ROLE OF NON-LEGAL FACTS IN JUDICIAL PROCESS

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Abstract

There are two theories of judging, legal formalism, that is judging is a rule bound activity and legal realism, for the adherents of the ideology, apart from legal rules, extra legal social fact, that is extralegal principles, policies, standards, statements, prejudices, preferences and morality, play an important role in decision making. Some of the realists even believe that judges use legal rules not to decide but to justify their decisions. In this paper we examine the position of Indian Judiciary at several levels: to what extent, if at all, social facts play a role in decision making process in India.

There are broadly speaking two theories of judging, legal formalism and legal realism. For legal formalists judging is primarily a rule bound activity, whereas for realists formal legal rules alone do not determine outcome of a case. However between the two extremes of judging as mere rule bound activity and judging substantially as non-rule bound activity, there are various sub divisions between these two extremes. Neither legal formalists define judging as a syllogism machine nor do realists maintain that legal rules do not matter at all. Our position in this paper is that though legal rules set an undefined and uncertain limit on judges' freedom of judging, yet to an extent non legal facts influence decision of a judge. Do judges use legal rules to decide cases or merely to justify them? The problem revolves between application of law to facts of a case or predominant use of extra-legal facts to do so. More often than not judges do not discuss extra legal facts, the real basis of decision, to avoid the positivists' charge of unethical judging. Do judges create rules rather than implement them? But there are considerable differences between formalists as well between realists. Neither of them is a uniform category. The paper is divided between two parts: first deals with theoretical position of formalists and realists and the second with the actual decisions of the Indian courts to discuss the role of extra legal facts in Indian decision making. However it must be made clear that in this paper we are not concerned with use of illegal and constitutionally impermissible extra legal factors such as illegal gratification, bias on grounds of personal likes and dislikes of a particular religion, race, cast, region and other similar facts. We are concerned only with legitimate use of extra legal facts in judicial process. For the purposes of this paper extra-legal facts include and mean extra-legal principles, policies, standards, statements, prejudices, preferences, morality and social facts.

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H.L.A. Hart, one of the better known positivists, gave several reasons why law is not capable of abstract interpretation: words do not have a meaning except in a context. Rules are to some extent indeterminate in their application, due to open texture of language, the necessity of exercising judgement to determine what fact situation fall under the specification of a rule and plurality of aims underlying in a rule.[1]

If a municipal law provides that "No vehicle should be driven in a park", does it include a child's tricycle, a perambulator, a truck carrying saplings to be planted in the park or a tractor used for re-laying a lawn in the park.[2] As words have meaning only in a context, judge will have to find out the contextual meaning of the word 'vehicle'. When rules do not provide appropriate legal answer to a legal question, there is a gap and judge can use discretion to fill in the gap. Because of indeterminacy in application of rules and inadequacy of rules to a specific task, it is quite possible for a judge to use extra-legal facts, though Hart never conceded such a role for extra legal facts.

On the other hand Ronald Dworkin, further limited the role of extra legal facts in judicial process: it has to be so, Dworkin was extremely defensive as western liberal mega narrative, its principled democracies, became questioned in the context of Vietnam war, charges of corruption in public life and assertion by critical legal studies that liberal institutions, principles and idea of rule of law needed clarification[3]. Dworkin was different from Hart in as much as for Dworkin there must be authoritative legal source of rights: when a judge decides rights of parties, it cannot be discretion. In hard cases, judges "make use of (judicial) standards that do not function as rules, but operate differently as principles, policies and other sort of standards.[4] The relevant point is discretion to decide rights under which authority, which standard[5]? He further narrowed down the scope of discretion: it is constrained by constitutionalism, constitutional practices[6], authored by community personified expressed as justice, fairness, and procedural due process;[7] also designated as master principle of western liberalism. As we have shown elsewhere[8] judicial precedents, principles, standards and doctrines are evolved in a continuous process; their scope may be narrowed down or widened according to changing situation; they are so broad generalisations as to fit

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1 H.L.A. Hart., *The Concept of Law* 126-129: (Oxford Clarendon Press, 1994).

2 *Ibid* p.123.

3 Wayne Morrison, *From Greeks to Post Modernism*, 415-16 (Cavendish Publishing, London 2000)

4 R. Dworkin, *Taking Rights Seriously,* 22. (Universal Law Publishing, New Delhi, 1999).

5 *Id.* p. 31.

6 *Supra* note 3 at 425.

7 R. Dworkin, *Law's Empire*, 225 (Harvard University Press, 1986).

8 Vinod Dixit, "Role of Judicial Standards in Judicial Process" 9 *Journal of the Delhi Judicial Academy*, 1-14 (2016).

into different situations; depending on exigency of a situation they may or may not be applied. They often are contradictory and use of all of them, not obligatory[9]. It may also safely be stated that rules of statutory interpretation also help curtail judicial freedom to use extra-legal facts. However even precedents, rules of interpretation, and highly generalised master principle of constitutionalism can limit but cannot eliminate use of extra legal facts in judicial process.

If any of predecessor jurists influenced Dworkin most it was Lon Fuller, a revived natural lawyer, for whom law cannot be separated from morality. In order to make his paradigm compatible with fullest possible liberty, Fuller sets out the goal of legal order in highly generalised terms, at the top morality of aspiration, the morality of good life or excellence and at the base the morality of duty, the basic rule without which an ordered society is impossible. Morality of aspiration and of duty are set out to remove irrationality from the order.[10] Fuller's morality seems to be inspiration of Dworkin's constitutionalism and master principle. Fuller never attempted to eliminate extra legal facts from judicial process. Morality of aspiration and duty "lays down the basic rule without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail in its mark."[11]

Essence of American realism consists in belief that judicial decisions are not fully based only on law. Extra legal facts, ideologies, principles, policies, standards, statements, prejudices, preferences, morality and social facts play an important role in decision making. The birth of legal realism is credited to a US judge who never called himself a realist. He was Oliver Wendell Homes, Junior who famously declared "the life of law has not been logic; it has been experience."[12] This individualistic experience differs from person to person and is a source of strength as well as of weakness of judicial process. It is strength because it brings in dynamism in judicial process and is weakness because it brings uncertainty. In judicial precedent making, policy preferences and personal experience of judges matter more and general propositions do not decide concrete cases. On the other hand Judge Benjamin Nathan Cardozo was more modest than Homes. In his famous book, 'The Nature of Judicial Process',[13] he observed that in most cases there are clear legal principles but not clear legal answers: in such cases judge should promote social ends but admitted that in most cases he substitutes his own views for that of the community. For him legal principles were not unimportant.

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9 *Id* at p. 3.

10 *Supra* note 3 at 386-87.

11 Lon Fuller *Morality of Law*, 5-6 (Yale University Press, New Haven, 1969).

12 Jr. O.W Homes, *The Common Law*, 1 (Dover Publications, New York, 1991).

13 N.B. Cardozo, *The Nature of Judicial Process*, (Yale University Press,New Haven, 1921).

Jerome Frank was a U.S. judge who famously declared in his 'Law and Modern Mind' published in 1930 that "only a limited degree of legal certainty can be attained. The current demand for exactness and predictability in law is incapable of satisfaction because a greater degree of legal finality is sought than is procurable, desirable or necessary."[14] Frank also argued that judicial decisions were more influenced by psychological factors than by objective legal premises alone[15]. He along with other realists was ridiculed by saying how a judge decides a case depends on what "the judge had for breakfast." Felix Frankfurter J. a former judge of the U.S. Supreme Court was also one of the important realists and in a significant way disagreed with legal formalism. He said, "It would be a narrow conception of jurisprudence to confine the notion of laws to what is written in the statute book and to disregard the gloss which life has written upon it."[16] As every one experiences a different life, his gloss is also bound to be different. This gloss is responsible for justice, fairness and creativeness of judicial process but paradoxically for its uncertainty as well.

