

Sustainable Fashion and Water Pollution: A Constitutional Analysis of Enforcing the Use of Natural Materials for Dying in the Fashion Industry

Filzah Belal ¹, Kahaan Mehta ²

¹ Faculty of Law, University of Toronto

² Symbiosis Law School, Pune, India.

Corresponding author: filzah.belal@gmail.com

© Authour(s)

OIDA International Journal of Sustainable Development, Ontario International Development Agency, Canada.

ISSN 1923-6654 (print) ISSN 1923-6662 (online) www.oidaijdsd.com

Also available at <http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html>

Abstract: The fashion industry is the second largest polluter of rivers in India. A significant pollutant discharged by the industry into rivers is the wastewater from the process of dyeing fabrics. This discharge contains toxic chemicals, which take years to decompose, and therefore are present in the water body for an extended period of time. Harmful effects include increased temperature of water bodies, severe disruption of the ecosystem of the river, etc. The components which make up these chemicals are inherently poisonous, so their hazardous impact sustains even after they decompose. Climate change is a natural fallout from this process. These consequences should suffice the argument for any law or regulation which seeks to prohibit toxic dyeing processes of the fashion industry. However, such an initiative faces the challenge from the fundamental right of businesses in the industry to determine their mode of operations and the processes they employ.

This paper seeks to resolve this contradiction. It addresses the contention of the fashion industry, that restrictions on their dyeing process violates their right to conduct business operations under Article 19(1)(g) of the Constitution of India, by expounding on the reasonable restrictions to such right inscribed in the Constitution, in light of the meaning given to them by the Supreme Court of India. To strengthen this argument, it further considers the Article 21 right to life, and to clean water, in the Constitution of India, and by addressing the contradiction between the two rights, fortifies its arguments for the legality of prohibition of toxic chemicals in the dyeing process.

Keywords: Sustainable Fashion, Dyeing of Fabrics, Water Pollution, Right to a Healthy Environment, Right to Business and Trade.

1. Introduction

The persistent use of toxic chemical dyes, when the more environment-friendly option of organic dyes is accessible to the fashion industry, raises concerns about the absence of a legal mandate upon businesses to prefer the eco-friendly option. A conflict of rights emerges in response, between the right of a clean and healthy environment, and the rights of businesses in the fashion industry to conduct their operations without unreasonable restrictions from the State. This paper studies this conflict of rights, and tests the presumption that the scales tip in favour of the right of businesses.

The Fashion Industry is the second largest polluter of river bodies¹. The toxic chemicals used in the process of dyeing, coloring, and bleaching fabrics, the wastewater of which is discharged in river bodies, has brought considerable disrepute to the industry. The chemicals used in the dyeing process have corrosive materials like zinc, formaldehyde, Chromium IV, etc. as ingredients. When discharged in water bodies, they cause harm at several levels. On the level of the ecosystem of the water body, the discharge poisons the water body, increases the temperature, and kills marine and aquatic life. The chemicals take years to break down, and even in their decomposed form, they are harmful, and even carcinogenic. Consumption of fishes from such water bodies, or

¹<https://www.unenvironment.org/news-and-stories/story/putting-brakes-fast-fashion>

consumption or use of this water in any manner can lead to skin sores, and gastronomical cancer in humans. By increasing the ²

Several queries arise when this issue is examined from a legal standpoint: Is the present legal system insufficient in preventing continued harms to water bodies from toxic chemical dyes? What are the failings of the system? Is there a case to be made for the use of organic dyeing materials from a legal standpoint? If so, what are the hurdles in imposing such a mandate?

It must be noted at this point, that although this paper will focus solely on the case of chemical dyes used by the fashion industry, the argument being made is a larger, constitutional one. The argument attempts to resolve a conflict of two constitutional rights, one that is of a business, and one of the environment and the *rem* at large. Reliance is placed on interpretations of these rights, and case laws and precedent on the resolution of conflict of rights. Therefore, although this article focuses on a particular industry and pollutant, the arguments suggested in it may be used as a model for dealing with constitutional challenges against sustainable solutions.

1.1 Present Legal Safeguards

Before a study of possible legal developments which could be useful in resolving the issues posed by the fashion industry, a brief overview of the prevailing legal order is necessary.

Constitutionally, Article 21 of the Constitution of India, which guarantees the *right to life and personal liberty*, has been read by the Supreme Court of India to include the right to a clean and healthy environment³, and the right to clean water⁴. The enforcement of these constitutional rights is executed through statutes which limit water pollution. Control of water pollution in India is exercised with the help of the Water (Prevention and Control of Pollution) Act, 1974, and the Environment (Protection) Act, 1986. Industries are required to obtain a ‘consent to establish’ and ‘consent to operate’⁵ before they are able to commence manufacturing operations. The grant of these *consents* is contingent on the guarantee by the industries that their discharge will not be released without treatment, and where toxic discharge is allowed, the same will be restricted within permissible limits.

In addition, the Constitution also provides *Directive Principles of State Policy* in Part IV, which are a set of directions to guide the State towards an ideal set of policies. These *Principles* have, inter alia, placed a duty on the State to protect natural resources for the future generations. As a provision encouraging ‘sustainability’, the direction is relevant for our contexts since, in the interest of protecting water bodies in India, it would be expected that the State would take active steps to prevent the use and release of harmful dyes through its administrative mechanisms. However, this has largely been a failed exercise. More tragically, the *Principles* are not enforceable, and therefore no *writ* may lie against the State demanding that it comply with the principle of protecting natural resources.

