

CONSTITUTION
OF
INDIA

14th NALSAR - Justice B.R. Sawhny Memorial Moot Court Competition, 2021

MOOT
PROBLEM



National Academy of Legal Studies and Research, Hyderabad

I. Prologue

1. The Social Democratic Republic of Sapota is a Union of States which gained its independence from colonial rule at the same time as India.
2. SDRS framed its own Constitution a few years after India and adopted large parts of the Indian Constitution for its own purposes.
3. SDRS, like India, was formed out of provinces ruled by the British, adopted a Westminster Parliamentary form of Government and its legal system is based largely on the common law.
4. Given the experience of India with the Tenth Schedule, the Sapotan Constitution was amended in 2020 (The Constitution (Thirty Sixth) Amendment Act, 2020) as follows: (Annexure A)
 - a. A member of Parliament or Legislative Assembly shall only stand disqualified if they vote contrary to the party whip in a no-confidence motion or when a money bill is being voted on.
 - b. The disqualification shall take effect the moment the vote of the member is recorded by the Speaker of the House.
 - c. Any vote of a member which results in the disqualification of a member shall be deemed to be null and void and the total votes cast shall be reduced by that number.
5. Further, the same amendment introduced the following provisions, as well, in respect of Governors:
 - a. Within twenty-four hours of the Election Commission of Sapota certifying the result of a State Assembly election, all political parties and pre-poll alliances which have won at least one seat in the elections have to designate one person as the “leader of the party in the House”.
 - b. Within forty-eight hours of the Election Commission of Sapota certifying the result of a State Assembly election, the Governor shall swear in as CM, the leader of the political party or alliance that has won more than fifty percent of the seats at the election to form the Government and ask them to prove their majority on the floor of the House.
 - c. If no single party or pre-poll alliance has crossed the fifty percent threshold, then the leader of the party with the most seats in the elections shall be sworn in as CM.

II. The controversial bill

6. The State of Gulmohar is one of the richest states in Sapota enjoying both a high ranking in the Human Development Index and a high per capita GSDP.

7. A majority of the residents of Gulmohar (65% as of the last census) consider the official language of the state, Gulmohari - a classical language with a long history and present in the Eighth Schedule of the Constitution - as their first language.

8. Gulmohari is largely spoken only in Gulmohar though it must be mentioned that as per census data, the percentage of native Gulmohari speakers has fallen from nearly 95% in 1971 to 65% as of 2021.

9. As of 2021, the Chief Minister of Gulmohar, Ms Azhilu, leads the Gulmohar Rashtra Party (GRP) which has 174 seats in the Gulmohar Legislative Assembly out of a total of 300.

10. In May 2021, civil society organizations in Gulmohar came together to hold the largest demonstration ever seen in the history of the state, in the capital city of Aura. The gathering was held to demand that the Government of Gulmohar save the Gulmohari language and Gulmohari speaking people from “being swamped by outsiders”. To this end, the organizations submitted a list of demands to the Chief Minister, the most prominent being that sixty-five percent of all government and private sector jobs in the State should be “reserved” for Gulmohari speaking people.

11. Ms Azhilu stated in public that this demand is acceptable to her, and she would introduce a Bill to this effect in the State Assembly.

12. This move by the Chief Minister caused consternation in the party ranks - especially those members who represented constituents, who were not native Gulmoharis but who had settled in the State in the last few decades. The most vocal opponent of this move was Mr Giduga, a cabinet minister.

13. In June 2021 a draft bill was prepared and placed by the CM before the Cabinet. The debate was acrimonious but eventually the Cabinet approved the Bill. Mr Giduga and two other Ministers tendered their resignations to the Governor protesting that the Bill was unconstitutional and xenophobic.