Pound was not as radical as Homes and Frank were; but he kept himself away from the formalists; he did not exclusively rely on logic, as a matter of fact logic plays a minor role in his sociological discourse. He argued that courts should develop law by relying on public policy preferences and assaulted the notion of mechanical jurisprudence.[17] Karl Llewellyn was perhaps the most influential realist. He scoffed at the idea that judging is a rule bound activity, where a judge proceeds downward from legal rules to the facts of the case. With a decision already made, the judge has sifted through the 'facts' again, and picked a few which he puts forward as essential- and whose legal bearing he then proceed to expand. For Llewellyn the formal rules-"the paper rules" or "pretty playthings"- have little effect on what judges actually do. He, however, did not say that there is no rational element in law: but at the same time he convincingly demonstrated ambivalence in legal rules, especially in the rules of interpretation, maxims etc. For every canon of interpretation that said one thing, there was a 'duelling' canon that said just the opposite. However in his later writings he adopted a moderate position. In "The Common Law Traditions" judges do follow accepted doctrinal techniques; they also want approval of their legal audience. [18]

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14 Jerome Frank, *Law and Modern Mind*, 12 (Transaction Publishers, New Brunswick and London, 2009).

15 Jerome Frank, *Law and Modern Mind*, 270-77 (Anchor Books, New York, 1963).

16 *Nashville, Chattanooga & St. Louis Railway* v. *Browning*, 310 U.S. 362, 369 (1940).

17 VitaliusTumonis, Legal Realism and Judicial Decision making, 19 *Jurisprudencija/Jurisprudence*, 1361-1382 *available at* www.mruni.cu/lt/mokslo_darbai/jurisprudencija (last visited an Feb. 12, 2018).

18 *Id.* at 1372-73.

We shall examine the role of extra legal facts and ideologies in judicial process. Law regulates society in its different aspects, interpersonal and institutional social relations. Therefore adjudicators have to apply and interpret law with reference to society, necessitating use of social ideologies and facts in judicial process. Judicial decisions are based on law and extra legal ideas and facts, though more often than not, decisions appear to have been given only on legal considerations. It is because of the application of alternative extra legal ideologies and facts by different courts, decisions and findings of different courts in judicial hierarchy are different though the facts and law are the same. These extra legal ideologies and facts can be divided into several categories such as religious, political, cultural, and social and those of the state and many more.

Extra-legal facts and ideas, from another point of view, may be divided into three categories, unacceptable, acceptable and inevitable. Ideologies based on monetary considerations, personal relations religious and caste considerations are unacceptable, those based on honesty, fairness, impartiality are acceptable as well desirable. But in this paper we are not concerned with neither of them, but primarily with inevitable extra-legal ideologies, they are inevitable because without them it is not possible to decide: these extra legal ideologies are distinguishing referents between sterile on the one hand and humane and dynamic, or sometimes even pervert judicial process on the other. What ideology a particular judge will apply in a particular case would differ from person to person and may depend on objective legal cultural considerations as well as on his subjective world view of the legal and social system. The extra legal ideology championed by the judge may be overt or covert, or even disguised, moral or immoral, just or unjust. It often is disguised when the judge is conscious that it is not acceptable to the dominant morality of the society in which he operates.

We would try to understand the importance of extra legal ideologies with reference to a hypothetical case. In a swimming competition in a particular event a swimmer was declared winner, but the decision in favour of the winning winner was challenged by the swimmer who stood second, alleging that he was declared winner in violation of the rules of the game. Immediately an appellate Board was set to decide on the challenge. After heated discussion among the sport officials, lasting more than two hours, the spokesperson of the Board declared that the winner of the event was disqualified as he was declared winner in violation of a rule and in his place the person who stood second was declared winner of the event. The relevant rule provided that, "the swimmer who first touches the wall of the pool with both the hands will be declared winner.' The spokes person further stated that the disqualified winner had touched the wall of the pool only with one hand and therefore he was disqualified. But only difficulty was the disqualified winner had only one hand, he lost the other hand in a road accident. The spokes person regretted the decision of disqualification but said the rule is rule and it has to be adhered to till it is changed.

It may appear on the face of it that the decision to disqualify is ideological neutral but even literal obedience may not be what it appears to be. There may be two contradictory ideologies relevant to this illustration. There are persons who believe that there are different sports for able bodied persons and differently able. Differently able persons should not participate in the games meant for able bodied persons. There are persons who are convinced that differently able persons are actually disabled persons and may have contempt in their subconscious mind against their assumed disability. But the difficulty with these persons is that they cannot express their contempt openly. On the other hand there are people who consider differently able as normal people and proud of them if perform well despite the disadvantage. Protagonists of the first view are likely to give literal interpretation to the impugned rule as they cannot openly say that they are not willing to concede equal rights to the differently able persons. (There may be judges who have contempt for persons belonging to certain caste and a certain religious minority but cannot say so it openly. We know that even the most corrupt person publicly abide by honesty and not by dishonesty, which he really believes in.) On the other hand the protagonists of the second view would prefer to give a purposive interpretation to the rule: but the interpretation must logically justify the different interpretation as the judge is not a legislator he cannot get out of the trappings of the language of the rule. Notwithstanding the use of extra legal facts a judge cannot go beyond the limits set out by the rules. He may do it in the following ways. (a) The word 'both', used in the rule is inclusive, the legislator has not used the word 'two' which is enumerative. 'Both' contextually would mean all the hands one has. The disqualified swimmer's one hand is all the hands he has. (b) One of the concepts of inner morality developed by Professor Lon Fuller is 'Law must provide rules that humans are capable of fulfilling'.[19] As the disqualified swimmer has only one hand he cannot fulfil the requirement of the rule. Do not disqualify him on grounds that he has only one hand; it would amount to asking him to do the impossible.

POLITICAL IDEOLOGIES OF STATE

More often than not the core ideology of state and main stream society influences the functioning of the judiciary as well. Since independence to the present day in term of the ideology of the state, we can divide the period in two segments: pre-1990 and post 1990. In terms of the structure and function of the state pre-1990 period's ideology was socialism of an uncertain variety; it was a mix of state capitalism, distributive justice, welfare state and poverty eradication programmes. During this period a number of laws for social upliftment of poorer and marginalised sections to assimilate them in main stream society, such as the Protections of Civil Rights Act, Scheduled Caste and

19 Lon Fuller, *The Morality of Law*, (Yale University Press, New Haven, Connecticut: 1964).

Scheduled Tribes (Prevention of Atrocities) Act, Bonded Labour System (Abolition) Act, various Debt Relief Acts were passed, legal aid to the poor was introduced and Gharibi Hatao programme was launched. Judicial response to state socialism was Public Interest Litigation (P.I.L.). Most of the cases under P.I.L. jurisdiction in the pre-1990 period were related to the problems of the poor. Different aspects of the problems of the poor were addressed by courts. From addressing the sufferings of the under trials in *Hussainara Khatoon*[20], to violence against the prisoners in jails in *Sunil Batra* v. *Delhi Administration*[21], to sufferings of poorer sections because of inefficiency of the local bodies in *Municipal corporation Ratlam* v. *Vardichand*[22], to protection of women in police lock up in *Shiela Barse* v. *state of Maharashtra*[23], to insensitivity of the state in not releasing a prisoner even after acquittal in *Rudul Sah* v. *State of Bihar*[24], to inhuman conditions in which the bonded labour live in *Bandhua Mukti Morcha* v. *Union of India*[25]and in many such cases the courts gave relief to the wretched of India.