While India has a host of laws to protect different elements of the environment like the Water Act, the Air (Prevention and Control of Pollution) Act, 1981, or the umbrella legislation which cover the whole of the environment: the Environment (Protection) Act, 1986 The failure of the existing laws in protecting the environment is well documented⁶. In addition, the legal framework in India is undergoing a significant change currently, at an extremely fast pace. For example, the present Government has proposed the removal of criminal liability for some of the offenses, and increasing the penalties instead, in statutes which protect the environment, including the Water (Prevention and Control of Pollution) Act, 1974. The effects of this are largely disputed in the legal community. While some lawyers have argued that this would be an effective step, others realize that the effectiveness of implementation would mean that industries can exempt themselves for gross violation of rights simply by compensating for the damage financially.

1.2 Moving beyond current weaknesses

² <https://www.intechopen.com/chapters/41411>; <https://edition.cnn.com/style/article/dyeing-pollution-fashion-intl-hnk-dst-sept/index.html>; <https://www.sciencedirect.com/science/article/pii/S2452072119300413>;

³ Rural Litigation Entitlement Kendra v. State of Uttar Pradesh, AIR 1985 SC 652.

⁴ Subhash Kumar v. State of Bihar, AIR 1991 SC 420.

⁵ Section 25, Water Act.

⁶ <https://greencleanguide.com/how-we-failed-to-implement-environmental-laws-in-india/>;
<https://www.thehindu.com/news/cities/Delhi/Pollution-problem-rules-tough-but-implementation-weak/article16989854.ece>

The failures of implementation of the existing legal framework could be resolved in different ways: increasing public awareness, political will, increasing vigilance amongst authorities and incentivizing compliance with environment friendly measures. These are all measures, however, the rollout period of which is long, and are efforts which have to be made gradually, and over time. Presuming that India has the luxury of time will be a fallacy. Even if the issue is viewed purely from a human-centric view, ignoring the damage to the environment, the urgency of immediate solutions is not diminished. Taking the case of chemical dyes alone, among the many different pollutants in India, the failure of the enforcement of laws in India affect the economically weak and downtrodden the most, who rely on local water bodies, having no access to clean drinking water. The polluted water bodies are also their source of food. Farmers rely on toxic water for irrigation, which in turn affects the produce. Cattle, fertility of soil, purity of groundwater have all impacted the agricultural communities. This has lowered their income drastically, and affecting their ability to afford basic necessities and proper healthcare⁷. Waiting for a gradual environmental revolution will in no way stop or reduce the damage to these families. Therefore, urgent and legally enforceable measures are needed.

This paper recognises one such alternative, and checks for the legal enforceability of the same. The subsequent section will highlight the sustainable alternative available to the fashion industry and test the implications of recognising a constitutional duty of the fashion industry to surrender toxic chemicals, and adopt the sustainable alternative.

2. The Emergence of Sustainable Fashion

Rising awareness of climate change has ethically cast a responsibility on corporations, apart from the State (responsible under the Public Trust Doctrine),⁸ to contribute in achieving climate goals.⁹ In the fashion industry, corporations as well as consumers have become increasingly inclined towards ‘sustainable’ choices, ie., garment companies showcasing their products as sustainable or environmental friendly. These could be done by a number of ways, such as use of sustainable processes, sustainable raw materials, etc. The present paper will focus on the process of sustainable options in the process of dyeing fabric. For the purposes of the same, it will take the example of the industry in *Sualkuchi, Assam*, which has become the center of attention as a hub of sustainable practices in the fashion and textile industry.

2.1 Sustainable fashion

The growing consciousness in making fashion more sustainable challenges the more profitable trends such as fast fashion. Sustainable fashion challenges existing processes of manufacturing (and dyeing) of garments, it poses a challenge to increase costs.¹⁰ To pursue the market, some popular brands have recently found themselves accused of ‘greenwashing’ their products.¹¹ This shows the trend of fashion houses to fulfill the growing appetite for sustainable fashion choices at any cost. In light of these incidents that have compelled fashion houses to falsely portray their garments as environmentally friendly (in other words, greenwash), it reflects the lack of intent on their part to practice sustainable methods. On that note, it may be contemplated to enforce sustainable methods of dyeing upon fashion houses to reduce water pollution and help combat climate change.¹²

2.2 Use of natural alternatives: Current Practices in Sualkuchi

Water holds cultural values which have prompted ‘primitive’¹³ techniques, including its prominence in livelihood activities. This section will focus on one such practice that is employed by the local communities: the use of natural

⁷ <https://www.dw.com/en/how-our-clothes-are-killing-indias-rivers/av-57380162>

⁸ Thomas Clarke, “Ethics, Values and Corporate Governance” *Values and Ethics in the 21st Century*, BBVA Research Publications (2012, Spain), at 405.

⁹ Myria W. Allen and Christopher A. Craig, “Rethinking corporate social responsibility in the age of climate change: a communication perspective” (2016) 1:1 *International Journal of Corporate Social Responsibility* (online) <<https://d-nb.info/1110091338/34>>

¹⁰ Kenneth P. Pucker, “The Myth of Sustainable Fashion” (13 January 2022) *Harvard Business Review* (online) <<https://hbr.org/2022/01/the-myth-of-sustainable-fashion>>

¹¹ *Commodore v. H&M (Hennes & Mauritz) LP*, 7:22-cv-06247 (United States District Court, Southern District of New York)

¹² *M.C. Mehta v. Kamal Nath*, (1997)1 SCC 388

¹³ The word ‘primitive’ has been used in the Constitution of India to describe various Scheduled Tribes and Scheduled Castes that exist in the country. Although it has been critiqued for the choice of this word, presently, it is how local

materials to dye silk in Sualkuchi, Assam (India). The objective of this section is to explore the use of natural products in Sualkuchi to dye silk and understand how they are more environmentally friendly. The objective of this section is to show that using natural dyes over chemical dyes is in compliance with environmental pollution laws, namely, the Water (Prevention and Control of Pollution) Act, 1974 ('Water Act').

