

PROVISIONAL TEAM CODE: 70

**3RD SURANA & SURANA & KLE LAW COLLEGE NATIONAL CONSTITUTIONAL
LAW MOOT COURT COMPETITION – 2019**

IN THE SUPREME COURT OF BHARATH NADU

WRIT PETITION (C) NO. ____/2019

(ART.32 OF CONSTITUTION OF BHARATH NADU)

UNITED NATIONAL CONGRESS PARTY AND OTHERS.....PETITIONERS

v.

UNION OF BHARATH NADU AND OTHERS..... RESPONDENT

MEMORIAL ON BEHALF OF THE RESPONDENT

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STATEMENT OF JURISDICTION

The petitioner has approached this Honourable Court under Section 32 of the Constitution of Bharath Nadu, 1949. The respondent humbly submits to the jurisdiction of the Honourable Court.

STATEMENT OF FACTS

Bharat Nadu is a country with a parliamentary form of government, with a federal structure and a multiparty system. The country has been facing challenges to its political stability in the form of splits in political parties, defections and corruption. According to the opinion of several political scientists, economists, jurists and international organisations Bharat Nadu has the potential to become a world leader if it effectively addresses these challenges.

A prison inmate wrote a letter to the Supreme Court expressing unfairness over the fact that inmates are prohibited from contesting elections even though the accused are allowed to contest from prison. He further asked the Union of Bharat Nadu to address the concerns regarding the unjustified burden on the exchequer due to multiple unsynchronized elections, and criminalization of politics. In response to this the Supreme Court stressed the need for reforms, while expressing the constitutional limitations on its powers. A committee was constituted to review the Electoral Law under the chairmanship of former Justice Radhakrishnan. In its report the committee suggested some broad objectives for electoral law.

In their manifesto for parliamentary elections, Bharat Nadu Janata Party ('BNJP') promised to implement these reforms if they came into power. After winning the election, they enacted the Constitution (104th Amendment) Act, 2019 which inserted certain provisions into the Representation of the People Act, 1951 [**RP Act**]. These provisions were challenged by several parties as being violative of basic structure of the Constitution and certain Fundamental Rights. The petitions were all admitted and clubbed together for a common hearing by the Supreme Court.

STATEMENT OF ISSUES

I.

WHETHER THE 104TH CONSTITUTIONAL AMENDMENT IS VIOLATIVE OF THE BASIC STRUCTURE
OF THE CONSTITUTION OF BHARATH NADU?

II.

WHETHER SECTION 123 (9) OF THE ACT IS VIOLATIVE OF ARTICLE 19 (1) (a) OF THE
CONSTITUTION?

III.

WHETHER SECTION 29D OF THE ACT IS VIOLATIVE OF ARTICLE 19 (1) (C) OF THE
CONSTITUTION?

IV.

WHETHER SECTION 168A OF THE ACT IS VIOLATIVE OF THE FREEDOM OF CONSCIENCE?

V.

WHETHER SECTION 123 (9) OF THE ACT IS ANTI-FARMER AND VIOLATIVE OF FUNDAMENTAL
RIGHTS OF THE FARMERS?

SUMMARY OF ARGUMENTS

[1]. THE CONSTITUTION (104TH AMENDMENT) ACT, 2019 IS NOT VIOLATIVE OF THE BASIC STRUCTURE OF THE CONSTITUTION

S.172(3) of the Constitution does not violate the basic structure because it does not alter the identity of the Constitution. First, it does not violate the federal character of the Constitution; second, it also does not violate the principle of democracy.

[2]. ART.123(9) IS NOT VIOLATIVE OF ART.19(1)(A)

S.123(9) of the RP Act does not violate Art.19(1)(a) of the Bharat Nadu Constitution because Art.19(1)(a) applies only to citizens, and political parties being associations are not citizens. Even if, Art.19(1)(a) did apply to political parties, such a provision is within the permissible limits of Art.19(2) since it adheres to constitutional morality.

[3]. S.29D IS NOT VIOLATIVE OF ART.19(1)(C)

S.29D does not violate Art.19(1)(c) of the Constitution of Bharath Nadu as Art.19(1)(c) does not extend beyond the formation of the association to other concomitant rights. Even if Art.19(1)(c) did extend to the hierarchy of the association, the restriction placed by S.29D is a permissible one on the grounds of constitutional morality.

[4]. S.168A IS NOT VIOLATIVE OF FREEDOM OF CONSCIENCE

The freedom of conscience hasn't been violated, as it does not constitute a valid claim, by reason of its being applicable to only religious matters. Assuming, *arguendo*, that it is applicable to non-religious matters, S.168A would still be pivotal in preserving constitutional morality, and is a reasonable legislation.

