PARENS PATRIAE AND JUDICIAL BEHAVIOUR: A WAY FORWARD

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Introduction

The conception of a State and its responsibilities has unfolded a complex labyrinth since ancient times, with a series of iconic notions to help determine the ideal State. The doctrine of *Parens Patriae* is one such notion which is Latin for 'Parent of the Fatherland.' It envisages the principle of public policy wherein the State protects and takes into custody the rights and privileges of its citizens while discharging its obligations.[1] It is the inherent power and prerogative of a State to protect the persons under some disability and property of persons *non Sui juris* such as minor, insane, and incompetent persons.[2] However, there exists a fine line of difference between the doctrine of *Parens Patriae* and the *in Loco Parentis* doctrine. The former includes long-standing sovereign or quasi-sovereign interests of the State such health, public order and welfare that the State interferes with when such interests are or threatens to be jeopardized.[3] The latter involves care that is temporary in nature and unlikely to affect state of affairs on a permanent basis.[4]

Evolution of Doctrine

The history of the doctrine of *Parens Patriae* dates back to the time of Edward I (1272-1307) during which the English Crown subsumed all wardship over all natural fools and lunatics, a claim that was officially recognized by the passage of the Statute Prerogativa Regis in 1324.[5] Over time, Indian Courts have interpreted it to involve the state's quasi-sovereign interests as well. This theory permits the State to bring to suit as guardian of the well-being of its general populace and economy.[6] Academically, there are two tests that guide the State in its decisions to assist hapless victims within its territory. The first test is the 'Best Interests' test and second is the 'Substituted

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[1] Stein, T. (2004). The Role of Law in Social Work Practice and Administration. Columbia University Press. Retrieved from http://www.jstor.org/stable/10.7312/stei12648

[2] Dudley, S. (1910). Equity Jurisdiction over the Person and Property of Incompetent Persons. II. The Virginia Law Register, 16(2), 81-102. doi:1. Retrieved from http://www.jstor.org/stable/1102438 doi:1

[3]Michael Robertson, Garry Walter, Ethics and Mental Health: The Patient, Profession and Community, CRC Press, 85

[4] Ibid

[5] Lawrence Custer, *The Origins of the Doctrine of Parens Patriae*, *Emory Law Journal* 27 (1978), 195-208

[6] Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens*?: Massachusetts v. EPA's New Standing Test for States, 49 Wm. & Mary L. Rev. 1701 (2008)

Judgment' test.[7] In the former, the State takes foremost account of the interest of the victim rather than the interests of his kith and kin or the rest of society as a whole. In the latter, the State steps into the shoes of those under such disability and attempts to make decisions as such persons would have made had they been devoid of such disability.[8] However, the lack of a firm conceptual threshold has enabled State authorities to squander this doctrine. Consequently, under the aegis of *Parens Patriae,* actions that are sanctioned as parental impetus are in reality, rendered nugatory. Hope and fear for the State found easy reconciliation in this concept which has deviated from its historic anchors.[9]

Impact of Doctrine on claim for damages

The first time this doctrine was codified and used pedantically in India was in the case of *Charan Lal Sahu v. Union of India*.[10] In this landmark case, the constitutional validity of the Bhopal Gas Leak Disaster (Processing of Claim) Act, 1985 was put to test on the touchstone of Article 14, 19 and 21. It was contended by the Appellants that the Section 3, 4 and 11 of the Bhopal Act, 1985 insofar as they take away the right of the victims to represent themselves should be, declared unconstitutional. The Supreme Court of India, in its judgment, upheld the constitutional validity of the Act under which the Indian government gave itself the exclusive right to represent all Bhopal victims in civil litigation against Union Carbide under '*Parens Patriae'*. The victims were no match physically, mentally, financially and economically to the multinational company and thus the onus was upon the State to further the ends of justice.[11] At the end of an out-of-court settlement in 1989, the company paid up $470 million to the Indian government as compensation to victims who were left unable to work or with long-term ailments.[12] But many received nothing and much to their dismay, the sentence of those accused was also reduced to a charge of death by negligence