Sualkuchi is famous for its silk and is also known as Assam's silk industry.¹⁴ Sualkuchi is known for Muga Silk, also called the 'Golden Silk of Assam', is indigenous to this State, creating more possibilities for promoting it as a culture attached to the State.¹⁵ For the purpose of this paper, it is important to note that the dyeing process in this region is with the use of natural ingredients. A paper titled "An Analytical Study on Traditional Techniques of Dyeing Textiles with Natural Dyes in Assam, India"¹⁶ has pointed out the various forms of dyes that are procured from the environment:

- *Dyeing with flowers*: The flowers are soaked submerged in water and boiled. Flowersmarigold, night Jashmin (Sewaliphul) and hibiscus (jobaphul)
- *Dyeing with berries*: The berries are washed and then crushed and boil in vinegar or lemon juice.
- *Rhizomes and leaves with soft branches*: Soaking the chopped rhizomes or the plants and fresh branches in warm water for one night.
- *Roots*: Madder, Turmeric, Madder roots Leaves- henna (jetuka pat)
- *Seeds*: Seeds also same procedure can be applied by first soaking the seeds and then crushed. (bixa - sendur gosh)
- *Barks woods*: Since these are difficult to dye, the bark woods are first made into chips, sawdust or if possible powdered. Dyeing barks it needs more time. (Jack fruits, red sandal wood)
- *Turmeric*: With constant developments, it has also come into practice how eri silk could be dyed with turmeric dyes by treating with different mordant to improve the colour fastness properties.¹⁷

At the National Seminar on Effective Protection of Traditional Knowledge and Cultural Expressions: National and Community Experience (May 2019) hosted by the National Law University and Judicial Academy, Assam, the Ministry of Textiles displayed the various ingredients that are used in Sualkuchi to dye silk clothes. This included neem leaves for green colour, raw turmeric for yellow, etc. The water collected after using such products would be the same as wastewater after using them for household purposes. This is different from wastewater from chemicals that come out of industrial units, primarily because the composition is not made up of natural substances.

The Water Act mandates that industries should be mindful of the waste being generated by them, and control pollution by limiting pollutants that they release into the water bodies. Wastewater coming out of kitchen products is, by nature and composition, different from wastewater coming out of dyes that are made of chemicals.

'Pollution', as per Section 2(e) of the Water Act, is described as contamination of water bodies by various kinds of discharges containing pollutants, including trade effluents. The example of *Sualkuchi* is one of 'primitive' methods, and which do qualify as 'pollution' under the Water Act being domestic and in small scale.¹⁸ Moreover, indigenous processes are better suited for the environment, but not popularly adopted, mainly because of the discrimination

communities (including from North-East India states) are described. See: Cultural Survivor "Observations on the State of Indigenous Human Rights in India" (2016) Prepared for: The United Nations Human Rights Council Universal Periodic Review, 27th Session, third cycle (online) <<https://www.culturalsurvival.org/sites/default/files/INDIAUPR2016final.pdf>>

¹⁴ Preeti Chakravartty and Dr.Keshab Basumatary, "Sualkuchi Village of Assam: The Country of Golden Thread" (2018) 20:3 IOSR Journal of Business and Management 12.

¹⁵ <http://www.assaminfo.com/tourist-places/32/sualkuchi.htm>

¹⁶ Dr. Sangeeta Chakravarty, Prof. Rani HazarikaKakaty, "An Analytical Study on Traditional Techniques Of Dyeing Textiles With Natural Dyes In Assam, India", Global Journal of Arts, Humanities and Social Sciences, Vol.3, No.10, pp.1-7, October 2015, Published by European Centre for Research Training and Development UK.

¹⁷ R Chakravorty, Pranab Dutta, J Ghose, "Sericulture and Traditional Craft of Silk Weaving in Assam", Indian Journal of Traditional Knowledge, Volume 9(2), April 2010, pp. 378-385.

¹⁸ IC Consultants "Pollutants in urban waste water and sewage sludge" (2001) European Commission, at 9 (online) <https://ec.europa.eu/environment/archives/waste/sludge/pdf/sludge_pollutants.pdf>

inflicted on them.¹⁹ Mandating the use of such materials across the entire industry would eliminate the time constraints of other methods of ensuring protection of water bodies from chemical dyes which were mentioned in section 1.2 of the paper. However, for this solution to be a meaningful contribution, it must pass the test of legality. The subsequent sections will test the challenges which may come towards a legal mandate on the fashion industry to renounce the use of chemical dyes.

2.3 Constitutional Implications of Enforcing the Use of Natural Ingredients for Dyeing

The Constitution of India lays down the fundamental rights of all citizens in Part III. These are rights typically enforceable against the State by way of writ petitions before the Supreme Court of India under Article 32 of the Constitution.²⁰ Each of these rights have attached with them some *reasonable restrictions*.²¹ These reasonable restrictions enable the Legislature to create laws, and the Executive to introduce rules drawing from the legislative instrument, which may restrict the exercise of the fundamental right of citizens.²² Article 19(1)(a) of the Constitution, for example, guarantees to all citizens the right to freedom of speech and expression. This guarantee is read with Article 19(2) of the Constitution, which empowers the State, notwithstanding the right in Article 19(1)(a) to make laws which restrict the freedom of speech and expression in the interest of “*sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offense.*” A law made by the Legislature, or a statutory instrument created by the Executive, which goes beyond these grounds, implicitly or explicitly, to restrict free speech, can be challenged by virtue of a petition before the Supreme Court of India.

The same model of rights, reasonable restrictions, and grounds to challenge them resonate for the two rights which are at the center of dispute in this paper. Article 19(1)(g) of the Constitution of India vests a fundamental right in all citizens to carry out their trade, business or profession without any interference from the State. Article 21 of the Constitution of India guarantees the right to a clean and healthy environment, which includes a right to clean water to all citizens. Proposing that the use of organic materials for dyeing of fabric be made mandatory by law, invites the challenge that such a mandate interferes with the right of businesses to carry out their trade and profession. However, the right to clean water requires the adoption of immediate steps by the State to ensure that industries are restricted from polluting water bodies, especially where sustainable alternatives are available, like in the case of natural products for dyeing. The subsequent section undertakes a detailed study of both of these rights, examines the interpretative approach taken by the Supreme Court to resolve a conflict of rights such as the one mentioned above, and emerges with a response which answers to the urgency of sustainable methods of manufacturing in the fashion industry.