14. On June 30, 2021, the 100th anniversary of the founding of the Gulmohar province (which later became the Gulmohar State), Ms Azhilu introduced the Gulmohar (Promotion and Protection of Gulmohari) Bill, 2021 (“the Bill”), the main features of which were:

- a. 65% of all State Government jobs would be reserved (horizontally) for “native Gulmoharis”, that is sixty five percent of general/SC/ST/OBC post shall be filled by “native Gulmoharis” belonging to general/SC/ST/OBC categories.
- b. All private enterprises (employing more than 10 workers, permanent or temporary) with an office, factory, or plant located in Gulmohar had to file an annual declaration with the Gulmohar Government showing the percentage of “native Gulmohari” and “non-native Gulmohari” staff on their rolls (permanent and temporary) in the last twelve months.
- c. Any private enterprise with less than 65% of “native Gulmoharis” on their rolls in a given year were to pay a fine of 1% of their annual turnover for every 1% they are short of 65% (E.g., a firm with only 50% of “native Gulmohari” workers would be fined 15% of its annual turnover).
- d. A “native Gulmohari” was defined as one who:
 - i. Had studied in the Gulmohari language for a period of ten years; or
 - ii. One of whose parents had been born in Gulmohar; or
 - iii. Both of whose parents had studied in the Gulmohari language for a period of ten year each.

15. Sensing the hostility of a section of her own party (not to mention the Opposition) to this Bill, Ms Azhilu introduced the Bill as a Money Bill and the same was certified by the Speaker as a “Money Bill”.

16. A three-line whip had been issued by the GRP to its members to vote in favour of the Bill, but Mr Giduga and 30 members voted against it in an effort to defeat it.

17. However, their votes were automatically invalidated because of the whip and the 31 members were disqualified as MLAs.

18. The Bill, however, passed with a margin of 143 to 125 (the Speaker not being permitted to vote) and was signed into law by the Governor thereafter.

19. As soon as the Bill came into force, it was challenged in the High Court of Gulmohar by Mr Giduga, who himself was not a “native Gulmohari” for the purposes of the law, on the ground that it was against the Constitution of Sapota, specifically in the context of the requirement for private enterprises to give preference to native Gulmoharis in employment. The court admitted the petition while noting that the petitioner wished only to challenge one aspect of the law without waiving his right to challenge the remaining parts of the law at an appropriate time.

20. While Ms Azhilu’s government was still stable, to capitalize on the political goodwill of passing the Bill, she resigned and asked for fresh elections to be called, seeking a fresh mandate from the people of Gulmohar.

III. A Surprise Result

21. Following the announcement of fresh elections, Mr Giduga and the other disqualified members formed the Sapota Bachao Party (SBP) breaking away from GRP and attracting other members of opposition parties as well.

22. Elections were held in the month of August, and to the shock of everyone concerned, GRP did not win a majority (as opinion polls had predicted).

23. The results were as follows:

- a. GRP - 132 seats
- b. SBP - 120 seats
- c. People’s Party of Sapota (PPS) - 38 seats
- d. Independents - 10

24. Within 24 hours of the results being declared, Ms Azhilu was designated leader of the GRP, Mr Giduga the leader of the SBP and Mr Ka’age, the leader of PPS.

25. Since no party had gone past the half-way mark, Ms Azhilu met the Governor of Gulmohar, Ms Bekku with the expectation of being invited to form the government and prove her majority. However, Ms Bulbul stated that she would rather wait for more developments on this front, given that she has forty-eight hours to invite her to form the Government.

26. However, even as she was meeting Ms Bekku, Mr Ka'age, leader of the PPS went over to the house of Mr Giduga, resentful at being taken for granted by the GRP, whom he expected to seek his support before going to the Governor. At Mr Giduga's house, the two leaders announced that they have formed a post-poll alliance and having the numbers, would approach the Governor to form the Government.

27. After she received the letters from Mr Giduga and Mr Ka'age, the Governor of Gulmohar, Ms Bulbul said that she would consult legal and constitutional experts before inviting either party to form the Government.

28. Just before the completion of the forty-eight-hour deadline, Ms Bulbul announced that she would invite Ms Azhilu to form the Government, since the text of the Constitution was clear and a "post-poll alliance" was not envisaged under it.