However after 1990 gradually the ideology of the Indian state was changed from socialism to neo-individualism: the welfare state gave way to the night watchman state: there was a systematic privatisation of welfare services like education and health. The gharibi hatao policy, without saying so, graduated to gharib hatao. Now the emphasis is on globalisation and development which of course is jobless. Judiciary could not remain uninfluenced by this shift: as a matter of fact there always is unity between all the three branches of state as far as main stream core ideology of state is concerned. Gradually the judiciary also began subscribing to the neo-individualistic ideology if not fully at least partially. In course of time emphasis of P.I.L. has shifted from the problems of the poor to the problems of the middle classes. For the night watchman state middle classes are crucially important: without a robust middle class the night watchman state cannot function. Middle classes are the investors and the consumers. Without consumption and investment, the corporates, the sustaining force of the economy, cannot survive. After 1990 the centrality of P.I.L. has shifted from problems of the poor to the environmental and developmental concerns of the middle classes. We do not mean to say that degradation of environment and non-development does not affect the poor but their priority is the fulfilment of basic needs that is roti, kapada

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20 (1980) 1 SCC 81.
21 (1980) 3 SCC 488.
22 (1980) 4 SCC 162.
23 (1983) 2 SCC 96.
24 (1983) 4 SCC 14.
25 (1984) 3 SCC 161.

aur makaan, and not environment and development, as the poor are the last to receive, or even doubtful receivers of, the benefits of development: sometimes development may also result in underdevelopment of the poor.[26] Environment and development are the priority problems of the middle classes, whose basic needs are almost satisfied. *Narmada Bachao Andolan* v. *Union of India*[27] is a classic case where developmental concerns of the kissans and urban people were given priority over basic needs (may be basic rights from another point of view) of forest dwellers not to be uprooted from their forest habitats. Again in *M.C.Mehta* v. *Union of India*[28], popularly known as Taj Trapezium case, environmental concerns (from another angle they are developmental concerns) were given priority over the concerns of livelihood of labour. *M.C. Mehta* v. *Union of India*[29] is a case on prevention of air pollution, but the case is silent about those who were rendered unemployed due to the closure (it is notoriously well known that in stone queries either the poorest of the poor or bonded labour are employed). The Court vehemently criticised a local body and the Pollution Control Board on their failure to control pollution in *M.C. Mehta* v. *Union of India*[30], popularly known as Ganga Pollution case. Equally important is *M.C. Mehta* v. *Union of India*[31] in which vehicular pollution in Delhi was sought to be controlled.

If another twist is given to evolution of environmental law, in and after 1990's, it may mean prioritising the agenda of laissez faire state, for which interest of commercial corporations, expressed as developmental concerns, often at the cost of the poor and even the environmental needs of the middle classes but projected as the interest of all. Our higher judiciary also seems to be committed to the core ideology of the state. Increasingly developmental issues trump environmental issues, not to speak of the issues of the poor. It would be better to begin with the doctrinaire definition of sustainable development given by the Supreme Court in *Vellore Citizen Welfare Forum* v. *Union of India*[32]. The Court observed that the government and statutory authorities must anticipate, prevent and attack the causes of environmental degradation. When there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. The Court further stated that the onus of proof is on the actor or developer to show

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26 Paul A. Baran, *Political Economy of Growth* (Monthly Review Press, U.S, 1989).

27 A.I.R. 2000 SC 3751.

28 A.I.R. 1997 SC 734

29 (1992) 3 SCC 256

30 A.I.R. 1988 SC 1115

31 Writ Petition (Civil) no.13029 of 1985, (1998) 6 SCC60 and (1999) 6 SCC 12

32 AIR1996 SC 42

that his action is environmentally benign. In the absence of adequate information lean in favour of environmental protection by refusing rather than permitting activities likely to be detrimental to environment.

However, in the interest of development the definition finds conformity, more often than not in its violation. We would discuss only one case, *Tehri Bandh Virodhi Sangarsh Samiti and others* v. *The State of U.P. and other*[33] to prove the point. The petitioners alleged that (a) in preparing the design of the project safety measures have not been taken into consideration as the site of the dam was prone to earthquakes, (b) the proposed dam would not be able to withstand an earthquake of the magnitude of 8+ on the rector scale and (c) the government did not apply its mind in the giving environmental clearance to the project.

The facts of this case clearly show the super ordinary efforts on the part of the Union of India to make it sustainable in as much as it kept on referring the matter to one committee of experts after another till it got approval of the project. First, the Environmental Appraisal Committee of the Ministry of Environment and Forest, after taking into consideration the ecological seismic settings, consequent risks and hazards, ecological and social impacts, came to the unanimous conclusion that the dam did not merit clearance. Secondly, the Committee of Secretaries of the government of India rejected the report of the Appraisal Committee on grounds that it should have confined itself only to environmental consideration (and perhaps not social and seismological) and referred the matter to another expert Committee. Thirdly, the High Level Committee reported after considering all safety aspects that the design of the dam was safe. Dr. V.K. Gaur, a member of this Committee, though initially agreed with the report, later sent a note of dissent questioning the conclusion of the Committee on safety aspects. Fourthly, the Committee of the Secretaries referred the report along with the dissent of Dr. Gaur to Prof. Jai Krishna, an expert of international repute (of which discipline, the judgment is silent). Finally, when Prof. Jai Krishna reported that the project was safe, green signal was given for the construction of the project. The court dismissed the petition on grounds that (a) the court was not an expert on the technical matters and (b) the opinion of the expert Committees appointed by government must be accepted, notwithstanding the petitioners objection that Prof. Jai Krishna, not being an expert of seismology, was not competent to say that the design of the dam was safe against earthquakes and notwithstanding that the opinion of Prof. James M. Brune, a Seismologist, relied upon by the petitioners, was different. The court in this case not only did not follow the *Vellore Citizen Welfare Forum case*, but provided much-needed legitimacy to the controversial governmental project aimed at development and this made the project sustainable.

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33 (1992) Supl (1) SCC 44

INSTITUTIONAL CULTURAL CONTEXT

Because of the change in extra-legal ideology, a number of constitutional provisions have undergone many interpretative variations. This primarily was because of difference in the ideology of the earlier Supreme Court judges and that of the later ones. Most of the early Supreme Court judges came from the Federal Court. These judges were trained in legal positivism the then dominant English jurisprudence, influenced by John Austin, John Salmond and H.A.L.Hart. These judges, following English tradition, were convinced that legislative will is inviolable: legislature best knows the needs and will of the people. Later judges began to become juridical activist: relatively stagnant colonial society of pre-1947 had to develop after independence, necessitating judiciary to adopt a more liberal constitutional interpretation. Another reason for becoming liberal interpreters may be the emergence of weak coalition central governments and post emergency and post *A.D.M. Jabalpur* v. *S.S.Shukla*[34] populist judicial activism.

In consequence Article 21 underwent massive interpretative changes. In A. *K. Gopalan* v. *State of Madras*[35] of 1950, the Supreme Court, taking a narrow view of the Article, refused to consider if the procedure established by law suffered from any deficiencies. It was held in Gopalan's case that the contents of Articles 19 (1) (d) and 21 are not identical and they proceed on different principles. Fortunately, three decades later, it took a 180 degree turn on this issue in the *Maneka Gandhi* v. *Union of India*[36] case of 1978 and held that procedure must also be fair.