3. Constitutional Analysis: Article 19(1)(g)

The framers of the Constitution of India envisaged “certain rights” which guaranteed what was promised in the preamble of the Constitution to the citizens of India. Of these “fundamental rights” enlisted in Article 19 of the Constitution, Article 19(1)(g) grants upon all its citizens the freedom “to practise any profession, or to carry on any occupation, trade or business”. This freedom of course, came with its restrictions in the form of Article 19(6). A bare reading of the mentioned Article indicates that the Constitution, while granting the freedom, reserved the right of the State to make any new law which is “interests of the general public” which imposes “reasonable restrictions” on the exercise of this right.²³ The Article also prevents a retrospective application of the same as long as any existing law imposes a restriction in the interest of the general public. The essence of the Article can thus satisfactorily be concluded to be one which measures public interest against private interest and in keeping with the spirit of the Constitution, public interest has been given the priority.

¹⁹ Dr. Ying Shih Hsieh, “Indigenous Peoples are the Guardians and Beneficiaries in the Era of Climate Change” (2019) Environmental Quality Protection Foundation (online) <https://seors.unfcc.int/applications/seors/attachments/get_attachment?code=3TTKY19B8Q5NN9GA4UEKNX6KDT7L5ROQ>

²⁰ Shristi Rupam, “Supreme Court as a Protector and Guarantor of the Fundamental Rights” (2018) 2 Penn Acclaims (online) <<http://www.pennacclaims.com/wp-content/uploads/2018/08/Shristi-Rupam.pdf>>

²¹ Khoday Distilleries Ltd v. State of Karnataka, (1995) 1 SCC 574.

²² Romit Raja Srivastava, “Test to Determine Reasonable Restrictions Under Article 19 of the Constitution of India” (2012) Working Paper: SSRN (online) <<http://dx.doi.org/10.2139/ssrn.2135681>>

²³ *Supra*, note 22. (Khoday Distilleries Ltd v. State of Karnataka, (1995) 1 SCC 574.)

Therefore, the prime argument before any Court of law in the interpretation of a statute which proposes to make the usage of natural ingredients for dyeing compulsory would be whether such a statute infringes on the fundamental right of the business owners of the fashion industry to carry on their business as they wish to do. This will have to be measured against the right of the State to make a law which protects the interests of the general public.

With regard to the argument of the State to be able to make such a law within the ambits of Article 19(6), a simple referral to the harm caused to the environment due to artificial ingredients shall suffice. Further arguments to support the State's claim to make such a law have been mentioned in Chapter 6 from various facets.

However, on the question of the right of the business owners to use ingredients which they wish to do, irrespective of their nature, an analysis can be drawn only after reviewing the attitude of the Supreme Court in the implementation of Article 19(1)(g).

3.1. Applicability of Article 19(1)(g):

The framers of the Constitution have used the word "citizens" to indicate the scope of applicability of the Article. This means that only the right of an Indian citizen to conduct their business free from State restrictions other than the ones cited in Article 19(6) can be protected by Indian Courts. Therefore, the right does not extend to foreign individuals.

Furthermore, the Supreme Court has made clear that an artificial living being cannot move to the Courts seeking protection under this Article.²⁴ Therefore, in case a company would wish to move against such a statute which obliges them to use natural ingredients upon pain of punishment, the same can only be done via its Directors or Shareholders. It would lie upon the party instituting the suit to prove their locus standi before the Court by proving that they are an association for citizens who own businesses in the fashion industry.²⁵

3.1.1. Ground for Challenge and Reasonableness of the Restriction

A statute, or any of its provisions, in question may be challenged on the grounds that it imposes unreasonable restrictions on the business owners. The challenge may be successful unless it complies with the ground within Article 19(6), the provision enlisting all the grounds which form the 'reasonable restrictions' to limit Article 19(1)(g). Here, an unreasonable restriction has been given the meaning in *Rameshwarlal Harlalka v. Union of India* as²⁶ "(restrictions may be deemed unreasonable if) *the restrictions go in excess of the object or because activities which are not pernicious are included within the sweep of the statute or because the procedure laid down in the statute for curbing such activities is unreasonable or unjust or arbitrary.*"

There is no question of the activities - the use of artificial chemical ingredients when natural alternatives are available- not being "*pernicious*". As has been stated before in this paper, there are abundant natural resources which can be put to good use for the purposes of dyeing of clothes. The ill effects of such usage of artificial chemicals, rather, qualifies as "*pernicious activities*" thereby allowing such a restriction as the statute might bring. Furthermore, after *Maneka Gandhi v. Union of India*,²⁷ the Supreme Court has introduced the interpretation of due process in the Constitution. The legislature having been well versed with such interpretation is unlikely to introduce a process for the ban on the use of artificial ingredients in a manner which is "unreasonable, arbitrary or unjust". While it may be assumed that to draw such an assumption may be too bold, the *Doctrine of Severability* may be triggered. Upon such an occurrence, only the part of the statute which is "unreasonable" as per the Court would be read down but the statute as a whole shall continue to be operations.

It will also be expected that the statute so prepared will ensure that principles of natural justice are followed in the procedures invoking the restriction on usage of chemical substances. The judgement in *Dwarka Pd. v. State of U.P.*,²⁸ should be used as the guiding principle by the legislature while drafting the law to prevent any challenge on the constitutionality of the procedure it prescribes. In the instant case, the statute which delegated powers related to licensing to administrative authorities was read down as "unconstitutional" on the grounds that the concerned statute did not lay down expressly the grounds on which control can be exercised by the administrative authority.