[5]. S.123(9) IS NOT VIOLATIVE OF FUNDAMENTAL RIGHTS OF FARMERS

S.123(9) does not violate any Fundamental Right. Further, S.123(9) is not manifestly arbitrary as it brings greater political accountability and protects the economic interests of the country.

ARGUMENTS ADVANCED

[1]. THE CONSTITUTION (104TH AMENDMENT) ACT, 2019 IS NOT VIOLATIVE OF THE BASIC STRUCTURE OF THE CONSTITUTION OF BHARATH NADU

The Parliament enacted the Constitution (104th Amendment) Act, 2019 under Article 368 of the constitution to insert Article 172(3). The power under Article 368 cannot be used to alter the **basic structure** of the constitution.¹ In order to identify whether a facet of the constitution is a part of the basic structure it must be construed, in each individual case, with respect to specific provisions of the constitution, its object and purpose and the consequences of its denial on the integrity of the constitution.² Therefore, the essence of identifying basic structure is the test of identity, i.e., the amendment must not alter the very identity of the constitution.³ It is submitted that the Constitution (104th Amendment) Act, 2019 does not alter the normative values and identity of the constitution because *first*, it does not violate the federal character of the constitution[1.1]; and *second*, it does not violate the principle of representative democracy[1.2].

[1.1] ARTICLE 172(3) DOES NOT VIOLATE THE FEDERAL CHARACTER OF THE CONSTITUTION

The amendment to curtail or extend the term of legislative assemblies does not violate the federal character for two reasons- *first*, there is pre-dominance of the Centre in division of power [1.1.1.], and *second*, the amendment does not disrupt division of legislative power [1.1.2].

[1.1.1] THERE IS PRE-DOMINANCE OF THE CENTRE IN DIVISION OF POWER

Admittedly, Bharath Nadu is a federal country⁴ with division of legislative power between the Centre and States under the provisions of the Constitution. Federalism as embedded is limited

¹ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

² *Indira Gandhi v Raj Narain* 1975 Supp SCC 1 [663] (Chandrachud J.).

³ *M Nagaraj v Union of India* (2006) 8 SCC 212 [102].

⁴ ¶ 1, Facts on Record.

to the legislative competence of the Union and the States on the three lists of the Seventh Schedule.⁵ The Constitution does not provide for an absolute federation in the strict traditional sense.⁶ The distribution of legislative and executive power is largely for convenience of administration.⁷ The powers of the union as per the provisions of the constitution have been particularly enlarged. The power regarding the territorial integrity of the States lies with the Central Government.⁸ Furthermore, despite there being a division of legislative power, by virtue of Article 248, read with Entry 97 in List 1 of the VIIth Schedule, the residuary power has been conferred on the Union. These provisions construed conjointly with extraordinary powers conferred to meet emergency⁹ and the prevalence of union laws over state laws,¹⁰ clearly indicate predominance of the union in the distribution of power. Therefore, despite there being a distribution of legislative power indicating the spheres of supremacy of state and central governments, the constitution is overlaid by strong unitary features.¹¹

[1.1.2] THE AMENDMENT DOES NOT DISRUPT THE DIVISION OF LEGISLATIVE POWER

The limited extent of federalism in the constitution is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically coordinated, and socially, intellectually and spiritually up-lifted. In such a system, the States cannot stand in the way of legitimate and comprehensively planned development of the country in the manner directed by the Parliament.¹² The power conferred upon the Parliament under Article 172(3) can be exercised **strictly for the purpose of synchronization of elections** and is not absolute. The division of legislative power as envisioned under Art.246 remains constant. Furthermore, the amendment has been enacted

⁵ Law Commission of India, *Draft Report on Simultaneous Elections* (30 August 2018) para 6.67.

⁶ *M Nagraj* (n 3).

⁷ Motion re. Draft Constitution, 4th November 1948; Constituent Assembly Debates Official Report, Vol. VII Reprinted by Lok Sabha Secretariat, New Delhi, Sixth Reprint, 2014. Also *State of West Bengal v Union of India*.

⁸ Constitution of Bharath Nadu, art 3.

⁹ Constitution of Bharath Nadu, art 352.

¹⁰ Constitution of Bharath Nadu, art 254.

¹¹ *State of Karnataka v Union of India* AIR 1978 SC 68 [51].

