ILS Law College, Pune

Centre for Public Law's

Public Law Bulletin

volume iv

october 02, 2018

PUBLIC LAW BULLETIN
VOLUME IV, OCTOBER 02, 2018

PUBLIC LAW BULLETIN

CENTRE FOR PUBLIC LAW AT ILS LAW COLLEGE, PUNE

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Public Law Bulletin Is An Initiative Of
The Centre For Public Law At ILS Law College, Pune.

MESSAGE FROM THE EDITOR(S)

Date: October 01, 2018

Monday

Dear All,

We are very happy to bring out the fourth volume of Public Law Bulletin on the auspicious occasion of birth anniversary of Mahatma Gandhi. When the rest of India is probably enjoying holiday tomorrow, our editorial team is burning the midnight oil to bring this issue on time. Consistently with our tradition to bring innovations, we have dedicated this issue to landmark judgments delivered by the constitutional benches presided over by Dipak Misra CJ. There is no doubt that his tenure is mix bag of controversies and candor, no one would deny that some of his judgments reflect a high watermark in the tradition of outcome oriented jurisprudence.[1] I congratulate the editorial team for accomplishing this feat particularly because all of them have worked from their homes and have displayed remarkable teamwork in bringing out this volume.

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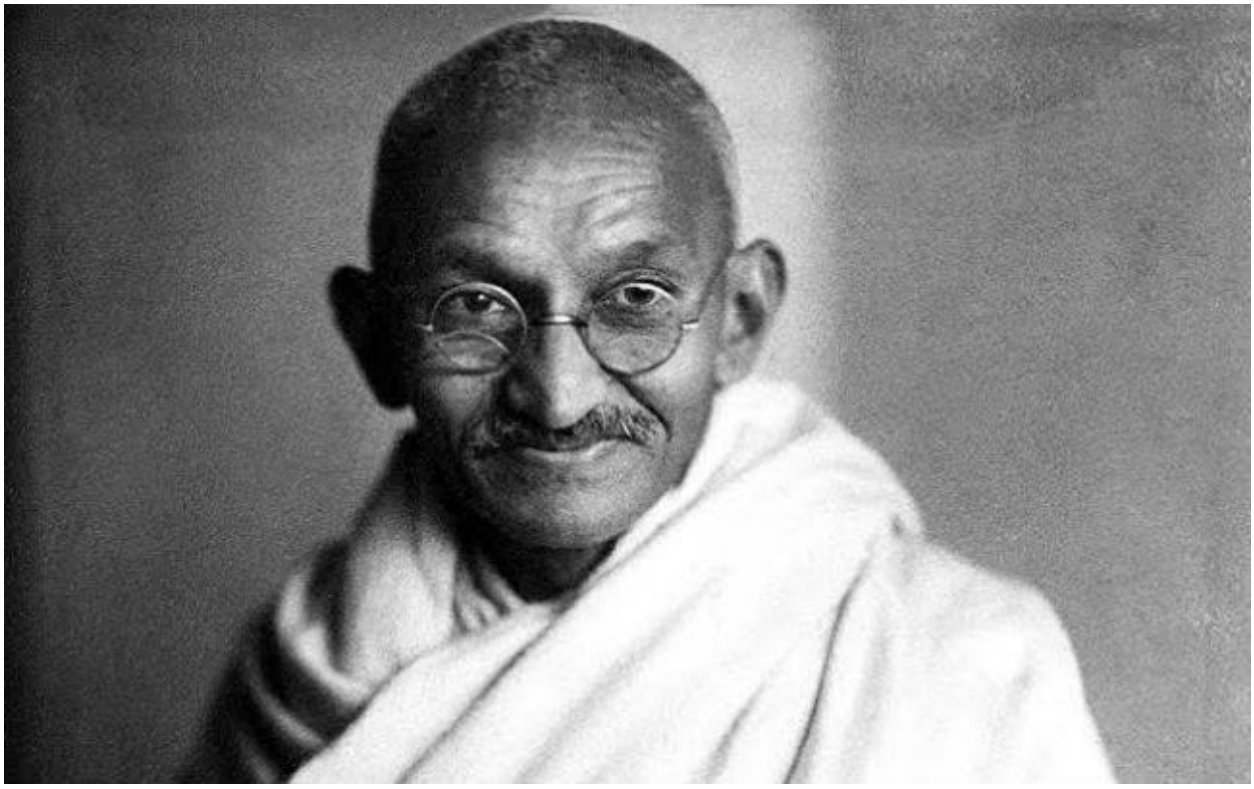
[1] Read for more critical understanding: https://indconlawphil.wordpress.com/2018/10/01/ends-without-means-outcomes-without-reasons-a-look-back-at-dipak-misra-and-the-constitution/



"The recognition of the golden rule of never taking the law into one's own hands has no exceptions."

~ MAHATMA GANDHI[2]

[2] For an interesting read, refer to the judgment of Supreme Court of India in *Devidas Tuljapurkar* v. *State of Maharashtra*, rendered by Dipak Misra J.

The Trial of Nathuram Godse Has Attained Finality.[3]

Last year, the Supreme Court of India was presented with a plea quite out of the ordinary. The plea, in a Special Leave Petition against an order of the Bombay High Court, sought re-investigation into Mahatma Gandhi's murder, and additionally prayed for revisiting the findings given by the Kapur Commission, which inquired into the conspiracy behind the murder. The petition was dismissed by the Bombay High Court vide order dated 06.06.2016 on grounds of finality of judicial proceedings and delay. The SLP filed by Dr. Pankaj Kumudchandra Phadniswas heard by S. A.B obde and L. Nageswara Rao JJ.

The petitioner raised doubts on the conclusions reached by the courts in the case and the findings of the Kapur Commission and claimed that four bullets were involved in the assassination of Mahatma Gandhi and that the fourth bullet found from the shawl of Gandhiji did not match the pistol recovered from the assailant, Nathuram Godse. He relied on reports published in newspapers the day after the murder to assert that four shots were in fact fired and also relied on a black and white photograph published at that time to show four bullet marks on Gandhiji. The petitioner thus submitted that this leads to the probability of a 2nd assailant and claimed a larger conspiracy involving the British Secret Service called "*Force 136*". He made further submissions relying on testimonies given to the Kapur Commission among others to buttress his contention. The petitioner during the course of the proceedings also contended that the trial of Nathuram Godse had never attained finality. The petitioner submitted that, the appeal made to Privy Council was not entertained only on the ground that the proceedings would not conclude prior to the establishment of the Indian Supreme Court and that being so the execution of the death sentence of Naturam Godse prior to the establishment of the court was part of a larger conspiracy and thus the trial had not attained finality.

The court cautiously admitted the plea and appointed Senior Advocate Amrendra Sharan as amicus curiae to submit a report to the court addressing the issues raised before the court. After

[3] This write-up has been authored by Rajmohan CV, IV.B.A. LL.B., ILS Law College, Pune.

examination of all the relevant documents including the depositions of witnesses, Trial Court and High Court judgments, the Kapur Commission Report and the examination of the materials such as the shawl, dhoti and watch of Mahatma Gandhi, made available at the Gandhi National Museum, Rajghat, the learned amicus curiae repelled the contentions of the petitioner and made observations adverse to the petitioner's cause. The report submitted that, "*The bullets which pierced Mahatma Gandhi's body, the pistol from which it was fired, the assailant who fired the said bullets, the conspiracy which led to the assassination and the ideology which led to the said assassination have all been duly identified. No substantive material has come to light to throw any doubt on any of the above requiring either a reinvestigation of the Mahatma Gandhi murder case, or to constitute a fresh fact finding commission with respect to the same*".

The court after considering the report of the learned Amicus Curiae and the contentions of the petitioner disposed off the petition on 28th March 2018. The court observed that there was no justification in reinitiating the investigation and that such reinvestigation because some academic research raises a different perspective and held that the same would amount to reopening issues on hearsay. The court relying on the report above mentioned came to a finding that there was no evidence of a fourth bullet or an empty cartridge of the alleged bullet at the place of occurrence. The court further relied on the depositions and accounts of eye-witnesses and the death report as mentioned in the report of the amicus curiae to substantiate its finding. The court also held that there was no ground to review the findings of the Kapur Commission. The petitioner had objected to certain remarks pertaining to Veer Savarkar. The court considering this objection concurred with the amicus curiae's report and held that the observation was not unfair and does not interfere with the acquittal of Savarkar that recognised his innocence. The court refused to enter into the correctness or fairness of the findings in the report. The conclusion of the proceedings vide the disposal of the petition before the court thus has indeed brought finality to the trial of Nathuram Godse.

(A.) JUSTICE DIPAK MISRA: AN INSIGHT INTO HIS JOURNEY TO THE SURPREME COURT

Born on 3rd October, 1953 Justice Misra began his illustrious career by enrolling as an Advocate at Orissa Bar. He practiced in Constitutional, Civil, Criminal, Revenue, Service and Sales Tax Matters at the Orissa High Court and Service Tribunal. He was appointed as an additional judge of the Orissa High Court in 1996 and was transferred to the Madhya Pradesh High Court where was he made a permanent judge in 1997. In 2009, he was elevated as the Chief Justice of Patna High Court and was transferred to Delhi High Court as Chief Justice in 2010. He was elevated as Supreme Court Judge in 2011. He took charge as Chief Justice of Supreme Court on 27th August, 2017.

Known for his impeccable judgments and vocabulary, Justice Misra has delivered many landmark judgments, which have changed the dynamics of constitutional

Jurisprudence. He is known for opening the gates of Supreme Court at 3 am and hearing Mumbai serial blasts convict Yakub Menon, plea to stay his execution. Among the other notable decisions, Justice Misra penned down the landmark judgment directing the Delhi Police to upload FIRs on their website within 24 hours. He pronounced the judgment upholding the death sentence of four convicts in the December 2012, Nirbhaya gang rape case. Justice Misra authored the judgment declaring criminal defamation as intra vires.

However, Justice Misra's tenure was as thorny as it was glorious. In November, 2015 he was criticized for his order making national anthem mandatory in the cinema halls across the country. He was also criticized for dismissing petition seeking probe into the death of Judge Loya. He even faced acute crisis that gripped Supreme Court in January, 2018 when four senior-most judges of the institution, led by Justice Chelameswar held an unprecedented press conference ultimately culminating in an impeachment motion, which was rejected by Chairman of Rajya Sabha. He has undoubtedly presided and survived over the toughest and unstable phases of the Indian Judiciary.

During his 13 months' tenure as CJI, Justice Misra presided over various Constitution Benches to decide matters of seminal importance, thus touching the political, personal, religious, economic life of the nation. He headed the bench as CJI to recognise passive euthanasia. He also headed the Constitution Bench deciding appeal of Government of NCT against UOI and declaring that Lieutenant Governor of Delhi is bound by the aid and advise of NCT Government in areas other than those exempted. Justice Misra presided over benches which recognized rights of LGBTQ thus declaring Section 377 of IPC as unconstitutional, scrapped the adultery law, upheld the validity of Aadhaar, allowed women of all ages into Sabarimala shrine. Justice Misra by ordering live streaming of court proceedings allowed a ray of hope to pass through opaque walls of the Supreme Court. He cracked the whip of justice on the rising incidents of vigilantism

and mob lynching in the country. When CJI Dipak Misra retires, his glory, his thoughts and his pursuit to secure to each individual liberty and gender equality without bending before the archaic societal morality, will always be omnipresent in the Indian Judiciary.

(B.) REMINISCING DIPAK MISRA'S J. SOJOURN AT THE SUPREME COURT

Joseph Shine v. Union of India

(Constitutionality of Section 497 of Indian Penal Code, 1860)

"Any provision of law affecting individual dignity and equality of women invites wrath of constitution."

This instant writ petition was filed under Article 32 of the Constitution of India challenging the validity of Section 497 IPC. It was on the first occasion referred to a three-Judge Bench, which, taking note of the authorities in ***Yusuf Abdul Aziz v. State of Bombay*** and other cases felt the necessity to refer it to a Constitutional Bench. This Constitutional Bench comprising of Chief Justice Dipak Misra and Justices R.F. Nariman, A.M. Khanwilkar, D.Y. Chandrachud and Indu Malhotra held that adultery should not be treated as an offence and declared Section 497 IPC and Section 198 CrPC dealing with the procedure for filing a complaint in relation to the offence of adultery as unconstitutional.