²⁴ Ghodra Electricity Co. Ltd. V. State of Gujarat;(1975) SC 199; AIR 1975 SC 32

²⁵ DharamDutt and others v. Union of India and others, (2004)SCC 712

²⁶ AIR 1970 Cal 520

²⁷ 1978 SCR (2) 621

²⁸ AIR1954 SC 224

Even if the question of the legitimacy of the statute were to be raised on the ground of its completely curbing on a fundamental right guaranteed by the Constitution of India, citing judicial precedents would suffice to assist the Court in disregarding any such claims.

In the *State of Bombay v. R.M.D. Charanbaughwalla*,²⁹ the Apex Court invoked the Doctrine of *Res Extra Commercium*. According to the Court, this Doctrine justified imposing reasonable restrictions on businesses which were “inherently pernicious or dangerous to the Community that nobody can claim any right to trade in such commodities or activities”. A simple perusal of scientifically supported data suggests that the use of chemicals for dyeing does have an effect strong enough to invoke this Doctrine.

The judgement cited above continues to remain “good law” and has not been overturned so far. But since this paper seeks to discuss all possible arguments from either sides of the Bar, the criticism that the interpretation of this Doctrine has invited must be mentioned and considered carefully. The essence of the argument made against the Doctrine is that it stands borrowed from the American Police Power Doctrine which does not find any sanction under the Indian Constitution whatsoever. A paper titled “Police Powers and The Constitution of India: The Inconspicuous Ascent of an Incongruous American Implant”³⁰ argues that within the framework of the Indian Constitution, the only way in which a statute can be questioned and struck down is by virtue of Article 19(6) for our purposes. It is argued that the in *Charanbaughwalla*, the Court’s invocation *res extra commercium* unconstitutional because that Doctrine provides for a ground to restrict the freedom of business other than the those stated in Article 19(6) and so was ultra vires the Constitution.

While the authors understand the spirit behind the paper in the understanding of *res extra commercium* viz-a-viz the Indian Constitution, the following two points are proposed:

- (a) The Doctrine of Police Powers in this case does apply and falls within the ambits of the Indian Constitution. The Directive Principles of State Policy impose a duty on the State to ensure that public health is improved (Article 47) and “Protection and improvement of environment and safeguarding forests and wildlife” (Article 48-A). While the impact of these Principles on the case at hand have been discussed at length in the subsequent parts of the paper, for the purposes of any objection raised against the Constitutionality of invoking *res extra commercium* in India with regard to the use of toxic chemicals for dyeing, it can be argued that though these do impose restrictions beyond the scope of Article 19(6) on the freedom to conduct business, they end up being a part of the Directive Principles of State Policy and thus fall within the constitutional framework. Furthermore, the Supreme Court itself in *Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir* stated that “Any action taken by the Government with the view to giving effect to any one or more of the Directive Principles would ordinarily, ..., qualify for being regarded as reasonable”.³¹ Therefore, finding the usage of chemicals for dyeing of clothes can be *res extra commercium* would stand in a Court of law despite the question on its constitutionality with regard to Article 19(6).
- (b) The Doctrine of Stare Decisis continues to be followed in India. The Supreme Court having ruled favourably for *res extra commercium* and there having been no overruling of the judgment granting such legality, the precedent shall apply not only on all lower Courts but also on the Supreme Court itself. The constitutionality for the purposes of the statue banning the use of chemical weapons of the doctrine having been protected as shown above, the rule set out in *Charanbaughwala* shall continue to apply.

Therefore, from the above discourse, it can be concluded that very few challenges exist to the constitutionality of an Act if it would propose to ban the usage of chemical ingredients so long as the precautions mentioned above are undertaken. It is highly likely that given the damage caused by such usage, the Constitution shall strongly defend such a statute.

²⁹ 1957 SCR 874

³⁰ Arvind Datar and Shivprasad Swaminathan, *Police Powers and the Constitution of India: The Inconspicuous Ascent of an Incongruous American Implant*, 28 Emory International Law Review, 65 (2014)

³¹ AIR 1980 SC 1992, 12.

4. Constitutional Analysis: Article 21

The Right to Life is undeniably the most intrinsic fundamental right that could ever be granted upon a living being.³² The sustenance of life is indeed the reason why other fundamental rights have been granted, without ensuring a life that can be lived with dignity, there is very less meaning that can be attached to the rest of the fundamental rights. The Indian Constitution under Article 21 grants the right to life and personal liberty, however this right to life is not restricted to one's mere existence, and it implies a right to live a life with dignity.

The scope of the term 'dignity' which is inclusive of the right to a clean environment and the right to clean water is a part of it.³³ Pollution being a consequence of abuse of the environment, it makes living a threat in severe cases. The expression "life" assured in Article 21 does not connote mere animal existence or continued drudgery through life, it holds a much wider meaning which includes right to be free from restrictions and encroachments, decent environment, livelihood, health, better standards of living, hygienic conditions in the workplace, leisure and all facets of human civilisation as contemplated by the Judiciary over the years.

The Hon'ble Supreme Court in the case of *Chameli Singh v. Union of India*³⁴ has stated that while dealing with Article 21, it is not merely meeting the 'animal needs' of a man that equates to one's right to live, but what also adds up to it are all the facilities that help a person to develop and free from any restrictions which may hinder his growth. This includes the right to food, water and decent environment, each expression used in Article 21 of the constitution of India is meant to enhance human dignity and value. It lays foundation for a society where the rule of law has primacy and not arbitrary or capricious exercise of power³⁵ for every citizen to have the enjoyment of quality and living and anything which endangers or impairs by conduct of anybody either in violation or in derogation of laws, the quality of life and living by the people is entitled to take recourse to Article 32 of the Constitution³⁶ for removing the pollution of water or air which may be detrimental to the quality of life.