¹² *State of Rajasthan v Union of India* (1977) 3 SCC 592 [57].

with a view to bring the electoral law in consonance with constitutional values and principles.¹³ Given the limited extent of federalism and the restricted power conferred upon the Parliament for the purpose of synchronization of elections, the amendment does not abrogate the federal character of the Constitution. Therefore, it does not alter the identity of the constitution and is not violative of its basic structure.

[1.2] ARTICLE 172(3) DOES NOT VIOLATE THE PRINCIPLE OF REPRESENTATIVE DEMOCRACY

Parliamentary democracy is a part of the basic structure of the Constitution where the multi-party system and free and fair elections are an inherent part of parliamentary democracy.¹⁴ The provision inserted by The Constitution (104th Amendment) Act confers the power upon the Parliament to curtail or extend the term of legislative. However, such power can only be exercised by the Parliament to synchronise the elections of state assemblies to the lower house of the parliament. This indicates that limited nature of such power cannot be exercised to disrupt the terms of legislative assemblies and therefore does not violate the principle of periodical elections. The restraint placed upon the exercise of such power by prescribing the purpose for which it can be exercised ensures that it is in consonance with the fundamental principles of the constitution. The essence of democracy which includes free and fair elections along with a multi-party system is under no circumstance invalidated by the provision. Furthermore, the amendment enacted is to further strengthen the democratic set up as it aims to reduce the burden on the exchequer.¹⁵ Therefore the amendment is in furtherance of the object of the constitution itself and it cannot be claimed that it is violative of its basic structure.

¹³ ¶ 3, Facts on Record.

¹⁴ *Kuldip Nayar v Union of India* (2006) 7 SCC 1 [452].

¹⁵ ¶ 3, Facts on Record.

[2]. ART.123(9) IS NOT VIOLATIVE OF ART.19(1)(A)

The Parliament of Bharat Nadu inserted the provision of S.123(9) in the RP Act.¹⁶ It is submitted that this provision does not violate Art.19(1)(a) of the Bharat Nadu Constitution as *first*, Art.123(9) does not fall within the scope of Art.19(1)(a) [2.1]; and *second*, even if Art.19(1)(a) did apply to political parties, such a provision is within the permissible limits of Art.19(2) [2.2].¹⁷

[2.1] S.123(9) DOES NOT FALL WITHIN THE SCOPE OF ART.19(1)(A)

The Fundamental Rights provided for under Art.19 are applicable to citizens. ‘Citizens’ as defined under the Citizenship Act, 1955 do not refer to juristic persons, or associations. Part II of the Constitution is supplemented by the Citizenship Act and the same definition of ‘citizen’ applies in Part II and Part III of the Constitution.¹⁸ A corporation can have a nationality based on its country of origin, but not citizenship.¹⁹ A company or association formed from an aggregate of citizens the company is not a citizen since the nature of its personality is originated in a fiction of law.²⁰ The rights under Art.19 have been guaranteed by the Constitution only to citizens, and not artificial persons like associations.²¹

S.123 of the RP Act regards the political party as a separate entity from the individual candidates put forward by it.²² An election manifesto is a statement of the political party’s policy, and not that of the individual candidate.²³ Since S.123(9) is to be applied to the political party, based on the statements made in its election manifesto, it does not apply to an individual candidate, that is, a citizen. Therefore, S.123(9) does not fall within the scope of Art.19(1)(a) and thus cannot be challenged on these grounds.

¹⁶ Representation of People Act 1951 (RP Act 1951) s 123(9).

¹⁷ Constitution of Bharat Nadu 1949, arts 19(1)(a) and 19(2).

¹⁸ *State Trading Corporation of India v Commercial Tax Officer* (1964) 4 SCR 99 [14] (Sinha CJ).

¹⁹ *ibid* [17] (Sinha CJ).

²⁰ *ibid* [25] (Hidayatullah J).

²¹ *ibid* [34], [65] (Sinha CJ).

²² *S Subramaniam Balaji v Govt. of T. Nadu* (2013) 9 SCC 659 [61.2].

²³ *ibid*.

[2.2] ART.123(9) IS A PERMISSIBLE RESTRICTION AS PER ART.19(2)

Assuming, *arguendo*, that S.123(9) did fall within the scope of Art.19(1)(a) and was found to be violative of it, it is submitted that it is a permissible restriction. Art.19(2) requires that a valid restriction must be a reasonable restriction in the interests of one of the listed grounds.