Chief Justice writing for himself and Justice Khanwilkar, analysed three major aspects of the provisions.

Firstly, he discussed how S. 347 is manifestly arbitrary and invites the frown of Article 14 of the Constitution as the provision does not treat a woman as an abettor but protects a woman and simultaneously, it does not enable the wife to file any criminal prosecution against the husband.

Secondly, he observed that if it is treated as a crime, there would be immense intrusion into the extreme privacy of the matrimonial sphere which will offend the two facets of Article 21 of the Constitution, namely, dignity of husband and wife, as the case may be, and the privacy attached to a relationship between the two.

Lastly, he noted that a punishment is unlikely to establish commitment, if punishment is meted out to either of the spouses or a third party.

"*A woman cannot be asked to think as a man or as how the society desires. Such a thought is abominable, for it slaughters her core identity. And, it is time to say that a husband is not the master.*"; "*Adultery, in certain situations, may not be the cause of an unhappy marriage. It can be the result.*" are some of the fascinating comments which he made while delivering the judgment.

Indian Young Lawyers Association & Ors vs. State of Kerela & Ors.

(**Sabarimala Temple Entry Case**)

"Devotion cannot be subjected to gender discrimination."

This PIL was filed challenging the tradition of Lord Ayyappa Temple, in Sabrimala (Kerela), banning the entry of women of the age group 10- 50 yrs, inside the temple. The bench comprising of Chief Justice Dipak Misra, Justice R F Nariman, Justice A.M. Khanwilkar and Justice D.Y. Chandrachud and Justice Indu Malhotra, by a 4:1 majority, permitted the entry of women of all age groups to the Sabarimala temple, holding that "devotion cannot be subjected to gender discrimination."

Chief Justice Deepak Misra writing for himself and Justice A.M. Khanwilkar held the following:

- That, applying the law laid down in the ***Shirur Mutt*** case, the devotees of Lord Ayyappa do not constitute a separate religious denomination as they do not have common religious tenets peculiar to themselves, other than those which are common to the Hindu religion.
- That, the right guaranteed under Article 25(1) has nothing to do with gender or, for that matter, certain physiological factors specifically attributable to women therefore the exclusionary practice being followed at the Sabrimala temple violates the right of Hindu women to freely practise their religion.
- That, the scope of the term 'morality' occurring in Article 25(1) of the Constitution cannot be confined to what an individual, a section or religious sect may perceive the term to mean. The notions of public order, morality and health cannot be used as colourable device to restrict the freedom to freely practise religion and discriminate against women.

- The exclusionary practice, is neither an essential nor an integral part of the religion, as the non-observance of the same will not change or alter the nature of Hindu religion.
- That, the Rule 3(b) of the 1965 Rules, that stipulates exclusion of entry of women of the age group of 10 to 50 years, is ultra vires Section 4 of the Act of 1965 as the proviso to Section 4(1) creates an exception to the effect that the regulations/rules made under Section 4(1) shall not discriminate, in any manner whatsoever, against any Hindu on the ground that he/she belongs to a particular section or class.

Manohar Lal Sharma vs. Sanjay Leela Bhansali & Ors.

(Padmavat Case)

In this PIL a plea seeking a direction to the makers of "Padmavati" not to release the movie outside India was filed before a bench headed by Chief Justice Dipak Misra. While, dismissing the petition CJI opined, "the creative instinct is respected and has the inherent protective right from within which is called artistic licence....artistic licence should be put on a high pedestal but the same has to be judged objectively on case to case basis." Further he observed that, "It is settled in law that no right is absolute but the fetters for enjoying the rights should be absolutely reasonable more so when it relates to the right to freedom of speech and expression and right to liberty."

Common Cause Society vs. Union of India & Anr.

(**Recognition of Passive Euthanasia**)

"The right to life and liberty as envisaged under Article 21 of the Constitution is meaningless unless it encompasses within its sphere individual dignity."

The Constitution Bench comprising of Chief Justice Dipak Misra and Justices AK Sikri, AM Khanwilkar, DY Chandrachud and Ashok Bhushan while dealing with PIL seeking robust system of certification for passive euthanasia and legal recognition for 'living will' in India held that right to die with dignity is a fundamental right. The Court also held that passive euthanasia and a living will also legally valid and has issued detailed guidelines in this regard exercising power under Article 142 of the Constitution of India.

The Chief Justice writing for himself and Justice A.M. Khanwilkar held that on a careful perusal of the Gian Kaur's case and Aruna Shaunbaugh's case reflects the right of a dying man to die with dignity when life is ebbing out, and in the case of a terminally ill patient accelerating the process of death for reducing the period of suffering constitutes a right to live with dignity.

Analysing the international legal position of euthanasia the CJI observed that that, "all adults with capacity to consent have the right of self- determination and autonomy. The said rights pave the way for the right to refuse medical treatment which has acclaimed universal recognition. A competent person who has come of age has the right to refuse specific treatment or all treatment or opt for an alternative treatment, even if such decision entails a risk of death."

He further opined that, "Right to life and liberty as envisaged under Article 21 of the Constitution is meaningless unless it encompasses within its sphere individual dignity.

It has to be stated without any trace of doubt that the right to live with dignity also includes the smoothening of the process of dying in case of a terminally ill patient or a person in PVS with no hope of recovery.""

Navtej Singh Johar & Ors v. Union of India

(Constitutionality of Section 377 of the IPC, 1860.)

"*I am what I am, so take me as I am*"

This judgment was made in a writ petition praying that the right to sexuality, right to sexual autonomy, and right to choice of a sexual partner be declared as part of the right to life guaranteed under A.21 of the Constitution. The petition challenged the constitutional validity of Section 377 of the Indian Penal Code, 1860 in as far as it affected the above rights. The petition was first listed before a three judge bench of the SC and was referred to a 5 judge bench considering the observations made in the Suresh Koushal judgment which overruled the decision made by the Delhi High Court in the Naz Foundation case. The case was heard by a constitution bench consisting of Dipak Misra CJI, D.Y.Chandrachud J, InduMalhotra J, Rohinton Nariman J and A.M.Khanwilkar J. Four judgments were given by the court and Dipak Misra CJI wrote for himself and A.M.Khanwilkar J.

The judgment held that sexual orientation is natural and that social morality cannot prevail over constitutional morality. The judgment rejected the reasoning of Suresh Kumar Koushal and held that the number of people asserting a fundamental right is not the correct metric in deciding the validity of a section. It went on to hold that the section does not satisfy the test of A.14 as there existed no reasonable nexus in the object of protecting women and children from being subjected to carnal intercourse and classifying persons into those who have carnal intercourse and those who don't. The judgment also applied the manifest arbitrariness test and held that the provision to be manifestly arbitrary on the grounds that there is no distinction between consensual and non consensual carnal intercourse, psychiatric studies indicating homosexuals to be of sound mental conditions, the stigma the section attached to the community among

others. The judgment also recognised that the section violates the rights to dignity, identity and privacy as interpreted under A. 21 in addition to the freedom of expression guaranteed under A.19(1)(a) of the Constitution. The judgment analysing and considering a large number of scholarly and legal work is a treatise in itself and is a remarkable exposition of the rights under A.14, 19 and 21 of the Constitution of India.

Shakti Vahini v. Union of India &Ors

(***Preventive Steps against Honour Crimes***)

"Class honour, howsoever perceived, cannot smother the choice of an individual"

This judgment was in an A.32 petition seeking directions to ensure the prevention of honour crimes and the creation of a State and National Action plan for the same among other reliefs such as proper and efficient prosecution of such crimes. The case was heard by DipakMisra CJI, D.Y.Chandrachud J and A.M.Khanwilkar J and the judgment was made by DipakMisra CJI to which Justice Chandrachud and Justice Khanwilkar. concurred. The petitioner was an organisation authorised by the NCW to do research studies on Honour Killings in Haryana and Western UP and filed the petition considering the chilling effects that these incidents were having on the general populace. The petitioners submitted that the actions commonly linked to Honour Crimes was loss of virginity outside marriage, infidelity, asking for divorce, leaving marital/family without permission, being a rape victim etc. The petition displayed the existence of parallel enforcement agencies known as Khap Panchayats punishing crimes by means of social boycott and even by death. The judgment recording the observations and representations of the State Governments and the Central Government and recognising the observations of the Law Commission and the previous judgments of the court held that Khap Panchayats as an enforcement agency can have no legal standing. The judgment declared that consensual choice of life partners is a right under A. 21 of the Constitution and any interference in such choice is illegal and untenable. The court while disposing of the petition directed the state and central governments to implement certain preventive steps mentioned in the judgment. These preventive measures included directions to the district police administration of the states and the home departments such as identification of districts where Khap Panchayats operate, interaction with the members and informing them of the illegality of their actions etc.

The judgment also pronounced remedial measures such as immediate filing of FIRs, security to the concerned individuals etc.

ShafinJahan v. Asokan K.M &Ors

(**A Love Jihad Case**)

"Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow"

This judgment arose out of a SLP questioning the validity and legality of the orders passed by the High Court of Kerala. The case was heard by a bench comprising of DipakMisra CJI, D.Y.Chandrachud J and A.M.Khanwilkar J. Dipak Misra CJI wrote the judgment for himself and .Justice Khanwilkar while Justice Chandrachud wrote a concurring opinion. Hadiya alias Akhila Asokan embraced Islam and left her parental home. Her father filed a writ for Habeus Corpus on failure to identify her location. Hadiya appearing in the petition expressed her desire to join the organisation, Satyasarani and produced evidence relating to her consensual residence at the hostel of the said organisation. The HC thus disposed of the writ petition. This was, however, immediately followed by another writ petition by her father alleging the possibility of Hadiya being transported out of the country. The HC ordered the State to ensure that Hadiya is not transported out of the country without further orders from the court while allowing her to continue living at the place of her choice. During the continuance of the proceedings, Hadiya informed the court of her marriage to Shafin Jahan, the appellant before the SC who was working overseas and who wished to take Hadiya with him. The HC expressing grave doubts regarding the marriage and exercising its Parens Patriae jurisdiction nullified Hadiya's marriage and provided her custody to her parents. This judgment of the SC dealt with the writ of Haheus Corpus extensively and while expounding its contours upheld the rights of an adult to make such life choices as law would permit. The judgment discussing the Parens Patriae doctrine held that its application cannot be without limitation and held that it can be invoked only in exceptional circumstances such as when the relevant party is mentally incompetent or

have not come of age. On the facts of the case the judgment found no ground to sustain the orders of the HC and set aside the impugned order while reiterating the rights of an individual under the Constitution of India.

The Cauvery Water Dispute

(**A Fiery Water Dispute**)

This judgment of the SC was in consequence of appeals filed by the State of Karnataka against the orders of the Cauvery Water Disputes Tribunal passed in 2007. The appeals involved the States of Karnataka, Tamil Nadu, Kerala and the Union Territory of Puducherry as the parties before the court. The case was heard by DipakMisra CJI, Amitava Roy J and A.M. Khanwilkar J. and the judgment was given by Dipak Misra to which the other judges concurred. The SC partially allowed the appeals after dealing with the entire dispute extensively through factual and legal analysis of the issues involved. The judgment upheld the validity of the agreements that laid down the water sharing arrangement and rejected all the arguments of unconscionability and nullity raised by Karnataka. The judgment approved and upheld the rejection of the Harmon Doctrine by the Tribunal, which applied Helsinki rules. The court approved of the application of the Helsinki rules that deals with equitable utilisation of international rivers and placing reliance on the Compione rules, Berlin rules, the National Water Policies and the judgment of the court in Presidential Reference Re Cauvery Water Disputes Tribunal declared the need for equitable apportionment and reiterated cross border rivers to be national assets to be equitably used by the concerned states. The judgment upheld the findings of the tribunal as regards the irrigation area of Tamil Nadu, the allocation of water for domestic and industrial purpose, the rejection of Kerala's request for trans-basin diversion for hydro power projects etc. It emphasised on the importance of drinking water requirement and placed it atop the hierarchy of equitable distribution. Disposing off the appeals the court directed Karnataka to release 177.25 TMC of water to Tamil Nadu instead of the 192 TMC requirement made by the Tribunal and also directed the Centre to frame a scheme for implementation of the SC's orders.

