

Law, State and Religion: Emergence of an Unholy Alliance

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ABSTRACT: Generally, the functioning of a modern democratic state is expected to be governed by the principles and ideologies enshrined in the constitution. The constitutional values should have precedence over the majoritarian values. The Constitutional morality should override the majoritarian morality. However, most of the modern states including India, having an extraordinarily strong religious fault-lines often caught between state identity vs. religious identity. These states policies often grapple between secular vs. non-secular debates. Under these circumstances, the state policies, be it welfare policy, economic policy or even policies erstwhile having no connection with religion are often characterized with religion.

In this present work, the author examines an ordinance promulgated by Governor of Uttar Pradesh titled as Uttar Pradesh Prevention of Cow Slaughter (Amendment) Ordinance 2020. By this ordinance sweeping changes were made to fasten constructive criminal liability over the driver, operator, and owner of the vehicle whereby cows/beef are allegedly transported. The notified law provides altogether new bail regime wherein jail, and not the bail would be the general rule. Generally, such laws are perceived as law to prohibit and to penalize certain act. However, the people's perception about this ordinance is little different. It seems that the majoritarian politics backed by religious fervor has penetrated deep into the legal system to establish a new criminal jurisprudence wherein state and its prosecuting agency shall be operating on assumptions to score on political front. Apprehensions were made that provisions contained in the ordinance would fuel the cow vigilantism, and thus have potential to destroy the social fabric.

KEYWORDS: Law; Religion; Cow Vigilante; Cow Slaughter; Bail Jurisprudence; Criminal Justice System.

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I. INTRODUCTION

On June 9, 2020 Uttar Pradesh Government notified Uttar Pradesh Prevention of Cow Slaughter (Amendment) Ordinance 2020 (UP Ordinance No. 11 of 2020).¹ Mysteriously, when entire country stand united to fight against pandemic Covid-19; when lakhs of people walking back to their villages, leaving their livelihood of urban settlements, the Governor of Uttar Pradesh was 'satisfied that such circumstance exist which render it necessary for him to take immediate action' to protect cow slaughter.² The press release issued in this regard proclaims rampant unabated slaughtering of the cow and her progeny, leaving the government with no other option but to bring the ordinance.

Was it needed?

It is no secret that many influential people, irrespective of their religious belief, are running slaughtering houses with or without government license. Even, the Centre government has actively supported the entrepreneurs of the meat industry by providing them financial aid up to 50% of the cost of setting up a unit. According to a report published in *Hindustan Times*, "Uttar Pradesh alone accounts for nearly 50 per cent of India's total meat exports and more than 25 lakh people are associated with the industry directly or indirectly."³ However, in the dark side of this flourishing meat market, there are people who mobilized resources, economic as well as political, to throttle the legal regime regulating the cow slaughtering. With sectarian politics taking the center stage, the idea of regulating the meat market through legal regime took the acrimonious religious colour.

II. METHODOLOGY

This work explores theoretical understanding about the working of law, state and religion in a modern democratic state. The study being a doctrinal in nature, the author has examined the inter-relationship between law, state, and religion through critical examination of an ordinance promulgated in the State of Uttar Pradesh, India. For the purpose of analysis and comparative study, the author has used information available from secondary sources such as books, article published in print as well as electronic media.

III. HISTORICAL PERSPECTIVES & CONSTITUTIONAL IDEALS

The Cow has pivotal to Hindu religious philosophy. More than animal providing milk, cow to worshiped in many forms. It is because of this reason that cow, and specially slaughtering of cow has been a debatable issue. *Tezkereh-al-Vakiat* written by Jouher, translated by Major Charles Stewart of the British East India Company contains private memoirs of the royalty, and the book throw light on the cow question. Jouher has cited an incident which reveals Humayun apparently opposed cow slaughter.⁴ Many believes that even during Mughal period cow slaughtering was banned.

During freedom movement, though the cow or cow slaughter was not central, still Professor P.C. Ghosh quoted the then Viceroy, Lord Lansdowne's statement where he said that the cow protection movement had transformed the Indian National Congress from "a foolish debating society into a real political power, backed by the most dangerous elements in native society."⁵ The Khilafat leaders and Khawaja Hasan Nizami's appeals against cow slaughter was huge success in almost all parts of India, and this once again brings the importance of cow in India's public life.