In addition to the meaning of procedure, the meaning of 'life' and 'personal liberty' also underwent changes. The court held in *In re Sant Ram,*[37] that life does not include right to livelihood. From this 1960 case the Court gradually moved to more expanded and liberal meaning of 'life' and 'personal liberty'. 'Life' in Article 21 includes right to fair trial as held in *Zahira Sheikh* v. *State of Gujrat*[38]*,* right to livelihood in *Board of Trustees of Port Of Bombay* v. *Dilipkumar Raghuvendranath Nadkarni*[39] and right against sexual harassment at workplace in *Vishakha* v. *State of Rajasthan.*[40]

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34 1976 AIR SC 1207, 1976 SCR 172
35 AIR 1951 SC 27
36 (1978) 1 SCC248
37 A.I.R.1960 SC932
38 AIR 1996 SC 1234
39 (1983)1 SCC124
40 (1997) 6SCC241

JUDUCIARY AND GOVERNMENT

Though there is unity of state power between all the organs of the state as far as the core ideology of the state is concerned: there is also competition, for extracting more powers, between executive and legislature on the one hand and the Judiciary on the other. Whenever the Central government is weak, balance of power tilts in favour of judiciary, on the other hand when central government is stronger balance tilts in its favour. It may partly also depend on prevalent contemporary legal culture. We will try to elaborate this point with reference to articles 13 and 124.

When the validity of the Constitution (First Amendment) Act 1951, was challenged on grounds that the amendment has the effect of abridging the fundamental rights, the Supreme Court rejected the contention in *Shankari Prasad Singh Deo* v. *Union of India*[41], the Court rejected the contention holding the 'law' under Article 13 (2) does not include a constitutional amendment. The same interpretation was followed in *Sajjan Singh* v. *State of Rajasthan*[42]. But two years after Sajjan Singh, the Supreme Court by a majority 6:5 in *Golak Nath* v. *Union of India*[43] held that the word 'law' in Article 13 (2) included amendment to the Constitution and consequently if an amendment abridges or takes away a fundamental right, the Amendment Act would be ultra vires the Constitution. However in *Kesavananda Bharati* v. *State of Kerala*[44] the Court overruled Golak Nath and held that the provisions affecting the basic structure of the Constitution could not be amended. There seems to be a pattern in these judgements. Till 1965 the interpretations were positivistic, but gradually the Court became more liberal and activist. All this started happening, after India was humiliated by China in 1962 which resulted in weakening of the central government and the death of Nehru and demystification of the aura of the Indian National Congress, and in course of time led to the era of coalition central governments. Weak governments continued in varying degree till 2014, when a very assertive government with a clear legislative majority assumed power. They began challenging the Judiciary and asserted that the Executive must have primacy in judicial appointments.

The Supreme Court also expanded its power through reinterpretation of Article 124 (2) of the Constitution. This article as it provided that the Judges of the Supreme Court and high courts shall be appointed by the President of India after consulting certain judges as required under the article. In 1982, the matter of appointment of High Court judges came before the Supreme Court in *S.P. Gupta* v. *Union of India*[45] The

41 AIR 1951 SC 458
42 AIR 1965 SC 845
43 AIR 1967 SC 1643
44 AIR 1973 SC 1461
45 1981 Suppl. SCC 87

main question considered by the court was: of the various functionaries participating in the process of appointment of a High Court judge whose opinion amongst the various participants should have primacy in the process of selection? The majority took the view that the opinion of the Chief Justice of India (and that of the Chief Justice of a High Court) were merely consultative, and that the power of appointment resides solely and exclusively in the Central Government and that the Central Government could override the opinions given by the Constitutional functionaries. But later on the Court gave a different interpretation of the article. The matter once again came up for consideration before a 9 Judge bench in the case of *Supreme Court Advocates on Record Association* v. *Union of India*[46] The Court emphasized that the question has to be considered in the context of achieving "the constitutional purpose of selecting the best…to ensure the independence of judiciary…" Thus began the collegium system to select the judges of higher judiciary and the recommendations of the collegium are binding on the government and the President. The reinterpretation of articles 13 and 124 has, perhaps, made the Indian Supreme Court the most powerful judicial body in the world.

But the government which came into power in 2014 has a massive mandate from the people after many decades and it is formed by an extremely assertive leadership. It is trying hard to regain the authority to appoint the vacancies in higher judiciary. For achieving the authority as a first step in this direction the Constitutional (ninety ninth amendment) Amendment Act 2014 was passed, which facilitated the passage of National Accountability Commission Act 2014. The National Accountability Commission Act sought to replace the Collegium system with a Commission, to select the judges of the Supreme Court and the High Courts, being represented by Judiciary and the government. Both Acts received the ratification by 16 states and the Accountability Commission came into existence on 13 April 2015. On 16 October 2015 the Constitution Bench of the Supreme Court by 4:1 Majority upheld the collegium system and struck down the NJAC as unconstitutional after hearing the petitions filed by several persons and bodies with Supreme Court Advocates on Record Association being the first and lead petitioner. Justices J S Khehar, MB Lokur, Kurian Joseph and Adarsh Kumar Goel had declared the 99th Amendment and NJAC Act unconstitutional while Justice Chelameswar upheld them[47].

There is apparently a face off between the central government and the Supreme Court. According to an *ANI* report in *The Indian Express*, "The apex court is particularly peeved at the pendency of 35 appointments it had cleared for the Allahabad High

46 (1993) 4 SCC 441

47 *Supreme Court Advocates on Record Association* v. *Union of India*, Writ petition no. 13 of 2015.

Court — the first batch of eight on 28 January and the second for appointment of 27 judges in August — both are yet to be notified. The Allahabad High Court is functioning with less than 50 percent of its strength with just 77 judges against the approved strength of 160."[48] The Supreme Court on Friday criticised the Narendra Modi led NDA government for its lackadaisical attitude to the appointment of judges, and accused the government of "trying to starve out the cause of justice by not appointing judges", reports said on Friday. "You cannot bring the entire institution (of judiciary) to a grinding halt," the Supreme Court told the government while expressing anguish over the delay in appointment of judges in high courts, despite recommendations made by the collegium in this regard. "Courts rooms are locked down. Do you want to lock down the judiciary?" a three-judge bench headed by Chief Justice TS Thakur said[49]. The face off further intensified when the Supreme Court said that in the event the central government fails to amend the Lokpal Act to facilitate selection of Lokpal chairperson, the SC would act on its own.[50] Judiciary does not want to do away with collegium system even when there is a strong government perhaps not to permit a government to pack the courts with judges politically committed with extreme rightist ideology.