Subramaniam Swamy v. Union of India &Ors

(**Constitutionality of Criminal Defamation**)

"Reputation of one cannot be crucified at the altar of another's right of free speech"

This judgment was made in a petition under A.32 of the Constitution challenging the constitutional validity of Sections 499 and 500 of the Indian Penal Code,1860 and Sections 199(1) and 199(4) of the Code of Criminal Procedure, 1972. The case was heard by a bench consisting of Dipak Misra J. (as he then were) and Prafulla C Pant J. and the judgment was given by Dipak Misra. The judgment is a detailed analysis of constitutional provisions, doctrine and the law of defamation in light of a citizen's freedom of speech under A.19(1)(a) and a person's right to dignity as interpreted under A. 21 of the Constitution. The judgment held that the word Defamation in Article 19(2) is not to be construed such that it includes only civil defamation nor should it be construed to include only such instances of defamation that affect public order and safety or affect public in general. It held that the term has to be given its natural meaning without any construction restricting it. The judgment emphasised the need for balance of right to freedom of speech and the right of reputation guaranteed as a right under A.21. After these findings the judgment dealt with the submissions regarding the above mentioned sections being substantively and procedurally reasonable as required under Article 19. Post an elaborate discussion on the concept of reasonable and it's standards and an examination of the sections it held the same to be reasonable and thus constitution thereby disposing off the writ petition.

Shyam Narayan Chouksey v. Union Of India &Ors

(The National Anthem Case)

"*Respecting the National Anthem is an elanvital of the nation and the fundamental grammar of belonging to a nation state*" (**emphasis added**)

This petition under A.32 of the Constitution was a public interest litigation seeking measures for inculcating respect for the National Anthem in the citizens, specifying what should be or should not be done while national anthem is being played, specifying what will constitute disrespect towards the national and to prevent commercial exploitation of the national anthem among others such as preventing the depiction of the national anthem on certain undesirable objects. The case was heard by DipakMisra CJI, Amitava Roy J and A.M. Khanwilkar J. The court passed an interim order on November 30, 2016 ordering the prohibition of commercial exploitation, the playing of the national anthem at cinema theatres among others. The order to play the national anthem at theatres and related parts of the order was mandatory in nature. Several intervening applications were thereafter filed especially concerning the rights of the disabled and appropriate action was taken thereupon. These orders were welcomed by the intervenors and the government who cited the Preamble, Article 51-A among other laws to buttress their acceptance of the order. The Central Government in pursuance of their undertaking formed a committee to deliberate upon the matters raised in the petition and the petition was disposed of by this judgment requiring the Central Government to take necessary action and modifying the interim order which governs the matters raised until such necessary action is implemented.

Aseer Jamal vs. Union of India & Ors.

(Benefits of RTI to Differently-Abled)

"The right to acquire and to disseminate information an intrinsic component of freedom of speech and expression"

This writ petition was filed challenging Section 6 of the Right to Information Act for its 'discrimination' as the provision suffers from unreasonable classification between visually-impaired and visually-abled persons and thereby invites the frown of Article 14 of the Constitution. It was further contended that certain provisions of the Act are not accessible to orthopedically impaired persons. The Bench comprising CJI Dipak Misra and Justices AM Khanwilkar and DY Chandrachud, refused to examine the constitutionality of the provision and disposed off the petition directing the petitioner to submit a representation to the competent authority pointing out any other mode available for getting information under the RTI Act.

(C.) PUBLIC LAW IN THE NEWS

SUPREME COURT:

1. **Recognizing the Concept of "Democratic Policing":** In the case of Yashwant v. The State of Maharashtra, the need to develop and recognize the concept of 'democratic policing' was stressed upon by the apex court. The bench enunciated that the means used in achieving order in the society is equally important and that crime control is not the only end. The case related to the custodial torture and eventual death of a man by three Maharashtra State Police officers.

2. **No Habeas Corpus if custody pursuant to judicial order:** A person who is in police custody in respect of a criminal case under investigation pursuant to a remand order by the Magistrate can seek no remedy in the form of the writ of habeas corpus. Thus, bench observed that since this was not a case of illegal detention but that of judicial custody under a judicial order in force, no remedy in the form of a writ could be granted.

3. **Pragmatic Realism in the context of creativity:** While dismissing a plea against the Malayalam novel 'Meesha', the apex court observed that free flow of ideas is affected under the culture of banning books, thereby hindering the freedom of speech, thought and expression. In this judgement, authored by CJI Dipak Misra, he highlighted that we live in a democratic nation which allows for free exchange of ideas and liberty of thought and expression, as opposed to a totalitarian regime. He further called upon readers and admires of literature and art to exhibit maturity, humanity and tolerance. In his opinion, the entire case was adjudicated on the basis

of 'pragmatic realism' in the realm of creativity. The court observed that it was essential that a constant interference by courts do not lead to the death of art.

4. **Consensual Homosexual Acts held unconstitutional:** In Navtej Singh Johar&Ors.v. Union of India, a five- judge constitution bench of the apex court struck down a 157-year old law, which criminalized homosexual acts between consenting adults in private. Thus, Section 377 was held unconstitutional to that extent.The verdict expressed was unanimous however, there were four separate but concurring judgments.

5. **Housing - a basic need:** The apex court while hearing a Public Interest Litigation in a case pertaining to the homeless people in urban areas held that housing is a basic need for everybody and that States as well as Union Territories should implement the Policy and Plan prepared by the Union of India in this regard. While looking into the progress made by the states and union territories in regard to the setting up of committees as proposed by the Union of Indiato monitor the progress of shelters to Urban Homeless, the apex court noted that it was indeed a sorry state of affairs. The Bench further imposed costs of Rupees 1 Lakh on the defaulting states, except the State of Uttarakhand, considering the peculiar circumstances of the State. The Bench called upon all the states to formulate a Plan of Action, which shall include the methodology for the identification of the homeless people, identification of land, nature of shelters, etc. The Bench reiterated that "persons without shelter cannot be left to fend for themselves".

6. **Criminal trial through Whatsapp?** The Supreme Court lashed out at a lower court in Hazaribagh, Jharkhand when a trial judge pronounced the order framing charges against the accused (a former minister of Jharkhand and his wife, a member of the

Legislative Assembly), through a Whatsapp call. The Bench opined that such a process cannot be allowed and that the administration of justice cannot be brought into disrepute. The couple in this case was accused for rioting and were granted a bail last year by the apex court, on the condition that they shall not enter Jharkhand except for attending court proceedings. Looking at the sensitivity of the issue and the bail conditions imposed on the accused, the trial was directed to be conducted by video conferencing. However, since the connectivity was very low in both the courts, the trial judge instead pronounced the order via a Whatsapp call.

7. **Leprosy patients - Elimination of discrimination:** Bench comprising CJI Dipak Misra and AM Khanwilkar and DY Chandrachud JJ, in the case of Pankaj Sinha v. Union of India and others, issued directions for the treatment and rehabilitation of persons affected by leprosy in order to end the stigma attached to leprosy patients. The court issued various directions on the basis of the petition as well as the 256th Law Commission report. The directions issued were to the effect that the Union and the States are to undertake periodic national surveys for determining prevalence rate and new cases of detection of leprosy, organize massive awareness campaigns on leprosy day, make available the drugs for leprosy management free of cost, ensure that medical officials in both Government as well as private medical institutions desist from discriminatory behavior while treating and examining patients and consider formulating a scheme for provision of at least a minimum monthly assistance, to name a few. The Bench also suggested that the Union Government may consider framing separate rules for assessing the disability quotient of leprosy affected persons.

8. **Legislators to be allowed to practice law:** A PIL was filed by Ashwini Kumar Upadhyaya contending that since Rule 49 of the Rules framed by Bar Council of

India prohibited an advocate from being a full-time salaried employee of any person, government, firm or corporation, so long as he continues to practice,therefore legislators being in full – time engagement and drawing salary from the Consolidated Fund of India, should be prohibited from practicing law. The petition sought a declaration to the effect that a person cannot be permitted to perform a dual role –that of a lawyer and a legislator, i.e. MP or MLA, simultaneously. While giving its decision in thematter, the Bench comprising of CJI Dipak Misra and AM Khanwilkar and DY Chandrachud JJ held that legislators cannot be characterized as full-time salaried employees as there exists no employer – employee relationship. Therefore, the said Rule 49 cannot be made applicable to legislators, thereby enabling them to practice law while being members of the House.

9. **Deportation of Nigerian National:** The apex court while considering the petition for admission, asked the Union Ministry of Home Affairs and External Affairs to jointly consider the release as well as the deportation of a Nigerian national, Nweze Raymond Chinenyeuba.He had been taken into custody by the Nagaland police on 9th September, 2016 on the ground that he did not have a valid visa. During his trial before the Chief Judicial Magistrate, Dimapur, he was sentenced to a period of imprisonment which he had already undergone under custody. The CJM thus, ordered for his immediate release, which was not complied with. Therefore, a public-spirited person, Solomon Shaikh moved the apex court for seeking a relief under the writ of habeas corpus.

10. **Criminalization of politics:** The Constitution Bench of the Supreme Court held that candidates cannot be disqualified merely on the ground that charges in a criminal case have been framed against them. The Bench however issued directions with the

aim of reducing criminalization of politics and stated that "a voter is entitled to have an informed choice". The Bench suggested that parliamentary legislation was necessary to address this issue in order to foster proper constitutional governance and also to keepa check on false cases foisted against prospective candidates.

11. **Removal of Disqualification under RP Act upon Stay of conviction:** The apex court, in a PIL filed before it, ruled that once the conviction of any MP or MLA has been stayed by the appellate court under Section 389 of the Cr.P.C., the disqualification which that person had been subject to under sub-sections 1,2 and 3 of section 8 of the Representation of People's Act, 1951 will cease to operate.

12. **Female Genital Mutilation:** The Supreme Court comprising of a Bench of CJI Dipak Misra and Justices A.M. Khanwilkar and D.Y.Chandrachud which was hearing a PIL filed by advocate Sunita Tiwari to ban the practice of Female Genital Mutilation, which is prevalent among the Dawoodi Bohra community in India, has been referred to thequestion to a five-judge Constitution Bench.

HIGH COURTS:

Delhi High Court:

R.K. Jain v. Union of India

1. **Appellate Authority under RTI Act not liable to any penal action:** The Appellant filed an application for information under RTI, Act 2005. The CPIO refused to furnish the information. The matter reached to the CIC who decided the matter in favour of the appellant and directed furnishing of certified copies while also recommending disciplinary action against the Appellate Authority. Section 20 of the

Act makes only a CPIO liable for disciplinary action. Further, it was also observed that an Appellate Authority under Section 19(1) is classified as an officer senior in rank to the CPIO; meaning thereby that the CPIO is a different authority from the Appellate Authority.

Prism Motion Pictures (P) Ltd. v. Mukta Arts Ltd

2. **No copyright over movie titles:**The plaintiff had registered the title *Double Trouble* for their Punjabi movie. The title was not used by the plaintiff. The defendant adopted the same title and in a Punjabi movie, against which the plaintiff instituted a suit. The Court stated that the movie titles may be entitled to protection, if substantial reputation and goodwill are established, per se. However, in absence of the same, they would not be protectable.

Rajeev Singhal v. MCD, LPA No. 379 of 2017

3. **Compensation allowed for death due to negligence in maintaining electricity system in public park:**The appellant and his 14-years old son had gone to Sanjay Park maintained by the East Delhi Municipal Corporation, where while playing cricket the son came in contact with an electric wire lying there and was electrocuted which resulted in his death. The Court held that "*the negligence on the part of respondents was writ large in the improper manner of maintaining the electricity system*." The Compensation was assessed at Rs. 27,38,607.81 along with interest.