It is submitted that this restriction is permissible in the interests of morality. The phrase “in the interests of” is interpreted using the test of clear and present danger. It requires that there be an intimate and proximate connection between the ground for restriction and the threatened disorder.²⁴ Further, this restriction must be narrowly tailored so as to restrict what is absolutely necessary.²⁵

Under the Constitution, the term morality implies constitutional morality.²⁶ Constitutional morality in its strictest sense of the term implies strict and complete adherence to the constitutional principles as enshrined in various segments of the document.²⁷ Accountability to the public is a crucial part of democracy, and thus, of constitutional morality.²⁸ Accountability is defined as, “*the criterion of responsiveness to changes in circumstances that alter citizen needs and abilities... In other words, accountability refers to the extent to which actual policies and their implementation coincide with a normative ideal in terms of what they ought to be.*”²⁹

S.123(9) ensures that the potential government cannot make promises of policies before there is surety of their implementation. Thus, there is a direct connection with political accountability, and thus, constitutional morality. Since the section is worded so as to restrict only those promises in an election manifesto that are to made solely for the purpose of securing votes, it has been narrowly tailored so as to restrict only what is necessary. Thus, the restriction is valid.

²⁴ *Shreya Singhal v Union of India* (2015) 5 SCC 1 [39]-[44].

²⁵ *ibid* [17].

²⁶ *Indian Young Lawyers Association v State of Kerala* 2018 SCC OnLine SC 1690 [106].

²⁷ *State (NCT of Delhi) v Union of India* (2018) 8 SCC 501 [58].

²⁸ *ibid*.

²⁹ *ibid* [325].

[3]. S.29D IS NOT VIOLATIVE OF ART.19(1)(C)

The Parliament of Bharat Nadu inserted the provision of S. 29D in the RP Act.³⁰ It is submitted that this provision does not violate Art.19(1)(c) of the Bharat Nadu Constitution as *first*, the provision does not restrict Art.19(1)(c) [3.1]; and *second*, even if the provision restricted Art. 19(1)(c) such a restriction is within the permissible limits of Art. 19(4) [3.2].³¹

[3.1] S.29D DOES NOT DOES NOT RESTRICT ART. 19(1)(C)

The right to association does not include within its ambit concomitant rights to achieve the purpose for which the association was formed.³² The right guaranteed by Art. 19(1)(c) is exercised as soon as the association is formed and no restraint is placed upon the formation.³³

The rights with respect to the activities of the association are subject to laws as might be framed. The validity of these are not to be tested by Art. 19(4) given that the right under Art.19(1)(c) has already been exercised.³⁴

In the present case, the political party exercises its right under Art. 19(1)(c) at the time of its formation. If there has been no restraint placed upon it at the time of formation, there is no infringement of the 19(1)(c) right. A provision such as Sec. 29D is framed in order to control a legitimate subject of legislative interference,³⁵ as Entry 72 of the Union List allows the making of laws in this area. Thus, the provision does not restrict Art.19(1)(c).

[3.2] THE RESTRICTION IS WITHIN THE PERMISSIBLE LIMITS OF ART.19(4)

Art.19(4) requires that a valid restriction must be *one*, permissible under one of the three listed grounds under Art.19(4) and *two*, a reasonable restriction. It is submitted that this restriction is permissible under the ground of morality. It is further submitted that it is a reasonable restriction.

³⁰ RP Act 1951, s 29D.

³¹ Constitution of Bharat Nadu 1949, arts 19(1)(c) and 19(4).

³² *All India Bank Employees' Association v National Industrial Tribunal* AIR 1962 SC 171 [28].

³³ *Tata Engineering and Locomotive Co. Ltd. v State of Bihar* (1964) 6 SCR 885 [29].

³⁴ *All India Bank Employees' Association* (n 32).

³⁵ *Raghubar Dayal Jai Prakash v Union of India* (1962) 3 SCR 547 [11].

In cases of a Fundamental Right violation the term morality implies constitutional morality.³⁶ Constitutional morality in its strictest sense of the term implies strict and complete adherence to the constitutional principles as enshrined in various segments of the document.³⁷ Democracy is an integral constitutional principle, and the constitution requires an attempt to be made in order to give full-fledged effect to democracy in society. Further, constitutional morality negates the idea of concentration of power in the hands of a few.³⁸ Elections at all levels of leadership of political parties ensures that there is democracy within political parties, and it ensures a fair allotment of power. This is in line with the principle of constitutional morality. Thus, the provision is a permissible restriction under the ground of morality.