5. Conflict between the Fundamental Rights

The scope of each of the rights having been established in the previous section, this paper will now turn to the commonly forwarded argument that a conflict of rights will follow should a legal mandate of using organic dyes be introduced. The Indian Constitution has been interpreted by the Judiciary in a very liberal manner in order to ensure that human life is given maximum scope for ease. As we have discussed the two fundamental rights above, we see a direct conflict between the two amidst the questions we have raised. On one hand is the right to freedom of trade and business under Article 19(1)(g) and on the other hand is the right to water under the scope of the right to life under Article 21. The question that arises at this juncture is which one must be upheld against the other when dyeing units pollute water bodies.

It is of no doubt that the Constitution of India grants every citizen the right to practice any profession, business or trade freely, i.e., every citizen has the freedom to conduct business the way they want under Article 19(1)(g). This freedom allows every citizen the freedom to carry on business and trade of their choice. This choice extends to the processes and materials they want to use in their business or trade. This means that even if one wants to use chemical textiles as a part of their business, they can do so. But should this be allowed even when public health is at stake? Relying on water for the sustenance of life is inevitable, and undeniably, water bodies are the major source for water. So when such toxic untreated water is released into the water bodies, whether it is justified to put restrictions on the release of such water from the dyeing plants.

The Right to Life, granted to all persons (it is not restricted to citizens only) under the Constitution of India, is inclusive of the right to health as was laid down by the Apex Court in the case of *M.C. Mehta v. Union of India*. It is therefore the duty of the State to ensure that the right to health is not infringed. It is safe to assume that if these dyeing plants are releasing water into river bodies that are untreated and harmful, it must be restricted.

In contrast, the right to life under Article 21 itself also includes the right to livelihood, and has been justified in many cases when this livelihood has been procured from the environment. In *Banwasi Seva Ashram v. State of Uttar*

³² Dinah Shelton, "Human Rights and the Environment: What Specific Environmental Rights have been Recognized?" (2006) 35:1 Denver Journal on International Law and Policy 129, 131.

³³ *Chameli Singh v. State of Uttar Pradesh*, AIR 1996 SC 1051.

³⁴ AIR 1996 SC 1051.

³⁵ *Khartar Singh v. State of Punjab*, (1994) 3 SCC 569.

³⁶ *ChhetriyapardushanMuktiSangarshSamiti v. State of Uttar Pradesh* AIR 1990 SC 2060.

Pradesh³⁷ the Supreme Court justified the plucking of tendu leaves for the purpose of livelihood as the same was balanced with environmental protection. To keep 'environmental protection' as the extent of economic development has often been the solution offered by sustainable development. Applying this to the present scenario being discussed can also be a strong argument, i.e., to restrict those dyeing plants which cause irreparable harm to concerned water bodies.

The Supreme Court of India had previously in the famous Kanpur Tanneries Case instructed for closure of tanneries that discharged water into the Ganga River thereby polluting the water. Ganga River river is a water body that not only sustains human and marine life, but it also hold a lot of religious importance in the Indian subcontinent. This makes it all the more necessary to prevent pollution of the water of the river. In a similar case named Tirupur Dyeing Factory Owners Association v. Noyyal River Ayacutdars Protection Association,³⁸ where water was discharged by dyeing and bleaching activities into the Noyyal River, the same was not approved by the judiciary and ordered to be shut down. The discharged water was destroying the water body which was used by many and hence was perceived as a threat to the people and public health.

At this point, a conflict between the two competing fundamental rights can be chalked out: one, the right to freedom of practicing any business, trade, etc., and the other, being the right to life. The conflict emerges from the point that which one should be given precedence over the other.

Upon choosing a side in this conflict, it would also mean that we are choosing one between environmental protection and economic development. However, the legal question is whether that is possible. Fundamental rights are a part of the 'basic structure of the constitution', it cannot be deviated from at any time. It is also true that fundamental rights are not absolute, they are bound by certain 'reasonable restrictions', as explained earlier in this paper. While the right to life and personal liberty is restricted by following of "due process of law" under Article 21, the right to freedom of trade and business under the scope of Article 19(1)(g) is restricted by the clauses that follow in the provision including public law and order, decency and morality, etc. Similarly, when every citizen is given the freedom to practice any business or trade within the application of Article 19(1)(g), it is implicit that it can be restricted if the restriction is reasonable. Such reasonable restrictions can be those which are in the interests of general public and subject to any law stipulating conditions for eligibility into those businesses.

5.1. Prevention of Statutory Violations

It has been laid down under the Water Act that companies that want to establish industrial units or plants must first obtain a Consent to Establish (CTE) and a Consent to Operate (CTO). These are in the nature of a 'no-objection certificate' which means that there is a clearance to establish and function a plant or a unit.

The Pollution Control Boards, which are established both in the state and the central level, administer the sanctioning of these consent certificates. For the ease of regulation, they have also categorized industries on the basis of pollution caused by the industry to be able to administer different categories accordingly.

It has been established that the right to water falls within the scope of the Right to Life and that severe pollution to water is a threat to life since people depend on water for their everyday life. Since the Constitution is the *grundnorm* and cannot be deviated from, the Water Act also has been enacted with the view of water pollution to sustain life better.

Contamination of water bodies is a form of pollution of a river contravening Section 7 of the Environment Protection Act, 1986. This argument is being advanced with support of the definition of "pollution" as defined under Section 2(e) of the Water Act. Also, Section 7 of the Environment Protection Act, 1986 clearly states that "persons carrying on industry operations, etc. shall not allow emission or discharge of environmental pollutants in excess of the standards". In account of the pollution that is being caused to a river, the activities causing such pollution must be stopped with immediate effect³⁹ as it indirectly affects the health and nourishment of the people which is to be protected under Art 21.⁴⁰

In order to ensure that the provisions of the Water Act are met with and to keep pollution levels in control, this statute has laid down certain compliances to be done before an industry is set up. The Consent to Establish (CTE)

³⁷ AIR 1987 SC 374.