During the framing of the Constitution, the protection of cow and cow slaughter was debated. Seth Govind Das, a member of the Constituent Assembly, called it a "civilisational [problem] from the time of Lord Krishna", and called for the prohibition of cow slaughter. He had rather demanded that the prohibition on cow slaughter be in the Part 3rd of the Constitution i.e. in the chapter dealing with the fundamental rights, and it should at par with prohibition of untouchability.⁶ Their contention to ban the cow slaughter was mixed of socio-cultural and economic arguments. Thus, the argument was hanging between the "sentiments of thirty crores of population" on the one hand to indispensability of cattle in an agrarian economy on the other.⁷ After fierce debate on cow slaughter, the Constituent Assemble adopted Article 48. The provisions is placed in Directive principle of State Policy, and reads inter alia:

48.Organisation of agriculture and animal husbandry. *The State shall endeavor to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.*

Soon after the Constitution of India came in enforcement, the issue of banning the cow slaughter reaches to the Supreme Court of India. The constitutional validity of legislations banning the cattle slaughter were raised before the Court. Majority of these cases were fought with an argument that ban on cattle/cow slaughter violates their rights to trade and business, and their right to freedom of religion. The Supreme Court of India, while rejecting these contentions relied heavily on economic considerations. Mr. Gautam Bhaita, in his argument, suggests that "*much like the Drafting Committee, it was as if the court was unwilling to admit — and to uphold — the possibility of non-economic considerations behind such laws, as though this would shatter the thin facade of secularism to which the Constitution remained (ostensibly) committed.*"⁸ However, the author believes that the Court, while rejecting any argument for lifting the ban on cow slaughter, rightly relied on economic consideration. The otherwise would have be disastrous to constitutional principles. Unlike the politics, the Constitutional Courts of India are required to stand by 'the principles' and not the numbers. It is in this backdrop, the Uttar Pradesh Prevention of Cow Slaughter Ordinance is required to be examined.

IV. U.P. COW SLAUGHTER ORDINANCE

The Uttar Pradesh Prevention of Cow Slaughter Act, 1955 [hereinafter referred as UP Act, 1955], belongs to the category of those legislations which intended to bring the constitutional ideals into reality.⁹ The U.P. Act of 1955 was primarily designed to prohibit the slaughtering of the cow only under certain circumstances.¹⁰ Neither the slaughtering nor the transport of cow was made *per se* punishable. The Section 3(3) of U.P. Act, 1955 necessitates 'certification process' which can render the slaughtering legally permissible. By an amendment in 1979 [U.P. Act No. 24 of 1979] section 5A was inserted, which *inter alia* provides regulation of transport of cow/beef. The section 5A of the Act prohibits '*transport or offer for transport or cause to be transported any cow, or bull or bullock, the slaughter whereof in any place in Uttar Pradesh*', and doing so '*without the permit, along with the conditions mentioned in the permit*', was made punishable offence.

Whenever transport vehicles, carrying cows, were intercepted, and confiscated by the police, most often, the poor driver, the operator/cleaner often get chargesheeted by the police. The owner of the vehicle uses to get loose from legal clutches citing his 'ignorance' about the alleged transporting of cow. For police also, fastening constructive criminal liability over the vehicle owner was not an easy task, as the same would demand proof of 'owner's knowledge' about the carrying of cows. The penal provisions dealing with conspiracy were found to be insufficient to tackle such case. Where the driver, with or without cleaner is prosecuted, the [influential] vehicle owner would immediately move an application for 'release' of vehicle. These vehicles are often released due to the Supreme Court's decision in *Ambala Case*.¹¹ Now, the vehicle owner would hire

another driver/cleaner and would run his business as usual. Thus, the whole process was seen tilted towards the repeat offenders, running transport business or slaughtering.

In the recent past, when investigating officers started filing charge sheet against the owner as well, it was realized that this trick is also of no use. The charge sheet against vehicle owner or the statement of driver alleging owner's knowledge was never ever considered enough to prevent the bail order of the vehicle owner or the release of the vehicle either.

This procedural lapse probably irritated the police department. The department, with whatever motive, always intended to nab the big fishes, and it seems that the present dispensation, which has already favored the police department heavily, could not resist its temptation, and thus hurriedly promulgated this ordinance.

Nefarious Design

The Ordinance inserts many new provisions in the Act. It begins by creating 'constructive criminal liability' based on 'presumption', and that too with enhanced punishment. Each of these provisions are of questionable in nature, posing serious threat to the social order, personal liberties, and would be disastrous to the criminal justice system. The fallouts of these provisions need to be examined critically.

Fastening a Constructive Criminal Liability

By virtue of newly inserted Section 5A(6) of the Ordinance, whenever a 'conveyance' has been confirmed to be related to 'beef', the 'driver, the operator and the owner' related to transport shall be charged with the offence under the Act unless. The owner can prove his innocence only by establishing that 'transport medium [was] used despite all [his] precautions and without [his] knowledge.' Further, the Section 5A(10) of the Act shifts the burden on the accused, and the court shall presume that such person (owner) has committed the offence. It would be interesting here to compare the constructive criminal liability created here with that of constructive criminal liability under the Narcotic Drugs and Psychotropic Substances Act, 1985 [NDPS]. Under NDPS Act, the constructive criminal liability would fail where the owner of the vehicle from which the alleged narcotic/drug is confiscated proves that drug transport happened in absence of 'his knowledge or connivance' and he took '*all reasonable precautions against such use.*'¹² Thus, unlike the NDPS Act which demands only '*reasonable precautions*' to avoid constructive criminal liability, the U.P. Ordinance, 2020, demands '*all precautions*'.