The test of reasonableness requires you to consider the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time.³⁹

The right of association is alleged to have been infringed in the present case. The underlying purpose of the restrictions imposed is to ensure transparency in political parties, and furthering the democracy in the system. This is a purpose that is in furtherance of the right of association in the sense that it ensures that the association that has been formed is one that adheres to constitutional values. Given that it is the political parties that run the governance of country it is necessary to introduce internal democracy in the working of political parties. Democracy and accountability constitute the core of our constitutional system, and therefore, these concepts must apply to and bind political parties which are integral to our democracy.⁴⁰ The remedy that is outlined in S.29D has been recommended by several Commissions after careful

³⁶ *Indian Young Lawyers Association* (n 26) [106].

³⁷ *State (NCT of Delhi)* (n 27) [58].

³⁸ *ibid.*

³⁹ *State of Madras v VG Row* AIR 1952 SC 196, *Justice KS Puttaswamy v Union of India* (2018) 1 SCC 809.

⁴⁰ Law Commission of India, 'One Hundred and Seventieth Report on Reform of the Electoral Laws' (May 1999) ch 1.

consideration and is found to be an adequate and proportionate measure. Further, taking into consideration the political instability prevailing in the country of Bharat Nadu,⁴¹ such a measure would help bring some amount of relief to the situation. The provision satisfies the test of reasonableness. Thus, the provision is a reasonable restriction on the right conferred by Art. 19(1)(c).

[4] S.168A IS NOT VIOLATIVE OF FREEDOM OF CONSCIENCE

The Fundamental Right to a freedom of conscience under Art.25 of the Constitution is traditionally attributed to only religion. However, in those instances where it is associated with non-religious issues, it is subject to public order, morality, health and to other provisions enshrined in Part III of the Constitution.⁴² Consequently, Art.25 is subject to reasonable restrictions under Art.19(5).⁴³ Therefore, it is submitted that S.168A is a reasonable restriction on the aforementioned Fundamental Right, owing to reasons of preserving morality.

[4.1] THE FREEDOM OF CONSCIENCE ARGUMENT DOESN'T CONSTITUTE A VALID CLAIM

Though Art.25 of the Constitution of Bharath Nadu states that all persons shall have the freedom of conscience, In the Constituent Assembly, the word 'conscience' was used to express clearly that a person was free to convert him/herself into another religion, based on his/her conscience.⁴⁴ Thus, it is submitted that the freedom of conscience is not a valid claim in the current factual matrix because it is not a right, and because it is applicable only in religious matters.

[4.1.1] THE FREEDOM OF CONSCIENCE IS NOT A 'RIGHT'

⁴¹ ¶ 3, Facts on Record.

⁴² *Bijoe Emmanuel v State of Kerala* (1986) 3 SCC 615.

⁴³ *The Commissioner, Hindu Religious Endowments v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1954) SCR 1005.

⁴⁴ Motion re. Draft Constitution, 6th December 1948; Constituent Assembly Debates Official Report, Vol. VII Reprinted by Lok Sabha Secretariat, New Delhi, Sixth Reprint, 2014.

‘Right’ has been defined as a ‘legally protected interest’.⁴⁵ This would mean that rights are enforceable by law. However, it is to be observed Art.25(1) guarantees the ‘right’ to religion, but the ‘freedom’ of conscience. Besides, our Constitution guarantees Fundamental ‘Rights’, not ‘Freedoms’. For instance, Art.19 states that citizens would have a ‘right’ to freedom of speech, etc. It is submitted that this choice of words indicates that the freedom of conscience is not a right, and therefore, it there cannot be legal claims arising out of such right.

[4.1.2] THE FREEDOM OF CONSCIENCE IS APPLICABLE TO ONLY RELIGIOUS ISSUES:

In *Mittal*, it was held that, though the freedom of conscience is to be widely interpreted, the freedom of conscience could not be separated from the right to religion.⁴⁶ It was also opined that this freedom flowed from the Preamble to the Constitution. Besides, clause (2)(a) of Art.25 of the Constitution talks about the power of the State to impose certain restrictions on activities which were ‘associated with religious practice’.⁴⁷

[4.2] S.168A IS NECESSARY FOR PROTECTING MORALITY:

Morality doesn’t refer to public, or popular, morality. The word ‘morality’ has to be construed as ‘constitutional morality’. Therefore, there should be no violation of the sacrosanct principles of the Constitution, whether explicitly stated or implied therein.⁴⁸ Thus, it is submitted that, *arguendo*, if it claimed that the right to conscience is applicable to non-religious matters too, S.168A is required for preserving constitutional morality.