[7] June Carbone, *Legal Applications of the "Best Interest of the Child" Standard: Judicial Rationalization or a Measure of Institutional Competence*?, Pediatrics Oct 2014, 134 (Supplement 2) S111 S120; DOI: 10.1542/peds.2014-1394G

[8] Louise Harmon, *Falling Off The Vine: Legal Fictions And The Doctrine of Substituted Judgment,* 100 Yale L.J. 1 (1990-1991)

[9] George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant*?, 25 DePaul L. Rev. 895 (1976) Available at: http://via.library.depaul.edu/law-review/vol25/iss4/5

[10] A.I.R. 1990 SC 1480

[11] Nanda, Ved P.,*For Whom the Bell Tolls In the Aftermath of the Bhopal Tragedy: Reflections on Forum Non Conveniens and Alternative Methods of Resolving the Bhopal Dispute,* 15 Denv. J. Int'l L. & Pol'y 235 1986-1987**,** p.241

[12] Sarangi, S. (2012). *Compensation to Bhopal gas victims: will justice ever be done*?. *Indian Journal Of Medical Ethics, 9*(2), 118-120. Retrieved from http://www.issuesinmedicalethics.org/index.php/ijme/article/view/114/183

(S. 304A, 336, 337 and 338 of Indian Penal Code) rather than culpable homicide not amounting to murder (S. 304 of Indian Penal Code).[13] The settlement was based on the earlier figure of 3,000 deaths and 70,000 injury cases; the curative petition has put the death numbers at 5,295 and injury figure at 527,894.[14] The victims of the tragedy, on the basis of a report of Indian Council of Medical Research, say the actual death figure is five times higher than the figure quoted in the curative petition and that most of the injuries were of permanent nature and not temporary as stated by the government in the petition.[15] Since the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 took away the victims' right to file individual suits for damages, the government should have felt a moral obligation to indemnify the whole exercise diligently under the garb of '*Parens Patriae'*, due to which victims continue in their hurdled path to justice even today.

Impact of Doctrine in Medico-Legal field

In the medico-legal field, this doctrine has far reaching implications as well. In 2008, a mentally retarded woman was brutally raped in a government run welfare institution in Chandigarh.[16] She was found impregnated for nine weeks. A medical board was set-up to determine whether she had the mental capability and comprehension to continue with pregnancy, which favored abortion. Subsequently, an expert body was set up by the High Court of Punjab and Haryana, which recommended continuation of pregnancy. On appeal, the Supreme Court exercising its *Parens Patriae* powers, overruled it and ordered termination on the grounds that she was neither "*intellectually*" nor on the "*social, personal, financial or family fronts*", able to bear and raise a child; allowing her to continue with her pregnancy would be a "*travesty of justice*" and a "*permanent addition to her miseries*."[17] Contrary to all expectations, the woman did want to keep the foetus.[18] The extraordinariness of this case lies in the fact that it primarily works on the assumption that a conception that has occurred due to a rape will be terminated willingly by the

[13] Ibid
[14] Hazarika, *India to Seek at Least $3 Billion From Union Carbide for Bhopal*, N.Y. Times, Nov. 23, 1986, at 10, col
[15] *Injustice Incorporated, Corporate Abuses and the Human Right to Remedy,* Amnesty International 2014 Index: POL 30/001/2014, ISBN: 978-0-86210-485-6
[16] *Suchita Srivastava and Anr. v. Chandigarh Administration*, (2009) 9 SCC 1
[17] Ajey Sangai, *PROMISE OF REPRODUCTIVE AUTONOMY: DOES SUCHITA SRIVASTAVA WALK THE TALK*?, *NALSAR Student Law Review*, 2011
[18]Pati, S., & Sen, R. (2012). *Unpacking Choice: What Does Feminist Theory Have to Rethink after the Nemo/Nari Niketan Cases. J. Indian L. & Soc'y*, *4*, 54

pregnant woman.[19] Yet again, undesired intrusion in the choices of a person in a field as sensitive and unique as a mother-child relationship seems to warrant more injustice than justice.