Punjab and Haryana High Court:

Sikander v. State of Haryana, CWP No.21291 of 2018

1. **Petition for termination of 28 weeks old pregnancy of a minor girl rejected:** The Petitioner alleged that she was raped and when the pregnancy of the minor came into light, the petitioner approached the Court for termination of 28 weeks

pregnancy in accordance with the Medical Termination of Pregnancy Act, 1971. The Court considered the question that if pregnancy of the minor is terminated, there would be danger to life of minor or not. The Court disallowed the termination of preganacy.

Uttaranchal High Court:

Laxman Singh Negi v. State of Uttrakhand

1. **Aadhar cards for persons with disabilities and release of pension:** The petitioner drew the attention of the court towards the grievances of the people who had faced problems under the Aadhaar regime whereby the aadhaar cards could not be accessed by them due to their disability. The Court directed the District Magistrate, Almora to ensure that the Aadhaar Cards of the said persons were prepared within three days from this date and, thereafter, respondent shall release the disability pension to them within seven days along with arrears.

Ban on the use of polythene in Uttarakhand, In re, WP(PIL) No. 132 of 2018

2. **State directed to implement an effective mechanism to eradicate the plastic menace:** The Court took judicial notice of the news item published in daily edition of 'Hindustan' newspaper wherein it was stated as to how polythene was damaging the ecology of the environment and consequently it expressed its concern over the havoc created by plastic and demanded the authorities to contribute towards sweeping away the damages caused by the plastic from the State. It was observed that "Polythene is polluting the fragile environment and ecology of the State of Uttarakhand.

Chhitij Kishore Sharma v. Justice Lok Pal Singh

3. **Judge has to be protected from vexatious charges and malicious litigations; Judge of Court of Record cannot be tried for committing contempt of his own Court:**

   This petition was filed by the petitioner who was an advocate, alleging contempt of Court, against a sitting judge of a High Court for using unparliamentary language against the petitioner. The Court maintained that "*The principal requirement for all Judges, and particularly for a Judge of Court of Record, is to maintain his independence but also maintained that judge has to be protected, from vexatious charges and malicious litigations.*" It was held that a judge of Court of record cannot be tried for committing a contempt of his own Court.

Diwan Singh v. State of Uttarakhand

4. **Single person can also qualify as a class of persons:** The Petitioner challenged Section 157-B of the U.P. Zamindari Abolition & Land Reforms Act, 1950 of being ultra-vires and unconstitutional. Accepting that a single person can also qualify as a class of persons as per the ratio of R.K. Dalmia v. Justice Tendolkar, the Court held that in the present case there was no violation of Fundamental Rights as Section 157-B does not create an absolute bar on the transfer of land and it could be transferred to a person belonging to Scheduled Tribes.

Aklema Parveen v. State of Uttarakhand, WP (PIL) No. 156 of 2018

5. **High Court decides for safety of students:** A Division Bench gave directions to ensure safety of school students from the moment they leave their home to when they reach back to the same. This order came after a case of sexual assault was reported against a student inside a school van.

Madhya Pradesh High Court:

Chetram Choudhary v. State Bank of India

1. **High Court sets aside order for lack of speaking order:** Petitioner was a Dy. Manager in the respondent Bank and was transferred to Katni from Jabalpur. After perusing the matter High Court was of the view that the respondents have not considered the grounds stated by the petitioner and thus impugned order was a non-speaking order. Therefore, the impugned order was set aside.

Kerala High Court:

P.K. Firoz v. State of Kerala, W.P (C) No. 29127 of 2018

1. **Uniform formula to be made to compensate flood affected victims of the State:** A Division Bench framed suggestions for fixing compensation for flood-affected victims of the State of Kerala. It was stated that there was an absence of any specific and uniform criteria for ascertaining the adequate amount of compensation to be granted by the respondent to the flood-affected victims of the State. The Court stated that *"The minimum compensation that was common to all victims shall be paid to the identified victim solely based on his claim presented with response to the published formula devoid of any further scrutiny as to its genuineness by the respondent."*

Rajasthan High Court:

Sawai Singh v. State of Rajasthan

1. **Government is morally accountable to the common people:**A PIL was filed claiming the misuse of public money by the respondent in order to cater to their

political motives during the Gaurav Yatra. The High Court concluded that, Ganga Yatra is so intermingled and state-sponsored that it would be impossible to segregate one from the other and hence it was held that no public functions will be sponsored and financed by the state funds.

Hyderabad High Court:

Union of India v. Nenavath Suresh

1. **Mere apprehension about future medical complications not regarded as a qualification to declare a candidate as unfit for employment:**The appointment of the respondent for Work Assistant at Nuclear Fuel Complex (NFC) was rejected by the petitioner on the grounds that he was medically unfit in view of his morbid obesity, uncontrolled hypertension and sleep disorder as opined by the Medical Committee. The Central Administrative Tribunal rejected the order by stating that that a candidate could not be declared unfit for a particular post merely on the ground that he suffered from a disease or disorder without a clear finding that he could not perform the duties and responsibilities attached to that particular post. The order was challenged, following which the Court stated that the nature of the work was not so onerous or strenuous that only a person in the pink of health could do it.

Karnataka High Court:

Sarvan v. State of Karnataka

1. **Taking the services of a prostitute cannot be penalized under IPC and Immoral Traffic (Prevention) Act:**The petition was filed under Section 482 of CrPC in order

to quash the entire proceeding in crime registered by the respondent under Section 370 of IPC and Sections 3, 4, 5 and 7 of the Immoral Traffic (Prevention) Act. The Court concluded by stating its opinion that the customer does virtually encourage prostitution along with exploiting the victim for money, but due to the absence of any specific penal provision, the Court cannot make the petitioner liable for prosecution under the said offences.

Allahabad High Court:

Shahin Bano v. State of U.P.

1. **Peaceful living is a right of married couple:** The petitioner and her husband were harassed by Respondent and other family members. The High Court held that petitioners had every right to live together peacefully and no one can be permitted to interfere and in case of any disturbance, for immediate protection the concerned police would provide the same.

In matter related to abuse of girls in shelter home in Deoria

2. **The Allahabad High Court issues interim guidelines for the management of shelter homes in the State of Uttar Pradesh**: The directions were issued while the Court was hearing the suomotu petition initiated in the Deoria Shelter Home case. The Bench comprising Chief Justice DB Bhosale and Justice Yashwant Varma directed all District Judges in the State to constitute monitoring committees of 3-4 members, comprising the Secretary of District Legal Services Authority (DLSA), and judicial officers.

LEGISLATIVE DEVELOPMENTS – A REVIEW OF THE BILLS PASSED IN THE LOK SABHA IN THE MONSOON SESSION OF THE PARLIAMENT, 2018:

In what has been one of the most productive sessions of the Parliament, many important legislative enactments received support on the floor of the House. However, it is to be noted that this session has been one where more Bills were introduced and passed but fewer Bills made it to Committees.[4] Here is a brief overview of the major Bills in the field of 'Public law' which have made their way through the both houses of the Parliament during the monsoon session (concluded on 10th August 2018)

1. **The Criminal Law (Amendment) Bill, 2018:** The increases the minimum punishment for rape of women from seven to 10 years and introduces death penalty as punishment for committing rape of girls below 12 years.

2. **The Fugitive Economic Offenders Bill, 2018:** The bill allows confiscation of properties of persons who have absconded the country to avoid facing prosecution for economic offences above Rs. 100 crore.

3. **The Constitution (123rd Amendment) Bill, 2017and The National Commission for Backward Classes (Repeal) Bill, 2017:** The NCBC Bill introduced alongside the Constitution (123rd Amendment) Bill, 2017 seeks to repeal the NCBC Act, 1993 which originally established the body. The National Commission for Backward Classes (NCBC) established was given a Constitutional status in the 123rd Constitutional Amendment Bill. The NCBC has the power to examine complaints

[4] Vital Stats Parliament functioning in Monsoon Session 2018, available at http://www.prsindia.org/parliamenttrack/vital-stats/parliament-in-monsoon-session-2018-5388/

relating to the inclusion or exclusion of groups within the list of backward classes, and advise the central government.

4. **The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Bill, 2018:** The bill amends the 1989 Act adding that the investigative authority would not require an approval to arrest an accused under the Act and a preliminary inquiry would no longer be necessary prior to registering an FIR.

5. **The Prevention of Corruption (Amendment) Bill, 2013:** Amending the 1988 Act, the bill covers the offence of giving bribe to a public servant and requires prior sanction to investigate public officials.

6. **The Requisitioning and Acquisition of Immovable Property (Amendment) Bill, 2017:** Amending the 1952 Act, the bill allows the central government to re-issue the notice of acquisition to a property owner to give them an opportunity to be heard.

ORDINANCE:

1. **Triple Talaq:** The President of India, Ram Nath Kovind, has promulgated an Ordinance to criminalise the practice of "Triple Talaq". The Ordinance comes in after the Triple Talaqbill i.e. Muslim Women Protection of Rights on Marriage Bill got blocked in the Rajya Sabha, though it was already cleared by the Lok Sabha. The Ordinance declares the pronouncement of talaq as void and illegal, and further makes it an offence punishable with imprisonment for a term which may extend up to three years and fine. For the purposes of the Ordinance, talaq means "talaq-e-biddat or any similar form of talaq having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband."

OTHER NEWS:

1. Delhi High Court directs the police to take stringent action within a week on a status report regarding the defacement of public property and violation of Court's order against illegal hoardings and pamphlets (which has been observed to be significantly less) in the run-up to the Delhi University Student Union polls have.

2. The Delhi High Court reaffirmed that denial of passport or its non-renewal without providing reasons as mentioned under the Passports Act, 1967 infringes the fundamental rights guaranteed under the Constitution of India.

3. The Delhi High Court held in favor of having CCTV cameras inside classrooms and disregarded the claims that children's right to privacy would be affected.

4. Concerned over loopholes in the process of Aadhaar verification and linkage, the Delhi High Court was faced with its disastrous consequences for individuals as well as national security during a bail hearing.The Court registered a suomotu PIL and sought response of the Centre, UIDAI, the Delhi Police.

5. In a significant case, the Gujarat High Court banned idol immersion in river Tapi which passes through Surat and other natural rivers in the State while directing the authorities concerned to ensure that immersion of idols is prohibited not only during Ganesh Visarjan, but also on other festivals, including Durga Puja, Janmashtami, Moharam etc.

6. The Uttarakhand High Court directed the State to remove all encroachments from ancient monuments and archaeological sites in the State within a period of three months.

7. Punjab and Haryana High Court ordered a convicted of abduction and rape of a minor victim girl, and his mother to pay Rs 90 lakh towards compensation.

8. Uttarakhand High Court directs reservations to be provided in Government jobs, housing scheme and separate toilets etc.

9. Allahabad High Court sets aside contempt proceedings against district magistrate by a complainant who initiated proceedings with a view to coerce the DM into giving a favorable verdict.

10. HNLU Students protest garners nation-wide support; student communities across the country erupt with support after the Supreme Court reinstated the Vice Chancellor. More than 800 students have signed the letter of no-confidence.

11. In a landmark decision for environmental rights, the High Court of Bombay issues an order that destruction of mangroves leads to violation of fundamental rights of citizens under Article 21. The High Court also passed directions for protection of mangrove rich regions.