FEDERALISM

There are several models of development and the structure and functions of government. According to one view maximisation of liberty with minimal state interference without welfare is the best model of development as maximisation of liberty will bring out the best in the society. Even though it will be an unequal and highly stratified and globalised society but economic spread effect will take care of those who are at the bottom of the society. This neo-individualistic model of development is the dominant mode of development particularly after the dismantling of soviet system of development, though protest against this jobless model of development have started appearing in the form of Brexit and victory of Trump, though Brexit is not likely to result, and victory of Trump has not resulted, in any change on ground. The other model lays emphasis on welfare with extensive state. Equality is as important as liberty is, if not more. Interestingly the main national political parties, the Indian National Congress Party and Bhartiya Janta Party, both follow the same night watchman model of development, where as the Aam Adami Party, that

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48 ANI, " Supreme Court to hear delay in appointment of Judges to high court." *Indian Express*, New Delhi,October 28, 2016

49 FP Staff, *First Post* Oct. 28 2016: "Supreme Court" Caps Narendra Modi Govt. for belaying appointment of Judges.

50 Supriya, Supreme Court and Government face off over Lokpal, *available at* http://www.newsbytesapp.com (last visited Jan 02, 2018)

rules the National Capital Territory of Delhi swears by welfare model of development. Another aspect of developmental model relates to the structure of federal polity. Whether the national capital territory should be completely subordinate to the national government or should it enjoy a degree of autonomy? These are two considerations which are likely to determine the dispute between the government of Indian national capital territory and the central government. The dispute between these two sets of government was decided recently by the Delhi High Court in *Government of National Capital Territory of Delhi* v. *Union of India*[51]. We do not know why the bench consisting of G.Rohini, C.J. and Jayant Nath, J. decided the way it was decided. It was the considered view of the bench that it is mandatory under the Constitutional scheme to communicate the decision of the Council of Ministers to the Lt Governor even in relation to the matters in respect of which power to make laws has been conferred on the Legislative Assembly of NCTD and an order thereon can be issued only where the Lt Governor does not take a different view". The Court further decided that "the contention on behalf of the Government of NCT of Delhi that the Lt Governor is bound to act only on the aid and advice of the Council of Ministers is untenable and cannot be accepted". It is the elected government of Delhi, the bench said, which is required to "communicate its decisions" to the Lt Governor and issue orders only after the latter's approval. The judgement has two consequences namely that the will of the voters of Delhi and their elected representatives has become subordinate to the will of a civil servant, that is Lt. Governor, and that democratic exercise of the people of Delhi has become meaningless, though democracy is one of the important basic feature of the Indian Constitution, and perhaps individualistic model should have primacy over welfare model of development.

RELIGIOUS FREEDOM

There are two competing ideologies secularism, which treats all religions equally, and ideology of giving priority to any one particular religion, Hinduism, Islam Christianity or Sikhism. There are many in India who prefer the second in preference to the first, but many, among the proponents of the second, are reluctant to admit it in public. There also exists a view that judiciary should not disturb the constitutional high position of the elected office holders. Only people have a right to decide their fate: especially that of elected popular public figures.

In accordance with constitutional ideals, section 123 (3) and (3A) of the People's Representation Act curbed appeal on grounds of religion or propagation of religion for creating feelings of enmity or hatred between different classes of citizens of India

51 W.P.(C) No.5888/2015 & CM Nos.10642/2015, 11083/2015, 13153/2015, 23565/2015, 5182/2016, 5183/2016, 12676/2016 & 16088/2016

during the election campaign by candidates or his agent or any person with his consent for furtherance of prospects of the election of that candidate or for prejudicially affecting the election of any other candidate. Provisions of this section have not been found to violate the freedom of religion guaranteed under article 25 (1). It was so held in *Subhash Desai* v. *Sharad J. Rao*[52], as well as in many other cases. However a different view of religion was taken in three important cases, *Dr. Ramesh Yashwant Prabhoo* v. *Prabhakar Kashinath Kunte*[53], *Manohar Joshi* v. *Nitin Bhaurao Patel*[54], and *Prof. Ramchandra B. Kapse* v. *Haribansh Ramakbal Singh*[55]. The Supreme, in these case concluded that the term 'Hindutva' is indicative more of a way of life of the Indian people and is not confined merely to describe persons practising the Hindu religion as a faith. However V.M.Tarkunde, a former judge of the Supreme Court did not appreciate these decisions and commented that, 'These decisions of the Supreme Court Bench are thus highly derogatory to the principle of secular democracy and the letter and spirit of Section 123(3) of the Representation of the People Act, 1951. It is to be hoped that a larger Bench of the Supreme Court will on a future occasion reconsider these decision and undo the great harm caused by them.'[56]

Proselytising

Graham Stains was an Australian Christian missionary who along with his two minor sons was burnt to death by a right wing Hindu extremist gang while sleeping in his station wagon. He had been working among the tribal poor and lepers of Odisha. But Hindu extremist believed that his primary purpose was to convert them to Christianity. The trial court sentences Rabindra Kumer @ Dara Singh to death and others to life imprisonment. The High Court reduced Dara Singh's sentence to life and maintained life of Mahendra Hembrum, but other accused were acquitted. The Supreme Court[57] confirmed the judgement of the High Court. Regarding the incidence the Supreme Court observed, "The intention was to teach a lesson to Graham Staines about his religious activities, namely, converting poor tribals to Christianity". The Court further observed, "In a country like ours where discrimination on the ground of caste or religion is a taboo, taking lives of persons belonging to another caste or religion is bound to have a dangerous and reactive effect on the society at large. It strikes at the very root of the orderly society which the founding fathers of our Constitution dreamt of."

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52 (1994) Suppl. SCC (2) 446

53 (1996) 1SCC130

54 (1996) 1SCC 169

55 (1996) 1 SCC 206

56 V. M. Tarkunde, Supreme Court Judgement: a blow to Secular Democracy, *PUCL Bulletin* (February, 1996).

The case is not being discussed for its criminal bearings but to discuss the issue of proselytising along with its ideological ramifications. Generally it is accepted that proselytising is an integral part of liberty and free speech: all liberal societies accept it provided illegal means are not adopted to convert a person. Proselytism and religious conversion is a sore subject in many parts of the world. It is banned in Greece, China, and Nepal and most Islamic countries encourage conversion to Islam but conversion from Islam is prohibited, while many others such as Russia and Israel are deeply uncomfortable with it. A Hindu need not convert to any other religion if he wants to incorporate tenets of other religion into his own but such an option is not available to Christians and specially to Muslims of wahabi and salafi schools.[58] But there are two other ramifications. Proselytising generally involves, especially with religiously enthusiastic missionaries, vituperative and unfavourable criticism often bordering on abuse of other religions, generating hatred and crime in certain cases. Can we allow generation of religious hatred for the sake of free speech? For a section of society and some peoples, proselytising is alright as long as conversion is to and not from their religion. Dara Singh and his goons alone do not suffer from the last and narrowest ramification of proselytising, but persons at high places as well, though they cannot express their thoughts so overtly. In the *Dara Singh case* the Court emphasised that he and his associates suffered from this one sided ramification of proselytising but it is not acceptable under the Indian constitution.

There is an unresolved controversy between the ideas that freedom of speech includes freedom to convert another to ones own religion or it does not. A five judge bench of the Supreme Court in *Rev. Stainislaus* v. *State of Madhya Pradesh*[59] held that right to profess and propagate religion under Article 25 does not include right to convert another to one's own religion. The court dissected Article 25 to hold that "the Article does not grant the right to convert other persons to one's own religion but to transmit or spread one's religion by an exposition of its tenets." The Court upheld the validity of two anti-conversion laws of 1960, the Madhya Pradesh Dharma Swatantrya Adhiniyam and Orissa Freedom of Religion Act. In support of the judgement of the Supreme Court this observation of Siva Rao may be cited, "If any attempt were made to secure mass conversion through undue influence either by money or through pressure the state has a right to regulate such activity."[60] The judgement was vehemently criticised

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57 *Rabindra Kumar Pal @ Dara Singh* v. *Republic of India*, (2011) 2SCC 490

58 Is religious conversion really fundamental right, or can ban it? India, *available at* http://www.firstpost.com/india/religious-conversion-really-fundamental-right-can-ban1701877.html (last visited Jan 08, 2018).