[4.2.1] S.168A HELPS PROTECT THE PARTY SYSTEM OF PARLIAMENTARY DEMOCRACY:

A party system is essential for the working of a free government. A candidate contesting for an election is often voted to power as a consequence of his/her being a member of a particular political party.⁴⁹ Therefore, it has been held that there should be a discouragement of the

⁴⁵ *Mithilesh Kumari v Prem Behari Khare* (1989) 2 SCC 95.

⁴⁶ *S.P. Mittal Etc. Etc vs Union of India And Ors.* 1983 SCR (1) 729.

⁴⁷ Article 25(2)(a), Constitution of India.

⁴⁸ *Manoj Narula vs Union of India* (2014) 9 SCC 1.

⁴⁹ E.C.S. Wade and A.W Bradley, *Constitutional Law* (Longman 1977) 9th edn, 24.

practice of changing political affiliations once an election has been contested, for obvious reasons of propriety.⁵⁰ The judges in *Zachilu* opined that Parliamentary Democracy should be preferred to responsibility to the constituency.⁵¹ S.168A imposes an exemplary penalty determinable by the Election Commission. It is submitted that, if S.168A is in effect, candidates like Mr. Belliyappa, who tend to switch political affiliations in order to secure personal benefits, will be discouraged from doing so. This will dissuade dishonest politicians from subverting the anti-defection law by resigning from the Parliament or State Legislature. It will also prevent the electorate from losing faith in the party's efficiency.⁵²

[4.2.2] S.168A ENSURES ECONOMIC JUSTICE

There are significant expenses incurred in conducting elections. Such expenditure is ultimately recovered from taxpayers' money meant for the citizens' welfare, thereby impacting the ideal of ensuring economic justice to the citizens of the country.⁵³ Constitutional morality is adherence to the 'conscience' of the Constitution.⁵⁴ The Directive Principles of State Policy have been construed as the 'conscience of the Constitution',⁵⁵ and the idea of economic justice is provided under Article 38(1) of the Constitution. Additionally, in *Manoj Narula*, it was held that corruption is antithetical to a democratic polity as it obstructs the rule of law, and therefore democracy must be protected by 'positive propriety' which ensures constitutional morality.⁵⁶ Since S.168A either dissuades dishonest politicians from quitting their party membership for electoral gains or imposes exemplary penalty on them if they do, it is submitted that S.168A helps ensure economic justice, a facet of constitutional morality.

⁵⁰ *LIC v Sushil* (2006) 2 SCC 471.

⁵¹ *Kihoto Hollohan v Zachillhu* (1992) Supp (2) SCC 651.

⁵² *LIC v Sushil* (n 50).

⁵³ B L Nimesh IAS, 'Indian democracy and electoral reforms' (*Daily Excelsior*, 18 September 2018) <<http://www.dailyexcelsior.com/indian-democracy-electoral-reforms/>> accessed 19 March 2019.

⁵⁴ *NCT v UoI* 2018 Indlaw SC 460.

⁵⁵ *Minerva Mills Ltd. & Ors vs Union Of India & Ors* (1981) 1 SCR 206.

⁵⁶ *Manoj Narula* (n 48).

[4.3] S.168A IS A REASONABLE LEGISLATION

Since the freedom of conscience is subject to the entire corpus of Part III Constitution, it also has to satisfy the test of proportionality. In the *Om Kumar* case, it has been held that the word ‘proportionality’ would mean that the law restricting a particular right has to be appropriate and has to directly qualify the object the legislation had set out to accomplish.⁵⁷ Therefore, the unintended effects of the law and the benefit it would provide, have to be juxtaposed, and the decision as to the law’s validity must be taken.⁵⁸ Thus, based on the purpose of the restriction imposed and the extent of the malaise to be remedied,⁵⁹ it is submitted that S.168 is a reasonable legislation.

The *Wednesbury* Test, which has been used in several Supreme Court cases, essentially propounds that the judiciary must not interfere until and unless the legislation did not consider the relevant factors and was so arbitrary that no sensible legislator could have brought about that law. At the same time, it lays down that the court need not examine whether the law was the best choice among several alternatives available.⁶⁰

S.168A, it is submitted, does not constitute an arbitrary piece of legislation. Admittedly, an unintended consequence of S.168A, could be that honest and conscientious dissenters would be burdened with an exemplary penalty in case they resign to contest elections from another political party. Alternatively, they might be discouraged from taking such a step altogether. However, the *Zachilu* case mentions that honest dissenters would be casualties in case anti-defection laws are introduced, and nothing could be done about it.⁶¹ The excessive expenditure incurred during bye-elections, would therefore be reimbursed to an extent with this law. Besides, the intent behind introducing S.168A is to reduce the incidences of the economic

⁵⁷ *Om Kumar and Ors. v Union of India* (2001) SCC 2.