(D.) CASES ACROSS THE POND

11 January 20118	Niang v. Carroll	United States 8th Circuit court upheld Missouri's requirement of license for cosmetology and barbering for African-style hair braiding. Though the State conceded that neither training nor the paid course, which is a prerequisite for the license, is of much relevance to the braiding profession, it contended that braiding had evident health risks like hair loss, inflammation and scalp infection and therefore license for practice was necessary. Court in its reasoning rationally related to a legitimate state interest in protecting consumers and ensuring public health and safety. [5]
31 August 2018	Cape High Court in Women's Legal Centre Trust v President of South Africa	South African Constitutional Court recognizes Muslim Marriages (not recognized in South Africa) and gives 2 years to the legislation to pass law to this effect.[6]
14 September	Rogers Communications Inc. v. Voltage Pictures,	Canadian Supreme Court held that when Copyright owners compel Internet Service

[5] https://law.justia.com/cases/federal/appellate-courts/ca8/16-3968/16-3968-2018-01-11.html
See also https://harvardlawreview.org/2018/06/niang-v-carroll/
[6] http://www.saflii.org/za/cases/ZAWCHC/2018/109.html
See also https://www.dailymaverick.co.za/artide/2018-09-11-understanding-the-muslim-marriages-judgment/

2018	LLC	Providers (ISP) to disclose the identity of person *suspected of infringing owners' copyright* by getting a Norwich order, Copyright owners cannot seek to not pay costs of disclosure based on provision in statutory notice and notice copyright regime. It conclusively held that ISPs are entitled to charge fee for time and efforts taken to disclose the *identity of such persons to the Copyright owner*[7].
18 September 2018	Minister of Justice and Constitutional Development v Prince	South African Constitutional Court decriminalized use or possession in private or cultivation in a private place of cannabis by an adult for his or her own personal consumption in private.[8]
19 September 2018	Guidelines to the judgment of the Second Senate of 19 September 2018[9]	The Constitutional Court of Germany upheld the constitutional validity of the Census 2011 which was challenged by Hamburg and Berlin. The census 2011 was based on register supported data acquisition, which was a shift from erstwhile primary statistical census. The two cities contended that there was negative deviation in their population, which accordingly resulted in lower federal funding

[7]https://scc-csclexum.com/scc-csc/scc-csc/en/item/17254/index.do
[8]http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/2018/30.html&query=cannabis
[9]https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2018/09/fs20180919_2bvf000115.html;jsessionid=6135EC75FF604A7BD7C5A0F04DDC326C.1_cid393

		(funding being contingent on population) and affected the cities accordingly.[10]

[10] See also https://www.dw.com/en/berlin-and-hamburg-lose-court-battle-over-germanys-2011-census/a-45563740

(E.) VITAL CONSTITUTIONAL QUESTIONS

ARTICLE V OF THE US CONSTITUTION: A COMICAL COMPLEX?[11]

The United States of America celebrated its Constitution Day on 17th of September, and in the wake of this celebration, I propose to analyze the amendment procedure envisaged in the American constitutional framework to ascertain whether America's rules for constitutional change are indeed unusually importunate.

ARTICLE V

In Article V, the Constitution sets out the following rules for its own amendment:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.[12]

DRAFTING HISTORY OF ARTICLE V

[11] This Essay Is Authored By Varad S. Kolhe, IV B.A. LL.B.., ILS Law College, Pune.
[12] Art. V., U.S. Constitution

These rules were proposed by the Philadelphia Convention of 1787 after considering an alternative providing that when two-thirds of the states called for amendment, the national legislature would "call a convention for that purpose." That procedure intentionally excluded any substantive role for Congress because abuses by that body might be the reason that amendment was desired. After Alexander Hamilton pointed out that any need for modification would likely be first noticed by Congress, the Convention provided that Congress could propose amendments on the approval of two-thirds of its members or when it received applications from two-thirds of the state legislatures. Such proposals would then be ratified by three-fourths of the state legislatures or by state conventions with the choice of method left to Congress. Now, however, Congress's role threatened to frustrate amendments aimed at its own oppressive behavior. The Convention, therefore, added a second method of proposing amendments: Congress would be obliged to call a national convention for that purpose when requested by two-thirds of the states. With the approval of this option, the final framework of Article V was established.[13]

Thus, with two ways to propose amendments and two ways to ratify them, there were four separate sequences for enacting amendments. In fact, twenty-six amendments have been approved using only one method—proposal by Congress and ratification by state legislatures. Only the Twenty-First Amendment, repealing the Eighteenth (Prohibition) Amendment was proposed by Congress but approved by *state conventions*. There has never been a *national* constitutional convention, one for proposing amendments.

REVIEW OF THE CHRONOLOGY OF AMENDMENTS TO THE UNITED STATES CONSTITUTION

The United States Constitution became effective in 1789. After 228 years, it is touted as "the world's longest surviving written charter of government."[14] More remarkably,

[13] *See* David E. Kyvig, Explicit And Authentic Acts: Amending The U.S. Constitution, 1776–1995, At 55–59 (1996).
[14] Zachary Elkins, Tom Ginsburg & James Melton, The Endurance Of National Constitutions 50 (2009).

notwithstanding that it is sometimes credited with inventing the very idea of machinery for modification of a constitutional text,[15] it has continued in much the same form as when ratified. There have been twenty-seven amendments, but really it has "been amended" only eighteen times.[16] The first ten amendments, dealing with individual rights, were presented to the states by the first Congress in a single package, fulfilling a pledge made to induce ratification of the unamended text.[17] As one commentator observed, they might reasonably be regarded, "as part of the original Constitution."[18] In fairly short order, two more amendments were adopted, each correcting what were regarded as mistakes or oversights in the original document. The Eleventh, ratified in 1795, made explicit the immunity of state governments from suit in the federal courts. The Twelfth, ratified in 1804, rejiggered the voting procedure for president in the electoral college to prevent a repetition of the deadlocked election of 1800.[19]

This was followed a period of sixty-one years with no successful constitutional amendment. Then, from 1865 to 1870, in the aftermath of the constitutional crisis of the Civil War, three critical amendments were approved. The Thirteenth, Fourteenth, and Fifteenth Amendments abolished slavery, secured the civil rights of the freed slaves, and prohibited denying the vote on account of race. Now, followed another long period, from 1870 to 1913, with no amendments. In fact, at the beginning of the twentieth century, it looked to many observers as if the Article V obstacles were too great to permit approval of useful constitutional modifications. In 1912, Senator Robert La Follette introduced a proposed constitutional amendment to Article V that would

[15] Yaniv Roznai, Unconstitutional Constitutional Amendments: The Limits Of Amendment Powers 3–4 (2017).
[16] Richard Albert, *American Exceptionalism In Constitutional Amendment*, 69 Ark. L. Rev. 217, 220 (2016); Joseph R. Long, *Tinkering With The Constitution*, 24 Yale L.J. 573, 576 (1914).
[17] Selden Bacon, *How The Tenth Amendment Affected The Fifth Article Of The Constitution*, 16 Va. L. Rev. 771, 775 (1929). Congress had approved twelve amendments in 1791 but only ten were ratified by enough states to satisfy the requirements of Article V. Pauline Maier, Ratification: The People Debate The Constitution, 1787–1788, At 458–63 (2010).
[18] Joseph R. Long, *Tinkering With The Constitution*, 24 Yale L.J. 573, 576 (1914).
[19] Ohn R. Vile, Encydopedia Of Constitutional Amendments, Proposed Amendments, And Amending Issues, 1789–2015, At 164–66, 476–78 (4th Ed. 2015).

have reduced the requirement for congressional proposal from two-thirds to a majority of each house and permitted the alternative of proposal by ten states. Ratification would be sufficient if approved by a majority of voters in a majority of states. Notwithstanding the failure of this and similar plans, the next four years saw an explosion of constitutional amendment. Two amendments were approved in 1913, the Sixteenth, empowering the federal government to impose an income tax, and the Seventeenth, calling for direct election of senators. The Eighteenth Amendment, approved in 1919, created the national prohibition on the manufacture or sale of "intoxicating liquors," and the Nineteenth, ratified in 1920, guaranteed suffrage for women in both state and federal elections. This amendment "surge" is associated with the success of the "progressive" movement in national politics.[20] Writing in 1920, Walter F. Dodd drily noted that "[a] few years ago it was thought that the difficulties of amending . . . were insurmountable except in times of grave crises . . . [but] at the present time the difficulties of federal amendment do not appear quite so great . . . ."[21]

Two amendments in 1933 repealed the Prohibition amendment and reduced the delay between election and taking office for the President and the Congress. In 1951, the Twenty-Second Amendment limited presidents to two terms. Then, in the period from 1961 to 1971, there was another burst of amendment activity, with four amendments being approved. Three (Twenty-Three, Twenty-Four, and Twenty-Six) expanded the right to vote. The Twenty-Fifth Amendment provided new rules for presidential succession and disability. The Twenty-Seventh Amendment represented the *reductio ad absurdum* of the choice not to enforce a requirement of reasonable contemporaneity in ratifications. This provision, postponing any increased compensation for members of Congress until after an intervening election, was one of the original amendments approved by the first Congress and submitted to the thirteen states in 1789. Six states

[20] Zachary Elkins, Tom Ginsburg & James Melton, The Endurance Of National Constitutions 50 (2009).
[21] Walter F. Dodd, *Amending the Federal Constitution*, 30 YALE L.J. 321, 349 (1921).

ratified before 1800 and a seventh in 1872. A new wave of ratifications began in 1978 and, along with the prior seven approvals, these reached thirty-eight in 1992, that being three-fourths of the by now fifty states. Congress promptly declared the text properly ratified and part of the Constitution.[22] No further amendment has been adopted since—a period of forty-seven years.

IMPLICATIONS OF ARTICLE V

While Article V's reference to "two-thirds of both houses" might mean two-thirds of the combined membership of the two bodies, Congress has uniformly treated it as calling for a two-thirds vote in each house.[23] The question of what a state legislature must do to make an effective ratification has been left to the legislators in each state.[24] As will be examined below, the Article tells us little about the kind of membership or procedures that would be required for a deliberative body to qualify as a national "convention for proposing amendments."[25]

Amendments to the Constitution are appended to the original text as additional articles. Article V merely states that after ratification, such amendments shall be "valid, to all intents and purposes, as part of this Constitution." In fact, when James Madison presented the first versions of the proposed rights amendments to the House of Representatives in 1789, he specified places in the original text that would be changed or supplemented. He thought this would assure a certain "neatness and propriety,"

[22] Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENT. 101, 102 (1994). Such official promulgation by Congress has occurred only twice, for the Fourteenth and Twenty-Seventh Amendments, probably the two most problematic ratifications. In every other case, a declaration by the Archivist of the United States has been deemed sufficient.

[23] David R. Dow, *The Plain Meaning Of Article V*, *In* Responding To Imperfection: The Theory And Practice Of Constitutional Amendment 117, 118 (Sanford Levinson Ed., 1995)

[24] Ohn R. Vile, Conventional Wisdom: The Alternate Artide V Mechanism For Proposing Amendments To The U.S. Constitution 30 (2016); Dyer V. Blair, 390 F. Supp. 1291, 1306–09 (N.D. Ill. 1975).

[25] The Convention Version Of Ratification Has Been Resorted To Only Once To Approve The Twenty-First Amendment, Repealing The Eighteenth (Prohibition) Amendment. For A Discussion Of The Largely Improvised Procedures Employed In That Process.

allowing a reader to see the amended meaning "without references or comparison." Others, however, objected that "interweaving" the changes distorted and confused the work of the original enactors.[26] Amendment, according to one delegate, was "the act of the state governments" and they lacked authority to alter the Constitution which was "the act of the people, and ought to remain entire."After some hesitation, the House agreed with this position, adopting the format that would be followed for all subsequent amendments.

