and procedure. This is demonstrated by the judgments in the various cases analyzed in this article, all of which address different aspects and issues which arise in medico-legal

[22] Malay Kumar Gangulyv.Sukumar Mukherjee, (2009) 9 SCC 219.

cases. The Courts have considered aspects such as 'res ipsa loquitur', criminal negligence, negligence per se, vicarious liability and exemplary damages in several cases and provided sufficient clarity on their applicability in medico-legal cases. The judgments of the Courts have not been altered by Acts of Parliament and have continued to be applicable.

The analysis of the judgments provides insight into the vital aspects of medical and procedural law that have been considered by Courts while deciding on the outcome of medico-legal cases. This is followed by a scrutiny of the judgments which outlines the limitations that persist despite the revolutionary decisions made by Courts. It is important to note that several issues have not been resolved by Courts and many others have been created due to inconsistency between judgments passed by Courts. Therefore, the ideal remedy to establish a uniform medico-legal regime would be through an Act of Parliament which taken account of the various important judgments passed by Courts as well as the limitations that are prevalent in the current medicolegal regime.