59 1977 SCR (2) 611.

60 Siva Rao, *Framing of India's Constitution*, (United law and Publishing House, New Delhi, 2004).

in certain quarters. "Religious conversions may appear to many in the Indian mindset to be unnecessary, puerile and a negation of the very concept of respect of both the religions and the followers of such religion. But, certainly, the freedom of faith guaranteed by the Constitution may not justify the negation of the right to pursue the chosen faith by conversion where necessary".[61] Indian Constitution, as interpreted by the Supreme Court does not prohibit conversion but only proselytising under certain circumstances. In *State of Karnataka* v. *P. Raju*[62] on the allegation that Pastor P. Raju, who is a member of Christian community, came to a gathering of Hindus who were observing maker sankranti and made an appeal to them to get converted to Christian religion where they would get many benefits and facilities which were not available to them in Hindu religion to which they belong, an F.I.R. was lodged. The issue before the Supreme Court was whether police, as required by section 153B I.P.C. ought to have obtained previous sanction of the Central Government or of the State Government or of the District Magistrate as required under the provisions of section 196 (1A) Cr.P.C. The High Court held as such permission was not obtained the initiation of criminal proceedings against the Respondent is bad in law and consequently it was liable to be quashed. However the Supreme Court disagreeing with the high Court held that the aforesaid provisions do not bar registration of a criminal case or investigation by the police agency or submission of a report by the police on completion of investigation. Indian Supreme Court has preferred the ideology that proselytising is not an integral part of the freedom of speech and religion to the western thought that it is integral part of right to practice and propagate religion. Even if we apply the harm principle, propounded by J.S. Mill[63], as justification of restricting liberty, the Supreme Court's decision is based on the idea that proselytising adversely effect communal peace.

The reason for preferring this ideology is simple. The essence of Indian idea of secularism consists in respect for all religions rather than separation between church and state. One of the important reasons why Indian legal system treats proselytising with disfavour is that it subscribes this peculiar ideal of secularism that is equal respect for al religions. The right to freedom of expression doesn't include the freedom to insult someone or disrespect a community on the basis of caste, religion, race, place of birth, and language. The Indian Constitution forbids anyone from making hate speeches that disturb the harmonious co-existence. In recent times, political discourse has created much discord among the electorates. Anti-hate speech laws have long been established to tackle these aberrations, under section 153A I.P.C. which provides for

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61 Editorial, An Unconstitutional Proposal, *Indian Express. New Delhi*, December, 20, 2014.

62 Criminal Appeal 814 of 2006.

63 *Supra* note 3

punishment of any individual promoting communal disharmony or feelings of hatred "between different religious, racial, language or regional groups or castes or communities." Section 295(A) of the IPC has the provision of punishing any individual whose written or verbal statements indicate "deliberate and malicious intention of outraging the religious feelings" of the citizens of India. However, individuals from the political fraternity had gone scot-free despite making a series of hate speeches. Leaders of religious groups and political outfits had often exchanged series of provocative speeches and yet they have not been booked under the law. The instances of the courts having been hesitant in handing out punishment to the political leaders have surfaced time and again.

One of the first important cases on this aspect of secularism is *Ramjilal Modi* v. *State of U.P.*[64] Constitutionality of S.295A was questioned before the Supreme Court. The Court upheld its validity on the ground that the restriction imposed on freedom of expression by the section was reasonable and was covered under the head of "public order". The reasoning of the court was that the section did not penalize any and every act of insult to religion or the religious belief of a class of citizen but was directed to acts perpetrated with the deliberate and malicious intention of outraging the religious feeling of a class of citizens. The same ideology of equal respect for all religions finds expression in *Chandmal* v. *State of West Bengal*.[65] The State was asked to proscribe Holy Quran and confiscate all copies of the Holy book. It was alleged that the Quran incited violence, disturbed public tranquillity, promoted, on grounds of religion, feelings of enmity, hatred and ill-will between different religious communities and insulted the religion or religious beliefs of other communities in India. The Court held that the Quran apart from being a holy religious book is also an important historical document and the distribution and propagation thereof cannot be suppressed under s. 95, of the Cr. P. C. The Court took note of the fact that the Quran has been accepted as holy through the ages. It will be contrary to the provisions and spirit of the Constitution of India, particularly the preamble and article 25 thereof to proscribe it.

In the case of *S. Veerabhadran Chettiar* v. *E. V. Ramaswami Naicker*,[66] the allegation was that one of the accused broke the idol of God Ganesa in public and the two others actually aided and abetted him with the intention of insulting the religious feeling of the complainant and his community who held the deity in veneration. As the idols were not installed and were not broken inside a temple, the lower court giving a narrow interpretation to section 295 I.P.C. held that the provisions of the section

64 AIR 1957 SC 620

65 Writ Petition no 370/1985 of Calcutta High Court

66 AIR 1958 SC 1032

were not attracted. The Supreme Court after considering and interpreting s. 295 of the penal code observed, "The section has been intended to respect the religious susceptibility of persons of different persuasions or creeds. Courts have got to be very circumspect in such matters and to pay due regard to the feelings and religious emotion of different classes of persons with different beliefs, irrespective of the consideration whether or not they share those beliefs, or whether they are rational or otherwise, in the opinion of the court". But the question still remains whether, even after expressing strong disagreement with the interpretation of the section by the courts below, the Supreme Court should direct a further inquiry into the complaint, which has stood dismissed for the last many years. The action complained of against the accused persons, if true, according to the Supreme Court was foolish, to put it mildly, but as the case has become stale; the Court did not direct further inquiry into this complaint. If there was a recurrence of such a foolish behaviour on the part of any section of the community, the Court had no doubt that those charged with the duty of maintaining law and order, would apply the law in the sense in which the Court had interpreted it. It is interesting to note, that the Court followed the appropriate ideology yet the Court showed a degree of leniency, perhaps, as the involved actors were activists of a political party.

Caste and Class

Articles 15 and 16 of the Constitution of India respectively make reservations in favour of 'socially and educationally backward classes of citizens' and 'backward classes of citizens', however both the phrases have similar implications. For interpreting these phrases extra legal ideology has played a very important role. For interpreting these phrases interpretation of 'class', 'caste', 'social' and 'backwardness' is required; the Constitution does not define these words: here comes the importance of ideology extraneous to enacted or judicially evolved legal precepts. Caste has two important characteristics. Caste system is based on occupational specialisation and secondly on the notion of relative ritual cleanliness and pollution. Caste is an enduring category; it depends on birth: no one can change one's caste, though one can change his status, class and life style but not caste. On the other hand class broadly has two meanings. In Marxist sense class depends on community and antagonism of interests; those who have community of interest are in one class: persons whose interests are antagonistic cannot be in the same class. For identifying community of interests, though most important is economic, but political social or any other factor may be important. But non-Marxist concept of class is different; persons or things with similar (not necessarily with community of interests) interests or characteristics belong to same class: therefore class involves identification of similarities and dissimilarities, in the sense in which class has been used under article 14 of the Constitution. Depending on the object sought to be achieved, non-Marxist class may use any of social, political, economic or

any other criteria or a combination of criteria to identify similarities.[68] Similarly 'social' was not interpreted with reference primarily to economic consideration.