Another case where a woman was raped in the basement of a hospital which rendered her brain dead in permanent vegetate state after being sodomised with a dog chain, draws much flak for improper application of the *Parens Patriae* doctrine.[20] The cardinal question in this case was who would decide whether life support ought to be withdrawn in a particular case. Answering this question, the Court declared that it was the hospital staff that had been of familial support to the victim and not journalist who filed the petition for euthanasia. As the hospital staff clearly

wanted the woman to live, the request for passive euthanasia was rejected.[21] The Court only relied on the Airedale judgment of the House of Lords only one of two guiding tests, i.e., only the 'best interest' test and not the 'substituted judgment' test and permitted passive euthanasia on a low standard of 'best interests' which was decided by keeping the wishes of parents and relatives in mind.[22] The Court completely ignored the possibility of the victim herself wanting to concede to passive euthanasia given the state of affairs from which there was no reprieve. This outlook sidelines the concept of autonomy and self-determination even for a mentally incompetent person. The judgment opens the door to passive euthanasia not requiring to keep in mind what course of action the patient himself/herself would have taken and places more importance on the choices of the relatives of the sick or disabled people.

Positive impact of Doctrine

There have been instances where *Parens Patriae* has also been put to optimal use. In the wake of the devastating earthquake in 2001 in Gujarat, a Public Interest Litigation was filed by prominent citizens seeking for a Court intervention to ensure speedy and efficacious distribution of funds, on the grounds that the State did not have adequate infrastructure to justly discharge its herculean duty of providing relief to the affected people.[23] This PIL was refuted by the central and state

[19]Ibid
[20] *Aruna Shanbaug v. Union of India,* (2011) 4 SCC 454
[21] Kishore, R. (2015), *Aruna Shanbaug and the right to die with dignity: the battle continues, Indian Journal Of Medical Ethics, 1*(1 (NS)), 38. Retrieved from http://www.issuesinmedicalethics.org/index.php/ijme/article/view/2278/4837
[22] Shukla R, *Passive euthanasia in India: a critique*, Indian J Med Ethics. 2016 Jan-Mar; NS1(1):35-8
[23] *Bipinchandra v. State of Gujarat* , A.I.R. 2002 Guj HC. 99

governments on ground that the judiciary had no right to interfere in matters solely assigned to the administrative authorities.[24] However, the Gujarat High Court applied the *Parens Patriae* doctrine and held that State has a constitutional obligation under Article 21 and that the contributors and donors of these funds have the enforceable right to ensure timely aid.[25] The Supreme Court also struck down a law which prevented the employment of men below the age of 25 and all women in bars, under the pretext of a paternalistic approach to quasi-sovereign interests. The Court held that such a restriction bars a person from exercising his right to profession which is a constitutionally guaranteed freedom.[26] Thus, the expansive outlook of the judiciary as was done in such cases must be adopted in the prospective application of the *Parens Patriae* doctrine to ensure the State does not encroach upon the rights of the people in furtherance of their parental objectives.

Chaose as outcome State intervention and Judicial misinterpretation

There is an unsettled dichotomous view that arises in the system of checks and balances with respect to the *Parens Patriae* doctrine. On some occasions, the courts have served justice to right-holders but on the others, the judiciary themselves have, as elucidated previously, misinterpreted this doctrine to the detriment of the people and caused further ruin. However, the judiciary plays a tremendous role in ensuring upkeep progress in society. The Supreme Court in cases such *State of Kerala v. N.M. Thomas*[27]and *Kesavananda Bharati v. State of Kerala and Another*[28]laid down the role played by the Courts as 'a State' in discharging Directive Principles of State Policy in light of Article 12. The doctrine of *Parens Patriae* is embodied in Article 38 (State to secure a social order for the promotion of welfare of the people), Article 39 (Certain principles of policy to be followed by the State) and Article 39A (Equal justice and free legal aid). Thus, the court takes on the role of a parent whilst furthering the ends of such DPSPs.