29. Mr Giduga once again rushed to the High Court of Gulmohar, challenging the 2020 amendment to the Constitution which dictated how the Governor would invite legislative party leaders to form the Government, asking for a stay on the swearing in of Ms Azhilu and that Governor Bulbul be directed to swear him in instead.

30. In the hearing, Ms Azhilu's lawyer agreed to a stay on the swearing-in, provided the court also heard the pending petition on the constitutional validity of the Gulmohar (Promotion and Protection of Gulmohari) Act, 2021 along with the present case at an early date.

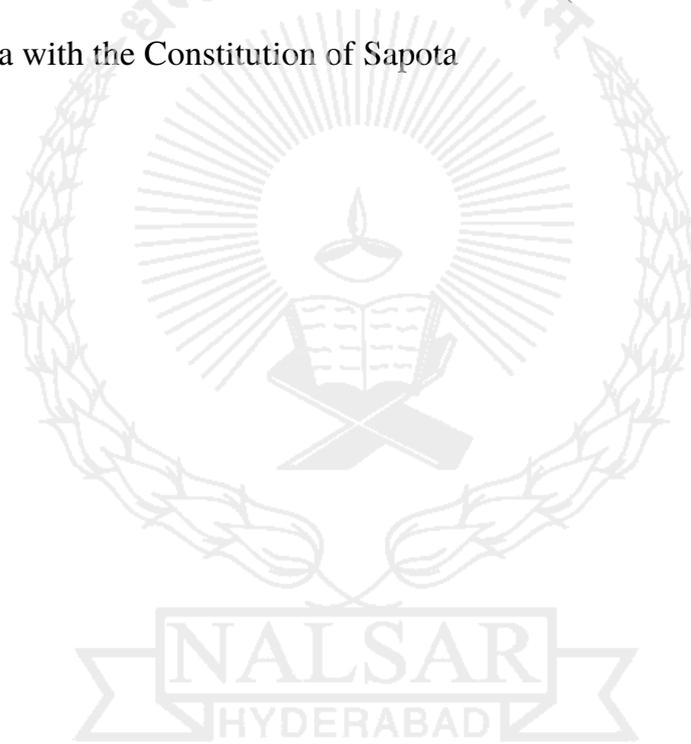
31. The High Court of Gulmohar agreed to the same and referred the matter to a Bench of Five judges, framing the following issues for consideration:

- a. Whether the Gulmohar (Promotion and Protection of Gulmohari) Act, 2021 is constitutionally valid?
- b. Whether the 2020 amendment to the Constitution violates the basic structure of the Sapota Constitution?
- c. Whether the High Court can legally direct the Governor of Gulmohar to invite a post-poll alliance to form the Government?

Instructions -

1. Counsels for petitioners are required to argue both the petitions of Mr Giduga, the first relating to the validity of the Act and the second relating to the validity of the amendment and the direction to the Governor.
2. Likewise, counsels for respondents must defend both the constitutional validity of the Act and the Amendment, and also why no direction ought to be issued to the Governor.
3. The judgements of all constitutional courts in common law countries (such as India, South Africa, the United Kingdom and United States have only persuasive value in Sapotan courts)

It may be assumed that the rest of the Constitution of India (save as otherwise indicated in the problem) is in pari materia with the Constitution of Sapota



Annexure A

The Constitution (Thirty Sixth) Amendment Act, 2020

1. In the Tenth Schedule of the Constitution, in paragraph 1, sub-paragraphs (b) and (c) shall stand deleted.
2. In the Tenth Schedule of the Constitution, paragraphs 2, 3, 4, 5, 6, 7 and 8 shall stand deleted and replaced with the following provisions:

“2. Disqualification on ground of defection. - (1) A member of a House belonging to any political party shall be disqualified for being a member of the House if they vote or abstain from voting in such House contrary to any direction issued by the political party to which they belong or by an person or authority authorised by it in this behalf, without obtaining, in either case, the prior written permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.

(2) The provisions of sub-paragraph (1) shall apply only when the vote taking place in the House relates to a money bill or a vote on a motion expressing want of confidence in the Council of Ministers.