But how to define class is the crucial question? Backward Classes Commissions have defined class primarily with reference to caste, other considerations were only peripheral. This is exactly what the Supreme Court did, notwithstanding the use of the concept of 'creamy layer'. There are two ways to define class. First, defines class primarily with reference to caste treating poverty, occupation and other considerations as peripheral issues. Secondly, class may either be defined primarily with reference to income considerations treating caste, and other factors as peripheral or primarily with reference to occupation treating caste and other considerations as peripheral. Suppose class is defined primarily with reference to income treating caste as peripheral consideration, the reservation formula would be: all persons with income up to rupees X, are entitles to reservation, but persons belonging to depressed caste A would be entitled up to income of rupees X + 5000, depressed caste B with income up to rupees X + 7000. Suppose class is defined with reference to occupation, all persons engaged in occupations A, B and C would be entitled to reservation with income up to rupees X if they belong to caste D, with income up to rupees X +5000 if they belong to caste F, so on and so forth.

The Supreme Court has preferred the first method, perhaps they were highly influenced by the recommendations of backward classes commissions. Had the Court interpreted 'backward classes' with reference to income or occupation based ideologies, substantive out come would have been completely different. In 21st century, income based ideology, preferred by Bhagvati and Kuldeep Singh JJ. in cases to be referred to later, would have been nearer the reality and caste conflicts could have been avoided. The Supreme Court's approach of identifying class with status based unchanging ritual notion of caste is not compatible with modern realities particularly of 21st century when the connect between caste and occupation is almost severed and even those who pursue caste based occupations are not bound to them unlike in the past. The idea of ritual cleanliness and pollution is unconstitutional and has penal consequences. We do not deny the continuous illegal practice of untouchability and existence of forced caste based occupations, but both of them are on substantial decline: persons of the same caste, unlike in the past, are not engaged in same occupations and do not enjoy similar respect and earn similar income. Then how caste can be class? Caste is an enduring category. One can change one's class but not caste. In a capitalist society honour and dignity primarily depends on property. Property is power; its lack is powerlessness, backwardness and poverty. Backwardness primarily depends on poverty

68 *Supra* note 3 at 3-7

though not on it alone. Because of these social changes, caste was and is not a homogenous category that is caste does cot consist of similarly situated persons or persons with similar occupations or persons with similar social honour. Right from the beginning the Supreme Court never gave a chance to alternative ideologies to define backward class. Instead of caste, centrality might have been given to occupation or poverty.

One of the earliest cases was *State of Madras* v. *Mrs. Champakam Dorairajan.*[69] In this case the Court struck down a government order, for reservation in favour of backward classes, not because reservation was made on the basis of caste but because Article 15 did not provide for reservations in favour of backward classes. *Balaji* v. *State of Mysore*[70] is an earlier authority to assert that caste alone cannot be the criteria to determine backwardness: poverty, occupation and habitation are relevant factors but the Court did not challenge Mysore reservation scheme that gave primacy to caste as primary determinant of backwardness, in which poverty, occupation and habitation were peripheral considerations.

R. Chitralekha v. *State of Mysore*[71] is an exceptional case in as much as in the reservation scheme primacy was given to income criteria. The Court commended a Mysore revised scheme classifying as backward all those whose family earned less than Rs. 1200/-per annum and whose parents' occupation fell into any of the specified categories. In this reservation scheme primacy was given to income as against caste. *Pradeep Tandan* v. *State of UP*[72] is a case where seats were reserved for geographical area in addition to for certain castes and tribes, girl children of political sufferers and army personnel and the scheme was held to be constitutionally valid. In *P. Rajendran* v. *State of Madras*[73] the Court changed its position. It reverted back to centrality of caste as criteria of backwardness. The Court observed, "It must not be forgotten that caste is also a class of citizens. And if the caste as a whole is socially and educationally backward, reservations can be made in favour of such a caste.[74] After Rajendran the tendency of the Court, perhaps with the exception of Pradeep Tandan, to equate caste with class became more marked. In State of *Andhra Pradesh* v. *U.S. Balram*[75] the Supreme Court upheld caste based reservations on the recommendation of the A.P. Backward Classes Commission and held that if the entire caste was found to be socially and educationally backward its inclusion by caste name is not violative of Article 15 (4).

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69 AIR SC 226

70 AIR 1963 SC649

71 AIR 1964 SC1823

72 AIR 1981 SC1009

73 AIR 1968 SC 1012

74 *Id.* at 1041-45

75 (1972) 1 SCC 760

For the Court, though caste can be class but poverty alone cannot be a determinant of class. In *K.C. Jayasree* v. *State of Kerala*[76] the Court observed "neither caste by itself nor poverty by itself constituted backwardness."[77] It appears that the Court has preferred one ideology over another. *K.C. Vasath Kumar* v. *State of Karnataka*[78] is an important judgement in as much as many opposite ideas were projected in this case. Desai J. in a minority judgement observed that caste test should be discarded as in the ultimate analysis backwardness is the result of poverty. A nine judges bench of the Supreme Court again considered the question of reservation in Indira Sawhany v. Union of India.[79] Except Kuldip Singh J. fidelity of all other judges to caste was basic. According to Kuldip Singh J. for determining backwardness primacy must be given to poverty consideration, whereas other judges determined backwardness with reference to caste alone or with reference to caste and certain peripheral determinants. In Ashok Thakur v. Union of India[80], the validity of the Constitution (Ninety-Third Amendment) Act, 2005, which provided for 27% reservation in institutions of higher learning was challenged. The Supreme Court observed, the Constitution (Ninety-Third Amendment) Act, 2005 does not violate the "basic structure" of the Constitution in so far as it relates to the state maintained institutions and aided educational institutions. Question whether the Constitution (Ninety-Third Amendment) Act, 2005 would be constitutionally valid or not so far as "private unaided" educational institutions are concerned, is left open to be decided in an appropriate case. There is nothing in this case to suggest that the Court has deviated from the idea of giving primacy to caste as primary determinant of backwardness.

Homosexuality

The role of extra-legal ideology plays a very important role in deciding socially and morally controversial matters. One such matter is homosexuality. Traditional religious and moral ideology perceives this as sin and perversion. A stigma is attaches to this practice. On the other hand modern scientific evidence does not consider the practice as perversion: the sexual orientation of homosexuals is different but not perverse. Nature has created them differently. But the Indian Penal code under section 377, enacted in the nineteenth century criminalizes "carnal intercourse against the order of nature". This phrase was interpreted to mean all forms of sexual activity other than heterosexual penile-vaginal intercourse. Criminalisation of homosexuality

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76 AIR 1976 SC 2381

77 *Ibid*.

78 1985 Suppl SCC 714

79 A.I.R. 1993 SC 447

80 2008 (6) SCC 1

was challenged by an N.G.O. NAZ Foundation on grounds of violation of rights under Articles 14, 15, 19 and 21. A bench consisting of A.P. Shah, C.J. and Murlidhar,J. delivered the judgement in 2009.[81] The Court located the rights to dignity and privacy within the right to life and liberty guaranteed by Article 21, because section 377 creates an unreasonable classification and targets homosexuals as a class. Public *animus* and disgust towards a particular social group or vulnerable minority, it held, is not a valid ground for classification under Article 14. Article 15 of the Constitution forbids discrimination based on certain characteristics, including sex. The Court held that the word "sex" includes not only biological sex but also sexual orientation, and therefore discrimination on the ground of sexual orientation is not permissible under Article 15. The Court also noted that the right to life under Article 21 includes the right to health, and concluded that Section 377 is an impediment to public health because it hinders HIV-prevention efforts. The Court also held that Section 377 offends the guarantee of equality enshrined in Article 14. The Court did not strike down Section 377 as a whole. The section was declared unconstitutional insofar it criminalises consensual homosexual acts of adults in private. The judgement keeps intact the provision insofar as it applies to non-consensual non-vaginal intercourse and intercourse with minors and with animals. The court stated that the judgement would hold until Parliament chose to amend the law