Since amendment procedures create constitutional rules, they have often been considered in connection with the authority to make constitutions in the first place. In designing the amendment formula, the constitution makers might have aimed "to share some of their authority . . . with subsequent generations."[27] In that case, the amendment procedure would reflect "roughly the same level of popular sovereignty as that used in the adoption of the Constitution."[28] The identification of the sovereign constituent authority in the United States is complicated by the central role of federalism. Like almost every federal constitution, Article V amendment incorporates the division between central and local power. The drafting history of Article V, outlined above,[29] shows the attempt to balance these interests. The result justifies James Madison's description of it as "neither wholly federal nor wholly national."[17] It provided one route to amendment that largely bypassed the national government: Congress would be obliged to call a national convention on the application of a sufficient number of states and to submit the proposals of that convention to the states for ratification. But the state governments might also be bypassed insofar as Congress

[26] *Quoted In* Jason Mazzone, *Unamendments*, 90 Iowa L. Rev. 1747, 1779, 1783–84 (2005).
[27] Stephen Holmes & Cass R. Sunstein, *The Politics Of Constitutional Revision In Eastern Europe*, at 275, 276.
[28] Donald S. Lutz, *Toward A Theory Of Constitutional Amendment*, *In* Responding To At 237, 240. *See* Nicholas Aroney, *Constituent Power And The Constituent States: Towards A Theory Of The Amendment Of Federal Constitutions*, 17 Jus Politicum: Revue De Droit Politique 5, 28 (2017) ("The Pattern In Which Constitutive Power Is Configured Tends To Be Replicated, In Modulated Form, In The Distribution Of Powers, Representative Institutions And Amendment Clauses Of The Resulting Constitutional Arrangement.").
[29] The Federalist No. 39, at 246 (James Madison) (Clinton Rossiter Ed., 1961).

could formulate a proposal and submit its ratification not to the state legislatures, but to specially elected state conventions.[30]

The use of conventions, state and national, shows another way Article V borrows the assumptions associated with constitution making. Unlike many modern constitutions, the Article has no provision for direct recourse to the approval of the governed population.[31] When the United States Constitution was created, the use of plebiscites to measure the assent of "the people" was largely unknown.[32] It went more or less without saying for the American founders that "the people" would express themselves only in extraordinary conventions. Speaking of the people's constituent act, Chief Justice Marshall said that "[t]he people acted upon it in the only manner in which they can act safely and effectively and wisely, on such a subject, by assembling in Convention."[33] This was "a method corresponding to the original organization which proposed the Constitution itself."[34] The availability of conventions as part of the amendment-making machinery is, therefore, a recognition of the underlying authority of the people as *pouvoir constituent* even if, when acting in the amendment process, it is also a *pouvoir constituent dérivé*.[35] At the Philadelphia convention, Alexander Hamilton declared congressional power to submit amendments to state conventions was safe insofar as

[30] The Convention Version Of Ratification Has Been Resorted To Only Once To Approve The Twenty-First Amendment, Repealing The Eighteenth (Prohibition) Amendment.
[31] *See E.G.*, Joel Colón-Ríos, *Introduction: The Forms And Limits Of Constitutional Amendments*, 13 Int'l J. Const. L. 567, 570 (2015).
[32] Draft Massachusetts Constitutions Were Put To A Vote In Town Meetings In 1778 And 1780. The Results Seem To Have Been Counted By Individual Votes Rather Than By Towns. Kyvig, At 27–28. In 1788, Rhode Island Employed A Plebiscite On The United States Constitution And The Voters Overwhelmingly Rejected Ratification. Pauline Maier, At 223. Rhode Island Did Not Ratify Until 1790 And Did So In A Convention. 2 Dep't Of State, Documentary History Of The Constitution Of The United States Of America, 1776–1870, At 310–20 (1894), http://avalon.law.yale.edu/18th_century/ratri.asp
[33] Mcculloch V. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819).
[34] Lester Bernhardt Orfield, The Amending of the Federal Constitution 40 (1942).
[35] Michel Lascombe, Le Droit Constitutionnel De La Ve Republique 331–37 (9th Ed. 2005).

"the people would finally decide."[24] Madison, in *The Federalist No. 49*, likewise, referred to a convention as a "recurrence to" or an "appeal to" "the people."[36]

As noted, ratification by state conventions has been adopted only once, in connection with the Twenty-First Amendment repealing the Eighteenth (Prohibition) Amendment. At that time, much improvisation was necessary with respect to the selection of delegates and the procedures followed. Although there have been several occasions on which state legislatures have petitioned Congress for it, no *national* convention has ever been held. Numerous questions have been raised about the circumstances in which Congress would be obliged to call one and the extent of its powers once assembled.[37] It is unclear whether state petitions must specify a particular subject of amendment or call for a general re-examination of the Constitution. It is similarly disputed whether or not the necessary state requests must be similar and if so, in what degree. There is disagreement as to how much control Congress or the states can exercise over a convention with respect to its subject matter or its procedure. Even apart from these questions, the prospect of a national convention has caused considerable anxiety in political observers.[38] The biggest fear is that such a convention, sensing the plenary power of the sovereign people, would ignore any agreed limitations of procedure or subject matter. It would become a "runaway" convention, one not unlike the Philadelphia Convention of 1787.[39]

CONFLICTING VIEWS

A brief summary of the history of amendment in the United States suggests that the requirements of constitutional amendment do not present insuperable obstacles. While

[36] *See* Jo Eric Khushal Murkens, From Empire To Union: Conceptions Of German Constitutional Law Since 1871, At 171–75 (2013).
[37] Russell L. Caplan, Constitutional Brinksmanship: Amending the Constitution By National Convention (1988).
[38] *See*, *E.G.*, *A Convention That's Uncalled For*, N.Y. Times, Aug. 18, 1987, At A24 (Opposing Threatened Convention to Propose A Balanced Budget Amendment).
[39] Richard S. Kay, *The Illegality Of The Constitution*, 4 Const. Comment. 57 (1987)

amendment is rare in American history, there have been periods where the alignment of political forces has been sufficient to accomplish important changes. The quick adoption of the Twenty-Sixth Amendment provides an example. In December 1970, in a challenge to a federal statute setting a minimum voting age of eighteen in both state and federal elections, the United States Supreme Court held that the law was valid with respect to federal elections but unconstitutional insofar as it applied to state elections.[49] Since federal and state officers were generally chosen in single, state-run elections, this risked acute administrative problems. (at the time, eighteen-year olds could vote in only three states.) A constitutional amendment setting a uniform age of eighteen for both levels of government was approved by the necessary majorities in Congress at the end of March 1971. The necessary ratifications were made and the amendment went into effect on July 1, 1971, making it the fastest ratification in United States history.

On the other hand, as early as 1788, in the Virginia ratifying convention, Patrick Henry—who thought the new constitution would need some prompt improvement—complained about the "destructive and mischievous" requirement that amendments be approved by three-fourths of the state legislatures. This would demand "genius, intelligence and integrity, approaching to miraculous."[40] Woodrow Wilson, in his book, *Congressional Government*, published in 1885, argued that "no impulse short of the impulse of self-preservation, no force less than the force of revolution, can nowadays be expected to move the cumbrous machinery of formal amendment."[41] A modern commentator calls the Article "almost comically complex."[42] In fact, about 12,000 proposals for amendment have been introduced in Congress but only thirty-three have been submitted to the states for ratification.[43] A number of studies have confirmed this

[40] *Quoted in* Dyer v. Blair, 390 F. Supp. 1291, 1306 n.36 (N.D. Ill. 1975).
[41] Woodrow Wilson, Congressional Government: A Study In American Politics 163 (Meridian Books 1956) (1885).
[42] Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 618 (2008).
[43] Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319, 342.

conclusion by assembling and comparing data on methods and experiences under constitutions in many jurisdictions. The United States is always at or near the top of the list of states with the most difficult amending procedures.[44]

CONCLUSION

The very nature of an "entrenched" constitution requires that it be harder to change than ordinary law. It follows that constitutional decision making should require more than a mere majority vote in the legislature. The majority's preference, therefore, can be frustrated by some minority and the harder it is to amend the greater will be the abridgment of the democratic power to choose the rules governing collective life. Patrick Henry's objections to the amending procedures implicitly raise this point with respect to Article V. Not only may a minority block widely desired change, a minority of citizens residing in the smallest population states can impose new constitutional rules on a dissenting majority.[38] According to historian David Kyvig, however, "in reality . . . [t]he distribution of population in ratifying and non-ratifying states [has been], in the aggregate, close to the proportion that the Founders held to be satisfactory to establish or deny a supermajority consensus."[45]

It is also hard to evaluate the "difficulty" built into amendment rules. It is challenging to identify all, or even the most important, variables that might explain the ease or difficulty of constitutional amendment. Amendment formulas make use of many institutional and procedural devices. They call for the approval of designated officers and bodies and specify the forms in which their assents can be manifested such as approval by supermajorities or by repeated votes. They can build delays into the

[44] Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT'L J. CONST. L. 686, 694–98 (2015). "Metrics" of amendment difficulty are criticized in Xenophon Contiades & Alkmene Fotiadu, *The Determinants of Constitutional Amendablity: Amendment Models or Amendment Culture?*, 12 EUR. Const. L. Rev. 192 (2016).
[45] Walter F. Dodd, *Amending the Federal Constitution*, 30 YALE L.J. 321, 349 (1921).

process allowing the relevant actors to have second thoughts.[46] Many of these factors may not lend themselves to comparison across legal systems.[47]

It has been pointed out that while only thirty-three amendments have survived the proposal stage in Congress, only six of these failed ratification. This suggests that the bottleneck in the Article V process is the need for approval of two-thirds majorities in the houses of Congress. But Vicki Jackson has pointed out that supermajorities are common in other constitutional systems. In the United States, moreover, the same majorities are required to override presidential vetoes of proposed legislation. Such overrides are infrequent but, as Jackson notes, they have occurred 110 times since 1789. 15.9% of vetoes since 1961 have been overridden. In sum, the strict procedures required for constitutional amendment in Article V do not make amendment impossible or near impossible. It is uncertain if the latest constitutional drought indicates that "the Article V process is 'dead,' or simply quiescent . . . ."

The frequency of constitutional amendment must depend in some measure on factors external to the bare amendment procedure. According to Bjørn Rasch and Roger Congleton, the frequency of amendment "cannot be understood by focusing on the number of veto players and degree of required consensus alone." It also depends on "economic, political, and cultural circumstances, as well as the magnitude of unresolved problems."[48] Tom Ginsburg and James Melton treat these and other intangible factors together under the caption of "amendment culture." A reluctant amendment culture, moreover, may be self-perpetuating. As Vicki Jackson points out, the failure of amendment proposals may convince subsequent actors that such attempts are futile. In

[46] *See Generally* Donald S. Lutz, Principles Of Constitution Design 114–82 (2006).
[47] Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, *in* Comparative Constitutional Law 96, 105 (Tom Ginsburg & Rosalind Dixon eds., 2011).
[48] Bjørn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, *in* Democratic Constitutional Design And Public Policy: Analysis And Evidence 319, 338 (Roger D. Congleton & Birgitta Swedenborg eds., 2006). *See also* Contiades & Fotiadu, at 210 (noting that amendment models should take into account "political conflicts, distrust, polarization, and veto strategies").

the United States, there is reason to believe that the political environment is unfriendly to explicit constitutional change. The constitutional text has developed an aura of sanctity placing a heavy burden of persuasion on anyone suggesting that it is imperfect and needs improvement. In *The Federalist No. 49*, Madison asserted that "a constitutional road to the decision of the people ought to be marked out and kept open" but only "for certain great and extraordinary occasions." Such occasions should be infrequent since "every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability."

David Kyvig concluded that by the time of its centennial, "Americans referred to the Constitution as 'the Ark of the Covenant,' and Independence Hall as 'the holiest spot of American earth.'" "[G]lorification of the Constitution," he concluded, had become a "formidable foe to advocates of political reform . . . ."[49] That attitude appears to continue in the twenty-first century.[50]

[49] *See* David E. Kyvig, Explicit And Authentic Acts: Amending The U.S. Constitution,1776–1995, at 55–59 (1996).
[50] Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law*, *in* The Least Examined Branch: The Role Of Legislatures In The Constitutional State 226, 230 (Richard Bauman & Tsvi Kahana eds., 2006).