³⁸ Tirupur Dyeing Factory Owners Association v. Noyyal River Ayacutdars Protection Association, (2009) 9 SCC 737.

³⁹ Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664

⁴⁰ Modern Dental College and Research Centre and Others v. State of Madhya Pradesh, (2016) 7 SCC 353

and the Consent to Operate (CTO) are two compliances that are mandatory to establish a unit and to operate the unit after its establishment, respectively. Dyeing units are always at the risk of violating these because of the chemicals they use, and thereby the effluents that they release into the water bodies. Undoubtedly, the usage of organic products

Discharging effluents into sources of water and failure to protect the inhabitants of the locality from the poisonous and highly injurious effects of distillery's effluents and obnoxious fumes amounts to an infringement of the inhabitant's rights guaranteed under Article 14, 21 read with Articles 47 and 48A of the Constitution of India.

The constitutional and civil law modification in procedural law has also shaped the substantive development of environmental law and the recognition of a virtual environmental right under Article 21 read with the fundamental duties chapter and Article 51A(g).⁴¹ The recognition and evolution of a constitutional tortious remedy in the form of compensation, not only for the aggrieved but also reparative damages for the harm done to the environment, mark a significant development of environmental jurisprudence in India.

Moreover, the River Ganga and its tributary Yamuna has been given legal personality to enforce protection from pollution. Giving rivers the status of an artificial person under the law can serve various purposes, such as protecting the river body from pollution or any other form of degradation. The Indian Courts have recently joined the trend when the High Court of the State of Uttarakhand granted the sacred River Ganga and Yamuna⁴² with the status of 'personhood'. It is a step appreciated by many because now that these rivers have rights, polluting them would be on the same pedestal as harming a person.

The Sociological School of Law, one of the schools of jurisprudence, states that laws must be consistent with the norms of the society, or must keep pace with the needs of the society. In a society that is becoming more and more aware regarding climate change is proof that this step by the Court was much needed. Therefore, it can be established that protecting the river body also protects the interests of people dependent on them. The Court even appointed officials who act as custodians of these water bodies.

5.2. Use of Natural Dyes as a Solution

All these potential violations of the law mentioned above can be avoided in our opinion if chemical products causing pollution are replaced with organic products that would decrease pollution of water bodies, it automatically reduced the chances of companies violating the laws that bind them. Since the fundamental rights also seem to be conflicting, use of organic materials for dyeing will eliminate this conflict. The reason for this is two-fold: *firstly*, it will reduce the pollution in the water bodies thus preventing violation of the Right to Life under Article 21; *secondly*, it will not restrict in any way, the freedom to conduct business of dyeing. Hence, there is a perfect balance in the implementation of both the fundamental rights at the same time.

Further, since organic ingredients like that of flowers, spices, vegetables, etc. are more accessible, it will also promote the application of the right to livelihood. Household products will also enable men and women to start dyeing as a small-scale business. Even in bigger companies, use of these products can decrease input cost and increase profit margin which if used to increase labour remuneration, or to hire more people and thus promote employment, it can raise the standard of life for many in the country.

6. International Obligations of India

The framers of the Constitution of India drafted the Directive Principles of State Policy to give directions to the State for their aspirations which they wanted actualized. Subsequent amendments to the State has therefore imposed the obligation on the Indian State to undertake measures to protect the environment and provide for Article 73 of the Constitution of India vests the power in the executive to enter into international treaties.

Article 253 of the Constitution of India also empowers the Parliament of India for the purposes of implementation of "any treaty, agreement or convention with any country or countries or any decisions made at any international conference, association or other body". This has a great bearing on the issue at hand.

⁴¹ R Ramamoorthy, "The Difficulties of Tort Litigants in India" (1970) 12 Journal of Indian Law Institute, pp. 312– 321

⁴² "Ganges and Yamuna rivers granted same legal rights as human beings", The Guardian, 2017, <https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings>

The Constitutional obligations of the State to protect the environment have already been stated above. Though those grounds are satisfactory enough to bring about a ban on the usage of chemical ingredients for dyeing, by the virtue of Article 253 of the Constitution, Parliament as whole has also been vested with significant powers to bring about such a change. Therefore, the very existence of charters which the Union of India has ratified can be used as an argument in favour of the ban.

The *Basel Convention on Trans-Boundary Movement of Hazardous Waste* is the most relevant example in this scenario. The convention of which India is a signatory creates an obligation on the State to ensure that trans-boundary movement of hazardous waste is kept at a minimum. The Ministry of External Affairs, pursuant to the same, introduced the *Indian Hazardous Waste Management Rules Act, 1989*. In the Schedule attached to the rules, Waste Category No. 8 talks about “Wastes from Dyes and Dye intermediate containing organic chemical compounds” and the regulated quantity of such disposal is 200 kilograms “per year calculates as oil or oil emulsions”.

With regard to the same, it is humbly submitted that:

- Given that the fashion industry in India is likely to grow by 15-20% in the next five years,⁴³ the limit imposed of 200 kilograms will result in detrimental impacts on the environment when the expected growth rate is measured in terms of income from the dye market is \$480 million;
- Section 4 and Section 5 of the Act simply clear state that it is the responsibility of manufacturer to ensure that the waste is treated before being released and vests powers in the authority to cancel the license. It creates no provision for fines which may be imposed on the polluter. In keeping with the ‘Polluter Pays’ principle, specific powers must be vested in the authorities for impose exemplary fine under this Act for violation of its provisions.