3. Disqualifying vote deemed an invalid vote. - Notwithstanding anything contained in this Constitution or any law or rule in force, any vote by a member of a House that attracts disqualification under paragraph 2 shall be deemed to be an invalid vote.

4. When disqualification takes effect. - A member of a House shall be deemed to be disqualified the moment the Chairman or the Speaker of the House certifies the results of the vote, where such member has voted in a manner so as to attract disqualification under paragraph 2.

5. Deemed disqualification. - When a political party, through a person designated for this purpose, communicates to the Chairman or the Speaker of the House, that a member of the House belonging to such party has been removed from or has tendered their resignation from such political party, such member shall be deemed to have been disqualified as a member of the House.”

3. After Article 162 in the Constitution, the following provision shall be inserted, namely:

“162A. Procedure to form Council of Ministers following elections. - (1) Within a period of twenty four hours after the Election Commission of India certifies the results of a State Assembly election, the elected members of a political party or parties which had mutually agreed to contest the election in a concerted manner, shall designate one person as the “head of the legislative party” or “head of the legislative alliance” as the case may be and communicate the same to the Governor of such State.

(2) Within a period of forty-eight hours after the Election Commission of India certifies the results of a State Assembly election, the Governor of the State shall invite the head of the legislative party or the head of legislative alliance enjoying the support of more than fifty per cent of the elected members of the Legislative Assembly of such state to take oath as Chief Minister of the State and present their Council of Ministers.

(3) Where no head of the legislative party or head of legislative alliance enjoys the support of more than fifty per cent of the elected members of the Legislative Assembly of such state, the Governor shall invite the head of a legislative party or the head of legislative alliance with the highest number of elected members of the Legislative Assembly of such state to take oath as Chief Minister of the State and present their Council of Ministers.”

Annexure B

Key extracts from the Gulmohar (Promotion and Protection of Gulmohari) Act, 2021

Section 2. Definitions. - (1) In this Act, unless the context otherwise requires,

...

(g) “native Gulmohari” shall mean any person who meets any one of the following criteria:

1. Has completed at least ten years of education in an institution where the medium of instruction is in the Gulmohari language; or
2. One of whose parents was born in the State; or
3. Both of whom parent have completed at least ten years of education each in an institution where the medium of instruction is in the Gulmohari language

...

Section 3. Reservations in Government jobs. - Notwithstanding anything contained in any law in force, there shall be horizontal compartmentalised reservation of sixty five percent in appointments being made to any civil post under the State of Gumohar in favour of native Gulmoharis.

...

Section 45. Declaration of employment of native Gulmoharis. - (1) Notwithstanding anything contained in any law in force, all industries, offices, businesses and shops located in Gulmohar shall submit to the competent authority a declaration containing such details as necessary, accompanied by an affidavit, as indicated in Form IV of Schedule II of this Act.

Provided that no industry, office, business or shop which has less than ten employees throughout the year shall be required to the declaration.

(2) The declaration required to be submitted under sub-section (1) shall be submitted no later than the 31st day of January in any year for the previous calendar year.

Section 46. Failure to submit declaration. - (1) If any industry, office, business or shop required to submit a declaration under Section 45 fails to do so within the stipulated time, such industry, office, business or shop shall be liable to a fine amounting to Rupees One lakh for every day beyond the due date and the persons in a decision making capacity in such industry, office, business or shop shall be liable to imprisonment for a period not less than one year and up to three years.

Section 47. Penalty for under-representation of Gulmoharis. - Notwithstanding anything contained in any law, any industry, office, business or shop which has less than sixty-five per cent of its employees being native Gulmoharis in the previous calendar year, shall be liable to pay a fine of one per cent of its turnover for everyone per cent less than the required sixty-five per cent.

Explanation: For the purposes of this section and Section 45, “employee” shall mean any person, whether permanent or temporary, who has been in a relationship of employment, in whatsoever manner, for a period of at least nine months in the immediately preceding financial year.