(F.) INTERSECTION(S) OF PUBLIC LAW

PUBLIC POLICY: THE CLUTCH OF DUE PROCESS PARANOIA IN ARBITRATION[51]

INTRODUCTION

Making an award is significantly different from enforcing an award. The jurisdiction of the arbitral tribunal to adjudicate dispute(s) is derived from the arbitration agreement, the touchstone on which arbitration proceedings consolidate. However, effective enforcement of an arbitral award lies within the domain of the legal machinery of the state. In light of this, law makes a provision for the recognition and enforcement of the arbitral award.[52]

Arbitral awards, similar to decisions of the court, are not always flawless and errors might flow freely from them. Hence, the New York Convention provides 7 grounds on which an award may be refused enforcement.[53] Constituting an exhaustive list,[54] on which an award may be denied enforcement, the enforcing court has the ultimate discretion in deciding the applicability of any ground raised in this regard by the award debtor.[55]

The very existence and exercise of this discretion has effectuated the due process paranoia amongst arbitrators as they are unwilling and reluctant to act resolutely for

[51] This essay is authored by Varad S. Kolhe, IV B.A .LL.B., ILS Law College, Pune.
[52] Convention on the Recognition and Enforcement of Foreign Awards of 1958 (June 10, 1958) 330 U.N.T.S 38, arts. III, IV [*hereinafter* "New York Convention"]; United Nations Commission on International Trade Law [UNCITRAL], Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res 61/33 (Dec. 18, 2006) UN Doc A/RES/61/33, art. 35 [*hereinafter* "UNCITRAL Model Law"]; Arbitration Act, 1996, § 101 (U.K.); Arbitration & Conciliation Act, No. 26 of 1996, pt. II (India)
[53] Artide V, New York Convention.
[54] Andrew Tweeddale, Arbitration of Commercial Disputes 412 (2007).
[55] China Nanhai Oil Joint Service Corp. v. Gee Tai Holdings Co. Ltd., (1995) XX Y.B. Comm. Arb. 671

fear of the award being refused enforcement on the ground of violation of due procedure.[56]

DUE PROCESS OF LAW

The term due process can assume a variety of connotations and meanings. The Magna Carta portrayed it to mean compliance with the law of the land.[57] In modern constitutional jurisprudence, due process of law refers to legal procedures that are owed to an individual or an entity according the law.[58] The requirement of due process manifests in the form of just, fair and reasonable procedure, principles of natural justice,[59] the right to be heard,[60] the right to be adjudicated upon by a fair and impartial tribunal,[61] the opportunity to defend oneself, timely access to opposition evidence and documents, and equality of treatment.[62]

DUE PROCESS IN ARBITRATION

Considering the wide scope and meaning which due process entails, it is inevitable that arbitrators are affected by the due process paranoia.

Section 48(1)(b) of the Arbitration and Conciliation Act, 1996

Often considered the most important and popular ground, violation of due process as a ground to refuse enforcement is incorporated in Section 48(1)(b) of the Act. Interestingly, neither this nor any other ground explicitly uses the phrase "*due*

[56] Lucy Reed, *Ab(use) of Due process: sword vs shield*, 33(3) Arb. Int'l 361 (2017); Remy Gerbay, *Due Process Paranoia*, Kluwer Arb. Blog (June 6, 2016), *available at* http://kluwerarbitrationblog.com/2016/06/06/dueprocess-paranoia/.
[57] Magna Carta, 1215, ch. 39.
[58] Andrew T. Hyman, *The Little Word "Due"*, 38 Akron L. R 1, 23 (2005)
[59] Justice R S Bachawat's Law of Arbitration and Conciliation 2372 (Anirudh Wadhwa & Anirudh Krishnan eds., 5th ed. 2010)
[60] Bernard Hanotiau & Olivier Caprasse, *Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention*, 25(6) J. Int'l Arb. 721, 727 (2008)
[61] O.P. Malhotra, The law and practice of International Commercial Arbitration 1678 (3d ed. 2014); Osamu Inoue, *The Due Process Defense to Recognition and Enforcement of Foreign Arbitral Awards in United States Federal Courts: A Proposal for a Standard*, 11 Am. Rev. Int'l Arb. 247 (2000)
[62] Gary B. Born, International Arbitration: Cases and Materials 1156 (2d. ed. 2011)

process". This clause can only be invoked in cases where the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was not given proper opportunity to present its case.[63] Though there is no definition of 'proper notice', for the purposes of this section, a notice is not be deemed to be proper if it is not issued at all, if it is irregular such that it fails to specify the time and place of arbitration, or if the notice period is insufficient. [64] In other words, parties must be given a fundamentally fair hearing[65] at a meaningful time and in a meaningful manner.[66]

Instances when awards were denied enforcement

Arbitrators not functioning together, [67] non-conformity with principles of natural justice,[68] award obtained without supplying statement of claims and documentary evidence to opposite party,[69] non-disclosure of names of arbitral tribunal,[70] not copying a letter send to the tribunal to the other party, [71] party being unaware of opposite party's arguments,[72] the arbitrator's refusal to consider evidence that was delayed due to disruption by September 11 terrorist attacks[73] have all resulted in courts refusing to grant enforcement under this provision.

Instances when awards were enforced

On the other hand, enforcement has been done in cases on the other end of the spectrum where, for instance, limited time was provided for oral arguments in light of

[63] Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd., (2006) 11 SCC 245
[64] Sohan Lal Gupta v. Asha Devi Gupta & Ors., (2003) 7 SCC 492; Bauer & Grobmann OHG v. Fratelli Cerrone Alfredo e Raffaele, (1985) X Y.B. Comm. Arb. 461 (Italy).
[65] Minmetals Germany GmbH v. Ferco Steel Ltd., [1999] CLC 647 (U.K.).
[66] Iran Aircraft Indus v. AVCO Corp., 980 F. 2d 141 (2d Cir. 1992).
[67] P.C. Markanda, Law Relating to Arbitration and Conciliation 1153 (8th ed. 2013).
[68] *Id.*
[69] Centrotrade, (2006) 11 SCC 245.
[70] Danish Buyer v. German Seller, (1979) IV Y.B. Comm. Arb. 258 (Ger.).
[71] U.S. Firm P v. German Firm F, (1997) II Y.B. Comm. Arb. 241 (Ger.).
[72] Portuguese Co. A v. Trustee in Bankruptcy of a German Co. X, (1987) XII Y.B. Comm. Arb. 486 (Ger.).
[73] Centrotrade, (2006) 11 SCC 245.

extensive written submissions,[74] no opportunity was given to provide a written reply to a typed list of points that had already appeared in the full statement of parties,[75] the party did not participate in further proceedings despite the plea of the tribunal being *functus officio* being rejected by the tribunal,[76] parties were given an opportunity to provide their own religious law experts,[77] notice did not set out the details of the claim but the correspondence between the parties meant that respondents were fully aware of the claim,[78] or when the party refused to appear before the tribunal despite repeated.[79]

Section 48(1)(d) of the Arbitration and Conciliation Act, 1996

Aspects of due process can also be found in Section 48(1)(d),[80] which mandates that the tribunal should comply with the procedure stipulated in the agreement or failing such stipulation, the procedure followed in the seat of arbitration.

PUBLIC POLICY: STILL A SLIPPERY FIELD

The scope and understanding of what 'public policy' means varies across jurisdictions. Moreover, even though there is a general consensus that public policy as envisaged here should be construed as narrowly as possible;[81] practice seems to suggest a wide divergence in the application of this provision. To begin with, Indian courts were not provided with any guidance as to the meaning of public policy. After going back and forth multiple times, the apex court concluded that for the purposes of Section 48(2)(b),

[74] Russell on Arbitration 406 (David St. John Sutton ed., 21st ed. 1997).
[75] D.L. Miller and Co. Ltd. v. Daluram Goganmull, AIR 1956 Cal 361.
[76] Renusagar Power Co. Ltd. v. General Electric Co., AIR 1994 SC 860.
[77] International Investor KCSC v. Sanghi Polyesters Ltd., 2003 (1) ALT 364.
[78] European Grain & Shipping Ltd. v. Seth Oil Mills Ltd., (1983) VIII Y.B. Comm. Arb. 371.
[79] Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain (India) Co., (2008) 4 Arb. L. R. 497.
[80] Barbara Steindl, *The Arbitration Procedure - The Development of Due Process Under the New York Convention, in* Austrian Y.B. Int'l Arb. 255, 260 (Gerold Zeiler et al. eds., 2008).
[81] Oil & Natural Gas Corporation Ltd. v. Saw Pipes, AIR 2003 SC 2629; Penn Racquet Sports v. Mayor International Ltd., (2011) XXXVI Y.B. Comm. Arb. 293; S.I. Strong, *Enforcing Class Arbitration in The International Sphere: Due Process And Public Policy Concerns*, 30 U. Pa. J. Int'l L. 1 (2008).

public policy can be understood to mean (i) the fundamental policy of Indian law; (ii) the interests of India; or (iii) justice or morality.[82] Subsequently, on the recommendation of the Law Commission of India,[83] judicial interpretations of 'public policy'[84] were incorporated in the statue. The provision was amended to explicitly provide that public policy would be violated if (i) the making of the award was induced by fraud or corruption; (ii) fundamental policy of Indian law was contravened, or (iii) the award was in conflict with the most basic notions of morality or justice.[85] Notwithstanding the amendment, it is not inconceivable that the requirement of a minimum due process would be subsumed not only by the fundamental policy of Indian law but also by the most basic notions of justice.[86]

There have been several instances globally,[87] as well as in India, where awards have been refused under the public policy grounds for procedural irregularities.[88] For instance, refusal of the arbitrator to allow cross-examination of a witness,[89] non-disclosure by the claimant before the arbitrators of one of the agreements involved in the case,[90] arbitral tribunal not considering the expiration of limitation period,[91] existence of bias,[92] breach of natural justice,[93] and parties being on unequal

[82] Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433.
[83] Law Commission of India, *Report No. 246, Amendments to the Arbitration and Conciliation Act 1996, 57 (2014), available at*http://lawcommissionofindia.nic.in/reports/report246.pdf.
[84] Renusagar Power Plant Co. Ltd. v. General Electric Co., AIR 1994 SC 860; Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433.
[85] Arbitration & Conciliation (Amendment) Act, 2015, No. 3 of 2016, § 22 (India).
[86] Oil & Natural Gas Corporation Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263; Associate Builders v. Delhi Development Authority, 2014 (13) SCALE 226.
[87] Corporacion Transnacional de Inversiones, SA de CV v. STET International, (2000) 49 OR (3d) 414.
[88] Ihab Amro, Recognition and Enforcement of Foreign Arbitral Awards in Theory and in Practice, 157, 159 (2013); Anton G. Maurer, Public Policy Exception Under The New York Convention: History, Interpretation and Application, 169 (2013).
[89] Compagnie de St. Gobain - Point à Mousson (France) v. The Fertilizer Company of India, Ltd., (1976) I Y.B. Comm. Arb. 184 (Fr.).
[90] Biotronik Mess- und Therapiegeräte GmbH & Co. v. Medford Medical Instrument Company, (1977) II Y.B. Comm. Arb. 250. (D.N.J. 1976).
[91] German Buyer v. German Seller, (1980) V Y.B. Comm. Arb. 260 (Ger.)
[92] Transocean Shipping Agency Pvt. Ltd. v. Black Sea Shipping, (1998) 2 SCC 281.
[93] Audley Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19(2) Arb. Int'l 217 (2003).

footing in the appointment of arbitrators[94]have all been considered as serious violations of procedure and hence, violative of the public policy.

CONCLUSION

It is often said that public policy is an unruly horse, and once you sit astride on it, you never know where it will carry you.[95] In order to ensure that the horse is restrained and the paranoia is addressed, courts should allow the invocation of public policy ground only when the facts of a case have been tested on the touchstone of Section 48(1)(b) and/or 48(1)(d) and when enforcement will lead to gross violation of fundamental procedural rights vested in a party. At the same time, the international community needs to start the process of building consensus on international notions of due process which can be codified and subsequently adopted (with modifications) by different jurisdictions.

[94] Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19(2) Arb. Int'l 249 (2003)
[95] Richardson v. Mellish, (1824) 2 Bing. 252 (U.K.)

(G.) APPURTENANT SCHOLARSHIP

1. **Gandhi's Satyagraha and the Earth Constitution, Glen Theron Martin (Radford University, USA)**[96]

   The article provides a new perspective to the *Gandhian* philosophy and extrapolates it to notion of world federalism. It argues the relevance of Gandhi's vision in 21st century , with a possibility of actualising it in the Constitution for the Federation of Earth.[97]

2. **The Justice Dipak Misra Reader, Sumeet Malik and Sudeep Malik (Easter Book Company)**[98]

   The book, due to be released on 10th October, gives a landscape view of the judgements pronounced by CJI Misra, due to retire today, leaving behind a eclectic constitutional legacy. It is a unique compilation of the judgements passed by him during the 7 years at the Apex Court.