⁵⁸ *ibid.*

⁵⁹ *State of Madras v VG Row* (n 39).

⁶⁰ *Union of India and Anr v G Ganayutham* (1997) 7 SCC 463.

⁶¹ *Kihoto Hollohan* (n 51).

problems plaguing Bharath Nadu. Since there is a greater discretion provided to the legislature in matters concerning an important economic policy,⁶² S.168A is a reasonable legislation.

[5] S.123(9) IS NOT VIOLATIVE OF FUNDAMENTAL RIGHTS OF FARMERS

The Parliament of Bharath Nadu inserted the provision of S.123(9) in the RP Act.⁶³ S.123(9) cannot be struck down by the Supreme Court because *first*, judicial review is juxtaposed with the doctrine of separation of powers [5.1]; and *second*, S.123(9) is not manifestly arbitrary [5.2].

[5.1] JUDICIAL REVIEW IS JUXTAPOSED WITH THE DOCTRINE OF SEPARATION OF POWERS

One of the principles that form the basic structure of the Constitution is the doctrine of separation of powers between the Judiciary, Executive and the Legislature. Art.246 of the Constitution talks about the separation of powers. Clause (1), due to the non-obstante clause, gives the Parliament exclusive powers to make laws on subjects in the Union List.⁶⁴ Admittedly, Fundamental Rights would serve to limit legislative power. However, this doesn't affect S.123(9) since it doesn't infringe any Fundamental Right.

[5.1.1] FUNDAMENTAL RIGHTS CONSTITUTE A LIMITATION ON LEGISLATIVE POWER

The exclusivity of the Legislature in making laws is restricted by Art.13(2) of the Constitution, which lays down that the laws violative of Fundamental Rights as guaranteed in Part III of the Constitution, shall be unconstitutional. This is to ensure that the Constitution remains the superior law of the land. Therefore, it is submitted the legislature has the complete prerogative to make laws which do not violate any Fundamental Right.

⁶² *Om Kumar* (n 57).

⁶³ RP Act 1951, s 123(9).

⁶⁴ Constitution of Bharath Nadu art 246(1) .

[5.1.2] S.123(9) DOESN'T VIOLATE ANY NEGATIVE FUNDAMENTAL RIGHT

It is also submitted that the right to livelihood cannot be a positive obligation ensuring the right to life. This is because the country must have the capacity, especially economic and legislative, to guarantee such rights, which in turn, are dependent on various contingencies.⁶⁵ It is for this reason that it is ensured under Art.41 of the Constitution,⁶⁶ which is a legally unenforceable Directive Principle of State Policy.⁶⁷

Additionally, the Supreme Court has held that in matters of judicial review, the *Thayer* doctrine of judicial review of any legislation must be applied.⁶⁸ This doctrine avers that the judiciary can declare an enacted legislation to be invalid, only if it violates a provision of the Constitution without a doubt.⁶⁹ In the issue at hand, S.123(9) doesn't absolutely deprive the farmers of this right. The empirical research that was conducted in Bharath Nadu clearly indicated the farm loan waiver schemes being used without proving advantageous to the needy farmers.⁷⁰ Additionally, there is no reliable data to indicate how far the farmers will be deprived of their right to livelihood, which is a requisite to judge whether this right is violated.⁷¹

Even if the political party doesn't make the promise of a loan waiver in its manifesto, it is submitted that farmers can still, with the means of influential organizations like the Raith Sanga, ensure that the elected government provides them any assistance to ensure their standard of living. Thus, assuming, *arguendo*, that the right to livelihood is ensured by loan waivers, it is not prohibited by S.123(9). Just as the legislature can take steps to ensure a greater standard of living of its own accord, it can also make laws denying the same, without violating Fundamental Rights that impose negative obligations.

⁶⁵ *Delhi Development Horticulture Employees' Union v Delhi Administration* 1992 AIR 789.

⁶⁶ Constitution of Bharath Nadu 1949, art 41 "The State shall, **within the limits of its economic capacity and development**, make effective provision for securing the right to work ... and in other cases of undeserved want." This indicates that economic efficiency is given great importance.

⁶⁷ *Delhi Development* (n 65).

⁶⁸ *State of AP v P Laxmi Devi* (2008) 4 SCC 720.