Denial of Bail

The offence categorized under the UP Act, 1955 are cognizable and non-bailable. As against the general rule of bail, the provisions prescribed through Section 7A contradicts established bail jurisprudence. Section 7A inserted *vide* this Ordinance provides that whenever a person charged under the Act is arrested and is under custody, *he shall not be released on bail, if the special public prosecutor, appointed in this behalf, opposes his release.* In case, the prosecutor opposes the bail, even the court cannot give the bail without recording her finding that "there is a *reasonable basis for believing that accused is not guilty of any such offence, and that it is unlikely to commit any offence while on bail*".

The conditions mentioned in Section 7A for grant of bail are fundamentally against established rule of bail jurisprudence. *Firstly*, the consent or opposition of bail by the special prosecutor need to be taken seriously. Whether bail, which is directly affecting once personal liberty, can be subjected to someone's subjective opinion, especially a non-judicial person? In theory, the public prosecutor is an 'officer of the court', assisting the court towards end of justice. However, being a government officer, a cadre appointee, he shall never, in practice, give his 'consent' to bail. Thus, the entire discretion for bail, howsoever judicious it may be, will fall squarely on the judge. It is now for the judge to consider the bail on his own, and before he could write bail order, he need to locate '*reasonable basis for believing that accused is not guilty of any such offence, and that 'it is unlikely [for him] to commit any offence while on bail.*' This need to be further emphasized here that even if the judge finds enough evidence which indicate no involvement of the owner in the transporting/conveyance, how will he assure himself that the accused will not commit "*any offence while on bail*"? The expression '*any offence*' under Section 7A would surely too much to expect from a judicial officer. It seems that rather asking a *bail bond* from the accused, the ordinance is asking *surety* from the judge!

Potential to Destroy Social Harmony

It is an established fact that politics on cow and emerging cow vigilante has affected the rural economy badly. Domestic animals including cows were known to be cash in hand with rural families. Many of these families were heavily relying on this asset under adverse circumstances. However, with the growing distrust amongst communities, these animals lost their economic values, and people scared of consequences started moving away from these domestic animals.

The Ordinance further reinforces the idea of cow vigilante and related victimization. Section 5B which is another new insertion in the Act through ordinance categorically have enough potential to destroy social

harmony. The Section is divided into three categories. The category first envisions penal provision against all such person who causes ‘any physical injury to any cow or its progeny so as to endanger the life thereof such as to mutilate its body.’ The second category penalize ‘transport it in any situation whereby endangering the life thereof.’ The third category talks about *intentionally* endangering the life of cow or progeny by not providing food or water. It is interesting that intention or mental element is mentioned only with the third category, and not with the first and second. Thus, the offence under category first and second would be of strict liability, wherein proof of *mens rea* would not require. These offences are punishable with the imprisonment of not less than one year and may be up to 7 years.

Since all these offences are cognizable and non-bailable, one could easily imagine the nefarious design about the death of a cow in the village and the possible consequence thereof.

Calculated Political Move

The ordinance is promulgated at time when a substantial population the state is in complete dilemma about her employment, food security and the future. The ordinance is brought when all the space, such as University, Colleges etc., generating newer political debates are under complete shutdown. It seems that the UP government moved the ordinance with a well calculated political design. Political advisors must be fully convinced that lakhs of population, walking back from thousand miles, will pay no heed to these issues, and thus any possible move from opposition will not be taken seriously. It is, thus obvious, that there is hardly any debate, either in the print or electronic media about the possible fallouts of this draconian ordinance.

V. CONCLUSION

Soon after the promulgation of ordinance, news came about calling the session of Uttar Pradesh Assembly through some online mode. In principle, such a move may look new, innovative and attracting. It is for sure that the Cow Slaughter Ordinance will be placed before the house for debate and approval, and the government having brute majority on the floor of the house, will get it enacted afresh. However, the kind of debate which is required here seems to far from possibility. It seems that politics of [cow] vigilantism has arrived at the doorsteps of U.P. Vidhan Sabha, and now it is for the members for the august house to take their position.

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⁷ Ibid.

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¹⁰Section 3, The Uttar Pradesh Prevention of Cow Slaughter Act, 1955 [U.P. Act No. 1 of 1956]

¹¹*Sunderbhai Ambalal Desai v. State of Gujarat*, (2002) 10 SCC 283

¹²Section 60, the Narcotic Drugs and Psychotropic Substances, Act, 1985