3. **Constitutional Amendment and Dismemberment, Richard Albert**[99]

   The paper introduces the concept of Constitutional Dismemberment which, per author, is deliberate effort to disassemble one or more of the constitution's constituent parts, whether codified or uncodified, without breaking the legal continuity that is necessary if not useful for maintaining a stable polity. While in

[96] https://www.igi-global.com/chapter/gandhis-satyagraha-and-the-earth-constitution/191724
See also https://www.radford.edu/gmartin/Gandhi.and.Earth.Constitution.Apr.16.pdf
[97] http://worldparliament-gov.org/constitution/about/-the-constitution-for-the-federation-of-earth/
[98] https://www.ebcwebstore.com/product_info.php?products_id=99024226
[99] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875931&download=yes

India we can instantly relate to Kesavanada Bharati case, this article is not limited to India, it is 84 page and addresses world constitution and trends therein.

(H.) PUBLIC LAW ON OTHER BLOGS

1. http://www.scotusblog.com/2018/09/kavanaugh-nomination-voted-out-of-committee-but-flake-endorses-fbi-investigation/
2. https://www.livelaw.in/judges-seeking-future-govt-appointments-may-result-in-indirect-political-influencein-conversation-with-prof-william-hubbard/
3. https://www.livelaw.in/dissecting-supreme-courts-protection-of-fundamental-rights-in-conversation-with-jayna-kothari-editor-rights-in-review/
4. https://www.livelaw.in/aadhaar-read-the-summary-of-majority-41-judgment/
5. https://lawandotherthings.com/2018/09/examining-the-legality-and-limitations-of-serving-summons-via-text-messaging/
6. https://lawandotherthings.com/2018/03/misnomer-of-the-decade-crypto-currency/
7. https://barandbench.com/aadhaar-speaker-money-bill-judicially-reviewable/
8. https://blog.scconline.com/post/2018/09/27/section-497-ipc-and-section-198-crpc-unconstitutional-adultery-no-more-an-offence-sc/
9. https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-iii-justice-chandrachud-and-radical-equality/
10. https://indconlawphil.wordpress.com/2018/09/28/the-aadhaar-judgment-and-the-constitution-i-doctrinal-inconsistencies-and-a-constitutionalism-of-convenience/
11. https://indconlawphil.wordpress.com/2018/09/27/the-aadhaar-judgment-a-dissent-for-the-ages/
12. https://indconlawphil.wordpress.com/2018/09/24/guest-post-the-uapa-some-interpretive-issues/
13. https://indconlawphil.wordpress.com/2018/09/24/guest-post-on-free-speech-and-jurisdictional-issues-in-online-defamation-cases/

14. https://indconlawphil.wordpress.com/2018/09/15/from-koushal-to-navtej-johar-round-up/
15. https://indconlawphil.wordpress.com/2018/09/12/guest-post-navtej-johar-v-union-of-india-on-intersectionality-were-not-quite-there-yet/
16. https://indconlawphil.wordpress.com/2018/09/06/civilization-has-been-brutal-navtej-johar-section-377-and-the-supreme-courts-moment-of-atonement/
17. https://indconlawphil.wordpress.com/2018/09/09/guest-post-navtej-johar-v-union-of-india-key-highlights/
18. https://indconlawphil.wordpress.com/2018/09/15/from-koushal-to-navtej-johar-round-up/
19. http://theproofofguilt.blogspot.com/2018/09/guest-post-understanding-section-377-in.html

(I.) MESMERIZING QUOTES

MAHATAMA GANDHI

"It is not legislation that will cure a popular evil. It is enlightened public opinion that can do it."

"All taxation to be healthy must return tenfold to the taxpayer in the form of necessary services."

"An unjust law is itself a species of violence. Arrest for its breach is more so."

JUSTICE D.Y. CHANDRACHUD

"Dissent is a symbol of vibrant democracy."

SHASHI THAROOR

"India has been born and reborn scores of time and it will be reborn again. India is forever, and india is forever being made."

***K.S. Puttaswamy v. Union of India (Privacy-9 J.),* (2017) 10 SCC 1,** citing

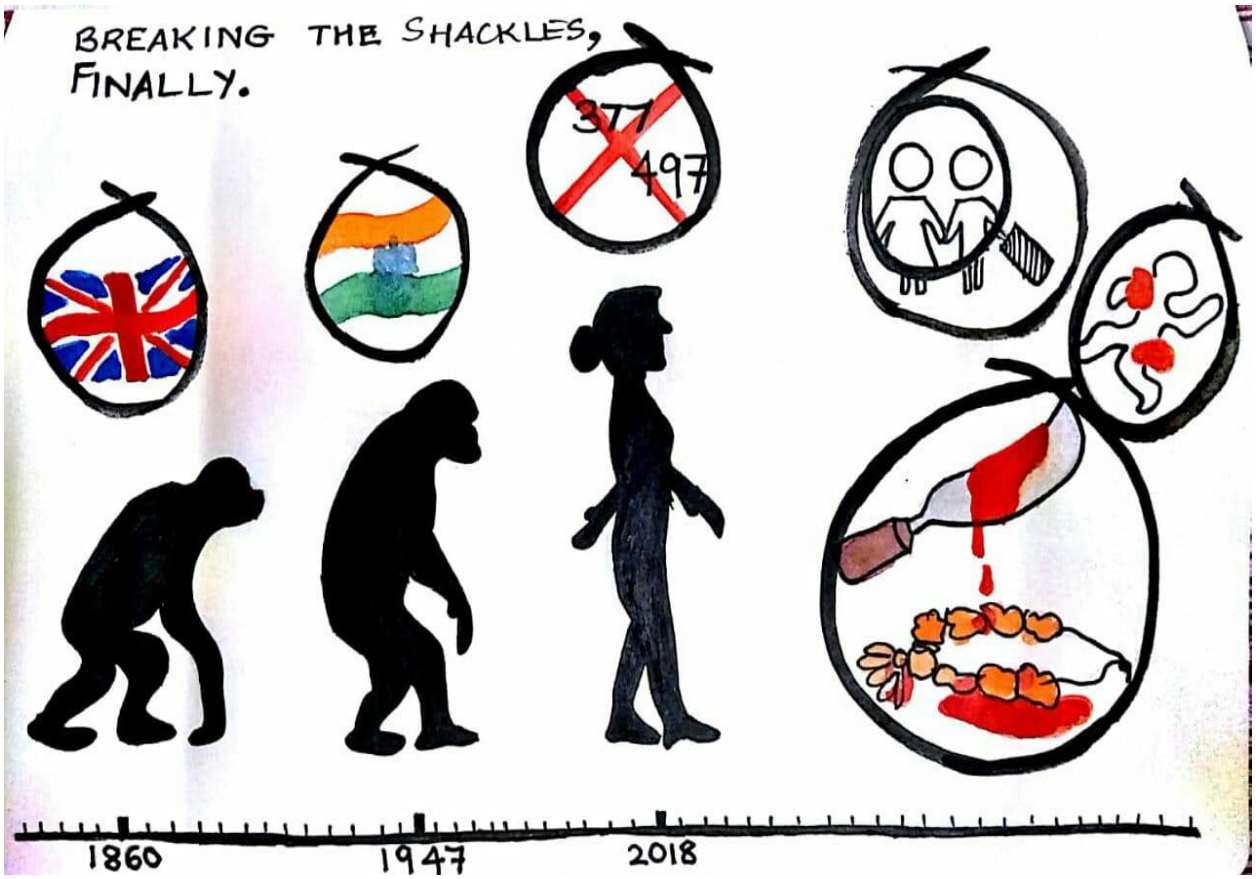
BHAGWATI, J.,

as he then was, in *National Textile Workers' Union* v. *P.R. Ramakrishnan* [*National Textile Workers' Union*v. *P.R. Ramakrishnan*, (1983) 1 SCC 228

"We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. ***If the bark that***

protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. *Law must therefore constantly be on the move adapting itself to the fast-changing society and not lag behind."*

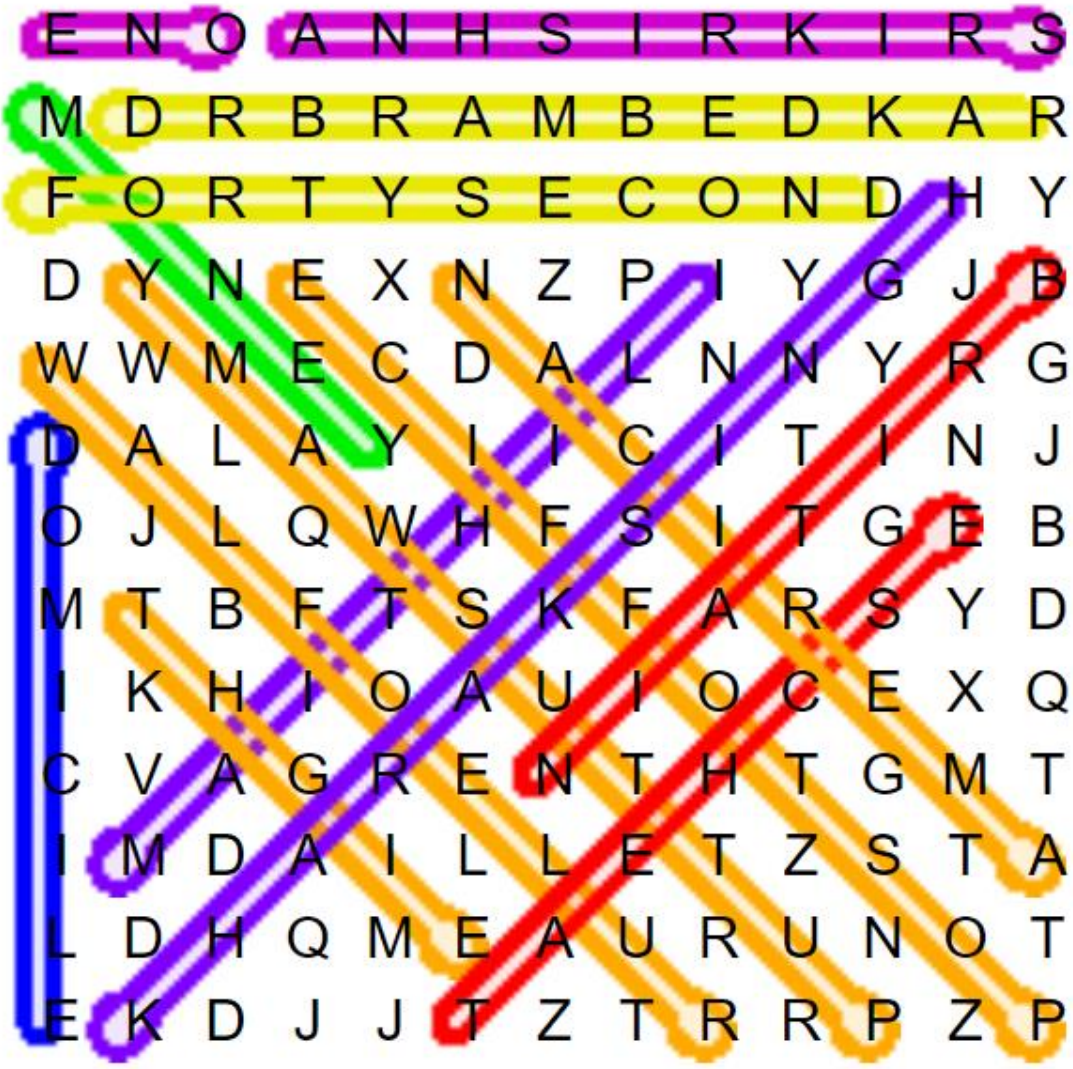
(J.) CARTOON[100]



[100] This cartoon is an artistic work of Rudhdi Walawalkar, III B.A. LL.B., ILS Law College, Pune.

(K.) CONSTITUTIONAL CROSSWORD PUZZLE SOLUTION[101]

Constitutional Word Puzzle



[101] This indicates the solution to the crossword puzzle in Volume 3 of the Public Law Bulletin, published on September 02, 2018. The winner of this puzzle contest was Nikhil Dubey, IV B.A. LL.B., ILS Law College, Pune.

PUBLIC LAW BULLETIN

CENTRE FOR PUBLIC LAW AT ILS LAW COLLEGE, PUNE

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