⁶⁹ *ibid.*

⁷⁰ ¶13, Facts on Record.

⁷¹ *Olga Tellis v Bombay Municipal Corporation* 1986 AIR 180.

[5.2] S.123(9) IS NOT MANIFESTLY ARBITRARY

Whether or not a restriction is reasonable has to be determined taking into consideration the beneficial effect to be accrued to the general public and if the restraint caused by the law is more than necessary in public interest.⁷² If a legislated statute doesn't infringe any constitutional provision, it cannot be struck down on grounds of its being void for vagueness.⁷³ The right to life guaranteed under Art.21 of the Constitution is indeed fundamental, but S.123(9) of the RP Act, in no way, violates it, because it is not a manifestly arbitrary legislation as it protects the country's economic interests and ensures greater accountability of political parties to the electorate.

[5.2.1] S.123(9) PROTECTS ECONOMIC INTERESTS:

Promises like loan waivers and freebies are desired by farmers as they claim they ensure their right to livelihood. However, the right to livelihood, which ensures the right to life, must be claimed only if the activity pursued is not immoral or contrary to public interest.⁷⁴ It has been held that legislations pertaining to economic interests have to be viewed with a larger amount of deference, because of the problem that said economic regulation is intending to resolve.⁷⁵ In the present case, if providing short-term incentives like loan waivers and freebies is not regulated, this would necessarily lead to an adverse impact on the financial institutions of the country.⁷⁶ In the long run, this would entice farmers to deliberately default on their loans, as organizations like the Raith Sangha have enough clout to ensure that a loan waiver is implemented each time. With the repayment culture destroyed, the burden of loan waivers would be on the exchequer and ultimately on the tax-paying citizens, who would have to pay

⁷² *Naren Kumar v Union of India* AIR 1960 SC 430.

⁷³ *Nand Lal v State of Haryana* AIR 1980 SC 2097.

⁷⁴ *Olga Tellis* (n 71).

⁷⁵ *RK Garg v Union of India* 9 (1981) 4 SCC 675.

⁷⁶ Pratik Mitra, Indranil Bhattacharyya, Joice John, Indrani Manna and Asish Thomas George, 'Farm Loan Waivers, Fiscal Deficit and Inflation' (*Reserve Bank of India*, 11 September 2017) <https://rbi.org.in/Scripts/MSM_Mintstreetmemos5.aspx> accessed 19 March 2019.

higher taxes.⁷⁷ This would go against the recommendation of the Radhakrishnan Committee of reducing the burden on the exchequer. Similarly, freebies too lead to an unnecessary wastage of resources as the funds are appropriated from the Consolidated Fund,⁷⁸ which could have been utilised for helping the same farmers with economically sustainable measures.

[5.2.2] S.123(9) BRINGS GREATER ACCOUNTABILITY TO THE ELECTORATE:

Until present, election manifestoes have not constituted promissory estoppel. It is submitted that an election manifesto is viewed as a desperate attempt by a political party in order to ensure that they get into power. Taking advantage of this, political parties tend to make fancy promises in order to lure voters, only to renege on them later on. Since election manifestos cannot constitute promissory estoppel,⁷⁹ political parties are not held accountable for the promises they had made before getting elected.

However, it is submitted that, with the introduction of S.123(9), there is a greater accountability of political parties, as they can only make promises that they know they have the ability and resources, once and if they get elected, to fulfil. With S.123(9), it is submitted that political parties will promise only what is practically implementable and economically pragmatic.⁸⁰

⁷⁷ *ibid.*

⁷⁸ *Subramaniam Balaji* (n 22).

⁷⁹ *ANZ Grindlays Bank Pie v Commissioner MCD* 1995 IIAD Delhi 573.

⁸⁰ *ibid.*

PRAYER

Wherefore, in light of the issues raised, arguments advanced and authorities cited, it is humbly prayed that this Hon'ble Court may be pleased to:

- I. Uphold the validity of the Constitutional (104th Amendment) Act, 2019 as it does not violate the basic structure of the Constitution.
- II. Uphold the validity of S.123(9) of the RP Act as it neither violates Art.19(1)(a) of the Constitution, nor does it violate the Fundamental Rights of farmers.
- III. Uphold the validity of S.29D of the RP Act as it does not violate Art.19(1)(c) of the Constitution.
- IV. Uphold the validity of S.168A of the RP Act as it does not violate freedom of conscience.

And pass any other order that this Hon'ble Court may deem fit in the interest of justice, equity and good conscience.

All of which is humbly prayed,

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Counsel for the Respondent.