However, the above-mentioned statute and any other treaty or convention that India may have signed and the Parliament may have acted upon stands now overridden by UN Resolution 70/1 of 2015 to which India is a party favourably. Theset up of the NITI Ayog, which is a extension of the erstwhile Planning Commission of India, is an outcome of the resolution to foster plans to implement the Sustainable Development Goals. The following goals have a direct relation to the discharge of hazardous waste by the fashion industry:

- “Goal 3: Ensure healthy lives and promote well-being for all at all ages;
- Goal 6: Ensure availability and sustainable management of water and sanitation for all;
- Goal 9: Build resilient infrastructure, promote inclusive and sustainable industrialization, and foster innovation;
- Goal 12: Ensure sustainable consumption and production patterns
- Goal 13: Take urgent action to combat climate change and its impacts by regulating emissions and promoting developments in renewable energy;
- Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development
- Goal 15: Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.”⁴⁴

Out of the total seventeen goals which India also set for itself along with the rest of the community, **seven** are directly related to the prevention of the detrimental effect that chemical dyes have on the environment. While seven goals are not required to accomplish the one feat at hand, their number should act as an inspiration and further justify the proposed ban on the use of chemical dyes by units of the fashion industry.

Goal 17 proposes that there be strengthening of implementation and revitalization of global partnerships for sustainable development. The *Fashion Industry Charter for Climate Change*²⁴ takes precedence here.⁴⁵ The

⁴³ SatabdiBhattacharjee, “Evolution of the Fashion Industry in India”, Indian Institute of Art and Design, <https://www.iiad.edu.in/stories/evolution-fashion-industry-india/>

⁴⁴ United Nations Resolution 70/1, <<https://sustainabledevelopment.un.org/post2015/transformingourworld>>

association of various companies engaged in the methods using chemical raw materials resolving to reduce their reliance on the same is the proudest affirmative action which the fashion industry has taken. While the charter speaks primarily of the various body corporates in the fashion industry and does not invoke the role of the state, the participation of Indian companies in the Charter is close to negligible.

Taking into consideration the fact that this initiative to support the Paris Agreement in reducing the global temperature falls under Goal 17 set under UN Resolution 70/1, it is humbly proposed that under Article 253, if the Government finds the same feasible, awareness campaigns must be introduced to the various units in the fashion industry to promote their participation in the same. Furthermore, taxation relief-based incentives have proved to have a very positive effect on the way industries in India conduct themselves. Thus, such incentives and where appropriate and feasible would go a long way in actualising the accomplishment of the goal.

7. Conclusion

This paper has been an attempt to find a constitutional answer to a constitutional problem- can industries which are responsible for pollution of water bodies, and by extension for all subsequent harms caused by it, be legally mandated to take sustainable steps. This question emerged largely due to the wilful ignorance of industries to the harms caused by them, and a lack of political incentive to ensure proper implementation of measures put in place to prevent and control the pollution of water bodies. In light of the fact that any method other than a legal mandate to adopt sustainable means is a process which requires time and resources, which would in turn mean that the economically backward societies and the environment would continue to suffer in terms of health and finances. Constitutionalising the issue at hand, the paper overcomes these hurdles, and provides a faster, more immediate response. The suggested method of the settlement of this legal dispute, as laid out above, through instruments of interpretation and by placing reliance on precedent, is not a settlement made in the abstract. As has been argued above, such a step in light of scientific facts, would not be an *unjust, nor an unconstitutional* one. Instead, it would further the *legislative intent* of the Constitution's requirement to protect and preserve natural resources, and the intent of several environment friendly statutes passed by the Indian Parliament over the years since its independence. Such a step is recommended with the full knowledge of the fact that requiring industries to abandon their current methods of dyeing fabrics will significantly increase cost, and may affect the quality of the output of the product as well.

Not responding to the problems which the recommended solution will create will be an irresponsible step. In conclusion, therefore, this section of the paper provides suggestions in light of the implications of the proposed solutions.

Firstly, a constitutional mandate for use of organic ingredients only would require a reorganization of the dyeing industry. Unorganized sections of the industry would have to be identified and brought under statutory control necessarily. The unorganized sector of the fashion industry continues to flourish free of any impediments, there being no specific law imposing any restrictions on the same, irrespective of whether they are followed by those upon whom they apply. This leads to a significant amount of discharge of waste into water bodies occurring unchecked and unrestricted. Therefore, taking a record of all units engaged in the fashion industry would be the first step to bring about a desirable change.

Secondly, a legislation which clearly categorizes chemical dye oriented waste discharging units and, based on the specific quantities of organic and inorganic raw materials used, allow the appropriate amount of discharge per unit per year, the amount having been decided after a state-sponsored study is carried out.

Thirdly, on the question of punishment and penalties, it has been argued and some studies show that retribution as a form of punishment has no positive consequences and instead increases recidivism, the same cannot be said for corporations. This is because it is humbly submitted that apart for mandatory prison sentences, exemplary fines and punitive damages and absolutely clear liability guidelines so that accountability is inculcated into manufacturing units, the legislation in question should revoke licenses of all responsible units and impose a lifetime ban on the holders of the units from engaging in the same line of business. There being no continued practise of the same, there can be no recidivism. Corruption of regulators and inspectors continues to be a problem due to which the responsible

⁴⁵ The Fashion Industry Charter for Climate Change, United Nations Foundation for Climate Change (online) <<https://unfccc.int/sites/default/files/resource/Industry%20Charter%20%20Fashion%20and%20Climate%20Action%20-%2022102018.pdf>>

often go unpunished for financial year upon year all the while chemical wastes are discharged into water bodies. Strict punitive actions similar to the ones responsible for said violations should be mandated by the legislative document to overcome this problem.

Albeit these requirements on the State could also be subjected to the same delays and inefficiency which has plagued the regime of pollution control in India so far, the triumph of the right to water over the right to business and trade would result in a *writ* against the State for failing to take these steps and enforcing them.

The non-absoluteness of rights is in recognition of the supremacy of the welfare of the public. The Indian constitutional design provides impetus for laws and institutions to enforce this welfare state. And where needed, in cases like the one which this paper has dealt with, it enables the citizen to *create* a constitutional issue, to protect their fundamental rights.