However, the bigamous outcomes of this doctrine undermines the people's trust in the state as well as the judiciary as it is subject to arbitrariness and discretionary interference by the State or by

[24] Puthucherril, Tony George, Change, *Sea Level Rise and Protecting Displaced Coastal Communities: Possible Solutions* (April 22, 2013). *Global Journal of Comparative Law* 2013 Vol. 1 . Available at SSRN:http://ssrn.com/abstract=2255225
[25] Ibid
[26] *Anuj Garg & Ors v. Hotel Association Of India & Ors,* A.I.R. 2008 SC 663
[27]A.I.R. 1976 SC 490
[28]A.I.R. 1973 SC 1461

improper interpretation by the Courts. *Parens Patriae* takes the view that that the state can justifiably override the citizen's right to freedom in order to further some objectives or idealistic goal that rest on tenterhooks. The philosopher John Stuart Mill argued in his essay *On Liberty* that only when there is harm or threat posed to others can restricting one's liberty be justified. Mere restrictions on grounds of 'best interest' are not a reason adequate enough.[29] Although the State's *Parens Patriae* power is wide-ranging, it is not without boundaries.[30] There must be a compelling need exhibited in order to evoke such involuntary intervention only if there is no alternative to the objective sought to be achieved instead of a prima facie intervention in an individual's right to privacy. There is a lack of procedural guarantee in such welfare doctrines since it is not subject to any reasonable procedure, as is the case with tests for due process of law to be followed for *Parens Patriae* applications in the United States of America.[31] Any procedure that deprives a person of life and personal liberty cannot be unjust, unfair and arbitrary.[32] In the light of the potential misuse and misinterpretation of the doctrine, it is time Courts in India move from application of *Parens Patriae* to a procedure established by law, to win the faith of the people. Procedure established by law has no scope for discretionary application. The application of *Parens Patriae* must be preceded by proof and reconciliation with individual interests which more often than not, do not outweigh State concerns.

Solutions proposed

In the absence of any preceding judicial pronouncement in India clearly stating the circumstances under which *Parens Patriae* can be warranted, the author proposes a four-pronged solution. Firstly and most importantly, there must be a clear weigh-off for the end result between what can be achieved by the individual on his/her own efforts and what can be achieved only by State obligations. If the case is such that desired outcome can be achieved by individual suits, *Parens Patriae* must be eschewed and the Court should ideally dismiss such petitions on the ground of the State exceeding its *Parens Patriae* powers. Secondly, both the tests, i.e., best interest test and substituted judgment test must be strictly adhered to for the best outcome. Frequently, the

[29] Herman Wheeler, *Law, Ethics and Professional Issues for Nursing: A Reflective and Portfolio*, Routledge, 2013 p. 289
[30] James G. Hodge Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & Health 309 (1997-1998)
[31] *Parens Patriae and Statutory Vagueness in the Juvenile Court*. (1973). *The Yale Law Journal, 82*(4), 745-771. doi:1. Retrieved from http://www.jstor.org/stable/795423 doi:1
[32] *Maneka Gandhi v. Union of India*, A.I.R. 1980 SC 1789

substituted judgment test is sidelined but it is of grave importance for the court to keep in mind what action the individual would have taken had the disability been cured. Thirdly, the doctrine of *Parens Patriae* must be invoked when there is a larger threat to society in general or the scenario where interests of others are also at stake and not just the disabled individual in question. Fourthly, in cases of monetary issues such as money contributed by individuals towards a fund or trust, the judiciary must be more proactive to ensure this money is being made utmost use of by the State so that the State fulfils its *Parens Patriae* obligations.

Conclusion

This concept though benevolent in its intentions, has through the course of time shown tendencies to blur the line of difference between an individual's personal life and the duty of the state to further equanimity in its sovereign and quasi-sovereign interests. Such parental powers of the State must not be restricted completely as there also exist situations where citizens cannot fend for themselves in light of grave injustice and it is the duty of the State to step in to aid people and not be indifferent to such circumstances. But if this doctrine expands the powers of the State, there is also expansion of duty of the courts to ensure no constitutional limit is exceeded on part of the State. In other words, the theory of *Parens Patriae* adds yet another dimension to the field of judicial activism. The onus lies on the courts as the final guardian of the rights of the people to ensure proper and just utilization of this doctrine. While doing so, the courts must keep in mind certain guidelines as suggested to ensure a procedure is followed to keep arbitrariness at bay. Thus, this doctrine warrants cautious use to prevent the State from turning into a tyrant