On appeal a bench consisting of G.S. Singhvi and Sudhansu Jyoti Mukhopadhyaya JJ., reversing the judgement of the High Court, held, in *Suresh Kumar Koushal* v. *Naz Foundation and others*[82] that section 377 of IPC is constitutionally valid in its entirety. The constitutionality was not, we are afraid, decided on merit but on the presumption of constitutionality of section 377. The Court said that it is true that the theory that the sexual intercourse is only meant for the purpose of conception is an out-dated theory. However, the Court proceeded with the case invoking the doctrine of separation of powers. Taking seriously the importance of separation of powers and out of a sense of deference to the value of democracy that parliamentary acts embody, self restraint has been exercised by the judiciary when dealing with challenges to the constitutionality of laws. This form of restraint has manifested itself in the principle of presumption of constitutionality. The Parliament did not consider it necessary to amend the law, even though the central government decided not to prefer an appeal against the High Court verdict, it can be inferred that the Parliament wants to leave the law as it is. The Court refused to 'read down' or 'read into' the provision of the Act to make it effective, workable and ensure the attainment of the object of the Act.

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81 *NAZ Foundation* v. *Govrnment of NCT Delhi*, 160 Delhi Law Times 277, Civil appeal no. 10972 of 2013

82 (2014) 1SCC1

Applying the afore-stated principles to the case in hand, the Supreme Court held that while the High Court and the Supreme Court are empowered to review the constitutionality of Section 377 IPC and strike it down to the extent of its inconsistency with the Constitution, self restraint must be exercised and the analysis must be guided by the presumption of constitutionality. The Court held that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable. Notwithstanding this verdict, the Court further observed that the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General.

The Court in this case does not seem to have preferred any of the two competing ideologies, namely, that homosexuality is a sin and that homosexuals are differently normal persons with different sexual orientation. It is difficult for any constitutional authority to say that homosexuality is a sin. But we all know that almost all religions, primarily based on beliefs, even if they are unfounded, greatly influences our life and opinions. Quite often we stick to our beliefs even if we know they cannot stand the test of modern scientific evidence. We do not know why the Court decided the case on presumption of constitutionality: we cannot read their mind. But we know that presumption of constitutionality is rebuttable and in a large number of cases, when a legislative enactment is alleged to be unconstitutional on grounds of violation of fundamental rights, Courts do not hesitate to declare them unconstitutional. In this case, strangely, the Supreme Court did not examine if section 377 violates any of the fundamental rights.

CULTURAL SPECIFICITY

There have always been the champions of cultural specificity and of universalism. There are arguments in favour of both. There are also divergent views on gender equality. Our Constitution specifically provides for preservation of cultural specificity when it provides for freedom of conscience and religious practices and protection of minorities and their culture. But the Constitution emphatically prohibits discrimination against women. There is an apparent conflict between the freedom to practice culture or religion, as interpreted by religious authorities, who often are ultra-conservatives and constitutional mandate requiring non-discrimination against women. These ultra-conservatives justify suppression of the rights of women in defence of culture, tradition and religion. What cannot be done directly is sought to done indirectly. There are a number of temples, tombs and mausoleums which discriminate against women, and they justify doing so on grounds of religion or culture and tradition. The argument of cultural specificity in a large number of cases, though not in all, is given to justify discrimination against women. Hindu and Muslim women's entry into religious places if prohibited on the additional ground of menstruation which according to these religions makes women impure is sought to be justified on grounds of impurity and is

not a discrimination against women. But women, even those who are not so modern know full well how to effectively prevent dropping and spilling of oozing blood: the truth is we all men as well women carry impurities in our bodies in the form of urine and excreta, then why only women are discriminated?

However the Bombay High Court in stead of upholding the ideology of the ultra conservatives, preferred to promote the idea of non-discrimination against women. In *Smt. Vidya Bal* v. *The State of Maharashtra*[83] the Bombay High Court upheld the equality of right of women to worship at the Shani Shignapur temple on grounds that the Maharashtra Hindu Places of Public Worship (Entry Authorisation) Act, 1956 says, "no Hindu of whatsoever section or class shall in any manner be prevented, obstructed or discouraged from entering such place of public worship or from worshipping or offering prayers, or performing a religious service…". As per the Act, prohibiting any person from entering a temple would attract six months in jail. Similarly in *Noorjehan Safia Niaz* v. *State of Maharashtra and Haji Ali Dargah Trust*[84] the High Court of Bombay ordered opening of the sanctum sanctorum of Haji Ali Dargah in Mumbai on grounds that right to equality of women cannot be denied on the pretext of religious practice.

Shayara Bano v. *Union of India and others*[85] is a landmark judgement on the constitutional validity of triple talaq (talaq-i-biddat) that is pronouncement of talaq three times in one sitting. The Bench consisted of five judges belonging to five different religions. J.S. Kehar, C.J. Kurian Joseph, U.U.Lalit, Iqbal Nazir, and R.F.Nariman, JJ. were the judges constituting the Bench. The constitution of the Bench suggests that the Court might be on defensive as the conservative section of the Muslim community vehemently opposed the idea of interference in their religious matters. Chief Justice Kehar and Justice Iqbal held the practice to be constitutional on ground that it is part of Sunni Islam for a long time. On the other hand the majority found the practice not to be valid. Lalit and Nariman, JJ. declared it unconstitutional on ground of violation of fundamental rights whereas Joseph,J. on grounds that it is against the teachings of the Quran. The interesting aspect of the case is difference of opinion among the judges if essential religious practices can be declared unconstitutional on grounds of violation of fundamental rights? The judges were influenced by two contradictory ideologies. Religious values are so fundamental in our lives that they must have primacy over fundamental rights: on the other hand other value dictates that fundamental rights are fundamental, they stand on a higher footing than personal laws.

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83 Public Interest litigation no 55 of 2016

84 Public Interest litigation no. 106 of 2014

85 Writ Petition (c) no. 118 of 2016

CONCLUSION

Indian judicial system more often than not use extra legal facts to bring dynamism into decision making and to satisfy demand of contextual justice. It is the use of extra-legal facts and ideology that promotes dynamism of judicial pronouncements, though it makes a section of the society uncomfortable. I would prefer to conclude the paper with a story but with a rider that it is not and cannot be correct the way it is narrated, but at the same time it contains an element of truth about judicial process. Once upon a time there lived, in the Republic of Gondwanaland, a wood cutter. One day when he came back from the jungle after cutting wood, he found his wife with a stranger in his bed. In fit of anger he took his axe and killed both his wife and the stranger. He was prosecuted for homicide; the case was tried before a judge who doubted fidelity of his own wife and wanted to kill his wife and her paramour but could not do so because he was a judge. In the wood cutter he found his hero. The wood cutter did what he wanted to do but could not do. By interpreting or rather misinterpretin the evidence, he found the wood cutter not guilty. The state preferred an appeal against the acquittal: the case was before a judge who did not believe in the institution of marriage. Man and woman should live with each other, preferably without marriage, and leave each other without any fuss, and in case they are married and they cease to love each other, should seek a mutual divorce. For him the wood cutter was a villain; persons such as these are responsible for generating disorder in the society; he must be taught a lesson. If a wife does not like her husband only recourse for the husband is to divorce her. Why did the wood cutter kill them? The Judge sentenced the wood cutter to life imprisonment.